



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

**A112/2023**

**NO: B248/2023**

**APPEAL CASE NO:**

**LOWER COUR CASE**

In the matter between:

**MOHAMMED IMRAN**

Appellant

and

**THE STATE**

Respondent

Date of argument: 31 October 2023

Dater of judgment: 7 November 2023

**Judgment**

**Andrews AJ,**

[1] This is an appeal in terms of Section 65(4) of the Criminal Procedure Act<sup>1</sup>(hereinafter referred to as the CPA), against the decision of the Presiding Magistrate Ms Belilie on 20 April 2023 in Goodwood Magistrate's Court to refuse the Appellant's release on bail.

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<sup>1</sup> Act 51 of 1977.

## Legal Framework

[2] Section 65(4) of the Act provides for the test of a Superior Court to interfere with a decision of the Lower Court to refuse bail.

*'The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court/judge is satisfied that the decision is wrong, in which event the court or judge shall give the decision which in its opinion the lower court should have given'*

[3] Section 60(11)(b) of the Act sets forth how bail applications that fall within the prescripts of Schedule 5, should be dealt with in this regard, the Act states:

*'(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-*

*(a) ...*

*(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, adduces evidence which satisfies the court that the interest of justice permit his or her release...'*

## Factual Background

[4] The Appellant was arrested at his place of residence on 18 March 2023. It is common cause that his wife, who is the co-accused in the matter, was not arrested and was requested to attend at the police station on 20 March 2023 where after both the Appellant and his wife appeared in court on a charge of fraud to the value of R908 454.50. The Appellant's wife was released on bail in the amount of R3000

without a formal bail hearing. The Appellant's release on bail was opposed and the matter was adjourned until 3 April 2023 for a formal bail application.

### **The evidence**

[5] The *viva voce* evidence of the Investigating Officer was led in opposition to the Appellant's release on bail. The Appellant did not testify and attested to a sworn affidavit which was read into the record. The following additional evidentiary documentation in support of his application was submitted into evidence, namely:

- (a) Document issued by the Commissioner of Companies and Intellectual Property Commission;
- (b) Deed of Transfer and
- (c) Mortgage Bond Registration.

### **The allegations on the merits**

[6] The Investigating Officer, Warrant Officer Ludada (hereinafter referred to as "Ludada") placed on record how the Appellant was linked to this matter. Ludada stated that his office was embarking on a project investigation under the name of "Project Virus". Ludada explained that the Appellant was part of a syndicate that fraudulently acquired motor vehicles and cash loans. He went on to explicate that the syndicate would fabricate payslips, bank statements, identity documents and divers' licenses that would be submitted to vehicle dealerships. The *modus operandi* would essentially entail creating a fictitious paid up letter from the financial institution that

financed the vehicle creating the impression that the vehicle that is still under finance is paid up. Thereafter they would, with the fraudulent documentation, change the title of the owner of the vehicle at the Licencing Department.

[7] Ludada testified that on 1 September 2022, the Appellant and his co-accused, went to the Auto World dealership in Goodwood where they submitted a forged driver's licence, falsified bank statements from First National Bank and payslip for the Appellant's wife. A fictitious address was provided on the application form for the loan. On the strength of the falsified documentation, a loan in the amount of R1.5 million was approved by Marquis Finance, a subsidiary of Standard Bank. The Appellant and his wife thereafter took possession of the vehicle and on 6 October 2022, they acquired a paid-up letter.

[8] On 7 October 2022, the title of the vehicle was changed from Marquis Finance to the name of the Appellant's wife, for a vehicle that was never paid for by them. Ludada further narrated that the Appellant drove the vehicle to McCarthy Toyota at N1 City on 2 December 2022, with the intention of selling the vehicle. McCarthy, on the strength of the documents provided; then bought the vehicle. An amount of R73 000 was electronically deposited from the Standard Bank account of the dealership into a Capitec bank account belonging to the wife of the Appellant.

[9] Ludada further orated that the project they were investigating entailed the monitoring of the eNatis. In this regard, he stated that they have a group of individuals on their radar and check on activities on a daily basis.

## **The Appellant's case**

[10] The affidavit read into the record essentially confirmed, that the Appellant charged with a Schedule 5 offence; was in custody since 16 March 2023; was 35 years of age; was residing at 15 Ramone Avenue, Riverton, Goodwood and that he was living there for two (2) years; was married for 9 years; has 4 minor children, aged 5, 4, 2 years old respectively and a baby of 2 months old; is in good health and is self-employed. He has a registered business under the name of Bismell Trading Well International; does not know the complainants and state witnesses in the matter; has no previous convictions and no pending cases; is not subject to any parole conditions and has no outstanding warrants for his arrest. The Appellant's release will not endanger the safety of the public or any particular person and will not disturb public order or undermine public peace or security. The Appellant will not evade his trial upon his release on bail; will not interfere with the police investigation or conceal any evidence of any nature; will not influence or intimidate the witnesses; is not a flight risk; undertakes to attend court; will adhere to any bail conditions and that the interest of justice permits the Appellants release on bail and that he will not commit any other offence when released on bail. The Appellant will be able to afford the amount of R3 000 bail.

[11] The Appellant did not present any evidence on the merits of the case.

## **The grounds of appeal**

[12] The Appellant's grounds of appeal as per the Notice of Appeal are encapsulated as follows:

1. *The Magistrate erred in not granting the Appellant bail, notwithstanding the fact that the proven grounds set out in Section 60(4) of Act 51 of 1977 are undisputedly in favour of the Appellant. More particularly, the evidence favoured the Appellant and that if he could be released on bail, he would not:*
  - a. *Endanger the safety of the public or any particular person;*
  - b. *Commit a Schedule 1 offence;*
  - c. *Attempt to evade trial;*
  - d. *Intimidate witnesses or conceal or destroy evidence; or undermine the proper functioning of the Criminal Justice System.*
2. *The Magistrate further erred and misdirected herself in not attaching sufficient weight to the fact that the Appellant is presumed innocent until proven guilty and in so doing overemphasised the strength of the State's case.*
3. *The Magistrate erred and misdirected herself in not finding that the accumulative weight of the Appellant's personal circumstances favoured the interest of justice in granting bail.*
4. *The Magistrate erred and misdirected herself in over-emphasising the seriousness of the offence by taking into account "other cases" not before the Honourable Court.*
5. *The Magistrate erred and misdirected herself in not properly evaluating whether proper bail conditions would offset a decision to rather deny bail.*

### **Parties Principal Submissions**

[13] The Appellant referred the court to various case authorities in augmentation of the submissions pertaining to the considerations in respect of bail,

which included *inter alia*, the objective of the institution of bail and the presumption of innocence<sup>2</sup>. The Appellant also referred to the oft quoted matter of **S v Acheson**<sup>3</sup> where Mohamed AJ stated the following:

*'An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment.'*<sup>4</sup>

[14] The Appellant contended that there were in essence three material misdirections of the court *a quo* that warranted the interference from the court of appeal namely that the Magistrate found:

- (a) the Appellant to be a flight risk, but ignored the fact that he had been previously charged, released on bail and attended court in a matter;
- (b) that the Appellant would commit further offences but ignored the fact that his past conduct is completely to the contrary and
- (c) a real likelihood that the Appellant would interfere with the investigation but ignored the fact that he co-operated with the SAPS by handing over a car key they sought.

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<sup>2</sup> See *S v Stansfield* 1997 (1) SACR 221 (C) 226H – 227B; *S v Mbele & Another* 1996 (1) SACR (W) at 235J – 236D, where Stegman J stated the following:

*'Therefore, I understand s. 25(2)(d) (and now s. 35) to mean, by implication that every person arrested for the alleged commission of an offence had a fundamental procedural right to go before a Court of law to seek his release with or without bail, and that the relative substantive fundamental right which he enjoys is the right to have a Court weigh up all the relevant interest of justice including those which favour his release pending the trial. (The presumption of his innocence, the facts pointing to a likelihood that he will stand trial, requirements that can be laid down to ensure that he does, and so forth) and those which may be adverse to his release pending the trial (the strength of the State's case and the various risks of the interest of justice already mentioned) and that he has a fundamental right to be released with or without bail unless, in particular circumstances of the case, the interest of justice adverse to his release outweigh the interest of justice that favours his release.'*

<sup>3</sup> 1991 (2) SA 805 SA (Nm) at 822 A – B.

<sup>4</sup> See also *Chiediebeze v S* (BA18/20) [2020] ZAMP MHC 34 (29 July 2022); *S v Thornhill* 1998 (1) SACR 177 (C) 183E – G.

[15] It was submitted that there is no evidence to draw a conclusion that a likelihood exists that the Appellant will interfere with the investigation or other witnesses. In this regard, the Appellant showed co-operation by handing over the key, which was submitted, he did not have to do.

[16] The Respondent contended that the Appellant during the bail proceedings failed to discharge the onus to show that on a balance of probabilities that it is in the interest of justice to be released on bail.

### **Interest of Justice Considerations**

[17] Section 60(4) of the CPA sets out the interest of justice considerations:

*'The interest of justice do not permit the release from detention of an accused where one or more of the following grounds have been established.*

- (a) Where there is a likelihood that the accused, if he or she were released on bail will endanger the safety of the public or any particular person or will commit a schedule 1 offence; or*
- (b) Where there is a likelihood that the accused, if he or she were released on bail will attempt to evade his trial; or*
- (c) Where there is a likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or*
- (d) Where there is a likelihood that the accused, if he or she would be released on bail will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;*
- (e) Where in exceptional circumstances there is a likelihood that the release of the accused will disturb the public order or undermine the public peace or security'*



[18] The Respondent is opposing the Appeal on the following grounds, namely:

- (a) The seriousness of the Offence and
- (b) That the Appellant is a flight risk.

### **Seriousness of the offence**

[19] In the matter of **S v Khan**<sup>5</sup> the court found that the listing of crimes under Schedule 5 and the proposed sentences indeed reflect the seriousness of the offences.

[20] The Respondent argued that regard is to be had to the full spectrum of the case the Appellant is standing trial on as per the testimony of the Investigating Office. In this regard, the allegations are that the Appellant is involved in the fraudulent acquisition of motor vehicles and cash loans with the objective of generating an income. In addition, it was submitted that so-called white-collar crimes are serious in nature and can have just as devastating an effect on society as violent crimes. In this regard, the court was referred to the judgment of **Ramokolo v The State**<sup>6</sup> where the seriousness of white-collar crimes is described as follows:

*'The circumstances of this case undoubtedly demand a custodial sentence. As pointed out by Marais JA in S v Sadler, the view that perpetrators of white-collar crime are not true criminals and do not belong in jail because it is non-violent, and the perpetrators are usually first offenders with ostensibly respectable backgrounds is a dangerous fallacy in view of the corrosive impact upon society of such crime. This view results in sentences which send out a message that it pays to commit these types of crime. There is absolutely*

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<sup>5</sup> 2003 (1) SACR 636 (T).

<sup>6</sup> (251/10)[2011] ZASCA 77 (26 May 2011) para 28.

*nothing respectable about a white-collar criminal and the effect of his actions may be as devastating as those of a violent crime.'*

## **Flight Risk**

[21] Section 60(6) of the CPA sets out the considerations which are to be taken into account when considering whether an accused will abscond which states as follows:

*'(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 to 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 the 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 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; or*

## REPORTABLE

*any other factor which in the opinion of the court should be taken into account.'*

[22] It was argued that the Appellant was labelled a flight risk based on his country of birth being Bangladesh. It was submitted that the court *a quo* failed to take into account that the Appellant owned immovable property and that he has made his life in South Africa with his wife and 4 children.

[23] In addition, it was submitted that although the Appellant is of Bangladeshi descent, he has a valid spousal visa, permanent residence and a valid South African identity number. It was also placed on record that the Investigating Officer is in possession of the Appellant's passport. The Appellant was previously arrested on a Parow CAS, where he was released on bail and attended court until the matter was withdrawn.

[24] It was mooted that regard is to be had to the behaviour of the Appellant during the period January 2023 and March 2023 when he failed to hand himself over to the police. In response, Counsel for the Appellant highlighted that the Investigating Officer came to the Appellants house from January 2023 until March 2023 without a J50 warrant.

[25] The Appellant was ultimately arrested when his house was raided by people in plain clothes who were jumping over the wall and activating the alarm. The Appellant was found hiding in the ceiling. It was argued that the Appellant's

explanation that he hid would under these circumstances be reasonable, given that his neighbour was recently murdered. It was argued that cognisance is to be taken of the fact that the Appellant did not flee during this period and in fact co-operated to a degree by handing the car key to the police.

### **Considerations by the court a quo**

[26] The court *a quo* took into consideration the strong opposition of the Investigating Officer to the Appellant's release on bail because of the strength of the State's case on the charges levelled against the Appellant as well as the other pending investigation.

[27] The court *a quo* took into account that the Investigating Officer made numerous requests between the period January 2023 to March 2023, for the Appellant to report to him, but to no avail. The Appellant was found hiding in the ceiling when the police ultimately raided his house, which is indicative of the possibility that the Appellant is a flight risk.

[28] In augmentation of the court *a quo*'s flight risk considerations, the court *a quo* considered that the Appellant used different names, and different ID's. Furthermore, the court *a quo* took into consideration that the Appellant was involved with manufacturing falsified payslip and document needed to apply for vehicle finance. In addition, the Appellant was no longer leasing the premises in Elsie's River and neither does the Appellant conduct business from the premises.

## REPORTABLE

[29] The court *a quo*, took into consideration that the Appellant was a foreign national from Bangladesh. The court indicated that Ludada expressed a concern that the Appellant would still be in a position to leave the country by way of producing false documentation in order to travel, despite the fact that his passport was handed in. The court *a quo* considered that the Appellant has left the country in 2022 and is linked in Pretoria on other matters.

[30] The court *a quo* took into account the concerns of Ludada that the Appellant may continue to commit crimes within the syndicate and potentially interfere with witnesses. The wife of the Appellant's neighbour who was murdered is also standing trial in Cape Town for a similar fraudulent charge and that the Appellant is linked thereto. This is indicative that the Appellant may be able to access other state witnesses. The evidence on record was that the Appellant could easily access other state witnesses, destroy evidence and interfere in the state's case.

[31] The court *a quo* was satisfied on a conspectus of the testimony of Ludada, that the evidence against the Appellant was overwhelming that he will not stand trial and that the Appellant had failed to discharge this onus.

[32] The court *a quo* considered that there is a likelihood that the Appellant would commit Schedule 1 offences should he be released on bail. In addition, the court indicated that he was permitted to consider other factors which included, that

the Appellant has a Parow matter which is still outstanding and stands to re-enrolled and two Pretoria matters to which he is linked. In addition, the court *a quo* considered the fact that there were vehicles found on the Appellants property linked to the Appellant and that the Appellant has provided no explanation for the vehicles found on his property. The court *a quo* was furthermore satisfied that there exists a real likelihood that the Appellant is involved in the syndicate and as such, should he be released on bail he will commit further Schedule 1 offences.

[33] The court *a quo* considered the fact that the investigation in the matter is ongoing and involves a syndicate and that there are additional documents outstanding which have not been secured. Furthermore, that the Appellant is the main suspect and is aware of his various contacts throughout the province and is aware of the documents that are still circulating. The court *a quo* concluded that it was satisfied that should the Appellant be released on bail, given the strength of the state's case and the possibility that the minimum sentence may be imposed, that nothing would prevent the Appellant from interfering with the state's case and concealing further evidence and/or disposing of any other vehicles that may be in circulation. The court *a quo* was further satisfied that there is a real likelihood that the Appellant will interfere in the state's case.

[34] The court *a quo* considered the possibility of imposing bail conditions as requested by the Appellant's legal representative and held the view that bail conditions could not be monitored 24 hours and could easily be broken. The court *a quo* opined that it was evident that the Appellant was capable of manipulating various systems in order to achieve his objective and therefore capable of

manipulating the bail conditions and interfere in the state's case and/or evade trial. The non-existent business in Elsie's River was also a factor that was considered and that the Appellant was essentially living off the proceeds of the sale of the vehicles which he obtained fraudulently.

### Legal Principles

[35] It is trite that the functions and powers of the court or judge hearing the appeal under Section 65 are similar to those in an appeal against conviction and sentence. In **S v Barber**<sup>7</sup>, Hefer J 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. 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 view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think 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...'*<sup>8</sup>

[36] In **S v Porthen & others**<sup>9</sup>, Binns-Ward AJ (as he then was), remarked that *'there could be no quarrel with the correctness of the observations of Hefer J as a general position'*. Notwithstanding, Binns-Ward considered it necessary to point out that a court hearing a bail application (i.e. the court *a quo*), exercises a wide as

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<sup>7</sup> 1979 (4) SA 218 (D) at 220E – H.

<sup>8</sup> See also *Killian v S* [2021] ZAWCHC 100 (24 May 2021) at para 7.

<sup>9</sup> 2004 (2) SACR 242 (C) at para 7.

opposed to a narrow (or strict) discretion. Binns-Ward also observed that it remains necessary to:

*'be mindful that a bail appeal, goes to the question of deprivation of personal liberty. In my view, that consideration is a further factor confirming that s 65(4) of the CPA should be construed in a manner which does not unduly restrict the ambit of an appeal court's competence to decide that the lower court's decision to refuse bail was "wrong"...*<sup>10</sup>

[37] Binns-Ward J in **Killian v S**<sup>11</sup> restated the nature of the discretion wherein he stated:

*'As I pointed out in S v Porthen and Others 2004 (2) SACR 242 (C), however, certainly in respect of bail applications governed by s 60(11), in which the bail applicant bears a formal onus of proof, the nature of the discretion exercised by the court of first instance is of the wide character that more readily permits of interference on appeal than when a true or narrow discretion is involved. I concluded (at para 15) "Accordingly, in a case like the present where the magistrate refused bail because he found that the appellants had not discharged the onus on them in terms of s 60(11)(a) of the CPA, if this court, on its assessment of the evidence, comes to the conclusion that the applicants for bail did discharge the burden of proof, it must follow (i) that the lower court decision was 'wrong' within the meaning of s 65(4) and (ii) that this court can substitute its own decision in the matter". That analysis was most recently endorsed in a decision of the full court of Gauteng (Johannesburg) Division of the High Court in S v Zondi 2020 (2) SACR 436 (GJ) at para 11-13.'*

## **Discussion in relation to the material misdirections identified**

[38] It is apposite to consider the context within which the investigation was conducted. Ludada orated that the Appellant was on their radar as part of Project

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<sup>10</sup> At para 17.

<sup>11</sup> [2021] ZAWCHC 100 (24 May), para 8.



## REPORTABLE

Virus, that they were investigating. Furthermore, when Ludada attended at the home of the Appellant on 20 January 2023, two vehicles were seized, namely an Audi Q5, as well as a BMW 520. When the police raided the premises of the Appellant on 18 March 2023, the day on which he was eventually arrested, they seized a Toyota Fortuner as well as a Mercedes-Benz. It bears mentioning that this Mercedes-Benz was driven by the neighbour of the Appellant, who was also of Bangladeshi origin and who was driving the said Mercedes-Benz when he was murdered. This particular Mercedes-Benz was seemingly seized as a police Exhibit in the murder investigation and placed into the SAP13. It is not for this court to speculate about how and why the Mercedes-Benz vehicle came to be found on the Appellant's premises. These are issues that will be dealt with separately insofar as the murder investigation is concerned.

[39] For the purposes of the Appellant's bail application, there is no explanation as to why these vehicles that were found on the Appellant's premises came to be there especially in view of the fact that these vehicles were all allegedly implicated in the activities of the syndicate. It does however beg the question as to whether there was an onus on the accused to volunteer an explanation or whether he could invoke his right to remain silent if regard is had to the burden of proof threshold required in Schedule 5 bail applications, which is essentially an interest of justice consideration.

[40] In Schedule 5, bail applications the court is enjoined by virtue of legislation to 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 interest of justice permit his or her release. The Appellant therefore bore an onus to satisfy the court by way of adducing evidence that on a balance of probabilities the interest of justice permitted his release. The election by the Appellant to adduce evidence by way of affidavit and to invoke his right to not disclose his defence or proffer an explanation, cannot be held against him. However, the Appellant's silence leaves the court with only the version of the State in relation to his alleged involvement in the offence for which he and his wife are standing trial and other offences where he appears to be a prominent role-player.

[41] The question to be answered with only the version of the Ludada on record, is whether the court *a quo* misdirected by taking into account the other pending investigation. Here again the testimony on record is that the Toyota Fortuner found on the property is linked to one of the Pretoria cases for which the Appellant is under investigation. In my view the court *a quo*'s consideration of this factor, is not out of place if regard is had to the landscape under which the Appellant was being monitored during the Project Virus investigation.

[42] The facts of this matter, in my view, are unique and ought to be considered in the milieu of the evidence given by Ludada regarding the surveillance of the Appellant. Although Counsel for the Appellant submitted that the Appellant's wife played a leading role, the Appellant was portrayed as the mastermind and as such the court *a quo* provided with this information, could certainly consider other facts, as it is permitted to do. I am thus not persuaded that the court *a quo*

## REPORTABLE

misdirected itself in making the finding that a real likelihood existed that the Appellant would interfere with the investigation.

[43] It bears mentioning that because the co-accused is the wife of the Appellant, the possibility certainly exists that the interference could be closer to home, proverbially speaking; even more so because the wife of his neighbour is also somehow implicated. The Appellant's co-operation with the SAPS by handing over a car key they sought will not in my view, tip the scales in his favour if probabilities are weighed up. In any event it is uncontroverted that the vehicles were found on the Appellant's property and the obvious inference would be that the Appellant was in possession of keys to the vehicles. With or without the keys, it follows that the vehicles were still going to be confiscated from the premises in some way. His gesture provides cold comfort in the overall scheme of things.

[44] Whilst it was argued that past conduct of the Appellant needed to be considered, the court *a quo*, on the testimony of Ludada considered that the web of the syndicate spans over numerous provinces. Similarly, the finding of the court that there is a likelihood of the Appellant committing similar offence is to be considered in the landscape of the evidence given by Ludada which the court *a quo* was permitted to consider. Therefore, I am satisfied that the court *a quo* did not misdirect itself in making this finding.

[45] It is unrefuted that the Appellant was apprehended as a result of a police raid. It is also uncontroverted that the Appellant was caught hiding in the

ceiling at his home. It is furthermore irrefutable that the Appellant did not respond to the numerous requests to see the Investigating Officer. The Appellants family was in the house while he was hiding in the ceiling. Even if the policemen were in plain clothing, why did he, the Appellant believe that he was the target and seek refuge in the ceiling and then leave his wife and four children vulnerable to the intruders? In my view, the handing in of the passport would not automatically serve as a deterrent with the means available to the Appellant and *modus operandi* sketched to the court.

[46] It was submitted that the wife of the Appellant was treated differently and her release was unopposed. In my view, the Appellant's role in the broader scenario as elucidated by Ludada demanded a different approach. Moreover, the wife of the Appellant had to take care of the children one of whom being two-month old baby. Flight risk considerations for her would invariably be different to those of the Appellant.

[47] The observations and reasoning of Jones J in ***S v Mpulampula***<sup>12</sup> is apt, and although distinguishable to the facts of the current case, I echo certain sentiments expressed therein:

*'...The conclusion is difficult to avoid that he had been deliberately avoiding the police for a considerable time, ...This in my view, reduces considerably one's confidence that he will ultimately stand trial...'*

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<sup>12</sup> 2007 (2) SACR 133 (E) at 136f-i.

[48] Moreover, the circumstances of the matter *in casu* appear to be clearly different to when the Appellant appeared in the Parow matter previously. There are noticeably more factors that require consideration, which I am satisfied, were correctly considered by the court *a quo*. Of seminal importance is the provision set out in Section 60(6)(j)<sup>13</sup> which allows the court to consider any other factor. There is therefore no *numerous clausus* of factors which a court should consider in assessing the likelihood that a bail applicant would attempt to evade trial.

[49] In **S v Van Wyk**<sup>14</sup> it was found that, not only is it the duty of the court to consider the relative strength of the State's case, but also that this fact, added to a relative long term of imprisonment awaiting at conviction may lead to an accused released on bail pending his trial to abscond.<sup>15</sup>

[50] The expectation of a substantial sentence of imprisonment would almost certainly provide an incentive to an Appellant to abscond and leave the country. I pause here to consider the personal circumstances of the Appellant which included that the Appellant's country of birth is Bangladesh, he is married to a South African with whom he shares 4 children, he has a registered business interest, has a South African identity document and owns immovable property. These factors, considered in isolation, in my view, reduces the risk of abscondment. In **S v Branco**<sup>16</sup> Cachalia AJ held that in granting bail on appeal, also observed the following as regards the position of the Appellant:

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<sup>13</sup> '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 –

(j) any other factor opinion of the court should be taken into account.'

<sup>14</sup> 2005 (1) SACR 41 (SCA).

<sup>15</sup> See also *S v Nichas* 1977 (1) SA 257 (K) at 263; *S v Hudson* 1980 (4) SA 145 (D) at 146.

<sup>16</sup> 2002 (1) SACR 531 (W) 537 a–h.

*'The fact that he is a foreign national does not in itself preclude the court from considering granting bail. This factor must be considered with other factors... Even serious charges would not in itself preclude foreign nationals from being granted bail.'*<sup>17</sup>

[51] The facts *in casu* are however clearly distinguishable and each case is to be considered on its own merits. There is a myriad of case law on point where courts have granted bail and refused bail for different reasons, as several factors ultimately informs a court's decision in determining whether the interest of justice permits an accused's release on bail. Each application ought to be decided on the objective facts placed before it.

[52] In considering the factors taken into account by the court *a quo* regarding why it believed the Appellant, was a flight risk, I can find no misdirection in the finding of the court in this regard. Therefore, I am in agreement with the findings of the court *a quo* that the interest of justice far outweighed any prejudices that may be suffered by the Appellant.

### **Conclusion**

[53] It is trite that the court *a quo* is imbued with a wide discretion when deciding on an accused's release on bail. Whilst being forever mindful of factors such as the purpose of bail and the deprivation of an accused person's liberty, the onus remains on the accused to adduce evidence and persuade the court that his or her release would be in the interest of justice.

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<sup>17</sup> 536d-e.

## REPORTABLE

[54] There is an overabundance of authorities that reaffirms the limitations and powers of a Court of Appeal. The ultimate consideration is whether the Magistrate, who had the discretion to grant bail, exercised such discretion wrongly. Only one of the considerations set out in Section 60(4) of the CPA need be present to refuse bail. In my view, the court *a quo*, cemented its decision to refuse bail on more than one of the factors listed in Section 60(4). It is evident that the court *a quo*'s refusal to grant bail was not based on the exclusive fact that the Appellant was a foreign national, but because the circumstances were such that he had failed to show that the interests of justice permitted his release on bail. I am satisfied that the court *a quo* considered the objective facts and applicable legal principles and correctly found that the interest of justice does not permit the Appellant's release on bail.

[55] Consequently, I am satisfied that the court *a quo* correctly denied the Appellant's application to be released on bail.

### **Order:**

[56] In the result the Appellants appeal against the order by the court *a quo* refusing his application for bail is dismissed.

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**ANDREWS, AJ**

**APPEARANCES**

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Instructed by:

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Counsel for the Respondent:

Adv B Maki  
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