IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A110/2022

DATE: 2022-11-24

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE
SIGNATURE

In the matter between

MOTHIANG KENNETH MAREDI Appellant

and

THE STATE Respondent

J U D G M E N T

STRYDOM J: This is a bail appeal from the lower court. Appellant first appeared in the lower court on 29 July 2016. On 24 August 2016 he applied for bail for the first time. In support of this application he filed affidavits. At the time it was agreed between the appellant and the state that the court was dealing with a Schedule 5 bail application. Schedule 5 is referred to in section 60(1)(b) of the Criminal Procedure Act (CPA) and reads as follows:

> "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 permits his or her release."

Consequently there was an onus on the appellant to adduce evidence which should satisfy the court that the interests of justice permitted his release.

On the date of the bail hearing a further count was added, without objection. Despite this the bail application went ahead. This further count brought the application within the ambit of a Schedule 5, of the Schedule 5 bail application, as the count involved an amount in excess of R500 000. This meant that the minimum sentence of 15 years' imprisonment applied. Just bear with me for a moment. I am just going to stand down for a while, I will continue now.

COURT ADJOURNS

COURT RESUMES

COURT: The court will now continue. I will just repeat that last sentence. This meant that the minimum sentence of 15 years' imprisonment applied, unless the sentencing court is satisfied that substantial and compelling circumstances exists which could, which would justify the imposition of a lesser sentence.

Having regard at the judgment of the court *a quo* it is clear that the court was dissatisfied with the address of the appellant. He also had no stated work address. The investigating officer experienced problems to arrest the appellant. His family contributed to make his arrest difficult by not providing information about the whereabouts of the appellant. It took three months to arrest the appellant. Previously there was a telephonic arrangement made between the investigating officer and the appellant, in terms of which the appellant would have handed him over to the police. The appellant failed to honour this arrangement. The court found that these factors indicated a likelihood that appellant might not stand his trial. On this basis the bail was refused.

Further, it was also indicated by the court *a quo* that the appellant failed to disclose his in his bail affidavit that he had a pending case. This was also not disclosed when he was pertinently asked by the presiding officer about this,

about further counts.

After the appellant resigned from his employment where the alleged over 80 acts of fraud were committed he allegedly involved himself in two further frauds; the last one, count 88, which concerned the buying of a motor vehicle on false information provided to the bank who then provided him with finance. Particularly as a result of the address uncertainty the court refused the appellant bail.

The appellant re-applied for bail on new facts on or about 30 March 2017, but bail was again refused. This court has no information pertaining to this application. Reference was only made thereto in the third bail application brought on alleged new facts. Bail was again refused on 31 March 2021. This is about one year and seven months ago.

This is the order against which the current appeal lies. Appellant applied for condonation for the late filing of the appeal. His lack of funds was advanced as the reason for the lateness of the appeal. The condonation application was not opposed by the state and should be granted.

The new facts mentioned in the affidavit for bail are limited and can be summarised as follows:

1. Appellant attracted Covid-19 and he is more susceptible to infections.
2. He is not receiving proper medical care for the virus.

3. His ex-wife is not properly looking after their children who is now in the care of his mother.
4. His uncle passed away and certain spiritual traditional rituals had to be performed.
5. He could no longer afford legal fees and the Legal Aid Board have, had refused him further assistance or refused him assistance.
6. He wants to pursue his Forex trading business to make money to support him and his family.
7. He wanted to gather evidence from First National Bank which he cannot do whilst in custody. He wants to use this evidence in his defence.

The appellant's current appeal was aimed not only against the refusal of bail on new facts, but also against the original refusal. It was argued that the learned magistrate misdirected herself to consider that the applicant, consider the applicant's bail application to fall within Schedule 5. It was argued that this court was only, this count was only added on the day of the bail application and that it was unfair towards the appellant. This submission is meritless as the state can add further counts at any time before an accused has pleaded. The appellant, through his legal representative, at the hearing could have applied for a postponement of the bail hearing if it was felt that the appellant was not ready to continue with such application.

Instead it was accepted on behalf of the appellant that the bail application be dealt with in terms of Schedule 5. The legal representative at that time indicated that he was ready to proceed with the bail application.

It was further argued that the learned magistrate should *mero motu* have decided that it would have been unfair to add a further count on the day of the bail hearing. In my view there is no merit in this submission and the court finds no misdirection in this regard.

10 The question remains whether the learned magistrate largely concluded that there are no new facts or there is no new facts upon which a fresh bail application could be brought and considered. The court will accept in favour of the appellant that after a period of five years has lapsed between his first bail application and the further application, new facts are likely to have been established, even if it is only the fact that the matter has been on the roll for so long. The court will accept that the financial position of the appellant changed, rendering it difficult for him to afford his
20 legal representation. Further, that the situation with his children has changed.

Accordingly, the court finds that there are in fact new facts which has been established which will now entitle the court to consider whether the magistrate should have granted the appellant bail, considering all the facts,

including these new facts.

The appellant previously pleaded guilty to 88 counts of fraud. Although the factual basis of this plea was not accepted by the state, it will serve as an indication to this court that the state has a strong case against the accused. If convicted the likelihood of a long period of imprisonment is self-evident. This possibility would certainly be a consideration on the mind of any accused and the appellant when a decision is made whether he or she should stand trial or not. The appellant also has other matters pending against him for serious, of serious nature. These crimes were allegedly committed after he left his employment at the Department of Education. The other voidable inference to be drawn is that the appellant has a disposition to commit Schedule 1 offences. He clearly has made a living out of his fraudulent behaviour.

As the appellant has now been in custody awaiting trial and during trial for a substantial period of time the court must refer to the criteria set in section 60(9) of the Criminal Procedure Act. I will quote this section:

> “In considering the question in subsection 4 the court shall decide the matter by weighing the interest of justice against the right of the accused to his or her personal freedom and in particular the prejudice he

or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely:

(a) the period for which the accused has already been in custody since his or her arrest;

(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;

(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;

(d) any financial loss which the accused may suffer owing to his or her detention;

(e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;

(f) the state of health of the accused; or

(g) any other factor which in the opinion of the court should be taken into

account."

The court already referred to period of detention. It is extraordinarily long. The court has been informed that the state has closed its case in this matter and that accused 1 testified. This has become common cause. Appellant will be next to testify. The conclusion of the trial cannot be too far in the future.

From the evidence before this court a finding cannot be made that the state has been responsible for the delays. It rather appears that the legal representation of the appellant caused some delays. The appellant avers that he wants to continue with his forex trading career. Whether it will be possible in the period which remains before conclusion of the matter is doubtful.

There is further no indication that the health of the appellant is currently so that he must get medical assistance which is not available in prison.

In my view there is still doubt whether the appellant will stand his trial and whether he will not commit further crimes to obtain money to make a living. The court cannot leave out of the equation the fact that the appellant tried to avoid his initial arrest. This he did with the assistance of his family.

In my view the appellant has failed to adduce evidence which satisfies this court that the interests of

justice permit his release. This court cannot find that the learned magistrate exercised her discretion wrongly initially to refuse bail; also that new facts at this stage requires the release on bail of the appellant. Accordingly the appeal is dismissed.

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STRYDOM, J

JUDGE OF THE HIGH COURT

DATE: ……..