IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

CASE NO. CA&R 38/2022

In the matter between:

ELIAS CELE **Appellant**

and

THE STATE **Respondent**

JUDGMENT

LAING J

[1] This is an appeal against the refusal of the magistrate for the East London Regional Court to grant bail to the appellant, pending the finalisation of his criminal trial.

[2] The bail application is premised on the argument that the magistrate found that the appellant is charged with an offence listed in Schedule 5 of the Criminal Procedure Act 51 of 1977 ('the CPA'), instead of Schedule 1. Furthermore, it is premised on the assertion that the magistrate failed to attach due weight to the personal circumstances of the appellant, including the interests of his minor children; that the appellant's evidence stood unchallenged at the end of his case; that his evidence in relation to the likelihoods set out in section 60(4) of the CPA was not challenged; that the magistrate erred in failing to find that the investigating officer's reasons for opposing bail were spurious; that the magistrate erred in finding that he

was a flight risk, that he would influence or intimidate state witnesses, that he would attempt to evade trial, that he would commit a Schedule 1 offence, and that the interests of justice did not permit the appellant's release on bail.

[3] The appellant has been charged with fraud. There was a dispute at the commencement of the bail application about the exact nature of the charge and under which Schedule of the CPA it fell to be included. The relevance of this was that whether it was a Schedule 1, 5 or 6 offence would determine where the onus of proof lay in relation to the basis upon which bail should be granted or refused.[1] Ultimately, the court *a quo* found that it was a Schedule 5 offence, thereby placing the onus on the appellant in terms of section 60(11)(b) to adduce evidence to demonstrate that the interests of justice permitted his release.

[4] It was argued on the appellant's behalf that there was no reason for the court *a quo* to have found that the matter pertained to a Schedule 5 offence. The charge sheet simply referred to fraud, with no further elaboration.[2] When the appellant's legal representative requested a copy of the complete charge sheet, counsel for the state refused, saying that the case was still under investigation.

[5] The provisions of section 35(1)(f) and sub-section (3)(a) of the Constitution are pertinent, which provide as follows:

> (1) Everyone who is arrested for allegedly committing an offence has the right—
>
> (a) – (e) …
>
> (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.
>
> (2) …
>
> (3) Every accused person has a right to a fair trial, which includes the right—

[1] If the offence falls under Schedule 5, then the provisions of section 60(11)(b) indicate that the onus rests with the accused to demonstrate that the interest of justice permit his or her release. However, if the offence falls under Schedule 6, then the provisions of section 60(11)(a) place a heavier onus on the accused. He or she is required to demonstrate that there are exceptional circumstances which, in the interests of justice, permit his or her release.

[2] This is apparent from the J15 included in the record at (i). The form referred to an Annexure A, purportedly containing details of the offences with which the appellant had been charged, but no such document was attached.

(a) to be informed of the charge with sufficient detail to answer it…

(b) - (o)…

[6] Furthermore, section 84(1) of the CPA deals with the essentials of the charge. The text reads:

(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

[7] It is trite that the right to a fair trial extends to the proceedings in a bail application. The accused must know precisely what charge has been brought against him or her so that he or she can respond thereto for purposes of enabling the court to determine whether the interests of justice permit release.

[8] In *R v Alexander and others* 1936 AD 445, Wessels J remarked as follows, at 457:

> ‘What is the object of an indictment? Its real purpose is to inform the accused in clear and unmistakeable language what the charge is or what the charges are which he has to meet. It must not be framed in such a way that an accused person has to guess or puzzle out by piecing sections of the indictment or portions of sections together what the real charge is which the Crown intends to lay against him.’

[9] The principles reflected above have survived and remain applicable. See, for example, *S v Hugo* 1976 (4) SA 536 (A), at 540E; and more recently, *Levenstein v S* [2013] 4 All SA 528 (SCA), at [98].

[10] Within the context of the lower courts, the starting point is the charge sheet.[3] If there are further details in relation to the offence indicated on the charge sheet, then

[3] The charge sheet is an official form, described as a J15. Also see n 2, supra.

these must be conveyed to the accused prior to the commencement of the bail application proceedings so that he or she can answer them. The nature of the charge must be sufficiently clear for the accused to deal with it properly before the hearing commences; further details cannot be withheld or sprung upon the accused at the last moment.[4]

[11] In *S v Msimango* 2018 (1) SACR 276 (SCA), Bosielo J observed, at [16], that:

> 'In the language of s 35(3)(a), this is intended to enable… an accused… to answer and defend himself or herself in the ensuing trial. Its main purpose is to banish any trial by ambush. This is so because our criminal justice is both adversarial and accusatory.'

[12] In the present matter, the information contained in the charge sheet merely referred to fraud, nothing more. Consequently, that is the charge that the appellant was required to have met. The court *a quo* was incorrect to have held that the offence fell under Schedule 5; on its own, without further detail, it could only have fallen under Schedule 1.

[13] Turning to section 35(1)(f) of the Constitution, there is authority to the effect that the onus remains with the prosecution in all instances, except those specifically mentioned in terms of section 60(11) of the CPA.[5] See E du Toit (et al) *Commentary on the Criminal Procedure Act* (Jutastat, RS 61, 2018), at ch9-p54H. If it was established, as it ought to have been, that the offence did not fall under either Schedule 5 or 6, then the state bore the onus to demonstrate that the interests of justice did not permit the release of the appellant.

[14] The pertinence of the interests of justice appears from section 60(4) of the CPA. In that regard, the text provides that the interests of justice do not permit the release of an accused when one or more of the grounds listed in sub-sections (a) to

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[4] This does not prevent the state, of course, from amending or supplementing the charges, on application where necessary, provided that this is done in advance of the bail application or trial and in such a way as not to infringe the accused's right to a fair trial.

[5] See n 1, supra.

(e) are established. The grounds are based on the likelihood of certain events occurring.

[15] The following general observations about section 60(4) were made by Flemming DJP in *S v Hudson* 1996 (1) SACR 431 (W), at 433e-f:

> 'Considering the granting of bail involves, as is well known, a balancing of the interests of the administration of justice against the wishes of the accused. But that is, of course, not accurate. Those interests are not fully in opposition. It is also to the public good and part of public policy that a person should enjoy freedom of movement, of occupation, of association, etc. That public interest is qualified, when appropriate, in the interests of the administration of justice. Secondly, considering bail involves a balance between unequal considerations. Risk of harm to the administration of justice involves unquantifiable and unprovable future possibilities. The interests of the accused generally turn upon extant facts and intentions. But it remains the chances that the administration of justice may be harmed which may justify the impact of detention despite a pending appeal.'

[16] More recently, the nature of the interpretation to be given to section 60(4) was considered in *S v Mwaka* 2015 (2) SACR 306 (WCC), where Le Grange J held, at [16], that

> '[i]n terms of section 60(4)… the basic principle in our law is that bail ought to be granted… unless it is not in the interests of justice.'[6]

[17] Turning to the grounds themselves, the first concerns whether the appellant would endanger the safety of the public or a particular person or commit a Schedule 1 offence. From a perusal of the record, there was simply no evidence to that effect. It was alleged that the appellant had hired a hitman to kill his wife (his co-accused) but the source and precise details of such allegation were never disclosed; the court *a quo* was correct in treating it as an unfounded rumour. No evidence was presented by the state to indicate, too, that the appellant had a disposition towards violence. As a youth, he had been convicted for the possession of dagga. Furthermore, he had previously been charged for the unlawful possession of a firearm and also for

[6] See, too, the discussion in Du Toit, at ch9-p30A-32A.

malicious injury to property; neither case appears to have been finalised. Importantly, none of the cases mentioned above convincingly disclosed a propensity for violence. With regard to the likelihood that the appellant would commit a further Schedule 1 offence, no facts were placed before the court *a quo*. In the absence of evidence, for the state to suggest that because the appellant is alleged to have committed numerous acts of fraud he would probably commit a further act of fraud upon his release amounts to no more than speculation. The court *a quo* was incorrect in having accepted such argument.

[18] The second ground pertains to whether the appellant would attempt to evade his trial. The court *a quo* held that he posed a flight risk. This finding, however, does not properly take into his business interests in East London, his substantial property portfolio in KwaZulu-Natal, his reputation as a successful business person, and his extensive family network, with numerous minor children for whom he is the main breadwinner. Furthermore, reliance was placed on old warrants of arrest that had not yet been executed and with regard to which the appellant had not yet been charged. There were at least two warrants that were more than ten years old and one that was more than nine years old. The investigating officer explained that the police were unable to trace the appellant. In light of the uncontested evidence that the appellant is a well-known business person in Amamzimtoti and that he owns a property that is situated a few hundred metres away from the local police station, the explanation given by the investigating officer was improbable and ought to have been rejected. In argument before this court, counsel for the state conceded that he had no answer for why the police had not executed the warrants in question. The court *a quo* was incorrect in having declined to exclude the outstanding warrants for purposes of deciding whether the appellant would attempt to evade his trial.

[19] The third ground is whether the appellant would attempt to influence or intimidate witnesses or conceal or destroy evidence. There is a slight overlap in relation to the first ground, which has already been addressed insofar as it concerns the alleged plot of the appellant to kill his wife. Nothing further needs to be said in that regard. However, in relation to the remaining issues, the court *a quo* merely made a general assertion to the effect that the appellant knew the witnesses and accordingly there was a risk that he might influence or intimidate them. No further

details were mentioned, such as the nature of his relationship with them, whether the witnesses had already made statements and agreed to testify, how familiar he was with the evidence that was to be brought against him, the extent to which the witnesses could be influenced or intimidated, and so forth. There was no evidence presented by the state to raise the likelihood that such event would occur to more than a remote possibility. The court *a quo* was incorrect to have made a finding on the basis of speculation.

[20] The fourth ground pertains to whether the appellant would undermine or jeopardise the objectives or proper functioning of the criminal justice system. If it was considered at all, then this ground was treated superficially at best. There was no indication from the record to suggest that he had supplied false information, previously failed to comply with bail conditions, or that there was evidence of any similar conduct.

[21] The fifth and final ground is whether, in exceptional circumstances, the release of the appellant would disturb the public order or undermine the public peace. This ground, too, was not adequately considered.

[22] Ultimately, the state bore the onus. Very little evidence was placed before the court *a quo* to indicate that the likelihood that the events listed in section 60(4) would occur was more than mere speculation. Crucially, the legal representative for the appellant argued that the latter's testimony was, in the main, undisputed. From the record, it seems that the state was focused more on the merits of the case than the factors listed in sections 60(4) to (9) of the CPA. Consequently, the facts alleged by the appellant must be accepted as true.

[23] With specific regard to section 60(9) of the CPA, a court is required to weigh the interests of justice against the right of the accused to his or her personal freedom, especially in relation to the prejudice that he or she would suffer should he or she continue to be detained. In the present case, the record reveals that the appellant has significant business interests that have already been affected by his incarceration, threatening the livelihoods of some 1,300 employees. More importantly, his incarceration has a direct impact on his immediate and wider family. It was not disputed that he has at least six minor children who depend upon him as

the main breadwinner. His release on bail would enable him to address his business concerns and to provide for the needs of his family, including his dependents.

[24] In the circumstances, this court is satisfied that the state failed to discharge the onus and to demonstrate that the interests of justice did not permit the appellant's release. With regard to the bail amount, the legal representative for the appellant submitted in the court *a quo* that his client could afford payment of R3,000. In argument before this court, no further submissions were made on behalf of either the appellant or the state. Mindful of the appellant's financial standing, including testimony in relation to the scale of his monthly income at the time of his arrest,[7] the above amount is not appropriate. It would not be unfair to set the amount at R10,000. Furthermore, given that his family and occupational ties are not to the Eastern Cape and that his assets are situated in KwaZulu-Natal, it would not be unfair to attach stringent conditions to the granting of bail.

[25] Accordingly, the following order is made:

(a) the appeal is upheld;

(b) the order of the court *a quo* is set aside and replaced with the following:

(i) the appellant's application for bail is granted and he is released on bail, pending the completion of his trial;

(ii) the following conditions apply:

(aa) the appellant shall deposit the sum of R10,000 in accordance with the provisions of section 60(13)(a) of the CPA;

(bb) the appellant shall reside at the house situated at 269 Impahla Road, Amamzimtoti;

[7] The appellant indicated that he was earning a monthly income of approximately R115,000. It is not known whether this represented his gross income; nevertheless, it is a substantial amount.

(cc) the appellant shall, not less than two (2) days prior to his departure from KwaZulu-Natal for legitimate purposes, notify the commanding officer or a duly delegated member of his or her staff, in person, at the police station in Amamzimtoti and furnish to him or her the details of his itinerary, including the duration of his absence and his whereabouts for the period in question, as well as the cellphone number at which he can be contacted;

(dd) the appellant shall report to the police station in Amamzimtoti between the hours of 06h00 and 18h00, on the Wednesday of each week, provided that he shall report to the nearest police station between the same hours and on the same day when outside KwaZulu-Natal for legitimate purposes;

(ee) the appellant shall notify the commanding officer or duly delegated member of staff in (cc), above, and the registrar of this court, in writing, of any change in his residential address at least two (2) weeks prior to any such change;

(ff) the appellant shall not influence, intimidate or harm any witness;

(gg) the appellant shall report to the police station in Amamzimtoti within 48 hours of a written notice to that effect having been delivered to his legal representative at the time, in the event that he is convicted and sentenced to a period of imprisonment;

(hh) the appellant is prohibited from applying for and being granted a passport for the duration of the trial proceedings;

(iii) a copy of this order must be provided to the Director-General for the Department of Home Affairs.

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JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE

Attorney for the appellant:	Mr Daubermann, instructed by Peter Daubermann Attorneys, Gqeberha.
Counsel for the respondent:	Adv Mati, instructed by the Office of the Director of Public Prosecutions, Makhanda.
Date of hearing:	31 May 2022
Date of delivery of judgment:	07 June 2022