Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Coram: LE GRANGE, J

REPORTABLE

CASE NO. A479/14
DPP REFERENCE NO: 9/2/5/1 – 61/14
LOWER COURT CASE NO: 30/25/2011

In the matter between:

ASANI MWAKA **Appellant**

And

THE STATE **Respondent**

JUDGMENT: 05 December 2014

LE GRANGE,

[1] This is an appeal against the Regional Court Magistrate's refusal to grant the appellant bail pending the finalization of his trial in the Cape Town Regional Court.

[2] The Appellant, a Tanzanian born citizen who presently resides in South Africa, with a co-accused is charged with committing the following offences: first, contravening the provisions of Section 5(b), read with Sections 1, 13, 17 to 25 and 64 of the Drugs and Drug Trafficking Act 140 of 1992 (Read with the provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997), namely, dealing in dependence-producing substances, alternatively, the unlawful possession of dependence-producing drugs; and secondly, contravening the provisions of s 3(b) read with s 1, 2, 24, 25, 26(1)(a)(ii) and 26(3) of the Prevention and Combating of Corrupt Activities Act, 12 of 2004.

[3] It is common cause, given that the offences the Appellant is charged with fall within the ambit of Schedule 5, the magistrate correctly applied s 60(11) of the Criminal Procedure Act, no 51 of 1977 ("the CPA") in terms of which, where an accused person is charged with a Schedule 5 or a Schedule 6 offence, the onus rests upon the accused to satisfy the Court that the interests of justice permits his release.

[4] The Appellant did not testify during his bail application in the court *a quo* but submitted an affidavit. This practice has now become a common feature in proceedings of this nature. The Appellant's affidavit detailing his circumstances was received as exhibit "A". His wife filed a confirmatory affidavit as exhibit "B". Attached thereto were annexures A – H2. Exhibit "C" was a letter by Firstwatch Fire Services CC stating that the Appellant started his employment in 2012.

[5] The nub of the Appellant's grounds of appeal is the Regional Magistrate's alleged failure to properly consider suitable and or stringent conditions as an alternative to the denial of bail in the present circumstances. Moreover, the Appellant alleges that the state's case against him in respect of the dealing and possession of dependence-producing drugs is far from convincing.

[6] It is common cause that the Appellant, with a co-accused, appeared on 25 May 2011 in the Regional Court. On that occasion the case against both of them was postponed until 6 of June 2011 and they were granted bail. The Appellant and his co-accused failed to appear in the Regional Court and warrants for their arrests were issued in June 2011. Their bail monies were also subsequently forfeited to the State.

[7] According to Constable Plaatjie, the police official who testified in the court a quo, upon receiving the warrant of arrest from the Regional Court he went to search for the Appellant and his co-accused at their given addresses. He obtained two further warrants of arrest from the District Court where the Appellant also failed to appear in other matters. It further transpired that in the beginning of June 2011, before his appearance in the Regional Court, the Appellant was again arrested in a sting operation by the police for dealing in dependence-producing drugs. Different addresses were given by the Appellant in these matters to the police. Plaatjie testified he could not locate the Appellant after a diligent search at the given addresses. In the beginning of

2012 Plaatjie caused the warrants of arrest to be circulated throughout the Country. Plaatjie was unable to confirm when and at what border posts the appellant exited or entered the country. According to Plaatjie the Appellant should have been arrested at the border posts on entry as the warrants for his arrest were circulated country-wide. It needs to be mentioned that the charges in the other Courts also relate to the unlawful possession and dealing in of dependence-producing drugs.

[8] According to Plaatjie, the Appellant fortuitously showed up on 5 August 2014 at the Woodstock police station for an unrelated matter. It was then that he recognized the Appellant and re-arrested him.

[9] It is not in dispute that the Appellant had four different matters pending against him before his disappearance and in all these matters he was granted bail. It is also common cause that after his arrest the Appellant pleaded guilty to the charges dating back to between 2010 and 2011 and was accordingly convicted and sentenced. The two counts of possession of drugs were taken together for the purpose of sentencing and the appellant was sentenced to a fine of R2000.00 or 2 months imprisonment. In respect of the dealing in drugs charge the Appellant was sentenced to a fine of R6 000.00 or 18 months imprisonment. In addition, the Appellant was sentenced to a term of 36 months' imprisonment which was wholly suspended for a period of 5 years on condition that he was not again convicted of contravening the provisions of sections 5(b) or 4(b) of the Drugs and Drugs Trafficking Act, 140 of 1992.

[10] The Appellant in his affidavit advanced a number of reasons why he failed to appear in the Courts in 2011. Briefly stated, the Appellant avers that his then girlfriend (now his wife) and him went to his father's funeral in Tanzania. There he and his wife were involved in an accident. The Appellant and his wife claim that their belongings and travel documents were stolen at the accident site. His wife apparently became ill which caused them to only return to South Africa, Cape Town, in January 2012. The Appellant further states that his wife and children do not have valid passports. According to the Appellant once his wife obtained the necessary travel documents they departed Tanzania for South Africa. The Appellant also avers that 'as a foreigner in South Africa he had some bad experiences and had heard horror stories of experiences other people have suffered in the justice system'. Therefore according to him he did not report to the Court upon his arrival in Cape Town in 2012 as he feared a long period of incarceration.

[11] The Appellant's wife claims she wanted to apply for a passport in Tanzania but was given temporary travel documents. A document purporting to be a receipt from the South African Department of International Relations and Cooperation which reflects an amount of 86 000 Tanzanian Shillings was attached as annexure D to the affidavit in support of the contention that certain temporary travel documents were issued to her. The date stamp on the document is illegible and it is unclear from the affidavit when and under what circumstances this document was issued. It is further unclear from the

Appellant's affidavit what documents he used to travel to South Africa. The evidence from both the Appellant and his wife is extremely vague as to when in January 2012 they entered South Africa and at what border post they entered the country. The Appellant's wife further avers she became ill and contracted tuberculosis and malaria whilst in Tanzania and a document purporting to be a hospital card was attached as annexure D. The language in the document appears to be foreign and the document was not translated into one of South Africa's official languages. It is also unclear from the affidavit on what portions of the document reliance is placed. The annexures relating to the Appellant's employment at Firstwatch Fire Services CC indicates that he was in their employ since 2012 but when in 2012 is also not clear from the documents.

[12] It is now well established in our law that a bail applicant may not be deprived of the right to testify in the application and an affidavit is admissible and in certain instances more convenient. A Court hearing a bail application is therefore, in terms of s 60(2)(b), (2)(c) and (2A) of the CPA, expressly given the power to receive information or data which is common cause and regarding matters which are in dispute, to receive evidence. In terms of s 60(11B)(c) of the CPA the accused's evidence at a bail hearing is admissible at the trial. It is therefore not uncommon that an accused person may be advised to stay out of the witness box in order to avoid being cross-examined, given that the accused's answers may prove harmful and detrimental at the trial. This however does not mean that the affidavit(s) and supporting document(s) of a bail applicant should be assessed differently. The golden rule is still that it must be assessed

according to its worth in light of the other evidence and circumstances. Moreover, our law is replete with authority as to the functions of affidavits in cases. In Swissborough Diamond Mines (Pty) Ltd and Others v Government of the RSA and Others 1999 (2) SA 279 (T) at 324 F – G it was held that: *'Regard being had to the functions of affidavits, it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed.'*

[13] In casu, if one has regard to some of the annexures that were attached to the affidavits in this case they clearly fall short of what is the established practice and referred to in the Swissborough Diamond case *supra*.

[14] Returning to the issues at hand. The Appellant's attorney Mr. Booth in essence argued that the Appellant has made out a good case to be released on bail with appropriate conditions and his return to South Africa is also a strong indication that he will stand his trial. It was also suggested by Mr. Booth that the detention of the Appellant since 5 August 2014 is sufficient punishment and a deterrent to comply with his bail conditions. This in my view is an incorrect manner to approach bail. The fundamental principal in our law is that respect for the freedom of a person demands that bail only be refused where there is a real danger that justice will not be done.

[15] Ms Thaiteng on behalf of the State contended that there was no misdirection on the part of the court a quo. Moreover, all the factors and surrounding circumstances were properly considered and bail was correctly denied by the Regional Magistrate.

[16] In terms of s 60(4) of the CPA the basic principle in our law is that bail ought to be granted for an Applicant unless it is not in the interests of justice. In casu, the onus is on the Appellant to convince the court on a balance of probabilities that the interests of justice do not require his further detention. In this regard see S v Swanepoel 1999(1) SACR 311(O).

[17] It is common cause that the Appellant absconded from court proceedings since 6 June 2011 and was only re-arrested on 5 August 2014. On his own version he left South Africa for Tanzania and returned in 2012. The Appellant essentially advanced two reasons for his failure to report at the Court or the police, on his return from Tanzania. The first is his inability to afford an attorney at the time. The second is the claim that as a foreigner in South Africa he had some bad experiences and heard some horror stories of experiences other people had suffered in the justice system. Therefore according to him he did not report to the Court upon his arrival in Cape Town in 2012 as he feared a long period of incarceration.

[18] On the undisputed facts, the Appellant was arrested for the first time on 1 November 2010 for possession of 15 units of heroin. Five days later, Appellant was arrested for the second time for possession of 250 units of heroin. A month later Appellant was arrested for the third time for dealing in drugs in an undercover operation. Five months later, the Appellant was arrested for the fourth time for a similar offence (which is the current case pending in the Regional Court). The Appellant faces a further charge of corruption where the allegation is he tried to bribe police officers not to arrest him. It needs to be mentioned that the Appellant was granted bail in each of these matters.

[19] The Appellant's reasons for not attending court are simply unconvincing. Even if it is accepted that he was in Tanzania for a period of time, the Appellant's explanation for his failure to report at Court or at the police at the first reasonable opportunity to explain his absence reeks of a cheap attack on our criminal justice system. There is no allegation being made by the Appellant that as an accused person his s 35 Constitutional Rights were not adequately explained to him. Furthermore, the Appellant failed to substantiate his claims of 'horror stories other people suffered in the justice system'. In fact the Appellant's own circumstances demonstrate the contrary. He was arrested in rather quick succession on four different occasions committing similar offences in 2010 and 2011 and was granted bail in each of these instances by the lower courts.

[20] It is difficult to imagine how stringent bail conditions in the circumstances of this case would be effective in ensuring attendance at court, if the Appellant previously has given four different addresses that successfully caused him to evade the police. Furthermore, the ease with which the Appellant, who is a foreign citizen, crossed South Africa's borders is also cause for concern as to whether indeed he will stand his trial despite his present personal and family circumstances.

[21] In S v Petersen & Another 1992(2) SACR 52 (C) at 55 d – f, the following was held:

> *'It is true that the accused have appeared in court where previously bail was granted. But mere attendance at court does not necessarily negative a propensity to traffic in drugs. The purpose of granting an accused bail is to minimise interference in his lawful activities. But where there is evidence from which the inference to be drawn is that the accused has abused the grant of bail by indulging in the same criminal conduct, drug trafficking, society is entitled to be protected against the risk of repetition of drug trafficking, of the same criminal misbehavior. Then the interests of society outweigh the rights of the lawless individual. Drug trafficking is detrimental to society, and it is not in the interests of society that the appellants, who have displayed a blatant disregard for the law, be granted bail and let free on society'.*

[22] Even though the above matter was decided prior to the commencement of our constitutional era and before the amended s60 of the CPA, I fully agree with these sentiments as they are still very relevant today. In the present instance the Appellant showed a flagrant disregard for the law and unashamedly continued with the possession and trafficking of drugs to which he has subsequently been found guilty and sentenced. In my view, in considering all the relevant factors to release the Appellant under these circumstances on bail again will bring the administration of justice into disrepute.

[23] On a conspectus of all the evidence in this bail appeal I am of the view the Appellant failed to show that the Regional Magistrate erred in refusing the granting of bail. On the contrary, I am of the view the Regional Magistrate's decision was correct. Accordingly the appeal cannot succeed.

[24] In the result the following order is made.

The appeal is dismissed.

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LE GRANGE, J