

REPUBLIC OF SOUTH AFRICA



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

CASE NO: SS29/2021  
DPP REF.NO: 10/2/11/1-2021/19

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

[25 June 2021]

  
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SIGNATURE

In the matter between:

**STATE**

**APPLICANT**

and

**MOLALE, MPHO**

**RESPONDENT**

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**J U D G M E N T**

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**MUDAU, J:**

- [1] This matter comes before me on special review. Section 22 of the Superior Courts Act, 10 of 2013, sets out the grounds for review. It is trite that review of the Magistrates' Court proceedings can also be brought in terms of the common law, to see that justice is served between litigating parties.<sup>1</sup> An applicant may

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<sup>1</sup> *S v Mokoena* 1983 (2) SA 312 (O) at 315D.

also rely on the courts' inherent power of review under the Constitution<sup>2</sup>. The relevant provision in this instance is section 22(1)(c) of the Superior Courts Act which provides that a ground for review includes if there has been a gross irregularity in the proceedings of the lower court. This review was thus brought on a very narrow issue, which is apparent from the facts as they appear below. The requirements for a review in terms of Uniform rule 53 are specified in Uniform rule 53(2), which reads:

'The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.'

- [2] None compliance with Uniform Rule 53 has been condoned for reasons that are apparent below. Importantly, the respondent is not prejudiced.
- [3] On 2 June 2021, the accused, who was on bail and legally represented, appeared on an indictment containing three charges, two counts of murder (read with the provisions of section 51(2) of Act 105 of 1997) as well as assault with intent to do grievous bodily harm involving close family members. The defence alleged, based on a psychological report privately secured, that there is a reasonable possibility that the accused suffers from mental illness or disorder.
- [4] The defence launched an application, which was not opposed by the State, for the court to order an investigation in terms of ss 78(2) and 79 of the Criminal Procedure Act 51 of 1977. However, the question arose whether the accused was not a danger to himself, and or members of the public if bail was extended,

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<sup>2</sup> See s 173 of the Constitution of the Republic of South Africa, 1996.



which prompted the State to bring an application for the cancellation of the bail granted by the Regional Magistrate, Orlando in terms of the provisions of section 68(1) of the CPA. The matter stood down until 4 June 2021, for that purpose.

- [5] On the return day (4 June 2021), it appears from the record of the proceedings that bail was fixed in favour of the accused without the requisite evidence in terms of section 60(11) of the CPA. Counsel for the State and the defence were *ad idem* that the proceedings in the court below were irregular and fall to be set aside. However, given the common cause facts, I solicited the views of the Regional Court Magistrate, Mr Le Roux in writing. The Regional Magistrate conceded that the proceedings were irregular and can be set aside. He explained that he was “unaware that there was more than one count or that the state was opposed to bail”. The Magistrate’s concession about the invalidity of the proceedings before him is, in my view, well founded. The bail proceedings before the regional magistrate were not only grossly irregular, but a nullity.

- [6] Section 35(1)(f) of the Constitution provides as follows: “Everyone who is arrested for allegedly committing an offence has the right . . . to be released from detention if the interests of justice permit, subject to reasonable conditions”. However, section 60(11) of the CPA provides that:

“Notwithstanding any provision of this Act, where an accused is charged with an offence referred to—

(a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court

that exceptional circumstances exist which in the interests of justice permit his or her release;

(b) in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.”

[7] Accordingly, whenever s 60(11) is applicable, there can be no question of an inquisitorial procedure and the issue of bail has to be decided on the question of whether the accused has discharged the burden of proof placed upon him by s 60(11) by presenting the necessary evidence.<sup>3</sup> Importantly, the “legislative scheme of s 60(11)(a) of the CPA indicates that it is for the applicants . . . to put their case forward first and for the State to answer it.”<sup>4</sup> The procedure to be followed in bail applications, which falls under schedule 5, entails that an accused is burdened with an onus and will commence adducing evidence, which must satisfy the court, on a balance of probabilities, that the interests of justice permit his release.

[8] The relevant provisions of the Act are peremptory and non-compliance therewith vitiates bail proceedings. In *S v Porthen & Others*,<sup>5</sup> Binns-Ward AJ (as he then was) cautioned that Magistrates and Prosecutors should be “careful to ensure that the Legislature’s intent is not subverted by allowing s 60(11)(a) bail applications to proceed in a way incongruent with the relevant provisions of the Act.” I may add that this includes s 60 (11) (b) bail applications.

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<sup>3</sup> See generally *S v Mbele & Another* 1996 (1) SACR 212 (W) at 237F–G.

<sup>4</sup> *S v Porthen & Others* 2004 (2) SACR 242 (C) at para [60].

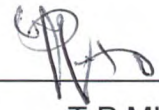
<sup>5</sup> *Id.*



This legal position is trite and requires no further elucidation. I am of the view that this is an appropriate case where an order setting aside the proceedings and order before Mr Le Roux should be made.

[9] Consequently, it is ordered that:

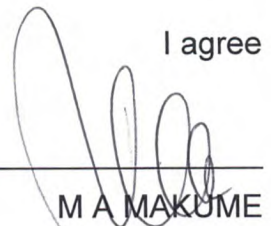
The bail proceedings and order against the accused which commenced before Regional Magistrate Le Roux on 5 October 2020 are hereby reviewed and set aside.



T P MUDAU

Judge of the High Court,  
Gauteng Local Division,  
Johannesburg

I agree



M A MAKUME

Judge of the High Court,  
Gauteng Local Division,  
Johannesburg

Date of Judgment: 25 June 2021

#### **APPEARANCES**

For the Accused: Mr B C Sago  
Instructed by: B C Sago Attorneys

For the Respondent: Adv R E Ndou  
Instructed by: DPP – JHB