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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

case no: A2025-181506

In the matter between:

SIBONGILE MBONAMBI

APPELLANT

and

THE STATE

FIRST RESPONDENT

ORDER

On appeal from Magistrate's court, Esikhaleni (Ms Lazarus) sitting as a court of first instance);

1. The appeal is upheld
2. The order of the court *a quo* that the bail of the applicant is refused is set aside and it is replaced with the following:
 1. The application for the release on bail of the applicant pending trial is granted. The applicant is granted bail in the sum of R10 000.00 on the same conditions

mutatis mutandis as those in the criminal case in S v Sibongile Mbonambi Esikhaleni magistrate court, Case No B172/2025, Esikhaleni SAPS Cas 112/6/2025.

JUDGMENT

Delivered:

Mngadi J:

[1] The appellant appeals the refusal of an application to be released on bail pending trial.

[2] The applicant is Sibongile Dlamini. She was arrested on 11 July 2025. She then appeared before the magistrate's court for the District of King Cetshwayo held at Eskhaleni (Ms Lazarus). She applied to be released on bail pending trial. The State opposed the application. The learned magistrate after hearing the matter refused the application.

[3] The bail application before the magistrate proceeded by means of affidavit. The charge the appellant was facing was contravening s4(a)/s4(b) read with s1,13,17 to 25 and 64 of the Drugs and Drug Trafficking Act 140 of 1992 in that she unlawfully had in her possession or use a dependence producing substance as listed in Part 1 of Schedule 2 of the said Act, to wit, 15 capsule of CAT drugs.

[4] The appellant in her affidavit before the magistrate states that she was 59 years old, unmarried and residing at H[...] Esikhaleni, a property she owned. She had one previous conviction of negligent handling of a firearm. She was sickly and on chronic medication. She intended to plead not to guilty to the charge. She has five (5) adult children.

[5] It transpired that the appellant had another pending case, a charge of possession or use of drugs, to wit 28 x rock cocaine committed on 18 June 2025. The State in opposing the release of the appellant on bail relied on an affidavit of Gugulethu Precious Mbatha (Mbatha). Mbatha stated that she was a sergeant in the detective branch of the South African Police Services and the investigating officer in the case against the appellant. She stated that she was opposing the release of the appellant on bail as there was a likelihood that if released on bail, she will commit a schedule 1 offence because she committed the crime whilst she was out on bail in the mentioned pending case, and that to release her on bail will undermine and jeopardise the objectives of the bail system.

[6] The learned magistrate stated that in schedule 5 bail applications, the applicant bears the onus to show that it is in the interest of justice that she be released on bail. She stated that the main thrust of the opposition by the state is that the applicant has a propensity to commit further schedule 1 offences if released on bail.

[7] The learned magistrate concluded that since the appellant was charged with the current offence of similar nature to the one on which she was on bail, it is an indication that proper functioning of the criminal justice or bail system will be undermined if the appellant is released on bail as there was a likelihood that the appellant if released on bail will commit further schedule 1 offences. The state, therefore, has shown as provided in s60(4) of the Criminal Procedure Act 51 of 1977(the CPA) existence one of the grounds for not granting bail.

[8] The appeal is founded on the provisions of s 65(1)(a) of the CPA which provides that an accused aggrieved by the refusal by a lower court to admit him to bail may appeal against such a decision. On appeal the question is whether the decision the magistrate arrived at in the exercise of its power is wrong or not. see *S v Barber* 1979 (4) SA 218 (D) at 220E-H.

[9] These provisions of the CPA find application. S60(4) provides that where there is a likelihood that the accused, if released on bail will undermine the objectives or the proper functioning of criminal justice system including bail system, bail may be refused. S60(8) provides that in considering whether the grounds in subsection (4) (d) has been established the court may, where applicable, take into account the following factors, namely-(a) the fact that the accused knowing it to be false, supplied false information at the time of his arrest or occurring bail proceedings; (b)whether accused is in custody in another charge or whether the accused is on parole; (c) any previous failure on the part of the accused to comply with bail conditions or any

indication that will not comply with any bail conditions; (d) any other factor which in the opinion of the court should be taken into account.

[10] Section 60(9) provides that in considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his personal freedom and in particular the prejudice he is likely to suffer if he were to be detained in custody, taking into account where applicable the factors, namely- (a) the period for which the accused has already been in custody since his arrest; (b) the probable period of detention until the disposal or conclusion of the trial of the accused is not released on bail; (c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regards to such delay; (d) any financial loss which the accused may suffer owing to his detention; (e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about the by the detention of the accused; (f) the state of health of the accused; or (g) any other factor which in the opinion of the court should be taken into account.

[11] The State before the magistrate argued that the presumption of innocent is not an absolute right; the State had managed to establish a *prima facie* case against the applicant in respect of both pending matters, in that in both matters the prohibited substance was found in possession of the applicant.

[12] It is clear that in order for the court to rely on the ground in s60(4) (d) it needed to be shown that the appellant probable committed the crimes. In the first matter the magistrate relied on a bail report. This court has been unable to see the contents of the said bail report, who compiled it, in particular, whether it contained matter of a hearsay nature or not. The magistrate in the judgment has not set out the contents of the bail report she relied on. As a result, the reliance on the bail report is discounted. In the second matter the learned magistrate relied on the affidavit of Mbatha, the investigation officer. Mbatha in her affidavit set out the allegations against the appellant. She was not involved in the apprehension of the appellant. In both matters statements of the police officers that found the drugs were not produced. As a result, it is not known on what basis it is concluded that the appellant possessed or used the drugs. This is crucial in considering the case against the appellant as well as the submission that the appellant if released on bail is likely to commit Schedule 1 offence or the submission that the appellant shows propensity to commit Schedule 1 offences if released on bail thus undermining the criminal justice system or the objectives of release on bail pending trial.

[13] As a result the finding that the ground s60(4) (d) was established cannot be sustained. Since this was the only ground found by the learned magistrate, there is no other ground showing that it was not in the interest of justice to release the appellant on bail pending trial.

[14] The parties as well as the magistrate proceeded on the basis that the appellant faced a Schedule 5 offence. As a result, the onus was on the appellant to show on

the balance of probabilities that it was in the interest of justice that she be released on bail pending trial. This appears not to be correct. Schedule 5 provides offences referred to in s13(f) of the Drugs and Drug Trafficking Act wherein the contravention referred to is s5(b) which refers to a person dealing in any dangerous dependence producing substance or any undesirable dependence producing substance. However, included in Schedule 5 is 'any offence referred to in Schedule 1 which was allegedly committed whilst the accused was released on bail in respect of an offence referred to in Schedule 1' Schedule 1 includes any offence, except the offence of escaping from lawful custody ..., the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine. The State needed to show that on the pending charge and on the current charge the appellant faced, if convicted, a sentence exceeding six months imprisonment without the option of a fine before her bail applicant would fall under Schedule 5. The issue was not dealt with, and it is for the State to show the applicable Schedule. As a result, the bail application ought not to have been dealt with under Schedule 5. It was supposed to be dealt with in terms of the provisions of s60(1)(a) of the CPA which provides that an accused is entitled to be released on bail if the court is satisfied that the interest of justice so permits. Interests of justice entails balancing the freedom of an accused who is presumed innocent against the interest of the State that the release of the accused on bail should not pose a risk to the investigation and/or the prosecution of the accused. In all cases falling outside the ambit of s60(11) of the CPA the State bears the burden of proof to show that it is not in the interest of justice to release the accused on bail pending trial. In *S v Tshabalala* 1998 (2) SACR 259(C) at 269 the court held that in cases not covered by s 60(11) there had to be a practical burden

on the prosecution to adduce evidence or furnish information going to show that a 'likelihood' as envisaged in s 60(4) existed.

[15] The learned magistrate misdirected herself in holding, without proper basis, that the release of the appellant on bail pending trial will likely undermine the criminal justice system or the objectives of the bail system. She erred to hold that the bail application of the appellant fell under Schedule 5 since the charge(s) the appellant faced were not shown to be of such a nature that a sentence of not less than six months imprisonment without the option of the fine needed to be imposed.

[16] It is ordered as follows:

1. The appeal is upheld
2. The order of the court *a quo* that the bail of the applicant is refused is set aside and it is replaced with the following.
 1. The application for the release on bail of the applicant pending trial is granted. The applicant is granted bail in the sum of R10 000.00 on the same conditions *mutatis mutandis* as those in Esikhaleni magistrate court, Case No B172/2025 Esikhaleni Cas 112/6/2025.

APPEARANCES

Case Number: A2025-181506

For the Plaintiff/Applicant/Appellant:

Instructed M A Mthethwa Inc.

For the Respondent: Mr E.S Magwaza

Instructed by: DPP, Pietermaritzburg
PIETERMARITZBURG

Heard on: 27 November 2025

Judgment delivered on: 27 November 2025