REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No. 520/96

In the matter between:

DIE PROKUREUR-GENERAAL VAN DIE VRYSTAAT **Appellant**

and

JOHANNES RAMAKHOSI **Respondent**

Coram: GROSSKOPF, OLIVIER JJA and MELUNSKY AJA
Heard: 15 MARCH 1999
Delivered: 26 MARCH 1999

Bail - appeal by attorney-general against order of Supreme Court releasing respondent on bail not a "civil appeal" - Section 21A of Supreme Court Act 1959 not applicable - delay of over three years since respondent's release on bail - appeal dismissed on the grounds that it would have no practical effect or result.

JUDGMENT

MELUNSKY AJA/

MELUNSKY AJA:

[1] The respondent was arrested as long ago as 21 December 1995 in connection with his alleged involvement in two offences, namely, certain unlawful gold transactions and housebreaking with intent to steal and theft. On the day of his arrest he brought an application for his release on bail. This was opposed by the State and was heard by the regional magistrate of Welkom during the night of 21 to 22 December. After hearing oral evidence the magistrate refused to grant the application and the respondent was detained in custody.

[2] The respondent noted an appeal to the Orange Free State Provincial Division of the Supreme Court, as it was then called. He also applied for the appeal to be heard as a matter of urgency. On 30 December 1995 the application came before Lichtenberg JP, who was then the duty judge. The court was in recess at the time. According to the

practice in that division bail appeals were ordinarily heard by two judges during term but the duty judge was entitled to hear such an appeal during recess if he regarded the matter as sufficiently urgent. The learned judge president did not consider that the matter was urgent enough to warrant a hearing before a single judge and he made an order in chambers directing, *inter alia*, that the appeal be placed on the roll for a hearing before a full court on a date to be arranged.

[3] Two days later, on 1 January 1996, and while the Provincial Division was still in recess, the respondent renewed his application for the appeal to be heard on an urgent basis, relying on certain further facts which were placed before the court on affidavit. The duty judge was then Edeling J. He was of the view that the order of Lichtenberg JP did not preclude him from hearing the appeal during recess if the circumstances justified it. Despite opposition by the attorney-general, Edeling J

regarded the additional facts as sufficiently cogent to warrant his hearing the appeal as a matter of urgency and he granted an order to this effect. He then proceeded to hear the appeal and, on the same day, ordered that the respondent be released on bail of R5 000, subject to certain conditions which do not require to be detailed.

[4] On 10 January 1996 the appellant applied for leave to appeal to this Court against the orders of the court *a quo*. On 12 January Edeling J postponed the application *sine die*. It was eventually heard on 12 April when, after argument, judgment was reserved. In a lengthy judgment delivered on 25 July 1996 the learned judge granted the appellant leave to appeal. The appeal eventually came before this Court on 15 March 1999, more than three years after the respondent's release on bail. As a result of the long delay and the possibility that subsequent events might have rendered this appeal of academic interest only, counsel were

requested to submit additional heads of argument on whether the judgment of this Court would have any practical effect or result. From the information put before us by counsel it appears that after the respondent's release on bail on or about 1 January 1996 he appeared before the regional court at Virginia on numerous occasions for the purposes of his criminal trial. We were informed that he appeared on ninety-three separate days in all. The leading of evidence in the trial has been completed and the matter has now been postponed to 19 April 1999 for the purposes of argument. The appellant accepts that the respondent has complied with all of the conditions which governed his release on bail.

[5] On appeal to this Court counsel submitted argument *in limine* on whether, if the appellant is successful, this Court's judgment would have any practical result or effect. Judgment was reserved on this aspect of the case without argument being addressed to us on the merits of the

appeal. It may be noted that since the judgment of the court *a quo* certain provisions of the Criminal Procedure Act 51 of 1977 relating to bail, which were extensively dealt with in the judgment on leave to appeal, have been substantially amended by the Criminal Procedure Second Amendment Act 85 of 1997. However, and for reasons which will become apparent, it is not necessary to deal with the effect of the amendments or with the merits of the appeal.

[6] It was conceded by the appellant that if the appeal is successful and a warrant issued for the respondent's arrest, he would, as a matter of strong probability, be released on bail again, pursuant to a fresh application. This result would follow due to his observance of all of the conditions of bail since 1 January 1996. Indeed, counsel for the appellant went so far as to state that an application for the respondent's release on bail would probably not be opposed by the State. Should the

appeal succeed, therefore, it will serve no purpose other than to involve the respondent in inconvenience and additional legal costs and to increase the workload of the court that is called upon to hear the application for his release on bail. For this reason the appeal will not have any practical effect or result. What has to be considered, however, is whether it is permissible for this Court to have regard to facts and circumstances that have arisen since the respondent's release on bail. If these may properly be taken into account, the appeal should fail.

[7] Counsel for the respondent, relying on *S v Maki en Andere (1)* 1994(2) SACR 630 (E) and *S v Ndjadayi* 1995(2) SACR 583 (E), submitted that the application for the respondent's release on bail was a civil proceeding for the purposes of the Supreme Court Act 59 of 1959. He argued, therefore, that in terms of s 21A(1) of that Act it was competent for this Court to dismiss the appeal on the grounds that it

would have no practical effect or result. The section, which was recently applied and explained in this Court in *Premier, Provinsie Mpumalanga en 'n Ander v Groblersdalse Stadsraad* 1998(2) SA 1136 (SCA) reads:

> "(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

A "civil appeal" in terms of the section would presumably be an appeal in "civil proceedings" (see s 20(1) of the Supreme Court Act and the marginal note to s 21A). In this appeal, however, it is not necessary to decide whether an application for bail is a civil proceeding. Nor is it necessary to pronounce upon the correctness of the views expressed in *S v Maki en Andere* and *S v Ndjadayi* and I refrain from doing so. The fact is that the appellant's appeal to this Court is not brought in terms of s 20 or, indeed, in terms of s 21 of the Supreme Court Act. It is

authorised and regulated by a special provision, namely, s 65(A)(2) of the Criminal Procedure Act 51 of 1977. Section 65A was introduced by s 7 of the Criminal Procedure Second Amendment Act 75 of 1995 which came into operation on 21 September 1995. Section 65(A)(2) of the Criminal Procedure Act reads:

> "(2) (a) The attorney-general may appeal to the Appellate Division against the decision of a superior court to release an accused on bail.
>
> (b) The provisions of section 316 in respect of an application or appeal referred to in that section by an accused, shall apply *mutatis mutandis* with reference to a case in which the attorney-general appeals in terms of paragraph (a) of this sub-section.
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> (c) Upon an appeal in terms of paragraph (a) or an application referred to in paragraph (b) brought by an attorney-general, the court may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of that court."

M G Cowling suggests in South African Journal of Criminal Justice

(1996) Vol 9 at 59 that s 65A "balances out the appellate procedure" by conferring upon an attorney-general the right of appeal which an accused has always enjoyed. There is, however, no need to consider whether, prior to the introduction of s 65A of the Criminal Procedure Act, an attorney-general had the right of appeal to this Court in terms of s 20 or s 21 of the Supreme Court Act. What is clear is that he cannot now appeal in terms of that Act as the right of appeal is regulated solely by s 65A read with s 316 of the Criminal Procedure Act. This being the case, s 21A of the Supreme Court Act cannot be invoked by the respondent in this appeal.

[8] The question that remains is whether this Court is nevertheless entitled to have regard on appeal to events subsequent to the judgment of the court *a quo* and, in consequence, to dismiss the appeal on the ground that those facts disclose that there will be no practical benefit

to the appellant, should the appeal succeed. It is not open to doubt that, as a general rule, the correctness of a court's decision is to be decided according to the facts in existence at the time it is given and not according to new circumstances subsequently coming into existence (see *Rex v Verster* 1952(2) SA 231(A) at 236). The preliminary point arising in this appeal, however, does not have any bearing on the correctness of the judgment given in the court *a quo*. What it raises is whether the subsequent facts can be considered solely for the purpose of deciding that the appeal, if successful, will result in no practical effect or result to the appellant. This Court has held that it is not obliged to give decisions on academic questions that have no real bearing on the conviction or acquittal of an accused (see *Attorney-General, Transvaal v Flats Milling Co (Pty) Ltd and Others* 1958(3) SA 360 (A) at 370H-372D). There is no reason why the same principle should not be extended to cover an

appeal relating to bail. Indeed, in a sense, a decision on bail is an *a fortiori* case because an accused person may, despite a court's refusal to order his release on bail, renew the application from time to time should the circumstances change (see *S v Makola* 1994(2) SACR 32 (A) at 35f-g; *S v Vermaas* 1996(1) SACR 528 (T) at 531e-g). It is necessary to emphasize, however, that the parties to an appeal on bail should not, in general, attempt to utilize the appeal procedure for the purpose of putting new facts before the court. The remedy of an accused person who wishes to raise these facts is to do so before the court of first instance and not before the court of appeal. This seems to be a special case. The respondent was released on bail more than three years ago. It is conceded by the State that he would be entitled to be released again if this Court had to allow the appeal and issue a warrant for his arrest. Counsel for the attorney-general was in fact constrained to concede that no practical

benefit would accrue to the appellant if the merits of the appeal were argued. He submitted only that a decision on the merits may be used as a precedent in other bail applications. This submission merely reinforces the view that the outcome of the appeal will not affect the rights of the parties in a practical manner.

[9] It may be noted, moreover, that the considerable delay in the matter being heard by this Court cannot be attributed to the respondent. Regrettably, the initial delay was due to the judgment on leave to appeal being delivered more than six months after the application was lodged. The second reason was that inadequate steps seem to have been taken by the appellant to request this Court to grant some preference for the hearing of the appeal (see *S v Makola (supra)*, admittedly a case dealing with an appeal by an accused person, which was heard in this Court a little more than a month after the judgment in the court *a quo*).

[10] For the reasons given I am of the view that this Court may, in the circumstances of the present case, consider the facts that have arisen since the release of the respondent on bail for the purpose of deciding whether the appeal will have any practical effect or result. Furthermore, it is proper to conclude, particularly in view of the appellant's own concessions in this regard, that the appeal will not have such a result. It is only necessary to observe, of course, that no view is expressed on the correctness of the decision of the court *a quo*.

[11] In the circumstances of this case the respondent's counsel did not request this Court to make an award of costs in favour of his client. The result is, therefore, that the point *in limine* is decided in favour of the

respondent and the appeal is dismissed.

L S MELUNSKY
ACTING JUDGE OF APPEAL

Concur:

Grosskopf JA
Olivier JA