**Reportable**

**IN THE HIGH COURT OF SOUTH AFRICA**

**EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

Case No: CC 18/2017
Date Delivered: 14 /12/2018

In the matter between:

| | |
|---|---|
| **JULIAN BROWN** | **First Applicant (Accused 1)** |
| **EUGENE VICTOR** | **Second Applicant (Accused 2)** |

and

**THE STATE**

---

**JUDGMENT**

---

**MAKAULA J:**

[1] The first applicant brought an application for the reduction of his bail amount from R800 000.00 to R50 000.00 or whichever lesser amount the court deems meet. On 16 November 2018 Mr Griebenouw, who is the instructing attorney, gave evidence in support of the application. He testified that the first applicant ceded his bail money to him and Senior Counsel as security for their fees. The matter has now proceeded for a period longer than they had anticipated. The first applicant has continued to make payments towards the fees ever since the matter started. The legal team has now run out of funds and cannot be able to continue without fees being paid. The bail amount is needed to pay for disbursements in his office. Mr Price, who appeared on behalf of the applicants, needs the money to settle his indebtness with the South

African Receiver of Revenue *(SARS).* He submitted that the first applicant had complied with all the bail conditions. He is not a flight risk. The police at some stage in error handed his passport to him. He returned it to the police on his own volition.

[2] The first applicant was arrested for charges of racketeering. He applied for bail in the regional court, Port Elizabeth which was granted in the amount of R800 000.00. He paid the amount set for bail. From the aforesaid date he has complied with the conditions set for his release on bail.

[3] Mr Griebenouw testified that bail was reduced in Kimberley High court for purposes of payment of fees. The order was attached in the Heads of Argument submitted by the first applicant. The order is in respect of Case No. KS 21/15 in the matter between the State and Ashley Brooks and Others issued on 16 March 2018 out of the High Court, Kimberley. The order reads:

> "Having heard Adv Roothman for the State and Adv Griebenouw for the 1st, 2nd and 12th Accused, Adv Hodes (SNR) for the 3rd to 8th Accused Adv Hodes (JNR) for 4th to 6th Accused, Adv van Heerden for the 7th to 9th and Adv Scheuder for the 10th Accused:
>
> **It is Ordered That:**
>
> 1. The bail in respect of Accused 1, 2, 3, 4, 6, 7, 8, 9, 10 and 12 is reduced to R50 000.00 each".

[4] The order does not state the reasons for the reduction of the bail amount contrary to the submission made in the Heads of Argument which state that Mr Griebenouw:

> "Has first-hand information therefrom because he appeared for the First, Second and Twelfth Applicant, this was an application not only for fees to be reduced as is pointed out in the order, but also that the reduced amounts be made payable to the legal representatives as fees". (My underlining).

As revealed above, the order speaks for itself and does not encompass what is stated as a fact in the Heads of Argument.

[5] I was further referred to S v *Panesh Heerall* KZN Case No. 177/2006 i.e. as also another precedent on point. Similarly, the order does not reflect the reasons for it. An affidavit of Mr Carl Johannes Albertus Van Der Merwe was attached. It states that bail was reduced from R500 000.00 to 25 000.00 solely for payment of fees. I shall not deal with this aspect for the following reasons.

[6] Both the aforementioned orders are not of assistance to this Court. Madlanga J eloquently stated in Turnbull-Jackson that the doctrine of precedent ordains that only the ratio decidendi of a judgment has binding effect. But even obiter dicta of higher courts in the judicial hierarchy may be of potent persuasive force.[1] An unreasoned order of a coordinate court has no precedent value for this court.

[1] Turnbull-Jackson v Hibiscus Coast Municipality & Others 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at para 54-57.

[7] Mr Price argued that section 63(1) of the Criminal Procedure Act[2] (the CPA) does not preclude the reduction of bail amount for purposes of payment of Counsel's fees.

[8] Mr Price further relied on sections 60(4)(a) - (e) and section 60(5) – (9) of the CPA, arguing that the first applicant has made out a case for the reduction of the bail money on a balance of probabilities. He argued that the principles relating to both bail in general and specific procedures should be considered.

[9] Mr Price submitted in argument that the first applicant has complied with his bail obligations for two and half years without fail. The first applicant is a successful businessman who is well known in the construction industry. He relied heavily on the bail amount to pay his legal fees, so he submitted. The Heads of Argument state that his legal representatives, comprise of the most senior attorneys and Senior Counsel of more than thirty years who are specialists in Criminal Law. He argued further that "the only issue to be decided is whether the reduction of bail to a reasonable amount will in any way encourage Mr Brown (first applicant) to commit further offences".

[10] Mr Price submitted that there is no prejudice which would be suffered by the State, were bail to be reduced. Instead, the first applicant would be prejudiced in many

[2] 51 of 1977.

ways if the reduction is refused. The first applicant would lose the privilege to be represented by a legal team of his choice. He would not get legal aid representation because of his income. The "new legal team" would have to produce a transcribed copy of the record, read and prepare for continuation of the matter. So it was argued.

[11] It was contended that the first applicant's right to a fair trial shall be infringed if the reduction were to be refused because the prosecutor refuses to agree to a reduction and the court believes that it cannot do so because it has not heard of it before. He further submitted that the recent delays in finalising the matter cannot be put at his door and not his responsibility in any way.

[12] Mr Le Roux, counsel for the State, submitted that first and foremost the bail amount was considered by the Magistrate after having considered all the various factors covered by the provisions of sections 59 and 60 especially the sections referred to above by Mr Price. He stated that there are no changed circumstances apart for the payment of fees, which necessitates that this Court should interfere with such conditions. He argued that the amount and the normal bail conditions imposed by the Magistrate seem to have served the purpose because the first applicant did not breach them and has attended court religiously. He further argued that the first applicant has presented as a "man of means" as he was able to repay an amount of R800 000.00 which was loaned to him by family and friends bearing in mind that such an amount was raised inside two days of bail having been fixed. Mr Le Roux contended that the decisions relied upon by the first applicant, which turn to be merely orders, were granted by agreement between the parties i.e. the State consented to the reduction.

The assumption by Mr Le Roux may be correct but there is nothing *ex facie* the order that the State consented to the reduction of bail amount in order to allow the applicant's to pay their legal fees. The orders that have been presented are silent on the reason for the reduction let alone the fee aspect. I say this mindful of the evidence of Mr Griebenouw.

[13] I should start by giving a brief background regarding the delay referred to by Mr Price. The record of the proceedings is more than two thousand pages excluding the exhibits. The merits were argued on 6 August 2018 and I postponed the matter for judgment to 18 September 2018. On 18 September 2018 I postponed it to 15 November 2018 and later to 5 February 2019. It is misleading to say judgment was reserved for six months by 14 November 2018. The serious cases I dealt with from August 2018 to November 2018 made it impossible for me to finalise the judgment by the appointed dates. The reasons therefore were explained to counsel and fully stated in the record of proceedings. The interlocutory judgments I had to write in those matters are evident for everyone to see. That coupled with the fact that this matter is not a simple criminal case but an involved, complex matter in terms of the facts, the trial within a trial and the numerous questions of law involved which all require a great deal of preparation. These factors are on record and were explained and understood by both Counsel. It was even communicated to the Judge President of this division as part of case flow management accountability. The delay therefore is an integral part of the trial and cannot be relied upon as an excuse for the reduction of the bail amount for the purposes or reasons stated.

[14] It is common cause that the first applicant has been attending court religiously and has never flouted the bail conditions laid down by the Court below. It is further not gainsaid by the State that the first applicant returned his passport when it was erroneously handed back to him by the police. It is further common cause that the applicant paid the amount set by the court below and that money is still held by the State as security for his attendance until the matter has been finalised. We have by now gone past the stage whether the amount which was fixed was excessive or not. The amount was never challenged at the time it was determined, instead is was paid within two days. Those consideration are not an issue for the purposes of this application. It is trite that the constitutional right to be released on bail, will become meaningless where an excessive amount is fixed[3] but not at this stage of these proceedings.

[15] Chapter 9 of the CPA, deals with bail. It starts from section 58 to 71. The provisions of the various sections have to be read in conjunction with one another. Section 58 of the CPA provides that bail shall endure until a verdict is given by a court in respect of the charges to which the offence relates. The provisions of the section are peremptory in this regard. If sentencing is postponed, the Court, if it sees fit may extend or withdraw bail.

[16] Section 59 of the CPA creates what is sometimes loosely referred to as police bail, i.e. bail determined by a police official of a certain rank or above and which is

[3] Commentary on the Criminal Procedure Act by Du Toit *et* All Service 60, 2018 at page 9-77.

determined before the first lower court appearance of the accused.[4] Section 60 is very wide. It deals with the various factors which the court should take into account when deciding either to admit or refuse bail. It further deals with numerous other considerations available to a court in the exercise of its discretion in this regard.

[17] In *casu,* the court below, has in its discretion, dealt with the various considerations and decided to allow bail in the amount of R800 000.00 as being appropriate. The first applicant complied with that by paying the amount fixed and by complying with the condition set out by the lower court.

[18] The relevant portions of section 60 which are applicable in the determination of this matter are sections 60(2B) and section 60(13)(b). Section 60(2B) provides:

> "(2B)(a) If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), and if the payment of a sum of money is to be considered as a condition of bail, the court must hold a separate inquiry into the ability of the accused to pay the sum of money being considered or any other appropriate sum.
>
> (b) If, after an inquiry referred to in paragraph *(a)*, it is found that the accused is-
>
> (i) unable to pay any sum of money, the court must consider setting appropriate conditions that do not include an amount of money for the release of the accused on bail or must consider the release of the accused in terms of a guarantee as provided for in subsection (13)*(b)*; or

[4] Commentary on the Criminal Procedure Act Du Toit *et* All 9-20C Service 60, 2018.

(ii) able to pay a sum of money, the court must consider setting conditions for the release of the accused on bail and a sum of money which is appropriate in the circumstances".

[19] Subsection 60(13) provides:-

"(13) The court releasing an accused on bail in terms of this section may order that the accused-

*(a)* deposit with the clerk of any magistrate's court or the registrar of any High Court, as the case may be, or with a correctional official at the correctional facility where the accused is in custody or with a police official at the place where the accused is in custody, the sum of money determined by the court in question; or

*(b)* shall furnish a guarantee, with or without sureties, that he or she will pay and forfeit to the State the amount that has been set as bail, or that has been increased or that has been increased or reduced in terms of section 63(1), in circumstances in which the amount would, had it been deposited, have been forfeited to the State". (Emphasis added)

[20] Subsections 60(2B) and 60(13) are the only subsections which deal with the issue of fixing and payment of bail money. Subsection 60(13)(b) deals exactly with the amount of money that has been varied in terms of section 63 of the CPA in releasing an accused on bail. Subsection 60(13)(b) spells out that an accused shall only be released upon payment of the money determined by the court in terms of section 60(2B)(a) or section 63(1). The provisions of section 60(13) are peremptory and directs which amount of bail shall be paid.

[21] Section 63(1) of the CPA provides this:

"**Amendment of conditions of bail**

(1) 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 60 or 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". (Emphasis added)

[22] Section 63 is meant to provide the necessary procedure for instances where changed circumstances require appropriate amendments to the conditions or amount of bail fixed at an earlier stage. The section spells out that upon an application by either the accused or the prosecution the court is vested with a discretion to either increase or reduce the amount of bail which had been earlier determined by a court in terms of the provisions of section 59 or 60 of the CPA.

[23] Section 62 empowers the court on an application by the prosecutor to add any further condition of bail. This section is not relevant for purposes hereof.

[24] Section 63(1) empowers a court to amend or supplement any conditions imposed under section 60 or 62. The first applicant does not seek to amend or supplement any bail conditions. All he seeks to do is to reduce the amount determined under section 60.

[25] Section 58 is the only section that deals with the effect of bail and for how long bail, in the absence of an application in terms of section 68, shall endure. Section 68 deals with circumstances under which bail shall be cancelled. Furthermore, bail can be reduced or increased only in terms of section 63. Section 63 therefore cannot be read in isolation. It has to be read with the provisions of section 58, and section 60(2B). I have referred to these sections above.

[26] As section 58 stipulates, bail money may not be reduced other than for purposes stipulated in section 60(2B) of the CPA. It is inconceivable that bail money may be reduced before the completion of the trial in order to allow the accused to pay his counsel's fees.

[27] Mr Price submitted that the money "belongs" to him and his instructing attorney as it was ceded for their fees. Section 69 of the CPA stipulates:

> "69. Payment of bail money by third person:
>
> (1) . . .
>
> (2) Bail money whether deposited by an accused or any other person for the benefit of the accused shall, notwithstanding that such bail money or any part thereof may have been ceded to any person, be refunded only to the accused or the depositor as the case may be". (Emphasis added).

[28] That, the bail money was ceded to an attorney and/or counsel is not an entitlement that it should be refunded to them. It stands still as security for the attendance of the accused and shall endure until the finalisation of the matter. Section

63(1) cannot be interpreted to mean that bail money may be reduced in order to allow the accused to fulfil his financial obligations, like payment of his legal fees. The purpose of bail money is clear in terms of the provisions of Chapter 9 of the CPA.

[29] The second applicant has always been out on bail. He failed to attend court. A warrant for his arrest was issued and executed. He was arrested and has been in custody since. A fresh bail application was brought before me simultaneously with this application. He did not testify. I was not advised of the outcome of any inquiry to his failure to appear on that day. All I am told from the bar is that he has a drug problem and has no place to stay. The first applicant has offered him a place. My understanding at the time of issuing a warrant of arrest was that he failed to attend court. The police found him asleep when they executed the warrant. That was on the day of the trial. He has been in custody since. There is no concrete evidence placed before me that if I release the accused on bail, he would be in a position to observe the bail conditions that would go with his release. Taking into account the various factors and the background to his bail being cancelled I am not inclined to release the second applicant on bail.

[30] Both the attorneys and the advocate's profession have stringent rules that as officers of the court they should not allow their personal interests to conflict with the interests of their client. This is stated in the context that the only lawful avenue that appears open to the applicant is for him to surrender himself to the police for his bail amount to be refunded bearing in mind the provisions of section 69. The legal representatives will have to deeply consider their present position.

[31] Consequently, I make this order.

Both applications are dismissed.

_____
**M MAKAULA**
**Judge of the High Court**

| | |
|---|---|
| Counsel for the Applicants: | Adv T Price (SC)<br>Port Elizabeth |
| Instructed by: | Griebenouw Attorneys<br>Port Elizabeth |
| For the State: | Adv M Le Roux<br>Director of Public Prosecution<br>Port Elizabeth |
| Dates Heard: | 16 November 2018<br>06 December 2018 |
| Date Delivered: | 14 December 2018 |