

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – MTHATHA**

Case No: CA&R97/2024

In the matter between:

INGA SOGIDASHE **1ST APPELLANT**

OSBORNE FUMILE LOLO **2ND APPELLANT**

SIPELELE NTSHIYANA **3RD APPELLANT**

And

THE STATE **RESPONDENT**

REASONS FOR JUDGMENT

Mhambi AJ

INTRODUCTION

- [1] This is an appeal in terms of section 65 (1) of the Criminal Procedure Act 51 of 1977, “**the Act**”.
- [2] The appeal is brought pursuant to the Magistrate at Butterworth Magistrates’ court refusing the Appellants to be admitted to bail.
- [3] The Appellants are charged with six counts of murder, possession of fire-arms, possession of ammunitions, and conspiracy to commit murder.

- [4] During the bail application in the court *a quo*, it was common cause between the defence legal representative and the State Prosecutor that the Appellants are charged with offences listed in schedule six of the Act. Consequently, the onus rests on the Applicants, now appellants during bail hearing to establish *exceptional circumstances* which render it in the interests of justice for them to be released out on bail.

THE LEGAL POSITION ON BAIL APPLICATION PROCEEDINGS

- [5] The authorities are clear on the legal nature of bail application proceedings as I will tabulate hereunder.

- [6] In **S v Schietekat**¹ Slomowitz AJ stated:

“Bail proceedings are sui generis. The application may be brought soon after arrest. At that stage all that may exist is a complaint, which is still going to be investigated. The State is thus not obliged in it’s turn to produce evidence in the true sense. It is not bound by the same formality. The court may take into account of whatever information is placed before it in order to form what is essentially an opinion or value judgment of what an uncertain future holds. It must prognosticate. To do this it must necessarily have regard to whatever is put up by the State in order to decide whether the accused has discharged the onus of showing that exceptional circumstances exist which in the interest of justice permit his release”.

- [7] In **S v Lupuwana**², Kahla AJ, held that:

*“This court is not concerned with proving guilt or innocence of the appellant, it only looks at pointers in the direction to arrive at a decision as to whether it can be said that the State’s case is so weak or the State has failed to submit a *prima case* against the accused”.*

¹ 1998 (2) SACR 707 © 713

² 2015 JDR 0455 (ECP)

[8] This accords with what the Constitutional court said in **S v Dlamini**³:

“There 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 the 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 interests 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”

[9] The court stated further at paragraph 49 as follows:

[49] “the manner in which a court enquiry into bail is to be conducted, remain substantially unaltered. It remains unique interlocutory proceedings where the rules of formal proof can be relaxed and where the court is obliged to take initiative if the parties are silent, and the court has to be proactive in establishing the relevant factors. More pertinently, the basic enquiry remains to ascertain where the interests of justice lie. In deciding whether the interests of justice permit the release on bail of an awaiting trial prisoner, the court is advised to look to five broad considerations mentioned in paras (a) – (e) of ss (4), as detailed in the succeeding subsections. And it then has to do the final weighing up of factors for and against bail required by ss (9) and (10)”.

THE POWERS OF BAIL APPEAL COURT

[10] Section 65 (4) of the Act provides that :

“ 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

³ 1999 (4) SA 626-627

decision was wrong, in which event the court or judge shall give the decision which in it's or his opinion the lower court should have"

[11] The court in **S v Barber**⁴, Hefer J remarked as follows :

" It is well known that the powers of this court are largely limited to here he matter comes before it on appealThis 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 it's own view for that of the magistrate because that would be an unlawful interference with the exercise of magistrate's discretion".

[12] In the matter of **S v Mpulampula**⁵ it was held that where the court a quo misdirected itself materially on the facts or legal principles, the court of appeal may consider the issue of bail afresh. Interference is therefore justified where the lower court overlooked some important aspects in coming to it's decision to refuse bail.

THE FACTS OF THIS CASE

[13] This bail appeal is premised on several grounds advanced by Appellants, which may be summarised as follows :

[a] The magistrate erred in finding that the interests of justice do not permit their release on bail, on this they raised several factors as reflecting on the record bundle.

[b] The magistrate erred in failing to attach any or sufficient weight to the Appellants uncontested personal circumstances.

⁴ 1979 (4) SA 218 (D) at E-H

⁵ 2007 (2) SACR 133(E)

- [c] The Magistrate misdirected herself in failing to consider granting bail coupled with appropriate conditions which could have addressed any possible concern or fear.
- [d] The magistrate erred in holding that the State's case against the appellants is strong and for that reason they may evade trial.
- [e] The magistrate ignored the constitutional right of the Appellants particularly the right to be presumed innocent until proven guilty, that constitutes misdirection.
- [f] The magistrate misdirected herself as to the facts and the law on bail.
- [g] The magistrate application of justice principles is bad in law.
- [h] The magistrate erred in not considering the principles laid down in **S v Acheson**⁶.

THE MAGISTRATE'S DECISION

- [14] It appears *ex facie* the record that the magistrate recorded the concession by the appellants' legal representative and the Prosecutor that the offence of which the Appellants' are charged fall under schedule 6, and that the bail Applicants to prove the existence of exceptional circumstances that permit their release out on bail, and that the interests of justice permit their release on bail.
- [15] The magistrate summarized the exceptional circumstances by the 1st appellant as follows:
 - a) He has a taxi business, owning six taxis and two motor vehicles registered in Cape Town at Kordet. He testified that he has an address

⁶ 1991 (2) SA 805 (NM)

in Cape Town and Willowvale, he still pays for his two cars and that his girlfriend was four months pregnant. He was recorded not to have previous convictions and pending cases.

[16] 2nd Appellant, exceptional circumstances were :

- a) He does not have previous convictions nor pending cases. He was once charged with murder, attempted murder, possession of fire-arms and ammunitions but charges were later withdrawn. He has a fixed address in Cape Town and that he is married staying with his wife and children. He has a taxi business and his taxis are paid up.

[17] 3rd Appellant's exceptional circumstances were recorded as follows:

- a) He does not have previous convictions but has a pending case where he is out on bail. He has a taxi business; he is married with two children. He has a fixed address at Cape Town and Willowvale, he pays about R4000.00 a month towards maintenance of his children.

THE STATE CASE AS PER THE RECORD

[18] The State opposed bail, in her decision not to grant Appellant's bail, the Magistrate considered the State evidence as adduced by the officer.

[19] The State testified that the appellants do not have fixed addresses in Cape Town, the addresses they claim to be their fixed addresses was verified by the investigating officer, and was found not to be their places of residence. As of the 1st appellant, the addresses he supplied is not where he resides, there was no confirmation that they live or sleep in the respective addresses. That happened to be the case in respect of all the appellants. It was noted that the Appellants' have no immovable assets in Cape Town, or in the Eastern Cape, in the result the magistrate concluded that they stand not to suffer any financial loss should they evade trail.

[20] It was the State evidence that it was even difficult to arrest the Appellants', they were apprehended through cell phone communication, the magistrate relied on cell phone communication retrieved from 1st Appellant cell phone where he said :

"we have already left for Cape Town. Police will never get us", the magistrate understood that to mean the appellants are a flight risk.

[21] The Magistrate noted the State evidence that the Appellants were arrested driving the VW Polo, which upon investigation, it was found to belong to the Department of Health, Mitchells Plain, it is alleged to have been hijacked and the case of car hijacking was opened at Lingaethu Police station under CAS no : 35/2/2024.

[22] It was an irrebuttable evidence that, the appellants soon after the commission of the offence were shot at, that resulted to 1st Appellant being injured, they were all travelling in the same vehicle, they never reported the shooting incident, they were shot at Willowvale but they the injured Appellant did not go to the nearest hospital but rather visited Frere hospital, East London. The magistrate reasoned that the Appellants' failure to visit the nearest hospital subsequent to being shot, or and the failure to report their shooting as an attempt to avoid being traced or identified.

[23] The magistrate further noted that out of the two taxi associations in conflict, the appellants are members of one of them, the magistrate was impressed that if the appellants are released they will attack the rival group and revenge themselves.

[24] In the result, the magistrate found nothing exceptional in the personal circumstances adduced by the Appellants. She relied on Supreme Court of appeal decision in **S v Scott Crossley**⁷, where the court said :

⁷ 2007 SACR page 471 (SCA)

“ Personal circumstances which are merely common place cannot constitute exceptional circumstances for the purposes of section 60 (11) (A) of the Criminal Procedure Act 51 of 1977”.

EVALUATION

[25] The authorities are clear to say that it is incumbent upon the accused charged with schedule 6 offence, to first discharge the onus to convince the court that the necessary exceptional circumstances exist that would warrant his or her release on bail, before the State attracts any sort of onus to show cause as to why bail should not be granted .

[26] The court in **Mthombeni v S**⁸ , Olivier AJ held that :

“what is expected from an accused in showing that exceptional circumstances do exist that would warrant his or her release on bail, is something more than a simple regurgitation of the accused personal circumstances and a simple statement that the accused will not act in a manner as described by section 60 (4) (a) to (e) of the CPA.”

[27] The court in **S v DV**⁹ , described what exceptionality is, as follows:

“In the context of section 60 (11) (a), the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused”.

[28] Regard had to be to the above analysis, it may be deduced that the accused charged with schedule 6 offence has his or her right to liberty restricted until it is shown that the interests of justice permit his release on bail, the onus is on such accused to show the court the existence not only of personal circumstances but of exceptional circumstances that permit his release on bail.

⁸ ZANCHC 2023, at para 38

⁹ 2012 (2) SACR 492 at paragraph 7

[29] Consequently, having carefully examined the record of proceedings in the court a quo, there is nothing to suggest that the magistrate misdirected herself in her findings both in law and facts, there is nothing that convinces me to differ with the eventual finding by the magistrate.

ORDER:

[30] In view of all the above, the following order was issued:

- 1. The appeal is dismissed.**

M. MHAMBI
ACTING JUDGE OF THE HIGH COURT

APPEARENCES:

M. Komsana : counsel for the appellants
Instructed by : Ngxekana Attorneys
Mthatha

J. Gwe : counsel for the respondent
: NDPP
Mthatha

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