

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A75/2014

In the appeal between:-

DAVID MOATLHODI MOANAKWENA

Appellant

and

THE STATE

Respondent

CORAM: DAFFUE, J

JUDGMENT BY: DAFFUE, J

HEARD ON: 23 APRIL 2014

DELIVERED ON: 2 MAY 2014

INTRODUCTION

[1] Appellant is a [.....] year old warrant officer in the employ of the South African Police Service, deployed at the Hawks' headquarters. Previously he was a member of the Organised Crime Unit tasked to investigate truck heists.

- [2] The count against him – cited as accused 3 - is one of robbery with aggravating circumstances in that on or about 11 October 2013 he and two other co-accused – accused 1 and 2 - were involved in a truck heist in the district of Winburg. *Ex facie* the charge sheet forming part of the record a fourth accused has been arrested on 3 February 2014 in respect of the count and as anticipated during appellant's bail hearing the charge against accused 1 has been withdrawn on 29 January 2014.
- [3] The bail applications of accused 1 and 2, made prior to appellant's arrest, were unsuccessful and are immaterial for purposes of this appeal. On 20 January 2014 appellant applied for bail in the magistrate's court, Winburg. The bail hearing started on that day and continued on 27 January 2014 when the application was dismissed.
- [4] Appellant appealed the judgment of the court *a quo* and on 7 April 2014 Naidoo J *inter alia* removed the bail appeal from the roll and referred the matter back to the court *a quo* for the magistrate's reasons. This has been supplied in the meantime and the bail appeal was enrolled for argument on Wednesday, 23 April 2014.

THE ISSUES

- [5] The grounds of appeal can be summarised as follows, i.e. that the court *a quo* erred
- 5.1 in finding that the State has a strong case against the appellant;
 - 5.2 that appellant has not shown exceptional circumstances permitting his release on bail.

THE REASONS OF THE COURT A QUO

- [6] The court *a quo* did not provide full reasons for judgment when the bail application was dismissed, apparently due to the insufficiency of available court time. The learned magistrate merely indicated that she was satisfied that the State had a *prima facie* case against accused number 3 (the appellant), that the case against him was indeed strong and furthermore, that he failed to prove that he was entitled to be released on bail. It is common cause that the offence with which the appellant is charged, is a schedule 6 offence and that he carried the onus to prove exceptional circumstances which in the interest of justice permit his release on bail.
- [7] In her reasons the learned magistrate dealt fully with appellant's personal circumstances as placed on record. It is also common cause that appellant has been suspended without pay by his employer based on the criminal case against him. Pertaining to the merits of the matter the court accepted the evidence that

appellant is linked with the crime based on cellphone evidence. The court *a quo* found that appellant's evidence was highly improbable, in particular his version as to his whereabouts during the relevant time especially when considered with the evidence of the investigating officer, warrant officer Basson. In conclusion the learned magistrate found that the offence is of a very serious nature, that the evidence against the appellant is strong, that he has already been suspended without pay and consequently he failed to prove that he was entitled to be released on bail.

LEGAL PRINCIPLES

- [8] Section 60(11)(a) of the Criminal Procedure Act, 51 of 1977, ("the CPA") stipulates, pertaining to schedule 6 offences, that

"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 interest of justice permit his or her release;" (emphasis added.)

- [9] The functions and powers of a court of appeal hearing a bail appeal is similar to those in an appeal against conviction and sentence. Section 65(4) of the CPA

stipulates that the court of appeal shall not set aside the court *a quo*'s decision unless such court is satisfied that the decision was wrong. Therefore, in the case of doubt, the court of appeal should not interfere. Hefer J (as he then was) considered the issue as follows in **S v Barber** 1979 (4) SA 218 (D) at 220E – H:

“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.”

Binns-Ward AJ (as he then was) stated in **S v Porthen and Others** 2004 (2) SACR 242 (C) at para [17], after discussing the aforesaid dictum of Hefer J, that it remains necessary:

“to be mindful that a bail appeal, including one affected by the provisions of section 60(11)(a), goes to the question of deprivation of personal liberty. In my view, that consideration is a further factor confirming that 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’.”

The court of appeal shall consider the issue of bail afresh where the court *a quo* misdirected itself materially on the facts or legal principles. See **S v**

Mpulampula 2007 (2) SACR 133 (E) at 136e and **S v Jacobs** 2011 (1) SACR 490 (ECP) at para [18]. See also Van der Berg, **Bail, A Practitioner's Guide**, 3rd ed p. 232-4.

[10] It is important to note that for purposes of section 60(11)(a) an accused shall be detained in custody until dealt with in accordance with the law, unless he/she after having been given a reasonable opportunity to do so, satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release. The standard of proof is on a balance of probabilities. See Van der Berg, *loc cit* p. 97 and **S v Dlamini; S v Dladla; S v Joubert; S v Schietekat** 1999 (2) SACR 51 (CC) at paras [61], [78] and [79].

[11] Once exceptional circumstances have been established by a bail applicant, the enquiry must focus on the balance between the interest of the State as set out in section 60(4) – 60(8)A on the one hand and the appellant's interest in his personal freedom as set out in section 60(9) on the other. See Du Toit *et al* **Commentary on the Criminal Procedure Act**, p 9-48B. The following dictum of Vivier ADCJ in **S v Botha en 'n Ander** 2002(1) SACR 222 (SCA) para [19] is apposite:

“Gewoonlik, maar nie noodwendig nie, sal dit (“with reference to ‘exceptional circumstances’”) omstandighede

wees wat daarop gemik is om die onwaarskynlikheid van die gebeure genoem in art 60(4)(a) - (e) te bewys. Met betrekking tot daardie gebeure, of andersins, moet die aangevoerde omstandighede, in die konteks van die besondere saak, van so 'n aard wees dat dit as buitengewoon aangemerkt kan word... Dit is vir die hof om in elke saak in die besondere omstandighede van daardie saak 'n waarde-oordeel te vel of die bewese omstandighede van so 'n aard is dat dit as buitengewoon aangemerkt kan word.”

See also **S v Scott-Crossley** 2007 (2) SACR 470 (SCA) at paras [7] and [12].

[12] Section 60(4)(a) – (e) concern the likelihood that the accused, if released, (i) will endanger the safety of the public or a particular person, (ii) will attempt to evade his trial, (iii) will attempt to influence or intimidate witnesses or to conceal or destroy evidence, (iv) will undermine the proper functioning of the criminal justice system or (v) will disturb the public order or undermine public peace or security.

[13] “Exceptional circumstances” as a concept has not been defined thus far. The Constitutional Court declined to define it in **Dlamini** *loc cit*, but made it clear in paragraph [76] that even so-called “ordinary circumstances” may serve to establish “exceptional circumstances”. See also **S v Rudolph** 2010 (1) SACR 262 (SCA) at 266 h-i and **Mooi v S** (162/12) [2012]

ZASCA 79 (30 May 2012 at paras [11] – [12]. There is no onus on the State to disprove exceptional circumstances. The accused must on a balance of probabilities prove that the State’s case was non-existent or subject to serious doubt. See **S v Mathebula** 2010 (1) SACR 55 (SCA) at paras [11] – [13]. In **S v Petersen** 2008 (2) SACR 355 (C) at para [55] the Full Bench concluded as follows on the meaning and interpretation of exceptional circumstances:

“Generally speaking 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different... This may, of course, mean different things to different people (exceptional circumstances), so that allowance should be made for a certain measure of flexibility in the judicial approach to the question... In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all the applicable legal criteria.”

- [14] An accused claiming innocence and that he will ultimately be acquitted, must prove his future acquittal on a balance of probabilities. See **S v Mathebula** *supra*. Van der Berg *loc cit* at para 7.16.5 regards this as an “outrageous *onus*”. Where an accused, confronted with allegations that he has committed a schedule 6 offence, does not make out a *prima facie* case of the prosecution failing, there is no duty on the prosecution to present evidence in rebuttal. See **S v**

Mathebula, *supra*, para [12] and S v Viljoen, 2002 (2) SACR 550 (SCA) at para [15].

[15] Personal circumstances which are really “commonplace” cannot constitute exceptional circumstances for purposes of section 60(11)(a). See *Du Toit et al*, *loc cit* at 9-62 and S v Scott-Crossley, *loc cit*, at para [12].

[16] The fact that a bail applicant will contest the admissibility of a confession on the ground that it was induced by a police assault and which may to an extent be thought to take away from the strength of the State case, was not considered as an exceptional circumstance in S v Mpulampula, *loc cit*, at 136b.

[17] It is not the function of the court considering bail to make a provisional finding of guilt, but to assess the *prima facie* strength of the State case. See S v Van Wyk *loc cit* at para [6].

EVALUATION OF THE EVIDENCE, THE JUDGMENT OF THE COURT A QUO AND COUNSEL’S SUBMISSIONS

[18] I do not intend to canvass all arguments raised by the parties during oral argument, save to mention that I have considered these, as well as the authorities relied upon, together with the evidence placed before the

court *a quo* and the reasons advanced by the magistrate.

- [19] Mr Monareng, counsel for appellant, relied on several authorities in support of his argument that the appeal should succeed. He did not provide me with copies of the judgments relied upon, but I managed to obtain copies, save for the judgment of **Amrose Mathebula v The State** which was heard in the Gauteng North High Court in which judgment the judgment of Van Dijkhorst J in **S v Vermaas** 1996 (1) SACR 528 (T) was cited with approval. I considered the **Vermaas** judgment. Far from being in support of the arguments raised by Mr Monareng, the judgment of Van Dijkhorst J tends to support the State's submission that appellant failed to prove exceptional circumstances. Mr Monareng also relied on the judgment of Mhlambi AJ in **Ramaisa v S** (A24/2012) [2012] ZAFSHC 88 (3 May 2012). This case involved a school teacher who was charged with the murder of his wife and whose bail application was dismissed in the magistrate's court. His bail appeal was successful. Nothing in that judgment supports any of the arguments raised on behalf of the appellant *in casu*. Section 60(11) did not apply in that case. Reliance was also placed on the judgment of Lekale J in **Molefe and Others v S** (A269/2013) [2014] ZAFSHC 1 (9 January 2014). The learned judge criticised the manner in which the accused was not confronted during cross-

examination with the statement of a section 204 witness, the photo identification parade and cellphone records. *In casu* the investigating officer followed up appellant's alibi after appellant had testified and prior to his own testimony. The evidence tendered was obtained after appellant had been cross-examined, but appellant was entitled to ask for re-opening of his case in order to deal with such evidence, but refrained. Nothing in the judgment of Lekale J tends to support the appellant's case *in casu*. I was also referred to the judgment of **Mooi v S** quoted *supra*. In that case the investigating officer stated during the bail hearing that the State had a strong case against the appellant, but as the SCA indicated, his evidence did not reveal this. The State did not manage, notwithstanding a trial running for 2½ years, to complete the evidence of their alleged strong case in the trial court, whilst the source of all the evidence against the appellant became known on the day of the incident and it could not be difficult to gather these then.

- [20] Appellant's version was that his friend Chris, accused 2, came to him after work on 10 October 2013 to borrow money for fuel. In the process and as he was seated in accused 2's motor vehicle, his cellphone must have been left behind in accused 2's vehicle when he alighted from the vehicle. Accused 2 brought this cellphone back to him early the following day. It is this

cellphone, according the evidence of the investigating officer, which picked up signals from the cellphone tower in the Ventersburg area, close to Winburg, during the night of 10 and 11 October 2013 when the truck heist occurred. Appellant resides in Crystal Park, Benoni, Gauteng, about 300 km from the Ventersburg/Winburg's districts. He also failed to turn up for work on 11 October, notwithstanding the fact that he, on his version, informed his commander telephonically that he would be late for work. Instead, he used the time to pay certain household accounts. His version is not only farfetched, but also vague and evasive in many instances. There is absolutely no reason why appellant would have got into accused 2's motor vehicle if the sole purpose was to merely hand over money to him.

[21] The specific cellphone of appellant – he had four at the time – allegedly fell in the water at the end of 2013 and appellant claimed to be unaware of the whereabouts of the relevant simcard. During his testimony he admitted that he used this cellphone with number 0..... until it was damaged. This is in direct conflict with his denial to the Police immediately after his arrest to which I shall refer again *infra*.

[22] According to accused 2 who was called to testify on behalf of appellant nobody phoned from appellant's phone whilst the phone was in his possession, but when

confronted in cross-examination, he tried to indicate that there might have been times when he left his vehicle and the cellphone alone and that somebody could have used the cellphone and put it back in the vehicle. This is improbable and farfetched. Initially he testified that when he found a cellphone in his vehicle, he phoned this phone from his own cellphone to establish whose it was, only to find out that the phone belonged to appellant. Later in his testimony he recognised the fallacy of his version and changed it by saying that he used the cellphone to phone his own phone and then established that it belonged to appellant. He admitted telephonic contact with accused 1 whom he was to meet in Botshabelo during the relevant night. However he never got there.

- [23] Warrant Officer Basson, the investigating officer, testified on behalf of the State. According to cellphone records that he obtained, the cellphones of accused 2 and appellant registered the same cellphone towers during the evening and early morning of 10 and 11 October 2013 indicating that these cellphones were moving in the direction, along the N1, to Ventersburg in the Free State. Up and until that time the cellphones did not communicate with each other, but during the early hours of 11 October there was contact between the cellphones whilst both cellphones picked up the Ventersburg cellphone tower.

[24] The investigating officer also had contact with captain Maponya, the commander of appellant, who informed him that she had a meeting with appellant and warrant officer Molefe during the morning of 10 October as they were supposed to make contact with a police informer that evening, but that this meeting never took place. According to captain Maponya she could not get into contact with appellant during the day of 11 October 2013 as all his cellphones were switched off. It should be mentioned that appellant testified that he used four cellphones with four different numbers at the time. She only got contact with him at about 8 o' clock that evening for the first time. This is in direct conflict with appellant's version. According to her appellant mentioned that he had slept the whole day and that he had put his cellphones off. This aspect was never put in cross-examination to appellant as the investigating officer followed up appellant's alibi after he had testified and informed the court *a quo* accordingly. However appellant was represented by a senior attorney who could and should have dealt with this issue in detail in cross-examination of the investigating officer and if necessary, to ask for the re-opening of his client's case, which he failed to do. An aspect which reflects adversely on appellant's version is that he denied during an interview, just after his arrest and when he had been informed that he was linked to the crime through cellphone records, that he used a cellphone with number 0..... According to the investigating officer

this phone was not registered in appellant's name, but that false information was provided to register it in terms of RICA. In court appellant admitted his ownership and usage of the particular phone, but in order to exculpate him a version was placed before the court that is really improbable and farfetched.

[25] Samuel Jantjie, accused 1, and accused 2 unsuccessfully applied for bail and their bail applications were finalised and dismissed as mentioned *supra*. It appears from the evidence that accused 1 made a statement incriminating accused 2 and 3. The case against accused 1 has been withdrawn on 29 January 2014, two days after the bail application of appellant was dismissed. This is apparent from the charge sheet forming part of the bail appeal record. Consequently and as anticipated during the evidence of the investigating officer, he will be used as a section 204 witness in the forthcoming trial.

[26] Bail proceedings are not to be viewed as a full dress rehearsal for the criminal trial and during the bail application the duty of the court is merely to assess the *prima facie* strength of the State's case against the applicant as opposed to making a provisional finding on the guilt or otherwise of the accused. The making of credibility findings of witnesses on the merits of the case against a bail applicant is left to the trial court, which will ultimately be better placed to assess the evidence in its

totality. See **S v Van Wyk** 2005 (1) SACR 41 (SCA) at par [6].

[27] The learned magistrate did not deal with the requirements set out in section 60(4) of the CPA in as many words, but she was in all probabilities well aware that the appellant, being a senior member of the Hawks and the South African Police Service and a former member of the anti-truck heist unit thereof, may well use his contacts, once released on bail, in an attempt to influence or intimidate witnesses or to conceal or destroy evidence and as a consequence or otherwise, also undermine or jeopardise the objectives of the proper functioning of the criminal justice system. The appellant has been suspended without pay and at this stage his prospects within the South African Police Service must be bleak to say the least. Therefore, bearing in mind the case against him and the uncertainty as to whether he would be returning to his employment, these circumstances are such that there is indeed a likelihood that he might attempt to evade his trial, notwithstanding strong family ties. Appellant's *ipse dixit* in this regard is insufficient. He did not prove that it is improbable that any of the events set out in section 60(4) will not materialise if he is released on bail.

[28] It is on record that there are other suspects – still at large - involved in the particular crime and that, at least at the stage when the bail hearing took place, the police

investigation had not been finalised. Although this was not expressly stated by the learned magistrate as a factor, she indicated in paragraph 7 of her reasons that she was convinced as a result of the factors mentioned as well as other factors that appellant had not shown on a balance of probabilities that he was entitled to be released on bail.

- [29] The fact that appellant is a member of the South African Police Service cannot be seen as an exceptional circumstance. In my view, this is an aspect that counts against him *in casu*, especially insofar as he, who until recently was supposed to take on the fight against criminals involved in truck heists, is now, based on *prima facie* evidence, in direct conflict with law and order which the South African Police Service so dearly want to protect. I have carefully considered the submissions, especially those made on behalf of appellant, but found them to be without merit. I am not convinced that the court *a quo* exercised her discretion wrongly or that she committed any material misdirections on the facts or legal principles. On the contrary, I am satisfied that she was correct in dismissing the bail application. Consequently the appeal cannot succeed.

ORDER

[30] The following order is issued:

1. Appellant's appeal against the dismissal of his bail application is dismissed.

J. P. DAFFUE, J

On behalf of appellant: Adv Monareng
Instructed by:
Matlho Attorneys
BLOEMFONTEIN

On behalf of respondent: Adv B Claasen
Instructed by:
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