REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO: BA01/2022

REPORTABLE: YES/NO

OF INTEREST TO THE JUDGES: YES/NO

REVISED.

DATE:4 FEBRUARY 2022

In the matter between:

MOKGAETJI SOPHY MMAKO **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

MANGENA: AJ

[1] On 10 September 2020 Ms Elizabeth Catherine Deacon and Hester Francina Deacon were accosted by the intruders in their house situated in Bendor, Polokwane. They were bundled into the vehicle and later found dead with injuries consistent with ligature strangulation and multiple stab wounds to the chest, back and arm respectively.

[2] The police embarked on a manhunt and arrested 4 (four) suspects in relation to this incident. The suspects were duly charged with two counts of murder, robbery with aggravating circumstances, two counts of kidnapping as well as contravention of the provision of Section 18 (2) (a) of the Riotous Assemblies Act. The appellant, Ms Mokgaetji Sophy Mmako is one of the accused persons.

[3] Subsequent to the arrest, Ms Mmako instituted bail proceedings in the Polokwane Magistrate Court and submitted evidence through the affidavit. In the affidavit she set out her personal circumstances and informed the court that she is employed by the Erasmus family as a house keeper at E[….] Polokwane, she has three children who are all female and are dependent on her. She does not have a passport and no relatives outside the country. She is therefore not a flight risk and if admitted to bail, she will stand the trial. She has a previous conviction of assault GBH which happened in 2005 and was sentenced to 5 years suspended sentence. At the time of the application, she had no pending cases. She further indicated that she intends to plead not guilty to the charges.

[4] The state opposed the application and led the evidence of the investigating officer, Warrant officer Malebana. He confirmed the existence of the previous conviction and stated that it happened in 2001 and not 2005. He opposed to the bail being granted on the basis that *"it will be easy for her to leave the country because of the boyfriend and [that] she has friend like foreigners and we do not have like…… because sometimes she is in Mookgophong, sometimes in Zebediela, sometimes in Westernburg"*. He had however verified that her place of birth is Zebediela and confirmed that he visited her homestead where he found her mother. The mother confirmed that the appellant is her daughter. He further testified that the appellant was arrested after she was called to report at the police station for questioning. In cross –examination he stated that the appellant has confessed to the crimes and the state has a prima facie case against her.

[5] The learned magistrate refused the application on the basis “that the state`s case against her is very strong as well as the fact that she has several addresses and [that] this court deems her to be a flight risk as well”. The court further held that the release of the applicant on bail will undermine public peace or security as there was public outcry and demonstrations since the death of the deceaseds who were well known in Polokwane. She found that she did not prove the exceptional circumstances required by Section 60 (11) (a) of the Criminal Procedure Act 51 of 1977.

[6] Aggrieved by the refusal, Ms Mmako brought another application purportedly on new facts and led the evidence of her daughter, Sheila Lusandra Mmako. She confirmed that her mother is a South African and that she resides in Zebediela together her grandmother and her two sibling. Her grandmother is suffering from Hypertension and needs the support of her mother to look after her. She is unable to do so as she is based in Pretoria where she worked until her retrenchment due to Covid. She is currently looking for a job. This application was also unsuccessful on the basis that the learned magistrate did not accept that there were new facts sufficient to persuade her to consider the application favorably. She stated that she does not believe that Ms Mmako has a residence. She heard that information and she rejected it. It cannot therefore be a new fact.

[7] Unrelenting Ms Mmako approached this court on appeal in terms of the provision of Section 65 (4) of the Criminal Procedure Act to have the decision of the magistrate refusing her bail reconsidered and set aside. It is contended on her behalf that the learned magistrate misdirected herself in several respects in her findings. It is submitted that the findings made were not based on the objective facts. It was argued that the fact that the appellant brought herself to the police station, does not have a passport and no relatives outside the Republic, has a residence in the Republic where two of her children resides are enough to satisfy the threshold requirement for exceptional circumstances. It was further argued that the learned magistrate was biased.

[8] The state, represented by Adv Mthombeni, contended otherwise and argued that there was no misdirection on the part of the magistrate. The appellant is facing serious charges which upon conviction, she may be sentenced to life imprisonment. She had made a confession to the crime and this is sufficient to satisfy the requirement that the state needs only to establish a prima facie case against the accused. Mr Mthombeni further submitted that the appellant is a flight risk in that she gave the investigating officer several addresses which means that it may be very difficult to find her. He denied that the learned magistrate was biased on a proper reading of the record, there are no facts to support the contention. It may very well be that the words regarded as offensive were said with a smile. He urged me to dismiss the application.

[9] The test for bail on appeal is well-established. Hefer J (as he then was) explained it in **S v Barber, 1979 (4) SA 218 (D)** as follows:-

> *"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."*

[10] In relation to the exercise of the discretion in the context of the bail proceedings governed by the provisions of Section 60 (11) (a) of the Criminal Procedure Act, Binns- Ward AJ (as he then was) eloquently explained the approach in **S v Porthen, 2004(2) SACR 242 (C).** He said:

"[8] When considering the extent of an appellate court`s power to interfere with a decision of a lower court entailing the exercise by the lower court of a discretion, it is necessary to know whether the discretion in issue is one in the narrow or wide sense of the term……"

[9] Where the lower court has exercised a discretion in the wide rather than the narrow sense the court of appeal *"is entitled to substitute its view for that of the court which heard the matter and is not precluded from interfering unless it concludes that the lower court has not exercised a judicial discretion."*

[14] On the issue of the existence of extraordinary circumstances within the meaning of Section 60 (11) (a) of the Criminal Procedure Act, there is a `formal onus` of proof on the applicant for bail. The ordinary equitable test of the interests of justice determined according to the exemplary list of considerations set out in S 60 (4) - (9) of the Act has to be applied differently. In my view, a court making the determination whether or not that onus of proof has been discharged exercises a discretionary power in the wide sense of discretion. The appellate court is, in terms of Section 65 (4) of the Criminal Procedure Act, enjoined to interfere with the lower court`s discretion of a bail application if it is satisfied that the lower court`s decision was wrong."

[11] Against the above test, I proceed to consider whether the learned magistrate was correct in her decision that the appellant failed to discharge the onus of proof regarding the existence of the exceptional circumstances.

[12] Section 60 of the Criminal Procedure Act 51 of 1977 provides that an accused person 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. Where an accused is charged with an offence referred to under schedule 6, the accused is required to adduce evidence which satisfies the court that exceptional circumstances exists which in the interests of justice permits his release from custody.

[13] Exceptional circumstances are not defined but the Supreme Court of Appeal per Shongwe AJA provided the following guideline in **S v Bruintjies, 2003 (2) SACR 575 (SCA) at 577**: What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the legislature has attached to the commission of a schedule 6 offence.

[14] In **S v Rudolph, 2010 (1) SACR 262 (SCA)** at 266, Snyders JA explained the purpose of Section 60 (11) (a) and the requirement for exceptional circumstances as follows:-

> *"[9] The Section places an onus on the appellant to produce proof, on a balance of probability, that "exceptional circumstances exist which in the interests of justice permit his release." It contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail, will be resolved in favour of the denial of bail, unless, "exceptional circumstances" are shown by the accused to exist. Exceptional circumstances do not mean that they must be circumstances above and beyond, and generally different from those enumerated in ss (60) (4) - (9). In fact, ordinary circumstances present to an exceptional degree, may lead to a finding that release on bail is justified".*

[15] The appellant was born in 1969 and her personal circumstances were spelt out in paragraph 3 above. At the time of the arrest she was 51 years old with no pending criminal cases. She handed herself to the police upon being called to do so. The investigating officer confirmed that her mother resides in Zebediela and this is the address she gave to him. This address was confirmed by the oral evidence of the daughter during the second application. The evidence of the daughter was not contested by the state and therefore remained unchallenged. Despite this unchallenged evidence on the crucial aspect of residence in the Republic, the learned magistrate without reason stated that she does not believe that the appellant resides in Zebediela. This despite the fact that in her earlier decision when she refused bail, the reason was that she is a flight risk in that she has several addresses.

[16] The learned magistrate has in my view failed to bring an objective and impartial mind in the determination of the issues she was called upon to adjudicate. She placed too much weight on the strength of the state`s case to the total exclusion of other relevant factors to be taken into account in the balancing of the equilibrium. In this regard the magistrate failed to heed the words of Mohamed AJ (as he then was) when he said in **S v Acheson, 1991 (2) SA 805** (**NM)** that: An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court. The court will therefore ordinarily grant bail to an accused unless this is likely to prejudice the ends of justice." This principle was underscored by Chachalia AJ (as he then was) in **S v Branco 2002 (1) SACR 531 (W)** where he said that the fundamental objective of the institution of bail in a democratic society based on freedom is to maximize personal liberty. The court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby. See also **S v Smith, 1969 (4) SA 175 (N).**

[17] In my view, the appellant had discharged the onus required of her and adduced evidence sufficient to meet the exceptional circumstances threshold required by Section 60 (11) (a). The fact that the offence is *"heinous"* can never under any circumstances be used as a sole and determining factor on an issue of bail". The learned magistrate had clearly closed her mind to persuasion and her remark that counsel "can pray as much as he likes, she will not get bail" confirms the view that she was not objective. The words of Ponnan JA are opposite and apply with equal force in the circumstances of this case. In **S v Le Grange and Others, 2001 (2) *SA* 434 (SCA)** the learned judge gave this advice to presiding officers and I deem it appropriate to quote him in full, lest I distort the message:-

> *"[18] Let me immediately state that I recognize that presiding over criminal trials is a difficult task. Where, as here, the killing of the deceased quiete clearly served to polarize that community and there is the added state of acute public interest, the burden on the presiding judge would have been all the greater. Furthermore, one knows all too well how cross-examination can sometimes appear protracted and seemingly irrelevant. Impatience, though, is something which a judicial officer must, where possible, avoid and in any event always strictly control. For, it can impede his perception, blunt his judgment and create an impression of enmity or prejudice in the person against whom it is directed, particularly when such person is an accused person. It may serve to undermine the proper course of justice and could lead to a complete miscarriage of justice. A judicial officer can only perform his demanding and socially important duty properly if he also stands guard over himself, mindful of his own weakness (such as impatience) and personal view and whims and controls them".*
>
> [21] *It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy it is*

important that the public should have confidence in the courts. Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. Impartiality can be described-perhaps somewhat inexactly-as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. Bias in the sense of judicial bias has been said to mean a departure from the standard of even-handed justice which the law requires from those who occupy judicial office. In common usage bias describes "a leaning, inclination, bent, or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

[18] In casu the record is riddled with intermittent interjections from the presiding officer during cross- examination by the appellant's legal representatives. During the evidence in chief by the daughter of the appellant, the learned magistrate made unsavoury remarks on the plight of the unemployed daughter of the appellant, when she said she was staying in Pretoria looking for a job. The learned magistrate told her that "she is doing nothing there". I find it extremely disconcerting for a presiding officer to equate searching for a job with "doing nothing". The remarks were not only unsavoury but demonstrated lack of empathy and poor choice of words on the part of the learned magistrate.

[19] What I say above should in no way be construed to mean that a presiding officer should lie supine during the proceedings. As a matter of fact, Judges and by extension magistrates are not silent umpires but may and should participate in

the trial proceedings by asking questions, ensuring that litigants conduct themselves properly and making rulings on the admissibility of evidence and other matters as the trial progresses. Where litigants or lawyers conduct themselves inappropriately and judicial censure is required that should be done in a manner befitting the judicial office. Indeed a presiding officer should seek to be measured and courteous to those appearing before them. See **S v Basson, 2007 (3) SA 582 (CC) at para 33-36** and the case referred to.

[20] In the circumstances I conclude without equivocation that the learned magistrate failed in her judicial duties and exercised her discretion injudiciously. I am therefore at liberty within the meaning of Section 65(4) of the Criminal Procedure Act to interfere with her wrong decision to refuse bail.

[21] ORDER

1. The appeal succeeds and the magistrate's order refusing bail is set aside.
2. Bail is fixed in the amount of R1000-00(One thousand rand) subject to the following conditions"

(a) The appellant shall report twice per week on Tuesday and Friday at Magatle SAPS in Zebediela area between the hours 09h00 and 14h00 each day

(b) The appellant shall not leave her area of residence, Zebediela without notifying the investigating officer or his authorised delegate.

(c) The appellant shall refrain from communicating with any witness save with the permission of the investigating officer or his authorised delegate.

MANGENA AJ.
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

COUNSEL FOR THE APPELLANT **D.E SEABELA**
INSTRUCTED BY **NCHA M.B ATTORNEYS**

COUNSEL FOR THE RESPONDENT	**T.J MTHOMBENI**
INSTRUCTED BY	**DPP**
DATE OF HEARING	**31 JANUARY 2022**
DATE OF JUDGMENT	**04 FEBRUARY 2022**