



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

CASE NO. CA & R 28/2024

In the matter between:

MZIWEBONGO BURWANA

Appellant

and

THE STATE

Respondent

BAIL APPEAL JUDGMENT

COLLETT AJ:

Introduction

- [1] This appeal is brought pursuant to the Magistrate at Mdantsane Magistrate's Court refusing the appellant to be admitted to bail.
- [2] The appellant is charged with public violence, robbery with aggravating circumstances as enunciated in *section 1* of the *Criminal Procedure Act 51 of 1977*

(hereinafter referred to as the 'CPA'), attempted murder, unlawful possession of a firearm and ammunition.

[3] The appellant brought a formal bail application, and the proceedings were adjudicated on the strength of an affidavits filed by the appellant and the *viva voce* evidence of the investigating officer, Warrant Officer Maka on behalf of the state.

[4] It is common cause that the appellant is charged with offences listed in *Schedule 6* of the CPA. Accordingly, the onus rests upon the appellant at the bail hearing to establish *exceptional circumstances* which would render it in the *interests of justice* for him to be released on bail.

[5] The appellant is required to not merely regurgitate his personal circumstances in a hope that these will morph into exceptional circumstances and to deny that he will act as described in *section 60(4) (a) to (d)* of the CPA.¹

[6] *Section 65 (4)* of the CPA provides that:

“The court or judge hearing an 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.”

[7] The powers of the appeal court are limited, and the court must be persuaded that the magistrate wrongly exercised his discretion. Even if the appeal court shares a different view, it cannot substitute its own view for that of the Magistrate as that would be tantamount to an unfair interference with the Magistrate's discretion. The overriding consideration is whether the Magistrate exercised his discretion wrongly.²

[8] The Magistrate must have misdirected himself in some material manner in relation to either fact or law and, in event of this being established, the appeal court can consider

¹ *Mthombeni v S* (CA&R 55/23) [2023] ZANHC 96 (8 December 2023)

² *S v Barber* 1979 (4) SA 218 at 220 E–H.

whether bail ought to have been refused or granted. In the absence hereof, the appeal must fail.³

Appellant's grounds of appeal

[9] The appellant's grounds for appeal can be summarized as follows:

- (i) The Magistrate misdirected himself in failing to hold that the 'ordinary circumstances' of the appellant cumulatively constituted exceptional circumstances as envisaged by *section 60(11)(a)* of the CPA.
- (ii) The Magistrate erred in holding that the bail application was in terms of *schedule 6* of the CPA and/or that exceptional circumstances in terms of *section 60(11)(a)* were not established notwithstanding that:
 - a. no evidence was presented that the appellant will endanger the life of the public or a particular person; and
 - b. no evidence was presented which could indicate a likelihood that the appellant, if released on bail, would attempt to evade standing trial, and
 - c. no evidence was presented which could indicate a likelihood that the appellant, if released on bail, would interfere with witnesses or evidence, and
 - d. no evidence was presented which could indicate a likelihood that the appellant, if released on bail, would commit *Schedule 1* offences, or would endanger the public, and
 - e. no evidence was presented which could indicate that the appellant's release on bail would disturb the public order or undermine public peace or security

³ *S v Ali* 2011 (1) SACR 34 (E); *S v M* 2007 (2) SACR 133 (E); *S v Porthen and Others* 2004 (2) SACR 242 (C).

(iii) The Magistrate misdirected himself in not making findings pertaining to the *likelihoods* set out in *section 60(4)(a) to (e)* of the CPA.

(iv) The Magistrate erred in holding the view that in *schedule 6* bail applications the appellant was expected to show that there are chances of acquittal when the case goes to trial.

[10] The respondent's response can be summarised as follows:

(i) The appellant is charged with are *Schedule 6* offences.

(ii) The onus is upon the appellant to adduce evidence which satisfies the court that there are *exceptional circumstances* in the *interests of justice* that permit his release from custody which he failed to do.

(iii) There is a likelihood that the appellant's release on bail will undermine the criminal justice system.

(iv) There is a likelihood that the appellant will not stand trial as the police were looking for him and could not establish his whereabouts prior to ultimately arresting him.

(v) There is a likelihood that he or people acting on his behalf may interfere with witnesses.

Evidence before the court a quo

[11] At this juncture, it is necessary to summarize the evidence placed before the court *a quo* in a bid to satisfy the requirement of *exceptional circumstances* by the appellants.

[12] The Appellant submitted an affidavit in support of his bail application. He is a 47-year-old South African citizen with no travel documentation. He was born and bred

in Cathcart, where he has a fixed address. He is currently employed as a security officer in Cathcart. He is married with children and has an 84-year-old mother. He owns both moveable and immovable property. He has no previous convictions or pending cases. He intends to plead not guilty at trial.

- [13] He stated that he will not endanger the safety of the public or any person or commit an offence if released on bail. He will also not influence or intimidate any person or destroy evidence. He further stated that he would not undermine the proper functioning of the criminal justice system or disturb public order.
- [14] He stated that the state's case is weak, questionable or open to doubt and that there is a real possibility that he will be acquitted. He presented *viva voce* evidence about what occurred on the day in question. He testified that he was chairperson of SANCO.
- [15] Warrant Officer Maka presented evidence on behalf of the state. He testified that the police attempted in vain to arrest the appellant prior to 26 February 2024 until they deceived him into coming to the charge office with his attorney.
- [16] He stated that if the appellant is admitted on bail, he and his followers will pose a danger to the witnesses, some of whom reside in the area where the appellant lives. He stated further that as the appellant stole a police firearm is thus capable of anything.
- [17] The farmers' association directed a letter indicating their concerns because of the unrest in Cathcart that blocked the N6 route and interfered with their business.
- [18] He testified that the appellant is known to him. The police attended a complaint of burning of trucks and stones being pelted next to the Caltex garage in Cathcart. They tried to remove the people by shooting rubber bullets. People tried to run away, and the police chased after them. During this incident the appellant managed to grab the complainant's firearm and a struggle ensued between them during which time the complainant was overpowered, fell down and stones were hurled at him.

- [19] The disruption continued, and the police again fired rubber bullets. The appellant was hit on the shoulder and tried to discharge the firearm, but it was locked - but for this, the appellant may have shot the complainant. He then ran away.
- [20] Warrant Officer Maka testified that the applicant is the one who incited the violence using the community and the damage caused cost more than a billion rand. He is thus a danger to the safety of the people. He and his followers are a danger to witnesses. The appellant tried to evade arrest.
- [21] When the appellant had his first appearance at court, there was havoc which caused the prosecutor to withdraw and the magistrate to recuse himself. The people blocked the entrance to the police station. There was toyi-toying in front of the magistrate's court with people saying that their leader cannot be incarcerated. Accordingly, he testified that public peace will be undermined if the appellant is released on bail.

Analysis of the refusal of bail by the magistrate

- [22] As the Magistrate's reasoning is pivotal to the determination whether this court should set aside the decision, it is necessary to analyse same, mindful of the alleged misdirections advanced by the appellant.
- [23] The Magistrate considered the submissions made on behalf of the appellant that there was no identification parade and concluded that as the appellant and the complainant knew each other and the appellant indeed placed himself at the scene, this rendered the further identification unnecessary.
- [24] Regarding the appellant's protestations that the state's case against him was weak and that he was likely to be acquitted, the Magistrate reasoned that the appellant had a duty to demonstrate the weakness and the mere assertion was not sufficient to be regarded as an *exceptional circumstance*.
- [25] The grounds advanced by the appellant as *exceptional circumstances* relating to the appalling conditions in the prison, the length of time he had been there and his

inability to earn an income before the trial were rejected by the Magistrate as not being exceptional.

- [26] The Magistrate requested the parties to address him on *Section 60(4)* of the CPA relating to the likelihood of endangering the safety or committing a *Schedule 1* offence inclusive of the maintenance of law and order and public safety which would be a valid ground for refusing bail. The appellant's legal representative declined to address this issue.
- [27] The Magistrate highlighted the evidence led regarding the blocking and disruption at court, the barricading of the N6 and concluded that this referred to endangering the maintenance of law and order.
- [28] Regarding *Section 60(4)(b)* the magistrate reasoned the fact that the appellant, supposedly afraid of POPS members, did not report to the police when summoned is an admission that he avoided the police and there is no evidence why he could not have attended earlier with his attorney. This translates into evading the law.
- [29] The Magistrate considered that the likelihood of the criminal justice system being undermined had already been demonstrated by the community having closed the court at the appellant's first appearance, consequent hereto the matter had to be moved from Cathcart to another district – this was not disputed under cross examination. This the Magistrate reasoned fell within the ambit of *Section 60(4)(d)*.
- [30] In considering *section 60(4)(e)*, the Magistrate relating to the release of the appellant and the likelihood of disturbing public order or undermining public peace or security, the Magistrate concluded that the barricading of roads, the refusal of the magistrate, and the withdrawal of prosecutors fearing for their lives demonstrated this likelihood. In addition, the Magistrate referred to the numerous cases that had been opened since the unrest had commenced. The magistrate referred to *S v Miselo*⁴ in support of his reasoning.

⁴ 2002(1) SACR 649

[31] Accordingly the Magistrate concluded that the appellant failed to prove the existence of *exceptional circumstances* or to show that his release on bail would be in the *interests of justice*.

Evaluation of the Appeal

[32] I do not propose to embark on a re-evaluation of the evidence, submissions and reasoning of the court *a quo* except insofar as the issues may impact or be of relevance in considering whether this appeal should succeed.

[33] The purpose of a bail application is to decide whether the interests of justice permit the release of an accused on bail pending the trial. Whilst the possible guilt of an accused may inform the *interests of justice* to a certain extent, the bail enquiry is not a pre-hearing of the trial to follow.⁵

[34] A formal onus rested on the appellant to satisfy the court and adduce evidence in terms of *section 60(11)(a)* as the evidential burden was upon the appellant.⁶ In assessing *section 60(11)(a)*, the Magistrate concluded that it was double pronged encompassing the *exceptional circumstances* and the *interests of justice*. This position was accepted by both counsel during their submissions on appeal.

[35] The Magistrate, in considering whether *exceptional circumstances* existed in accordance with *section 60(11)(a)*, considered and discounted the issue of the identification parade, that the appellant denied being involved in the offences, the strength of the state's case, the conditions in prison and the length of time that he had already been incarcerated.

[36] Despite the fact that the Magistrate in addition raised the issue that the appellant was being financially prejudiced as he could not earn an income and that he was compromised in his preparation for trial, he made no finding in this regard. Regrettably, the Magistrate failed to consider any of the further factors that the

⁵ *S v M* (CCT 53/06) [2007] ZACC 18

⁶ *Skietekat v S* 1999 (2) SACR 51 (CC) at p 84

appellant placed before the court in a bid to establish *exceptional circumstances*. Whilst I am mindful of the submission made by counsel for the state that there is no such thing as a perfect judgment,⁷ I am not comforted by the submission made by counsel that the Magistrate had received the evidence from the appellant, had been addressed by counsel regarding the facts placed before the bail court but found that that the appellant failed to adduce *exceptional circumstances* to show that his release on bail will be in the *interests of justice*.

[37] In reality, the Magistrate demonstrates nowhere in his judgment that he considered the other factors either individually or cumulatively and made a value judgment thereon as to whether they should or could be considered as *exceptional circumstances*.

[38] Thereafter, the Magistrate turned his attention to *section 60(4)(a), (b), (d) and (e)*. It deserves mention that the Magistrate invited the appellant's legal representative to make submissions regarding *section 60(4)*, but the latter declined to do so which is most unfortunate and unbecoming conduct of an officer of this court. Nonetheless, it is incumbent upon this court to assess the reasoning of the Magistrate in this regard.

[39] It is trite that *exceptional circumstances* found to exist must be balanced with the *interests of justice*. The Magistrate embarked upon a consideration of the *section 60(4)(a)*. He turned his attention to the evidence that had been presented, in summary, that there had been extreme disruption outside the court when the appellant had appeared, that the proceedings had been moved to different courts due to this, that withdrawal of the prosecutors and recusal of the Magistrate from the matter and then commented, without further reasoning or conclusion:

'Now the question is, does that do not talk to endangering the maintenance of law and order or public safety?'

[40] The Magistrate continued with the reference to the activities of the public in considering *section 60(4)(d) and (e)* and particularly regarding the latter, again posed a question:

⁷ *Barendse and Another v S* (A01/2023) [2023] ZAWCHC 125 (22 May 2023) para 21

‘With what has been testified on, the events that has unfolded the barricading of roads, the recusal of the Magistrate, the withdrawal of prosecutors, because they are fearing for their lives, can we then say there is no likelihood of that?’

- [41] The Magistrate thereafter referred to *S v Miselo* in considering the evidence in this matter. The Constitutional Court in *S v Dlamini etc*⁸ emphasised the need for a cautious approach and highlighted the limited field of application in refusing bail on account of the provisions of *section 60(4)(e)* and *(8A)*. This clearly postulates the need for *exceptional circumstances* in this regard which is indicative that the application of these sections should be limited to rare cases where the circumstances are justified. Furthermore, even if such *exceptional circumstances* are established in respect hereof, they must be weighed against the *section 60(9)* before a decision to refuse bail is taken.
- [42] The Magistrate was enjoined in considering the *interests of justice* in terms of *section 60(4)* not to unduly elevate their significance but to consider them in conjunction with the factors contained in *section 60(9)*. A failure to do so conflicts with the jealously guarded right to freedom as entrenched in our *Constitution*.⁹ Moreover, it remains necessary for the court to enquire as to whether the ‘*likelihood*’ referred to in *section 60(4)* exists even if such *exceptional circumstances* are found.¹⁰
- [43] Firstly, the Magistrate’s reasoning was based on the events that had unfolded outside the courts by persons who were clearly dissatisfied with the arrest and incarceration of the appellant, drawing inferences from such activity. There was no objective evidence to suggest that such conduct would persist should the appellant be released on bail and, in fact the converse would probably result. The Magistrate’s finding in this regard is speculative and untenable. A further significant salient fact is that the appellant was not the author of these activities and to impute such conduct on him in a bid to deny him the right to freedom surely vitiates the spirit and objectives of our *Constitution*. Regrettably, the Magistrate appears to have paid lip service to the

⁸ (CCT 21/98; CCT 22/98; CCT 2/99; CCT 4/99) [1999] ZACC 8 at [57]

⁹ Act 108 of 1996 section 35(1)(f)

¹⁰ *S v Mohammed* 1999(2) SACR 507 (C)

statutory provisions which is not in accordance with justice.¹¹ This is clearly a misdirection.

[44] Furthermore, the Magistrate misdirected himself in failing to weigh the considerations in *section 60(9)* despite there having been evidence from the appellant on various of the enumerated factors and other factors presented which should have been considered. This is a further misdirection by the Magistrate.

Conclusion

[45] In considering the evidence presented in the court *a quo* and the reasoning of the Magistrate, I am of the view that the Magistrate misdirected himself materially on both the facts and the law. In these circumstances, *Section 65(4)* of the CPA empowers this court to set aside the decision of the Magistrate and give the decision which the lower court should have given.

[46] Having considered the evidence led by the appellant and the respondent in the court *a quo*, I am satisfied that the appellant discharged the onus of establishing *exceptional circumstances* and that the *interests of justice* permit his release on bail. I am further satisfied that the basis of opposition by the state will be adequately addressed by the imposition of appropriate bail conditions. Both counsel submitted that conditions, such as house arrest would be appropriate should the appellant be released on bail and that an amount of R 5000.00 would be appropriate.

[47] I therefore make the following order:

1. The appeal is upheld and the Magistrate's order refusing the appellant's bail is set aside.
2. Pending the outcome of the trial, the appellant is granted bail in the amount of R 5000.00.
3. The appellant's release is subject to the following conditions:

¹¹ *S v Nel & Others* 2018(1) SACR 576 (GJ)

- 3.1 The appellant must appear in court on each and every date to which his trial has been remanded.
- 3.2 The appellant shall report to the Cathcart Police Station once a day between the hours of 06h00 and 18h00.
- 3.3 The appellant may not leave the magisterial district of Cathcart without the written permission of the investigating officer in this matter.
- 3.4 The appellant may not participate in any unlawful gathering and/or exercise any influence over any persons at any gathering which will have the effect of disrupting public peace and order and/or cause damage to property and/or the safety of persons.
- 3.5 The appellant may not incite and/or cause any person to incite or cause the disturbance of public tranquillity and/or safety.
- 3.6 The appellant shall not directly and/or indirectly and/or via a third party have contact with any state witnesses.

S A COLLETT
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

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|--------------------|---|--|
| For the Appellants | : | Mr Mvinjelwa |
| Instructed by | : | Mongoato Mavuso & Associates East London |
| For the Respondent | : | Mr Gula |
| Instructed by | : | Office of the Director of Public Prosecutions, Bhisho |

Date heard : 6 June 2024

Date judgment delivered : 7 June 2024