

SOUTH AFRICA / JUDGMENT

Namlela and Another v S (CA&R 16/2024)

[2024] ZAECKMKHC 25 (7 March 2024)

[2024] ZAECKMKHC 25

COURT

Eastern Cape High Court, Makhanda

BEFORE

Govindjee

CASE / FILE NUMBER

CA&R 16/2024

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

OF INTEREST

Case no: CA&R 16/2024

In the matter between:

LEVISON NAMLELA

First Appellant

STEVEN MARUTA

Second Appellant

and

THE STATE

Respondent

BAIL APPEAL JUDGMENT

Govindjee J

Background

- [1] The appellants stand arraigned in the Magistrate's Court at Port Alfred on various charges, including contravention of sections of the Marine Living Resources Act, 1998[1] ('the MLRA') and the Immigration Act, 2002.[2]

- [2] Opposed applications to be released on bail were dismissed by the court a quo on 10 January 2024. Before considering the applicable constitutional and legislative framework, the reasoning of the court a quo and the grounds of appeal, a preliminary evidentiary matter requires determination.

Application to adduce further evidence on appeal

- [3] The appellants rely on two cases in support of their contention that they should be permitted to adduce further evidence before this court, on appeal.[3] Neither case deals with an application of this nature in the context of a bail appeal. As was the case in *S v Janssen*, [4] the proposition advanced is novel and, as will be indicated, seemingly unsupported in case law.

- [4] Bail applications are sui generis and unique, being neither civil nor criminal proceedings. Consequently, the rules of evidence applied in trial actions are not strictly

adhered to and the inquisitorial powers of the presiding officer are greater. To quote Kriegler J:[5]

‘An important point to note here about bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails, in the

main, protecting the investigation and prosecution of the case against hindrance.’

- [5] The State is not obliged to produce evidence in the true sense in bail proceedings, or bound by related formalities. The court may take into account whatever information is placed before it in order to form ‘what is essentially an opinion or value judgment of what an uncertain future holds. It must prognosticate’.[6] The court is not so much concerned with the rules of procedure regarding evidence but with the cogency of the information, to determine whether there is a likelihood of the interests of justice being prejudiced by the release of the accused.[7]

- [6] As for evidence on appeal, in *S v Ho*, [8] the court distinguished the present position from that in operation in terms of the previously applicable legislation:

‘The first point to be noted is that this is an appeal and not, as it was under the 1917 Act, an application. The case has therefore to be decided upon the material appearing on the record, including the magistrate’s reasons, either given at the time or furnished in terms of s 65(3). There is no provision for furnishing additional information to this Court. On the contrary s 65(2) provides: “An appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts are first placed before the magistrate or regional magistrate against whose decision the appeal is brought and such

magistrate or regional magistrate gives a decision against the accused on such new facts.” 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.’

[7] The position has been confirmed by Van Zyl J in this Division in *S v Yanta*:^[9]

‘Like any other appeal an appeal against the refusal of bail must be determined on the material on record. There is no provision for furnishing additional information to the Court hearing the appeal. In terms of s 65(2) an appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts were first placed before the court against whose decision the appeal is brought and such court has given a decision against the accused on such new facts.’

[8] I am bound by this decision and disinclined to deviate from it. The position may be different, in exceptional or so-called ‘peculiar’

cases,^[10] in respect of other kinds of appeals and reviews, such as in the case of remittal to a regional court for the hearing of further evidence following review and in appeals against sentence, based on the s 35(3) rights of an accused person to a fair trial.^[11] Where an accused has been convicted in a High Court, an application for fresh evidence to be led is governed expressly by s 316(5) of the CPA.^[12] It is also interesting to note that s 22 of the now repealed Supreme Court Act, 1959^[13] empowered higher courts to receive further evidence on the hearing of an appeal, or to remit the matter to the court of first instance for further hearing, with instructions as to the taking of further evidence as necessary. Although similar provisos have been included in chapter 5 of the Superior Courts Act, 2013,^[14] ‘appeal’ in chapter 5 is defined specifically to exclude appeals in matters regulated by the CPA or in terms of any other criminal procedural law.^[15] The rationale for the more generous approach prevalent in respect of appeals generally is also noteworthy, the dictates of fairness

requiring that all relevant information bearing on the question of guilt or innocence being placed before the trial court to enable it to determine the true facts in order to avoid injustice.^[16] Considerations pertaining to fair trial rights and questions of guilt or innocence, to be determined after trial, are not central to the present application.

[9] The appellants accept that the facts upon which they rely constitute ‘new facts’. They submit, however, that the presiding magistrate is clearly disqualified from hearing a bail application on new facts because she had authorised the search warrant and, furthermore, that the search warrant is fatally defective so that the State’s case is poor. This judgment does not pronounce upon those issues.^[17] Relying upon the available authorities, the point is that the present appeal is to be determined based on the record of the bail

proceedings in the court a quo, a bail application on new facts to be considered by the presiding magistrate or, if necessary, before a different magistrate, in the usual manner. I am unconvinced that cogent reasons exist to depart from this approach in the present circumstances.[18]

[10] In addition, I consider that to do so would open the door to attempts to bypass the court a quo in circumstances where this is unwarranted. Even if there may be a good basis for a presiding officer to recuse themselves in certain

circumstances when faced with an application based on new facts, this should be pronounced upon by that magistrate. If necessary, I see no reason why another magistrate may not be allocated to consider the matter thereafter, bearing in mind that the accused stand arraigned in that court. To hold otherwise would be to turn an appeal court into a court of first instance, saddling this court with an obligation to receive evidence, in circumstances where this has not been contemplated by the legislature. Whether there are 'new facts' for a renewed bail application, and their effect on the outcome, will be decided by that court and that determination may then be subjected to further appeal.[19] It goes without saying that the appellants have a right to a reasonable opportunity to present new facts for purposes of a renewed

bail application before a magistrate, and that this right should not be denied without good reason. [20]

[11] The application to adduce further evidence is accordingly refused.

The legal position

[12] A judge hearing an appeal shall not set aside the decision against which the appeal is brought, unless the judge is satisfied that the decision was wrong, in which event the judge shall give the decision which in their opinion the lower court should have given.[21] The real question is therefore whether the presiding magistrate exercised their discretion, in refusing bail, wrongly.[22] As Hefer J held in *S v Barber*: [23]

'It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive

application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, 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. I think it should be stressed that, no matter what this Court's own view are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.'

[13] It is accepted that interference is also justified where the lower court 'overlooked some important aspects' in coming to the decision to refuse bail.[24]

[14] The factors that the court a quo had to consider in determining the question of interests of justice are outlined in s 60(4) of the Act. According to the section, the interests of justice would not permit the release of the accused if one or more of the following grounds are, inter alia, shown to exist:

‘(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 ...

(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;’

[15] In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors, namely[25] –

‘(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.’

[16] Section 60(8) provides that –

‘[i]n 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 factor which in the opinion of the court should be taken into account.'

[17] Section 60(9) provides additional guidance:

'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.'

[18] Bearing in mind the importance of personal liberty and the presumption of innocence, the appellants have the right to be released on bail, subject to reasonable conditions, if the interests of justice permit.[26] Before refusing bail, the court must be satisfied that there is a probability, and not a mere possibility, of one or more of the factors mentioned in s 60(4) of the CPA occurring.[27] It is for the appellant to show that the court a quo overemphasised aspects which militate against the granting of bail, whilst aspects in favour of the appellants were not given sufficient

weight:[28]

'I am of the view that this court can only conclude that the court a quo was "wrong" if it considers all the relevant aspects for and against the granting of bail to the appellant. If this court then is of the view that the court a quo, in the light of all these circumstances, should have granted bail to the appellant, the only conclusion would then be that the court a quo's decision was wrong ... Thus, to be successful in this appeal the appellant will have to show that the court a quo overemphasised aspects which militate against the granting of bail, whilst aspects in favour of the appellant were not given sufficient weight. It speaks for itself that, if this court cannot conclude that the court a quo wrongly weighed up the points for and against the granting of bail,

this court would not be at liberty to consider the issue of bail afresh. The court a quo's decision will have to stand.'

The decision to refuse bail

[19] The court a quo correctly held that the onus was on the State to adduce evidence to show on a balance of probabilities that it would not be in the interests of justice for the appellants to be released on bail, given the nature of the alleged offences. The magistrate also correctly identified various relevant subsections, cited above, in determining the applications, emphasising the need to weigh the interests of justice against the appellants' rights to personal freedom and, particularly, any prejudice likely to be suffered as a result of detention.[29]

[20] Considering the nature of the evidence led, the court a quo cannot be faulted for focusing specifically on s 60(4)(b) and s 60(4)(d), coupled with s 60(6), s 60(8) and s 60(9). The magistrate had regard to the evidence tendered by way of affidavit, including undisputed

information from the Department of Home Affairs reflecting that the appellants were both undocumented. It was therefore accepted that the appellants were not lawfully present in the country. This fact, coupled with the lack of a fixed address, was emphasised, it being noted that addresses at 'Martindale Farm' and Makhanda had been provided, as well as a false residential address in Gqeberha in respect of one of the appellants. The court a quo ultimately rejected the applications for bail, concluded as follows:

'From what has been tendered before this Court, the Court can safely prove that the provisions of section 60(4)(b) as well as (d) have been proved by the State. That indeed, they are flight risks. They do not have passports. They do not have emotional ties, family ties. And the State did not address the Court in as far as extradition. The strength of the State's case remains strong.

Nothing was said coming from the applicants. Now the Court also has to look at the binding effect and enforceability of bail conditions

which may be imposed ... And also the fact that they do not have fixed addresses. All these addresses that they have mentioned. They are leased by an unknown person or an unknown Chinese who could not come and assist the Court. They tendered evidence that they are employed. As to where? Nobody knows. It remains unclear or not true or as evidence that is being furnished as false. So, the Court is not convinced, taking into account everything in totality.'

The appeal

[21] Various grounds of appeal are raised in the appellants' amended notice of appeal. Leaving aside those grounds based upon the application to adduce new evidence, the crux of the complaint is that the magistrate failed to properly analyse and consider all the evidence in determining the interests of justice, in the context of the applicable constitutional and legislative framework, including s 60(4). This bearing in mind that the State had adduced evidence by affidavit. The fact that the appellants have no previous convictions or other

pending cases was, it is submitted, not afforded the proper weight and the court a quo also erred in failing to find that the State's case was 'non-existent or open to serious doubt'. The finding that the appellants do not have fixed addresses and furnished false addresses to the police is also challenged.

Analysis

[22] The appellants are charged with schedule 1 offences so that the State bore the onus of proving that it is not in the interests of justice for the appellants to be granted bail. Did the State do so on a balance of probabilities or did the magistrate exercise their discretion in refusing bail wrongly?

[23] Considering the list of factors contained in s 60(6) of the CPA, I am unable to find that the decision of the court a quo was wrong. No real emotional, family, community or occupational ties of the appellants to the place where they are to be tried is apparent. That both appellants indicate that they have been in the country for five years and stayed at the farm where they were apprehended since September 2023, in unexplained circumstances, does not alter the position. There is also no explanation of the link between the appellants and the address they provided during their bail applications and as an alternative address to the police, a property seeming the subject of a sale to a Chinese national. Neither appellant holds any assets. Both entered the country unlawfully, suggesting that the absence of travel documents will not be a bar to their departure pending trial.[30] Both face serious charges and the nature and gravity of the punishment which is likely to be imposed should the accused be convicted also count against them. As a further consideration, no information was forthcoming as to the identity of their employer or the location of their work.

[24] It is apparent from the summary of the decision of the court a quo that little or no weight was attached to the strength of the case against the accused. This is unsurprising when considering the

contents of the affidavit relied upon by the State: Warrant Officer Fullarton made no mention of a strong case, relying only on the serious nature of the charges and possibility of lengthy prison terms, in addition to the factors directly relevant to possible trial evasion. The nature and gravity of the charge is a distinct consideration from the strength of the case against the accused, in terms of s 60(6). Counsel for the State also made no mention of any matter indicative of a strong case, closing the State's case once Fullarton's affidavit was read into the record and the various affidavits were admitted into evidence. The affidavits of the appellants, read into the record by their representative during the bail proceedings, made no mention of any consideration relevant to the strength of the case against them, both appellants choosing not to disclose the basis of their defence until trial. The entire paragraph of the judgment referring to the strength of the State's case constituted an attempt to apply ss 60(4)(b) and (d), as confirmed by the explicit reference in the paragraph to elements contained in those subsections. To the extent that the court a quo considered the State's case against the appellants to be strong, it may be criticised for doing so in blanket fashion, as opposed to specifying that the comment was only applicable in

respect of count 3. The strength of the State's case in respect of that count cannot be gainsaid. Even if this were not the case, the other factors remain in force and justify the outcome reached by the magistrate, the central issue being whether the interests of justice permit release on bail, rather than an assessment of the strength of the State's case.[31]

[25] The record reflects that the appropriate factors were given due consideration by the court a quo. Cumulatively they are such that on the probabilities there is a likelihood that the appellants, if released on bail, will attempt to evade trial. The magistrate cannot be faulted for arriving at that conclusion, based on s 60(4)(b) read with s 60(6), balancing the interests of justice against the right of the appellants to their freedom in an appropriate manner. In coming to this conclusion, I am mindful of the constitutional basis upon which s 65(4) ought to be interpreted whenever a court of appeal exercises its appellate authority in bail proceedings.[32]

[26] It is accordingly unnecessary to consider whether there is the likelihood that the appellants, if released on bail, will also undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system, merely because of the different addresses provided to the investigating officer and in their bail applications.

Order

[27] The appeals against the court a quo's refusal to grant bail are dismissed.

A GOVINDJEE

JUDGE OF THE HIGH COURT

Heard: 05 March 2024

Delivered: 07 March 2024

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[1] Act 18 of 1998.

[2] Act 13 of 2002.

[3] S v De Jager 1965

(2) SA 612 (A); Seedat v S

[2016] ZASCA 153 para 21.

[4] S v Janssen 2010

(1) SACR 237 (ECG) para 2.

[5] S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat

[1999] ZACC 8; 1999

(2) SACR 51 (CC) at 63e -- 64a.

[6] S v Schietekat 1998

(2) SACR 707 (C) at 713h – 714a.

[7] S v Yanta 2000

(1) SACR 237 (Tk) at 246H – I.

[8] S v Ho 1979

(3) SA 734 (W) at 736E – H. The reference to the ‘1917 Act’ is to the repealed Criminal Procedure and Evidence Act, 1917.

- [9] S v Yanta above n 7 at 249E – J. See S v Baleka and Others 1986 (1) SA 361 (T) at 375E–J: if, after refusal, new facts arise or are discovered, provision is implicitly made by s 65(2) for the renewal of the bail application in order to place the new facts before the lower court, it being ‘expressly provided that new

facts

which arise or are discovered after the decision appealed against may not be used as the basis for an appeal unless they have first been placed before the magistrate who gave the decision appealed against, and he has also given a decision against the accused in the light of such new facts ...’

- [10] See S v EB 2010

- (2) SACR 524 (SCA) para 5.

- [11] Mziako v Director of Public Prosecutions, Transvaal & Another 2001

- (2) SACR 231 (T); Cf S v Marx 1992

- (2) SACR 567 (A) at 573i–j; S v Swart 2004

- (2) SACR 370 (SCA) para 6.

- [12] S 316(5)(a): ‘An application for leave to appeal under subsection (1) may be accompanied by an application to adduce further evidence ...’. Constitutional appeals are governed by different considerations altogether. In exceptional circumstances, and in terms of its inherent jurisdiction, the SCA may also order the reopening of a case before a trial court: see N Whitear-Nel ‘Evidence’

- (2010) 2 SACJ 289.

- [13] Act 58 of 1959.

- [14] Act 10 of 2013.

- [15] Cf Mulala v S [2014] ZASCA 103.

- [16] S v Ndweni and Others 1999

- (2) SACR 225 (SCA) at 230B–D.

- [17] See S v Udeobi (unreported, ECG case no 158/2018, 13 July 2018).

- [18] See S v Green and Another

- [2006] ZASCA 3; 2006 (1) SACR 603 (SCA) para 25, the court making no order on appeal as to bail.

- [19] Ibid.

- [20] S v Nwabunwanne 2017

- (2) SACR 124 (NCK) para 25.
- [21] S 65(4) of the Criminal Procedure Act, 1977 (Act 51 of 1977) ('the Act'). Cf *Bechan and Another v SARS Customs Investigations Unit and Others*
- [2024] ZASCA 20 para 22.
- [22] *S v Barber* 1979
- (4) SA 218 (D)
- [23] *Ibid* at 220E – G.
- [24] *Alehi v S* [2021] ZAGPPHC 492; 2022 (1) SACR 271 (GP) para 21.
- [25] S 60(6) of the CPA.
- [26] *S v Branco* 2002
- (1) SACR 531 (W) at 532H and following.
- [27] *S v Diale and Another* 2013 (2) SACR 85 (GNP) para 14.
- [28] *S v Zondi* 2020
- (2) SACR 436 (GJ) para 14.
- [29] S 60(9) of the CPA.
- [30] See *S v Mwaka* 2015 (2) SACR 306 (WCC) para 20.
- [31] *S v Udeobi above n 17* para 11; *S v Malumo & 111 Others* (2) 2012 (1) NR 244 (HC) para 30.
- [32] *S v Porthen & Others* 2004
- (2) SACR 242 (C) paras 17, 18.

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