

SOUTH AFRICA / JUDGMENT

Terblanche v S (CA&R 05/2022) [2022] ZAECQBHC 36 (4 October 2022)

[2022] ZAECQBHC 36

COURT

Eastern Cape High Court, Gqeberha

BEFORE

M. S. Rugunanan, V. Noncembu

CASE / FILE NUMBER

CA&R 05/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GQEBERHA

CASE

NO CA&R 05/2022

In

the matter between:

ARNOLDUS

ABRAHAM TERBLANCHE

Appellant

and

THE

STATE

Respondent

JUDGMENT

THE COURT

- [1] The appellant approaches this court in an appeal against the refusal by the magistrate, Gqeberha, to grant him bail on new facts pending the finalisation of criminal proceedings against him. It is common

cause that the appellant will be arraigned in the high court on charges involving: conspiracy to commit murder; murder; robbery with aggravating circumstances; unlawful possession of a firearm; unlawful possession of ammunition; defeating or obstructing the course of justice; and possession of drugs.

[2] In essence, the charges implicate the appellant in the murder of his wife in relation to whom divorce proceedings were pending at the time of the inception of the criminal proceedings against him. It suffices

for present purposes to mention that murder falls into the category of offences listed in Schedule 6 of the Criminal Procedure Act 51 of 1977.

[3] The factual history pertaining to the conduct of the proceedings in the court a quo since the time of the appellant's arrest and the course of bail applications brought on his behalf are set out in an appeal judgment delivered by Goosen J on 8 March 2022. That history is not repeated herein but may conveniently be incorporated

by reference, except of course for the factual findings by the learned judge regarding the appellant's appeal against a first

refusal of bail on 28 January 2022 in the magistrate's court.

[4] On 7 April 2022 the appellant applied for bail on new facts. In a

judgment

delivered on 30 May 2022 the magistrate dismissed the appellant's application, and it is that dismissal which precipitated the present appeal to this court. Succinctly stated, the issue lies squarely on whether the magistrate erred in his approach to the determination of new facts.

[5] In his judgment the magistrate had recourse to the Concise Oxford English Dictionary which defined the word 'new' to mean 'not existing before'. On this approach the magistrate reasoned that the facts introduced by the appellant in his second attempt for seeking bail were extant at the time of his first bail application on 28 January 2022. Accordingly, they did not constitute new facts within the scope of the dictionary meaning ascribed to the word 'new'.

[6] In the course of the hearing of the matter the parties advanced legal argument on the courts' approach to the issue of new facts. It is, considered edifying to quote directly from the appellant's heads of argument where reference is made to a convenient summary of guidelines and principles supported by case authority.[1]

'There is no definition of 'new facts' in [the Criminal Procedure Act 51 of 1977]. Case law, however, provides at least 5 guidelines or principles which are of assistance:

- (a) New facts are facts that came to light after refusal of bail, and obviously also include circumstances which have changed since the unsuccessful bail application was lodged. A detention period of almost 3 years between the first and the renewed bail application amounts to changed circumstances constituting a 'new fact' (*S v Moussa* 2015 (3) NR 800 (HC) at [7]); and the passage of considerable time coupled with the State's failure to make progress with the investigation of the case, can also qualify as a new fact (*S v Hitschmann* 2007 (2) SACR 110 (ZH) at 113b).
- (b) New facts must be 'sufficiently different in character' from the facts presented at the earlier unsuccessful bail application (*S v Mohamed* 1999 (2) SACR 507 (C) at 512b) and 'must not constitute simply a reshuffling of old evidence' (*S v Petersen* 2008 (2) SACR 355 (C) at [57]).
- (c) The alleged new fact or facts must be 'relevant for purposes of the new bail application': see *S v Petersen* (supra) at [57]). This means that there must at least be some advance indication that the new facts, if received, would on their own – or in conjunction with all the facts placed before the court in the earlier unsuccessful bail application – assist the court in considering release on bail afresh: see *S v Mohammed* supra at 511h-512a.
- (d) In determining whether facts are new or not, a court is inevitably required to have due regard to the evidence presented or information received at the earlier unsuccessful application: see *S v Vermaas* (supra) at 531e-g. In *S v Mpofana* 1998 (1) SACR 40 (Tk) at 44g-45a Mbenenge AJ[2] explained that 'whilst the new application is not merely an extension of the initial one, the court which entertains the new application should come to a conclusion after considering whether, viewed in the light of the facts that were placed before court in the initial application, there are new facts warranting the granting of the bail application'.
- (e) In a situation where evidence was known and available to a bail applicant but not presented by him at the time of his earlier application, such evidence cannot for purposes of a renewed bail application be relied upon as 'new facts': see *S v Le Roux en andere* 1995 (2) SACR 613 (W) at 622a. In *Le Roux* at 622b it was explained that in the absence of such a rule, there could be an abuse of process ('misbruik van hofprosedure') leading to unnecessary and repeated bail applications. An accused should not be permitted to seek bail on several successive occasions by relying on the piecemeal ('broksgewyse') presentation of evidence. It has been suggested that the rule is an absolute one and should be applied regardless of the bail applicant's reasons for not reducing the evidence at the unsuccessful application: see generally *S v Petersen* (supra) at [58]. However, it is submitted that the rule should be applied with caution. It can hardly find application where the probable reason for the applicant's failure to present the impugned evidence at the first bail application can be attributed to the applicant's bona fide misinterpretation of the probative value of the evidence in relation to factual and legal issues

concerning bail. The right to liberty pending the outcome of the trial of final appeal should not be frustrated by an inflexible rule. A bail court should be willing to examine and consider the reasons why relevant and available facts known to the bail applicant were not relied on in the initial application.’ (the underlined emphasis is ours)

- [7] The record of the proceedings in the court a quo includes the magistrate’s judgment. Pages 360 to 371 of Volume 3 reflects the magistrate’s analyses of the material which the appellant contends constitutes new facts. The proceedings did not entail leading oral testimony from witnesses – both parties elected to tender their evidence on affidavit. Electing rather to deal only with the issue whether the appellant proved the existence of new facts, the respondent did not enter upon the merits of question of bail.
- [8] The appellant’s founding affidavit dealt with the evidence which he contended constituted new facts. With this affidavit the appellant mounted a challenge to the evidence put up by the investigating officer in opposition to the appellant’s first bail application.[3] The opposing affidavit makes reference to various persons by name and in some instances by designation such as ‘the domestic of Terblanche’ with mention in addition being made of the appellant’s ‘previous marriages’. Moreover the investigating officer states that each allegation in the opposing affidavit is supported by evidence contained in affidavits.
- [9] The appellant believed that the persons so mentioned, whether by name or designation, were state witnesses and that this presented an impediment in procuring evidential material to support his bid for

bail in the first application. It appears that the appellant’s belief did not read persuasively with the magistrate. For

reasons

indicated below, this led to an unsustainable result.

- [10] To begin with, if attention is directed to the opposing affidavit the objective reader may reasonably engender the impression that the persons mentioned therein were state witnesses. It is not illogical to accept that a reasonable person in the position of the appellant would be disinclined to seek their assistance despite entertaining a belief that they may be of assistance to him. Once it became known to the appellant (after the first bail application) that some of them were not state witnesses, it was open to him to procure evidence from them to support a further bail application. A disclosure made by the appellant’s brother and nephew to the appellant’s legal team that their names were mentioned in the opposing affidavit but that they were never consulted by the investigating officer and were not state witnesses appears to have been the precipitant for the second application based on ‘new facts’ with further affidavits obtained from the persons the appellant initially assumed to have been state witnesses[4].

[11] Respectfully, in this matrix of events the magistrate did not appreciate that what constituted a new fact was the circumstance of it becoming known to the appellant that the persons previously assumed to be state witnesses were not. By parity of reasoning the subsequent availability of electronic evidence in the appellant's cellphone, notwithstanding the prior existence of the evidence,

constituted a new fact. At one level it is the change in circumstances which made the evidence accessible to the appellant that in our view constitutes new facts. At another level it is the relevance of the evidence, and it is to this issue that we turn to.[5]

[12] In the opposing affidavit by the investigating officer the appellant is portrayed as a narcissistic, domineering, and overbearing individual who, during his marriage, physically and emotionally abused his wife for whose murder he is charged with. Indications are that the pattern of abuse featured in the appellant's previous marriages and/or relationships, and that the appellant dissipated his assets pending the divorce action from his deceased wife; and further

that he instigated one of his co-accused to encourage her to develop a drug addiction and thus lay the foundation for her subsequent

murder. We do not deem it necessary to recapitulate all the material contained in the opposing affidavit suffice to mention that its drift seeks to attribute dishonest and dismissive personality and character traits to the appellant.

[13] In the magistrate's approach to the determination of new facts it appears that he did not consider that the appellant procured

evidential material[6] that was intended to augment his prospects for obtaining bail and in essence demonstrating a two-fold purpose, namely:

- (i) by presenting a favourable portrayal of the appellant's personality and character traits; and
- (ii) by demonstrating that the investigating officer's evidence, apart from being circumstantial, was false and that he misled the court.

[14] Stated otherwise the evidence procured by the appellant was aimed at revealing that the evidence presented by the respondent during the initial bail application might be compromised and that the circumstantial nature of the state's case on the alleged murder was – contrary to the assertions of the investigating officer – not as strong as he had made it out to be.

[15] There can be no justification for the magistrate having applied the 'not existing before' approach in relation to the evidence the appellant sought to introduce in his second application. The evidence which subsequently came to the fore, existed – it existed with the persons concerned but was unavailable to the appellant at the time of the first bail application. The same rationale applies to the electronic evidence retrieved from the appellant's cellphone which had been in possession of the police at the time of the first bail

application. The evidence existed at the time of the first bail application but was unavailable to him until 28 April 2022 once information was retrieved by an IT specialist. Here too, there is no scope for applying the ‘not existing before’ approach.

- [16] In summary, and based on the aforementioned guidelines and principles, it was submitted for the appellant that the mere fact that the evidence relied on in the second bail application existed at the time of the initial application for bail does not mean that such evidence cannot constitute new facts. Taken further, the submission was that if the evidence was unavailable to the appellant at the time of the first bail application, then it constitutes new facts even though it may have been in existence at the time of that application. The considerable force in these submissions inclines us to conclude, in the circumstances of this matter, that the approach adopted by the magistrate was unsound and erroneous. In our view, the evidence procured by the appellant may assume relevance where a court is required to make a determination on the bail issue by weighing the contested versions put up by the respective parties. In this regard the sweeping averment in the opposing affidavit by the investigating officer that his allegations are supported by evidence contained in affidavits, exhibits, voice recordings cellular phone downloads, billings and digital evidence – without specifically setting out exactly what evidence the state has against the appellant – is of particular note.
- [17] We now turn to addressing the ambit and scope of this appeal. For the appellant it was submitted that where the magistrate’s decision had been faulted, this court is at liberty to consider the question of bail afresh and to grant the appellant bail in an appropriate amount and on appropriate conditions. The conclusion flowing from this submission is that the matter is before this court as a substantive application for bail. The appellant’s notice of appeal is so widely crafted that it does not specify clearly and in unambiguous terms exactly what case is put forward for consideration by this court and which the respondent is required to meet. In argument the respondent correctly referred to the record, which in our view provides a complete answer.[7]
- [18] In his address to the magistrate the record indicates that the appellant’s legal representative stated the following:[8]

‘As I understand the procedure as set out in law, evidence has to be placed before court and on the evidence placed before court, the court needs to make a decision whether that evidence indeed constitutes new facts or not and then only take a decision and compare. So my submission, Your Worship, is that the applicant be given permission to place the new facts before court and ultimately the court will then decide whether those facts are in fact new or not and then the state will have the opportunity of, if they are of the opinion that it is new facts, to reply thereto.’

- [19] At the conclusion of argument before the magistrate, the appellant’s legal representative stated:[9]

‘Your Worship, it is my submission that in the light of the facts placed in front of Your Worship and in the light of how these facts came to light and were obtained after the denial of bail, that these facts are in fact new facts which only became available to the applicant after the denial of bail and that therefore this application should be entertained.’

[20] Clearly, the scope of the proceedings before the magistrate was specifically identified and limited to the determination of new facts. For this reason the respondent did not, in the court a quo, enter upon the merits of the appellant’s application for bail on new facts and elected to deal only with the question whether the appellant had proved the existence of new facts. Accordingly, the respondent correctly submitted that the inquiry before this court was limited solely to this issue. Our pronouncement against the magistrate’s finding does not entitle the appellant to a hearing in the sense that this court must determine the question of bail afresh. In this regard the following remarks necessitate mentioning.

[21] Once an applicant for bail on new facts has established the existence of new facts, he is allowed to re-open his case and is entitled to lead any further evidence, new and old[10], which he wishes to lead in support of his new application for bail.[11] Due regard must of course be had to section 60(11)(a) of the Criminal Procedure Act. The section implicates Schedule 6 offences and obliges an accused on being given a reasonable opportunity to adduce evidence which

satisfies[12] the court that exceptional circumstances exist which in the interests of justice permit his release.

[22] There is merit in the respondent’s submission that what is yet to be determined is whether the new facts (or further evidence which the appellant may wish to adduce) constitute exceptional circumstances for his release on bail[13]. It stands to reason that should the respondent choose not to rebut the appellant’s evidence the magistrate will then have to consider the matter on the strength of the evidence put forward by the appellant. Should the respondent rebut, the magistrate will have to consider the evidence holistically i.e. the evidence in rebuttal together with the evidence of the appellant read with the provisions of the aforementioned section in deciding whether bail should be granted.[14]

[23] As we are of the view that the magistrate erred in his approach to the determination of new facts by concluding that the evidence presented by the appellant[15] did not constitute new facts, the following order will issue:

1. The matter is remitted to the magistrate or an alternate magistrate to urgently make a determination of the appellant’s bail application on new facts in accordance with section 60(11)(a) of the Criminal Procedure Act 51 of 1977 within seven (7) days of the date of this judgment.
2. The appellant is to be afforded the opportunity to adduce evidence in support of his further bail application of 7 April 2022 in respect of the new facts that had come to light and/or any further evidence that

he wishes to lead in support thereof.

3. The respondent is to be afforded the reasonable opportunity to adduce further evidence in response to any evidence presented by the appellant in accordance with paragraph 2 above.

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

I agree.

V. NONCEMBU

APPEARANCES:

For the Appellant: P. Daubermann

P. Daubermann Attorneys

Gqeberha

For the Respondent: M. Stander

Office of the Director of Public Prosecutions

Date heard:

09 September 2022

Date delivered: 04 October 2022

[1] See Criminal Justice Review No. 2 of 2017 at page 9 'New facts for purposes of a bail application: Principles, issues and procedures', by Steph van der Merwe

[2] As he then was.

[3] The opposing affidavit appears in volume 1 of the record as Annexure 'D' at page 73 et seq

[4] The persons are mentioned in the magistrate's judgment at page 362, and the totality of the evidential material, including

electronically retrieved information, placed by the appellant before the magistrate is detailed in paragraph 21 of the respondent's

heads of argument filed in this court on 2 September 2022

[5] Compare *S v Petersen* 2008 (2) SACR 365 (C) at paragraphs [57]

[6] The material is detailed in paragraph 21 of the respondent's heads of argument.

[7] Compare *Moto Health Care Medical Scheme v HMI Healthcare Corporation (Pty) Ltd and Others* (341/18) [2019] ZASCA 87 (31 May 2019) at paragraph [37] in which *Thompson v South African Broadcasting Corporation*

[2000] ZASCA 76; 2001 (3) SA 746 (SCA) at paragraph [7] was cited with approval

[8] Volume 3 page 3:18 - page 4:3

[9] Volume 3 page 209:19-24

[10] S v Vermaas 1996

(1) SACR 528 (T) at page 531e-f

[11] Compare Nwabunwanne v S 2017

(2) SACR 124 (NCK) at paragraph [29]

[12] This presupposes that the appellant will discharge the onus upon a balance of probabilities – S v Jonas and Others 1998 (2) SACR 677 (SE) at page 679g

[13] C[...] and Another v The State (SS013/2021) [2021] ZAGPJHC 125 (26 July 2021) at paragraphs [8] and [9], and compare S v Mgumbi 2022 (1) SACR 478 (WCC) at paragraphs [21]-[27]

[14] S v Jonas supra at page 680d

[15] As detailed by the material identified in paragraph 21 of the respondent's heads of argument

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