

REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 41/918/2011

Date:23/03/2012

In the matter between:

THE STATE

versus

BAREND JACOBUS ENGELBRECHT

Accused

JUDGMENT

MEYER, J

[1] The question for decision in this matter is whether the provisional forfeiture of the bail money that was deposited for the benefit of the late Barend Jacobus Engelbrecht ('the deceased') should be confirmed or whether it should be repaid to the deceased's brother, Mr Cornelius Johannes Engelbrecht, who had paid it.

[2] This matter could not be heard on Monday, 19 March 2012, when it was enrolled for hearing and I accordingly stood it down until this morning. Mr GL Roberts SC, who appears for the state with Ms Marriot, and Mr SW van der Merwe, who was to represent

the deceased at his criminal trial and who presently represents the deceased's brother, were *ad idem* that I do not have a discretion other than to declare the deceased's bail money provisionally forfeited to the state in terms of s 67(1) of the Criminal Procedure Act 51 of 1977 ('the CPA') pending argument today on the issue of a final forfeiture order. I was unable to consider the matter and I accordingly made such an order.

[3] The pertinent facts are few and simple. The deceased had been arraigned for trial on an indictment containing two charges of the murder of his wife and paraplegic son early in the morning on 27 May 2011. He was granted bail pending the finalisation of his criminal trial, which was to commence on 19 March 2012. It is common cause that the deceased died on 14 March 2012 as a result of a road accident. The cause of his death is recorded as an 'unnatural cause' in his abridged death certificate that was handed in at the commencement of these proceedings. The *innuendo* is that he committed suicide.

[4] The relief sought in this matter requires an interpretation of the relevant provisions of the CPA, and particularly the provisions of sections 67 and 70 thereof, which read as follows:

'67 (1) If an accused who is released on bail –

- (a) fails to appear at the place and on the date and at the time-
 - (i) appointed for his trial; or
 - (ii) to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or
- (b) fails to remain in attendance at such trial or at such proceedings,

the court before which the matter is pending shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused.

- (2) (a) If the accused appears before court within fourteen days of the issue under subsection (1) of the warrant of arrest, the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the accused satisfies the court that his failure under subsection (1) to appear or to remain in attendance was not due to fault on his part.
- (b) If the accused satisfies the court that his failure was not due to fault on his part, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall lapse.
- (c) If the accused does not appear before court within fourteen days of the issue under subsection (1) of the warrant of arrest or within such extended period as the court may on good cause determine, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall become final.
- (3) The court may receive such evidence as it may consider necessary to satisfy itself that the accused has under subsection (1) failed to appear or failed to remain in attendance, and such evidence shall be recorded.'

...

70 The Minister or any officer acting under his or her authority or the court concerned may remit the whole or any part of any bail money forfeited under section 66 or 67.'

[5] A case in point upon which much reliance is placed by Mr Roberts on behalf of the state, is *S v Cronje* 1983 (3) SA 739 (W). There the facts were that an accused to whom bail had been granted committed suicide on the morning before his criminal trial. Flemming, J held that a court has no discretion and that it has to declare the bail money provisionally forfeit if an accused to whom bail had been granted commits suicide before his trial. It was held '... that s 67(1) of the Criminal Procedure Act 51 of 1977 compelled the Court to cancel bail provisionally and to declare the bail money provisionally forfeited – an order which, in terms of s 67(2)(c), would become final after 14 days if the accused did not appear personally before the Court so as to satisfy the Court, in terms of s 67(2)(b), that his non-appearance was not due to fault on his part.' I am respectfully unable to follow the interpretation in *Cronje* that the provisions of s 67 of the

CPA apply to a deceased to whom bail had been granted and who, as a result of his or her death, fails to appear or to remain in attendance at his or her criminal trial.

[6] The plain wording of s 67 makes it clear that the Legislature contemplated living persons. The provisions of s 67 apply to 'an accused who is released on bail' and 'fails to' appear or to remain in attendance at his or her criminal trial. The dictionary meaning of the noun 'accused' is 'the prisoner at the bar' (*The New Shorter Oxford Dictionary on Historical Principles* – Clarendon Press, Oxford – 1993 Vol I, p 16) or 'person or people accused of a crime in a court' (*Collin's Dictionary and Thesaurus* 3rd Ed 2006, p 7) and that of the adjective 'accused' is 'charged with a crime or fault' (*The New Shorter Oxford Dictionary on Historical Principles (supra)* Vol I, p 16). A deceased, since the moment of his or her death, cannot be a 'person' who is charged with or accused of a crime or offence in a court. The words 'an accused who is released on bail' used in s 67(1) also postulate a living person since a deceased 'is' not 'released on bail.' The release of a person on bail can obviously not continue after his or her death.

[7] The sanctions, which a court has to impose upon an accused who is released on bail and who fails to appear at his or her criminal trial or who fails to remain in attendance provided for in s 67(1), are not separable and are obligatory. A court, under such circumstances, must do three things. It '... shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused.' See: *Da Costa v The Magistrate, Windhoek, and Others* 1983 (2) SA 732 (SWA), at pp 741H – 743H. It makes no sense to declare the bail provisionally cancelled in circumstances where a deceased is no longer at liberty on bail. The issue of a warrant for the arrest of someone known to be deceased would be

absurd and a *brutum fulmen* or exercise in futility. The purpose of issuing a warrant of arrest is for the warrant to be carried out. A warrant can obviously not be carried out upon a deceased. The provisional cancellation of bail and forfeiture of bail money become automatically final in terms of s 67(2)(c) if the accused does not appear within 14 days of the issue of the warrant of arrest or extended period as the court may on good cause determine. It is obvious that a deceased can neither appear nor satisfy the court that his or her failure under s 67(1) was not due to fault on his or her part.

[8] The language used in s 67 of the CPA is clear and unambiguous and must accordingly be given effect to. The provisions of s 67 of the CPA find no application when the default is due to the passing away of a former accused, whether or not the cause of his or her death was a natural or an unnatural one, such as suicide. This interpretation, in my view, also accords with the obvious purpose of the bail provisions, which is to ensure the attendance of an accused person. Nothing in the context of the CPA indicates that the words used should not be given their plain and ordinary meaning.

[9] The Legislature, in my view, did not intend a court to embark upon an investigation into the question whether the accused is alive or not before issuing an order contemplated in s 67(1). If a court only becomes aware of the passing away of an accused after it had issued a provisional cancellation and forfeiture order and warrant of arrest in terms of s 67(1) of the CPA, then, depending on the circumstances of a particular case, the provisional order, it being interlocutory, could be recalled or rescinded (compare: *S v Zibula* 1968 (2) SA 956 (ECD), p 598G) or the provisions of s 70 of the CPA could be invoked to bring about the repayment of the bail money.

[10] The provisional forfeiture order that was granted in *Cronje* can never become a final one since a warrant of arrest had, in my view appropriately, not been issued. An order for the provisional cancellation of bail and for forfeiture of bail money can only become final in the event of a defaulting accused, who appears before the court within fourteen days of the issue of a warrant of arrest, fails to satisfy the court that his or her failure to appear was not due to fault on his or her part, or in the event of his or her non-appearance within fourteen days, or any extended period, of the issue of a warrant of arrest.

[11] Mr Roberts, on behalf of the state, also relies on *Ex parte Estate Phillips: In re R. v. Phillips* 1958 (1) SA 803 (N), wherein the Full Bench of the then Natal Provincial Division held that ‘... an accused person who takes his life to avoid standing his trial clearly makes default in the condition of his recognizance or deposit.’ The condition referred to was that the accused should appear in court on a specific date ‘... to answer the charge and at all such times and places to which the case may be postponed.’ The contention that ‘... the forfeiture provisions of s 106 [of the former Criminal Procedure Act 56 of 1955] must inevitably be interpreted as applying only to *living persons*’ was rejected by the court based on its construction of ‘... the plain language of the statute.’ It was held that ‘[t]he statutory condition of the recognizance or deposit is that the accused appear to answer the charge against him. If he makes default, the Court may order a forfeiture.’ See: *Per* Holmes, J, at p 806 B-C and at pp 806G – 808C. The Full Bench decided that suicide in order to avoid standing trial was not a sufficient reason not to declare bail forfeited.

[12] S 106, the provisions of which section applied *mutatis mutandis* also in respect of any deposit of money in terms of s 105(1)(b), and s 107 of the former Criminal Procedure Act 56 of 1955, which were *inter alia* considered and interpreted in *Phillips supra*), read as follows:

- '106 If it appears to the court, Judge, magistrate or other judicial officer concerned that default has been made in any condition of a recognizance taken before it or him, or if it appears to the court, Judge, magistrate or other judicial officer before which or whom an accused person has to appear in terms of any recognizance entered into before another court, Judge, magistrate or judicial officer, that default has been made in any condition of such recognizance, such court, Judge, magistrate or other judicial officer may –
- (a) issue an order declaring the recognizance forfeited, and such order shall have the effect of a judgment on the recognizance for the amounts therein named against the person admitted to bail and his sureties respectively;
 - (b) issue a warrant for the arrest of the person admitted to bail and afterwards, upon being satisfied that the ends of justice would otherwise be defeated, commit him, when so arrested, to a goal until his trial.
- 107 The Minister or any person acting under his authority, may in his discretion remit any portion of any amount forfeited under this Chapter and enforce payment in part only.'

[13] The differences in wording between the relevant statutory provisions of the former Criminal Procedure Act 56 of 1955 and of the CPA presently under consideration are such that the interpretation given to s 106 of the Criminal Procedure Act 56 of 1955 in *Phillips (supra)* cannot inform the interpretation of s 67 of the CPA. A few illustrations suffice: s 106 does not refer to 'an accused who is released on bail'; it does not enjoin the court before which the matter is pending in an event of default to declare the bail provisionally cancelled 'and' to declare the bail money provisionally forfeited 'and' to issue a warrant for the arrest of the defaulting accused; it does not afford an opportunity to a defaulting accused to appear and to satisfy the court that his or her

default was not due to fault on his or her part before the provisional cancellation of the bail and forfeiture of the bail money is confirmed by the court; and sub-secs (a) and (b) of s 106 were held in *Phillips*, at p 807F, to ‘...contain separable remedies’, which finding served to refute the submission made ‘... that the provisions of sub-secs. (b) dealing with the arrest of the accused, showed that throughout sec. 106 the Legislature had in mind an accused *in esse*’.

[14] I am in all the circumstances of the view that the provisional order in this instance should not have been issued and should be recalled. The bail money must be repaid to the deceased’s brother.

[15] In the result the following order is made:

1. The order made on 19 March 2012 declaring the deceased’s bail money provisionally forfeited to the state in terms of s 67(1) of the CPA, is hereby recalled.
2. The state is ordered to repay to Mr Cornelius Johannes Engelbrecht the bail money that he had paid for the benefit of the deceased.
3. The criminal case against the late Mr Barend Jacobus Engelbrecht is struck from the roll due to his death on 14 March 2012.

P.A. MEYER
JUDGE OF THE HIGH COURT

22 March 2012

Date of Hearing:	23 March 2012
Date of Judgment:	23 March 2012
Counsel for the state:	Mr GL Roberts SC Ms Marriot
Attorney for the former accused and for the bail depositor:	Mr SW van der Merwe Linden, Johannesburg