



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION. PRETORIA)**

Case No: A23/2020

In the matter between:

CLEMENT MAHLANGU

Appellant

and

THE STATE

Respondent

JUDGMENT

VAN OLST, AJ

[1] The Appellant who is presently incarcerated brought an appeal application for the granting of bail pending his trial in the District Court for the district of Tshwane North held at Pretoria North.

[21] The Appellant is charged with two counts of contravening the provisions of Section 3 read with sections 1, 2, 50, 56(1), 56A, 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 as amended. Further read with sections 94, 256 and 261 of the Criminal Procedures Act

51 of 1997. Further read with section 51(2)(b) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended. Further read with Section 120 of the Children's Act, 38 of 2005 in that on or about 23, June 2019 and at or near Soshanguve in the district of Tshwane North the appellant unlawfully and intentionally committed an act of sexual penetration with the complainants namely [In respect of [count 1] a certain [...] (28 years old) by Inserting his penis inside her vagina without her consent and [in respect of count 2] at the appellant on or about the 2019 and at or near Soshanguve in the district of Tshwane North the appellant unlawfully and intentionally committed an act of sexual penetration. with the complainant by inserting his penis Inside her vagina without the consent of the said complainant.

[3] The Appellants, in the affidavit In support of bail application [signed on 1 July 2019] indicated that he intends pleading not guilty to the charges against him [pages 109 to 115].

[4] The Appellant launched a bail application before Magistrate Wessels that commenced on the 11 July 2019, Judgment delivered on 19 August 2019 and bail was refused on 19 August 2019.

[5] The Appellant bears the *onus* to satisfy the court that exceptional circumstances exist, which the interests of justice, permits his release on bail.

[6] During the bail application in the district court the State relied on the evidence of Mr Chauke the Investigating Officer. The prosecutor first provided the Magistrate with a statement by Mr Chauke and also called Mr Chauke to testify in court. Mr Chauke referred the district Court to the list of offences committed by the Appellant according to the records at his disposal. It appeared that the Appellant is out on bail pertaining to two pending trials in respect of previous rape charges. Numerous other offences under investigation were listed as well as several rape charges which were withdrawn. Mr Chauke further indicated that the first complainant approached him Chauke to have the charges withdrawn against the Appellant. The first complainant alleged that if the charge is not withdrawn, attending court proceedings will Interfere With her studies as well as employment duties and commitments. The first

complainant later on again approached Mr Chauke and indicated that she was approached by the second complainant to withdraw the charges against the Appellant and indicated that the Appellant is in the process of selling one of his vehicles and the first complainant will be paid a certain amount from the sale of this vehicle. It does not appear from the record of proceedings that the first complainant did in fact formally withdraw the charges against the Appellant. It does not appear from the record of proceedings during the bail application that the second complainant had in fact withdrawn the charges against the appellant. According to Mr Chauke both complainants are proceeding to trial with the charges against the appellant.

[7] Mr Matshona, attorneys, on behalf of the Appellant presented the District Court with a statement by the Appellant regarding his bail application. Mr Matshona commenced to present the evidence of the second complainant on behalf of the Appellant. The second complainant commenced to testify that she was the girlfriend of the Appellant at the time of the hearing of the bail application. The testimony was interrupted by Magistrate Wessels when it was ascertained that the second complainant is a State witness. There was as a discussion of whether Mr Matshona should be allowed to proceed presenting by evidence of the second complainant or not. Mr Matshona did not proceed with the evidence by the second complainant. Mr Matshona did not call the Appellant to testify at the bail application.

[8] It was furthermore recorded that the charges of complainants 1 and 2 have been defined as Schedule 6 offences.

[9] On 13 December 2019 the Appellant's legal representative proceed with a Notice of Appeal in terms of Section 65 of the Criminal Procedure Act, Act 51 of 1977 and seeks an order that the Appellant be released on bail pending the trial of the two aforesaid complainants. The Appellant stated the following grounds and reasons why the Appellant is entitled to appeal against the refusal of the district court to grant bail in that the magistrate erred in finding that:

- [a] It will not be in the best Interest of Justice to release the Appellant on bail;
- [b] The Appellant failed to establish the presence of exceptional circumstances;
- [c] In not finding that the Appellant succeeded in establishing that it is in the

interest of justice to be released on bail and that exceptional circumstances have been established;

[d] In not finding that the following factors are indeed exceptional circumstances

- [i] the cumulative effect of the Appellant's personal circumstances
- [ii] that the Appellant is financially supporting three children and his elderly mother
- [iii] that the Appellant provide in the medical need of his elderly mother;
- [iv] that the Appellant is In need of an urgent operation for his injured leg;
- [v] that the Appellant is involved in divorce proceedings which will be extremely difficult to contest if not released on bail;
- [vi] that the Appellant has no previous convictions of any nature including of a violent nature.

[e] In over emphasizing the previous arrests of the Appellant despite the clear evidence that all outstanding charges were withdrawn against the Appellant for valid and acceptable reasons.

[f] Moving on the the premise that the Appellant is a "serial rapist" whilst his previous cases had been withdrawn against him after due consideration by a prosecutor and In light of the fact that the Appellant has never been convicted of an offence of a sexual nature previously.

[g] In not taking into account that the second complainant who had withdrawn the charge, testified under oath that the Appellant is her boyfriend.

[h] In merely dismissing the lack of medical evidence Indicative of penetration In the Form J88.

[i] Not considering at all any appropriate bail condition to alleviate any fear regarding intimidation of state witnesses.

[10] Mr Pistorius appeared on behalf of the Appellant and from the outset argued *in limine* that the documentation in the application for appeal against the refusal of bail with specific reference to the statement by Magistrate Wessels are inadmissible and should not be regarded and taken into account. He *inter alia* also pointed out that the case law referred to by Magistrate Wessels is incorrect.

[11] From the outset I shall first deal with the point *in limine* raised by Mr Pistorius.

[a] It Is clear from the relevant case law read with Section 65(2) of the Criminal

Procedure Act [CPA], 51·1997; that:

"(2) An appeal shall not lie In respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts are first placed before the magistrate or regional magistrate against whose decision the appeal is brought and such magistrate or regional magistrate gives a decision against the accused on such new facts." . .

[b] I have therefore not taken into account the statement by Magistrate Wessels nor any other documentation in the file contents regarding the issues raised in Magistrate Wessels' statement.

[12] Mr Pistorius addressed the court on the reasons advanced in the application for leave against the bail and over and above pointed out that Magistrate Wessels specifically erred by interfering of evidence by e second complainant on behalf of the Appellant.

[13] Mr Pistorius also Indicated that Magistrate Wessels was subjective by referring to Mr Matshona [attorney on behalf of the appellant In the bail application) to possibly reporting the matter to the Law Society [Legal Practice Council] should Mr Matshona persist in calling the second complainant as a witness on behalf of the Appellant and by questioning the investigating officer if the Appellant could be profiled as a serial rapist. Mr Pistorius indicated that Magsitate Wessels elicited evidence from Mr Chauke and, furthermore, that Mr Chauke did not have the full information regarding the employment of the Appellant and how the Appellant made a living.

[4] Mr Pistorius submitted on behalf of the Appellant that Magistrate Wessels erred on various issues and as such bail should have been granted to the Appellant.

[15] With reference to pages 13, 14 and 15 of the record of proceedings [relating to outstanding investigations and charges against the Appellant] Mr Pistorius indicated that Mr Chauke obtained the Information from so-called system profiling and that the Appellant should have received the benefit of the doubt.

[16] Mr Pistorius also indicated that taking into account the seriousness of the

offences bail may be granted in the sum of between R10,000 and R15,000 but that is something he can discuss with Mr Luyt on behalf of the Respondent

[17] Mr Luyt appeared on behalf of the Respondent and indicated that:

- [a] The Appellant failed to, on a balance of probabilities prove that he was entitled to bail during the bail application. The Appellant relied on a sworn statement and did not testify at the hearing of the bail application. The Appellant failed to prove beyond a reasonable doubt the *onus* the Appellant has to discharge
- [b] According to Mr Luyt with regard to pages 42 - 43 of the record of proceedings In the District Court, It Is clear that the Appellant interfered with a witness. The Appellant did not satisfy the required proof that has to be addressed to the District Court regarding Interference of witnesses.
- [c] Bail applications are *sui generis* and as such the magistrate should participate in hearing bail applications.
- [d] The Appellant did not provide any evidence that exceptional circumstances exist to be granted bail pending trial.
- [e] There are pending cases against the Appellant.
- [f] Magistrate Wessels did not err by refusing bail In respect of the Appellant

[18] In rebuttal Mr Pistorius indicated that:

- [a] The inquisitorial approach by Magistrate Wessels was subjective.
- [b] Magistrate Wessels exceeded the prescribed boundaries.
- [c] No Affidavit was placed before the District Court that there was in fact interference with witnesses by the Appellant.
- [d] If the Appellant Is released on bail, he will be re-arrested.

[19] Section 65 of the CPA is paramount for purposes of appeal and I quote the following:

"(1)(a) An accused who considers himself aggrieved by the refusal of a lower court to admit him bail or by the imposition of such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any Judge of that court if the court is not then sitting.

...

(2) An appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts are first placed before the magistrate or regional magistrate against whose decision the appeal is brought and such magistrate or regional magistrate gives a decision against the accused on such new facts.....

(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."

[20] An overemphasis of the Appellants' rights to appeal a decision of a court *a quo* should not be tipped in favour of the alleged offenders and an overemphasis of their rights would not be in accordance with the legislation governing bail, nor with the guidelines set by the Constitutional Court in *S v Dlamini*, *S v Dlala*, *S v Joubert*, *S v Schietekat*. As stated in *S v Dlamini*, the Constitutional Court held:

"Furthermore a bail hearing is unique judicial function. It is obvious that the peculiar requirements of bail as an interlocutory and inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal court procedure, it is considerably less formal than a trial. Thus the evidentiary material proffered need not comply with the strict rules of oral or written evidence. Also, although bail, like the trial is essentially adversarial. The inquisitorial powers of the presiding officer are greater. An important point to note here about bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application, the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to the bail, the focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails, in main, protecting the investigation and prosecution of the case against hindrance".

[21] The issue to determine is whether the Appellant has discharged the *onus* which rests on him in terms of Section 60(11)(a) of the Criminal Procedure Act to be admitted on bail. The question therefore arises as to what the exceptional circumstances are and I point out the following:

[a] In *S v Bruintjies* 2003(2) SACR 575 (SCA) at 577f Shongwe AJA said:

“..what is required is that the court consider all the relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitations of freedom which the legislature has attached to the commission of a Schedule 6 offence.”

[b] In *S v Rudolph* 2010(1) ACR 2152 (SCA) at 266 g-h the court again stated that the applicant in a schedule 6 bail application must, on a balance of probability, demonstrate that “exceptional circumstances” in his or her case, indeed, do exist and that they “in the interests of justice permit his release.” A balance of liberty of the accused and the interests of society in denying the bail, will be resolved in favour of the denial of bail, unless “exceptional circumstances” are shown by the accused to exist.

[c] Section 60(4) of the CPA provides that

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

(a) Where the 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 is released on bail, will attempt to evade his or her trial; or;

(c) There is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimate witnesses or to conceal or destroy evidence; or

(d) Where there is a likelihood that the accused, if he or she were 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 the likelihood that the release of the accused will disturbing the public order or undermine the public peace or security.”

[22] I have considered the record of proceedings in the bail application in the District Court, as well as the arguments on behalf of the Appellant and the Respondent in the proceedings before me.

- [a] In view thereof that the Appellant is already on bail in two previous rape charges against him of which trials are pending, and, subsequently committed the offences set out above in respect of which bail was refused;
- [b] Regard having been had that we are dealing with Schedule 6 offences and the fact that it was not proven by the Appellant that the charges by complainants 1 and 2 In the District Court, Pretoria North have in fact been withdrawn:
- [c] It is clear that the Appellant is not a first offender;
- [d] The Appellant failed to discharge the *onus* on him that there are exceptional circumstances to grant bail in his favour.

I could not find any exceptional circumstances that which in the interests of justice permit the appellant's release on bail.

[23] Accordingly I am not persuaded that the magistrate's decision on 19 August 2019 was wrong and make the following order:

The appeal is refused.

E VAN OLST

Acting Judge Of The Gauteng Division, Pretoria

Appeal heard on:	February 2020
Counsel for the appellant:	Mr Pistorius SC
Instructed by:	Emile Viviers Attorneys

Counsel for the respondent:	Mr Luyt
Instructed by:	The Director of Public Prosecutions
Judgment handed down on:	21 February 2020