IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

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

Case number: 226/2022
Appeal Number: A17/2023

In the matter of:

THABO PETRUS THOKOANA **APPELLANT**

versus

THE STATE **RESPONDENT**

CORAM: NAIDOO J

HEARD ON: 3 FEBRUARY 2022

DELIVERED ON: 6 FEBRUARY 2022

JUDGMENT – BAIL APPEAL

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[1] The appellant came before me on an urgent basis in an application in which he sought to appeal the refusal of the Senekal Magistrates Court to admit him to bail. It seems that when the bail application commenced before the court *a quo*, the appellant was charged with Assault with Intent to do Grievous Bodily Harm (Assault GBH). However, during the course of the hearing and after receipt by the prosecutor of the medical examination form J88, the prosecutor decided that the charge should be changed to one of Attempted Murder. This was only revealed just prior to the court delivering its judgment in the bail application. There were other charges also added at that stage, but they did not impact on the bail application. I will touch on this aspect later. Adv RJ Nkhahle represented the appellant in this court and Adv (Ms) S Thunzi represented the State.

[2] By way of background, the complainant and the appellant were in a relationship. The appellant allegedly assaulted the complainant on 16 October 2022. She opened a charge of assault against him and also obtained a Protection Order against him in terms of the Domestic Violence Act 116 of 1998. The Protection order was served on the appellant on 17 October 2022. The incident which led to the arrest of the accused in this matter occurred in the early hours of Sunday 30 October 2022. The appellant and complainant were in the same tavern at that time, having gone there separately on the previous evening. The state alleges that the appellant indicated that he wished to speak to the complainant, and when she refused, he stabbed her

in the chest with a broken bottle. He was informed a few hours later that the police were Looking for him. He handed himself to the police on the Monday morning.

[3] The judgment of the court *a quo* was assailed, in essence, on the following grounds, namely that the court erred in:

3.1 finding that the appellant failed to adduce evidence to show that the interests of justice permitted his release on bail;

3.2 failing to consider the totality of the evidence placed on record by the appellant, including the personal circumstances of the appellant and the concessions of the investigating officer;

3.3 over-emphasising the seriousness of the offences and the interests of the community, and in doing so found that the appellant had assaulted the complainant and contravened the provisions of the Protection Order. In so doing, the court contravened the appellant's constitutional right to be presumed innocent;

3.4 placing undue reliance on the investigating officer's fear that the appellant will not observe any bail conditions as the offence was committed against the backdrop of the Protection Order.

[4] The appellant's personal circumstances placed on record, are that he is a forty three (43) year old unmarried man, with three minor children aged twelve (12), ten (10) and four (4) years old respectively, whom he maintains. He is permanently resident in Senekal in the

Free State and lives in the Matwabeng Location with his mother, siblings and nieces/nephews. His father passed away when he was very young. The appellant completed Grade 11 at school, but failed Grade 12. He also did not complete his studies in Public Administration but did obtain a qualification as a Basic Ambulance Assistant. At the time of his arrest, he was employed by the Department of Health as an ambulance assistant, earning a monthly salary of Twelve Thousand Five Hundred Rand (R12 500.00).

[5] He supports his three children, none of whom live with him. In addition, he supports his mother and the other occupants of the residence he shares with them. As I indicated earlier, he heard on Sunday 30 October 2022 that the complainant had laid a criminal charge against him and that the police were looking for. As a result he handed himself to the police on the morning of Monday 31 October 2022. He asserted that if he is kept in custody, he could lose his employment and, consequently, his ability to support his dependants. He has two pending matters, being in respect of the alleged assault on the complaint on 16 October 2022 and the other in respect of his contravention of the Protection Order that was served on him on 17 October 2022. The appellant alleged that he had a previous conviction for “drinking and driving” and paid a fine of Two Hundred Rand (R200). The state led the evidence of the investigating officer that the previous conviction in fact was in respect of a charge of resisting arrest. In respect of this matter, he asserted that if the court should set bail, he will comply with any conditions that the court may attach to such bail.

[6] It is common cause that the offences with which the appellant has been charged in this matter fall within the ambit of Schedule 5 of the Act. Section 60(11)(b) of the Act provides 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".

[7] Both counsel correctly conceded that section 65 (4) of the Criminal Procedure Act 51 of 1977 (CPA) finds application in this matter. The relevant provision reads thus:

"(4) 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".

[8] The Constitutional Court found that several sub-sections of section 60 of the Act, including section 60(11)(b), were constitutional when it dealt with the cases of *S v Dlamini; S v Dladla & others; S v Joubert; S v Schietekat 1999 (2) SACR 51 (CC)*. With regard to the right to freedom, the learned authors *Du Toit et al in the Commentary on the Criminal Procedure Act, RS 49, 2012 ch9-p26* succinctly summarised the position thus: "In *S v Bennett 2000 (1) SACR 406 (W)* 408*e–g* Willis J also said that the 'fundamental premise' is that s 12(1) of the Constitution confers on everyone the right to freedom which includes the right not to be detained without trial, subject to constitutionally permissible limitations in

terms of s 36 of the Constitution. See also *S v Mabapa 2003 (2) SACR 579 (T)* 583*h* and *S v Petersen 2008 (2) SACR 355 (C)* at [60] where reference was made to s 35(1)*(f)* of the Constitution"

[8] I turn to the grounds of appeal, which I summarised earlier in this judgment. The starting point for an appeal court is to accept that the court *a quo* was correct in its conclusions, unless it can be shown that the court misdirected itself in the interpretation and application of the law or the facts. Even if the court did not specifically set out its analysis of the law and the facts, based on what evidence and information was placed before the magistrate, this court cannot assume that the court *a quo* did not consider or apply its mind to the facts and the law. As indicated earlier, the prosecutor decided, whilst these bail proceedings were in progress, to change the charge from one of Assault GBH to one of Attempted Murder, after receipt of the J88 form, and added the other charges relating to the assault on the complainant on 16 October 2022 and the contravention of the Protection Order. The court proceeded on the basis that the charge was one of Assault GBH, holding that the evidence led was in respect of a charge of Assault GBH. The court delivered a detailed judgment summarising the evidence for both the appellant and the state, including the personal circumstances of the appellant, as placed on record by his legal representative.

[9] The magistrate considered the submissions of both the prosecution and the defence. One of the submissions made by the defence is that the grounds set out in section 60(4)(a)-(e) (grounds which militate against the interests of justice) are unlikely to be present in respect of

the appellant. I pause to mention that section 60(4)(a) of the CPA reads thus:

> The interests of justice do not permit the release from detention of an accused where **one or more** of the following grounds are established:
>
> (a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, **any person against whom the offence in question was allegedly committed**, or any other particular person or will commit a Schedule 1 offence; (my highlighting)

The court clearly disagreed with the appellant's proposition and pondered the appellant's assertion that he now considers the matter serious and will abide by the conditions set by the court. The magistrate questioned whether the appellant did not consider as serious the opening of a charge against him (on 16 October 2022), the warning of the police officials that he was not to have any contact with the complainant and the terms of the Protection Order, served on him on 17 October 2022, which also prohibited contact with the complainant.

[10] The court was of the view that despite the warnings and prohibition against contact with the complainant, the appellant committed another act of violence against her. This was relevant in its consideration of whether the interests of justice permit the release of the appellant on bail. The court further considered the provisions of section 60(5)(d) of the CPA that "any disposition to violence on the part of the accused, as is evident from his or her past conduct as a factor to be considered in determining whether one of the grounds mentioned in

section 60(4) has been established. The court concluded that, based on his past conduct, two weeks earlier, the appellant has a propensity for violence against the complainant and clearly concluded that the ground mentioned in section 60(4)(a) had been established, justifying its conclusion that the appellant had failed to establish that the interests of justice permit his release on bail.

[11] Mr Nkhahle argued that the incarceration of appellant is an infringement of the constitutional rights of the appellant's children, as they are being prejudiced by his inability to pay maintenance, I once again cite the exposition of the learned authors Du Toit *et al*, at *RS 63, 2019 ch9-p66*: "Where the circumstances relied on by a bail applicant include the constitutionally protected interests of a minor child, the court must take due cognisance of the child's right 'to family care or parental care, or to appropriate alternative care when removed from the family environment', as provided for in s 28(1)*(b)* of the Constitution. But whilst the best interests of the child are paramount as determined in s 28(2) of the Constitution, they cannot 'simply override all other legitimate interests, such as the interests of justice or the public interest'. See *S v Petersen* 2008 (2) SACR 355 (C) at [63]–[65] where Van Zyl J, writing for a full bench, also referred to *S v M (Centre for Child Law as Amicus Curiae*) 2007 (2) SACR 539 (CC), which dealt with the constitutional best interests of a child where a court is required to consider incarceration of a parent or primary caregiver. In *Petersen* the full bench was satisfied (at [76]) that on all the available facts the bail applicant's minor child was 'in more than appropriate alternative care, as envisaged by s 28(1)*(b)* of the Constitution' and that her best interests could be served by permitting her 'regular and unimpeded access to [her jailed mother] at all reasonable times' (at [77])."

[12] In the present matter, the appellant's three children are each living with their respective mothers so it is evident that he is not their primary caregiver. No evidence has been placed before this court regarding the employment status of the mothers, whether they are in receipt of a child support grant, or what has been their position since the incarceration of the appellant. Similarly, there are no details as to the ages of the appellant's siblings, whether any of them is employed, whether the appellant's mother is in receipt of a state grant, and whether the parents of the nieces/nephews are contributing to their upkeep. There is furthermore, no indication of whether the appellant continues to receive his salary, as the assertion was that if he continues to be incarcerated, he could lose his job. In my view, it is the position in the present matter that the appellant's children are being appropriately cared for by their mothers. This cannot conclude that the court *a quo* did not apply its mind to this aspect

[13] There is a duty upon a court hearing an application for bail to enquire into the accused person's circumstances and satisfy itself that the interests of justice would not be adversely affected by the release of the accused on bail. The court *a quo* set out the personal circumstances of the appellant extensively in its judgment as well as in its reasons for judgment. I am constrained to find that the court did not properly take into account such circumstances. The investigating officer made the following concessions, namely, that

- the appellant is not a flight risk
- he lives with his mother and other people

- that he handed himself to the police, leading to his arrest in this matter, and
- that he did not communicate with the complainant upon hearing of the criminal charge against him, until his arrest.

It is trite that these are some of the factors and circumstances to be taken into account by a court considering bail, and by the court considering an appeal against the refusal thereof. In balancing these factors against those that I have mentioned earlier in this judgment, I cannot fault the reasoning of the court *a quo* in arriving at the conclusions it did.

[14] It was argued that the court *a quo* over-emphasised the seriousness of the offence and the interests of society and in so doing, effectively found that the appellant assaulted the complainant and contravened the Protection Order. Such an argument is, in my view, misguided. The fact of a criminal charge of assault and of contravening the provisions of the Protection Order, pending against the appellant are not in dispute, nor is the fact that those charges pertain to an assault upon the complainant in this matter. The determination of whether it is the interests of justice to admit the appellant to bail must, of necessity, take into account such pending charges, the nature thereof and whether the conduct of the appellant indicates a propensity to violence. The prevalence of the offence is also a factor that the court must consider, which the court *a quo* did in this matter. The court also correctly took into account that gender-based violence is a scourge that the courts need to address seriously and strictly.

[15] In the circumstances, the following order is made:

15.1 The appeal is dismissed.

15.2 The refusal of the Magistrate to release the appellant on bail is upheld and confirmed

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S NAIDOO J

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