In the High Court of South Africa
(Western Cape Division, Cape Town)

Appeal Case Number: A124/2023
Lower Court Case Number: Q261/2023

In the matter between:

RASHEED FAREED MAHFOUZ **Appellant**

And

THE STATE **Respondent**

JUDGMENT ON BAIL APPEAL

LEKHULENI J

[1] This is an appeal against the refusal of bail by a Magistrate in the District Court of Wynberg. The State preferred a charge of fraud against the appellant as it alleged that the appellant practised as a medical doctor at a medical practice situated at Phillipi Medical Centre without being registered with the Health Professions Council of South Africa *("HPCSA")* as required by the Health Professions Act 56 of 1974.

[2] To this end, the State alleged that on or about 15 February 2023 and at or near Phillipi East in the district of Wynberg, the appellant wrongfully, unlawfully and with the intent to defraud and to the prejudice or potential prejudice of the complainant represented to the complainant that he was a medical doctor who was authorised to practice, consult, examine patients, dispense medication and charging complainant fee of an unknown amount to the State.

[3] In addition, the State further alleged that pursuant to this misrepresentation, the appellant induced the complainant to consult with and receive medicine as well as a sick note from the appellant and further induced her to pay him an amount unknown to the State. When making this misrepresentation, the State contends, the appellant knew that he was not a medical doctor authorised to practice medicine.

[4] The appellant was arrested on 15 February 2023, and on 08 March 2023, he brought a formal application for bail in the Wynberg magistrate's court, and the court dismissed his application. The appellant now appeals against that decision and seeks a reversal of that order in terms of section 65(1)(a) of the Criminal Procedure Act 51 of 1977 *("the CPA").*

[5] During the bail hearing, the appellant did not testify but submitted an affidavit in support of his application. In the sworn statement, the appellant vehemently denied his involvement in the crime he was accused of. He claimed that he worked as a general administrator in the business in question, responsible for recordkeeping and following

up on medical aid claims. He disputed that he ever worked as a medical practitioner. Bashir Madhi, the Managing Director of Honey Stationery and Print, also testified in support of the appellant's bail application.

[6] On the other hand, the respondent opposed the bail application and presented the oral evidence of Colonel Vos, the investigating officer, and Wasegan Mphambo, a liaison officer responsible for receiving prisoners at court and handling dockets from the police station. A summary of the evidence provided by these witnesses is detailed below.

Background facts

[7] At the hearing of the bail application, it was common cause between the State and the defence that the appellant was facing a schedule 5 bail application. Thus, the appellant having been given a reasonable opportunity to do so, had to adduce evidence which satisfied the court that the interests of justice permitted his release.

[8] The appellant was accordingly given such opportunity. To this end, he submitted an affidavit in which he asserted he is 65 years of age and residing at 109 Sunnyside Villas Stemmet Road Crawford since 2011. He worked as a general administrator, with duties including record-keeping and following up on medical aid claims. He worked five days a week and earned between R50,000 to R60,000 monthly. He holds a PhD as his highest level of education. He has one previous conviction of fraud under case number

162/6/2018 and was sentenced to five years imprisonment which was suspended for five years on condition that he did not commit similar offence during the period of suspension. He has no pending cases and has no outstanding warrants against him. He committed not to interfere with witnesses.

[9] He has a passport, and he stated that he was prepared to surrender it to the clerk of the court pending the finalisation of the matter. He asserted in his affidavit that he is not a flight risk and is willing not to take up any employment within the medical sector until this matter is finalised. He is married and has three children. His family is solely dependent on him. His children are studying outside South Africa, and he is responsible for their upkeep and academic expenses. He agreed to any condition that the court would deem appropriate. He was also prepared to sign at a local police station and to stay under house arrest at all relevant times. He believed that the State's case against him was very weak. The appellant further stated that he could afford an amount of R10 000 and R15 000 as payment for bail.

[10] The appellant called Bashir Madhi as his witness. This witness is 62 years old and resides in Rylands Estate in Athlone. Mr Madhi is the Managing Director of Honey Stationery and Print. The appellant is his friend. Mr Madhi has offered employment to the appellant as a sales representative with a basic salary of R10 000 per month and a commission of 50 percent of the net profit of the sales generated. That was the appellant's case presented in summary at the lower court.

[11] The State tendered the evidence of the investigating officer, Colonel Vos, who opposed the appellant's application. Colonel Vos stated that the appellant is not authorised to practice medicine as a doctor. Colonel Vos further testified that the appellant was arrested in 2018 during an operation which led to the arrest of six unregistered doctors. The appellant pleaded guilty to that charge of fraud in terms of section 112 of the CPA and was sentenced to five years imprisonment, which was wholly suspended on the condition that he is not found guilty of fraud committed during the period of suspension. The witness stated that the appellant has two previous convictions of fraud. In 2016, the appellant was arrested for a similar offense, but the charge was later withdrawn.

[12] Colonel Vos testified that the HPCSA received information that the appellant was practicing as a doctor without being registered with the HPCSA and was seeing patients. The HPCSA followed up on the information and investigated a practice in Phillipi where the appellant was practicing. On 15th February 2023, inspectors of the HPCSA contacted the police and intelligence members, who accompanied them to the appellant's alleged practice. When they arrived, they asked to see the doctor on call, and the receptionist told them that the doctor was busy praying in the consultation room. The receptionist asked if they were cash or medical aid patients, and upon requesting to see the doctor, the appellant appeared and invited them into his consultation room. The appellant asked if they were paying cash or through medical aid. In response, they informed him that they were inspectors from the HPCSA.

[13] The appellant then informed them that he was just the administrator at the practice. The applicant further informed them that Dr Augustus, the owner of the practice, was the responsible doctor, and that the appellant worked as an administrator for him. He further informed the inspectors and the police in attendance that when there were patients, he would phone Dr Augustus to come and consult with the patients. As part of the investigation, the inspectors asked him to call Dr Augustus to confirm his (appellant's) allegations. The appellant did not comply with the request, but instead admitted to seeing patients in the capacity of a doctor.

[14] The inspectors interviewed the receptionist, and the latter produced evidence of four patients the appellant had seen that day. The evidence also consisted of files, clinical notes, and patient registers. The inspectors received counterfoils of medical certificates the appellant allegedly issued to patients. They subsequently contacted some of the patients and, with the assistance of the police, managed to obtain statements from two of them. The appellant was then later arrested and detained at Phillipi Police Station.

[15] The State also called Sergeant Mphambo in opposition to the applicant's application. Sergeant Mphambo is the liaison officer based at Wynberg court and receives dockets from the Police Station. Sergeant Mphambo's evidence was that on 08 March 2023, he was sitting in his office, and one constable, Gomme, called him and told him that the appellant wanted to see him in the cells. He went straight to the cell where the appellant was detained. Upon arrival, the appellant told Sergeant Mphambo that he

had several practices, some in Khayelitsha and others in Phillipi. Sergeant Mphambo testified that the appellant requested him to destroy the docket relating to the appellant's case, so that the charges against him could be dropped. At that stage, a prisoner who was behind the appellant laughed at this and stood backwards, not to hear the conversation between them.

[16] In response, Sergeant Mphambo told the appellant that he would not do that; in doing so, he would be destroying his job, too. The appellant promised Sergeant Mphambo that he would provide him with any amount of money he desired. Sergeant Mphambo testified that he felt disturbed and disrespected by this request and walked away. In cross-examination, the appellant disputed Sergeant Mphambo's version and stated that he only gave him a number, which Sergeant Mphmabo entered in his phone. Sergeant Mphambo refuted these allegations. This was, in brief, the evidential material that was placed before the court *a quo*.

The findings of the Bail Court

[17] After considering the conspectus of the evidence, the Magistrate found that the State has established that on a balance of probabilities, there was a likelihood that if the appellant was released on bail, he would endanger the public's safety or commit a schedule 1 offence. The court *a quo* also found that a likelihood existed that the appellant if released on bail, would attempt to evade trial, and would attempt to conceal or destroy evidence or intimidate state witnesses. In weighing the interest of justice

against the appellant's rights, particularly his freedom, the court found that the appellant failed to discharge the onus placed on him to satisfy the court that the interest of justice permits his release on bail. Consequently, the court below refused his bail application.

The appellant's grounds of appeal

[18] The appellant raised a plethora of grounds upon which the appeal is based. However, these grounds of appeal as discernible from the notice of appeal may, in a nutshell, be summarised as follows:

18.1 That the magistrate erred in finding that the appellant has a propensity to commit schedule 1 offences even though his record shows otherwise.

18.2 The magistrate erred by not accepting the evidence of Mr Madhi, who testified that he offered the appellant employment.

18.3 The court below erred by not finding that the State's case against the appellant is weak.

18.4 That the court *a quo* erred in finding that the State has established on a balance of probabilities that the likelihood exists that the appellant if released on bail, would endanger the safety of the public or will commit a schedule 1 offence despite there being no such evidence.

18.5 That the court *a quo* erred in finding that a likelihood exists that the accused if he is released on bail, will attempt to evade his trial despite there being no such evidence.

Applicable legal principles and discussion

[19] It is trite that a court or a judge hearing an appeal in terms of section 65(4) of the CPA 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 shall give the decision which in its opinion the lower court should have given. Kriegler J, as he then was, made the following remarks in *S v Dlamini: Sv Dladla and Others; S v Joubert: S v Schietekat* 1999 (2) SACR 51 (CC) at para 74:

> "What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted".

[20] Against this backdrop, I turn to consider the question whether the lower court erred in refusing to admit the appellant to bail. In my opinion, the Constitution should be the starting point to address the issues before this court. Section 35(1)(f) of the Bill of Rights provides that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interest of justice permits, subject to reasonable conditions. From the reading of this section, it is abundantly clear that it is not absolute, but the interest of justice circumscribes its ambit. The court must be satisfied that the interest of justice warrants the appellant's release from detention.

[21] Bail applications for accused persons in court are governed by section 60 of the CPA. Section 60(1)(a) of the CPA provides that *'An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence,*

if the court is satisfied that the interests of justice so permit'. Section 60(4) 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 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
>
> (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 circumstance there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security".

[22] It is trite that the court hearing the bail application must express a balanced value judgment considering the factors mentioned in section 60(4). *S v Bennet* 1976 (3) SA 652 (C) at 656. In bail applications, the court must strike a balance, as far as that can be done, between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice. Crucially, the presumption of innocence operates in favour of an applicant for bail even where there is a strong prima facie case against him. Still, if there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if he is allowed out on bail, the Court

would be fully justified in refusing to allow him bail: *S v Essack* 1965 (2) SA 161 (D) at 162C. The essence, therefore, of the principles and considerations underlying bail is that no one should remain locked up without good reason or a just cause.

[23] I pause to mention that the State opposed bail on two grounds at the court *a quo*. *Firstly*, that the appellant is likely to commit this type of offense again, and *secondly*, that he is a flight risk. Notably, the charge levelled against the appellant involved an offence listed in Schedule 5 of the CPA and his application in the court *a quo* had to be determined in terms of section 60(11)(b) of the CPA, which provides as follows:

> "Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in Schedule 5, but not 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 the interests of justice permit his or her release".

[24] The magistrate found that the appellant is likely to commit schedule 1 or other offences if released on bail. I see no fault in the magistrate's finding on this matter. The following reasons bear this out. It is common cause that in 2018, the appellant was found guilty of two counts of fraud for practising as a medical practitioner despite not being registered with the HPCSA. He received a sentence of imprisonment, which was wholly suspended for five years on condition that he was not convicted of a similar offence during the period of suspension.

[25] The offence that the appellant is currently facing was allegedly committed during the period of suspension. Although the appellant was not on bail at the time of the

alleged offence, this fact is relevant in determining the likelihood of him committing further offences. More so, his previous sentence included a condition not to commit a similar offence during the suspension period, which the present offence allegedly violates. I am mindful that the condition of the suspended sentence is only triggered upon conviction of a similar offence. However, in my opinion, the appellant did not provide sufficient evidence to prove to the bail court that there is no likelihood of him repeating the same offence if he were to be granted bail. It was argued on behalf of the appellant that it can hardly be contended that because the appellant committed two counts of fraud five years ago that he has a propensity to commit fraud. I disagree with this proposition. The appellant is facing similar charges that he faced five years ago. He was sentenced subject to a condition that he does not commit the similar offence during the period of suspension. Notwithstanding that condition, the allegations are that he committed this offence again. This factor in my view, is relevant for the purposes of section 60(4)(c) of the CPA.

[26] It seems to me that the appellant is thriving in practicing as a doctor, even though he is not registered with the HPCSA. In his affidavit supporting his bail application, he averred that he earns an income of R50 000 to R60 000 a month as an administrator of this doctor's practice. The appellant informed Sergeant Mphambo that he has a lot of practice in various places in the Cape, including Khayelitsha and Phillipi. In my view, there is a likelihood that if he is released on bail, he will stealthily continue his practice as an unregistered doctor, and this will endanger the safety of the public. To this end, the magistrate's finding was spot on and cannot be faulted.

[27] I must also emphasise that there are cogent and compelling reasons why doctors and healthcare professionals must be registered with the HPCSA. The HPCSA is a statutory body established in terms of section 2(1) of the Health Professions Act 56 of 1974. Among other things, the mandate of this professional body is to protect the public and uphold the ethics and quality of healthcare professionals in South Africa. The HPCSA ensures that practitioners keep and maintain professional and ethical standards within the health professions and ensures that disciplinary actions are taken against persons who fail to act accordingly. Evidently, practising without registering with this body is a danger to the public at large. In my view, the magistrate's finding in this regard, cannot be faulted, as public safety was already compromised when the appellant practised as an unregistered doctor and dispensed medicine.

[28] Furthermore, the appellant principally impugned the State's case as being weak and took issue with, *inter alia,* the contention that he is a flight risk and that he has a propensity to commit offences. The courts have repeatedly emphasised that bail proceedings should not be treated as a rehearsal for the trial. During bail proceedings, the court is not required to make any findings, even on a provisional basis, about the guilt of the applicant or any amendment to the bail conditions. All that a court must do is weigh the *prima facie* strength or weakness of the State's case, and such a decision ought not to be made regarding credibility findings so that bail proceedings do not become a dress rehearsal for the trial itself. *S v Viljeon* 2002 (2) SACR 550 (SCA) at 25.

[29] Despite this, I am of the opinion that the State has a strong case against the appellant. I must mention that the HPCSA inspectors and the intelligence unit police officers have obtained evidence implicating the appellant. There are witnesses (patients of the appellant) who are said to have made statements that they consulted with the appellant in his practice as a medical practitioner. The appellant's receptionist also confirmed to the HPCSA inspectors and police officers who attended the premises that the appellant was practising as a medical practitioner. She presented evidence of four patients seen by the appellant that day, including patient files, clinical notes, patient registers, and counterfoils of medical certificates issued to patients.

[30] In my opinion, the court *a quo* was correct in concluding that the State has a strong case against the appellant. On a conspectus of all the evidence, it cannot be said that the State's case against the appellant is weak and that the appellant in all likelihood will be acquitted after the trial.

[31] It was submitted that the court *a quo* erred in disregarding the fact that the appellant was on bail when he was previously charged and that he did not flee the country, despite an attempt by the State to have his bail revoked. In my view, this argument is mistaken and unsustainable. It must be stressed that this case stands on a different footing. Although the appellant has previously adhered to his bail conditions by attending court without fail in his previous fraud matter, I believe that the severity of the charge levelled against him in this matter and the potential sentence he may face if convicted could entice him to abscond.

[32] Importantly, it must be borne in mind that if convicted of the fraud charge, the suspended sentence that proverbially hangs over his head may be brought into operation. There is also a potential charge of corruption that the State may prefer against the appellant, which is likely to attract a severe sentence on conviction. In my opinion, the severity of these crimes and the potential sentence that the trial court may impose in case of a conviction could lead the appellant to flee if released on bail. Consequently, there is a likelihood that if he is released on bail, the appellant may evade his trial.

[33] Significantly, the appellant's conduct during the bail proceedings is very concerning and paints a very dim picture. The evidence of Sergeant Mphambo was that the appellant attempted to bribe him to destroy the docket/evidence so that the case against him could be withdrawn. The appellant challenged this version through cross-examination and did not present any evidence in rebuttal. I am mindful that the bail proceedings are not a dress rehearsal of the trial and that the dispute on this issue is a matter that a trial court would be best posed to adjudicate. However, I am of the view that it militates against the granting of bail. This conduct implies that the appellant is willing to resort to unlawful methods to get rid of the charges or evidence against him. This is a crucial point that the court must consider when deciding whether to grant the appellant bail.

[34] Section 60(4)(c) of the CPA provides that one of the factors to be taken into account in the grant or refusal of bail is whether there is the likelihood that the accused, if he is released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence. Section 60(7) sets out the factors that must be taken into account to determine whether the grounds set out in section 60(4)(c) have been established. Among others, is whether the witnesses have already made statements and agreed to testify and, the relationship of the accused with the various witnesses, and the extent to which they could be influenced or intimidated.

[35] In the present matter, the civilian witnesses are patients allegedly treated at the appellant's practice. The investigating officer testified that statements had been obtained from two witnesses. These witnesses should be known to the appellant. Alternatively, the appellant can easily access them. Crucially, the appellant knows the evidence that these witnesses would tender against him. Considering the appellant's past conduct, during the bail proceedings, I believe that the appellant would not hesitate to go to extreme lengths to interfere with State witnesses.

[36] Lastly, it was argued that the court below did not consider Mr Madhi's evidence, who had offered the appellant employment. In my opinion, this offer was made with opportunistic intentions and only purposed to support the appellant’s application for bail.

[37] Ultimately, the court *a quo* was correct, in my view, in finding that the appellant failed to discharge the onus placed on him in terms of section 60(11)(b) of the CPA that

the interest of justice permits his release on bail. In the final analysis, the Magistrate's refusal to admit the appellant to bail cannot be said to have been wrong in any way.

[38] In the result, the following order is made:

38.1 The appeal against the refusal of bail is hereby dismissed.

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LEKHULENI JD

JUDGE OF THE HIGH COURT

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