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

REPORTABLE

Case no: **A214/2021**

In the matter between:

MCEBISI MGUMBI Appellant

and

THE STATE Respondent

Date of Hearing: 25 February 2022

Date of Judgment: 16 March 2022

This judgment was handed down electronically by distribution to the parties' legal representatives by email.

BAIL APPEAL JUDGMENT

NYATI, AJ

[1] This is an appeal against the refusal of bail against the appellant. The appellant, who is accused no.3 in the main case is charged with two other accused and is standing trial at Cape Town Regional Court. Accused no.2 was released on

bail at Cape Town district court before the matter was transferred to the Regional Court. On 18 December 2018, the appellant and his co-accused (accused no 1) brought a formal bail application in the Cape Town Regional Court. Their application to be released on bail was refused. On 01 April 2021 the appellant brought another application based on new facts and same was refused. At the hearing of that application, the appellant was represented by Mr McKay. The appellant now appeals against that decision in terms of section 65(1)(a) of the Criminal Procedure Act 51 of 1977 *("the CPA").* I was informed at the hearing of this appeal that the trial of the main case is pending in the Regional Court in Cape Town. The appellant is standing trial with two co-accused on charges namely; housebreaking with the intent to rob and robbery with aggravating circumstances, attempted murder and defeating the administration of justice. At the hearing of this appeal, the record of the trial proceedings of the Regional Court did not form part of the papers before me.

[2] It is common cause that the appellant's bail falls under the ambit of Schedule 6 and in terms of section 60(11) (a) of the Criminal Procedure Act 51 of 1977 (the "CPA") he had to adduce evidence which satisfies the court that exceptional circumstances exist to persuade a court that he should be released on bail.

[3] The charges against the appellant and his co-accused emanate from an incident of house robbery with aggravating circumstances. The appellant and two others were arrested on 1 March 2017 and first appeared at the magistrates' court before the matter was transferred on 02 February 2018 to the Regional Court.

[4] The appellant now stands trial at the Regional Court, Cape Town and only one witness testified so far. During his first bail application the appellant gave oral evidence. The respondent opposed the application but chose not to call the investigating officer but instead submitted an affidavit deposed to by the investigating officer, Detective Warrant officer Van Wyk ("D/W van Wyk").

FACTUAL BACKGROUND

[5] The appellant's evidence in the first bail application can succinctly be summarized as follows:

He was 28 years old then, his home address is Section 3 […] T[…] Street. It is his brother's house. He was renting the house together with his wife. They have one minor child, who was 6 years old at the time. Before his arrest he worked as a barber. He had no previous convictions, no pending cases and no outstanding warrants. Although he had been arrested before, those matters have since been withdrawn against him.

[6] He testified that on the day of the alleged incident he was with accused 1. They were looking for work when a security officer approached them in relation to a house robbery that had happened earlier. The security officer called the police, upon arrival the police took over. They were charged and detained at Table View police station.

[7] Meanwhile the state relied on the affidavit of the Investigating officer, Detective Warrant Tertius van Wyk (Mr Van Wyk) to oppose the bail application. His affidavit opposing the first bail application contained the following averments:

On 1 March 2017, at about 8h45 Ms Nomawanga Bugqwangu a domestic worker was about to enter her work premises when she heard a male voice calling her. It was a black male dressed in a two piece working overall. He grabbed her by her neck and ordered her to go inside the house. Another black male joined them and they both forced her to the house entrance where they met up with the owner of the house Mr. Stephen David (Mr. David). One of the assailant had a firearm and she was unable to see if the second man had a firearm or not. The man carrying the firearm asked for money from Mr. David, and the latter told him that the money was in the safe. They all went to the main bedroom where Mr David pointed out the safe inside the cupboard. The man with the firearm instructed Mr. David to open the safe. Mr. David could not open the safe, he went blank and could not remember the combination digital numbers. The one with the firearm became aggressive and hit him in the face causing his nose to bleed. Mr. David then told them to take the safe with them. Then a third male came into the bedroom while the other two were carrying the safe out of the house. At that time, the third man was busy tying up Mr. David and thereafter they all left.

[8] A few minutes later at about 9h00 Mr. David's son Jarrod David together with his wife ("Jarrod") arrived at Mr. David's home. As the gate was opening two unknown black males approached them, he first thought they were his father's employees but became suspicious when they came to their respective door sides. He locked the doors and reversed his vehicle trying to run them over. They all

jumped into a VW Polo and fled the scene. The passenger sitting in the back fired two shots to Jarrod's vehicle from their VW Polo. It is alleged that the three suspects also stole an Omega watch that belong to Mr. David worth R5000-000, a pepper spray gun and a paint ball gun.

[9] Jarrod chased them down Arum Road towards Blaauwberg Road where they pulled their car half on the pavement, got out and ran towards Blaauwberg Road. The Table View complex patrols (security officers) populated / circulated the house robbery information to the community security. Mr. Craig Botha (Mr. Botha), a security officer working in the area rushed to the scene. At the corner of Grey and Athens roads he saw two unknown black males walking down the road very fast. He stopped next to them and asked them where they were going. They said they were going to Bayside Mall and he became suspicious, apprehended them and then called the police. When the police arrived he handed them over to Warrant Officer Prins of Table View Police Station. A third suspect was arrested at Table View police station while trying to report a false case of hijacking. Mr van Wyk interviewed all three suspects and charged them with house robbery with aggravating circumstances. Buccal samples were taken for DNA purposes. The Omega watch was later recovered from one of the accused and was returned to Mr. David.

[10] A photo identity parade was conducted at the police station. Jarrod identified the person in one of the photos as the man who came walking towards him from his father's yard carrying a gun. The domestic worker pointed out Alfred Nebulani (accused 1) and Mr. David pointed out Mcebisi Mgumbi (accused 3) as the people who were at the scene and robbed them. The VW Polo get-away car driven by the suspects was identified by accused 2's brother, Bongani Nomakhakhayi to be the

lawful property of Thobela Nomakhakhayi (accused 2). Fingerprints uplifted from Jarrod's vehicle positively linked Thobela Nomakhakhayi (accused 2).

[11] In his affidavit, the investigating officer states as follows; that accused 1 has two pending cases of robbery, accused 2 has a pending case of riotous behavior and *crimen inuria* where it is also stated that a warrant of arrest was issued against him and accused 3 has three pending cases. Of the three cases of accused 3, two are for robbery and one is for unlawful possession of a firearm and ammunition. Investigating officer further states that accused 3 has an outstanding warrant of arrest. The investigating officer further states that all three accused had positive primer residue on their hands. On 3 June 2019 the appellant's bail application was unsuccessful. The court found that the appellant failed to prove exceptional circumstances that warrant their release on bail.

THE SECOND BAIL APPLICATION (APPLICATION ON NEW FACTS)

[12] On 1 April 2021, the appellant's legal representative (Mr McKay) informed the court that the appellant intends to bring a bail application on new facts. The regional magistrate enquired from the legal representative what those facts were.

[13] This is where the error began, Mr McKay placed before court the alleged new facts on record. The regional magistrate postponed the matter for the investigating officer to confirm the submissions made by Mr. McKay. According to the appellant, the following were the new facts that they wish the court to consider:

1. The unreasonable delays in finalizing the main trial. They first appeared

   at the regional court on 09 October 2017 and pleaded on 28 February 2019. There were numerous postponements owing to various reasons but when I look at the record, the major delays to the progress of this matter were caused by regular non-attendance by legal representatives in court. The charge sheet is riddled with postponements for legal representatives. To date, only one witness was called since the trial started in 2019;

2. Pending cases against the accused were withdrawn.

3. Ballistic report came back indicating that only one firearm was used in the alleged house robbery and there are three accused standing trial. They contend that it is highly unlikely that they all handled the firearm or that primer residue was found on all three accused's hands.

4. Fingerprints and DNA are only linking accused 2 and the latter was granted bail by the magistrates' court on 10 February 2021 before the matter was transferred to the regional court.

[14] It became apparent when the court enquired from the State that it had not at that time received the ballistic report that the appellant relied upon.

[15] On 1 April 2021, the matter was postponed to 13 April 2021 for ballistic report and/or for the investigating officer to attend court. On 13 April 2021, the investigating officer was not present at court and the State was not in possession of the ballistic report.

[16] The matter was then postponed to 14 May 2021 for the State to address the court, answer to the appellant's submissions of bail on new facts to secure ballistic report and/or for the investigating officer. Even on that day, the investigating officer was not at court and the State was not in possession of the ballistic report.

[17] The matter was postponed to 20 May 2021 and on that day, the investigating officer was still not in attendance. The matter was postponed to 24 May 2021 for judgment of bail on new facts. The regional magistrate was of the view that the appellant has failed to convince the court that new facts exist. She found that the appellant failed to prove on a preponderance of probabilities that exceptional circumstances exist and that it will be in the interest of justice to release him on bail. The regional magistrate did not specify the factors she dealt with and her reasons for her refusal of bail were scanty.

[18] The appellant's grounds of appeal are based on the same new facts that were submitted before the regional magistrate, as stated at paragraph 13: 1-4 above. Both the appellant and the respondent informed the court that a proper procedure was not followed by the regional magistrate. They all agreed that the regional magistrate erred in not admitting the appellant on bail when he did not afford him an opportunity to present his case properly. The appellant stated further that the cumulative facts presented by the appellant, the probabilities favor that he will be acquitted by the trial court. The appellant's personal circumstances were confirmed by the state and there is no evidence that the appellant will evade trial.

[19] The respondent is opposing this application on the strength of the state's case, that it is alleged that primer residue was found on the appellant's hands. Further that he has been arrested before and used a different name. The Respondent frankly conceded that the appellant has no previous convictions, pending cases and outstanding warrant of arrest. His address was positively verified by the respondent. The respondent submitted that the court should dismiss this application if it finds that the regional magistrate followed a proper procedure.

LAW AND ANALYSIS

[20] Section 65 of the CPA at (1)(a)

> *"(1) (a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.*
>
> . . .
>
> . . .
>
> *(4) 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."*

[21] According to section 65(4) of the CPA commentary, the appellant has a right to appeal against refusal of a renewed bail based on new facts **if these new facts have actually been placed before the magistrate or regional magistrate in an**

acceptable and procedurally correct manner (my emphasis). Reference to the above is also confirmed by section 60(11) (a):

> *"(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to (a) 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*** *(my emphasis) which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release."*

[22] This means therefore that the appellants, having informed the court of his intention to apply for bail on the new facts, the court should have given them an opportunity to present their evidence before it delivers judgment. In our law, evidence is presented in two ways, either orally (by testifying under oath) or filing a sworn statement (affidavit).

[23] The oversight by the court below after the appellant has indicated his intention to bring a bail application on new facts is concerning. It is required of presiding officers to be vigilant all the time especially bearing in mind that they deal with the liberty of accused persons on daily basis. While I understand the pressure presiding officers work under in particular in the lower court; however, the interest of justice must always prevail. In an application for bail on new facts the court must afford the accused person an opportunity to bring facts that did not exist at the time the initial bail application was heard. The court must give an accused person an opportunity to present evidence in support of his application. In this case, the court decided on the submissions made by the legal representatives from the bar. It must be emphasised that argument from the bar is not evidence and it is not given under oath. It is merely

a persuasive comment by the parties or legal representatives with regard to questions of fact or law. Argument does not constitute evidence, and cannot replace evidence. *Maboho v Minister of Home Affairs* 2011 JDR 104 (LT) at para 13.

[24] The oversight by the regional magistrate renders these proceedings irregular. Bail applications are *sui generis* in nature but that does not allow overlooking proper procedure that infringes on the accused person's rights as entrenched in the Constitution. In ***S v Lupuwana*** **(CA&R03/2015) ZAECPEHC 12 2015 para 41,** Sui generis in the context of bail proceedings was explained to mean; it is unique in that the formal rules of evidence are not strictly adhered to, they can be relaxed and where the court is obliged to take the initiative if the parties are silent; the court still has a pro-active role in establishing the relevant facts. For example, hearsay evidence is admissible but even that hearsay evidence must be strong and reliable.

[25] The rules of court procedure are devised for the purpose of administering justice and not hampering it. There is no rule in law which indicates that in bail on new facts formal evidence may be dispensed with. In any event that will be to the prejudice of the accused which in my view cannot be countenanced.

[26] ***S v Barber*** *1979 (4) SA 218 (D)* established a standing principle that the powers of this court are limited where the matter arises before it on appeal and not as a substantive bail application.

[27] In my view, the magistrate erred in failing to give the appellant an opportunity to present evidence in support of his application for bail on new facts. Accordingly, I

am of the view that this matter should be referred back to the regional magistrate, Cape Town to follow proper procedure as prescribed in the CPA by section 60(11)(a).

[28] In the result the following order is made:

1. The Matter is remitted back to the regional magistrate, Cape Town to urgently hear the bail application on new facts within 10 (ten days) from the date of this judgment.

2. The office of the Regional Court president is directed to ensure that this order is urgently given effect to.

_____

N NYATI, AJ

ACTING JUDGE OF THE HIGH COURT

BAIL APPEAL

CASE NO: A214/2021

In the matter between:

MCEBISI MGUMBI **Appellant**

and

THE STATE **Respondent**

Date of Hearing: 25 February 2022

Date of Judgment: 16 March 2022

APPEARANCES:

Counsel for Appellant: Adv. A Njeza

Instructed by: Prince Attorneys c/o Godla & Partners Attorneys

Attorney briefed:	Mr. P Vepile
Counsel for Respondent:	Adv. R E Lewis
Instructed by:	Director of Public Prosecutions, Cape Town, Western Cape