



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

Case No: A172/2024

(1) Reportable: No
(2) Of interest to other judges: No
(3) REVISED: Yes

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Signature Date

In the matter between:

PHUTYANE JOSEPH LETSOALO

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

LESO AJ

INTRODUCTION

1. The appellant brought an appeal against the decision of magistrate Botha sitting at Hatfield District Court on 28 December 2023 refusing the appellant to be admitted to bail on new facts. The applicant is facing the charges of robbery with

aggravating circumstances in terms of section 51(2)(a) of Act 51 of 1977. The State opposed the application for bail and the appeal.

BACKGROUND

2. Appellant first appeared in court on 18 March 2022, his first bail application was on 25 May 2022 and on 1 June 2022 he was denied bail. The second bail application on new facts was refused on 28 December 2023. The appellant's application was customarily made on an affidavit and the prosecutor opposed the application. The evidence adduced in the bail application was to the effect that the applicant cannot access the educational investment for his daughter to enroll in further education. The second reason advanced by the applicant was that his health has deteriorated because he is not getting proper medical treatment in prison(Kgosi Mampauru Prison). The appellant complained about the delays in the prosecution of this case and indicated that the matter was set down for plea more than twice but could not proceed because the witnesses were not subpoenaed by the state. The appellant submits that the magistrate erred in her finding that the applicant was not truthful to the court about the number of children the appellant has and further complained about the magistrate's finding regarding the appellant's pending case and failure by the magistrate to consider his withdrawal.
3. It is further submitted on behalf of the appellant that no evidence seems to suggest that the appellant has supplied false information during his bail application and that it is not in the best interest of justice to refuse the release of the applicant on bail by establishing the following grounds:
 - 3.1 Appellant will in all probability stand his trial;
 - 3.2 Appellant will not interfere with the administration of justice;
 - 3.3 The appellant has one outstanding case and he has no previous convictions.
 - 3.4 There is no evidence to suggest that the appellant has a propensity to commit a Schedule 1 offence.

- 3.5 There appears to be no evidence that the appellant will endanger the public or any particular person.
- 3.6 It is improbable and unlikely to an exceptional degree that if the appellant is released on bail, he will endanger the safety of the public or any particular person.
- 3.7 The appellant's residential address is not disputed. He has been residing at this address for the better part of his life except when going away for work purposes and he is residing at this address with his wife and children and it is his property.
- 3.8 The appellant is a South African citizen and there is no evidence that the appellant will not stand his trial.
- 3.9 The appellant has limited financial means and this considerably reduces any flight risk that may pose and moreover the appellant's right to suitable conditions to such an extent that it renders it practically impossible for the Applicant to evade his trial.

Respondents case

4. The state opposed the application for appeal on the basis the appellant's application falls under the ambit of schedule 6 as he was charged with robbery with aggravating circumstances as intended in section 1 of 51 of 1977. The state argued that the court *a quo* in the application have established numerous grounds as referred to in section 60(4) of the CPA as to why the interest of justice does not permit the appellant's release on bail, let alone exceptional circumstances. The state contends that the appellant was not truthful to this court because he provided false information during his bail application. The state argued the applicant can sign a power of attorney to his wife to be able to access the investment and that and his medical condition can be checked at the prison hospital.

5. The prosecutor submitted that the applicant will not suffer prejudice because the case has already commenced and that the applicant should be kept in custody because the case is reminded to 16 January 2024.
6. The reasons for the magistrate to deny the release of the applicant on bail are succinctly set out below:
 - 6.1 there is no evidence that the policy is still active or who pays for the policy because in the first application, the applicant indicated that he was self-employed and he supports his family.
 - 6.2 that 'indeed' new facts exist based on the medical condition of the applicant. She also found that the medical condition of the applicant was mentioned in the first bail application and the deterioration of his health was not elaborated.
 - 6.3 that the information provided by the applicant about the pending cases does not accord with the information provided in the first bail application.
7. In conclusion the magistrate found that there are still no exceptional circumstances and the court was not satisfied that the accused will not undermine or jeopardize the objectives of proper functioning of the criminal justice system including the bail system.

DISCUSSION AND THE APPLICABLE LAW

8. Section 65 of the Criminal Procedure Act provides for procedure on appeals to the superior court with regard to bail. The court must determine whether the decision by magistrate Botha to refuse bail was wrong. This court has limited power to intervene with the lower court's discretion regarding the decision on bail. *'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', this is the law in terms of section 65(4).

9. The Court has to decide whether the court a quo misdirected itself materially on the facts or legal principles. The applicant applied for bail on new facts and the court found that "indeed" new facts existed because of the appellant medical condition of the appellant which was deteriorating. I will not interfere with the magistrate's finding on this point. The magistrate found that no exceptional circumstances were permitting the release of the appellant on bail based on the inconsistent information relating to the appellant's pending and previous cases given by the appellant during both bail applications and the information relating to the number of children the appellant has.
10. In the schedule 6 bail application the onus of proof rests upon the appellant that exceptional circumstances exist which in the interest of justice permit his release mainly because he is facing a serious charge of robbery with aggravating circumstances. The appellant must discharge the burden of proof in terms of section 60 (11) (b) of the CPA. In terms of section 60(4) the interest of justice does not permit the appellant's release from detention 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 undermine or jeopardise 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.'*

11. The appellant's grounds in terms of section 60 (11) (b) of the CPA are outlined in paragraph 3 above. The state did not challenge the appellant's case or the grounds during the bail application and in the appeal save to state that the state relied on the alleged inconsistent information as to why the interest of justice does not permit the appellant's release on bail as envisaged by section 60(4) of the CPA. Having stated the reasons or the finding of the magistrate in paragraph 6, I am inclined to agree with the appellant that the magistrate exercised her discretion wrongly when she found that new facts indeed exist however there are no exceptional circumstances allowing the release of the appellant on bail. It is clear that the magistrate did not rely on sections 60(4) and (c) of the Act in refusing to grant bail. The finding by the magistrate that the appellant lied about the number of children he has no bearing on the issue of bail and it cannot be used as a yardstick to deny him bail.
12. The basis for opposing bail by the state was based on the allegation that the applicant did not disclose the pending case in Kempton Park for robbery with aggravating circumstances. This was factually incorrect because the record reflects that the court was aware of this pending case on the first bail application. It is obvious that the magistrate relied on the state submission and incorrectly found that the appellant provided inconsistent information about the pending and previous case that the appellant provided in both applications. The state provided insufficient information about the appellant's case pending after having informed the court that the appellant had a pending case which was postponed to Sunday and that the investigating officer will be contacted to verify information on the pending case.

13. The court did not enquire about the cases during the application but only in the judgment did the magistrate find that there was inconsistent information. Section 60(3) of the CPA requires the court to require further information during bail application and it states as follows: *'if the court is of the opinion that it does not have reliable or sufficient evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the Court'*. The magistrate was wrong to blame the appellant for the incomplete investigation and inconsistent information.
14. The general background against which the applicant's application for bail ought to be considered is as discussed in paragraph 3. Section 60 (11) (b) of the CPA and sec 60(4) will form the basis of the decision on bail application. *S V Botha & 'n Ander 2002 (1) SACRF 222 SCA the court said the following 'It is trite law that where an Appellant wishes to be released on bail he/she must adduce evidence and prove on balance of probabilities that the interest of justice permit his/her release on bail'.*
15. The basic principle that the court considers in bail application is the freedom of an accused person. In our law, the accused is entitled to bail where the interest of justice permits. The delays in the prosecution of this case are one of the factors that should be considered in the bail application because the delay threatens the accused person's Constitutional right as entrenched in section 35(3)(d) of the Constitution. *In S V Branco 2002 (1) SACR 532h* and further Cachalia A.J (as he was then) remarked as follows:
'it must be borne in mind that any Court seized with the problem of whether or not to release a detainee on bail must approach the matter from the perspective that freedom is a precious right protected by the constitution. Such freedom should only be lawfully curtailed if the interests of justice so require'.
16. The issue of the Constitutional right to a speedy trial and the granting of bail was discussed in *S v Mabena & another 2007 (1)SACR 482(SCA)* at 24 to 26 and *S v Joseph 2007 (1) SACR 496*. In *Joseph*, it was held that the court is obliged to follow

all the applicable prescribed bail procedures and take into account all the rules, principles, and guidelines that govern the decision to grant bail. The fact that the case against the applicant has already commenced is not one of the grounds to be considered for refusal of the applicant's bail in terms of section 60(4). It is not ideal nor it is in the interest of justice to keep the accused in custody pending the finalization of the trial mainly because the trial had commenced.

17. There is no case made by the state that suggests that the trial proceedings will be frustrated by the release of the applicant nor is there any suggestions by the state that the applicant will interfere with the witnessed or evade trial. It appears from the record that the accused has been in custody since 13 March 2022 and the state has been granted postponement for various reasons including the docket, witnesses and further investigations. Both the state and the defence contributed to the delays in the prosecution of the bail hearing to the extent that the court should have held an inquiry in order to determine what caused the delay in the bail hearing instead of just warning the applicant's attorney of inquiry in terms of section 342A of the CPA. The inquiry would have empowered the magistrate to have applied her mind based on the outcome of the inquiry.
18. The appellant's Constitutional rights in terms of 35 (1) (f) of the Constitution, all circumstances relevant to this application and presumption of innocence favours the release of the appellant on bail. Section 35 (1) (f) of the Constitution advocates for the release of the accused from custody if the interest of justice so permits subject to reasonable conditions.

CONCLUSION

19. The decision of the magistrate Botha to refuse the release of the appellant on bail was wrong because the appellant has discharged the onus in terms of the provisions of Section 60 (11)(b) of the CPA on a balance of probabilities that exceptional circumstances exist permitting his release on bail and that it will be in the interest of justice that he be admitted to bail.

20. I cannot find that it is in the interest of justice that the be kept in custody pending the finalization of the trial. The decision of the magistrate must be set aside and the appellant must be released on bail at the reasonable amount and stringent conditions so that he does not evade his trial.
21. I do not doubt that the appellant will be able to afford bail because during his bail application, he indicated that he was earning R12,000.00 as a freelance employer and his wife Rebecca Letsoalo is employed.

THEREFORE, I MAKE THE ORDER AS FOLLOWS:

ORDER

1. Appeal against the refusal by the magistrate to release the appellant on bail is upheld and the appeal succeeds.
2. The decision of the court a quo refusing bail is set aside and is replaced with the following order:
 - 2.1 Appellant is granted bail in the amount of R5000.00(Five Thousand Rand) on the conditions as follows:
 - 2.1.1 Appellant shall be released from custody after payment of the above amount set for bail and he shall appear in the court *a quo* on the date and time set by the court a quo.
 - 2.1.2 The appellant shall report to Lyttelton Police Station from 6:00 to 18hrs from Monday to Friday.
 - 2.1.3 The appellant shall not leave the province of Gauteng without informing the investigating officer.

3. No order as to costs.

[REDACTED]

**J.T LESO
ACTING JUDGE OF THE
HIGH COURT, SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Heard on: 14 August 2024

Delivered on: 11 September 2024

PARTIES

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