

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 2498/2024P

In the matter between:

SIPHAMANDLA MTSHALI

FIRST APPELLANT

MDUDUZI DLAMINI

SECOND APPELLANT

and

THE STATE

RESPONDENT

ORDER

The following order is granted:

a) The appeal is dismissed.

JUDGMENT

Veerasamy AJ

[1] This is an appeal against the refusal of bail by the Uthukela Magistrates' Court. Both appellants were charged with two counts of the theft of stock or produce read with sections 1, 11, 12, 14 and 15 of the Stock Theft Act 57 of 1959.

[2] On 30 November 2023, at approximately 03h00, and along the N3 freeway, the South African Police Services ('SAPS') visible policing officers stopped a Quantum with an NT registration number. The appellants, together with another

individual, were the occupants of the vehicle. Inside the vehicle, the SAPS found four cattle, one of which had died.¹

[3] In the bail application, the first appellant submitted an affidavit in support of his bail application and from the record it appears that affidavit was placed before the court and his personal circumstance were read into the record. No oral evidence was thus led by the appellants. The State led the oral evidence of Constable Mitchell Anthony, who is employed by the SAPS Estcourt Stock Theft Unit, and Mr Noah Francis Dlangalala, the chairperson of the Amangwe Forum and a chairperson of the CPF for the area wherein the arrests were made.

[4] In summary, the magistrate found as follows:

- (a) The appellants are confronted with the serious offence of stock theft, which carries a possible term of imprisonment. The first appellant, in particular, is confronted with the possibility of a long-term imprisonment since he had previously been convicted of similar offences.
- (b) In effecting the arrest of the appellants, the SAPS had pursued them with blue lights and sirens for approximately 15kms before the appellants eventually stopped.
- (c) It was clear that the appellants were trying to evade the police during this chase.
- (d) This pointed to them being a flight risk.
- (e) The evidence of Mr Dlangalala was evident of the public interest in the case.
- (f) In the event that the appellants were given bail, they would be a flight risk and there was indeed a likelihood that they would evade their trial.

¹ The record at pages 74–75.

(g) It was in the interests of justice that they were not to be released on bail.

[5] The statutory framework for determining an appeal relating to bail is set out in section 65(4) of the Criminal Procedure Act 51 of 1977 ('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 should have given.'

[6] In order to interfere on appeal, it is necessary to find that the magistrate misdirected him or herself in some material way in relation to either the facts or law.²

[7] If a misdirection is established, then the appeal court may consider whether bail ought, in the particular circumstances of the case, to have been refused or granted. However, absent a finding that the magistrate misdirected him or herself, the appeal must fail.³

[8] In *S v Baber*,⁴ the court held that:

'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 that 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.'⁵

² *S v Ali* 2011 (1) SACR 34 (ECP) para 14; *S v Mpulampula* 2007 (2) SACR 133 (E).

³ *S v Porthen and others* 2004 (2) SACR 242 (C) para 11.

⁴ *S v Barber* 1979 (4) SA 218 (D).

⁵ *Ibid* at 220E–G.

[9] The grant or refusal of bail is a discretionary decision, and judicial officers have the ultimate decision as to whether or not in the particular circumstances bail should be granted.⁶

[10] The offence with which the first appellant is charged falls within the ambit of Schedule 5 of the CPA, since he has been charged with an offence which falls under Schedule 1 of the CPA and he has previous convictions. Section 60(11)(b) provides that where an accused is charged with an offence

‘referred to 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...’

[11] The onus was on the first appellant to convince the court, on a balance of probabilities, that the interests of justice permit his release on bail.⁷

[12] Section 60(4) of the CPA provides that the interests of justice do not permit the release from detention of an accused where one or more of the grounds enumerated therein are established. One of the grounds is whether there is a likelihood that the accused, if he were to be released on bail, would attempt to evade his or her trial (section 60(4)(b)).

[13] Section 60(6) of the CPA provides that, in considering whether the ground in section 60(4)(b) has been established, a court may, where applicable, take into account following factors:

‘(a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;

⁶ *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (2) SACR 51 (CC) paras 74, 76 and 78.

⁷ *S v Branco* 2002 (1) SACR 531 (W) at 532f-g.

- (b) the assets held by the accused and where such assets are situated;
- (c) the means, and travel documents held by the accused, which may enable him or her to leave the country;
- (d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
- (e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;
- (f) the nature and the gravity of the charge on which the accused is to be tried;
- (g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;
- (h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
- (i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
- (j) any other factor which in the opinion of the court should be taken into account.'

[14] In these proceedings, the court is confined to the first appellant's affidavit where he relied upon the following personal circumstances. He is 35 years of age, engaged and has four minor children aged 15, 14, 11 and 5. He is a self-employed taxi owner and resides in the KwaManaka area in Mooi River where he has resided since his birth. He resides at his house with his sister and four brothers. He owns two Toyota Quantum vehicles valued at approximately R500 000 and a property at which he stores his motor vehicles, which include two bakkies. He does not have a passport and he submitted that he has no reason to consider fleeing before the trial

is complete. He is unaware of any witnesses in the matter and does not intend to interfere with any witnesses. He contended that he is not a flight risk.

[15] If incarcerated, he submitted that his business would fail and this would have a ripple effect on the livelihoods of those he employs, who are equally dependant on him. It would also prejudice his children as he is the sole income provider for them.

[16] The offence with which the second appellant is charged falls within the ambit of Schedule 1 of the CPA, since he has been charged with an offence which falls under Schedule 1 of the CPA.

[17] The bail application for first appellant would be governed by section 60(1) of the CPA which reads as follows:

‘(1) (a) An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.’

[18] Section 60(4) of the CPA provides that the interests of justice do not permit the release from detention of an accused where one or more of the grounds enumerated therein are established. I have already set out the grounds of section 60(4) of the CPA previously in this judgment.

[19] The second appellant submitted that he was 24 years of age, single and has no children. He worked at Top Carpets as a floor fitter, earning approximately R5 000 a month, with no previous convictions or pending matters. That was the totality of the evidence he placed before the magistrate. The onus was on the State to convince the court, on a balance of probabilities, that the interests of justice did not permit his release on bail.

[20] Neither of the appellants tendered any proof of the personal circumstance upon which they relied. Thus there was no evidence before the court regarding the

first appellant's business ownership or family ties and there was no proof of the second appellant's employment.

[21] The evidence of State (through Constable Anthony) was that the police had to chase after the appellants for approximately 15kms with their sirens blazing and lights flashing before the appellants eventually brought the vehicle to a halt.

[22] The appellants' singular criticism of this evidence was that it had been elicited through the magistrate's further questions rather than during evidence in chief or cross examination.

[23] The conclusion, as reached by the magistrate, was that the appellants were attempting to evade their arrest.

[24] The seriousness of the offence and the probable sentences militate against the releasing of the appellants on bail.⁸

[25] In *S v Sibeko*⁹ the court was unconvinced that the appellants would not evade trial, when evaluating a strong case against them and taking into account the serious nature of the offence which they were confronted with, their previous convictions and the likelihood that they will be convicted and face jail sentences.

[26] The appellants are charged with two counts of stock theft involving approximately 12 head of cattle (four of which were found in the possession of the appellants).

[27] The first appellant clearly failed to demonstrate that it was in the interests of justice to permit his release.

[28] The State which attracted the onus in respect of the second appellant, had demonstrated that there was a risk that the second appellant would likely attempt to evade trial if released from detention.

⁸ *Ntsiki and Others v S* [2023] ZAGPPHC 1681; CC2/2020 (10 March 2023)

⁹ *Sibeko and others v S* [2016] ZAGPPHC 852 paras 19-20.

[29] Under section 60(4) of the CPA, where there is a likelihood that either of the appellants, if they were released on bail, would attempt to evade their trial, then it would not be in the interests of justice to permit their release from detention. The magistrate found accordingly after considering the factors as set out in section 60(4)(b).

[30] I am thus of the view that the magistrate committed no material misdirection or error.

Conclusion

[31] The appeal accordingly cannot succeed.

[32] The magistrate considered the factors which are ordinarily taken into account and those which each appellant advanced in their application for bail. She came to the conclusion on the totality of the evidence that it was not in the interests of justice to permit their release on bail. I am accordingly unable to find that the magistrate was wrong in doing so. This is in accordance with the test to be applied in bail appeals.¹⁰

Order

[33] I therefore make the following order:

a) The appeal is dismissed.

I VEERASAMY AJ

CASE INFORMATION

Counsel for the Appellant : Mr Mkhize

Attorneys for the Applicant : B and M Attorneys Incorporated
1st Floor Pharos House

¹⁰ *S v Barber* 1979 (4) SA 218 (D), *S v Porten and others* 2004 (2) SACR 242 (C).

70 Buckingham Terrace
Westville
Ref: B&M/Appeal121/09
c/o Nzimande LV Attorneys
12 Chief Albert Luthuli Street
Parkland Centre
Pietermaritzburg
3201

Counsel for the Respondent : Adv P T Ntsele

Attorneys for the Respondent : DPP Pietermaritzburg
286 Pietermaritz Street
Email: MGula@npa.gov.za
Tel: 033 845 4400

Date of Hearing : 27 March 2024

Date of Judgment : 28 March 2024