

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case No: A73/2013

In the matter between:

DATE: 15/5/2013

SUREIA MOMADE SULEMANE FAQUIR

Appellant

and

THE STATE

Respondent

JUDGEMENT

MAKHUBELE AJ

INTRODUCTION

[1] This is an appeal in terms of section 65(4) of the Criminal Procedure Act, 51 of 1977 (the CPA) against the refusal of bail by the Magistrate Barberton.

[2] The matter came before me on 14 February 2013 and after perusing documents filed and hearing counsel for both parties, I ordered the release of appellant on bail under certain conditions. I was on a three (3) weeks

acting appointment stint at the time and due to heavy court roll, I was not able to give a written judgement. I undertook to give reasons at a later stage.

Here are the reasons:

[3] The circumstances under which the alleged offences were committed, nature of charges preferred against the accused as well the bail proceedings before the Magistrate appear from the transcript of the record of proceedings placed before me and marked Volumes 1 and 2¹. It is not the best transcription, however, I was able to get the gist of the arguments presented before the Magistrate.

[4] Counsel for the appellant filed heads of argument. I am indebted to him for the submissions as well as legal precedents referred to therein. The State did not file heads of argument. The explanation by its counsel was that he did not receive a directive to file heads of argument as is often the case before (or after) an appeal is enrolled. Counsel who argued the matter on behalf of the State is not the one who handled the bail application. He appeared to be not familiar with the intricate facts of the case. This of course would not have happened if the State had filed heads of argument to assist the court, not only with the reasons for opposing the appeal, but why bail was opposed in the first place.

¹ Altogether they run to 193 pages.

[5] Appellant and her co-accused, one Vincent Khumalo (hereinafter referred to as Accused 1) appeared before Magistrate P Mlotshwa in the Magistrate's Court for the District of Barberton on charges of contravening Section 13 (f) of the Drugs and Drug Trafficking Act 140 of 1992 (the Act) ,
- dealing in dangerous dependence producing substance.

[6] The accused were travelling to South Africa from Mozambique by motor vehicle on 11 September 2013. They were arrested at the Lebombo border post. It is alleged that approximately 7,810 kilograms of a substance that was provisionally identified as heroin was found in their motor vehicle after what appears to have been a routine search. It is also alleged that they did not have any permit or authority to possess the substance in terms of the Act.

[6] The value of the drugs was estimated to be R2 300 000, 00. Schedule 5 of the CPA includes amongst other offences *“any offence referred to in section 13(f) of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992), if it is alleged that-*

(a) the value of the dependence-producing substance in question is more than R50 000,00; or

(b) the value of the dependence-producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate

(c)”

[7] The bail application was adjudicated (correctly so) in terms of Section 60(11) (b) of the CPA which reads as follows:

“Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in Schedule 5, but not in Schedule 6, the court shall order that the accused be kept 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 the interests of justice permit his or her release.”

[7.1] The appellant therefore bore the onus to prove, on a preponderance of probabilities that the interests of justice favour his release on bail.

[8] The powers of the appeal court to interfere with the decision of the Magistrate are prescribed by section 65(4) of the CPA which 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.”

[8.1] I am required to approach this appeal on the basis of the assumption that the decision of the Magistrate was correct, and not to interfere with it unless I am satisfied that it was wrong².

² See: *Sv Mbele and Another 1996(1) SACR 212 (W)*

GROUND S OF APPEAL

[9] According to the Notice dated 17 January 2013, the appeal is premised on the allegations that the Magistrate erred in one or more of the following grounds:

- “(i) *In not judging the application on the totality of the evidence.*
- (ii) *Did not consider the fact that the investigation officer’s evidence was unreliable and based on speculation.*
- (iii) *Did not consider the undisputed evidence that the appellant is not a flight risk, nor a danger to the public, legal or bail system nor is there any likelihood that she will interfere with the State’s case or State’s witnesses.*
- (iv) *In not finding on the totality of the evidence that the Appellant proved that the interest of justice permits her release.*
- (v) *By not considering the fact that there is no likelihood that:*
 - *Appellant will flee*
 - *Appellant will interfere with investigations, witnesses, bail system. Legal system or criminal system.*
 - *Appellant will commit further crimes*
 - *Appellant will endanger he public order and safety*
- (vi) *Appellant has a family to maintain and several financial responsibilities*
- (vii) *By not evaluating the evidence but only summarized it without making any factual finding.*

(viii) *By finding :*

“ that there is no evidence indicated regarding those grounds being affected”

But still refused bail.

(ix) *That the Learned Magistrate’s application of the interest of justice principles is bad in law.*

(x) *Erred in rejecting the principles laid down in **S V Acheson 1991 (2) SA 805 (Nm)***

(xi) *By not granting bail to the Appellant.*

THE EVIDENCE OF THE APPELLANT

[10] Appellant testified and placed the following facts before the Magistrate:

[10.1] She is a Mozambican national and was born on 10 April 1974.

[10.2] She is a widow with one child, a girl, fourteen (14) years old. They reside in Maputo in a rented flat with her younger brother. She does not have property in Mozambique, but owns a three vacant “stand” which she had paid off. Other family members, including her mother, uncles and siblings reside elsewhere in Mozambique.

[10.3] The value of the stands was not mentioned. Her furniture is valued at about R42 000,00. She also owns the vehicle in which they were travelling.

[10.4] She earns her living by selling clothing and “car parts”. Her average monthly income is about 30 000 Meticas (Mozambican currency). This was estimated to be about R8 500,00.

[10.5] She used to buy the clothing she sells in Brazil and South Africa. She intended to travel to China too, but could not because she failed to “make a loan at the bank”.

[10.6] Accused 1 is her friend. She has met him whilst he was still married to his ex-wife known as Anna Maria.

[10.7] On the day of their arrest, they left Mozambique together. They met at Shoprite. Accused 1 took her vehicle and left her to “go and pick up his bags³). He came back after a short while, picked her up and they left for South Africa.

[10.8] She was prepared to stay in South Africa if necessary until finalization of her criminal trial. In this regard, she indicated that she had a friend, Lucia Khumalo who was prepared to take her in.

[10.9] She saw the alleged drugs for the first time when they were arrested at the border post. The drugs were found “under the chair or under the foot of the driver’s side and at the back under the driver’s seat under the carpet”⁴. When she gave accused 1 the vehicles to fetch his bags there were no drugs in it and she did not see them before their arrest. She intended to plead not guilty to the charges.

³ The record is indistinct, however, it is common cause that accused 1 at some point took appellant’s vehicle and went to fetch his bags somewhere shortly before they left).

⁴ Vol. 1 p 67, line 20

[10.11] The reason for the trip was to buy “parts in Johannesburg”. She asked him to drive the vehicle a day before they travelled because she *“cannot drive on those roads or that area”*.⁵

[10.12] She does not know who the state witnesses are. She will not interfere with them if she were released on bail.

{10.13] She had no objection in surrendering her passport.

[10.14] She is responsible for her daughter’s school fees.

[10.15] She has no record of previous convictions and there are no criminal cases pending in any court against her.

[11] Under cross examination, she confirmed that her friend Lucia stays in Honeydew, Johannesburg. She denied that she had eyesight problems or that this was the reason she requested accused 1 to drive the vehicle. She was going to leave accused 1 in Johannesburg and return to Mozambique with Lucia.

[11.1] She confirmed that no other person, except for accuse 1 drove the vehicle before they left Maputo.

[11.2] The prosecutor asked her to confirm her trips by plane undertaken in 2012. She then mentioned Zanzibar, Brazil and South Africa. He then said to her *“Ma’m i put to you that the reason why you visit these*

⁵ Vol.1, p69, line 1.

countries is because you are what is known as a drug mule it is your profession to smuggle drugs to other countries”⁶. She denied this.

[11.3] It was also put to her that the police would have difficulties to trace her should she be granted bail and flee South Africa because there was no extradition treaty between South Africa and Mozambique. She maintained that she had close links with South Africa because she also consults medical specialists here and *“we depend a lot on South Africa”*.

[11.4] She denied having knowledge of any drugs found where she was seating in the vehicle.

[11.5] She has a relative in Johannesburg, other than her friend, Lucia.

[11.6] She admitted, after being asked to comment, that Maputo is used as a drug trafficking route between South Africa and Brazil. She knows this because she watches Television. She denied having knowledge of the ingredients of drugs or that the leaves for making drugs come from Brazil.

[11.7] When told that the only reason she would stay in South Africa was the criminal trial, appellant answered that *“I have thought of it because my daughter is still a South African citizen in Mozambique so i have thought of maybe getting her to come and stay on this side”⁷*.

[11.8] She confirmed that she often comes to South Africa with her daughter during holidays and the longest she had stayed was two weeks. They stay at Lucia’s house.

⁶ Vol.1, p79, line25 – p80, 1-2.

⁷ Vol.1, p85, line 10.

12. **Lucia Khumalo** testified on behalf of appellant. Her testimony was that:

[12.1] She stays in Honeydew, Johannesburg with her children. She owns the house. Appellant is her friend and they have known each other for about twelve years.

[12.2] Appellant stays with her whenever she comes to Johannesburg. She fetches her at Park Station.

[12.3] She is prepared to take appellant in for the duration of her trial in Barberton. She stays close to Honeydew police station and she is prepared to assist appellant with reporting there should she be raised on bail under such conditions.

13. Under cross examination, she indicated that she came to South Africa in 1987. She has family members in Maputo and she travels there sometimes. She and appellant met in Maputo.

[13.1] She has a trucking business.

[13.2] Accused 1 was her husband and they still have contact with each other.

[13.3] She confirmed that she was prepared to take appellant in, even if the trial takes two or more years to be finalized. She was also prepared to provide for appellant and her child, to the best of her ability.

[13.4] She was prepared to take the police to her house to confirm the address.

[14] It also emerged that she earns a net income of about R20 00,00 from her business.

EVIDENCE FOR THE STATE

[15] The investigator officer, **Mduduzi Mtubatsi** testified and confirmed the arrest and the charges as indicated above.

[16] When asked what steps he took to verify the correctness of the address given by Lucia Khumalo, Mtubatsi testified that he telephoned the i DPCI office and spoke to a Mr Ndlela. Mr Mr Ndlela went to Lucia's address and gave him feedback that *“ there is a guy who was arrested who was staying at that address and that address drugs were found. What led to the arrest of that guy is because of a lady who has now been arrested in Welkom”*

[17] According to Mr Ndlela, the woman arrested in Free State gave the residential address mentioned by Lucia. The drugs found there are known as TIK and weighed 26 Kilograms. Lucia's son was arrested.

[18] When asked why he chose Ndlela to verify the address, Mtubatsi indicated that the latter *"overheard that there is a case that I am dealing with of drugs and so he phoned me and these people who were arrested in that same field that I am dealing with. Actually, he wanted to come and interview one of the suspects in that case that I am dealing with to establish to whether there is no linkage of this case that i am dealing with, with that one for the people who were arrested in the very same address just to find a syndicate as to whether there is a linkage or what"*⁸

[18.1] He did not know if the interview took place.

[18.2] He is not part of the Free State case investigation team.

[18.3] He does know the status of the investigations in the
Honeydew and Free State cases.

[18.3] He does not know if there is any extradition treaty between South Africa and Mozambique. He is aware of a working agreement between the police.

[19] He obtained appellant's travel records from the Department of Home Affairs, but did not obtain accused 1's. He does not know if they ever

⁸ Vol.2,p105, line 3-15

travelled together in the same vehicle on the same dates or through the same border post.

[20] He testified further that the tests results for possible DNA and fingerprints on the drugs were still outstanding.

[21] He confirmed accused 1's written statement, in particular where he stated that the vehicle did not belong to him and that he was asked by appellant to drive it because she had an eyesight problem.

[22] He went on to testify that it is possible that if one of the accused evade trial, the remaining one would blame the absent co-accused for the crime.

[23] He concluded his testimony by requesting the court not to grant the appellant bail.

[23.1] He did not state the reasons why he opposed bail..

[24] Cross examination yielded the following:

[24.1] When asked why he objected to appellant being granted bail, Mtubatse testified that “ *Actually looking at the profile of the case that the accused person is facing the amount of drugs that was found and the fact that the accused is a person who is always visiting the other neighbouring*

countries she can be granted bail today and go for example go and stay in Zimbabwe who can trace this suspect that can happen and it is very difficult to an trace the accused person and there is no address of the accused in the Republic the old address may be still be in Mozambique. So those are the reasons why i said the accused should not be granted bail.”⁹

The last and fourth reason that he gave is that “ *the accused can be given a long term of imprisonment when coming to sentence looking at the profile of the case*”

[25] When asked why he did not object to the bail application of accused 1 who, save for citizenship of South Africa, faced the same obstacles (such as profile of case, long prison sentence, travelling between countries), Mtubatse indicated that all those do not “ *mean anything due to the fact that accused 1 is a South African citizen*”¹⁰

[26] Mtubatse admitted that accused 1 could evade trial too. However, according to him, he would be able to trace him at the given address.

[27] Mtubatse’s attention was directed to accused 1’s written statement where he indicated that he was born in Mozambique and his sisters still live

⁹ Vol. 2, p 118, line 20 to p119, line 1-10.

¹⁰ Vol.2, p120, line 8-12

there. It was also put to him that it would be easy for accused 1 to evade trial, leave South Africa and go to Mozambique and not return.

Another fact put to Mtubatse is that accused 1 was paying off property in Mozambique that was purchased in his sister's names.

Mtubatse refused to answer some of the questions put to him about the personal circumstances of accused 1 and on others he simply stated that *"it is for the first time to overhear (sic) about that in court today"*¹¹.

[28] On the issue of verification of the address provided by Lucia, Mtubatsi admitted that:

[28.1] The address did exist, it was not fake.

[28.2] There is no evidence that Lucia, as a matter of fact confirmed that she knows the woman that was allegedly arrested in the Free State or that the said woman was staying in her house. He maintained however that the *"guy confirmed that he knows the lady who is arrested in Welkom"*.¹²

The young man in question is Lucia's son. Mtubatsi did not know whether Lucia herself knew the said woman.

[29] Mtubatsi refused to accept a suggestion that there is no evidence that there was a link between the different cases, that is, the arrest

¹¹ Vol.2, p123, line 14-25.

¹² Vol.2, p 124 to 125.

of the woman in the Free State and the appellant. He could not provide a link except to state that both accused gave the same address of Lucia.

[30] He admitted that the evidence is equally strong against accused number 1 and the appellant and that the both of them could evade trial.

[31] Mtubatsi could not explain the working relationship between South African police and their Mozambican counterparts he testified about earlier.

[32] The state closed its case.

ACCUSED 1

[33] Accused 1 applied for and was released on bail of R10 000, 00. I need to sketch some relevant facts that were placed on record by accused 1 (in an affidavit form) that I consider relevant, and which in my view should have been taken into account by the Magistrate when assessing the bail application of the appellant.

[33.1] Accused 1 was also born in Mozambique. He came with his father to South Africa when he was still young. He has since acquired South

African citizenship, though he does not know how his father went about it. He also possesses a South African passport.

[33.2] He has no Mozambican travel documents. His siblings live in Mozambique and he travels there on a regular basis to see them. He cannot acquire property there because he is not a citizen, however, he is currently paying off a stand acquired in his sister's names.

[33.3] They were arrested as he returned from Mozambique to attend to the affairs of his deceased step mother and was on his way back with appellant.

[33.4] Appellant is the owner of the motor vehicle and he was the driver thereof from Maputo until their arrest.

[35] Other common cause issues that came out during appellant's evidence are:

[35.1] Accused 1 requested to use appellant's vehicle to fetch his bags shortly before they left Maputo. He went alone. They left for South Africa when he came back from this lone excursion.

[35.2] Appellant and accused 1 are not complete strangers. They are friends and have known each other through his wife. It is not clear whether the said wife is Lucia because appellant gave the name of the former wife as Anna Maria. Be that as it may be, appellant is friends with Lucia Khumalo, who is accused 1's current estranged wife. She (Lucia) helped to raise bail for accused 1 and was willing to accommodate the appellant in her house in Honeydew, Johannesburg until finalisation of the criminal trial.

[36] My observation from perusal of the record is that accused 1's bail application was dealt with differently compared to the hard stance taken by the prosecutor against the appellant. The prosecutor displayed a hostile attitude against appellant from the start of the cross examination. He labelled her "drug mule" simply on the basis that she had travelled to countries such as Brazil and had applied for a Visa to travel to China. Her explanation that she buys and sells women clothing was ridiculed and no attempt was made to investigate if it was correct. Emphasis was placed on the fact (not proven in any event) that there is no "extradition agreement between South Africa and Mozambique.

[37] I also find that Accused 1 was relieved of the onus placed on accused persons who seek bail in terms of section 60(11)(b) of the CPA. The prosecutor and ultimately the Magistrate appeared to be of the view that a flight risk can only be a non-South African citizen. In fact, Mtubatsi was bold enough to state, under cross examination that the other factors that

could have weighed against accused 1 were overlooked because he is a South African citizen.

[38] It is absurd to even think that the onus in section 60(11)(b) applies to non-citizens only, and that citizens can simply be granted bail without an attempt to enquire as to whether the interests of justice demand that they be released on bail.

[39] Another issue that arises out of this is whether co-accused should be treated differently simply because of their citizenship status.

Section 9(1) of the Constitution of the Republic of South Africa provides that “ *Everyone is equal before the law and has the right to equal protection and benefit of the law.*”

FINDINGS MADE BY THE MAGISTRATE AND REASONS FOR JUDGEMENT

[40] It is difficult to discern findings of facts and reasons for judgment because as counsel for the appellant submitted in his heads of argument, the Magistrate simply summarized the facts and shied away from making findings on those facts.

[41] After summarizing the evidence, the Magistrate stated that she “confirmed” *that appellant has no emotional family ties at the place of the trial she has no assets held by herself in South Africa she does have travelling documents she has access to other countries and in between South Africa and Mozambique there is no extradition treaty she is facing a long term of direct imprisonment should she be convicted* **therefore the grounds of Section 60(4) (B) is at stake. The Court will not comment regarding Section 60(4)(A)(B) and (D) as there is no evidence indicated regarding those grounds being affected.**¹³ (my emphasis)

[42] I do not understand why the Magistrate would refer to a restatement of facts that were placed on record by the appellant and the prosecutor as having been “confirmed” by her. The evidence of the investigating officer was not of assistance in material respects as it appears above. He was not clear about the existence of an extradition treaty between the two countries. This lack of a treaty was his view, and he did not take steps to verify. He testified about the existence of what he referred to as a working agreement, but he was not certain how it works.

[42.1] The fact that the appellant bore the onus to present facts that would establish that the interests of justice required her to be released on bail does not mean that the State had to sit back and hope that she was not

¹³ Volume 2, page 185, 8-17.

going to discharge her onus. In fact, as i have already indicated above, the stance of the State was that appellant was a drug mule who was going to evade trial simply because she was a foreigner.

[43] I am also not certain about what the Magistrate meant by “section Section 60(4)(B) being at stake and that there is no evidence that grounds in sections 60(A) (B) and (D) are affected. In the context of the issues before the Magistrate, at stake in my view means that appellant had to prove that she was not going to evade trial. However, this meaning i have just ascribed to “at stake” is contradicted by what the Magistrate said after holding that section 60(4)(b) is at stake., namely, her finding that there is no evidence that the grounds in sections 60(a)(b) and (d) are affected. This in my view means that appellant is not affected by those grounds.

[44] It is necessary to refer to relevant sub sections of Section 60(4) that are referred to in this part of the judgment in order to illustrate the contradiction.

Section 60(4) states that

“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)¹⁴ *“Where there is a likelihood that the accused, if he or she is 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; or*

(c) *.....*

(d) *Where there is a likelihood that the accused, if he or she is released on bail, will undermine or jeopardise the proper functioning of the criminal justice system, including the bail system”*

[45] If I follow the logic of the statement of the Magistrate (in p185, vol.2), it means that the appellant had to prove that she will not evade trial. However, the Magistrate went on to state that there is no evidence that Section 60(4)(a)(b) and (d) are affected. This means that there was no evidence that she will endanger the safety of persons or commit schedule 1 offence, she will evade trial or that her release would likely endanger the proper functioning of the criminal justice system.

[45.1] Unless there is a mistake in the inclusion of section 60(4)(b) in the categories where a finding that there is no evidence, it means that the Magistrate did not find evidence that appellant would evade trial.

[45.2] I am prepared to accept that this is not what the Magistrate intended to say because her statement was preceded by reference to factors

¹⁴ Although the transcribed record refers to Section 60(4)(A)(B) and (D), I am satisfied that it is section 60(4)(a)(b) and (d)... in small caps.

referred to in section 60(6) that should be taken into account to determine whether the ground in section 60(4)(b) (likelihood of evading trial) has been established. In this regard she found that indeed they were. I must mention that this finding was wrong because it is not based on cogent reasons.

[46] The attempt to weigh¹⁵ the interests of the appellant against the interests of justice in terms of section 60(9) was also not genuine because :

[46.1] It is common cause that the investigation was not complete. The laboratory still had to submit final results of the sample. The DNA results on the drugs were still outstanding.

[46.2] Although an impression was created that the matter was ready for trial, i was advised from the bar that it was not, three (3) months after the refusal of the bail (when the appeal was heard).

[46.3] It is not correct that there was no financial loss for the appellant. The evidence (not disputed) was that she is a business person who buys and sells clothes and vehicle parts.

[47] The only reason why bail was refused appears to be founded in the statement that “ *Should the Court grant, should the Court release the accused person **to stay in the house where people are being arrested for drugs***”

¹⁵ Vol 2, p185

while the accused is also facing a similar charge the Court is satisfied that the accused did not succeed in adducing evidence which satisfies the Court that the interest of justice permit her release therefore bail is refused you are in custody until the finalisation of the matter”¹⁶

[48] This statement was preceded by remarks in page 183, line 3 that:

“Upon the sudden new address given to the State the evidence that was not disputed by applicant through her attorney and further that the address of Lucia does exist and in that address the police arrested a man alleged to be a son of Lucia Khumalo for drugs 26 Kg of TIK were found in the house.....”.

[48.1] As I have already indicated above, it is not correct that the evidence of Mtubatsi was not rebutted. In fact, appellant’s representative managed to show that it was unreliable and should not be admitted.

[48.2] It may be so that hearsay evidence is admissible in bail proceedings, however, this piece of evidence, prejudicial and unreliable as it is should not have been admitted.

[48.3] The allegations of unlawful activities in Lucia’s house were not put to appellant or even Lucia for them to comment or rebut.

¹⁶ Vol.2,p 186, line 11-17

[48.4] The investigation officer relied on information he obtained over the telephone from a Mr. Ndlela, who was not able to verify certain material facts, such as whether Lucia was aware that a woman has been arrested in Welkom and that her address was mentioned.

[48.5] It is not clear what the Magistrate meant by “*sudden evidence*”. However, what is clear is that the investigating officer was supposed to go and verify the address, which he did not. He left this to his contact person at the DPCI (whatever this means). The information relayed back to the investigating officer did not assist the court at all because it left many questions unanswered.

[48.6] Despite the fact that Lucia was still in the court corridors when the investigating officer testified,¹⁷ she was not recalled to be confronted with the allegations of unlawful activities in her house.

[48.7] In my view, the evidence of the investigating officer in this regard should have been rejected.

WHETHER BEING A FOREIGNER PRECLUDED HAPPELLANT FROM BEING GRANTED BAIL.

[49] I already made a finding that appellant was in no worse or different position than accused 1 with regard to ;

[49.1] Strength of state case,

¹⁷ She was sitting outside with accused 1. The prosecutor asked Mtubatsi if he knew her. See vol.2, p 102, line 20-24.

[49.2] Seriousness of charges,

[49.3] Convenience of another foreign country ;

As such, none of these factors should have been used against the appellant.

[50] Counsel for the State conceded that the only reason appellant was denied bail is the allegation (as the Magistrate's remarks bear testimony), that there were some alleged unlawful activities in Lucia's house.

[50.1] He also conceded that if this piece of evidence is thrown away (for reasons i have already dealt with above), then there is no reason why appellant should not be granted bail.

[51] My understanding of the bail proceedings before the Magistrate is that appellant was required to prove that she has an address in South Africa where she would stay until finalisation of her criminal trial. This appears from a concession made by the investigating officer that at first she gave an address at South Thekwane. It is not clear what happened to this address, but she later called in Lucia to testify and confirm her address.

[52] It would appear from the record that the concern that appellant would not stand trial was not based on objective facts that there was a likelihood that she would flee, but simply on the basis that she was a foreigner.

[53] The Supreme Court of Appeal in the matter of **S v Masoanganye and Another 2012 (1) SACR 292 (SCA)** had the following to say about the factors to be taken into account when considering whether an accused person is a flight risk.

“[18] A further problem is that the court below intimated that it had other reasons for refusing bail which it was prepared to disclose if approached. Such an approach was not made. It would appear that the trial judge was under the impression that the application for bail could be renewed because she said that she was not satisfied that the appellants could be released on bail 'at this stage'. On a conspectus of the judgment as a whole it seems that what the learned judge had in mind was that the appellants could produce further evidence concerning their assets — the only matter that she dealt with in her judgment. Her judgment boils down to this: she was not satisfied that the appellants were not a flight risk because they did not have sufficient assets. Ahmed, who had sufficient assets, was held not to be a flight risk for that reason only.

[19] The proper route to have followed would have been to allow the matter to stand down — as requested by counsel — or to postpone the bail application. However, what the court failed to consider is that the personal circumstances of an accused — much more than assets — determine whether the accused is a flight risk. The court knew that the second appellant had three children, one of 18 months, that her husband lives and works in the country and that she is still employed in some or other position in a master's office. These facts, in my view, if taken into account, would have satisfied that she was not a flight risk”

[54] Of course, there is ample authority that our courts do grant bail to foreigners. Therefore, this alone can not be a reason for refusal to grant bail.

In the matter of **S V Savoi 2012 (1) SACR 438 (SCA)**, Heher JA restated the factors that should be taken into account when considering bail of a foreigner (although the accused in this case was not considered a flight risk)

[21] The appellant was and is not regarded as a flight risk. The respondent does not say in its affidavits that he was so regarded at any time. The learned judge said in her judgment that so much was common cause between the parties. That finding was attacked in argument on E appeal, but counsel was unable to point to any factual allegation by Lt Col Perumal that he had grounds for thinking the appellant to be a flight risk, or, indeed, any allegation that, despite the absence of grounds, he believed that the appellant was a flight risk. Although the appellant's applications for consent were directed solely at business trips, the terms of the bail conditions did not limit the discretion to such purposes, although counsel were agreed that only business travel was intended.

[22] It may be accepted that the danger of a bailed accused avoiding attendance at his trial can never be entirely ruled out. But courts must determine cases according to the facts, and whether an accused person will or will not attend in due course is entirely a question of fact and inference from fact. The facts must be relevant to the conclusion. Thus the absence of an extradition treaty with a given country is of itself meaningless; it only becomes meaningful if there is reason to believe that the accused may take advantage of that fact. By contrast, an increase in the number and seriousness of the charges that an accused faces may of itself be a relevant factor as exercising a new influence on a previously compliant accused. So also might the proximity of a trial in which an accused faces a real prospect of a term of imprisonment. But in all these cases not only must the facts be established, but also the reliance on them by the functionary, since, otherwise, it becomes merely counsel's

I speculation as to how the facts could or might have affected the application to the functionary. As I have pointed out, none of the three decision-makers under the existing bail conditions made any pretensions to being influenced by facts relevant to the refusal of the application”

[55] I believe that the Magistrate would have granted bail, but her mind was swayed by the unconfirmed reports that there were some unlawful activities going on in the address where appellant was going to stay.

[56] The Magistrate should have considered imposing suitable conditions to offset whatever concerns she may have had about a likelihood that appellant would evade trial. I must state that she did not made a finding that there was such a likelihood, instead she ascended a moral throne and based her decision on allegations of unlawful activities without a shred of objective evidence in that regard.

[56.1] I have already stated that under the circumstances, i believe that the State or even the Magistrate should have been entitled to hide behind admissibility of on hearsay evidence in bail applications.

[56.2] Appellant discharged her onus and then the onus shifted on the state to prove that such activities indeed were taking place and that they were relevant considerations on the question of whether she would evade trial or not.

[57] The Magistrate disregarded the appellant's evidence that she had ties with South Africa and would not simply disappear into thin air.

[57.1] In the matter of **S v BRANCO 2002 (1) SACR 531 (W)**¹⁸, Cachalia AJ held that the Magistrate misdirected himself by failing to take into account the ties that the accused had with South Africa and failing to consider imposing suitable conditions.

"Finally, a court should always consider suitable conditions as an alternative to the denial of bail. Conversely, where no consideration is given to the application of suitable conditions as an alternative to incarceration, this may lead to a failure to exercise a proper discretion. The appellant has stated under oath that he is prepared to report to the police station. This was not challenged. I was informed by Mr Hodes that the Edenvale police station is a mere 250 metres away from the appellant's resident. Reporting to the police station will place the police in a position to monitor his movements. With respect to a suitable amount to be paid in the event of his being released on bail, both Mr Wasserman and Mr Hodes accepted, that if I were to uphold the appeal a minimum amount of at least R150 000 would be appropriate. I was informed by Mr Hodes that such an amount could be raised with the assistance of the appellant's friends and family.

I have given this matter anxious consideration. It seems to me that there are important aspects of this case that the magistrate overlooked which justify a Court on appeal to interfere with his decision. "

CONCLUSION

[58] I am satisfied that the decision of the Magistrate is wrong and that I am entitled to interfere.

¹⁸ At p537

[59] According i make the following order:

[60] THAT the bail appeal be and is hereby upheld.

[61] That the order of the Magistrate, P Mlotshwa sitting at Barberton under case number 883/12 issued on 21 November 2012 be and is hereby set aside and substituted as follows:

[a] The appellant is released on bail of R10 000.00 (ten thousand rand) subject to the following conditions:

(i) Appellant is released into and restricted to stay at the address known as:

Cycad Close, No, 12, Corner Blue Berry & Apple Streets, Honey Dew Estate, Roodepoort, Gauteng Province. This address is indicated in the record of proceedings, it does not appear to be complete. The investigating officer is ordered to deliver the appellant to this address and verify it and record it in his book. The appellant is restricted to stay at this address until the finalisation of the proceedings against her. This condition may only be amended by a Magistrate on application after due notice has been given to the investigating officer.

(ii) The appellant will only leave this address between 06;00 am and 18:00 pm for purposes of attending a medical facility or consultations with her attorney. In the latter case, prior written consent should be obtained from the investigating officer.

- (b) That the appellant should report at the Honey Dew police station , Roodepoort, Gauteng Province, twice a day between 06;00 am and 20;00 pm.
- (c) That the appellant should surrender her passports and all travelling documents to the Investigating Officer or any other designated officer.
- (d) That the Investigating Officer and any other member of the South african Police Service in general are ordered to put mechanisms in place to ensure that these bail condiions are complied with at all times and to report to the presiding officer whenever the appellant appears in court.

Makhubele AJ

Acting Judge of the High Court

Date heard: 15 February 2013

Judgment delivered on: 15 May 2013.

Apperances

Appellant: Advocate HJ Potgieter

Instructed by: Coert Jordaan Inc. Attorneys

Nelspruit

Respondent: Advocate Z. Mabodi

On behalf of the Director of National Public Prosecutions, Pretoria.