REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A212/2023

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

30 August 2023
Date

Signature

In the matter between:

VERDINE ABRAHAMS Appellant

And

THE STATES Respondent

JUDGMENT

Munzhelele J

Introduction

[1] This appeal pertains to a judgment delivered by Regional Magistrate Matlaila of the Pretoria Regional Court on 5 December 2022, wherein the refusal to grant bail based on new facts is being challenged.

[2] It was common cause that at the hearing before the *court a quo* one of the offences which the appellant was charged with, is murder, read with the provisions of section 51(1) of the Criminal Law Amendment Act[1] which falls within the confines of Schedule 6 of the Criminal Procedure Act[2] and section 60(11) (a) is applicable. Section 60(11) (a) of Criminal Procedure Act 51 of 1977 stipulates, pertaining to Schedule 6 offences, that:

> 'Notwithstanding any provision of this Act, where an accused is charged with an offence referred to 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 permits his or her release.'

[3] The appellant was expected by the *court a quo* to prove on a balance of probabilities that there are exceptional circumstances which in the interest of justice permits his release on bail. See *State v Rudolph*[3]. Exceptional circumstances are as defined by the case of *S v Petersen*[4] where the full bench concluded as follows on the meaning and interpretation of "exceptional circumstances":

> "Generally speaking "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different ... This may, of course, mean different things to different people so that allowance should be made for a certain measure of flexibility in the judicial approach to the question... In essence the court will be exercising a value judgement in accordance with all the relevant facts and circumstances, and with reference to all the applicable criteria"

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[1] 105 of 1997
[2] 51 of 1977
[3] 2010 (1) SACR 262 (SCA) at para 9
[4] 2008 (2) SACR 355 (C) at [55]

[4] Upon evaluating the newly presented facts in conjunction with the original facts pertaining to the bail application, the *court a quo* did not find any facts that could be deemed exceptional or extraordinary. Consequently, the court dismissed the bail application. The appellant, aggrieved by the said decision, has now lodged an appeal against the aforementioned decision.

[5] Before the appeal court can intervene with the ruling of the *court a quo*, it is imperative that the court must ascertain that the decision rendered by the *court a quo* was erroneous. See *State v Barber*[5], *State v Botha en ander*[6], *Maxwell Zwelithini Zondi v State* case no SS15/2017 delivered on 8 April 2020 ZAGPJHC/2020 delivered by Strydom J for the full court. The appeal court is required to deal with the bail appeal pursuant to the provisions outlined in section 65(4) of the Criminal Procedure Act 51 of 1977. Section 65(4) of Criminal Procedure Act 51 of 1977 sets out the powers of courts hearing the appeal. It provides as follows:

> *"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 opinion, the lower court should have given".*

[6] All the aspects raised by the appellant must be collectively examined to determine the correctness of the decision made by the *court a quo*. Should I ascertain that the *court a quo*'s decision was accurate, there would be no need for me to reassess the bail application afresh.

Background facts of the appeal case

[7] On 14 April 2020, the appellant instituted an application seeking his release on bail before Magistrate Bogajo. Within this application, the appellant proceeded to provide testimony in the form of an affidavit, aiming to establish the existence of exceptional circumstances that, in the interest of justice, would justify his release pursuant to section 60(11) (a) of Act 51 of 1977. The investigating officer also

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[5] 1979 (4) SA 218 (D) at 220 E-H
[6] 2002 (1) SACR 222 (SCA)

submitted evidence in the form of an affidavit, marked as Exhibit C. Testimony by the state witnesses were additionally given by Mr. Chabalala and Ramabele Moretsele during this initial bail application. The appellant's request for bail was denied on 22 April 2020, based on the reason that he had not demonstrated the presence of exceptional circumstances warranting his release on bail.

[8] On 1 November 2022, the appellant initiated a bail application before Magistrate Matlaila, based on new facts. Even in this application, the appellant's submission was presented through an affidavit outlining the grounds as stated below on paragraph 9, that the court should deem exceptional, thereby justifying, the appellant's release on bail.

[9] The following were the new facts as contended by the appellant:

9.1. The unreasonable postponements which delayed the finalization of the trial resulting in the appellant suffering prejudice.

9.2. The appellant stated that he had never intimidated the state witnesses.

9.3. There is no charge brought against the appellant for attempted murder on the Metro Police as the state had said before.

[10] The respondent opposed the application; however, no evidence was adduced by the respondent. The respondent in addressing the *court a quo*, relied upon the evidence presented during the initial application by the state witnesses as well as evidence on the appellant's affidavit which was based on new facts. The state contended that the appellant had not sufficiently addressed each and every ground for postponement mentioned on their affidavit. Further the respondent asserted that the appellant had failed to discharge the burden incumbent upon him to demonstrate the existence of exceptional circumstances. The new facts raised where normal delays in the criminal trial. The appellant should have brought to the attention of the court extra ordinary circumstances, which if proven, would warrant his release on bail in the interest of justice.

[11] Notwithstanding these new facts, the appellant's application was denied, on the basis that he failed to meet the obligation imposed upon him to demonstrate the presence of extraordinary circumstances justifying his release on bail. The Magistrate reasoned that these delays as mentioned by the appellant do not constitute exceptional circumstances. Additionally, the Magistrate expressed concerns that, should the accused be released, they might tamper with witnesses. This concern was fuelled by what was said in the affidavit of Remano Creswell Jacobs, who attested that Mr. Johnson, a state eyewitness, had been communicating with both him (Remano Creswell Jacobs) and Verdine Abrams, and had indicated an intention not to testify in the trial. Interestingly, this information had hitherto remained undisclosed to the prosecution; its revelation occurred for the first time through the accused, Remano Jacobs, during the bail application predicated on new facts. What perplexes me is that the state was aware solely of his status as a key witness who should avail himself to testify, while the accused possessed a recent knowledge indicating his intent not to testify against them in this trial. The question that arises is, what prompted Mr Johnson to convey his intention of refraining from testifying in this trial to the accused persons rather than to the prosecution?

[12] It is an established principle that the appellant has an onus to demonstrate, on a balance of probabilities, the presence of exceptional circumstances warranting his release on bail, even when presenting his application based on new facts. See *Mvambi v S* (GJ) (unreported case no A113/2021, 4-2-2022) (Malangeni AJ) at paras 19, 20 and 22; *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* (CCT21/98, CCT22/98, CCT2/99, CCT4/99) [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771 (3 June 1999) where it was said:

> "[78] Then there is the question of the onus under sub-s (11) (a). It was not suggested that the imposition of an onus on an applicant for bail is in itself constitutionally objectionable, nor could such a submission have been sustained. This Court has in the past unhesitatingly struck down provisions that created a reverse onus carrying the risk of conviction despite the existence of a reasonable doubt;104 but what we have here is not a reverse onus of that kind. Here there is no risk of a wrong conviction, the objection that lies at the root of the unacceptability of reverse onuses. All that the subsection does in this regard, is to place on an accused, in whose knowledge the relevant factors lie, an onus to establish them in a special kind

of interlocutory proceeding not geared to arriving at factual conclusions but designed to make informed prognoses." (my emphasis) see also *State v Rudolph* 2010(1) SACR 262 (SCA) at 9; State v Ehrlich 2003(1) SACR 43 (SCA) at para 1; State v Mohammed 1999 (2) SACR 507 (C).

[13] The appellant heavily relied upon the delays resulting from the adjournments as newly emerged facts, which he regarded as exceptional in nature and justified his release on bail. These postponements primarily arose due to circumstances such as power outages within the court premises, resulting in the accused not being transported from prison to court; the unavailability of the magistrate due to her involvement in high court proceedings; the accused's request for a new attorney following the withdrawal of the previous attorney of record; the non-attendance of witnesses in court; the absence of a state witness due to family responsibility leave; the illness of another witness; and the congested court roll. I agree with the appellant and a decision of the *court a quo* that these constitutes new facts including the period of two years in detention. The only issue which the appellant should prove is whether such delays amounts to exceptional circumstances in terms of section 60(11) (a) of the Criminal Procedure Act 51 of 1977.

[14] The appellant further contended that the *court a quo* should not have addressed each circumstance in isolation, but rather should have considered them collectively, and subsequently determined whether their cumulative effect amounted to exceptional circumstances. The appellant referred to the case of *Wild and Another v Hoffert NO and Others*[7] where Kriegler J said that:

> "if the accused was in custody his or her release could be considered. Conditions of bail be set."

[15] The appellant argued further that the postponements have resulted in an unreasonable delay in the finalization of the trial, this has prejudiced him, therefore, he should be released on bail pending the finalization of the trial. In terms of the Constitution of the Republic of South Africa, 1996, section 35 reads:

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[7] (CCT28/97) [1998] ZACC 5; 1998 (3) SA 695; 1998 (6) BCLR 656 (12 May 1998) paragraphs 29-35

"(1) "Everyone who is arrested for allegedly committing an offence has the right— (f) to be released from detention if the interests of justice permit, subject to reasonable conditions and in terms of section 35 (3)(d) "Every accused person has a right to a fair trial, which includes the right – (d) to have their trial begin and conclude without unreasonable delay".

[16] Even though the appellant is constitutionally presumed innocent and is safeguarded by the provisions outlined in paragraph 15 above, certain enumerated offenses have been subject to prescriptive legislative measures by the legislature. These measures dictate that the appellant would generally be detained, unless compelling reasons have been presented to secure his release on bail. Section 60(11)(a) of the Criminal Procedure Act 51 of 1977 constitutes one such statutory provision. Consequently, the appellant is obliged to substantiate, through evidence, that the cumulative effect of those postponements amounts to exceptional circumstances. These circumstances, if proven, must be of such gravity that they warrant his release in the interest of justice.

[17] In assessing the delays highlighted by the appellant, I also undertook a comprehensive examination of the contents of the charge sheet, which forms an integral part of the transcribed record presented to me for consideration in the course of this appeal. It is evident that a subset of these postponements was unavoidably encountered and emerges as unintended ramifications within the framework of the justice system. The initial postponements were characterized by phases of disclosure and pre-trial conferences. Over time, subsequent developments included the withdrawal of the attorney representing accused 2, necessitating the appointment of a new attorney. Furthermore, a state witness fell ill, leading to another postponement. Additional postponements were caused by court power outages, resulting in the accused not being brought to court or their delayed arrival in court, a state witness taking family responsibility leave, and the final postponement due to the attorney's health concerns. Equally pertinent is the observation that the broader criminal justice system currently operates under considerable stress due to various reasons like high crime rate leading to more cases registered per day. Consequently, circumstances such as congested court rolls becomes inevitable. The electricity outages are the order of the day within the court premises. Organizational delays in securing interpreters for

languages spoken beyond the Gauteng region should not be overlooked. See *Sanderson v Attorney-General, Eastern Cape*[8].

[18] In considering these factors, as elucidated in the appellant's affidavit cumulatively and also having gleaned from the charge sheet, I find that they constitute typical and routine occurrences inherent to the operation of the criminal justice system. They do not possess the requisite attributes of being exceptional or extraordinary. It is undisputed that these postponements resulted in a delay in concluding the trial; however, it cannot be reasonably asserted that such postponements or resultant delays were of an unreasonable nature to the extent that they necessitate the appellant's release from custody. Consequently, the assessment conducted by the court a quo, concluding that the new facts presented by the appellant did not amount to exceptional circumstances, stands as a justified evaluation.

[19] The appellant contended that, as a detainee who has already been held in custody for a duration of two years, the court should have taken his release into consideration. In this regard, the appellant's assertion is accurate, as in terms of *article 2(b), Justice Crime Prevention and Security Protocol (JCPS)* the objective is;

> *"to ensure that the further detention of a remand detainee is considered by a court before the expiry of a period of two years, and is reconsidered at least annually each 1 year thereafter,*
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> *(i) Article 6(2) provides: "In considering the further detention of the remand detainee, the normal considerations and processes relating to bail in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) apply; and*
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> *(ii) Article 8(1) regarding the role of presiding officers provides: "The normal principles and requirements relating to bail, as set out in the Criminal Procedure Act, 1977 (Act 51 of 1977), apply when the further detention of or release of a remand detainee is considered in terms of the requirements of section 49G of the Correctional Services Act."*

[20] The charges preferred against the appellant are encompassed by the provisions outlined in Schedule 6 of the Criminal Procedure Act 51 of 1977. Therefore,

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[8] (CCT10/97) [1997] ZACC 18; 1997 (12) BCLR 1675; 1998 (2) SA 38 (2 December 1997)

even in this context, where the court is tasked with assessing the appellant's release under section 49G, due to the conjoined applicability of section 60 of the Criminal Procedure Act 51 of 1977 to section 49G of the Act, the appellant remains burdened with demonstrating the presence of exceptional circumstances that would justify his release on bail in the interest of justice. Hence, it is not merely a matter of just asserting that the appellant should have been released under the provisions of section 49G without evidence substantiating the presence of exceptional circumstances justifying his release on bail.

[21] In relation to the state's case against the appellant being weak, the appellant asserts that there exists evidence corroborating the absence of gun residue tests conducted on his hands. Consequently, the appellant posits that the state's case against him is rendered frail. Additionally, it is contended that the state did not ultimately lay charges of attempted murder against him, despite prior assurances to that effect. On these grounds, the appellant contends that his release on bail is warranted due to the state's weak case. In *Mathebula v S*[9] where the Supreme Court of Appeal emphasised that in order to successfully challenge the merits of such a case in bail proceedings an applicant needs to go further: he or she must prove on a balance of probability that he or she will be acquitted of the charge. An attack on the State's case does not amount to the discharge of the onus. The court confirmed the decision *of S v Viljoen*[10] and held that until an applicant has set up a *prima facie* case of the prosecution failing, there is no call on the state to rebut his or her evidence to that effect. Therefore, the *court a quo* was correct when dismissing this point in its judgment.

[22] The appellant predicated his argument on his individual circumstances and the fiscal strain arising from the pre-trial detention, which has adversely impacted his emotional, physical, and financial well-being. He posits that these extraordinary factors collectively suffice as grounds for his release on bail. In state *v Mokgoje*[11] it was said that:

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[9] 2010 (1) SACR 55 (SCA) 11
[10] 2002 (2) SACR 550 (SCA) 561f-g
[11] 1999 (1) SACR 233 (NC)

"Everyday or general occurring circumstances could never be described as exceptional". In this case the fact that the appellant's business was being prejudiced by the reason of his detention could not be regarded as exceptional. In S v Mathebula 2010 (1) SACR 55 (SCA) at para 15 held that: 'Parroting the terms of section 60 (4) ....does not establish any of those grounds, without the addition of facts that add weight to his *ipse dixit*. In S v Mabena and Another [2007] 2 All SA 137 (SCA) at para 6, the Supreme Court of Appeal confirmed that the 'potential factors for and against the grant of bail', listed in section 60(4), are no less relevant than what they are in a schedule 6 bail application."

[23] The appellant contends that he has never engaged in witness intimidation directed towards the state's witnesses. This matter underwent comprehensive examination by the *court a quo*, specifically on page 220 of the judgment in paragraphs 5-20. I concur with the *court a quo*'s assessment of the affidavit of Mr Jacobs elucidating the details pertaining to Mr. Johnson change of heart about giving his testimony on this case as a state's witness. Upon my scrutiny of the reasons of the *court a quo* 's judgment regarding this state witness, I have identified no misdirection in the *court a quo*'s determination concerning this aspect.

[24] In conclusion, the *court a quo* comprehensively addressed the substantive aspects of this case and arrived at the conclusion that no exceptional circumstances exist, encompassing both the new and existing facts which in the interest of justice necessitates the appellant's release on bail. Accordingly, I am persuaded that the decision of the *court a quo* to deny bail to the appellant was appropriately made.

Order

[25] In the result the following order is made;

1. The appeal is dismissed.

M Munzhelele J
Judge of the High Court, Pretoria

Heard On: 1 August 2023

Delivered On: 30 August 2023

APPEARANCE:

For the Appellant: Adv H.J Potgieter

Instructed by: Johan van Zyl Attorneys

For the State: Adv L Sivhidzho

Instructed by: The Office of the Director of Public Prosecutions