

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A256/2022

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

.....
DATE MEERSINGH SD
AJ

In the matter between:

THABANG MPONGO

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

MEERSINGH SD AJ

[1] This is an appeal against the judgment of the Magistrate sitting in the Mamelodi Magistrates' Court handed down on 25 August 2022 refusing to

admit the appellant to bail pending the finalisation of criminal proceedings against him.

[2] The appellant is charged with the offence of contravening the provisions of Section 120(6)(b) read with Sections 1, 103, 120(1)(a), Section 121 read with Schedule 4 and Section 151 of the firearms Control Act, 60 of 2000 which is the offence of Pointing of anything which is likely to lead a person to believe it is a firearm.

[3] The appellant had applied for his release on bail before the Magistrate on 25 August 2022. This application was refused on the same day. The criminal proceedings against the Appellant is part heard. The state has closed its case. The Appellant is required to undergo a medical evaluation before continuing with his trial. The Appellant remains in custody pending the finalization of the matter. He was previously granted bail which was forfeited to the state.

[4] Appeals from the lower court are dealt with in terms of Section 65(1)(a) of the CPA. The section provides:

“S65 APPEAL TO SUPERIOR COURT WITH REGARD TO BAIL

(1)(a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.

.....

(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.*"

[5] In terms of section 60(1) of the CPA, an accused is entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit. Further, Section 60(4) of the Act provides that:

"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 or any particular person or will commit a Schedule 1 offence; or*
- (b) *where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or*
- (c) *where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or*

- (d) *where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;*
- (e) *where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security”.*

[6] In terms of Section 60(11) the onus falls upon an applicant to adduce evidence which would satisfy the court that exceptional circumstances exist in the interests of justice which would permit his or her release on bail. The Constitutional Court in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*¹ stated the following pertaining to exceptional circumstances:

“[75] An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant or anything else that is particularly cogent

[76] ... In requiring that the circumstances proved be exceptional, the subsection does not say they must be circumstances above and beyond and generically different from those enumerated. Under the subsection, for instance, an accused charged with a Schedule 6 offence could establish the requirement by proving that there are exceptional circumstances relating to his or her emotional condition that render it in the interest of justice that release on bail be ordered notwithstanding the gravity of the case...”.

¹ 1999 (4) SA 624 (CC) at paragraphs 75 – 76.

[7] It was submitted on behalf of the appellant that the Court misdirected itself by not granting bail to the Appellant. The Appellant had only failed to come to Court on one occasion. This had resulted in his bail being withdrawn and forfeited. The Court a *quo* also placed too much reliance on the purported petition of the community which was used to oppose the bail application. The Appellant if released on bail would reside at another location and not return to the same community. The Court also misdirected itself in affording any weight to the report of the district surgeon recommending an evaluation of the mental state of the Appellant at a psychiatric hospital. The Appellant also further submitted that it would be a long wait at the Weskoppies Psychiatric hospital because of a backlog. This will inevitably result in him being in custody for a long. It was also further submitted that he has already been in custody for 6 months. If he is found guilty the maximum sentence that could be imposed would not be more than a year.

[8] Counsel for the state submitted that the Appellant would likely evade his trial. He had previously failed to appear in court whilst on bail. This resulted in his bail being withdrawn and forfeited to the state. The Appellant also does not have respect for the bail system and the conditions thereof. He had violated a condition of his bail. The Appellant suffers from hallucinations and is self-destructive. A district surgeon's report recommends a psychiatric evaluation. A petition was obtained from the community and was relied upon by the court a *quo*. This petition should be taken into account by this court in considering whether the release of the Appellant on bail would disturb the public and the public peace.

- [9] In terms of Section 60(11)(a) of the CPA the accused bears the onus of adducing evidence which satisfies the court of the exceptional circumstances which exist. The standard of proof is a civil one, that is, on a balance of probabilities.
- [10] This court can only interfere with the decision to refuse bail, if it is found that the decision of the court *a quo* was wrong. (See section 65(4) of the Act and *S v Barber* 1979 (4) SA 218). However, in *S v Porthen and Others*² the court expressed the view that interference on appeal was not confined to misdirection in the exercise of discretion in the narrow sense. The court hearing the appeal should be at liberty to undertake its own analysis of the evidence in considering whether the appellant has discharged the onus resting upon him or her in terms of section 60 (11) (a) of the CPA.
- [11] In *S v Botha en 'n ander*³ the court held that “in the context of s 60 (11) (a) of the CPA, the strength of the State's case has been held to be relevant to the existence of ‘exceptional circumstances’. A weak state case will not necessarily result in the granting of bail. On the other hand, a strong state case will not necessarily result in the refusal of bail.
- [12] Bearing in mind the appellant' right to freedom which should not be unnecessarily restricted, I am satisfied that the court *a quo* correctly found that the appellant had not shown cause of the existence of exceptional circumstances justifying his release on bail in the interests of justice. No evidence has been adduced showing that the Court *a quo* who had the

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³² 2004 (2) SACR 242(C).

³ 2002 (1) SACR 222 at para 21.

discretion to grant bail on 25 August 2022 exercised that discretion incorrectly.

[13] Therefore, in view of the fact that no evidence was adduced to show that the Magistrate had misdirected herself, I am satisfied that she had correctly assessed the totality of the evidence on a balance of probabilities in coming to the decision to deny the appellant bail.

[14] Accordingly the appeal should fail.

[15] In the result, the order I make is that the appeal against the order of the court *a quo* to refuse to admit the appellant to bail is dismissed.

MEERSINGH AJ
JUDGE OF THE HIGH
COURT OF SOUTH
AFRICA
GAUTENG DIVISION,
PRETORIA

FOR THE FIRST APPELLANT:

MR HERMAN ALBERTS
LEGAL AID SOUTH AFRICA

FOR THE RESPONDENT:

ADVOCATE NYAKAMU
ADVOCATE SIPHO LALANE
NATIONAL PROSECUTING
AUTHORITY

DATE OF HEARING:

15 NOVEMBER 2022

DATE OF JUDGEMENT:

17 NOVEMBER 2022

DATE OF REASONS :

13 DECEMBER 2022