




IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: A262/16

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
10 / 08 / 2016	
DATE	SIGNATURE

11/8/2016

IN THE MATTER BETWEEN:

L T KHUMALO

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

APPEAL AGAINST REFUSAL OF BAIL

MAKAMU AJ:

[1] This is an appeal against refusal of bail in the Regional Court at Kwamhlanga by Magistrate Combrink, when he refused to release the accused on bail based on new facts, as he was refused bail initially and his appeal was unsuccessful.

I am not going to deal with issues that were dealt with on his previous bail application and the appeal thereof.

[2] The appellant brought an application for bail on new facts before Regional Magistrate Combrink yet he had appeared before Mr Du Preez on his first two bail applications and decided not to bring his bail application before, Mr Du Preez as he was ill and was operated on, and other factors which were not canvassed in this application why Mr Du Preez could not hear his application on new facts, it would appear the Counsel for the appellant had some reservations however Mr Combrink went ahead to hear his application on new facts.

[3] The main new facts were based on two main issues, the report by Dr Botha that the appellant's health condition is deteriorating in the Correctional facility and Dr Botha is specialist physician who examined the records to come to the conclusion that the appellant's condition was indeed deteriorating.

The second part is that the police or State did not assist the appellant with photos of the vehicle in which the appellant is alleged to have been travelling

and it only came to the fore after a while which the appellant feel it is unfair, that the State had the information but decided not to disclose to the appellant.

[4] The appellant deposed of an affidavit in support of his bail application and according to the decision by SCA in *S v Mathebula* 2010 (1) SACR 55 (SCA) the appellant relied on affidavit which was not open to test by cross examination and, therefore, less persuasive. The appellant was never subjected to cross examination and his affidavit could not be tested.

[5] The appellant complained that The State withheld the information of photos of the vehicles concerned and according to the SCA referred to the case of *S v Botha en 'n ander* 2002 (1) SACR 222 (SCA) and to *S v Viljoen* 2002 (2) SACR 550 (SCA) "that is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the State is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence. An attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him, thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the State to rebut his evidence to that effect".

[6] The question of photos of the vehicles were available at the time of the first bail application or second bail application and cannot now be considered to be new facts, the magistrate made no mistake in that regard.

[7] The appellant says his medical condition is deteriorating and relies on the evidence of Dr Botha after the criticism by Judge Kollapen in the first appeal and then the applicant went to obtain this evidence, it is clear that the evidence was already available and could have been brought before court then, but the applicant failed to do so. It is very clear from *S v Van Wyk* 2005 (1) SACR 41 (SCA) that medical condition should be taken into account together with other factors in order to be considered to be exceptional circumstances in existence to allow the applicant out on bail and it cannot be the only factor as the appellant has other remedies to deal with the situation rather than bail to be a remedy.


[8] The appellant or his counsel relied on the fact that Mr Mlangeni was released out on bail on appeal, however that does not discharge the onus placed on the appellant to prove exceptional circumstances exist. I would like to refer to the case of *S Van Wyk supra*, where seven other accused were released out on bail and were attending court regularly, this does not make it an exceptional circumstance to be considered, the appellant then still had to discharge onus that is placed before him and in that case bail was refused and the appeal also failed.

[9] The appellant argues that he has brought new facts before regional magistrate Combrink however, all these factors were already in existence when he brought bail application. In *S v Petersen* 2008 (2) SACR 355 (C) "When in a second or subsequent application for bail, the accused relies on new facts which have come to the fore since the first, or previous, bail application, the court must be satisfied, first, that such facts are indeed new and secondly, that they are relevant for purposes of the new bail application. They must not constitute simply a reshuffling of old evidence or an embroidering upon it. The medical records were available during the initial bail applications however the applicant did not source them in order to prove his medical condition then and it does not make the facts to be new at this stage. In this case it is clear that this is the situation as all these facts were already in existence when initial two bail applications were brought and subsequent appeal thereof, as the magistrate said in his judgment on page 47 of his judgment, "as a whole, it is clear that the same stale old facts which other courts ruled upon were polished and embellished upon and given new coat of varnish, that does not make these to be new facts".

Under this circumstances the appeal fail and make the following order.

ORDER

The appeal is dismissed.



M S MAKAMU

ACTING JUDE OF THE HIGH COURT

DATE OF THE JUDGEMENT : 11/08/2016

APPELLANT'S COUNSEL : ADV D P VAN DEN BERG

STATE'S COUNSEL : ADV G J C MARITZ