

REPUBLIC OF SOUTH AFRICA



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

01/11/13

CASE NO: A20/13

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
1/11/2013	
DATE	SIGNATURE

In the matter between:

MOABI VERNON NKHI

Appellant

and

THE STATE

J U D G M E N T

DEWRANCE AJ

- [1] This is an appeal against the judgment of Magistrate G Travers, the Regional Court Magistrate for the Regional Division of Pretoria dismissing an application for bail, which application was brought on

new facts as contemplated by the provisions of the Criminal Procedure Act, Act 51 of 1977 ("the Criminal Procedure Act").

[2] The Appellant's application in the court *a quo* disclosed two "new facts".

[3] With respect to the two "new facts", the learned magistrate, on page 170 line 24 - page 171 lines 1-6, states the following:

"The question therefore, that the (sic), that I must answer as the Bail Court is whether the two pieces of information (sic), the issue relating to disclosure as well as the issue relating to the accused's address taken together with all the other information and bearing in mind the onus rests upon Mr Nkhi to show on a balance of probabilities that the interest of justice permit his release on bail, is whether those two pieces of information then do justify Mr Nkhi's release on bail."

[4] The first new fact was that the Appellant now has a confirmed address where he resides. The address is situated at 201 Church Street, 6 Elizabeth Court, Pretoria.

[5] The property is registered in his wife's name, N N Nkosi-Nkhi.

[6] In support of this allegation, the Appellant attached a statement of account from Berange Inc together with a "Pre-agreement Statement of Agreement of Loan" entered into between Nedbank Ltd and the Appellant's wife.

- [7] The Appellant also attached a certified copy of an antenuptial contract which records that the Appellant and his wife are married out of community of property with exclusion of the accrual system. The date of their marriage is 4 August 2010.
- [8] The Appellant also attaches a lease agreement concluded between himself and his wife. In terms of the agreement, no rental is payable, it does not provide for a lease period and does not provide for a rental deposit.
- [9] No evidence was presented to the court *a quo* that the Defendant's wife already occupies the property.
- [10] With regard to this property, the court *a quo* stated the following, at page 167, line 20 of the record:

"The Prosecution has accepted the fact that the property in question is or has been purchased by Ms Nkhi and that it is indeed a viable address but as I understand their contention still (sic) oppose bail because their contention is that the, their (sic) is no hold on the accused in respect of the property. It is merely an address which the accused has put up as an address where he will stay. It is not his property in any way whatsoever. The accused also, or the applicant, Mr Nkhi also put up a lease agreement which is marked as EXHIBIT G in the new facts bail application. There was initially an objection to the lease agreement being received by the Court but after an agreement that was properly signed and dated was tendered (sic) it was received by the Court. This was on the 18th of June this year."

- [11] With regard to the lease agreement, the court *a quo* opined the following on page 168 line 9 of the record:

"Now what is interesting from this lease agreement so-called (sic) is that the lease agreement specifically provides that there will be no deposit, in other words that the deposit that is to be made will be, R0.00, that there will be no rental payable, that the agreement will be in effect for five years, that their (sic) the escalation in the rental will be 0% of 0 (sic) and further contains the usual provisions that a standard lease of immovable (sic) contain. It is dated in the case of the lessor on the 11th of June 2012 and in the case of the lessee on the 1st of June, correction twenty, both dates are 2013. That is then, the evidence that was tendered."

[12] The Court a quo rejected this new fact and concluded, on page 172 line 11 of the record, the following:

"In regard to the address as appears clearly from the documents the address is registered in the name of Mr Nkhi's wife. Mr Nkhi is not making any contribution to the payment of the bond, at this stage him being in custody and the lease agreement in my view is merely a sham. I cannot, I have never in my 23 years as a magistrate come (sic) across a lease agreement where the rental is nil. In fact it is doubtful whether this can be termed a lease agreement because it is an essential term of an agreement of lease that there should be a, a rental and that the rental should be more, or at least the rental should be a figure and not a rental of nil or zero. In my view the fact that there is an address that the accused may go to and the fact that the so-called lease agreement makes provision for him to actually stay there does not or is not sufficient to safeguard the accused from fleeing at some or other stage from the particular address. There is no hold in this case on the accused to stay at the particular address. It is merely a so-called agreement that he will stay there. There is no other hold that exists for him to actually remain staying (sic) there during the course of his trial." (my emphasis)

[13] This leads me to the second new fact.

[14] The Appellant states that since 15 August 2012 he has been incarcerated. The matter has still not been allocated a trial date.

Taking into consideration that there are 184 witnesses who must testify, the trial will not start before the last quarter of 2013.

- [15] He was awaiting disclosure of documents and the disclosure is on a CD/DVD that contains 14 000 pages. He is not in a position to work with a CD/DVD because he does not have access to any computer.
- [16] The Department of Corrections refused him access to a computer to prepare for his trial.
- [17] Accordingly, he will not be able to prepare for his trial and prays that the Court *a quo* sees this as a new fact.
- [18] The Court *a quo* opined that section 60 of the Criminal Procedure Act does make provision that a court must take into account the various factors pertaining to an applicant for bail, including the issue of whether the Appellant will be able to properly prepare for his trial.
- [19] In the Court *a quo*'s view it is not a requirement, in a case such as this, that an accused be afforded documentary disclosure on DVD or CDs. In his view, it was sufficient if the documents were given to Mr Nkhi in the form of hardcopies as has been done in this case.
- [20] The learned magistrate also indicates (page 171 line 20) that he explained to the Appellant that he may apply for a single cell for this purpose.

[21] The learned magistrate was of the view that it cannot be said that the mere fact that the appellant is not given disclosure in electronic format can prevent him from preparing for his trial.

[22] There may be various reasons why the prison or correctional centre may not in a particular case be willing or able to provide a particular accused with a computer.

[23] In conclusion, he was of the opinion that if the Appellant were to be given a single cell and if he were to be given the documents in hardcopy format he would then be afforded the necessary resources to prepare his trial insofar as disclosure was concerned.

[24] The court *a quo*, considering all the facts placed before it, at page 173 line 6, found the following:

"The Court, as I have said must take into account all the factors and also must bear in mind that Mr Nkhi bears the onus in this particular case. I am of the view that taking into account all the circumstances that have been placed before me, all the documents, as I have stated most of the facts and these documents are common cause that Mr Nkhi has not discharged the onus that rests upon him to show on a balance of probabilities that he should be released on bail and that accordingly I find that at this time it is not in the interest of justice that Mr Nkhi be released on bail. Mr Nkhi if you can stand. Your application on new facts is refused."

[25] At the hearing of this appeal, the Appellant informed me that although he is not utilising the services of a legal practitioner for this appeal he would be appointing an attorney to represent him at the trial. If regard is had to this submission, the State would be at liberty to provide the

Appellant's new attorneys-of-record with disclosure who will then be able to prepare and advise the Appellant accordingly.

[26] At the hearing of this application, the respondent informed me that the matter is ready to proceed and that the trial will commence shortly.

[27] In terms of section 65(4), this Court may not interfere with the decision of the Court *a quo* unless this Court is satisfied that the Court *a quo* was wrong.

[28] I am of the view that the learned magistrate was correct in refusing bail.

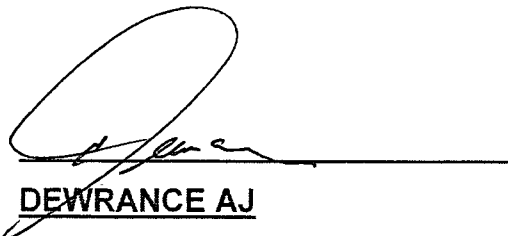
[29] The lease agreement does not contain the essentialia of a normal lease agreement. I agree with the learned magistrate that it is a sham.

[30] I agree with the court *a quo* that, if regard is had to the evidence as a whole, Mr Nkhi has not discharged the *onus* that he should be released on bail and that it is not in the interests of justice for him to be released on bail.

[31] At the hearing of this application, counsel for the Respondent requested me to exercise my discretion and, as I understood him, to order the Department of Corrections to place the Appellant in a single

cell. The Appellant refuses to be placed in a single cell. I do not have such a discretion as this is an appeal.

[32] Accordingly, this appeal is dismissed.



DEWRANCE AJ

ACTING JUDGE OF THE NORTH AND SOUTH

GAUTENG HIGH COURTS, PRETORIA

Matter heard on:

Judgment delivered on:

Representation for the appellant:

Appellant appeared in person.

Representation for respondent:

Adv Maponya