REPUBLIC OF SOUTH AFRICA

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

APPEAL CASE NO: A202/2018

CASE NO: SS40/2006

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

10/12/18
DATE

SIGNATURE

In the matter between:

PORRITT, GARY PATRICK Appellant

and

THE STATE Respondent

JUDGMENT

WEINER, J (MOOSA AJ and MOGOTSI AJ concurring)

Introduction

[1] This appeal is against a final forfeiture order, in terms of which the appellant's bail money was forfeited and his bail cancelled, in accordance with section 67(2)(a) of the Criminal Procedure Act No 51 of 1977 (the 'CPA'). The appellant had previously been released on bail pending the finalisation of his trial.

[2] The order of the court a quo was issued on 21 July 2017 (the 'July order'). The relevant parts of the order read as follows:

'1. In terms of section 67(2)(a) of the CPA, the provisional cancellation of bail that was ordered on the 19th June 2017 is confirmed and Mr Porritt is to be held in custody as an awaiting trial prisoner, unless the court decides to grant him bail, or provide any special dispensation as to the place of his detention, under a fresh application.

2. The provisional forfeiture of the bail money, which was reduced at some stage, from the sum of R800 000,00 to the sum of R100 000,00, is confirmed subject to the rights, if any, of the Office of the Chief Justice to claim disbursements incurred ….'

[3] In terms of the order, the proceedings were adjourned to 1 August 2017 and would continue on the dates set out in the order.

[4] On 7 September 2017, the court a quo refused leave to appeal its judgment and order. The appellant applied for leave to appeal to the Supreme Court of Appeal (the 'SCA') on 9 November 2017. On 15 February 2018, the SCA granted the appellant leave to appeal to the Full Bench of this Division. This appeal came before us on 26 November 2018.

Appealability

[5] The respondent argued that the court a quo's decision was not appealable and referred to various authorities in this regard. It was submitted that the fact that this order is not appealable does not leave the appellant without remedies. The appellant argued that he had an automatic right of appeal against the withdrawal of bail in terms of section

68 of the CPA. He referred to *S v Nqumashe.*[1] Section 68 of the CPA provides for the withdrawal of an accused's bail after an inquiry, whereas section 67 is predicated solely upon the non-appearance of an accused at the proceedings.

[6] Section 68 postulates a wider inquiry than section 67, into allegations that an accused may be on the verge of evading justice or interfering with the respondent's witnesses. However, the appellant argued that the two sections are identical and that accordingly the court a quo's decision was appealable. In *Nqumashe* the Court referred to the opinion in *Hiemstra: Suid Afrikaanse Strafproses* that the cancellation of accused's bail is not appealable, but rejected this opinion because it predated the promulgation of the interim and final Constitutions.[2] The Court observed that different considerations apply in the light of the post-constitutional dispensation in terms of which an accused has a right to be released on bail provided that the interests and the administration of justice are not compromised by such release.[3]

[7] The respondent argued that the CPA does not provide for an appeal when bail is forfeited in terms of section 67. It argued that there are alternative remedies available to the appellant - the appellant may approach the Minister of Justice and Constitutional Development, or the court, in terms of section 70, for a remission of the bail. Further, he is at liberty to launch a fresh bail application.

[8] This Court gave a ruling that the matter was appealable with reasons to follow. There are conflicting authorities in regard to the issue of appealability.[4] The respondent's submissions that there is no appeal against an order in terms of Section 67 does not take into account that the order also involves a cancellation of bail and the resultant incarceration of the appellant. As the SCA has granted leave to appeal, this Court is of the view that, taking into account the constitutional imperatives referred to by Majiedt J (as he then was), in *Nqumashe*, it is in the interests of justice that the appeal be heard.

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[1] *S v Nqumashe* 2001 (2) SACR 310 (NC).
[2] J Kriegler *Hiemstra: Suid Afrikaanse Strafproses* 5 ed (1993) at 160-161.
[3] *Nqumashe* (note 1 above) para 13.
[4] Ibid; *S v Mohamed* 1977 (2) 531 (A).

Application to introduce new evidence

[9] The appellant sought to introduce new evidence relating to a diagnosis that the appellant received on 17 August 2017. The diagnosis was that the appellant is suffering from paroxysmal atrial fibrillation and postural hypotension (the 'diagnosis'). This diagnosis, made before the application for leave to appeal was launched, does not appear to have formed part of the appellant's application for leave to appeal in the court a quo, nor was it mentioned in his application to the SCA for leave to appeal. It was, however, adverted to in the condonation application, when he petitioned the SCA for leave to appeal. According to the appellant, the new evidence that he wishes to introduce at this stage, provides confirmation that he did experience syncope attacks, and that the cause thereof was the medical condition that has now been diagnosed. He thus contends that this confirms that he was not malingering when he was admitted to the Mediclinic in Pietermaritzburg ('Mediclinic') on 10 June 2017.

[10] The appellant only filed the application to adduce the new evidence in this Court on 26 September 2018, more than a year after the diagnosis. The respondent contends that this application should have been brought in the court a quo when the diagnosis was made, in a fresh bail application.

[11] The respondent also submits that, in general, an appeal court will decide whether the judgment appealed from is right or wrong, according to the facts in existence at the time it was given – and not in accordance with new facts or circumstances which subsequently come into existence. The introduction of such facts will be only allowed in exceptional and peculiar circumstances.[5] The respondent argues that the application to lead new evidence must fail, in instances where the facts sought to be canvassed are irrelevant or disputed, in other words, where they are not incontrovertible.

[12] It is also submitted by the respondent that the new evidence of the diagnosis is untested and inadmissible hearsay evidence. Opinions given by the medical practitioners have not been confirmed under oath. The appellant alleged in the founding affidavit that

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[5] *S v EB* 2010 (2) SACR 524 (SCA) para 5; *Mulala v S* (074/2014) [2014] ZASCA 103 (29 August 2014) para 11.

'Dr Makda made the actual diagnosis of paroxysmal fibrillation'. However, there is no evidence in the form of an affidavit from Dr Makda. There is also no evidence presented by the appellant that Dr Tsitsi ('Tsitsi'), upon whose report he relies, ever examined him. The respondent accordingly contends that the new medical evidence should have been presented in accordance with the general rules applicable to evidence in criminal trials, that is, that witnesses in criminal proceedings should be examined and cross-examined under oath.

[13] This Court ruled that the new evidence was not admissible at this stage of the proceedings and indicated that reasons would be given thereafter. The reasons are those that appear above. The correct procedure was for the appellant to have launched a fresh bail application in the court a quo based upon this new evidence of the diagnosis and any other factors which he wished to bring to the court's attention. The appellant has not shown any exceptional or peculiar circumstances why this Court should accept this untested and challenged evidence at this point in time.

Section 67 of the CPA

[14] Section 67(1) of the CPA provides that when an accused fails to appear in court, the court '*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' [emphasis added].

[15] Section 67(2)(a) provides that, if the accused appears before court, within 14 days of the issue 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* [emphasis added].

[16] If the accused does not show that his non-attendance was not due to fault on his part, then the provisional cancellation of the bail and the provisional forfeiture of the bail becomes final.

[17] The court a quo went into much detail as to the test to be applied. In this regard the court relied on *S v Singo*.[6] In *Singo,* dealing with section 72 of the CPA, the Constitutional Court held:

'It is true that the section requires the accused to prove only those facts which are within his or her knowledge. However, it is one thing to require the accused to produce evidence that raises a reasonable doubt, but quite another to require the accused to establish his or her innocence on a balance of probabilities, and if he or she fails to do so, to convict the accused despite the existence of reasonable doubt. There are no particular circumstances here which suggest that the State cannot achieve its objective by imposing merely an evidentiary burden. That burden, while requiring the accused to prove facts to which he or she has access, is also faithful to the presumption of innocence. The imposition of such a burden would equally furnish the reason for failure to appear in court.'[7]

[18] The court a quo, in applying *Singo* to section 67(2)(a), stated that it would interpret such section by reading into it the words set out in italics below:

'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 '*there is a reasonable possibility that*' his failure, under subsection (1) to appear or to remain in attendance, was not due to fault on his part.

This insertion, the court a quo held, would also apply to section 67(2)(b). The section thus provides for an evidentiary burden, not a full onus. In referring to the term "reasonable possibility" the court a quo equated such term with a 'fair possibility' as opposed to a fair probability. Thus, the court a quo applied a less stringent test for the appellant to satisfy.

[19] In deciding whether or not the appellant has discharged the evidentiary burden placed upon him, the Court has had regard to the chronology of events which are set out hereunder:-

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[6] *S v Singo* 2002 (4) SA 858 (CC).
[7] Ibid para 39.

[19.1] On 5 June 2017, the appellant applied for a postponement. Such postponement was refused and the parties agreed to dates for when the trial was to proceed; that is on 6 to 8 June, 12 to 14 June and 19 to 22 June 2017.

[19.2] The appellant alleges that, on the evening of 9 June 2017, he suffered three attacks of syncope whilst at the Keg Restaurant. He was with one Vanessa Pretorius. Vanessa Pretorius was not mentioned by the appellant as a witness until late in his cross-examination in this regard. Gregg Porritt, the appellant's son, saw the CCTV video footage for the night of 9 June 2017 at the Keg Restaurant, but was not called as a witness.

[19.3] On 10 June 2017 at 14h00, the appellant was taken to the Mediclinic in Pietermaritzburg and admitted to the cardiac ward.

[19.4] It is common cause that on 12 June 2017, the appellant failed to appear in court. An order for the provisional forfeiture of his bail money and the provisional cancellation of the bail was issued.

[19.5] The Judge a quo, when issuing the order, stated that he had been informed by the second accused, Susan Bennett ('Bennett') that the appellant was in hospital. She requested the court not toissue a warrant of arrest. The respondent acceded to the request that the warrant be authorised but not issued. The court a quo was prepared to make that order, having due regard to the possibility that Porritt's admission at Mediclinic could be prolonged.

[19.6] The order of 12 June 2017 (the '12 June order') provided as follows:

1. *A warrant for the arrest ("the warrant") of Accused no 1, Mr G Porritt, is authorised*

2. *Accused no 1 ("Porritt") is to show cause on Monday, 19 June 2017 at 10 am why the warrant should not be issued and his bail be estreated.*

3. *Porritt shall obtain a written report from Dr Mugabi or a specialist which is to be forwarded to the parties and the court by no later than 14h00 on 15 June 2017 with regard to whether or not he is able to attend court on 19 June 2017 and, if not, to provide a date by when*

Porritt will be discharged from hospital and whether there is any medical condition that precludes him:

a) from appearing in court on 19 June 2017; or

b) once in attendance on 19 June 2017, from being able to participate in the continuation of the trial

and, if applicable, for how long is it expected that he will be unable to so participate.

[19.7] On 12 June 2017, the appellant underwent various medical tests at the Mediclinic. Dr Mugabi ('Mugabi'), the cardiologist, provided a certificate stating that the appellant would be an in-patient for three to five days for an investigation into the cause of his syncope attacks.

[19.8] On 13 June 2017, Dr Yacoob ('Yacoob'), was ready to discharge the appellant but the appellant requested to see Mugabi again. Mugabi saw him at 19h00. Mugabi was also ready to discharge him, but the appellant then mentioned the court case, and requested to stay overnight in order to see a psychologist and a neurologist. Mugabi felt that the request was not unreasonable. The appellant requested that he only be discharged the following day.

[19.9] On 13 June 2017, Detective Warrant Officer Harding served the court order on Porritt at the Mediclinic and informed him that Mugabi and Yacoob should submit reports to the court by 15 June 2017, as per the 12 June order. It is common cause that the appellant did not ask either doctor for such a report.

[19.10] The appellant was discharged from the Mediclinic at noon on 14 June 2017.

[19.11] Mugabi had suggested that the appellant see a Clinical Psychologist, Dr Elder. That doctor was unavailable and could not see the appellant. The appellant then tried to see Dr Dobreva, Bennett's psychologist, but she was also not available. The book-keeper at Dr Dobreva's rooms advised the appellant to have himself admitted at the Oatlands facility ('Oatlands'). However, in order to do so, he required a referral letter from a medical

practitioner. He thereafter consulted with Dr Brown ('Brown') who noted, inter alia, in her clinical notes:

'Quite stressed at present – co-accused also – wants to be admitted to Oatlands to miss court date on Monday.'

[19.12] It is common cause that by 15 June 2017, the appellant had failed to submit any doctors' reports to the court as provided for in the 12 June order.

[19.13] The appellant was referred to Oatlands by Brown for evaluation of possible epilepsy and his psychiatric state of health. Brown arranged for the appellant to be admitted on 17 June 2017. The appellant only went to Oatlands on 18 June 2017. He arrived at Oatlands in his own car at 15h50 and he was admitted thereafter. He requested to see a psychiatrist urgently as he needed a doctor's letter for the court proceedings the following day.

[19.14] Thus, on 19 June 2017, the appellant failed to appear in court. Bennett applied for a postponement until 31 July 2017, which was refused. The court postponed the matter to 26 June 2017 and issued the following order (the '19 June order'):

1. *The matter is postponed for trial to Monday 26 June 2017 at 10:00. Accused No.2 (Ms Bennet) and Mr Milne have been warned to appear on that date.*

2. *Accused No 1's (Mr Porritt) bail conditions are hereby amended in terms of Section 62 of the Criminal Procedure Act, Act 51 of 1977, in that Mr Porritt shall in addition submit himself prior to the hearing on Monday 26 June to the District Surgeon Johannesburg to be examined and assessed on:-*

    2.1 *what may have caused the alleged syncope suffered by Mr Porritt and what is the likely prognosis in so far as it may affect the trial proceedings in this matter;*

    2.2 *Mr Porritt's medical condition (which includes his psychological and psychiatric condition) including his ability to stand trial;*

3. *In terms of s 67 (1) of the said Criminal Procedure Act:*

3.1 the bail of Mr Porritt is provisionally cancelled;

3.2 Mr Porritt's bail monies or those paid on his behalf are provisionally forfeited to the State;

4. *In terms of s 67 of the said Act a warrant for the arrest of Mr Porritt is hereby issued.*

5. *The Officer responsible for serving the warrant is required to forthwith bring Mr Porritt to appear before this Court. If there is a delay Mr Porritt will be brought before the District Surgeon of Johannesburg to establish which medical facility Mr Porritt may be detained at prior to his appearance before this Court.*

6. *The District Surgeon of Johannesburg shall forthwith determine as a matter of urgency, and in any event by no later than Friday, 23 June 2017.*

6.1. Whether Mr Porritt's medical condition (which includes his psychological and psychiatric condition) precludes him from attending the court on Monday 26 June 2017.

6.2. Whether Mr Porritt's medical condition (which includes his psychological and psychiatric condition) precludes him from following the proceedings or being able to sit through the duration of the proceedings scheduled from 26 June through to 12 noon on Friday 30 June 2017.

7. *The District Surgeon of Johannesburg shall also examine Mr Porritt and provide a diagnosis as to;*

7.1. What may have caused the alleged syncope suffered by Mr Porritt and what is the Likely prognosis in so far as it may affect the trial proceedings in this matter.

7.2 Mr Porritt's medical condition (which includes his psychological and psychiatric condition), including his ability to stand trial.

[19.15] On 19 June 2017, at 07h30, he consulted with Dr Pillay ('Pillay'). Pillay had been contacted by Bennett who had informed Pillay that the court had ordered the appellant to be examined by a district surgeon. Pillay issued a medical certificate from Oatlands stating that the appellant was 'not fit to attend court currently.' (She stated in her evidence, that the reason for this certificate was not that he was not fit to stand trial, but that she consulted with him on that morning and therefore he would not have been

able to appear in court. However, she agreed that, in his physical and mental condition, he could be investigated at another facility and not necessarily at Oatlands.)

[19.16] On 20 June 2017, an application for leave to appeal the 19 June order was brought by both the appellant and Bennett.

[19.17] On 20 June 2017, Pillay realised that the contents and purport of her medical certificate had been misconstrued and accordingly clarified the gist of her certificate by forwarding an email to all the relevant persons. On 21 June 2017, the appellant was discharged from Oatlands by Pillay in terms of the 19 June order.

[19.18] Having been discharged from Oatlands by Pillay, the appellant admitted himself into the Mediclinic at 20h44 with dizzy spells. He was seen by Dr Siddique ('Siddique') at 21h00. Siddique examined the appellant and found that it was not necessary for him to be admitted at the Mediclinic and that he was fit to travel. Siddique suggested that he see a psychiatrist, as an outpatient, for his anxiety.

[19.19] The appellant was thereafter examined by Dr Soni ('Soni'), the district surgeon, at 12h30 and by Dr Mabata ('Mabata'), a psychiatrist, at 16h05.

[19.20] According to Mabata, the appellant was 'asking for help to be given time off, to work on the case, as he needs a break. He is exhausted'. However, it was specifically stated that he could not be booked off sick. It was also noted on the hospital records that according to the cardiologist, the neurologist and the psychiatrist, all the doctors have confirmed that he was fit to travel.

[19.21] The appellant was thus declared fit to travel by Soni, who had consulted all of the doctors – being Yacoob, Mugabi, Siddique and Mabata.

[19.22] On 21 June 2017, the appellant's legal representatives withdrew the application for leave to appeal. The court issued a warrant for the appellant's arrest. It was also ordered that:

(1) The appellant was to be brought before the court and could have a medical practitioner present.

(2) He was to be detained at the Charlotte Maxeke Hospital until further direction from the court.

(3) Subpoenas *duces tecum* were to be served on Drs Brown, Mugabi and Pillay to furnish the court with all relevant medical records from 8 June 2017 to date.

(4) The appellant was to testify first during the Section 67 inquiry.

(the '21 June order')

[19.23] On 21 June 2017, the appellant was arrested at the Mediclinic and transferred to Johannesburg. He and his family refused to have a nurse, a paramedic or a doctor accompany him on the trip to Johannesburg. In terms of the 21 June order, he was first taken to Charlotte Maxeke Hospital, but they would not admit him as there was a long waiting list; he was thereafter taken to Milpark Hospital ('Milpark') where they would not admit him as he was in custody. Thereafter, he was taken to a hotel for the night.

[19.24] On 22 June 2017, the appellant appeared in court. He seemed unstable and was lying on the floor in court. His counsel elected to proceed with the matter. The matter was then postponed to the following day. The appellant was to remain in custody but detained at Milpark, if he was admitted. He thereafter went to the Milpark Emergency Department. There is CCTV footage of the appellant at Milpark, which the court a quo found shows that he appeared to be well and stable as opposed to his appearance in court that morning.

[19.25] On 23 June 2017, the section 67 inquiry was postponed at the appellant's request to 27 June. The appellant was to be taken by SAPS to Milpark to be examined by a neurologist, Dr Rowji (or whoever Dr Rowji referred him to) on 23 June.

[19.26] On 26 June 2017, the appellant was examined by a neurologist and according to the appellant, he received a verbal report. No written report was produced, nor was any information provided by the appellant as to the contents of the verbal report.

[19.27] On 27 June 2017, the section 67 inquiry commenced. The appellant's counsel stated that the appellant would be the only witness in his defence. The court did not allow the affidavits of two witnesses – Van Eeden and Govender – who apparently witnessed his fall on 9 June 2017. The court found that the evidence that they had seen him fall, did not exclude the possibility that he was malingering.

[19.28] On 8 July 2017, after finally revealing that the name of his friend that had accompanied him to Keg Restaurant, was Vanessa Pretorius, the appellant made an application for a postponement in order to call her. The court refused the postponement.

[20] The appellant refers to these two rulings as one of the grounds for his appeal. However, in view of the decision to which we have come, it is not necessary to go into the circumstances relating to his default on 12 June for the reasons set out below.

[21] Having regard to the evidence that was led and the medical certificates that were obtained, this Court finds that the explanation as to why the appellant did not appear on 12 June appears to be reasonably possible. Accordingly, we find that such default was not due to his fault. The fact is, he was in hospital and was undergoing tests. For that reason, irrespective of whether he was malingering or not, he was unavailable to attend court.

The default of 13 June and 14 June

[22] In regard to the dates of 13 and 14 of June 2017, the appellant was still detained in hospital. The court a quo specifically provided for the situation where the possibility that Porritt's admission at Mediclinic may be prolonged, when postponing the matter. Furthermore, it is a valid interpretation that as the matter was postponed to 19 June by the court a quo, he was excused from attending court until 19 June. That is also a reasonably possible explanation for his default on 13 and 14 June 2017.

The default of 19 June

[23] The situation is different in regard to 19 June 2017. It is quite clear from the chronology set out above that the appellant arranged his admission into Oatlands on 18 June 2017, so that he would not be able to appear in court on 19 June 2017.

[24] The fact that he did not want to attend court on the appointed date is apparent from the notes made by Brown and Mabata, referred to above.

[25] Initially, the appellant stated that this quote of Brown was 'completely incorrect' and he attempted to attribute the note as referring to Bennett and not to him. However, in cross-examination, he agreed that the correct interpretation of this note is that it referred to him. Brown would only have been able to make such a note, if she had been told about the court date on Monday 19 June 2017, by the appellant.

[26] The note by Mabata lends further credence to the contention that the appellant did not want to appear in court, presumably in order to further delay the proceedings.

[27] It is pertinent that the appellant chose not to have a medical practitioner accompany him to Johannesburg, when he was arrested, despite this being made available to him. All the doctors that had examined him found it was not necessary for him to be admitted at the Mediclinic and that he was fit to travel. If he was really suffering from a life-threatening medical illness or was in such a poor emotional and physical state, he would have elected to have a doctor, nurse or paramedic accompany him. He stated initially that this was the police officer's fault, but then later said it was because three doctors had advised him that he was fit enough to travel.

[28] The fact that he was quite able to appear in court and continue with the trial, appears to be corroborated by a comparison of the CCTV footage at Milpark compared to the collage of images of the appellant prior to the court appearance on 22 June 2017, including his conduct in court, when he was immobile, uneasy on his feet and had difficulty sitting up. He could not even sit on the chair and lay down on the floor in court. However, the video evidence from Milpark depicts a very different picture. The appellant had indicated that his condition on 22 June 2017 was the same as his condition prior to being

arrested and brought to court from Pietermaritzburg. The learned Judge a quo summarised what the Milpark video depicted, and from this Court's viewing of the video, this appears to be an accurate summary. According to the Judge's summary the video:-

'*...shows Porritt lounging in a very relaxed manner on a chair. It also shows that those with him in particular Bennett were not concerned about his well-being – Bennett moved and left Porritt to his own devices as did the attorney. Porritt stood up without difficulty, chatted and answered his cell phone. He also picked up the bag with which he arrived without difficulty. No one offered to take it for him and he was seen leaving the hospital still carrying it.*'

[29] In the video, the appellant was not walking slowly, he was not immobile or uneasy on his feet, and he had no difficulty sitting up and sitting on a chair, as opposed to lying on the floor. The video extends over a period of hours and the conduct of the appellant over those hours does not change.

Delay

[30] From the chronology presented above, it is apparent that the failure to attend court on 19 June 2017 was a stratagem for delay on the part of the appellant. This ties in with the previous history of this matter which can be summarised as follows:-

[30.1] The appellant was arrested on 14 December 2002 and released on bail of R1 million on 20 December 2002.

[30.2] In 2005, the respondent seized a large number of documents. The appellant applied to court to declare the seizure unlawful. This was upheld by the High Court in Gauteng but subsequently overturned by the SCA.

[30.3] The appellant and Bennett brought an application for Borchers J to recuse herself, and on 19 September 2011, Borchers J did so. The matter was allocated to Mailula J.

[30.4] The appellants then brought an application for removal of the prosecutors. On 20 September 2011, Mailula J upheld the claim by the appellants and set aside the appointment of counsel for the respondent. This order was also set aside by the SCA in

2015, where Ponnan JA found that the appellant and Bennett were following a strategy of delay.

[30.5] On 27 July 2015, the indictment was served on the appellant and Bennett. The High Court proceedings commenced on 31 July 2016 before Spilg J. There is no information as to what occurred thereafter. Presumably, the court recess intervened, for part of this period.

[30.6] The respondent commenced leading its first witness, Mr Milne, on 5 September 2016.

[30.7] In January 2017, Bennett fell ill and had emergency heart bypass surgery and was diagnosed with stress-induced depression. The matter was thus postponed until 5 June 2017 when the parties agreed on the dates for the trial to resume.

[31] What is noteworthy from the above, and in particular from the notes of Mabata and Brown, is that the appellant stated to them that 'he was exhausted' from the court case and required 'a break to work on his case'.

[32] This information provided to the medical practitioners must be seen as a further stratagem to get them to assist the appellant in having the trial delayed. The trial had not run for the past six months. Therefore, he could not have been exhausted from the trial and could not have needed a break to prepare for the trial. He had six months within which to do so. Accordingly, this leads further to the conclusion that his explanation for his non-appearance on 19 June 2017 does not satisfy the requirement that he must show a reasonable possibility that no blame can be attributed to him for not being in court.

[33] The appellant is not left without a remedy. The new evidence which he wished to bring before this Court can be brought before the court a quo in a fresh application for bail based upon, inter alia, the new evidence. A full inquiry can be held as to whether or not he is a flight risk or will interfere with witnesses. The inquiry in terms of section 67 is restricted to whether or not there is a reasonable explanation for his default in failing to appear. Once it is decided that there is no reasonable explanation the court 'shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State and

issue a warrant for the arrest'. In such event, when the appellant fails to give a reasonable explanation 'the provisional cancellation of the bail and the provisional forfeiture of the bail money shall become final'. Thus, once the court rejects his explanation as not being a reasonably possible explanation, there is no further inquiry and the order becomes final.

[34] Accordingly, we find that the appellant has failed to show that the court a quo erred in its finding that he was in default on 19 June 2017.

Accordingly, the appeal is dismissed.

S WEINER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

PP **C I MOOSA**
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

J MOGOTSI
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	**26 November 2018**
Date of judgment:	**10 December 2018**

APPEARANCES:

Counsel for the Appellant:	Adv. W Vermeulen SC
Instructing Attorney:	Frank Cohen
Counsel for the Respondent:	Adv. E Coetzee SC Adv. J Ferreira Adv. P Louw
Instructing Attorneys:	State Attorney