

SOUTH AFRICA / JUDGMENT

Lehlo v S (A255/2024) [2024] ZAWCHC 425 (12 December 2024)

[2024] ZAWCHC 425

COURT

Western Cape High Court, Cape Town

BEFORE

Parker, AJ

CASE / FILE NUMBER

A255/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE

DIVISION, CAPE TOWN)

REPORTABLE

CASE NO: A255/2024

In the matter between:

BULELANI

LEHLO

Appellant

And

THE

STATE

Respondent

Coram: Parker, AJ

Matter heard on: 05

December 2024

Judgment delivered

electronically on: 12 December 2024

JUDGMENT

PARKER, AJ:

Introduction

“Between a rock and a hard place[1], was a report on Bail in three South African courts published by the Open Society Foundation for South Africa and provided insights into the considerations of bail.

[1] This is an appeal in terms of Section 65(4) of the Criminal Procedure Act (hereinafter referred to as the CPA), challenging the decision of the Presiding Magistrate Mr D Lakey on 18 January 2022 in the Regional Court in Grabouw who refused the Appellant’s release on bail. The Appellant was arrested together with a number of co accused on 17 July 2021 and charged with:

- 1.1. Robbery with Aggravating Circumstances (Firearm used).
- 1.2. Pointing of a firearm.
- 1.3. Reckless and/or Negligent Driving.
- 1.4. Attempted Murder.
- 1.5. Theft.

The court a quo

[2] The bail application was opposed by the Respondent on several grounds, including but not limited to the offence which fell within the ambit of Schedule 6 of the CPA, and particularly, according to the Investigation Officer because the Appellant jumped out of a moving vehicle that was a getaway vehicle being pursued by the police. The further analysis follows.

The current appeal

[3] In bringing this appeal, the Appellant contended that the Learned Magistrate had erred and misdirected himself in refusing the Bail, notwithstanding the fact that none of the requirements set out in section 60(4) of Act 51 of 1977 were properly established by the state. More particularly, the evidence adduced by the state did not establish the probability that if released on bail, the Appellant would:

- 3.1 Endanger the safety of the public or any particular person; and/or commit a schedule 1 offence; and/or
- 3.2 Attempt to evade trial;
- 3.3 Attempt to influence or intimidate witnesses or conceal or destroy evidence; and/or

3.4 That his release on bail will undermine the proper functioning of the criminal justice system including the bail system; and/or

3.5 That his release will disturb public order or compromise peace and security.

- [4] The Magistrate erred and misdirected himself by emphasizing the seriousness of the offence. It is common cause that the Appellant has no previous convictions. The pending case had subsequently been withdrawn. There is no real concern that if he were to be released on bail, he would commit further offences.
- [5] The Magistrate further erred and misdirected himself by failing to consider that the appellant is a South African Citizen with strong ties to the Republic of South Africa. He does not have any ties outside South Africa, and moreover possesses no travelling documents. Consequently, the prospects of fleeing the country and not attending his trial until completion, are minimum if not zero.
- [6] The Learned Magistrate erred and misdirected himself by failing to take into account that the Docket of this case is in possession and proper care of the investigating officer, and therefore, the Appellant will not have means to access and destroy any evidence in the docket.
- [7] The Learned Magistrate erred and misdirected himself by failing to take into account that there was no evidence suggesting that the Appellant will not attempt to influence or intimidate witnesses. According to the record, such witnesses had already made statements, thereby committing themselves to testifying. Moreover so the Appellant resides at considerable distance from the state witnesses.
- [8] The Magistrate further erred and misdirected himself by not taking into consideration the health of the accused.

Test on Appeal

- [9] Section 65(4) of the Act provides for the test of a Superior Court to interfere with a decision of the court a quo to refuse bail[2].
- [10] The success of any bail appeal is premised and dependent upon whether the Appellant, in the court a quo, discharged the onus in terms of subsection 60(11) of the Act.[3] It is self-evident that the Act in terms of section 65(4) mandates that the Court, before setting aside any decision of bail, that the Court should be satisfied that the lower court was wrong in its decision.[4]
- [11] A plethora of Constitutional court judgments, amongst others *S v Dlamini*, *S v Dladla and Others*; *S v Joubert*; *S v Schietekat*[5] are apposite in respect of onus in section 60(11) (b) of the CPA. These matters crystallises the Court's approach on interest of justice considerations and offer guidelines for schedule 6 bail applications, addressing the "likelihood" and considerations related to "exceptional circumstances." In considering the interests of justice while balancing the objectives of the Bill of Rights, it is important not to unduly elevate the

criteria outlined in section 4. However, the accused's release on bail should not be permitted if the grounds specified in section 60 (4)(a) to (e) of the CPA are applicable criteria.

[12] A court hearing a bail appeal should be at liberty to conduct its own analysis of the evidence when determining whether the appellant has discharged the onus placed upon him in terms of section 60(11)

(a) of the CPA. This therefore means that the Appellant has a responsibility to prove facts that establish exceptional circumstances warranting that he should be released on bail.

[13] In *S v Bruintjies*, the court of appeal held that:

“the court consider all relevant factors and determine, whether individually or cumulatively, they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the Legislature clearly had in mind circumstances which remove the Applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the Legislature has attached to the commission of a schedule 6 offence. The prospect of success may be such a circumstance, particularly, if the conviction is demonstrably suspect”.[6]

[14] It was argued that there is no evidence suggesting that the Learned Magistrate had applied section 60(9), when he considered the grounds of opposition to the Appellant's bail application raised by the State, in respect of section 60(4). In terms of this section, it is argued he ought to have weighed up the interest of justice against the rights of the Appellant to human dignity and medical care, as well as the potential prejudice the Appellant is likely to suffer if he were to be detained. This should include consideration of the period that the Appellant has already been in custody since the arrest, the probable period that he would continue to remain in detention, if he were not released on bail, and the continued medical condition of the Appellant, or any deterioration he may suffer.

[15] The Appellant argued that the Learned Magistrate erred in law by not considering a cumulative reading of the provisions of section 60(11)(a) read with section 60(4)(a)-(e) and the established jurisprudence on an open-ended list of exceptional circumstances. The Magistrate failed to consider the possibility of a lengthy period of incarceration of the Appellant.

[16] It is trite that a court of appeal may only interfere with the decision of the court a quo in a bail application and following *S v Barber*[7] and *S v Vanga*[8] if the Court is satisfied that the court a quo, who had the discretion to grant bail, exercised that discretion improperly and wrongfully.

“although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion.”

[17] In *S v Ho*[9] it was pointed out that the case has to be decided on the material appearing on record, held the following.

“It is therefore incumbent upon an appellant or his legal representative to place the relevant facts fully before the magistrate when the application for bail is made or, if any such facts are not known to such legal representative, to take steps under ss

(2) when they become known to him. It is not competent to lay them before the appeal Court by way of affidavit, nor is it proper to attempt to introduce them by way of statements from the Bar.”

The Appellant's case

[18] The Investigating Officer testified that on 17 July 2021, armed men robbed a business known as Prime Meat Market and its employees. They took money, a laptop and a safe key. Following, the robbery, the men exited the shop and drove off in a Toyota Quest. Within a half an hour from the robbery commencing the vehicle was observed on the N2 highway. The vehicle had false number plates. A chase ensued and the occupants in the Toyota opened fire on the police. The police returned fire at the vehicle and the vehicle collided into a traffic light. The police managed to arrest 5 suspects, and another was killed. Money, firearms, a laptop and safe key were recovered from the vehicle. The CCTV footage from the shop was viewed and the Appellant can be seen pointing a firearm at the employees and assaulting them. He also directed them into the fridges. A firearm was found in the Appellant's possession upon arrest. The Appellant is alleged to belong to the 26 number gang.

Personal circumstances

[19] The court a quo took the Appellant's personal circumstances as detailed in his affidavit into consideration, noting that he was 22 years old, unmarried, and has no minor children. At the time of the Appellant's arrest, he worked as an electrician, operating as an independent contractor taking on various odd jobs earning approximately R2 500.00 per week. He called no witnesses.

[20] The Appellant has a fixed address in Crossroads, Western Cape. The Appellant's pending matter of possession of stolen property in the Wynberg Magistrates Court, which factor was considered at the bail enquiry, has subsequently been withdrawn. Appellant submits his release on bail will enable him to provide for his family. The release will enable him to consult his legal representative whilst in custody. A further factor for his release is that he was wounded during his arrest, and he suffers from pain and carries an ostomy bag medical attention. This injury was sustained as a result of a gunshot

wound during the arrest. The Appellant however elected not to deal with the merits of the case.

[21] The Appellant argues that the court a quo did not attach sufficient weight to his personal circumstances. The Respondent submits that the personal circumstances of the Appellant

does not constitute exceptional circumstances and refers the Court to *S v Botha en 'n Ander*[10] where the accused advanced similar circumstances to that of the Appellant where no exceptional circumstances was found in the face of a *prima facie* case.[11] Bail was refused.

The purpose of bail

[22] The underlying concept and fundamental principal of bail is the presumption of innocence, whereby every person is presumed to be innocent until he is adjudged guilty. The basic principle underlying the law on bail is that bail is not a punishment and that an accused is entitled to bail where the interests of justice permit.[12] This is closely related to the principle within the adversarial criminal justice system that an accused is innocent unless proven

guilty at trial. Although not intended as a punitive measure, pre-trial incarceration nevertheless carries a penal element in that

it deprives an innocent person of his or her freedom. In this sense the right to bail, as an extension of the presumption of innocence,

is founded on the legality principle of the rule of law. It follows that bail, like the presumption of innocence, is a procedural human right, subject to an evaluation of various factors.

[23] It was argued quite correctly that the basic purpose of bail, from the perspective of society, has always been and still is to secure the reappearance of the accused for trial. Pretrial release allows an individual accused of crime to keep the fabric of his life intact, to maintain employment and family ties in the event s/he is acquitted or given a suspended sentence or probation. It spares his/her family the hardship and indignity of welfare and enforced separation. It permits

the accused to take an active part in planning his/her defence with counsel, locating witnesses, proving his/her capability of staying free in the community without getting into trouble. Currently this matter is part heard.

[24] I do not disagree that it is important to be constantly mindful, therefore, the purpose of bail, the liberty of an accused, the need for that purpose to be achieved through acceptable evidence as opposed to mere speculation and rumour of a strong state case. These interests are to be balanced against a *prima facie* case.

[25] In my view, the Appellant did not take the court *a quo* into his confidence. When he failed to deal with the merits on the basis that he relied on the advice of his legal representative, he decided to remain silent. He did not forward a compelling case for his release on bail. He called no witnesses. The fact that the appellant did not see it proper to bring relevant evidence before the bail court points to the fact that he is not playing open cards with the court.

- [26] It might be so, that the appellant has a clean criminal record. However, that does not mean that this Court should turn a blind eye to the fact that he tried to jump from a moving vehicle. With the evidence that was put by the Respondent before Court, mere denial of his involvement in this crime is not enough for this Court to find in his favour. I am of the strong view that, to simply release him on bail would be reckless in light of the ongoing trial.
- [27] Given the serious nature of the offence, the likelihood of him influencing the evidence of witnesses cannot be overlooked.

Interest of Justice Considerations

- [28] The court a quo is vested with a wide discretion when deciding on an accused's release on bail. Whilst being forever mindful of factors such as the purpose of bail and the deprivation of an accused person's liberty, the onus remains on the accused to adduce evidence and persuade the court that his or her release would be in the interest of justice. The mere submission that he will not venture outside the Western Cape is insufficient.
- [29] The Appellant argues in the main that the court a quo erred in finding that one or more of the grounds mentioned in section 60(4) of the CPA was present in this case. The court a quo held that the attempted escape from the police during the arrest of the Appellant led him to find that there was a likelihood that the accused would evade his trial thus being a flight risk. The Appellant does not possess travel documents and argues that he is not a flight risk. However, the absence of a passport does not mean that he will therefore attend the hearing.
- [30] It is not enough for him to simply deny his involvement in a crime without proffering a prima facie version that will prove that he will be acquitted at the end of the trial.
- [31] The Appellant's evidence that served before the magistrate was adduced on affidavit. In my view, it is detrimentally short of the true onus. In light thereof, the respondent has adduced a strong case before the magistrate that convinced him not to grant bail. A mere denial is not sufficient the applicant is required to adduce convincing factual evidence to support any contention by him that the considerations do not apply in the circumstances of *Conradie v S* [2] –

‘... a mere denial by an applicant for bail affected by S60 (11) (a) of the probability of any of the considerations in S60 (4)(a) to (e) pertaining would be insufficient to show exceptional circumstances. More is required; the applicant is required to adduce convincing

factual evidence to support any contention by him or her that the considerations do not apply in the circumstances.’

- [32] Turning to the offences that he is charged with, the following cannot be ignored. The seriousness of the charges is prevalent in this division. Balancing the interests of society which ought to be protected from these crimes far outweighs the liberty of the Appellant.

- [33] There is an overabundance of authorities that reaffirms the limitations and powers of a court of Appeal. The ultimate consideration is whether the Magistrate, who had the discretion to grant bail, exercised such discretion wrongly. Only one of the considerations set out in section 60(4) of the CPA need be present to refuse bail.
- [34] In my view, the court a quo, cemented its decision to refuse bail on more than one of the factors listed in section 60(4). It is evident that the court a quo's refusal to grant bail is based on the relevant provisions of Section 60(11)(B) and the interest of justice considerations encapsulated in Section 60(4) of the CPA was well grounded.
- [35] Consequently, I am satisfied that the court a quo correctly denied the Appellant's application to be released on bail. The offences are serious and the personal information placed before me does not persuade to be tantamount to being of an exceptional nature. His health consideration given the factors referred to above does not justify his release as medical assistance is available to him while incarcerated. He has placed no evidence before me of the state failing in its constitutional duty to provide for the Appellant's medical needs. No evidence has been placed before this court to show his right to adequate health care has been compromised. He has thus far been attending the trial with seemingly no handicaps. No exceptional circumstances regarding his health were proffered in this current appeal. Nevertheless, the Appellants rights are safeguarded as there are avenues available to him if he has been denied adequate health care. At this stage there is nothing before me to prove that his constitutional right to medical attention has been hampered or denied.
- [36] Whilst it is said that:
- "Judicial officers continue to be caught between the proverbial rock and a hard place when it comes to decisions on bail. They face criticism regarding the setting of unaffordable bail and the consequent impact on overcrowding at the same time as competing criticism regarding any form of release for those of accused of serious offences".[13]*
- [37] In conclusion, I am satisfied that the court a quo properly assessed and evaluated the totality of the evidence; considered the objective facts and applicable legal principles, the personal circumstances of the Appellant, and correctly found that the interest of justice does not permit the Appellant's release on bail. Therefore, I agree with the findings of the court a quo that the Learned Magistrate arrived at a decision and was not squeezed into a rock and a hard place as the weighing of interests exercise are such that his release from custody would not be in the interest of justice.
- [38] It is submitted that the evidence in its totality reveal the inevitable conclusion that the Appellant failed to discharge the onus that exceptional circumstances exist that justifies his release on bail in the interests of justice.
- [39] For these reasons, I make the following order:

39.1 The appellant's bail appeal is dismissed.

R K PARKER

ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for Appellant : Advocate Site Nosilela

Instructing Attorney : Mathe Attorneys

Counsel for Respondent : Advocate Leon Snyman

Instructing Attorney : Office of the Director of Public Prosecutions: Western Cape

[1] https://dullahomarinstitute.org.za/acjr/resource-centre/OSF_Bail_text_web.pdf Report prepared for the Open Society Foundation for South Africa (OSF-SA) Report compiled by Vanja Karth Data and legal analysis by Michael O'Donovan and Jean Redpath

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[2] Sewela v S (731/10)

[2010] ZASCA 159 (1 December 2010). The interference with the decision by another court to refuse bail: "are circumscribed by section 65 (4) of the Criminal Procedure Act 51 of 1977 – A court of appeal can only set aside such a decision if it is satisfied that it is wrong. Cases such as S v Mathebula 2010

(1) SACR 55 (SCA) – Referred...(b), that the interests of justice permitted his release on bail. The powers of an appeal court to interfere with the decision by another court to refuse bail are circumscribed by section 65 (4) of the Criminal Procedure Act. A court of appeal can only set aside such a decision if it is... 60(11)(b), that the interests of justice permit his release on bail. I cannot find any fault with this conclusion. It is trite that the powers of an appeal court to interfere with the decision by another court to refuse bail are circumscribed by section 65(4) of the CPA."

[2] Sewela v S (731/10)

[2010] ZASCA 159 (1 December 2010).

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- [1] SACR 55 (SCA) – Referred...(b), that the interests of justice permitted his release on bail. The powers of an appeal court to interfere with the decision by another court to refuse bail are circumscribed by section 65 (4) of the Criminal Procedure Act. A court of appeal can only set aside such a decision if it is... 60(11)(b), that the interests of justice permit his release on bail. I cannot find any fault with this conclusion. It is trite that the powers of an appeal court to interfere with the decision by another court to refuse bail are circumscribed by section 65(4) of the CPA.”
- [3] “Notwithstanding, any provision this Act, where an accused is charged with an offence referred to- (a) 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 exceptional circumstances exist, which in the interest of justice permit his or her release;” See also *S v Petersen* 2008 (2) SACR (C) 355 at para [7] ; *Rudolph v State* (484/2009) [2009] ZASCA 133 (30 September 2009) at para [9].
- [3] “Notwithstanding, any provision this Act, where an accused is charged with an offence referred to-
- (a) 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 exceptional circumstances exist, which in the interest of justice permit his or her release;” See also *S v Petersen* 2008 (2) SACR (C) 355 at para [7] ; *Rudolph v State* (484/2009) [2009] ZASCA 133 (30 September 2009) at para [9].
- [4] The Criminal Procedure Act 51 of 1977, section 65(4) – The court or judge hearing the appeal shall not set aside the decision against, which the appeal is brought, unless such court or judge is satisfied that the decision was wrong. In which event the court or judge shall give the decision which in its or his opinion the lower court should have given.
- [5] (CCT21/98, CCT22/98, CCT2/99, CCT4/99) [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771 (3 June 1999), para [65].
- [6] *S v Bruintjies* (676/2002)
- [2003] ZASCA 4; 2003 (2) SACR 575 (SCA) (25 February 2003) at para [7]
- [7] 1979
- (4) SA 218 (D) at page 220.
- [8] *S v Vanga* 2000 (2) SACR 371(Tk) at page 372
- [9] *S v Ho* 1979 (3) SA 734 (W) at page 737 E
- [10] *S v Botha en ‘n Ander* (336/01) [2001] ZASCA 146; [2002] 2 All SA 577 (A) (30 November 2001).

[11] Ibid (para 27.)

[12] Supra “Rock and a hard place” Part 1

[13] Supra page 31

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