

06 / 3 / 13

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER A16/13

BEFORE THE HONOURABLE JUDGE; THULARE AJ

In the matter between

MZOXOLO VICTOR DEVI

AND

THE STATE

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
6/3/13 DATE	 SIGNATURE

APPELLANT

RESPONDENT

JUDGMENT

THULARE AJ

[1] Appellant, a male of 46 years of age, is charged with rape as defined in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007). It is alleged that he unlawfully and intentionally committed an act of sexual penetration with the complainant, a 4 year old girl child in Kanana, in the district of Klerksdorp on or about 12 October 2012. The complainant, being a child under 12 years, is a female person incapable of consenting to a sexual act in terms of section 57 of the above-mentioned Act.

[2] If convicted, and the trial court is not satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence, appellant shall be sentenced to imprisonment for life as prescribed by section 51 read with schedule 2 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997).

[3] Appellant was arrested on 30 October 2012 and made his first appearance in Orkney on 31 October 2012. The matter was postponed to 7 November 2012 for

his own legal representative as well as for bail application. The application was considered on 7 November 2012 and the Magistrate refused to grant appellant to bail. It is this decision, to refuse bail, in respect of which appellant approaches this court for relief.

[4] I have to express my displeasure at the quality of the output of Mr Langa, attorney for the appellant, in this matter. The papers suggest that he personally appeared for the appellant in the court *a quo*. It is not wrong, in my view, to conclude that what was put before the magistrate was his best professional industry as an attorney representing the appellant.

[5] In my view the magistrate did not raise concerns herewith as she was heavily influenced by what Schreiner JA said in *Trans-African Insurance Co. Ltd v Maluleka* 1956 (2) SA 273 (AA) at 278:

"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

The "Commissioner of oaths" to what purports to be an affidavit, has identifying features of a policeman or woman. This is because there is a signature, followed by what appears to be a surname. Between the signature and what appears to be the surname, but on top, are the letters "CST", which is a practice abbreviation for "Constable". On top of this all, is what is clearly, a force number. There is, in my view, reason to believe that the commissioner of oaths, for purposes of appellant's affidavit in support of his bail application, is a police constable.

What then follows is a cause for concern, if not alarm. How the constable found access to the magistrate stamp may be perhaps because he or she is a court orderly and perhaps because of the trust that the magistrate in that district has of the court orderly, to allow them to use the magistrate stamp, for instance on warrant of detentions (J7). In this case at least, it would appear that the trust was misplaced at most, or at least there was abuse of the right of access to the stamp of the magistrate, in that it is the magistrate stamp that the constable uses to give

his capacity as well as business address as commissioner of oaths on appellant's statement.

Having regard to the nature and purpose of the directory provision of the Regulations (Regulation 4 (2) of the Regulations issued in terms of section 10 of the Justice of the Peace and Commissioners of Oath Act, 1963 (Act No. 16 of 1963)), which require a commissioner of oaths to state his/her designation and the area for which he /she holds his appointment or office, I am not satisfied that there will be no confusion, even for a person of ordinary intelligence to deduce the office held by the commissioner of oaths in this matter. A person of ordinary intelligence, will deduce misrepresentation of the true facts. I am not inclined, in the face of such misrepresentation, in the context of this application, to exercise my discretion in favour of receiving the document relied upon in this matter as an affidavit. At best, it remains an unsworn statement.

[6] Even if I were to consider the statements made, the result, in my view, does not assist the appellant. His founding papers comprise two parts, to wit, the statement earlier referred to, and the annexure. For ease of reference, I will first deal with the statement. It is preferable to quote its substantive part in total. After the title it reads:

"I, the undersigned

Mzoxolo Victor Deyi

Hereby state under oath as follows:

1. 1.1 *I am an adult male, 46 years old, born on 14/3/1977 and the Accused in this matter.*
- 1.2 *The facts contained herein fall within my personal knowledge and is true and correct.*
2. *I shall in no way attempt to evade my trial or any court appearance in this regard.*
3. *I shall in no way tamper, or attempt to tamper with any witnesses by influencing or intimidating them to hide or destroy evidence.*
4. *There is no probability that, should I be released on bail, that I shall undermine the goals or proper functioning of the Criminal Law system, including the bail system.*
5. *I confirm the contents of the Formal Bail Application Form attached hereto, marked "Annexure 'A'". The contents of this form forms part of my affidavit.*
6. *I shall adhere to all conditions of bail, set out by the Honourable Court.*

7. Should I not be released on bail, I may incur severe financial losses, in that I may forfeit pay for the period that I am held in custody. There is also a possible risk that I may lose employment.

In paragraph 8 appellant says he is familiar with the contents of the statement and understands it, that he has no objection in taking the prescribed oath and that he considers the oath as binding on his conscience and thereafter is his signature, before the certificate which is followed by the signature of the commissioner and stamp as earlier discussed.

[7] Paragraph 2 is a restatement of section 60(4) (b), paragraph 3 is a restatement of section 60(4)(c) and paragraph 4 is a restatement of section 60(4)(d) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977). These are barren conclusions. No facts are set out, upon which these conclusions are arrived at. Paragraphs 1.2 and 5 are advisory statements. Paragraph 6 is a commitment, which is not supported by any facts.

The terminology employed in paragraph 7 shows that appellant sets out some speculative opinions. The use of the word "may", twice in the first sentence and once in the second sentence, is indicative that he is not sure that these may be the eventualities.

In the result, only paragraph 1.1 is a set out of facts, in the whole document.

[8] In the annexure, appellant states that he is married and has four children aged 12, 5, 2 years and another at 3 months respectively. His wife is unemployed. His family lives in Qumbu, in the Eastern Cape. He resides for the past six years at 23107 Extension 14, Kanana in Orkney at his RDP house and lives alone at this address. He is employed at Vaal Reefs Number 8, Great Nologwa as a Rock Driller for the past 14 years and earns R6000-00 per month. He has furniture in his RDP house. He has no family outside the borders of South Africa.

[9] He has no previous convictions and no pending cases. His neighbour will assist with the payment of bail and has R500-00 available.

[10] He is not related to the complainant and does not stay in the same house with her. The complainant's grandmother is his former girlfriend. He intends to plead not guilty. He understands the seriousness of the crime and the possible sentences that the court may consider.

[11] It is disturbing for officers of the court to treat other areas, especially areas that in the past fell within the areas of former Transkei, Ciskei, Bophuthatswana, Venda, KwaNdebele and Lebowa as if those areas are not part of one, sovereign and democratic State of the Republic of South Africa, as set out in section 1 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996). It is worrying if that treatment has the tendency to deny other citizens, especially accused persons, of the equal entitlement to the rights, privileges and benefits of citizenship.

[12] Although these areas are mainly rural, there are municipalities as well as traditional leadership structures that make land, zones or properties easily identifiable. Consequently, in my view, there is no other reason why the magistrate could not be favoured with full particularization of the other home that appellant has in the Eastern Cape, where his wife and children allegedly reside. The only reason I can discern, is incompetence or sheer laziness. Either Mr Langa or the Investigating Officer, or both of them, could have assisted the court. They did not.

[13] I find it disturbing that Mr Langa did not assist the appellant to reduce what appears to be his answer to the allegations against him, in writing, and as part of the affidavit filed in support of his application.

Surprisingly, Mr Langa adduces what amount to evidential material from the bar in his address to the court, wherein the court is informed that the grandmother of the complainant is a former girlfriend of the appellant and that the reason she accuses him is because this grandmother had two boyfriends and when the appellant discovered that she is involved with another man who also works at the same mine as him, he terminated his relationship with her and then she made the allegations against him as a retaliation because she wants to continue with the relationship and get money on both sides, from both men.

[14] It is inconceivable how the State would not object to this manner of putting information before a court by an attorney. It is of concern why the magistrate allowed it. That piece of information is not evidence before the court, to be considered for purposes of determining the issue.

[15] In its opposition to the application, the State used the statement of the investigating officer, Kedibone Julia Monnatlala, a detective constable stationed

at the Family Violence, Child protection and Sexual Offences, Klerksdorp, in the employ of the South African Police Services.

[16] She states the facts of the State case as that on 12 October 2012 at approximately 09:10 the complainant was at her residential place sleeping with her elder brother of 8 years in the dining room. When they opened the door, it was appellant. He told them to wake up and go with him to the shop where he was going to buy airtime and simbas. They accompanied him and thereafter went with him to his residential place. After he unlocked the door, they went inside the house and proceeded to the bedroom where the television is situated, to watch television. In the bedroom, appellant gave the brother a chair to sit on and watch television whilst he and applicant climbed onto the bed.

The brother saw appellant on top of the victim. The brother was surprised and screamed and told appellant that he is going to report appellant to the mother at home. The brother and sister left for home and reported the matter. The victim was taken for medical examination on the same day and the doctor found signs of forceful penetration and bruises all over the genitalia area. Appellant was arrested on 30 October 2012.

There are still other witness statements outstanding as well as a DNA report from the Forensic Science Laboratory.

[17] It is also worth noting that even in her instance, the Commissioner of oaths did not comply with the Regulations (Regulation 4(2)(b). No designation and area of appointment is given, amongst others. Other than that the Commissioner also appears to be a policeman, nothing more is known.

[18] In an application like the present, the legal position is set out in section 60(11) which reads as follows:

"Notwithstanding any provision of this Act, where an accused is charged an offence referred to –

(a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release."

[19] It is common cause that the appellant is charged with a schedule 6 offence. No doubt appellant has been given a reasonable opportunity to adduce evidence. His application was considered by the magistrate. The question is whether the magistrate misdirected herself, and as a result of her misdirection, refused to grant appellant to bail.

[20] Appellant, in my view, made an unsworn statement or unattested declaration in support of his application for bail. (See *East Cape Consumer Co-operative v National Liquor* 1986 (4) SA 612 (ECD). What is before me, is not an affidavit, affirmation, solemn or attested declaration.

At best for appellant, in my view, there was an attempt on his part to adduce evidence. In *Silberman and others v Novter Investments (Pty) Ltd* 1993 (2) SA 850 (WLD) at 852 I to 853 C the learned Cloete J said:

"Because of the view which I take of the matter I am prepared to assume, but I expressly refrain from deciding, that there was no affidavit before the court as required by Rule 14(2)(a). The consequence is that summary judgment could not have been granted. But it does not follow from this that the plaintiff did not take a step in the prosecution of the action. He did. He attempted to obtain summary judgment. It is in my view wholly artificial to argue that because the 'affidavit' forming part of the application for summary judgment suffered from such fundamental defect that it amounted to nothing more than an unsworn statement, there was no application at all."

[21] The Supreme Court of Appeal has already provided a response to a restatement of the provisions of subsection 4 of section 60:

"Parroting the terms of ss(4) of s 60, as he did, does not establish any of the grounds, without the addition of facts that add weight to his ipse dixit." *S v Mathebula* 2010 (1) SACR 55 at paragraph 15 on page 60.

[22] In my view, the legislature intends that where an accused is charged with such a serious offence as the rape of an infant, and such accused has no answer to the case against him, such accused person should remain in custody. In my view, for a person in the position of appellant to escape the extra-ordinary and stringent step of dealing with serious crime, by being incarcerated, he has a duty to show that it is reasonably possible that the State case is very weak, or that he has a good defence. It is the applicant, in my view, who seeks an indulgence from the court, who should make sure that the court he or she asking to make a

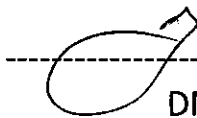
pronouncement in his or her favour, is at least appraised of the facts known to him or her, which if proved at trial, may stand as an answer to the allegations against him or her.

[23] The Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) amongst others nurtures the tree of democratic choices. An applicant is at liberty to pluck the fruit of his or her democratic choice. If an applicant in the position of appellant chooses not to assist the court as regards the facts, he cannot be heard to complain of the fruits of his democratic choice, however bitter it is.

[24] Appellant was in a position to, and chose not to, indicate the facts which he seeks to rely on to indicate his good defence, if any, or the weaknesses of the State case, if any.

[25] In my view, for the reasons set out hereinabove, appellant did not adduce evidence which satisfied the court that exceptional circumstances exists which in the interests of justice permits his release.

[26] The appeal is dismissed.

 6/8/13
DM THULARE
ACTING JUDGE OF THE HIGH COURT