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Case No 220/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

VUSI ZACHARIA MAKOLA — Appellant

and

THE STATE — Respondent

Coram: VAN HEERDEN, E M GROSSKOPF, SMALBERGER

F H GROSSKOPF et HARMS JJA

Heard:	Delivered:
20 May 1994	20 May 1994.

REASONS FOR JUDGMENT

F H GROSSKOPF JA:

This court made the following order at the hearing of the appeal:

> "For reasons to be handed in the appeal succeeds and the order made by the court a quo is set aside. The matter is remitted to that court to reconsider the appellant's application for bail."

These are the reasons for the order.

The material facts are common cause. The appellant was arrested on 4 May 1993. He first appeared in the Boksburg magistrate's court on 7 May 1993. Thereafter the case was postponed on a number of occasions until 1 September 1993 when the appellant, represented by an attorney, applied to the magistrate's court at Boksburg for bail ("the first bail application"). It was refused, but no appeal against such refusal was noted. The appellant was further remanded in custody until 23 September 1993 when he

pleaded not guilty to charges of murder and attempted murder put to him in terms of s 119 of the Criminal Procedure Act 51 of 1977 ("the Act"). The magistrate thereupon stopped the proceedings and adjourned the case pending the decision of the attorney-general. The appellant was advised on 23 December 1993 that the matter had been set down for trial in the Witwatersrand Local Division on 11 April 1994. On that day the case stood down until the next day, and on 12 April 1994 the trial was postponed to 25 July 1994.

Immediately after the case had been postponed the appellant's counsel applied to the Witwatersrand Local Division for his release on bail ("the second bail application"). This application was heard by Stegmann J on 13 April 1994. The State opposed the application and contended that the Witwatersrand Local Division had no jurisdiction to entertain a new application for bail. The State submitted that the appellant was required to renew his bail application before the magistrate at

Boksburg in terms of s 65(2) of the Act. In support of its submissions the State relied on the judgment of **Stegmann J** in the case of **S v Baleka & Others** 1986(1) SA 361(T), at 375B-381A, where the learned judge considered the relevant statutory provisions of the Act pertaining to bail, and dealt in particular with the construction to be placed on s 60(1) of the Act. (The other two judges who sat in the **Baleka** case came to their respective conclusions on different grounds.)

S 60(1) of the Act provides as follows:

> "An accused who is in custody in respect of any offence may at his first appearance in a lower court or at any stage after such appearance, apply to such court or, if the proceedings against the accused are pending in a superior court, to that court, to be released on bail in respect of such offence, and any such court may, subject to the provisions of section 61, release the accused on bail in respect of such offence on condition that the accused deposits with the clerk of the court or, as the case may be, the registrar of the court, or with a member of the prisons service at the prison where the accused is in custody, or with any police official at the place where the accused is in custody, the sum of money determined by the court in question."

In the Baleka case Stegmann J agreed with the construction which the State sought to place on s 60(1), and he held at 380H that the submissions advanced by the State were correct. These submissions were summarised by the learned trial judge at 376D-H:

> "Mr Jacobs contends on behalf of the State that, once the applicants had been arrested on the charges set out in the indictment, there were two courts which in terms of s 60 potentially had jurisdiction to hear and determine the bail application by the applicants. The first court potentially having such jurisdiction was the lower court in which the applicants first appeared (the Pretoria magistrate's court), and the second was the Court in which the proceedings were pending (the Transvaal Provincial Division of the Supreme Court). Mr Jacobs draws attention to the fact that s 60 entitled the applicants to approach the Pretoria magistrate's court "or" the Supreme Court. This is not a context in which the word "or" can be understood to mean "and". The applicants were obliged to make a choice. The choice they in fact made was the Pretoria magistrate's court. Once the applicants had made that choice, the Supreme Court no longer had the jurisdiction to entertain an original bail application. If the applicants were aggrieved by the decision of the magistrate, they were free to appeal against his decision in terms of s 65. If they considered that the magistrate had committed a reviewable irregularity, they were free to approach the Supreme Court in the manner provided by Rule 53 to review his decision. What the applicants were not free to do was simply to ignore the magistrate's

> decision, to treat it as if it had never been made, and to institute a new application for bail in the Supreme Court."

After rejecting the arguments advanced in the Baleka case on behalf of the applicants in answer to the State's contentions, the learned judge concluded as follows at 380I-J:

> "My conclusion is therefore that because the applicants chose to apply to the magistrate's court for bail, as they were free to do in terms of s 60 of the Criminal Procedure Act 51 of 1977, they abandoned the alternative choice given them by that section, viz the choice of directing their initial application for bail to the Supreme Court in which the matter was pending."

Stegmann J applied the same reasoning in the present case. I respectfully disagree with the construction which the learned judge has placed on s 60(1) in both these cases. Counsel appearing for the State in this appeal in fact conceded the appeal, and rightly so.

In my judgment s 60(1) gives both the "lower court" and the "superior court" jurisdiction to release

an accused on bail. As far as the lower court is concerned the section provides that "[a]n accused who is in custody in respect of any offence may at his first appearance in a lower court or at any stage after such appearance, apply to such court .... to be released on bail in respect of such offence ...." The supreme court, on the other hand, will have jurisdiction to entertain an original application for bail, as opposed to an appeal, at any stage, provided "the proceedings against the accused are pending" in such court.

It appears from the judgment granting leave to appeal in the present matter that the learned judge in the court a quo assumed throughout that when the appellant brought his first bail application on 1 September 1993 the proceedings against him were already "pending" in the supreme court within the meaning of s 60(1) of the Act. In my judgment, and for the reasons which follow, the learned judge erred in making that assumption. (In the Baleka case he also assumed at

379E/F that "[s]ince its inception, the matter has been 'pending before a Superior Court'".) On the strength of that wrong assumption the court a quo took the view that at the time of the first bail application the appellant was faced with an election whether to apply for his release on bail in the magistrate's court, Boksburg, or in the supreme court. The learned judge concluded that having elected to bring the first bail application in the magistrate's court the appellant thereby abandoned his other option of applying in the supreme court.

It is clear in my opinion that at the time of the first bail application on 1 September 1993 there were no proceedings pending against the appellant in a superior court. There could accordingly be no question of an election on the part of the appellant. The further conclusions based on the said erroneous assumption can likewise not be justified.

As at 1 September 1993 the appellant had not even been asked to plead in terms of s 119 of the Act.

When he was required to plead on 23 September 1993 the appellant pleaded not guilty to the various charges put to him. Thereafter the attorney-general still had to decide in terms of s 122(2) whether to arraign the appellant on a charge at a summary trial before a superior court or any other court having jurisdiction, or to institute a preparatory examination. There was therefore still no question of any pending proceedings against the appellant in a superior court at that stage. According to s 76(1) the proceedings at a summary trial in a superior court shall be commenced by serving an indictment on the accused and lodging it with the registrar of the court. This had been done by the time the appellant brought the second bail application on 12 April 1994. By then the proceedings against the appellant were undoubtedly pending in the Witwatersrand Local Division, thus entitling the appellant to apply to that court for bail in terms of s 60(1). I do not agree that once the appellant had applied for bail in the

magistrate's court s 60(1) prevented him from bringing the second bail application in the supreme court where the proceedings were pending.

My interpretation above is fortified by the further consideration that where the matter is pending before the supreme court, such court will in any event be the appropriate court at that stage of the proceedings to deal with any bail application. Counsel prosecuting on behalf of the State would certainly be in a better position than a prosecutor in the magistrate's court to assist the court and to deal with the latest facts and circumstances relevant to a bail application. It would indeed lead to an anomalous situation if the present case against the appellant was to proceed in the Witwatersrand Local Division while his second bail application had to be dealt with in the magistrate's court at Boksburg.

I fail to see on what principle the appellant should be barred from bringing his second bail application on fresh grounds in the supreme court where

the case is pending. There is nothing in s 60(1) which expressly precludes such a step. The section actually makes provision for an accused to apply for bail "at any stage" in the proceedings. That provision is consistent with the notion of more than one bail application. (See **S v Nkosi en Andere** 1987(1) SA 581 (T) at 584B-C; **S v Acheson** 1991(2) SA 805 (Nm HC) at 821 G-J.)

The court **a quo** further held that if there were grounds on which the appellant wished to found a second bail application, he was not entitled to approach the supreme court, but obliged in terms of s 65(2) to renew his first bail application in the magistrate's court at Boksburg. S 65(2) provides as follows:

> "An appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts are first placed before the magistrate or regional magistrate against whose decision the appeal is brought and such magistrate or regional magistrate gives a decision against the accused on such new facts."

S 65(2) makes provision for a particular case, viz where new facts are discovered before an appeal is heard. The legislature could never have intended that s 65(2) should also govern all other renewal applications. In my judgment such new applications may indeed be brought under s 60(1) of the Act.

The provisions of s 62 and s 63(1) lend further support to the conclusion that the Witwatersrand Local Division has jurisdiction to consider the appellant's second bail application. S 62 provides that "[a]ny court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail" with regard to those aspects set forth in the section.

S 63(1) reads as follows:

> "Any court before which a charge is pending in respect of which bail has been granted may, upon the application of the prosecutor or the accused, increase or reduce the amount of bail determined under section 59 or 60 or amend or supplement any

> condition imposed under section 62, whether imposed by that court or any other court, and may, where the application is made by the prosecutor and the accused is not present when the application is made, issue a warrant for the arrest of the accused and, when the accused is present in court, determine the application."

It is the court "before which a charge is pending" which has jurisdiction to act in terms of these two sections. If bail had been granted in the present matter by the magistrate, Boksburg, the Witwatersrand Local Division would have been the only court which has jurisdiction at this stage to add further conditions of bail, or increase or reduce the amount of bail, or amend or supplement any conditions imposed by the magistrate. In my view it could never have been the intention of the legislature on the one hand to authorise the supreme court before which a charge is pending to amend conditions of bail, yet on the other hand to disallow that same court to hear a new application for bail.

It follows that the court a quo in my judgment wrongly decided that it did not have jurisdiction to

entertain the appellant's second bail application. This court accordingly made the order set out above.

F H GROSSKOPF JA

VAN HEERDEN JA)
E M GROSSKOPF JA)
SMALBERGER JA)
HARMS JA) Concur.