



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Bail Appeal number: A1/2024

In the appeal between:

SOLOMON WILLIAM PHADI

1st Appellant

THAPELO ABRAM TSHABALALA

2nd Appellant

and

THE STATE

Respondent

CORAM: VAN ZYL, J

HEARD ON: 7 FEBRUARY 2024

DELIVERED ON: 3 JUNE 2024

- [1] Mr Phadi ("the first appellant") and Mr Tshabalala ("the second appellant") are two of three accused who pleaded to a charge of housebreaking with the intent to rob and robbery with aggravating

circumstances. In this regard it is alleged by the State that the three accused persons wrongfully and intentionally broke into and entered the house of the complainant with the intent to rob and then wrongfully robbed the complainant from cell phones and cash whilst pointing him with firearms. All three accused pleaded not guilty to the said charge.

- [2] After they pleaded not guilty the proceedings continued for purposes of a bail hearing on behalf of all three accused. All three accused enjoyed legal representation during the bail hearing.
- [3] The court *a quo* denied bail in respect of all three accused.
- [4] This is an appeal by the first appellant and the second appellant ("the appellants") against the aforesaid denial of bail by the court *a quo*.
- [5] It was and still is common cause between the parties that the offense with which the appellants are charged falls within the provisions of Schedule 6 of the Criminal Procedure Act, 51 of 1977 ("the CPA"). The bail application was therefore heard in terms of the provisions of section 60(11)(a) of the CPA and the same applies to the consideration of the bail appeal.
- [6] Section 60(11)(a) determines as follows:

“(11) Notwithstanding any provision of this Act, where an accused is charged with an offense –

- (a) referred to in Schedule 6, 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 interests of justice permit his or her release;"

[7] The onus was and is consequently on the appellants to show that exceptional circumstances exist which in the interests of justice permit their release on bail.

[8] The standard of proof required from the appellants to establish "exceptional circumstances" is on a balance of probabilities. See **S v Rudolph** 2010 (1) SACR 262 (SCA) at para [9].

[9] In terms of Section 60(4) of the CPA 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, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;
- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her bail; 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 jeopardize the objectives or the proper functioning of the criminal 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."

[10] Sections 60(5) up to and including Section 60(9) of the CPA set out the factors to be considered in determining whether the grounds set out in Section 60(4)(a) to 60(4)(e) have been established.

[11] In terms of the appellants' Notice of Appeal the grounds of appeal are, *inter alia*, the following:

1. The court *a quo* erred in finding that the appellants failed to prove exceptional circumstances.
2. The court *a quo* failed to apply the principles enunciated in **S v Rudolph** 2010 (1) SACR 262 (SCA).
3. The court *a quo* erred in overlooking that none of the likelihoods contained in Section 60(4)(a) to (e) of the CPA was present.
4. The court *a quo* erred in overlooking the fact that the first appellant has no previous convictions and the previous

conviction of the second appellant is not related to the present charge and occurred 12 years ago. The second appellant is 60 years old.

5. The court *a quo* overlooked and disregarded the fact that both the appellants are breadwinners who maintain their families, which include their minor children.
6. The court *a quo* erred in overemphasising the strength of the State's case by relying on submissions made by the prosecutor and which could not be tested in any way.
7. The court *a quo* overlooked the fact that the appellants are not a flight risk.
8. The court *a quo* erred in denying bail instead of having considered granting bail with applicable conditions attached thereto.
9. The court *a quo* failed to consider the factors set out in Section 60(9)(a) to (g) of the CPA.
10. The court *a quo* erred by not finding that the cumulative effect of all the relevant factors constitute exceptional circumstances.

[12] Both the appellants placed their personal and other relevant circumstances before court by means of an affidavit. The affidavit of the first appellant mentions, *inter alia*, the following:

1. The first appellant is an adult male, aged 31 years old and he has been resident at Viljoenskroon since birth.
2. He did not furnish an alternative address as same was not required of him.
3. He is a South African citizen and he does not have any relatives outside the Republic.
4. He does not own any movable assets and he is self-employed in Viljoenskroon as a builder for six years and earn R1 400.00 per month.
5. He is unmarried, however, he does have a child who is 10 years old. He pays maintenance for the child in the amount of R500.00 per month in a good month. Continued incarceration will be financially prejudicial to his child as the trial might be disposed of only after some time.
6. He understands the charges levelled against him and he intends to plead not guilty. He knows that should he be found guilty the sentence to be imposed might be severe, however, he maintains that he is not a flight risk.
7. He harbours no resentment against the complainant and will not interfere with any of the state witnesses or the complainant.

8. He did not supply false information to the police and he co-operated fully with the investigating officer at all times.
 9. He does not have any previous convictions and no pending cases.
 10. His release on bail will not jeopardize the safety of the members of the public and furthermore the criminal justice system will not be undermined and consequently he will also accept any bail conditions that the court may wish to impose.
 11. He therefore submits that there exist exceptional circumstances for him to be released on bail, especially given the absence of the factors mentioned in Section 60(4)(a) to 60(4)(e) of the CPA, the fact that the State is not opposed to his release on bail and that he has no previous convictions."
- [13] On questions raised by the court *a quo*, it was placed on record that the first appellant performs piece jobs as a builder when he is requested by people to assist with the construction of buildings. He is staying alone.
- [14] The affidavit of the second appellant mentions, *inter alia*, the following:
1. The second appellant is an adult male, 60 years old and he has been staying in Orkney for a period of 25 years. He stays with his wife.

2. He did not furnish an alternative address since same was not requested from him.
3. He is a South African citizen and does not have relatives and/or friends outside the Republic of South Africa.
4. He is the owner of immovable property, being the house where they stay and he also owns a movable asset in the form of a taxi vehicle.
5. He is self-employed at Orkney as a taxi driver and owner and he has been doing so for 24 years. He earns a monthly income of R9 000.00.
6. The second appellant is married and has three minor children aged 12, 8 and 6 respectively.
7. He pays an amount of R1 000.00 per month towards the maintenance of the children and he also provides food and shelter for them. His continued incarceration will therefore be financially prejudicial to the minor children as the matter might be disposed of only after some time.
8. He understands the nature of the charge against him and intends to plead not guilty.

- 9 He knows that should he be found guilty the sentence to be imposed might be severe. However, he maintains that he is not a flight risk and will not flee or evade his trial.
10. He does not harbour any resentment against the complainant and will not interfere with the State witnesses and/or the complainant.
11. He did not supply any false information to the police at any stage and he co-operated fully with the investigating officer at all times.
12. The second appellant has two previous convictions, being assault in 1999 and receiving stolen property in 2011. He has no pending matters.
13. His release will not jeopardize his safety and/or the sense of safety and security amongst members of the public. The criminal justice system will not be undermined.
14. The second appellant is willing to accept any conditions that the court may attach to the normal bail conditions and he can afford to pay a bail amount of R500.00.
15. The second appellant submits that taking into account the aforesaid, there are exceptional circumstances which in the interests of justice permits that he be granted bail and he specifically referred to the following:

1. The fact that the State is not opposed to his release on bail.
2. The absence of the factors listed in Section 60(4)(a) to 60(4)(e) of the CPA.
3. He is the breadwinner.
4. He has pure social and economic ties in the RSA.
5. His last previous conviction was 12 years ago.

[15] In response to the aforesaid affidavits filed on behalf of the appellants, the State presented an affidavit deposed to by the investigating officer. The investigating officer basically confirmed the personal circumstances of the appellants as stated by them. I deem it necessary to quote the additional information as contained in the said affidavit:

- "1. Accused 1... he further said he does not have a passport, as such he is not a flight risk. Accused person is a first offender. He does not have any previous convictions. However, it is established that there is a likelihood that the accused may pose a threat to the safety of the public as the community members, on the day of the incident, were surrounding his place when his arrest was effected. Accused is directly linked with the crime committed as he attacked the complainant, being a businessman, in his neighbourhood without even covering his face, knowing that he is precisely known by the victim.

2. Accused 2 ... he does not have a passport, as such he is not a flight risk. Accused has previous convictions, though they are not similar to the current offences. Accused is directly linked with the crime committed as his vehicle was the vehicle used during the commission of the offence and also used as a getaway car. Further, the victim's cell phone was found in the possession of accused 2 during his arrest.
3. Accused 3 ... he was arrested near the scene and it is alleged that he is the one who pointed a firearm to the victim. As such he was the most aggressive person towards the victim.
4. All three accused persons are linked with the crime. It is in the interest of justice to refuse bail. They all know the witnesses and will intimidate them. They might also jeopardize the objectives of the proper functioning of the criminal justice system. This is a pre-meditated crime as all the accused and their associates planned to attack and rob the shop which is situated near accused 1's place, who even accommodated these people who are from out of town and let them wait there for a specific time to hit the business place. It is a Schedule 6 offence as the victim was pointed with firearms and threatened to be killed. Even poured with paraffin in order to conceal the evidence on the body after he could have been shot. It was due to the community of the Rammulotsi that assisted to save the life of the victim by calling the police on time. That is all I can state.

[16] The aforesaid affidavit of the investigating officer was handed in and received into evidence as exhibit "D".

[17] The bail application then took an astonishing direction. The prosecutor merely made a comment and stated "circumstances of the offence are as follows" and then gave a detailed description of

how and where the robbery allegedly occurred, what allegedly happened immediately after the robbery and the alleged manner in which the three accused were arrested. Although the prosecutor narrated the greater part of the aforesaid alleged facts and circumstances in the third person, he also used words like "I" and "we". My distinct impression is that the prosecutor was reading from the witness statement of the complainant and, possibly, also from the arrest statement deposed to by one or other of the police officials.

- [18] The aforesaid very detailed narration was not part of the affidavit deposed to by the investigating officer and it was not handed in as an exhibit. In fact, it is even unclear whether the document(s) from which the prosecutor read was an affidavit or not.
- [19] It is settled law that a bail applicant can motivate his application by means of *ex parte* statements from the bar and/or by means of sworn statements and/or by means of *viva voce* evidence. See **S v Hartslief** 2002 (1) SACR 7 (T).
- [20] However, such *ex parte* statements may not be used to put "evidence" which is in dispute, before the Court. A legal representative's submission of detailed factual information in order to supplement an inadequate written statement submitted on behalf of the client, was found to be unacceptable in **Deyi v S** (A16/13) [2013] ZAGPPHC 75 (6 March 2013) at paras [13] to [14]. There is no reason why the same principle would not *mutatis mutandis* apply to the State.

[21] In **S v Mwaka** 2015 (2) SACR 306 (WCC) the following was stated at paragraph [12] thereof:

“It is now well established in our law that a bail applicant may not be deprived of the right to testify in the application and an affidavit is admissible and in certain circumstances more convenient. A court hearing a bail application is therefore, in terms of S 60(2)(b), (2)(c) and (2A) of the CPA, expressly given the power to receive information or data which is common cause and, regarding matters which are in dispute, to receive evidence.” (My emphasis)

[22] The aforesaid case law complies with the provisions of Section 60(2) of the CPA which provides as follows:

“60(2) In bail proceedings the court –

- (a)
- (b) may, in respect of matters that are **not** in dispute between the accused and the prosecutor acquire in an informal manner the information that is needed for its decision or order regarding bail;
- (c) may, in respect of matters that **are in dispute** between the accused and the prosecutor require of the prosecutor or the accused, as the case may be, that **evidence be adduced**;
- (d) ...” (My emphasis)

[23] In **S v Boeck** 2000 (2) SACR 185 (TPD) the Court declined to admit a statement on behalf of the State which was unsworn and did consequently not constitute an affidavit.

[24] The constitutional right to a fair trial is not confined to trial proceedings, but includes pre-trial proceedings such as a bail application. Bail can only be decided after a proper and judicially conducted enquiry.

[25] In the unreported judgment of **Majali v S** GSJ Case No. 41210/2010, (19 July 2011) at paragraph [33] the following was said:

"A bail enquiry is a judicial process that has to be conducted impartially and judicially and in accordance with relevant statutory and constitutional prescripts."

[26] In **S v Miguel and Others** 2016 (3) NR 732 (HC) the Court held at paragraph [27] that it was impermissible for the bail court to have had regard to the facts falling outside the scope of the evidence adduced. The Court found that it constituted an irregularity.

[27] Section 65(4) determines the following with regard to a bail appeal to a Superior Court:

"65(4) The Court or Judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such Court or Judge is satisfied that the decision was wrong, in which event the Court or Judge give the decision which in its or his opinion the lower court should have given."

- [28] Where the court *a quo* misdirected itself materially on the facts or legal principles, the court of appeal may consider the issue of bail afresh. See **S v Mpulampula** 2007 (2) SACR 133 (E) at 136 E.
- [29] In the present matter the court *a quo*, in my view, misdirected itself materially by having allowed the prosecutor to have put the alleged facts and circumstances surrounding the offence before court in the manner it did. From a reading of the judgment of the court *a quo*, as well as the "appeal reasons" which the court *a quo* provided later, it is evident that not only did the court *a quo* refer to and relied heavily on the facts which were put before court in an improper manner, but also made a number of inferences based on those irregular alleged facts. The first such inference is the State's alleged strong case against the appellants. There are a number of occasions in the judgment where the court *a quo*, based on the information which was improperly placed before it, made its inference that the State has a very strong case against the appellants. In fact, the court went so far in its judgment as almost repeating the totality of what was placed before it regarding the alleged facts and circumstances surrounding the offence.
- [30] In addition, the court made the inference that the appellants would intimidate the witnesses and that the community should be protected against the appellants, also based on the information which was irregularly placed before it. In my view the objectivity of the court *a quo* was clearly tainted by the information which was put before it irregularly. It clearly had a huge impact on the court *a quo*'s decision to deny the appellants bail.

[31] I am therefore entitled to consider the issue of bail afresh in order to determine whether the court *a quo* was in fact wrong when it denied bail.

[32] It is necessary to consider what constitute "exceptional circumstances". As indicated in the appellants' grounds of appeal, they aver that the court *a quo* failed to apply the principles enunciated in **S v Rudolph** 2010 (1) SACR 262 (SCA) at paragraph [9]:

"The section places an onus on the appellant to produce proof, on a balance of probability, that 'exceptional circumstances' exist which in the interests of justice permit his release. It 'contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail, will be resolved in favour of the denial of bail, unless exceptional circumstances are shown by the accused to exist'. Exceptional circumstances do not mean that 'they must be circumstances above and beyond, and generally different from those enumerated' in ss 60(4) to (9). In fact, ordinary circumstances present to an exceptional degree, may lead to a finding that the release on bail is justified."

[33] The appellants also relied in their grounds of appeal on the judgment in **S v Bruintjies** 2003 (2) SACR 575 (SCA) at 577 F. The relevant quote should, however, be read in context where the circumstances were that the appellant were granted leave to appeal on the merits and submitted that the existence of reasonable prospects of success in the appeal constituted an

exceptional circumstance which warranted bail. The Court stated as follows at 577 D and further:

"If that were so, however, the great majority of persons facing charges involving Schedule 6 offences would have to be released on bail pending their trial without regard to other important considerations, such as, for example, the public safety. The mere fact that the trial court considers that the appellant has a reasonable prospect of succeeding on appeal thus not of itself amount to an exceptional circumstance. What is required is that the court consider all relevant factors and determine whether individually and cumulatively they warrant a finding that circumstances of an exceptional nature exist which justifies 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 removed the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the Legislature has attached to the commission of a Schedule 6 offence. The prospect of success may be such a circumstance, particularly if the conviction is demonstrably suspect. It may, however, be insufficient to surmount the threshold if, for example, there are other facts which persuade the Court that society will probably be endangered by the appellant's release or there is clear evidence of an intention to avoid the grasp of law. ...If, upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interest of justice, warrant his release, the appellant must be granted bail." (My emphasis)

- [34] The investigating officer stated in his affidavit that the appellants are directly linked to the offence and stated the grounds for his statement. I'm accordingly willing to accept that it seems that the State has a *prima facie* case against the appellants although

identity will probably be in dispute, which will necessitate the applying of the relevant cautionary rule.

[35] The investigating officer further stated as follows:

“However, it is established that there is a likelihood that the accused may pose a threat to the safety of the public as the community members, on the day of the incident, were surrounding his place when his arrest was effected. It is in the interest of justice to refuse bail. They all know the witnesses and will intimidate them. They might also jeopardize the objectives of the proper functioning of the criminal justice system.” (My emphasis)

[36] The second appellant lives in Orkney. The investigating officer stated no facts in support of his allegation that the second appellant knows the alleged witnesses who are from Viljoenskroon.

[37] The court *a quo* apparently just accepted the mere *ipse dixit* of the investigating officer without considering whether there is evidence to sustain the allegations. An investigating officer's opinion which merely amounts to a statement without supporting evidence lacks probative value and should not be relied upon. In **Sambo v S** (CA01/2020) [2020] ZANHC 27 (17 June 2020) at paragraph [12] the court of appeal stated as follows:

“It seems that the court placed much reliance on the investigating officer's whims for reaching the conclusion that the appellant should be denied bail as he was considered to be a flight risk who may try to evade trial. Without evidence to support this finding, the court *a quo* committed a misdirection in finding that the appellant is likely to try to evade trial. There simply exists no persuasive evidence to support such finding. The statement of the investigating officer is just what it is,

a statement without supporting evidence. It should not have been relied upon.”

[38] Mere restatements or parroting of the relevant sub-sections of section 60 of the CPA does not carry any weight without factual details supporting those allegations. See **S v Mathebula** 2010 (1) SACR 55 (SCA) at para [15].

[39] The court *a quo* also failed to consider the possibility of suitable bail conditions in order to prevent the aforesaid dreaded events from happening. In this regard the court stated as follows in **S v Branco** 2002 (1) SACR (W) at 537 A- B:

“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.”

[40] In this instance the appellants stated in their respective affidavits that they will abide by any bail condition which the court may impose, but yet the court *a quo* completely failed to consider the possibility and appropriateness thereof.

[41] Another important factor is that the refusal of bail in order to protect society is only justified in extreme circumstances. See **S v Du Plessis** 1993 (2) SACR379 (T) at 384 J – 385 B.

[42] The investigating officer did not dispute the personal circumstances of the appellants, nor the fact that they are not a flight risk. In fact, it appears from the record that this bail application was apparently initially unopposed, where after it became opposed at a later stage.

[43] I have given much consideration to the matter at hand. I take due cognisance of the following *dicta* and many others alike, stated in **S v Miguel**, *supra*, at paragraph [51]:

"[51] Factors such as to whether or not it would be in the interest of justice to grant the appellants bail, or whether the State has a strong or weak case against the appellants must not be viewed in isolation. As with the evaluation of all evidence, the court must follow a holistic approach when assessing and weighing the evidence for and against the applicants in a bail application."

[44] The appellants bear the onus to establish exceptional circumstances. Having said that, the State has a duty to assist the court by putting as much as possible relevant information before the court in order to make a well-informed decision. That did not happen in this instance.

[45] When I take all the relevant facts and circumstances into consideration, I am satisfied that the appellants discharged their onus on a balance of probabilities. The court *a quo* was wrong in not having granted bail to the appellants.

[46] With regard to the amount of bail, the second appellant indicated in his affidavit that he will be able to afford R500.00 bail. The first

appellant did indicate an amount in his affidavit, but it is illegible. However, I take into consideration that he was only employed on a piece job basis and would probably not be able to afford R500.00 bail.

Conclusion:

[47] In the circumstances and having considered all the relevant facts and principles, I intend granting bail to the appellants on appropriate conditions.

Order:

[48] The following orders are made:

1. The first appellant and the second appellant's appeal against the dismissal of their bail, is upheld.
2. The order of the court *a quo* is set aside and substituted with the following:
3. The first appellant (Mr SW Phadi):
 - 3.1 The first appellant is released on R300.00 bail.
 - 3.2 The first appellant shall report to the Viljoenskroon Police Station every Wednesday between 6h00 and 20h00.

- 3.3 The first appellant shall attend his trial and all postponements thereof and remain in attendance until excused and finally until a verdict is given in respect thereof.
 - 3.4 The first appellant shall not make contact with, communicate to or visit the premises/shop of the complainant in this case in any manner whatsoever until finalisation of the case.
 - 3.5 The first appellant shall not make contact with, communicate to or visit the premises of any of the State witnesses in this case until finalisation of the case.
 - 3.6 The first appellant shall not interfere with or intimidate the complainant or any of the State witnesses in this case until finalisation of the case.
 - 3.7 Should the first appellant's address where he lives change, he shall immediately inform the investigating officer accordingly within 24 hours of such change.
4. The second appellant (Mr TA Tshabalala):
 - 4.1 The second appellant is released on R500.00 bail.
 - 4.2 The second appellant shall report to the Orkney Police Station every Wednesday between 6h00 and 20h00.

- 4.3 The second appellant shall attend his trial and all postponements thereof and remain in attendance until excused and finally until a verdict is given in respect thereof.
- 4.4 The second appellant shall not make contact with, communicate to or visit the premises/shop of the complainant in this case in any manner whatsoever until finalisation of the case.
- 4.5 The second appellant shall not make contact with, communicate to or visit the premises of any of the State witnesses in this case until finalisation of the case.
- 4.6 The second appellant shall not interfere with or intimidate the complainant or any of the State witnesses in this case until finalisation of the case.
- 3.7 Should the second appellant's address where he lives change, he shall immediately inform the investigating officer accordingly within 24 hours of such change.


C. VAN ZYL, J

On behalf of the Appellants: Ms V Abrahams
Instructed by:
Legal Aid

BLOEMFONTEIN

On behalf of the State:

Adv S Giorgi

Instructed by:

Department of Public Prosecutions

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