IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.:A122/2023

In the matter between:

BUSISWE KGANTLAPANE Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 31 JULY 2023

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] This is an appeal against the refusal of bail by a Magistrate in the District Court of Klawer. The appellant was arrested on 26 April 2023 and charged with the offence of contravening section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 (dealing in drugs).

[2] On the day in question the South African Police Services (SAPS) held an authorised road block on a weigh bridge, on the N7 near Klawer. The appellant was the only occupant and driver of a navy blue Mercedes-Benz which approached the road block. After the police asked her to open the boot of her vehicle they found three bags filled with 41 plastic bags which, in turn, contained approximately 1000 mandrax tablets. The police estimate the street value of the drugs to be more than two million rand.

[3] In the bail application there was no oral evidence led. The appellant submitted two affidavits - one from herself, and another from her brother, Boitshoko Kenneth Kgantlapane. For its part the State submitted two affidavits - one from the investigating officer, John Robert Williams, another from Lieutenant Colonel Johann Smit the SAPS, as well as a petition from the community of Van Rhynsdorp, signed by 84 signatures of that community.

[4] In summary, the Magistrate found the following:

a. He was doubtful about whether the applicant was being honest and frank with the court regarding whether or not she owns a motor vehicle.
b. The appellant’s version in respect of the merits of the case is questionable. He was doubtful regarding the appellant’s alleged failure to search the vehicle and boot before taking possession of the vehicle and taking a long distance trip with it.
c. The provisions of section 60(4)(b) of the CPA were applicable – that there is the likelihood that the appellant, if she were released on bail, will attempt to evade her trial.
d. There was a possibility that the appellant may evade her trial given the seriousness, nature and gravity of the charge against her, strength of the State’s case against her, and the possible lengthy term of imprisonment that she faces as punishment.

e. It is not in the interests of justice to grant the appellant bail.

f. The impact of mandrax and drugs in the community was severe and very serious.

g. There would be no effective measures to stop the appellant from continuing to transport drugs if she is released on bail.

B. THE LAW

[5] The statutory context for determining an appeal relating to bail proceedings is section 65(4) of the Criminal Procedure Act 51 of 1977 ("the CPA"), which 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 or his opinion the lower court should have given.'

[6] The test for interfering with the Magistrate's judgment is whether the *court a quo* misdirected itself in a material way, in relation to facts or the law.[1] The Court stated as follows in *S v Barber*[2]:

> *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. 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 substitute its own review for that of the magistrate because that would be an unfair interference with the magistrate's exercise of its discretion. I think it should be in 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 but exercised that discretion wrongly.*

[7] If such misdirection is established, the appeal court is at large to consider whether bail ought, in the particular circumstances, to have been granted or refused, and in the absence of a finding that the magistrate misdirected him or herself the appeal must fail.

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[1] *Panayiotou v S Panayiotou v S* (CA&R 06 /2015) [2015] ZAECGHC 73 (28 July 2015), para [26] – [27].

[2] *S v Barber* 1979 (4) SA 218 (D) at 220 E – H.

[8] An accused is, in the absence of a conviction by a court of law, constitutionally presumed to be innocent.[3]

[9] The grant or refusal of bail is a discretionary decision 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.[4]

[10] Since the offence with which the appellant is charged falls within the ambit of Schedule 5 of the Criminal Procedure Act 51 of 1977 (CPA), section 60(11)(b) of the CPA is applicable, and it provides as follows:

> "Notwithstanding any provision of this Act, where an accused is charged with an offence referred to 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, adduces evidence which satisfies the court that the interests of justice permit his or her release"

[11] The effect of this provision is that the appellant bore an onus to establish, on a balance of probabilities, that the interests of justice permit her release on bail. In this regard, section 60(4) of the Criminal Procedure Act provides that the interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

> *"(a)* Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;
>
> ***(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

[3] Section 35(3)(h) of the Constitution of the Republic of South Africa Act 108 of 1996.

[4] *S v Dlamini*; *S v Dladla and others*; *S v Joubert*; *S v Schieteket* [1999] ZACC 8; 1999 (2) SACR 51 *(CC)* at 88H – I , 89 E and 90B-D.

> *(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 jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or
>
> *(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."

[12] In terms of section 60(6) of the CPA, in considering whether the ground in section 60 (4) *(b)* has been established, the court may, where applicable, take into account the following factors:

> *(a)* the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
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> *(b)* the assets held by the accused and where such assets are situated;
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> *(c)* the means, and travel documents held by the accused, which may enable him or her to leave the country;
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> *(d)* the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
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> *(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;
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> *(f)* the nature and the gravity of the charge on which the accused is to be tried;
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> *(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 be convicted of the charges against him or her;
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> *(i)* the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
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> *(j)* any other factor which in the opinion of the court should be taken into account."

THE APPEAL

[13] The grounds for appeal are many and varied, covering, in essence every issue raised in the bail application, and the appellant submits that the Magistrate erred in reaching the following findings:

a. The appellant is a flight risk and will not stand trial on her own accord;

b. Her release will undermine the proper functioning of the criminal justice system;

c. By placing undue emphasis on the seriousness of the offence;

d. That the appellant's personal circumstances do not warrant the granting of bail in the interests of justice;

e. That the interests of justice do not permit her release.

[14] In these proceedings the appellant relies significantly on the fact that she has family ties, in South Africa, a verifiable address as well as an alternative address which is provided by her brother. To this the appellant adds that she is a single parent of a four-year old daughter to whom she has emotional ties.

[15] It is most convenient to begin with the last-mentioned consideration – the appellant's tie to her four-year old minor. On the appellant's own version, the minor child has been living with her grandparents since before the appellant's arrest for this matter, and has simply continued to be in their care since the arrest of the appellant. No danger or significant concern has been raised in that regard, save for the concern that the appellant will not be able to adequately care for her financially. But, according to the appellant's affidavit, she was not able to provide for her daughter, even before her arrest. Hence her decision to move to Gauteng and leave the minor with her grandparents.

[16] The appellant has continued to maintain that her incarceration is impeding her ability to look for employment or to receive employment offers and contractual offers. In this regard, she has attached to her affidavit a number of emails from various institutions to demonstrate that she was actively looking for economic opportunities and that, after her arrest there was some interest shown from at least two government departments. However, the interest shown by the government departments was for her to provide quotations for the supply of items. The emails were not offers of employment, or agreements for her to supply those items. In other words, there is no guarantee that her quotation would have been selected, although I do accept that it would have provided her with some hope.

[17] As I pointed out to the appellant's legal representative in Court, the appellant is in no different position from many South Africans who are looking for work opportunities. It is a known fact that there is a shortage of employment opportunities in South Africa. Daily, our courts are inundated with criminal activity committed by accused persons who explain that they struggle to find work and to make ends meet. If this were permitted as a ground to grant bail for purposes of section 60(11)(b), then every such arrested individual might qualify for bail. Even worse, it would be considered in the interests of justice for such persons to be released on bail on account of their economic circumstances. That would negate the whole purpose of the provision which is to set stringent conditions for granting release on bail in the circumstances proscribed.

[18] In any event, it is common cause that the appellant was not employed at the time of her arrest, and was in fact unemployed for a while before the arrests which is the reason that she moved from Klerksdorp to Pretoria. In other words, her arrest did not change her situation by, for example, creating a loss of employment. I am therefore of the view that the economic factors upon which the appellant relies do not assist her for purposes of discharging the onus placed upon her by section 60(11)(b). Neither is the reliance on her ties to her daughter.

[19] An issue which took prominence during the court proceedings before me is the issue of the fixed residential address of the appellant. It is common cause that the address provided by the appellant to the police for purposes of the bail application was 1 Aloe Boulevard, Roodepark, Eco Estate, Pretoria *("the Pretoria address")*. As a result of that information, the police visited and verified that address, and confirmed that in the affidavit of Detective Williams.

[20] By the time the bail proceedings were heard on 17 May 2023 the appellant had been evicted from that address, apparently due to her failure to pay rental as a result of her incarceration. The eviction notice is dated 10 May 2023. It is not clear from the record that the address from which she was evicted is the same address that was verified by the police. I say so because the address contained in the notice of eviction is Unit 100, Roodepark, Eco City, which seems to me to be a different address. This issue did not receive any attention during the bail application and the proceedings continued on the basis that the appellant was evicted from the Pretoria address that she had provided to the police.

[21] Whatever the address of the appellant was in Gauteng, it was not disputed that she had in any event only moved there at the beginning of April 2023. As a result, whatever the address was it could not constitute a fixed address as at 26 April 2023 when the appellant was arrested. In any event, Mr Paries who represents the appellant admitted that, as a result of the eviction, the Pretoria address has fallen away and cannot be considered a fixed address. What is relevant though, is that this was the primary address given by the appellant as a fixed address to the police and to the Magistrate for purposes of the bail application. There was no misdirection in the Magistrate being dissatisfied regarding that address, and forming a view that the appellant was a flight risk.

[22] Faced with the challenge of the eviction, the appellant also relied on her brother's address at 2 Ackerman Street, Edenburg, Free State Province (*"the Edenburg address"*). This address was not verified by the police. However, the Magistrate did take it into account in her decision, referring to it as an alternative address. In response to this alternative address, the State's argument was that, since the appellant was arrested in the Western Cape there is no reason to grant her bail which is to be enjoyed in another province. In my view, there are additional problems with regard to the appellant's reliance on the alternative address.

[23] Whilst relying on her brother's address in Edenburg, the appellant also continues to rely upon the address in Klerksdorp where she previously lived with her mother and child, at 12 Boshoff Road, Stilfontein, Klerksdorp (*"the Stilfontein address"*). It was argued before me that this address can also be considered a fixed address because of the length of time that the appellant resided there before moving to Pretoria, and because of the fact that her minor child and family reside there, thus constituting an emotional tie. But Edenburg and Stilfontein are not the same location. The two addresses may even be in different provinces, namely the Free State and the North-West Province. This issue highlights the argument made on behalf of the State, that it would place an undue burden on the public resources of having police of a different province monitoring a bail candidate residing in another province. Initially, this argument was made in regard to the fact that the appellant was arrested in the Western Cape Province whilst she wants to enjoy her bail in the Free State at her brother's address. But it is now clear that the appellant also relies on the address in Klerksdorp where her daughter and mother reside, claiming to have emotional ties there, which makes the situation much worse.

[24] The purpose of providing a fixed address is to assure the court that an accused's trial attendance is secure. There is no such comfort when a fixed address is not present.[5]

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[5] S *v Diale and Another* 2013 (2) SACR 85 (GNP) at 18.

And the emphasis here is on a fixed, not moving, address. Furthermore, I am in agreement with the State that it would be onerous to expect it to contact or monitor the appellant for the purposes of her trial. But this factor – the lack of a fixed address - is not the sole factor to be considered in the circumstances of this case. When taken cumulatively with other factors, it is not a surprise that the Magistrate was not persuaded that the appellant is not a flight risk. The Magistrate was correctly cautious that the existence of different addresses might well provide opportunity for the appellant to evade trial. It is also no wonder that the State argues that it would be difficult to monitor the appellant's movements as between the two addresses, which are not in the same location, even if it can be argued that they are in the same general region.

[25] To further compound the issue, the trial proceedings are to be held in the Western Cape Province, the province where the appellant was arrested. Thus, even if it were established that the appellant has a fixed address somewhere in the Free State, that does not provide comfort that the appellant might not attempt to evade the trial. As the State points out, the appellant has no emotional, economic, family, community or occupational ties to the Western Cape and especially to the town of Klawer where the trial is to be heard – a factor which is relevant in terms of section 60(6)(a).

[26] To add to the mobility concerns, there is to consider the issue of the appellant's assets which, according to her, were allegedly last left in Pretoria but at present she has no knowledge of their whereabouts. What this means is that the appellant has no assets in the Free State or Edinburg, where she now relies as her resident address.

[27] The issue of the appellant's assets raises another concern, relating to the appellant's ownership of a motor vehicle. After all, she was arrested whilst driving a luxury vehicle. The appellant's version in the Magistrate's Court was that she did not own

any motor vehicle. Yet, as the Magistrate observed, there were numerous emails attached to her affidavit in which she stated while looking for job opportunities that she had *"my own reliable transport in case the job requires one to have one"*. It was argued before me that this does not mean that the transport referred to is owned by the appellant. It is difficult to reconcile that version with the clear text of the e-mails, which expressly state that the said transport is the appellant's *own*. In one of the e-mails, after mentioning that she has her own reliable transport, the appellant adds as follows: *"Am willing to travel and work extra hours"*. What cannot be denied is that the emails indicate that the appellant has full access to transport, including after hours. These emails were sent in very close proximity to the appellant's arrest, the last one being dated 18 April 2023. What all of this means is that, at the very least, the appellant has access to transport which she may access outside ordinary working hours. The Magistrate's cynicism regarding the appellant's version was not misplaced. The appellant's version regarding ownership and access to a motor vehicle remains dissatisfactory. I consider this aspect to be an important consideration in the context of bail proceedings, where there are flight risk concerns. It lends itself towards the probability that there is a likelihood that the appellant might attempt to evade trial.

[28] I have otherwise found no misdirection in the decision of the Magistrate. He correctly took into account the strength of the State's case against the appellant. This is especially the case given the nature and gravity of the punishment which is likely to be imposed should she be convicted of the charges against her. *Prima facie*, it cannot be said that the State's case against the appellant is non-existent, or weak and that the appellant in all likelihood will be acquitted after the trial.

[29] It deserves highlighting that the appellant has been charged with a Schedule 5 offence, an indication of the seriousness of the crime. In those circumstances, the fact that the crime was not violent - an issue which was also argued for me - does not assist

the appellant. The said crime is so serious that the legislature found it necessary to prescribe a minimum sentence for it.

[30] The fact that the offence concerned is included in Schedule 5 means that the appellant possibly faces a very long term of direct imprisonment. The case law[6] indicates that this is a relevant factor which may be taken into account when considering whether an appellant might be inclined to evade trial for purposes of bail. The Magistrate was not misdirected when he took this factor into account. The fact that the appellant does not possess a passport is neither here nor there. She may still manage to evade the authorities, given the concerns already discussed.

[31] It is also not disputed that there was a petition from the community of Van Rhynsdorp containing 84 signatures of people who were obviously triggered by the fact that the offence in this case involves the dependence-producing drug, mandrax, a well-known enemy to the children and communities of the Western Cape. In his judgment, the Magistrate set out some of the dire consequences of drug-dealing upon communities, and those are not disputed.

[32] It was argued that the nature of the crime with which the appellant is charged was not repetitive such that she can be considered a notorious drug dealer. That, however, also does not assist the appellant in the circumstances of this matter given the value of the drugs involved. In any event it is not a requirement that she be a repeat offender.

[33] In all circumstances, the appeal against the Magistrate' refusal of bail is dismissed.

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[6] *See S v Hudson* [1980] 1 All SA 130 (D) at 131; S v Nichas 1977 (1) SA 257 (C).

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N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the appellant	:	Adv A. Paries
For the respondent	:	Adv M September-Qatana D.P.P. Cape Town