IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: A 218/22
LOWER COURT CASE NO F563/2022

In the matter of the bail appeal between:

EBRAHIM KARA	First Appellant
MESHACK NGOBESE	Second Appellant
ELIAS RADEBE	Third Appellant

and

THE STATE	Respondent

Bench: P.A.L. GAMBLE, J

Heard: 25 November 2022

Delivered: 1 December 2022

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Thursday 1 December 2022.

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. On 4 August 2022 members of the SA Police Service pulled over a 10 ton Isuzu truck, with registration number CAA 141 124, on Jan Smuts Drive in the Magisterial District of Athlone. Upon searching the truck, the police found an extraordinarily large quantity of what is believed to be cocaine contained in the enclosed cargo section of the truck. It is said that the stash, apparently hidden between sheets of pine wood, consisted of some 672 bricks of cocaine, weighing 672 kg and valued at approximately R403m.

2. The first appellant, who was the driver of truck at the time, was arrested there and then on charges of dealing in cocaine as also a number of charges relating to the unlawful driving of the truck. The second and third appellants were evidently arrested at a different location, brought to the truck and similarly charged. The 3 appellants appeared before the Magistrate, Athlone on 8 August 2022 and thereafter on 19 August 2022 when they applied for bail, which application the State opposed. The appellants were represented in that hearing by Adv. R. M. Liddell and the State by Adv. P-J. Damon.

3. On 12 September 2022 the Magistrate refused bail whereafter the appellants lodged an appeal against that refusal on 23 September 2022, which appeal was heard by this Court on Friday 25 November 2022. The parties were represented in this Court as they were before the court a quo. The Court is indebted to counsel for the comprehensive heads of argument and bundles of authorities which have facilitated the speedy determination of this appeal.

APPLICABLE LEGAL PRINCIPLES IN THE COURT A QUO

4. Given that the first count on which the appellants were charged (the narcotics offence) resorts under Schedule 5 to the Criminal Procedure Act, 51 of 1977, ("the CPA"), it is common cause that they bore the onus of establishing that their release on bail was in the interests of justice.[1] Section 60 (11)(b) of the CPA is to the following effect –

> "60(11) Notwithstanding any provisions of this Act, where an accused is charged with an offence referred to –
>
> (a)…
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> (b) in Schedule 5, but not 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, produces evidence which satisfies the court that the interests of justice permit his or her release."

5. The appellants elected to discharge that onus through the filing of affidavits rather than presenting viva voce evidence. The State responded similarly whereafter the appellants filed replying affidavits. The State put up a further affidavit in reply to further allegations made in the replying affidavits. After hearing comprehensive argument from both counsel on a number of days in August, the court a quo gave a detailed judgment on 6 September 2022. In so doing it was held that each of the appellants had failed to discharge the onus under s60 (11) and consequently bail was denied.

6. The onus which an accused person bears in bail proceedings was discussed at length by the Constitutional Court in Dlamini et al[2], the leading case on the constitutionality of a variety of aspects of bail applications and to which the court a quo had regard in the course of a detailed judgment. The following remarks of Kriegler J in that matter are, in my respectful view, apposite in this appeal.

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[1] Schedule 6 offences, on the other hand, require proof of exceptional circumstances – a more stringent test.

[2] S v Dlamini; S v Dladla & ors; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC)

"[11] Furthermore, a bail hearing is a unique judicial function. It is obvious that the peculiar requirements of bail as an interlocutory and inherently urgent step were kept in mind when the statute [i.e. the CPA] was drafted. Although it is intended to be a formal court procedure, it is considerably less formal than a trial. Thus the evidentiary material proffered need not comply with the strict rules of oral or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. An important point to note here about bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. **The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails in the main protecting the investigation and prosecution of the case against hindrance**…

[45] …(T)he default position [has] changed: whereas previously the starting point was that an arrestee was entitled to be released, the position under s 35(1)(f) [of the Constitution, 1996] is more neutral. Now, unless there is sufficient material to establish that the interests of justice do permit the detainee's release, his or her detention continues." (Emphasis added; internal references omitted)

7. The Learned Justice had the following to say in relation to the understanding of this criterion.

"[46] The separate yet associated problem with sub-ss (4) to (9) [of s 60] arises from the use of criterion of the interests of justice. The term "the interests of justice" is of course well known to lawyers, especially students of South African constitutional law. It is a useful term denoting in broad and evocative language a value judgment of what would be fair and just to all concerned. But while its strength lies in its sweep, that is also its potential weakness. Its content depends on the context and applied interpretation. It is also, because of its breadth and adaptability, prone to imprecise understanding and inapposite use…

[49] One can therefore confidently conclude that although the wording of sub-s (1)(a) no longer replicates the governing constitutional norm, and although the term "the interests of justice" is used with variable content, the nature of the exercise under chapter 9 of the CPA, and the manner in which a court enquiry into bail is to be conducted, remain substantially

unaltered. It remains a unique interlocutory proceeding where the rules of formal proof can be relaxed and where the court is obliged to take the initiative if the parties are silent; and the court still has to be pro-active in establishing the relevant factors. More pertinently, the basic enquiry remains to ascertain where the interests of justice lie. In deciding whether the interests of justice permit the release on bail of an awaiting trial prisoner, the court is advised to look to the five broad considerations mentioned in paragraphs (a) to (e) of sub-s (4), as detailed in the succeeding subsections. And it then has to do the final weighing up of factors for and against bail as required by sub-s (9) and (10).

[50] Sub-ss (4), (9) and (10) of s 60 should therefore be read as requiring of a court hearing a bail application to do what courts have always had to do, namely to bring a reasoned and balanced judgment to bear in an evaluation, where the liberty interests of the arrestee are given the full value accorded by the Constitution. In this regard it is well to remember that s 35(1)(f) [of the Constitution] itself places a limitation on the rights of liberty, dignity and freedom of movement of the individual. In making the evaluation, the arrestee therefore does not have, a totally untrammeled right to be set free. More pertinently than in the past, a court is now obliged by s 60(2)(c), (3) and (10) to play a pro-active role and is helped by sub-ss (4) to (9) to apply its mind to a whole panoply of factors potentially in favour of or against the grant of bail."

8. As the Constitutional Court has thus observed, a court hearing a bail application is statutorily assisted in coming to its conclusion by a host of considerations ("a panoply of factors") set forth in s60 of the CPA. So, in the case of the consideration of "the interests of justice" criterion, the bail court may have regard to s60(4) which is to the following effect –

"60(4) 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;
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> (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
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> (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives of the proper functioning of the criminal justice system, including the bail system;
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> (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."

And, these individual criteria are buttressed by further factors in ss60 (5) – (9) which seek to assist a bail court in assessing whether the criteria have been established. I shall revert to this later.

9. It has repeatedly been said that an accused who elects to go by way of affidavit rather than presenting viva voce evidence in a bail application runs a distinct risk. Recently, in Killian[3] (where the accused was charged with murder which resorted under Schedule 6 to the CPA), Binns-Ward J observed, in my respectful view correctly, that, in choosing to attempt to discharge that onus on affidavit, an accused person runs the risk of not resolving disputed allegations which might arise in the process.

> "[9] The appellant chose to bring his application for bail by means of an affidavit and the state responded with answering affidavits. Each side in effect submitted two sets of affidavits. In the result the court a quo was called upon to determine the bail application on what were in substance motion proceedings. I question whether it is wise or desirable for a party bearing a formal onus to seek to discharge it by adducing its evidence on paper, especially when the evidence is likely to be challenged or disputed, as was the case in the current matter.
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> [10] The difficulty may be illustrated by reference to a single but important aspect of the evidence in the current matter. The appellant averred that when the police descended on him after the shooting of Colonel Kinnear he had informed them that he had been tracking the deceased at the instance of a certain Mr. Mohammed, whom

[3] Killian v S [2021] ZAWCHC 100 (24 May 2021)

the appellant understood wished to recover a vehicle from the person he had been asked track. The police, on the other hand, testified, also on affidavit, that the appellant gave a variety of mutually inconsistent explanations for his tracking activities.

[11] Neither side applied to offer oral evidence in support of its version or to cross-examine the deponent to the version in conflict with its own. How was the court a quo to deal with the conflicting evidence on paper?

[12] In civil proceedings, there are rules to deal with that sort of situation. In terms of the so-called Plascon-Evans rule, where final relief is sought on paper and there is a conflict on the facts, the version asserted by the respondent prevails unless it is obviously far-fetched or untenable. The rule operates in that manner irrespective of incidence of the onus. Where interim or interlocutory relief is sought, the court makes a determination on the probabilities as they appear from the papers.

[13] Bail applications are sui generis. To an extent they are inquisitorial and, in general, there is no prescribed form for introducing evidence at them. But in cases where s 60(11) applies and there is consequently a true onus on the applicant to prove facts establishing exceptional circumstances, an applicant would be well advised to give oral evidence in support of his application for bail. This seems to me to follow, because - differing from the position in which the Plascon-Evans rule is applied – the discharge of the onus is a central consideration in s 60(11) applications. If the facts are to be determined on paper, the state's version must be accepted where there is a conflict, unless the version appears improbable. Reverting to the example in the current case used to illustrate the proposition, the probabilities are neutral on whether the appellant gave the police a consistent explanation or various conflicting ones. Applying the approach I have just described, as I believe it was bound to do in the circumstances, the court a quo was obliged - if it chose not to exercise its power of its own accord to require oral evidence - to accept the police evidence on the point. The example given was not chosen idly. Whether the accused supplied false information at the time of his arrest or thereafter is a material consideration in bail proceedings (see s 60(8)(a))." (Internal references omitted)

10. As to the manner in which an accused may discharge the onus under s60(11), and in particular the evidential material that will suffice, the Supreme Court of

Appeal set the bar fairly high in Mathebula[4], also a charge of murder falling under Schedule 6 and thus requiring proof of "exceptional circumstances".

"[11] In the present instance the appellant's tilt at the state case was blunted in several respects: first, he founded the attempt upon affidavit evidence not open to test by cross examination and, therefore, less persuasive: cf S v Pienaar 1992 (1) SACR 178 (W) at 180h; second, both the denial of complicity and the alibi defence rested solely on his say-so with neither witnesses nor objective probabilities to strengthen them. The vulnerability of unsupported alibi defences is notorious, depending as it does, so much upon the court's assessment of the truth of the accused's testimony. In so far as the appellant suggested that the police had extracted an inadmissible confession from him (or his co-accused), he provided no detail which might have enhanced either his or their reliability or credibility.

[12] But a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. **In order successfully to challenge the merits of such a 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**: S v Botha 2002 (1) SACR 222 (SCA) at 230h, 232c; S v Viljoen 2002 (2) SACR 550 (SCA) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the state is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see Shabalala & Others v Attorney-General of Transvaal and Another 1996 (1) SA 725 (CC). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it has been 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 evidence to that effect: S v Viljoen at 561f-g.

[13] As will be apparent from the paucity of facts in support of his case, the appellant fell substantially short of the target. Despite the weak riposte of the state, the magistrate was left, after hearing both sides, no wiser as to the strength or weakness of the state case than he had been when the application commenced. It follows that the case for the appellant on this aspect did not contribute anything to establishing the existence of exceptional circumstances."

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[4] S v Mathebula 2010 (1) SACR 55 (SCA)

I will deal below with the relevant evidence that was advanced by the parties before the court a quo.

THE APPROACH ON APPEAL

11. Turning to the function of this Court, the test on appeal against the decision of the court a quo is set forth in s65 (4) of the CPA.

> "65(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."

12. In Porthen[5], Binns-Ward AJ (as he then was) examined the authorities and postulated the approach on appeal as follows.

"[8] When considering the extent of an appellate court's power to interfere with a decision of a lower court entailing the exercise by the lower court of a discretion, it is necessary to know whether the discretion in issue is one in the narrow or wide sense of the term. The distinction between 'wide' and 'narrow' (or strict) discretion has been explained in a number of comparatively recent judgments of the Supreme Court of Appeal and the late Appellant Division. See Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') 1992 (4) SA 791 (A) at 800CJ, Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A) at 360D-362G (and the authority cited there) and Hix Networking Technologies v System Publishers (Pty) Ltd and Another 1997 (1) SA 391 (A) at 402BC.

[9] Where the lower court has exercised a discretion in the wide rather than the narrow sense the court of appeal '*is entitled to substitute its view for that of the court which heard the matter and is not precluded from interfering unless it concludes that the lower court has not exercised a judicial discretion'*. See Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd and Others 2003 (3) SA 268 (W) at para [26], pp. 2778. Accordingly, where the court a quo, exercises a discretion in the wide sense, it does not have a free hand to do whatever it wishes to do and a court of appeal is not hamstrung by the

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[5] S v Porthen & ors 2004 (2) SACR 242 (C)

traditional grounds of whether the court exercised its discretion capriciously or upon a wrong principle, or that it did not bring its unbiased judgment to bear on the question, or that it acted without substantial reasons. See Ndlovu v NGGPBP; Bekker and Another v Jika 2003 (1) 113 (SCA) at para [18], p.124…

[12] In determining whether or not a bail applicant has established the existence of 'extraordinary circumstances' within the meaning of s 60(11)(a) of the CPA, the court has to make a decision on the facts judged within the context of the particular case. Facts which might be sufficient in one case, might not be enough to warrant the grant of the bail application in the peculiar context of another matter. In S v Botha en 'n Ander 2002 (1) SACR 222 (SCA), at paragraph [19], p.230, Vivier ADCJ described the exercise required of the court as entailing the making of a 'value judgment' as to whether the proven circumstances are of such a nature as to be 'exceptional'.

[13] The term 'value judgment' (Afr. waardeoordeel) is an expression which does fit comfortably with the concept of judicial discretion in the narrow sense of the term. The expression 'value judgment' is, for example, often used in the civil context to describe the court's powers to determine an appropriate sum of general, as distinct from special damages. The onus in such a case is on the claimant to show that damages have been suffered. The quantum of general damages is however not amenable to empirical proof, unlike special damages where the quantum has to be proved. The fixing of the quantum of general damages constitutes the exercise of a discretion in the narrow sense. In the context of criminal law, sentencing in general entails the exercise of judicial discretion in the narrow sense. Sentencing plainly entails the making of a value judgment as to what punishment is appropriate in the relevant circumstances. In my view, however, the concept of a 'value judgment' goes not so much to the question of whether the power entailed in its making is discretionary in the wide or narrow sense of the word, but rather to emphasise the flexibility that is available in the exercise of the power (cf. S v Dlamini, supra, at paragraph [75]). I offer the following illustration of the point I seek to articulate. Whether or not to grant an interdict entails the exercise of a discretionary judicial power. It is a power, the exercise of which generally entails weighing a number of countervailing considerations and interests, ultimately requiring the making of a value judgment. As confirmed in the passage in Knox D'Arcy cited above, that incidence of the exercise does not, however, result in the inherent exercise of judicial discretion in the narrow sense.

[14] On the issue of the existence of 'extraordinary circumstances' within the meaning of s 60(11)(a) of the CPA, there is a 'formal onus' of proof on the applicant for bail. The ordinary equitable test of the interests of justice determined according to the exemplary list of considerations set out in ss 60(4)(9) of the Act has to be applied differently. See S v Dlamini, supra, at paragraph [61]. In my view, a court making the determination whether or not that onus of proof has been discharged exercises a discretionary power in the wide of sense of discretion. The appellate court is, in terms of s 65(4) of the CPA, enjoined to interfere with the lower court's decision of a bail application if it is satisfied that the lower court's decision was wrong".

Porthen enjoyed the subsequent approval of a Full Bench in this Division in Petersen[6] and has been followed elsewhere in Faye, Sithole and Mbaleki[7].

13. Finally, in Trencon[8], the Constitutional Court restated the approach to reconsideration by a higher court of matters involving the exercise of a discretion by the lower court. Khampepe J put it thus;

"[83] In order to decipher the standard of interference that an appellate court is justified in applying, a distinction between two types of discretion emerged in our case law. That distinction is now deeply-rooted in the law governing the relationship between appeal courts and courts of first instance. Therefore, the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was a discretion in the true sense or whether it was a discretion in the loose sense. The importance of the distinction is that either type of discretion will dictate the standard of interference that an appellate court must apply.

[84] In Media Workers Association[9], the Court defined a discretion in the true sense: '*The essence of a discretion in [the true] sense is that, if the repository of the power follows any*

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[6] S v Petersen 2008 (2) SACR 355 (C)

[7] S v Faye 2009 (2) SACR 210 (Tk); S v Sithole 2012 (1) SACR 586 (KZD); S v Mbaleki 2013 (1) SA 165 (KZD)

[8] Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another 2015 (5) SA 245 (CC)

[9] Media Workers Association of South Africa and Others v Press Corporation of South Africa Limited 1992 (4) SA 791 (A) at 800E.

one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him.'

[85] A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of the Restitution of Land Rights Act. It is '*true*' in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.

[86] In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in Knox[10], a discretion in the loose sense – '*means no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision.'*

[87] This Court has, on many occasions, accepted and applied the principles enunciated in Knox and Media Workers Association. An appellate court must heed the standard of interference applicable to either of the discretions. In the instance of a discretion in the loose sense, an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded.

[88] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised— '*judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles*.' An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.

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[10] Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (SCA) at 361I

[89] In Florence,[11] Moseneke DCJ stated:

'*Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making*.' (Footnotes otherwise omitted)

14. In summary then, this Court will, at common law not lightly interfere with the exercise by the court a quo of its "true" discretion to refuse bail and, even more so in light of the express statutory imperative contained in s60(4).

THE MATERIAL EVIDENCE BEFORE THE COURT A QUO

15. Reading the judgment one can see that the court a quo carefully analysed the evidence adduced in the affidavits. The appellants relied on a series of rote allegations in their individual affidavits which bore a remarkable similarity in structure and content – the term 'cut and paste' comes to mind. So, they point out that they are all family men with various dependents whom they support and all have clean criminal records. Only the second appellant (aged 47) has health issues - chronic diabetes and hypertension - which are evidently controlled by medication. The first appellant (aged 39) and the third appellant (aged 42) enjoy good health.

16. Each of the appellants claims to be gainfully employed. The first appellant says he is an IT specialist who works from home on his laptop and also has an interest of sorts in a vaping shop in Stellenbosch. He says his income fluctuates around R20 000 per month, although he told the investigating officer it was as high as R30 000. The second appellant claims to be a sub-contractor in the building industry (he does not specify the trade he practices) earning around R10 000 per month, while the third appellant says he works as a "Bolt driver" – an e-hailing taxi service – where he earns approximately R6 000 per month.

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[11] Florence v Government of the Republic of South Africa 2014 (6) SA 456 (CC) at [111].

17. According to the charge sheet, the J15, the addresses given by the appellants at their first appearance were as follows –

15.1 The first appellant - 131 Riebeeck Street, Goodwood, Western Cape;

15.2 The second appellant - 45 Perth Road, Westdene, Gauteng; and

15.3 The third appellant - 3 End Street, Westdene, Gauteng.

These are the addresses which the three appellants gave up to the police on their arrest and which are recorded in their interview statements taken down contemporaneously. There is no issue with the address of the first appellant, which was verified by the police as a house being rented by him for R10 000 per month.

18. However, prior to submitting their bail affidavits, which were obviously drawn up by their legal representatives and deposed to on 19 August 2022, on around 9 August 2022, the second and third appellants gave different addresses. No 2 then told the police that he lived at 17/19 Rothbury Avenue, Auckland Park, Johannesburg and went on to explain later that he had furnished the investigating officer, Capt. John Daniel May, with the Perth Road address because it was “a postal address”. The third appellant gave his second address as E610, Kathrada Park, Newclair, Johannesburg but chose not to explain the discrepancy.

19. The investigating officer explained in his first answering affidavit dated 19 August 2022 that he had asked a colleague in Gauteng, Col Mark du Bruin, to follow up on the addresses of no’s 2 and 3. Col du Bruin, who was furnished with each accused’s pair of addresses conducted a verification exercise around midday on 11 August 2022 and reported (and later confirmed by way of affidavit) that the Perth Road address furnished by no 2 was false. He said that when he went to the premises he found a tuck shop being operated by a Zimbabwean national who did not know the second appellant and did not recognize him when shown his photograph.

20. He established further, after speaking telephonically to no 2's wife (who was in the Eastern Cape at the time) that this appellant lived at 19 Lothberry (not Rothbury) Road, Auckland Park. Col du Bruin visited the home of the second appellant which he described as "a cottage in the back of a main house" and met the second appellant's son there, thus satisfying himself as to the correctness of the second address. He also noted that a VW Polo vehicle with registration number CKD 378 GP (allegedly belonging to no 2) was parked at these premises. The son, Sicelo, confirmed that it was the second appellant's VW vehicle but disavowed knowledge of the owner of a Nissan Almera car also parked there.

21. In respect of the third appellant, Col du Bruin found that the End Street address was false – it evidently consisted of a disused factory with adjacent rooms – and the occupants there also knew nothing of the third appellant. He said he further contacted no 3's wife, who worked in Johannesburg, and was then taken to the address in Kathrada Park. This was a shack in an informal settlement. At that address, said Col du Bruin, he asked appellant no 3's wife what vehicle her husband drove. She spoke of a Nissan Almera motor vehicle with registration number FS17LN GP but the accused's wife said she did not know where it was. In his ball application affidavit, the third appellant asserted ownership of this vehicle, which he said he used in the course of his employment as a Bolt driver.

22. In his further affidavit dated 26 August 2022, Capt. May clarified an obvious mistake which had crept in to his earlier affidavit regarding which vehicle had been parked where. He went on to explain that when Col du Bruin visited the Lothberry Road address he found a Nissan Almera with registration number FS17LN GP. He later established that this vehicle belonged to the second appellant. Both the Polo and the Nissan were, however, registered at the Perth Road address.

23. In his first affidavit, Capt. May gave the court a quo an overview of the State's case. He said that the perpetrators were put under police surveillance as early as 29 July 2022 when the Isuzu truck involved was driven by the first appellant to a McDonalds fast food outlet opposite Kenilworth Centre. There the truck was handed over to the second appellant who drove off in the general direction of Gauteng.

24. Capt. May went on to say that on 4 August 2022 the same truck was seen at another McDonalds outlet, this time at N1 City in Goodwood where it was handed over by appellants 2 and 3 to no 1 who drove the truck further until it was stopped by the police in Athlone. He stated that the truck was not registered to any of the appellants. The police knew who the owner was but did not want to disclose that person's identity to the court at that stage.

25. Capt. May also referred to the passports of the 3 appellants which confirmed that all of them have regularly travelled in and out of the Republic in the past number of years. The first appellant made regular trips to Namibia and during February/March 2022 he went to Turkey for a month. This, according to May, is a country with which South Africa has no extradition treaty. The second appellant also travelled into Namibia on occasion while the third appellant travelled extensively in and out of Botswana.

26. Lastly, Capt. May said that the second appellant made incriminating admissions during the course of interrogation, which he partially reduced to writing before his legal representative arrived and put a stop to it. There is also an allegation that that the truck was searched in the presence of all three appellants, the inference being that no's 2 and 3 were brought along to the truck shortly after it had been stopped. Capt. May said that the first appellant gave permission that the truck might be searched and that he too made an incriminating statement to the arresting officer in the process. These incriminating statements need not be expanded upon at this stage. Suffice it to say that there is admissible evidential material for purposes of considering bail and which was placed before the court a quo, in which the said two appellants admitted being involved in the transportation of the cargo to a lesser or greater extent.

THE APPELLANTS' VERSIONS

27. What of the appellants? What do they have to say on the merits at this stage? And, ultimately what evidence have they put up to demonstrate that their release on bail is in the interests of justice? Or, as was suggested in Mathebula, what

evidence have they adduced to demonstrate that they have an arguable defence to the charges, in circumstances where at the very least a prima facie is set up against them?

28. The answer, I regret to say, is precious little. Other than a rote repetition of their personal circumstances and a promise that they will stand their trial, they have chosen to remain silent on the merits, which they are of course entitled to do. But, they have expressly challenged the evidence put up by the State and asserted their innocence in relation thereto. That silence must thus be evaluated in the context of what, in my view, is a fairly compelling prima facie case made against them at this time. It is axiomatic that if they had an innocent explanation regarding their respective presences on a truck with which they apparently have no connection, they would surely have advanced it so as to discharge the onus which they have under the CPA. Indeed, in terms of the *dictum* in Mathebula they were obliged to persuade the court a quo of their innocence. They did nothing of the sort.

29. To advance an exculpatory defence, the first appellant was required, for instance, to explain how he, an IT specialist and sometime purveyor of e-cigarettes, came to be driving the truck, both when it left Cape Town and when it was stopped by the police in Athlone. One is reminded of a harbour pilot seeing the vessel out of port and safely back in upon its return with a valuable cargo on board. Further, he needed to explain why he handed over a truck, which was not his own, to no 2 in Kenilworth and received it back into his control at N1 City a few days later. And against the case put up by the State, he was required to contextualize his frequent travels outside of the Republic, bearing in mind that he said that his work as an IT specialist did not require that he keep an office from which to work – his laptop is his office, he claimed.

30. The other 2 appellants were required to explain what they, as persons ordinarily resident in Gauteng, were doing driving a truck laden with narcotics 1500 km away in the Western Cape when they handed it back to the first appellant at N1 City. And that, in circumstances where the evidence strongly suggests that they set out together on their journey southwards, parking their cars at the alleged abode of

the second appellant. The latter had the further duty of explaining why he came down to Cape Town to collect the truck in the first place.

31. Lastly, the second and third appellants were required to explain why they furnished false addresses to the police when arrested. The third appellant has not explained that fact at all, while the second respondent's referral to furnishing a "postal address" makes little sense, given the fact that the warning statement which he signed on the day of his arrest required him to provide the police with an address at which he was residing. The police would have had little interest in knowing where the appellant allegedly received his mail. For purposes of considering whether to oppose bail or not, the police obviously need to know where an arrested person ordinarily resides.

32. An issue which none of the appellants dealt with was why they were all found in possession of 2 cell phones at the time of arrest. Given the ease with which criminals can make use of so-called "burner phones" – the name given to cheap mobile devices which can easily be disposed of when it is expedient to do so – the appellants, in my view, faced a further difficulty in discharging the onus.

THE REASONING OF THE COURT A QUO

33. The court a quo was concerned primarily with the fact that the appellants might seek to evade their trials. After all they are charged with a so-called victimless crime and the prospect of interference with State witnesses does not loom large. Accordingly, the court a quo focused on the criterion referred to in s60 (4)(b) of the CPA. In so doing, the bail court was alive to the provisions of s60 (6) which lists a further number of factors that a bail court may take into account when looking at whether the ground contended for under s60 (4)(b) has been established.

"60(6) In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors, namely-

(a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;

(b) the assets held by the accused and where such assets are situated;

(c) the means, and travel documents held by the accused, which may enable him or her to leave the country;

(d) the extent, if any, in which the accused can afford to forfeit the amount of bail which may be set;

(e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;

(f) the nature and gravity of the charge on which the accused is to be tried;

(g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;

(h) the nature and gravity of the punishment which is likely to be imposed should the accused to be convicted of the charges against him or her;

(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached;

(j) any other factor which in the opinion of the court should be taken into account"

34. Although the court a quo did not specify the provisions of ss60 (6)(a) to (j) and deal with each *seriatim* in the judgment, it is clear that the substance thereof was considered. The court a quo was alive to the fact that all three appellants had travelled in and out of South Africa fairly extensively over a protracted period of time. In the case of the first appellant, he was shown to have travelled outside the Republic 15 times during the period 2019 to 2022. In the case of the second appellant, it was said to be 10 times over the period 2011 to 2020 while the third appellant's travel

record was very high – 64 times over the years 2010 to 2018. In respect of no's 2 and 3, these are extensive travel records for persons who hold down fairly menial jobs and do not earn salaries commensurate with the extent of travel.

35. In regard to the first appellant, he chose to explain only the month-long trip to Turkey in early 2022, which he said was a holiday with his wife. For a family man earning a modest income of between R20 000 and R30 000 per month, with a monthly rental component of R10 000 in his domestic expenses, travel of that sort and duration does seem rather extravagant in the circumstances. I agree with the court a quo that this factor raised a red flag in respect whereof there is no satisfactory explanation. And, such an explanation would not ordinarily have impacted upon the appellants' right to remain silent about the merits of the case. If there were innocent explanations, these should have been forthcoming.

36. It was suggested in this Court that the appellants' passports could be surrendered and that orders might be made that they be precluded for applying for new travel documents. It is, however, a concern of this Court that this may not be a suitable answer to the flight risk question. It is a matter of public knowledge that the Department of Home Affairs ("DOH"), has regularly been reprimanded by the courts in relation to its tardiness and bureaucratic ineptitude.[12] Simply put, this Court cannot be satisfied that such an undertaking would be adequately policed by DOH. And, in any event, the possibility that the appellants may procure travel documents unlawfully can also not be discounted as a possibility which is too remote in the circumstances. It is also regrettably a matter of fact that the country's borders are notoriously porous.[13]

37. The court a quo correctly looked at the strength of the State's case and the potential sentences which the appellants face if convicted on the drugs charges. During argument before this Court, Mr. Liddell confirmed that the appellants faced a minimum sentence of 15 years under the relevant minimum sentencing legislation[14],

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[12] See, for example, Director-General of Home Affairs and others v De Saude Attorneys and another [2019] 2 All SA 665 (SCA) at [44] *et seq*

[13] S v Rohde 2020 (1) SACR 329 (SCA) at [14]

[14] S51 of the Criminal Law Amendment Act, 105 of 1997 read with Part II of Schedule 2 thereto

while the drug trafficking legislation itself[15] permitted a sentence up to a maximum of 25 years. These heavy sentences are predicated on the quantity of contraband involved. Given the huge mass and value of the drugs allegedly involved here, it is not unreasonable to postulate that the prospect of a double digit prison sentence would be a legitimate basis to be concerned about a person evading his bail, particularly where the State has shown a fairly convincing prima facie case, even at this relatively early stage of the investigation.

38. In my view, the court a quo correctly considered the facts before it contextually[16] and did not misdirect itself on any issue. In accordance with the principles and approach set out above, I am unable to find that the bail court was wrong or that it exercised its true discretion improperly. It thus follows that the appeal against the order refusing bail for all three appellants must fail.

PROPOSED BAIL ORDERS

39. A further issue falls to be mentioned. In the court a quo the appellants did not indicate what amount of bail each could afford nor what further conditions might be attached to the granting of bail. Rather, there is a rote allegation by each in their bail affidavits to the effect that –

"I respectfully aver that any concerns which this Honourable Court may have in the event of it granting me bail, can be addressed via the imposition of appropriate and, if necessary, strict bail conditions.

I am willing to pay any amount of reasonable bail to ensure my release, which I am advised, is a further consideration by this Honourable Court, in the event of it finding that it is interests of justice that I should be released on bail."

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[15] The Drugs and Drug Trafficking Act, 140 of 1992

[16] S v Bruintjies 2003 (2) SACR 525 (SCA) at [7]. This matter involved a Schedule 6 offence but the approach is the same in respect of both schedules.

40. At the conclusion of argument, the Court enquired of Mr. Liddell what might be considered a reasonable amount of bail and what conditions might be appropriate in relation thereto, in the event that the Court was mindful to uphold the appeal. Mr. Damon was invited to do likewise. In the result, counsel presented this Court with a draft order on Monday 28 November 2022 which contained terms with which both parties were in agreement should be made, if the appeal was upheld.

41. That order contemplated bail for the first appellant in the amount of R200 000.00 and for the second and third appellants in the amount of R150 000.00 each. The conditions attached thereto were that each appellant would report at his local police station on a Monday and Thursday between the hours of 09h00 and 15h00 and that they were not to leave the jurisdiction of the provinces in which they reside without the written permission of the investigating officer.

42. In my view the conditions attached to the proposed orders are wholly inadequate. Firstly, there is no mention therein regarding the surrender of travel documents or an undertaking not to apply for new documents. Secondly, the delay between reporting hours is of such a duration that there would be more than enough time for the appellants to leave the country without being missed. Thirdly, the second and third appellants reside outside of the jurisdiction of the province in which they will be tried and the monitoring of their suggested reporting will be an unduly onerous task for the investigating officer. Further, they are the persons who furnished false addresses upon their arrest.

43. As to the amount of bail which each appellant has tendered to pay, there is no evidence on record that any of them can afford such large amounts. This is an important consideration because a court will not fix bail in an amount which is beyond the means of an arrested person: that would manifestly defeat the purpose of bail. What does the evidence establish?

44. Appellant 1 has a wife and family of five to support, as also his aged parents, this Court was told. He said he earns a maximum of R30 000 per month and pays monthly rent for his house of R10 000. In addition, the lease on the vaping shop

(which was concluded by the first appellant on behalf of a company of which he is the sole director) makes provision for monthly rental of R9000 and the first appellant has put up a suretyship for the company's obligations under the lease. He has no assets of any significant value with which he might be able to raise such a substantial amount of bail as that offered, other than a second hand car. The first appellant manifestly is not possessed of the funds to put up the bail suggested by counsel

45. The second and third appellants are in a similar predicament. They claim to earn far less than the first appellant and have no assets of any significance other than a couple of second-hand cars. The costs associated with their accommodation (if any) are not disclosed. But the position is clear: the second and third appellants are not possessed either of sufficient funds to put up the bail offered.

46. In the result, the appellants have failed explain to this Court how they collectively will procure the aggregate of R500 000,00 which is tendered as bail. The only reasonable inference in the circumstance is that a third party (or parties) is likely to put up the money for the appellants' bail. If the appellants are not putting up their own money to secure their release on bail, the provisions of ss60 (6)(d) set out above come into play. Absent any explanation as to the basis upon which their bail is to be funded, it seems to me fair to infer that the appellants can afford to forfeit their bail given that it is not their money that has been tendered.

47. Lastly, there is the question of extradition. S60 (6)(e) of the CPA requires consideration to be given of how readily extradition can be effected if the appellants skip their bail. In the case of Turkey, it is common cause that there is no extradition treaty with South Africa. But even in respect of Botswana and Namibia, destinations regularly visited in the past by all of the appellants, an extradition application would take time and that is not in the interests of justice in a matter such as this.[17]

ORDER OF COURT

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[17] Rohde at [15]

Accordingly, it is ordered that the appeal by the first, second and third appellants against the refusal of bail in the Athlone Magistrates Court is dismissed.

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GAMBLE, J

APPEARANCES:

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For the respondent:

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