



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No: A29/2023

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

In the matter between:

XOLANI NOEL NGUBANE

Appellant

And

THE STATE

Respondent

Neutral Citation: *Xolani Noel Ngubane v The State* (Case No: A29/2023) [2023]
ZAGPJHC 500 (18 April 2023)

JUDGMENT

THUPAATLASE AJ

Introduction

[1] This is a bail appeal following a refusal by the regional magistrate sitting in Johannesburg regional court to admit the appellant to bail. The parties are agreed that the offences fall under schedule 5 and that the provisions of section 60 (11) (b) of Act 51 of 1977 (the Act) are applicable.

Background

[2] The appellant appeared charged with various charges including unlawful possession of a firearm in contravention of section 3 of the Firearm Control Act, 60 of 2000 (the Act) read with various sections of the same Act. In addition, the appellant is also charged with unlawful possession of ammunition in contravention of section 90 of the Act. A further charge of contravening the provisions of the Custom and Excise Duty Act 91 of 1964. Another charge is that of contravening section 1(A) of Counterfeit Goods Act, 37 of 1997.

[3] The appellant lodged the appeal and has assailed the refusal to grant him bail on various grounds and principally that the court a quo erred in finding that he failed to discharge the onus that it was in the interest of justice that he should be released on bail. That the magistrate erred in concluding that the State has a strong case against him, and a strong likelihood of the appellant being convicted and that given the seriousness of the charges, imprisonment may be the only option. In addition, the magistrate erred in concluding that the appellant does not stay at the address provided in his affidavit.

[4] The appellant submitted an affidavit in support of his application. In opposing the application, the State also submitted an affidavit of the investigating officer. In his affidavit the appellant denied the allegations against him. He confirmed that he was merely renting the property as his permanent residence was in Umlazi in Kwa- Zulu Natal (KZN). He indicated that he was a businessperson and that he commutes between the provinces of Gauteng and KZN in pursuit of his business as an owner of a construction company. He specifically states that he is married and has children.

[5] The affidavit also disclosed previous convictions of the appellant. He also dealt with the factors contained in section 60(4) of the Act and specifically denied that he was a flight risk and that he had no ability to interfere with state witnesses.

[6] In respect of the charges relating to an unlawful possession of a firearm the appellant gave an explanation. The explanation is to the effect that he denies possession of the said firearm and its involvement with the housebreaking. He states that he is not the sole occupier of the property and that the said firearm was found in a room that was unoccupied. He submitted that he would abide by any conditions that may be imposed if bail was to be granted.

[7] The affidavit of the investigating officer details how an operation was set in motion to investigate allegations that the appellant was dealing in counterfeit goods in contraventions of the Custom and Excise Duties Act. The operation led to the arrest of the appellant at the place in Naturena, a suburb of Johannesburg. It is clear that fortuitously the police also discovered a firearm and ammunitions which resulted to further charges in terms of the Firearms Control Act.

[8] The affidavit further details how the search was conducted at the premises of the appellant and also items that were found and seized. The affidavit by the police confirm that the appellant is a South African citizen and proof of that was an identity document that he had in his possession. He also has drivers' license issued by South African licensing authorities.

[9] The affidavit deals with the reason why the appellant should not be granted bail. It is stated that the appellant is not permanently resident in Gauteng and that it will be difficult to trace the appellant should he skips his bail. The reason being that the Gauteng province is densely populated, and it would cost the State money to trace the appellant.

[10] The investigating officer states further that there is no evidence that the appellant will destroy any evidence and that there is no evidence that he'll intimidate witnesses as these were State officials. There is also no evidence that his release will disturb public peace.

[11] The affidavit further opines that the property where the appellant alleges to be his rented residential property was scantily furnished and also has little clothing. As such the investigating officer concluded that the place was only used as place where the appellant is conducting his illicit business. He stated that the fact the appellant has previous convictions shows that he has propensity to commit offences.

[12] A further point raised by the investigating is about the strength of the State case against the appellant. The investigating officer expressed a firm view that the State has a strong case against the appellant. He indicated there is a possibility of trial court imposing a lengthy imprisonment term if convicted given the serious nature of the charges the appellant is facing.

Bail refusal

[13] The court a quo refused to admit the appellant to bail and hence this appeal. The reasons by the learned magistrate are essentially that the appellant has failed to discharge the onus that it was in the interest of justice that he should be admitted bail. The court a quo found that he failed to proof that he was resident of the property where he was arrested and illicit goods including a firearm and ammunition were found. It was a finding of the court a quo that the property was used as a warehouse.

[14] The court further found that the State case against the appellant was strong and that the appellant faces a long period of incarceration which is incentive enough for the appellant to evade his trial. The court a quo found that the appellant has propensity to commit offences and further the court was not satisfied that the appellant has a legitimate construction business. This was based on the fact that no documentary proof was provided to back up the claim.

Law Applicable

[15] The application is in terms of Section 65 (1) of the Act which provides that: *'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.'

[16] The section directs how the appellate court should deal with such an appeal by providing in section 65 (4) 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'*."

[17] The approach expounded in *S v Barber* 1979 (4) SA 218D at page 220 E-H has been widely accepted as the correct approach to the test contemplated in section 65(4) of the Act that: *"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 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... Without saying that the magistrate's view was actually the correct one, I have not been persuaded to decide that it is the wrong one.'*

[18] This approach was endorsed with added qualification in the case of *S v Potthen & Others* 2004 (2) SACR 242 (C) at para [16] where the court explained that *' Insofar as the quoted dictum in S v Barber might be amenable to be construed to suggest that the appellate court's power to intervene in terms of Section 65 (4) of the CPA is strictly confined, in the sense of permitting interference only if the magistrate has misdirected him or herself in the exercise of his or her discretion in the narrow sense, I consider that it would be incorrect to put such a construction on the subsection; certainly in respect of appeals arising from bail applications made in terms of s60 (11) (a) of CPA. I am fortified in this conclusion by the manner in which the Supreme Court of Appeal dealt with the bail appeal in Botha's case supra. See paras [21]- [27] of the judgment. It is clear that the Appeal Court undertook its own*

analysis of the evidence and came to its own conclusion that the appellants had not discharged the onus on them in terms s 60 (11) (a) of the CPA.'

[19] It is apparent that Section 65(4) of the Act is couched in peremptory terms. This is clear by the use by the Legislature of the word "shall". The decision of the magistrate cannot be set aside unless it is found to be wrong, and if this Court is satisfied that the decision was wrong, this Court shall give the decision which in its opinion the magistrate should have given. The *Barber* decision is a pre-constitution decision and the modification of it in *Pothen* is to be welcomed as it infuses constitutional flavor to it.

[20] It follows that in terms of s 65 (4) of the Act interference with the decision of the magistrate can only take place if the appellate court is satisfied that the decision was wrong in refusing to grant bail. For appellant to be successful in this appeal will have to show that the court a quo overemphasized aspects which militate against the granting of bail, whilst aspects in favour of the appellant to be granted bail were not given sufficient weight. As stated in *S v Zondi* 2020 (2) SACR 436 (GJ) at para [12] *'It speaks for itself that if this court cannot conclude that the court a quo wrongly weighed up the points for and against the granting of bail, this court would not be at liberty to consider the issue afresh. The court's decision will have to stand.'*

[21] The purpose of the bail proceedings had been crystallized in a number of decisions and recently Thulare J in the case of *S v Motsisi* 2023 (1) SACR 218 (WCC) at para [28] stated that *'the essentials of a bail application include addressing relevant offence if the applicant so elect and such particulars as may be reasonably sufficient to satisfy the court, in this instance that the interest of justice permit the release of the applicant.'* The question to be determined is always whether the applicant will appear at the trial. See Hiemstra's Criminal Procedure (Issue 1) at 9-1- under the Chapter Bail hearing and trial.

[22] The learned magistrate came to the conclusion that the appellant has failed to discharge the onus that it was in the interest of justice to be released on bail. The reading of the judgment by the learned magistrate reveals to be poorly reasoned. The learned magistrate speculated on the strength of the State case on the mere say so of the investigating officer.

[23] He further states that the appellant faces a possibility of a lengthy imprisonment term. This the learned magistrate bases with reference to what he states that the unlawful possession of unlicensed firearm is subject to provisions of minimum of 15 years imprisonment. This is clearly wrong, and in this regard, the learned magistrate misdirected himself. The law in this regard prescribes a maximum sentence of 15 years imprisonment.

[24] 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 accused unless this is likely to prejudice the ends of justice.'*

[25] The court a quo failed to balance the interests of the appellant with that of the society. The court a quo appeared to have been preoccupied with the fact that there is a strong case against and that he is recidivist who appears to have no regard to laws of the country.

[26] It is always important for the court to remind itself about the purpose of bail application so that a possibility of misdirection is avoided. The court must keep in mind that prima facie case, in itself is not a basis for refusing to admit an applicant to bail. This was made clear in the *S v Dlamini; S v Dladla and others; S v Joubert; Schietekat* 1999 (2) SACR 51 (CC) where the following is stated at para [11] *'Furthermore, a bail hearing is a unique judicial function. It is obvious that the peculiar requirements of bail as an interlocutory and inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal court it is considerably less formal than a trial. Thus, the evidentiary material proffered need not comply with the strict rules of oral evidence or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. 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 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.'

[27] In considering whether to grant or refuse bail the court should not speculate of what the court thinks might happened. This is unfortunately what the court a quo did in this matter. A clear example of such instance of speculative and conjectural reasoning is to be found in the following remarks by the court that *'it might well be that the applicant resides with unknown relatives, or his assets are outside of the province.'* See line. This statement is not supported by evidence that was presented before the court and there is basis for such an inference.

[28] The court must be satisfied that there is a probability and not a possibility of one or more of the factors mentioned in section 60(4) happening. The point was emphasised in *S v Diale and Another* 2013 (2) SACR 85 (GNP) at para [14] where it is stated that *"A court cannot find that refusal of bail is in the interest of justice merely because there is a risk or possibility that one or more of the consequences mentioned s60(4) will result. The court must not grope in the dark and speculate; a finding on the probabilities must be made. Unless it can be found that one or more of the consequences will probably occur, detention of the accused is not in the interest of justice, and accused should be released."*

[29] A reading of the judgment of a quo gives the impression that the court failed to apply its mind to the issues that it was required to have adjudicated. The following is an illustration of my observation. The court during in its judgment remarked as follows:

'As far as the counterfeit goods go, it has serious implication to the economy. If people import illegal items and sell it as real item, as the real MaCoy (sic) it has severe financial implications to the companies concerned to the owner of trademark. Secondly if one does not pay the value of the customs and customs duties government suffers. That has been considered in the past.'
See line 20 of the typed record.

[30] The considerations by the court were clearly off the mark. The remarks would perhaps be appropriate where a trial court was considering sentence after

conviction, otherwise the remarks were clearly misplaced in the context they were made.

[29] The learned magistrate appears to have an issue with the fact that the appellant travels to various parts of the country. This is illustrated by what is said during the course of the judgment that:

'the fact that he was convicted in Vryburg previously, he resides in Umlazi in Natal and convicted in Vryburg in the Northern Cape suggests to the court that either that the applicant when things get warm moves his operation elsewhere or he is a part of a greater syndicate which is also a possibility if one considers the merits of this matter.' See line 10 of the typed record page 34.

The court appear not to recognise the constitutional right to freedom of movement. This right is enshrined in the Bill of Rights. Section 21 (1) of the Constitution provides that *"Everyone has the right of movement."* Section 21 (3) further provides *'Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.* It can never be a good reason that an individual is denied bail because he/she stays in a different province in the Republic.

[30] During argument on appeal the State supported the finding of the learned magistrate, that the appellant failed to discharge the onus resting on him to show that the interest of justice permit his release and that it has not been shown that the judgment of the learned magistrate was wrong as required by s65 (4) of the Act.

[31] The State assailed the use of an affidavit by the appellant instead of presenting oral evidence. It was argued such evidence was less persuasive as it is not open to cross-examination. For this submission reliance was placed in the case of *S v Mathebula* 2010 (1) SACR 55 (SCA).

[32] The case of *Mathebula* is distinguishable as in that matter the appellant had to prove exceptional circumstances to permit his release on bail. The SCA at para [11] of the judgment had the following to say: *In the present instance the appellant's tilt at the State case was blunted in several respects; first he, founded the attempt upon affidavit evidence not open to test by cross-examination and therefore less*

persuasive.' The *Mathebula* decision is not authority that evidence by affidavit cannot be used.

[33] The use of affidavit is permissible and in casu the State evidence in opposing the application also submitted in an affidavit. In *S v Pienaar* 1992 (1) SACR 178 (W) at 180C the court stated as follows "*In my view therefore there is nothing in the Criminal Procedure Act that renders the use of affidavits in bail applications impermissible. Obviously, an affidavit will have less probative value than oral evidence which is subject to the test of cross-examination.*"

[34] The evidence shows that the appellant is a South African citizen with the necessary documentation to proof that and that he is having property in KZN. The State has conceded that there is no possibility that appellant will interfere with witnesses. He has no travelling documents that could enable him to travel outside the country. The State further conceded that the release of the appellant will not cause public disturbance. The appellant has indicated his willingness to abide by bail conditions that maybe imposed by this court.

[35] I have come to the conclusion that in the absence of any likelihood of any factors contemplated in section 60 (4) occurring the interest of justice permit the appellant to be released on bail. In conclusion that the evidence at the bail hearing did not establish such a probability. The learned magistrate premised his reason to refuse bail on the finding of the strength of the State's case and the guilt of the appellant rather than the probability that the appellant would interfere with investigations and hinder the administration of justice if released on bail.

Order

[36] In the circumstances it is ordered as follows:

1. Appeal against refusal of bail is granted.
2. The appellant is granted bail in the sum of R 10 000.00
3. Upon payment of the said sum of money, the appellant shall be released from custody on condition that:

- 3.1. That the appellant attend court on the next date and any further date to which this matter is postponed and remain in attendance until excused by the court or dealt with in accordance with justice.
- 3.2. He informs the investigating officer of his whereabouts at any stage that he has to leave Johannesburg metropolitan municipal area and also when he for reason whatsoever changes his residential address.
- 3.3. The appellant is informed that in terms of section 67(1) Act 51 of 1977, if, after his release on bail, he fails to appear at the place and on the date and at the time appointed for his trial or to which the proceedings are adjourned, or fails to remain in attendance at such trial or at such proceedings, or fails to comply with the above conditions, the relevant Court shall declare the bail provisionally cancelled, and the money provisionally forfeited to the State, and issue a warrant for his arrest. The appellant is further informed that it is also a punishable offence for failing to appear or for non-compliance with a stipulated condition.
- 3.4. A copy of this order with the bail conditions must be served on the appellant personally by the Investigating Officer before his release on bail. A copy of such service duly signed as acknowledgment by the appellant certifying that he is fully conversant with the conditions of his release in bail must be filed as part of the record in the Regional Court, Johannesburg.

A handwritten signature in black ink, appearing to read 'T. Thupaatlase', is written over a horizontal line.

T. THUPAATLASE

Acting Judge of the High Court

Appearances:

For the Appellant: Mr Justice Magayi

Instructed by: Magayi Attorneys Inc.

For the Respondent: Adv. MM Phaladi

Instructed by: Office of Public Prosecution

Gauteng Local Division, Johannesburg

Date of hearing: **11 May 2023**

Date of judgment: **18 May 2023**