**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION: PRETORIA)**

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

17/6/2014 .....
DATE

.....
SIGNATURE

17/6/2014

**CASE NO: A356/14**

**MARTHINUS CHRISTIAAN GROENEWALD** **APPELLANT**

and

**THE STATE** **RESPONDENT**

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**JUDGMENT**

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**KHUMALO J**

[1] This is an Appeal against the refusal by the Magistrate Court in Modimmole to admit Appellant to bail. He was arrested in that district on a charge of stock theft of 25 cattle in the value of +-R200 000. At the time of his bail application on 2 September 2013, he was also a suspect in another charge of stock theft of cattle valued at R650 000 and scheduled to appear in the Mokopane Regional Court in the following day to apply for bail.

[2] The arrest of the Appellant followed a news bulletin aired on radio, television and published in the newspapers regarding the stock thefts at Modimmole and Mokopane and the suspects that were wanted by the police for the thefts. Appellant came forward, accompanied by his attorney and gave himself up to the police. His subsequent bid to be released on bail on 5 September 2013 was unsuccessful, hence this appeal.

[3] Counsel for the Plaintiff, Mr Van Wyngaard argued that the learned magistrate in the court a quo erred when he premised his refusal to admit Appellant to bail on the fact that there is a very strong case against Appellant with prospects of success, therefore Appellant will not stand trial, is a flight risk and will in the likelihood

influence the witnesses, ignoring Appellant's personal circumstances that were brought to the court's attention. Counsel implored that in *S v Stanford* 1997 (1) SACR 221 (C), it was pronounced that it is trite that the prosecutor must establish a probability premised on objective facts that the suspect will evade trial or is a flight risk.

[4] He further argued that Appellant gave himself up to the police. There was no warrant against him and that should be an indication that he is not a flight risk.

[5] s 60 of the Act, in ss (4) (1) (a), reads that:

> "An accused who is in custody in respect of an offence shall, subject to the provisions of s 50 (6) 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."

[6] s 60 (4) of the Criminal Procedure Act 51 of 1977 ("The Act") provides as follows:

> 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 a likelihood that the accused, if he or she is 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 a 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 a 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 a likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system;
>
> (e) where in exceptional circumstances there is all likelihood that the release of the accused will disturb the public order or undermine the public peace or security; or order or undermine the public peace or security,

[7] The factors that are to be considered to establish if the accused (is a flight risk) might evade the trial as provided in ss 60 (4) (b) are set out in s 60 (6) that reads as follows:-

> 'in considering whether the ground in subsection (4) (b) has been established, the court may where applicable, take into account the following factors, namely-
>
> (a) the emotional, family, community or occupational ties of the accused to the place at which he is to be tried;

(b) the assets held by the accused and the place where such assets are situated;

(c) the means, and travel documents held by the accused, which may enable him or her to leave the country;

(d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;

(e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;

(f) the nature and the gravity of the charge on which the accused is to be tried;

(g) the strength of the case against the accused and the incentive that he or she in consequence have to attempt to evade his or her trial;

(h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;

(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached;

(j) any other factor which in the opinion of the court should be taken into account.'

[8] In considering whether the ground in ss (4) (d) has been established, the court may where applicable, take into account the following factors, namely-

(a) the fact that the accused is familiar with the identity of the witnesses and with the which they may bring against him or her;

(b) whether the witness has already made statements and agreed to testify;

(c) whether the investigation against the accused has already been completed;

(d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;

(e) ...;

(f) whether accused has got access to the evidentiary material which is to be presented at his trial;

The ease in which the evidentiary material could be concealed or destroyed

[9] *Stainford* that has been referred to by Appellant's Counsel went beyond what Appellant's Counsel mentioned in his argument and held that:

> 'the court a quo had lost sight of the fact that denial of bail would be in the interest of justice **only if one of the grounds** set out in s 60 (4) was probable. The onus is upon the Respondent/prosecution to establish the existence of such grounds for the continued incarceration of the Appellant in the interest of justice.

[10] How the prosecution is to go about establishing the required grounds to discharge the onus is explained in *Botha v Minister of Safety and Security & Others; January v Minister of Safety and Security & Others* 102 (10 SACR 305 (ECP) (at [33] by Tshiki BJ as follows:

> "Prosecutors also have a duty to establish facts that justify the further incarceration of a detained person before he or she can apply to the court for the detainee's further incarceration. One of the methods expected to be used by the prosecutor is to establish, from the police official investigating the case, all the facts which would justify the further detention of the arrested person. He or she had **to protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim**, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of a suspect." (*my emphasis*).

[11] The Respondent Counsel in opposing the Appeal, submitted that in the court a quo, the Respondent did not only prove a strong case that has prospects of success against the Appellant, but also that after his arrest, the investigating officer discovered that he was a suspect in six other cases of stock theft of an approximate value of R2 400 000 with more witnesses still to be interrogated. There was likelihood that he might interfere with the witnesses and an indication that he seems to be operating a syndicate, a fact that was still being investigated with more arrests imminent. The Respondent also submitted that the case invoked public interest especially to cattle or stock farmers, their workers and businesses whose livelihood is depended on stock, highlighting the hardships created by the stock thefts.

[12] Counsel further argued, in contention to the argument that Appellant's conduct of handing himself to the police demonstrate that he is not a flight risk, that Appellant at the time was aware of being a suspect only in the two cases of stock theft, so the surfacing of the other six cases after his arrest and the fact that all of them carry a potential heavy sentence might lead to him evading trial.

[13] Respondent submitted the abovementioned evidence in the court a quo by leading the evidence of two police officers who were involved in the investigation of the stock thefts in the relevant areas, one being assigned to this particular case and the one in Mokopane. They testified to the existence of statements of witnesses, one from an erstwhile employee linked to Appellant's operations, a video footage of stolen cattle being transported in trucks and trailers, some of the parts on the trucks seen on the video found with stolen cattle in Appellant's business premises, Appellant's bank statements showing money received as proof of payment by an abattoir for the stolen stock, witnesses that are prepared to testify but afraid of Appellant who allege that he is dangerous.

[14] A stock farming expert was, although his evidence regarded as premature, also called to give perspective on the impact the offence has on commercial farmers, especially cattle farmers, villagers, ordinary people with vested interest and to convey their outrage which they demonstrated by attending the bail proceedings on the first day of the bail hearing. He also testified to the negative impact caused by stock theft to the people and the economy in general.

[15] The investigating officers further pointed out that Appellant's surrender of his passport is not a measure preventing him from fleeing because he still can obtain a

temporary passport. They indicated that Appellant does not have immovable assets in the country. He has been staying in his brother's property for 13 years as a tenant, whilst one of his brothers has been residing in Australia for nearly twelve (12) years. They emphasised that Appellant is facing very serious charges and harsh sentences that might motivate him to evade trial.

[16] In response to the evidence led by the Respondent, Appellant tendered his evidence in a form of an affidavit, outlining his personal circumstances. According to him, the grounds that entitle him to be admitted to bail are that his mother, sister and brother live not far from him in Heidelberg and Boksburg. Only the one brother lives out of the country, being a farmer in Australia and has been living there for 12 years. He resides in a property that he is renting from his brother, for which he is paying the bond and which property used to belong to him. He has been living in it for 13 years, has three children with his ex – wife and a one year old with a former girlfriend who lives in the second residential dwelling in the property. Although he has no fixed property or investments he owns unencumbered movables consisting of trucks, a trailer, motor vehicles, livestock to the value of +-R850 000 and has one bank account. He conducts his business at premises that he is renting from his mother principally dealing in livestock and employs six permanent employees with a turnover of R750 00. He submitted that he, as a result have economic and family ties in the country. He also mentioned his handing himself over to the police to prove not being a flight risk.

[17] Counsel for Appellant referred to the matter of *S v Mosoanganye* 2012 (1) SACR 292 where Harms A P commented that:

> "However, what the court failed to consider is that the personal circumstances of an accused-much more than assets- determine whether the accused is a flight risk. Therefore holding that in considering an application for bail pending an appeal, the court should consider not only the assets of the convicted person but also his or her personal circumstances to determine whether or not she is a flight risk."

[18] In response to the prima facie strong case and prospects of success established by the Respondent Appellant stated in his affidavit that he is not required to deal with his defence and contended that the presumption of innocence remain operative. He therefore did not rebut, as he was expected to do, the prima facie case established against him or deal with the evidence of a possibility of interference with the witnesses in his affidavit.

[19] It is trite that this court has no authority to interfere with the discretion of the court a quo unless if the court a quo has erred or misdirected itself as clearly stipulated in s 65 (4) of the Act that provides that:

> "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."

[20] The court a quo, in refusing bail to the Appellant, explained that the right to be presumed innocent is not a bail right but a trial right as plainly pointed out in *S v Dlamini* 1999 (2) SACR 51 (CC) (1999 (4) SA 623; 1999 (7) BCLR 771). Fittingly, the duty of the court in a bail application is to *prima facie* determine the relative strength of the state case against the bail applicant as opposed to making a provisional

finding of guilt or innocence of such an applicant; *S v Van Wyk* 2005 (1) SACR 41 (SCA) at par [6]. Therefore the learned magistrate could not deal with the innocence or guilt of the Appellant but only with a fact whether or not the Respondent has established a prima facie case against the Appellant that makes his continued incarceration to be in the interest of justice. A determination that is to be made in consideration with other various factors that has been highlighted by s 60 (4), which the learned magistrate indicated in this matter to be the strength of the gathered evidence, the video camera, witnesses statements, items and stolen cattle found in Appellant business premises and all the other factors that revealed a strong case against the Appellant plus the possibility that he might influence or interfere with the witnesses and the seriousness of the offence.

[21] In addition the court took cognisance of the reaction of the community, interest of other role players with invested interest like the victims, balancing that with the interest of the Appellant, looking at the pending cases against him and the lack of possession of immovable property in the country. On the basis of that evaluation concluded that the Respondent had proven that it would not be in the interest of justice to release the Appellant on bail.

[22] The establishment of the *prima facie* case by the Respondent coupled with the likelihood of Appellant influencing or interfering with the witnesses, people who are known to him, placed a burden of rebuttal upon the Appellant. The magistrate correctly applied his mind in concluding that Appellant's failure to rebut the existence of a *prima facie* case, when there is likelihood that he will influence or interfere with the witnesses and the severity of the charge, the nature and gravity of punishment, factors under s 60 (4) of the Act were such that, notwithstanding his personal circumstances, it would not be in the interest of justice to release Appellant on bail and if he might be a flight risk.

[23] In *S v Masoanganyi* referred to also by Appellant's Counsel, Harms A P in that matter, when considering a bail after conviction pending an appeal, emphasized the importance of personal circumstances and explained that,

> "that is not the end of the matter. One still has to consider the seriousness of the crimes and the possible length of incarceration."

In the matter of *S v DV* 2012 (2) SACR also referred to by the Appellant, the court held that:

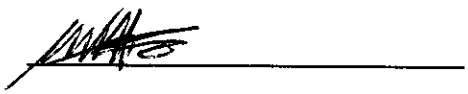
> "The court a quo had proceeded from a wrong premise, which made it concentrate only on the seriousness of the offence without dealing with the case whether, if released on bail, the Appellants would interfere or intimidate state witnesses, or whether their personal circumstances were such that they would not stand trial."

It is therefore important to note that neither personal circumstances nor any of the factors in s 60 (4) can be considered in isolation but are together of equal importance when deciding on the interest of justice. The court is as well required in exercising its discretion, to balance the interest of justice and the constitutional right of the Appellant to liberty in that way.

[24] The other factor that might not have been highlighted with equal significance is that the Appellant had recently travelled to visit his brother in Australia, just before the arrest.

[25] The Appellant has rather failed to prove that this court has a reason not to defer to the exercise of the court a quo's discretion or that the court misdirected itself or erred. I, in that regard make the following order:

[25.1] The appeal against refusal of bail by the Magistrate Court, Modimolle is dismissed.



**N V KHUMALO J**

**JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION: PRETORIA**

**On behalf of Appellant:** **Adv Van der Westhuizen/ Wyngaard**
**Instructed by:** **Beukes & Sonja Nel Attorneys**
**Brakpan**

**On behalf of Respondent:** **Adv Pruis**
**Instructed by:** **National Director of Public Prosecutions**