

SOUTH AFRICA / JUDGMENT

Sewpersad v S (D13878/18) [2019] ZAKZDHC 1 (18 January 2019)

[2019] ZAKZDHC 1

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Henriques

CASE / FILE NUMBER

D13878/18

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. D13878/18

In the matter between:

SACHIN SEWPERSAD APPELLANT

and

THE STATE RESPONDENT

O R D E R

The appellant's appeal against the refusal to admit him to bail is dismissed

J U D G M E N T

Henriques J

Introduction

[1] This is an appeal against the refusal by Magistrate Coetser, presiding in the Ramsgate Magistrate's Court on 28 November 2018, to admit the appellant to bail. On 10 January 2019, I issued

the order and indicated reasons were to follow in a written judgment. This is the written judgment.

Offences

- [2] The appellant is charged with fraud, in the matter which formed the subject matter of the bail proceedings in the court a quo.

Although no formal charge sheet forms part of the record it would appear from the transcript of the proceedings that the charge faced by the appellant was one of fraud in the sum of R350 000.

- [3] At the commencement of the bail proceedings it was agreed with the appellant's legal representative that he bore the onus to satisfy the court that the interests of justice permit his release on bail as the offence fell under Schedule 5 of the Criminal Procedure Act 51 of 1977 ('the CPA').
- [4] During the course of the bail proceedings, the respondent, in opposing the granting of bail, led the viva voce evidence of the investigating officers Warrant Officer de Witt and Warrant Officer van der Merwe. After the respondent presented evidence, the appellant elected not to testify and filed an affidavit in support of his bail application. The original signed affidavit does not form part of the record of these proceedings. At the commencement of the matter, Mr Winfred confirmed that the unsigned affidavit[1] is an exact replica of the affidavit used in the court a quo.
- [5] In the judgment in the bail application, the court a quo considered the affidavit of the appellant and the evidence of the two

investigating officers.

- [6] In her judgment[2] the magistrate considered the following:

- (a) the issue for her to decide was whether or not it would be in the interests of justice for the appellant to be released on bail;
- (b) that there were three matters pending in which the complainants are to still make statements for charges to be opened;
- (c) the fact that in total the appellant faced seven counts of fraud across the country which are cases pending in court;
- (d) that these pending fraud matters span a period of time from 2016 to 2018[3];
- (e) that she did not have to decide whether or not the appellant was guilty[4];
- (f) competing interests-the appellant's right to liberty as opposed to the interests of the community[5];
- (g) that although she could not find that the appellant would evade trial or interfere with witnesses, the appellant had a propensity to commit fraud offences and faces a number of counts in various courts[6];

- (h) that although the appellant had not been convicted of the offences, he was facing several counts across the country and she was of the view that if he were to be released on bail the appellant will continue with his 'fraudulent activities'[7];
 - (i) that there was a warrant of arrest pending for the appellant which had not been executed and evidence was led by the investigating officer, Warrant Officer van der Merwe, that such warrant of arrest would be executed[8] once the bail proceedings had been concluded.
- [7] The nub of the court a quo's judgment is that the magistrate was of the view that the appellant had not satisfied the court that the requirements set out in s 60(11)(b) had been met in that he had failed to prove on a balance of probabilities that it would be in the interests of justice[9] for him to be released on bail.

The affidavit of the appellant

- [8] The appellant in his affidavit deals with his personal circumstances, his lack of previous convictions, his non-attendance at court and his adherence to bail conditions. Notably the appellant does not indicate in his affidavit whether he intends to plead guilty or not guilty to the current offence and he also does not deal with the respondent's case against him, specifically the evidence of the investigating officers relating to the three pending cases; the fact that he currently faces seven counts of fraud; the evidence in respect of the doctors' certificate; his failure to comply with the request for him to make a statement in the current matter, and an undertaking to repay the complainant.
- [9] The appellant's affidavit deals to a limited extent with the requirements envisaged in terms of section 60(4) to s 60(9) of the CPA, and, in the last paragraph[10] thereof, he submits that he has discharged the onus to show it is in the 'interests of justice' that he be released on bail.

The respondent's opposition

- [10] The investigating officers, Warrant Officers De Witt and Van Der Merwe, in essence testified that the respondent's basis for opposing bail were the following reasons, namely:
- (a) the appellant is considered a flight risk;
 - (b) he does not have a fixed address;
 - (c) the appellant did not comply with his bail conditions and failed to make a court appearance submitting a doctor's certificate which prima facie appeared to be false when compared to cell phone records;
 - (d) he has a propensity to commit similar offences as there are currently seven similar fraud matters pending in various courts throughout the country;

- (e) there are currently three fraud matters in respect of which the complainants, for reasons stated in the record, have not yet been able to make affidavits in order for charges of fraud to be opened;
- (f) since his arrest on 19 November 2018 there have been similar cases opened for similar offences;
- (g) there is a pending warrant of arrest for the appellant which has yet to be executed;
- (h) in respect of the complaint registered in Port Shepstone on 21 August 2018 (Port Shepstone Cas 346/8/2018), the appellant was requested to provide a warning statement prior to a warrant for his arrest being obtained. He failed to comply with the telephonic undertakings to provide a warning statement and promised to repay the complainant the money.

Grounds of appeal

- [11] The appellant noted an appeal on 12 December 2018 against the refusal of bail and the grounds for such appeal are recorded in the detailed notice of appeal[11]. In addition, the transcript of proceedings containing the court a quo's judgment, the viva voce evidence presented at the bail hearing and the magistrates' reasons for refusing bail were filed simultaneously with the notice of appeal and a request for reasons. I am not certain why this was done, nor why a threatening letter was sent on 14 December 2018[12] demanding that the magistrate provide reasons for her ruling on the same day. Although the section makes provision for the

judgment

and reasons to be requested, it is clear on a mere reading of the transcript, that an ex tempore judgment including the reasons was delivered by the magistrate on the day that she refused to admit the appellant to bail.

- [12] At the hearing of the matter, I raised this with Mr Winfred who appeared for the appellant, and he indicated that the appeal was properly before me and could be dealt with on the papers and no further reasons were required. (In addition the appellant's legal representatives indicated as much in the heads of argument[13]).

Submissions

of the parties

Appellant

- [13] In his heads of argument, Mr Winfred submits that the court a quo failed to apply its mind to whether or not the appellant would stand trial. The court a quo did not apply itself in any manner as to whether or not grounds existed for the appellant to abscond or forfeit his bail. The court did not take into account the appellant's emotional state, his occupational status, his family roots, his assets and how strong the case against him was, to determine how

much of an inducement it would be for him to stand trial. Most importantly the court a quo over-emphasised the fact that the appellant had pending cases against him and it was submitted relied on the investigating officers' ipse dixit 'without even a shred of prima facie evidence'.

- [14] He submitted that there was no evidence before the magistrate to make a finding that the appellant had a propensity to commit offences of this nature or that the investigating officer intended to execute a warrant of arrest for the appellant in an unrelated fraud matter. At the hearing of the matter he indicated that the state's case against the appellant was very weak and the court a quo ought to have called for additional evidence to be led. This submission was made despite the fact that he conceded that the appellant bore the onus to show it was in the interests of justice for him to be released on bail on a balance of probabilities.
- [15] In addition when it was pointed out to him that the affidavit of the appellant did not deal with any of the viva voce evidence of the investigating officers, he rather reluctantly acknowledged that there were some deficiencies in the appellant's case. He submitted however that the court a quo ought to have thus called for additional evidence in this regard despite the fact that the appellant was legally represented in the court a quo and his legal representatives did not challenge any of this evidence during the course of cross-examination and elected not to supplement the appellant's affidavit in any way to deal with these aspects.

Respondent

- [16] Mr MacDonald submitted that the court a quo did not err in refusing to admit the appellant to bail and that although the appellant had no previous convictions there are pending matters against him for similar offences as well as a warrant of arrest which will be executed. The undisputed evidence before the court a quo was that the appellant had defrauded the complainant in the sum of R350 000 and that the appellant had undertaken to repay the amount.
- [17] Although Mr MacDonald rightfully concedes that the appellant does not have any previous convictions, and that one must assume he intends to plead not guilty in respect of this particular matter, it is undeniable that there is unchallenged evidence which suggests that between the period 2016 to 2018 there were a number of similar offences committed in respect of which the appellant may be charged and in fact there are seven counts in respect of which he has already been charged for fraud. In particular, the two counts in the Durban Magistrates' Court involve approximately R8 million.
- [18] In addition he indicated that despite the submissions of Mr Winfred to the contrary, there was a prima facie case which the appellant failed to address in his affidavit or challenge during cross-examination, and submitted that there was no obligation on the court a quo to call for any additional evidence if the appellant's legal representative failed to do so.

The bail appeal

[19] This appeal is brought in terms of s 65 of the CPA and this court must therefore consider the appeal in accordance with s 65(4) which reads as follows:

‘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.’

[20] In applying the provisions of s 65(4) the court hearing the bail appeal must approach it on the assumption that the decision of the court a quo is correct and not interfere with the decision, unless it is satisfied that it is wrong.[14] This is where the court states the following:-

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 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'

Schedule 5 offences

[21] In respect of schedule 5 offences, the onus is on the appellant to satisfy the court that the interests of justice permit his release on bail. In respect of the test for ‘interests of justice’, the bail application must start on the premise that the continued detention of the appellant is the norm.[15] This applies equally to both Schedule 5 and 6 offences in my view.

[22] A presiding officer must weigh up the personal interests of the appellant against the interests of justice as it appears from all the evidence presented. Consequently, this court must consider whether on the facts and the evidence presented in the court a quo,

the magistrate misdirected herself or erred when she found that the appellant had failed to satisfy the court on a balance of probabilities that the interests of justice permitted his release on bail. The court was required to make a value judgment and evaluate the strength of the state's case.[16]

[23] In *S v Yanta*[17] the court was of the view that on a proper construction of s 60(11) of the CPA the interests of society and the proper and

effective administration of the criminal justice system are “supreme” and the personal interests of an accused are secondary.

[24] In *S v Hudson*[18] the court held the following:

‘. . . the expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the appellant to abscond and leave the country . . .’

And further that:[19]

‘where an accused applies for bail and confirms on oath that he has no intention of absconding due weight has of course to be given to this statement on oath. However, since an accused who does have such an intention is hardly likely to admit it, implicit reliance cannot be placed on the mere say-so of the accused. The court should examine the circumstances.’

[25] In *S v Schietekat*[20] Slomowitz AJ stated the following:

‘Bail proceedings are sui generis . . . The state is thus not obliged in its turn to produce evidence in the true sense. It is not bound by the same formality. The court may take account of 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. To do this it must necessarily have regard to whatever is put up by the State in order to decide whether the accused has discharged the onus . . .’

[26] Subsections 60(4)(a) to (e) of the CPA sets out the grounds, which if established, would not permit the release of the appellant on bail in the interests of justice, namely:

‘(a) where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any 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’

[27] Section 60(5) to s 60(9) details the factors to be considered when having regard to subsections 60(4)(a) to (e).

[28] I have had regard to the proceedings in the court a quo, the appellant’s affidavit, the judgment, and the transcript of the evidence presented. I cannot find that the court a quo misdirected itself in any way in reaching the conclusion that it did.

[29] In deciding whether the appellant had discharged the onus, one cannot read his affidavit in isolation and only have regard to his personal circumstances. One cannot ignore the evidence under oath of the two investigating officers in relation to the seven accounts

currently being faced by the appellant as well as the evidence given under oath in respect of the matter which is pending before the Sandton magistrate's court and the matters under investigation. In addition the court cannot ignore the evidence which has come to light since the arrest of the appellant on 19 November 2018. One must weigh this evidence against the version of the appellant as deposed to in his affidavit. This must be considered in deciding whether the appellant had discharged the onus on a balance of probabilities before the court a quo.

[30] In my view, the court a quo was correct in finding that when weighed against this evidence, the appellant had not discharged the onus on a balance of probabilities showing that the interests of justice permitted his release on bail. The appellant had a fair opportunity to deal with the allegations and the viva voce evidence of the two investigating officers but elected not to do so. Apart from indicating that he intended pleading not guilty to this particular count, very little if anything was said on oath in relation to the seven other pending counts. Nor did he say anything in respect of the evidence presented concerning the pattern of activities that were uncovered by the investigating officers since his arrest.

[31] In addition he did not comment on the strength or otherwise of the state's case but elected to confine himself to the following, namely:

‘ . . . [8] I state that the State will not be able to present any objective facts that I committed a planned or premeditated the

offence for which I am charged herein after I was released on bail in the other matter (the Durban matter).’

‘[9] For all intents and purposes the allegations against me herein occurred in the same time frame as the other offences (in the Durban matter).’ [21]

[32] In respect of what he refers to as two so-called offences, he submits the following:

‘[12] . . . one in Van der Bijl Park (I submit that I charged the client R2 800.00 for accounting work, this charge I clearly have a defence too) as I performed accounting work for the client.’

‘ . . . Another charge emanates from the Sandton area. Here I loaned a guy money and had taken as security his ring and watch. These two matters have no bearing on the charges I currently face.’ [22]

‘ . . . Further, I believe that a certain Warrant Officer van der Merwe has a warrant for my arrest. Again, this so-called charge is an old charge and was not “committed during my bail in the Durban matter.”[23]

[33] The appellant despite having sufficient opportunity to deal with the allegations presented in evidence elected not to do so. This is surprising given the fact that the state presented its evidence prior to the appellant presenting the affidavit sworn to under oath I am not certain why the respondent presented evidence first. Nothing more need however be said about the form of procedure involved as the proceedings occurred over two days and sufficient

opportunity had been given to the appellant to deal with same. In addition, the procedure followed in the court a quo was not an issue raised on appeal.. He certainly could have utilised the opportunity to deal with this either by supplementing the affidavit or during cross-examination of the state witnesses by his legal representative.

[34] The strength of the state's case is a relevant factor to be taken into account[24]. The respondent appears to have had a 'prima facie'[25] case against the appellant. Evidence was placed before the court which stood uncontradicted in light of the appellant's

failure to deal with same. The court a quo can therefore not be faulted nor criticized for the reliance and weight attached to the evidence presented by the respondent as opposed to that of the appellant.

[35] Insofar as his personal circumstances are concerned the appellant does not indicate how he is employed and where he is employed, and no information further was placed before the court apart from the fact that he was a qualified financial accountant. In addition he appears to have conceded that although he resided in Morningside, Johannesburg he regarded his parents' home in Marburg as his home. In his affidavit he contents himself with the following explanation, namely:

'I have never attempted to flee but do concede to living in Johannesburg for a while, which will now come to an end.'[26]

[36] This appears to lend some credence to the investigating officers' evidence that the appellant did not have a fixed address and appeared to have resided both in Johannesburg and KwaZulu-Natal.

[37] One of the factors which weighed heavily with the court a quo related to the propensity of the appellant to commit similar offences. This certainly is a factor that must be considered by the court (see *S v Mathebula*[27]). Although this judgment dealt with a Schedule 6 and not a Schedule 5 offence, this approach has been endorsed by the Supreme Court of Appeal in *Sewela* referred to hereinbelow. The failure by the appellant to deal with the evidence adduced by the respondent can only justify one

conclusion in my view, and that is the prima facie strength of the respondent's case. The failure by the appellant to deal with this evidence in his affidavit or during cross-examination was a factor to be considered in determining if the appellant discharged

the onus.

[38] I am fortified in this view having regard to the decision in *Sewela v S* (731/10) [2010] ZASCA 159 (1 December 2010), in which the court at paragraph 11 said the following:

'... The fact that the current offences were allegedly committed whilst the fraud case in Phokeng was pending suggests that the

appellant either has a propensity to commit fraud or is disrespectful of law and order. In determining whether an applicant for bail, may, if released on bail commit further offences, a court, not being blessed with some prophetic foresight, can legitimately rely on the past alleged conduct of such an applicant. The appellant's alleged conduct points to a possibility which cannot be said to be remote or fanciful that he is likely to continue to commit further crimes should he be released on bail. To release the appellant on bail under these circumstances would, to my mind, not be in the interests of justice as it is likely to seriously undermine the criminal justice system including the bail system itself. I have no doubt that it will seriously undermine and erode the confidence of the right thinking members of society in our criminal justice system. See s 60 (4) (d) of the CPA.'

[39] Fraud is a serious offence. The fact that it is recognised as a serious offence is demonstrated by the legislature enacting the prescribed minimum sentences[28] which provides for an accused convicted of corruption or fraud to be sentenced to imprisonment for a period ranging from 15 to 25 years depending on whether or not the accused is a first, second, third, or subsequent offender.

[40] The number of pending charges faced by the appellant at the time of the bail application and the uncontradicted evidence presented that there are likely to be further charges laid, would in my view, certainly weigh heavily in the consideration as to whether or not the appellant would likely evade his trial. The evidence of the investigating officer that the number of pending cases affects the resolve of the appellant to evade trial cannot be faulted. Such opinion was not controverted or challenged in any way[29] and the court a quo was on the facts of the current matter entitled to rely on same.

[41] In addition, the merits of a further submission made by Mr MacDonald cannot be underestimated, namely that, given the number of counts faced by the appellant; the pending Sandton case; the possibility of three further charges being laid, and the value of the alleged fraud in the two Durban matters being approximately R8 million, if the appellant was released on bail this would undermine or jeopardise the objectives and/or the proper functioning of the criminal justice system. In *S v Patel*[30] the court referred to an English decision *R v Phillips* in which it was held 'that it was undesirable to grant bail where there was a likelihood of a repetition of the offence by the person asking for bail'. In addition at 568A-B of the judgment, the court noted as follows:

'It seems to me that an applicant's past record, his actions immediately prior to the application for bail and particularly while he was out on bail in respect of another charge, may be relevant factors, particularly when they indicate a propensity to commit a particular type of crime.'

It is a matter of record that the appellant currently faces seven counts of fraud.

[42] I am cognisant of the fact that in exercising a judicial discretion, a court must consider the totality of the evidence[31] and decide the matter on the probabilities[32]. This court of appeal, like the court a quo, is fully cognisant that the Constitution provides that no person ought to be deprived of his freedom arbitrarily, and if it is in the interest of justice to do so, an arrested person is entitled to be released from detention on bail.

[43] However, s 60 of the CPA has been promulgated to regulate the granting or the release from detention in respect of serious crimes and must accordingly be implemented with due regard to the guidelines provided by the Act and the decided cases. As was held in *S v Green & another* [33]:

‘It is clear from s 60(10) that the court’s function in a bail application is intended to be more proactive than in normal criminal proceedings. As it was put in the *Dlamini* decision (at para 11), “a bail hearing is a unique judicial function” and the “inquisitorial powers of the presiding officer are greater”.’

[44] Having considered the transcript of the proceedings and the judgment of the court a quo I am not persuaded on the merits of the appeal. I am also unable to find that the court a quo was wrong in the exercise of its judicial discretion in finding that the appellant had failed to discharge the onus permitting his release on bail[34].

[45] In the result the following order will issue:

‘The appellant’s appeal against the refusal to admit him to bail is dismissed’.

CASE INFORMATION

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KwaZulu-Natal

Date of Argument: 10 January 2019

Date of Order: 10 January 2019

Date of Written Judgment: 18 January 2019

- [1] Pages 34 to 39 of the indexed papers.
- [2] Transcript pages 29 to 31 of the indexed papers.
- [3] Transcript page 29 lines 17 to 20 of the indexed papers.
- [4] Transcript page 30 lines 3 to 5 of the indexed papers.
- [5] Transcript page 30 lines 5 to 7 of the indexed papers.
- [6] Transcript page 30 lines 12 to 18 of the indexed papers.
- [7] Transcript page 30 lines 19 to 22 of the indexed papers.
- [8] Transcript page 30 lines 22 to 24 of the indexed papers.
- [9] Transcript page 30 lines 1 and 2 of the indexed papers.
- [10] Appellant's affidavit page 39 of the indexed papers.
- [11] Indexed papers, pages 42 to 48.
- [12] Transcript page 51 and 52 of the indexed papers.
- [13] Heads of Argument, pages 56-58 of the indexed papers.
- [14] *S v Mbele & another* 1996 (1) SACR 212 (W) at 221H-I; *S v Barber* 1979 (4) SA 218 (D) at 220E-F.
- [15] Section 60(11)(b). See also *S v Dlamini*; *S v Dladla & others*; *S v Joubert*; *S v Schietekat* [1999] ZACC 8; 1999
(2) SACR 51 (CC) at 84C-E and 85.
- [16] *S v van Wyk* 2005
(1) SACR 41 (SCA).
- [17] *S v Yanta* 2000 (1) SACR 237 (Tk) at 249C-D.
- [18] *S v Hudson*
[1980] 1 All SA 130 (D) at 131.
- [19] *S v Hudson*
[1980] 1 All SA 130 (D) at 133.

- [20] S v Schietekat 1998 (2) SACR 707 (C) at 713H-J.
- [21] Appellant's affidavit, page 35 indexed papers
- [22] Appellant's affidavit, page 36 indexed papers
- [23] Appellant's affidavit, page 37 indexed papers
- [24] S v Botha en 'n Ander 2002 (1) SACR 222 (SCA); S v Viljoen 2002 (2) SACR 550 (SCA); S v Kock 2003 (2) SACR 5 (SCA) para 15
- [25] S v van Wyk 2005 (1) SACR 41 (SCA).
- [26] Appellant's affidavit, page 37 indexed papers
- [27] S v Mathebula 2010
- (1) SACR 55 (SCA)
- [28] Section 51(2) as read with Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.
- [29] S v Faye 2009 (2) SACR 210 (Tk) para 17
- [30] S v Patel 1970 (3) SA 565 (W) at 567E
- [31] S v Stanfield 1997 (1) SACR 221 (C) at 226C-D.
- [32] S v Diale & another 2013 (2) SACR 85 (GNP) para 14.
- [33] S v Green & another
- [2006] ZASCA 3; 2006 (1) SACR 603 (SCA) para 23.
- [34] S v Rudolph 2010 (1) SACR 262 (SCA).

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