

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

Case Number: A175//2022

In the matter between:

**PHUMLANI BANZANA**

Appellant

and

**THE STATE**

Respondent

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for handing down judgment is deemed to be 10h00 on 22 December 2022.

**JUDGMENT**

**DE WET AJ:**

**INTRODUCTION:**

1. This is a bail appeal in terms of s 65(4) of the Criminal Procedure Act 51 of 1977 ("the CPA"), against the decision of the Simons Town District Court dated 18

August 2022, refusing the appellant's release on bail. The appellant was charged with one count of robbery with aggravating circumstances as intended in s 1 of the CPA, one count of possession of a firearm in contravention of s 3 of the Firearms Control Act 60 of 2001 and one count of pointing a firearm in contravention of s 120 (6) of Act 60 of 2000.

2. The appellant was legally represented and, as is his right, applied for bail by way of affidavit. In his founding affidavit he confirms that the bail application is in terms of a schedule 6 offence. He sets out his personal circumstances, which can be summarised as: he is 29 years old; he lives with his girlfriend at [...] D[....] S[....], M[....] and has been living at this address for 6 years; he has 3 dependent children aged 11, 9 and 2 years old respectively; he is employed as a general worker at VVF and does not have a passport or travelling documents. He further confirmed that he has no previous convictions, no pending matters and no outstanding warrants of arrest. He further stated that there is no likelihood of him committing any of the offences set out in s 60(4) of the CPA and that he will plead not guilty to the charge(s) against him.<sup>1</sup>

3. He explained further that when arrested on 24 July 2022, he was shot 5 times and sustained injuries on his stomach, had a broken arm, a broken finger and injuries on his leg and his waist. He was taken to hospital on the same day, discharged on the 27<sup>th</sup> of July 2022 and kept at the Fish Hoek police station until he appeared before court at the behest of his attorney on 2 August 2022. The appellant further stated that his life, since the 24<sup>th</sup> of July 2022, had taken a sudden turn that had a major negative impact on his health both mentally and physically. He is confined to an overcrowded space with limited health services and he's wounds have developed bacteria.

4. As to the charges against him, he stated that he would plead not guilty and explained that at the time of his arrest he was walking with his friends, who he was

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<sup>1</sup>Initially the charge against the appellant was robbery with aggravating circumstances. On the day of the bail application the further two charges were added. The appellant did not deal with these charges in his affidavit, was not called to testify nor did his legal representative request a postponement to deal with the further charges.

visiting in Simon's Town, unarmed, and that he was not in possession of the stolen items mentioned on the charge sheet.

5. The bail application was opposed by the state who called detective sergeant Steenkamp, the investigating officer, to testify. It is alleged by the state, in accordance with the charges, that at 16h20 on Sunday, 24 July 2022, the complainants, who are Ethiopian nationals, came out of Food Zone shopping centre, Fish Hoek and, whilst getting into their vehicle, two individuals were pointing firearms at them demanding money and their cell phones. The assailants then tried to force the complainants into the boot of their vehicle, but they fought back and managed to run away. One of the assailants left the scene on foot running towards Site 5, Khayelitsha and the other one drove off in the vehicle driven by the complainants, a Toyota Yaris, in the direction of Lekkerwater Road, also near Site 5, Khayelitsha, where it was later found abandoned. The complainants "flagged down" a police vehicle that was in the vicinity and whilst tracking the phone of one of the complainants, one of the assailants was seen and identified in the street by the complainants. The uniform policemen alighted from their vehicle and pursued the suspect. He ran into a house from which he could not escape. When the police entered, the assailant (the appellant) pointed a firearm at them, and they opened fired. The appellant was arrested, and a colt pistol was recovered from the scene.

6. The charges against the appellant falls in the category of the schedule 6 offences and the bail application in the court *a quo* was determined in terms of section 60(11) (a) which provides that:

"Notwithstanding any provision of this Act, where an accused is charged with an offence referred to 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 exceptional circumstances exist which in the interest of justice permit his or her release."

7. As correctly pointed out by Binns-Ward J in the matter of *Killian v The State*<sup>2</sup> the effect of s 60 (11)(a) was exhaustively discussed and elucidated in the Constitutional Court's judgment of *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999(2) SACR 51 (CC) and it is now trite that an onus is imposed on an applicant for bail in such matters to adduce evidence to prove to the satisfaction of the court the existence of exceptional circumstances justifying his or her release on bail. Furthermore, the court must be satisfied that the release of the accused is in the interest of justice and the standard proof is on a balance of probabilities.

8. It has further been held that exceptional denotes something "unusual, extraordinary, remarkable, peculiar or simply different" (see *S v Petersen* 2008 (2) SACR 355 (C); *S v Josephs* 2001 (1) SACR 659 (c) at 6681 and *S v Viljoen* 2002 (2) SACR 550 SCA).

9. In determining this bail appeal, I have to be mindful of the provisions as set out in s 65(4) of the CPA which states:

"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"

10. In the matter of *S v Barber* 1979(4) SA 218 (D) at 220 E-H Hefer J remarked as follows in this regard:

"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

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<sup>2</sup> Case A 87/2021

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.”<sup>3</sup>

11. The grounds of appeal as set out in the notice of appeal focuses mainly on the failure of the court *a quo* to properly consider the personal circumstances of the appellant, which includes his medical condition, and that no objective evidence was placed before the court to indicate that there is a likelihood that the appellant would interfere with the criminal investigation or evade his trial. The appellant does not dispute that the state has a strong case against him and further does not dispute the evidence led in the court *a quo* pertaining to his arrest.

12. It was further contented that the court *a quo* misdirected itself by not considering that the appellant was not brought to court, after he had been discharged earlier than expected from hospital, within 48 hours of his discharge, with reference to s 50(1) of the CPA and that this was a violation of the appellant’s constitutional rights in terms of s 35(1)(d) of the Constitution.<sup>4</sup> It was contended that the court *a quo* should have found that this alleged violation, together with the other facts as set out by the appellant, constituted exceptional circumstances which, in the interest of justice, permitted the release of the appellant.

13. I shall deal with this aspect first. It is common cause that the appellant was shot during his arrest on 24 July 2022 and taken to Groote Schuur Hospital by emergency services. It is undisputed that the case against the appellant was brought before the court *a quo* on 26 July 2022, in compliance with s 50(1)<sup>5</sup> read with s 35(1)(d) of the Constitution.

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<sup>3</sup> Also see *S v Mbelele and Another* 1996(1) SACR212 (W) 221 H-J.

<sup>4</sup> Section 35(1)(d) of the constitution reads as follows: “Everyone who is arrested for allegedly committing an offence has the right—(d) to be brought before the court as soon as reasonably possible, but not later than –(i) 48 hours after the arrest; or (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day.”

<sup>5</sup> Section 50 (1) states: “ Any person who is arrested, with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant. (b) A person who is in detention as contemplated in paragraph (a) shall as soon as reasonably possible be informed of his or her right to institute bail proceedings. (c) subject to paragraph (d), if such an arrested person is not released by reason: (i) no charge is to be brought against him or her; or (ii) bail is not granted to him or her in terms of section 59 or 59A, he or she shall be brought before a lower court as soon as reasonably possible but not later than 48 hours after the arrest. (d) if the period of 48 hours expires-(i) outside ordinary court hours or on a day which is

14. When the case was called on 26 July 2022, the court *a quo* was presented with a letter from Groote Schuur hospital confirming that the appellant was admitted there and that he would be unable to attend court due to his medical condition. According to the letter it was estimated that he will remain in hospital for a period of two to three weeks. The case was consequently postponed in his absence to 17 August 2022, presumably in terms of s 50(1)(d)(ii) although this is not apparent from the record.

15. Contrary to the letter, the appellant was discharged from hospital on 27 July 2022<sup>6</sup> and held in custody at the Fish Hoek police station. His attorney, Mr Gangatela was contacted by family members, who then made the necessary arrangements for the appellant to be brought before court. This happened on Tuesday, 2 August 2022 and the matter was postponed, by agreement between the state and Mr Gangatela, to 15 August 2022 for a bail application.

16. It was contended on behalf of the appellant in the bail application and in this appeal, that there was a duty on the state, when the appellant was discharged earlier than expected from hospital, to ensure that he be brought before a court within 48 hours of his discharge in terms of s 50(1) of the CPA, which did not happen.

17. On behalf of the state it was contented that s 50 (1) was complied with after the appellant was arrested as the case was enrolled on 26 July 2022, that the 48- hour period did not start running afresh upon the release of the appellant from hospital, that the investigating officer was not on duty when the appellant was unexpectedly

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not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day; (ii) or will expire at, or if the time at which such period is deemed to expire under subparagraph (i) or (iii) is or will be, a time when the arrested person cannot because of his or her physical illness or other physical condition, be brought before a lower court, the court before he or she would, but for the illness or other condition, have been brought, may on the application of the prosecutor, which, if not made before the expiration of the period of 48 hours, may be made at any time before or on, the next succeeding court day, and in which the circumstances relating to the illness or other condition are set out, supported by a certificate of a medical practitioner, authorise that the arrested person be detained at a place specified by the court and for such period as the court may deem necessary so that he or she may recuperate and be brought before the court: Provided that the court may, on an application, as aforesaid, authorise that the arrested person be further detained at a place specified by the court and for such period as the court may deem necessary; or (iii)..."

<sup>6</sup> According to the submissions filed on behalf of the appellant he was discharged on the 28<sup>th</sup> of July 2022 and no details were provided as to when the 48-hour period was suppose to commence.

released and that upon becoming aware of the new circumstances, the appellant was brought before court as soon as reasonably possible.

18. The appellant's complaint is in my view somewhat opportunistic as he and or his legal representative, had they believed that the appellant was unlawfully detained after his early discharge from hospital, could have employed the appellant's common law remedy known as the "writ of habeas corpus" with reference to the English law, or the Roman-Dutch equivalent which is known as the *interdictum de homine libero exhibendo*, to ensure his appearance in court.

19. Section 50(1)(d)(ii) further expressly deals with the expiry of the 48-hour period and allows the court to make an order, even after the expiry of the 48-hour period, in circumstances where an accused cannot attend within the 48-hour period due to illness or any other condition, that an accused be detained at a specified place until they have sufficiently recuperated in order to be brought before court.

20. As with the interpretation of ss 50(1)(d)(i) in the matter of Minister of Police v Ndaba and others (A553/2014) [2016] ZAGPPHC 277 (6 May 2016), the interpretation and application of ss 50(1)(d)(ii) dictates that expedition is relative to circumstance. In the Ndaba-matter the court held in this regard at para 43, with reference to ss 50(1)(d)(i) and the matter of Mashilo and Another v Prinsloo 2013(2) SACR 648 (SCA)<sup>7</sup>, that each case has to be treated on its own merits and that an arrested person, relying on "deliberately obstructive behaviour" on the part of a police officer, may, in a proper case, approach the court for assistance and relief

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<sup>7</sup>Section 50(d)(i) was dealt with in this matter as follows: "*Section 50(d)(i) was clearly intended to extend the 48-hour outer limit during which an arrested person could be detained. That is made plain from the language of the subsection and has, during the last thirty five years since the introduction of the Act, always been understood to be so. This is clear from one of the earlier, foremost authorities on criminal law and procedure, namely the work by Lansdown & Campbell South African Criminal Law and Procedure vol 5: Criminal Procedure and Evidence op cit at 299 300. See also the interpretation given by Eksteen J in Hash and Others v Minister of Safety and Security [2011] ZAECPHC 34 in paragraph 71. The legislative purpose in extending the 48 hours, if interrupted by a week-end, appear to me to be fairly obvious. It is because the logistics of ensuring an appearance before court over a week-end are difficult. Put differently, it is difficult to co-ordinate police, prosecutorial and court administration and activities over a week-end. This was especially true at the time that the legislation was introduced. It continues to be true today.*" (my emphasis)

even before expiry of the 48-hour period with a view to obtaining adequate relief and/or assistance to facilitate a bail application.

21. Section 50(1)(d)(ii) does not dictate a time-frame within which an accused, if discharged earlier from being detained at a specified place, should be brought before court, but common sense, the Constitution and the authorities referred to herein, dictate that it must be as soon as reasonably possible.

22. I therefore do not accept, that there is an onus on the state to bring the matter, which had already been postponed in terms of ss 50(1)(d)(ii) to a date based on the available medical information, forward in terms of s 50(1) within 48-hours or that the 48-hour period commences afresh at date of discharge. There is further nothing on the record to indicate that the police and the state, after becoming aware of the changed circumstances, delayed or acted in an unreasonable or obstructive manner in making arrangements for the appellant to be brought before court expeditiously. Whether the court *a quo* had considered this complaint is consequently irrelevant and, in any event, in the circumstance of this particular matter, does not constitute exceptional circumstances.

23. This brings me to the personal circumstances of the appellant. Whilst it is positive that he has no previous convictions, a fixed address, a girlfriend, is employed and has three dependent children, these circumstances do not amount to exceptional circumstances. The affidavit further lacks specificity regarding his income, whether the children reside with him and whether he even supports them financially or otherwise. His statements that his health is compromised is not supported by any medical evidence and despite his injuries listed herein earlier, he was discharged from hospital two days after being admitted.

24. The question whether there is a likelihood that the appellant would commit a crime as contemplated in s 60(4) of the CPA if released on bail, clearly played a pivotal role in the court *a quo*'s decision to refuse bail. In this regard, the court *a quo* correctly focused in my view on the undisputed evidence regarding the events leading to the arrest of the appellant, which were:



24.1 The appellant was identified by one of the complainants as one of the persons who robbed them whilst pointing a firearm;

24.2 The appellant, after being identified, fled from the police into a house from which he could not escape;

24.3 The appellant pointed a firearm at the police which resulted in them shooting him several times;

24.4 A colt 45 firearm was found on the scene.

25. The aforesaid uncontested evidence strongly indicates that the appellant poses a flight risk: he fled from the police and resisted arrest after allegedly committing a violent crime. This, seen with the evidence that the assailants, one of which apparently has not been apprehended, is familiar with the identities of the complainants, who are already receiving threats, although it cannot be linked to the appellant, causes grave concerns in light of the evidence that the investigation had not been completed. The vehicle of the complainants was further found abandoned near Site 5 in Khyhalisha, where the complaints' shop is located.

26. It was finally also contended that the court *a quo* made credibility findings which is for the trial court to determine. This submission, as far as I can see, is based to the court *a quo* stating that:

*"The applicant's application is a mere denial of the offence. He has not dealt with the merits of the case. It can be seen that he was not frank and honest with the Court, as this will show whether the State has in fact a strong case against him or not. The applicant has not seriously challenged those allegations by the state, that there is a strong prima facie case against him, or given any details how it transpired that a law-abiding citizen walking with his friend are shot several times by the police ."*

These statements were made based on the following facts listed by the court *a quo*: a robbery took place; not long after with the assistance of the police a suspect was

identified, chased down and shot; a firearm was seized and the identity of the person chased and shot is not challenged.

27. The version of the appellant must be weighed and considered against the uncontested evidence by the state, which evidence is incidentally supported by the appellant in his affidavit where he confirms that he was the person shot by the police on the day of the robbery. The evidence presented by the state is irreconcilable with the appellant's version that he was unarmed and walking with friends when arrested. It further lends support to the court's finding that the state has a strong case against the appellant.

28. In the matter of *S v Panayiotou*<sup>8</sup> it was held that:

“There is no obligation on the part of the applicant for bail to challenge the strength of the state case. It is not necessary to do so in order to establish exceptional circumstances. Exceptional circumstances warranting the release of an applicant on bail can be established without challenging the strength of the state case (*S v Mathebula* 2010 (1) SACR 55 (SCA) at para 12). However, if an accused person challenges the strength of the state case against him in the bail proceedings then in that event the challenge attracts a burden of proof to show that there is a real likelihood that he will be acquitted at trial.”

As pointed out by counsel for the state, the appellant in this matter did not dispute that the state has a very strong case against him and relied mainly on his personal circumstances and the circumstances surrounding his arrest to establish exceptional circumstances. The court *a quo* did not find that an accused must show that the state's case is weak or non-existent but rather that in circumstances where the state has a strong *prima facie* case in the context of a bail application, it would be to the benefit of an accused to show that the state does not have a case or a weak case. The appellant failed to do so in the court *a quo*.

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<sup>8</sup>2015 JDR 1532 (ECG) at para 56

29. In the circumstances I cannot find that the court *a quo* committed a misdirection and on a consideration of the conspectus of the evidence, I am not persuaded that an exception should be made to the default situation as set out in s 60(11) or that I should interfere with the discretion exercised by the judicial officer in the court *a quo*.

30. In the circumstances the following order is made:

The appeal is dismissed.

**A De Wet**  
**Acting Judge of the High Court**

Coram:	De Wet AJ
On behalf of the Appellant:	Adv A Tyemela instructed by Mvana & Associates Inc lgangatele@gmail.com
On behalf of the Respondent	Adv M J September
On behalf of the Director of Public Prosecutions	Email: mseptember@npa.gov.za