

SOUTH AFRICA / JUDGMENT

Ismail v S (A60/2024) [2024] ZAGPJHC 614 (4 July 2024)

[2024] ZAGPJHC 614**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Dosio

CASE / FILE NUMBER

A60/2024

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Policy**FLYNOTES:**

CRIMINAL – Bail refusal – Fraud
and theft –
Likelihood
that accused will attempt to evade trial – Past conduct
important to predict future conduct – Propensity
to provide
false addresses – Subpoenas required in tracing appellant –
Tracing appellant should bail be granted
would not be in interests
of justice – Familiar with identity of witnesses – Has
access to evidentiary material
yet to be presented at trial –
High valued goods untraceable – Creates means to abscond –
Application dismissed
– Criminal Procedure Act 51 of 1977, s
60(4).
REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
1.

REPORTABLE: NO
2.
OF INTEREST TO OTHER JUDGES: NO
3.
REVISED
4
July 2024
CASE
NUMBER: A60/2024
In

the matter between:

AMMAARAH
ISMAIL
Appellant
and
THE
STATE
Respondent

Coram:

DOSIO J

Heard:

18 June 2024

Delivered:

4 July 2024
ORDER
The appellant’s
application for bail is dismissed.

JUDGMENT

DOSIO J:

Introduction

- [1]

This is an appeal against the denial of bail in the Palm Ridge Specialised Commercial Court. The bail application commenced on 24 April 2024 and was concluded on 8 May 2024.
- [2]

The appellant is charged with fraud and theft.
- [3]

On 13 December 2022, Arthur Kaplan (Pty) Limited (‘Arthur Kaplan’), was provisionally liquidated with the Master of the High Court. One of the powers of the provisional liquidator was to safeguard all assets of Arthur Kaplan. The State alleges that the appellant was involved in stealing some of the jewellery and watches.
- [4]

The court a quo dealt with this matter as a schedule five offence.

Evaluation

- [5] The provisions of ss60(4)-(9) of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977') apply. These subsections must be construed consistently with s35(1)(f) of the Constitution, which guarantees the right of an arrested person 'to be released from detention if the interests of justice permit, subject to reasonable conditions'.
- [6] In the matter of *S v Smith and Another*,^[1] the Court held that:
- 'The Court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby'^[2]
- [7] In the matter of *S v Dlamini*^[3] the Constitutional Court held that:
- '...The interests of justice in regard to the granting or refusal of bail therefore focus primarily on securing the attendance of the accused at the trial and on preventing the accused from interfering with the proper investigation and prosecution of the matter.'
- [8] In terms of s65(4) of Act 51 of 1977, the court hearing the appeal shall not set aside the decision against which the appeal is brought unless such court is satisfied that the decision was wrong.
- [9] This court must consider all relevant factors and determine whether individually or cumulatively they warrant a finding that the interests of justice warrant the appellant's release.
- [10] In support of the application the appellant submitted an affidavit. The viva voce evidence of Noorjahaan Ismail, ('the appellant's mother'), was also presented.
- [11] The respondent, in opposing the granting of bail, filed the affidavit of the investigating officer, Lieutenant Colonel Ludi Rolf Schnelle ('Lt Col Schnelle'). Lt. Col. Schnelle is stationed at the Directorate for Priority Crime Investigation National Anti-Corruption unit, based in Pretoria.
- [12] The court a quo referred to the personal circumstances of the appellant which comprise the following:
- (a) She is 23 years of age and a South African Citizen.
 - (b) Her passport was seized by the investigating officer in November 2023. She does not have any other travelling documents in her possession.
 - (c) She does not have any assets, outside the borders of South Africa.
 - (d) She attended the Calvin Muslim School in Johannesburg and is a Marketing Management second-year student at Richfield.
 - (e) She was employed as a personal assistant at Kaplan Jewellers for the period January 2023 to June 2023.

- (f) According to the appellant she allegedly was not aware of the existence of the warrant of arrest until she was arrested on 22 April 2024.
- (g) She stated that her maternal grandmother, who is a stroke patient, is based at number 1[...] T[...] Avenue, R[...] Hout Bay, Cape Town.
- (i) She generates an income of R3500.00 per month. She is a part-time waitress and also a student.
- (j) She is unmarried and does not have any dependents, apart from her maternal grandmother.
- (j) She does not have any previous convictions, nor does she have any outstanding cases.
- [13] The appellant denied the allegations preferred by the State and submitted that there exists no likelihood that the factors referred to in s60(4)(a-e) of Act 51 of 1977 will occur.
- [14] The appellant's mother testified that:
 - (a) The appellant is her biological daughter and resides with her at number 2[...] H[...] Road, [...], Johannesburg, together with her other children.
 - (b) The appellant is a student and her eldest child.
 - (c) The appellant assists in caring for her paraplegic grandmother who is a resident at number 1[...] R[...] T[...], Hout Bay, Cape Town. Her mother and sister reside at the same address.
 - (d) Her son, namely Azar Ismail is also an accused in the matter.
 - (e) When her son was arrested the members of the SAPS did not mention the existence of a warrant of arrest for the appellant.
 - (f) If the appellant is released on bail, she will be residing with her and she will ensure that the appellant attends court proceedings if released on bail, in the same manner she has been doing with her son.
 - (g) The appellant is suffering from low blood pressure and anaemia.
 - (h) The appellant is a third-year student at Richfield College and attends virtual and contact classes. The study fees are R3000.00 per month.
 - (i) The appellant has a grandmother, residing in Durban.
- [15] The appellant's mother denied any knowledge of Lt. Col. Schnelle approaching her to enquire about the whereabouts of the appellant. She denied having told him that the appellant moved out of the house and that she hadn't had contact with the appellant for months. She also denied that Lt. Col. Schnelle informed her about an existing warrant for the arrest of the appellant.
- [16] There are glaring discrepancies and undisclosed information pertaining to the affidavit of the appellant and the viva voce evidence of her mother. These are:

- (a) The appellant stated that she was in her second year of studies at Richfield College, whereas her mother testified that she was in her third year.
- (b) The appellant stated that she is a part-time waitress. She only disclosed her employment with Arthur Kaplan and failed to disclose her employment with CAD4ALL or her pending employment with Display Mania. The appellant's mother made no mention of any employment.
- (c) The appellant failed to disclose that she had entered into a lease for the property at 1[...] 6[...] Avenue, R[...] E[...], Cape Town from 8 February to 31 July 2024. The appellant's mother did not know about this lease agreement.

[17] The general principle is that hearsay evidence by way of affidavit carries less weight than viva voce evidence. During the bail proceedings, the appellant did not testify. An affidavit was filed in support of her bail application. It was argued by the appellant's counsel that because the appellant's mother testified, her evidence should carry more weight than that of Lt. Col. Schnelle.

[18] In the matter of *S v Bruintjies*, [4] the Supreme Court of Appeal stated that:

‘(f) The appellant failed to testify on his own behalf and no attempt was made by his counsel to have him testify at the bail application.

There was thus no means by which the Court a quo could assess the bona fides or reliability of the appellant save by the say-so of his counsel.’[5]

[19] Although this Court cannot draw a negative inference from the appellant proceeding by way of affidavit, the fact remains that she could not be cross-examined. The State similarly adduced evidence on affidavit. From the provisions of s60(11)(b) the onus is on the appellant and not the respondent to discharge the onus that it is in the interests of justice to release an accused on bail. The appellant was given the opportunity to supplement her application once the affidavit of the investigating officer had been disclosed but chose to place no further evidence before the Court. As such, the evidence of the investigating officer stands unchallenged.

[20] Regard must be had for the quality of the viva voce evidence presented. The mother of the complainant clearly did not impress the Court a quo, due to her lack of knowledge of the appellant's work commitments and actual address. When questioned about these aspects she stated that the appellant was an adult who could do as she wanted. During her evidence, she would often give long answers that were evasive or would simply not answer the question.

- [21] The evidence of the appellant's mother was correctly rejected as patently false. The difference between the evidence of the appellant as opposed to that of the respondent is that in the former instance, there was an attempt to conceal evidence, whereas in the latter case, Lt. Col. Schnelle merely placed factual evidence before the Court which was not contradicted by the appellant.
- [22] The uncontested evidence placed before the Court by Lt. Col. Schnelle is the following:
- (a) On 22 December 2022 the complainant was appointed as the provisional liquidator of Arthur Kaplan.
 - (b) The appellant, acting as an assistant to accused number one, (who was the former director of Arthur Kaplan), assisted accused number one in removing high-value watches from branches of Arthur Kaplan.
 - (c) The appellant acted with her co-accused and ultimately removed watches to the value of R38 645 052.40.
 - (d) Lt. Col. Schnelle applied for a J50 warrant on 14 July 2023 as he could not find the appellant.
- [23] Lt. Col. Schnelle stated that an exceptionally strong case existed against the appellant and that the circumstances of the appellant differed from those of the other accused who were granted bail. These circumstances are the following:
- (a) He could not trace the appellant. As a result, on 17 July 2023, he went to 2[...] H[...] Road, B[...], Johannesburg where he met the appellant's mother. The latter denied any knowledge of the whereabouts of the appellant even though she was informed that a warrant of arrest had been authorised for the appellant.
 - (b) Although he traced the appellant's brother at 25 High Road, Bramley, Johannesburg, the appellant could not even be traced on her mobile number. He eventually traced the appellant to an Air B&B based at 1[...], 6[...]th Avenue, R[...] E[...], Cape Town ("The Air B&B"). The appellant was arrested at this address on 22 April 2022 by Captain Polori of TOMS. The appellant had entered into a lease agreement and was renting the Air B&B from 8 February 2024 to 31 July 2024. The name of the appellant's paternal grandmother, namely Fatima Ismail, was also inserted on this lease agreement. Fatima Ismail informed Lt. Col. Schnelle that she never signed any lease agreement or consented to her name appearing on the lease.
- [24] The owner of the Air B&B also informed Lt. Col. Schnelle that the appellant was employed at a company called CAD4ALL and that she earned an amount of R10 500.00 per month. She had subsequently resigned from CAD4ALL when she was arrested. The appellant was offered employment at another company, namely Display Mania, but did not commence with this employment as a result of her arrest.
- [25] The provisions of s60 (11) (b) of Act 51 of 1977 state the following:

‘(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to -

(b) In Schedule 5, but not in schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.’

[26] Whilst the strength of the State’s case is an important consideration, it is not the only factor that a court should consider in determining whether to grant or refuse bail. It is trite that further considerations as stipulated in ss60 (4)-(9) of Act 51 of 1977 must be considered cumulatively.

[27] This court must consider all relevant factors and determine whether individually or cumulatively they warrant a finding that the interests of justice warrant the appellant’s release.

[28] Section 60(4) of Act 51 of 1977 states that:

‘The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

- (a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;
- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
- (c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;
- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.’ [my emphasis]

[29] Section 60(6) of Act 51 of 1977 states that:

‘In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors, namely—

- (a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
- (b) the assets held by the accused and where such assets are situated;

- (c) the means, and travel documents held by the accused, which may enable him or her to leave the country;
- (d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
- (e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;
- (f) the nature and the gravity of the charge on which the accused is to be tried;
- (g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;
- (h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
- (i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
- (j) any other factor which in the opinion of the court should be taken into account.' [my emphasis]

[30] Section 60(7) of Act 51 of 1977 states that:

'In considering whether the ground in subsection (4)(c) has been established, the court may, where applicable, take into account the following factors, namely—

- (a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;
- (b) whether the witnesses have already made statements and agreed to testify;
- (c) whether the investigation against the accused has already been completed;
- (d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;
- (e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;
- (f) whether the accused has access to evidentiary material which is to be presented at his or her trial;
- (g) the ease with which evidentiary material could be concealed or destroyed; or
- (h) any other factor which in the opinion of the court should be taken into account.' [my emphasis]

[31] Section 60(8) of Act 51 of 1977 states that:

'In considering whether the ground in subsection (4)(d) has been established, the court may, where applicable, take into account the following factors, namely—

- (a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;
- (b) whether the accused is in custody on another charge or whether the accused is on parole;
- (c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or
- (d) any other factors which in the opinion of the court should be taken into account.' [my emphasis]

[32] It was argued by the appellant's counsel that in determining the likelihood that the interests of justice do not permit the release of an accused in terms of s60(4)(a) to (e), the operative word is 'likelihood' and not merely a suspicion or possibility. Reference was made to the case of *Prokureur Generaal van die Vrystaat v Ramokhosi*.^[6]

[33] In assessing the likelihood that an accused will attempt to evade his or her trial, due regard should be given to s60(4)(b), which pertains to the past conduct of an accused. This is important to predict the future conduct of the accused and to determine the likelihood of flight.

[34] The appellant contends that her residential address was 2[...] H[...] Road, B[...], Johannesburg and that she visited Hout Bay to look after her sickly grandmother. Lt Col Schnelle disagrees. He could not find the address 1[...] R[...] T[...], Hout Bay, and Captain Dlamini could not find any residents at this address. No explanation was forthcoming from the appellant concerning the address 1[...] B[...] Street, Cape Town, which is the address the appellant submitted in her employment application to work at CAD4ALL. The affidavit of Lt. Col. Schnelle revealed that this address doesn't exist.

[35] After the offence was committed, the appellant left her family home at 2[...] H[...] Road, B[...], Johannesburg and stopped using her current cell phone number. She obtained a new cell phone number on 25 September 2023, relocated to Cape Town, and gave a false address to her two employers and Capitec Bank.

[36] Lt. Col. Schnelle revealed that the known cell phone of the appellant was switched off three days after the theft and was only switched on sporadically.

[37] The investigating officer detailed the efforts he took to trace the appellant. Various police officers visited the address listed by the appellant as her home address, on several occasions, whilst surveillance was done on suspected addresses of the appellant.

- [38] The appellant has the propensity to provide false addresses. Numerous attempts to call her on her known cell phone number were unsuccessful. To trace the appellant, subpoenas had to be obtained for cell phone numbers linked to the appellant, her brother and her mother. The Court a quo was correct to accept that to trace the appellant, should she be granted bail, would not be in the interests of justice.
- [39] In terms of s60(6)(b) of Act 51 of 1977, this Court finds that the appellant has no fixed property as the only asset she did own, namely an Audi motor vehicle, has now been sold.
- [40] In terms of s60(6)(f) of Act 51 of 1977 the nature and gravity of the charge on which the accused is to be tried is high and the incentive to hide and abscond is great. In terms of Part II of Schedule 2 offence, should an accused be found guilty of theft or fraud:
- ‘(a) involving amounts of more than R500 000.00:
- (b) involving amounts of more than RI 00000.00. if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy’
- then in terms of Part II of Schedule 2, the sentence applicable would be:
- ‘(i) a first offender. to imprisonment for a period not less than 15 years:
- (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;’
- [41] The state alleges that the amount stolen is R38 645 052.40. This would fall under the ambit of Part 11 of schedule 2.
- [42] In terms of s60(7)(a) of Act 51 of 1977 the accused is familiar with the identity of witnesses in this matter.
- [43] In terms of s60(7)(d) of Act 51 of 1977 there was a relationship between the appellant and employees, in that on 31 May 2023 it is alleged that the appellant, together with employees of Arthur Kaplan, removed high-value watches and jewellery from the World’s Finest Watches store (‘WFW’), Arthur Kaplan branch and packed them into numerous bags. It is further alleged that on 1 June 2023, the appellant gave further instructions to employees of the WFW and the Diamond Walk Arthur Kaplan branch stores to remove watches and all high-value jewellery stock. The appellant allegedly instructed the employees to conduct stock transfers between the two branches and then hand her the high-value watches and jewellery. During this process, the appellant allegedly instructed the employees to fabricate accounts on the stock register to make everything look normal.

- [44] The employees delivered the stolen stock in two deliveries due to the volume of the property. Later on 1 June 2023, the employees of Arthur Kaplan in the Eastgate branch were ordered and instructed by the appellant to remove all high-value watches and jewellery and place them into bags, which they did. On 1 January 2023, the Gateway Arthur Kaplan employees situated in Umhlanga Ridge were instructed by the appellant to remove all high-value watches and jewellery and place them into bags as information had been received that there would be a robbery. This was clearly a lie. Due to the familiarity between the appellant and her co-workers, should the appellant be granted bail, she would be able to contact these co-workers. She had considerable influence on these co-workers.
- [45] In terms of s60(7)(f) of Act 51 of 1977 it is clear that the appellant has access to evidentiary material which is still to be presented at the trial. In terms of s60(7)(g) the ease with which evidentiary material could be concealed or destroyed is a reality from the past conduct of the appellant.
- [46] In terms of s60(8)(a) of Act 51 of 1977, it is clear that the appellant withheld information about false addresses she had given to two employees and Capitec Bank. The appellant failed to disclose these addresses at the time of her arrest or during the bail proceedings.
- [47] The appellant's counsel argued that the Court a quo disregarded the possibility of imposing bail conditions and reference was made to the case of *Faquir v S*.^[7]
- [48] Before a Court can impose conditions, a Court must find it is in the interests of justice to release an accused on bail. The appellant has no assets which indicates her ability to move. Lt. Col. Schnelle took months to trace her. The facts in the matter of *Faquir v S* are distinguishable from the facts in the matter in casu, in that the accused in that matter were travelling to South Africa from Mozambique, by motor vehicle, on 11 September 2013. They were arrested at the Lebombo border post and were immediately arrested.
- The police in the matter in casu searched three provinces to find the appellant and had to engage TOMS.
- [49] The circumstances pertaining to the arrest of the appellant also differ from the other accused in the matter in casu who handed themselves over to the police.
- [50] This Court does not believe that releasing the appellant on bail, with conditions, will ensure the attendance of the appellant in Court. Several goods totalling R38 000 000.00 are still untraceable and creates the means for the appellant to abscond.
- [51] After a perusal of the record of the Court a quo, this Court cannot find any demonstrable misdirection of the Court a quo in coming to its conclusion in refusing bail.
- [52] There are no grounds to satisfy this Court that the decision of the Court a quo was wrong. The requirements of s65(4) of Act 51 of 1977 were not met.

Order

[53] In the result, the appellant's application for bail is dismissed.

D DOSIO

JUDGE OF THE HIGH COURT

JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 4 July 2024.

APPEARANCES

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Instructed by Madhi Attorneys Inc.

ON BEHALF OF THE RESPONDENT: Adv. A Carstens

Instructed by Office of the National

Prosecuting Authority

[1] S v Smith and Another 1969

(4) SA 175 (N)

[2] Ibid page 177 para e-f

[3] S v Dlamini 1999(2) SACR 51 (CC)

[4] S v Bruintjies 2003

(2) SACR 575 (SCA)

[5] Ibid page 577

[6] Prokureur Generaal van die Vrystaat v Ramokhosi 1997

(1) SACLR 127 Orange Free State Division

[7] Faquir v S (A73/2013)

[2013] ZAGPPHC 523 (15 May 2013)

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Prepared on 14 October 2026 · Esheria