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**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MTHATHA]**

CASE NO: CA&R115/2024

In the matter between:

ANDILE KWELETA

1ST APPELLANT

NKOSOMZI NDLUNGANA

2ND APPELLANT

NKOSINATHI NOKHOTSOYI

3RD APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT- BAIL APPEAL

MTSHABE AJ

Introduction.

1. This is an appeal in terms of the provisions of Section 65 of the Criminal Procedure Act, Act 51 of 1977 (the Act) against the decision of Magistrate's Court, at Dutywa on 7 October 2024 refusing to release the appellants on bail pending their trial.

Background.

2. The three appellants are facing charges involving possessions of firearms and ammunitions.
3. The appellants number one and three are charged with an offence referred to in Schedule 5 of the Criminal Procedure Act, and appellant number two is charged with an offence referred to in Schedule 6 of the Act.
4. Schedule 5 of the Criminal Procedure Act provides for various offences, one of which is an offence in contravention of section 36 of the Arms and Ammunition Act, 1969, (Act No. 75 of 1969). Section 36 of the Arms and Ammunition Act provides that:

“...no person shall be in possession of any ammunition unless he is in lawful possession of an arm capable of firing that ammunition.”

5. On 9 September 2024, the appellants applied to be released on bail after they were charged with two Counts of Possession of prohibited firearms in contravention of Section 4(1)(f)(iv) of the Firearms Control Act 60 of 2000, two Counts of possession of firearms in contravention of Section 3 of the same Act. They were further charged with four Counts of possession of ammunitions in contravention of Section 90 of the same Act.
6. Andile Kweleta (first appellant), during the bail proceedings, testified that he was 44 years old and married. He stated that he resides at No. 1[...] B[...] Road, Amalinda, East London. He informed the court *a quo* that presently he is staying at New Homes Tsolo as he was looking for employment. He is not a skilled person other than that he has a public driving license. He informed the

court that out of his marriage he has two children. The first child is 19 years old, and the second child is 13 years old. He informed the court that the 19-year-old child is a child with special needs and is studying in a special school and the 13 year old is doing grade 5.

7. He has no previous convictions; however, he confirmed that he has a pending case of possession of ammunition. At the time of hearing the bail application, he informed the Court that on the pending case of possession ammunition he is out on bail. He has attended the court consistently has never absconded court attendance. He denied the allegations contained in the present case.
8. Mr Kweleta informed the Court that on the day of his arrest he was coming from Tsolo to Ngqamakhwe. According to him whilst they were in Idutywa, there was an accident. He was during the motor vehicle as he observed the accident, he slowed down his motor vehicle. According to him the motor vehicle he was driving belonged to his friend. He was arrested at Idutywa by the police. He denied charges against him and the knowledge of the fire arms or ammunition that were found in the motor vehicle. He stated that during the trial pleading not guilty.
9. I must mention at this stage that during the hearing of this appeal the respondent (state advocate) informed me that the pending case of possession of firearm which emanates from Maclear has been withdrawn.
10. Nkosomzi Dlungana (second appellant), testified that he is a permanent resident of Ntshiqo Administrative Area, Tsolo. He informed the court that he is 54 years old and informed the court that he has a house in Ngcolosi Administrative Area Tsolo. He is married and has two children. He informed the court that he has the previous conviction of murder, of which he was sentenced to 57 years imprisonment. He informed the court that in respect of that offence he has been released on parole during October 2023. The second appellant has no pending cases. He also denied being involved in the commission of an offense in the current case.

11. Mr Dlungana further denied that he was found to be in possession of any firearms and or ammunition on the day in question. He also informed the court that during the trial he will plead not guilty. On the day in question, that is, that the day he was arrested, he informed the court that he was on his way to East London to consult with his doctors as he had a medical condition. According to him he was given a lift by the first appellant, who had found him hitchhiking on the road at Tsolo junction. The appellant informed the court he is suffering from kidney failure. He informed the court that in vehicle that was driven by the first appellant, he joined three occupants. As I have indicated above, he denied charges against him.

12. Nkosinathi Nokhotsoyi (third appellant) adduced his evidence by way of an affidavit. In his affidavit he stated that he is 50 years old, being born on 12 October 1974. He is residing at Nontyakashe Administrative Area, Qumbu and has four children from his deceased wife. He informed the court that he is not educated. The highest education is standard 1. He informed the court that he is self-employed as director in construction work and is receiving an income of R8 000.00 (Eight Thousand Rand per month.) He testified that he had previous conviction of being found in possession of unlawful firearms of which he was convicted in 2002 and sentenced to a fine of R2 000.00 (Two Thousand Rand.) His second conviction was of stock theft, for which he paid a fine of Six Thousand Rand. He stated that he has no pending cases except the one which is before Court. He also informed the court that he intends to plead not guilty to the charges level against him and wished to reserve the basis of his defense. He informed the Court that if he is released on bail, he shall neither danger the safety of the public nor any particular person nor will commit a schedule one offence. He informed the court that he shall not attempt to invade trial. He will not influence or intimidate the state witness or conceal or destroy evidence. He informed the court that he shall not undermine or jeopardize the objectives of the proper functioning of criminal justice including the bail system. He shall not disturb public order or undermine the public peace or security. He informed the court that he does not have a document and has never been resistant at any arrest effected

upon him. He informed the court via his affidavit that he will attend the trial to its finality.

13. On behalf of the state, during the bail proceedings, the Investing Officer Sergeant Pieters informed the Court that he was not involved during the arrest of the appellant. His evidence is based on the statements contained in the docket. Therefore, according to the statements in the docket the State has a strong case against the appellants. He informed the court that as the appellants were travelling from Tsolo to East London, they were in possession of firearms. According to him the appellants together with other accused were traveling in two vehicles, a white Ford Ranger and white Mercedes Benz. These vehicles were stopped by the police at Dutywa and upon search, they, the police found two 9mm pistols, one A refill and R5 refill as well as ammunitions. He confirmed that the police have verified the address of the first appellant and that he is married. He also confirms that the first appellant has a pending case at Maclear in which he's out on bail. This is the case I have stated that it has been since withdrawn.
14. In respect of the second appellant Sergeant Pieters testified that he had no pending cases. He confirmed that he had a previous conviction and confirmed that he had verified.
15. In respect of the third appellant Sergeant Pieters confirmed that he has no pending cases, and he had previous conviction of which he paid a fine on that conviction. He also confirms the address on the third appellant and that he has four children.
16. The basis for the state to oppose the release of the appellants on bail was mainly on the basis that the State has a strong case against and that if they're convicted, they would face long term of imprisonment.

Judgment of the court a quo.

17. In evaluating the evidence before the court, the magistrate refused bail on the basis that the appellants could evade trial. In this regard the Court in respect of first appellant relied on the pending case at Maclear. Then he arrived at the conclusion that his release on bail will not be in the interests of justice. As I have indicated above the case in Maclear has been withdrawn and this was a common cause during the hearing of this appeal.
18. In refusing bail for the second appellant the court relied on previous convictions and the fact that he is again implicated in an unlawful possession of a firearm and ammunitions. The court concluded that the second appellant has failed to discharge the onus on him to be released on bail. The court stated that the appellant has failed to discharge the **onus** rested on him that exceptional circumstances exist in which it is in the interest of justice for him to be released on bail. Therefore, bail was refused.
19. In respect of the third appellant, the court *a quo* refused bail on the basis that he has two previous convictions although these do not appear on the system, however, the appellant is the one who knows very well that he has been convicted of crimes in the past. The court stated that, in view of past his conduct it is not in the interest of justice that bail should be granted. Bail was refused.

Grounds of appeal.

20. The Notice of Appeal consists of fourteen grounds of appeal. They appear to have been derived from provisions of Section 50(6) and 60 of the Criminal Procedure Act, (Act No. 51 of 1977).
21. On reading the grounds of appeal it transpires that they can be summarized as four small headings.
- 21.1 The contention that the magistrate failed to consider the factors set out in Section 60 (4) (a-e) Criminal Procedure Act.

21.2 The second ground is that the magistrate failed to apply her mind to the relevant considerations applicable to the interests of justice.

21.3 Thirdly, the magistrate misdirected herself regarding the charges that have been leveled up against the appellant in that she introduced her own charges, namely, possession of stolen motor vehicle.

21.4 The fourth ground is that the magistrate has failed to take into account the Constitutional Rights of the appellants, especially the children's interest as is required by case law.

Analysis of evidence and applicable law.

22. It is common cause that the charges against the appellants fall in the category of offences listed in schedules 5 and 6 of the Criminal Procedure Act 51 of 1977.

23. As the results of the charges levelled against the appellants, the provisions of Section 60(11) of the Act are applicable to currently bail application. Section 60(11) provides as follows:

“Notwithstanding any provision of the Act, where an accused is charged with an offence-

(a) referred to in Schedule 6, the Court shall order that the accused be detained in custody until he/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 in which in the interest of justice and made his/her release;

(b) referred to in Schedule 5 but not in Schedule 6, the Court shall order that the accused be detained in custody until he/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 that the Court that the interests of justice permit his/her release.

24. Section 60(1)(a) of the Criminal Procedure Act reads as follows-

“An accused who is in custody in respect of an offence shall subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his/her conviction in respect of such offence, if the court is satisfied that the interests of justice permit”.

25. Further, Section 60(4) of Criminal Procedure Act provides as follows:

“The interests of justice do not permit the release from detention of an accused where one or more the following grounds are established:

- (a) Where there is likelihood that the accused, if he/she were released on bail, will endanger the safety of the public or any particular person or will commit Schedule 1 offence: or*
- (b) where there is the 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 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 jeopardize 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.”*

26. In *S v Dlamini*¹, the Constitutional Court defined the interpretation of the term ‘interests of justice’ and how it is to be applied. The Court held:

“... must also be the sense in which interests of justice concept is used in ss (4). That subsection actually forms part of a functional unity with ss (9) and (10). Between them they provide the heart of the evaluation process in a bail application, ss (9) being predominant. If it is read first and the interests of justice bears the same narrow meaning akin to interests of society (or the interests of justice minus the interest of the accused), the interpretation of three subsections falls neatly into place. The opening words of ss (9) (in considering the question in ss (4)) refer to question whether it should be refused. That question, so the presiding officer is told, is to be answered by weighing up the societal interests listed in ss (4) and detailed in ss (5) – (8A) against the personal interests adverted to ss (9). And whenever the parties may contend, ss (10) obliges the presiding officer to ultimately assume whom responsibility for that evaluation.”

27. In paragraph 6 of the Constitutional court in the matter of *S v Dlamini* (supra) dealing with Section 35(1)(f) of the Constitution of Republic of South Africa², the Court stated the following:

“Section 35(1)(f) in its context, makes three things plain. The fact 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 s12. The second is that notwithstanding lawful arrest, the person concerned has the right, but a circumscribed one, to be released from custody subject to reasonable conditions. The third basic proposition flows from second and really sets

¹ *S v Dlamini and others* 1999 (4) SA 623 (CC) PARA 48

² Constitution of the Republic of South Africa, 1996, section 35

the normative pattern for the law of bail. It is that the criterion for release is whether the interests of justice permit it”.

27.1 From the above paragraph, it is clear that the starting point dealing with bail proceedings is Section 35(1)(f) of the Constitution which provides the principal template against which the whole of Chapter 9 of the Criminal Procedure Act must be measured. The said section reads as follows:

“Everyone who is arrested for allegedly committing an offence has the right-... to be released from the detention if the interests of justice permit, subject to reasonable conditions.”

27.2 It is clear from the reading of section 35(1)(f) of the Constitution that there are limitations placed by it on the rights of liberty, dignity and freedom of movement of individuals. That limitation is contained in the last part that provides that the release of an arrested person from detention can be granted if interests justice of permit.

28. The common law inherent jurisdiction power to grant bail must be exercised consistently with the nature and purpose of section 39(2) of the Constitution, which provides that a Court ‘*must promote*’ security purport and objects of the Bill of Rights and enjoins the Courts to develop common law in the interests of justice when dealing with matters involving the fundamental Constitutional issue of liberty. This context ‘to promote’ means to develop or advance the Constitutional imperative of taking into proper account for fundamental rights provided in section 12(1)(a)(1)(f) of the Constitution.

29. In my view, when I consider section 60 of the Criminal Procedure Act, I should take every effort to take full account of the Constitution in the light of the requirements of section 39(2).

30. Section 12(1)(a) of the Constitution guarantees everyone’s right to freedom and security of the person, which includes the right is not deprived of freedom

arbitrary or without cause. However, the Constitution does not create an absolute right to personal freedom. The liberty is qualified and circumscribed by provisions of Section 35(1)(f) of the Constitution.

31. It is clear that the approach to bail by a judicial officer must be considered within the parameters of the Constitution. Section 35(1)(f) of the Constitution postulates a judicial evaluation of different factors that make up the criterion of the interests of justice. The application of Constitutional norms to the law and practice of bail obliges judicial officers to harmonize section 60 Criminal Procedure Act when dealing with bail provisions and Constitutional norms and practice.
32. The purpose of bail is to strike a balance between the interest of society and liberty of an accused person, who pending the outcome of his trial presumed to be innocent³.
33. Further, the basic purpose of bail, from society's point of view, has always been and still is to ensure the accused's reappearance for trial. But pretrial releases serve other purposes as well. The purposes recognized over the last decades and often dispositive of the fairness of the entire criminal proceedings.
34. Pre-trial release allows a man accused of crime to keep the fabric of his family intact, to maintain employment and family ties in the event he is acquitted or given a suspended sentence or probation. Further it spares his family the hardship and indignity of welfare and enforced separation. It permits the accused to take an effective part in planning his defense with his legal representative, locating witnesses, improving his capability of staying free in the community without getting into trouble.

³ Majali vs S (unreported, GSJ Case No.41210/2010, 19 July 2011 @ para 17

35. In *S v Peterson* ⁴ the court pointed out that the purpose of bail is to minimize interference in the lawful activity of an accused. In *S v Branco* ⁵ the court observed:

“The fundamental objective of the institution of bail in a democratic society based on freedom is to maximized personal liberty”.

36. It is trite that a bail application should be impressible be heard as a matter of urgency because it affects personal liberty. In *Magistrate, Stutterheim v Mashiya*⁶, the court held:

“It is evident that finalizing an application for bail is always a matter of urgency.....and if bail is refused the decision can be appealed. The right to prompt decision is thus a procedural right independent of whether the right to liberty actually the entitles the accused to bail.”

37. The deprivation of a person's liberty due to arrest pending trial is subject to judicial supervision and control. In exercising such oversight, in regard to bail proceedings, a court is expressly enjoined by the provisions of section 60, in particular s(4) and no to act as passive bystander but to take the initiative in the bail proceedings.

38. It must be mentioned that in *S v Acheson* ⁷, Mohamed J (as he then was) said the following:

“An accused person cannot be kept into detention pending his trial as form of anticipatory punishment. The presumption of the law is that he is innocent until his guilty has been established in Court. The court will therefore ordinarily grant bail to an accused person unless this is lightly to prejudice the ends of justice.

⁴ 1999 (2) SACR 52 (C)

⁵ 2002 (1) SACR 531 (w)

⁶ 2003 (2) SCR 106 (SCA)

⁷ 1991 (2) SA 805 PARA 822 A-B

This has been the position then and still is. The Constitution has codified the conditions for the release of an accused person from detention.”

39. The provisions of Section 60(11)(a) apply to the second appellant (Nkosomzi Dlungana.) The appellant was therefore expected to show on a balance of probabilities by adduce evidence which satisfies the Court that exceptional circumstances exist which in the interests of justice permit his release. The appellant, unlike the State which can place information formally at the disposal Court, has an onus and is therefore enjoined in terms of section 60(11)(a) of the Criminal Procedure Act. In support of his bail application, he is pertinently averse that such is the case for him to be released on bail.

40. In *S v Jonas*⁸, the court dealing with exceptional circumstances stated the following:

“The term exceptional circumstances is not defined. There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused’s absence is one that springs to mind. A terminal illness may be another. It should be futile to attempt to provide a list of possibilities which constitute such circumstances.”

41. Further, court in the same matter of *S v Jonas (supra)* state that:

“Where a man is charged with a commission of Schedule 6 offence when everything points to the fact that he could not have committed the offence because he has cast-iron alibi this would likewise constitute an exceptional circumstance.”

He evidence was that he did not commit any offence relating to the possession of firearms and ammunitions. This was not refuted by the State.

⁸ 1998 (2) SACR 677 (SEC) at 678 A-A

42. The evidence of the three appellants was not refuted by the State. In respect of the appellants (one and three) who were charged with regard to Schedule 5 offences, they bear the onus to demonstrate that the interests of justice favour the granting of bail. In doing so the factors listed in Section 60(4) of the Criminal Procedure Act must be taken into account and the accused must demonstrate that they have met them. These are:

42.1 They are not a danger to the public.

42.2 Will not evade their trial.

42.3 Will not intimidate or influence witnesses.

42.4 Will not undermine or jeopardize the objects or the proper functioning of criminal justices, including the bail system.

43. In terms of Section 60(4) the refusal to grant bail shall be in the interests of justice where one or more of the grounds set out in s60(4)(a) to (e) are established. In *S v Diale*⁹ court stated the following:

“A court will not find that the refusal of bail is in the interests of justice merely because there is a risk or possibility that one or more of the consequences mentioned in s60(4) will result. The court must not speculate, a finding on probabilities must be made. Unless it can be found that one or more of the consequences is probable occur, the detention of the accused is not in the interests of justice, and the accused should be released.”

44. In *Pineiro*¹⁰, the court stated the following:

⁹ 2013 (2) SACR 85 (GNP)

¹⁰ *S v Pineiro* 1992 (1) SACR 577 (NM) at 580 C-D

“In evaluating the factors in section 60(4) of the Criminal Procedure Act, the Court in the exercise of its discretion to grant or refuse bail, the court does in principle address one or embracing issue, will the interests of justice be prejudiced if the accused is granted bail? In this context, it must be borne in mind that if an accused person is refused bail in circumstances where he will stand trial, the interests of justice are also prejudices. Four subsidiary questions arise. If released on bail, will the accused stand his trial? Will he interfere with the State witness or police investigation? Will he commit further crimes? Will his release be prejudicial to the maintenance of law and order and the security of the state? At the same time, the court should determine whether any of objective release on bail cannot suitably be met by appropriate conditions pertaining to release on bail...”

45. If none of these factors mentioned above are satisfied, then it is in the interests of justice that bail be granted, and a magistrate is required to grant bail as a matter of law.

46. A Judge hearing an appeal shall not set aside the decision against which the appeal is brought, unless the Judge is satisfied that the decision was wrong, in which even the judge shall give the decision which in his opinion the lower court should have given ¹¹.

47. In *S vs Barber* ¹² the court stated the following:

“It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as 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 magistrate’s exercise of his discretion. I think it should

¹¹ *Bechan and Another v SARS Customs Investigations Unit and others* 2024 (5) SA 1 (SCA)

¹² 1979 (4) SA 21A €

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."

48. It is accepted that interference is also justified where the lower Court overlooked some important aspects in coming to the decision to refuse bail¹³.

49. Section 65(4) of the Criminal Procedure Act provides the following:

"The court or judge hearing the appeal shall not set the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event court or judge shall give the decision which in its or his opinion the lower court should have given."

50. In this case the magistrate merely considered the general statement of the investigating officer which was not substantiated at all. What influenced the magistrate is the previous conviction and the pending cases of the appellants. I must mention at stage as I have in the previous paragraphs that the pending case for appellant number 1 has been withdrawn. The case of the first appellant is that he was not involved in the commission of any offence, and he had no knowledge of the firearms and ammunitions.

51. Furthermore, the magistrate misdirected himself in finding that the appellants have been charged with theft of motor vehicle or possession of stolen motor vehicle. This does not appear from the charge sheet.

52. I find that the magistrate misdirected himself in fact in law. He failed to appreciate provisions of Section 35(1)(f) of the Constitution.

53. I find that it is in the interests of justice that the accused should be released on bail and that there are the exceptional circumstances that warrant the same.

¹³ Alehi v S 2022 (1) SACR 271 (GP) para 21

54. Consequently, in applying the High Court's inherent common law, Constitutional jurisdiction, I am satisfied that the appellants have complied and satisfied the requirements Section 60(11) and are entitled to be released on bail.

ORDER:

55. I consequently make the following order:

1. The bail appeal of the appellants is upheld.
2. The magistrate's court order refusing bail to the appellants is hereby set aside and substituted with the following order:
 1. Bail is granted in the amount of R10 000.00 (Ten Thousand Rand), in respect of each appellant, subject to the following conditions:
 - (a) The first and second appellants must report in person at the Tsolo police station between 08H30 and 16H30, every Monday and Friday of each week, not unless they are attending their trial at Dutywa or any place determined by the trial court, in which event they will produce proof thereof.
 - (b) The third appellant must report in person at the Qumbu police station in 08H30 and 16H30, every Monday and Friday of each week, unless he is attending his trial at Dutywa or at any place determined by the trial court, in which event he shall produce proof thereof.
 - (c) The appellants must not leave their homesteads situated in Tsolo and Qumbu for more than 5 consecutive days without informing the investigating officer under Case No. 333/2024 held in Dutywa or the branch commander of the detective of South African Police Services

in Tsolo in respect of the first and second appellant and Qumbu in respect of third appellant.

- (d) The appellants shall not travel beyond the borders of Republic of South Africa without prior written consent of the investigating officer or in his absence written consent of the branch commander the detective of South African Police Services at Tsolo in respect of the first and second appellant and Qumbu in respect of third appellant.
- (e) The appellants are restricted or prohibited from applying or to be in possession of passports while on bail. In the event that they have such passports, or travel documents they must surrender them to the Investigating Officer.
- (f) The appellants are not allowed to change their addresses without reporting/informing the Investing Officer or Branch Commander of the detectives of South African Police Services in Tsolo in respect of the first and second appellants and Qumbu in respect of the third appellant.
- (g) The appellants are ordered to attend trial court until the finalization of the criminal matter, and remain in such attendance, wherever the matter is before court, unless they are excused from such attendance by the court.
- (h) The appellants shall not interfere with the investigation and shall not interfere, contact, communicate or intimidate any of the State witnesses, whether known or unknown to them.

N.R MTSHABE
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the appellant : M Notyesi

Instructed by : Mvuzo Notyesi Inc. Attorneys
MTHATHA

Counsel for the respondent: B Bidla

Instructed by : National Director of Public Prosecution
MTHATHA

Date heard : 31 January 2025

Date delivered : 27 February 2025