



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

NOT REPORTABLE

Case no: CA&R161/2023

In the matter between:

SICELO MBULAWA

Appellant

and

THE STATE

Respondent

JUDGMENT

Govindjee J

Background

[1] The appellant stands arraigned, together with four other accused persons, in the Magistrate's Court at Alice on various charges under Case No: A80/23 ('the case'). The appellant is accused no. 2 in the case. The charges include various counts of murder and attempted murder, as well as alternative charges in respect of conspiracy to commit murder in contravention of the Riotous Assemblies Act, 1956.¹

¹ Act 17 of 1956.

[2] An opposed application to be released on bail was dismissed by the court *a quo* on 12 June 2023. The grounds of appeal include that court's alleged misdirection in treating the charge(s) as a Schedule 6 offence, and the failure:

- a) to have proper regard to all the evidence adduced in support of bail;
- b) to attach due weight to the appellant's personal circumstances;
- c) to find that none of the likelihoods set out in s 60(4) of the Criminal Procedure Act, 1977 ('the CPA') existed *in casu*;

Was the magistrate's discretion wrongly exercised?

[3] It has been held that a bail appeal goes to the question of deprivation of personal liberty, thereby implicating constitutional rights, so that an appeal court's competence to determine the exercise of the court *a quo*'s discretion ought not to be unduly restricted.² Section 65(4) of the CPA provides:

'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.'

[4] A court of appeal may consider the issue of bail afresh where the court *a quo* misdirected itself materially on the facts or legal principles. It will not interfere merely because it holds a different view to the court *a quo*, or even in cases where there is doubt about whether to interfere. On the assumption that the decision of the court *a quo* is 'correct', an appeal court must be persuaded that the magistrate exercised their decision wrongly.³

[5] The record reveals that the court *a quo* relied on a concession from the legal representative who appeared on behalf of the appellant at the bail application,

² *S v Porthen & Others* 2004 (2) SACR 242 (C) para 17.

³ See *S v Barber* 1979 (4) SA 218 (D) at 220E. Cf *S v Porthen & Others* 2004 (2) SACR 242 (C) para 7. Also see *S v Sesing* (unreported, FSB case no A11/2019, 25 January 2019) para 8; *S v Sewpersad* (unreported, KZD case no D13878/18, 18 January 2019) para 20.

following submissions from the prosecutor, in respect of the applicability of schedule 6 of the CPA to certain of the charges.⁴ That approach ignored the salutary remarks of Opperman J in *S v Modise*:⁵

‘There is not a bail application that can commence without the schedule applicable; and the onus prescribed therefor, having been determined ... all bail applications must start with the establishment of the schedule applicable, and the applicant must have a clear understanding of the issue.

...

In practice the court will have to probe the schedule applicable from both parties, rule on it and explain the onus to the applicant. Then and then only may the hearing commence. *The court must rule on the schedule because the parties might have it wrong. Bail applications are completely in the hands of the court.*’ (Own emphasis.)

[6] As was the case in that matter, the magistrate’s decision to apply schedule 6 was erroneous. This is because there was no reference in the charge sheet to the crime of murder ‘when planned or premeditated’ or when ‘committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy’. The State argued that this might be implied from the bail proceedings and from the very fact that the appellant was charged together with other accused. It was also submitted that the appellant had not suffered any prejudice because of the charge sheet omissions.

[7] Those arguments are, in my view, without merit. A similar occurrence was recently pronounced upon by my brother, Laing J. The learned judge relied on the constitutional right to be released from detention if the interests of justice permit, subject to reasonable conditions, the accused person’s fair trial rights, including the right to be informed of the charge with sufficient detail to answer it, and the essentials of the charge as described in s 84(1) of the CPA.⁶ The court added that these rights extended to bail application proceedings, so that an accused person

⁴ Cf s 60(11A) of the CPA.

⁵ *S v Modise* 2021 (2) SACR 218 (FB) paras 11, 12.

⁶ S 84(1) of the CPA: ‘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.’

could respond appropriately to enable the court to determine whether the interests of justice permitted release.

[8] Following that approach, the starting point is the charge sheet itself, which is an official form. Nothing prevented the state from amending or supplementing the charges, on application where necessary, in advance of the bail application in such a manner as not to infringe the accused's right to a fair trial.⁷ As it stands, the absence of reference to planning, premeditation, common purpose or conspiracy in explaining the murder charges resulted in the court *a quo* erring in respect of its treatment of the matter in terms of schedule 6. Absent further detail in the charge sheet, the bail application was governed by the approach to Schedule 5 offences.

[9] The magistrate's exercise of discretion accordingly commenced off the wrong foot and necessitates this court's own enquiry as to whether the interests of justice permit the granting of bail. The authorities submitted by the state, which deal mainly with appeal court decisions at the culmination of trials where the charge sheet was inadequate, also in respect of minimum sentence provisioning, and which consider the issue of possible prejudice to the accused in that context, take the issue no further.

[10] Section 60(11)(b) of the CPA sets out that:

'(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to—

...

(b) in Schedule 5, but not in Schedule 6, 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.'

[11] Section 60(4) of the CPA sets out the circumstances where the interests of justice do not permit the granting of bail, including when there is the likelihood of the

⁷ *Cele v The State* (unreported ECD, case no. CA&R 38/2002) para 10.

accused evading trial,⁸ endangering the safety of the public or any particular person,⁹ attempting to influence or intimidate witnesses or to conceal or destroy evidence,¹⁰ or undermining the proper functioning of the criminal justice system, including the bail system.¹¹ In determining the core issue ('interest of justice') in the light of the various considerations noted in s 60, this court is obliged to decide the matter by weighing the interests of justice against the right of the appellant to his personal freedom. In particular, the likely prejudice to be suffered if the appellant were to be detained in custody, including any financial loss that may be suffered due to continued detention, and the probable period of detention until the disposal or conclusion of the trial, must be considered.¹²

[12] The prima facie strength or weakness of the state's case is a relevant consideration for purposes of determining where the interests of justice lie for the purpose of s 60(11)(b).¹³ This enquiry must include consideration of matters which influenced the magistrate in deciding to refuse the bail application.¹⁴

[13] The court *a quo* placed considerable emphasis on a disputed confession in refusing bail. This aspect was considered as part of the erroneous enquiry in respect

⁸ S 60(6) must be read together with s 60(4)(b). This includes consideration of the ties of the accused to the place where he is to be tried; his assets, and the location of those assets; the means, and travel documents held by the appellant, which may enable him to leave the country; the extent to which he may be able to forfeit any bail amount set; the nature and the gravity of the charges against him; the strength of the state's case and the incentives to evade trial in the circumstances; the nature and gravity of the punishment likely to be imposed; the ease with which any set conditions could be breached.

⁹ This must be considered together with the provisions of s 60(5), noting particularly, in the present circumstances, the degree of violence towards others implicit in the charges against the appellant, and the prevalence of those crimes.

¹⁰ In terms of s 60(7), the following factors may, *inter alia*, be considered as part of this enquiry:

- (a) The appellant's familiarity with the identity of witnesses and with the evidence they may lead;
- (b) Whether the witnesses have already made statements and agreed to testify;
- (c) Whether the investigation against the appellant has been completed;
- (d) The relationship of the appellant with the various witnesses and the extent to which they could be influenced or intimidated;
- (e) How effective and enforceable bail conditions prohibiting communication between the appellant and witnesses are likely to be; and
- (f) Whether the appellant has access to evidentiary material to be presented at his trial and the ease with which this could be concealed or destroyed.

¹¹ See the various factors listed in s 60(8).

¹² S 60(9) of the CPA.

¹³ When the state has either failed to make a case or has relied on one which is so lacking in detail or persuasion that a court hearing a bail application cannot express even a prima facie view as to its strength or weakness the accused must receive the benefit of the doubt: *S v Kock* 2003 (2) SACR 5 (SCA) at 11i—12a. Also see *S v Van Wyk* 2005 (1) SACR 41 (SCA) para 6.

¹⁴ See *S v Kock* 2003 (2) SACR 5 para 16.

of 'exceptional circumstances', on the basis that the charge(s) were covered by Schedule 6. The magistrate concluded that this high threshold had not been met, and focused their enquiry to that question alone. The applicants for bail were also, at various times during the judgment, treated as a collective, for example in support of findings that there was a likelihood of witnesses being influenced. The magistrate considered the education level of all applicants as a factor that counted against them, based on 'a pattern of proper planning and execution shown in the commission [of] the alleged offences'.

[14] Those conclusions were based on the investigating officer's affidavit in opposition to bail, which was the only evidence relied upon by the state. It is convenient to deal with that evidence before considering the appellant's affidavit, bearing in mind that the burden of proof in these proceedings is on the appellant, with reference to the civil standard of proof.¹⁵

[15] The investigating officer's affidavit in opposition to bail details multiple shooting incidents that occurred between March 2022 and January 2023, including the shooting, execution style, of Mr Petrus Roets on 19 May 2022, and the murder of Mr Vesele, as well as kidnapping of a University of Fort Hare electrician. An abandoned vehicle seemingly contained clues that led to the arrest of the accused. In particular, the police found a hitlist with all the names of the victims of the various shooting incidents or attempted shooting incidents. Various inferences are drawn from the inclusion of a cellular phone number of one of the accused persons (Mr Bongani Peter) at the back of some A4-size photographs of victims found inside the vehicle.

[16] Mr Peter was, according to the investigating officer's affidavit, employed as a chief transport officer serving under Mr Roets. The affidavit alleges a conspiracy including the appellant and Mr Peter, and that the appellant was tasked with organising hitmen. He 'promised to bring his Mthatha guys' and 'all three have

¹⁵ See *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC) para 65; *S v Tshabalala* 1998 (2) SACR 259 (C) at 269*g–i*. When an accused, taking into account what is already on record, does not even make out a prima facie case, there is authority that there is no duty on the prosecution to present any evidence in rebuttal: *S v Mabusela & Another* (unreported, GP case no A909/2015, 9 February 2016) para 8.

confessed about [the] killing of Roets'. Reliance is placed on a payment made by Mr Peter to the appellant's company four days after Mr Roets was killed, the allegation being that this was an amount that Mr Roets had 'refused to pay' and that Mr Peter and the appellant were linked against those 'closing the "financial tap"' they had managed to open.

[17] It may be accepted that the appellant is unmarried and has three children, owning motor vehicles but no fixed property. He is a final-year Bachelor of Laws student at the University of Fort Hare. He rents accommodation since 2019 and voluntarily surrendered his passport to the authorities. He established various legitimate businesses to support his family, and registered various companies. He alleges company assets and household goods in excess of R1 million, with a monthly income of between R50 000 and R100 000. The appellant has been in custody since 9 April 2023, alleging brutal treatment, including interrogation and violation of rights. He has no previous convictions or pending cases and there is nothing to suggest that he knows any of the possible witnesses in the matter, or the location of any evidential material. He is legally represented and indicates that he will leave matters in respect of state witnesses to his legal team, and strictly comply with any bail conditions set.

[18] The appellant highlights that not standing trial would jeopardise his chance of obtaining his law degree, in circumstances where he is on the verge of obtaining same. His affidavit explains a close connection to his children, including strong financial support, and the negative implications for his business should he fail to stand trial. The appellant considers the state's case against him as weak and states that he does not fear attending trial to be vindicated, intending to enter a plea of 'not guilty'.

[19] The state avers that he would be in a financial position to obtain a false passport and leave the country. The state highlights the disconcerting nature of the crimes and notes that an unnamed state witness was recently the victim of a hit-and-run incident. The outstanding investigations require two months to be completed.

Those aspects aside, the appellant's evidence on affidavit as to his personal circumstances stands uncontested.

Analysis

[20] Each bail-related case should be considered on its merits and the court is obliged to consider the 'totality of the evidence'.¹⁶ It has been accepted in this division that courts should always grant bail where possible and should lean in favour of the liberty of the subject provided that the interests of justice will not be prejudiced.¹⁷

[21] It is correct that the offences with which the appellant has been charged are serious. There is, however, little evidence of the strength of the state's case in respect of the appellant, who intends denying the charge. That affects the assessment of the probabilities in respect of the s 60(4) considerations. On the probabilities, the appellant stands to lose a great deal, personal and financial, in the event that he fails to stand trial. While one cannot predict future behaviour with any degree of certainty, a mere possibility of the appellant acting contrary to the dictates of s 60 is insufficient basis to refuse the appeal. In the present circumstances, especially when considering the limited material contained in the investigating officer's affidavit pertaining specifically and directly to the appellant, the factors presented in support of the application, and this appeal, are compelling. Reliance on the disputed confession was also inappropriate in the present circumstances, and there is little beyond this suggestive of a strong case against the appellant.

[22] In the final analysis, the probabilities do not support a finding that the appellant is likely to endanger the safety of others, attempt to evade trial, attempt to influence or intimidate witnesses or the like, thereby undermining the criminal justice system. Absent plausible rebuttal, the evidence in favour of granting bail outweighs the evidence to the contrary. The imposition of stringent bail conditions, including an appropriate financial amount, will further limit any risk that the appellant may not stand trial. The inevitable conclusion is that the appellant has succeeded in

¹⁶ See *S v Nkuna* (unreported, GNP case no A82/2013, 22 February 2013) para 9.

¹⁷ *S v Mququ* 2019 (2) SACR 207 (ECG) para 6.

demonstrating, on the probabilities, that it is in the interests of justice for the appellant's release on bail.

[23] Bearing in mind the caution that the amount of bail should not be merely nominal, and is a factor contributing to the appellant facing trial, I intend to grant bail in the amount of R75 000, subject to various conditions contained in the draft order submitted during the bail appeal proceedings.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 03 November 2023

Delivered: 03 November 2023

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