



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

Case number: 20/665/2021
Appeal Number: A3/2022

In the matter of:

MESHACK KHAHLISO MAZIBUKO

APPLICANT

versus

THE STATE

RESPONDENT

CORAM: NAIDOO J

HEARD ON: 21 JANUARY 2022

DELIVERED ON: 28 JANUARY 2022

JUDGMENT – BAIL APPEAL

[1] The appellant came before me with an urgent application in which he sought to appeal the refusal of the Bloemfontein Magistrates Court to admit him to bail. Adv PG Chaka represented the appellant in this court and Adv BG Claassens represented the State. The appellant, together with seven others, faces the following charges:

- 1.1 One count of Robbery with Aggravating Circumstances;
- 1.2 Three counts of Kidnapping, and
- 1.3 Two counts of contravening section 36 of the General Law Amendment Act 62 of 1955 –. Possession of Property Suspected to be Stolen.

[2] The magistrate, regrettably, delivered a 20-line judgment, in which he said nothing except that the accused had to prove exceptional circumstances in order for the court to grant them bail, and that the court found that no exceptional circumstances were proved by any of the (6) accused persons who applied for bail. I should mention that neither the appellant nor his co-accused testified, but filed affidavits in support of their application for bail. It seems to me that the magistrate's comments in respect of the accused testifying may have played a role in the accused deciding to file affidavits. He said on page 2 of the record, at lines 20-21: "Ag moet ons nou al agt roep? Moet al agt getuig? Dit gaan agt jaar vat om hierdie saak klaar te maak." (loosely translated: "*Oh must we now call all eight? Must all eight testify? It will take eight years to finalise this case*") This is unfortunate, and

while it is appreciated that the court rolls in the District Courts can be quite challenging, this is a good example of how a matter should not be dealt with. If it was the wish of the accused persons to testify, they ought to have been allowed to do so. The magistrate, in compliance with section 65(3) of the Criminal Procedure Act 51 of 1977 (the Act), indicated that he had no further reasons to furnish for his judgment.

- [3] The judgment of the court *a quo* was assailed, in essence, on three grounds, namely that the court erred in:
- 3.1 failing to place due weight on the appellant's evidence that he is the father of two minor children and the breadwinner of his family, and in so doing, failed to give effect to the Constitutional provision enshrined in section 28, that the interests of a child are paramount in every matter concerning the child. Had the court done so, it would have found that the appellant had shown the existence of exceptional circumstances.
 - 3.2 incorrectly interpreting the onus (on an accused person) provided for in Schedule 6 (of the Act), in that the court found that it was impossible for the appellant to discharge the onus except where the state's case was weak or the state was not opposed to the appellant's release on bail.
 - 3.3 not finding that the state's case against the appellant is weak or non-existent, in that the only evidence against the appellant is the text messages sent by one of his co-accused to his mobile telephone. The appellant presented a solid alibi, there was no evidence of stolen items being found in his possession or that state witnesses could

identify the appellant as one of the perpetrators. The appellant had, therefore, shown that exceptional circumstances exist to release him on bail.

- [4] The appellant's personal circumstances placed on record, are that he is a 34 year old married man, with two children aged seven and two years old respectively. He lives in Bloemfontein with his family and at the time of his arrest was employed by the South African Police Service (SAPS), since 2015, as an administration clerk, earning a salary of R11 000.00 per month. His wife is unemployed. According to the charge sheet, he was arrested on 13 September 2021, while his bail application was heard and refused by the court *a quo* on 29 September 2021. He has no previous convictions but has two pending cases, where he is charged with Kidnapping and Robbery with Aggravating Circumstances. Bail of R500.00 was fixed in respect of each of those cases. He alleges further that he has two motor vehicles, which are currently being repaired, as well as several movable assets of value, without specifying what these assets are. He has very strong ties with his community and his family and is not a flight risk.
- [5] The appellant denies any involvement in the commission of the crimes with which he has been charged in this matter and alleges that he has an alibi which account for his movements on the day the offences were committed. He alleges that all these factors taken

cumulatively constitute exceptional circumstances which were not considered by the magistrate, thus amounting to a misdirection on the part of the magistrate. With regard to his alibi, he alleges, that he visited his psychologist between 10h00 and 11h00 on 10 September 2021. Thereafter he reported to the Kagisanong Police Station at 12h20, in compliance with one of his bail conditions in the pending matters. Thereafter, he went home and remained at his home from around 12h30 to 17h30, when his brother arrived at his home to take him and his family to Bethlehem for the weekend.

- [6] It is common cause that the offences with which the appellant has been charged in this matter fall within the ambit of Schedule 6 of the Act. Section 60(11)(a) of the Act provides that:

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

- (a) 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 exceptional circumstances exist which in the interests of justice permit his or her release;

- [7] The Constitutional Court found that several sub-sections of section 60 of the Act, including section 60(11)(a), were constitutional when it dealt with the cases of *S v Dlamini*; *S v Dladla & others*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC). With regard to the right to freedom, the learned authors *Du Toit et al in the Commentary*

on the Criminal Procedure Act, RS 49, 2012 ch9-p26 succinctly summarised the position thus: “In *S v Bennett* 2000 (1) SACR 406 (W) 408e–g Willis J also said that the ‘fundamental premise’ is that s 12(1) of the Constitution confers on everyone the right to freedom which includes the right not to be detained without trial, subject to constitutionally permissible limitations in terms of s 36 of the Constitution. See also *S v Mabapa* 2003 (2) SACR 579 (T) 583h and *S v Petersen* 2008 (2) SACR 355 (C) at [60] where reference was made to s 35(1)(f) of the Constitution”

- [8] I turn to the grounds of appeal, which I summarised earlier in this judgment. As I mentioned, it is unfortunate that the magistrate did not mention the personal circumstances of the appellant, or specifically say that he had, in fact, considered those circumstances and the various factors placed before him in concluding that the appellant had failed to discharge the onus placed on him by section 60(11) of the Act. He failed to enlighten this court even when he was requested to furnish reasons for his judgment. The starting point for an appeal court is to accept that the court *a quo* was correct in its conclusions, unless it can be shown that the court misdirected itself in the interpretation and application of the law or the facts. Even if the court did not specifically set out its analysis of the law and the facts, based on what evidence and information was placed before the magistrate, this court cannot assume that the court *a quo* did not consider or apply its mind to the facts and the law.
- [9] In the present case, the personal circumstances of the appellant are unremarkable. He placed great emphasis on the fact that he is the

breadwinner in his family and that he is the father of two minor children, whose constitutional rights as enshrined in section 28 of the Constitution, are being violated as a result. In this connection, this court enquired about the disciplinary action allegedly being brought against the appellant by SAPS. I was informed by Mr Chaka that such proceedings have not yet commenced and that the appellant is still in receipt of his salary, in spite of being incarcerated. The appellant's wife is unemployed and appears to be the primary caregiver of the children and takes care of them while being financially supported by the appellant. It appears that she continues to take care of the children in the appellant's absence. The impression that the appellant attempts to create is that his incarceration has the consequence that his family is left without any financial means. This is clearly not so as the appellant is still in receipt of his salary with which he would continue to support his family.

- [10] When one considers whether the incarceration of appellant is an infringement of the constitutional rights of the appellant's children, as he claims, I once again cite the exposition of the learned authors Du Toit *et al*, at RS 63, 2019 ch9-p66: "Where the circumstances relied on by a bail applicant include the constitutionally protected interests of a minor child, the court must take due cognisance of the child's right 'to family care or parental care, or to appropriate alternative care when removed from the family environment', as provided for in s 28(1)(b) of the Constitution. But whilst the best interests of the child are paramount as determined in s 28(2) of the Constitution, they cannot 'simply override all other legitimate interests, such as the interests of justice or the public interest'. See *S v Petersen* 2008 (2) SACR 355 (C) at [63]–

[65] where Van Zyl J, writing for a full bench, also referred to *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC), which dealt with the constitutional best interests of a child where a court is required to consider incarceration of a parent or primary caregiver. In *Petersen* the full bench was satisfied (at [76]) that on all the available facts the bail applicant's minor child was 'in more than appropriate alternative care, as envisaged by s 28(1)(b) of the Constitution' and that her best interests could be served by permitting her 'regular and unimpeded access to [her jailed mother] at all reasonable times' (at [77])."

In my view, it is the position in the present matter that the appellant's children are more than appropriately being cared for by their mother.

- [11] With regard to the court's utterances that it is impossible to discharge the onus placed on the appellant, except if the state did not oppose the release of the appellant or if state's case was weak, I agree that such utterances are unfortunate and regrettable. However, I am unable to go so far as to say that such utterances amounted to a misdirection, as it must be borne in mind that even though the state may not oppose the granting of bail, there is still a duty upon a court hearing an application for bail to enquire into the accused person's circumstances and satisfy itself that the interests of justice would not be adversely affected by the release of the accused on bail. The bail application in this matter was moved by way of an affidavit, The court's "enquiry" would have been limited to the circumstances contained in the affidavit. The fact that the court did not ask further questions in respect of the allegations in the affidavit, does not automatically lead to the conclusion that it did not consider the circumstances of the appellant in determining that the onus placed on him had not been discharged.

[12] I deal now with the alibi proffered by the appellant. In opposing the application for bail, the state handed up affidavits by the investigating officer (I/O). The second affidavit, deposed to by the I/O deals, *inter alia*, specifically with the timeline of the alibi defence of the appellant. The I/O avers that the offences were committed between 13h45 and 18h00 on the day in question. The appellant informed him during the arrest of the applicant, that he had reported at the Kagisanong police station. The he deposited some money for his brother who was to collect the appellant later that day. The I/O confirmed that the appellant had reported to the Kagisanong police station around 12.20 that day. The state is also relying on the text message sent to the appellant's mobile telephone by one of the appellant's co-accused. The goods stolen from the complainants in this matter were pointed out by another of the appellant's co-accused, who also appears to be linked by telephone communication to the offences in this matter.

[13] The appellant attempted to make much of the fact that when the appellant was arrested in one of the pending matters against him, his cellular telephone was confiscated by the police, hence he could not have been using that telephone and/or number when these offences were committed. Ms Claassens on behalf of the state pointed out that even if the device is lost, stolen or confiscated, the number can still be used as the SIM card is inserted into another device. In any event the bail application was heard about two weeks after the appellant's arrest. It would not have afforded the I/O sufficient time to obtain

further cellular evidence from the appellant's cellular service provider for the bail hearing.

[14] There is no indication of the stage to which the investigation has progressed and whether the appellant was indeed linked to the offences in this matter. His arguments that he was not at the scene of the crimes, nor that any stolen property was found in his possession does not advance his defence further, as the state is relying on common purpose. It is a well known fact that some of the people involved in robberies of this nature control and facilitate the commission of the offences without ever being present at the scene of the crime. I am therefore, of the view that the assertion that the state's case is weak cannot, at this stage, be sustained. That is not to say that there may be the possibility that there is no evidence linking the appellant or that such evidence may be weak or tenuous. The appellant has the option, if this turns out to be the case, to approach the court *a quo* to reconsider bail, based on new facts.

[15] I mention also that the appellant has two pending charges for exactly the same offences as in this matter. He is on bail in those matters, and all indications are these offences were committed while he was on bail in those matters. In my view, this is a factor that certainly weighs against the appellant, and was clearly before the magistrate in the court *a quo*. I am therefore constrained to find that the court *a quo* erred or misdirected itself in refusing the appellant's application to be released on bail in this matter. I am satisfied that the court was

correct in concluding that the appellant had failed to discharge the onus on him to show that exceptional circumstances exist that do not adversely affect the interests of justice and which permit his release on bail.

[16] In the circumstances, the following order is made:

16.1 The appeal is dismissed.

16.2 The refusal of the Magistrate to release the appellant on bail is upheld and confirmed

S NAIDOO J

On behalf of the appellant: Adv PG Chaka
Instructed by: Matlho Attorneys
96 Henry Street
Westdene
Bloemfontein
(Ref: MD Matlho/MAZ1/0003)

On behalf of the Respondent: Adv BG Claassens
Office of the DPP
Bloemfontein