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

CASE NO.: CA&R62/25

In the matter between:

NCEDO ZENZISI

Appellant

and

STATE

Respondent

JUDGMENT

ZONO AJ:

Introduction

[1] This is a bail appeal emanating from Engcobo Magistrates (District) Court. This appeal is against the decision of the learned Magistrate, Mrs Kakaza, refusing the appellant to be admitted to bail. The decision refusing appellant to be admitted to bail was taken on 04th October 2024.

- [2] The appellant appeared before the court *a quo* facing a count of unlawful possession of firearm, unlawful possession of ammunition, attempted murder and a count of premeditated murder. It was accepted that the bail application would be dealt with under Section 60(11) (a) of the Criminal Procedure Act 51 of 1977 (CPA) as amended as the appellant was facing schedule 6 offence. The court *a quo* found that the appellant failed to discharge the onus rested on him to satisfy the court that exceptional circumstances exist which in the interests of justice permit his release on bail. Aggrieved by that decision the appellant noted the appeal against the court *a quo*'s decision of 04th October 2024.

Brief Background

- [3] Prior to its finalization appellant's bail application in the court *a quo* proceeded for several days. The appellant testified that he is a resident of No 1[...] S[...] Street, Dunoon, Cape Town since 2004. He is residing with his child's mother and his elder sister. The house they are staying in is his father's house. His father is staying in East London. He is unmarried with two children. The first born was five years old and the second born was four years eight months old. The first born is staying with her aunt in Johannesburg whilst the other one is staying with her mother at Dunoon, presumably at the same address he is staying. He testified that he is responsible for the maintenance of the minor children. The appellant is a taxi driver. He is earning R1000.00 per week.
- [4] He was convicted and sentenced of drunken driving and a fine of R1000.00 was imposed. He never had a warrant of arrest. It transpired that he was convicted and sentenced for robbery with aggravating circumstances. He was released from imprisonment in respect thereof on medical parole which would expire or end in 2027. He testified that if he is released on bail he will not endanger the safety of the public or any particular person or commit schedule 1 offence. He does not have passport; He will not intimidate state witnesses. He will abide by the bail conditions. He will not disrupt the public order or undermine the criminal justice system. He will not evade trial.

- [5] The appellant testified that he was arrested on 20th February 2024. Although he does not know how other family members are holding up, he is aware that his boy child dropped out of school because he was unable to pay his school fees. His girl child seemingly has health problems as she goes in and out of medical clinics for medical care and attention. The appellant has a heart problem for which he was receiving medical treatment, care and attention before his arrest. In custody, he receives some of the medication and he is unable to get some of other (tablets) medications. He testified that the medical treatment he receives in custody thins or weakens his blood and when that occurs, he bleeds. In the clinic and hospital in the correctional facility there is no medical treatment and equipment suited for his medical condition. He will plead not guilty.
- [6] During cross examination it transpired that the address he referred to as his residential address in Dunoon, Cape Town was made up of a shack which was recently burnt down at the time of his testimony on 16th July 2024. No date is mentioned when the shack was burnt down, but it can reasonably be assumed that it was burnt down when he was in custody. That assumption is based on the fact that the prosecutor put a version of the shack having been burnt down on 16th July 2024 and when putting a version, he stated that the shack had recently burnt down, whereas the appellant was arrested on 20th February 2024. However, he further testified that the structure has been rebuilt to a finish. After his arrest his child's mother moved back to her home after the shack was burnt down. He specified his father's address in East London as Thembisa Location in one of the localities of Kuni. Affidavits proving the following were handed up in the court *a quo*: employment as a taxi driver, that he is maintaining his children as their respective mothers are not working together with children's birth certificates.
- [7] The above represents a fair recordal of summary of appellant's evidence in the court *a quo*. The record before me does not show that there was a countervailing evidence to the facts above. None was suggested or referred to by the legal representatives when they were making oral submissions.

[8] Sergeant Nguni seemingly had testified that he was an investigating officer in the case and was opposed to the appellant being released on bail as he held that the appellant committed the offences he was facing while out on parole for a robbery with aggravating circumstances. He violated parole condition and it is being revoked. The appellant has previous convictions. He does not have fixed address as his shack in Dunnon, Cape Town was burnt down. The appellant could not go with the investigating officer to point out his East London address as he mentioned that he left East London while he was still very young. Appellant's father mentioned (presumably to the investigating officer) that the appellant could go and stay with him in East London. The investigating officer testified that the appellant was unemployed and was not a taxi driver on the day in question and the alleged taxi owner stated (presumably to the investigating officer) that he was not employed by him. The alleged taxi owner is a state witness. The investigating officer confirmed that appellant's father is sickly but disputed that the appellant is the one who is providing the medication for him as he is receiving the treatment from the mobile clinic. On the date of his arrest the appellant was not delivering passengers when he came to Ngcobo. This is the evidence of the investigating officer as recorded by the learned Magistrate.

Applicable Legal Framework

[9] Section 35(1) of the Constitution provides that:

“Everyone who is arrested for allegedly committing an offence has the right-

.....

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.”

[10] Section 36(1) of the Constitution provides for limitation of rights thus:

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose”.

- [11] The decision sought to be appealed is an outcome of bail proceedings which were conducted in the court *a quo* in terms of section 60 (11)(a) of CPA which provides thus:

“(11) Notwithstanding any provision of this 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 or 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 which in the interests of justice permit his or her release”.

- [12] Appeal to Superior Court with regard to bail is governed by Section 65 of CPA. Of importance is Section 65(1) (a) and Section 65(4) of the CPA. Section 65(1)(a) of the CPA provides:

“(1)(a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.”

.....

(4) The court or judge hearing the 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 judge shall give the decision which in its or his opinion the lower court should have given.”

Discussion and Analysis

[13] Appellant’s version in the court *a quo* was largely a common cause. The only aspect in his evidence that called for clarity was the fact that his shack at No [...] S[...] Street, Dunnon, Cape Town was burnt down when the appellant was in custody, but the evidence that a structure in the same address has been built to a finish was not controverted. Notwithstanding that he testified that the structure in his Cape Town address has been completely built, he further testified that he would stay in his father’s address in East London for the duration of his trial should he be released on bail. The investigating officer corroborated that evidence or testimony by testifying that appellant’s father confirmed and showed willingness to stay with the appellant for the duration of the trial. The evidence did not show that the factors to be taken into account in terms of section 60(4) of CPA were not established or satisfied. Both in the court *a quo* and in this court it was not shown that the applicant fell below the threshold set or prescribed by section 60(4) of CPA to establish that interests of justice permit the release of the appellant on bail. I am also satisfied, guided by the evidence, that the interests of justice do permit the release of the appellant on bail. However, in the light of the offences the appellant is facing and the schedule within which those offences fall require more than showing that interests of justice in terms of section 60 (4) of CPA permit the release of the appellant on bail.

[14] The bail applicant has a dual responsibility in terms of which he does not only have to show that interests of justice permit his release on bail, but also that exceptional circumstances exist. In terms of section 60(11) (a) of CPA the bail appellant must adduce evidence which satisfies the court that exceptional

circumstances exist which in the interests of justice permit his release. The provisions require synergy between the two requirements which points to the co-existence of the two important jurisdictional factors. The two jurisdictional factors must contemporaneously exist¹. In the event that the bail applicant succeeds to prove one jurisdictional fact, but fails to establish the other, he may not succeed in his application to be released on bail. Absence of one requirement may not avail the applicant to be admitted to bail². By way of an example, if the bail applicant succeeds in showing that interests of justice permit his release, but fails to demonstrate that exceptional circumstances do exist also permitting his release, he may not be released for want of another requisite. I have found above that the appellant has succeeded in establishing that interests of justice permit his release as there is no gainsaying that the factors referred to in section 60(4) of CPA have been established.

- [15] The appellant demonstrated that he suffers from heart conditions. He is on record to say not all the necessary treatment is available within the prison facility for his condition. He does not receive some of the medication inside the correctional or prison facility. He further states that some of the medication (tablets) he is taking thins or weakens the blood. Once his blood gets weak or thin, he bleeds. The hospital inside the correctional centre or prison does not have the kind of medication and equipment for such a condition. He is not taken to the outside medical centres for this condition. In addition, he testified under cross examination that he was released from custody in respect of an offence of robbery with aggravating circumstances on medical parole in 2017. It was contended that he was considered for medical parole in respect of the same ailment of heart condition. I take judicial notice of the fact that it was after all the necessary investigations and examinations by medical experts that it was concluded that the prison environment is inimical to his health and is life threatening that he was released on parole. In any event, that evidence is not in any way controverted.

¹ **Lategan v S** 2025 (1) SACR 513 (ECMK) Para 43, 44 and 45.

² **Cele v S** (CA & R13/2024) [2025] ZAECMHC 2 (21 February 2025) Para 31, 32 and 33.

[16] The court *a quo* accepted that the appellant is suffering from a heart condition and that he is receiving treatment or medication in custody. It further accepts the fact that such a condition enjoys a feature of an exceptional circumstance. However, it summarily dispels that evidence by simply saying there is no evidence that, should the appellant remain in custody, his condition will deteriorate. In what follows, I quote the court *a quo* in its judgment for the sake of completion.

[17] The learned Magistrate deals with this aspect as follows:

“I do not intend again summarise the personal circumstances of the applicant, but the applicant suffered from a heart condition[?] he receives medication whilst he is in custody. The applicant confirmed to the court that he is receiving treatment while he is in custody. Should he remain in custody his health will deteriorate. No evidence appeared before this court to confirm such. The factor that enjoys [?] as an exceptional circumstance is the heart condition of the person before court” (sic)

Elsewhere in judgment the learned Magistrate seems to confirm that the prison authorities do take the appellant to outside medical facilities, for example to Nelson Mandela Academic Hospital for the same heart condition. That is incongruous with the earlier statement suggesting that the correctional facility has sufficient capacity to deal with appellant's ailment of heart condition.

[18] There is simply no basis to find that there is no evidence that the appellant is suffering from the ailment of heart condition as the learned Magistrate herself refers to the medical certificate which was marked as exhibit A attesting to the same heart condition. Whilst the learned Magistrate finds that there is no evidence that the appellant would not be treated inside prison, a far cry from what the appellant says, she does not state the kind of treatment or medication the appellant received and how effective that medication was to the appellant's heart condition. It just cannot be fathomed how the appellant

could have been released on medical parole for the same heart condition by the prison authorities of this country if that condition was manageable inside the prison. In my view, based on the above, appellant's health condition is capable of deteriorating in custody.

[19] The question of appellant's address appears to be forming part of the *ratio decidendi* of the court *a quo*. The appellant answered satisfactorily that his shack was burnt down when he was already in custody but there was no gainsaying that it had been rebuilt to a finish now. In any event the investigating officer is on record to state that appellant's father showed willingness to stay with the appellant once released on bail. The appellant himself gave direct evidence that if he is released on bail he will stay in East London with his father. That put paid to the question of the appellant's place of abode.

[20] The learned Magistrate makes moment of the fact that the appellant breached his parole condition. She says that in the context of this case. That approach is frightening, regard being had to a celebrated fundamental principle of our Law that "*everyone has a right to be presumed innocent until proven guilty.*" Section 35(3)(h) of the Constitution provides that:

"(3) Every accused person has a right to a fair trial, which includes the right-

.....

(h) to be presumed innocent....."

The learned Magistrate proceeds from the premise that the appellant has committed the offences he is accused of. The learned Magistrate's remark is an infraction to the aforesaid constitutional provision as it has an effect of prejudging the appellant. At this stage it is unknown if the unmentioned parole condition was broken.

[21] The basic reason the court *a quo* refused to grant appellant bail is because it found the appellant had failed to discharge the onus resting on him to show that exceptional circumstances do exist. She comes to that conclusion in the following words:

“And therefore, the court after careful considering the evidence before this court, the court is unable to find that the applicant discharged the onus rest upon him, that the court cannot find any exceptional circumstances adduced by the applicant before this court and therefore the court issues the following order:

That bail is refused against the applicant before this court.” (sic)

Now we know why she refused to grant appellant bail. She found that no exceptional circumstances were shown to exist.

[22] The exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to grant bail³. It must be borne in mind that the scale of proof is on a balance of probabilities⁴. Proof by the bail applicant that continued detention will seriously prejudice his or her health may constitute an exceptional circumstance for purposes of section 60(11) of CPA. Evidence regarding an alleged illness will have to be clear and preferably corroborated⁵. Where the case against the accused appears to be weak and the accused’s medical condition is not good, bail should be granted⁶. Detention is not ideal for a person in a weak physical position. The medical condition of the accused must be weighed against other factors and must not be considered in isolation⁷.

[23] I am satisfied that the court *a quo* was wrong in not considering appellant’s health condition as an exceptional circumstance. It is not gainsaid that the appellant is suffering from the heart problem and he is not receiving sufficient medical treatment from the prison facility. It is important to note that when the appellant testified to the effect that he is only taken to attend the clinic or hospital inside prison where they do not have all the necessary medication and equipment for his heart condition, it was never put to him that he was taken to the outside medical facility for purposes of medical treatment.

³ **S v Petersen** 2008 (2) SACR 355 (C) Para 56.

⁴ **S v Yanta** 2000(1) SCAR 235 (TK).

⁵ **S v Yanta** 2000 (1) SACR 237 (TK) at 250 C-D.

⁶ **K v S** 2003 (1) SA 551 (SCA); 2003 (2) SACR 5 (SCA) Para 24.

⁷ **S v Van Wyk** 2005 (1) SACR 41 (SCA) Para 9.

However, the learned Magistrate seems to have relied on the evidence that was never put to the appellant when he was on the witness stand, that he was taken to Nelson Mandela Academic Hospital. We do not even know what kind of treatment did the appellant receive, if at all he was taken there. It is unknown what appellant's answer would be to that proposition.

- [24] In *Small*⁸ Classen J had the following to say about cross examiners failure to put the version of his witness to the opposing witness whilst on the witness stand:

*"It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him a fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved."*⁹

The institution of cross examination imposes an obligation to direct witness's attention to the fact it is believed that he is not speaking the truth to afford that witness an opportunity while still on the witness box to defend himself or proffer an explanation¹⁰.

- [25] It was again wrong of the learned Magistrate to rely in her judgment on an evidence that was never put to the appellant when he was still in the witness box. That amounted to litigation by ambush, which is impermissible. That conduct rendered those proceedings unfair as they were an affront to the section 35(3) of the Constitution. On the conspectus of all this, I am satisfied that appeal must succeed. During the hearing of this matter parties agreed that an amount of **R3 500.00** is an appropriate amount to be fixed as bail for the release of the appellant.

⁸ *Small v Smith* 1954 (3) SA 434 (SWA) at 438.

⁹ DT Zeffett: The South African Law of Evidence, Second Edition, Page 112-914

¹⁰ *President of RSA and others v SA Rugby Football Union and Others* 2000 (1) SA; 1999 (1) BCLR 1059 Para 61

[26] I am therefore justified to substitute Magistrate's decision as I am satisfied that she was wrong. In *Faye*¹¹ this court found as follows:

*"9. These provisions leave no room for any doubt that the appeal Court can justifiably interfere with the decision of the court of first instance only if it is satisfied that the decision of the Judicial Officer who was seized with the bail application and refused it was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given."*¹²

Order

[27] In the result I make the following order

[27.1] The appeal is upheld.

[27.2] The decision of the Magistrate, Ngcobo Magistrates Court refusing to admit the appellant to bail is set aside and substituted with the following order:

27.2.1 The appellant is admitted to bail and shall be released upon payment of R3500.00 (*Three Thousand Five Hundred Rand*).

27.2.2 The appellant shall appear and present himself at court at 08:30 or at such time as the Presiding Judicial Officer may dictate on every date to which the case may be or is postponed.

27.2.3 The appellant is ordered not to:

(a) interfere with state witnesses, or to conceal or destroy evidence and not to interfere with the investigations.

(b) not to disturb the public order or undermine the public peace or security.

(c) not to undermine or jeopardise the objectives or the proper functioning of the criminal justice system.

¹¹ **S v Faye** 2009 (2) SACR 210 (TK) Para 9

¹² Section 65(4) of the CPA

(d)not to endanger the safety of the public or any particular person or commit a schedule 1 offence.

27.2.4 The appellant is directed to report once in a fortnight at Fleet Street Police Station, East London until his trial is finalized.

A.S ZONO

JUDGE OF THE HIGH COURT (ACTING)

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