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

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

Appeal no. A 42/2023

In the appeal of:

TEBOGO VICTOR LITSOANE

Appellant

and

THE STATE

Respondent

CORAM: VAN RHYN J

HEARD ON: 14 APRIL 2023

DELIVERED: 26 APRIL 2023

[1] This is an appeal by the appellant, Tebogo Victor Litsoane, against the refusal by Magistrate Ms Alexander, presiding in the District Magistrate's Court held at Botshabelo on 12 May 2022, to admit the appellant to bail.

[2] The appellant is charged with the following offences, namely:

(2.1) robbery with aggravating circumstances;

(2.2) defeating the ends of justice; and

(2.3) possession of ammunition.

[3] Bail and bail appeals are by their very nature urgent. In *S v Banger*,¹ the Supreme Court of Appeal held that an accused person should not be deprived of his or her constitutional rights to freedom and to freedom of movement for longer than is reasonably necessary.

[4] It is common cause that the bail application of the appellant and his co-accused in the district court was heard in accordance with the provisions of Schedule 6 of the Criminal Procedure Act 51 of 1977 (the “CPA”). The Bail application was therefore heard with the understanding that the onus was on the appellant to show that exceptional circumstances exist which, in the interests of justice, permit his release on bail.² In discharging this onus, the appellant adduced evidence under oath. The following is a summary of his testimony on 12 May 2022:

4.1 appellant was 42 years old at the time of his bail application;

4.2 he has been a resident of 2[...], L section Botshabelo for the past 20 years;

4.3 he is not residing with his spouse. He has a son aged 14 years who is residing with his mother. Appellant is not sure whether the minor son was in grade 6 or 7 at the time of the bail application;

4.4 the appellant was residing with his mother, 68 years of age, who suffers from a mental illness;

4.5 appellant was employed by Senforce Armed Response, a security company for a period of 5 years prior to his arrest. He risks losing his employment if he is remanded in custody pending the trial;

¹ 2016 (1) SACR 115 (SCA) para 14.

² Section 60(11)(a) of the Criminal Procedure Act.

- 4.6 appellant earned a salary of R7 500.00 per month and after deductions, he received an amount of R3 800.00. He is maintaining his mother as well as his son;
- 4.7 he does not have a passport.
- 4.8 appellant has no previous convictions and no other pending criminal cases;

[5] The application for bail was opposed by the State, *inter alia*, on the grounds that 9 live rounds of ammunition were found at the appellant's residence subsequent to a search conducted by the members of the South African Police Service at the time of his arrest. During cross examination it was discovered that the appellant's mother had not been diagnosed by a medical practitioner regarding the so called mental problems but by the appellant himself. His mother suffers from high blood pressure and he employed the next door neighbour to look after his mother when he is at work, which includes working shifts at night.

[6] Respondent contends that the evidence presented by the Investigating Officer, Sergeant I L Mara, is relevant to the adjudication of this appeal. His testimony can be summarised as follows: The appellant and three other accused are implicated in a robbery that occurred at a house at Bothsabelo on 19 April 2022. The appellant is linked to the crime in that a vehicle belonging to Senforce Armed Response was used during the robbery. Appellant is furthermore linked by way of cellular phone calls between himself and accused no 2. Appellant had reported that he had been hijacked shortly prior to the crime being committed, but subsequently made an attempt to withdraw his statement in this regard. The court *a quo* found that the State had a strong case against all the accused.

[7] The appellant noted an appeal against the refusal of bail and the grounds for such appeal are recorded in detail in the notice of appeal. Mr Jeje, who appeared on behalf of the appellant, argued that the court *a quo* unfairly disregarded the appellant's secure employment with a security company and his obligations towards his minor son and his mother and did not have due

regard to the fact that the appellant's continued detention will have an adverse effect on his mother, his son and his employment.

[8] On behalf of the appellant it is submitted that the court *a quo* misdirected itself in failing to find that the appellant's personal circumstances and the fact that the case against the accused is based upon circumstantial evidence ought to have been regarded as a combination of ordinary circumstances referred to in section 60(4)(a) to (e) of the CPA and as such qualify as exceptional circumstances warranting his release on bail.

[9] An appeal against the refusal of bail is governed by section 65(4) of the CPA which provides that:

"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 shall have given".

[10] The approach of a court hearing a bail appeal is trite. In **S v Barber**³ it was 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 it 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 ... "

[11] It is unnecessary, for purposes of this judgment, to set out all the considerations listed by the Legislature that should be taken into account when assessing bail applications. Suffice to say that, while the magistrate was

³ 1979 (4) SA 218 (D) at 220 E-H.

required to consider them all, she retained a discretion to decide the weight to be given each.

- [12] Mr Harrington, appearing on behalf of the respondent referred to **S v Porthen and Others**⁴ where Binns-Ward AJ held as follows:

“On the issue on the existence of ‘extraordinary circumstances’ within the meaning of s 60(11)(a) of the CPA, there is a” formal *onus*’ of proof on the applicant for bail. The ordinary equitable test of the interests of justice determined according to the exemplary list of considerations set out in s 60(4)–(9) of the Act has to be applied differently. See *S v Dlamini* (*supra* in para [61]. In my view, a court making the determination whether or not that *onus* of proof has been discharged exercises a discretionary power in the wide sense of discretion. The appellate Court is, in terms of s 65(4) of the CPA, enjoined to interfere with the lower court’s decision of a bail application if it is satisfied that the lower court’s *decision* was wrong”⁵

- [13] During his testimony, the appellant denied all the charges against him and explained that he intended to hand in the 9 live rounds of ammunition which was found when the members of South African Police Services searched his residence. According to him, he discovered the ammunition when he was doing patrol duties shortly prior to his arrest. He intended to write a report and hand in the ammunition with his report but he was arrested before he was able to submit the report. The appellant testified that he was issued with a fire arm and he was the driver of a vehicle belonging to this employer, being Senforce Armed Response when he was on duty. He was not in possession of the fire arm when he was arrested at his home and was obliged to hand in the fire arm issued to him when he was not on duty.

- [14] I agree with the finding by the court *a quo*, that the State’s case against the 4 accused, including the appellant, appears to be *prima facie*, reasonable strong. In **S v Botha and Another**⁶ the court held that proof by the appellant that he will probably be acquitted can serve as ‘exceptional circumstances’. It can hardly be argued that, given the gravity of the State’s case against the appellant as presented by the Investigating Officer, this factor, even though the case against the appellant is based upon circumstantial evidence, can

⁴ 2004 (2) SACR 242 (CPD).

⁵ Porthen (*supra*) at [14].

⁶ 2002(1) SACR 222 (HHA).

serve as “exceptional circumstances” within the meaning of section 60 (11) of the CPA. To my mind, a major consideration in all cases relating to bail applications, is the likelihood of an accused not facing the trial or preventing the course of justice. Mr Harrington argued that the fact that the appellant was able to utilise the monies received from his provident fund to provide financial instruction to his attorney, is a clear indication that he has lost his employment since his arrest.

- [15] The Investigating Officer, set out all the evidence relevant and available to the State during the bail application. The evidence recounts how the robbery was committed as well as the evidence which links the appellant with accused 4, the role of the appellant in the planning of the crime which amounts to a visit by the appellant at the crime scene prior to the robbery. A motor vehicle identified as the property of Senforce Armed Response was used to commit the robbery. The complainant in the case also previously worked with the appellant and the complainant’s testimony will most probably also link the appellant with the robbery.
- [16] Financial harm is an inevitable consequence of the arrest and subsequent incarceration of any employed person. No information has been placed before this court or the court *a quo* to make a finding that the appellant’s mother and his minor son will not be cared for or has been left destitute since the appellant’s arrest.
- [17] The court *a quo* was of the view that the appellant failed to show that exceptional circumstances exist which in the interests of justice permit his release on bail. Bail was accordingly refused.
- [18] The likelihood that, in the event of the appellant being released on bail, he would endanger the safety of a possible witness or any particular person or that he poses a flight risk, is more than a just a perception. I therefore cannot find any misdirection on the part of the Magistrate in finding that there were no exceptional circumstances, which in the interests of justice permitted the appellant’s release on bail.
- [19] In the result the following order is made:

The appeal is dismissed.

VAN RHYN, J

On behalf of the Appellant:

Instructed by:

MR A J JEJE

MADUBA ATTORNEYS

BLOEMFONTEIN

On behalf of the Respondent:

Instructed by:

Adv. W J HARRINGTON

DIRECTOR PUBLIC PROSECUTIONS

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