

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG.**

Case Number: 2024/082016

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

5 August 2024

DATE

A black rectangular box redacting the signature of the judge.

SIGNATURE

In the matter between:

NIVESH BISWANATH DEVANARIAN

Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS

First Respondent

**SENIOR PUBLIC PROSECUTOR – SPECIALISED
COMMERCIAL CRIME COURT, JOHANNESBURG**

Second respondent

MAGISTRATE K KHESWA

Third Respondent

PRISON HEAD: JOHANNESBURG SUN CITY PRISON

Fourth Respondent

JUDGMENT

Noko J

Introduction

[1] The applicant launched an urgent application for an order reviewing and setting aside the decision of the Magistrate P Kheswa delivered on 3 July 2024. The application is brought in terms of Rule 53(1) of the Uniform Rules of Court read with section 22(1)(b),(c) and (d) of the Superior Court Act¹ (“SC Act”). The third respondent constituted an inquiry constituted in terms of section 67 of the Criminal Procedure Act² (“CPA”) and decided to revoke bail granted to the applicant and ordered forfeiture of the balance of the bail amount paid by the applicant.

[2] The application is opposed only by the first respondent (“respondent”) who contended that it should be struck off the urgent roll as the urgency was self-created and further that the applicant has failed to succinctly set out the grounds on which the review application is predicated.

Background

[3] The background set out below is in general common between the parties. The applicant was arrested on 13 April 2018 and arraigned on two counts of money laundering of the sum of 15 million rand in contravention of section 4 of the Prevention of Organised

¹ Act 10 of 2013.

² Act 57 of 1977.

Crimes Act³ (“POCA”). He was granted bail in the sum of R50 000.00 on 24 April 2018. The applicant subsequently pleaded guilty to the charge on 23 February 2023 and the plea was accepted by the state. He was accordingly convicted by the third respondent. The bail was extended pending sentencing.

[4] Shortly after the conviction, the applicant was admitted to a hospital with septic gangrene and underwent a foot amputation. Subsequently the applicant failed to attend court on several occasions between then and June 2024. The third respondent stated that the applicant handed up 16 sick notes over that period. On 28 February 2024, in one of the dates when the applicant failed to appear in court, the third respondent issued warrant of arrest and provisional order of forfeiture of the bail with the return date of 13 March 2024.

[5] The applicant appeared on 13 March 2024 and conveyed his unfavourable medical condition which led to his inability to attend court. The court ordered that the applicant’s hospital records be produced and the matter was postponed to 15 March 2024. The applicant failed to appear on 15 March 2024 and his medical practitioner reported that the applicant was unable to attend due to his unhealed foot pursuant to the amputation. An inquiry was held on 15 March 2024 at which the third respondent ordered forfeiture of the amount of R10 000.00 (from the total bail amount paid of R50 000.00) as the court was not satisfied with the explanation advanced by the applicant for his non-appearance. The case was postponed to 20 June 2024 for sentencing.

[6] The applicant failed to appear on 20 June 2024 and his legal representative conveyed to the court that the applicant has consulted a medical practitioner who declared that the applicant was unable to travel or work for a period between 15 June 2024 and 15 July 2024. The third respondent issued a warrant of arrest against the applicant and ordered a provisional forfeiture of the bail money. The case was postponed to 3 July 2024 for an inquiry.

³ Act 121 of 1998.

[7] An inquiry was held on 3 July 2024 at which it was reported that the applicant was in fact hospitalised on 19 June 2024 and not 15 June 2024 as it was made to appear on 20 June 2024. There was also a note from the same medical practitioner who stated that the applicant was unable to attend court between 19 June 2023 and 23 June 2023.

[8] The third respondent was not satisfied with the contradictions in the sick notes/explanation presented and decided that bail be revoked and further made a final order of forfeiture of the balance of the bail amount to the state. The third respondent ordered further that the applicant should be detained at the hospital section of the prison.

[9] The applicant was aggrieved by the decision of the third respondent and decided to mount a challenge. Due to the applicant's worsening health conditions, he also made attempts to bring a fresh application for bail on the basis of new facts. He further attempted to bring an urgent application in this division for the reinstatement of the bail and the review of the decision of the court *a quo* but could not succeed in getting his applications adjudicated upon. The high court directed that his application should be entertained by the third respondent. The third respondent who presided over the matter informed the applicant's legal representatives that she is *functus officio* and would therefore not preside over an application launched by the applicant.

[10] The applicant then launched this urgent application for an order to review and set aside the decision of the third respondent on the basis that there were gross irregularity committed and further that the court *a quo* unjustifiably rejected admissible or competent evidence.⁴ The applicant contends further that the third respondent should have invoked the provisions of section 186 of the CPA and invite the medical practitioner to attend court and explain the contradiction or the confusion. The applicant has crafted the prayers in the Notice of Motion as follows:

⁴ See para 6.4 of the applicant's Founding Affidavit at CaseLines ("CL") 01-13.

1. An order dispensing with the form, service and time periods of the Uniform Rules of court and directing that the matter be heard as one of urgency in terms of Rule 6(12) of the Rules of the above Honourable Court.
2. Reviewing and setting aside in terms of Uniform Rule 53 the decision of the Third Respondent, revoking and forfeiting the Applicant's bail, handed down on the 03rd of July 2024 in the Specialised Commercial Crime Court, held at Palm Ridge under case number 72/2018.
3. Reinstating the bail deposited in the amount of R50 000.00 (fifty thousand) on the same conditions granted by the bail court prior to the revocation, pending the conclusion of criminal proceedings, and
4. Directing the Fourth Respondent to forthwith release the Applicant from custody,
5. Costs of suit.

Submissions by the parties.

Urgency

[11] The counsel for the applicant submitted that ordinarily matters of personal freedom/bail deserves urgent attention of the courts. In this regard the counsel referred to the judgment in *Mashiya*⁵ where the Court held that “... *it is of paramount importance that matters of personal freedom should be dealt with as a matter of urgency*”. The applicant's efforts taken since 3 July 2024 for the matter to be considered by the courts demonstrated that he was just not sitting supine and not acting at all.

[12] The respondent in retort contended that the urgency on the part of the applicant is based on his alleged worsening medical condition but fails to present any evidence corroborating his stance. In the premises, the State argued, no proper foundation has been laid and urgency, if any, was self-created and the application should therefore be struck off the roll.

[13] In view of the evidence and argument mounted by the applicant I hold the view that the applicant did not adopt a laissez-faire stance after 3 July 2024 and the contention that

⁵ *Magistrate Stutterheim v Masiya* 2003(3) SACR106 (SCA) at 113 C-D.

urgency is self-created is unsustainable. I therefore find that the application deserves audience of the urgent court.

Review

[14] The counsel for the applicant contended that the presiding officer took a decision in terms of section 68(1) which requires that evidence should be proffered under oath before a decision is taken. The presiding officer failed to comply with the said section and instead of receiving evidence under oath she decided to consider oral arguments and submissions presented by the legal representatives. This is irregular and it was held in *D M*⁶ that without compliance therewith the decision of the presiding officer was bound to be reviewed and set aside.

[15] The counsel for the applicant contended that the health status of the applicant has worsened due to substandard medical treatment he is receiving from the prison hospital. As a result, he has become a burden financially to the state as he requires specialised care. In any event, the argument continued, there is no justification for the continued incarceration especially because it cannot be pre-empted that the applicant would receive a custodial sentence. It is noted, counsel continued, that the report from the probation officer is still outstanding and the delay in finalisation of that report cannot be placed on the doorstep of the applicant.

[16] Counsel for the applicant contended further that during argument before the third respondent the applicant was behaving strangely and his sister stated that there is a sudden change in the applicant's behaviour and further that the applicant has threatened to commit suicide. This situation according to counsel could be informed by the applicant being worried that he is facing imprisonment.

⁶ *D M v The State* A53/2021 [2021] GPJHBHC (25 June 2021).

[17] The counsel for the defence contended further that it was not clear as to why the third respondent decided that the balance of the bail in the amount of R5000.00 be forfeited as the total amount paid for the bail was R50 000,00.

[18] The prosecution on the other hand contended that the applicant was playing hide and sick and continuously frustrated the finalisation of the matter by submitting sick notes every time the matter had to progress. The sick notes submitted by the applicant are also confusing. It appears on the sick note that the applicant was unable to travel on 15 June 2024 for a month but the other sick note shows that the applicant was hospitalised on 19 June 2024 and discharged on 23 June 2024.

[19] The prosecution argued that the fact that the applicant always requested remands when the sentencing process need to be undertaken cannot be accommodated any further as it brings mockery to the justice system. On one occasion the doctor stated that the applicant was unable to travel and strangely he managed to attend court on 3 July 2024. It has been conceded that he is suicidal and that goes against granting bail because one of the reasons to refuse bail is for the accused's personal safety.

[20] Further that the probation report has long been completed and submitted but due to the applicant's failure to attend court the sentencing process was unduly thwarted. The date for sentencing is now scheduled for 12 August 2024.

Legal principles and analysis

[21] Section 22(1) of the Superior Court Act provides for the review of the proceedings before any Magistrate's Court on the grounds set out in subsections (a) to (d). The applicant's review application is predicated on the grounds set out in subsections 1(b) to (d) which provides as follows:

- (a) ...
- (b) Interest in the cause, bias, malice or corruption on the part of the presiding officer;

- (c) Gross irregularity in the proceedings;
- (d) The admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

[22] I had regard to the transcript of the record of hearing before the third respondent and noted that the history of the matter was comprehensively chronicled and displays an ugly picture on the delay of the finalisation due to postponements. The essence of the reasoning presented by the court *a quo* had regard to the background of the matter and the continuous non-appearance of the applicant as concerning. There have been several requests for the applicant to procure his own private medical practitioners to compile reports for consideration before sentencing. Noting that even in June 2024 there was also a request for the postponement of the matter for a period of ten weeks to compile the report.

[23] The following brief summary of the reasoning is as gleaned from the record of the hearing before the third respondent, first, the applicant's legal representative informed the court on 20 June 2024 that the applicant was admitted in a psychiatric hospital but it subsequently transpired that this was not correct. Second, the third respondent complained that the matter commenced in 2018 and at some stage the applicant was absent from court in three different instances and amount of R10 000,00 was forfeited pursuant thereto. Thirdly, the applicant's representative had previously stated that arguments were ready regarding sentence but suddenly stated that the applicant's medical practitioner needs a month to compile a report regarding the depressive status of the applicant.⁷ The extension was granted for six weeks previously for the applicant's medical report to be compiled and same has not yet been compiled and a further period is requested. In addition, the previous applicant's medical sick note stated that applicant was admitted on 15 June and would be unable to attend the court for a period of a month ending 15 July 2024. Strangely the subsequent medical record shows that the applicant was not admitted on 15 June but on 19 June 2024. In addition, though the medical practitioner certified that the applicant would not be able to travel until 15 July the applicant managed to attend court on 3 July 2024. The same doctor has also issued a note which stated that the applicant would not be able to attend to travel between the period between 19 June until 23 June 2024. The two

⁷ See para of the transcript of CL 02-9.

sick notes, the third respondent held, cannot co-exist. The court observed that as of July 2024 the applicant submitted 16 sick notes.

[24] The third respondent further noted that the applicant was given a period of almost 15 months to procure the report from his medical practitioner but nothing came out of it.

[25] I observed that the applicant contended that section 22(1)(b) of the Superior Court Act is applicable the applicant failed to present evidence to support the contention that the presiding officer was bias and/ or corrupt. The applicant need to heed advices from the legal representatives not to throw around accusations of, *inter alia*, corruption, which are unfounded and have the potential to unjustifiably and unlawfully infringe on the *dignitas* of court official.

[26] The reference to the judgment in *D M* appears to have been misunderstood as the requirement for evidence under to be taken under oath is as set out in section 68 of the CPA whereas the proceedings before the court *a quo* were in terms of section 67 of the CPA which provides in subsection 3 that the court may accept *any* evidence relating to the accused's non-attendance which may lead to the cancellation of bail and forfeiture of the bail money. It was held in *Theko*⁸ that:

“... had the court, in the present instance, acted in terms of section 67(2)(a), the bail of the accused could have been cancelled and the bail money been declared forfeited to the state. The forfeiture of bail money and the loss of liberty would thus have been- the consequences of the failure to the accused to appear in court.”⁹

[27] There is also no basis for the applicant to contend that the presiding officer should have invoked the provisions of section 186 of the CPA to look for evidence from his medical practitioner so that version of the applicant should be devoid of contradictions. It is contemplated in section 67(3) of the CPA that the presiding officer should have regard to the evidence presented by the applicant. The applicant submitted evidence stating that

⁸ *The State v Justice Theko* (Spec8/09) [2010] GPPHHC (13 January 2010).

⁹ Id at para [9].

he is unable to travel or attend court for a period between 15 June to 15 July 2024. At the same time presenting evidence confirming admission only between 19 and 23 June 2024. There was good basis for the presiding officer to find this evidence contradictory and the applicant should have taken it upon himself to clarify this position. The confusion is also fortified by the fact that the applicant who was unable to travel until 15 July 2024 managed to attend court by himself on 3 July 2025. In this regard the contention that admissible or competent evidence was rejected or that there was gross irregularity as contemplated respectively in subsections (c) and (d) of section 22(1) is unsustainable.

[28] It is also quite concerning that the defence made a statement which was not challenged by the applicant that he was suicidal and in common parlance such an admission would make the applicant not a good candidate to be on bail.

Conclusion.

[29] I therefore remain unpersuaded that the applicant has failed to mount a persuasive case to persuade me that the court *a quo* has committed irregularity as envisaged in section 22 of the Superior Court Act warranting to review and set aside the decision taken to revoke the bail, forfeit bail amount and detention of the applicant. It is also noted that the hearing for the sentencing is now set down for 12 August 2024 and this may bring to end the long walk to finality of this *lis*.

Costs

[30] The costs shall follow the outcome.

Order

[31] In the premises I make the following order

The application is dismissed with costs.



M V Noko
Judge of the High Court.

Dates:

Hearing: 30 July 2024.

Judgment: 5 August 2024.

Appearances:

For the Applicant : Adv. Pool.

For the State: Adv Nchabeleng