OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

In the High Court of South Africa
(Western Cape Division, Cape Town)

High Court Ref No: A180/21
Magistrate Serial Number: 16/265/2016

In the matter between:

SIMTHOLE MPANDE **Appellant**

And

THE STATE **Respondent**

JUDGMENT ON BAIL APPEAL 08 NOVEMBER 2021

LEKHULENI AJ

[1] This is an appeal against the refusal of bail against the appellant. On 07 May 2016, the appellant and his two co-accused brought a formal application for bail in the Cape Town magistrate's court. Their application to be released on bail was refused. At the hearing of that application, the appellant was represented by Mr Ahmed from the Office of the Legal Aid. The appellant now appeals against that decision in terms of section 65(1)(a) of the Criminal Procedure Act 51 of 1977 *("the CPA").* This court was informed at the hearing of this appeal that the trial of the main

case is pending in the Regional Court before Mr Msingapantsi in Cape Town Regional Court. The appellant is standing trial with two co-accused on three charges of robbery with aggravating circumstances and one count of attempted Murder. At the hearing of this appeal, the record of proceedings of the Regional Court before Mr Msingapantsi did not form part of the application before me. However, I have only had sight of the record of the appellant's unsuccessful bail application in the Magistrate's Court, which was heard in July 2016.

[2] Gleaned from the record of proceedings placed before me, during the bail proceedings, the appellant testified in support of his application to be released on bail. He testified that he was 29 years of age and that he resided at No [….] for about nine years. Prior to his arrest, he resided with his siblings who were attending school. His siblings were still very young and depended on him. He is not married but had a girlfriend. His girlfriend lives in the same vicinity in Phillipi. He testified that he does not have children with the current girlfriend. However, he has two children with his erstwhile girlfriend who lives in the Eastern Cape. The two children are currently living with his parents in the Eastern Cape. He testified that he was employed as a taxi driver since 2006. From his employment as a taxi driver, he earns R800 per week. He spends his salary to support his siblings. He occasionally supports his children in the Eastern Cape with his income.

[3] It was his testimony that he has one previous conviction of robbery committed in 2014 where he was sentenced to two years imprisonment. He informed the court that he does not have any pending cases against him or any outstanding warrants. He was warned of his rights not to incriminate himself regarding the merits of the

current case and he understood. He did not give any evidence at all relating to the merits of the case and he did not answer any questions put to him by the prosecutor during cross-examination relating to the merits of the case.

[4] On behalf of the state the investigating officer, Warrant Officer Lewis Arthur Western *("Warrant Officer Western")*, testified. He gave details of the offence which the appellant and his co-accused were charged with, namely; that it concerned two armed robberies of two shops. Warrant Officer Western's evidence was that on 26 April 2016 two shops were robbed which are approximately 60 meters apart from each other and that the modus operandi of the robbery was precisely the same. He informed the court that according to witnesses who witnessed the two robberies in both shops, the four suspects arrived at the shop where one suspect watched at the door while the other three suspects entered the shop. Two of the suspects who entered the shop had firearms while the other had a green bag.

[5] It was further the evidence of Warrant Officer Western that the customers in the two shops were told to lay down and thereafter the shops were searched for cash, cigarette and airtime. At the second shop, one victim was shot after he tried to grab the firearm from the suspect. The victim was shot in the leg and he managed to hold on to the firearm. The police were contacted after the first shop was robbed and the police spotted two suspects running down the street and one of the suspects was holding the green bag which was used to put the loot of both shops. The police immediately called for backup and gave a description of the two suspects. The appellant and his co-accused (accused number 2), were arrested not far from the scene at a parked Golf vehicle which belonged to the appellant's brother. On

searching the appellant and his co-accused a firearm was found in the possession of the appellant's co-accused. After further investigation, one of the witnesses in the shop had recognised the appellant's co-accused 3 from the scene.

[6] An identity parade was held and witnesses pointed the appellant and his co-accused as the perpetrators of the two robberies. Warrant Officer Western confirmed that the appellant had a previous conviction of robbery committed in 2014 and has no outstanding warrants and or pending cases. The investigating officer also confirmed that the appellant was found inside the Golf vehicle which was not parked far from the scene of crime shortly after the commission of the offence. It is the state's case that this vehicle was to be used as a getaway vehicle by the suspects. Nothing was found in the appellant's possession.

[7] It is worth noting that the appellant did not say anything regarding all the allegations of robbery levelled against him by the state. He chose to remain silent and not to incriminate himself.

[8] It is trite that a court or a judge hearing an appeal in terms of section 65(4) of the CPA 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 shall give the decision which in its opinion the lower court should have given. Kriegler J, as he then was, made the following remarks in *S v Dlamini: S v Dladla and Others; S v Joubert: S v Schietekat,* 1999 (2) SACR 51 (CC).

> "What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted."

[9] The offences which the appellant is facing are offences listed in Schedule 6 of the CPA. The appellant therefore had to persuade the Court *a quo* on a balance of probabilities that exceptional circumstances existed to permit his release on bail. An assessment of the strength of the state's case is germane and apropos to an enquiry as to the existence of exceptional circumstances.

[10] In *State v Dlamini* (CA&R 117/07) (07 March 2008)(NC) at para 13, Majiedt J, as he then was, observed that in the course of a bail application, the presiding officer does not have to make a finding, even on a provisional basis, as to the guilt or innocence of an applicant for bail. All the Court has to do is to weigh the *prima facie* strength or weakness of the state's case and such a decision ought not to be made with regard to credibility findings in order that bail proceedings do not become a dress rehearsal for the trial itself. See in this regard: *S v Van Wyk* SACR 2005 (1) 41 at para 6.

[11] As stated above, the appellant had to prove the existence of exceptional circumstances within the meaning of section 60(11)(a) of the CPA. In this case, the appellant only placed two reasons for consideration by the bail court for his release on bail, namely; that he wanted to look after his children who are residing with his mother in the Eastern Cape and that he wanted to look after his siblings. The appellant did not negate or say anything regarding charges levelled against him.

[12] It has to be emphasised that in order to establish whether the appellant has discharged the onus in terms of section 60(11)(a) of the CPA, the magistrate was constrained to determine whether on the facts of the case, the proven circumstances can be said to be exceptional. This entailed the making of a value judgment on the part of the bail court. See in this regard: *S v Botha en ander* 2002(1) SACR 222 (SCA) at para 19 (230 a-b).

[13] In her judgment, the magistrate found that there was a strong case against the appellant. In refusing bail, the magistrate made the following pronouncement:

"And from what was testified in the absence of any alibi or anything from the defence's side it seems that there is a strong prima facie case against the accused …. the court needs to ascertain whether exceptional circumstances exists and when the court looks at the factors I have just indicated the court needs to highlight the following first:

- *First of all outset, onus is on the three applicants, they face very serious charges of robbery aggravating as well as attempted murder.*
- *There is independent eye witnesses that gave statements and identified the accused.*
- *The complainant got hurt, got shot and that might be a danger to society….*
- *No alibi or independent evidence was tendered to clearly show that the applicants were not involved. And with that into consideration the court cannot find a single exceptional circumstance that can say that the accused indeed prove to the court that it will be in the interest of justice to grant bail". ("magistrate's text quoted verbatim")*

[14] In my view, the conclusion of the magistrate is properly supported. In addition, from the totality of evidence placed before court, the magistrate cannot be faulted in her finding that there was a strong *prima facie* case against the accused, based on the evidence of the investigating officer. I am not persuaded at all that the magistrate was wrong in her refusal of the appellant's bail application.

[15] Furthermore, I am of the view that, in light of the seriousness of the charges levelled against the appellant, the strength of the state's case, the previous conviction of the appellant, the fact that the matter is partly heard before the Cape Town Regional Court and the high probability that, if convicted, the appellant will be sentenced to a long term of imprisonment, it is not at all possible for me to conclude that the magistrate was wrong in denying the appellant bail.

[16] Notably, the appellant has a previous conviction of robbery which was committed in 2014. He is standing trial on three charges of robbery with aggravating circumstances and on a charge of attempted murder which were committed in 2016, a year or so after he was convicted of robbery. In her judgment, the magistrate considered the likelihood whether if released on bail, this will undermine or jeopardise objectives of the proper functioning of the criminal justice system. Having considered this fact and other aspects, she concluded that the accused failed to discharged the onus vested on him in terms of section 60(11)(a) of the CPA. In my view, the decision of the magistrate in this regard was correct and cannot be questioned.

[17] As stated above, the appellant is facing very serious charges. He has a previous conviction of robbery of 2014. The current charges were allegedly committed on 25 April 2016. In my judgment, if the accused is released on bail, he is likely to commit other offences. In the premises, I am not persuaded at all that the magistrate was wrong in her refusal of the appellant's bail application. In any event, there were no exceptional circumstances that were shown by the appellant to be entitled to be released on bail. That then makes me to conclude that there is no basis in law for this court to interfere with the discretion exercised by the Magistrate. In my view, the appeal must therefore fail.

ORDER

[17] In the result, the following order is made:

17.1 The appeal is dismissed.

LEKHULENI AJ

ACTING JUDGE OF THE HIGH COURT