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

Case Number: A388/2009

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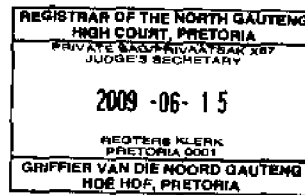
1. REPORTABLE: ~~YES~~ NO.

2. ON INTERACT TO OTHER JUDGES: ~~YES~~ NO.

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In the matter between:

PHILIP DAILE LEKGAU

APPLICANT

vs

THE STATE

RESPONDENT

JUDGMENT

Delivered on: 15 June 2009

POTTERILL AJ

1. Before me is an appeal against the refusal of bail by the Regional Magistrate D Makgoba. In terms of paragraphs 2,3 and 4 of the grounds of appeal this appeal is against the second and third refusal of bail on new facts. In argument it was expanded to include an appeal against the first bail application. To understand last mentioned it is necessary to set out the background to this appeal.

2. The appellant was arrested on 8 April 2006 at the Lebobombo Borderpost, Komatipoort, Mpumalanga. This was due to the fact that the present Investigating Officer, Sergeant Kalis, had black-listed the appellant at all borders. The appellant is charged with 24 counts, *inter alia*, housebreaking, robbery with aggravating circumstances, attempted murder, theft of motor vehicles, abduction and escaping. It was also put to me that he is also on trial at Ladysmith and another trial in the Pretoria Regional Court. He is also in custody in these cases. On 30 May 2006 he brought the first application for bail. This application was refused. On 9 October 2007 a bail application on new facts was heard and refused on 15 October 2007. On 21 November 2008 a further bail application on new facts was heard and refused. The hearing of the matter is well on its way; 30 – 40 witnesses have been led, but will due to the magnitude of charges and number of co-accused not be finalized within the year. He has on at least 13 charges been linked with fingerprints and expert testimony thereto.
3. I am not now, in 2009, considering an appeal against the first and second refusal of bail. If the appellant was aggrieved with the decision of the Regional Magistrate, he in 2006 and 2007 could have exercised his fundamental right of appealing against these decisions. If appellant considered that the Magistrate committed a reviewable irregularity he could have approached the High Court in terms of Rule 53. In *Shefer v Director of Public Prosecutions, Transvaal, And Another* 2004(2) SACR 92 (T) it was found that where an appeal procedure is provided for it can not be circumvented. In this case one appeal can not be utilized to circumvent two appeals that should have been brought

earlier. The Court went further and found that with rule 65 governing bail appeals there is very little room for the Court to exercise common law powers.

4. In *S v Maliwa and Others* 1986(3) SA 721 WLD it was found that a bail appeal in terms of s65 is analogous to an ordinary criminal appeal. In *S v Ho* 1979(3) 734 it was decided that in bail appeals the lax habit of making *ex parte* submissions from the Bar should not be tolerated. The first, very general, ground of appeal was argued relates to the first appeal. This ground is so vague that it is unhelpful and in no way links the first bail application to this appeal. There simply lies no appeal against the first bail application. Even if there were grounds the appeal against the first and second bail refusals are not to be entertained for the reasons set out in paragraphs 3,5 &6.
5. Bail appeals have been time and again classified as *prima facie* urgent. The appellant however after respectively 3 and 2 years only now appeals against these refusals. There is not a single reason forwarded why this is only done now. With no reasons before me I can not find that they need to be pursued now.
6. Furthermore even if I should entertain all three appeals one appeal could become a bar to the other two appeals. If I should find that the first bail appeal should not have been refused [which I have not considered] then the factual situation is that the second and third applications were refused: he would have to stay incarcerated. There is simply no basis to entertain one appeal against three bail applications.

7. I am prepared to entertain an appeal against the last bail application. This application was brought and refused on 21 November 2008 and the appeal thereto was launched during March 2009. It is thus launched within a reasonable period. Furthermore it is addressed in the grounds of appeal. An urgent application had also been launched in the meantime setting forth some grounds for the lateness of the appeal.
8. The grounds of appeal pertinent to this bail appeal is that the Magistrate erred in: "...failing to consider that the appellant had adduced evidence based on new facts in the second and third applications for bail that indeed showed new facts which is " exceptional circumstances " which permits his interest of justice [sic] (and his release on bail . " [Paragraph 2] And in paragraphs 5&6: " The learned Magistrate erred by holding subsequently in the third bail application based on new facts that the appellant will not be permitted to move another bail application and has to give prior notice to a new application for bail for the facts upon which he relies to substantiate his application for bail. This finding in itself is irregular and unconstitutional. " The learned magistrate erred by not considering all the factors pertaining to the various applications for bail in toto and having disregarded all the relevant evidence as so tendered by the applicant and his witnesses. "
9. In his affidavit the appellant starts off by saying he has been moved to C-max with a lack of privileges affecting his mental state. He has also developed a heart condition that requires specialist care which can not be treated in prison. "I consulted Dr Hlope who after medical examination expressed severe

concern about a possibility of a heart attack and he referred me to a specialist cardiologist at the Kalafong Hospital on the 29th of September 2008 . " He then states that the Investigating Officer who had knowledge of the appointment failed to pick him up. He again failed to pick him up for an appointment for the 6th of October 2008. The specialist is now refusing to book another appointment due to his non-appearance. Furthermore his relationship with his wife and children is deteriorating due to his incarceration at C-max. His businesses are suffering and he is on the verge of bankruptcy. He will no longer be able to employ his legal team and he does not have confidence in the legal aid board. " I humbly confirm that in my previous bail applications I raised the possibility of house arrest as a possible condition as proposed 62(f) of the Criminal Procedure Act. " He then refers to a statement by a correctional officer, Mr Ngaxu Nocideem, for his suitability for placement under community corrections as proposed in section 62(f). I accept that he is in fact referring to the statement of Ngaku Nicodemus Seakamala.

10. The state handed in an affidavit from the Investigating Officer in which he states that he took the Appellant to an outside hospital. He attaches 4 temporary transfer of detainee [SAP127] forms as proof that on 29 April 2008, 12 May 2008, 23 June 2008 and 7 July 2008 he in fact did take the appellant to a doctor. Each time the appellant informed the investigating officer that there is nothing medically wrong with him, but is doing this to keep the investigating officer from working and with this he will force the investigating officer to return him to "Newlock. " The investigating officer after 6 months refused to take the prisoner to the outside hospital because there was nothing

wrong with the appellant and he was scared it was part of a plan to escape. The State also handed in an affidavit from a Correctional Services investigator in C-max. She confirms that on a number of occasions cell phones have been recovered from the appellant. These cell-phones are smuggled in contrary to the rules and regulations of the Correctional Services and the matters against the appellant are under investigation. This affidavit is to confirm a Newspaper report wherein the appellant is mentioned by name in having smuggled in cell-phones and that by implication these devices lead to escapes. This also establishes that the accused has no regard for rules and regulations and he would not adhere to bail conditions.

11. The Magistrate found that unless new facts are established bail application upon bail application is an abuse of the process. He then addresses the heart condition and the struggling businesses and lack of finances as the only new facts. He then relies on, and quotes from *S v van Wyk* 2005 (1) SACR 41 (SCA) in which it was found in circumstances on par with the appellant that: "Hoe dit ook al sy in sover as wat die appellant nie behoorlike aandag in bewaring ontvang nie het hy ander regsmiddels tot sy beskikking en is borg in die algemeen nie die remedie vir die vergryping en versuim van die Gevangenis Owerhede nie."

And

"Daar is min indien enigiets oor van hierdie besigheid wat hy kort voor sy arrestasie begin het. Sou hy op borgtog vrygelaat word, betwyfel ek of hy die besigheid kan bestuur en herbou aangesien die verhoor sy bywoning vereis."

The Magistrate found that attending trial on these 24 charges, and attendance in two other courts would leave him being in the same position; not much time to attend to his business interests. He further found that in view of the seriousness of the counts, the 13 finger print experts that had linked him to the counts, the other two cases in which he is not on bail and the probability of a very long jail term if found guilty, he should not be granted bail. This is amplified by the fact that the appellant might evade justice.

12. In terms of s65 (4) I shall not set aside the decision of the Magistrate unless satisfied that the decision was wrong. The Magistrate did in fact address the medical condition and the running of his business as new facts and found them in view of S v van Wyk supra not to be exceptional. I can not find that his decision is wrong. There was no corroborating medical evidence before the court. Evidence regarding an alleged illness has to be clear and to date this medical problem has not manifested in that the cardiologist has filed a report or recommended that he not be kept in custody for health reasons. This could have been done as the appellant surprisingly failed to enlighten the court that he was taken to the hospital for the period April 2008 – July 2008. In the replying affidavit he takes note of the fact that the investigation officer is refusing to take him to the hospital after July, but does not deny the serious allegations by the investigating officer that he [appellant] told him that he is not at all ill, but is only frustrating the investigation officer. On a preponderance of probabilities he did not prove his health problems and in these circumstances it can not sustain exceptional circumstances.

13. The appellant's financial bankruptcy rendering him not being able to pay his legal team fees was also correctly decided as not being exceptional. He has been in custody since April 2006. No reasons were forwarded why the businesses are on the verge of bankruptcy. He has a wife, 12 employees in the tavern and 6 employees in the taxi business. Although it is probable that he was in control of the businesses, there is no averment that he did the day to day running of the business. In fact it does not seem to be a new fact as on p217 of the record Irma Labuschagne states, " it should also be stated that, due to his incarceration, he is not in any position to look after his business interests and is, therefore, suffering serious financial losses. It is now 3 years later and with him not there it is possible that the businesses are not run as well with him in control, but this is not said. It is just boldly averred that they are bankrupt. Questions are unanswered. are they stealing from him, have they closed the businesses, due to the recession are people drinking less? The appellant did not prove on a preponderance of probabilities that his financial position is exceptional. The magistrate is also correct that due to the magnitude of the court proceedings his time to control the business would be very limited. In these circumstances this is not an exceptional circumstance. It was submitted from the Bar that the appellant is re-iterating his offer to pay R200 000.00 bail. This is a substantial amount of money and does not sustain the alleged bankruptcy. Accordingly there is money available for his legal team and he has not proven exceptional circumstances.

14. Mr Pistorius for the appellant also argued that his mental state was a new factor to consider. The appellant avers that due to restricted visits his

communication with his wife and children has broken down. This and little access to other inmates and newspapers etc, has affected his mental state. This is all due to his transfer to C-max from 22 February 2008, thus after his first application for bail based on new facts. The Magistrate addresses this with the following: "I am glad you have brought the application to the High Court about your treatment, your being sent to C-max prison, but it has got nothing to do with me, I cannot then on that basis release you on bail. " [p115 of bundle] I have to agree that his transfer to C-max is not per se a fact for bail to be granted; this is something between him and Correctional Services. The appellant however instructs his attorney to postpone the urgent application against his transfer to C-max sine die despite his knowledge that a pending internal investigation " is not expected soon . " [p88 of bundle] This transfer does however potentially create new facts pertaining to his mental state. Once again there are very little facts to substantiate his mental state as an exceptional circumstance. Being in solitary confinement and with restricted access to family and media would affect his mental state. There are however no facts that his mental state is substantial and therefore exceptional. It was submitted that I must also take cognisance of the facts that he had previously tried to commit suicide and according to Irma Labuschagne is depressed. From her report the move to C-max has brought about very little new facts:" Since his last bail application, he has not been allowed any contact visits with his wife or children. This has caused his depression to deepen. He has voiced serious concern that his situation is causing a serious rift between him and his wife as there is no communication allowed " [p217 of the record.] In C-max the chances of him being afforded an opportunity to take his own life are thankfully

less. On the one hand there are very little new facts and on the other hand they are not exceptional.

15. It was also argued that the Magistrate should have considered the fact that according to Correctional Services he is fit for house-arrest. The Magistrate did not address this as new fact. House-arrest was indeed raised at the first appeal on new facts. This time round however there is a report from Correctional Services confirming this. The information contained in this statement was obtained from the appellant himself. Contrary to the information contained therein the appellant had already pleaded, only half of what he was charged with was divulged, i.e. escaping and now he has only three employees working at the tavern. Nothing is divulged of the other two cases wherein he is also in custody. These inconsistencies negate the recommendation therein and then in fact there are no new facts before the court. Even if the statement does constitute new facts then its recommendation is not to be accepted. Granted house-arrest can be a factor in determining whether bail should be granted, but Section 62(f) only comes into play when a court has already granted bail and upon application by the prosecutor. I can accordingly not find that the magistrate's decision is wrong.

16. On the entire set of facts before me I can not find that the Magistrate's decision in either not accepting facts as new facts, or finding them not to be exceptional was wrong.

17. The Magistrate did not err in not deciding on the evidence of all three bail applications *in toto*. This is only done by the Court of Appeal of the bail applications. The Magistrate can not sit on appeal on his previous judgment; his only duty is to determine whether there are new facts and to compare the applications in this regard.

18. The Magistrate can not refuse an accused his right to apply for bail on new facts. The new facts must however be substantial and the accused can not simply apply for bail afresh every second day – *S v Vermaas* 1996(1) SACR 528(T). The fact that the Magistrate warned the accused not to do so is not irregular. It is debatable whether it is irregular to require an affidavit before bringing a bail application. This does however not render his decision pertaining to the granting of bail wrong.

19. On all the facts I can not find that the Magistrate's decision is wrong and I accordingly make the following order:

20. The appeal is refused.


S Potterill Acting Judge of the High Court