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

APPEAL CASE NO: A20/2022

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

11 May 2022 **.....**
DATE

In the matter between:

MTHETWA, JUSTICE MELUSI Appellant

And

THE STATE Respondent

JUDGMENT

Coram NOKO AJ

Introduction

[1] The Appellant brought an application in terms of section 65 of the Criminal Procedure Act 51 of 1977, as amended (*CPA*) for this court to set aside the decision of the Protea Regional Magistrate Court (per Naidu) of 2 September 2021 in terms which the appellant's second application for bail was dismissed.

Background

[2] The appellant is facing 12 charges, namely, arson, three counts of attempted murder, kidnapping, assault with intention to cause grievous bodily harm, 4 counts of malicious damage to property, 2 counts of pointing with anything which is likely to lead a person to believe it is a firearm. In view of the fact that he is facing charges falling within schedule 1 of the Criminal Procedure Act 51 of 1977 (CPA) the court must be persuaded that circumstances whihc justify that in the interest of justice the appellant should be admitted to bail.

Before court a quo

[3] The appellant brought the first bail application which was dismissed. The application was refused by the court a quo which concluded, *inter alia*, that the appellant was a flight risk. The appellant has since then been in custody.

[4] The second application for bail was predicated on the appellant's contentions that there are new facts which, *inter alia*, speak to the appellant being a new person since his incarceration. The appellant having, *inter alia*,

decided to terminate the relationship with the complainant.[1] The appellant's counsel having contended further that the State has taken an inordinately too long with its investigation whilst the appellant was in detention and this warrant consideration as a new fact in terms of which the appellant will be entitled to approach court for bail again.

[5] The appellant has children who depended on him for their livelihood. He is also employed and in support hereof he submitted a letter from the employer to confirm that he is indeed still in their employment. He stated further that whilst in prison he attended a course on prevention of GBV and anger management.[2] He will also ensure that he complies with the bail conditions which may be set by the court. He has no travel documents and as such there is no possibility that he will skip the country. He contented further that the court a quo's finding in the first application that the borders in the country are porous should not be used to disadvantage the appellant. The appellant contended further that he is concerned about congestion in prison and the inherent risk of contracting a deadly Covid-19.

[6] The respondent contended that the appellant has failed to present new facts upon which the second bail application should be founded, except to state that he is now a changed person. Notwithstanding that this assertion of newness it can generally not be construed as a new fact as contemplated in the bail regime there is no evidence to even support the assertion that the appellant is a changed person. In addition, the investigating officer struggled to find the appellant and despite several telephone calls by the investigating officer the appellant failed to

[1] See appellant's affidavit at para 6 on pg 007-4 on caseline, under the heading new facts.
[2] Ibid.

cooperate with the investigating officer before his arrest and as such there is a basis to presume that the appellant is a flight risk.

[7] The court a quo decided that there are no new facts as circumstances put forward by the appellants were not new. The court further held that after assessing the appellant's contention as against the provisions of section 60(4)(a-e) of the CPA the appellant could still not be a candidate to be admitted to bail. One new fact, so counsel went further, was the fact that the appellant has resolved to ensure that no violence or any form of threats will visit the complainant to which the court held that it is indeed correct that the complainant was not harassed by the appellant as he was incarcerated, though this did not stop the appellant's family to persist with harassment.

[8] The contention with regard to exposure to Covid -19 due to population in prison was also dismissed as unsustainable. The court a quo having referred to the judgment in *S v Van Wyk* 2005(1) SACR 41 (SCA) where it was held that … *[T]he grating of bail cannot be seen as a reedy to a medical situation*."

[9] The court a quo in conclusion held[3] that:

"*[I]n its analysis of all the factors that have been placed before this court is that the so-called new facts are no more than reshuffling of existing facts with a view to addressing problems uncovered in the first application. They are for the most part directed and …[inaudible] amending unsatisfactory aspects of that first application. And in the court's opinion neither has the applicant demonstrated that the burden that rests on him to provide new facts that show on that balance*

[3] Page 003 – 33 on caseline.

of probabilities that it is in fact in the interest of justice that he be admitted to bail." (sic). To this end the second application for bail was found to have no merits and was accordingly dismissed.

On appeal

[10] The appellant's counsel persisted with contentions advanced before the court a quo that the appellant is not a flight risk as he has no passport. Further that there is no evidence submitted to prove that the appellant was ever outside the borders of the Republic of South Africa. In addition, that the failure of the investigating officer to trace and arrest the appellant timeously should not be the basis to refuse bail. The investigating officer went to the house of the appellant at awkward hours, instead he should have gone to the appellant's house after work as he would ordinarily be at work during the day. Counsel submitted further that the contention on the part of the state regarding the porous border cannot be used against the appellant. The appellant's counsel referred to *S v Archeson* 1991 (2) SA 805 as authority for the contention that refusal to bail should not be used as a punishment. In this regards counsel in addition, referred and reminded the court to also defer to the provisions of section 35 of the constitution which guarantee the presumption of innocence.

[11] The appellant's counsel further submitted that the appellant is employed and submitted a letter from the employer which stated that the appellant is still in their employ though his employment is subject to the labour relations regulations. The appellant has 5 children and others are minors and they all depend on the appellant for their livelihood.

[12] Of utmost importance, so went the argument, for the application is the fact that the case is not ready for trial and no one can decipher as to when will the investigation be completed so that the case could be trial ready. Counsel for the appellant in this regard referred to the judgment in *S v Hitchmann* 2007(2) SACR 110 where the court held that the passage of time coupled with lack of progress in the investigation may constitute a changed circumstances which warrant the reconsideration of the application for bail.

[13] The respondent on the other hand contended that the court should not overlook the pervasive failure by the accused persons to attend court in general and further referred to the case of one Pastor Bushiri who escaped from the Republic of South Africa and effort to extradite him and his wife being thwarted by the Malawian government. This is a testimony, so went the argument, to challenges facing the state and the court should ordinarily be slow to grant bail where there is a possibility that the accused may not attend trial. *In casu* the appellant demonstrated the propensity not to cooperate and this was the reason why it took long for the investigating officer to arrest him despite several telephone calls. The appellant's argument that he would have been at work is not true as the investigating officer was told that he had absconded from his work without leave for weeks.

[14] The respondent's counsel conceded however that the failure on the part of the state to properly deal effectively with the porous borders cannot be used as stratagem to frustrate the admission of accused to bail. The appellant's position, so went the contention by the respondent's counsel, is aggravated by the fact that

there are several charges proffered and some of them are very serious. This will certainly dissuade him to attend trial.

[15] The respondent could not state in detail[4] on the status of the case except to state the record seem to suggest that the matter was postponed in December 2021 for trial to January 2022. The appellant's counsel contended that the matter was never enrolled for trial but ultimately changed the tune on asked why the respondent stated that there was a date for trial and he cannot account for it. Further that ordinarily trial dates are arranged and agreed to between the parties which would also be preceded by the disclosure of the docket. At the end of this obfuscation journey the appellant's counsel admitted that he is only on brief for bail and it was conveyed to him that the case was postponed for further investigation.

[16] The parties were then requested by this court to forward a joint submission on the status of the proceedings within two days. The respondent's counsel uploaded on case line the submission and the appellant's legal representative confirmed through the court's secretary that the said respondent's submission reflects their understanding. It was relayed that this case was indeed enrolled for 5 May 2022 for trial and the witnesses were in attendance but the accused was not brought to court hence the case could not proceed. The case was therefore postponed to 11 May 2022 for the accused to be brought to court and then to arrange a new trial date.

Legal principles and analysis

[4] Except that the respondents head at para 13, p014-8 on caseline, it is stated that "… *it is submitted that there are no delays in the finalization of this matter as it is clear from the record that the matter is on trail stage. It shows that investigations are finalized and the trial could be concluded at any stage now."*

[17] The question before the court is whether the magistrate erred in the exercise of discretion for refusing the appellant with bail and that in fact should have found that on the balance of probabilities that it in the interest of justice that the appellant should be admitted to bail. This court is further enjoined to set aside the decision of the court a quo if it satisfied that the said decision is wrong.[5]

[18] It is trite that an accused has a constitutional right to apply for bail. That notwithstanding, the accused need to demonstrate that when applying for bail based on new facts that such facts are truly new as it becomes an "*abuse of … proceedings to allow an unsuccessful bail applicant to repeat the same application for bail based on the same facts week after week.*" (*see S v Vermaas* 1996 (1) SACR 528 (T). at 531e. The facts which were presented in the second application, bar what follows hereunder, are repeated and the court a quo correctly dismissed the contention advanced by the appellant.

[19] The court has noted from the appellant's affidavit that what could be construed as new fact is placed under paragraph 7[6] which deals with interest of justice and not paragraph 6 which dealt with what the appellant regarded as new facts. This relates to the averment that the prolonged period of investigation would ordinarily warrant reconsideration, as new fact, for considering to grant the appellant bail. The basis of this submission is informed by the decision referred to by the appellant's counsel in *S v Hitschmann* 2007 (2) SACR 110 (ZHC) (*Hitschmann*) at 113, where court confirmed that the delay in finalising

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[5] See section 65(4) of the Criminal Procedure Act 51 of 1977 as amended. See also *S v Rawat* 1999 (2) SACR 398 (W).

[6] See page 007-5 on caselines.

the investigation can indeed be considered as a new fact. The sentiments in *Hitschmann's* case are also mirrored in *S v Moussa* 2015 (3) NR 800 (HC) where it was held that the incarceration period of the region of 3 years between the first and second application can be construed as changed circumstances constituting new facts.

[20] The court a quo appeared not to have applied its mind to this issue of the delay in investigations. Having regard to what is set out hereunder the failure by the court a quo to have regard to this factor does not vitiate the conclusion arrived at by the court a quo. It is clear and was admitted by both parties that the case is ready for trial. The fulcrum of the contention of the appellant's counsel for impressing on this court to decide to grant bail on the new fact which predicated on the argument that the investigation is not completed has therefore turned out to be incongruous with the correct state of affairs. This case was ripe for trial in December 2021 and set down for January 2022 and has since been postponed. The recent date was just the day after the argument of this application before this court on 5 May 2022.[7] In view of the fact that the contention of new fact (being prolonged detention and want of readiness for trial) was not based on the correct information such a submission is clearly untenable and cannot sustain the argument advanced in support for the second bail application as a new fact and therefor *cadit quaestio*. The court is left with no argument to support the case advanced that the interest of justice warrants that the appellant be admitted to bail.

Conclusion

[7] It was held in Hitschmann at p113 C-D that …*(O)n the contrary, we were advised that the State has now set down the matter for trial on 26 June 2006. I have no reason to doubt the sincerity of the State counsel and indeed no reason has been advanced as to why I should disbelieve the State*.

[21] It is trite that interference with the decision of the court a quo would be justifiable if it becomes clear that the said decision is wrong. As set out above there are no bases for this court to find fault in the decision of the court a quo

[22] In consequence, I make the following order:

The appeal in respect of the appellant is dismissed,

Noko AJ,
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

Appellant	Adv Tshivhase, TD Mudau Attorneys Johannesburg.
Respondent	Adv Maphangula, DPP, Johannesburg.
Date of hearing	4 May 2022
Date of judgment	11 May 2022