REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A80/2024

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

09-05-2024 — **DATE**

PD. PHAHLANE — **SIGNATURE**

In the matter between:

BONGINKOSI EMANUEL SENGWAYO — **APPELLANT**

and

THE STATE — **RESPONDENT**

Judgment – Bail Appeal

PHAHLANE, J

[1] This is an appeal against the judgment of the Benoni Regional Court pursuant to the dismissal of the appellants' application to be released on bail. The appeal is brought in terms of the provisions of section 65 of the Criminal Procedure Act 51 of 1977 ("the CPA") which makes provisions for an appeal to a superior court against the refusal of bail in a lower court. The section provides:

Sec 65 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.

(b) .....

(c) .....

(2) .....

(3) .....

(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.

[2] The grounds of appeal as noted in the Notice of Appeal are as follows:

2.1 The Learned Magistrate erred in finding that the appellant failed to discharge onus vested on him to prove that exceptional circumstances exist demanding his release on bail. (sic)

2.2 The Learned Magistrate erred in finding that the interests of justice demand appellant's continued incarceration pending finalisation of the main case. (sic)

2.3 The Learned Magistrate erred in finding that appellant has no fixed address despite various alternative addresses being provided and verified and confirmed to be correct, with occupants confirming relationship and undertaking to house appellant in the event so directed by court as conditions. (sic)

2.4 *The Learned Magistrate misdirected herself in finding that, amongst others, the fact that the same court admitted the appellant's co-accused to bail does not constitute an exceptional circumstance. (sic)*

2.5 *The Learned Magistrate misdirected herself in finding that the allegations against appellant are strong which renders the State's case strong despite co-accused being admitted to bail by the same court on same allegations. (sic)*

2.6 *The Learned Magistrate misdirected herself in finding that the appellant failed to satisfy the requirements of section 60(11)(a) of the Criminal Procedure Act*

2.7 *The Learned Magistrate misdirected herself in finding that appellant if released on bail will interfere with witnesses despite the fact that State's case is based on circumstantial evidence with no eye witness. (sic)*

[3] The appellant has been charged with murder, which is one of the offences listed under Schedule 6 of the CPA, as well as kidnapping. Accordingly, the application falls to be dealt with is in terms of **section 60(11)(a)**[1]. This section saddles the appellant with the onus to prove on a balance of probabilities and adduce evidence which satisfies the court that exceptional circumstances exist, which in the interests of justice entitles him to be released on bail, failing which he must be detained in custody.

[4] Both parties correctly stated in their heads of argument that in applying the "interests of justice" criterion, both trial-related and extraneous factors are to be taken into account. This criterion requires a weighing up of the interest of the accused liberty, against those factors which suggest that bail be refused in the interest of society.

[5] In ***S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat***[2] the following instructive passage in the judgment of Krigler J, is noted: "*Under subsection (11)(a), the lawgiver makes it quite plain that a formal onus rests on a detainee to satisfy the court that*

[1] Section 60(11)(a) provides: "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 permit his or her release".

[2] 1999 (4) SA 623 (CC); 1999 (2) SACR 51 (CC).

exceptional circumstances exist justifying his release on bail... What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted".

[6] The exceptionality of the circumstances must be considered with reference to the peculiar facts of the case. Exceptional circumstances as a concept have not been defined by the legislator but generally speaking, the word "exceptional", is indicative of something unusual, extraordinary, remarkable, peculiar or simply different[3]. Accordingly, the exceptional circumstances must be circumstances which are not found in the ordinary bail application but pertain peculiarly to an accused person's specific application. What the court is called upon to do is to examine all the relevant considerations, not individually, but as a whole in deciding whether an accused person has established something out of the ordinary or unusual which entitles him to relief under section 60(11)(a) of the Act[4]. 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. It follows that the true enquiry is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the appellant's release[5].

[7] The SCA addressed the meaning of exceptional circumstances in ***S v Bruintjies***[6] as follows:

> *"What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstance which remove the*

[3] S v Petersen 2008 (2) SACR 355 (C) at 55. See also: S v Josephs 2001 (1) SACR 659 (c) at 6681; and S v Viljoen 2002 (2) SACR 550 SCA).
[4] S v H 1999 (1) SACR 72 (W) at 77E.
[5] S v Mohammed 1999 (2) SACR 507 (C)
[6] 2003 (2) SACR 575 (SCA) at 577

applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the legislature has attached the commission of schedule 6 offence".

At 577 the court went on to say –

"*If, upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interest of justice, warrant his release, the appellant must be granted bail.*"

[8] At the bail hearing before the Magistrate, the appellant was legally represented and elected to present his evidence in the form of an affidavit. His personal circumstances and various addresses of where he would be found if the court were to admit him to bail were noted on the affidavit. He further stated that he was gainfully employed as a technician operator at Asan Dicklers, and that he does not have any relatives outside the borders of South Africa.

[9] In opposing the bail application at the court *a quo,* the State relied on the affidavit of the Investigating officer, sergeant Dowalani Deon Mulaudzi, wherein he stated, amongst other things, that the appellant originates from KwaZulu Natal and the addresses the appellant supplied as his residential address were incorrect[7]. Interference and intimidation of witnesses, as well as the appellant being a flight risk were noted by the IO. A brief summary of facts placed before court is that:

9.1 On 12 March 2023 the appellant and his co-accused were driving in a blue Polo TSI and were looking for a person who broke into the house of the accused to steal his property. Information led them to Daveyton Hostel where the deceased was apparently selling some of the items, and one person who was found to be in possession of the speaker belonging to the appellant confirmed having bought it from the deceased.

[7] Page 22 of Record

9.2 The appellant went to the deceased home and told the deceased's grandmother that she must prepare a tent for the deceased's funeral because he is going to kill him. They finally found the deceased and put him into the boot of the vehicle and the deceased was taken to an open veld behind Modderbee Prison in Springs where he was severely assaulted. The appellant and his co-accused drove back to Daveyton, leaving the deceased unconscious, but decided later to return to where the deceased was left in the veld.

9.3 Upon their arrival, they put the deceased into the boot of the vehicle again and drove back to Daveyton, and subsequent thereto, five litres of petrol were bought from Engen garage. They drove to an open veld near Benoni where the deceased was doused with petrol and set on fire.

[10] In terms of section 60(3) of the CPA, the Learned Magistrate requested that the IO be summoned to give more information as she did not have sufficient information to enable her to make a decision on the bail application [8].

10.1 Sergeant Mulaudzi testified that the appellant does not have a fixed address and that he went several times to his given address of 411 Mpingo street, Daveyton, and found that he was no longer residing there because the appellant was on the run. He further testified that upon his arrest, the appellant confirmed that he was on the run because he knew that the IO was looking for him. The said the appellant informed him that his vehicle that was used in the commission of the offence was in Swaziland. He testified that he went to the appellant's place of employment several times and it was reported that the appellant did not report for duty for a number of days and that he has absconded because the employer did not know his whereabouts. In this regard, sergeant Mulaudzi testified that the appellant is a flight risk and will never attend trial because he does not have a fixed address.

10.2 It was placed on record that the appellant had approached the family of the deceased and threatened them.

---

[8] Section 60(3) provides: "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".

[11] In a bail application, the enquiry is not primarily concerned with the question of the guilt of the accused. The focus at the bail stage is to decide whether the interest of justice permits the release of the accused pending trial. Bail will usually be denied to protect the investigation and prosecution of the case and to protect society against the possible future life threatening criminal acts of an accused.

[12] 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. This exercise is one which departs from the constitutional standard set by s 35(1)(f). Its effect is to add weight to the scales against the liberty interest of the accused and to render bail more difficult to obtain than it would have been if the ordinary constitutional test of the 'interests of justice' were to be applied[9].

[13] The CPA provides in section 60(4)(a) to (e), a checklist of the main criteria to be considered against the granting of bail such as: Where there is the likelihood that the accused, if he is released on bail, he will: **(a)** endanger the safety of the public or any particular person or will commit a Schedule 1 offence; **(b)** attempt to evade his or her trial; **(c)** attempt to influence or intimidate witnesses or to conceal or destroy evidence; **(d)** undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; and **(e)** disturb the public order or undermine the public peace or security.

[14] As already indicated, the court of appeal can only set aside the refusal to grant bail if it is satisfied that the court *a quo* had exercised its discretion wrongly. In ***S v Barber***[10] the court remarked as follows: *"It is well known that the powers of this court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this court may have a different view, it should not*

[9] S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat at para 64.
[10] 1979 (4) SA 218 (D) at 220E-F

substitute its own view for that of the magistrate, because that would be an unfair interference with the magistrate's exercise of his discretion. It should be stressed that no matter what this court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly".

[15] It is not in dispute that the appellant was on the run for three months and had admitted to the IO that he was on the run because he knew that the IO was looking for him. Further undisputed is the evidence that he has ties outside the borders of South Africa, in Swaziland. All these aspects were never challenged by the appellant's counsel during the bail application at the court *a quo*.

[16] Relying on the case of ***S v Acheson***[11], his counsel argued that the Learned Magistrate erred in finding that the appellant is a flight risk and failed to take into consideration the aspects such as the appellant's emotional, occupational, and family roots within the country where he has to stand trial. In this regard, it was submitted that 'the Learned Magistrate misdirected herself by overlooking the most important factor on the personal circumstances of the appellant, the social fact of attachment and his deep roots in the Republic and declaring him a flight risk'.

[17] It was further submitted that "the Learned Magistrate misdirected herself by overlooking the fact that the appellant surrendered himself to the police because this action is indicative of a person who is prepared to stand trial. It was further submitted that if the appellant was indeed a flight risk and had strong roots in Swaziland where his uncle resides, he would have skipped the country during the three months period when he was on the run and was sought by the police.

17.1 Counsel insisted that even though the circumstances under which the appellant surrendered himself are questionable, the court should have considered the alternative addresses provided by the appellant as having been confirmed addresses where he could be found because one of his brothers had offered to house him by erecting a shack for him in his yard in Mpumalanga. Further that

[11] 1991 (2) SA 805

"the Learned Magistrate misdirected herself in finding that provisions of section 60(4)(c) were applicable in that the appellant was likely to interfere with witnesses".

[18] The respondent on the other hand submitted that the appeal is void of merit and that the Learned Magistrate was correct in finding that the appellant is a flight risk and that he will interfere with witnesses because he had already approached the family of the deceased in the murder charge and threatened them.

[19] It is worth noting that the appellant does not have a fix address or property, hence the IO had difficulty finding him at the place where he was renting because he had abandoned that address and the appellant's address could not be verified. Furthermore, the appellant also vanished from his employment without a trace, and it was difficult for the IO to locate him.

[20] In my view, the fact that the appellant gave addresses of people in three different provinces where he can be found does not necessarily mean that those are the places where he would be staying if he is released on bail. Neither can it be interpreted that the appellant has deep emotional, occupational, and family roots within the country as submitted by his counsel.

[21] Consequently, I do not agree with the appellant's submission that the Learned Magistrate misdirected herself in not considering the issues outlined in the case of ***S v Acheson*** referred to. On the contrary, the issues identified in this case cannot be comparable to the circumstances of the appellant in the present case. Having said that, it must be appreciated that every case ought to be considered according to its own merits. Having regard to the aforesaid, I am of the view that the appellant failed to satisfy paragraphs (a); (b); and (c) in ***S v Acheson*** which he relies on. This however does not mean that the other aspects raised in ***Acheson*** were not considered by this court.

[22] The Learned Magistrate reasons for refusing to grant bail was based on the fact that:

(a) The appellant is a flight risk because he has ties in a foreign country, in Swaziland, which is contrary to what he stated in his affidavit. Added to this aspect was the fact that according to the undisputed and unchallenged evidence of the IO, the vehicle that was used in the commission of the offence was in Swaziland where the appellant has family or relatives. In this regard, the Learned Magistrate held that the appellant would evade his trial if bail was granted.

(b) The appellant was on the run and the IO struggled to arrest him.

(c) The appellant approached the family of the deceased and threatened them.

[23] The appellant avers in his affidavit, as argued by his counsel that the State's case is weak because it is based on confessions made by other co-accused who have already been released on bail, and circumstantial evidence. His counsel submitted that the court should take this aspect into consideration and find that the interest of justice favours the release of the appellant.

[24] I concur with the respondent's submission that the mere averments that the State's case is weak is not enough. This is so because the appellant has the onus to proof on a preponderance of probabilities that the interest of justice favours his release on bail. Be that as it may, the respondent was deprived of the opportunity of cross-examination due to the fact that the appellant's case was on affidavit.

[25] In my view, the merit issues raised on behalf of the appellant are misplaced and should be ventilated during the trial proceedings because these aspects did not even form part of the reasons for the Magistrate to deny bail. The question of the burden of proof to establish the strength of the State's case has been dealt with by the SCA in ***Mathebula v S***[12] where the court stated that: The appellant's tilt at the state case was blunted due to the fact that affidavits are not open to test by cross-examination and are therefore less persuasive. Further that in order to successfully challenge the merits or weakness of the State's case in bail proceedings, an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge. (emphasis added)

[12] 2010 (1) SACR 55 (SCA).

[26] Counsel on behalf of the appellant argued that even though the evidence of Sergeant Mulaudzi that the appellant had approached and threatened the family of the deceased in the murder case was never disputed, the Learned Magistrate erred in concluding that the appellant will interfere with the witnesses because it is not clear whether the family members are witnesses or not. In the unreported decision of ***Nhlapo v S***[13] the court stated that: "An applicant for bail that faces a Schedule 6 charge is expected to present more than that he or she will not interfere with witnesses or will stand trial. He or she must present cogent evidence that can stand up to scrutiny and convince a court (Mathebula v S 2009 SCA at para 11) on a preponderance of probabilities that he should be committed to bail".

[27] Having said that, if one looks at the personal circumstances of the appellant and what has been submitted by his counsel as exceptional circumstances, those circumstances are in my view, normal and ordinary circumstances which cannot be said to amount to exceptional circumstances. In ***S v Scott Crossley***[14], the SCA held that: "Personal circumstances which are really 'commonplace' can obviously not constitute exceptional circumstances for purposes of section 60(11)(a)". On the other hand, the fact that the appellant has handed himself over to the police does not in itself amount to an exceptional circumstance, considering that even his counsel has conceded that the circumstances under which the appellant was brought to the police by his brother are questionable.

[28] On the same breath, the fact that the co-accused of the appellant were granted bail is not an exceptional circumstance. It may be that his case is different from those of his co-accused, which is an aspect considered by the Learned Magistrate when she stated that the case of each individual accused before the court *a quo* was different.

[29] As indicated above, what is exceptional cannot be defined in isolation. What is required is that the court consider all relevant factors and determine whether individually or

---

[13] (A07/2023) [2023] ZAGPJHC 155 (17 February 2023)
[14] 2007 (2) SACR 470 *(SCA)* at paragraph 12

cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify the appellant's release.

[30] Reading through the judgment of the Learned Magistrate, there is nothing which suggest that the Learned Magistrate misdirected herself. An analysis of all the evidence before the court *a quo* supports the finding that the appellant has failed to establish exceptional circumstances. I am not persuaded that there is presence of exceptional circumstance in the appellant's application. When all the evidence is considered and weighed against the appellant's personal circumstances, I find that the appellant has failed to prove that the interests of justice permit his release on bail.

[31] In light of the circumstances of this case and having considered all the relevant factors to determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify the release of the appellant, I am of the view that the Learned Magistrate's decision to refuse to grant bail to the appellant was the correct one.

[32] What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstance of a particular case, bail should be granted. In my view, in exercising his discretion, the Learned Magistrate considered all the evidence presented by the parties as well as the submissions made. Accordingly, I am satisfied that the Learned Magistrate properly exercised her discretion in refusing bail.

[33] It is also my considered view that to release the appellant on bail under these circumstances would, to my mind, not be in the interests of justice as it is likely to seriously undermine the criminal justice system including the bail system itself. In this appeal, there are no grounds to satisfy this court that the decision of the Learned Magistrate was wrong. Put differently, the grounds set out above do not justify a conclusion that the appellant has made out a case or that the Learned Magistrate misdirected herself. I cannot find any fault with the conclusion of the Learned Magistrate, and I have no reason to interfere with her decision to refuse the appellant bail.

[34] In the premise, the following order is made:

1. The bail appeal is dismissed.

PD. PHAHLANE
JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the Appellant		: Adv. M.E Tshole
Instructed by		: C. Kgope Attorneys
Counsel for the Respondent	: Adv.	: Adv. C Pruis
Instructed by		: National Director of Public Prosecutions, Pretoria
Heard on		: 6 May 2024
Date of Judgment		: 9 May 2024