IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case Number: A218/2023
Bellville Case No.:E720/2023

[Reportable]

In the matter between:

GILBERT JOHANNES Appellant

And

THE STATE Respondent

Date of judgment: 1 December 2023

JUDGMENT – BAIL APPEAL (delivered electronically)

PANGARKER AJ

The charges

1. This appeal, which emanates from the refusal of bail by the Bellville Magistrates' Court, is decided in terms of section 19(a) of the Superior Courts Act 10 of 2013. Counsel for the parties confirmed that there was no objection to the appeal being decided in terms of the aforementioned section.

2. The appellant (accused) is charged with three counts of fraud, one of theft and one of attempted murder. The alternative to the attempted murder charge is contravention of section 63 read with the various sections of the National Road Traffic Act 93 of 1996, more specifically, reckless or negligent driving.

3. In respect of the fraud charges (counts 1 – 3), it is stated in the charge sheet that the offences are alleged to have been committed on 1 and 23 September 2022, and 17 August 2023, respectively. More specifically, the State alleges that the appellant, with the intent to defraud Rendezvous Motors in Parow, pretended to pay for petrol with a SAPS Fleet Card, when in actual fact, he had no right to use the card. The amounts which the complainant were allegedly defrauded of are R976,85, R1010,02 and R926,47 respectively. Furthermore, the State alleges that the appellant drove a VW Polo vehicle at all material times during the commission of the five offences.

4. In respect of count 4 (theft), the allegation is that the appellant, on 8 August 2023, stole R1165,64 worth of petrol from the same Rendezvous Motors, by having the aforementioned VW Polo (the vehicle) filled up and then driving off without paying. Count 5 is related to count 4 in that the State alleges that on the same day, pursuant to the appellant fleeing Rendezvous Motors, he attempted to kill Const. Brandon Smith by driving into him with the VW Polo.

The bail application

5. At the time of his bail application, the appellant had a pending matter in the Bellville Regional Court where he faces charges of defeating the ends of justice, theft and possession of drugs. The record indicates that at the time of his application in the Bellville Magistrates' Court, the Regional Court trial had already commenced and was due to continue in October 2023. At the time, the appellant was out on R1000 bail in the Regional Court matter.

6. At the commencement of proceedings in the District Court, the parties were *ad idem* that section 60(11)(b) of the Criminal Procedure Act (the Act) was applicable in that the application fell under Schedule 5 of the Act. The appellant was legally represented in his application and elected to testify under oath. To summarise his testimony, the appellant testified that he was married for four years, had no children, no outstanding warrants of arrest and no previous convictions. He placed his personal circumstances before the Court, from which it was apparent that he had previously worked for a shipping company, then attended the Police College in 2009. He was stationed as a Constable at Parow SAPS from December 2009 and was dismissed from service on 3 March 2023, after failing to attend a disciplinary hearing.

7. The appellant confirmed that he did not own a passport and did not know the complainant. At this stage, it is prudent to mention that it is unclear from the record which complainant in relation to the five charges, was referred to. He elected not to testify regarding the merits of the charges and stated that the allegations against him were false. The appellant indicated that he intended pleading not guilty to all the charges and would not interfere with police investigation nor witnesses were he to be released on bail. He testified that he would be able to afford R500 to R1000 bail and adhere to any bail conditions fixed by the magistrate.

8. In cross examination by the prosecutor, the appellant stated that all the alleged offences were within the Parow police area and that in respect of counts 4 and 5, he

was arrested by members of Parow SAPS. The appellant admitted that he knew Const. Smith, the complainant in the attempted murder charge, as he had previously worked at Parow SAPS but on different shifts. The appellant testified that in previous matters, he had not breached any bail conditions, hence it would be in the interests of justice that he be released on bail. He was pressed on the bail conditions and his response was that he had not committed any offences nor interfered with witnesses while released on bail.

9. It was put to the appellant that he had indeed breached his bail conditions as he had become involved in the five offences while out on bail, but he maintained his denial in this respect. At the time of presenting his bail application, the appellant was 39 years old, in custody for a month since arrest and stated that conditions in prison were not good for a police officer and he feared for his safety at Goodwood Prison. The appellant had a fixed address in Bellville, which was rented by his wife. Furthermore, he was unemployed and had received a job offer as a safety officer at a mine in Springbok. The appellant called no witnesses.

10. The State presented an affidavit by the investigating officer, Detective Sergeant Khumalo in support of its opposition to the granting of bail. Insofar as the merits were concerned, the affidavit indicates that on 8 August 2023 at 18h40, members of the Parow SAPS, saw a white VW Polo travelling at speed from a Caltex garage on Voortrekker Road. The police gave chase and called for back-up, and in Koeberg Road, Maitland, the Polo came to a standstill and the driver *"bumped one police member".* It is unclear from the affidavit how exactly the incident unfolded, but D/Sgt Khumalo stated that the police shot at the vehicle's tyres with the result that the driver could not move and he was subsequently arrested.

11. The D/Sgt confirmed all the appellant's personal and bail information which the appellant provided during his testimony. He opposed the granting of bail on the basis that the appellant was on bail in a matter when he allegedly committed five other offences. Furthermore, if released on bail, there was the likelihood that he may commit other crimes and thus the granting of bail would not be in the interests of justice.

12. During the defence's submissions, the appellant's legal representative submitted that the value of the fraud was uncertain and took issue with whether the CAS numbers stated in the investigating officer's affidavit corresponded with the charges which the appellant faced. The further submissions supported the view that the appellant was not a flight risk, had never absconded from previous Court appearances, and that he would stand trial. The defence emphasized that the State had not proved any of the grounds listed in section 60(4) which would show that it was not in the interests of justice for the accused to be released on bail.

13. The prosecutor confirmed that bail was opposed in terms of section 60(4)(a) of the Act and argued that the offences occurred over a period, in the same area, and after the appellant had already been released on bail. It was also submitted that the appellant had the propensity to commit offences while released on bail, that he posed a danger to the public as he displayed a disregard for the law and that there was a degree of violence implicit in the charges (presumably, count 5). As the argument progressed, the prosecutor submitted that the appellant would attempt to influence or intimidate witnesses and based her reliance on section 60(4)(c) of the Act, on the fact that the appellant was familiar with Const. Smith. She emphasized that the appellant had only acknowledged his familiarity with Const. Smith when questioned about this aspect in cross-examination and she disbelieved him when he stated that he would not interfere with State witnesses.

14. The State further relied upon section 60(4)(d) of the Act, in that the prosecutor argued that considering the charges and the facts pertinent thereto, the appellant would jeopardise or undermine the proper functioning of the justice system, including the bail system as he had disregard for the rule of law. In reply, the appellant's legal representative submitted that no factors were placed before the Court supporting a finding in terms of section 60(4)(d).

The bail judgment

15. Firstly, the magistrate held, correctly so, that the application fell under section 60(11)(b) as a Schedule 5 application. Secondly, it is apparent from her judgment that she was of the view that the appellant had committed the offences he was charged with while out on bail in the Regional Court matter – I address this aspect further below.

16. In her judgment, the magistrate found that the appellant was a danger to the public and that from the facts alleged by the State, he had attacked police officers. Insofar as her findings related to section 60(4) are concerned, the magistrate, with reference to section 60(4)(c), found that the appellant worked with and was the partner of Const. Smith (albeit that they worked on different shifts) and thus he *"is aware and familiar to the witnesses of this case. He knows the witnesses of this case. He might even know the witnesses who can be called on count 1, 2 and 3 on this matter committed whilst he was still a police officer"* **(Record, p 66).**

17. Furthermore, the magistrate found that the appellant had committed fraud on all three counts, as well as the theft, and went further by stating that, in respect of count 5:

> *"When given chase, he now opted to try and attempt to kill the constable who is the complainant on the fifth count".*
> **(Record, p66)**

18. The magistrate thus found in her judgment that there was a likelihood that the appellant would undermine or jeopardize the objectives or proper functioning of the criminal justice system and that the interests of justice did not warrant granting him bail.

Grounds of appeal

19. The grounds of appeal are summarised as being the following:

19.1 The finding that the appellant, if released on bail would endanger the safety of the public or an individual or would commit a Schedule 1 offence was made without the State proving a history of criminal behaviour or any facts to support such findings;

19.2 The magistrate erred when she found that there was a likelihood that the appellant would influence or intimidate witnesses;

19.3 The magistrate, in finding that the appellant would undermine or jeopardize the proper functioning of the criminal justice system, was influenced by *"punitive notions"*, which approach is conflict with the principle that bail in non-penal in nature.

Discussion

20. The appeal to this Court is in terms of section 65(4) of the CPA which states that:

65 Appeal to superior court with regard to bail

(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 .

21. From the above sub-section, it is thus apparent that the legislation provides that a decision regarding bail shall only be set aside if the Court on appeal is satisfied that the magistrate's decision was wrong. That the magistrate hearing the bail application has a discretion to grant or refuse bail, within the context of section 60, of that there can be no doubt. The question as to whether the magistrate's discretion was exercised wrongly, is the one which the Court on appeal is required to answer, and to this end, the

dictum of Hefer J in ***S v Barber 1979(4) SA 218 (D) at 220 E – F****,* is apt:

> *"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 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"*

(See also *S v Branco 2002 (1) SACR 531 (W) at 533I*; *S v Porthen and Others 2004 (2) SACR 242 (C) para 16 – 17)*

22. Having regard to the aforementioned authorities, the approach of the appeal Court when considering the refusal of bail, and whether the magistrate was wrong in doing so, requires a consideration of the accused person's liberty pending the outcome of his trial, balanced against the interests of society ***(S v Conradie [2020] ZAWCHC 177 para 19 – 20)***.

23. With the above reminders in place, I then turn then to consider whether the magistrate was wrong to refuse bail to the appellant. In terms of section 60(11)(b), the appellant bore the onus of establishing evidence which satisfied the Court on a balance of probabilities, that the interests of justice permits his release on bail. His testimony was straight forward and through which he established the following facts: he had a fixed and monitorable address; was married with no dependents; had no previous convictions; no outstanding warrants of arrest; was unemployed but seeking employment and would plead not guilty to all five charges against him. He furthermore disclosed that he had a pending matter, which had progressed to trial stage in Bellville Regional Court and that he was out on bail of R1000.

24. In respect of the merits of the five charges, the appellant elected to exercise his right to silence. It was further apparent from his testimony, that he had been a police officer, stationed at Parow SAPS, until being dismissed on 3 March 2023, and that he knew Const. Smith, the complainant in the attempted murder charge, as they were colleagues at Parow SAPS.

25. From the bail proceedings, it was apparent that the investigating officer opposed bail on the basis of section 60(4)(a), namely the existence of a likelihood that the appellant would endanger the safety of an individual or the public or will commit a Schedule 1 offence. The address by the prosecutor indicated this, but later in her submissions to the magistrate, the prosecutor indicated that the State also relied upon sections 60(4)(c) and (d) in opposition to the granting of bail.

26. Section 60(4)(c) refers to the likelihood that an accused will attempt to influence or intimidate witnesses or conceal or destroy evidence. On this aspect, the first point is that the investigating officer never based his reason for opposing bail on section 60(4)(c), even knowing that the appellant and Const. Smith had been colleagues at Parow SAPS prior to the appellant's dismissal in March. The prosecutor's motivation for relying on this section seemed to be based on the fact that in her view, the appellant's confirmation under oath that he would not interfere with witnesses, was untrue and merely his say-so. Why the prosecutor elevated the appellant's statement under oath to an untruth is inexplicable.

27. The record reflects that unfortunately the magistrate adopted a similar view. I say this because the magistrate concluded in the judgment, that because the appellant and Const. Smith were colleagues and thus knew each other, therefore he might even know the witnesses in the fraud matters as he was a police officer at the time the offences were committed **(Record, p65 – 66).**

28. On the finding that factors falling under section 60(4)(c) were present, and at the risk of repetition, it must be noted that the appellant confirmed under oath that he knew

Const. Smith and he explained this in the application. In my view, there is nothing unusual nor untruthful about the appellant's explanation and it made complete sense that he would know other members of Parow SAPS as he was stationed there prior to his dismissal. Furthermore, to the extent that the magistrate relied on the State's submission that the appellant only confirmed knowledge about Const. Smith in cross-examination, I hold the view that such fact cannot (and should not) be interpreted as an indication that the appellant was reluctant to disclose that he knew Const. Smith. There were five charges and he was asked if he knew the complainant, to which he said *No*, yet later admitted and confirmed that he and Const. Smith worked at Parow SAPS. In my view, a negative inference should not have been drawn in the circumstances.

29. In her judgment, the magistrate concluded that the appellant was aware of, familiar with and may know the witnesses in the fraud matters *"as those three offences were committed whilst he was still a police officer"* **(Record, p66).** This finding is incorrect, as it is not premised on any facts placed before the magistrate during the application and amounted, at best, to speculation. Furthermore, whilst it was indeed established that the appellant knew Const. Smith, there was no *"positive evidence"* presented during the bail application which pointed to attempts by the appellant to influence or interfere with his former colleague or any of the witnesses in the other charges ***(S v Barber supra, p220 D-E).***

30. I also highlight that the investigating officer's affidavit was silent on whether the appellant knew the complainants and witnesses in the fraud and theft charges and whether he held a suspicion that the appellant could influence or interfere with them. In my view, to have thus concluded that because the appellant was a police officer at the time of the commission of some of the offences, he therefore might know the witnesses related to counts 1 to 4, was also incorrect, as it was based on speculation and not evidence. These findings were made in the judgment to support the view that the interests of justice did not permit the appellant's release on bail because some or all of the factors under section 60(4)(c) read with section 60(7) were established. Considering the preceding discussion, there was simply no factual basis for concluding that there

existed a likelihood that the appellant will interfere with witnesses and complainants ***(See S v Kock 2003 (2) SACR 5 (SCA 13c)***.

31. Turning to the finding on section 60(4)(d), as far as the merits of the cases against the appellant were concerned, the investigating officer's affidavit only referred to the attempted murder charge. The alleged facts are that the police gave chase when they saw a white VW Polo which sped from a Caltex garage on Voortrekker Road, and they called for back-up. The Polo came to a standstill on Koeberg Road, Maitland, and the appellant allegedly bumped into a police officer with the vehicle and SAPS members shot at the vehicle's tyres. It would seem that no injuries were sustained by Cons. Smith during the course of the incident. Furthermore, the affidavit was silent on the merits of the fraud and theft charges and to this end, I agree with the appellant's submission that the affidavit was cryptic.

32. It is also of some concern that despite the appellant's indication that he did not wish to testify about the merits of the matters/charges, the prosecutor nonetheless cross-examined him as to whether he was driving a VW Polo on the day, which he denied doing. The prosecutor seemed to have been oblivious to the fact that the appellant had elected, as was his right, not to testify regarding the merits of the charges. The State's argument was that the appellant had clearly disregarded the rules of law through the commission of the offences, hence he would thus undermine or jeopardize the objective or proper functioning of the criminal justice and bail systems.

33. The judgment found that because the appellant, as a police officer, used the SAPS fleet card to fill petrol on three occasions at Rendezvous Motors as alleged by the State and had attempted to kill Const. Smith, thus the grounds in section 60(4)(d) were established. In this regard, the ground of appeal that the magistrate was influenced by punitive notions warrants closer scrutiny.

34. The first point to emphasis is that bail applications are *sui generis*, and that unlike a trial Court, the function of a bail Court is not to grapple with the innocence or guilt of

the applicant, but to balance the interests of society in refusing bail against an applicant's interest to his/her liberty. Binns-Ward J in ***Conradie v S supra at paragraph 20***, states that this balancing act would entail that the bail Court:

> *"…will have to weigh, as best it can, the strengths or weaknesses of the state's case against the applicant for bail. A presumption in favour of the bail applicant's innocence plays no part in that exercise. The court will, of course, nevertheless bear in mind the incidence of the onus in making such assessment."*

(see also Mafe v S [2022] ZAWCHC 108 par 143 Lekhuleni J, dissenting)

35. While the presumption of innocence plays little or no role in a bail application, it bears remembering that it is evident from section 58 of the Act that bail is non-penal in nature and the proper refusal of bail should not be viewed as a form of anticipatory punishment for the alleged offences which the applicant faces ***(S v Noble and Another 2019 (1) NR 206 (HC) 30***).

36. The argument on appeal is that the magistrate misdirected herself by approaching the appellant (as an accused applying for bail) as already convicted of all the offences with which he was charged. Having regard to the record of the bail proceedings and the judgment, I find that the submission by counsel for the appellant is persuasive because from at least page 60 of the record, one sees that the magistrate's remarks and findings in her judgment indicate that she considered the appellant as having committed all five offences of which he was charged. Put another way, the record clearly indicates that the magistrate viewed the appellant as guilty of the charges and expressed this in her judgment.

37. To illustrate, in the judgment at page 66 of the record, the magistrate states the following:

> *"Accused person was put in trust by the Department of Justice (SAPS) when he*

decided to use the said fleet car (card) and put petrol on the third motor vehicle that was driven by him, as it is alleged by the state, on three incidents. He has done that on the first incident. He went to do it again on the second incident. He went again for the third time now. He went again for the fourth time, because even the one of theft, he stole the petrol. The same thing that he has done previously when he was using the fleet card of the said SAPS. When given chase, he now opted to try and attempt to kill the constable who is the complainant on the fifth count"

38. Given that the ground of appeal related to punitive notions, I do consider the language use and choice of words in the judgment to be unfortunate and with respect to the magistrate, indicates that the appellant's fate in the bail application was determined as if he was already guilty of all the charges. As will be illustrated, this permeated most of the findings in weighing up the interest of liberty versus the interests of society that bail not be granted. To highlight, it is not insignificant that the magistrate, notwithstanding the fact the appellant had testified that he was dismissed from SAPS in March 2023, nonetheless treated him as a police officer who had committed the offences. I say this because it is evident from the judgment that the magistrate set the bar higher for the appellant as with reference to counts 1, 4 and 5 which were allegedly committed after he was dismissed from SAPS she nonetheless wrongly regarded the appellant as a police officer, who had indeed committed such offences.

39. In the circumstances, I hold the view that the magistrate's approach to the application and several of her findings, were indeed underscored and guided by taking a penal approach to bail, and thus the ground of appeal that the magistrate displayed such punitive notions has merit. This is contrary to the principle that bail is not penal. On the issue of section 60 (4)(d), aside from the fact that the appellant was arrested for the Parow charges while out on bail in another matter, the State did not prove on a balance of probabilities the existence of any factors in the sub-section, read with section 60(8).

40. The only section which is relevant is section 60(4)(a). I have already indicated

that the investigating officer's affidavit is silent on detail related to the charges in the Regional Court matter as well as the current fraud and theft charges. The defence correctly, in my view, questioned the CAS numbers and the legal representative's comparison during the application, it became evident that the apparent confusion was never cleared up by the State.

41. This brings me to a consideration of the factors in section 60(5) which must be read with section 60(4)(a). Even accepting that the appellant was out on bail in the Regional Court matter when he was arrested on the five Parow charges, the question is whether it was established on a balance of probabilities that he had any disposition to commit Schedule 1 offences, evident from his past conduct and/or previously committed a Schedule 1 offence while out on bail.

42. From the appellant's bail history, supported by his oral testimony, there are no previous convictions and there is no evidence that he had previously committed a Schedule 1 offence. Thus, one may conclude that he had no 'criminal career' at the time he applied for bail. In respect of *"any disposition of the accused to commit offences referred to in Schedule 1"*, the magistrate found that the appellant had five pending cases that he had committed after his release on bail in the Bellville Regional Court matter **(section 60(5)(e); Record, p64)**.

43. In my view, there is no past conduct to speak of as the appellant had no previous convictions. As to his future conduct, which the magistrate was correct to assess, the difficulty with the rationale in the judgment is that the magistrate approached the section 60(4) issues on the basis that the appellant had indeed committed all five offences while out on bail. In this regard, I refer to the earlier *dictum* in ***S v Conradie*** and also Lekhuleni J's discussion in ***Mafe v S (supra)*** around the presumption of innocence in bail applications. It is perhaps apt to be reminded that the balancing act in a bail application must also bear in mind the onus in such application. In this matter, the onus referred to in section 60(11)(b) was on the appellant to show that the interests of justice warranted his release on bail. That also meant that if the State established the section

60(4) factors which it relied on to oppose bail, a value judgment had to follow, whereby the magistrate weighed up the appellant's liberty against the interests of society.

44. Herein lies the difficulty with the correctness of the magistrate's balancing act. The bail Court's duty to assess the appellant's future conduct must be conducted with reference to all the circumstances of the matter, and in doing so, it is required of the magistrate to adopt a cautious and balanced view, mindful that ultimately, bail is non-penal in character. ***(See, for example, S v Stanfield 1997 (1) SACR 221 (C) 233 g-l)***

45. Given that the appellant was out on bail, and then arrested on the Parow charges, I appreciate that the magistrate considered that a likelihood existed that he would commit a Schedule 1 offence again. To this end, in ***S v Dlamini, S v Dladla and Others, S v Joubert, S v Schietekat [1999] ZACC 8 at paragraph 53,*** it was held that a finding of a likelihood of a risk that a bail applicant will commit an offence if released on bail is *"no more than a factor, to be weighed with all others, in deciding what the interests of justice are".* When considering this matter, the likelihood of commission of a Schedule 1 offence should, in my view, have been weighed against at least, the following factors: the absence of a criminal history; the absence of the factors mentioned in section 60(4)(c) and (d); good personal circumstances and bail information; a lack of information regarding the strength of the State's case in four out of the five charges, and the confusion regarding CAS numbers.

46. Having regard to the judgment, it would thus seem that the fact that the appellant was out on bail and was subsequently arrested on the five charges, was considered in isolation and without reference to the other prevalent factors in determining the interests of justice. In my view, the cautious and balanced approached required in determining what the interests of justice were, was affected by approaching bail from, a punitive perspective, which it is not. As a result, I find that the Magistrate erred in her consideration of the appellant's liberty against the interests of society.

Conclusion

47. The submissions by the respondent do not add much more to the grounds of appeal and the discussion of the issues. As a matter of completeness, one of the aspects highlighted in the appellant's counsel's heads of argument is that the magistrate relied on factors placed before her regarding the merits of the attempted murder charge, which the prosecutor only brought to light during the State's submissions *after* the appellant's legal representative had concluded his address to the magistrate. While the magistrate correctly recognized that bail proceedings are *sui generis*, it should not be seen to be par for the course that subsequent information is placed before the bail Court in this fashion, and without an opportunity being given to the other party to consider it, as to do so may have as a consequence, the potential prejudice to a bail applicant.

48. The submissions and subsequent finding that the appellant had breached the rule of law and that violence was implicit in the offences must be seen in the light of the fact that the bail Court had adopted a punitive approach and secondly, the details of the incident described in the investigating officer's affidavit were in places, cryptic or lacked detail. In view of the findings above, I agree with the appellant's counsel that all of the factors mentioned, considered cumulatively, established that it was in the interests of justice to have granted bail for the appellant, who in my view, discharged the onus in section 60(11)(b).

49. Having regard to section 65(4), I thus find that the magistrate exercised her discretion wrongly in refusing bail and thus the appeal succeeds. From the evidence presented during the hearing, the appellant indicated that bail in the sum of R500 to R1000 was affordable. However, with reference to the order below, I take account of the fact that attempted murder is by its nature a serious charge and that the appellant faces five charges in total.

Order

50. In the result, the following order is granted:

50.1 The appeal is upheld.

50.2 Bail in the amount of R3000 is granted with the following conditions:

(1) The appellant (accused) shall attend Court on all the dates he is required to until the matter under Bellville case number E720/2023 (or any Regional Court case number related to the same matter) is concluded;

(2) The appellant may not leave the Western Cape without the knowledge of the investigating officer.

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M Pangarker
Acting Judge of the High Court

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