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

CASE NO: 12428/2016

In the matter between:

BONGINKOSI GIFT KHANYILE **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

CHILI J:

[1] This is an appeal against the Learned Magistrate's refusal to grant the appellant bail pending his trial on charges which emanated from a campaign by the students at various institutions of learning [hereinafter referred to as "the Fees Must Fall campaign"].

[2] In his bail application before the Learned Magistrate in Durban on the 5th October 2016, the applicant presented his evidence by way of numerous affidavits. He subsequently filed a supplementary affidavit dated the 10th October 2016. The state on the other hand led evidence of 2 witnesses, the Investigating Officer W/O De Beer and Colonel Xulu. Colonel Xulu's testimony in the main, related to the contents of the video footage which was presented to court as evidence.

[3] The appellant's personal circumstances are as follows. He was born on the […] December 1989 at Entumeni, Eshowe. He is a final year student at Durban University of Technology (OUT), ML Sultan Campus in Durban. At the time of his arrest he resided at the University's commune situated at […] Mansfield Road in Durban. He is single and has 3 children aged 4, 3 and 2 years respectively. He submitted in his affidavits that he is not a flight risk and in amplification stated that he does not own a passport or any travel document. He is a student [so he submitted] and he intends pursuing his studies. With regards to the charges he submitted that he intends pleading not guilty and added that he elects to exercise his right to remain silent. The appellant undertook not to interfere with state witnesses or evidence in the state's possession. In addition he stated that he has no knowledge of who the state witnesses are.

[4] The appellant submitted that his continued incarceration would cause him prejudice. He stated that it would prevent him from sitting for his final examinations which were otherwise scheduled to resume on the 31st October 2016. In the result, he would not be able to graduate. In his supplementary affidavit dated the 1oth October 2016 the appellant added that he was due to start in-service or practical training at Ethekwini Metropolitan Municipality on the 15th November 2016; an essential component of his academic qualification. He also dealt with the contents of the video footage in which he, by his own admission, made certain utterances. I return to this aspect later in the judgment. He re-iterated an undertaking he made in the initial affidavit, that he would not breach bail conditions if allowed out on bail.

[5] On the 17th October 2016 the appellant was denied bail and he subsequently brought another application on new facts. He again presented evidence in the form of an affidavit. In his affidavit on the new facts the appellant re-iterated that he is not a flight risk and further that he would abide whatever bail conditions the court may impose. He disputed having breached any bail conditions before and also dealt with a matter in respect of which he was released on warning in February of 2016 [the February matter]. I return to this aspect later in the judgment. The appellant was again denied bail and hence the present appeal.

CURRENT BAIL APPEAL

[6] S65 (4) of the Criminal Procedure Act 51 of 1977 [hereinafter "the Act"] 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. The appellant's appeal turns on the question whether the Learned Magistrate was wrong in concluding that the interest of justice do not permit his released from custody. When arriving at that conclusion the Learned Magistrate was guided by the provisions of s60 (4} of the Act. It is apposite to quote this section in its entirety:

> "S 60 (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 there is 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 1offence; or
>
> (b) where there is likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
>
> (c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
>
> (d) where there is the 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 disturb the public order or undermine the public peace or security; or [sic]"

[7] Implicit in the provisions of s60 (4) is the fact that the establishment of at least one of the grounds in para's (a) through to (e) justifies a conclusion that the interests of justice do not permit the accused person's release from custody. The Learned Magistrate dealt with each ground referred to in para's (a) through to (e) individually,

and in each case made a finding. In light of the view I take of this matter I do not consider it necessary to deal with all the grounds referred to in s60 (4). The question that requires determination is whether the Learned Magistrate was correct in concluding that the ground referred to in s60 (4)(d) of the Act, namely, a likelihood that the accused if he were released on bail would undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system, was established. Before arriving at that conclusion the Learned Magistrate observed that the appellant had had previous brushes with the law in the following respects. In 2010 he was charged with theft. The criminal proceedings were nevertheless diverted to a NICRO program. I pause to point out that a diversion occurs in instances where an accused person who has admitted guilt, is afforded the opportunity to maintain his/her clean criminal record.

[8] In February 2016 the appellant was charged with offences similar to the offences charged, resulting from the Fees Must Fall campaign. He was due to appear in court on the 1st November 2016. In respect of the February 2016 charges he was released on warning and the court imposed warning conditions which Ideal with shortly hereunder. The appellant also has a pending charge of trespassing alleged to have been committed on the 11th September 2016 in respect of which he was issued with a warning notice informing him of a charge preferred against him and the date on which he is to appear in court being the 1st November 2016. After having dealt with the appellant's previous brushes with the law, including an allegation relating to a charge emanating from the appellant's participation in a protest at Mangosuthu Technikon which resulted in his expulsion during the year 2011, the Learned Magistrate then concluded:

> "The applicant has no respect for the law, and to release the applicant on bail under these circumstances would, to my mind, not be in the interests of justice. It is likely to seriously undermine the criminal justice system, including the bail system itself. I have no doubt that it would seriously undermine and erode the confidence of the right thin king members of the society and our criminal justice system if the applicant were to be released on bail."

[9] 860 (8) of the Act provides:

"In considering whether the ground in subsection (4)(d) has been established, the court may, where applicable, take into account the following factors, namely -

(a) ...

(b) ...

(c) the previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any conditions: or

(d) any other factors which in the opinion of the court should be taken into account."

When the applicant was released on warning in respect of offences allegedly committed in February of 2016, the court ceased with that matter imposed warning conditions which were paraphrased in the following terms:

- "Not allowed to gather (unlawfully)
- Refrain from intimidating: inciting any person to participate in any unlawful gathering
- Not to intimidate any member of staff or Security at the Uni (sic)
- Not (sic) obstruct any Police or Security personnel in the performance of their duties."

[10] Mr. Ngcukaitobi, the appellant's legal representative, submitted that it was procedurally irregular for the Learned Magistrate to conclude that the appellant had breached the warning conditions without having held an inquiry in terms of s66 of the Act. Firstly, the appellant was not out on bail in the February 2016 matter. He had been released on warning in terms of s72 (1) (a) of the Act. S66 deals with an inquiry into an accused person's failure to adhere to bail conditions. An inquiry into an accused person's failure to adhere to conditions imposed in accordance with the provisions of s72 (1) (a) of the Act is dealt with in terms of s72 (4) read with 72 (2) (a) of the Act. Secondly, the Learned Magistrate was not dealing with an inquiry into the appellant's failure to adhere to bail conditions. She was dealing with a bail application and all that she had to establish was whether it was likely in light of the appellant's

prior conduct that he (the appellant) would, if allowed on bail, breach the bail conditions. There therefore was no obligation on the Learned Magistrate to deal with an inquiry into the appellant's failure to adhere either to bail or warning conditions.

[11] Mr. Ngcukaitobi further submitted that before concluding that the appellant breached warning conditions, the Learned Magistrate ought to have made a finding on whether or not the gathering the appellant participated in was unlawful. He referred the court to the unreported judgment of S *v Bophela* decided by the full bench of the Eastern Cape division on the 1ih November 2016 which he (Mr. Ngcukaitobi) did not make available to the court. It is worth mentioning that all attempts made by a researcher of this court to locate that decision were unsuccessful. I therefore do not consider it necessary to deal with that judgment. I do not agree with Mr. Ngcukaitobi's submission relating to substantive irregularity. A court hearing a bail application is not a trial court. Bail proceedings proceed on the basis of allegations. Even an accused person is arrested on the basis of allegations. In my view it suffices if allegations presented before the court hearing the bail application are such that the court is placed in a position where it is able to conclude, based on the said allegations, that a *prima facie* case has been established. If the Learned Magistrate were to decide on the unlawfulness or otherwise of the gathering the appellant was alleged to have participated in, she would have had to hear the evidence of witnesses regarding the alleged demonstration, including the appellant's, if necessary. That is the duty of the trial court, not a court hearing a bail application. It was W/O De Beer's evidence, which it must be said was not disputed at the bail hearing, that the gathering the appellant participated in was unlawful.

[12] I now proceed to deal with warning conditions. The appellant is facing charges *inter alia,* of convening or attending an illegal gathering or demonstration; incitement to commit public violence; public violence and assault. It is not disputed that the appellant participated in the Fees Must Fall campaign from which allegations in the charges leveled against him flow. In a supplementary affidavit dated the 1oth October 2016, the appellant when dealing with the contents of the video footage concedes having made utterances which he describes as 'strong views expressed in the heat of the moment'. He proceeds to state that he no longer holds the views expressed in the video footage and thereafter makes the following comment:

> "In hindsight I erred in expressing such strong views. I would like to state that I have never acted in accordance with those views".

In the affidavit presented to court in support of bail application on new facts the applicant states:

> "I have had a chance to reflect on my actions and I strongly believe that violence is not the solution to address one's concerns and grievances".

The above facts are in my view sufficient to conclude that the appellant participated in an unlawful gathering in direct breach of the warning conditions. Mr. Ngcukaitobi submitted that the words "moer them" which were possibly uttered by "someone" in the crowd, directed at the police cannot be attributed to the appellant. He further submitted that there is no evidence that the appellant threw stones at the police. It is important to note that the appellant conceded in his affidavits having uttered "certain words" and also having participated in a violent protest. I am therefore satisfied that the Learned Magistrate was correct in concluding that the appellant breached the warning conditions imposed in the February matter.

[13] Mr. Ngcukaitobi submitted that the Learned Magistrate was wrong in concluding that the appellant failed in establishing new facts that warrant his release from custody. That submission is partially correct. In her first judgment the Learned Magistrate observed that the investigation was not complete and thus concluded that a likelihood existed that the appellant would interfere with state witnesses. It was common course at a subsequent bail application brought on new facts that the investigation was complete. That fact was new and in my view the Learned Magistrate erred in concluding that it was not. The question though is whether that new fact has any bearing on the question whether the interests of justice demand that the appellant be released from custody. The one damning factor staring at the appellant's face is breach of the warning conditions imposed by the court in the February matter. A flagrant disregard of a court order borders on contempt and is sanctionable. If it is condoned, law abiding citizens are likely to lose confidence in our justice system. If the appellant only participated in the demonstration merely by

his presence, that would have been a different story altogether. Instead, he played a very vital role. He was elevated above the crowds by his supporters, making utterances which by his own admission, triggered violent behavior amongst the crowds, including hurling stones at the police; in blatant disregard of a direct order barring him from participating in an unlawful gathering. The manner in which the appellant conducted himself begs the question "if the appellant breached the warning conditions imposed by the court, what would prevent him from breaching the bail conditions?". The answer to that question should in my view be: "nothing".

[14] It is worthy to be noted that the appellant did not deal with an allegation that he breached the warning conditions, at all, in the affidavit presented at the initial bail application. He only dealt with it at the bail proceedings on new facts and at best, merely gave an undertaking that he would not breach bail conditions. He further requested the court to take into account the fact that he has never breached bail conditions before. He then cleared the issue frowned upon by the Learned Magistrate relating to his failure to attend court in the February matter, stating that it had been settled and further, that the warrant of arrest authorized in respect of that matter has since been cancelled. That inquiry related to the appellant's failure to attend court in February matter, not the breach of warning conditions imposed by the court.

[15] I took note of Mr. Ngcukaitobi's concern that of all the students who were arrested following on their participation in the Fees Must Fall campaigns, the appellant is the only student who remains in custody. Unfortunately I am not privy to the circumstances that prevailed in bail proceedings related to other students who were involved in the Fees Must Fall campaigns. I am therefore unable to comment on the circumstances leading to their release from custody.

[16] Mr. Ngcukaitobi requested the court to comment on the Learned Magistrate's conduct during the bail proceedings. Ido not think it would be appropriate of me to do so given the fact that the Learned Magistrate was not afforded the opportunity to respond to the issues raised by Mr. Ngcukaitobi.

[17] To conclude I am not persuaded that the Learned Magistrate was wrong in

denying the appellant bail and for that reason I make the following order.

ORDER.

1. The appeal is dismissed.

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CHILI. J

Appearances

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Date of hearing:	20 December 2016
Date of judgement:	22 December 2016