REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

PALMRIDGE SSCC3/2022

CASE NO: A34/2022

DPP REF NO: 10/2/5/2-2022

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

Date: ....

In the matter between :

MAHENDREN MUNSAMY Appellant

and

THE STATE Respondent

JUDGMENT

STRYDOM J :

[1] In this appeal against the Learned Regional Court Magistrate's ("the Magistrate") refusal of bail for the appellant, the court is dealing with a bail application which fell within the ambit of section 60(11)(a) of the Criminal Procedure Act.

[2] Section 60(11)(a) reads as follows:

> *"Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –*
>
> *(a) 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 exceptional circumstances exist which in the interests of justice permit his or her release;"*

[3] Included in Schedule 6 is an offence referred to in Schedule 5 which was allegedly committed whilst a person was released on bail in respect of an offence referred to in Schedule 5. The latter Schedule includes fraud involving amounts of more than R500 000.

[4] The Magistrate, in my view, correctly found that the bail application should be considered in terms of section 60(11)(a) which deals with Schedule 6 offences.

[5] It should be noted that the word "allegedly" is used and accordingly the allegations of complainants, pointing to fraud, involving more than

R500 000 committed by the appellant contained in their affidavits would suffice.

[6] This would mean that on the basis of allegations pertaining to the commission of Schedule 5 offences a bail applicant may find himself in a bail application where section 60(11)(a) sets the criteria for the application if he was previously arrested for a Schedule 5 offence. Proof of conviction is not necessarily required.

[7] Once the category of the bail application has been established the bail application should further be considered I conjunction with the criteria set out in sections 60(4) to (9) of the Criminal Procedure Act 51 of 1977 ("the CPA").

[8] It is not disputed that the appellant was previously arrested and charged with offences which fell within the ambit of Schedule 5. He was released on bail on 28 July 2016. Whilst on bail the appellant was again arrested on a fraud matter involving more than R500 000 under case No. CAS491/10 of 2019. This offence was allegedly committed during or about November 2017 whilst the appellant was on bail. This fact was not contested by the appellant and will be dealt with further in this judgment.

[9] The appellant applied for bail after his arrest in the magistrate's court. The learned magistrate refused bail and this refusal is now appeal before this court.

[10] In the court *a quo* the appellant had to show on a balance of probabilities, through evidence, that exceptional circumstances exist which in the

interest of justice permitted his release on bail. The appellant and the State elected to place evidence before court by way of affidavit. The gist of the appellant's version set out in his affidavit was that the cases against him are of a civil nature and that he is likely to be acquitted in these matters. On behalf of the State reference was made to previous cases opened against the appellant with emphasis on the case for which he was now arrested and also on other charges being laid whilst the appellant was out on bail since July 2016.

[11] In the appellant's bail affidavit, he states that he had certain business dealings with the complainant, Mr Ravesh Moodley, which ended in a failed business transaction and money was lost. He stated that he obtained the money from Mr Moodley by way of a loan agreement. These allegations are contradicted by the statement of the investigation officer, Lt. Col. Sandra Van Wyk. According to her affidavit, the appellant represented to Mr Moodley that he was importing fuel from Mozambique. He asked Mr Moodley to pay R 4 491 000.00 as an investment into an FNB account held by ALSAA. The FNB account was in fact not held by an entity ALSAA but it was held by one Elliot Masapa. He is also a suspect in the matter. Appellant caused Mr Moodley to pay a further amount of R 1 120 800-00 into an ABSA account to secure the clearing of the fuel import into the country. These moneys were never utilised to import fuel but were misappropriated by the appellant. Appellant caused Mr Moodley to pay a further amount of R 746 000-00 to activate a credit facility with ABSA. This money was also allegedly misappropriated by appellant.

[12] Clearly, the court had to deal with two mutually destructive versions which could not readily be decided on the papers. The onus was on the appellant to adduce evidence which satisfied the court that exceptional circumstances exist which in the interests of justice permitted his release. To the extent that the appellant wanted to indicate that the case against him is weak, the onus was accordingly on him to show this.

[13] It has been authoritatively held that evidence produced by way of affidavit in bail applications are admissible. See *S v Pienaar* 1992 (1) SACR 178 (W) at 180 H-J; *S v De Kock* 1995 (1) SACR 299 at 307 A-B; *S v Nichas and Another* 1977 (1) SA 275K at 260E – 262H; *Moekazi and others v Additional Magistrate, Welkom and Another* 1990 (2) SACR 212 (O).

[14] The question arises whether this evidence is of sufficient probative value to assist an applicant in a bail application to discharge an onus to prove that the state has a weak case against him or put differently, that his chances of being acquitted is real, and therefore it will be in the interests of justice that he should be released on bail.

[15] In *Pienaar*, supra, it was found as follows pertaining to the probative value of evidence in a bail application placed before court by way of affidavit:

> *"Obviously an affidavit will have less probative value than oral evidence which is subject to the test of cross-examination."*

[16] In *S v Mathebula* 2010 (1) SACR 55 (SCA) at p 59, with reference to *S v Pienaar*, Heher JA found as follows:

> *"[11] In the present instance the appellant's tilt at the state case was blunted in several respects: first he founded the attempt upon*

> *affidavit evidence not open to test by cross-examination and, therefore, less persuasive; cf S v Pienaar 1992 (1) SACR 178 (W) at 180H; second, both the denial of complicity and the alibi defences rested solely on his say-so with neither witnesses nor objective probabilities to strengthen them."*

[17] The court in *Mathebula* further found as follows:

> *"[12] But a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probabilities that he will be acquitted on the charge : S v Botha en Ander 2002 (1) SACR 22 (SCA) (2002) SA 680 : [2002] All SA 577 at 230h and 232c; S v Viljoen 2002 (2) SACR 550 (SCA) [2002] 4 All SA 577 at 556c."*

[18] I am of the view that by merely filing an affidavit the appellant prevented the state from cross-examining him on the allegations levelled against him rendering a decision that the state's case against the appellant is weak almost impossible.

[19] In my view, a person who applies for bail in an application falling within the ambit of section 60(11)(a), would be well advised, if he or she wants to argue that the case against him or her is weak, to present oral evidence, which can be subjected to cross-examination.

[20] In my view, the appellant has failed to prove that the state's case against him is weak and that he will in all likelihood be acquitted when the matter finally proceeds to trial. The fact that the matter was previously *nolle prosequi* is of no moment because the exact circumstances why that decision was made was not properly ventilated before court. The same

would apply to the delay in prosecuting the matters pending against him. The reasons for the delay have not been placed before court for consideration.

[21] In my view the court *a quo* correctly found that there exists *prima facie* evidence against the appellant and that he failed to indicate on a balance of probabilities that the fraud case instituted by the complainant, Mr Moodley, under CAS 491/10/2019 has no prospect of success.

[22] It should be noted that in a civil commercial transaction fraud in the form of misrepresentation can be committed which could lead to criminal prosecution. A person making a false representation cannot hide behind the civil nature of the transaction. In our courts so-called “white collar” crimes are as prevalent and serious as any other crime and prosecutions should be pursued with vigour as should be the case in any other criminal matters.

[23] The magistrate refused bail on the basis of the appellant’s propensity to involve himself in fraudulent activities in general, but more specifically, whilst out on bail.

[24] The issue in this appeal is not whether the appellant is going to evade his trial by not standing his bail. The court can accept that the appellant is not a flight risk. The issue is rather if the interests of justice do not permit the release on bail of the appellant as there exists a likelihood that if he is again released on bail he will commit a Schedule 1 offence. Section 6(4) of the CPA stipulates that it would not be in the interests of justice to permit the release from detention of the accused if there is a likelihood

that an accused will commit a Schedule 1 offence whilst on bail (section 60(4)(a)).

[25] In section 60(5) it is provided that when the grounds mentioned in subsection (4)(a) is considered a court will take into account any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct (section 60(5)(e)) and any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail (section 60(50(g)).

[26] The court *a quo* considered the previous and current charges levelled against the appellant. These charges relate to fraud of substantial amounts bringing it within the ambit of the Schedule 1 offences. The appellant was released on bail during July 2016 in a matter serving before the High Court under CAS 679/2/2013. This matter pertains to an offence or offences committed during 2011. Whilst out on bail, the appellant allegedly committed offences pertaining to Mr Moodley under Sandton CAS491/10/2019. There are also three further matters, one allegedly committed during November 2019 in Pinetown under Westville CAS218/11/2019. Also another case with Sandton CAS 825/5/2019 dated 29 May 2019 and Sandton CAS 807/3/2020 dated 25 March 2020. CAS 825/5/2019 relates to a misrepresentation about a fuel order. By Ms Precious Mahosho. She was allegedly defrauded in the amount of R 739 200-00. In the other matter R2 500 000-00 was paid for goods by a Mr Maharaj but the goods were never delivered by appellant. All of these

matters relate to Schedule 1 offences committed whilst the appellant was out on bail from July 2016.

[27] The magistrate considered these cases and concluded that the appellant has a propensity to commit Schedule 1 offences in general but also whilst out on bail.

[28] In my view the magistrate was correct in his findings that the appellant indeed has a propensity to commit Schedule 1 offences. The court was dealing not with one further case but with three further cases. The court must now decide whether the magistrate was wrong in his findings not to grant the appellant bail despite the finding that the appellant has allegedly committed further Schedule 5 offences whilst on bail. This is what is required in terms of section 65(4) which reads:

> *"65(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."*

[29] In *S v Barbour* 1979 (4) SA 218D E-H, Hefer J (as he then was) remarked as follows:

> *"It is well known that the powers of this court are largely limited to where the matter comes before it on appeal and not as a substantive application. This court has to be persuaded that the magistrate exercised a 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 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 a magistrate who had the discretion to grant bail but exercised that discretion wrongly ... Without saying that the magistrate's view was accurately the correct one, I have not been persuaded to decide that it was the wrong one."*

[30] It was submitted that the exceptional circumstances which favoured the granting of bail related to the personal circumstances of the appellant. He is a qualified non-practising medical practitioner with adult children and a wife. His wife must care for her ill mother which places her under stress. He has health problems and already undergone two heart procedures and still suffers from active cardiac disease which require him to take chronic medication. He was willing to cooperate with the police, he has no previous convictions and he maintained that the essence of the charges against him pertains to matters of a civil nature. An allegation was made that there seems to be a personal vendetta in this matter delivered by the prosecutor, Mr Tchabalala. As far as the latter is concerned, such finding cannot be made. It was also stated that the appellant has got a good track record and attended court in other matters when he was required to do. On the occasions that he did not appear, he had good reason for that and those reasons were accepted by the trial courts.

[31] In my view, the magistrate correctly found that exceptional circumstances were not established.

[32] In my view, the magistrate exercised his discretion properly and I cannot find that the magistrate exercised his discretion wrongly.

[33] This would mean that the appellant has failed to convince this court that the magistrate's decision should be set aside.

[34] In my view, the personal and other circumstances referred to by the appellant were outweighed by the finding that the appellant has a propensity to commit crimes, especially when out on bail.

[35] Accordingly, the appeal should be dismissed.

[36] The following order is made:

The appeal is dismissed.

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RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date of hearing: 19 and 20 April 2022

Date of Judgment: 25 April 2022

Appearances:

For the Appellant: Adv. L. M. Hodes (SC)

Instructed by: Vather Attorneys

For the Respondent: Adv. T. R. Chabalala

Instructed by: Counsel for the State