IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

APPEAL NO: A156/2019

- REPORTABLE: **NO**
- OF INTEREST TO OTHER JUDGES: **NO**
- REVISED

27 June 2019
DATE

SIGNATURE

In the appeal of:

BAFANA TWALA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

VUMA, AJ

INTRODUCTION

[1] The appellant appeals in terms of section 65 of the Criminal Procedure Act 51 of 1977, hereinafter "the Act" against a decision delivered on 13 May 2019 by the Learned Magistrate Ms M Mokoena in the Pretoria Magistrate's Court, Regional Division, in terms of which he was refused admittance to bail.

[2] According to Annexures B, C and D of the Charge sheet, he is charged with the following:

2.1 Possession of a firearm;

2.2 Possession of suspected stolen property; and

2.3 Possession of ammunition.

[3] By agreement between the State and the Defence at the court a *quo*, his bail falls within the ambit of Schedule 5 of the Act.

[4] Section 60(11)(b) of the Act which deals with bail matters falling within the above ambit provides that '*Notwithstanding any provision of this Act, where the accused is charged with the offence referred to in schedule 5 but not schedule 6, the court shall order that the accused be kept in custody until he or she is dealt with in accordance with the law unless, he 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.*'

[5] The appellant who was legally represented in the court *a quo* lodged a formal bail application during which he tendered *viva voce* evidence in support of his application for bail and was the defence's only witness. The state opposed the application and the investigating officer ("I.O") in this matter, that is, Constable Masasi's affidavit, was admitted as Exhibit "A" and his affidavit was the only evidence read and tendered by the State. In a nutshell, Constable Masasi opposed the bail application on the basis the appellant has a previous conviction for which he was released on parole and that by him being found in 'possession a stolen motor vehicle', the appellant has violated his parole conditions. He however stated that in the event the court *a quo* found otherwise, the appellant may be admitted into bail but on certain conditions.

THE FACTS GIVING RISE TO THIS BAIL APPEAL

[6] The police had received information about a hijacked or a robbed BMW motor vehicle which had been reported as such at Littleton police station. The police followed the said information. This led to the arrest of the appellant at Simon Vermooten Road in Pretoria who was driving the said BMW at the time. Inside the said motor vehicle two unlicensed firearms and police equipment were found. In his evidence the appellant stated he could take the police to the person named Jabu to whom he had gotten the said motor vehicle from. He further testified that he knew nothing about items that were found inside the BMW since he had just received the said motor vehicle from the said Jabu.

SUBMISSIONS ON BEHALF OF THE APPELLANT

[7] On behalf of the appellant it was submitted that the court *a quo*'s refusal and the continued detention of the accused is not in the interests of justice. It was further

submitted that the court *a quo* has misdirected itself in the following manner:

1. It disregarded the favourable personal circumstances of the appellant;
2. It made a finding in respect of section 60(4)(b) of the Act, that is the appellant's evasion of his trial if he is granted bail whereas from the Record, there was no evidence in support of same;
3. It did not consider the undisputed evidence that the appellant is not a danger to the public, nor that there is no likelihood that the appellant will interfere with state witnesses; nor that the appellant will commit further crimes; nor that he will not endanger public order or safety;
4. It did not consider the fact that appellant has a family to maintain and a business to run; and
5. It did not consider that the appellant has a verified fixed address.

[8] It was further submitted that the fact that the appellant was at the time of his arrest on parole does not in itself presuppose that he has violated his parole conditions, given the presumption of his innocence until proven otherwise. Furthermore, the fact that the state in its submissions admitted that it could not gainsay, *inter alia*, neither the appellant's explanation regarding Jabu as the person from whom he had gotten the said motor vehicle from and that the appellant was even willing to take the police to the said Jabu nor that the appellant was not aware of the items that were found inside that motor vehicle and that the said concessions by the state should bode in the appellant's favour. It was further submitted that the State even submitted that bail may be fixed in favour of the appellant but that despite same, the court *a quo* refused the appellant bail.

[9] Before the court *a quo* the appellant had testified that if he was granted bail, he would be in a position to pay an amount of R4 000-00. The emphasis on behalf of the appellant was that on the balance of probabilities, the interests of justice favours that the appellant be granted bail.

SUBMISSIONS ON BEHALF OF THE STATE

[10] Before the court a quo, the state had submitted that the offences the appellant is facing are very serious in nature but regardless and save to state that he was out on parole, it could neither gainsay the explanations given by the appellant regarding the charges he faced. The state thus submitted that the court may grant the appellant under those circumstances. Before this appeal court, the state submitted that the fact that the appellant had violated his parole conditions is indicative that a likelihood exists that the objectives or proper function of the criminal justice system would be undermined or jeopardised should the appellant be released on bail, which in itself cannot be in the interest of justice.

ANALYSIS

[11] Foremost it must be stated that in its judgment, regarding the appellant's personal circumstances, the court *a quo* did not make any contrary finding to that of either the defence or the state. Similar to both the I.O and the state, the court a quo's scrutiny or concern, it would appear, fell on the fact that the appellant had violated his parole conditions. In its judgment it held that contrary to submissions by the defence, the fact that an accused person was on parole at the time of his arrest is a *prima facie* violation (my words) of his parole conditions and thus '*does not any substantiation*'.

[12] In terms of section 60(10) of the Act a duty is imposed on a court hearing a bail application to weigh up personal circumstances of an accused against the interests of justice. In considering the question in subsection (4), the Act provides that the court must decide the matter by weighing up the interests of justice against the prejudice the accused will likely suffer if he or she were to be detained in custody, taking into account factors enumerated in section 60(9) of the Act.

LEGAL PRINCIPLES

[13] Section 65(4) of the CPA sets out the basis on which this court can interfere with the refusal of bail by the court *a quo*. The test is the following: was the magistrate wrong.

[14] In the matter of ***S v Mpulampula 2007 (2) SACR 133 (E)*** it was held that where the court *a quo* misdirected itself materially on the facts or the legal principles the court of appeal may consider the issue of bail afresh. Interference is also justified where the lower court overlooked some important aspects in coming to its decision to refuse bail.

[15] The functions of the court hearing the appeal under section 65 are similar to those in an appeal against conviction and sentence. In ***S v Barber 1979 (4) SA 218 (D) at 220 E-H*** Hefer J remarked as follows:

"It is well known that the powers of this court are largely limited where the matter comes before it on appeal..... 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 discretion".

[16] In the matter of ***S v C 1998 (2) SACR 721 (KPA) at 724 H-I*** (English translation from headnote) the court held the following:

"*It could not have been the intention of the Legislature that an alleged offender must be detained when he has established conclusively that he will attend his trial, that he will not interfere with the administration of justice, and that he will commit no further wrongdoing (i.e., the usual circumstances that arise for consideration in a bail application). As soon as more is required of him, the procedure becomes punitive. That would be altogether objectionable. Therefore, all that the Legislature enacted, somewhat clumsily, is that a Court which is seized with a matter involving a Schedule 6 offence must exercise exceptional care when considering the usual circumstances. The Court must be able to hold with a greater degree of certainty that the detainee will do all that his bail conditions require of him. That is all.*"

Although the ***S v C*** above related to a Schedule 6 offence, reference is made thereto for comparison purposes only.

[17] In ***S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat 1999 (2) SACR 51 (CC)*** it was held that the focus was to protect the investigation and prosecution of the case against hindrance. It was held that it would simply mean a value judgment of what would be fair and just to all concerned. The Court further held that content of such value judgment would depend on the context and applied interpretation in each and every case. The Court further held that in applying the interests of justice criterion, both the trial-related and extraneous factors are to be taken into account. This criterion requires a weighing up of the accused's interests in liberty against those factors which suggest that bail be refused in the interests of the society.

ANALYSIS

[18] It is common cause that the basis on which this court can interfere with the

refusal of bail by the court *a quo* in a bail appeal is set out in terms of section 65(4) of the Act, namely: "was the magistrate wrong" and the *ratio* as laid down in the matters of ***Dlamini, Dladla, Joubert*** and ***Schietekat*** above.

[19] The question for determination by this court is whether, from the Record of the bail application in the court *a quo*, the appellant has succeeded to prove that, on the balance of probabilities, the interests of justice exist warranting his release on bail. It is trite that in the event the bail appeal court finds that the evidence adduced by the appellant in the court *a quo* meets the above standard, then it court must determine if the court *a quo*'s decision to deny the appellant bail under those circumstances was wrong, in which event it can thus interfere with such a decision.

[20] In its judgment, the court *a quo* stated that the state's objection to the appellant's admittance to bail turned on the fact that he was on parole. It thus held the following:

19.1. That the appellant was on parole;

19.2. That should the appellant be released on bail, the likelihood that the objectives or proper function of the criminal justice system would be undermined or jeopardised exists; and

19.3. That the appellant himself personally acknowledges the seriousness nature and gravity of the charge(s) he faces.

[21] It is indeed common cause that the appellant was and still is on parole. It is further common cause that despite the above being the case, the state submitted that bail may be fixed for the appellant, although not suggesting the amount. In his evidence the

appellant has indicated that he would be able to afford bail in the amount of R4 000-00 if granted. It is trite that section 60(10) of the Act emphasizes the duty incumbent on the court, even where the prosecution is not opposing the granting of bail, to weigh up the personal interests of '*the accused against the interests of justice*'.

[22] From the Record, the court *a quo* does not state her reasons and findings which led to her conclusions and thus her judgment. Such a *lacuna* therefore calls for this court to rely on probabilities. However, the general tone of her judgment seems to suggest that should the appellant be released on bail, a likelihood exists that the objectives or proper function of the criminal justice system would be undermined or jeopardised for two reasons:

1. The appellant was on parole; and

2. He might evade his trial if released on bail.

[23] Based on the above she concluded that the appellant failed to discharge his onus in this regard as provided for, particularly in section 60(4) of the Act.

[24] It is my view that in determining whether an accused should be admitted to bail, a holistic approach should be adopted and not to consider each factor in a piecemeal fashion. However, the court *a quo*'s conclusion that the appellant will evade justice is made without even laying a basis for same since, in my view, from the Record, there is no evidence that justifies such a conclusion. His undisputed personal factors state, *inter alia*, that he a married father of two minor kids who are of a school-going age; he has a fixed address; he does not own any travelling documents; he owns a business by selling clothes the value of which is R70 000-00, from which business he generates a monthly income of R10 000-00 and earns a living as a sole breadwinner; he owns furniture to the value of R70 000-00 and a motor vehicle worth over R200 000-00; and other than the previous conviction for which he is out on parole, he has no pending cases against him.

[25] Moreover, the state's submission is that it could not gainsay that Jabu was not indeed the person from whom the appellant had gotten the motor vehicle from and that the appellant knew nothing pertaining to the items found inside the said motor vehicle. It is my view that these concessions by the state should have been factored in the court *a quo* in determining the strength of the state's case against the likelihood of the appellant evading his trial.

[26] The fact that the appellant was out on parole at the time of his arrest does not, in my view, presuppose that he has violated his parole conditions, hence my view as appears above that a holistic approach should have been followed by the court *a quo* in making the assessment in respect hereof. Although not categorically stated in the judgment, given its silence *re* its conclusions regarding its refusal now being appealed against, such a finding cannot be lightly arrived at in isolation of the glaring evidence from the Record. As stated in paragraph 25 above, the concessions made by the state in its submissions seem to suggest that save for the issue of the appellant being out on parole, the evidence or the state's case relating to the offence(s) as against the appellant *per se* was weak and may thus not withstand the explanations given by the appellant at the time of the bail application. It is my view therefore that to the extent that the state's case against the appellant was/is weak, the probability of his conviction did not exist and thus neither his perceived violation of his parole conditions. This view brings me to the conclusion that the court *a quo*'s conclusion that release of the appellant on bail carries the likelihood of the criminal justice system being undermined and /or jeopardized wrong as same is not supported by the Record.

[27] From the above, I find that the state's concessions and acceptance with regard to the appellant's explanation as an admission that its case is weak. On the whole the general view is that an accused against whom the state's case is strong would most likely evade his trial. However, the reverse of such a likelihood not existing in *casu* should be

made in favour of the appellant in that given the state's weak case against him, he would not evade his trial. I therefore further find that the court *a quo*'s conclusion of the evasion of trial against the appellant is not supported by the Record, bearing in mind that the court *a quo* could have held a proper enquiry to clarify any grey area during the bail application to elucidate and justify her conclusions, yet she did not. One may add that the serious nature and gravity of the offence cannot be viewed at in isolation of the strength or weakness of the state's case against an individual accused.

[28] In conclusion, if it is accepted that from the state's submissions, the deduction that may be drawn is that the state's case is weak, then on the probabilities it follows that at the end of the trial he will be acquitted. Invariably therefore and moving from the above premise, I am of the view that there will be parole conditions that would have been violated by the appellant. I am of the further view that in the interest of justice "the contravention" of the parole conditions should never be viewed without taking into account the strength or weakness of the state's case. The approach, in my view, regarding the question whether the parole conditions have been contravened should not flow from a blanket approach as held by the court *a quo* when she stated that it does not need or require any substantiation. A value judgment based on the totality of the facts ought to be made.

RESULT

[29] In the result and taking into account, *inter alia*, s60(1) of the Act, the court *a quo*'s decision to refuse the appellant bail was wrong and this court therefore ought to interfere with same.

[30] Regarding the amount may be set for the appellant, the factors that have to be taken into account by the court are trite, amongst which, whether the appellant can afford the said amount.

CONCLUSION

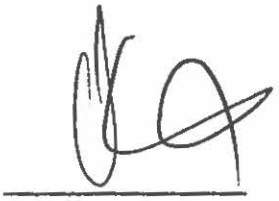
[31] From the aforegoing consideration, I am satisfied that the appellant has established that on the balance of probabilities the interest of justice permit his release on bail pending the trial. As provided for in terms of section 65(4) of the Act, I am persuaded that the decision of the court *a quo* in refusing to admit the appellant to bail was wrong and is hereby set aside and the appeal is upheld.

ORDER

1. Bail is fixed in the amount of R 8000-00 (eight thousand rand) in favour of the appellant subject to the following conditions:

    1.1 Should the appellant change his current address, he must inform the Investigating Officer of such changes before relocation.

    1.2 The appellant must attend his trial on the given date and subsequent days not later than 9am and must remain in attendance until this matter is finalised or he is excused by the court.



L.B. VUMA
Acting Judge of the High Court
Gauteng Division, Pretoria

Heard on: 24 June 2019
Judgment delivered: 27 June 2019

Appearances:
For the appellant: Adv Joubert
Instructed by: S Mahlangu Attorneys
For the respondent: Adv Maritz
Instructed by: Office of the DPP, Pretoria