IN THE CAPE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 153/2008

In the matter between:

BRENDAN FAAS Appellant

vs

THE STATE **Respondent**

JUDGMENT: 29 APRIL 2008

Meer, J:

[1] This is an appeal in terms of Section 65 of the Criminal Procedure Act No. 51 of 1977 ("the Act") against the refusal by a Magistrate of the Blue Downs Magistrate's Court to grant bail to the Appellant on 19 December 2007. The Appellant is to be tried later this year in this Court as a Superior Court. The notice of appeal indicates that the Magistrate refused to grant bail on new facts.

[2] The charges for which the Appellant is to be tried in this Court, as contained in the indictment, are as follows:

1. Conspiracy to murder Lukas Kok in contravention of Section 18 Act 17 of 1956.
2. Attempted murder of Lukas Kok.
3. Murder of Michaela Kok.

4. Possession of firearms without the requisite license in contravention of Act 60 of 2000.
5. Possession of ammunition without the requisite license in contravention of Act 60 of 2000.
6. Conspiracy to murder Elverecia Pennings in contravention of Section 18 of Act 17 of 1956.

[3] The grounds of appeal in essence are that the Magistrate erred in finding there to have been no exceptional circumstances justifying the Accused's release on bail, and in not having due regard to his personal circumstances as well as the factors listed in Section 60(4) to (9) of the Act.

[4] Two bail applications were brought in the Court *a quo* by the Appellant. In refusing the first application on 13 September 2007, the Magistrate found on the evidence, that Appellant planned to kill a state witness. She also found there to be an absence of exceptional circumstances. In refusing the second bail application on 19 December 2007, on new facts, the Magistrate found no reason to deviate from her decision not to grant bail.

[5] The record of the proceedings in the Court *a quo* make for confused and difficult reading. The transcript clearly does not record all that was said in Court, is peppered with the comment "inaudible" next to incomplete sentences, and the reader is required to read between the lines, as it were. This is unsatisfactory. It goes without saying that proceedings must be properly transcribed and checked in the interests of justice. This is

especially so to enable expeditious and efficient appeal proceedings.

[6] A further unsatisfactory factor, as appears from the record, is that the charge sheet for the charge of conspiracy to murder a witness, the charge in respect of which Appellant applied for bail, was not before the Court *a quo* during the bail applications. Instead an incorrect charge sheet for the charge of attempted murder was presented to the Court *a quo*.

[7] From a reading of the problematic record of the two bail applications, I was with difficulty able to cobble together the following background facts, which were today confirmed by counsel at this hearing: The appellant and three others were charged with the murder of a baby, Michaela Kok. The state alleges that they had aimed and planned to kill her father Lucas Kok, a gang leader, but had shot his baby daughter instead, who was in his arms at the time. The motive for the murder according to the testimony of Investigating officer Captain Pretorius, was drug related, and the murder of De Kok had been planned by Appellant who himself was not present at the shooting.

[8] The Appellant and two of his co accused to the murder charge were each granted bail of R500. It would appear that the only bail condition was that Appellant could not enter the area of Spandou in the Western Cape. According to Captain Pretorius, the reason for bail being granted to Appellant on the murder charge, was that the names of the state witnesses had not been

disclosed. Whilst out on bail, the Appellant was rearrested and charged for conspiring to murder a key state witness in the murder trial. It is in respect of the refusal of bail on that conspiracy charge that the current bail appeal stems.

[9] Testifying at the first bail application in the Court *a quo*, Captain Pretorius stated, appropo the conspiracy charge, that he had a statement from one of the persons involved in planning to kill the key witness in the murder trial, to the effect that Appellant had planned that the witness, a woman of 25, would be shot by someone else whilst walking in an alley, after being fetched from her house. He also had other supporting statements to this effect. Pretorius had also received complaints that Appellant had not adhered to his bail condition.

[10] In his testimony Appellant himself confirmed there was a plan to kill the state witness but denied he was involved. He had heard from one, Mogabe, that the witness was dangerous and must be killed. He claimed to have abided by his bail condition, attested to a fixed address of 20 years, to being in a relationship for 3 years and having held down fixed employment for 5 years. He had contact with one of his 3 co accused in the murder trial. This much appeared from the proceedings in the first bail application.

[11] In refusing the first bail application, the Magistrate accepted Pretorius's testimony about Appellant's plans to kill a witness, and cited Section 60 (4)(vi) of the Act which excludes bail where there

is a likelihood that an accused will attempt to influence or intimidate a witness or destroy evidence. She stated also that as Appellant was involved in a murder case with other accused, he had to show exceptional circumstances existed in the interests of justice permitting his release on bail, and had failed to do so. Her reference to exceptional circumstances is somewhat baffling, there being no evidence before her that the bail application pertained to a Schedule 6 offence, which requires the consideration of exceptional circumstances as a factor.

[12] At the second bail application on 19 December 2007, the Appellant attempted to procure bail on new facts. From the record of those proceedings, (also again punctuated with the word "inaudible",) it would seem that Mr Scott for Appellant presented as a new fact that Appellant himself had been threatened at the instance of Lucas De Kok, aforementioned, by the latter's girlfriend. Mr Scott said he was applying for bail on these new facts "*ex parte*", and that Appellant would not testify. What then followed in Scott's submissions on the new facts, approximated Scott's giving evidence from the bar, untempered, I note, by either the prosecution or the Court.

[13] The prosecutor indicated that the state was not in possession of the dockets and it was difficult to consider the facts. The question then arose as to whether the murder charge against Appellant was a Schedule 5 or 6 offence. There was some deliberation on this aspect but no clarity emerged. Captain Pretorius who again testified, once more opposed bail, adding as

another reason for refusal, the fact that, from the new evidence the Appellant's life was now also in danger.

[14] In her judgment on the second bail application, after acknowledging that the application was on new facts, and that the previous bail application had been refused, the Magistrate once again, out of the blue it would appear, made the following somewhat incoherent and startling observation, and I quote:

"This bail application at that stage was treated as Schedule 6 which the defence confirmed thereto. And that's for the purpose of this bail on new facts seeing that this is (s)till a question the Court will again make a comment thereto and show why does the Court rule that it is still a Schedule 6" [1].

[15] She then said,

"…the Court agrees the conspiracy to murder on this matter is a Schedule 1 because it falls under Schedule 1. But accused is out on a Schedule 6 matter where there is four accused that acted in February of a common purpose that made Schedule 6. I will comment if and when called upon to do so but my view is that this is a Schedule 6 bail application."[2]

I note that the Magistrate did not comment on this aspect when reasons were requested from her for the purpose of this appeal, stating merely in lieu of reasons that she had nothing further to add.

[16] The judgment concluded that in the previous bail application, bail was refused because a witness was planned to be killed. In the second application the new facts indicated that if bail was granted there would still be a problem as the accused and the witness are in the same area. Bail was then refused.

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1 lines 5to 25; p67 lines 1tp2"
2 Record page 68 line 8 to 20

[17] It is difficult from the record or indeed the indictment to find support for the Magistrate's conclusions that the murder with which the Accused is charged is a Schedule 6 murder, and that any of the bail applications were in respect of a Schedule 6 offence. There is no charge sheet in the record to this effect, nor does the indictment reflect a Schedule 6 offence. The only charge sheet in the Court *a quo*, as aforementioned, was the incorrect one for attempted murder. The record, on the contrary, indicates that the two bail applications were in respect of a charge for conspiracy to murder, that bail of R500 had already been granted on the murder charge whereafter the current conspiracy charge arose.

[18] It is further difficult to understand why, if the Magistrate concluded she was dealing with a bail application for a Schedule 6 offence, she did not consider in terms of Section 60 (11) (a) of the Act, at the second bail application, if exceptional circumstances existed which in the interests of justice permitted Appellant's release, the applicable test in bail applications for Schedule 6 offences.

[19] As is well known an Accused who has been charged with an offence referred to in Schedule 6 of the Act, faces the onus to adduce evidence to satisfy a Court on a balance of probabilities that exceptional circumstances exist which in the interests of justice permit his release. Examples as to what would constitute exceptional circumstances in the context of Section 60(11)(a) range from exceptional circumstances relating to an Accused's

emotional condition that render it in the interests of justice that release on bail be ordered notwithstanding the gravity of the case, (*S v Dlamini 1999(2)* SACR 51CC, at paragraph 76), to strong independent evidence of an Accused's innocence indicating reasonable prospects of success at his trial, (*S v Mohamed 1999(2)* SACR 507 at 514d), acceptable evidence that the prosecution's case against an Accused is non-existent or subject to serious doubt, an urgent serious medical operation or terminal illness (*S v Jonas 1998(2)* SACR 673(SEC) at 678e-i). The Appellant failed to adduce any evidence which approximated the existence of exceptional circumstances which in the interests of justice permitted his release and the Magistrate appeared not even vaguely to have enquired into this aspect before reaching her conclusions.

[20] In simply concluding without any confirmation, as she did, that a Schedule 6 offence was applicable after this question arose as aforementioned, the Magistrate, in my view was in contravention of Section 60(11A)(c) of the Act which states:

> "Whenever the question arises in a bail application or during bail proceedings whether any person is charged or is to be charged with an offence referred to in Schedule 6, a written confirmation issued by an attorney general under paragraph (a) shall, upon its mere production at such application or proceedings, be *prima facie* proof of the charge to be brought against that person."

The Magistrate could also under Section 60 (3) of the Act, have ordered that information be placed before her on this aspect, or have called for the missing docket. The record does not indicate that she resorted to either of these measures.

[21] It became common cause during the appeal proceedings, that both bail applications pertained to the charge of conspiracy to murder, a Schedule 1 offence. The provisions of Section 60 (4) are relevant to the determination of bail for such an offence. Given the undisputed evidence about a plan to kill a key witness and the additional evidence of threats of violence against the Appellant, I am satisfied that the grounds set out at Section 60 (4) (a), (c) and (d) of the Act for refusing bail, have been established, and the interests of justice do not permit the Appellant's release, for this reason.

[22] Section 65(4) of the Criminal Procedure Act provides that this Court can set aside a decision in respect of bail, against which an appeal is brought, if satisfied that the decision was wrong. In light of all of the above, whilst I am critical of and indeed puzzled by of the Court *a quo's* reasoning, I am nonetheless of the view that the decision to refuse bail was not wrong. The appeal is accordingly dismissed.

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MEER, J