

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION: MTHATHA**

CASE NO: CA & R 93/2023

In the matter between:

WILLIAM SAULE

Appellant

and

THE STATE

Respondent

JUDGMENT

PITT AJ

Introduction.

[1] The appellant was charged with murder, conspiracy to murder, malicious injury to property and possession of unlicensed firearms and ammunition. It is alleged that he used a TLB to destroy the home of the complainant, and then hired three hitmen to kill the complainant. After the complainant was shot and killed by the hitmen, a chase and shootout ensued between the police and the three hitmen. According to the respondent, the hitmen were being transported by the appellant right after the shooting when they were chased and apprehended by the police.

[2] A first bail application was launched on behalf of the appellant on 22 September 2022 in the Mount Fletcher Magistrate's Court, where bail was refused. A

further bail application on new facts, which the respondent opposed, was launched on 15 June 2023, and dismissed on the ground that the facts relied on were not new.

Findings of the court a quo.

[3] The court *a quo*, in dismissing the appellant's bail application, found that from the evidence in the initial and renewed bail applications, and the arguments advanced on behalf of the appellant and the respondent, it was not satisfied that the facts raised were sufficient to grant the appellant bail.

[4] In her judgment on the bail application on new facts, the learned magistrate held that the only fact which can be considered as new was that the investigation was completed and as such there is no likelihood that he will interfere with investigations. The magistrate went further to say that while the appellant was in custody, his girlfriend was expecting his seventh child and the fact that the child had since been born was raised in the initial bail application.

[5] She further reasoned that the fact that the appellant was diagnosed with glaucoma and a cataract, and that he had a subsequent operation on 24 October 2021 are not new facts. The bullet wounds, the appellant's injuries and his diabetic condition were all facts already known to the court from the initial bail application. The condition of the appellant's grandchild who has a biological father for primary care, was also known during the initial bail hearing.

[6] It was submitted that the appellant's financial position had deteriorated substantially because three of his head of cattle were reported missing but were recovered. The learned magistrate found that this was not a loss as the cattle were recovered. It was also alleged that 150 of the appellant's sheep had died, that his shop had since been broken into, vandalised and closed, that his family is unable to protect his assets. The court found that all of these factors were present at the initial bail application and were not new facts to the court.

Grounds of appeal.

[7] The appellant brings this appeal on a number of grounds set out in his notice of appeal. These grounds are that the Honourable Magistrate erred in finding that: -

- (a) the bail application by the appellant was not based on any new facts, and that the appellant had failed to demonstrate that there were any new facts that had arisen since the refusal of bail on 15 September 2022;
- (b) the interests of justice required that the appellant be detained in custody pending trial;
- (c) exceptional circumstances did not exist warranting the release of the appellant on bail;
- (d) the alleged public outcry at the incident for which the appellant is facing charges has not subsided;
- (e) the release of the appellant would undermine public order and public confidence; and

- (d) the appellant failed on a balance of probabilities to satisfy the requirements for his release on bail on new facts.

[8] In addition, the appellant submitted that the learned Magistrate erred in concluding that: -

- (a) the personal and other circumstances set out in the appellant's affidavit in support of the bail on new facts did not constitute exceptional circumstances as envisaged in section 60(11)(a) of the Criminal Procedure Act 51 of 1977;
- (b) the State's case was *prima facie* so strong that no exceptional circumstances existed;
- (c) the interests of justice did not warrant the release of the appellant on bail.

[9] The appellant further contends that the Magistrate erred in over-emphasising the strength of the State's case, and ought to have held that the appellant had clearly demonstrated that there were new facts which justified his release on bail and that the following new facts existed:

- “(a) that the investigation by the South African Police Services (SAPS) was complete and that the release of the appellant on bail would not interfere with the investigation and/or preparation of the State's case for trial;
- (b) that any public outcry that had existed in September 2022 had subsided and that the State had not shown that any public outcry still existed which militated against the release of the appellant;

- (c) that the only evidence before the court *a quo* that the public outcry had subsided and no longer existed, if it had existed at all, was that of the appellant, and such evidence was not contradicted;
- (d) that the time between the hearing of the bail appeal on new facts in November 2023 was unduly lengthy and his continued remand in custody effectively subjected the appellant to a prison sentence before the commencement of his trial while he was still presumed innocent;
- (e) that the appellant had suffered a material change in his financial circumstances which included the loss of cattle and sheep as well as his ability to conduct business from his trading store;
- (f) that the forfeiture proceedings under Mthatha High Court case number 5297/2022 for the forfeiture of the appellant's motor vehicles and cash is a material change in his financial circumstances which is a new fact which requires his urgent attention and release on bail to be able to attend thereto properly;
- (g) that the appellant's eye condition has deteriorated and is deteriorating and that his further incarceration exacerbates such condition and his ability to receive medical treatment as is required;
- (h) that the new facts mentioned above considered in conjunction with the previous circumstances relied on by the appellant in support of his bail application in September 2022 constitute exceptional circumstances which justify his release on bail."

[10] It is the appellant's contention further, that the court *a quo* ought to have reconsidered the new facts in conjunction with the following facts:

- "(a) that the appellant's business and farming operation require his personal attention and that he will suffer irreparable harm and loss if he is not able to attend thereto;
- (b) that the appellant's grandchild was handicapped and required his financial support and care and assistance;
- (c) that the appellant as a disabled person of advanced age and deteriorating eyesight and physical condition posed no flight risk whatsoever, and that his

continued incarceration was not in the interests of justice or required in any way in this matter.”

[11] The appellant further contends that the court *a quo* ought to have held that the interests of justice further warranted the release of the appellant in the context of this particular matter in that the State had not shown:

- “(a) that the appellant would attempt to evade his trial;
- (b) the appellant was likely to interfere with the State witnesses;
- (c) that the appellant would endanger any members of the public;
- (d) that the appellant was likely to jeopardize the proper functioning of the criminal justice system; and
- (e) that the public disorder would result if the appellant were to be released on bail.”

Evidence in the court a quo in support of bail application on new facts.

[12] During the bail application on new facts on 13 April 2023, the appellant adduced evidence in support of his application by way of an affidavit which was read out in the court *a quo* by his legal representative. Those new facts are set out below.

[13] The appellant suffers from a condition described as advanced glaucoma and leucoma and cataracts. On 24 June 2021, he underwent a cataract operation to his left eye, and he has poor vision in both eyes despite the operation. He had been attended to by an ophthalmologist, and he requires chronic treatment of eye drops, and the progress needs to be reviewed every six months. Since the last bail application, he has run out of eye drops and he does not have any to treat his condition. He only has expired eye drops and he is afraid to use them without the advice of the ophthalmologist who prescribes his medication. He has brought this to

the attention of the authorities, but they have ignored his request to take him to his ophthalmologist or any other doctor for attention to his eyes and further treatment. Since running out of eye drops, the sight in his right eye has deteriorated substantially. A milky white appearance is spreading over his right eye and he is not sure if this is a cataract or some other illness. His right eye is losing sight at a rapid rate, and he is afraid of becoming completely blind in his right eye if he is not attended to by an eye specialist urgently.

[14] The appellant set out a further set of new facts as follows. During his arrest he was shot and received four bullet injuries, which are causing him severe discomfort and pain, extending to his left hip and lower back. Since the previous bail application, his mobility had decreased substantially, and he walked with increased pain and great difficulty. He was in constant pain and despite having made the authorities aware thereof, they have failed and refused to take him to a doctor for treatment of the pain he was experiencing. The bullet wounds have closed but the scarring is particularly painful, his muscles are simply not recovering and are deteriorating.

[15] He and his family are able to seek the necessary specialist medical care that he requires. His reduced mobility has made him sedentary and his release on bail poses no risk whatsoever to the administration of justice. He is not physically able to flee and he is not a flight risk in any way since he can hardly move and needs to be cared for by his family.

[16] The appellant further alleged that he suffers from diabetes, for which he started treatment in April 2022. His chronic medication had since run out and,

despite having brought this to the attention of the authorities, they have failed to take him to a clinic and/or hospital for further treatment.

[17] It was his evidence further, that he has a grandchild who suffers from epilepsy and cerebral palsy with developmental delays who is dependent on him, while he is the main breadwinner and support for this child. This child's father (his son) works for him and requires assistance from her family to look after and support this child. He also alleges that his daughter's income is not sufficient to pay for the extensive treatment and care that the child needs. The appellant further contends that his financial position has declined dramatically since the previous bail hearing and there is simply not enough money to support his grandchild while he is in custody.

[18] He further stated that his family requires income to be generated by him to look after the grandchild and that it was in the best interests of the minor child that he be released to generate an income which would support and assist the child with her terrible medical condition.

[19] Since the previous bail application, the appellant's financial positions, so it is alleged, has deteriorated substantially as a result of certain factors. These factors are described as three heads(herd/s?) of cattle having been stolen from his livestock at his homestead since his incarceration. His store and shop had been broken into and vandalised and that his family was not able to protect the assets at the store, stock in trade and/or the business. He was the person running and managing the store and since his incarceration, the business had deteriorated to such an extent that it has effectively closed down. His physical presence at the store is urgently

required to manage and save the store so that an income can be generated for his family.

[20] He also contends that the State has applied for the forfeiture of a Fortuner motor vehicle, a Toyota Hilux vehicle, and R 26 300.00 cash that had been frozen. Because of his incarceration, he is unable to consult his attorney of record to properly oppose the application for forfeiture. It has been difficult to give instructions and/or attend to the signing of documents while he is incarcerated. His attorneys practice from Matatiele and he is incarcerated in Mthatha, making consultations extremely difficult and expensive and his assets are accordingly vulnerable to being forfeited should his opposition to the forfeiture application not succeed.

[21] The appellant further states that the prosecution was persisting to have the forfeiture application heard while he is in custody, thus making it an abuse of the processes of the law with his rights being prejudiced and forcing him to waive his right to silence and attempt to gather evidence against him before trial in this matter. The appellant further contended that this was a new development which is exceptional and a breach of his fundamental rights.

[22] The appellant further told the court *a quo* that the trial had been set down for 30 October 2023 to 17 November 2023, which is an extensive and long period for trial with legal costs amounting to R 300 000.00, for which he needed to make financial arrangements which he cannot do while in custody. He will have to sell assets and/or take out loans which his family are not able to do on his behalf. He had

not anticipated such a long trial, which only came to his attention after the bail hearing, which is a new fact that must be taken into account.

[23] He has been incarcerated for a lengthy period of eight months already and the trial would only be heard at the end of the year (2023), which is an excessive delay and exceptional because the time he will spend in prison is unreasonable and excessive, thus making it exceptional circumstances.

[24] The appellant further highlighted that at the time of the previous hearing, the investigating officer indicated that the investigations would be complete within approximately three weeks after the bail hearing, and therefore should have been completed at the time of the bail hearing on new facts. This, according to the appellant, constitutes a new fact that must be taken into account in his favour. He further contends that the State has had more than adequate time to complete the investigations and cannot maintain that he will in any way interfere with the investigations as they purported to do at the previous bail hearing.

[25] During the previous bail application, the appellant alleged that he had an address in Pretoria where he could reside pending finalisation of the investigations and the hearing of the matter. Since investigations had been completed, or should have been, there would be no prejudice whatsoever to the State and witnesses should he be released on bail and remain at his rural home at Vuvu Location, Mount Fletcher.

[26] He had no knowledge of who the witnesses were in the matter against him and there is no possibility of likelihood that he will interfere with such witnesses even if their identities become known to him. He walks with great difficulty and is immobile. He is not in a physical state to interfere with any witnesses, and he has no intention of interfering with such witnesses. His financial losses require him to reside at his home at Vuvu Location, which is near to his business and livestock which must be managed by him, even if it is from his home where he will be based.

[27] According to the appellant, the alleged public outcry that the State relied on at the previous bail hearing had subsided and does not exist. He further contends that it will not be reignited by the State in the interim to oppose bail. Any alleged community anger has subsided, which anger of the community is not a ground to oppose his release on bail. This element which the State relied on has changed dramatically and there is no danger or likelihood that if he were released on bail that the public safety would be endangered in any way.

The State's case in opposing bail application on new facts.

[28] The investigating office did not adduce any evidence in rebuttal of the case put forward by the appellant in support of his bail application on new facts. The prosecutor submitted that the eye problem referred to by the appellant as a new fact was present at the time of the hearing of the initial bail application. It is therefore not a new fact. On 6 March 2023, there was an order made by the court that the appellant must be taken to the doctor by the investigating officer, and that he was subsequently taken to the doctor.

[29] The State further contended that the fact of the bullet wounds referred to by the appellant in the bail hearing on new facts was present during the previous bail hearing and was nothing new. This is therefore also not a new fact. The prosecutor submitted that the accused being diabetic is not a new fact either. This was the situation before the alleged offences were committed by the appellant.

[30] Regarding the fact that the appellant has a duty to care for his grandson, the State argued that if the grandchild has her biological father, it is his duty to look after his child and that of the appellant. The state submitted that the appellant conceded that the fact of his residence in Pretoria was mentioned during the initial bail application and was therefore not a new fact.

[31] The State further highlighted that during the renewed bail application the appellant confirmed that the cattle had since been recovered, and that even if he was not in custody, he was not going to go look for his cattle himself but would send his children to look after and for them. It was argued by the State that this is also not a new fact or exceptional circumstance, especially since the cattle were recovered and the appellant has not suffered any loss.

[32] With regards to the assets of the appellant which were seized by the State as instruments of an offence, the State submitted that it was a High Court matter and not a Regional Court matter.

[33] As against the appellant's contention that it is difficult for him to consult with his attorneys due to the long distance they have to travel in order to consult with him at his current place of detention, the State argued that this was the choice of the appellant to instruct an attorney who is far from where he is and that this was not an exceptional circumstance.

[34] Further according to the prosecution, the issue of the public outcry was still present. The father of the deceased and family members were present in court and that he was opposed to the appellant being released on bail. The community was not protesting outside court, but this did not mean that there was longer a community outcry against the appellant being granted bail.

[35] The prosecution was of the view that even though the appellant's finances were not the same as when he was not incarcerated, that should not be the only factor to consider. The other factors must be taken into consideration, such as the offence that was committed while the appellant was out on bail for another offence of malicious injury to property. The state contends that there was a high possibility that if the appellant is released on bail that he would commit another offence.

The appellant's submissions on appeal.

[36] It was submitted on behalf of the appellant that the offence with which he is charged does not fall within the ambit of Schedule 6 of the Criminal Procedure Act No. 51 of 1977 ("CPA") and that the State erred in approaching the matter as such.

[37] Mr Duminy argued in this regard that at the time of the bail hearing on new facts, the appellant had not yet been charged and therefore there was uncertainty with regards to which Schedule of the CPA the offences which the appellant was charged fell under. He conceded, however, that the appellant had since been provided with an indictment which sets out the charges in greater detail, thereby confirming that the offence is a Schedule 6 offence.

[38] At the time of the bail hearing on new facts, so the submission continued, the investigation had not yet been completed and the investigating officer feared that the appellant may interfere with the investigation if he was released on bail. Mr Duminy argued that the investigation should have been completed as at the time of the renewed bail application. He was of the view that since those investigations were now complete, this was a ground on its own to release the appellant on bail because the appellant cannot interfere with any police investigation. In support of this point, the appellant referred to *S v WC and Another*¹, in which the new facts which were present were:

- (a) the investigation that had subsequently been completed;
- (b) the appellant's child's health that had deteriorated; and
- (c) the appellant's financial position that had been changed and the appellant was suffering financially.

[39] It was conceded at the bail appeal hearing that whether the appellant is charged with a Schedule 6 offence is no longer a point of contention. Regarding the

¹ *S v WC and Another* 2022 (1) SACR 159 (GJ)

existence of exceptional circumstances, it was further argued on behalf of the appellant that the new facts proffered by the appellant, considered in conjunction with the previous circumstances relied on by the appellant, constitute exceptional circumstances and indicate that it is in the interests of justice that the appellant be released on bail.

[40] Otherwise, Mr Duminy persisted with the contention that the court *a quo* erred in finding that there were no new facts that arose since the refusal of bail in September 2022. It was also submitted that the appellant had set out new facts in detail in the affidavit supporting the application for bail on new facts. On this score, Mr Duminy submitted that the State had not placed in dispute what was placed before the court *a quo*, and which justified the appellant's release on bail.

The state, so the argument went, did not establish that:

- (a) the appellant would attempt to evade his trial;
- (b) the appellant was likely to interfere with State witnesses;
- (c) the appellant would endanger any members of the public;
- (d) the appellant was likely to jeopardise the proper functioning of the criminal justice system; and
- (e) public disorder would result if the appellant were to be released on bail.

[41] These facts were merely denied by the State in cross-examination and the investigating officer did not give any evidence in rebuttal. On this score, Therefore, so Mr Duminy argued, the court *a quo* should have held that the appellant had demonstrated that there were new facts which justified his release on bail.

[42] In regard to the strength of the case for the state as a relevant factor as to the existence of exceptional circumstances, it was also argued that no credibility finding was made against the appellant by the court *a quo* and that the appellant had offered a plausible explanation as to his whereabouts and activities on the day of the alleged offences.

[43] Reference was made to *S v Jonas*², where the court at 679A held that what the magistrate at the end of the enquiry had before him was the uncontested evidence of the appellant denying that he had committed the offences or as in any way implicated in the commission of the offences and the appellant's evidence of an alibi which, if proved, would have served to show that the appellant could not have committed the offences. It was further held at page 679G-L that –

“[i]f the State was serious with its opposition to the granting of bail, it should have led rebutting evidence – at least placing in dispute the uncontested evidence of the appellant. Placing in dispute in this sense, postulates a genuine dispute. Mere accusations are not enough.”

[44] Further, it was submitted on behalf of the appellant that the provisions of section 60(11)(a) of the CPA require the appellant to satisfy the court that he should be granted bail, with the word ‘satisfy’ presupposing that he will discharge the onus on a balance of probabilities. *S v Tshabalala*³; also see *S v Stanfield*⁴.

² *S v Jonas* 1998 (2) SACR 677 (EC).

³ *S v Tshabalala* 1998 (2) SACR 259 (C) at 269g-i.

⁴ *S v Stanfield* 1997 (1) SACR 221 (C) at 23.

[45] It was further submitted that the personal circumstances of the appellant, which include his age, the fact that he has no previous convictions, his health (deteriorating eyesight, diabetes and gunshot injuries suffered during his arrest), his grandchild's health, his business and farming interests, his changed financial circumstances and the lengthy delay of the trial constitute grounds for releasing the appellant in the interests of justice as contemplated in section 60(11) of the CPA, alternatively, they constituted exceptional circumstances as envisaged in section 60(11)(a) of the CPA.

[46] Mr Duminy submitted that had the court *a quo* properly applied its mind to and considered the factors set out in Section 60(7) of the CPA referred to above, it should have come to the conclusion that the release of the appellant on bail would not result in any danger to state witnesses.

[47] He further argued in accepting the investigating officer's vague statements relating to public outcry and possible public disorder should the appellant be released, the court failed to approach the application of section 60(4)(e).

[48] Mr Duminy was of the view that the vague and unsubstantiated allegation that the appellant's release would result in public disorder or undermine public peace and security was not established on a preponderance of probabilities and the court *a quo* erred in taking this into account against the appellant. It was further submitted on behalf of the appellant that the court *a quo* ought to have held that it was in the best

interests of justice that the appellant be released on bail pending his trial and/or that exceptional circumstances existed justifying the appellant's release on bail.

The State's submissions on appeal.

[49] Mr Mkentane submitted on behalf of the State that an appeal against refusal of bail is governed 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 even the court or Judge shall give the decision which in its opinion the power court should have given.

[50] He further submitted that in the present case, the appellant has failed to discharge the onus of establishing on a balance of probabilities that exceptional circumstances exist which in the interests of justice permit his release on bail as required by section 60(11)(a) of the CPA. According to the prosecution, the appellant lodged another bail application on the same facts. In this regard, Mr Mkentane submitted that the record of the initial bail application and the application on new facts does not reveal any exceptional circumstances which in the interests of justice permit the appellant's release on bail. He took the view that the court should consider why relevant and available information was not placed before the court in the initial application.

[51] The respondent contends that the appellant will likely contravene the provisions of section 60 (4)(e) directly or indirectly. It is alleged that the appellant

murdered the complainant who appeared to be a witness, and now the appellant is facing more serious offence including murder of the complainant, an offence which carries life imprisonment.

[52] It was further submitted on behalf of the respondent that there is a high risk of interference with the state witnesses should the appellant be released on bail and there is a likelihood that public peace would be disturbed since community members vandalised the appellant's shop or business while he was incarcerated. On these bases, Mr Mkentane submitted that it cannot be said that the interests of justice permit the release of appellant on bail.

[53] The State contended that it has a very strong case against the appellant and that the offences against him are serious as they carry a minimum sentence of life imprisonment, which can influence the appellant to interfere with state witnesses, to evade trial, and or disturb public peace should he be released on bail.

The law.

[54] A bail appeal is brought in terms of section 65 of the CPA, which provides as follows:

“65. Appeal to superior court with regard to bail.

- (1) (a) *An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against*

such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.

(b) The appeal may be heard by a single judge.

(c) A local division of the High Court shall have jurisdiction to hear an appeal under paragraph (a) if the area of jurisdiction of the lower court in question or any part thereof falls within the area of jurisdiction of such local division.

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

...

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

[55] In *S v Simthembele Yanta*⁵, certain general principles were identified as relevant when a court is approached for a bail application on new facts. Those principles were summarised as follows:

- "(a) Whether the facts came to light after the bail was refused. Such facts can include circumstances which have changed since the first bail application was brought such as the period that an accused had been incarcerated.*
- (b) Whether the facts are sufficiently different in character from the facts presented at the earlier unsuccessful bail application in that it should not simply be a reshuffling of old evidence. The court was referred to S v Mohamed⁶ and S v Petersen⁷.*

⁵ *S v Simthembele Yanta* under case number Cc 44/2021 Western Cape Division Cape Town per De Wet AJ at para 15.1 to 15.4.

⁶ *S v Mohamed* 1999 (2) SACR 507 (C).

⁷ *S v Petersen* 2008 (2) SACR 355 (C).

- (c) Whether the alleged new facts are relevant in that if received by the court, it would *per se* or together with other facts already before the court from the initial bail application, assist the court to consider the release to consider the release of an accused afresh.
- (d) The court hearing an application on alleged new facts must determine whether such facts are indeed new with reference to the evidence previously presented in the unsuccessful bail application. Mbenenge AJ, as he then was, in *S v Mpofana*⁸ explained that '*whilst the new application is not merely an extension of the initial one, the court which entertains the new application should come to a conclusion after considering whether, viewed in the light of the facts that were placed before court in the initial application, there are new facts warranting the granting of bail.*'
- (e) Where evidence was known and available to a bail applicant but not presented by him at the time of his earlier application, such evidence can generally not be relied upon for purposes of a new bail application as new facts. In *S v Le Roux en andere*⁹, it was explained that in the absence of such a rule, there could be an abuse of process leading to unnecessary and repeated bail applications and that an accused should not be permitted to launch bail applications on several successive occasions by relying on the piecemeal presentation of evidence."

[56] And in *S v Mququ*¹⁰, where the court held that new facts included:

- "(a) that the appellant's trial had been delayed for a lengthy period;
- (b) that the appellant was suffering financially; and
- (c) that the appellant's health was deteriorating in custody pending trial."

Application of the law to the appeal.

⁸ *S v Mpofana* 1998 (1) SACR at 44-45.

⁹ *S v Le Roux en andere* 1995 (2) SACR 613 W at 622.

¹⁰ *S v Mququ* 2019 (2) SACR 207 (ECG).

[57] During the hearing of the bail appeal, the appellant persisted with the facts raised in the bail hearing on new facts. For edification, I will mention these. The first fact is that the investigation was complete, and that the appellant would not interfere with the investigation and/or preparation of the State's case for trial.

[58] Although it was argued that any public outcry that existed in September 2022 had died down and the State had not shown that any public outcry still existed which militated against the release of the appellant on bail, the only evidence was that of the appellant that such an outcry had subsided. His evidence in this regard was not contradicted by the State.

[59] I note that the appellant's initial bail application was heard in September 2022. His bail application on new facts was heard in November 2023. He continues to be in custody. As at the time of the renewed bail application and the hearing of this appeal, the trial of the matter had not yet commenced, but mentioned was made that it was to commence in April 2024. I am of the view that this is unduly lengthy and that his continued remand in custody effectively subjects him to a prison sentence before the commencement of the actual trial while he was still presumed innocent.

[60] Reference was made to the pending forfeiture case by the State against the appellant in respect of his cash and motor vehicles. This was argued to be a new fact which requires his urgent attention and release on bail to be able to attend thereto properly. I hold the view that this is a big contributor to the financial circumstances of the appellant, and he is severely prejudiced by the forfeiture

proceedings as he is not able to effectively oppose those forfeiture proceedings while he is in custody.

[61] Another point which was presented as a new fact was the deterioration of the appellant's eye condition and his further incarceration exacerbates his condition and his ability to receive medical treatment as is required. The appellant challenges the strength of the case against him. He will succeed in doing so if he is able to show by adducing acceptable evidence that the State's case against him is non-existent, or subject to serious doubt. Where the appellant's evidence stands alone, as it does in the present appeal, then the suggestion that the State's case is non-existent or doubtful becomes almost a foregone conclusion. If the State does not lead evidence in rebuttal, then I fail to see how it can be said that the appellant had not succeeded in discharging the onus.

[62] In determining whether the bail applicant poses a real and imminent danger to the safety of state witnesses the court must consider the grounds set out in section 60(7) of the CPA, which are as follows:

- “(a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;*
- (b) whether the witnesses have already made statements and agreed to testify;*
- (c) whether the investigation against the accused has already been completed;*
- (d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;*
 - (e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;*

- (f) *whether the accused has access to evidentiary material which is to be presented at his or her trial;*
- (g) *the ease with which evidentiary material could be concealed or destroyed; or*
- (h) *any other factor which in the opinion of the court should be taken into account.”*

(S v Mauk¹¹ and S v Botha en another)

[63] Kriegler J, in *S v Dlamini; S v Dladla A and Others; S v Joubert; S v Schietekat*¹², held as follows regarding exceptional circumstances:

“[57] It is important to note that sub-s (4)(e) expressly postulates that it is to come into play only “in exceptional circumstances”. This is a clear pointer that this unusual category of factors is to be taken into account only in those rare cases where it is really justified. What is more, sub-s (4)(e) also expressly stipulates that a finding of such exceptional circumstances has to be established on a preponderance of probabilities (“likelihood”). Lastly, once the existence of such circumstances has been established, paragraph (e) must still be weighed against the considerations enumerated in sub-s (9) before a decision to refuse bail can be taken. Having regard to these jurisdictional prerequisites, the field of application for sub-ss (4)(e) and (8A) will be extremely limited. Judicial officers will therefore rely on this ground with great circumspection in the knowledge that the Constitution protects the liberty interests of all.”

From the above, it follows that the court *a quo* had a duty to consider these factors and weigh them against the mere say- so of the investigating officer who, as the appellant argued, made bald, unsubstantiated, and vague allegations relating to the safety of state witnesses.

¹¹ *S v Mauk* 1999 (2) SACR 479 at 488. Also see *S v Botha en another* 2002 (1) SACr 222 (SCA)).

¹² *S v Dlamini; S v Dladla A and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) at para 57.

[64] When regard is had to the fact that the investigation is now complete, it can be said that the fact that the appellant cannot interfere with the investigation constitutes a new fact as was held in *S v WC and Another* referred to above.

[65] In the circumstances of the present matter, I find the following to constitute exceptional circumstances which warrant the release of the appellant in the interest of justice. I conclude that the court *a quo* erred in not accepting the appellant's circumstances as referred to above as exceptional and warranting consideration for release of the appellant on bail in the interest of justice. However, this was not the only reason for my decision. I also considered other factors such as the financial interests of the appellant, the fact that he has a forfeiture application to also oppose, and he must prepare for his trial, in reaching my decision. I therefore find that there are exceptional circumstances, and that it is in the interest of justice that the appellant be released on bail pending his trial.

Order.

Accordingly, the court makes the following order:

1. The bail appeal succeeds and the order of the court *a quo* is set aside and replaced with the following order:
 - 1.1 The appellant is granted bail in the sum of R 20 000.00 subject to the following conditions:
 - (a) The appellant is prohibited from making contact, directly or indirectly with any witnesses in the case pending before court.

- (b) The appellant is to report to the Mount Fletcher police station twice a week, every Tuesday and Friday between 6am and 6pm.
- (c) The appellant must reside at his home at Vuvu Location, Mount Fletcher for the duration of his trial, unless exceptional circumstances are reported to the investigating officer warrant that he resides elsewhere.
- (d) The appellant is ordered to attend his trial on the given date and on subsequent days not later than 8h30am and to remain in attendance until this matter is finalized or he is excused by the court.

DV PITT

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant : *Adv Duminy*

Instructed by : McCleod Attorneys
Matatiele

Counsel for the Respondents : *Adv Mkentane*

Instructed by : Director of Public Prosecutions
Mthatha

Heard on : 23 February 2024

Date judgment delivered : 02 May 2024