

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

CASE NO. CA&R 103/2024

In the matter between:

DORIAN DAVIES

Appellant

and

THE STATE

Respondent

JUDGMENT

LAING J

[1] This is an appeal against the decision of the district court in Somerset East to refuse bail to the appellant, who has been charged with dealing in drugs, alternatively using or being in possession of drugs.

Background

[2] It was common cause that, on 29 February 2024, members of the South African Police Services stopped a Nissan NP200 *bakkie* along the N10 national road in the vicinity of Cookhouse. The appellant was driving the motor vehicle at the time, accompanied by a Mr Julius Menziwa. A police search led to the discovery of a large quantity of Mandrax tablets and a sachet of 'Tik'. The two suspects denied any knowledge of the drugs but were arrested and taken to the police station at Cookhouse, where they were placed in detention. A body search of Mr Menziwa led to the discovery of further drugs.

In the court *a quo*

[3] At the bail application in the court *a quo*, the appellant's legal representative presented an affidavit in lieu of testifying. He stated that he was 41-years old and had been residing at his current address in Somerset East for six years. He was a South African citizen; he had no passport. The appellant was married with five children, ranging from 19 to four years in age. He was self-employed and was an events organizer, earning about R7,500 per month. He had no previous convictions and there were no cases pending against him. Regarding the offence, the appellant stated that he was unaware that there had been drugs hidden in the motor vehicle. He was able to pay R5,000 for bail.

[4] Mr Menziwa testified in support of his application. He alleged that he did not know the appellant and met him for the first time when he hitched a lift from him along the route in question. He did not know how the drugs came to be hidden in the motor vehicle. He conceded that he had numerous previous convictions, mostly pertaining to dealing in drugs; there was also a case still pending against him.

[5] The state presented a petition that had allegedly been submitted by the communities residing in the Somerset East district, calling for the support of the magistracy and emphasizing that no bail should be granted to anyone accused of drug-related offences. There were 786 signatures on the petition.

[6] A police officer attached to a drug-related crime unit and with considerable experience of policing in this area submitted an affidavit stating that the value of the Mandrax and 'Tik' found in the motor vehicle was approximately R148,000. The drugs found in Mr Menziwa's possession were valued at approximately R115,000. The investigating officer, Capt Malunga Mvulazi, also submitted an affidavit. He asserted, with reference to sections 60(4)(a) and (e) of the Criminal Procedure Act 51 of 1977 ('CPA'), that it would not be in the interests of justice for bail to be granted to the

appellant. Capt Mvulazi confirmed the personal details of the appellant; he admitted that the appellant was not a flight risk. He went on to describe the circumstances of the search of the motor vehicle, the arrest of the appellant and Mr Menziwa, and their subsequent detention.

[7] The state then called a member of the community, Ms Susan Martins, who testified about the impact of drugs on her 25-year-old son and her family in general. She explained that her son's drug addiction had almost destroyed her family and had caused considerable suffering. She said that drug use was very widespread in Somerset East.

[8] The previous witness, Capt Mvulazi, was recalled. He testified that the motor vehicle driven by the appellant was registered in the name of ABSA Bank; the accompanying ID number belonged to neither the appellant nor Mr Menziwa but to someone residing in Randburg, Gauteng.

Judgment of the magistrate

[9] In his judgment, the magistrate observed that a person's right to liberty and freedom was constitutionally entrenched. It was, however, also subject to limitations. The magistrate went on to acknowledge the petition that the state had presented but reiterated that a court should not be swayed by public opinion. He remarked that the time taken for the finalization of the laboratory reports regarding the drugs could not be used as a basis for granting bail and emphasized the prevalence of drug-related cases on the court roll. The magistrate held that it was necessary for the court to consider public opinion and the effect that drug use had on a community; if the court did not act decisively then the community would take the law into their own hands, anarchy would result. There would be no trust in the criminal justice system. The appellant was found in possession of a large quantity of drugs; this and the prevalence of drug use in the Somerset East district persuaded the magistrate that it would not be in the interests of justice to grant bail to the appellant.

Basis for appeal

[10] On appeal, the appellant listed several grounds. He contended that the magistrate failed to consider, *inter alia*: the appellant's personal circumstances and the effect that his continued detention would have on the wellbeing of his children; that the appellant has a permanent address, which was verified by the investigating officer; that he was not a flight risk; that he has no previous convictions. There was no evidence that the appellant had previously undermined or jeopardized the functioning of the criminal justice system. Suitable bail conditions could have been imposed to address any reservations that the magistrate had held about the appellant's release.

[11] The above grounds constitute, very broadly, the issues to be decided in the present matter. A brief overview of the applicable principles follows.

Legal framework

[12] The starting point is section 65(4) of the CPA, which stipulates that the decision against which an appeal is brought shall not be set aside unless a judge is satisfied that the decision was wrong, in which event the judge shall give the decision which, in his or her opinion, the court *a quo* should have given. The catalyst for the appeal court's intervention is its finding that the decision of the court *a quo* was incorrect.

[13] It was common cause that the offence with which the appellant was charged fell under Schedule 5 of the CPA. This attracted the test set out in section 60(11)(b). In other words, the appellant must continue to be detained in custody unless he adduces evidence which satisfies the court that the interests of justice permit his release. The provisions of section 60(4), however, indicate that the interests of justice do not permit the release of the appellant where one or more of the grounds listed in sub-sections (a) to (e) is or are established. They comprise a set of 'likelihoods'. A court may consider the factors listed under sections 60(5) to (8A) for purposes of determining whether the grounds or 'likelihoods' have been established. Finally, the court must decide the matter

by weighing up the interests of justice, which include the safety of the person against whom the offence was allegedly committed, against the right of the appellant to his personal freedom, as envisaged under sections 60(9) and (10).

[14] The above principles provide a legislative framework for the decision. The application thereof to the facts of the matter follows.

Discussion

[15] The appellant bore the onus of satisfying the court *a quo* that the interests of justice permitted his release. It is helpful to refer to the decision of the Constitutional Court in *S v Dlamini*; *S v Dladla and others*; *S v Joubert*; *S v Schietekat*,¹ where Kriegler J held:

‘...the basic enquiry remains to ascertain where the interests of justice lie. In deciding whether the interests of justice permit the release on bail of an awaiting trial prisoner, the court is advised to look to the five broad considerations mentioned in para’s (a) to (e) of sub-s (4), as detailed in the succeeding subsections. And it then has to do the final weighing up of factors for and against bail as required by sub-ss (9) and (10). Subsections (4), (9) and (10) of s 60 should therefore be read as requiring of a court hearing a bail application to do what courts have always had to do, namely to bring a reasoned and balanced judgment to bear in an evaluation, where the liberty interests of the arrestee are given the full value accorded by the Constitution.’²

[16] In the present matter, the state relied on the grounds or likelihoods in sections 60(4)(a) and (e) to oppose the granting of bail. These must be considered further.

[17] It seems that, regarding section 60(4)(a), the state based its case on the likelihood that the appellant would endanger the safety of the public. None of the factors

¹ 1999 (2) SACR 51 (CC).

² At paragraph [49].

listed in section 60(5) were addressed, save for the prevalence of the offence in the Somerset East district. The magistrate appeared to have been swayed, considerably, by the petition presented by the state, as well as Ms Martins's testimony. Neither, however, carried much, if any, evidential value. The petition was directed at drug-related offences in general, Ms Martins's testimony pertained to the destructive impact of drug use on her son and her wider family; the appellant was not implicated directly. In his affidavit, the appellant asserted that he was unaware that drugs had been hidden inside the motor vehicle and received 'the shock of my life' when the police made the discovery. This was not disputed by the state. Furthermore, no drugs were found on the appellant; Capt Mvulazi testified that the police had not been able to trace the ownership of the motor vehicle to him; Mr Menziwa (previously convicted of drug-related offences) stated that he did not know the appellant; and the appellant had no previous convictions or cases pending against him to suggest that he was implicated in the offence. Although these aspects will need to be tested properly at trial, there was, quite simply, no evidence in the court *a quo* that the appellant would endanger the safety of the public. The requirements of section 60(4)(a) were not met.

[18] Turning to section 60(4)(e), read with section 60(8A), it is necessary to refer to *S v Schietekat*,³ where Slomowitz AJ observed, regarding the relevant factors, that:

'...[the factors] are no more than an expression, in statutory form, of what amounts to lynch law. It is true to say that it is the duty of courts of law to ensure the maintenance of law, order and justice and so prevent the greatest of evils, a criminal justice system so weak and vacillating that people feel the need to avoid the courts and take the law into their own hands. Despite this courts have a greater obligation to society at large. They must jealously guard the rule of law. That is the lesson of this century. A court of law must not permit the body politic to give legislative credibility, for whatever reason, to uninformed or ignorant public outcry, or to what the government of the day perceives will best assuage those

³ 1999 (1) SACR 100 (C).

feelings of the general public which, if quelled, are calculated to do no more than to ensure that it be returned to elected office, whether it deserves to be or not.¹⁴

[19] Importantly, section 60(4)(e) qualifies the ground that, if established, would prevent the release of the appellant in the interests of justice. There may well be a likelihood that the release of the appellant would disturb the public order or undermine public peace or security, but this can only be invoked in exceptional circumstances. There is no similar qualification attached to the preceding grounds that are listed in sections 60(4)(a) to (d), indicating that the legislature intended the ground listed in sub-section (e) to be treated with great care and circumspection. At the least, the state would need to present evidence of such exceptional circumstances.

[20] The magistrate appears to have been motivated by a concern that, if the court *a quo* did not act decisively, then the community would take the law into their own hands, leading to anarchy; the community would lose trust in the criminal justice system. There was, however, no evidence at all to that effect. The petition and Ms Martins's testimony clearly painted a picture of a community beset by a serious and hugely destructive societal problem, but there was nothing to demonstrate that the appellant himself would disturb the public order or undermine public peace or security if released from detention. There was, critically, no evidence of any exceptional circumstances that would have allowed the state to have invoked section 60(4)(e). Consequently, it cannot be said that the requirements thereof were met.

[21] Finally, it is apparent from the judgment that the magistrate did not undertake the exercise contemplated in terms of sections 60(9) and (10) by weighing up the interests of justice against the appellant's right to his personal freedom. To that effect, little, if any, consideration was given to the fact that the appellant is married, has five children (all but one being minors), and is self-employed. His continued detention would have a serious impact on the welfare of his family and his business. These factors were simply never investigated.

⁴ At 104h-j.

Relief and order

[22] Having regard to the record and to the argument made by the respective counsel, the court is satisfied that the interests of justice permit the release of the appellant from detention. Strict conditions, as discussed with counsel, must, however, be attached to the bail to be granted.

[23] The following order is made:

1. The appeal succeeds and the order of the court *a quo* is set aside.
2. The appellant is released from detention, subject to the conditions that follow. The appellant is required to:
 - (a) pay bail in the amount of R5,000;
 - (b) report in person to the officer in charge at any time between 06h00 and 18h00, Mondays and Thursdays, at the Somerset East police station;
 - (c) notify the investigating officer at least 48 hours' prior to his intended departure from the district of Somerset East for work or any other reasons;
 - (d) have no contact whatsoever with any persons previously convicted of drug-related offences or reasonably suspected of being involved therewith, pending the finalization of the trial;
 - (e) not to intimidate, harass, or interfere with state witnesses; and
 - (f) to appear personally at trial and at such time, date, and place to which the proceedings might be adjourned.

JGA LAING
JUDGE OF THE HIGH COURT

APPEARANCES

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Date of hearing:	19 June 2024
Date of delivery of judgment:	19 June 2024