REPUBLIC OF SOUTH AFRICA

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

Case Number: A155/2023

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

22 February 2024 _____

DATE SIGNATURE

In the matter between:

MOSEBETSI MATSI First Appellant

NKOSINATHI KHUMALO Second Appellant

and

THE STATE Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 22 February 2024.

Key words: Criminal Procedure - Bail Appeal- Magistrate Court- The matter is remitted to the Regional Court for a new bail application.

JUDGMENT

Mudau, J:

[1] This is an appeal against the refusal of bail pending trial in the Regional Court, Orlando on a charge of robbery with aggravating circumstances. It was accepted by the parties concerned that the application had to be dealt with in terms of section 60(11) (a) of the Criminal Procedure Act 51 of 1977 ("the Act"). It follows therefore that the appellants bore the onus to satisfy the Court that there were exceptional circumstances which, in the interest of justice, permit their release on bail respectively.

[2] Compounding the issues in this case however, the State did not produce a certificate from the Director of Public Prosecutions authorising the holding of bail proceedings in the Regional Court. In this regard, section 50(6)(c) of the Act which I return to below provides that:

> "The bail application of a person who is charged with an offence referred to in Schedule 6 must be considered by a magistrate's court: Provided that the Director of Public Prosecutions concerned, or a prosecutor authorised thereto in writing by him or her may, if he or she deems it expedient or necessary for the administration of justice in a particular case, direct in writing that the application must be considered by a regional court." [Emphasis added.]

[3] It is trite that the powers of an appeal court to interfere with the decision by another court to refuse bail are circumscribed by section 65(4) of the CPA. However, the decision whether to order that the appellants should or should not be released on bail depends on the circumstances of each case. It is trite that bail applications should in principle be heard as a matter of urgency. The right to a prompt decision is thus a procedural right independent of whether the right to liberty entitles the accused to bail.[1] It is for the above reason that, subsequent to hearing arguments, I made the following order:

(a) The proceedings of the bail application in the Regional Court in respect of the two appellants are held to be a nullity and set aside;

(b) The matter is remitted to the Regional Court for a new bail application within seven days (7) of this order before another Regional Court Magistrate, and also for the prosecution to obtain the necessary written

[1] In *Magistrate Stutterheim v Mashiya* 2003 (2) SACR 106 (SCA) at 113C-D.

authority as envisaged in terms of section 50(6)(c) of the CPA failing which the matter may be dealt with in the District Court if another Regional Court Magistrate is unavailable.

[4] Section 35(1)(f) of the Constitution acknowledges that persons may be arrested and detained for allegedly having committed offences, but such arrestees, as in this instance, are entitled to be released on reasonable conditions if the interests of justice permit. Deciding whether the interests of justice permit such release and determining appropriate conditions is an exercise to be performed judicially in accordance with the procedure laid down in section 60 of the CPA.

[5] However, section 35(1)(f) itself places a limitation on the rights of liberty, dignity and freedom of movement of the individual. In making the evaluation, the arrestees, as in this instance, therefore do not have totally untrammelled right to be set free.[2]

[6] In relevant parts, the proceedings in this appeal start in an unusual manner compared to matters of this nature:

> "COURT: Yes, what am I dealing with Mr Prosecutor? PROSECUTOR: Your Worship the incident happened on 10 March at around 11:00 in the evening. The complainant was sitting outside in his car at the pub in Zone 2, Diepkloof and suddenly an unknown suspect arrived with another car, a black Toyota Etios or gold- silver-black Toyota Etios, pointed the complainant with a firearm and demanded his cell phone. The complainant then handed the cell phone to the suspect and they drove off. According to the complainant the suspects were four in the vehicle and he was able to identify the suspects to the police after they were arrested Your Worship. The police continue with the investigation and the robbed cell phone was traced and it was found at Deflin in the possession of the accused by the name of accused 2, Nkosinathi Khumalo, at Vlakfontein as he was arrested on the spot."

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[2] *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* ("*Dlamini*") [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 at para 50.

[7] It is apparent from the transcript of the record of proceedings as if the respondent accepted the onus and commenced proceedings by answering questions from the magistrate regarding the circumstances leading to the arrest of the appellants and by handing up the unsworn statement of the investigating officer, whereafter affidavits by the appellants were presented in support of their bail applications. The prosecutor communicated his position from the investigating officer about the content of the docket as it then stood and quoted from statements in the docket. Importantly however, there is no indication that any of the material necessary to support these allegations was properly produced at the bail hearing. Neither was the investigating officer called to confirm his unsworn statement. The prosecutor simply conveyed the gist of the State's evidence to the court.

[8] It must be pointed out that although a bail application is less formal than a trial, it remains a formal court process that is essentially adversarial in nature. A court is afforded greater inquisitorial powers in such an inquiry to ensure that all material factors are investigated and established. However, the correct procedure to be followed in bail applications, which falls under Schedule 6, entails that an accused is burdened with an onus and will commence adducing evidence which has to satisfy the court, on a balance of probabilities, that the interests of justice permit his release. Section 60(2) of the Act permits facts relevant to a bail application to be canvassed informally from a prosecutor only where those facts are not in dispute.[3] Where the facts adduced are in dispute, then the State must lead evidence.[4]

[9] It follows that, where a bail applicant leads evidence to discharge the onus on them in terms of section 60(11)(a), the State may only rebut that evidence with admissible evidence of its own which it failed to do in this instance. The *ipse dixit* of the prosecutor is not sufficient.[5] In terms of section 60(3) of the Act:

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[3] See section 60(2)(b).
[4] See section 60(2)(c); See also *S v Mwaka* 2015 (2) SACR 306 (WCC) para 12.
[5] See *Selahle v S* [2022] ZAGPJHC 73 para 11.

> "If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court".

It follows again that section 60(3) can only be invoked after compliance by the state with section 60(2)(c) of the Act.

[10] Section 60(11)(a) of the Act, it must be be recalled, provides that where an accused is charged with an offence listed in Schedule 6 —

> "the court shall order that the accused be detained ... 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 the release."

[11] It is trite that section 60(11)(a) contemplates an exercise in which the balance between the liberty interests of the accused, and the interests of society in denying the accused bail, will be resolved in favour of the denial of bail, unless "exceptional circumstances" are shown by the accused to exist.[6] The strength or weakness of the State's case is of course relevant in determining where the interests of justice lie in the context of section 60(11)(a) or (b) of the CPA.[7]

[12] In *Majali v S*,[8] this court (per Mokgoatlheng J) stated thus:

> "A bail inquiry is a judicial process that has to be conducted impartially and judicially and in accordance with relevant statutory and constitutional prescripts".

[13] Counsel for the appellants also referred to the case of *S v Mabena and Others*[9] in which the Court held that the bail proceedings were a nullity for

[6] *Dlamini* n 3 above para 64.
[7] *S v Kock* 2003 (2) SACR 5 (SCA) at 11I-12A.
[8] [2011] ZAGPJHC 74 para 33.
[9] [2021] ZALMPPHC 14.

non-compliance with section 50(6)(c) of the Act. Mr Mabilo for the appellants, with which counsel for the respondent Ms Kau, agreed that the bail proceedings of the appellants in this case must be declared to be a nullity.

[14] I am satisfied that the Magistrate had misdirected himself in respect of the procedure to be followed in the bail application.

Order:

The order is confirmed.

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TP MUDAU

JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of Hearing: 19 February 2024

Date of Judgment: 22 February 2024

APPEARANCES

For the Appellant: Mr Mabilo TL

Instructed by: Mabilo Tl Inc Attorneys

For the Respondent: Adv. R Kau (NPA)