REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: BA03/2025

(1) REPORTABLE: YES/**NO**
(2) OF INTEREST TO THE JUDGES: YES/**NO**
(3) REVISED.

.....
.....

DATE: 19 March 2025 SIGNATURE...[redacted].....

In the matter between:

ROELOF FREDERICK BOTHA Appellant

And

THE STATE Respondent

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **19 March 2025**.

JUDGMENT

Makoti AJ

Introduction

[1] This is a bail appeal in which the Appellant impugns the decision of the Magistrate, Groblersdal, Mr B H Mashele. The Appellant was first taken to police detention since the day of his arrest on 19 July 2024. He has been in police detention from that date on and beyond the date of his first appearance before a Magistrate on 22 July of the same year. The appeal is opposed by the State.

[2] The Appellant is part of a group of persons who were arrested by the police at a farm near Groblersdal on serious allegations of contraventions of various provisions of the Drug and Drug Trafficking Act, 1992.[1] Both the Appellant and the State agree on the seriousness of the criminal charges, and also that crimes fall within Schedule 5 of the Criminal Procedure Act[2] (the CPA). The farm at which they were arrested is known as Thaba E Monate, Loskop South (the farm), near Groblersdal, Limpopo Province, and it is the property of the Appellant.

Summary of the charges

[3] On 19 July 2024 the police raided the farm property and found drugs and/or drug manufacturing substances. The substances which according to the State form part of the several criminal charges instituted against the Appellant and his co-accused include methamphetamine and crystal meth. The charges against the Appellant and the co-accuse are for, amongst others:

---

1 Act No. 140 of 1992.

2 Act No. 51 of 1977.

[3.1] possession of drugs, methamphetamine and crystal meth weighing in total 408.95 kilograms and valued at approximately R1 000 000-00 (One Million Rand), in contravention of the Drugs Act mentioned above;

[3.2] money laundering in contravention of section 4 (a) or (b)(i) and (ii), read with sec 1, 8, 76(1) of the Prevention of Organized Crime Act, 1998[3] No 121 of 1998, as amended by Act no 24 of 1999. The money laundering allegations also relate to the activities of the accused persons which the police uncovered on that date of 19 July 2024, and at the above-mentioned farm in the vicinity of Loskop.

[4] As it shall appear more fully below, the Magistrate, sitting as the Court *a quo* noted that the allegations which the Appellant and others are facing are serious, which necessitated that he proves that the interests of justice favoured his release on bail. The criminal offences fall within the scope of offences listed in schedule 5 of the CPA, which places onus on bail applicant to establish that it is in the interest of justice that he be entered to bail.

Appellant's business and personal circumstances

[5] The Appellant is a 57 year old male South African, who was born and raised in the Country. He lived for most of his life in the Republic and even did his military training in 1986 with the erstwhile SA government. Thereafter he attended and completed his artisanship in 1992, at PMC. From there he worked at PMC from 1992 to 1994, whereupon he started to settle at Marble Hall, Limpopo Province. He worked at various places within the country, including at furniture stores for a period of about 3 (three) years. It is not

[3] Act No. 121 of 1998.

necessary for purposes of this judgement to state all the Appellant's work experiences, save to note that he has done several jobs in the Republic. He appears to have built his life in this country.

[6] The farm property also serves as the Appellant's permanent place of residence, apart from it being used for other farming business operation. It is valued at approximately R4 000 000-00 (Four Million Rand). He alleged before the Court *a quo* and through a statement that he rents out part of the farm to a person named George (surname unknown) for a rental fee of R15 000-00 (Fifteen Thousand Rand) per month, which he uses to pay salaries and other personal needs.

[7] Before he settled on the farm, during or about 2017 he worked beyond our shores when he travelled and stayed from two years in Mongolia. There he was employed at a copper mine, but returned to SA in 2019. He has built his life entirely in SA, although he possesses a valid passport issued by the Department of Home Affairs. He is currently a businessman, having his business establishments in Germiston, Gauteng Province. He works with an associate named Mr Jody Ben van Niekerk. Without deciding anything at this stage, it seems to me that the Appellant has substantial investments in the Republic.

[8] At a more personal level, apart from the businesses, the Appellant is a divorced father of four daughters who were born in 1992, 1994, 1997, and the last one in 2002. During his bail hearing and in his statement supporting the application he explained that he shares a good relationship with his daughters, two of whom are still minor. The first two of his daughters are grown up and married. His eldest daughter lives in Pretoria and has

expressed interest to accommodate the Appellant should he be released on bail.

Bail appeal principles

[9] The Appellant raised a number of grounds of appeal, the principal of which was that the Magistrate refused him bail on unsound and speculative reasoning. This relates to the finding that the Appellant is a flight risk and that the offence affects the economy of the Republic. He also argues that the Magistrate erred in his findings that the release on bail would not be in the best interest of justice. The Magistrate held that the Appellant has not discharged the onus resting on him to justify his release on bail as he has failed to show that it is in the interests of justice for him to be so released.

[10] Further, the Appellant contends that Magistrate erred in finding that the Appellant has not demonstrated that the State has a weak case. This would mean, if the conclusion of the Court *a quo* is to be understood, that the Appellant has failed to show that the interests of justice justify his release on bail. Also, the Appellant contends that the Court *a quo* erred in failing to take his personal circumstances into consideration when refusing him bail.

[11] The CPA enlists circumstances under which a person facing a schedule 5 offence may not be released from detention. For that purpose section 60(4) of the CPA provides that the interests of justice do not permit the release of an accused on bail where:

[11.1] the accused will endanger safety of the public, any person against whom the offence in question was allegedly committed, or against another person or if he is likely to commit an offence in schedule 1

[11.2] he or she is likely to evade trial if released on bail;

[11.3] there is likelihood that the accused upon being released on bail will attempt to influence or threaten witnesses, or where he is likely to destroy or hide evidence;

[11.4] would undermine or jeopardise the objects or proper functioning of the criminal justice system;

[11.5] exceptional circumstances militate against the release of an accused on bail because there is likelihood that he or she will disturb public peace or security.

[12] Subsection (5)[4] provides the statute further provides guiding principles or considerations that a Court hearing bail should have regard to before arriving at the conclusion whether the interests of justice favour or are against the release of an accused person on bail.

[13] Unless the accused has shown that the interests of justice favour his or her release on bail, the Court shall order that the such person remain in police custody until such time that he or she has been dealt with in accordance with the law.[5] To decide whether an accused is a potential flight risk the Court may be guided by a number of factors, including whether an accused shares strong family bond, his or her assets, the nature and gravity of the offence,

4 Section 60(5) of the CPA.

5 S v Nkqayi and Others (CA&R 121/2022) [2023] ZAECMHC 17 (28 March 2023) at para [3.11].

the means and travel documents which the accused has which may enable him or her to escape the country.[6] This list is not exhaustive.

[14] The Magistrate in this case did find that the Appellant was a flight risk, amongst other findings that he has made. Not just that, as he also found that the Appellant's alleged criminal conduct of dealing with counterfeit, jeopardises the country's economy. The judgment refusing bail is impugned for the findings made by the Court *a quo*. An accused person who has been refused bail may appeal the decision before the High Court.

[15] My role as a Court sitting on appeal are circumscribed by section 65(4) of the CPA. It regulates that a Court or Judge hearing an appeal shall not set aside the decision against which the appeal is brought, unless such Court is satisfied that the decision was wrong. This denotes that there must be a demonstrable material misdirection on the part of the Court of first instance in its refusal to grant the Appellant bail. Where such has not been shown, the Court shall not set aside the decision impugned. This was confirmed in *S v Barber*[7] where the following was stated:

> *"It is well known that the powers of this Court are largely limited to 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 view for that of the Magistrate because that would be an unfair interference with the Magistrate's exercise of his discretion. …without saying that the Magistrate's view was actually the correct one, I have not been persuaded to decide that it was the wrong one."*

[16] I have already recorded that the *Court a quo* refused to enter the Appellant for bail on the grounds that he failed to discharge the onus that the interest of

---

6 Section 60(6) of the CPA.

7 1979(4) SA218(D)220E-H.

justice permitted him to be admitted to bail. That Court also found that he should have known about the drug activities or manufacturing that was happening on his farm. The reasoning of the Court was that the Appellant who resided full time on the property in question ought or should have known what was happening on it.

[17] When denying the Appellant bail the Court reasoned *inter alia* that:

[17.1] the case for the State against him was strong and that the Appellant faces a long period of incarnation;

[17.2] because of that, the Court held it to be an incentive for him to evade his trial; and

[17.3] the Appellant to be a flight risk, who may skip the country and evade his trial due to the seriousness of the charges against him.

[18] A Court when hearing bail application must avoid speculating about things which may or may not happen.[8] When deciding on bail the Court must be satisfied that there is a probability, not just a possibility, of one or more of the factors listed in section 60(4) of the CPA. Where the Court does not arrive at the conclusion that the probability exists of those circumstances happening, the Court cannot then rely in its refusal to grant bail on the mere existence of a risk or possibility that one or more of the things mentioned in that legislative text may result. To do so the Court would not be exercising its decision making or discretion appropriately.

8 S v Diale and Another 2013 (2) SACR 85 (GNP) at para [14].

[19] The Appellant relied on the decision in *S v Dlamini; S v Dladla and Others; S v Jubert; Schietekat*[9] to challenge the bail decision reasoning that it was speculative and not borne out of the facts which were before the Court a quo. In this case it was held amongst others that:

> *"Furthermore, a bail hearing is a unique judicial function. It is obvious that peculiar requirements of bail as an interlocutory inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal Court it is considerably less formal than a trial. Thus, the evidential material profert need not comply with the strict rules of oral evidence or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the Presiding Officer are greater. An important point to note here about bail proceedings is so self-evident that it is often overlooked. It is that the is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the inquiry is not really concerned with the question of guilt. That is the task of the trial Court.*
>
> *The Court hearing bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interest of justice permit the release of the accused pending trial; and that entails, in the main, protecting the investigation and prosecution of the case against hindrance."*

[20] The principle is also true that the continued detention of an accused person should not be a form of anticipatory punishment. This, if it was to be the case, would fly in the face of the constitutional principle that an accused person remains innocent until his or her guilt has been proven beyond reasonable doubt at a hearing of the matter in trial.[10] Based on that understanding, an accused person would ordinarily be granted bail in a matter implicating the provisions of schedule 5 of the CPA unless the interests of justice do not justify such release on bail. How a Court hearing bail arrives at the conclusion whether bail should be granted in the interests of justice is a matter that is to borne by facts and evidence.

---

9 1999 (2) SACR 51(CC) PARA 11.

10 Section 35 of the Constitution.

Discussion

[21] Having read the papers before me, particularly the judgement as granted by the Magistrate, one gets a clear indication that the denial of the accused to be admitted to bail was twofold. Firstly, the Magistrate considered the seriousness of the allegations against the Appellant and, secondly, having formed the view that the allegations were too serious considered him a flight risk. In considering the seriousness of the allegations against the Appellant the Magistrate reasoned that the crimes which he is facing, which relate to or include possession and distribution of counterfeit goods, have serious implications for the country's economy.

[22] The Magistrate said in the bail judgment *inter alia* that:

> *"As far as the counterfeit goods go, it has serious implication to the economy. If people import illegal items and sell it as real item, as the real MaCoy (sic) it has severe financial implications to the companies concerned to the owner of trademark. Secondly if one does not pay the value of the customs and customs duties government suffers. That has been considered in the past."*

[23] As to why those remarks were relevel for bail proceedings is something that I struggle to understand. They appear as if the Court a quo has already found the Appellant to have imported counterfeit material and has cheated the country of customs revenue.

[24] I have foreshadowed earlier that the State opposes the appeal and supports the outcome reached by the Court *a quo* to deny to enter the Appellant on bail. In its support for bail denial, the State relied on *S v Mathebula*[11] and contended that the Appellant ought to have shown that there were

---

[11] Mathebula v S (431/2009) [2009] ZASCA 91; 2010 (1) SACR 55 (SCA) ; [2010] 1 All SA 121 (SCA) (11 September 2009).

probabilities for his acquittal. At paragraph [12] of that judgment the following is said:

> *"[12] But a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. 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: S v Botha 2002 (1) SACR 222 (SCA) at 230h, 232c; S v Viljoen 2002 (2) SACR 550 (SCA) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the state is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see Shabalala & Others v Attorney-General of Transvaal and Another [1995] ZACC 12; 1996 (1) SA 725 (CC). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the state to rebut his evidence to that effect: S v Viljoen at 561f-g."*

[25] First, the judgment relied on was concerned with exceptional circumstances in terms of schedule 6 of the CPA and not with the test in schedule 5 bail application. Second, the judgment recognises the difficulty facing an accused who may not at the time of applying for bail have full facts upon which the charges against him or her are predicated. This judgment is completely unhelpful for the contention that the State wants to make.

[26] In any case the relevance of the dictum in *Mathebula* was explained in *Conradie v S*[12] thus:

> "*The point of relevance in Mathebula in respect of applicable principle is the statement that if an applicant for bail in a matter affected by s 60(11)(a) seeks to rely on the weakness of the state's case against him as proof of the existence of 'exceptional circumstances', he must show on a balance of probabilities that he is likely to be acquitted; see Mathebula at para 12. The court in Mathebula cited S v*

[12] [2020] ZAWCHC 177 (11 December 2020) at para [12].

Botha en Andere supra, at para 21, where Vivier ADCJ stated that proving a likelihood of acquittal would make out 'exceptional circumstances'."

[27] The following issues were raised by the Magistrate in his judgment, which appear to have substantially influenced his decision to refuse enter the Appellant for bail:

[27.1] that the importation of fake or illegal items, which are then sold to the public, has severe financial implications to companies in the country which own trademarks;

[27.2] that the counterfeit goods cost the State revenue due to the failure to pay the value of the customs and custom duties to the relevant department or entity of government.

[28] This reasoning was not borne out of the facts or evidence that was before the Court. The Court did not pay attention to relevant considerations and allowed itself to be influenced in its decision making by these irrelevant considerations. How it arrived at the conclusion that the Appellant is a flight risk is also a sore point. I did not get a sense from a factual point of view as to what makes the Appellant such a flight, apart from the fact that he has a passport and has previously worked outside of the Republic.

[29] That the Appellant is owner of properties and businesses in the country, as a factor which the Court hearing appeal will take into account, was simply overlooked. Instead, the Court *a quo* adopted conjecture in its reasoning and considered things that were not before it. No rationality can be drawn out of the Court's comment that the Appellant may be residing with unknown relatives, or that his properties may be situated in other provinces. Why it

mattered that properties may be in other provinces, while they may still in the country, is unfathomable.

[30] So too, the Court *a quo* ignored the fact that the Appellant had a strong bond or relationship with his four daughters, and that one of his daughters has actually offered he place to be the Appellant's residence while the criminal case is running its course. which did not play any significant role in the Court reaching of its decision. This reflects intention to not interfere with the work of the police or to jeopardise any evidence which the State will need during trial.

[31] Having regard to the evidence presented in the Court *a quo* and the reasoning of the Magistrate, I reach the conclusion that the Magistrate misdirected himself materially on both the facts and the law. In such circumstances, section 65(4) of the CPA empowers this Court of appeal to set aside the decision and to replace it a decision which the Court *a quo* should have given.

[32] Being satisfied that the Appellant had discharged his onus of establishing that the *interests of justice* permit his release on bail, I proceed to make an order which deals with bail conditions. The Appellant proposed bail to be set at an amount of **R10,000-00**. I do not agree with this amount. The amount is too low given the nature of the criminal charges which the Appellant and his co-accused are facing.

Order

[33] I make the following order:

[a] The appeal is upheld and the Magistrate's order refusing the Appellant bail is set aside.

[b] The Appellant is granted bail in the amount of **R50,000-00** (Fifty Thousand Rand Only).

[c] The Appellant must, if he has not done so, forthwith surrender all his travel documents [passports] to the Investigating Officer of the case.

[d] Once the Appellant has paid the bail amount, he shall be entitled to be released from custody on the following conditions:

[i] He shall attend Court on the court day after his release for determination of the date on which the criminal case is postponed and, thereafter, he shall remain in attendance until such time as the matter is finalised and the Appellant is excused by the Court or he is dealt with in accordance with justice.

[ii] He shall stay with his daughter in Pretoria and shall not leave Pretoria metropolitan area save for the purpose of attending trial and, in any such circumstance in which the Appellant has to temporarily leave Pretoria, for any reason, he shall inform the investigating officer of the place which he is going to visit and the duration of such visitation.

[iii] Should the Appellant fail to attend any Court session on a date and time appointed, or should he fail to remain in attendance at trial or such other proceedings as he may be

required, the Appellant may be dealt with in terms of section 67(1) of the CPA.

[iv] The Investigating Officer shall serve a copy of this order on the Appellant personally prior to being released on bail.

M. Z. MAKOTI
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION

APPEARANCES:

FOR APPLICANT	**:**	**ADV JJN SWART** **FRIK VAN SCHALKWYK INC** **C/O ELMARIE BIERMAN ATTORNEYS** **POLOKWANE**
FOR FIRST RESPONDENT	**:**	**ADV G SEKHUKHUNE** **NATIONAL DIRECTOR OF PROSECUTIONS** **POLOKWANE**
DATE HEARD:		**17 FEBRUARY 2025**
JUDGMENT DELIVERED:		**19 MARCH 2025**