



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Appeal No: **A35/2024**

In the matter between:

PAPIKI SEDI

Appellant

and

THE STATE

Respondent

JUDGMENT BY: JP DAFFUE J

HEARD ON: 12 April 2024

DELIVERED ON: 15 April 2024

INTRODUCTION

[1] Appellant, a 32-year-old-male, is charged with contravention of a protection order granted on 10 October 2019 at Ventersburg in terms of section 17 of the Domestic Violence Act 116 of 1998 (the Act). It is alleged that on 11 February 2024 he assaulted the complainant 'by hitting the complainant [his girlfriend] with a bottle on the head and kicking her all over her body whilst she was lying on the ground'.

[2] Appellant unsuccessfully applied for bail, his bail application having been dismissed on 5 March 2024 by the honourable magistrate of Ventersburg. Dissatisfied with the outcome of the bail application, appellant served and filed a notice of appeal. On 4 April 2024 a whole bundle of documents, properly bound, paginated and indexed, containing all relevant documents from the notice of appeal

– even an affidavit by the appellant - his counsel’s heads of argument, the charge sheet and the record of the proceedings in the court a quo, a total of 103 pages, was served on the Director of Public Prosecution, Bloemfontein, as well as the clerk of the Ventersburg court. The documents were filed with this court on the same day.

[3] On 7 March 2024, two days after the refusal of the bail application, the appellant requested written reasons from the honourable magistrate, indicating that he intended to file a bail appeal. No reasons were furnished as requested. More about this later.

[4] The bail appeal was heard on Friday, 12 April 2024. After hearing the parties’ submissions, judgment was reserved until Monday, 15 April 2024 at 14h15.

GROUND OF APPEAL

[5] The appellant relied on no fewer than ten grounds of appeal in his notice of appeal which was accompanied, contrary to practice, by an affidavit dealing with the incomplete transcribed record and appellant’s submissions pertaining thereto and the grounds of appeal. Over and above that, appellant’s counsel provided the court with detailed heads of argument. I do not intend to deal in any detail with any of the grounds of appeal, but shall for the purpose of considering the appeal refer to some. It is alleged that the honourable magistrate erred in the following instances:

- 5.1 in finding that the appellant was guilty of committing a serious offence;
- 5.2 due to the love relationship between the appellant and complainant, there is a likelihood that he would intimidate her and/or assault her again, she being a defenceless woman;
- 5.3 the appellant breached the protection order issued in terms of the Act;
- 5.4 the parties’ minor child did not require financial assistance in the form of maintenance notwithstanding the common cause fact that the appellant is paying R1500 per month towards the maintenance of the child in accordance with a maintenance order;

5.5 the complainant did not object to the granting of bail and in final argument the State prosecutor conceded that bail could be granted, subject to appropriate conditions;

5.6 that the appellant would evade trial as he was a flight risk;

5.7 in emphasising the seriousness and prevalence of offences in terms of the Act, he over-emphasised the fact that the appellant was facing a maximum sentence of 10 years' imprisonment; and

5.8 he did not consider all appropriate circumstances in order to find that the interests of justice permitted the release of the appellant on bail.

INCOMPLETE RECORD

[6] When the matter was called at 09h30 on Friday morning, 12 April 2024, Adv E Ontong on behalf of the State placed on record that the State opposed the bail appeal. He also put on record that an improper record of the bail proceedings was placed before me. It is recorded that the bail application was conducted over two days. As a result of loadshedding, as is apparent from the appellant's aforesaid affidavit, the first day's evidence was not digitally recorded and transcribed. The appellant attached the charge sheet and the honourable magistrate's handwritten notes of the evidence led on day one to his affidavit, as well as the transcript of the second day's hearing.

[7] I pointed out to the parties at that stage that the honourable magistrate failed to furnish the reasons for his decision to the High Court on receipt of the notice of appeal. This is a peremptory provision and I have in the past declined to hear a bail appeal without the court *a quo's* reasons.¹ However, I have also on occasion proceeded to hear a bail appeal without the court *a quo's* reasons where I was satisfied that full reasons were given in the judgment refusing bail and also, bearing in mind the relative urgency applicable to these kind of proceedings. I requested Adv Ontong to contact the honourable magistrate telephonically to find out whether reliance could be placed on his written notes in respect of the first day's bail hearing and why he failed to furnish reasons as required by section 65(3) of the Criminal

¹ *S v Sesing* (A11/2019) [2019] ZAFSHC 9 (25 January 2019) with reference to section 65(3) of the Criminal Procedure Act 51 of 1977.

Procedure Act 51 of 1977. Consequently, I adjourned until Friday afternoon at 14h15.

[8] Adv Ontong sent an email to my secretary after he had an opportunity to discuss the matter with the honourable magistrate for which I wish to thank him. When the matter was called again that afternoon Adv Ontong reported back, confirming his email correspondence and stating that although the honourable magistrate mentioned that he had only drafted cryptic notes, he had elaborated in more detail in his judgment on the issues at hand. I agree that the honourable magistrate dealt with the evidence presented to him in much detail. The honourable magistrate also indicated that he had nothing to add to the reasoned judgment. Therefore, I accepted that I could proceed in hearing the bail appeal.

EVALUATION

[9] In light of the authorities, I accept that it is trite law that courts of appeal's powers are limited in bail appeals and no matter what such court's own views are, the question to be considered is whether the court *a quo* misdirected itself materially on the facts or legal principles. Only in such a case may the court of appeal consider the issue of bail afresh. It may also be justified to interfere on appeal when the court *a quo* did not consider one or more important aspects in arriving at its decision.

[10] I accept that the legislature intended that only courts may consider bail applications of persons involved in domestic violence offences. So-called police bail prior to the first appearance in court is prohibited. I also accept that the legislature had due regard to the seriousness of offences under the Act to such an extent that section 59(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA) now reads as follows:

- '(1) (a) An accused who is in custody in respect of any offence, other than an offence-
- (i) referred to in Part II or Part III of Schedule 2;
 - (ii) against a person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998); or
 - (iii) referred to in-
- (aa) section 17 (1) (a) of the Domestic Violence Act, 1998;
 - (bb) section 18 (1) (a) of the Protection from Harassment Act, 2011 (Act 17 of 2011); or
 - (cc),

may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.’

[11] Section 60(11)(c) of the CPA reads as follows:

‘(11) Notwithstanding any provision of this Act, where an accused is charged with an offence

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(a) ...

(b)...

(c) contemplated in section 59 (1) (a) (ii) or (iii), 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.’ (emphasis added)

The mere fact that offences relating to domestic violence are dealt with in the same subsection as the most serious offences mentioned in Schedules 5 and 6 is confirmation of the seriousness with which the legislature considers such offences. As highlighted, the applicant in a bail application relating to a domestic violence offence should adduce evidence which satisfies the court that the interests of justice permit their release on bail.

[12] This should also be read with section 60(11B)(a)(iii) of the CPA which reads as follows:

‘(11B)(a) In bail proceedings, the accused, or his or her legal adviser, is compelled to inform the court whether - ...

(i) ...

(ii) ...

(iii) an order contemplated in section 5 or 6 of the Domestic Violence Act, 1998, section 3 or 9 of the Protection from Harassment Act, 2011, or any similar order in terms of any other law, was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, and whether such an order is still of force; and

(iv)’

[13] In *S v Dlamini*², Kriegler J, writing for a unanimous Constitutional Court bench, made the following important observations:

² *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC) at para [11]

[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 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. (emphasis added)

[14] When one reads the filed documents, it appears as if the honourable magistrate at a stage believed that he was involved in a criminal trial and not a bail application. He even recorded the following in his handwriting after the parties' closing arguments: "Guilty". In the process he failed to duly consider the purpose of bail. I shall henceforth refer to the honourable magistrate as 'the court *a quo*'.

[15] In my view the court *a quo* misdirected itself materially both on the facts and the legal principles. Clearly, it failed to consider the main issue, to wit 'protecting the investigation and prosecution of the case hindrance' as stated by Kriegler R in the quoted *dictum*. This aspect could have been catered for in appropriate bail conditions, but the court *a quo* failed to consider this. Whilst ignoring the purpose of bail, the court *a quo* considered the appellant guilty as if it was sitting as a trial court. Even so, the court *a quo* did not consider whether the trial court might eventually, and even after a verdict of guilty, decide to impose a fine as an alternative to direct imprisonment.

[16] The court *a quo* became unnecessarily emotional, even recording in the judgment that 'this case will go to the regional court where you can be sentenced to 10 years' imprisonment ...'. It then continued as follows:

'But the Court is trying, get the message out, should the Department of Justice get it out, should the National Prosecuting (sic) get it out, should the radio, should the journalist, to the newspapers get this news out please let's reduce domestic violence and maintain our anger.'

The court *a quo* mentioned this without considering that the parties have a 10-year-old child and that they were therefore in a relationship for about 11 years. Although the complainant obtained a domestic violence interdict in 2019, it is apparent that they still stayed together thereafter and continued with their love relationship. It appears as if the complainant moved back to her parental home at the instructions of the appellant only very recently.

[17] Vague evidence was tendered that the appellant assaulted and/or threatened the complainant once, or perhaps twice, before the present incident during the whole period of their relationship. The court *a quo* failed to consider that the complainant made it clear that she did not want the appellant to remain in custody. In my view, any attack by a male on a female should be severely criticised and appropriate sentences should be imposed when such persons are convicted. I have said in many judgments that there are too many male persons in this country that have no regard for the rights of females, bearing in mind the thousands of murders, rape cases and domestic violence offences occurring annually. The President of our country has also spoken out about this several times, but to no avail. But each and every case must be considered on its own merits.

[18] The court *a quo* stated that the appellant was 'facing seriously (sic) allegations of assault imposed on her [the complainant], in a very gruesome manner.' On her version she was hit with a bottle over the head and also kicked when she was lying down on the ground. No doubt this appears to be a serious assault. However, no medical evidence was presented to the court *a quo* and it could not be found as did, that a gruesome attack had taken place. That will be for the trial court to decide eventually.

[19] The complainant indicated that her child would survive on the child grant that she is receiving. On a question by the court *a quo* she *inter alia* said that she did not depend on the appellant's money (the maintenance payments of R1500 per month for the child) and that she and her child will be 'able to eat'. These answers followed upon a certain line of questioning by the court *a quo* which is difficult to understand.

The complainant would never approach the maintenance court if she did not need money for the upbringing of her child and that court would never have granted an amount of R1500 per month maintenance if a need had not been proven. In the process the court *a quo* neglected to consider section 28(2) of the Constitution which stipulates that '(a) child's best interests are of paramount importance in every matter concerning the child.' If the appellant is kept in custody pending a criminal trial that may take months to be finalised, he would surely be dismissed by his employer. In such case the child will have to forfeit maintenance.

[20] The appellant is a firefighter in the employment of the Matjhabeng Municipality and earns about R21 000. He has been supporting his child, but will clearly not be able to continue if he is to be dismissed by his employer.

[21] The complainant and the appellant shared a house in Ventersburg, but she recently moved to her parental home. The appellant has a fixed residential address at [...], Welkom and is employed by the Matjhabeng Municipality. He should be prohibited from entering the Ventersburg magisterial district, unless required for court purposes and shall also be confined to the Welkom magisterial district pending finalisation of the criminal hearing. In requiring that there should be no contact between the appellant and the complainant prior to the finalisation of the criminal case, one of the main purposes of granting bail will be achieved.

[22] The aim of bail is *inter alia* to minimise the accused's freedom prior to his conviction and sentence. The court *a quo* did not recognise that. In conclusion, I am satisfied that no balance was struck between the interests of society, *ie* that the appellant should stand his trial without any interference with the administration of justice on the one hand and his liberty of the other hand.

ORDER

[23] The following orders are issued:

1. The appellant's appeal against the dismissal of his bail application is upheld.

2. The order of the court *a quo* is set aside and substituted with the order set out as follows:

'2.1 Bail is granted to the applicant in the amount of R2000.00 (two thousand rand) on the following conditions:

2.1.1 he shall report to the Thabong police station twice a week, *ie* on Mondays and Fridays between 06h00 and 17h00, the first day of such report to be on Friday, 19 April 2024;

2.1.2 he shall attend his trial and all postponements thereof and remain in attendance until excused and finally until a verdict is given in respect of the charge to which this case relates;

2.1.3 he shall not communicate in any manner whatsoever with the complainant, *ie* personally, or by means of contacting her or communicating with her via WhatsApp or cellphone, until finalisation of the criminal case against him;

2.1.4 he shall not make contact with any of the State witnesses and shall not interfere with any of them and/or intimidate any of these persons, including the complainant;

2.1.5 he is forbidden from visiting the magisterial district of Ventersburg where the complainant resides until finalisation of the criminal case against him, save for attending court on those days that his attendance is required in the Ventersburg Magistrate's Court;

2.1.6 he shall not leave the magisterial district of Welkom without the prior written approval of the Investigating Officer and in order to obtain such permission, he shall provide a valid itinerary of his movements and keep the Investigating Officer updated at all times as to his whereabouts;

2.1.7 the applicant's residential address is recorded as [...], Welkom and should he change that address, he should notify the clerk of the court, Ventersburg and the Investigating Officer of such change within 24 hours; and

2.1.8 a copy of this order with the bail conditions shall be served on the applicant personally by the Investigating Officer before his release on bail and a copy of such written acknowledgment by the applicant, certifying that he is fully conversant with the conditions of his release on bail, shall be filed as part of the record with the clerk of the Ventersburg Magistrate's Court.'

JP DAFFUE J

On behalf of the appellant:

Adv F Kunatsagumbo
Motaung Attorneys
BLOEMFONTEIN

On behalf of the respondent: Adv E Ontong
DPP
Bloemfontein