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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION,
PRETORIA**

CASE NO: A95/2024

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

DATE: 22 July 2024

SIGNATURE

IN THE MATTER BETWEEN:

REBECCA VUELWA MFOLO

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

CEYLON AJ

[A] INTRODUCTION:

[1] This is an appeal against the order and whole judgment handed down by the Learned Magistrate Mr Rosenberg on 04 April 2023 at the Magistrate's Court for the district of Madibeng held at Brits, in which the Appellant's bail application was refused.

[2] The said Magistrate gave an *ex tempore* judgment on said date and in his Reasons for Judgment, dated 05 April 2024, he indicated that he carefully perused the Appellant's Notice of Appeal, and after considering all the grounds set out therein, he had nothing to add.

[3] In the said judgment, the Learned Magistrate concluded as follows:

"So the Court is satisfied that the bail should be denied. It will definitely not be in the interest of justice if the accused is released on bail, and there is also no exceptional circumstances placed before me to permit the accused on bail. So bail is refused."

[B] THE GROUNDS OF APPEAL:

[4] The appeal is premised on the elaborate grounds detailed in the Notice of Appeal dated 02 February 2024.

"1. That the Learned Magistrate erred in finding that the Appellant did not prove that there were exceptional circumstances which proved that it was in the interest of justice that she should be released on bail;

2. That the Learned Magistrate erred in law by relying on the wrong test applicable to bail applications which resorts within the ambit of Schedule 6 of the Criminal Procedure Act 51 of 1977 as amended;

3. That the Learned Magistrate erred in finding that the Appellant failed with flying colours to convince the court and did not discharge the onus to show there were exceptional circumstances which in the interest of justice permitted in release of the Appellant on bail, despite there being no finding being made by the Honourable Court as to on what ground did the Appellant fail to discharge the onus that rested on her;

4. The Learned Magistrate misdirected himself by failing to consider all relevant factors under Section 60(4) of the Criminal Procedure Act 51 of 1977 read with the factors extrapolated in sections 60(5), 60(6), 60(7), 60(8) and 60(8A) of the Act,

despite it being trite law that Section 60 is full of factors to be considered and same are peremptory;

5. The Learned Magistrate misdirected himself by not considering all the relevant factors referred to in the provisions set out in paragraph 4 above and determine whether individually or cumulatively warrant a finding that an exceptional circumstance exist which justifies the release of the Appellant;

6. The Learned Magistrate misdirected himself by considering Section 60(1) of the Act in isolation of all the relevant elaborating factors in Section 60(5), 60(6), 60(7), 60(8) and 60(8A) of the Act;

7. The Learned Magistrate erred by not finding that the facts showed a low risk pertaining to flight and the low risk of re-offending, which in essence should constitute exceptional circumstances;

8. The Learned Magistrate misdirected himself and/or committed a strange irregularity when dealing with bail by employing as his primary test that the Appellant has to prove that the State's case is non-existent;

9. The Learned Magistrate erred by over-emphasizing the purported strong case against the appellant at the expense of the presumption of innocence which exists in favour of the appellant;

10. The Learned Magistrate misdirected himself by not finding that the Appellant has satisfactorily addressed the provisions of Section 60(4)(a)-(e);

11. The Learned Magistrate misdirected himself by not considering the provisions of section 60(4) properly, in that he was supposed to decide the matter by weighing the interests of justice against the right of the Appellant to her personal freedom and in particular the prejudice she is likely to suffer if she were to be detained in custody by taking into account factors such as;

(a) The age of the Appellant, she was 58 years at the time of bail;

- (b) *The state of health of the Appellant;*
- (c) *The probable period of detention until the disposal or conclusion of the trial if the Appellant is not released on bail;*
- (d) *The reason for any delay in the disposal or conclusion of the trial;*
- (e) *Any financial loss which the Appellant may suffer owing to her detention;*
- (f) *The means and travel documents held by the Appellant, which may enable her to leave the country;*
- (g) *The binding effect and enforceability of bail conditions which may be imposed upon the Appellant;*
- (h) *The emotional and family ties of the Appellant;*
- (i) *Other factors such as the Appellant's confirmed address of more than 20 years and the provided alternative address;*

12. *The Learned Magistrate misdirected himself by failing to consider the health of the Appellant as an exceptional circumstance which justified the release of the Appellant;*

13. *The Learned Magistrate erred and misdirected himself in failing to give proper regard to the following aspects;*

- (a) *The Appellant was arrested and charged with premeditated murder of her husband Aubrey Molefe Mfolo on 15 January 2023 on allegations that the Appellant was the mastermind behind arranging persons and weapons to kill the deceased;*
- (b) *The State presented no evidence to justify and/or substantiate the above allegations;*

(c) *The State did not contest the material evidence presented by the Appellant, and merely addressed the court stating that the Appellant failed to prove exceptional circumstances permitting her release on bail;*

(d) *The State did not allege that the Appellant is a risk, a danger to society or that there is likelihood that the Appellant would commit further offences, or that her release will bring the administration of justice into disrepute, it merely alleged political outrage and unjustified concerns about the safety of the Appellant.*

14. *It is further submitted that the Learned Magistrate erred and misdirected himself in failing to give proper regard to the following personal circumstances of the Appellant;*

(a) *Appellant does not have previous convictions or any pending cases against her;*

(b) *The Appellant was 58 years of age;*

(c) *The Appellant is a relatively old woman and a mother;*

15. *It is respectfully submitted that the Learned Magistrate erred and misdirected himself in failing to consider that;*

(a) *The right to be released from detention lies at the heart of a bail application if the exceptional circumstances so require;*

(b) *Although the Appellant has the right to be presumed innocent, her right to appeal remains intact and setting the test whether or not to be released on bail too high might negate this right;*

16. *It is respectfully submitted that the Learned Magistrate erred and misdirected himself by totally disregarding the personal circumstances of the Appellant and the inherent flaw in the State's case.*

17. *It is therefore submitted that the Learned Magistrate erred and misdirected himself in failing to find that there are exceptional circumstances showing that it is in the interest of justice that the Appellant be released on bail.*

18. *It is respectfully submitted that the decision to refuse bail was clearly wrong, and the Learned Magistrate should have fixed bail pending further investigation, together with appropriate conditions."*

C. BACKGROUND:

[5] The Appellant is Rebecca Vuelwa Mfolo an adult, self-employed businesswoman and resident at 1[...], Zone 1[...], L[...], Brits, North West Province, and 58 years old.

[6] The Appellant was charged with premeditated murder of the deceased (the late Mr Aubrey Molefo Mfolo) on 11 January 2023, and the State alleged she was the mastermind in assembling her three co-accused and weapons together to execute the murder. The deceased was the husband of the Appellant.

[7] The Appellant was legally represented during the bail proceedings.

[8] The Appellant was arrested and applied for bail in the Court *a quo* on 31 December 2023. An affidavit in support of her application was read in Court on her behalf by her legal representative setting out the facts and circumstances the Appellant submitted is necessary for purposes of the application.

[9] The application for bail was opposed by the State and *viva voce* evidence of witnesses was led.

[10] The legal representatives addressed the court and made closing arguments on behalf of the parties. The Court then refused bail on the grounds set out herein-above.

D. THE CONTENTIONS OF THE PARTIES:

[11] The main contentions of the parties are as follows:

(l) The contentions of the Appellant:

(a) The Appellant brings this application in terms of section 65(1)(a) of the Criminal Procedure Act 51 of 1977 ("the CPA"). She also relies on section 65(4) of the CPA for purposes of this application.

(b) The Appellant contended that it is common cause between the parties that this case resorts under Schedule 6 which is governed by section 60(11)(a) of the CPA. She further submitted that she persists with all the grounds of appeal contained in the Notice of Appeal.

(c) It appears from the Appellant's Heads of Argument that the main issues she takes with the Magistrate's decision is that the Appellant is convinced that there are exceptional circumstances that exist and that it would be in the interest of justice that the Appellant be granted bail.

(d) The Appellant cited S v Barber [1979 (4) SA 218 (D) at 220 E-H to explain the nature and extent of said sections 60 and 65 of the CPA, and S v Porthen & Others [2004 (2) SACR 242 (C) at para 4], where the appeal court's right to interfere with the discretion of the court of first instance in cases of refusal of bail was considered.

(e) With regards to the principles relating to bail, the Appellant submitted that these were expressly considered in S v Dlamini; S v Dladla; S v Joubert; S v Schietekat [1999 (4) SA 623 (CC)] by the Constitutional Court.

(f) With regards to exceptional circumstances as envisaged in said section 60(11)(a) of the CPA, the Appellant referred the Court to S v Jonas [1998 (2) SACR 677 (SE)], S v Bruintjies [2003 (2) SACR 575 (SCA) at 577], S v DV [2012 (2) SACR 4492 (GMP) at para 8] and S v Mabena [(373/06)[2006] ZASCA 178; [2007] 2 All SA 137 (SCA); 2007 (i) SACR 482 (SCA) (17 October 2006) at para 6]. These decisions explain the nature and extent of this concept and how it should be applied in bail applications.

(g) The Appellant then submitted in light of the aforementioned, that a proper case has been made out for the application to be granted.

(II) The Respondent's contentions:

(a) According to the Respondent, the Appellant is charged with the Schedule 6 offence of murder in the execution or furtherance of a common purpose, conspiracy to commit murder, robbery with aggravating circumstances and kidnapping.

(b) The Respondent contended that the Appellant brings this application in terms of section 65(1) of the CPA whereas the proper procedure to be followed is the procedure under section 65(4) of the CPA [citing S v Bruinties 2003 (2) SACR 575 (SCA) at 577 E- G], which reads as follows:

"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."

(c) The Respondent submitted further that the powers of the appeal court, regarding bail refusals, are limited, and the real question is whether it can be said that the court *a quo* vested with the discretion to grant bail, exercised that discretion wrongly, and, that such court of appeal may only consider the issue of bail afresh if the court *a quo* misdirected itself materially on the facts or the law, relying on S v Mpulampula 2007 (2) SACR 133 (E) AT 136E and S v Green and Another [2006] ZA SCA 3; 2006 (1) SACR 603 SCA at 609 I-J].

(d) The Respondent further contended that it is common cause that the charges against the Appellant resorts under the offences listed in Schedule 6 of the CPA. Therefore, the Respondent argued, the onus rests on the Appellant to show on a balance of probabilities that exceptional circumstances exist, in the interest of justice, to permit her release on bail. [citing section 60(11) of the CPA].

(e) With regards to the evidence in the matter, the Respondent submitted that the Appellant led evidence by way of an affidavit and *viva voce* evidence of one witness

whereas the Respondent led only oral evidence. Accordingly, the Respondent argued that oral evidence carries more probative value than affidavits. The Respondent submitted further that if successfully established that the case against the Appellant is strong, which the Appellant denied, with any details or basis for her defence.

(f) The Respondent submitted that the Court *a quo* correctly considered the provisions of section 60(11)(a) of the CPA, the decision of S v Mathebula (in considering the strength of the state's case), that the release on bail would not be in the interest of justice and that no exceptional circumstances exist to support the Appellant's release on bail;

(g) The Respondent submitted that it concedes that the Court *a quo* gave brief reasons for its judgment but contended that it does not mean that the ruling was incorrect. The Respondent cites S v Ali, [2011 (1) SACR 34 (ECP) at para 15] where the court held, in dismissing an appeal, that the reasons provided by the Court *a quo* were "scant but clear".

(h) In light of the above, the Respondent prayed that the appeal be dismissed.

E. LEGAL PRINCIPLES/EVALUATION:

[12] Section 60(11)(a) of the CPA, as amended, reads as follows:

"11. Notwithstanding any provision of the Act, where the accused is charged with an offence referred to –

(a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his/her release."

[13] It is trite that section 60(11)(a) burdens the bail applicant with the onus to prove that exceptional circumstances exist which in the interest of justice permit the release on bail, and if there are no exceptional circumstances which exist, the court is enjoined to order the detention of such applicant until evidence that satisfies the court that they do exist, is adduced [S v Nwabunwanne 2007 (2) SACR 124 (NGK) at para 10; Mtengwana v S (91/23) ZAECMHC 68 (12 December 2023)].

[14] It is settled law that the concept of exceptional circumstances is not defined, however, in S v H 1999 (2) SACR 72 (W) at 77 E-F, it was observed that:

"Exceptional circumstances must be circumstances which are not found in the ordinary bail application but pertain peculiarly ... to an accused person's specific application. What a court is called upon to do is examine all the relevant considerations... as a whole, in deciding whether an accused person has established something out of the ordinary or unusual which entitles him relief under section 60(11)."

[15] Section 65(1), in terms of which this application is brought provides that:

"An accused who considers himself aggrieved by the refusal of a lower court to admit him to bail or by the imposition of such court of a condition of bail, including a condition relating to the amount 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."

[16] Subsection 65(4) is the section that directs how the appellate court should handle such an appeal in terms of section 65(1) of the CPA, and which reads that:

"A 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."

[17] It is not in dispute that the charges faced by the Appellant falls under Schedule 6 of the CPA and that the onus to establish on a balance of probabilities that exceptional circumstances exist, in the interest of justice, to pursue the Appellant to bail, rest on the Appellant.

[18] The Respondent's contention that the Appellant brings this application in terms of section 65(1) of the CPA is incorrect as the Appellant clearly indicated, in their HOA, that it is brought in terms of section 65(1) and 65(4).

[19] The parties are *ad idem* that since said Schedule 6 applies to this matter, section 60(11) finds application with regards to this bail application.

[20] It is trite that this Court can only interfere with the decision of the discretion of the Court *a quo* in bail refusal matters where exceptional circumstances exist and where this Court is of the opinion that the decision of the Court *a quo* is wrong [S v H *supra*; section 65(4); Mtengwana *supra*].

[21] As indicated above, the Court *a quo* did not give explanations for its findings in its decision on exceptional circumstances not existing in the matter and why it will not be in the interest of justice if the Appellant is released on bail. This is unfortunate. It would have been expected that the judgment contained the reasons for the findings of that Court. However, the legal representatives placed the full case of the Appellant before Court by means of an affidavit and one witness. The Appellant was fully aware of the onus that was resting on her, the law applicable to bail applications under Schedule 6, and specifically the provisions of sections 60 and 65 of the CPA.

[22] The Appellant adduced evidence with regards to the strength/weakness of the State's case, her personal circumstances, the petitions filed by the community and/or certain political parties and the seriousness of the offence.

[23] The Appellant had the opportunity lead evidence on her alternative address and her witness was subjected to cross examination by the State. The Appellant also had the opportunity to cross examine the State witnesses and heard the evidence led by the State.

[24] There is nothing procedurally and legally, to my mind, that the Learned Magistrate did, that suggest any misdirection as to the facts and the law, that would constitute that he was wrong. There is nothing to suggest that the Learned Magistrate did not consider the requisite facts or the law when he made his decision. As indicated before, it is regrettable that the full reasons for the decision was not stipulated, but he was clear in his findings that the onus placed on the Appellant, was not discharged, and that he could not find exceptional circumstances that justifies, in the interest of justice, the Appellant's release on bail [see S v Green, S v Mpullampula supra and S v H supra].

[25] In my view, the Court *a quo* correctly found that the Appellant did not show, on a balance of probabilities that exceptional circumstances exist and that it will be in the interest of justice that bail be granted in this instance. [see section 60(11) and 65(1) and (4)].

[26] In light of the aforementioned, the grounds upon which this appeal is premised cannot be sustained.

ORDER:

[27] In the result, the following order is made:

(i) the bail appeal is refused

B CEYLON
ACTING JUDGE OF THE HIGH
COURT, GAUTENG DIVISION, PRETORIA

Date of Hearing: 24 May 2024

Date of Judgment: 22 July 2024

For the Appellant: Adv MG Skhosana

Instructed by: T.B Masemola Attorneys Inc
Brits

For the Respondent: Adv D Molokomme

Instructed by: The Director of Public Prosecutions
Pretoria