



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

Bail appeal case number: A28/2022

Magistrate's Court case number: G914/2021

In the matter between:

PRINCE DANIEL ANINWANGU

Appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED ON 28 APRIL 2022

VAN ZYL AJ:

Introduction

1. This is an appeal by the appellant against the refusal of bail by the Bellville Magistrate's Court on 17 December 2021.

2. The appellant is charged with two counts, namely (1) dealing in drugs and (2) the contravention of section 49(1) of the Immigration Act 13 of 2002 (it is alleged that he remained in the Republic of South Africa illegally). It appears from the record that on 24 November 2021 near Delft the appellant, together with his co-accused, were found in possession of Mandrax and Tik valued at approximately R1,4 million. The State further alleges that the appellants does not have the required immigration status in the Republic.
3. Aggrieved by the refusal of the bail application, the appellant appeals against the refusal in terms of section 65(1) of the Criminal Procedure Act, 1977 ("the CPA"). The appellant refers to the fact that he has a family in Cape Town, including three children attending school, living with him and dependent on him. He argues that the magistrate was wrong in refusing bail, as it misdirected itself as regards the law and the facts.
4. In the premises, the appellant seeks that his appeal be upheld and for an order releasing him on such conditions as this Court may deem fit.
5. The State opposes the appeal upon considerations that will be dealt with in the course of the discussion below.

The appellant stands accused of Schedule 5 offence

6. The charges faced by the appellant render Schedule 5 of the CPA applicable

to this matter.

7. The starting point in bail applications generally is section 60(1)(a) of the CPA, which provides that *“an accused who is in custody in respect of an offence shall ... 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.”*
8. Section 60(4) enjoins the Court, in determining a bail application, to have regard to the following factors in deciding whether to grant bail:

“The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

- (a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or*
- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or*
- (c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or*
- (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or*
- (e) where in exceptional circumstances there is the likelihood that the release*

of the accused will disturb the public order or undermine the public peace or security.”

9. Section 60(11)(b) of the CPA provides as follows:

“Notwithstanding any provisions of this Act, where an accused is charged with an offence referred to-

(a) ...

(b) In Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release”.

10. In *Ntoni and others v S* (5646/2018P) [2018] ZAKZPHC 26 (21 June 2018) at para [25] the Court held that a presiding officer must weigh up the personal interests of the appellant against the interests of justice as it appears from all of the evidence presented.
11. Bail appeals are *sui generis*. They are appeals in the wide sense. If there was any misdirection on the part of the lower court, the appeal court engages in a complete rehearing and re-adjudication of whether bail should be granted. This is subject thereto that in terms of section 65(2) of the CPA, read with section 63(3), the Court is bound by the record, and there is no scope for placing additional facts before the Court for the purposes of the hearing on appeal (*S v*

Ho 1979 (3) SA 734 (W) at 737G).

12. Section 65(4) of the CPA provides 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.*” In *S v Vanqa* 2000 (2) SACR 371 (Tk) the Court held at page 372 that “*It is quite clear from the provisions of the subsection that the duty to satisfy the appeal Court that the lower court’s decision was wrong is borne by the appellant. It is also clear that the power of the Court of appeal to interfere is heavily circumscribed and is limited to decisions proved to be wrong only. The fact that the appeal Court could have granted bail had it been the court of first instance does not justify interference.*”
13. A court may interfere on appeal when the lower court misdirected itself materially in respect of the relevant legal principles or the facts of the case (*S v Essop* 2018 (1) SACR 99 (GP) at paras [34]-[35]), or where the lower court overlooked important aspects in coming to its decision to refuse bail (*Ramasia v S* (A24/2012) [2012] ZAFSHC 88 (3 May 2012)). The power of the court on appeal are thus similar to those in an appeal against conviction and sentence (*S v Ho* 1979 (3) SA 734 (W) at 737H).
14. Nevertheless, in *S v Porthern and others* 2004 (2) SA SACR 242 (C) the Court observed at para [17] that it remains necessary “*to be mindful that a bail appeal, including one affected by the provisions of section 60(11)(a), goes to the*

question of deprivation of personal liberty. In my view, that consideration is a further factor confirming that section 65(4) of the CPA should be construed in a manner which does not unduly restrict the ambit of an appeal court's competence to decide that the lower court's discretion to refuse bail was 'wrong'".

15. The mere fact that the reasons for refusing bail are brief, is not in itself a sufficient ground for the court of appeal to infer that insufficient consideration was given to the considerations set out in section 60 of the CPA (*S v Ali* 2011 (1) SACR 34 (ECP) at para [15]).
16. It is against this background that I consider the facts at my disposal, and the argument presented by the parties.

The case against the appellant

17. In the present matter, the charges against the appellant are serious. The State argues that there is a strong *prima facie* case against him.
18. The appellant is a Nigerian national, married to accused number 2 in the case against them. By way of background, the police had received information that a Nigerian man was transporting large quantities of drugs in the Delft area. A description of the vehicle used was also provided.
19. The police followed up on the information received and traced the vehicle,

which was being driven by the appellant. During the investigation the police recovered and confiscated drugs valued at approximately R1,4 million, as well as drug paraphernalia. These items were found in the vehicle and in the appellant's and his wife's house.

20. The State mentions the following additional factors as they appear from the record in relation to the case against the appellant:
 - a. The appellant is sought on a J50 warrant of arrest for dealing in drugs in Sunnyside under case number 123/05/2007.
 - b. The appellant is not legitimately in South Africa.
 - c. The appellant has previously been convicted of failing to adhere to his permit conditions.
 - d. The appellant previously misrepresented to the Department of Home Affairs that he has never been convicted of a criminal offence in South Africa.
21. The State's arguments in relation to the grounds of appeal will be dealt with in the course of the discussion below.

The strength of the State's case

22. In relation to the strength of the State case: there is no obligation on an applicant for bail to challenge the strength of the State case (*Panayiotou v S* (CA&R 06 /2015) [2015] ZAECHGC 73 (28 July 2015) at para [56]). But if the applicant does choose to challenge the strength of the State's case against him in bail proceedings, then he attracts a burden to of proof to show that there is a real likelihood that he will be acquitted at trial. In *Panayiotou v S* (at para [57]), the Court held that, in order to enable the court to come to the conclusion that the State case was weak or that he was likely to be acquitted, he was required to adduce convincing evidence to establish this.
23. In the present matter the appellant did not have insight into the docket and therefore chose to remain silent. The magistrate therefore found that the State had a strong *prima facie* case against the appellant.
24. The State argues that the quantity of drugs in this matter indicate that the appellant is an important cog in the larger machine of organized crime. This is a matter to be decided at the trial in due course. The appellant informed the court that he had been advised by his attorney that he did not need to adduce evidence in relation to the charges at the bail stage, and that he intended to plead not guilty to the charges. It is therefore not common cause that the State has a strong case.
25. It must be kept in mind however that a *prima facie* case is not a basis, in itself, to refuse bail. In *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 771 (CC) at para the Constitutional stated as follows at para

[11]: *“An important point to note here about bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails in the main protecting the investigation and prosecution of the case against hindrance.”*

26. At para [53] the Constitutional Court states: *“The broad policy considerations contemplated by the ‘interests of justice’ test, in that context, can legitimately include the risk that the detainee will endanger a particular individual or the public at large. Less obviously, but nonetheless constitutionally acceptably, a risk that the detainee will commit a fairly serious offence can be taken into account. The important proviso throughout is that there has to be a likelihood, i.e. a probability, that such risk will materialise. A possibility or suspicion will not suffice. At the same time, a finding that there is indeed such a likelihood is no more than a factor, to be weighed with all others, in deciding what the interests of justice are.”*

The appellant’s case, and a discussion of the ground of appeal

27. The appellant stated his case for the grant of bail on affidavit. He indicated

there and in his subsequent notice of appeal that:

- a. He is 49 years old.
- b. He has a fixed address in Delft, and has lived in South Africa for nearly twenty years.
- c. He is married to accused number 2 and they have 3 minor children. They children go to school in Cape Town and are dependent upon the appellant.
- d. He is employed as an Uber driver and earns approximately R10 000,00 per month.
- e. Although the appellant was convicted during 2010 in Polokwane for failing to adhere to his permit conditions, the conviction was subsequently expunged from his criminal record. This was done on the appellant's application on 13 May 2021.
- f. He has a pending permit application to regulate his residence in South Africa.
- g. The appellant did not attack the strength of the State's case in his evidence, but chose to remain silent in respect thereof.

28. On appeal, the appellant argued that the magistrate had committed various misdirections:

Firstly, the magistrate found that he could not accept the appellant's *bona fides* on affidavit evidence

29. The magistrate held that, because of the fact that the appellant provided evidence by way of affidavit instead of oral evidence, the court could not accept that the appellant was *bona fide* or credible. This was because, so the court held, "*in general a case on affidavit evidence is not open to cross-examination and is less persuasive....*:"
30. The magistrate relied on *S v Bruintjies* 2003 (2) SACR 575 (SCA) in coming to this conclusion. That case is, however, not authority for the proposition that the court cannot accept *bona fides* upon affidavit evidence because, in that matter no evidence had been placed before the court. The bail application was premised on statements from the bar. It was for that reason that the court could not assess the appellant's *bona fides* (at 578C of the report).
31. *S v Mathebula* 2010 (1) SACR 55 (SCA), upon which the magistrate also relied, concerned an appeal against the refusal of bail where the appellant had to prove exceptional circumstances to permit his release on bail. He sought to discharge the onus by way of an affidavit. In response, the investigating officer also delivered an affidavit. The Supreme Court of Appeal stated (at 569B) that the appellant had attempted to "tilt" the State's case by way of affidavit, which

evidence was not open to cross-examination and thus less persuasive. Nothing further was said on the issue.

32. In *S v Pienaar* 1992 (1) SACR 178 (W) at 180C-I the Court held that, if the State is prepared to accept an affidavit in support of a bail application, the need for oral evidence falls away. There is nothing in the CPA that renders the use of affidavits in bail proceedings impermissible, although “*obviously an affidavit will have less probative value than oral evidence which is subject to the test of cross-examination.*”
33. I agree with the appellant’s counsel that these cases show that affidavits in bail proceedings are permissible but that, in the case of factual disputes, may be less persuasive because they cannot be subjected to cross-examination.
34. The present matter, however, do not pose any serious factual disputes. Aside from the strength and merits of the State’s case (which is to be dealt with at trial), all of the personal facts set out in paragraph 22 above were common cause. The State also did not dispute that the appellant pays R3 000,00 rent per month in respect of his house, that he is the sole breadwinner for his family, and that all of his personal ties are within the jurisdiction of the court.
35. There was thus no reason to doubt the *bona fides* or reliability of the appellant’s evidence (especially as such evidence had been accepted by the State, which would have had the opportunity of investigating the veracity thereof). The fact that the magistrate found otherwise constituted a material misdirection which

tainted the rest of his judgment against the appellant.

Secondly, the magistrate enquired into factual issues that were not in dispute

36. Flowing from what is set out above, it appears that the magistrate overlooked the common cause facts in at least two respects: he questioned the appellant's evidence in relation to his fixed address, and doubted the appellant's employment. These are important facts in relation to the consideration of the interests of justice, *inter alia* in the consideration of whether the appellant is a flight risk.
37. Given that the State had accepted that the appellant resided at the address specified and paid rent in respect thereof, and that the appellant was employed as an Uber driver, the appellant did not have to provide further information in relation to these facts. If, for good reason, the court required more evidence in support of these allegations, it could have called for it prior to the closing of the parties' cases. This it did not do.
38. In the circumstances, the criticism levelled against the appellant at this stage to the effect that his submission that he has a legitimate source of income leaves a lot to be desired does not assist the State, as it was not disputed at the bail hearing that the appellant's income was derived from his employment as an Uber driver.
39. I agree with the appellant's counsel that, in effectively rejecting these common

cause facts, the court committed a further misdirection.

Thirdly, the magistrate placed reliance on the appellant's previous conviction which had been expunged

40. In *S v Smith* 2017 (1) SACR 520 (WCC) at 529A-C this Court stated as follows regarding the relevance of expunged previous convictions in sentencing proceedings:

"Apart from the fact that these convictions did not involve violence, they were more than 10 years old and should have been expunged ... Unfortunately, the prosecutor made reference to them during the cross-examination of Ms Cawood, a social worker called for the defence, when challenging her view that the appellant had not displayed anti-social behaviour. Although I do not think the magistrate attached much weight to the previous convictions, she did refer to them as undermining Ms Cawood's opinion. This was a misdirection."

41. The appellant argues that, by analogy, the same applies to bail proceedings. The effect of expungement is that the criminal record in respect of the relevant conviction is erased, and it is deemed never to have occurred.

42. In *Molefe v S* (2018) GDP A129/18 (unreported decision of the Pretoria High Court), it was held at para [11] that *"only in the event that it was proven that the appellant had a previous schedule 1 conviction which had not been expunged, would his bail application have resorted under schedule 6"*.

43. The appellant properly informed the lower court of the fact of the conviction, the basis thereof, and the fact that it had been expunged in 2021. The appellant thus argues that the fact that the magistrate relied on his expunged conviction in denying bail was a misdirection. The conviction in question occurred in 2010.
44. The State further argues that the appellant had lied to the Department of Home Affairs on his visa application by stating that he did not have a previous conviction. It is clear from the record that he did indeed indicate to Home Affairs that he had no previous convictions. He has given an explanation for his conduct, however: he was not aware of the conviction, because at the time he simply paid an admission of guilt fine; he appeared in court and was told that he was free to go, as the admission of guilt fine had taken care of the matter. It was only when Home Affairs rejected his application on the basis of the conviction that he realized that payment of the fine did not preclude a conviction, and thus he applied for it to be expunged. His explanation was not disputed by the State.
45. It is not correct to argue, as the State does, that the appellant “*does not timeously renew his permit and that that shows that he would disregard any bail conditions that might be imposed*”. It appears from the record that the appellant’s permit was valid until 13 February 2020. He applied for a new permit on that day.
46. The State argued that even though the conviction had been expunged, the

previous conduct underlying the conviction was not erased. In terms of section 60(5)(e) of the CPA a court may consider an applicant's "past conduct" in considering whether to grant bail. But that subsection specifically deals with past conduct in the context of a disposition to commit Schedule 1 offences.

47. Therefore, even if I am wrong in my conclusion as regards the prohibition on relying on an expunged conviction, the lower court's reliance on the expunged conviction constituted a further misdirection because of the fact that it related to a failure by the appellant to comply with a condition of his permit under the Immigration Act. That is an offence under that Act and not an offence under Schedule 1 of the CPA. Therefore, even if the conviction had not been expunged it was irrelevant for the purposes of considering whether the appellant was prone to committing Schedule 1 offences. The magistrate accepted the State's incorrect submission that that previous conviction related to a charge of fraud, and thus misdirected himself in this respect, too.

Fourthly, the magistrate found that the appellant had committed other offences on the basis of charges that had been withdrawn

48. During the bail proceedings in the lower court the State handed in a page which, under the heading "Previous convictions" listed a number of cases that had been withdrawn. The lower court placed much reliance on those cases, holding as follows in relation to them:

"These offences the court finds they are prevalent in this jurisdiction similarly

the one for dealing in drugs. Every day this court is dealing with those kind of matters and in fact given the fact that there is even though those were withdrawn against the applicant the court will have to take account of the conduct of the applicant where he is told that when he was released from custody he would go and commit further offences."

49. It seems that, on the basis of the charges that have been withdrawn, the lower court made two findings, namely (1) that the applicant had previously committed offences based on the cases that were withdrawn and (2) that the applicant committed further offences after the withdrawal of the charges, namely the offences which he is currently charged with. The appellant argues that both of these findings constitute material misdirections.
50. The problem is that the State led no evidence to prove that the appellant had previously committed these offences, other than the references to the cases themselves. The fact that the cases were withdrawn probably indicates that the evidence against the appellant at the time was insufficient to establish his guilt. The appellant would in respect of those cases, in any event, be presumed to be innocent. No evidence was led by the state to rebut that presumption.
51. The lower court obviously also could not, at bail stage, find that the appellant committed the offence that he is currently charged with. The court must presume the appellant to be innocent. *S v Essack* 1965 (2) SA 161 (D) at 162D-E, decided before the advent of our constitutional era, the court held that the presumption of innocence operates in favour of the applicant even where it is

said that there is a strong *prima facie* case against him, but if there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if he is allowed out on bail, the court would be fully justified in refusing to allow him bail. (See also *S v Fourie* 1973 (1) SA 100 (D) at 101G-I.)

52. It needs to be kept in mind that the right to presume be presumed innocent is in applicable to bail proceedings or irrelevant there too. In *S v Van Wyk* 2005 (1) SACR 41 (SCA) at 44I it was held that it is not for the bail court to make a provisional finding of guilt or innocence in respect of the applicant, but rather to assess the strength of the State's case.
53. In the present matter, though, the lower court seemingly presumed the applicant to have committed offences on the bases of the withdrawn charges, and used this to deny the appellant bail. The court's presumption of the applicant's guilt in this context even in relation to the pending matter where no evidence has yet been led, amounts to a material misdirection.
54. In *S v Acheson* 1991 (2) SA 805 (Nm) at 177E-F the Court emphasised 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."

Fifthly, the magistrate found that the appellant was a flight risk because a withdrawn

case had been re-enrolled and a warrant issued, which re-enrolment and warrant the appellant had no knowledge of

55. In the State's affidavit presented at the bail hearing, it was alleged that there was a warrant of arrest for the appellant outstanding. No proof of the appellant having knowledge of the outstanding warrant was provided. The State alleged that the appellant's visa application had been denied because of the outstanding warrant and therefore that the appellant had knowledge of the warrant. The appellant contends that the allegation is misplaced, because the visa application was denied as a result of the appellant's failure to comply with the condition of his permit as can be gleaned from the record.
56. The conviction in that respect has since been expunged (and referred to earlier) and the appellant had re-applied for a visa. His application was still pending at the time of the bail proceedings. No record of the appellant's warrant of arrest is apparent from the home affairs documents on record, and there is accordingly no proof that the appellant had knowledge of the warrant.
57. The matter for which the warrant was issued related to a matter that had been withdrawn. The appellant had attended court without fail until the matter was withdrawn. The warrant of arrest was subsequently issued in 2007. No proof that the warrant was put into circulation has been presented. The appellant appears to have been lawfully entering and exiting the country ever since without the warrant becoming an issue. It appears therefore that the warrant was not in fact in circulation.

58. On the record the appellant was not arrested on the warrant. This appears to be a consequence of the State's lack of action, rather than the consequence of the appellant's conduct, who is routinely regularising his status in South Africa and not making any attempt to conceal his whereabouts.
59. The appellant argues that the fact that he should suffer now as a result of the warrant issued 15 years ago and which the State seemingly had no serious intention of pursuing, is unfair. I agree.
60. The lower court placed much reliance on the warrant and found as follows:
"There is a J 50 warrant that is out for the accused again because being aware of the J50 warrant he does not deal with that J50 warrant in his application."
61. However, the only allegation that could possibly demonstrate the appellant had knowledge of the warrant of arrest was the State's allegation that *"at his first appearance warrant W/O Mlomiso spoke to the Attorney of the accused and explained to him that there is a possible warrant out for the accused, his client, and it was mentioned by the Attorney that there is a J50 warrant out for him"*.
62. The appellant's attorney explained in argument that the matter had been postponed to determine the status of the outstanding warrant and that the appellant had had no knowledge thereof. Therefore, the lower court's finding during the bail proceedings that the appellant did have such knowledge is not founded upon evidence. The fact that this finding appears to have been a

material consideration in denying the appellant bail on the basis that the warrant pointed to the appellant being a flight risk, was a misdirection.

63. The State argues that the fact that the warrant had been issued by a magistrate indicates to there must have been *prima facie* evidence in relation to the drug-related case against the appellant at the time. That may be so, but it does not point to knowledge of the warrant on the part of the appellant. Given that the matter had been withdrawn, I am of the view further that it should not have been taken into account as evidence of similar conduct as far as drug-related offences are concerned.
64. In all of these circumstances, I agree with counsel for the appellant that, in the present matter, there is no proof of a probability that the appellant would attempt to flee or interfere with the administration of justice.

Conditions of release on bail

65. In his affidavit deposed to for the purposes of the bail hearing, the appellant expressly undertook not to undermine or jeopardize the proper functioning of the judicial system, not to intimidate witnesses, not to interfere with the investigation, not to conceal or destroy evidence, and to accept and comply with any bail conditions imposed.
66. The lower court's judgment does not indicate whether any conditions of bail were in fact considered. In *S v Branco* 2002 (1) SACR 531 (W) at 537A-B the

court held that a *“court should always consider suitable conditions as an alternative to the denial of bail. Conversely, when no consideration is given to the application of suitable conditions as an alternative to incarceration, this may lead to a failure to exercise a proper discretion. The appellant has stated on oath that he is prepared to report to the police station. This was not challenged.”*

67. It appears from the record in this matter that there is no likelihood (or probability) that the appellant would conduct himself as listed under section 60(4) of the CPA. However, because the lower court was of the view that the appellant was not a suitable candidate for bail, it did not consider any conditions of release as an alternative.
68. I find myself in agreement with the submission of counsel for the appellant that in the absence of any likelihood as contemplated in section 60(4) considered with the personal circumstances of the appellant, the interests of justice permit the appellant to be released on bail. The evidence available at the bail hearing did not establish any such likelihood, and the refusal to grant bail was premised on the finding of the strength of the State’s case and the guilt of the accused rather than on the probability that the appellant would interfere with the administration of justice if released on bail.

Order

69. In the circumstances, it is ordered as follows:

1. The appeal is upheld and the magistrate's refusal to grant bail is set aside.
2. The appellant is granted bail in the amount of R15 000,00, subject to the following conditions:
 - (a) The appellant must surrender his passport and any other travel documents to the investigating officer within 24 hours of being released on bail.
 - (b) The appellant may not apply for any passport or other travel documents.
 - (c) The appellant is to report to the Delft Police Station every day between the hours of 05:00 and 20:00.
 - (d) The appellant may not depart from the metropolitan area of the City of Cape Town.
 - (e) The appellant may not directly or indirectly have contact or communicate with any State witnesses or potential State witnesses whose names appear in the docket or whose names are communicated to the appellant by the State.

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

Counsel for the appellant: B. Prinsloo (instructed by Matthewson Gess Incorporated)

Counsel for the respondent: L. Snyman (Director of Public Prosecutions, Western Cape)