REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A53/2021

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

[25 June 2021] .....
SIGNATURE

In the matter between:

D[....], J[….] M[….] **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

MUDAU, J:

[1] This is an appeal against the decision of a Regional Magistrate, Palm Ridge, in the cancellation of the appellant's bail and the forfeiture thereof in terms of the provisions of section 66(3) of the Criminal Procedure Act 51 of 1977 ("the CPA") in favour of the State. Before the court *a quo*, the appellant

has pending charges of attempted murder, assault with intent to do grievous bodily harm, contravention of a protection order as envisaged by the relevant provisions of the Domestic Violence Act, 116 of 1998 of which his estranged wife, Mrs N[....] L[....] D[....], is the complainant. He also faces a charge with regard to failure to disclose previous convictions in violation of the provisions of section 60 (11B) of the CPA.

[2] The grounds relied upon by the appellant in attacking the decision of the Magistrate to refuse the application for bail are the following, and I quote in relevant parts, from the notice of appeal:

"1. The honourable court erred by exercising its discretion to cancel the appellant's bail in terms of section 68 of Act 51 of 1977 wrongly and in so doing, materially erred in fact and law

…

3. The honourable court erred by not accepting the version of the appellant that his decision to contact the, complainant was not directed and/or based on any of the grounds stated in section 68(1)(a) to (f) of Act 51 of 1977, nor did he communicate with the complainant in respect of the pending criminal matter.

4. The honourable court erred by not considering the factual context and circumstances which led to the appellant's decision to call his estranged wife and that he had no intention (*mens rea*) to be in deliberate breach of his bail conditions.

5.The honourable court erred by not considering or properly considering the evidence of the complainant that the telephone call was very short in duration (less than a minute), and at no time did the appellant threaten her, intimidate her or even refer to the pending criminal case, and that the only purpose of the call was to plea with her to reconcile and/or allow the appellant to see his children.

6. The honourable court erred and misdirected itself by finding that the appellant, under the circumstances, was at fault and as a result had alternatives than to communicate directly with the complainant.

7. The honourable court misdirected itself and erred by not considering the evidence of the appellant that was a desperate individual, who at the time of contacting the complainant was desperate and emotionally upset.

8.The honourable court erred and misdirected itself by not finding that the delay in reporting the breach of the bail condition itself confirmed the fact that the complainant on the probabilities did not regard the breach as a serious breach, nor on the accepted evidence was the breach of the bail condition of a serious nature at all…".

[3] When the application was launched, reference was made, in addition to the provisions of section 66(1), to sections 67A as well as 68 of the CPA. The procedures referred to in sections 66,67A and 68 of the CPA are distinct. They are clearly intended to serve different circumstances following the granting of bail. Section 66 of the CPA provides as follows:

"(1) If an accused is released on bail subject to any condition imposed under section 60 or 62, including any amendment or supplementation under section 63 of a condition of bail, and the prosecutor applies to the court before which the charge with regard to which the accused has been released on bail is pending, to lead evidence to prove that the accused has failed to comply with such condition, the court shall, if the accused is present and denies that he or she failed to comply with such condition or that his or her failure to comply with such condition was due to fault on his or her part, proceed to hear such evidence as the prosecutor and the accused may place before it.

(2) If the accused is not present when the prosecutor applies to the court under subsection (1), the court may issue a warrant for the arrest of the accused, and shall, when the accused appears before the court and denies that he failed to comply with the condition in question or that his failure to comply with such condition was due to fault on his part, proceed to hear such evidence as the prosecutor and the accused may place before it.

(3) If the accused admits that he failed to comply with the condition in question or if the court finds that he failed to comply with such condition, the court may, if it finds that the failure by the accused was due to fault on his part, cancel the bail and declare the bail money forfeited to the State.

(4) The proceedings and the evidence under this section shall be recorded."

[4] Section 67A of the CPA on the other hand provides as follows:

"Any person who has been released on bail and who fails without good cause to appear on the date and at the place determined for his or her appearance, or to remain in attendance until the proceedings in which he or she must appear have been disposed of, or who fails without good cause to comply with a condition of bail imposed by the court in terms of section 60 or 62, including an amendment or

supplementation thereof in terms of section 63, shall be guilty of an offence and shall on conviction be liable to a fine or to imprisonment not exceeding one year".

[5] The proceedings in terms of s 66 are completely separate from a trial involving contravention of section 67A of the Act.[1] Prior to the insertion of section 67A, the CPA did not make non-appearance, or non-compliance with a bail condition, punishable. Forfeiture of bail money and loss of liberty were the 'sanctions'.[2] Section 67A, from its introduction, creates a statutory offence with the burden of proof on the prosecution to prove its case beyond a reasonable doubt, like in any other criminal trial, with a charge sheet drawn and a formal trial held for that purpose.[3] With regard to proceedings as envisaged in section 66 however, the State bears the onus to prove on a balance of probabilities that the accused has breached the conditions of bail due to fault on his part.

[6] Section 68 on the other hand provides in relevant parts as follows:

"(1) Any court before which a charge is pending in respect of which bail has been granted may, whether the accused has been released or not, upon information on oath that—

(a) the accused is about to evade justice or is about to abscond in order to evade justice;
(b) the accused has interfered or threatened or attempted to interfere with witnesses;
(c) the accused has defeated or attempted to defeat the ends of justice;
(d) the accused poses a threat to the safety of the public or of a particular person;
(e) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail;
(f) further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to grant bail; or
(g) it is in the interests of justice to do so,

[1] *S v Williams* 2012 (2) SACR 158 (WCC).
[2] *S v Nkosi en Andere* 1987 (1) SA 581 (T) and *S v Bobani* 1990 (2) SACR 187 (TK).
[3] *S v Mabuza* 1996 (2) SACR 239 (T); See also *S v Luzil* 2018 (2) SACR 278 (WCC) at para [13].

issue a warrant for the arrest of the accused and make such order as it may deem proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings."

[7] Section 68(1) is clearly distinct from sections 66 and 67A in that it requires that 'information on oath' be received by the court before a finding can be made regarding the existence of one or more of the grounds in s 68(1)*(a)* to *(g)* which justifies the cancellation of bail. Reliance by the prosecution on all of the three sections for purposes of the application launch was, therefore, misconstrued.

[8] However, it is clear that the learned Regional Magistrate was alive to this and made a determination on the basis of section 66 of the CPA, as apparent from the record of proceedings. She was at pains in her judgment, to point out the distinctions in the sections of the CPA relied upon by the state as alluded to above. Nothing turns on the approach adopted by the Magistrate as the appellant was legally represented throughout by an SC and accordingly, was not prejudiced. There is no suggestion on papers before me that there was any prejudice suffered. In cancelling the applicant's bail, it is clear from the record that the Magistrate acted in terms of the provisions of s 66 (3) of the CPA. A suggestion that the order regarding this matter was given is in terms of section 68 is therefore ill-conceived.

[9] Initially, the parties agreed that the appeal may be disposed of on papers as envisaged in terms of section 19 (a) of the Superior Courts Act 10 of 2013. I subsequently directed the parties to file additional heads on whether the matter is subject to appeal or review for purposes of Rule 53 of the Uniform Rules. Counsel maintained in supplementary papers that the matter is appealable and if this court is minded otherwise, to invoke its inherent powers and dispose of the matter as a review.

[10] Counsel for the appellant, Pistorius SC, contended in written submissions that, since the question before this court challenges the manner in which the court *a quo* exercised its discretion set out in section 68 of the Criminal Procedure

Act, the correct remedy to follow is an appeal as was held in *Nqumashe v S.*[4] The matter is not concerned with procedural irregularities, so the argument went. Contrary to counsel submissions in this regard, as indicated above, the Regional Magistrate clearly exercised a discretion in terms of section 66(3) and not in terms of section 68 of the CPA. I return to this aspect below.

[11] Turning to the facts of the present matter, they are largely common cause. On 6 January 2019, the appellant was granted bail and he was released on bail under certain conditions. Relevant for current purposes is paragraph 4 of the bail conditions in terms of which the appellant was prohibited from making any direct or indirect contact with the complainant regarding visitation rights of their two minor children. Paragraph 4 of this specific condition reads as follows:

> "The accused is to refrain from any contact, direct or indirect with the complainant, including social media and involving other people until the case is finalised."

[12] In paragraph 5 of the bail conditions, the court *a quo* formulated it as follows:

> "All arrangements regarding contact and or visit to the children is to be dealt with through the accused and the complainant's legal representatives".

[13] On 14 April 2021 the appellant appeared before the Magistrate under arrest, having surrendered himself, on which occasion the prosecutor applied in terms of s 66 of the CPA to lead evidence to prove that the applicant had failed to comply with the abovementioned conditions of bail. In support of its application, the State presented three sets of affidavits, two by the complainant dated 25 February 2021 and 9 March 2021 respectively, and that of the investigating officer in charge of the case. The complainant also gave oral testimony. It is common cause that on 6 January 2021 the appellant, however, made a telephonic call to the complainant at 10:27 pm from an undisclosed number. From the voice, she recognized the caller as her estranged husband against whom she had a domestic violence interdict. The appellant suggested during the course of the call that he was reaching out to

[4] 2001 4 AII SA 471 (NC).

her because he did not want lawyers involved any further with regards to the children.

[14] The appellant further pointed out that he was aware that he was not supposed to call her as per the bail conditions. The appellant proposed reconciliation. She did not say a word, but after listening for some time, dropped the call. In so doing, the appellant breached his bail conditions. The complainant deposed to her first affidavit as indicated, on 25 February 2021 in which she stated that the appellant was in breach of his bail conditions.

[15] A warrant for the appellant's arrest was subsequently authorised. The appellant was arrested after he surrendered himself to the Brackenhurst police on 13 April 2021. Upon his appearance in court on 13 April 2021, the case was adjourned to 14 April 2021 for a formal application by the State for the cancellation of his bail. On 14 April 2021, a formal application was lodged by the State for the cancellation and forfeiting of the appellant's bail as a result of the breach of the bail conditions set, which the appellant opposed.

[16] The investigating officer, Jonas Kekana deposed to a confirmatory affidavit. In that affidavit, he also alleged that there was a text message sent to members of the NPA in which the author stated that a certain Mr Modise N Zwelake wanted an amounted of R500-000-00 in return for the life of the complainant on behalf of the appellant. The appellant allegedly expressed great concerns regarding the high costs of litigation in their pending divorce action and concomitant division of the estate. It was further alleged that the appellant had assaulted his girlfriend, T[....]. The latter was allegedly paid R350,000-00 not to report the matter to the police.

[17] In the oral testimony, the complainant confirmed that she denied him access to the children based on allegations that the appellant wanted to commit suicide coupled with the allegations that she was on a hit list.

[18] During cross-examination however, she confirmed that the appellant, pursuant to a rule 43 application was granted permission to access the children and

that the visitation rights were subject to mediation by the court appointed social worker, which he exercised before the suicide allegations surfaced. The services of the court appointed social worker has since been terminated by the appellant and she feared for her and the children's lives. The child who became aware of the message was also scared of the appellant. As to why she deposed to her first affidavit on 21 February 2021, that was because she was being sent from pillar to post. As to the second affidavit, it was upon the advice of a Senior Public Prosecutor.

[19] In opposing the application, the appellant testified that he breached the bail condition as he was desperate to see his two children with the complainant. He had asked her that they be civil. He denied any knowledge of the SMS allegedly received by the complainant referred to above, and was not involved in any plot on the life of the complainant which he subsequently reported to the police. He denied assaulting his girlfriend, T[....], or that he gave her R350,000-00 as hush money. During cross-examination however, the appellant was constrained to concede that the SMS, which had details of his contact numbers and those of his girlfriend, T[....], would have scared the complainant. After the complainant had moved out of the common home and was with her parents, she was shot at four times, which he was aware was the subject of the pending trial. The appellant in corroboration with the fact that he did not so assault or gave hush money, called T[....] as his witness. T[....] denied that she had been assaulted or given hush money.

[20] At the conclusion of evidence by both parties, the Magistrate found that the appellant had failed to comply with (or had breached) the said bail condition and that the failure to comply (or the breach) had been due to the fault of the appellant and accordingly cancelled the bail and declared the bail money forfeited to the State as indicated above. It is this decision and order that the appellant now seeks to upset on appeal or alter on review. In cancelling the appellant's bail, the Regional Magistrate reasoned that the appellant, desperate as he was, had options available to him rather than to breach the conditions, in this case, to approach the complainant via his lawyers.

[21] That the judgment and order of the Magistrate in terms of section 66(3) is not appealable and could only be challenged on review has been the subject of judicial consideration in a number of matters. In this division, in *Pillay v Regional Magistrate, Pretoria, and Another*,[5] the full bench held that, a withdrawal of bail does not amount to 'refusal' of bail and the matter cannot therefore be brought under s 65 by way of such artificial reasoning.[6]

[22] From the above judgments, it is clear that the weight of authority favours the view that the proceedings in terms of s 66 are only reviewable and not appealable. I must be quick to point out however, that cancellation of bail by a High Court is not reviewable, but appealable.[7] It is trite that court orders are to be obeyed. Anyone who does not respect a court order, does so at their own peril. The disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice.

[23] In this case, the appellant was quite clearly aware that he was not permitted to be in direct contact with the complainant. This is clearly manifest by his use of a private cell phone number, in respect of which the identity of the caller was hidden. The conduct of the appellant also falls within the definition of intimidation as well as harassment, under the circumstances of the matter. It is no wonder that the complainant dropped the call when she recognised that the appellant was the caller. It is of no moment that the call, as the appellant suggested, was not of long-duration, or that a period of time elapsed, before she reported the matter. The conduct complained off amounted also, to self-help, which the apex court has pointed out, is inimical to a society in which the rule of law prevails[8].

[24] As the Regional Magistrate concluded, the appellant had other legal remedies to enforce his rights. If I was to be charitable, as I am in favour of the appellant

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[5] 1977 (1) SA 533 (T).
[6] See also *Ex Parte Estate Phillips: In Re R v Phillips* 1958 (1) SA 803 (N) and *Jack v Vermeulen NO and Another* 1979 (1) SA 659 (C) as well as *Sebe v Magistrate, Zwelitsha, And Another* 1984 (3) SA 885 (CkS).
[7] See *Pretoria Portland Cement Co Ltd & another v Competition Commission & others* 2003 (2) SA 385 (SCA) ; *Nontenla v Director of Public Prosecutions, Umtata, & Another* 2003 (2) SACR 205 (Tk) as well as *S v Porrit* 2018 (2) SACR 274 (GJ).
[8] Chief Lesapo v North West Agricultural Bank [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 11

by considering this matter as a review and to condone non-compliance with review procedures, as bail matters are inherently urgent,[9] the appellant has not shown that the Magistrate erred in the cancellation and forfeiture of bail. I cannot find any persuasive reason to interfere, on review, with the discretion exercised by the Magistrate in finding, as she clearly did, that (a) the condition of bail prohibiting the applicant from contacting the complainant had been breached and (b) the said breach was due to the fault of the appellant. The On the contrary, I am of the opinion that the decision was correct. Accordingly, the appeal stands to be dismissed.

[25] Accordingly, I make the following order:

1. The appeal against the cancellation of bail and forfeiture of the bail money is dismissed.
2. The review against the cancellation of bail fails and the order for the cancellation of the bail and forfeiture of the bail money is confirmed.

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T P MUDAU
Judge of the High Court,
Gauteng Local Division,
Johannesburg

I agree

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M A MAKUME
Judge of the High Court,
Gauteng Local Division,
Johannesburg

Date of Judgment: 25 June 2021

APPEARANCES

[9] *S v Banger* 2016 (1) SACR 115 (SCA).

For the Appellant:	Adv. P F Pistorius SC
Instructed by:	Emile Viviers Attorneys
For the Respondent:	Adv. J F Masina
Instructed by:	DPP – JHB