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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

14 February 2024

DATE

SIGNATURE

CASE NUMBER: A157/2023

In the matter between:

MAKHUBELA AMUKELANI

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

DOSIO J:

Introduction

[1] This is an appeal against the refusal by the Tembisa Regional Court to admit the appellant to bail, pending his trial. Bail was refused on 1 November 2023.

[2] The appellant is charged with the crime of rape, kidnapping and a contravention of a protection order.

Evaluation

[3] It is common cause that the charges of rape and kidnapping fall in the category of offences listed in schedule 5 of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977').

[4] Section 60(4) must be construed consistently with s35(1)(f) of the Constitution, which guarantees the right of an arrested person 'to be released from detention if the interests of justice permit, subject to reasonable conditions'.

[5] Section 60 (11) (b) of Act 51 of 1977 states the following:

'(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.'

[6] In the matter of *S v Smith and Another*,¹ the Court held that:

'The Court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby'²

[7] In the matter of *S v Dlamini*³ the Constitutional Court held that:

¹ *S v Smith and Another* 1969 (4) SA 175 (N).

² *Ibid* page 177 para e-f.

³ *S v Dlamini* 1999 (2) SACR 51 (CC).

The interests of justice in regard to the granting or refusal of bail therefore focus primarily on securing the attendance of the accused at the trial and on preventing the accused from interfering with the proper investigation and prosecution of the matter.'

[8] In terms of section 65(4) of Act 51 of 1977, the court hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong.

[9] This court must consider all relevant factors and determine whether individually or cumulatively they warrant a finding that the interests of justice warrant the appellant's release.

[10] The appellant is 34 years old and a South African citizen. He resides at 2[...] W[...] M[...], Z[...] [...], T[...]. The house belongs to his mother. He has resided there since 2011. An alternative address was given, namely, M[...] Z[...] [...], which belongs to his cousin. The appellant was self-employed as a plumber, earning R10 000.00 per month. He was born in the province of Limpopo and has been living in Gauteng since 2011. He has two minor children aged four and six years respectively, whom he maintains.

[11] The following factors are of concern to this Court, namely:

(a) the appellant has a previous conviction for assault committed in 2007 for which he was sentenced to R300,

(b) the complainant testified that on 9 September 2023 the appellant grabbed her in the street, twisted her hand and started to strangle her. He then took her to his house where he raped her,

(c) the complainant was afraid of the appellant as she obtained a protection order against him on 7 September 2023, (case number 3288/2023), at the Tembisa Magistrate Court. The contents of the protection order states as follows:

I L[...] B[...] of the above-mentioned address would hereby like to apply for protection order against Amukeleni Makhubela of 2[...] W[...] M[...] Z[...] 6 because he abuses me physically and also use vulgar words. He also comes

to my place of residence and threatens me and also threatens me that he will burn my belongings.' [my emphasis]

(d) it is clear from the last page of the protection order that when the protection order was brought to the appellant to sign on 8 September 2023, he refused to sign it, as he stated 'he didn't do anything wrong'.

[12] Whilst the strength of the prosecution's case is an important consideration, it is not the only factor which a court should consider in determining whether to grant or refuse bail. It is trite that further considerations as stipulated in ss60(4)-(7) of Act 51 of 1977 must be considered cumulatively.

[13] During the course of the bail proceedings the appellant did not testify. An affidavit was filed in support of his bail application.

[14] The respondent, in opposing the granting of bail, filed the affidavit of the investigating officer, sergeant Khutsi Rapa and led the *viva voce* evidence of the complainant, Ms. L[...] B[...] B[...].

[15] In the matter of *S v Bruintjies*,⁴ the Supreme Court of Appeal stated that: ' (f) The appellant failed to testify on his own behalf and no attempt was made by his counsel to have him testify at the bail application. There was thus no means by which the Court *a quo* could assess the *bona fides* or reliability of the appellant save by the say-so of his counsel.'⁵

[16] Although this Court cannot draw a negative inference from the appellant proceeding by way of affidavit, the fact remains that he could not be cross-examined on the fact that he refused to sign a protection order and shortly thereafter assaulted and raped the complainant. This is of serious concern to this Court.

[17] In terms of s60(5)(a) of Act 51 of 1977 it is evident from the *viva voce* evidence of the complainant that the appellant has demonstrated a degree of violence against the complainant. In terms of s60(5)(c) and (d) of Act 51 of 1977, it is

⁴ *S v Bruintjies* 2003 (2) SACR 575 (SCA).

⁵ *Ibid* page 577.

clear to this Court that the appellant harbours resentment towards the complainant. Due to his current actions and previous conviction he has a predisposition to violence.

[18] In terms of s60(6)(a) and (b) of Act 51 of 1977, this Court finds that apart from the moveable assets valued at R30 000.00, the appellant has no fixed property as he lives at his mother's house. Apart from him being self-employed, there is no guarantee that the appellant will not evade his trial.

[19] In terms of s60(6)(f) of Act 51 of 1977, this Court finds that should the appellant be found guilty of the crime of rape, he may be sentenced to a period not less than ten years imprisonment, which may be a further incentive not to stand trial.

[20] This Court does not believe that releasing the appellant on bail, with conditions, will deter him from having contact with the complainant again. It is clear that when he was made aware of the protection order sought against him, he still assaulted and raped the complainant. As a result, there is a strong likelihood that if bail conditions were set, that they would be violated, thereby undermining the provisions of s60(6)(i) of Act 51 of 1977.

[21] It is clear that due to the familiarity of the complainant's identity, that the appellant would attempt to contact the complainant, which in terms of s60(7)(a) of Act 51 of 1977, would not be in the interests of justice.

[22] It is somewhat puzzling that the investigating officer did not oppose bail. Irrespective of this, s60(10) of Act 51 of 1977 stipulates that:

'Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice.'

[23] It is true that the complainant stated she had no objection to bail being granted as she has moved on with her life, however, it is the bail court who must make a decision which is in the best interest of a complainant in a domestic violence and rape case.

[24] After a perusal of the record of the court *a quo*, this Court cannot find any demonstrable misdirection of the court *a quo* in coming to its conclusion on refusing bail.

[25] There are no grounds to satisfy this Court that the decision of the court *a quo* was wrong. The requirements of sections 65(4) of the Act were thus not met.

Order

[26] In the result, the appellant's application for bail is dismissed.

**D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG**

Date Heard:	9 and 13 February 2024
Judgment handed down:	14 February 2024

Appearances:

On behalf of the Appellant:	Adv Shilowa
Instructed by:	MOLOTO STOFIL INC
On behalf of The State:	Adv C. Mack
Instructed by:	Office of the DPP