

SOUTH AFRICA / JUDGMENT

Lipholo and Others v S (A78/2023; A96/2023) [2023] ZAFSHC 252 (5 July 2023)

[2023] ZAFSHC 252

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi

CASE / FILE NUMBER

A78/2023; A96/2023

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IN THE HIGH COURT

OF SOUTH AFRICA,

FREE STATE

DIVISION, BLOEMFONTEIN

Case number: A78/2023

Case Number: A96/2023

REPORTABLE: YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO

YES/NO

MAGISTRATES:

In the matter between: TEBOHO
 JAMES LIPHOLLO
 1st
 Appellant
 SENOHE
 ISHMAEL MATSOARA
 2nd
 Appellant
 TIEHO
 FRANCE MAKHOTSA
 3rd
 Appellant
 and
 THE
 STATE
 Respondent

JUDGMENT

BY: MHLAMBI J,

HEARD ON: 30 June 2023

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for hand-down is deemed to have been on 05 July 2023 at 14h15.

- [1] This is an appeal against the learned magistrate's refusal to grant an order that the appellants be released on bail. Section 65(4) of the Criminal Procedure Act, (the CPA),^[1] provides that 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.
- [2] The application was argued in the court a quo on the basis of affidavits which were filed by the appellants while the state presented the oral evidence of Lieutenant-Colonel Flyman on whose evidence the state relied to oppose the granting of bail and argued in that court that such opposition was based on the provisions of section 60 (4)(b), (c), (d) and (e) of the CPA. The whole sub-section reads as follows:

"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; or
 - (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.”
- [3] I pause to mention that at the commencement of the proceedings in this court, the state launched an unsuccessful application for the postponement of the proceedings to the Wednesday of the following week to enable Advocate Bester, who was off sick having undergone an operation in both eyes, to attend to the argument of the application on behalf of the state. The application was opposed by both the legal representatives of appellants 1, 2 and 3, Messrs Van Wyk and Moruri.
- [4] The appellants filed two separate appeals, namely, T Lipholo v The State, case number A78/2023 and SI Matsoara and TF Makhotsa v The State, case number A96/2023. Mr Roothman, on behalf of the state, argued that Mr Strauss, who was present in court and who ultimately argued the application, was prepared to argue the one appeal but not fully prepared to do so in the second one. The state opposed both appeals and contended that it would suffer prejudice if a postponement were not granted. Mr Moruri submitted that there was no guarantee that the application would be argued on the day of the postponement. Advocate Bester, he contended, did not argue the case in the magistrate’s court and a postponement was more prejudicial to the appellants who
- were in custody.
- [5] Both state advocates in court are seasoned prosecutors. All the parties agreed that bail proceedings were urgent in nature. It was then agreed that the cases would be consolidated and argued simultaneously. The first appellant was referred to as the second applicant while appellants 2 and 3 were referred to as applicants 1 and 4 in the court a quo.
- [6] The first appellant stated in his affidavit that he is 45 years old, married with 7 children who are between the ages of 2 and 24 years. His wife is unemployed and they have resided at 5[...] C[...] M[...], Bloemfontein, for the past 13 years. He has an alternative address at Vanstadenrus, near Wepener, where he can move to, if necessary, pending the finalisation of the case as the house belongs to a family member. He has a valid South African identity document but not a passport. He is currently unemployed and was, until his arrest, employed by Integrity Security where he earned R 14 500.00 per month.

- [7] He knows the charges preferred against him and intends to plead not guilty thereto. He has been in custody since 11 April 2023. He has at all times during his arrest and the investigation of the case never tried to run away or hide from the police. Instead, he handed himself to the police after he received a call to meet the police at the Mimosa Mall in Bloemfontein. He will not interfere with any evidence nor attempt to influence any of the witnesses on being released on bail. He had no intention of interfering with the investigation and the state witness are unknown to him. He has no resentment towards any person involved in this matter and has no wish to harm any witness that may testify against him. There is no clear indication of how long the investigation may take and the possible period of his stay in custody. His family may assist him to pay bail in the amount of R 5 000.00 should the court grant him bail.
- [8] The second appellant stated in his affidavit that he is 38 years old, his permanent residence is at 1[...] F[...] K[...] street, Phase [...], Bloemfontein and has been resident at Bloemfontein for the past 12 years. His deep-rooted and strong community and family ties make it improbable not to attend his trial and gives an irrevocable undertaking to attend his trial including the preliminary hearings. He lives with his life partner and three children aged 15, 13 and 7. He provides for his father, a pensioner, and his 15-year-old brother.
- [9] He is a South African citizen and a passport holder which he surrendered to the police on his arrest. He has no intention to apply for another passport before the finalisation of the criminal case against him. He voluntarily handed over his cell phone together with its password to the police as a sign of his intention to fully cooperate with the police investigations. He has no previous criminal convictions. He anticipated his arrest when false media reports insinuated that he purchased a motor vehicle from proceeds he received from aiding a prison escape from the Mangaung Correctional Centre where after he was dismissed.
- [10] His dismissal had nothing to do with the escape but related to a contravention of certain provisions of his former employer. Despite the imminent arrest according to the media reports, he never fled and was arrested at his residence. The identity of the state witnesses is unknown to him. Should their identities be revealed to him, he will not contact them. He never gave false information to the police and has always given his full cooperation. His release on bail will neither jeopardise his safety nor the safety and security of the members of the public. His continued incarceration makes it difficult for him to earn an income and finalise his Unemployment Insurance Fund claim. He is engaged in a labour dispute with his former employer and the dispute is scheduled to go on arbitration.
- [11] He is prepared to comply with every bail condition that may be imposed. He can afford to pay bail in the amount of R3000.00.

- [12] The third appellant stated that he is 51 years old, married and resides with his family at 3[...] F[...] S[...], Bloemfontein. He has two children aged 12 and 19. He has been resident in Bloemfontein for the past 22 years. He is a South African citizen and a passport holder which he gave to his attorney to surrender to the police if needs be. He was arrested at his house and never attempted to flee from the police but gave his full co-operation which he tenders to do throughout the police investigation.
- [13] He was dismissed from work and is contesting such dismissal which is unrelated to the alleged aiding of an inmate to escape from prison. He suspected that he could be a suspect in the case after the second appellant was arrested and dismissed on similar charges as his relating to an incident of 3 May 2022. He did not flee and does not intend to or to avoid the due and proper administration of justice. He does not know the identity of the state witnesses and even if their identities were revealed, he would not communicate with them.
- [14] He is also engaged in a labour dispute with his former employer. At the time of his arrest, he was in the process of claiming his pension and unemployment benefits. He can afford to pay bail in the amount of R3 000.00 and undertakes to comply with every bail condition that may be imposed.
- [15] Lt Colonel Flyman testified that the crux of the case related to the escape from prison of one Thabo Bester who faked his death and bribed his way out of prison. This case enjoyed maximum media publicity. The reasons for his opposing bail was that the matter was high profile and had also enjoyed the attention of Parliament. The community viewed the police as not doing their work and was enraged, saying that bail should not be granted to the accused. The second appellant was scared for his life especially from harm by his co-accused. The community would frown upon the justice system and potentially take the law into their own hands should the accused persons be released on bail.[2]
- [16] The court a quo found that all the parties were ad idem that the bail applicants were charged with offences mentioned in Schedule 5 and that the onus was on them to convince the court that the interests of justice permit their release on bail.[3] Having summarized the evidence, the court remarked that not much weight should be attached to the evidence by way of statements as it was never subjected to cross-examination.[4] He found that on the evidence before him, the grounds mentioned in section 60(4)(a) and (d)[5] were not established[6] and went on to state that:

“However, I find paragraph (b), (c) and (e) having been established. Sub-section (4)(b) provides that the interest of justice does not permit the release from detention of an accused where there is the likelihood that the accused if he/she were released on bail will attempt to evade his/her trial. Sub-section (6) provides that in considering whether the grounds in (4)(b) has (sic) been established the Court may, where applicable, take into account the following factors, namely amongst others;

“(f) the nature and gravity of the charge on which the accused is to be tried and

- (g) the strength of the case against the accused and incentive that/she may in consequence have to attempt to evade his/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/her.”

In this regard I will argue that all the applicants did not deal effectively with aforementioned factors and as a result thereof found to be existing and dictates against their application.” [7]

- [17] Similarly, in considering whether the grounds in (4)(c) were established, the court only took into account the factors in subsections 7(a) and (d)[8] and rejected the applicants’ evidence that they did not know the state witnesses and potential state witnesses. It found that the grounds in (4)(e) were established as the applicants failed to deal with the factors mentioned in subsection 8(A). It went further and stated that:

“I will also argue that the nature of the case itself, it is of its own unusual and thus attracts the application Sub-Section (4)(e). I have considered the provisions of Section 60(9) and I have weighed the personal circumstances of the applicants as against the interest of justice. On evidence presented before me I am convinced that there is a prima facie case against applicant 1,2,3 and 4”[9]

- [18] The court then went on to express its concern about the:

“allegations as it would appear that the offence was committed in cahoots with the people whom a trust was bestowed and that the offence was committed at a place to be secured and a safe place. It is hard, if not possible to find the personal circumstances of the applicants outweighing the interest of justice in this case. I therefore find that the interest of justice do (sic) not permit the release of the applicant 1,2,3 and 4 on bail and such bail is denied.”

- [19] Mr Moruri submitted that the court a quo misdirected itself by finding that section 60(4)(b) of the CPA was established by the state as Lt Colonel Flyman’s evidence was never to the effect that the appellants were a flight risk and the state did not advance this ground in opposing bail. Both second and third appellants had fixed addresses which were confirmed by the investigating officer to whom both had surrendered their travel passports. The presiding magistrate failed to advance any reasons why he found that the appellants were a flight risk.

- [20] He contended further that there was no evidence to support the allegations contained in subsection 60(4)(c) of the CPA that there was a likelihood that the appellants would attempt to influence or intimidate witnesses were they to be released on bail. On the contrary, the investigating officer testified that there were no such claims by the witnesses notwithstanding that the witnesses had testified against the first appellant months before the appellant was arrested. Even if the appellants knew the identity of the witnesses, this could be remedied by appropriate bail conditions. Besides, the appellants made a solemn undertaking that they would neither interfere with any witnesses nor tamper with the investigations in any manner whatsoever.

- [21] Mr Moruri also contended that despite the state witness' fear that public violence may be sparked by the release on bail of the appellants, hardly 50 people showed up in court on the one day of the bail proceedings, namely, the 11th of May 2023. Besides, two of the appellants' co-accused had been released on R10 000.00 bail each and there was no community uproar.
- [22] Mr Van Wyk contended that the presiding officer erred in making sweeping statements that the appellants failed to make out a case to be released on bail and that he failed to evaluate and analyse the personal circumstances of each applicant and to state the reasons for the refusal to release them on bail. He overlooked that the investigation was still at its infancy stage and that it would take a while before the case is ready for trial seeing that arrests were still taking place.
- [23] Mr Strauss emphasized the nature and seriousness of the crimes and that there was a likelihood that the release of the appellants would disturb the public order or undermine the public peace or security. He contended that the appeal should be dismissed on the basis of the grounds in section 60(4)(e) of the CPA even if the grounds in section 60(4)(b) and (c) are found to be just assumptions and not proven.
- [24] On the analysis of the judgment of the court a quo, it is evident that bail was refused on the basis that the grounds contained in sections 60(4)(b), (c) and (e) of the Act were established. On closer scrutiny, it is clear that the court only paid lip service to the provisions of sections 60(6), (7), (8A) and (9). In the case of the consideration of the grounds in sections 60(6) and 60(7), only selected sections were considered by the court. The omitted subsections 60(6)(a) - (e) and 60(6)(i)-(j) provide 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...
- (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."

- [25] The crucial factors contained in the omitted subparagraphs were not evaluated in the judgment to show that they were considered in assessing whether the ground in subsection 4(b) was established. In determining where the interests of justice lie, the essential exercise is to ascertain the relevant circumstances by using as a guide the checklist of relevant factors against the grant of bail provided in subsection (4), as particularised in subsections (5) -(8A), and of those for the grant of bail provided in subsection (9). In seeking to establish the presence of such factors the court is to act as proactively and inquisitorially as may be necessary. Having established all relevant factors, the court must weigh up the pros and cons of bail judicially, keeping in mind the possibilities of using appropriate conditions to minimise possible risks. [10]
- [26] Nowhere in the judgment was any consideration given to the imposition of suitable conditions as an alternative to refusing bail altogether. This, as stated in *Wilkinson vs S*, [11] is a compelling reason why interference on appeal is warranted as it constituted a failure by the court to exercise a proper discretion. The court, in this instance, failed to take into account the uncontested evidence of Lt Colonel Flyman that the second and third appellants had handed their passports over to the investigating officer and that the evidence presented by the state is that the appellants were not a flight risk.
- [27] Section 35 (1)(f) of the constitution provides that everyone who is arrested for allegedly committing an offence has a right to be released from detention if the interests of justice permit, subject to reasonable conditions. The bail provisions of the Criminal Procedure Act seek to give effect to this constitutional imperative. In terms of section 60 (11) (b) the court should be satisfied on a balance of probabilities that there has been sufficient evidence adduced by the appellant that permit his release.
- [28] Section 60(7) provides 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.”

[29] The court found that the ground in section 60(4)(c) was established simply by referring to sections 60(7)(a) and (d) and concluding,

without analysis or proactively and inquisitorially seeking to establish the presence of such factors, rejected the applicants’

evidence that they did not know the state witnesses. The court categorised the applicants’ evidence on that point as an argument that would defy logic and was questionable. The court misdirected itself when it came to this conclusion and finding that

section 60(4)(c) was established without grappling with the factors in the particular section.

[30] The court found that the ground in section 60(4)(e) was established based on the evidence before it and that the applicants did not deal with the factors contained in section 60(8) A. It stated that it considered the provisions of section 60(9) and weighed the personal circumstances of the applicants as against the interests of justice and on the evidence presented it was convinced that there was a prima facie case against applicants 1,2,3 and 4. Section 60(9) provides as follows:

“In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely-

- (a) the period for which the accused has already been in custody since his or her arrest;
- (b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
- (c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
- (d) any financial loss which the accused may suffer owing to his or her detention;
- (e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
- (f) the state of health of the accused; or
- (g) any other factor which in the opinion of the court should be taken into account.”

[31] It is clear that the court failed to take into account the factors in this subsection and misdirected itself as to the test applicable. On analysing the court’s reasoning, one would think that the court was applying a test applicable to a trial. In Sibiya,[12] It was said that:

“It is important to note that ss (4)(e) expressly postulates that it is to come into play only 'in exceptional circumstances'. This is a clear pointer that this unusual category of factors is to be taken into account only in those rare cases where it is really justified. What is more, ss (4)(e) also expressly stipulates that a finding of such exceptional circumstances has to be established on a preponderance of probabilities ('likelihood'). Lastly, once the existence of such circumstances has been established, para

- (e) must still be weighed against the considerations enumerated in ss (9) before a decision to refuse bail can be taken. Having regard to these jurisdictional prerequisites, the field of application for ss (4)(e) and (8A) will be extremely limited. Judicial officers will therefore rely on this ground with great circumspection in the knowledge that the Constitution protects the liberty interests of all. Incorrect application of the criteria listed in ss (4) by elevating one of them unduly, is a matter for the criminal justice system to remedy. It must do so by applying s 60(4)(9) in the balanced manner prescribed and in accord with 'the spirit, purport and objects of the Bill of Rights’.

[32] The court failed to take into consideration the evidence of Lt Flyman that during the days when the bail proceedings were held, less than 50 members of the public attended the court for only one day. Two of the accused have since been released on bail and there was no public outcry and disturbance. Furthermore, the court failed to state what the exceptional circumstances were to prove that the ground in this subsection was established.

[33] The court hearing bail application must express a balanced value judgment taking into account the factors mentioned in subsection (4). The reasons for refusal of bail can usually be found in one of two considerations, or both: (1) will the accused abscond; and (2) will the granting of bail lead to interference with the investigation and/or prosecution.[13] In *State v Swanepoel*[14]:

“Artikel 60(4) bepaal: ...

Hieruit volg dit, onteenseglik, dat die landdros nie kan bevind dat die weiering van borgtog in die belang van geregtigheid bloot is omdat daar 'n risiko of moontlikheid bestaan dat een of meer van die gevolge sal intree by vrylating nie. Die landdros kan nie in die donker rondtas en gis en raai om tot so 'n bevinding te kom nie. Hy moet bevind dat dit waarskynlik sal plaasvind. Indien hy nie kan bevind dat een of meer van die gevolge waarskynlik sal intree nie, kan hy nie bevind dat die aanhouding van 'n beskuldigde in belang van geregtigheid is nie en moet die beskuldigde in vryheid gestel word. Dit blyk dus duidelik dat die grondliggende beginsel by die reg insake borgtog is dat die borgtog toegestaan behoort te word behalwe waar dit nie in belang van geregtigheid is nie.”

[34] A court could therefore not find that the refusal of bail is in the interest of justice merely because there is a risk or possibility that one or more of the consequences mentioned in subsection (4) will result. The court cannot grope in the dark and speculate. A finding on the probabilities must be made and if it cannot be found that one or more of the consequences will probably occur then the detention of the accused is not in the interests of justice and they should be released. The evidence of both the state and the appellants show that they

are not a flight risk and in these circumstances, the court should always try to see whether suitable bail conditions would make bail possible rather than refuse bail.[15]

[34] In light of the above, I am of the view that the appellants are not a flight risk. I find that there is neither a likelihood that they will influence or intimidate witnesses nor undermine the criminal justice system if they were to be released on bail. The imposition of appropriate bail conditions will, in my view limit any risk that they may not stand their trial. The appeal should succeed and all the three appellants must be granted bail with appropriate conditions.

[35] Consequently, I grant the following order:

1. The appeal is upheld and the magistrate's order refusing bail is set aside.
2. Pending the outcome of the trial, the appellants are granted bail in the amount of R 10 000.00.
3. The appellants' release is subject to the following:

3.1 The appellants must appear in the Bloemfontein magistrate's court on each and every date to which their trial has been remanded

3.2 The appellants shall report to the Kagisanong Police Station on Mondays between the hours of 06h00 in the morning and 18h00 in the afternoon;

3.3 The appellants shall not directly or indirectly have contact with any state witnesses;

3.4 The appellants shall not leave the area of Bloemfontein without the written permission of the investigating officer;

JJ MHLAMBI, J

Counsel for the applicant: Mr C Van Wyk Instructed by: Legal Aid South Africa 4th Floor Fedsure Building Charlotte Maxeke Street Bloemfontein Counsel for the applicant: Mr K Moruri Instructed by: Moruri Attorneys Incorporated Office 03 Anglican Cathedral Cnr Saltzmann & St Georges' Street Bloemfontein Counsel for the respondent: Adv. M Strauss Instructed by: Director of Public Prosecutions Waterfall Building Bloemfontein

[1] Criminal Procedure Act 51/1977.

[2] Page 187, lines 16-25 and lines 1-6 of the transcript.

[3] Page 386 of the transcript.

[4] Page 407 of the transcript.

[5] Criminal Procedure Act 51/1977.

[6] Page 408, lines 6-8.

[7] Pages 408 and 409.

- [8] Page 409, lines 10-25.
- [9] Page 411 of the transcript.
- [10] S v Dlamini and Others 1999 (4) SA p680-681.
- [11] (20706/2014)
- [2014] ZASCA 192 (27 November 2014).
- [12] Supra, para 57.
- [13] Hiemstra's Criminal Procedure: Albert Kruger 9-11.
- [14] 1999 (1) SACR 311 (O) at page 313.
- [15] State v Branco 2002 (2) SACR 531 (W).
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