



**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, MTHATHA**

**Not Reportable**

CASE NO. CA&R 60/2022

In the matter between:

**SIZWE BEBULA**

**Appellant**

and

**THE STATE**

**Respondent**

---

**JUDGMENT**

---

**LAING J**

[1] This is an appeal against the judgment of the Magistrates' Court for the District of Libode, on 9 May 2023, refusing the granting of bail to the appellant on new facts.

**Background**

[2] The appellant has been charged with, *inter alia*, murder and the unlawful possession of a firearm and ammunition. It is common cause that he has been charged

with an offence listed in Schedule 6 of the Criminal Procedure Act 51 of 1977 ('the CPA'). It is also not disputed that he would need to satisfy a court, in terms of section 60(11)(a), that there were exceptional circumstances which, in the interests of justice, permitted his release.

[3] The appellant brought an initial bail application, which was dismissed on 8 March 2022. He subsequently brought a further bail application on new facts. This was dismissed and forms the subject of the appeal. The matter was, in the interim, transferred to the High Court.

[4] The details of the appellant's applications are set out below.

### **First bail application**

[5] The appellant stated on affidavit that he is an adult male, born on 27 March 1981. He resides in Grabouw, Western Cape Province. He is unmarried and has a child who was born on 28 April 2018. The child is an epileptic and stays with his mother, whom the appellant supports with monthly payments of R 3,500. At the time of his arrest, the appellant had been employed by a security firm, earning R 20,000 per month. He also worked for his family business, Bebula Family Transport Services, which employed approximately nine staff and made monthly profits of about R 10,000. The appellant mentioned that he participated in community development programmes.

[6] He had a previous conviction in 2002 for the possession of dagga; a conviction in 2012 for robbery<sup>1</sup> in relation to which he had just completed a sentence of nine years; and he had been charged with murder in the Regional Court in Cape Town, which case was still pending. The appellant asserted that he had never intimidated witnesses, evaded trial, or interfered with police investigations. He had no relations outside the country, possessed no travel documentation, and was not a flight risk. Several undertakings were made in one form or another to cooperate with the authorities. The

---

<sup>1</sup> It is not apparent from the record whether the conviction was for robbery or 'attempted robbery' as averred by the appellant.

appellant presented a letter from the Grabouw Community Police Forum ('CPF'), apparently indicating the community's support for his application for release on bail. He averred that he intended to plead not guilty to the charges.

[7] Dealing with the existence of exceptional circumstances, the appellant argued that the state's case against him was 'very weak' since it depended chiefly on the evidence emanating from an identification parade. He also pointed out that he had depleted his funds and needed to be released so that he could generate an income to pay for a legal representative of his choice. The transfer of the matter to the High Court meant that there would be an inordinate delay before finalization. The appellant said that his health was deteriorating because of the alleged assault and torture that he had suffered at the hands of the police and the medical attention that he had received had been wholly inadequate. Moreover, his child, as an epileptic, needed his love and support. The child's mother was unemployed and was unable to transport the child to hospital for proper care; the appellant asserted that he had been the child's primary caregiver. In support of his application, the appellant attached various documents, including letters from both the security firm and his family business which indicated that they had suffered considerable losses without his experience and expertise. A letter from the Grabouw CPF, signed by a member thereof, referred to a meeting whereat the community had supported the appellant's release on bail.

[8] For its part, the state called the investigating officer, Capt Xolile Mdepha, who explained why the application for bail was opposed. He said that the appellant had used different names in the past. In the case before court, the state would rely on the testimony of the wife of the deceased, who had identified the appellant and whose statement was corroborated by another witness. Capt Mdepha also said that the appellant had been arrested in connection with the murder of a school principal from Grabouw, after the appellant had been released on parole in relation to his previous conviction and sentence. There was a danger that he could harm the wife of the deceased in the present matter, especially as he knew her address.

[9] The investigating officer listed additional convictions, including a conviction for robbery in 2001. Other cases had been opened against the appellant, too. He testified that the appellant had used different names on different occasions. Capt Mdepha went on to say that he had not had an opportunity to verify much of what the appellant had mentioned in his affidavit and still needed to do so. He concluded by saying that the appellant was a 'very wanted man' and that there was a risk that he could be killed if he were to be released from custody.

[10] In his judgment, the magistrate declined to answer the question of the admissibility of the evidence emanating from the identification parade. However, he held that there was a likelihood that the appellant would interfere with the main witness, viz. the wife of the deceased. There was also a likelihood, said the magistrate, that the appellant would commit further offences. By reason of the seriousness of the charges brought against the appellant and the sentence that could be imposed, he would be attempted to evade trial. The magistrate held, ultimately, that the appellant had failed to discharge the onus; there were no exceptional circumstances.

### **Second bail application**

[11] The appellant made a further application for bail, based on several new facts that allegedly amounted to exceptional circumstances. These are detailed below.

[12] Firstly, the appellant averred on affidavit that the case pending in the Regional Court in Cape Town had since been struck off the roll. This had occurred on 3 March 2023 in terms of section 342A of the CPA. The case, argued the appellant, had previously persuaded the magistrate that he had a propensity to commit violent crimes.

[13] Secondly, the main witness had already testified, after the transfer of the matter to the High Court. She had placed her evidence on record and had subsequently been excused from the proceedings. Her safety had weighed heavily in the magistrate's earlier decision to refuse the granting of bail.

[14] Thirdly, there had been an inordinate delay in the trial proceedings in the High Court, caused in part by the judge's taking long leave. The appellant had had nothing to do with the delay. His continued detention was not in the interests of justice.

[15] Fourthly, the appellant's incarceration had deprived him of an opportunity to earn an income, resulting in the depletion of his financial resources. He was, consequently, unable to pay for the services of a legal practitioner of his choice. The appellant submitted a letter from his employer, confirming that employment was still available.

[16] Fifthly, the matter was taking a lengthy period to become finalised in the High Court. A period of two years had lapsed, and the state had yet to conclude its case.

[17] The appellant concluded his application by making several undertakings. He also indicated that he could afford bail in the sum of R 2,000.

[18] The state called Lt-Col Mdepha to testify.<sup>2</sup> He confirmed that he remained the investigating officer and that the state still opposed the granting of bail. In that regard, Lt-Col averred that the main witness may yet be called back to the stand to provide further evidence. There were other witnesses, too, who had to testify. The likelihood was there that the appellant may interfere.

[19] Regarding the case in the Regional Court, Lt-Col Mdepha said that an arrangement had been made with his counterpart that the Mthatha case be finalised before further steps were taken in Cape Town. There was too much risk involved in transporting the appellant between the two centres. The case in the Regional Court had not been removed from the roll permanently.

[20] Lt-Col Mdepha could not comment on the judge's taking long leave in the High Court. The state had nothing to do with any delay in that regard. He indicated, too, that there were less than ten witnesses still to testify. The case for the state was close to completion.

---

<sup>2</sup> It appears that the witness was promoted from the rank of captain to lieutenant-colonel after having previously given evidence.

[21] In relation to the appellant's employment, Lt-Col Mdepha alleged that he had not had permanent employment at the time of his arrest; however, he may have been involved in piecemeal work. Lt-Col Mdepha did not know the employer referred to by the appellant.

[22] There had been no reports, said Lt-Col Mdepha, pertaining to the appellant's state of health. He had heard nothing to this effect from either the Department of Correctional Services officials or the appellant himself.

[23] Lt-Col Mdepha was adamant that the appellant remained a flight risk. He would attempt to evade trial because of the charges that he was facing, and the police would find it difficult to apprehend him because he used different names.

[24] Under cross-examination, Lt-Col Mdepha could not dispute that the appellant had depleted his financial resources. He could also not dispute that the conclusion of the main witness's testimony, the removal from the roll of the case in the Regional Court, and the offer of employment, were new facts.

[25] The magistrate, in his judgment, accepted that the appellant had presented new facts for consideration. They could not, however, be considered in isolation. The facts that emerged from the first bail application were overwhelmingly against the granting of bail.

[26] It is the above decision against which the appellant appeals.

### **Grounds of appeal**

[27] The appellant's grounds of appeal are as follows: the magistrate failed to address the question whether the new facts amounted to exceptional circumstances; he failed to weigh up all the evidence presented in the first and second bail applications to decide whether exceptional circumstances existed; he failed to exercise his discretion at all; he failed to protect the appellant's right to a fair hearing of his bail application by merely

advising him that he could appeal the decision; and, overall, the magistrate exercised his discretion wrongly.

[28] The provisions of section 65(4) of the CPA, contends the appellant, ought to be invoked.

### **Issue to be decided**

[29] The provisions of section 65(4) are indeed pertinent. They provide 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.’

[30] From the above, the crisp issue for determination is whether the decision made by the magistrate on 9 May 2023 was wrong. This will depend, in turn, on whether the appellant met the conditions of section 60(11)(a), which stipulate as follows:

‘...Notwithstanding any provision of this Act, where an accused is charged with an offence—

(a) referred to in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release...’

[31] It will be necessary, at this stage, to consider the case presented by the appellant in further detail.

### **Discussion**

[32] As a starting point, counsel for the appellant helpfully referred to the decision in *S v Barber*,<sup>3</sup> where Hefer J held as follows:

'It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not 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>4</sup>

[33] The above authority is a useful reminder of the role of a court of appeal. It involves a two-stage process: (a) deciding whether the decision of the lower court was wrong; and (b) if so, then making the decision which, in its opinion, the lower court ought to have given.

[34] Beginning with the magistrate's advice to the appellant, if it can be called that, the record merely indicates as follows:

'COURT:	...Therefore, bail on the new facts does not succeed.
MR GWEBINDLALA:	As the Court pleases.
PROSECUTOR:	As the Court pleases.
COURT:	So, the bail in fact is denied. Matter I think postponed to 26 June 2023, in the High Court Mthatha. Applicant may appeal the decision by this Court.' <sup>5</sup>

---

<sup>3</sup> 1979 (4) SA 218 (D).

<sup>4</sup> At 220E-F.

<sup>5</sup> Sic.



[35] To assert, as the appellant has done, that this demonstrates that the magistrate failed to afford him a fair hearing is difficult to understand. The magistrate merely stated the obvious at the conclusion of a standard bail application: the appellant still had recourse available to him, notwithstanding that the decision had been unfavourable. It would be unduly stretching the limits of interpretation to contend that the above extract reveals unfairness or possible bias on the part of the magistrate.

[36] Counsel for the appellant went on to argue that the magistrate's decision was not based on any proper reasoning. Whereas the magistrate accepted that the appellant had presented new facts, he failed to evaluate and assess both the old and the new facts to arrive at his decision. The decision of Van Dijkhorst J *in S v Vermaas*<sup>6</sup> was relied upon to assert that the court is required to consider all the facts before it, old and new, and conclude on the totality thereof.<sup>7</sup>

[37] From the record, however, it is apparent that the magistrate did not limit himself to the new facts. The following extract is pertinent:

'COURT: ...As I indicated that these factors of bail, new facts in this case, cannot be considered in isolation. The factors on the first bail application are still overwhelming. They are still overwhelming against the new facts.'<sup>8</sup>

[38] If anything, then the magistrate can be criticised for the paucity of reasons given for his decision to refuse the application. This does not necessarily mean, however, that his decision was wrong.

[39] In *S v Ali*,<sup>9</sup> Grogan AJ held that:

'I have already adverted to the brevity of the reasons the magistrate gave for his decision to dismiss the appellant's third bail application. However, brevity is not in itself sufficient basis for

---

<sup>6</sup> 1996 (1) SACR 528 (T).

<sup>7</sup> At 531e-f.

<sup>8</sup> Sic.

<sup>9</sup> 2011 (1) SACR 34 (ECP).

concluding that the magistrate ignored or gave insufficient weight to the considerations set out in s 60 of the Act. It is clear that the magistrate concluded that it was in the interests of justice that the appellant should be denied bail because he is a flight risk.<sup>10</sup>

[40] The test remains whether the decision was wrong. This must be determined on whether the appellant successfully demonstrated that there were exceptional circumstances which, in the interests of justice, permitted his release.

[41] Precisely what constitute exceptional circumstances is not always easy to say. In *S v Jonas*,<sup>11</sup> to which counsel for the appellant referred, Horn JA held that:

'The term "exceptional circumstances" is not defined. There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused's absence is one that springs to mind. A terminal illness may be another. It would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence which he did not commit could also be viewed as an exceptional circumstance. Where a man is charged with a commission of a Schedule 6 offence when everything points to the fact that he could not have committed the offence because, e.g. he has a cast-iron alibi, this would likewise constitute an exceptional circumstance.'<sup>12</sup>

[42] In summary, the circumstances listed by the appellant in his first bail application consisted of the following: he has a child who is an epileptic and for whom the appellant alleges that he is the primary caregiver; he was employed both at a security firm and at a family business, which depended on his expertise and experience for their financial viability; he had participated in community development programmes and enjoyed the support of his community; he had just completed his sentence in relation to a conviction for robbery; he had not interfered with police investigations or witnesses; and he was not a flight risk. The exceptional circumstances mentioned by the appellant included the

<sup>10</sup> At paragraph [15]. See, too, *S v Sinuka* (unreported, ECB case no CA&R 06/2011, 12 April 2011); *S v Mququ* 2019 (2) SACR 207 (ECG).

<sup>11</sup> 1998 (2) SACR 677 (SEC).

<sup>12</sup> At 678e-f.

alleged weakness of the state's case, the appellant's inability to generate an income to fund his defence, the unreasonable delay that would be caused by the transfer of the matter to the High Court, his deteriorating health, and his child's need for the appellant's emotional and financial support.

[43] None of the circumstances listed, on their own, could be said to be exceptional. The consequences of being taken into custody entail, often, the loss of support for family members, and the loss of employment or other sources of income. In the present matter, the extent of support from the Grabouw community is unclear, especially considering the allegation made against the appellant that he had murdered a school principal from the same community. The strength of the state's case against him can only be properly tested during the ongoing trial; it was not apparent why the appellant had described it as 'very weak'. The delay in the trial was not unusual; it was common cause that the state's case was well underway. There was simply no independent evidence produced by the appellant regarding the state of his health, such as a medical report. In relation to the child, the appellant had not explained if or why the mother was unable to continue providing support, notwithstanding financial hardship.

[44] The remainder of the facts presented are unremarkable. Cumulatively, they fall far short of being exceptional.

[45] Regarding the second bail application, the appellant expressly listed the new facts as follows: the case in the Regional Court had been struck from the roll; the main witness in the present matter had already testified; there had been an inordinate delay, caused by the judge's taking long leave and the failure of the state to finalise its case; and the appellant, despite being unable to generate an income to pay legal fees, had received confirmation from his employer that employment was still available.

[46] The provisions of section 342A of the CPA address unreasonable delays in trials. To that effect, sub-section (3) provides that:

'If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order–

(a) ...

(b) ...

(c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted *de novo* without the written instruction of the attorney-general...'

[47] It is common cause that the case in the Regional Court was struck from the roll. Whereas counsel for the appellant contended in argument that his client was a 'free man' in relation to such proceedings, Lt-Col Mdepha made it clear that further steps would be taken against the appellant by the investigating officer in Cape Town, but not before the Mthatha case had been completed. The relevant portion of sub-section (3) allows the resumption or institution *de novo* of the prosecution of the appellant, albeit upon the written instruction of the relevant authority. The striking of the case does not assist the appellant. His further prosecution remains a distinct possibility, as Lt-Col Mdepha indicated.

[48] Regarding the completion of the main witness's testimony in the present matter, counsel for the appellant appeared to skirt the issue of her possible recall. In that regard, counsel for the state pointed out that the witness in question could be requested to testify during sentencing proceedings. She was still not safe. There were concerns, too, about the safety of other witnesses. This aspect was not satisfactorily addressed by counsel for the appellant, the new fact does not assist.

[49] Counsel for the appellant, in relation to the alleged delay in the High Court proceedings, referred to the decision of De Wet AJ in *S v Yanta*,<sup>13</sup> where the court observed:

---

<sup>13</sup> 2023 (2) SACR 387 (WCC).

'...As to the issue of the delay in the finalisation of the trial, I point out that new facts or changed circumstances will not have the same effect in every bail application on new facts, as the cumulative effect of the facts in each bail application may differ. Whilst a delay in one matter may tilt the scales in favour of an applicant in some circumstances, it does not necessarily have the same effect in others.'<sup>14</sup>

[50] The above principle applies equally to the present matter. There is nothing to persuade this court that any delay already experienced by the appellant is inordinate or that the effect thereof, when combined with the other facts mentioned by the appellant, should persuade the court that exceptional circumstances exist. It is common cause that the state's case is well underway and that the trial was in progress shortly before the hearing of the appeal.

[51] Regarding the appellant's favourable prospects of employment, notwithstanding his incarceration, the court is not convinced that this should be elevated to anything extraordinary. The appellant may well depend on such employment to fund his defence. His right to a fair trial includes the right to choose and to be represented by a legal practitioner,<sup>15</sup> who is likely to charge a fee for his or her professional services. The right is, however, not unrestricted. If an accused person such as the appellant cannot afford the services in question, then the state can assist but there is little opportunity to pick and choose, so to speak. The decision in *S v Halgryn*<sup>16</sup> illustrates this, where Harms JA stated:

'...Although the right to choose a legal representative is a fundamental right and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations... It presupposes that the accused can make the necessary financial or other arrangements for engaging the services of the chosen lawyer and, furthermore, that the lawyer is readily available to perform the mandate, having due regard to the court's organization and the prompt despatch of the business of the court. An accused cannot, through the choice of any

---

<sup>14</sup> At paragraph [43].

<sup>15</sup> Section 35(3)(f) of the Constitution of the Republic of South Africa, 1996.

<sup>16</sup> 2002 (2) SACR 211 (SCA).

particular counsel, ignore all other considerations... and the convenience of counsel is not overriding...<sup>17</sup>

[52] The availability of employment cannot be used, in the present matter, to justify the appellant's release from custody to exercise his right to choose and to be represented by a legal practitioner of his preference. If the appellant has depleted his resources, then he may yet avail himself of the services of a practitioner appointed by the state. The new fact relied upon by the appellant, viz. confirmation received from his employer that he may return to work, advances his case no further.

### **Relief and order**

[53] In *S v Mpozana*,<sup>18</sup> mentioned by counsel for the appellant, Mbenenge AJ (as he then was) held that:

'In considering an application for bail allegedly brought on the strength of new facts, the court's approach is to consider whether there are, in the first instance, new facts and, if there are, reconsider the bail application on such new facts, against the background of the old facts...

...whilst the new application is not merely an extension of the initial one, the court which entertains the new application should come to a conclusion after considering whether, viewed in the light of the facts that were placed before court in the initial application, there are new facts warranting the granting of the bail application.<sup>19</sup>

[54] Counsel for the appellant argued that, viewed collectively, the old and new facts outlined in the bail applications demonstrated conclusively that not only were the so-called 'likelihoods' mentioned in section 60(4), read with sub-sections (5) to (9), absent, but also that exceptional circumstances existed. Having had regard to above facts, the court is not satisfied that this is so. There are no exceptional circumstances which, in

---

<sup>17</sup> At paragraph [11].

<sup>18</sup> 1998 (1) SACR 40 (TKHC).

<sup>19</sup> At 44g- 45a.

the interests of justice, permit his release. The appellant has failed to meet the requirements of section 60(11)(a).

[55] Consequently, the court is not satisfied that the magistrate's decision was wrong. He exercised his discretion correctly. There is no basis upon which to set aside the decision in question.

[56] It is ordered, accordingly, that the appeal be and is hereby dismissed.

---

**JGA LAING**  
**JUDGE OF THE HIGH COURT**

Appearances

For appellant: Adv Calaza, instructed by V. Gwebindlala & Associates,  
Mthatha.

For the respondent: Adv Maarman, instructed by The Director of Public Prosecutions, Mthatha.

Date of hearing: 20 October 2023.

Date of judgment: 31 October 2023.