

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

29 January 2025

DATE

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SIGNATURE

CASE NUMBER: A118/2024

In the matter between:

ISAAC VAN BILJON

Appellant

and

THE STATE

Respondent

Coram: DOSIO J

Heard: 29 January 2025

Delivered: 29 January 2025

ORDER

The appeal of the appellant is dismissed.

JUDGMENT

DOSIO J:

Introduction

- [1] This is an appeal against the refusal of bail by the Protea Regional Magistrates Court.
- [2] The appellant was arrested on the 13 March 2022 and on the 14 March 2022 the state declined to prosecute the appellant. The appellant was re-arrested on the 19 January 2024 and his bail application was dismissed on 16 February 2024.
- [3] The appellant now approaches this court on appeal, in terms of s65(1)(a) of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977'), against the refusal of bail.
- [4] The appeal is opposed by the respondent.

Grounds of appeal

- [5] The appellant contends that the court a quo erred and misdirected itself in finding that:
- (a) there is no evidence from the State that if he is released on bail, pending trial, he will not adhere to any bail conditions imposed on him.
 - (b) the appellant is a flight risk in that he never absconded when he was released from custody when the state declined to prosecute him in 2022 and that this is a clear indication that if he is released on bail he will attend court until the finalization of trial.

- (c) that there was no corroborative evidence in the form of DNA or any direct evidence linking the appellant to the commission of the offence, other than the victim alleging that he raped her.
- (d) that the appellant denied having raped the victim, yet despite his denial the court a quo still denied the appellant bail.
- (e) even though the victim alleged that she was raped by the appellant, she does not know the date upon which she was raped and that alone should have been considered in favour of the appellant.
- (f) the court a quo erred by not finding exceptional circumstances for the appellant to be released on bail.

Legal principles

[6] Section 60(11) (a) of Act 51 of 1977 states:

‘Notwithstanding any provision of the Act, where an 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 interests of justice permit his or her release on bail.’

[7] In the matter of *S v Rudolph*,¹ the Supreme Court of Appeal stated that:

‘The applicant in a schedule 6 bail application must, on a balance of probability, demonstrate that ‘exceptional circumstances’ in his or her case, indeed, do exist and that they ‘in the interests of justice permit his release.’²

[8] In the context of s60(11)(a) of Act 51 of 1977, the concept ‘exceptional circumstances’, has meant different things to different people. In *S v Mohammed*³ (*‘Mohammed’*), it was held that the dictionary definition of the word ‘exceptional’ has two shades of meaning: The primary meaning is simply:

¹ *S v Rudolph* 2010(1) ACR 2152 (SCA)

² *Ibid* at page 266 g-h

³ *S v Mohammed* 1999 (2) SACR 507 (C)

'unusual or different'. The secondary meaning is 'markedly unusual or specially different'. In the matter of *Mohammed*,⁴ it was held that the phrase 'exceptional circumstances' does not stand alone. The accused has to adduce evidence which satisfies the court that such circumstances exist 'which in the interests of justice permit his or her release'. The proven circumstances have to be weighed in the interests of justice. The true enquiry is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the appellant's release on bail.

[9] In the matter of *Dlamini v S ; Dladla and Others v S ; S v Joubert ; S v Schietekat*,⁵ the Constitutional Court held that:

'Likewise I do not agree that, because of the wide variety of "ordinary circumstances" enumerated in sub-ss (4) to (9), it is virtually impossible to imagine what would constitute "exceptional circumstances", and that the prospects of their existing are negligible. In requiring that the circumstances proved be exceptional, the subsection does not say they must be circumstances above and beyond, and generically different from those enumerated. Under the subsection, for instance, an accused charged with a schedule 6 offence could establish the requirement by proving that there are exceptional circumstances relating to the his or her emotional condition that render it in the interests of justice that release on bail be ordered notwithstanding the gravity of the case.'

[10] In so far as the weakness of the State's case in a bail application is concerned, the Supreme Court of Appeal in the matter of *S v Mathebula*⁶ ('*Mathebula*') held that:

'...In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge...'⁷

[11] In the matter of *S v Smith and Another*,⁸ the Court held that:

⁴ Ibid

⁵ *Dlamini v S ; Dladla and Others v S ; S v Joubert ; S v Schietekat* (CCT 21/98; CCT 22/98; CCT 2/99; CCT 4/99) [1999] ZACC 8 (3 June 1999)

⁶ *S v Mathebula* 2010 (1) SACR 55 (SCA)

⁷ Ibid para 12

⁸ *S v Smith and Another* 1969 (4) SA 175 (N)

‘The Court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby’.⁹

[12] In the matter of *S v Rudolph*,¹⁰ the Supreme Court of Appeal stated that in respect to schedule 6 offences:

‘The section places an onus on the appellant to produce proof that exceptional circumstances exist which in the interests of justice permit his release. It contemplates an exercise which the balance between the liberty interests of the accused and the interests of society in denying the accused bail, will be resolved in favour of the denial of bail, unless exceptional circumstances are shown by the accused to exist’.¹¹

[13] In *S v Bruintjies*¹² (*‘Bruintjies’*), the Supreme Court of Appeal stated that:

‘(f) The appellant failed to testify on his own behalf and no attempt was made by his counsel to have him testify at the bail application. There was thus no means by which the Court *a quo* could assess the *bona fides* or reliability of the appellant save by the say-so of his counsel.’¹³

[14] In *Mathebula*,¹⁴ the Supreme Court of Appeal stated that:

‘In the present instance the appellant's tilt at the State case was blunted in several respects: first, he founded the attempt upon affidavit evidence not open to test by cross-examination and, therefore, less persuasive’.¹⁵

Evaluation

[15] Presumption of innocence is an important consideration, but a Court needs to look holistically at all the circumstances presented in a bail application.

⁹ Ibid 177 e-f

¹⁰ *S v Rudolph* (note 1 above)

¹¹ Ibid para 9

¹² *S v Bruintjies* 2003 (2) SACR 575 (SCA)

¹³ Ibid para 7

¹⁴ *Mathebula* (note 6 above)

¹⁵ Ibid page 59 B-C

- [16] The personal circumstances of the appellant are that:
- (a) he is a 46 year old adult male and a South African citizen.
 - (b) he has no valid passport and no family members outside the borders of South Africa.
 - (c) He has two minor children.
 - (d) He worked as an electrician at Home Luxury Furnitures since February 2023 and was earning an income of R6000-00 per month.
 - (e) He owns assets to the value of R50 000-00.
- [17] In terms of s65(4) of Act 51 of 1977, the court hearing the appeal shall not set aside the decision against which the appeal is brought unless such court is satisfied that the decision was wrong.¹⁶
- [18] The appellant bears the onus to satisfy the Court, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his release.¹⁷ A mere denial of the considerations and/or probabilities of events, as contained in s60(4) — (9) of Act 51 of 1977, would not suffice in order to succeed in convincing the Court of the existence of exceptional circumstances, in order for bail to be granted.
- [19] The appellant did not present *viva voce* evidence in order to discharge the onus. He sought to rely on an affidavit accepted as an exhibit in the bail proceedings.
- [20] As stated in the case of *Bruintjies*¹⁸ and *Mathebula*,¹⁹ evidence on affidavit is less persuasive than oral evidence. The denial of the appellant rested solely on his say-so with no witnesses or objective probabilities to strengthen his version. As a result, the State could not cross-examine the appellant to test the veracity of the averment in his affidavit. This affects the weight to be attached to the averments made in the affidavit as the probative value of the

¹⁶ *S v Rawat* 1999 (2) SACR 398 (W)

¹⁷ *S v Mabena and Another* 2007 (1) SACR 482 (SCA) and *S v Van Wyk* 2005 (1) SACR 41 (SCA)

¹⁸ *Bruintjies* (note 12 above)

¹⁹ *Mathebula* (note 6 above)

affidavit could not be tested. The investigating officer stated in her affidavit that the complainant's biological father, raped the complainant in October 2020. This occurred when the complainant's mother had gone out. It is alleged that the appellant tried to rape the complainant for a second time in February 2021.

[21] The investigating officer was called by the Court a quo and testified that she was opposing bail because once the prosecution declined to prosecute the matter for the first time, the appellant went back home and attempted to rape the complainant for a second time. The investigating officer explained that the reason why the matter was not placed on the roll the first time is because the sexual offences prosecutor first wanted to consult with the complainant and the other witnesses and that it was not because of a weak case against the appellant. After the investigating officer was subpoenaed by the Court a quo to clarify certain aspects, the appellant still opted not to testify or to dispute this evidence.

[22] This Court must assess whether the Court a quo misdirected itself.

[23] Section 60(4) of Act 51 of 1977 states as follows:

'(4) 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, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a

Schedule 1 offence;

(b) where there is a 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.' [my emphasis]

[24] In considering whether the ground in subsection (4)(b) has been established, the Court may, where applicable, take into account the factors referred to in s60(6) of Act 51 of 1977, namely:

‘(a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;

(b) the assets held by the accused and where such assets are situated;

(c) the means, and travel documents held by the accused, which may enable him or her to leave the country;

(d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;

(e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;

(f) the nature and the gravity of the charge on which the accused is to be tried;

(g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;

(h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;

(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached;’ [my emphasis]

[25] This Court finds that the likelihood of the appellant not attending his trial is high due to the following factors:

(a) He has no immovable assets in his name.

(b) The nature and gravity of the charges, namely rape of a minor child carries with it a mandatory minimum prescribed sentence of life imprisonment.

(c) The strength of the case against the accused appears to be strong in that the medical J88 report states that the doctor found the following gynaecological injuries:

1. Bruising at 6 o’ clock on the fossa navicularis.
2. Four clefts at positions 3,4,5 and 9 o’ clock.
3. A cleft on the edge of the hymen at 6 o’ clock.

- [26] There is also a risk that if the appellant is granted bail he will interfere with the complainant. As a result, in order to secure the complainant's safety, she has been placed in a children's home.
- [27] Although there is no onus on an appellant in a criminal trial to prove his innocence, an appellant still has an onus to prove he will be acquitted if he challenges the strength of the State's case. This was not done.
- [28] In the matter of *S v Masoanganye and another*,²⁰ the Supreme Court of Appeal held that:
 'It is important to bear in mind that the decision whether or not to grant bail is one entrusted to the trial judge because that is the person best equipped to deal with the issue having been steeped in the atmosphere of the case.'²¹
- [29] After a perusal of the record of the Court a quo, this Court finds that there is no persuasive argument to release the appellant on bail. The Court a quo was fully aware of the appellant's personal circumstances and considered them. The appellant has not successfully discharged the onus as contemplated in s60(11)(a) of Act 51 of 1977 that there are exceptional circumstances which permit his release on bail. Accordingly, there are no grounds to satisfy this Court that the decision of the Court a quo was wrong.

Order

- [30] In the result, the appeal of the appellant is dismissed.



D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

²⁰ *S v Masoanganye and another* 2012 (1) SACR 292 (SCA).

²¹ *Ibid* para 15.

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 29 January 2025.

APPEARANCES

ON BEHALF OF THE APPELLANT:

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