



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: A154/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

Date: 27 January 2023

In the matter between:

MACHAILA: VINCENT ZITATA

APPELLANT

and

THE STATE

RESPONDENT

APPEAL JUDGMENT

ALLY AJ

[1] This is an appeal for the Appellant to be released from bail in terms of Section 65 of the Criminal Procedure Act¹, hereinafter referred to as 'the Act'.

[2] The State was represented by Adv. M.M. Maleleka and the Appellant by Adv. W. Makhubela.

[3] The Appellant had appeared before the Court *a quo* on a charge of attempted murder which common to the State and the Accused was accepted² as a Schedule 5 offence.

[4] It is appropriate at this point to set out the statutory provisions governing the bail procedures in relation specifically to the Appellant. Section 60 (4) of 'the Act' provides as follows:

"(4) 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 or any particular person or will commit a 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

¹ 51 of 1977, as amended

² Record: 003-4 at para 16-17

(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 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 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;...”

[5] Section 60 (5) to Section 60 (8A) of ‘the Act’ then amplifies, in my view, the factors to be taken into account when considering whether to grant an accused bail where it pertains to a Schedule 5 offence.

[6] The Appellant noted five grounds of appeal:

- 6.1. *“The learned magistrate erred in finding that the appellant failed to prove on balance of probabilities that the interest of justice permit his released on bail;*
- 6.2. *The learned magistrate erred in taking in to account evidence of the Respondent that the appellant is a danger to society because the firearm is not discovered, and rejected the explanation of the appellant that the firearm belongs to the victim and further that, after the incident, he threw a firearm on the scene and ran to Orlando Police Station to report the matter.*
- 6.3. *The learned magistrates’ [sic] erred in not taking into account the personal circumstances of the appellant which includes “inter alia” [sic] his age, minor children, company and property in the country (RSA).*

- 6.4. *The learned magistrate erred in ignoring the presumption of innocence and his constitutional rights in chapter two (2) in the Bill of Rights.*
- 6.5. *The learned magistrates [sic] ignored the fact that the appellant surrendered his documents and willing to submit himself to any conditions of bail."*

[7] Now an Appeal Court such as the present is guided by, firstly, Section 65 (4) of 'the Act' and secondly, by certain principles that have been laid down by our Courts in applying the said section. Section 65 (4) of 'the Act' provides:

"(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."

[8] The following principle is trite as expounded in **S v Barber**³ with which I align myself, wherein it is stated:

"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. 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 the magistrate's exercise of his

³ 1979 (4) SA 218 (D) at 220 E-H

discretion. I think it should 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."

[9] In applying the above quoted principles and statutory provision, this Court found the occasion wherein the Magistrate after the adjournment of the bail proceedings, from what appeared from the record⁴ to be a clarification on the whereabouts of the Appellant after the alleged commission of the offence, to be confusing and somewhat concerning. The Magistrate, after receiving the further affidavit of the Investigating Officer, then delves into whether there are independent witness statements in respect of the incident.

[10] It should be noted, that up to this stage of receiving the further statement of the Investigating Officer, there didn't appear from the evidence of the Investigating Officer that the Appellant would be flight risk on the contrary the Investigating Officer had confirmed the whereabouts of the Appellant as well as that the Appellant was in the Republic of South Africa legally and that he had property in this country. From the evidence of the State, before the Magistrate's 'intervention', it would appear that it was more about the conditions of bail rather than anything else. Counsel for the State, in this Court, conceded this fact.

⁴ Record: 003-15 at para 10-16

[11] Now, it should be noted that Section 60 (3) is clear that a Court may call for further information or evidence where it is of the opinion that the Court does not have reliable or sufficient information at its disposal or that the Court lacks certain important information to reach a decision with regard to the bail application.

[12] In my view, however, in requesting such further information or evidence, it is incumbent on a presiding officer in the position of Magistrate to exercise 'fair trial rights' enshrined in the Constitution⁵ by enquiring how many independent eye witness statements were available and not only rely on the State to choose which eye witness statements to produce, especially in circumstances where the proceedings are at the beginning stages and the Court is unaware of the number of statements in the possession of the State and whether same has been shared with the Defence. In my view, it is doubtful whether statements in the docket would have been shared with the Defence but I make no finding with regards thereto.

[13] What is clear, however, and appears from the record, is that the State informs the Magistrate that the Appellant and his girlfriend made two statements which completely contradict each other⁶. I stress, it was still incumbent on the Magistrate to make further inquiries in order to satisfy himself of the facts once he knew that there was another independent witness. In this regard, it is my view that more should have and could have been done in order to obtain a balanced and in the interests of justice view of the case before the Magistrate.

⁵ Section 35

⁶ Record: 003-19 at para 16-19

[14] The above circumstances, in my view, can only lead one to conclude that the Magistrate was clearly wrong in applying his discretion in relation to the granting of bail to the Appellant bail or not in the present circumstances. This therefore permits this Court to interfere with the judgment of the Court *a quo*.

[15] This Court is satisfied that the Magistrate had sufficient regard to the personal circumstances of the Appellant and does not deem it necessary to delve into all the grounds of appeal of the Appellant. Suffice it to say that the glaring 'irregularity' set out above enjoins this Court to make its own finding on whether the Appellant should be released on bail.

[16] It is my view that the evidence before the Court *a quo* on the record satisfies the requirements of Section 65 as well as Section 60 (4) (a) – (e). To repeat, the statements by the Investigating Officer are decidedly poignant. In weighing up the scales as to whether they tilt in favour of the Appellant or the State and in so doing ensuring that the interests of justice are protected and maintained, one needs to have regard to all the evidence placed before the Magistrate. Having done this exercise, I am of the view that the Appellant is a good candidate for bail.

[17] It should be stated that there is no evidence on record which shows that the Appellant will not stand trial.

[18] Having regard to what is stated above I take solace in the principles expressed in the Constitutional Court:⁷

"Furthermore, a bail hearing, is a unique judicial function...Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. An important point to note here about bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry 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."

[19] Having found that the Appellant is a good candidate for bail it remains for this Court to consider the conditions that should be attached to such bail. These conditions must perforce be of such nature to ensure that the interests of justice are maintained as well as to ensure that the Appellant attends trial.

[20] Accordingly, the following Order will issue:

1. The Appeal is upheld;
2. The Order of the Court *a quo* is set aside and replaced with the following:

⁷ S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat 1999 (4) SA 623 CC @ para 11

a). the Applicant's application for bail is granted under the following conditions:

- i). payment of the amount of R5000-00
- ii). the Applicant report to the Orlando Police Station each week on a Thursday on or before 17H00;
- iii). the Applicant is not to communicate with State witnesses directly or indirectly;
- iv). failure to comply with the abovementioned conditions may result in bail being withdrawn and any monies paid, forfeited to the State.



GALLAGHER

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down in Court and circulated electronically by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be **27 January 2023**.

Date of hearing: 25 January 2023

Date of judgment: 27 January 2023

Appearances:

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