FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable: NO **Of Interest to other Judges: NO** **Circulate to Magistrates: NO**

Case No: A156/2023

In the matter between: -

NANDIPHA MAGUDUMANA **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: JORDAAN, AJ

JUDGMENT BY: JORDAAN, AJ____

HEARD ON: 01 NOVEMBER 2023

DELIVERED ON: 07 NOVEMBER 2023

INTRODUCTION:

[1] This is an appeal in terms of section 65(1) of the Criminal Procedure Act 51 of 1977 (the Act) against the refusal by the Magistrate at Bloemfontein to release the appellant to bail on the 11th of September 2023. The Learned Magistrate refused bail on the grounds that the appellant is a flight risk and that no bail condition will assist under the circumstances to limit the risk and

that the appellant did not satisfy the court that it is in the interest of justice for her to be released on bail.

[2] The appellant is charged, together with other accused, on an array of criminal offences ranging from fraud, corruption, violation of a body, defeating the ends of justice and other charges. The appellant with her co-accused is to be arraigned and stand trial in the Bloemfontein High Court. One of the co-accused of the appellant is Thabo Bester, accused 5 in the case, who was previously convicted on charges of rape and murder and was serving life imprisonment in Mangaung Correctional Prison, referred to as G4S. Accused 1,6,7,8,10,11 and 12 were employed at G4S; accused 3 was an IT specialist at G4S; accused 2 is the appellant's father and accused 9 was the appellant's gardener. The charges in the instant matter arise from the alleged common aim of the accused persons that Thabo Bester must escape from prison and it is alleged that they all acted in the furtherance of that common purpose in effecting his escape.

[3] The appellant lodged a formal bail application, which proceedings were adjudicated on the strength of affidavits filed by both the appellant and the prosecution. It was agreed between the parties that the offences that the appellant face resort under Schedule 5 to the Act.[1] Accordingly, the appellant bore the onus at the bail hearing to satisfy the court *a quo* that the interests of justice permits her release on bail. Subsequent to the handing in of the affidavits and during closing arguments, the appellant disputed that the offences resort under Schedule 5 in response to which the prosecution handed in a written confirmation in terms of section 60(11A)(a) of the Act that the appellant will be charged with an offence referred to in Schedule 5, the court *a quo* then proceeded to hear the closing arguments.

[4] In the Notice of Appeal filed on record the appellant assail the court *a quo's* refusal to remit the appellant on bail on the following grounds:

[1] Paginated Bundle Part 2 page 237 line25 to page 238 line 1 and lines 21 to 24

1. *The Court misdirected itself in finding that the charges preferred against the Appellant fall under Schedule 5 despite the evidence of the Respondent tendered through the Investigating Officer.*

   ALTERNATIVELY

   In the event that this Honourable Court does not find in favour of the ground referred above, it is respectfully submitted that the Court a quo erred in finding that the interest of justice does not permit the release of the Appellant on bail.

2. *The court erred in finding that the certificate issued by the Director of Public Prosecution (DPP) constitutes sufficient evidence to prove the charges of corruption against the Appellant.*

3. *The Court erred in finding that there is a strong case against the Appellant on many charges including corruption charges.*

4. *The Court misdirected itself by finding that the Appellant is a definite flight risk and that no bail condition will assist under the circumstances to limit this risk. The Court patently ignored the possibility of imposing alternative bail conditions that could be used to minimise the risk, if there is, of absconding.*

5. *The Court erred in finding that when the Appellant left the country, she knew that she most probably will not return.*

6. *The Court misdirected itself in finding that the Appellant knowing it to be false supplied false information at the time of her arrest.*

7. *The Court erred in prematurely pronouncing on the merits reserved for the trial court and finding that the Appellant will have more opportunities and means to assist Mr. Bester to escape.*

In doing so the court failed to take into consideration that there was no evidence to support its finding. It is also noteworthy that the court failed to properly analyse the evidence before it and unfairly placed undue weight on the aspects not tendered in evidence by the respondent.

8. *The Court misdirected itself by ignoring the Appellant's evidence relating to having an alternative address. It is submitted that equal weight ought to be attached to the evidence of the Investigating Officer as well as the Appellant.*

9. *The Court misdirected itself in placing undue weight on the respondent's allegations that the Appellant rented a black Mercedes Benz in South Africa, and this vehicle was found abandoned in Zimbabwe before she was arrested. Notwithstanding the fact that these findings lacks material details such as date, place of the rental, and how it was abandoned. It is submitted with respect that there are no grounds in law to reject the Appellant's version and same should carry equal weight and the evidence of the Investigation Officer should not be accepted above that of the Appellant.*

10. *The Court erred in finding that there should be no reason why the Appellant would elect to disclose the full information regarding her kidnapping. In doing so, the Court unfairly ignored the submissions by the Appellant to exercise and assert her right to remain silent and not to disclose the basis of her defence until at the appropriate time and forum.*

11. *The Court misdirected itself in finding that there is evidence that accused number 1 was promised millions to arrange this escape, and he arranged for accused 3,6,7,8,10 and 12 to assist. In doing so, the court failed to appreciate that no evidence of such nature was presented by the respondent.*

12. *The Court misdirected itself in finding that the Appellant's claim on being kidnapped by Accused no. 5 was not supported by the available evidence. In doing so, the court unjustly rejected the Appellant's version.*

13. *The Court misdirected itself in finding that the Appellant has the necessary means, the know-how to leave the country. It is respectfully submitted that the latter finding is not supported by evidence.*

14. *The Court erred in finding that the chances of conviction is good and in so doing assumed the role of a trial court. It is respectfully submitted that even in the event that a strong case against the Appellant existed, this was no reason to refuse the Appellant bail as the Court erred in failing to acknowledge that bail is non penal in character.*

15. *The Court erred in finding that it appears the Appellant and accused 5 were able to convincingly deceive everyone to work with them. In doing so the court made a factual conclusion with no supporting evidence.*

16. *The Court misdirected itself in finding that by allowing the Appellant to go out on bail will enable her to yet again try to facilitate another escape if she wants to.*

    In doing so, the Court reduced the bail application into a drawn-out full dress-rehearsal trial before the criminal trial.

17. *The Court furthermore erred in finding that if the Appellant is out on bail nothing will stand in her way. She will have access to all the necessary information and people to facilitate another escape. There is no evidence supporting this finding.*

[5] Before the Court, Counsel appearing for the Respondent made the following submissions:

5. 1 Counsel submitted that the decision by the bail court was not wrong and that a court on appeal can only set aside such decision, if the court hearing the appeal is satisfied that the decision was wrong;

5.2 Counsel submitted that the offence resort under Schedule 5 that the Director of Public Prosecutions can issue such certificate at any time before an accused person pleads.

[6] Section 65(4) of the Criminal Procedure Act 51 of 1977, stipulates the requirements for setting aside any bail decision. The section 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.”

[7] In S v Barber 1979 (4) SA 218 (D) 220E-H Hefer J remarked as follows:
“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. 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 but exercised that discretion wrongly.”

[8] Bearing in mind the provisions of s65(4) and the authorities it is accordingly necessary to find that the magistrate misdirected himself or herself in some

material way in relation to either fact or law in order to interfere on appeal.[2] If such misdirection is established, the appeal court is at large to consider whether bail ought, in the particular circumstances to have been granted or refused. In the absence of a finding that the magistrate misdirected him or herself the appeal must fail.[3]

[9] The appellant advanced several grounds upon which it was submitted that the magistrate had erred in refusing to remit the appellant to bail. I turn to deal with the alleged misdirections hereunder.

[10] The first of these relate to the finding that the charges preferred against the appellant fall under Schedule 5 despite the evidence of the respondent tendered through the Investigating Officer, while the second deals with the court having erred in finding that the certificate constitute sufficient evidence to prove the charges of corruption against the appellant. I will deal with both simultaneously for reasons that will become apparent.

[11] In this regard the evidence of the Investigating Officer started off with him stating:

"*My investigation revealed that accused 1 was promised R7 million to orchestrate the escape. He enlisted the assistance of his co-accused, that being accused 3,6,7 and ....(indistinct)"*[4] He later further testified on the charges that in count 3 the offence is the contravention of Section 3(b) of Act 12 of 2004, that is corruption. "*The applicant and her co-accused acted in the furtherance of a common purpose. Their aim was that Bester must escape. The objective evidence of bank statements shows that the applicant was also on occassions a source who provided the money to accused 1 for distribution to their co-accused. So far, it has been established the applicant paid R85 000 to accused 1."*

[12] Corruption is defined in the PREVENTION AND COMBATING OF CORRUPT ACTIVITIES ACT NO 12 OF 2004(PRECCA) as follows:

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[2] S v Ali **2011 (1) SACR 34** (E) at para 14; S v M **2007 (2) SACR 133** (E)

[3] S v Porthen and others **2004 (2) SACR 242** (C) at par [11]

[4] Index bundle page 24 line 2-7

"3. General offence of corruption- any person who, directly or indirectly-

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) gives or agrees or offers it give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,

In order to act, personally or by influencing another person so to act, in a manner-

(i) That amounts to the-

(aa) illegal, dishonest, unauthorised, incomplete, biased, or

(bb) misuse or selling of information or material acquired in the course of the,

Exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) That amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) Designed to achieve an unjustified result; or

(iv) That amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption."

The word "gives" includes an agreement by X to give the gratification to Y, or the offering by X to give it to Y. The word "accepts" in turn incudes an Agreement by Y to accept the gratification or the offering by Y to accept it.[5] This means that the corruption is complete when there is an offer of gratification which is accepted in order to act in an illegal manner, irrespective of what amount is ultimately paid.

[13] Schedule 5 provides for any offence relating to Chapter 2 of the PRECCA:

[5] Snyman's Criminal Law Seventh edition Updated by SV Hoctor page 357.

(a) involving amounts of more than R500 000,00; or

(b) involving amounts of more than R100 000,00, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution of a common purpose or conspiracy; or

(c) if it is alleged that the offence was committed by any law enforcement officer-

  (i) involving amounts of more than R10 000,00; or

  (ii) as a member of a group of persons, syndicate or any enterprise acting in the execution of a common purpose or conspiracy.

[14] However, in the instant case the Director of Public Prosecutions(DPP) also issued a certificate in terms of section 60(11A)(a) of the Act, which was accepted as Exhibit J by the court *a quo*. In terms of the certificate the DPP confirmed that the appellant and her co-accused will be arraigned on amongst others, four(4) counts of contravention of section 3(a) and (b) of Act 12 of 2004, Corruption, respectively, wherein R2,5million was offered and R40 000,00 and R85 000,00 was paid and R500 000,00 was offered and R10 000,00 was paid) emanating from incidents which occurred during April 2022 in the district of Mangaung. The c/s3(a) and (b) resort under Schedule 5 of the Act as it involves amounts more than R500 000,00 and or involves amounts more than R100 000,00 if it is alleged that it was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

[15] Having regard to the court *a quo's* judgment in this regard, the court quoted section 60(11A) and ended off by stating:

"…the written confirmation shall upon its mere production be prima facie proof of the charges to be brought against such a person. Prima facie proof become conclusive proof in the absence of evidence to the contrary. This court does not have any evidence to the contrary therefore the application will be done in terms of Schedule 5 and the onus rests upon the applicant to satisfy the court that the interest of justice permits her release on bail as

initially agreed." The wording is clear, it shows that the court *a quo* did not find, as submitted on behalf of the appellant, that the certificate is sufficient evidence to prove the charges of corruption against the appellant, but that it is evidence of the charges to be brought against the appellant.

[16] In the case of S v Botha en 'n ander[6] Viviers ADCJ, as he then was, stated: "Namens beskuldigde 1 en 3 is ter aanvang voor ons betoog dat die Wetgewer nie kon bedoel het dat 'n blote bewering in die akte van beskuldiginig dat 'n beskuldigde aan 'n Bylae 6 misdryf skuldig is, voldoende is om art 60(11)(a) van die Wet van toepassing te maak nie. Volgens die betoog moet die hof wat die borgaansoek aanhoor, self eers die feite evalueer ten einde te bepaal of die Staat by die vehoor n Bylae 6 misdryf sal kan bewys, voordat art 60(11)(a) toepassing vind. Ek kan nie met die betoog saamstem nie. Die bewoording van die subartikel is duidelik en ondubbelsinning en is net vir een uitleg vatbaar. Dit is dat die formulering van die aanklag in die akte van beskuldiginig, indien nodig, aangevul deur 'n skriftelike bevestiging ingevolge art 60 (11A), beslissend is vir die vraag of 'n beskuldigde hom van die bewyslas in art 60(11)(a) moet kwyt om sy vrylating op borgtog te verkry." In this regard see also S v van Wyk[7] and Gade v S[8] where it was stated:

"Before the onus falls on the accused a jurisdictional factor has to be established by a certificate from the Director of Public Prosecutions <u>*or*</u> *full description of the charge in the charge sheet."* In the instant case the court *a quo* relied on the certificate issued by the DPP, as is clear from the Act and the authorities quoted herein, this court finds that the court *a quo* did not misdirect itself in doing so. This challenge only arose during closing argument, at no stage did the appellant request the reopening of their case in order to challenge the Schedule of the bail application.

[6] 2002 (1) SACR 222 (SCA) at [16]
[7] 2005(1) SACR 41 (SCA) at [3]
[8] 2007 (3) All SA 43 (NC)

[17] The appellant submit that it was wrong for the court *a quo* to find that there is a strong case on mere affidavits. In the court *a quo* the affidavits was submitted as evidence, thus the evidence was that there are witness statements, fingerprint evidence and documentary evidence linking the appellant to the various charges that will be levelled against her. It should be noted from the outset that the appellant did not in her founding affidavit set out to challenge the strength of the State case against her. The essential allegations of fact which the respondent will prove against the appellant at trial was set out in the affidavit of the Investigating Officer, Colonel Flyman. These allegations and the evidence that the respondent has available to substantiate them were summarised in detail by the court *a quo* in its judgment. What the court is called upon to consider, in a bail application, is the nature of the evidence that is available to the prosecution and, absent a challenge in the bail proceedings to the admissibility or reliability of that evidence, the court will accept the evidence. It is upon this acceptance that the court decides whether the case is strong or weak. In this instance there was no admissibility challenge founded upon convincing evidence calling into question the admission of the evidence of the fingerprint evidence showing that the appellant claimed the body of the deceased at the mortuary, the witness statements and documentary evidence. This Court cannot find any misdirection in this finding of the court *a quo.*

[18] The appellant submitted that the court *a quo* erred in finding that the chances of conviction is good it assumed the role of the trial court, even if there is a strong case, that does not provide reason to refuse appellant bail. The magistrate considered the strength of the state case against the appellant as but one of the factors to be considered when deciding whether there was a likelihood that the appellant would evade trial, as the court was required to do and the court was cognisant of the role that the assessment of the strength of the state's case plays in the overall decision whether the appellant satisfied the court that the interests of justice permit her release. This approach is correct. The fact that the magistrate found that there is a strong case against the appellant also cannot be criticized.

[19] The judgment was in ground eleven of the notice to appeal assailed that there was no evidence that accused 1 was offered millions and he arranged for accused 3,6,7,8,10 and 12 to assist. In this regard the evidence of the Investigating Officer in his affidavit started off with him stating: "*My investigation revealed that accused 1 was promised R7 million to orchestrate the escape. He enlisted the assistance of his co-accused, that being accused 3,6,7 and ....(indistinct).*"[9] The court *a quo* thus did not misdirect itself in finding that there was such evidence submitted.

[20] It was submitted that the court misdirected itself in finding that the appellant is a flight risk, that no bail condition will limit that risk and that the appellant has the necessary means and know-how to leave the country and that the appellant left the country willingly. In S v Hudson[10] it was held that where an accused applies for bail and confirms on oath that he has no intention of absconding, due weight should be given to his testimony, however implicit reliance cannot be given on the mere ipse dixit of the accused. Ngcobo J in S v Thornhill[11] stated that the "reliability of such a statement must be assessed in the light of the other established facts."

[21] The court *a quo* had in contrast, the evidence of Colonel Flynn which stated that the appellant was found in Tanzania on the 07th of April, without having used her passport to cross the various borders to get there. In this regard there is also a statement of a witness which states that the appellant under false pretences requested her passport which was found by the police in Tanzania. The affidavit of the investigating officer further indicated the various means that the appellant made to claim the body which was to be used to facilitate Thabo Bester's escape, in the process even making use of the legal process to facilitate claiming a body as Thabo Bester and requesting an interdict against the police, showing no regard for the law. This the state contended showed that the appellant is a flight risk, with no regard for the law and no bail condition would have any effect, the fact that she was able to enter other countries without having her passport stamped shows her

[9] Index bundle page 24 line 2-7
[10] 1980 (4) 145 (D)
[11] 1998(1) SACR 177 (C) 182F

know-how of how to evade being traced. The appellant's behaviour challenging her return is contrary to the behaviour expected of a person kidnapped and she never in all this time took steps to report same, thus according to Colonel Flynn calling her kidnapping into question.

[22] This Court cannot find that the court *a quo* misdirected itself in the circumstances as the court had regard to the evidence and assessed it holistically[12] and made inferences based on the evidence presented as a whole.

[23] The submission that the court misdirected itself in finding that should the appellant be released on bail nothing will stand in her way as she will have access to all the people and information to facilitate another escape and in finding that the appellant and accused 5 convincingly deceived people to work with them. This court cannot fault the finding of the Magistrate. The nature of bail is that it is expected of the judicial officer to look into the future behaviour of the appellant, using the appellants past behaviour. The Magistrate did exactly that, she had regard to the evidence that the state presented, where the appellant was the main role player in facilitating the escape of the accused 5.[13] Her deductive reasoning based on evidence cannot be faulted.

[24] The further attack on the judgment was that the magistrate erred in finding that the appellant knew that when she left that she will probably not return and in ignoring the appellants evidence of an alternative address. The court had regard to the evidence that was presented by the state that the appellant vacated her house that she was renting prior to leaving, her movable assets were removed and no evidence from the appellants side of what happened with her property in the face of the state evidence that she removed it prior to leaving, the car which appellant rented was found outside the borders of the country, her own car was not used. The appellant submitted evidence of a friend offering her an alternative address. There was no rebuttal in regard to

[12] Paginated Bundle page 206 lines 19-21
[13] Paginated Bundle page 200 line 1 to 25

this evidence of the state. This evidence was considered by the court *a quo* in making its conclusion and this court cannot fault it.

[25] The court *a quo* it was submitted misdirected itself in finding that the appellant supplied the police with false information. When regard is had to the appellant's affidavit[14], she stated that she stayed at the mentioned address prior to her arrest for approximately two years. The appellant vacated the premises prior to her later arrest in Tanzania and also directed her parents to vacate the premises in Sandton during March, yet at her later arrest in April she provided the same address she had vacated. The court cannot be faulted for its conclusion based on evidence presented at her arrest.

[26] The court *a quo* was assailed in not respecting the appellants right not to disclose the further details of her being forced to leave the country against her will. The state made it clear that the appellant is not charged for an offence of the nature and the person implicated is accused 5, according to the submission of the appellant. The court considered that details around being forced are factors to be considered as against the considerations of being a flight risk in circumstances where the available evidence shows the opposite. In bail proceedings the applicant may excercise his or her right to silence as was stated in the unreported case of S v Basodien GPHC A397/2019 delivered on 15 January 2020. He cannot be expected to disclose his defence that will be raised at trial, but non-disclosure can hardly enure to the benefit of the bail applicant, especially in those statutory instance where he or she carries a burden of proof. In the instant case, the details pertain to a charge which has not been levelled against anyone and much less the appellant.

[14] Paginated Bundle page 241 paragraph 7.1.3

[27] In my view, the magistrate's finding, having regard to all of the relevant factors addressed in the evidence, that there was a real risk that the appellant is a flight risk and that no bail condition will assist under the circumstances to limit the risk and that the appellant did not satisfy the court that it is in the interest of justice for her to be released on bail was not tainted by error or misdirection. It must therefore stand as correct.

[28] In the circumstances I make the following order:

28.1 The appeal is dismissed.

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M.T.Jordaan

Acting Judge Free State High Court,

Bloemfontein

APPEARANCE:

Advocate Machini Motloung for Appellant

Advocate Amanda Bester for state