

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: CA&R 5/2018
Date heard: 3 May 2018
Date delivered: 10 May 2018

In the matter between

BRENDA WARDLE

Appellant

And

THE STATE

Respondent

JUDGMENT

GOOSEN, J.

[1] The appellant faces charges of fraud, alternatively theft, further alternatively contravention of s 83 of the Attorneys Act, 73 of 1979. The amount involved exceeds R500 000. She is presently incarcerated pending trial. The appellant applied for bail and on 10 July 2017 the application for bail was refused. No appeal was directed against the refusal of bail. In November 2017 the appellant brought a further bail application on new facts. On 29 November 2017 the application for bail on new facts was refused. The appellant now appeals against this finding.

- [2] The appellant was unrepresented. A perusal of the record indicates that the appellant has steadfastly insisted throughout the proceedings in the court below that she would represent herself. It appears from the record that the appellant holds both a bachelor and master of laws degree and that she is presently engaged in doctoral studies. She has styled herself as a legal analyst. Thus, although she has represented herself as a lay person, she is anything but a lay person without knowledge of law and legal procedure.
- [3] The prosecution of this appeal has suffered from some delays. It appears that these arose during the preparation of the record and that on a previous occasion when the matter was enrolled for hearing the record was incomplete. That has now been corrected although it should be stated that the voluminous record, comprising six volumes, is poorly organised and presented.
- [4] It is common cause that the provisions of Schedule 5 of the Criminal Procedure Act, 51 of 1977, find application. Accordingly the appellant bore the *onus* to establish that it is in the interests of justice that she be released on bail.
- [5] It is appropriate to set out briefly the background to the present appeal. The facts, set out below, are essentially common cause. They are in any event set out as findings made by the magistrate in the judgment in the first bail application. Those findings are not subject to appeal.
- [6] The appellant first appeared in the Regional Court on the charges preferred against her on 12 May 2014. She was then released on bail which was set in an amount of R3000. The trial was scheduled to commence on 20 April 2015. On that date the appellant did not appear and a warrant of arrest was issued which was stayed until 28 April 2015. On

28 April 2015 the appellant appeared and presented a medical certificate explaining her previous absence. The court accepted the certificate and the warrant was cancelled. On 2 June 2015 the appellant again appeared in court. On this occasion she was represented. A postponement was sought by the appellant to 19 June 2015.

- [7] On 19 June 2015 the appellant again did not appear in court. A warrant was issued which was stayed until 3 July 2015. The appellant did not appear on 3 July and the court ordered that the warrant be executed. On 17 July 2015 the appellant's bail was estreated.
- [8] On 28 July 2015 the appellant appeared in court of her own accord. She provided a medical certificate explaining her previous absence from court. The magistrate cancelled the warrant and released the appellant on warning. The case was postponed to 28 August 2015 to enable a legal representative to be appointed. It was further postponed on that date at the request of the appellant. On 11 September 2015 Adv Kriel appeared on behalf of the appellant. The case was postponed for the trial to commence on 29 March 2016.
- [9] On 29 March 2016 the appellant failed to appear. Adv Kriel also did not appear. It appears that the appellant had advised the investigating officer that she was ill due to high blood pressure. The magistrate issued a warrant for the arrest of the appellant.
- [10] Some fifteen months later the appellant was arrested in East London. Her appearance in court in June 2017 when she was remanded in custody gave rise to the bail applications referred to hereinabove.

- [11] As indicated above the appellant launched a bail application in June 2017. She filed a set of affidavits in support of her application. The state opposed bail and presented the evidence of Warrant Officer Horak, the investigating officer in the case. I shall hereunder deal with the basis upon which the bail application was brought and the reasoning of the magistrate in refusing bail. Following the magistrate's refusal of bail the appellant indicated that she would consider an appeal or a further application for bail based upon new facts. Arrangements were then made to prepare the transcript of the bail proceedings and to arrange a provisional date for trial. It is not necessary to recount the lengthy exchanges that appear from the record. It suffices to state that no appeal was launched against the magistrate's refusal of bail. Instead a further bail application was commenced.
- [12] This further bail application proceeded on what the appellant contended are 'new facts'. It was brought on affidavits which the appellant read into the record. In opposing the application the state led the evidence of Horak, the investigating officer.
- [13] The appellant submitted lengthy heads of argument outlining the basis upon which the appeal was prosecuted. The heads of argument consisted of, inter alia, a section setting out the 'key issues to be decided'; the 'background facts'; a discussion of 'bail proceedings and the incidence of the onus'; and an outline of 'facts on record which point to the indisputable conclusion that the interests of justice (broadly speaking) were not served.
- [14] I do not intend to address each and every submission made by the appellant in her heads of argument. It was conceded by her, during argument that in relation to the bail application brought on new facts the *onus* rested upon her to establish that she should, in the interests of justice, be released on bail. The broad and wide ranging discursive

treatment of the incidence of the *onus* and the nature of bail proceedings accordingly provided little assistance in the determination of the matter. It was also accepted by the appellant that her formulation of the nature of the proceedings on appeal as being both an appeal and a review was incorrect. What was to be considered in the appeal was whether the magistrate, in considering the new application, had wrongly exercised the discretion vested in him.

[15] In submitting that the magistrate was wrong not to release her on bail the appellant argued that the magistrate had failed to apply his mind to the matter. In support of this it was argued that the new facts were either not considered or inadequately considered by the magistrate. These new facts related to the conditions of her detention and the effect thereof on her ability to prepare for her trial; the nature and extent of the evidence indicating that she has a defence to the charges; and the extensive related litigation initiated by the appellant to vindicate her rights. The litigation referred to concerns, *inter alia*, an application launched by the appellant in the South Gauteng High Court to set aside certain warrants of arrest. There is also litigation to obtain prohibitory and mandatory interdicts against the Department of Correctional Services. Reference was also made in argument to an application for direct access to the Constitutional Court, although it does not appear that this featured in the bail application.

[16] Before turning to consideration of the judgment of the magistrate, it is necessary to deal briefly with an issue raised as an 'issue to be decided' in the appellants heads of argument. Appellant contended that the initial bail application was conducted according to an incorrect procedure. The argument was premised on s 72 of the Criminal Procedure Act. As I understood the argument it was that the section, which provides for a summary enquiry to be conducted into the reasons for the non-appearance of an

accused person, was not complied with. Instead, so it was contended, a bail application was conducted.

[17] The point is without merit. Section 72(4) indeed requires an enquiry to be conducted in relation to the failure of an accused person to appear. The purpose of such enquiry is to determine whether the punitive provisions which apply to such non-appearance are to be imposed. It has nothing to do with bail. The appellant's appearance before the magistrate arose in consequence of the execution of a warrant of arrest. She was accordingly to be held and remanded in custody unless she was released on bail. Section 60 provides that an accused person remanded in custody be afforded a reasonable opportunity to apply for bail. This is what occurred. The appellant was indeed afforded an opportunity to make application for bail in accordance with the provisions of s 60.

[18] Section 65(4) of the Criminal Procedure Act provides that a judge hearing a bail appeal 'shall not set aside the decision against which the appeal is brought', unless he or she 'is satisfied that the decision was wrong'.

[19] In S v Barber 1979 (4) SA 218 (D) Hefer J said (at 220 E – H.):

It is well-known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own review for that of the magistrate because that would be an unfair interference with the magistrate's exercise of its discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail but exercised that discretion wrongly.

[20] In order to interfere on appeal it is accordingly necessary to find that the magistrate misdirected himself or herself in some material way in relation to either fact or law (see S v Ali 2011 (1) SACR 34 (E) at para 14; cf. also S v M 2007 (2) SACR 133 (E)).

[21] It is appropriate to begin with the manner in which the court *a quo* approached the adjudication of the appellant's application. In this regard court's judgment reflects a consideration of the evidence as a whole, including that which served before it at the first hearing and which forms the basis of the first judgment. Although the magistrate stated that the 'new' evidence did not encompass facts which had not been considered before, he nevertheless addressed the 'new' evidence which was presented. For this reason he, quite correctly, re-appraised the evidence as a whole in order to determine whether the appellant had established that the interests of justice required her release on bail.

[22] The appellant's reliance on the pending High Court applications to set aside the warrants issued in relation to criminal matters pending against her in Gauteng and the litigation against the Department of Correctional Services does not establish a new set of facts which bear upon the exercise of the magistrate's discretion. The fact that she is pursuing an application to challenge the lawfulness of certain warrants and the fact that she is pursuing litigation to protect or enforce her rights as against Correctional Services can have no relevance to the question as to whether she is likely to evade trial. In S v Peterson 2008 (2) SACR 355 (C) at par [57] it was held that:

When, as in the present case, the accused relies on new facts which have come to the fore since the first, or previous, bail application, the court must be satisfied, firstly, that such facts are indeed new and, secondly, that they are relevant for purposes of the new bail application. They must not constitute simply a reshuffling of old evidence or an embroidering upon it. See S v De Villiers 1996 (2) SACR 122 (T) at 126e-f. The purpose of adducing new facts is not to address problems encountered in the previous application or to fill gaps in the previously presented evidence.
(Emphasis added)

- [23] A reading of both judgments in the bail proceedings indicates that the magistrate was alive to the appellant's claim that the conditions of detention were adverse to her health and that they affected her proper preparation for trial. The magistrate concluded that she is receiving appropriate medical treatment for her hypertension and that she has access to proper medical care. The strictures of incarceration did not prevent her from conducting litigation nor preclude her access to legal resources which had been made available to her.¹ In these findings the magistrate was undoubtedly correct.
- [24] The central basis upon which the magistrate refused the application for bail on 'new' facts was that the 'new' evidence presented did not alter the initial finding, namely that that the appellant had not succeeded in showing that the interests of justice permit her release.
- [25] In coming to this conclusion the magistrate considered the evidence presented by Horak relating to the strength of the state's case against the appellant and his evidence that further cases had been commenced since her previous bail application. Against this he weighed the appellant's denial of any wrongdoing. The appellant criticised the magistrate's assertion that her evidence was presented in affidavit form and therefore not subject to testing. It was submitted that the magistrate had not had regard thereto or attached sufficient weight to the evidence.
- [26] It is indeed so that evidence presented by way of affidavit is not subject to testing. The fact that is not is to be weighed when considering the probative value of the evidence

¹ It is to be noted that the appellant had, in relation to this aspect, launched separate legal proceedings against the Department of Correctional Services in this Court to be permitted access to a laptop computer and various other resources. The application was dealt with Chetty J who delivered judgment on the day that the bail appeal was heard. Although the application was dismissed, the judgment records that access to computer resources and internet access have been provided.

in the face of contradicting evidence which is presented *viva voce*. The respondent presented such evidence in order to justify its opposition to bail; to indicate the nature and strength of the case against the appellant; and to establish further grounds for refusing bail. This latter evidence included the fact that further cases against the appellant had come to light since the first bail application. The appellant did not present any evidence to contradict or rebut the evidence of Horak which was tendered *viva voce*.

[27] In dealing with the challenge to the strength of the state case the magistrate noted, quite correctly, that it is for the person on whom the *onus* rests to establish on balance of probabilities that he / she will be acquitted (cf. S v Mathebula 2010 (1) SACR 55 (SCA)). He found that this was not established.

[28] The magistrate's finding that there is a likelihood that the appellant would seek to evade trial should she be admitted to bail cannot, in my view, be faulted. The finding was based on a careful appraisal of the history of the matter; that she had on numerous occasions failed to appear at trial; that she had previously failed to comply with her bail conditions and had forfeited bail moneys to the state in respect of matters before the courts in Port Elizabeth and in Gauteng. It was on the strength of this finding that the magistrate concluded that the appellant had failed to discharge the *onus* which rested upon her.

[29] In order for the appellant to succeed it is necessary that this court be satisfied that the magistrate was wrong in his conclusion. I am unable to discern any misdirection in regard to the facts as they appear from the record. Nor am I able to discern any error in relation to the legal principles applicable to matters such as this. I am therefore not satisfied that the magistrate was wrong in refusing to admit the appellant to bail. In my view the magistrate's conclusion is based upon a consideration of all of the evidence

The appeal is dismissed.

Appearances: The Appellant in person.

For the Respondent
Adv. T. Van Zyl
C/o Director of Public Prosecutions