



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Case No: CA&R 04/25

Reportable	YES
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In the matter between:

ZILINDILE TABATHA

Appellant

and

THE STATE

Respondent

JUDGMENT (BAIL APPEAL)

Summary: bail appeal - domestic related case - wife allegedly shot multiple times- whether the appellant is eligible to be released on bail where the complainant requests to withdraw the charge against the appellant - the role of the state, the defence and the court in bail proceedings - appeal against the refusal of bail by the court a quo dismissed.

Cengani-Mbakaza AJ

Introduction

[1] The appellant, an adult male person, faced a charge of attempted murder for allegedly shooting his wife multiple times, which he denied. The state subsequently added two charges, namely possession of unlicensed firearm (9mm pistol) and possession of unlicensed 10 live rounds of ammunition. Both charges were brought under ss 3 and 90, read with the relevant provisions of the Firearms Control Act of 60 of 2000, respectively. Considering the pending robbery charge

and the domestic nature of the dispute, the bail proceedings were held under Schedule 5 as contemplated in terms of s 60 (11)(b) and (c) of the Criminal Procedure Act 51 of 1977(CPA), as amended.

[2] The appellant applied for bail which was refused by the magistrate sitting at Lady Frere Magistrates' court (the court *a quo*). At the centre of the proceedings before me is the appellant's appeal against the decision of the magistrate (the impugned judgment). The appeal is vigorously opposed by the state.

Grounds of appeal

[3] In the notice of appeal dated 31 January 2025, the grounds upon which the appellant rely in his appeal against the judgment *a quo* are as follows:

‘1. The Court *a quo* should have found that the Appellant as required by the provisions of section 60 (4) (a) to (e) of the Criminal Procedure Act 51 of 1977, discharged the onus rested upon him.

1.1 The Appellant is an adult male married person with four children whom their mother is employed and that they are depending in him, of importance is that is a well businessperson (sic) running same business within the area of Lady Frere District, Eastern Cape Province.

1.2 The Appellant has a fixed addressed (*sic*) at Cacadu Location in the District of Lady Frere, Eastern Cape Province, wherein he has resided therein since birth and he owns his own dwelling.

1.3 He is the sole care giver to his children as their mother could not meet the daily needs of the appellant's children.

1.4 That the Appellant's business was and is still not operating well now that the appellant is in custody and this was brought to his honour through an affidavit but has erred in ignoring same.

1.5 The Appellant stays with the witness as they are married, however the complainant who is the wife to accused and the only witness has filed a withdrawal statement that she cannot afford supporting her children in the absence of the appellant.

1.6 That the Appellant has no previous convictions but has a pending case of common robbery and the complainant is Cacadu Local Municipality.

1.7 The court erred in over emphasising that the accused committed serious offences and that there is no strong case against him...’

The Law

[4] The peremptory provisions of s 60 (11)(b) of the CPA places an *onus* on the accused to prove on a balance of probabilities that the interests of justice permit his release. On 05 August 2022, the legislature put certain amendments to the CPA into operation. The amendments aim to regulate the granting and cancellation of bail in domestic-related offences. Furthermore, the amendments seek to regulate sentences imposed for offences committed against vulnerable persons. In terms of the bail legislation, the legislature places certain obligations on the state, the accused persons and the presiding officers.

[5] According to s 59 of the CPA, an accused who is in custody for certain offences may be released on bail by any police official of or above the rank of the non-commissioned officer, in consultation with the police officer charged with the investigation, before his/her first appearance in the lower court. The significance of the provisions of s 59 (1)(a) (i), (ii) and (iii) in terms of the new amendments is that the domestic violence and other domestic-related matters are specifically excluded from the provisions that allow bail to be granted by police officials. This therefore implies that domestic-related offences are treated more serious and have strictest bail requirements.

[6] In *Kula v S (Kula)*¹ Petersen J held:

‘[12] The introduction of s 59(1)(a)(i) and (ii) and (iii) has brought about a new bail dispensation to deal with the scourge of gender-based violence which sadly engulfed our nascent democracy. There are infact now four categories of bail applications which a Court may be called upon to adjudicate. These include a bail application in respect of offences identified in ss 60 11 (a), b and (c) and any other bail application not falling within the ambit of the aforesaid sections. Section 59 (i) (a)(ii) and (iii) must now be read conjunctively with the provisions of with the newly introduced s 60 (11)(c) which provides that:

(60)(11) Notwithstanding any provisions of this Act, **where an accused is charged with an offence-**

(c) contemplated in section 59(1) (a)(ii) or (iii), 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 so do, adduces evidence which satisfies the court that the interests of justice permit his or her release.’ (emphasis added)

[7] In relation to the offences listed under s 60(11)(b), the public prosecutor is in terms of s 60(2) (d) of the CPA compelled to furnish reasons for not opposing bail. Following the provisions of s 60(2A) of the CPA, the court must before reaching a conclusion on the bail application take into account the views of the complainant regarding her safety concerns. These ss read as follows:

‘Section (60)(2)(d) provides that in bail proceedings the court shall, where the prosecutor does not oppose bail in respect of matters referred to in subsection (11)(a), (b) and (c), require of the prosecutor to place on record the reasons for not opposing the bail application.

¹ (CAB 02/2023) [2023] ZANWHC 35; 2023 (2) SACR 52 (NWM; [2023] 3 All SA 218 (NWM) 4 April (2023).

(2A) The court must, before reaching a conclusion on the bail application, take into consideration-

- (a) any pre-trial service report regarding the desirability of releasing an accused on bail, if such a report is available; and
- (b) the view of any person against whom the offence in question was allegedly committed regarding his or her safety.'

[8] Pursuant to s 60(10) of the CPA amendment, in a case where bail is not opposed by the state, the court is obligated under s 60(9) to weigh the accused person's interests against the interests of justice, provided that the interests of justice would be interpreted to include, but not limited to, the safety of any person against whom the offence in question has allegedly been committed.

The facts

[9] In the court *a quo*, the appellant elected not to adduce oral evidence but filed an affidavit in support of his bail application. In his affidavit, the appellant provided the following information, that:

- (a) He is a 43-year-old married person;
- (b) is self-employed in the logistics industry, earning R15 000 monthly;
- (c) owns two taxis, a truck and a house in Cacadu Extension; and
- (d) has no previous convictions against him.

The succeeding paragraphs of the appellant's affidavit simply regurgitate the provisions of s 60(11)(4)(a-e) of the CPA without adding new material information to the application.

[10] The release of the appellant on bail pending trial was initially opposed by the public prosecutor. However, Sergeant Ncethelo, the investigating officer (I/O) did not object to the release of the appellant on bail. She testified that:

- (a) As a result of the alleged incident, the complainant had left the marital home and was staying at her parental home;
- (b) No protection order was ever granted in favour of the complainant.
- (c) There was no evidence to suggest that the appellant would commit a Schedule 1 offence, if released;
- (d) The complainant had filed a withdrawal statement, indicating she wanted to withdraw the case against the appellant;
- (e) There was no evidence to suggest that the appellant would, if released on bail, evade his trial; and
- (f) That the state's case was not strong primarily because the complaint had filed an application to withdraw the charges against the appellant.

The impugned judgment

[11] In arriving at a conclusion, the magistrate applied all the principles governing bail legislation including the new amendments. She relied on the provisions of s 6(4)(a)-(e) which provide guidance on assessing the interests of justice criterion. Section 60(4) of the CPA provides that:

‘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 the likelihood that the accused, if he or she were released on bail, will attempt to evade his 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 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.’

[12] The magistrate specifically referenced to s 60(4)(a), (b) and (d). She then noted that the complainant had been allegedly shot multiple times, and the appellant had a pending case involving violence in the regional court. Despite being released on bail in the robbery matter, the magistrate concluded that if released again, the appellant would possibly commit a Schedule 1 offence. He will intimidate witnesses including the complainant and undermine the integrity of the criminal justice system as well as the bail system.

In this court

[13] The primary issue is whether the decision of the magistrate was wrong. Section 65(4) of the CPA, which is framed in peremptory terms, stipulates that the appeal court may only set aside the magistrate’s decision if it is satisfied that the decision was wrong. Once the court has determined that the magistrate’s decision was wrong, it shall substitute its own decision, which in its opinion, the lower court should have given.

[14] The court in *S v Barber*² explicitly set a legal tone and the correct approach to be adopted in bail appeal matters. It held that:

‘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. The 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

² 1979(4) SA 218D at page 220 E-H.

interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter 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 his discretion wrongly.'

Discussion

[15] During my engagement with Mr Mengo, counsel for the appellant, he conceded that the magistrate did not overly emphasise the seriousness of the offence, as alleged in the appellant's notice of appeal. In my view, this concession is well-founded as it resonates with the observations by the court in *Kula*³ as well as the amendments to domestic-related matters in bail proceedings.

[16] Notwithstanding this, it remains to be assessed whether the magistrate had struck a balance between the interests of justice as well as the appellant's personal circumstances, as required in terms of the law. In my view, the magistrate was well versed with all the principles of bail legislation, the factors of the case, including the appellant's personal circumstances. Although it was argued that the appellant is a businessperson, it is clear that his business continues to operate, managed by his elder son. The concern about the lack of supervision in the business sector cannot be viewed in isolation. Notably, the complainant who is the appellant's wife cannot be said to be lacking the necessary skill to manage the business.

[17] The paramountcy of the best interests of the minor children are well protected. The children are in the care of their mother, who currently resides at her parental home due to the consequences of this alleged incident. The allegations that the appellant is a sole caregiver of the minor children is not

³ Fn 1 above.

supported by the facts. The complainant is employed as a clerk at the Department of Social Development and therefore capable of taking care of their needs.

[18] Mr Mengo strongly raised a contention regarding the complainant's apparent lack of interest in the matter as well as the investigating officer's failure to object to the appellant's release on bail. Mr *Qebeyi*, counsel for the state emphasised that despite the complainant's request to withdraw the case, the Director of Public Prosecutions (DPP) will continue to pursue prosecution of the case. For this reason, *inter alia*, counsel argued that the state opposes the bail appeal, contending that the magistrate's decision was correct.

[19] Considering the submissions by the appellant's counsel, it needs to be examined whether the appellant is automatically eligible to be released on bail in cases where the complainant has apparently lacked interest in the case. To provide context, it is apposite to revisit and emphasise the role of the prosecution in the criminal justice system. Section 25(1) (a) to (c) of the National Prosecuting Authority Act⁴ (NPA Act) provides that:

‘(1) A prosecutor shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her-

- (a) under this *Act* and any other law of the *Republic*; and
- (b) by the head of the Office or *Investigating Directorate* where he or she is employed or a person designated by such head; or
- (c) if he or she is employed as a *prosecutor* in a lower court, by the *Director* in whose area of jurisdiction such court is situated or a person designated by such *Director*.’

[20] Furthermore, s 20(1) of the NPA Act provides that the prosecutor has the power as contemplated in s 179(2) of the Constitution⁵ and all other relevant sections of the Constitution, to institute criminal proceedings on behalf of the

⁴ 32 of 1998.

⁵ Act 108, 1996 (the Constitution).

state, and to carry out any necessary functions incidental to instituting criminal proceedings.⁶ Pursuant to section 20(1)(c), the prosecutor has the power to discontinue the criminal proceedings. The Constitutional's establishment of a single and independent prosecuting authority unequivocally underscores that the prosecution of criminal offences is a constitutional imperative. Therefore, the state's power to institute criminal proceedings enables the state to fulfil its constitutional obligation to prosecute those cases that threaten or infringe the rights of the citizens.⁷ This obligation must be fulfilled without fear, favour or prejudice.

[21] The complainant's wishes to withdraw the case is not unusual for domestic violence victims who may feel embarrassed, intimidated, guilty or fearful of their partner's resentment. Given the vulnerable nature of domestic violence victims, the interests of justice may necessitate prosecution, even if such is contrary to the complainant's wishes. Thus, it is known that at this juncture that by virtue of powers vested in him, the DPP still pursues prosecution of the appellant. Therefore, it is logical to conclude that, in this instance the bail application and the complainant's wishes are distinct considerations, each evaluated on its own merit rather than inextricably linked.

[22] I now proceed to examine the role of the I/O in the matter under consideration. In bail proceedings, unlike in trial proceedings which are adversarial in nature, the court adopts an inquisitorial approach and plays an active role.⁸ As contemplated under s 59 of the CPA, police officials have no authority to grant bail in domestic-related matters. Even in bail proceedings, the I/O lacks the authority to dictate to the court to release the accused on bail. The

⁶ *Brown v National Director of Public Prosecutions and Others* (1800/2011) [2011]ZAWCHC 386; [2012]1 All SA 61 (WCC) (28 September 2011) at para 27.

⁷ *S v Basson* 2007(1) SACR 566 (CC) at 144.

⁸ *S v Bruinders* 2012(1) SACR 25 (WCC).

I/O's role is limited to providing information to assist the court in arriving at a just decision.

[23] As a consequence of these basic principles, the court's function is not to rubber-stamp the submissions of the public prosecutor, the defence and the I/O. The court's function is to exercise an independent assessment of the facts presented before it. As evident in the proceedings before me, the magistrate correctly determined that the I/O's opinion holds no probative weight. The argument challenging the decision of the magistrate is without merit, both factually and legally. Furthermore, the magistrate correctly found that the appellant had failed to discharge the *onus* rested on him. Therefore, the interests of justice do not permit the release of the appellant on bail.

[24] In the result, the application must fail.

Order

[25] The appeal against the refusal of bail is dismissed.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Appellant	:	Adv: W. Mengo
Instructed by	:	MNIKELO DALASILE & ASSOCIATES MTHATHA
For the Respondent	:	Adv: T. Qebeyi
Instructed by	:	DIRECTOR OF PUBLIC PROSECUTIONS MTHATHA
Date Heard	:	14 March 2025
Date Delivered	:	27 March 2025