**IN THE HIGH COURT OF SOUTH AFRICA,**

**FREE STATE DIVISION, BLOEMFONTEIN**

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| **Reportable:** | **YES/NO** |
| **Of Interest to other Judges:** | **YES/NO** |
| **Circulate to Magistrates:** | **YES/N** |

Appeal number: A111/2024

In the Appeal between:

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| **JOHAN LOOTS** | 1st Appellant |
| **BRIAN ODORA** | 2nd Appellant |
| and | |
| **THE STATE** | Respondent |

**Coram:** Daniso J

**Heard:** 19 July 2024

**Delivered:** 30 July 2024. This judgment was handed down in court and electronically by circulation to the parties' legal representatives *via* email and release to SAFLII on 30 July 2024. The date and time of hand-down is deemed to be 15H00 on 30 July 2024

## ORDER

1. The appeal against refusal of bail is dismissed.

## JUDGMENT

**Daniso J**

[1] On 25 January 2024, the appellants were arrested and subsequently charged with fraud. There are three accused in this matter.

[2] On 7 March 2024 the district court magistrate, Ladybrand refused the appellants' bail pending their trial on a charge of fraud. The third accused's bail was successful.

[3] The appellants are aggrieved by the magistrate's refusal to admit them to bail. They appeal to this court in terms of section 65(4) of the Criminal Procedure Act (the Act)[1] which saddles them with the onus of persuading this court that the magistrate's decision to refuse bail was wrong. In *S v Barber*[2] it was pointed out by Hefer, J that:

> *"It is well-known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own review for that of the magistrate because that would be an unfair interference with the magistrate's exercise of its discretion. I think it should be in should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail but exercised that discretion wrongly."*

[4] In the court *a quo,* it was common cause that given the nature of the offence which the appellants are charged with, the appellants were not entitled to be released from custody pending trial, unless the first appellant adduced evidence which satisfied the court that the interests of justice permit his release and the second appellant as he was on bail pending his trial at the high court on a similar charge of fraud involving R24 million, he had to prove on a balance of probabilities that exceptional circumstances exist which in the interests of justice permit his release on bail.[3]

[1] Act No, 51 of 1977.
[2] **1979 (4) SA 218 (**D) at 220 E–F.
[3] Section 60 (11) (a) and (b) of the Act.

[5] In opposing bail, the State relied on the testimony of the investigating officer, Captain Adriaan Gerhardus Marais from the Serious Commercial Crimes Investigating Unit. He testified that the State's case against the appellants was strong because, they were captured by the Nedbank CCTV cameras and also identified by the bank employees when they approached the information desk and thereafter proceeded to the bank teller where the first appellant presented an identification document to the teller and requested that a limit on a bank account be increased to R950 000.00. The first appellant explained to the bank teller that the money was to pay the second appellant for the purchase of a TLB construction equipment. The verification of both the details of the account holder and the transaction revealed that the identification document presented by the first appellant was fraudulent as the photo on that identification document did not match the photo of the account holder in the bank's banking profile. The account holder also did not respond to the OTP (the one- time password generated by the bank and sent to the account holder's cell phone number to authorise the transaction). The bank teller alerted the bank manager who in turn contacted the bank's fraud division and the police. Upon realizing that bank teller was suspicious of the transaction, the second appellant exited the bank followed by the first appellant. When the appellants saw the police outside the bank, they ran away. The first appellant was caught a block away from the bank whilst the second appellant was arrested inside a Pharmacy after the nurse approached the police and pointed out where he was hiding. The identification document presented by the first appellant and the bank account he tried to transact on turned out to belong to a Mr Paulsen who was overseas.

[6] Captain Marais also told the court *a quo* that none of the appellants reside in Ladybrand. Upon his arrest, the first appellant provided the address 9[…] H[…] Street, Summerfield, Durban-West in Kwazulu-Natal as his address, however the investigation revealed that the address was false, it did not exist. His father's affidavit refers to a different address viz: N[…] S[…] D[…], P[…] Road, Summerfield.

[7] The second appellant is a Ugandan national although he resides in Bloemfontein. He also provided a false name, his real name was only discovered when the police searched him and found his driver's license.

[8] It was his testimony that the appellants' attempts to evade arrest and by providing false information when they were arrested indicate that they are a flight risk. Both the offences involve the similar *modus operandi* in that, before the crime is committed the second appellant befriends or establishes a relationship with the employees of the targeted bank. In this matter, he came all the way from Bloemfontein and visited the bank on various occasions before the day of the incident buying lunch for the bank employees and also devised a romantic relationship with one of the female employees.

[9] On the other side, the appellants tendered oral evidence in support of their bail application. The facts upon which the bail was predicated were essentially that:

9.1. The first appellant was 36 years old with no previous convictions nor pending cases. He was an unmarried father of five children who are financially dependent on him as their mother was unemployed and he was maintaining them with his salary of R5600.00 to R7500.00 per month which he earned as a security guard employed by the company Marese Investments situated at Hillcrest in Kwa-Zulu Natal. He also has a fixed address where he lives with his father at the rented property number 9[…], N[…] S[…], Summerfield, Durban-West also in Kwa-Zulu Natal. As proof thereof he handed in an affidavit deposed to by his father as Exhibit "A."

9.2. Regarding the merits of the case, he confirmed that he was indeed at Nedbank on that day. He explained that he went there to find out some information but elected to remain silent with regard to what information he required including why he was in Ladybrand on that day. He also confirmed that he was arrested after fleeing, he explained that he was not aware that the gentleman he saw brandishing a firearm outside the bank was a police officer.

9.3. He denied having provided a false address. He stated that it was the police who wrote it down incorrectly. According to him, his father's affidavit, Exhibit "A" corroborates the details of his address.

9.4. With regard to the second appellant, he was 37 years old, married with three dependent children. His wife is unemployed as a result he is the sole breadwinner. He holds a Bachelor's degree in Business Administration and he is self-employed trading in Supply and Delivery of cleaning equipment. He has no previous convictions and at the time of arrest, he was on R10 000.00 bail granted by the magistrates' court pending his trial at the high court in a case of fraud involving between R24 and R26 million.

9.5. He is originally from Uganda. He attained permanent residence in the Republic since 2005 and he lives in a bonded house in Bloemfontein with his family. His father and siblings are also residing in the Republic.

9.6. He is a hands on parent, he assists in taking his children to school and with school work. The eldest (aged 17) is currently in Matric and he needs his support as he transitions to tertiary education.

9.7. He submitted that he was not a flight risk by pointing out that despite the amount involved in the fraud case pending in the high court, he has diligently attended court, he has also left the Republic and travelled to Botswana but informed the investigating officer and the State Advocate about his traveling plans and this is despite the fact that he was not required to do so. He stated that it was not true that he ran away when the police tried to arrest him, he simply went to the pharmacy to seek medical attention due to a stomach ailment.

9.8. It was his testimony that the State's case against him is weak as there is no evidence that he presented any document to the bank or that he wanted to perform any transactions. He stated that there is nothing wrong being seen with the first appellant in the bank and there is also no evidence of the content of their discussion. It was his contention that taken cumulatively with his personal circumstances, all these factors constitute exceptional circumstances which in the interests of justice permit his release on bail pending trial.

[10] The magistrate was not persuaded that the evidence rendered by the appellants proved that it was in the interest of justice that the first appellant be released on bail and that it qualified as exceptional circumstances which in the interests of justice warrant the second appellant's release on bail.

[11] In refusing bail, the magistrate relied on the State's testimony that there was a prima facie case against the appellants in terms of the CCTV footage which recorded their activities in the bank and the undisputed evidence that the identification document which the first appellant produced to initiate the increase of the limit in the bank account was found to be fraudulent as it did not belong to him including the account he attempted to access. With regard to the second appellant, he was the mastermind who paved the way "lubricated the system" for the crime to take place. The magistrate concluded that the appellants failed to dispel the State's allegations despite the fact that the State had elected to begin with leading evidence granting them an opportunity to be cognizant of the case they were to meet. The magistrate found that both the appellants' personal circumstances were outweighed by the likelihood that they may evade trial considering their attempt to evade arrest and also furnishing false information upon arrest.

[12] In the grounds of appeal, the appellants attack the magistrate's decision for refusing bail essentially on the grounds that the magistrate failed to properly analyse the evidence before him and unfairly placed undue weight on the aspects favourable to the State and had less regard to the evidence beneficial to the appellants. The rest of the grounds of appeal are simply a regurgitation of the evidence and arguments presented by the respective parties at the bail hearing for that reason, I do not deem it necessary to repeat them here except for those relevant parts for the purpose of this judgment.

[13] Taking into consideration the facts of this matter, the magistrate's findings alluding to the presence of the circumstances contemplated in section 60 (4) (a) to (d) of the Act[4] are indisputable namely that;

13.1. The appellants are a flight risk, they ran away when the police attempted to arrest them and when they were ultimately arrested, the first appellant supplied the police with a false address. He holds no occupational obligations and owns no assets to tie him to the place where he is to be tried. It must be borne in mind that he merely alleged that he was employed without any proof in that regard. In his own version he lived with his father, he does not own any immovable property. Furthermore, his children also live with their mother therefore there is a likelihood that if he is released on bail he will attempt to evade his trial.

13.2. There is a likelihood that the second appellant will commit further schedule 1 offences. His propensity to commit a schedule 1 offence is evidenced by the fact that at the time he was arrested he was out on bail in relation to a similar offence. There is a likelihood that he will attempt to evade his trial if he is released on bail because he provided a false name during arrest, he has a passport and family ties outside the Republic namely, Uganda is his place of birth and he has friends in Botswana. Based on his

[4] Read with ss (5) (e) and (g); (6) (a), (b) (c) and (g); 7(a), (d) to (8) (a).

prior conduct of befriending the bank employees there is a likelihood that if he is released on bail he will attempt to influence or intimidate those witnesses.

13.3. It is trite that the weakness of the State's case can be construed as "exceptional circumstances" as provided for in section 60 (11) (a) of the Act justifying the appellant's release on bail pending trial. The onus was on the second appellant to adduce evidence which proves on a preponderance of probabilities that he will probably be acquitted at the trial[5] instead the second appellant merely tendered a bare denial of the allegations proffered by the State. It is important to note that on the available facts, there is a CCTV footage and eye witnesses as in the bank employees who observed the appellants in the bank and their activities including their surreptitious exit from the bank.

[14] The interests of justice do not permit the release of an accused on bail where the above-mentioned factors prevail. Both the appellant's personal circumstances are outweighed by the possibility that they might evade trial and also interfere or intimidate the State witnesses.

[15] I am not persuaded that the magistrate exercised his discretion wrongly in refusing the appellants' bail. The appeal must accordingly fail.

**ORDER**

[16] In the premises, I make the following order:

1. The appeal against refusal of bail is dismissed.

[5] *S v Mathebula* **2010 (1) SACR 55** (SCA) para 12.

**N.S. DANISO**
**JUDGE OF THE HIGH COURT**

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| On behalf of appellants: | Adv. J. Nkahle |
| Instructed by: | Hilda Odora and Associates |
| | **BLOEMFONTEIN** |
| On behalf of respondent: | Adv. F. Pienaar |
| Instructed by: | Director: Public Prosecutions |
| | **BLOEMFONTEIN** |