



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A12/2021

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
	
SIGNATURE	03/03/2021 DATE

In the matter between:

KOBUS NEL

Appellant

v

THE STATE

JUDGEMENT

MOSOPA, J

1. This is an appeal against the decision of Magistrate Ms Setshogoe in the Pretoria Commercial Crimes Court, refusing the appellant's bail application on 10 December 2020. The appeal is brought in terms of the provisions of section 65(1)(a) of the Criminal Procedure Act 51 of 1977 ("the Act").

2. The parties agreed that the bail proceedings fall under Schedule 5 of the Act, mainly for the following reasons:
 - 2.1. The appellant committed a Schedule 1 offence, while on bail for a pending matter;
 - 2.2. The monetary amount in respect of the charges the appellant is currently arrested for, exceeds R1 million;
 - 2.3. The appellant has two previous convictions, dating back to 1992 and 2015.

Background

3. The appellant is a 58-year-old male South African citizen, who is married and currently resides in Stilbaai in the Western Cape.
4. He is diabetic and has been battling this condition for a relatively long period of time as is evident from the letters of his physicians. He has a family and currently lives with his wife and one of his children.
5. He is a businessman and the owner of a company called Green Confidence Innovations (Pty) Ltd. He is the holder of a passport, as he conducts business in Namibia too.
6. On 9 December 2020, after the appellant appeared in court, he was arrested on four (4) charges of fraud, alternatively theft, in the following amounts:
 - 6.1. R910 000.00;
 - 6.2. R305 000.00;
 - 6.3. R300 000.00 and;
 - 6.4. R140 000.00

No bail hearing was entertained on the day and the bail hearing was postponed to the following day, 10 December 2020. At that stage, he was out on bail of R5000.00 for the pending matter.

7. The appellant was legally represented by Ms Alberts in his bail proceedings. I must at this stage pause to mention that no charge sheet was formalized when the bail application of the appellant was heard. Ms Alberts, on behalf of the appellant, did not raised any objection and the bail application was heard without a charge sheet.

Legal Principle

8. Section 60(11)(b) of the Act provides:

“60(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 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.”

9. The subsection places a burden on the appellant to adduce evidence which satisfies the court that the “interest of justice” permits his or her release on bail. The concept “interests of justice” is not defined in the Act and in **S v De Kock 1991 (1) SACR 299 (7)**, it was said that it meant nothing more than the usual factors which ought to be taken into account in bail proceedings. The Constitutional Court, in the matter of **S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (2) SACR 51 (CC)**, defined the concept as follows:

“If it is read first and the “interests of justice” bears the same narrow meaning akin to “the interests of society” (or the interests of justice minus the interests of the accused).”

10. Section 60(4)(a)-(e) is also of interest and deserves mention. It provides as follows:

“60(4) The interests of justice do not permit the release from detention of an accused where one of more of the following grounds are established;

- (a) Where there is a likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or*
- (b) Where there is a likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial;*
- (c) Where there is a likelihood that the accused, if he or she is released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence, or;*
- (d) Where there is a likelihood that the accused, if he or she is released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;*
- (e) Where, in exceptional circumstances, there is a likelihood that the release of the accused will disturb the public order or undermine the public peace.”*

11. In **S v Diale 2017 (2) SACR 85 (GNP)**, Kubushi J, at para 14, stated;

“A court cannot find that the refusal of bail is in the interest of justice merely because there is a risk or possibility that one of more of the consequences mentioned in s60(4) will result. The court must not grope in the dark and speculate, a finding on the possibilities must be made. Unless it can be found that one or more of the consequences will probably occur, detention of the accused is not in the interest of justice, and the accused should be released.”

12. Finally, section 65(4) of the Act provides,

“65(4) 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.”

13. Where the lower court misdirected itself materially on the facts or legal principles, the above subsection enjoins the court to either set aside such refusal, remit the matter back to the lower court for consideration of bail afresh or release the accused on bail. (See **S v Essop 2018 (1) SACR 99 (GNP)**, **S v Mathonsi 2016 (1) SACR 417 (GP)**).

14. The functions and powers of the court hearing an appeal under section 65 are similar to those of the court hearing appeal on conviction and sentence. In **S v Barber 1979 (4) SA 318 (D) 220E-H**, Heher J remarked;

"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..."

Discussion

15. Both the State and the appellant presented their evidence in the form of affidavits. The investigating officer in the matter and one complainant in the charges against the appellant deposed to affidavits. The appellant also deposed to an affidavit which was used in support of his bail application. There is an onus on the appellant to adduce evidence which satisfies the court hearing the bail application that the interests of justice permit his release on bail. The onus must be discharged on a balance of probabilities.

16. The requirement that the party must "adduce evidence", must not be construed to mean "oral evidence". The party who is called upon to adduce evidence, should be permitted to adduce evidence in terms of the normal, relaxed rules of evidence, i.e., by way of an affidavit, which have traditionally been applied in bail applications (**S v Hartsliet 2002 (1) SACR 7 (T)**). The fact that the appellant carries the onus does not mean that the state can remain passive by not adducing evidence or sufficient rebutting evidence. (See **S v Viljoen 2002 (2) SACR 350 (SCA)**).

17. The court below, in my view, correctly found that the appellant is not a flight risk. This is based on his appearances at the pending charge – he attended court on the dates and times stipulated. I must also pause to mention that this pending matter dates back to 2015. The only instance when the appellant could not attend at court, was during the height of the pandemic, given his health issues.
18. The below court, when refusing the appellant bail, found that, *“The appellant has got an inclination in committing Schedule 1 offenses.”(sic)*. This is based on the fact that the appellant, after his release on bail on a Schedule 1 offense, committed a further Schedule 1 offenses. These offenses were committed using the same *modus operandi* wherein victims were lured into investing in the appellant’s company and ended up losing their monies, as the appellant fails to refund or return their monies.
19. When dealing with the above aspect, i.e., propensity to committing Schedule 1 offenses while out on bail, the appellant should not be punished because of his previous conduct. It is also of importance that the appellant should demonstrate, on a balance of probabilities, by adducing acceptable evidence that the state’s case against him is non-existent and subject to serious doubt. (See **S v Tshabalala 1998 (2) SACR 259 (C)**).
20. The appellant in his affidavit, when dealing with this aspect, indicated that,
- “...he intends pleading not guilty to the charges and further that he has undertaken to the investigating officer to provide her with a total outset of the financial structures and monies flowing in and out of the companies alleged.”(sic)*.

In my view, the appellant failed to adduce evidence to show that the state’s case is non-existent. The appellant did not only commit one Schedule 1 offense, but four. I am alive to the fact that the offenses date back to 2016 and 2017 and there is no explanation as to why the appellant was only arrested on 9 December 2020 and not immediately after their commission.

21. Mr von Mansberg's affidavit remains undisputed. He explained how he was swindled out of money by the appellant in May 2020, which is when the appellant was on bail for a Schedule 1 offense, similar in nature. The appellant has a previous conviction of fraud which is also similar to the current offense the appellant is charged with. When coming to the conclusion that the appellant has a propensity to commit further offenses, the below court did not say it out of the nowhere, but based on facts. It is my view that the conduct of the appellant after his release on bail made it impossible for him to be released on bail, as he breached one of the grounds set out in section 60(4)(a)-(e) of the Act.
22. The health issues of the appellant cannot be underestimated. It is clear that he is suffering from a chronic illness which requires that he be on constant medication. What concerns this court is the fact that despite the treating physician's letter which restricted the movement of the appellant because of the pandemic, he was seen in public not wearing a mask and driving his motorcycle. He was able to meet with Mr von Mansberg in a restaurant wherein the investment was discussed which resulted in the complainant losing a large sum of money. The appellant could not attend his court appearances as a result of his medical condition, but was seen travelling between the Western Cape Province and Gauteng Province. If the appellant was genuine about his medical condition, he should have found it prudent to confine himself to Stilbaai which is a less populated area, compared to Pretoria, which is densely populated.
23. The appellant failed to place evidence before me, in respect of how the refusal of his bail application affected his medical condition in a form of a supplementary affidavit. This leaves me with the only inference that the appellant continues to receive his medical treatment whilst in custody.
24. Mr Pistorius, in response to the question of the appellant's breach of a bail condition, namely when he relocated from Paarl to Stilbaai without informing the investigating officer, contended that the court erred in considering that, as the state failed to invoke the provisions of section 68 of the Act. The issue of

the change in address was apparent from the affidavit deposed to in support of the bail application in the current matter. There is nothing on record which indicated that before the affidavit was deposed to, the investigating officer was aware of the appellant's change in address. It must also be noted that the investigating officer in this matter is also the investigating officer in the appellant's pending matter. The contention of Mr Pistorius would have been relevant if the investigating officer was aware of the change in address, but still failed to invoke the provisions of section 68 of the Act. The court below did not misdirect itself by finding that the appellant breached a bail condition in the pending matter.

25. Granting the appellant bail at this stage, in my considered view, will undermine and jeopardise the proper functioning of the criminal justice system, including the bail system. The appellant has a previous conviction of fraud, from 2015. In 2015/2016, he was arrested for fraud and released on bail. In 2016, leading up to 2017, he commits another fraud offense, but he is only arrested in 2020. In May 2020, he commits another similar offense. I see no reason to interfere with the decision of the court below, as the court did not misdirect itself on the question of fact or law.

26. In the consequences, the following order is made:

1. The appeal against the decision of Magistrate Ms Setshogoe to refuse the appellant bail on 10 December 2020 is refused.



MJ MOSOPA
JUDGE OF THE HIGH
COURT, PRETORIA

Appearances:

For the applicant: Adv. P Pistorius
Instructed by: De Meyer Attorneys

For the respondent: Adv. M Nethononda
Instructed by: The DPP

Date of hearing: 24 February 2021
Date of judgment: Electronically delivered