

**THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case. No.: **A249/2023**
Lower Court Case No.: **16/564/2023**

**Hearing on: 25 April 2024
Judgement on: 13 May 2024**

In the matter between:

NICOLE JOHNSON

Appellant

and

THE STATE

This judgment was handed down electronically on by email circulation to the parties' legal representatives' email addresses.

JUDGMENT

SLINGERS J

[1] The appellant, Nicole Johnson (**'Johnson'**), was arrested on 29 September 2023 along with her husband. They were charged with two other persons and on 2 October 2023, she made her first appearance in the court *a quo*. On 9 October 2023, all the accused, including Johnson applied for bail. Both Johnson's legal representative and the state agreed that the bail application fell within the ambit of schedule 5 of the Criminal Procedure Act (**'CPA'**) as they were charged with contravening section 9(1) of the Prevention of Organized Crime Act (**'POCA'**), theft of a motor vehicle (the value whereof exceeded R100 000.00) and fraud.

[2] In accordance with the provisions of section 60(11) of the CPA, in a bail application brought within the ambit of schedule 5, a court shall not order the

release of an accused until he/she, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his/her release.

[3] Section 60(4) of the CPA provides 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) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 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 trial; or

(c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(d) where there is the likelihood that the accused, if he or she were released on bail, will jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system;

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security;'

[4] As seen from the preceding paragraph, the release of an accused would not be in the interests of justice where one or more of the grounds set out in section 60(4) are established. Put differently, bail may be refused if one of the grounds set out in section 60(4) have been met.

- [5] In support of her bail application Johnson elected not to present *vive voce* evidence and instead presented an affidavit that was duly read into the record. A report prepared by the Department of Social Development at the request of the court *a quo* was also received as an exhibit and read into the record. Johnson's co-accused similarly applied for bail, duly supported by affidavit. In opposing bail for all the accused, the state presented an affidavit by the investigating officer, Lieutenant Colonel Van Renen.
- [6] On 30 October 2023, the court *a quo* delivered its judgment refusing the release of Johnson on bail pending her trial.¹ On 17 November 2023, Johnson filed a Notice of Appeal against this decision refusing to grant her bail. Before the appeal could be entertained, Johnson brought a second bail application based on new facts. In this application Johnson presented *vive voce* evidence on 21 December 2023. This application was opposed by the state which again presented evidence on affidavit by the investigation officer. Johnson was unsuccessful with the bail application based on new facts with judgment being delivered on 16 January 2024.
- [7] This is an appeal against both decisions refusing bail.
- [8] The original Notice of Appeal noted thirty-one grounds of appeal with multiple grounds pertaining to the purported bias or prejudice of the magistrate, the failure to individualize Johnson's bail application from that of her co-accused and her likelihood to attend court and not evade her trial. It also included the following grounds of appeal wherein it is alleged that the magistrate erred by:
- (i) allowing the state to make further submissions after Johnson's legal representative had replied but refusing her legal representative permission

¹ The court *a quo* refused bail for all the accused.

to make further submissions in relation thereto even though Johnson had to discharge the onus to show that her release on bail was in the interests of justice;

- (ii) having inadequate regard to the social worker's report obtained at the request of the magistrate;
- (iii) misconstruing the evidence relating to Johnson's need to adjust the petrol price at her garage and how this occurred;
- (iv) misconstruing the allegations pertaining to the identity of the state witnesses, and confusing the allegations pertaining to the complainants with those related to the unidentified state witnesses referenced in the investigating officer's affidavit;
- (v) holding that Johnson had family overseas;
- (vi) over-emphasizing the possible sentence which could be imposed and the failure to have regard to the presumption of innocence until proven guilty and the right to remain silent;
- (vii) holding that Johnson did not state in her affidavit that she was the primary care giver of her minor children, whereas this was obvious from not only her affidavit but also the social worker's report;
- (viii) holding that there was a likelihood that if Johnson was released on bail with conditions, she would not adhere thereto because she is a member of the gang;
- (ix) holding that if Johnson was released on bail, there was a likelihood that she would conceal or destroy evidential material; and

- (x) holding that Johnson's version that the Pollsmoor nurse's refusal to treat her was highly improbable and that the nurse had not made a statement to this effect, so it was clear that Johnson had attempted to mislead the court.

[9] The appellant adopted a shotgun approach and challenged almost every finding by the magistrate.

[10] In the heads of argument filed on behalf of Johnson it was argued that the following were narrow issues which justified interference with the decision of the court *a quo*:

- (i) the failure to individualize Johnson's application and considering it collectively with that of the other accused's' applications;
- (ii) the evidence does not show that there is a likelihood that Johnson would commit a schedule 1 offence if released on bail;
- (iii) the evidence does not show that there is a likelihood that she would interfere with witnesses or evidence or the investigation of she is released on bail;
- (iv) there is no evidence that Johnson would undermine or jeopardize the objectives or the proper functioning of the criminal justice system, if she is released on bail;
- (v) there is no evidence that she would not attend court if released on bail; and
- (vi) there is no evidence that her release would disturb public order or undermine the public peace or security.

The first bail application

[11] In her affidavit filed in support of her first bail application, Johnston stated, *inter alia* that:

- (i) the facts deposed to in her affidavit are to the best of her knowledge, true and correct;
- (ii) she was arrested at her home on 28 September 2023 in relation to an incident which occurred on 24 November 2022;
- (iii) she grew up and resides in the Western Cape although at one stage she intended to move to Gauteng;
- (iv) she is currently studying towards her LLB degree at UNISA;
- (v) she is married and has a 17-year-old son and a 15-year-old daughter;
- (vi) the family home is owned by a company of which she is the sole shareholder and director;
- (vii) she is self-employed and receives a salary from the various businesses she owns which include two beauty therapy outlets and a retail shop. She also draws a salary from a petrol station which she co-owns with her husband;
- (viii) her average monthly income in the most recent financial year from these businesses was R97 100;
- (ix) she is the senior person in all her businesses and solely responsible for the day to day running of them. As she does not trust anyone to run the business, she has not empowered anyone else to operate the businesses and without her the businesses will fail. Johnson goes on to state:

'For example, the price of fuel increased on Wednesday, 3 October 2023 and I am the only person in the business that can change the price of fuel at the fuel pumps. It has not been done.'

- (x) Johnson explains that she had an emergency medical operation and was put under a strict regime when she was discharged. She goes on to state that the nurse at Pollsmoor refused to change her dressing from the operation and advised her that only a doctor can do so;
- (xi) she has a pending criminal matter which originates from 2014 in respect whereof she has been released on a warning;
- (xii) she has a fixed address, is financially stable and is not a flight risk;
- (xiii) in respect of the motor vehicle, which is the subject of the theft charge, she states:

'I am aware that the vehicle mentioned in count 1 was owned by Kelly Stuurman. She was the girlfriend of my employee. Both of them lived in a house that I own. I paid the deposit for the motorvehicle and Stuurman financed the balance. Her boyfriend, who also was an employee of mine stole a vast amount of money from my business and defrauded a business partner. When I found this out and confronted him he fled and switched off his phone. I have not spoken to either of them since then and do not know their whereabouts.'

- (xiv) Johnson states that she did not supply the SAPS with any false information before or after her arrest, and she has never been accused of frustrating the criminal justice system or the bail system ever;

(xv) Johnson denies that she stole the motor vehicle and stated that she has not even touched the vehicle; and

(xvi) she denied being present when any assault took place and denied making a misrepresentation to anyone or being involved in any fraud.

[12] Section 65(4) of the CPA sets out the approach to be adopted when considering an appeal against the refusal of bail. It 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.’

[13] I deal firstly with the criticisms and grounds of appeal which allege that the court failed to consider Johnson’s bail application individually and on its own merits.

[14] The court *a quo* specifically states that it will deal with each application individually²and proceeds to deal with Johnson’s personal circumstances.³ In evaluating the provisions of section 60(4) and whether the interest of justice permits the granting of bail, the magistrate dealt with each subsection and evaluated the case for each accused and the opposition thereto by the state. The form of the judgment dated 30 October 2023, was in my view, necessitated by all four accused bringing the bail application in the same proceedings and in the same manner. All the accused, including Johnson as well as the state presented their cases on affidavit.

[15] When the magistrate’s evaluation of Johnson’s application and the state’s opposition thereto is analyzed within the context of the requirements of section

² page 654, ln 24-25

³ page 648, ln14 and page 675, ln23

60(4) of the CPA, it cannot be said that she failed to consider the merits of Johnson's application on its own or that she failed to individualize Johnson's bail application. This is evidenced by *inter alia* when she accepts that the charges faced by Johnson does not include an element of violence, as the charges against her co-accused do. Similarly, the court *a quo* was cognizant that the evidence presented did not show that Johnson made any threats of violence whereas it did in respect of her husband. If the court *a quo* had failed to individualize Johnson's bail application from that of her co – accused, it would have made general findings in respect of section 60(4)(a) to (d). This was not the case.

- [16] In considering whether the evidence presented established that there was a likelihood that Johnson, if she was released on bail, would endanger the safety of the public or any particular person or would commit a schedule 1 offence, the magistrate found that the evidence presented showed that Johnson harbored resentment against her ex-employee who allegedly stole money from the garage. This resentment manifested in Johnson, together with her co-accused, undertaking a manhunt to locate the rogue employee and to remove the motor vehicle which is the subject of the theft charge. The evidence which shows that Johnson used deception and misrepresented who she was to locate the vehicle and to have it removed was not challenged by Johnson or her legal representative. On the contrary, they argued that Johnson was entitled to act in the manner that she did as she had assisted with the financing of the vehicle and provided a R100 000.00 as a deposit for its purchase. They submitted that this was a civil dispute and not a criminal one. However, this argument is disingenuous as the steps taken by Johnson was not to recover her loan but to recover the money which was allegedly stolen from her.

[17] Section 60(4)(c) of the CPA provides that one of the factors a court may consider when determining if there is a likelihood that an accused, if released on bail, would endanger the safety of the public or any particular person or will commit a Schedule 1 offence is the issue of resentment which the accused is alleged to harbour against any person.

[18] In the circumstances, the court *a quo* cannot be said to have erred when it found that there was a likelihood that Johnson, if released on bail would endanger the safety of the public or any particular person or would commit a Schedule 1 offence.

[19] In considering whether the evidence presented established that there was a likelihood that Johnson, if released on bail, would attempt to evade her trial, the court recognized the right to familial life contained in section 28(1)(b) of the Constitution as well as that the best interests of the child contained in section 28(2) of the Constitution. However, the magistrate, correctly in my view, held that these rights could not override the interests of justice or the public interest.

[20] The magistrate cannot be faulted for finding that neither Johnson nor her husband mentioned that their children would suffer financially or emotionally if they were further detained. Johnson's affidavit addresses her children in a single paragraph which is set out in full below:

'12. I am married and we have two minor children, a 17 year old son and a 15 year old daughter. Our two children attend school and do very well academically. My son is in his final year and has received numerous offers to study further abroad.'

[21] Therefore, the court *a quo* was correct when it records that Johnson via her legal representative states that she is the minor children's primary caregiver but that it was never mentioned in her affidavit.

[22] During the hearing of the bail appeal, Johnson's legal counsel submitted that the social worker's report clearly stated that Johnson was the primary caregiver. This is not so. Other than reporting in an introductory paragraph that '*A Primary Care givers report was requested by Cape Town Court 16 Magistrate for Tracy Johnson Stanfield*', the contents of the report do not support the allegation that Johnson is the primary care giver. On the contrary, it speaks about the minor children's relationship with both parents which is evident from the following excerpt:

'The children of the accused reported that they have a strong relationship with their parents. The son report that he speaks to both parents when he is facing challengers. The maternal grandmother reported that the daughter is very close to their parents. The children reported that they are close to their maternal grandmother. She loves and takes care of them.'

[23] The court *a quo* correctly found that it was not the social worker's mandate to make a recommendation on the granting or refusal of bail but rather to determine whether the minor children were being looked after. In evaluating the social worker's report, it is evident that the author thereof was not qualified nor equipped to make a recommendation pertaining to the release on bail as she does not address the seriousness of the charges or any of the other requirements set out in section 60(4) of the CPA. The social worker's mandate and expertise pertained to whether the minor children were being cared for in the absence of their parents.

- [24] However, the court *a quo* erred when it found that Johnson had family overseas as there was no evidence to support this finding. This factual error influenced the magistrate's finding that the evidence presented established that there was a likelihood that Johnson, if she was released on bail, would attempt to evade her trial. Therefore, this finding by the magistrate cannot be sustained.
- [25] In considering the evidence presented in respect of section 60(4)(c) the court found that there was a likelihood that Johnson, if released on bail would attempt to influence or intimidate witnesses or to conceal or destroy evidence.
- [26] In reaching this conclusion, the court considered Johnson's affidavit which unequivocally states that *'...For example, the price of fuel increased on Wednesday, 3 October 2023 and I am the only person in the business that can change the price of fuel at the fuel pumps.'*
- [27] This statement was proven to be false by the evidence presented by the state showing that the fuel price had indeed been changed at the fuel pumps after Johnson was arrested and detained. Once again, this evidence was not contradicted. On the contrary, Johnson's legal representative attempted to downplay the evidence by making submissions from the bar that Johnson had made prior arrangements to change the fuel price.
- [28] Furthermore, after it was announced in open court that the police would be attending at the petrol station to conduct investigation at the fuel pumps, the garage was mysteriously closed for business, thus preventing the police from conducting their further investigation. Although Johnson denies shutting down the business, her denial must be seen against the context of her statement that she is the only person who runs or operates the business.

[29] In the circumstances, the magistrate's conclusion that Johnson prevented the investigation into the petrol price adjustment as she wanted to conceal the evidence that the petrol price had been changed while she was in custody cannot be faulted after considering the evidentiary and factual matrix. The magistrate correctly noted that Johnson's legal representative's submission that prior arrangements had been made to change the fuel price constituted a submission from the bar which carried no evidentiary weight. Furthermore, she correctly pointed out that it was contradictory to what was contained in Johnson's affidavit.

[30] The court also addressed the fact that Johnson contradicted herself in stating that she does not know who the state witnesses are but then goes to state that she is aware that the vehicle in question was owned by Kelly Stuurman, who was the girlfriend of her employee who stole a vast amount of money from her. Therefore, Johnson could not have declared that she did not know who the witnesses were.⁴

[31] The grounds of appeal in this respect states the magistrate erred

'In misconstruing the allegations pertaining to the identity of the State witnesses. In this regard, the learned Magistrate appears to have confused the allegations pertaining to the complainants with those related to the unidentified State witnesses that were referred to in the Investigating Officer's affidavit.'

[32] However, at the time Johnson deposed to her affidavit she would not have had insight into the investigating officer's affidavit as it was presented to the court after Johnson's case had been presented. There is nothing in the record to show that she knew what was in the investigating officer's affidavit at the time of

⁴ Section 60(4)(a) provides that one of the factors a court may consider in determining the likelihood that an accused, if released on bail, would influence or intimidate witnesses or conceal evidence, is the fact that an accused is familiar with the identity of witnesses and the with the evidence which they may bring against him or her.

deposing to her affidavit. Furthermore, her affidavit does not state that *I know the complainants but do not know the other witnesses*. On the contrary, she firmly states that *'I do not know who the State witnesses are...'*

[33] In Johnson's affidavit, she also states that *'... the nurse at Pollsmoor refused to change my op. dressings. She said only my doctor can.'*

[34] When the state sought a postponement to investigate this aspect of the evidence, Johnson's legal representative objected thereto and informed the court *a quo* that the senior nurse at the Pollsmoor hospital section would state that she has refused to deal with Johnson's operation stitches. When it was pointed out to the legal representative that this was the very issue the state wanted to investigate, the legal representative informed the court that they do not have the nurse's name.

[35] After the state's investigation into this aspect, it was placed on record that Johnson refused to grant the nurse consent to treat her stitches. Furthermore, the senior nurse denied that she refused to deal with Johnson's stitches. This differed materially from Johnson's evidence on this aspect.⁵

[36] Therefore, the magistrate cannot be faulted for finding that Johnson attempted to mislead the court in respect of her knowledge of the witnesses' identity, the change of fuel at the petrol pumps and the refusal of the nurse to deal with her stitches.

[37] In considering whether there was a likelihood that Johnson, if released on bail would undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system, the magistrate incorrectly found that Johnson would not adhere to bail conditions as she was a member of

⁵ page 338, lines 8-13; page 410, line 7 to page 412, line 3

accused 1's gang. No evidence was presented that Johnson was a gang member. Therefore, this finding cannot be sustained by the evidence.

[38] However, the evidence shows that Johnson actively associated herself with the activities of and furthered the objectives of accused 1, her husband, and her co-accused in locating the motor vehicle and removing same without any legal authorization to do so.

[39] I turn now to the ground of appeal that the magistrate erred:

'By allowing the Prosecutor to make further submissions after the Appellant's legal representatives had replied but refusing the Appellant's legal representatives permission to make further submissions in relation thereto even though the Appellant bore the onus of proving that her release on bail would be in the interests of justice.'(own emphasis)

[40] A consideration of the record will show that although Mr Maharaj, as Johnson's legal representative, requested to make further submissions after the prosecutor had done so after Johnson's legal representatives had replied, it did not relate to the submissions made by the state.

[41] During his exchange with the court, Mr Maharaj first states that during consultations with his client he was able to establish certain issues he wanted to bring to the court that was not contained in the submissions. He goes on to state that it was not contained in his reply as it was information obtained during the morning by Johnson.⁶ After the state objects, Mr Maharaj does an about-turn

⁶ page 634, line 6-13; line 23 – page 635, line 3

and informs the court that the aspects he wanted to address the court on has been covered and it nothing new.⁷

[42] Therefore, Johnson's legal representative was not prevented from responding to the state's submissions and on a reading from the record it appears that he was not prevented from addressing the court on issues already covered as he conceded that it was not necessary.

[43] The appeal against the refusal to grant bail made much ado about the 'duplicitous' approach of the magistrate to the affidavit presented by Johnson as compared to those presented by the state.

[44] It is common cause that the bail application fell to be considered within the ambit of schedule 5. Therefore, Johnson had the onus to show that her release was in the interests of justice. As stated in *Killian v S*⁸ the discharge of the onus is a central consideration in bail applications considered in terms of section 60(11). Therefore, where the facts are to be determined on paper because of the parties presenting their cases via affidavits, then the state's version must prevail, unless it is improbable.

[45] Therefore, in my view there is no merit in the criticism that the magistrate adopted a duplicitous approach to the affidavit presented by Johnson as compared to the affidavits of the state.

[46] Based on the above legal position, there is also no merit in the ground of appeal pertaining to the magistrate holding that Johnson's version that the nurse at Pollsmoor refused to treat her was improbable and that the nurse had not made

⁷ page 636, line 18-20

⁸ [2021] ZAWCHC 100 (24 May 2021); See also *S v Kara and Others* 2023 (2) SACR 171 (WCC)

a statement to that effect. Similarly, the finding that Johnson had attempted to mislead the court on this aspect cannot be criticized.

[47] The judgments of the *court a quo* was criticized for over emphasizing the possible sentence which could be imposed with regard to the charges faced by Johnson while not having regard to the right to remain silent and the presumption of innocence.⁹ A further criticism was that the magistrate misdirected in failing to appreciate that Johnson had given a *viva voce* explanation in response to the theft of the motor vehicle which, it was submitted, raised a complete defence and is reasonably possibly true, thereby rendering the state's case weak on the merits.¹⁰

[48] However, section 60(6)(h) of the CPA directs that a court may consider the nature and gravity of the punishment likely to be imposed. Furthermore, while an accused person such as Johnson has the right to remain silent, the election to do so has consequences.¹¹ When the presumption of innocence is considered within the context of a challenge to the merits of the state's case within a bail application, the accused would have to show on a balance of probabilities that he/she will be acquitted of the charge.¹²

[49] After an evaluation of all the evidence presented in both bail applications, I am not convinced that Johnson has demonstrated that she would, on a balance of probabilities, be acquitted of the theft of a motor vehicle charge. As conceded by her counsel during the hearing, Johnson deceived Tracker more than once and she lied to the police. Furthermore, her version pertaining to the theft of the

⁹ This was a ground of appeal against the first bail judgment.

¹⁰ This was a ground of appeal against the bail judgment in respect of new facts.

¹¹ *S v Boesak* 2001 (1) SA 912 (CC)- If there is evidence which calls for an answer and an accused elects to remain silent, the court may be entitled to conclude that the evidence in the absence of an explanation, was sufficient to establish guilt.

¹² *Mathebula v The State* (431/09) [2009] ZASCA 91 (11 September 2009)

motor vehicle theft set out in her affidavit deposed to in support of the first bail differed substantially from her version presented in the *vive voce* evidence

[50] I turn now to the bail application based on new facts.

New facts bail application

[51] It has been held that new facts are facts which should be discovered after the bail application was heard and cannot merely be an elaboration of facts presented in the first bail application.¹³

[52] When considering a bail application brought on new facts, the court must be satisfied that the facts are new and relevant to the determination of bail.¹⁴ A renewed application based on new facts should be properly referenced with those facts which were placed before the court in the first instance.¹⁵

[53] During November 2023, Johnson instituted a second bail application based on new facts. These new facts were:

- (i) Johnson's daughter's health who suffered a suspected burst ovarian cyst and who, the court was informed, suffers from depression and anxiety mainly because of her mother's incarceration¹⁶;
- (ii) the events pertaining to the Sorbet franchises¹⁷; and
- (iii) the events pertaining to John Ramsay Service Station¹⁸.

[54] After the bail application based on new facts was refused, Johnson amended her Notice of Appeal to include the grounds set out below:

¹³ *Davis and Another v S* (unreported KZDLD case no 2888/2015, 8 May 2025); *S v Petersen* 2008 (2) SACR 355 (C)

¹⁴ *S v Petersen* at [57]

¹⁵ 2019 (2) SACR 207 (ECG) at 7

¹⁶ page 781, line 10

¹⁷ page 781, line 15

¹⁸ page 781, line 23

[55] After the judgment of 16 January 2024 refusing the bail application based on new facts, Johnson amended her Notice of Appeal to add further grounds of appeal which included the misdirection by the magistrate:

- (i) in rejecting the *viva voce* evidence of Johnson regarding the health of her daughter in circumstances where it was admissible and uncontested by the state;
- (ii) in not appreciating that the new facts such as the failure of the Sorbet franchises came to Johnson's attention after her first bail application;
- (iii) by not attaching proper weight attached to the *viva voce* evidence of Johnson when compared to that attached to the evidence of the state; and
- (iv) failing to appreciate that Johnson gave a *viva voce* explanation to the charge of theft which raised a complete defence and is reasonably possibly true, rendering the state's case weak on the merits.

[56] I deal firstly with the ground that the magistrate misdirected by failing to attach proper weight to the *viva voce* evidence of Johnson and attaching too much weight to the affidavit submitted by the state. This ground of appeal fails to take cognizance of the fact that Johnson was clothed with the task of showing that her release was in the interest of justice and that the state was not required to meet *vive voce* evidence with *vive voce* evidence.¹⁹ Furthermore, the court found that Johnson had on numerous and on material aspects contradicted herself and was adjusting her evidence as she went along. This negative finding undoubtedly impacted on the evidentiary weight attached to Johnson's evidence where it was not corroborated.²⁰

¹⁹ *S v Viljoen* (286/2002) [2002] ZASCA 81

²⁰ page 1049, line 13

- [57] I turn now to the issue of the health of Johnson's daughter. Johnson testified that her daughter was 15 years old and in grade 9 at the A[...] I[...] School of C[...] T[...].
- [58] On 27 November 2023, Johnson's daughter visited her in prison. Johnson could see that her daughter had lost a lot of weight and asked her what was going on. Her daughter told her that for the last two weeks she had trouble eating and keeping her food down. Johnson cut the visit short and asked her mother to take her daughter to hospital. It was then that they discovered that Johnson's daughter has ovarian cysts.
- [59] When her daughter visited her at a later occasion, Johnson was informed that the ovarian cysts were growing and that her daughter may require an operation in January 2024.
- [60] Johnson testified that her daughter was always an anxious girl but that she never had panic attacks the way she is having which requires her mother to fetch her daily from school.
- [61] Johnson also testified that her daughter missed 18 days of school. However, it appears from the record that these 18 days were missed not as a result of the daughter's anxiety but rather as a result of the need to recuperate from her treatment for cysts.
- [62] Furthermore, Johnson testified that her daughter always had digestive problems which she treated. She also testified that her daughter is not well and that she is isolating herself in her room and does not talk much. Johnson testified that she has not seen her daughter's anxiety manifest to extent it was.

[63] During cross-examination by the state, Johnson confirmed that her daughter had always been an anxious child but has never been diagnosed with anxiety. Although her daughter had been taken to Kingsbury hospital for a panic attack she had at school, Johnson was not able to tell the court what the reason for the panic attack was.²¹

[64] In evaluating the evidence pertaining to Johnson's daughter, the magistrate found that to qualify as a new fact, no health problems must have excised prior to the applicant being denied bail. Furthermore, the court had to consider the facts that had been placed before the court in the initial bail application as well as the new facts should be considered together.

[65] The court *a quo* correctly noted that although her daughter had always been anxious, Johnson did not testify to this in her initial bail application. Furthermore, it was also not mentioned in the social worker's report or during the address of her legal counsel. On the contrary, the court referenced the social worker's report that recorded that both children were able bodied individuals with no physical or mental disability, with no health issues reported during the consultation.

[66] The court correctly highlighted that Johnson's daughter did not even remotely indicate to the social worker that she suffers from anxiety or any kind of mental illness.

[67] Whilst the mental aspects of Johnson's daughter's health were questioned, it was accepted that she suffered health issues in respect of her ovarian cysts. Therefore, the court could not be faulted if it had to find that Johnson's daughter's mental health issues were fabricated or did not constitute new facts. However,

²¹ page 850, line 25- page 851, line 6

the magistrate went further and found that Johnson had fabricated her daughter's health issues.

[68] In her affidavit deposed to in support of her first bail application, Johnson stated that:

'17. I am the senior person in all my businesses and solely responsible for the day to day running of the businesses. I do not trust anyone to run the businesses and have not as result empowered anyone to be able to run the businesses. Without me the businesses will fail.'

[69] In the application based on new facts, Johnson testified that her Sorbet franchise stores are going down and that the manager who was appointed was stealing.

[70] Johnson was also informed that Sorbet Man (Pty) Ltd was cancelling the franchise agreements with her in respect of her two stores. This cancellation was caused by Johnson's breach of clause 20.2.23 of the franchise agreement as she had been absent from the business for a period in excess of 30 days. In opposing the bail application based on new facts, the investigating officer deposed to an affidavit wherein he states that he spoke with Matthew Welz ('Welz'), who is the head of legal and the Sorbet Company Secretary. Welz informed the investigating officer that the release of Johnson on bail would not affect the termination of the franchise agreements.

[71] As seen from the paragraph 62 above, Johnson predicted that her businesses would fail without her as she had not empowered anyone to take over the day to day running thereof. The resultant failure of the Sorbet stores was a fulfillment of this expectation. It is not, in my view, new facts. If Johnson had not believed the truth of this prediction (the failure of her businesses), then the question must be posed why she made such a statement in her affidavit in the first instance.

- [72] However, even if I am incorrect on this aspect, I fail to see how the termination of the Sorbet franchise agreements would constitute new facts that are relevant to the bail application. Moreso, as the evidence is that Johnson's release on bail would not impact on this termination.
- [73] Furthermore, the position pertaining to the termination of the Sorbet stores would remain the same if Johnson was released on bail with conditions which prevented her from physically attending at the Sorbet stores as it would result in the continued breach of the franchise agreement. Therefore, it had not been shown that the release of Johnson on bail would have any impact on the termination of the franchise agreements.
- [74] Similarly, in respect of the petrol station – the fulfillment of the predicament that her business will fail without her, is not, in my view, a new fact.
- [75] Furthermore, it is clear from the letter dated 24 October 2023 and which addresses Johnson's breach of the Retail and Supply Agreement concluded between John Ramsay Service Station CC and MBT Petroleum (Pty) Ltd that the breach was caused by Johnson's unlawful cessation of business operations prior to 13 October 2023.
- [76] In *S v Petersen*²² a full bench found that the appeal court should be at liberty to undertake its own analysis of the evidence in considering whether the appellant discharged the onus in terms of s60(11)(a) of the CPA.
- [77] I turn now to analyzing the evidence presented.
- [78] I consider firstly whether there is a likelihood that if Johnson were to be released on bail, she would endanger the safety of the public, any person against whom

²² 2008 (2) SACR 355 (C)

the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence.

[79] Johnson's own evidence shows that when she realised that one of her employees had stolen a large amount of money from her she elected not to report the theft to the police but rather to launch a manhunt to track him down. Johnson's first reaction was not to call the police but to take the law into her own hands. She intentionally deceived Tracker by repeatedly pretending to be Kelly Stuurman in order that she could locate the whereabouts of the BMW motor vehicle which is the subject matter of the theft charge.

[80] During argument it was submitted that Johnson had Kelly Stuurman's permission to contact Tracker and to locate the vehicle. This argument is inconsistent with Johnson's evidence as she pertinently states that *'...I would also like to put on record that phone call was made to Tracker was right before I spoke to Kelly Stuurman regarding what is happening at work with the money.'*²³

[81] In defending her deception of Tracker, Johnson states that *'I had – in my best ability at the moment I did what I needed to do.'*²⁴ The employee was missing with her money and the car, and she would do whatever was necessary to get it back, which she felt she was entitled to do.²⁵

[82] The above evidence shows that Johnson resented the employee who stole from her and felt that she was entitled to- in her words - *do what she had to do*, which evidently included taking the law into her own hands.

[83] In light of the above, I am of the view that there is a likelihood that, if released on bail, Johnson would endanger the safety of the public, and any person against

²³ page 893, line 15

²⁴ page 897

²⁵ page 906, line 1

whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence.

[84] In considering whether there is a likelihood that Johnson, if she was released on bail, would attempt to evade her trial, regard must be had to her dishonesty pertaining to her income.

[85] As conceded by her counsel during the hearing of the appeal, Johnson was not honest in disclosing her monthly income of R70 000 she received from Ayepep. Johnson's evidence on this aspect was very confusing, intentionally so, in my view to muddy the waters pertaining thereto.²⁶ In her affidavit deposed to in support of her first bail application, Johnson states that her average monthly income in the most recent financial year was R97 100.00. She does not disclose any income she received from Ayepep. Johnson proceeds to blame this omission on Mr Guma, who remains her attorney and her accountant.

[86] Not only did Johnson not disclose her salary income she received from Ayepep, but she also failed to disclose the loan repayments which she received.

[87] The undisclosed income which included the loan repayments received by Johnson would have eased any discomfort she may have suffered if she chose to forfeit the monies paid in respect of bail, thereby increasing the likelihood thereof.

[88] As set out above, Johnson, if convicted is facing a minimum sentence of 15 years in the absence of substantial and compelling circumstances. In light of the audio recording pertaining to the telephone conversation with Tracker and the video evidence, it cannot be said that the state had a weak case against her.

²⁶ page 858, line 3

[89] Johnson also considered applying for business residency in Dubai. She did not disclose this information, even though she deemed it appropriate to disclose that she had years ago considered relocating to Gauteng. Even though nothing came from this, she had been in contact with a person who would have assisted with the residency applications as recently as 27 March 2023. This contact could have provided her with the means of applying for residency in Dubai, if needed.

[90] Therefore, there is a likelihood that she could attempt to evade her trial if she were to be released on bail as she had the necessary contacts to establish residency in Dubai and had the financial means to do so.

[91] Johnson is clearly acquainted with and knows Kelly Stuurman and her boyfriend, the complainant in the motor vehicle theft. As one of the charges pertained to the theft of the motor vehicle which, in Johnson's own words -was owned by Kelly Stuurman, and which was unlawfully towed and removed as a result of Johnson's intervention and actions, she must have known that they would be witnesses against her at least in respect of the theft of the motor vehicle. This is common sense. Further, Johnson is not an ordinary lay person completely ignorant of the law but was busy with completing her LLB degree.

[92] In her affidavit, Johnson unequivocally denies making a misrepresentation to anyone and denies that she provided false information to the police before or after her arrest. The evidence presented in the bail application based on new facts showed these statements to be false. Prior to her arrest, Johnson told the police that she was the owner of the BMW to persuade them to allow her to remove it after it was located by deceptive means. She also misrepresented to Tracker that she was Kelly Stuurman, the registered owner of the BMW. This much was conceded by her counsel during the hearing of the appeal.

[93] Furthermore, she was also dishonest when she stated in her affidavit that the petrol price at her petrol station had not been changed. This was proven to be a lie when the petrol station was visited by the investigating officer. When it was disclosed in open court that the police would further their investigation by visiting the petrol station, it was mysteriously closed thereby preventing this investigation. Although Johnson denied that she closed the petrol station, she stated that she is the only person who operates it as she has not empowered any other person to do so. Furthermore, she would be the only person to benefit from the closure of the petrol station.

[94] Therefore, I find that there is a likelihood that if Johnson was released on bail, she would attempt to influence or intimidate witnesses or to conceal or destroy evidence.

[95] In her affidavit, Johnson states that:

'23. ... Her boyfriend, who also was an employee of mine stole a vast amount of money from my business and defrauded a business partner. When I found this out and confronted him, he fled and switched off his phone. I have not spoken to either of them since then and do not know their whereabouts.' and

'28. ... In fact, I have not even touched the vehicle.'

[96] The evidence presented in the bail application brought on new facts shows that the above quoted contents of her affidavit were false. On the contrary, Johnson remained in contact with Stuurman, was proactive in locating the vehicle and having it removed.

[97] A holistic analysis of the evidence portrays Johnson as a person who *does what she needs to* even if this means being deceptive and taking the law into her own

hands. She does not hesitate to lie and give false evidence, if she thinks it will benefit her. Such a person does not respect the legal system and would not hesitate to undermine the criminal justice system, including the bail system.

[98] In summation, Johnson unapologetically took the law into her own hands, was dishonest to the SAPS and Tracker, failed to disclose that she was considering applying for residency (albeit business residency) in Dubai and her subsequent communication pertaining thereto, failed to disclose the full extent of her income and was dishonest in the evidence she presented to court in applying for bail.

[99] In light of the above, Johnson has not discharged her onus to show that it would be in the interests of justice that she be released on bail. Therefore, the bail appeal is dismissed.

Slingers J

13 May 2024