

SOUTH AFRICA / JUDGMENT

Nyakane v S (Bail Appeal) (CAB18/2024)
[2024] ZANWHC 301 (6 December 2024)
[2024] ZANWHC 301

COURT
North West High Court, Mafikeng

BEFORE
Wessels

CASE / FILE NUMBER
CAB18/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE NUMBER:CAB18/2024
MAGISTRATE CASE
NUMBER:M80/2024
Reportable: YES / NO
Circulate to Judges: YES
/ NO

Circulate to Magistrates: YES / NO
Circulate to Regional
Magistrates: YES / NO

In the matter between: MOKHETHI
NYAKANE
APPELLANT
and
THE
STATE
RESPONDENT
Coram: WESSELS AJ
Date: 6 December 2024
ORDER
i.The appeal against the
refusal of bail is dismissed.

JUDGMENT

- [1] This bail appeal emanates from a decision of the Rustenburg Magistrate's Court to refuse bail.
- [2] The appellant faces a charge of assault with the intent to cause grievous bodily harm for the assault of the complainant, with a bottle, wherein the complainant sustained serious injuries. On 4 July 2024, Magistrate Fortuin dismissed the appellant's bail application. The notice of appeal was filed on 12 November 2024

and the appeal was initially set down for hearing on 22 November

2024. On 22 November 2024, this Court postponed the bail

application to 4 December 2024 for filing of the complete record of the proceedings in the court a quo.

- [3] The grounds of appeal are the following:

"1. The learned had Magistrate erred in finding that the Appellant did not succeed in proving that the interests of justice permit his release on bail as required by section 60 (11) (b) of the Act.

2. The learned Magistrate erred by not considering the totality of the evidence or the facts presented in the Appellant's bail application, as a whole or cumulatively, as required by various case laws which were submitted by the Appellant, in that:
 - (a) The learned Magistrate disregarded the facts that the Appellant is not a flight risk and that his address was verified by the state also furnished an alternative address.
 - (b) The learned Magistrate failed to consider the fact that the Appellant co-operated with the police upon his arrest.
3. The learned Magistrate erred in that he wrongly exercised his judicial discretion in the Appellant's bail application by placing the requirement to prove "interests of justice" in a schedule 5 bail application so high to make it impossible for the Appellant to get bail even though the interests of justice clearly called for the release of the Appellant on bail.
4. The. learned Magistrate erred in that he failed to exercise his discretion and to apply his mind to the main considerations regarding the interests of justice in terms of section 60(4)-(10) of the Act, which factors were generally or largely in favour of the Appellant's release on bail.
5. The learned Magistrate erred by refusing to admit the Appellant on bail application without considering the lengthy probable period of detention which the Appellant may be subjected to when awaiting trial or the conclusion of his case.

6. The learned Magistrate erred by not exercising his discretion in an impartial and objective manner in deciding the issues he was called upon to adjudicate.
7. The learned Magistrate erred by failing to consider the main purpose or objectives of bail because the learned Magistrate was more concerned about the merits of the case and the defence of the Appellant who was not obliged to tender a defence at the stage of bail application.
8. The learned Magistrate erred by concluding that the Appellant is an immigrant and will flee the country once released on bail (this fact is deducted from the learned Magistrate's judgement on the Appellant's bail application - Page 21 of the paginated records).
9. The learned Magistrate erred in that his decision to refuse to admit the Appellant on bail was technically a form of a provisional finding of guilt against the Appellant, which goes against the well-established principles concerning bail.
10. The learned Magistrate erred in that his decision to refuse to admit the Appellant on bail was technically as a form of anticipatory

punishment in that, the learned Magistrate made a number of conclusions against the Appellant based on the state's version of events which are still to be challenged by the Appellant in the subsequent trial when the investigations are complete.

11. The learned Magistrate erred in that he failed to consider all the relevant factors in the Appellant's bail application and to find cumulatively that those factors constituted which in the interests of justice permit the release of the Appellant on bail.
 12. The learned Magistrate erred in that he ought to have granted the Appellant bail and set appropriate conditions instead of denying bail.
 13. The learned Magistrate erred in finding that the Appellant would commit a schedule 1 offence.
 14. The learned Magistrate erred in finding that there is a likelihood that the Appellant would attempt to evade trial.
 15. The learned Magistrate erred in not considering the Appellant's enshrined Constitutional right in terms of Section 35.
 16. The learned Magistrate erred in finding that that the Appellant will violate bail conditions if released on same as he found his way to the hospital where the complaint was, whilst in truth, the Appellant took the complainant to hospital as testified by the complainant.”
- [4] Section 60(11)(c) of the Criminal Procedure Act[1] (“CPA”) provides for the following test to be employed in a bail application in the case of assault with the intent to cause grievous bodily harm:

“Notwithstanding any provision of this Act, where an accused is charged with an offence—

(a)...

(b)...

- (c) contemplated in section 59 (1) (a) (ii) or (iii), 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.”

(own emphasis)

- [5] The reference to Section 59(1)(a)(ii) and (iii) of the CPA in Section 60(11)(c) above denotes assault when a dangerous wound is inflicted, the infliction of grievous bodily harm or a threat of grievous bodily harm against or on a person with whom the accused is in a domestic relationship.
- [6] In *Kula v S*[2], in a judgment from this division, Petersen J succinctly dealt with the impact of section 60(11)(c) read with section 59(1)(a)(ii) and (iii) of the CPA brought about by the Criminal and Related Matters Amendment Act, Act 12 of 2021 (“the CRMAA of 2021”) with effect from 5 August 2022. The following extracts of *Kula* are apposite:

“[7] Since the decision of the Constitutional Court in S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat, the bail legislation ensconced in Chapter 9 of the CPA has been amended from time to time, with the most recent amendments brought about by the Criminal and Related Matters Amendment Act, Act 12 of 2021 (“the CRMAA of 2021”) with effect from 5 August

2022. The present appeal provides an opportunity to revisit the salutary wisdom of the justices of the Constitutional Court in *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* as a reminder of one of the most difficult tasks a judicial officer and more so Magistrates are called upon to perform on a daily basis, and the diligence required in dealing with bail applications.

...

Chapter 9 of the Criminal Procedure Act, Act 51 of 1977 (BAIL): The amendments brought about by the CRMAA of 2021” with effect from 5 August 2022

- [9] Against the background of *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat*, I turn to the drastic changes brought about by the CRMAA of 2021 with reference to Chapter 9 of the CPA dealing with bail, with effect from 5 August 2022.
- [11] To appreciate the tenor of this judgment and the ultimate decision of this Court, an overview is provided of the changes brought about by the CRMAA of
2021. For purposes of the present discussion and this appeal, s 59 of the CPA as amended by s 2 of the CRMAA of 2021 with effect from 5 August 2022 provides that:

“59 Bail before first appearance of accused in lower court

- (1) (a) An accused who is in custody in respect of any offence, other than an offence-
- (i) referred to in Part II or Part III of Schedule 2;
- (ii) against a person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998); or
- (iii) referred to in-
- (aa) section 17 (1)
- (a) of the Domestic Violence Act, 1998;
- (bb) section 18 (1) (a) of the Protection from Harassment Act, 2011 (Act 17 of 2011); or
- (cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.”
- (my emphasis)

[12] The introduction of s 59(1)(a)(ii) and (iii) has brought about a new bail dispensation to deal with the scourge of gender based violence which has sadly engulfed our nascent democracy. There are in fact now four categories of bail applications which a Court may be called to adjudicate. These include a bail application in respect of offences identified in ss 60(11)(a), (b) and (c) and any other bail application not falling within the ambit of the aforesaid sections. Section 59(1)(a)(ii) and (iii) must now be read conjunctively with the newly introduced s 60(11)(c) which provides that:

“60(11) Notwithstanding any provision of this Act, where an accused is charged with an offence –

- (c) contemplated in section 59(1)(a)(ii) or (iii), 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. (my emphasis)

[13] An observation is made in passing that it is not entirely clear why the legislature elected to couple s 60(11)(c) with s 59(1), which deals with offences for which bail may be granted by any police official of/or above the rank of non-commissioned officer,

in consultation with the police official charged with the investigation, rather than provide a distinct schedule in the CPA similar to schedules 5 and 6. This may hold the potential for misconstruing of s 59(1) by certain police officials, contrary the intention of the legislature.

[14] The appellant is alleged to have killed the deceased with whom he was in a domestic relationship as envisaged in section 1 of the Domestic Violence Act, Act 116 of 1998 in that they were either married according to any law, custom or religion. The introduction of s 60(11)(c) read with s 59(1)(a)(ii) and (iii) effectively means that murder under schedule 5 no longer finds applicability to murders alleged to have been perpetrated if the jurisdictional fact in section 59(1)(a)(ii) is present. I deal with the State's reliance on schedule 6 later.

[15] How would it be established that s60(11)(c) read with s 59(1)(a)(ii) and (iii) is applicable in any bail application? This can manifest itself in one of two ways. Firstly, it is implicit in s 50(6) that an accused must be informed of the charge on which he has been detained. The information about the charge is by implication within the knowledge of the State and should be made clear to the accused and the Magistrate, either in the charge sheet or placed on record by the prosecutor, s 50(6)(a) of the CPA reads thus:

"50(6) (a) At his or her first appearance in court a person contemplated in subsection (1)(a) who —

(i) was arrested for allegedly committing an offence shall, subject to this subsection and section 60—

(aa) be informed by the court of the reason for his or her further detention; or

(bb) be charged and be entitled to apply to be released on bail, and if the accused is not so charged or informed of the reason for his or her further detention, he or she shall be released; or

(ii) was not arrested in respect of an offence, shall be entitled to adjudication upon the cause for his or her arrest."

[16] Secondly, the provisions of s 60(11)(c) read with s 59(1)(a)(ii) and (iii) would be triggered by the provisions of the newly introduced section 60(11B)(a)(iii) which compels an accused:

"(11B)(a) In bail proceedings, the accused, or his or her legal adviser, is compelled to inform the court whether —

(i) the accused has previously been convicted of any offence;

(ii) there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges;

(iii) an order contemplated in section 5 or 3>6 of the Domestic Violence Act, 1998, section 3 or 3>9 of the Protection from Harassment Act, 2011, or any similar order in terms of any other law, was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, and whether such an order is still of force; and

(iv) the accused is, or was at the time of the alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998.

- (b) Where the legal adviser of an accused on behalf of the accused submits the information contemplated in paragraph (a), whether in writing or orally, the accused shall be required by the court to declare whether he or she confirms such information or not”.

(my emphasis)”

- [7] From the evidence adduced by the complainant in the bail application, the appellant and the complainant were in a domestic relationship. The domestic relationship referred to by the complainant in the bail application resonates with the definition of a domestic relationship as is found in the Domestic Violence Act[3] on the basis that the complainant and the appellant lived together in a relationship and are both the biological parents of a minor child.
- [8] The test that the court a quo was expected to apply, was whether it would be in the interests of justice to release the appellant on bail.
- [9] The principle of the “interests of justice” is to be applied in accordance with the grounds as found in Section 60 (4) of the CPA.

“(4) 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;”
- [10] This Court’s powers in hearing an appeal against the refusal of bail is governed by section 65(4) of the CPA, which 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 opinion the lower court should have given.
- [11] The provisions of Section 65(4) of the CPA are nuanced in the following remarks by the court in *S v Barber*[4]:

“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 views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.”

- [12] The evidence of the complainant is that she was residing with the appellant but is no longer doing so resulting from what the complainant described as numerous incidents of physical assault by the appellant. Previous charges of assault laid by the complainant were all withdrawn due to the intervention of the appellant’s family.
- [13] Furthermore, the complainant testified that the appellant threatened that if he was arrested for any charges laid by the complainant, he would kill her and flee to Lesotho. Having been assaulted by the appellant in the assault that led to the appellant’s arrest in this matter, the appellant locked the complainant in a room. With the help of a friend, the complainant was liberated from this room and taken to hospital.
- [14] As a result of the injuries caused by the assault, the complainant has lost her eyesight.
- [15] As has become a practice in many bail applications, the appellant presented his evidence in the bail application by means of an affidavit. The appellant’s affidavit merely replicates the principles to be considered in a bail application as opposed to take issue with the facts at hand.
- [16] The salient points of the appellant’s evidence are as follows:
- 16.1. He denied that he would be any danger to the safety of the public or any other particular person and would not commit a Schedule 1 offence. Furthermore, that there is no likelihood of him evading trial and that he will not interfere with any witnesses.
- 16.2. He has no access to evidentiary material that is to be presented at trial and he will not undermine or jeopardise the objective and proper functioning of the criminal justice system.
- 16.3. The appellant does not intend to reside in the same residence as the complainant if released on bail.
- 16.4. The appellant is not married and earns R5,000.00 from performing odd jobs. He holds an immovable property in Marikana West and will surrender his passport to the South African Police Service.
- 16.5. He confirmed that she will stand trial and will plead not guilty to the charges for which he will be acquitted.
- 16.6. He has no previous convictions.

- [17] As had become a widely applied practice, the appellant brought his bail application on affidavit. There normally exist good reasons for presenting the applicant's evidence through affidavit in bail proceedings but a "one size fits all" approach is not always preferable as is the case with the appellant's evidence in the bail application. The affidavit that served before the court a quo deals in very broad and general terms with the considerations as outlined in Section 60 of the CPA. The affidavit does not deal with, or contradict any part of the complainant's evidence.
- [18] In the appellant's affidavit, he merely states that he intends to plead not guilty to the charge brought against him. The appellant's assertion that he intends to plead not guilty, is the high watermark of the appellant's attempt to deal with the facts surrounding the charge levelled against him. The following remarks made by the Constitutional Court in *S v Dlamini*[5] insofar as it relates to how an applicant in bail proceedings can deal with the issue of guilt are apposite:

"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."

- [19] In addition to presenting his evidence in the bail application only by way of affidavit, the appellant's version of the facts in her evidence was open to scrutiny in cross-examination to assess the complainant's evidence. That did not happen. The mundane and brief nature of the cross-examination did not refute the complainant's evidence.
- [20] In dealing with the evidence as was produced by the appellant on affidavit, the Supreme Court of Appeal stated in *Mathebula v S*[6] that:

"But a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge: S v Botha 2002"

- (1) SACR 222 (SCA) at 230h, 232c; *S v Viljoen* 2002
- (2) SACR 550 (SCA) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the state is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see *Shabalala & Others v Attorney-General of Transvaal and Another* [1995] ZACC 12; 1996

(1) SA 725 (CC). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the state to rebut his evidence to that effect: *S v Viljoen* at 561f-g”. (own emphasis)

[21] What the undisputed evidence of the complainant distils down to is the following:

21.1. The appellant and complainant are in a domestic relationship;

21.2. The complainant was assaulted by the appellant on many previous occasions, which cases have been reported to the SAPS but have subsequently been withdrawn by the complainant.

21.3. The appellant threatened to kill the complainant if she laid charges against him whereafter the appellant threatened to flee to Lesotho.

21.4. There is a protection order against the appellant, the terms of which have been contravened by the appellant.

21.5. The complainant believes that if released, the likelihood exists that the appellant will commit a Schedule 1 offence.

[22] Having regard to the evidence of the appellant measured against the evidence of the State, the appellant failed to prove that it will be in the interest of justice if the appellant is released on bail. This leaves this court to conclude that the order of the Magistrate cannot be faulted.

[23] This Court cannot come to the finding that the decision of the Magistrate in refusing bail was wrong.

Order

[24] In the result, the following order is made:

M WESSELS

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

Date of hearing

: 4 December 2024

Date of judgment

: 6 December 2024

APPEARANCES

Counsel for appellant : Adv Mogiowa

Instructed by

: Marema F Attorneys

c/o M Moshidi Inc

Mahikeng

Counsel for Respondent : Adv Tlatsana

: Directorate of Public Prosecutions

[1] Criminal Procedure Act 51 of 1977

[2] Kula v S [2023] ZANWHC 35

[3] Domestic Violence Act 116 of 1998

[4] S v Barber 1979 (4) SA 218 D at page 220 E-H

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

[1999] ZACC 8; 1999 (4) SA 623 (CC) at paragraph 11

[6] Mathebula v S [2009] ZASCA 91 at paragraph 12

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