

SOUTH AFRICA / JUDGMENT

Dyakophu and Another v S (A20/2004)
[2024] ZAWCHC 104 (22 April 2024)
[2024] ZAWCHC 104

COURT

Western Cape High Court, Cape Town

BEFORE

M Pangarker

CASE / FILE NUMBER

A20/2024

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Republic

of South Africa

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Before:

Ms Acting Justice Pangarker

Date

of hearing: 18 April 2024

Date

of judgment: 22 April 2024

REPORTABLE

Case

No: A20/2024

SIYABONGA

DYAKOPHU

1st

Appellant

(1st

Applicant in Court a quo)

ANELE

KOMANISI

2nd

Appellant

(2nd

Applicant in Court a quo)

and

THE

STATE

Respondent

JUDGMENT

Judgment

delivered by email to the parties' legal representatives

PANGARKER AJ:

Introduction

[1] The appeal is against the dismissal by the Bellville Specialised Commercial Crimes Court of the appellants' application for bail

pending appeal. The appellants (applicants in the Court a quo) were convicted of contravening section 4(1)(a)(ii) read with sections 1, 2, 24, 25, 26(1)(a)(ii) and 26 (3) of the Prevention and

Combatting of Corrupt Activities Act 12 of 2004 in that they were public officers who accepted a gratification. The

appellants were on bail throughout the trial in the Court a quo and were convicted on 23 November 2022.

[2] On 30 November 2022 each appellant was sentenced to 8 years' direct imprisonment of which 3 years were suspended for 5 years. Their

application for condonation for the late filing of their leave to appeal application was dismissed by the Regional Court Magistrate

(the Magistrate) and subsequently, on 12 April 2023, they petitioned the Acting Judge President of this Division in terms of section 309C of the Criminal Procedure Act 51 of 1977 (the Act). On 27 September 2023, two Judges granted both appellants leave to appeal against conviction. It is notable from correspondence

received from the State Advocate on 16 April instant, and as confirmed by both counsel during the bail appeal, that the appeal

against conviction is enrolled for hearing on 24 May 2024.

[3] On 30 November 2023, the appellants applied for bail before the Magistrate. The record reflects that she determined that the application was governed by section 60 (11) (b) of the Act, hence the onus was on the appellants to show that it was in the interests of justice that bail be granted pending the appeal. Neither of the appellants testified, but rather relied upon the content contained in their affidavits which were read into the record by their legal representative.

[4] Prior to arrest, the first appellant resided in Manenberg and the second appellant resided in Du Noon. Both lived with their spouses. The appellants were police officers at the time of arrest and were the sole breadwinners for their respective families. The affidavits

indicate that neither of them had previous convictions, nor outstanding warrants or pending matters. They were able to afford R2

500 each for bail pending appeal.

[5] As a consequence of their convictions in this matter, the appellants were dismissed from the police service. Their affidavits indicate

strong family ties to the Western Cape; neither possessed a passport, nor did they have families outside the province. Their contention was that they were not a flight risk. No corroborating nor confirmatory affidavits of family members were provided during the bail

application.

[6] The State relied on the testimony of Lt. Col. Amon, the Commander of the Western Cape Anti-Corruption Unit and investigating officer, who opposed the appellants' release on bail on the following bases: each appellant was serving a custodial sentence; neither was the owner of the residences referred to as fixed addresses and corruption within the police service was rife. He confirmed that the appellants' addresses were not visited by the police.

[7] In cross examination, the witness could not dispute the appellants' versions that they had fixed addresses nor was he able to deny that they had strong family ties to the Western Cape. Furthermore, he confirmed that he had not opposed bail after arrest nor did he have an issue with the appellants' addresses after their arrest. Lt. Col Amon regarded the appellants as a flight risk because, in his view, they would evade the completion of their custodial sentences as R2 500 bail could be forfeited easily. He held the view that if bail pending appeal was fixed at R50 000 each, the likelihood of the appellants' absconding would be far less. In respect of the merits, he confirmed that the first appellant was found in possession of two envelopes each containing cash.

[8] During his submissions, the appellants' counsel reiterated the content of the affidavits and that his clients only had six months left to serve of their custodial sentences, that they had attended the trial diligently while on bail and were not a flight risk. The State's view, on the other hand, was that the appellants were indeed a flight risk and that the amount of bail suggested[1] could readily be forfeited. The State argued that the fact that leave to appeal was granted, was of itself not a basis for granting bail especially as the appellants were convicted of a serious offence, corruption was the order of the day and their prospects of success on appeal were not good.

[9] The Magistrate's judgment focused mainly on the merits of the case, her findings on conviction and what she deemed to be errors in the Petition to this Court. To elaborate, she found that Mr Sityata, the appellants' counsel in the bail application and drafter of the Petition, had committed "a negligent error or an intentional distortion of the truth to the high court"[2] when he submitted (in the Petition) that there was no offer to accept nor any acceptance of the cash gratification on the date of the offence.

[10] Furthermore, the Magistrate found that Mr Sityata had wrongly referred in the Petition to section 4(1)(b) of Act 12 of 2004, when the appellants were never charged nor convicted of the offence referred to in this sub-section, but were charged and convicted of contravening section 4(1)(a) of the said Act. The judgment refers to the authorities *Beetge v S*[3], *Rohde v S*[4] and *Mosoanganye v S*[5] and in passing to the factors mentioned in section 60(6) of the Act which require consideration in an application for bail pending appeal is a flight risk.

[11] In applying the law to the facts, the Magistrate then made the following findings in her judgment:

"1. had the defence advocate not made these three errors in law and in fact in applicant's favour as mentioned above the petition

would in all probability not be granted. This Court/presiding officer was also not approached for a response to the petition application.

It seems the magistrate's certificate on the transcribed record was signed by a clerk of the court without permission from the magistrate."[6]

[12] The Magistrate relied on section 60(6)(j) of the Act, in that she found that during the trial before her, the appellants gave different

versions as to why they were found in possession of the R2 000 cash in two envelopes at the time of arrest. She held that this was a factor which she took into account in the bail application. She found that the appellants were not in possession of passports, had family and fixed addresses in the Western Cape, and that these factors together with the granting of leave to appeal, counted in their favour. The judgment then returns to the merits of the trial and the findings during the judgment on conviction.

[13] The Magistrate found that the possibility of a convicted person absconding when on bail pending appeal increases and concludes that

"evidence only in affidavit form together with the grant of leave to appeal do not satisfy this Court that the interests of justice permit their release on bail"[7].

[14] The main attack on the Court a quo's

judgment

and findings is that the Magistrate focused most of her judgment on the merits of the conviction; that she failed to consider that Lt. Col. Amon did not give a reason why he considered the appellants a flight risk; that she failed to make a finding that they were indeed a flight risk; that she failed to consider that the appellants qualified for a remission of sentence, and that the Magistrate failed to consider that the appellants had reasonable prospects of success on appeal.

- [15] The submissions during the appeal follow the submissions made during the bail application in the Court a quo. Counsel were ad idem that the appellants' status changed when they were convicted and aspects which were relevant during a bail application prior to a conviction, now took on a different complexion. The appellants' counsel submitted that the Magistrate wrongly focused on her findings on conviction and the merits of the case, and ignored the question of whether his clients were a flight risk, the fact that leave to appeal was granted and furthermore, that the Magistrate paid scant regard to the remission of their sentences as being a factor in the interests of justice consideration.
- [16] The State concentrated on the seriousness of the offence, the offer and acceptance issue[8], aspects addressed in the judgment insofar as the Petition was concerned, as well as the frequency of corruption in the police service. The State advocate, however, was of a similar view as her opponent that it was not the Magistrate' prerogative to address the Petition "errors" nor question Mr Sityata's bona fides when he drafted the Petition. Ultimately, the State was of the view that the appellants had not discharged the onus of proving that the interests of justice warranted their release on bail, and requests that the appeal in relation to both appellants be dismissed.
- [17] To commence the discussion, issues such as interference with witnesses and considerations related to the investigation of the matter are irrelevant when considering to grant bail pending appeal[9]. The relevant considerations are whether the appellants were a flight risk or not, the increased risk of abscondment, the section 60(6) factors, the fact that the appellants' status changed after conviction and that leave to appeal was granted[10]. Included in the consideration of bail were the further factors that the evidence was that the appellants received a remission of sentence and were due to be considered for parole within months after the bail application before the Regional Magistrate.
- [18] Having regard to the section 60(6) factors relevant to the appellants, the record of proceedings in the Court a quo certainly indicates that the Magistrate found that the appellants had fixed addresses, no passports and strong family ties in the Western Cape. The Magistrate dealt extensively with the merits of the offence and facts related to the appellants' arrest, the seriousness of the offence in light of the epidemic of corruption in the country and her findings on conviction. The fact that these appellants were already serving their sentences received little attention in the judgment.

- [19] Notwithstanding a finding that the appellants had fixed addresses and were previously police officers, thus easily traceable and known to the police, the judgment nonetheless failed to consider whether any conditions for bail could be imposed pending appeal[11].
- [20] The Magistrate referred to and relied upon the Nicholls JA judgment in Rohde, which is insightful in that it informs the reader of some of the aspects to consider when dealing with a bail pending appeal application. Having relied upon the minority judgment, it must therefore be presumed that the Magistrate also took note of the majority judgment in Rohde and was alive to the fact that the Judges considering the Petition do not provide reasons for granting leave to appeal[12].
- [21] In the majority judgment in Rohde, Van der Merwe JA (with Maya P[13] concurring) stated as follows at paragraph [23]:

‘[23] First, on the facts of this matter, leave to appeal could only have been granted on the merits thereof. Therefore we have to accept that, after having specifically applied their minds to this question, our Colleagues concluded that there are reasonable prospects that the convictions may be overturned on appeal. They no doubt applied the test set out in *S v Smith* 2012 (1) SACR 567 (SCA) para 7:

‘What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’

(my emphasis)

- [22] My reference to paragraph [23] in Rohde must be seen in the context of the following: the Magistrate found that, had the appellants’ counsel not made errors or intentionally distorted the truth in the Petition, the Petition would in all probability not have been granted. This was not a comment in passing or a discussion in the judgment, but a finding and conclusion which the Magistrate had reached after hearing the bail application. It is a problematic conclusion to draw for two main reasons: firstly, it was not within the Magistrate’s authority to consider the bases of the Petition, and I address this below. Secondly, the Judges who considered the Petition in chambers had the benefit of the trial record, the Magistrate’s judgment, and the Petition.

- [23] Furthermore, following on from Van der Merwe JA's finding in Rohde supra, it is apposite to emphasise that the Judges seized with the Petition must have applied their minds to the merits of the matter as contained in the record of the Court a quo when they decided to grant the Petition. Consequently, they saw fit to grant leave to appeal the conviction, and in coming to such decision, it must therefore be accepted that the Judges were of the view that the appellants have reasonable prospects of success on appeal.
- [24] Considering the above, I hold the view that the Magistrate erred when she revisited in the bail judgment, the facts and findings in the trial in order to address the perceived or real errors in the Petition to the High Court. With respect to the Magistrate, she was seized with a bail application pending appeal and her judicial task related to adjudicating that application which encompassed a consideration of the various factors mentioned above in order to come to a dispassionate finding as to whether the interests of justice warranted the granting of bail pending appeal.
- [25] As a reminder, section 309C(2)(a) gives an accused person a discretion to apply to the Judge President[14] of the High Court having jurisdiction to grant, inter alia, an application for leave to appeal. This is exactly what transpired here and it was therefore not appropriate for the Magistrate in the bail application to have considered the Petition. Furthermore, the error was exacerbated by her further finding that but for these errors and/or intentional misleading of the Judges, the Petition would not have been granted. The Magistrate's approach and findings in this regard were incorrect.
- [26] The Magistrate's further finding was that as the presiding officer[15], she was not approached for a response to the Petition[16]. This finding in the judgment drew criticism from both counsel during the bail appeal. To address this, I refer to section 309C(6)(a) which states the following:

309C Petition procedure

...

- (6) Judges considering a petition may –
- (a) call for any further information from the magistrate who refused the application in question, or from the magistrate who presided at the trial to which the application relates, as the case may be; or
- (b) ... [17]
- [27] It is apparent from section 309C(6)(a) that, generally speaking, Judges seized with a Petition are vested with a discretion to call on the Magistrate for further information regarding the matter. In this instance, there is no indication that the Judges requested the Magistrate to provide further information as envisaged by the above legislation. When I have regard to the finding that she was not approached for a response to the Petition, I am left with an impression that the Magistrate harboured an expectation that she should have been asked or

requested for her response thereto because of the counsel's apparent errors or intentional misleading of the Judges.

[28] It is unfortunate that the Magistrate held this view. Section 309C(6)(a) does not create a situation where the Magistrate who refused

condonation and/or leave to appeal, plays a role by being called upon to respond or reply to the Petition. As indicated above, the discretion to Petition the High Court vests solely with the accused person. If the Judges seized with the Petition deem it necessary or appropriate, in the exercise of their judicial discretion, then they may call on the Magistrate who refused the leave to appeal application or in this case, the condonation application, to provide information[18] to them.

[29] In this matter, the Judges did not do so and it was not the Magistrate's place therefore to question or query in her findings, that she was not approached for her response to the Petition. In concluding this point, I hold the view that the Magistrate's finding was incorrect. Her further finding regarding a clerk of the court signing off the Magistrate's certificate is ultimately irrelevant to the bail appeal; hence I need not address it in this judgment.

[30] The Magistrate's finding that the appellants' evidence[19] was only in affidavit form is difficult to understand, especially as it is clear that section 60(11)(b) does not limit the adducing of evidence to overcome the onus, to only oral testimony/evidence. It is a daily occurrence in bail applications throughout South Africa that applicants may supply their information for purposes of bail in an affidavit. Returning to the bail application, it is notable from her judgment that the Magistrate made no findings that the affidavits contained any falsehoods, so I fail to see the basis upon which she viewed the provision of affidavits in the application in a negative light and concluded that this was a factor supporting a finding that the interests of justice did not permit the appellants' release on bail.

[31] Furthermore, section 60(11B)(b) of the Act provides that information regarding previous convictions and pending charges are to be submitted by an applicant for bail, either orally or in writing. In view of this legislative provision, it is difficult to understand the Magistrate's issue with the appellants' providing evidence in the form of an affidavit, particularly where the record of proceedings does not indicate, nor does her judgment make, negative findings regarding the appellants' personal information, fixed addresses, previous convictions and the like. In my view, the negative finding regarding evidence in the form of an affidavit was not justified in the circumstances.

[32] I have already found that the Magistrate did not make a finding that the appellants were a flight risk, as is required when one has regard to the dicta in Beetge[20] and Rohde. Having regard to Lt. Col. Amon's testimony and the submissions, I am in agreement with the appellants' counsel

that the witness could provide no cogent reason why he believed the appellants to be a flight risk other than stating that the risk of absconding is greater when the bail amount is only R2500 or thereabouts. The argument by the State which follows the witness's

view, is unconvincing because it is based on conjecture and not on fact.

[33] Unlike the appellant in Beetge, who was convicted of murder and sentenced to 15 years' imprisonment, and thus had to show exceptional circumstances warranting her release on bail pending appeal, these appellants are required to show that the interests of justice permit their release on bail pending appeal. In my view, even absent confirmatory affidavits by the appellants' spouses, the facts before the Court a quo were such that their addresses were not in issue, they had strong family ties to the Western Cape and were easily traceable. Secondly, even accepting that the risk of abscondment increases after conviction[21], one must not forget that every application should be dealt with on the merits and circumstances peculiar to it and its applicants for bail. Thus, the risk of abscondment should surely be considered with reference to the facts and evidence during the application.

[34] In this matter, the risk of abscondment, or flight risk (which the Magistrate made no finding on) should have been considered in

contemplation of the following factors: firstly, the appellants were convicted of a serious, non-violent crime and already serving their effective 5 year sentence of imprisonment[22]. Secondly, consideration should have been given to the remission of sentence, a factor which was not considered nor mentioned in the Magistrate's judgment.

[35] Thirdly, while corruption is indeed serious and as correctly submitted by the State, rife within the police service, these appellants were not serving sentences akin to those in Beetge and Rohde, which the Magistrate and the parties referenced. Fourthly, their attendance during the trial while out on bail and their looming appeal, should also have factored into the question of the risk of abscondment, but the record is silent on this. Fifthly, the appellants' personal circumstances should have weighed more heavily in the determination as to whether they were a flight risk, and in this matter, the facts should have dictated a finding that they were not at risk of absconding[23].

[36] The last aspect relates to the granting of leave to appeal. It is apparent from the authorities referred to that the grant of leave to appeal is an important consideration in an application for bail but does not of itself form a ground to grant bail[24]. I am in no position to anticipate nor guess the outcome of the appeal on conviction which is due to be heard in May. Except to point out that the appellants were police officers who were convicted of a serious, non-violent offence, it would be inappropriate to delve into the merits of the matter and address any further facts relevant to the offence.

[37] In my view, the likelihood of the appellants' absconding from serving the rest of their sentence should not only have been balanced against the prospects of success on appeal, but also against the appellants' circumstances in order to reach a finding as to the interests of

justice[25]. Here, leave to appeal was granted and it follows that the prospects of success on appeal were considered not to be remote, but more importantly, the facts and evidence before the Court a quo in the bail application were such that the appellants showed that they were not at risk of absconding. Thus, even if the Magistrate were of the view that the prospects of success on appeal were poor, she should have found that the appellants had succeeded in showing on a balance of probabilities, that they were not at risk of absconding in respect of the completion of their sentences should the appeal not succeed.

- [38] These aspects should have weighed favourably with the Magistrate in her consideration of bail and had she taken them into account, she should have found that the appellants had discharged the onus of proving on a balance of probabilities that it was in the interests of justice to grant bail pending appeal. Based on the above, I am of the view that the Magistrate erred when she dismissed the application for bail pending appeal. As a consequence, in terms of section 65(4) of the Act, there is room for interference with the Court a quo's decision. Accordingly, the appellants are to be admitted to bail pending appeal.
- [39] As a final point, the State submitted that because the appeal on the merits will be heard soon and the appellants are to be considered for parole sometime in May, this should also dictate a refusal of the appeal. In my view, the balance of convenience is not the threshold nor yardstick in a bail application such as this and to elevate it above the interests of justice would be contrary to what section 60 of the Act prescribes.
- [40] It is notable that the appellants filed their Notice of Appeal on 31 January 2024 and their actions indicate that they wished to pursue an application for bail after conviction. This gives me an indication that, whatever the outcome of the appeal, they consider bail seriously and this cannot be held against them. By the time the appeal comes around, the appellants may well be on parole, or not. In the event that the appeal is dismissed and they are found not to be eligible for parole, the appellants would then have to serve the remainder of their sentence[26].
- [41] For all the above reasons, I grant the following orders:
1. The appeals of both appellants (applicants in the Court a quo) are upheld.
 2. The order of the Court a quo is set aside and replaced with the following orders:
 - (a) The applicants' application for bail pending appeal is granted.
 - (b) The first and second applicants' release is subject to payment of R3 000 each which shall be paid at the Registrar of the Western Cape High Court or any correctional facility/facilities, as the case may be, where the applicants are currently serving their sentences.
 - (c) The applicants, on release on bail, shall report to their nearest police stations twice a week, between the hours of 6am to 6pm, every Wednesday and Saturday, until conclusion of their appeal (appeal against conviction).

- (d) In the event that their appeals are unsuccessful and the applicants are to continue to serve the remainder of their sentences imposed by the Court a quo, the applicants are, with the assistance of their legal representative(s), required to report to the Department of Correctional Services immediately.
- (e) While on bail pending finalisation of the appeal, the first applicant, Siyabonga Dyakophi, shall reside at 50 Hex Crescent, Manenberg, and the second applicant, Anele Komanisi, shall reside at 203 New Rest, Du Noon. The applicants may not change their residence without first informing the investigating officer.

M PANGARKER

Acting Judge of the High Court

APPEARANCES

Appellants' counsel: Mr P Sityata

Respondent's counsel: Ms A Harmse

[1] R2500 each

[2] Record, page 56

[3] [2013] ZASCA 1

[4] [2019] ZASCA 193 – the appeal judgment against the refusal of the Western Cape High Court to grant bail pending appeal

[5] 2012

(1) SACR 292

[6] Record, page 62

[7] Record, page 65

[8] This aspect relates to the merits

[9] See section 60(7) of the Act

[10] Rohde supra, minority judgment, para 5-8, 13

[11] Section 60(6)(i)

[12] See paragraph 8 of Rohde supra

[13] As she then was

[14] In this instance, the Acting Judge President of the Western Cape High Court

[15] It is accepted that the Regional Court Magistrate was the same presiding officer in the trial and bail application

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- [16] Record, page 62
- [17] This sub-section is excluded as it is not relevant to the issue addressed above
- [18] My emphasis
- [19] Record, page 65
- [20] Supra, par [5]
- [21] Rohde supra, par [6]
- [22] At the time of the bail application, the appellants had served a year of their sentence
- [23] Masoanganye supra, par [19]
- [24] Rohde supra par [8]
- [25] See *S v Williams* 1981 (1) SA 1170 (A)
- [26] I take account the remission
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