**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: A 319/2021**

**DATE: 22-12-2021**

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| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED: YES/NO |

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| **22 December 2021** | **PD. PHAHLANE** |
| DATE | SIGNATURE |

**In the matter between:**

**MPHIKWA CLINTON MTHOMBENI** **Appellant**

**And**

**THE STATE** **Respondent**

*Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, and uploaded on Caseline. The date and time for hand-down is deemed to be 10H00 on 22 December 2021.*

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**BAIL APPEAL**

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**PHAHLANE, J**

[1] This is an appeal which emanates from the Court *a quo* (the Magistrate's Court for the District of Tshwane East, held at Cullinan) pursuant to the dismissal of the appellants' application to be released on bail. The appellant initiated this appeal in accordance with the provisions of section 65 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as "the CPA").

[2] Section 65 of the CPA makes provisions for an appeal to a superior court against the refusal of bail in a lower court. The test on appeal is whether the lower court had exercised its discretion to refuse bail incorrectly. The section reads as follows:

**S65 Appeal to superior court with regard to bail**

(1) (a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.

(b) …….

(c) ……..

(2)……...

(3)……

(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.

[3] The appellant was legally represented during the bail application, and as it appears from the charge sheet, he was charged with a Schedule 1 offence of Stock theft. The grounds upon which the decision to refuse bail is challenged appears from the notice of appeal and the heads of argument prepared for the appellant.

[4] In opposing the bail application at the court *a qou,* the state relied on the affidavit of the Investigating officer, captain Ockert Jaco Van der Walt, wherein he stated that the appellant was a fugitive who fled from the scene when the SAPS found him on 8 February 2021. It is further stated that the appellant was found driving a Toyota bakkie which is alleged to have been hijacked under Lebowakgomo CAS 199/12/2020 and carrying the stolen stock of cattle which was loaded at the back. The affidavit also states that the appellant had a pending case of stock theft in Mametlhake with CAS 18/02/2020, but the case was provisionally withdrawn at court. Captain Van der Walt further stated that the address of the appellant was verified, and that should the court decide to release him on bail, the amount should be relevant to the value of the stock stolen, and that conditions be set, which may include that the appellant sign at Siyabusa SAPS twice a week.

[5] At the bail hearing before the magistrate, the appellant elected to present his evidence on affidavit and also gave *viva voce* evidence in support of his case. The following were his personal particulars placed before court:

*(a) That he is 23 years of age and is customarily married.*

*(b) That he has 2 children*

*(c) He has no pending cases nor previous convictions*

*(d) That he has passed Grade 12 and is a second year part-time student at North West University studying for a Bachelor of Science degree.*

*(e) That he is self-employed earning an amount of R 700 per day*

5.1 He stated in his affidavit that he is not a danger to the safety of the public; that if he is released on bail he will not to commit a schedule 1 offence;

that he did not have access to the docket at that stage and does not know the identity of the witnesses the State intended to call; that he intends not to interfere with the investigation or witnesses; that he will not evade his trial; and that he is prepared to comply with all the bail conditions, should he be released on bail.

5.2 He explained in his affidavit that he was transporting livestock and was stopped by the owner of the cattle at the robots when the people he was transporting for, ran away.

[6] The appellant was warned by the court that is not obliged to testify on the merits of the case and of his rights not to incriminate himself before testifying. He however elected to testify and stated that he did not know that the bakkie he was driving was hijacked. He denied knowing anything about the Lebowakgomo case with CAS 119/12/2020 and stated that he does not know why the Mametlhake case with CAS 18/02/2020 was withdrawn. Under cross-examination, the appellant was confronted about the J50 warrant which was issued against him for the Mametlhake CAS 18/02/2020 and it was put to him that the fact that there was a warrant issued, coupled with the investigating officer's affidavit in which he stated that the appellant tried to flee from the scene, meant that the appellant was a flight risk and should not be granted bail.

[7] In a bail application, the enquiry is not primarily concerned with the question of the guilt of the accused. The focus at the bail stage is to decide whether the interest of justice permits the release of the accused pending trial. Bail will usually be denied to protect the investigation and prosecution of the case, and to protect society against the possible future life-threatening criminal acts of an accused.

[8] The CPA provides in section 60(4)(a) to (e), a checklist of the main criteria to be considered against the granting of bail such as: Where there is the likelihood that the accused, if he is released on bail, he will: **(a)** endanger the safety of the public or any particular person or will commit a Schedule 1 offence; **(b)** attempt to evade his or her trial; **(c)** attempt to influence or intimidate witnesses or to conceal or destroy evidence; **(d)** undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; and **(e)** disturb the public order or undermine the public peace or security.

8.1 It proceeds in sub-section (5) to (8A) to itemise considerations that may go to make up those criteria. In sub-section (9) it provides a list of personal criteria pointing towards the granting of bail. That context can legitimately include the risk that the accused will endanger a particular individual or the public at large. Less obviously, but nonetheless constitutionally acceptably, a risk that the accused will commit a fairly serious offence can be taken into account. The important proviso throughout is that there has to be a likelihood, that is a probability that such risk will materialise. A suspicion will not suffice.

[9] Section 35(1)(f) of the Constitution postulates a judicial evaluation of different factors that make up the criterion of the interests of justice, and that the basic objective traditionally ascribed to the institution of bail, namely to maximise personal liberty, fits tightly into the normative system of the Bill of Rights. This means that the deprivation of liberty and freedom through arrest is one that should always be in line with the Constitution, hence section 35(1)(f) of the Constitution ensures that this deprivation serves the limited purpose of ensuring that the accused is duly and fairly tried, and hence the interest of justice requirement ought to be utilised as the foundation of any application to be released on bail. The section provides that:

*"Everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions"*.

[10] The basic principle regarding bail appeal is 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.

[11] In the case of ***S v Barber***[1] the court stated that:

> ***"****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"*.

[12] In ***S v Porthen and Others***[2], Bins-Ward AJ (as he then was) focuses on the appeal court's right to interfere with the discretion of the court of first instance in refusing bail, and held that:

> *"When a discretion is exercised by the court a quo, an appellate Court will give due deference and appropriate weight to the fact that the court or tribunal of first instance is vested with a discretion and will eschew any inclination to substitute its own decision*

[1] 1979 (4) SA 218 (D) at 220E-F.
[2] 2004 (2) SACR 242 (C) para 4.

*unless it is persuaded that the determination of the court or tribunal of first instance was wrong."*

[13] It is trite that the purpose of the bail application is mainly to assess the "l*ikelihood*" of risk in light of the purpose of bail, which in its essence involves the securing of attendance of an accused person at trial and the prevention of that accused from interfering with the investigation of the case.

[14] As the Constitutional Court explained in the 1999 case of ***S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat***[3]**,** the question of whether it would be in the interest of justice to grant bail will focus "primarily on securing the attendance of the accused at trial and on preventing the accused from interfering with the proper investigation and prosecution of the case.

[15] The question as to on whom the onus rests to show that it is in the interests of justice that the accused be admitted to bail or be refused, as the case may be, depends on the Schedule under which the offence was committed. Where the offence is a Schedule 1 offence, such onus rests on the State.

[16] In dealing with the onus created by section 60(1)(a) of the CPA, Van Dijkhorst J, in ***S v Vermaas***[4] remarked as follows:

*"The general rule set out in section 60(1)(a) is that the accused is entitled to be released on bail unless the Court finds that it is in the interests of justice that he be detained in custody. That wording, in my view, creates an onus. The onus rests upon him who asserts that the accused should not be released, that is the State."*

[3] 1999 (2) SACR 51 (CC).
[4] 1996 (1) SACR 528 (T) at 530 d-e

[17] Advocate Milazi acting on behalf of the appellant argued that bail application of the appellant was in terms of Schedule 1 of the CPA where the appellant was only required to disclose whether he has no previous convictions and no pending cases. Advocate Sivhidzho on behalf of the respondent also confirmed in his heads of argument that the appellant appeared before court on Schedule 1 offence of Stock theft. It was argued on behalf of the appellant that the fact that there was a warrant which the appellant knows nothing about, and which warrant was not served on him, does not mean that the appellant has a pending case. Counsel submitted that a case which was withdrawn whether provisionally or otherwise, is not a pending case in a true sense, as it was the case in this matter.

[18] I am inclined to agree with this submission because for a Schedule 1 offence, there is no onus on the appellant to show that it is in the interests of justice that he be released on bail.

[19] Advocate Milazi argued in his heads of argument that the Learned Magistrate misdirected herself in denying the appellant bail in that she tried the appellant during bail application and found him to be a flight risk on the basis of the investigating officer's allegations that the appellant absconded, without such evidence being tested by cross-examination.

[20] I am also conscious of the fact that the respondent opposed bail by means of an affidavit which was not open to test by cross-examination and therefore, less persuasive[5]

[21] In refusing to grant bail, the Learned Magistrate stated the following: *"in order for the warrant to be authorised the identity of the culprit on the 8 February 2021*

[5] See: S v Pienaar 1992 (1) SACR 178 (W).

*must have been known to the applier of this warrant. Not just a suspicion, based on evidence and the warrant was then requested by the public prosecutor and the magistrate then signed the warrant. What I am trying to say is, even before the arrest of the accused on 13 April, it was known to the state that he committed the offence of the 8 February. So, the accused's evidence that he knows nothing about the incident of the 8 February is hard to believe and the reason why he was not arrested on the 8 February is most probably, and it makes sense with the allegation of the investigating officer, that he fled the scene".*

*….. Considering everything and what I have already said, I am in agreement that it is true that the accused is indeed a flight risk. He has been linked to two similar offences within a period of almost two months, which is indeed very serious offences".*

[22] It is on this basis that advocate Milazi submitted that in expecting the appellant to explain himself as to why he was at a particular place at a particular time, the Learned Magistrate was attempting to conduct a mini trial during the bail application, more particularly when she stated that she does not believe the appellant.

[23] On the other hand, advocate Sivhidzo on behalf of the respondent argued in his heads of argument that the appellant was not honest when he testified that he was transporting live stock for other people. He further argued that the appellant misled the court in an effort to get bail, and submitted that the only reasonable inference that can be drawn from the set of facts is that the appellant flee the scene because he knew that he was driving a hijacked bakkie transporting stolen live stock.

[24] Advocate Sivhidzo also argued that the appellant failed to rebut the State's evidence that the bakkie that he was driving was found to be stolen; that he failed to rebut the evidence that he fled the scene; and that he failed to rebut the evidence that the J50 was issued on 12 March 2021 which led to his arrest on the 13 April 2021. Counsel insisted that with such evidence at her disposal, the Learned Magistrate was "left with no choice" but to consider the appellant a flight risk. He submitted that the Learned Magistrate did not exercise her discretion wrongly or misdirect herself in refusing the application and that the appeal should be dismissed.

[25] In my view, the Learned Magistrate disregarded the principle which relates to the presumption of innocence as the accused person is presumed innocent until proven guilty. It is clear from the judgment that the court was not alive to the provisions of section 35(1)(f) of the Constitution in the exercise of its discretion.

[26] In terms of Section 60(9) of the CPA, 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 following factors, which in my view are the relevant sections in subsection 9, viz. (a) (b) and (d) only, namely-

**(a)** the period for which the accused has already been in custody since his or her arrest – in this regard, the appellant has been in custody since his arrest on 13 April 2021.

**(b)** the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail

**(d)** any financial loss which the accused may suffer owing to his or her detention – in this regard, the personal circumstances of the appellant placed on record

are that he is married and has two minor children aged one year and two years respectively, who are dependent on him for support; that he was self-employed and studying for his BSc degree.

[27] Relying on the case of ***S v Fourie***[6] advocate Milazi submitted that, in refusing to grant bail to the appellant, the Learned Magistrate misdirected herself in failing to consider the personal circumstances of the appellant, as she concentrated more on the strength of the state's case, and further in disregarding the purpose of granting bail

[28] In the case of ***Botha and another v S***[7] the court stated that:

> *"Bail appeals are inherently urgent in nature. An accused person should not be deprived of his or her constitutional rights to freedom and to freedom of movement for longer than is reasonably necessary".*

[29] It has been submitted on behalf of the appellant that he will not violate any of the provisions as laid down in section 60(4) paragraph (a-e). I am of the view that in denying to grant bail to the appellant on the basis that he has been linked to two similar offences which the learned Magistrate considered to be very serious offences, and further that it was hard to believe the evidence of the

[6] 1973 (1) SA 100 (D) at 102H – where the court stated that bail should be considered in light of its Fundamental Principles, and held that the primary consideration is whether the accused will turn up for trial. Further that if no sufficient grounds are advanced for a reason to expect that the accused will flee, the possibility of further crimes is not sufficient reason to refuse bail**.**

[7] 2002 (2) ALL SA 577 (A).

appellant, the Learned Magistrate disregarded the appellant's right to be presumed innocence.

[30] It is also my considered view that denying the appellant the right to be released on bail under those circumstances is tantamount to being found guilty even before the investigations are complete or the complainant's evidence is challenged in court. In the circumstance, it follows that the appeal must succeed. Consequently, I am of the view that the Learned Magistrate exercised her discretion wrongly as it was not in the interest of justice to deny bail to the appellant.

[31] This is by no means a case where the interests of justice require continued incarceration of the appellant. Those interests will be best served by setting the appellant at liberty pending his trial.

[32] Having considered all the factors, arguments and submissions made by both counsels, the following order is made:

1. The appeal against the refusal to grant bail is upheld.
2. The investigating officer should arrange a specific police station within the jurisdictional area where the appellant resides in order for the appellant to report twice daily.
3. The order of the Magistrate is set aside and substituted as follows:
   3.1 The appellant is released on bail in the amount of R 10 000.00 subject to the following conditions:

a) That the appellant must report twice a day between 6:00 and 9:00 and between18:00 and 21:00 at the nearest police station to be arranged by the investigating officer.

a) That the appellant may not leave the area of jurisdiction of Gauteng without first informing the investigating officer, within 72 hours of his travel arrangements. Such information must include the destination to be travelled to and his whereabouts. The appellant must also report to the investigating officer on his return.

b) That the appellant must provide thorough reasons why it is necessary to travel outside the borders of Gauteng and he must submit contact particulars of the person and/or business whom he is going to visit and/or going to work at.

c) That all travelling documents must be handed to the investigating Officer.

d) Should the appellant change his address he must inform the investigating officer accordingly and supply him with the new address.

PD. PHAHLANE

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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| For the Appellant | : Adv A.A. Milazi |
| | Email: a.a.milazi@gmail.com |
| | Cell: 083 597 3247 |
| Instructed by | : TK Segodi Attorneys |
| | Sonpark Building, Mbombela |
| | Tel: (013) 741-3994 |
| | Email: tksegodiattorneys@gmail.com |
| For the Respondent | : Adv L. Sivhidzo |
| Instructed by | : Director of Public Prosecutions, Pretoria |
| | Email: LSivhidzho@npa.gov.za |
| | Tel: (012) 351-6730 |