



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

CASE NO: 8085/2022P

In the matter between:

SELBY MENZI KHULEKANI MTHANTI

Appellant

And

THE STATE

Respondent

Delivered electronically: The judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for hand down is deemed to be 4 August 2022.

ORDER

The appeal against the refusal of bail is dismissed.

JUDGMENT

Delivered on: 04 August 2022

REDDI AJ

Introduction

[1] This is an appeal by Selby Menzi Khulakani Mthanti against the Nquthu Regional Magistrates Court's refusal to admit him to bail on 18 October 2021.

[2] The appellant was arrested on 14 August 2020 and, together with three co-accused, charged with one count of conspiracy to commit murder and murder. The allegation against the appellant was that during or about July and August 2020, he had used his lover at the time, now a s 204¹ state witness, as an intermediary and had hired his co-accused to kill a former induna in the area where he lived. The appellant had applied to the Nquthu Regional Court to be released on bail pending trial. His application was denied on 11 November 2020.

[3] On 30 August 2021, the appellant brought a renewed bail application alleging new facts but was again unsuccessful when his application was refused on 18 October 2021.

[4] It is common cause that the bail application had to be made in terms of the provisions of s 60(11)(a) of the Criminal Procedure Act 51 of 1977 (hereafter "the Act"). Thus, the appellant was vested with the onus of proving on a balance of probabilities that exceptional circumstances existed that permitted his release on bail in the interests of justice.²

¹ Section 204 of the Criminal Procedure Act 51 of 1977.

² *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC) para 65.

Meaning of 'exceptional circumstances'

[5] The term 'exceptional circumstances' is not defined in the Act. The courts have explored the concept of exceptional circumstances in several cases involving s 60(11)(a) bail applications. Two common principles may be deduced from these cases: first, the list of factors that comprise exceptional circumstances is not circumscribed, and secondly, the peculiar circumstances of each case determine whether exceptional circumstances exist. Kriegler J's words in the Constitutional Court's unanimous judgment in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*³ echo these conclusions:

'An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant, or anything else that is particularly cogent...In any event, one can hardly expect the lawgiver to circumscribe that which is inherently incapable of delineation. If something can be imagined and outlined in advance, it is probably because it is not exceptional.'

[6] Referring to *Dlamini et al* above, Snyders JA in *S v Rudolph*⁴ interpreted exceptional circumstances to be 'ordinary circumstances present to an exceptional degree.' The observations of Van Zyl J in *S v Petersen*⁵ are equally instructive:

'Generally speaking "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are...varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration.

In the context of s 60(11)(a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person.

³ *S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC) paras 75-76.

⁴ *S v Rudolph* 2010 (1) SACR 262 (SCA) at 266H.

⁵ *S v Petersen* 2008 (2) SACR 355 (C) paras 55-56.

This may, of course, mean different things to different people, so that allowance should be made for a certain measure of flexibility in the judicial approach to the question.'

The court crystallised this statement as requiring the bail court to exercise a value judgment with regard to all relevant facts, circumstances and legal criteria.

Ambit of court's authority in bail appeal

[7] The approach this court must adopt in deciding the appeal is long established, central to which is an analysis of the provisions of s 65(4) of the Act, which reads:

'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.'

[8] These provisions unequivocally assert that the appeal court can justifiably interfere with the decision of the court *a quo* only if it is satisfied that the decision of the judicial officer who had been seized with the bail application and refused it was wrong. This point was iterated by McEwan J in *S v De Abreu*⁶ when he confirmed that s 65(4) countenances interference only if the judge or court is satisfied that the magistrate was wrong. In instances where there has been a material misdirection by the bail court on either the facts or the legal principles, or both, which have a bearing on the matter, the appeal court may itself consider the issue of bail anew.⁷

⁶ *S v De Abreu* 1980 (4) SA 94 (W) paras 96H-97A.

⁷ *S v Essop* 2018 (1) SACR 99 (GP) paras 34-35; *S v Jacobs* 2011 (1) SACR 490 (ECP) para 18; and *S v Mpulampula* 2007 (2) SACR 133 (E) at 136D-E.

[9] In discussing the ambit of an appeal court's powers with specific reference to interference with a magistrate's exercise of discretion, Hefer J said this in *S v Barber*:⁸

‘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 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.*’ (My emphasis.)

[10] Ultimately though, a pivotal issue in bail appeals is the question of the deprivation of personal liberty. For this reason, 's 65(4) of the CPA should be construed in a manner which does not unduly restrict the ambit of an appeal Court's competence to decide that the lower court's decision to refuse bail was "wrong."⁹

The renewed bail application

[11] I now revert to the issues at the heart of this appeal. A fundamental issue for determination in a renewed bail application is whether, when viewed in conjunction with the facts placed before the court in the initial application, there are new facts that merit bail being granted in the renewed application.¹⁰ In *S v Petersen*,¹¹ the court clarified that the import of presenting new facts is not to supplement deficiencies or gaps in the evidence of the initial bail application.

⁸ *S v Barber* 1979 (4) SA 218 (D) at 220E-H.

⁹ *S v Porthen and Others* 2004 (2) SACR 242 (C) para 17. See also *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC) para 79.

¹⁰ *S v Mpofana* 1998 (1) SACR 40 (Tk) at 44.

¹¹ *S v Petersen* 2008 (2) SACR 355 (C) para 57.

Steyn J's statement in *Davis and Another v S*¹² further clarifies that 'new facts should be facts discovered after the bail application was heard and not merely an elaboration of facts presented at the first bail application.'

[12] Thus the first step facing the bail court in a renewed bail application is to determine if new facts have come to light that legitimate a reconsideration of the bail application. In the instant matter, the learned magistrate accepted that the appellant's renewed application met the new-facts threshold for reconsidering the bail application.

[13] It is trite that if new facts are present, the court must assess the conspectus of evidence adduced at the initial and renewed bail applications in considering whether to grant bail. It is evident from the learned magistrate's judgment in the renewed application that he was mindful of this requirement and had acted in consonance with it.

[14] As was his right, the appellant elected at both his initial and renewed bail applications to file affidavits instead of testifying viva voce. The gist of the averments in his initial application was that:

- i. He was the sole breadwinner in his family, comprising his wife, four children and three nephews.
- ii. He lived his entire life in a house he owned in Ndindini, Nquthu.
- iii. He was a sergeant in the SAPS and feared that he would lose his job if he were to be incarcerated.
- iv. The deceased "Terror" was very well known to him as they 'grew up together in the same area' and he 'knew him for a long time.'

¹²*Davis and Another v S* (2888/2015) [2015] ZAKZDHC 41 (8 May 2015) para 3.

- v. Their relationship became strained when in 2017/2018, he replaced the deceased as induna in their area and investigated him for selling sites without authority at inflated prices.
- vi. He had nothing to do with the deceased's murder and did not understand how he was arrested in this matter.
- vii. The only State witness he knew was the s 204 witness as she was from his area. He will not interfere with the witness.

[15] These facts proffered by the appellant, at the initial application, to discharge the onus resting on him failed to achieve their objective. In its assessment of the appellant's untested evidence on affidavit and the oral testimony of the investigating officer regarding the strength of the State's case, the risk of abscondment because of the severity of the likely punishment following conviction; the attitude of the community towards the murder; and the possibility of interference with the state witness, the court *a quo* did not find exceptional circumstances to justify the appellant's release on bail.

[16] In the appellant's renewed bail application, the following were presented as new facts in his founding and supplementary affidavits:

- i. A denial of complicity in the murder based on an alibi defence;
- ii. A letter of support from the chief of his area of the appellant's good character;
- iii. Information of the conviction and sentence imposed of a fine regarding a case of unlawful possession of unlicensed firearms which had been pending against the appellant at the time of the initial bail application;
- iv. Fraudulent transactions on the appellant's bank account;
- v. The death of 11 head of livestock due to being fed the incorrect type of feed;
- vi. An offer of employment which the appellant hoped to take up; and
- vii. Details of an assault by the police at the time of the appellant's arrest resulting in him becoming deaf in one ear. This information was presented in the appellant's supplementary affidavit.

[17] In assessing the conspectus of evidence, including the new facts raised in the appellant's two new affidavits, the learned magistrate correctly concluded that the letter of support from the chief was not new information. The chief's views of the appellant, that he was a good person, is information that would have been available to the appellant at the time of his initial bail application. It is implausible that the chief only concluded as such about the appellant almost a year after the latter had been in prison, awaiting trial on a murder charge. Evidently, the submission of the letter was intended to bolster the appellant's original bail application and to fill a perceived gap. The learned magistrate was, therefore, correct in his assessment of the weight that should be given to the letter.

[18] The denial of complicity in the murder, based as it was on the untested affidavit evidence of the appellant's wife and a car mechanic, was also correctly found to be uninfluential in dislodging the strength of the State's case against the appellant. In this regard, the oral testimony of the investigating officer was significant when weighed against the untested averments in the affidavits, one of which had been deposed to by the appellant's wife.

[19] The learned magistrate was also not persuaded that the information regarding the appellant's conviction for the unlawful possession of firearms could, in the context of this case, be perceived as an exceptional circumstance. Relying on *Mooi v S*,¹³ the appellant's assertion concerning the conviction was that because he had attended his trial on every occasion, this proved that if released on bail, he would do likewise in the instant matter. I am of the view that the learned magistrate was correct in his assessment of this factor as 'one swallow does not make a summer, neither does one fine day.'¹⁴ Evidence of regular attendance at a single trial where the conviction resulted in the imposition of a

¹³ *Mooi v S* [2012] JOL 29148 (SCA) para 12.

¹⁴ Aristotle 'The Nicomachean Ethics'.

sentence of a fine is scarcely proof that a trial involving a possible punishment of life imprisonment will be attended with the same level of enthusiasm. Moreover, in *Mooi*, the accused had been charged and tried on several charges in different courts, including a charge of murder, and had attended his trials on every occasion. The pattern of his conduct confidently spoke of a person who, if released on bail will be unlikely to abscond from his trial.

[20] The learned magistrate also dealt appropriately with the appellant's submissions regarding the fraudulent transactions in his bank account and the loss of 11 of his livestock. Neither issue was deemed relevant in the assessment of exceptional circumstances.

[21] The appellant also attempted to submit an offer of employment letter in support of his renewed bail application. However, the learned magistrate was unmoved by the undated letter of employment from the operations manager of Ntabayepheza Construction & Other Services. The letter mentions that the appellant was successful in his job application and proposed a meeting with him at the company's offices on 25 June 2020.

[22] The appellant raised this offer of employment as a new fact when, based on the date of the proposed meeting, this information was within his knowledge at the time of the initial bail application in September 2020. This conclusion also finds support in the appellant's new affidavit which mentions that he resigned from his job in the SAPS at some stage before being arrested on 13 August 2020.

[23] The fact that the appellant was unemployed but had a job offer at the time of his initial bail application is an important matter deserving of consideration by the court *a quo*. However, for reasons best known to him, the appellant chose not to mention this to the court at the time. Instead, he falsely deposed the following

statements in his affidavit dated 10 September 2020: (i) ‘I am employed by the South African Police Services as a sergeant, VIP Unit, in Ulundi; (ii) I have been in the employ of the SAPS since 2008.’

[24] It seems to me that the appellant believed the above information would carry greater weight in the court *a quo*’s consideration of his bail application than would the details of an offer of employment. When the false information about his employment status at the SAPS came to light at the initial bail hearing and, therefore, failed to have the impact that he had hoped for, the appellant changed tack and attempted to raise the old letter of employment as a new fact. Moreover, the appellant’s submission in his renewed application that this job was still waiting for him was unsubstantiated. In the light of the foregoing, the learned magistrate’s refusal to view the offer of employment to the appellant as influential in the decision of whether to grant bail was correct.

[25] I turn now to the appellant’s supplementary affidavit filed in support of his renewed bail application. In this affidavit dated 23 August 2021, the appellant makes the following averment under the heading ‘Merits’:

‘During or about my arrest *of this case that I am charged with* I was abused physically by the members of the SAPS during my arrest and was further abused physically and mentally by members of the SAPS...’. (My emphasis.)

[26] The appellant proceeds to state under the heading ‘New Facts’ that on 22 January 2021 his left ear was examined and assessed by an audiologist at Charles Johnson Memorial Hospital because he had been assaulted by members of the SAPS on Tuesday, 21 January 2021. However, a barely legible copy of the audiologist’s report, attached to the affidavit, is dated 23 January 2020 and states that the patient had reported an assault on Tuesday, 21 January 2020, so implying

that the ear injury had happened almost seven months before the appellant's arrest on the current murder charge.

[27] In the context of its presentation as a 'new fact', it seems to me that the appellant had intentionally tried to mislead the court about his ear problem in an attempt to show that this is an exceptional circumstance warranting his release on bail.

[28] If one were to give the appellant the benefit of the doubt by taking his misrepresentation regarding the date of the ear injury to be a mere typographical error, then the details of the ear injury were available to the appellant at the time of his first bail application. It does not qualify as a new fact and was correctly dismissed in the learned magistrate's assessment of all relevant factors.

[29] While there is an onus on the court in a renewed bail application to consider the conspectus of evidence submitted in both the initial and renewed applications, it behoves the applicant who elects to file affidavits in support of his application instead of testifying orally to bear in mind that the evidence in his various affidavits will all be scrutinised.

[30] In the instant case, several anomalies are apparent in the affidavits filed by the appellant. For instance, in the section titled 'Personal Circumstances' in the appellant's new affidavit, reference is made to him owning three sheep and three cows. But later, in the section titled 'New Facts,' he mentions that 11 of his livestock died while he was in custody, due to them not being in his care. No reasons are offered to explain this discrepancy.

[31] Similarly, when referring to the deceased in his initial affidavit the appellant states this: 'The deceased in this matter, generally known as "Terror" is very well

known to me. We grew up together in the same area and I have known him for a long time.’ However, in the renewed application affidavit the appellant says this: ‘I did not know the deceased on a personal level... I further state that the deceased was induna and well known in his area and that is how he was known to me.’

[32] Another discrepancy is evident in paragraph 11.2 of the initial affidavit where the appellant avers:

‘I am afraid that if I am incarcerated I may lose my employment as a Police Sergeant as I will not be able to perform my functions and I would lose my source of income.’

There are two serious problems with this statement. First, when the affidavit was deposed on 10 September 2020 the appellant had already resigned from the employ of the SAPS. This fact was confirmed at the initial bail application hearing and in his affidavit in support of his renewed application. Secondly, as is evident from his employment letter, the appellant was already, by June 2020, in the process of taking up another job outside the SAPS. The fear of losing his job, as mentioned in his affidavit is, therefore, a lie.

[33] Since the appellant elected to present his evidence via affidavits, his averments are untested and must be judged on the papers. Taken in conjunction with the various anomalies listed above, the indubitable conclusion is warranted that the appellant is an opportunistic liar whose credibility is wanting. Therefore, his bald claims that he is not a flight risk; not disposed to violence; will not evade justice or abscond from his trial; not communicate with any witness; or undermine the proper functioning of the criminal justice system carries little weight in discharging the onus on him of showing on a balance of probabilities that exceptional circumstances exist that warrant his release on bail in the interests of justice.

[34] The appellant's counsel, Ms *Barnard*, submitted that a piece-meal approach to assessing the renewed application must be avoided. Instead, the enquiry should be approached holistically with the court considering if bail conditions would ameliorate any attendant risks to bail being granted. Counsel for the respondent, Mr *Truter*, submitted that the jurisdictional trigger for this holistic appraisal is a finding by the court that exceptional circumstances exist that warrant bail being granted. I agree with this latter argument and cannot fault the learned magistrate for not looking at bail conditions in his assessment of the appellant's application.

[35] I also cannot fault the learned magistrate in his assessment of the appellant's initial and renewed bail applications. It is evident from the appeal record that he painstakingly weighed the conspectus of evidence presented at both bail applications before concluding that there are no exceptional circumstances present to justify granting the appellant bail in the interests of justice. The result is that there has been no misdirection by the bail court to warrant interference in the decision to refuse bail to the appellant.

[36] I accordingly make the following order:

The appeal against the refusal of bail is dismissed.



REDDI AJ

APPEARANCES DETAILS

Date of Hearing:	28 July 2022
Date of Judgment:	04 August 2022
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