THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 731/10
No precedential significance

In the matter between

FJ SEWELA **Appellant**

and

THE STATE **Respondent**

Neutral citation: ***FJ Sewela v The State*** **(731/10) [2010] ZASCA 159 (01 December 2010)**

Coram: Cloete, Ponnan and Bosielo JJA

Heard: **25 November 2010**

Delivered: **01 December 2010**

Summary: Bail – Refusal of – Appeal against – onus in terms of s 60 (11) (b) of the Criminal Procedure Act 51 of 1977 – failure by the appellant to prove that the interests of justice permit his release on bail – s 65 (4) of the CPA.

ORDER

On appeal from: South Gauteng High Court (Johannesburg), (Mabesele AJ sitting as a court of appeal).

The appeal is dismissed.

JUDGMENT

BOSIELO JA (Cloete and Ponnan JJA concurring):

[1] This is an appeal against a judgment of the South Gauteng High Court (Mabesele AJ), in which the court dismissed an appeal by the appellant against the refusal by the regional magistrate sitting at Wynberg to grant him bail pending his trial.

[2] The appellant was arrested on 24 October 2009. There are three co-accused in this matter, one of whom is the customary wife of the appellant (accused 3). They are charged with five counts of fraud and the appellant will be charged with money laundering in contravention of s 5 of the Prevention of Organised Crime Act, 121 of 1998 ('POCA'). In essence, the state alleges that all the accused, acting in concert changed bank account numbers of other people or entities and created fictitious bank accounts into which they diverted large sums of money from

the South African Revenue Services (SARS). The five accounts involve a total amount exceeding R77 million.

[3] It is not in dispute that, given the nature of the charges against the appellant, his bail application falls to be dealt with in terms of s 60 (11) (b) of the Criminal Procedure Act 51 of 1977 (CPA). This section provides:

'S 60 (11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to —

> (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 interests of justice permit his or her release.'

This section therefore saddles the appellant with the onus to prove, on a balance of probabilities, that it is in the interests of justice that he be released on bail, failing which he must be detained in custody.

[4] At the bail hearing before the regional magistrate, the appellant elected to present his evidence in the form of an affidavit. In opposing the bail application, the state also relied on affidavits, amongst others by the investigating officer, Mr Mahlangu and Mr Schoeman, a manager in the Anti-Corruption and Security Special: Project Unit at SARS.

[5] The following important facts emerged from the appellant's affidavit:

5.1 the appellant was born on 23 July 1965;

5.2 the appellant has been staying with his wife at his wife's home at 53 Wandel Street, Woodmead, Sandton for the past five years;

5.3 the appellant owns property at 15 Conway Street, Kelvin, Sandton, which is fully paid for. The estimated value thereof is R3,5m;

5.4 the appellant is married and has four children aged 17, 12, 9 and 6 respectively;

5.5 the appellant has movables to the value of R300,000,00;

5.6 the appellant is the registered owner of an Audi Q7 motor vehicle which is fully paid up;

5.7 the appellant has a B.SC degree;

5.8 the appellant is a shareholder in a number of companies;

5.9 the appellant is the sole member of Oxy Trading 847 CC;

5.10 the appellant has a pending case of fraud at Phokeng Magistrate Court, Rustenburg involving approximately R1,3m;

5.11 although the appellant admitted payment of R8m into Oxy Trading's account, he denied any involvement in the fraudulent activities forming part of the charges;

5.12 the appellant has no previous convictions;

5.13 the appellant undertook, should he be granted bail, to attend court at all times, comply with all bail conditions, not to communicate with or try to influence or intimidate state witnesses, not to conceal or destroy any evidence and not to undermine or prejudice the objectives or proper functioning of the criminal justice system, including the bail system.

[6] The salient features which I have gleaned from the affidavits filed on behalf of the respondent which are directly relevant to the bail proceedings are:

6.1 that the appellant is allegedly involved in a crime syndicate which has targeted SARS and which has committed substantial frauds;

6.2 the modus operandi involved the identification of a duly registered company which was due to receive a refund; the syndicate registered a fictitious duplicate company at the Companies and Intellectual Property Registration Office; the bank details of a legitimate company were altered to those of the fictitious company; the refunds due by SARS were then fraudulently diverted from the legitimate company and channelled into the bank account of the fictitious company; various bank accounts were used to distribute the money;

6.3 there were five such transactions involving the actual loss to SARS of some R50, 949, 743, 80 and a potential loss of R26 798 102, 13 which form the subject matter of the charges against appellant;

6.4 members of the South African Police Service are in possession of exhibits which directly link the appellant, and his wife (accused 3) to a fictitious company SBC International Management Service (Pty) Ltd, which fraudulently received a refund of R31 600 946, 89 from SARS which was destined for SBC International Management Service Inc.;

6.5 during a prior search and seizure at the appellant's home at 15 Conway Street, Kelvin, some electronic equipment allegedly used in the commission of these offences was found and confiscated by SAPS;

6.6 further exhibits which appear to link the appellant to the frauds including SBC blank letterheads, copies of an SBC audit file, bank

statements of the fictitious SBC and enquiries on SBC letterheads about payments of refunds were also found at 53 Wandel Avenue, Woodmead, the house occupied by the appellant and his wife;

6.7 the police are in possession of documents proving that appellant used R498 000, 00 from the fictitious bank account of SBC International Management Service (Pty) Ltd to pay for a BMW X5 at Lyndhurst Auto;

6.8 SBC International Management Service Inc lost R31 600 946,89 which was fraudulently diverted into the fictitious bank account of SBC International Management Service (Pty) Ltd over which the appellant had control.

[7] It was contended on behalf of the appellant that his personal circumstances are such that the interests of justice permit his release on bail, particularly the fact that he is a South African citizen, married with children and that he has valuable assets both movable and immovable inside the country. Furthermore, it was submitted that his consistent attendance of his trial at Phokeng Magistrates' Court which has been pending since April 2008 is clear and irrefutable testimony that, should he be released on bail, he will honour his bail conditions and attend trial. Although Mr Grovè, who appeared for the appellant, conceded that the respondent has a prima facie case against the appellant in the current case as well as the one pending in Phokeng, he urged us to remain mindful of the presumption of innocence operating in favour of the appellant.

[8] On the other hand, it was submitted on behalf of the respondent that this is a very serious matter and that the respondent has a strong prima facie case against

the appellant which in the event of conviction, exposes the appellant to the possibility of a very long term of imprisonment. Mr Simpson, who are appeared for the respondent, submitted that the strength of the state's case required an answer from the appellant. He referred in particular to two transactions involving the purchase of the BMW X5 and the house at Kelvin by the appellant. Concerning the explanation by the appellant that the R8m which he admitted to have received, Mr Simpson submitted that the contract of service on which the appellant relied was vague in its terms and did not avail him. Relying on *S v Mathebula* 2010 (1) SACR 55 (SCA) he argued that even though the present appeal falls to be decided in terms of s 60 (11) (b) it involving a Schedule 5 offence, the evidence incriminating the appellant is so strong that he should have said more to show that the interests of justice permit his release on bail. He submitted further that except for the contract of service between Tiespro and Tiffany Trading, there are no other documents such as receipts or tax invoices which evidence the receipt by the appellant's close corporation of R8m for services rendered under this contract.

[9] This State alleges that this case involves a syndicate or enterprise acting in the furtherance of a common purpose with the primary objective of defrauding SARS by unlawfully diverting huge sums of money to be paid by SARS as refunds to legitimate tax payers to the accounts controlled by the syndicates. Importantly, the appellant admits that some R8m of this tainted money was paid into the account of his close corporation, OXY Trading 847, from Tiespro 102 (Pty) Ltd. However, he alleges that he did not know that the R8m was the proceeds of crime. According to the appellant these were legitimate payments lawfully made to

Tiffany Trading for services rendered by his close corporation. The appellant has however not furnished any documentary proof in the form of either a valid contract, tax invoices or receipts to prove this alleged transaction. In essence there is no acceptable proof that appellant's close corporation (Tiffany) rendered any services to Tiespro 102 (Pty) Ltd which justified the payment of R8m into his account. The failure by the appellant to produce supporting documents casts grave doubt on his explanation. We are aware that documents were seized when the police raided the appellant's offices but that should not have prevented him from making the simple statement that such documents exist.

[10] On the other hand there is evidence that some documents pertaining to SBC International Management Services (Pty) Ltd which, as I have said was a company used in this fraud, were found at the appellant's home which he shares with his wife. Coincidentally there is also evidence that the appellant's wife (accused 3) also received some R4,2m from fraudulent transactions involving SBC International Management Services (Pty) Ltd. Importantly, the State alleges that there is evidence that appellant received through OXY Trading 847 an amount of approximately R6,5m not from Tiespro but through an electronic transfer from SBC and Sun Micro System. This evidence called for an explanation by the appellant. He failed to provide any acceptable explanation.

[11] One other important fact which, in my view, militates strongly against the appellant being granted bail is the fact, which he admits, that he has a pending case of fraud involving approximately R1,3m in the magistrates' court, Phokeng. It is worth noting that the same modus operandi was used in the Phokeng case to divert

money destined for a legitimate account to a fictitious one. A s 204 witness implicates the appellant as the kingpin of this scheme. The fact that the current offences were allegedly committed whilst the fraud case in Phokeng was pending suggests that the appellant either has a propensity to commit fraud or is disrespectful of law and order. In determining whether an applicant for bail, may, if released on bail commit further offences, a court, not being blessed with some prophetic foresight, can legitimately rely on the past alleged conduct of such an applicant. The appellant's alleged conduct points to a possibility which cannot be said to be remote or fanciful that he is likely to continue to commit further crimes should he be released on bail. To release the appellant on bail under these circumstances would, to my mind, not be in the interests of justice as it is likely to seriously undermine the criminal justice system including the bail system itself. I have no doubt that it will seriously undermine and erode the confidence of the right thinking members of society in our criminal justice system. See s 60 (4) (d) of the CPA.

[12] Both the regional magistrate and the high court found that the appellant had failed to prove, on a preponderance of probabilities, as is required by s 60 (11) (b), that the interests of justice permit his release on bail. I cannot find any fault with this conclusion. It is trite that the powers of an appeal court to interfere with the decision by another court to refuse bail are circumscribed by s 65 (4) of the CPA. It is not as if the court of appeal has carte blanche. A court of appeal can only set aside such a decision if it is satisfied that it is wrong. *S v Barber* 1979 (4) SA 218 (D) and *S v Faye* 2009 (2) SACR 210 (TK).

[13] When all the evidence is considered and weighed against the appellant's personal circumstances, I am satisfied that the appellant failed to prove that the interests of justice permit his release on bail, *S v Botha en `n ander* 2002 (1) SACR 222 (SCA) para 20. In fact the contrary is true. Accordingly, I am of the view that the court a quo was correct in upholding the magistrate's decision to refuse to grant the appellant bail.

[14] The appeal is dismissed.

L O Bosielo
Judge of Appeal

APPEARANCES:

For Appellant:	N Potgieter N Grovè
	Instructed by: Nardus Grovè Attorneys: Johannesburg Symington & De Kok: Bloemfontein
For Respondent:	A Simpson
	Instructed by: Director Public Prosecutions: Pretoria Director Public Prosecutions: Bloemfontein