

SOUTH AFRICA / JUDGMENT

Munsamy v S (A34/2022) [2023] ZAGPJHC 972 (29 August 2023) [2023] ZAGPJHC 972

COURT

South Gauteng High Court, Johannesburg

BEFORE

Makume

CASE / FILE NUMBER

A34/2022

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REPUBLIC OF
SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG
CASE NO: A34/2022
NOT REPORTABLE
NOT OF INTEREST TO OTHER
JUDGES
REVISED

In the matter between: MAHENDREN
 MUNSAMY
 APPELLANT
 and
 THE STATE
 RESPONDENT

JUDGMENT**MAKUME J:**

- [1] This is an appeal against a judgement of the Regional Court Magistrate E.S. Magampa who presided over the bail application by the Appellant on new facts and refused to grant the Appellant bail.
 - [2] On the 24th January 2022 pursuant to the issuing of a Warrant of Arrest the Appellant a man of 55 years was arrested by Lieutenant Colonel Sandra Van Wyk from the DPCI. He is accused number 1 his co-accused were arrested on the 2nd February 2022 but have all been released on bail except him.
 - [3] All four accused are to appear before the Specialised Commercial Crimes Court in Palmridge and face charges of Fraud, Theft, Money Laundering Contravention of Section 6 of Act 121 of 1998. The charges relate to certain commercial transactions that the Appellant and the others concluded with the Complainant during 2017 and earlier. The offences fall within Schedule
6. He faces in all 24 counts.

BACKGROUND FACTS

- [4] Shortly after his arrest in January 2022 the Appellant applied on affidavit for his release on bail. Bail was refused on the 31st January 2022 where after he appealed against such refusal and on the 25th April 2022 before Strydom J in this Court the appeal against refusal of bail was dismissed. In that appeal the judge found that the Magistrate was not wrong in making a finding that there is a likelihood that the Appellant will commit an offence listed in Schedule 1.
 - [5] On the 24th March 2023 the Appellant once more appeared before the Regional Court Magistrate Magampa and applied for his release on bail based on new facts. The Application was dismissed. This appeal is aimed at challenging the decision dated the 24th March
2023. It is common cause that unlike in the first application the Appellant now chose to give oral evidence in support of his application to be released on bail. He was cross-examined extensively by the Respondent.
- [6] It is common cause that as the charges preferred against the Appellant are offences in Schedule 6 to the Criminal Procedure Act 51 of 1977 the task and onus of adducing evidence which will satisfy the Court that exceptional circumstances exist which in the interest of justice permits the Court to release him on bail in terms of Section 60(11)
- (a) of the Act, lies within the Appellant.
- [7] In his evidence in support of the new facts the Appellant testified about the following:

7.1 The current and deteriorating health of his wife.

7.2 Lack of proper facilities in prison which hamper his preparation for various civil and criminal matters affecting him.

7.3 His own deteriorating health condition.

7.4 The impact of the Appellants incarceration on him, his family- including his children's education.

7.5 The weakness of the state's case against him and that he will in all likelihood be acquitted.

7.6 The prejudice suffered by him as a result of the state failing to make arrangement that he be transported to Durban to attend one of his cases.

7.7 The offer of employment.

THE APPELLANT'S PERSONAL CIRCUMSTANCES

[8] In a letter addressed to the Commercial Crimes Court by a Mr Pottas dated the 15th July 2016 the Appellant is described as an adult male non-practising medical doctor. That he resided at 112A 9th Road Hide Park, Johannesburg. He is a director of Basadi Logix (Pty) Ltd. He is a director of others Companies through which he transacted.

[9] He is married and is the father of two elderly children both of whom still attend college or University.

THE NEW FACTS RELIED UPON FOR BAIL

[10] The Appellant argues that his wife is not well and he needs to be with her to give her the necessary moral support. His argument is that his wife is suffering from depression and he has supported her since 2008. In my view this can't be a new fact and falls to be dismissed in any case she is free to seek medical help elsewhere.

[11] The second new fact alleged by the Appellant is that he is confined to a small space in his cell and with the amount of paperwork concerning his civil and criminal matters that he is not in a position to prepare. Once more this can never have been a new fact. When he applied for bail in January 2022 he already had many civil and criminal cases facing him. In the result the learned Magistrate was correct in dismissing this as a new fact.

[12] The third new fact relied upon is the fact that Appellant says his health is deteriorating and that he needs specialists' attention. That also was correctly dismissed as the evidence is that Appellant has been having a heart-related problems since about 2011. He also did mention this in his first bail application. In any case all that he needs to do is to apply to the department to be taken to a specialist at his own expense.

- [13] The fourth ground is that as a result of his continued incarceration his children have had to stop attending University of their choice because of lack of funds. Whilst this could qualify as a new fact it has nothing to do with the requirement of exceptional circumstances. The Appellants children are free to apply to NSFAS for funding.
- [14] The failure by the Prosecutor to see to it that he should have been taken to KZN for his pending criminal case that can never be a factor in support of the onus on him to set out exceptional circumstances that merit his release. The fact that the matter was struck off the roll is in fact in his favour it would have been something else if the state had applied for his Warrant of arrest and estreatment of bail.
- [15] The Appellant says that he has been offered an opportunity to take up employment as a project manager. In view of the order that I contemplate making I say nothing about this issue as a new fact.

WEAKNESS OR OTHERWISE OF THE STATE CASE AND THE APPELLANTS

PROPENSITY TO COMMIT CRIMES

- [16] Section 60 (11) (a) of the Criminal Procedure Act 51 of 1977 provides as follows:

Notwithstanding any provisions of 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 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.
- [17] One of the reasons that the learned Magistrate in the Court a quo found to refuse bail is that the Appellant has pending cases further that because he committed the offence of fraud and theft whilst on bail on those other cases and therefore it must be concluded that the Appellant has a propensity to commit offence in Schedule 1.
- [18] Whilst it is correct that the Appellant has pending cases it is also correct that one of those was struck off the roll there has up to now been no indication that the matter will be re-enrolled for hearing. Secondly the one matter is dated 2013 i.e. the Swaziland matter. There is no evidence as to when that matter will be enrolled for hearing.
- [19] Section 60 (9) of the CPA enjoins a Court considering an application for release on bail to take into account several factors namely the period for which the accused has already been in custody since arrest. In this regard it is now almost 20 months that the accused has been in custody.
- [20] The probable period of detention until disposal or conclusion of the trial is another factor that a Court should take into consideration. A reading of the record when the Appellant gave oral evidence in his application on new facts runs into a number of pages. The cross-

examination lasted many days. Controversial argument surfaced during cross-examination of the Appellant understandably so because of the nature of the offence. Commercial transactions are known to elicit complex arguments and conclusions. It is in my view clear that this criminal trial will take many months before is it brought to conclusion unless there is some form of plea bargaining. This fact alone with others in my view suffices as exceptional circumstances.

- [21] The State's case is not necessarily weak as I have already said this matter arises out of a complex commercial transaction. The affidavit of Elliot Mashapa which was read into the record is evidence of a co-accused and at this stage cannot be considered against the Appellant. What is clear is that the Complainant Ravesh Moodley paid a lot of money into an account at the instance of the Appellant. That transaction will have to be dealt with in the trial not at the stage of bail application.
- [22] In *S v Botha and Ander* 2002 (1) SACR 222 (SCA) it was held that proof by an accused that he will probably be acquitted can serve as exceptional circumstances. In the Constitutional decision of *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 at paragraph 75 and 76 it was held as follows: "under the subsection for instance an accused charged with a Schedule 6 offence could establish the requirements by proving that there are exceptional circumstance relating to this emotional condition that render it in the interest of justice that release on bail be ordered notwithstanding the gravity of the case."
- [23] The fact that the Appellant presented oral evidence and subjected himself to intense cross examination should in my view lend credence to his belief that he may very well be acquitted. This suffices as exceptional circumstances.
- [24] The Appellant is a South African and has a family and commercial interest in this Country there is no evidence that he is likely to leave the country and evade justice. He has been in custody for more than a year and there has up to now been no evidence that he has in any manner interfered with the witnesses nor that his release will hamper the process of justice. A person released on bail is usually saddled with conditions that reassure not only his or her continued appearance in Court until finalisation of the matter but also provides some measure of protection to witnesses.
- [25] I am satisfied that the Appellant has put forward through his evidence exceptional circumstance and is accordingly entitled to be released on bail. I however, propose that stringent bail condition be attached to his release.

[26] In the result I make the following order:

Order

1. The Appeal against refusal to release the Appellant on bail is hereby granted. The Magistrate's order is set aside and substituted with the following:

- (a) The accused is to be released on payment of bail in the sum of R100 000.00 (One Hundred Thousand Rand).
- (b) Upon his release the accused shall attend Court on all the postponed days and shall remain in attendance until finalisation thereof.
- (c) The accused shall not make any contact with any witness in this matter.
- (d) The accused shall on his release submit to the Investigating Officer in this matter his International Travel documents and passport for safekeeping until this matter is finalised.
- (e) The Accused shall report to the Investigating Officer in this matter at Sandton Police Station on every Monday between 8am and 12noon until the case against him is finalised.

DATED at Johannesburg on this the August 2023.

M A MAKUME

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING : 17 AUGUST 2023

DATE OF JUDGMENT : AUGUST 2023

FOR APPLICANT :

ADV V.S. NOTSHE SC

INSTRUCTED BY :

DAVID H BOTHA, DU PLESSIS & KRUGER INC.ATTORNEYS

FOR RESPONDENT :

ADV T.R. CHABALALA

INSTRUCTED BY :

NATIONAL PROSECUTING AUTHORITY

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