IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST HIGH COURT, MAFIKENG

HIGH COURT REF: 08/2017

In the matter between:-

THE STATE

AND

THABANG LERUMO

THSEPISO MASANGO

BAFANA MATANA

NKOSINATHI MTSHWENI

CALVIN MOTSENGA

SPECIAL REVIEW JUDGMENT

HENDRICKS J.

[1] The accused, Mr. Nkosinathi Mtshweni, who is accused 4 in the trial in the court *a quo*, was released on bail in the amount of R1000.00 on 23 January 2017. The matter was thereafter remanded on several occasions. On a subsequent appearance on (05 May 2017), accused 4 was unable to attend court. He was attending an initiation school. The legal representative of the accused communicated this to the presiding Magistrate. The presiding Magistrate issued a warrant for the arrest of the accused with immediate execution. This was done despite an attempt by the legal representative of accused 4 to have the execution of the warrant of arrest stayed. The bail money paid was also provisionally forfeited to the State. The matter was then remanded until the 19th May 2017.

[2] This came to the attention of the Senior Magistrate who requested to be provided with reasons for the said decision by the presiding Magistrate. The presiding Magistrate obliged. *Inter alia,* he stated that she does not have a discretion to stay the execution of the warrant of arrest. The Senior Magistrate then send the matter on special review to this Court, stating *inter alia*, that *"a rule of practice was developed over the years where the execution of a warrant of arrest is stayed in situations where the accused person is unable to attend the court proceedings due to illness, hospitalization and other unforeseen and compelling circumstances".* He requested that the reviewing Judge provide guidance and to make an appropriate order.

[3] This matter came before my sister **Djaje J**, who invited comments from the Director of Public Prosecutions for the North West Province. An opinion was duly provided and I am grateful to the Director of Public Prosecutions, for his valuable input. The issue for determination is whether a Magistrate can issue a warrant of arrest but order that its execution be stayed.

[4] Section 67 of the Criminal Procedure Act 51 of 1977, as amended, states:

> *"(1) If an accused who is released on bail-*
>
> *(a) fails to appear at the place and on the date and at the time-*
>
> *(i) appointed for his trial; or*
>
> *(ii) to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or*
>
> *(b) fails to remain in attendance at such trial or at such proceedings, the court before which the matter is pending shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused.*
>
> *(2) (a) If the accused appears before court within fourteen days of the issue under subsection (1) of the warrant of arrest, the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the accused satisfies the court that his failure under subsection (1) to appear or to*

remain in attendance was not due to fault on his part.

(b) If the accused satisfies the court that his failure was not due to fault on his part, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall lapse.

(c) If the accused does not appear before court within fourteen days of the issue under subsection (1) of the warrant of arrest or within such extended period as the court may on good cause determine, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall become final.

(3) The court may receive such evidence as it may consider necessary to satisfy itself that the accused has under subsection (1) failed to appear or failed to remain in attendance, and such evidence shall be recorded."

[5] This section makes it abundantly clear that the court shall:

(i) declare the bail is provisionally cancelled thereby withdrawing the release of the accused from custody pending his trial;
(ii) declare that the bail money paid is provisionally forfeited to the State;
(iii) issue a warrant of arrest for the accused person.

[6] The wording of this section is peremptory and mandatory and a Magistrate

(or Judge) does not have a discretion. The purpose of section 67 (1) is to deal with absconders and persons released on bail who fail to comply with the conditions attached to the granting of bail. Section 67 sets out a comprehensive procedure to deal with situations when accused persons who are on bail fail to appear in court on the specific date and time. The first step in the process is the provisional cancellation of the bail together with the issue of a warrant for the arrest of the accused person.

[7] In order not to prejudice the situation for the accused and to give the accused an opportunity to explain his or her absence, section 67 (2) (a) provides that the cancellation of the bail will not be confirmed if failure to appear was not due to fault on the part of the accused. Should the accused succeed in establishing this, section 67 (2) provides that *'the provisional cancelation of the bail and the provisional forfeiture of the bail money shall lapse'.*

[8] In **Terry v Botes and another** 2003 (1) SACR 206 (C) the following is stated:

> *"The magistrate misunderstood the section in the Act, which provides in ss (1) that if an accused who is released on bail fails to appear at the place and on the date and at the time appointed for his trial, the Court before which the matter is pending*

'shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused'.

Subsection (2)(a) continues:

'(a) If the accused appears before court within 14 days of the issue under ss (1) of the warrant of arrest, the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the accused satisfies the court that his failure under ss (1) to appear or to remain in attendance was not due to fault on his part.

(b) If the accused satisfies the court that his failure was not due to fault on his part, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall lapse.'

Subsection (c) deals with an accused person who does not appear before Court within the required 14 days, and ss (3) is to the effect that:

'The Court may receive such evidence as it may consider necessary to satisfy itself that the accused has under ss (1) failed to appear or failed to remain in attendance, and such evidence shall be recorded.'

What is quite clear from these provisions is that an accused person may, either himself or through his legal representative, satisfy the Court that his failure under s 67(1) was not due to fault on his part, and also that the Court may receive any evidence as it considers necessary in order to determine this question. Nowhere is it stated that a warrant of arrest must be executed before an accused

in these circumstances may be heard, nor is it stated that an accused person is obliged to give evidence and that his attorney may not address the Court in regard to this question.

The warrant of arrest had been issued on Friday, 2 November, and had not been carried out. The magistrate seems to have adopted a policy in general that before he would be prepared to listen to the reasons why bail should not be forfeited through non-appearance, that the arrest and incarceration of the accused was a necessary precursor to any judicial consideration of the matter. There is no legal foundation for such a view."

[9] Section 67 (1) compel the court to cancel the bail provisionally and to declare the bail money provisionally forfeited, an order which in terms of section 67 (2) (c), would become final after 14 days if the accused did not appear personally before the court so as to satisfy the court, in terms of section 67 (2) (b), that his/her non-appearance was not due to fault on his/her part. An order in terms of section 67 is imperative. Non-appearance has the inevitable consequence that a warrant of arrest be authorised.

[10] In **Da Costa v The Magistrate, Windhoek, And Others** 1983 (2) SA 732 (SWA) the following is stated on page 742-A & H:

"But, in my view, the contention of Mr O'Linn is correct, namely that it means that the bail, that is the release of the accused from custody pending his trial, must be withdrawn. This of course links up with the third requirement, namely that a warrant of arrest of the accused

must be issued.

It is equally clear that the judicial officer concerned must, when an accused who has been granted bail fails to appear at the place and time appointed for his trial, make an order declaring the bail to be provisionally cancelled and the bail money provisionally forfeited to the State and issue a warrant for the arrest of the accused. Failure to make such an order can obviously not result in any provisional forfeiture of bail money, nor subsequently in final forfeiture thereof."

[11] In **S v Cronje** 1983 (3) SA 739 (W) the following is stated:

"Artikel 67 (1) van die Strafproseswet 51 van 1977 dra duidelik 'n plig oor o die borgtog in te trek (en die borgtog verbeurd te verklaar) sodra dit blyk dat die beskuldigde op die aangewese tyd nie by die verhoor aanwesig is nie. Die Hof het geen keuse nie. Hierdie resultaat word aangedui selfs sonder enige klem op die teenstelling met ander voorskrigte wat ook gebeisinge bevat (art 66 (4) kan voorbeeldshalwe genoem word) maar uitgedruk word in die Afrikaanse teks in 'n trant wat met die vertellende trant ooreenstem. Die Afrikaanse teks van arts 67 (1) en 67 (2) (c) dui eweneens duidelik aan dat die voorlopige intrekking en verbeurverklaring kragtens art 67 (1) sonder meer finaal word by verstryking van 'n periode van 14 dae vanaf die voorlopige bevel indien die beskuldigde nie binne daardie periode voor die hof verskyn nie."

[12] In **S v Madau** 1999 () SACR 636 (W) the following is stated:

> *"However, during the proceedings the accused was on bail of R1 000; when he failed to appear the bail was (correctly) provisionally forfeited; when the matter again came before the court the bail was finally estreated in the absence of the accused."*

and

> *"The order made by the magistrate appears to be imperatively required by s 67 of the Criminal Procedure Act 51 of 1977. This was the attitude of Flemming J in S v Cronjé 1983 (3) SA 739 (W) and I have no reason to differ with Flemming J."*

[13] In **S v Nkosi en Andere** 1987 (1) SA 581 (T) the following is stated:

> *"Hierdie patroon word in art 67 teruggevind want, indien 'n beskuldigde versuim om te verskyn, word eweneens 'n lasbrief vir sy inhegtenisneming uitgereik.*
>
> *Dit is belangrik om daarop te let dat geen van hierdie laasgenoemde artikels misdrywe skep nie. S v Sibiya 1979 (3) SA 192 (T). Oortredings van bv borgvoorwaardes ens is dus nie strafbaar nie. Wat wel kan of moet gebeur is dat die bestaande borgtog ingetrek en die borggeld verbeur kan word. Daar is geen aanduiding dat indien borgtog in terme van art 66 ingetrek en borggeld verbeur word die beskuldigde nie weer aansoek om borg kan doen nie. Dit is ook nie 'n noodwendige implikasie van so 'n intrekking en verbeurding nie.*

Die vraag ontstaan dan of daar enige beginselrede is waarom dit anders moet wees ingeval van 'n intrekking en verbeurding onder art 67. Volgens Barnard se saak volg dit uit die gebiedende aard van art 67(1): nie-verskyning verg 'n lasbrief tot inhegtenisname, 'n voorlopige intrekking en 'n voorlopige verbeurding. My gevolgtrekking verskil omdat ek van oordeel is dat intrekking en verbeurding in beide gevalle dieselfde gevolge het. Dit is irrelevant dat in een geval intrekking en verbeurding mag plaasvind en in die ander geyal moet plaasvind. Die vraag is immers wat is die posisie van die beskuldigde met betrekking tot sy aanspraak op borgtog nadat die intrekking en verbeurding plaasgevind het.

Soos in al die ander gevalle genoem, is die doel van die lasbrief uitgereik in terme van art 67 om die beskuldigde voor die hof te bring. Dit is nie 'n metode om die beskuldigde se inhegtenishouding tot afhandeling van die verhoor te bewerkstellig nie. Anders gestel, dit is nie 'n handeling verrig in die uitvoering van 'n opgelegde gevangenisstraf vir 'n onbepaalde termyn wat afhang van die toevalligheid van die tydsduur tot en met afhandeling van die verhoor nie.

Die gevolgtrekking in Barnard se saak beteken dat die nie-verskyning onder art 67, hoewel nie 'n misdaad nie, tog strafbaar is. Die straf is 'n indirekte straf, naamlik die verlies van die bevoegdheid om weer aansoek om borg te doen. Ek vind dit moeilik om te aanvaar dat mens so 'n straf by wyse van implikasie in art 67 moet inlees veral waar, soos gesê, art 67 nie 'n misdryf skep nie.

Ek vind dus niks in die skema van die Wet in die algemeen of in die bepalings van art 67 in besonder wat beperkings in art 60 invoer wat nie in woorde daar uitgedruk is nie."

and

"Dit volg uit voorgaande dat ek van oordeel is dat 'n intrekking van borgtog en verbeurdverklaring van borggeld ingevolge art 67 nie 'n nuwe aansoek om borgtog ingevolge art 60 onontvanklik maak nie. Die feit dat die borgtog ingetrek is sal natuurlik 'n relevante feit wees wat in aanmerking geneem kan word by die oorweging van die nuwe aansoek om borgtog."

[14] In **S v Engelbrecht** 2012 (2) SACR 212 (GSJ) the following is stated:

"[7] The sanctions, which a court has to impose upon an accused who is released on bail and who fails to appear at his or her criminal trial or who fails to remain in attendance provided for in s 67(1), are not separable and are obligatory. A court, under such circumstances, must do three things. It 'shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused'. (See Da Costa v The Magistrate, Windhoek, and Others 1983 (2) SA 732 (SWA) at 741H – 743H.) It makes no sense to declare the bail provisionally cancelled in circumstances where a deceased is no longer at liberty on bail. The issue of a warrant for the arrest of someone known to be deceased would be absurd and a brutum fulmen or exercise in futility. The purpose of issuing a warrant of arrest is for the warrant to be carried out. A warrant can obviously not be carried out upon a deceased.

The provisional cancellation of bail and forfeiture of bail money become automatically final in terms of s 67(2)(c) if the accused does not appear within 14 days of the issue of the warrant of arrest or extended period as the court may on good cause determine. It is obvious that a deceased can neither appear nor satisfy the court that his or her failure under s 67(1) was not due to fault on his or her part.

[8] The language used in s 67 of the CPA is clear and unambiguous and must accordingly be given effect to. The provisions of s 67 of the CPA find no application when the default is due to the passing away of a former accused, whether or not the cause of his or her death was a natural or an unnatural one, such as suicide. This interpretation, in my view, also accords with the obvious purpose of the bail provisions, which is to ensure the attendance of an accused person. Nothing in the context of the CPA indicates that the words used should not be given their plain and ordinary meaning."

[15] The presiding Magistrate stated in her reply to the questions raised by the Senior Magistrate:

"The court has no discretion in terms of the said section whether to issue a warrant of arrest or not and/or to stay a warrant of arrest. It is an immediate action that the court "shall" perform upon the satisfying of the conditions mentioned in the section namely that the accused was released on bail and has failed to appear and/or remain in attendance on the trial date appointed and/or the date to which the matter was adjourned to, by the court."

and

> *"Therefore, I'm of the view there was no irregularity. The proceedings are in accordance with justice. The bail of accused 4 has not been finally forfeited to the state as of yet and even if it was, accused 4 can have recourse in terms of section 70 of the Act for the remittal of his bail."*

[16] **Advocate J. J. Van Niekerk** of the office of the Director of Public Prosecutions, North West Province, (with whom the Director of Public Prosecutions, North West Province, **Advocate J. J. Smit SC** agree) submitted that in his opinion the presiding Magistrate is correct. I am also in agreement with this submission. The presiding Magistrate is correct and this matter is therefore not reviewable.

[17] I am of the view that the practice of issuing warrants of arrest for accused persons and staying the execution thereof is not in accordance with the prescripts of section 67 of the Criminal Procedure Act, and should be done away with, unless the legislature amend the said section. Until then, this practice must be stopped.

[18] A copy of this judgment must be forwarded to the Director of Public Prosecutions North West Province, the Chief Magistrate, the Acting Regional Court President of the North West Province and to the Magistrate Commission.

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R.D HENDRICKS

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG.

I agree

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T.J DJAJE

JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG.

DATED: 10 August 2017