



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

CASE NO: BA 02/25

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

SIGNATURE

04/03/2024

DATE

In the matter between:

RALPH MALAMBE

APPELLANT

and

THE STATE

RESPONDENT

BAIL APPEAL JUDGMENT

[1] Mr Ralph Malambe was born on 01 September 1988 and turned 36 years old on 01 September 2024. It was also on this day of his birthday that the state alleges that he murdered Ms Phumla Maphanga by shooting her with an unlicensed firearm. The shooting took place in front of members of his family and those of the deceased.

[2] Immediately after the shooting, he disappeared and re-surfaced after two to three days when he presented himself at the police station accompanied by his lawyer. He was arrested and charged with one count of murder and one count of contravention of the provisions of the Firearms Control Act 60 of 2000 read with section 250 of the Criminal Procedure Act 51 of 1977 ("the CPA"), possession of a prohibited firearm. The state further alleges that the murder was premeditated.

[3] He instituted bail proceedings and same was opposed by the state. Both parties agreed that the charges the appellant is facing fall within the ambit of Schedule 6 of the CPA. It was therefore incumbent upon the appellant to place before the court facts upon which he relies to prove the existence of the exceptional circumstances which would in the interests of justice permit his release.

[4] The appellant deposed to an affidavit in which he sets out his personal circumstances including parental obligations to his three minor children. He has business interests in two enterprises through which he earns his living and takes care of his family. He has one employee who will not be able to take care of the business if he is not granted bail. He disclosed his previous convictions as well as other charges he was arrested for that were later withdrawn. He submitted that he will not evade trial and in support of that contention said that he handed himself to the authorities and co-operated with the police by pointing out to them the firearm used in the commission of the offence. He intends to plead not guilty should the matter proceed to trial. If the court grants bail, he will neither interfere with witnesses nor undermine the administration of justice.

[5] The state opposed bail and presented oral evidence through the investigating officer. It was averred on behalf of the state that the appellant's release on bail will

undermine the administration of justice. He killed the deceased in the presence of his family members and there is likelihood of interfering with them as witnesses. The case against the appellant is overwhelming and if convicted he is likely to be sentenced to a long period of imprisonment. It is therefore likely that if admitted to bail, he will evade trial. It is therefore not in the interests of justice that he be granted bail.

[6] The learned magistrate after weighing up the evidence tendered by both the appellant and the state concluded that the appellant had failed to establish exceptional circumstances required to justify his release from custody pending trial. He consequently refused to grant bail.

[7] The appellant appeals against the decision of the magistrate and contends that his finding that he failed to discharge the onus to prove that exceptional circumstances exist to permit his release on bail is wrong. It was submitted on his behalf that the magistrate committed an error of law by emphasizing the protection of witnesses against interference and failed to balance it against other factors such as the poor health of the appellant, the fact that he handed himself to the authorities and co-operated with the police. By denying the appellant bail, so the submission went, the learned magistrate has effectively convicted him, and this runs contrary to the established principles of our law that every person is entitled to bail unless the interests of justice dictates otherwise.¹

[8] The state opposed the bail appeal and predictably supported the decision of the learned magistrate. Mr Zindela, counsel for the state, submitted that the appellant killed the deceased who was his wife in the presence of her family. All the witnesses are known to him and if granted bail he is likely to interfere with them. His release on bail will also undermine the administration of justice as the appellant has not established exceptional circumstances justifying his release. He urged me not to interfere with the decision of the magistrate as it is well-reasoned and correct.

¹ See section 35(1)(f) of the Constitution.

[9] The principles governing bail appeal are trite. An appeal court can only interfere with the finding of the lower court if satisfied that the decision is wrong. Section 65(4) of the CPA provides as follows:

“The court or judge hearing an 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 the judge shall give the decision which in its opinion the lower court should have given.”

[10] In *S v Barber*,² the court formulated the proper approach to be adopted by the court hearing a bail appeal as follows:

“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 for bail. 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 view for that of the magistrate because that would be an unfair interference with the magistrate’s exercise of his discretion. I think it 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 exercised that discretion wrongly.”

[11] The approach in *Barber* was given approval by the Supreme Court of Appeal in *S v Masoanganye and Another*,³ where the court said:

“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... [The appeal court] has to defer to the exercise of the trial court’s decision unless that court failed to bring an unbiased judgment to bear on the issue, did not act for substantial reasons, or exercised its discretion capriciously or upon a wrong principle.”

² *S v Barber* 1979 (4) SA 218 (D) at 220E-F.

³ *S v Masoanganye and Another* 2012 (1) SACR 292 (SCA) para 15.

[12] The starting point in any application involving Schedule 6 offences is to appreciate that the law allows that certain categories of offenders suspected of having committed serious offences be kept in custody pending trial. An accused person charged with a Schedule 6 offence should be kept in custody until the court is satisfied that it is in the interests of justice that he be released. The court has a duty to make the necessary enquiries to establish where the interests of justice lie. This duty is imposed on the judicial officer by the provisions of the constitution which states that every accused person has a right to be released on bail. In relation to Schedule 6 offences, an accused person has a duty to place facts upon which the court would after careful analysis arrive at a conclusion that it is in the interest of justice that he/she be released. Once the court is so satisfied, there is no legal basis upon which the accused should be detained. The court should in performance of its duties uphold the Constitution and the Bill of Rights enshrined in it and release him/her from custody.

[13] The Constitutional Court underscored this point emphatically in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*,⁴ when it said:

“[6] Section 35(1)(f), in its context, makes three things plain. The first is that the Constitution expressly acknowledges and sanctions that people may be arrested for allegedly having committed offences, and may for that reason be detained in custody. The Constitution itself therefore places a limitation on the liberty interest protected by section 12. The second is that notwithstanding lawful arrest, the person concerned has a right, but a circumscribed one, to be released from custody subject to reasonable conditions. The third basic proposition flows from the second... [and] it is that the criterion for release is whether the interests of justice permit it.”

[14] It is therefore incontrovertible that an arrested person is entitled to be released on bail. There are however instances where the law requires an arrested person to satisfy the court that it is in the interests of justice that she/he be released on bail. If the arrested person fails to provide facts which when considered objectively establish exceptional

⁴ *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) para 6.

circumstances in Schedule 6 offences, the court should refuse bail and order that he/she be detained.

[15] In determining whether exceptional circumstances have been established, the court takes into account various factors listed in section 60(4) of the CPA, including any disposition to violence on the part of the accused as is evident from his/her past conduct, the prevalence of the offence and the likelihood of it inciting violence and public disorder as well as the likelihood of the accused person evading trial incentivised by the penalty/sentence the court is likely to impose if found guilty.

[16] In the bail application, the appellant sought to prove exceptional circumstances by adducing evidence through an affidavit. In the affidavit he stated that he intends to plead not guilty when the matter goes to trial. This was despite the fact that he shot the deceased with an unlicensed firearm whose serial numbers are obliterated. The maximum sentence the court may impose for illegal possession of a firearm is 25 years. During the appeal hearing I engaged Mr Maseko on this glaring omission and failure by the appellant to take the court into his confidence and explain the circumstances under which the alleged offence was committed including how it came about that he possessed an unlicensed firearm. Mr Maseko readily conceded that the appellant did not deal with this crucial aspect in his bail application.

[17] It was therefore important for the appellant to explain the basis upon which he believes that he will be acquitted if the matter were to proceed to trial. An applicant who challenges the strength of the state's case and wants the court to objectively take this factor into account needs to prove on a balance of probabilities that he will be acquitted of the charge.⁵

[18] In *Killian v S*,⁶ Binns-Ward J deprecated the practice of adducing evidence through affidavit more especially in matters involving Schedules 6 offences. He said:

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

⁶ *Killian v S* [2021] ZAWCHC 100 para 13.

“Bail applications are *sui generis*. To an extent they are inquisitorial and, in general, there is no prescribed form for introducing evidence at them. But in cases where s 60(11) applies and there is consequently a true onus on the applicant to prove facts establishing exceptional circumstances, an applicant would be well advised to give oral evidence in support of his application for bail. This seems to me to follow, because – differing from the position in which the Plascon-Evans rule is applied – the discharge of the onus is a central consideration in s 60(11) applications. If the facts are to be determined on paper, the state’s version must be accepted where there is a conflict, unless the version appears improbable.”

[19] On the facts of this case, it is clear that the learned magistrate applied his mind correctly and took into account all the relevant factors in the determination of whether the interests of justice required the release of the appellant on bail. The appellant shot the deceased in full view of the members of his family. He used an unlicensed firearm. The circumstances under which the firearm got to be in his possession had not been disclosed to the court. The appellant has a history of violence when one considers that he was previously charged with assault and rhino poaching, which was later withdrawn.

[20] Our country is battling with gender-based violence and that is the harsh reality the court had to deal with in *S v Dlamini supra*. It would have been irresponsible for the magistrate to ignore this harsh reality and grant bail to the appellant. As Kriegler J said more than 25 years ago:

“crime is a serious national concern, and a worrying feature for some time has been public eruptions of violence related to court proceedings... There is widespread misunderstanding regarding the purpose and effect of bail. Manifestly, much must still be done to instil in the community a proper understanding of the presumption of innocence and the qualified right to freedom pending trial under s 35(1)(f). The ugly fact remains, however, that public peace and security are at times endangered by the release of persons charged with offences that incite public outrage.”⁷

⁷ *S v Dlamini supra* para 55.

[21] Guided by all the relevant principles applicable in a Schedule 6 bail application, the magistrate found that the appellant failed to discharge the onus placed on him and given the perfunctory manner in which he dealt with the issue relating to the circumstances under which the alleged offences were committed, the relationship he has with the witnesses and the possible lengthy sentence he may have to serve if convicted, as well as the prevalence of gender based violence in our society, he concluded that there were no exceptional circumstances proven to warrant his release on bail.

[22] On the authority of *Killian* and *Mathebula* referred to above, the conclusion by the learned magistrate that the appellant be refused bail cannot be faulted. The decision was correct and there is no legal basis to interfere with it.

[23] In the circumstances, it is ordered that the appeal is dismissed.


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MANGENA ACTING JUDGE
ACTING JUDGE OF HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Appearances

Counsel for the Applicant:	Mr M Maseko MM NONYANE ATTORNEYS
Counsel for the Respondents:	Adv Zindela National Director of Public Prosecutions
Date of Hearing:	20 February 2025
Date of Judgment:	04 March 2025