IN THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA DIVISION, MIDDELBURG

(LOCAL SEAT)

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

.....	.....
SIGNATURE	DATE

CASE NO: BA 18/20

In the matter between:

IKE CHIEDIEBEZE **APPLICANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

JUDGMENT HANDED DOWN VIA EMAIL DUE TO COVID 19. JUDGMENT DEEMED TO HAVE BEEN HANDED DOWN ON 29JUNE 2020.

BRAUCKMANN AJ

INTRODUCTION

[1] The appellant ("Mr Ike") was arrested on 7 January 2020 and charged with the offence of contravention of section 5(b)[1], of The

[1] 5 Dealing in drugs
No person shall deal in-
(a) any dependence-producing substance; or
(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance,
unless-
(i) he has acquired or bought any such substance for medicinal purposes-
(aa) from a medical practitioner, veterinarian, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder;
(bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, veterinarian, dentist or practitioner; or
(cc) from a veterinary assistant or veterinary nurse in terms of a prescription in writing of such veterinarian,
and administers that substance to a patient or animal under the care or treatment of the said medical practitioner, veterinarian, dentist or practitioner;
(ii) he is the Director-General: Welfare who acquires, buys or sells any such substance in accordance with the requirements of the Medicines Act or any regulation made thereunder;
[Para. (ii) amended by s. 4 of Act 18 of 1996 (wef 1 April 1997).]
(iii) he, she or it is a medical practitioner, veterinarian, dentist, practitioner, nurse, midwife, nursing assistant, pharmacist, veterinary assistant, veterinary nurse, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter, or any other person contemplated in the Medicines Act or any regulation made thereunder, who or which prescribes, administers, acquires, buys, transhipps, imports, cultivates, collects, manufactures, supplies, sells, transmits or exports any such substance in accordance with the requirements or conditions of the said Act or regulation, or any permit issued to him, her or it under the said Act or regulation; or
(iv) he is an employee of a pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter who acquires, buys, transhipps, imports, cultivates, collects, manufactures, supplies, sells, transmits or exports any such substance in the course of his employment and in accordance with the requirements or conditions of the Medicines Act or any regulation made thereunder, or any permit issued to such pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter under the said Act or regulation.

Drug and Drug Trafficking Act ("DTA")[2] (dealing in drugs). The charge of dealing in drugs follows an incident on 6 January 2020 where he was found in possession of drugs valued at more or less R I0 000.00 and subsequently arrested. The alleged drugs (cocaine) was found in the car he alone was travelling in at the time.

[2] The accused has previously been convicted of an offence referred to in Schedule 1 (contravention of section 4(b) of the DTA - possession of drugs), thus qualifying this matter to fall within the ambit of Schedule 5 of the CPA[3], and it also became common cause that the offence that Mr Ike is charged with, falls within the ambit of Section 60(11) (b) of (so-called Schedule 5 offence).

A BRIEF SUMMARY OF THE LEGAL POSITION

[3] Section 60(11) (b) of the Criminal Procedure Act stipulates that:

> *"Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in Schedule 5, the court shall order that the accused be detained in custody until he is dealt with in accordance with the law, unless the accused, having been given a reasonable*

[2] Act 140 of 1992
[3] Act 51 of 1977

opportunity to do so, adduces evidence which satisfies the court that the interest of justice permit his release."

[4] Mr Ike was given an opportunity to adduce evidence which satisfies the court that the interest of justice permit his release. He submitted evidence by way of affidavit. The State, in opposing the application for bail, submitted evidence by way of affidavits, and on the evidence thus adduced, the Court a quo was of the opinion that it was not in the interest of justice for him to be released on bail.

[5] In the Constitutional Court case *S v Dlamini, et al*[4], the following observation was made in para [6] of the judgment:

"*[Section] 35(1)(f) postulates a judicial evaluation of different factors that make up the criterion of interests of justice, and ..... the basic objective traditionally ascribed to the institution of bail, namely to maximise personal liberty, fits snugly into the normative system of the Bill of Rights.*"

[6] An accused is, in the absence of a conviction by a Court of Law, constitutionally presumed to be innocent[5]. An accused person cannot be kept in detention pending his trial as a form of

[4] 1999(2) SACR 51(CC)
[5] Section 35(3) (h) of the Constitution of the Republic of South Africa 1996.

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"[6].

[7] In *S v Branco* [7]Cachalia A.J (as he then was) remarked as follows:

> *"It must be borne in mind that any court seized with the problem of whether or not to release a detainee on bail must approach the matter from the perspective that freedom is a precious right protected by the Constitution. Such freedom should only be lawfully curtailed if 'the interests of justice so require'. (See s 35(1) (f) of the Constitution, which entitles any arrested or detained person 'to be released from detention if the interests of justice permit; subject to reasonable conditions'.)"*

[8] The fundamental objective of the institution of bail in a democratic society based on freedom is to maximise personal liberty. The proper approach to a decision in a bail application is that:

> *"The court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby[8]."*

[6] S v Acheson 1991 (2) SA 805 (Nm) at 822 A-B per Mohamed J (as he then was).
[7] 2002 (1) SACR (W) 532 H and further.
[8] Harcourt J in S v Smith and Another 1969 (4) SA 175 (N) at 177 E-F.

[9] Johan van der Berg[9], inter alia, remarks as follows:

> *"In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible provided the interests of justice will not be prejudiced by this. Expressed differently, it may be said that bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of his release. Similarly, the accused's liberty should be encroached upon as little as the proper administration of justice will permit."*[Own emphasis]

[10] The weight of judicial opinion in South Africa fortunately appears to favour the notion that the accused is innocent until he is proven guilty, and that such presumed innocence also operates in bail hearings. This would be the case even where a strong prima facie case against the accused exists. In this matter no such case has been made out on the papers. 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.

[11] The reasons for refusal of bail can usually be found in one of two considerations, or both: (1) will the accused *abscond*; and (2) will

[9] Bail, A Practitioner's Guide, Third Edition, 2012, on page 10.

the granting of bail lead to *interference with the investigation* and/or prosecution? These considerations entail a projection of future conduct taking into account past conduct[10].

[12] Section 60 (4) of the CPA stipulates that:

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;

(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

[10] S v Thornhill (2) 1998 (1) SACR 177 (C) at 182 E to G.

(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;

(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;

[13] A court cannot find that the refusal of bail is in the interests of justice merely because there is a risk or possibility that one or more of the consequences mentioned in subsection (4) will result. The court cannot 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 interests of justice and the accused should be released[11].

[14] The purpose of the bail application is mainly to assess the "*likelihood*" of risk in light of the purpose of bail, which in its essence involves the securing of attendance of an accused

[11] S v Swanepoel 1999 (1) SACR 311 (O) at 313 D to F.

person at trial and the prevention of that accused from interfering with the investigation of the case[12]. The Section 60(4) listed factors thus provides the framework under which this risk is to be assessed. The deprivation of liberty and freedom through arrest is one that should always be in line with the Constitution hence section 35 (1) (f) of the Constitution ensures that this deprivation serves the limited purpose of ensuring that the accused is duly and fairly tried, and hence the interest of justice requirement ought to be utilised as the foundation of any application to be released on bail[13].

[15] Section 65(4) of the CPA stipulates:

> "*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 opinion the lower court should have given.*"[Own emphasis]

[16] The judge hearing the appeal can only interfere with the decision of the Court a quo to refuse bail, if it is satisfied that the decision

[12] S v Dlamini and Others 1999 (2) SACR 51 (CC) at paragraph [52].
[13] The Constitution OF THE REPUBLIC OF SOUTH AFRICA, 1996.

was wrong[14]. The Court has to be persuaded that the Court a quo exercised its discretion *wrongly*. Accordingly, although this Court may hold a different view, it should not substitute its own view for that of the Court a quo because that would be an unfair interference with the Court a quo's exercise of its discretion. No matter what this Court's own views are the real question is whether it can be said that the Court a quo, who had the discretion to grant bail, exercised the discretion wrongly. The test set out in Barber has been followed by numerous courts since[15].

MR IKE'S CASE

[17] Mr Ike dealt with his personal circumstances and the requirements envisaged in terms of s 60 of the CPA. In the affidavit filed in support of his application, he states that he Is 49 years old, married with two minor children and currently resides at No […] C Street, Witbank with his wife and children. He is the breadwinner of the family, the owner of two saloons and a shop and that his continued incarceration will have a negative effect on his family in that he will not be able to take care of them financially. He does have travelling documents, but is not a flight risk and will attend court at all material times, whilst he will not interfere with the

[15]S v Barber 1979(4) SA 218(0) at page 22 0E-H.

investigation. The only outstanding investigation is the laboratory results of the substance found in the vehicle that he was travelling in when he was arrested. The complainants are member of the police, and he will not interfere, threaten or intimidate them. Mr Ike has a relevant previous conviction, however has no pending cases. He was found guilty of possession of drugs in 2016 and was given a wholly suspended sentence. The alleged crime that he was arrested on now occurred within the period of suspension. Mr Ike denies any involvement in the alleged offence and denies that any drugs were found in his possession or that he was dealing in drugs. He further submitted that he had discharged the onus to show that the interest of justice permit his release on bail.

THE STATE'S CASE

[18] The State challenged the granting of bail primarily on two grounds. Firstly, the risk that Mr Ike will commit a schedule 1 offence [16] whilst on bail, and secondly, the risk that he will evade his trial[17]. None of the factors mentioned in section 60(6) (a) of the CPA can be said to count in his favour. Mr Ike has a previous conviction of a similar offence to the one he is currently facing. Furthermore, there is

[16] Section 60 (4) (a) of the CPA.
[17] Section 60 (4) (b) of the CPA.

uncontested evidence that Mr Ike was allegedly found in possession of drugs valued at RI0 000.00.

DISCUSSION

[19] Mr Ike's counsel submitted that the Court a quo failed to consider that his family ties and that he owns two salons and shop which, according to them, was an indicative of strong family, and financial ties within the jurisdiction wherein he resides, reducing the likelihood that he may evade trial. The fact that he provided the investigating officer with false information should out-weigh the unconfirmed information that he owns two salons and a shop.

[20] I am concerned about the way in which the Court a quo approached the bail application. There is a strong perception that the Court a quo rushed through the matter. The State was not even afforded an opportunity to reply to the defence's oral submissions. That despite the fact that the Court a quo asked the Mr Ike's attorney whether his client's vehicle was confiscated. That question was posed to the attorney after she stated that the Investigating Officer removed the vehicle from the address: […] C street eMalahleni, where Mr Ike's family was residing. Although the

facts were not included in Mr Ike's affidavit, it became common cause after the Court asked Mr Ike to confirm the facts provided by his attorney in her address to Court, and the State was not given an opportunity to reply to the positive statement. The Court a quo only had postponement in mind.

[21] In its ruling, the Court a quo then proceeded to find the Investigating Officer could not confirm the address provided to him by Mr Ike. The finding was made despite the fact that the Court was made aware, and even went so far as to enquire from Mr Ike's attorney about the fact that the vehicle was confiscated at the address referred to in Mr Ike's affidavit. I am of the firm view that the Court a quo erred in finding that Mr Ike's address could not be confirmed and the statement to that effect in the Investigating Officers affidavit cannot be correct.

[22] No reference can be found of the undisputed evidence by Mr Ike in his affidavit to the effect that he owned two salons and a shop. In other words, he is a businessman, and as such earns his keep and that of his wife and two children by conducting those businesses. His incarceration will, according to his attorney, lead to financial difficulties for Mr Ike and his family. I am of the view that the Court a quo erred in not even referring to this very relevant

factor to be taking into account when considering whether it will be in the interest of justice to order his release on bail.

[23] If the above is taken into account, it can be accepted that the Court a quo should have found that Mr Ike has close family ties (he is married to a South African citizen, and two children were born from that marriage); lives in eMlahleni at the address provided to the Investigating Officer; and have at least three business ventures gives him not only financial ties to the country, but also clos familial ties. It is not disputed that the Mr Ike is a foreign national, that this is not sufficient reason to deny an accused to be released on bail. It is not the State's case that they intend deporting him and that is the cause for his detention.

[24] The investigating officer made reference to statements in his affidavit which statements form part of the docket, but were not attached to the Investigating officer's affidavit and could thus not be challenged or commented on by Mr Ike. The Court a quo even referred to: *"and there is an extra affidavit attached to Exhibit "B", the IO's statement*". This statement apparently led the Court a quo to conclude that Mr Ike's address could not be confirmed. This "extra affidavit" was not given to Mr Ike's attorneys, nor does it appear from the record or transcript that the Court a quo had

sight of this documentation, unless the Police Docket was given to her without a copy being given to the defence team. Thus the court ought to have expressly disregarded that portion of the investigating officer's affidavit. I do not think that the Court a quo had the documentation, but it is clear that the Court a quo made assumptions, and failed to take uncontested evidence by Mr Ike into account before reaching its conclusion that it was not in the interest of justice to release Mr Ike on bail.

[25] The investigating officer indicated that the only outstanding investigations were the FSL (Laboratory report), the chain of evidence statements that had to be taken down. The Court a quo correctly noted that the Laboratory report could take long to obtain, however failed to consider, and conclude, that the evidence still to be obtained is evidence already at the state's disposal in that the substance was sent to the Laboratory for analysis and the chain of evidence are statements to be made by police officials, thus eliminating the likelihood that Mr Ike could ever interfere with or jeopardise the investigation and proper function of the justice system.

[26] The fact that Mr Ike is not a first offender, and was convicted of a similar offence in 2016 is important, but should not be over

emphasised. It is one of the important factors the Court a quo had to consider in reaching its finding. The mere fact that Mr Ike is charged for allegedly having committed a similar offence, is but one of the factors and is clearly subject to the interests of justice standard. Section 35(1) (f) of the Constitution for the release of an accused from arrest and detention subject to the interests of justice. Thus a finding of an existence of any of the likelihoods would serve the purpose of ticking a box on the list of factors but would still have to be subjected to the anchor of the section being the weighing up of all factors considered, against the interests of justice.

[27] The function of the Court a quo was to determine prima facie the relative strength of the state's case and not to make a provisional finding of guilt or innocence[18]. The Court a quo mentions that the state's case against Mr Ike is strong; however there is no substance or grounds for the conclusion as the Investigating officer indicated in his affidavit that Mr Ike was:

> 1) Caught in possession of an illegal substance which when tested "preliminary" (sic), "showed" Cocaine;
>
> 2) Mr Ike was the only person in the vehicle; and

[18] S v Van Wyk 2005 (1) SACR 41 (SCA) par [6].

3) Mr Ike apologised to the arresting officer and admitted it was drugs.

[28] This evidence of the investigating officer relating to the merits of the case and the conclusion derived therefrom by the Court a quo presupposes a strong state case means that the court relied on:

[28.1] Evidence of a substance yet to be tested and analysed as per investigating officer's affidavit;

[28.2] Evidence that Mr Ike was the only person in the vehicle, without enquiring whether the alleged substances found on the Mr Ike or in a vehicle driven by him.

[29] To worsen matters, the Investigating Officer does not even state how it was determined that the "substance" found in the vehicle was Cocaine. It is simply stated that:

> "*Accused was caught in possession of an illegal substance, when tested (PRELIMINARY) by Capt: (not legible) of the Hawks it showed COCAINE.*"

And further on in his affidavit he states:

> *"Accused was caught in possession of substances, He was the only one in the Vehicle, Accused apologized to arresting officers (See A1) Admitting it was drugs. Also see witness statement as per A2."*

The statements he refers to was not annexed to his affidavit resisting Mr Ike's application to be released on bail. In the absence of these affidavits, it is not clear how the Court a quo came to the conclusion that the State had a strong case at all.

[30] The opposition of the application to be released on bail was premised on speculation not backed by anything further in support thereof. The Court a quo erred in not disregarding the unsubstantiated averments by the Investigating Officer. It was obliged in the circumstances to enquire further substantiation of where exactly this substance was found and why was Mr Ike charged with dealing, and more importantly, whether the vehicle was confiscated at Mr Ike's residence by the Investigating officer whom denied the existence of such address. 'An inability to show ownership of assets and to provide fixed address does not automatically mean the accused will evade trial'[19]. The averment that Mr Ike would undermine the proper functioning of the criminal justice system as he had no assets in South Africa is, as indicated earlier in this judgment, without merit. The Investigating Officer did

[19] S v Maswanganyi 2012 SACR 292 (SCA).

not dispute or comment about Mr Ike's businesses that he owned a motor vehicle, which motor vehicle was confiscated by him.

THE CONCLUSION AND ORDER

[31] I am of the view that there was no evidence before the Court a quo that indicated that Mr Ike will not attend his trial. The Court a quo should have considered additional conditions as measures to secure Mr Ike's attendance at his trial, such as a higher amount of bail and placing further conditions in place such as reporting to their local police stations on certain days etc. Mr Ike's attorney mentioned that he had an amount of R 1000.00 available as a cash deposit to secure his release on bail. I am of the view that the amount is not sufficient at all.

[32] Bail conditions have always served to ensure that whatever fear the state might have in the release of an accused person is taken care of. It is a necessary consideration as also envisaged in section 60(6) of the CPA, which provides that in considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the binding effect and enforceability of bail conditions which may be imposed and the

ease with which such conditions could be breached. There is no indication whatsoever that Mr Ike will not attend his trial. He is in possession of a passport/travelling documents that the Court a quo could have ordered him to hand to the Investigating officer until the trial has been finalised. Because the Court a quo missed the point in *toto,* no consideration was given to the option of laying down strict conditions to secure Mr Ike's attendance of his trial. I intend doing so.

[33] Therefore the court finds that:

[33.1] the appeal against the refusal of release on bail by Mr IKE CHIDIEBEZE is hereby upheld;

[33.2] the refusal of his release on bail is hereby set aside and substituted as follows:

[33.2.1] Mr IKE CHIDIEBEZE is hereby granted bail on the following conditions:

[33.2.1.1] that Mr IKE CHIDIEBEZE pay an amount of R 20 000.00 cash as bail money;

[33.2.1.2] that Mr IKE CHIDIEBEZE shall be released upon payment of the amount in [33.2.1.1] and compliance with paragraph [33.2.1.5] hereof;

[33.2.1.3] he shall reside at No. […] C Street, eMalahleni, MPUMALANGA;

[33.2.1.4] he will only be allowed to change his residential addresses in exceptional circumstances, with the prior approval of the investigating officer. Such request from the accused shall be in writing and the investigating officer's reply thereto shall also be in writing and must be retained in the case-docket;

[33.2.1.5] Mr IKE CHIDIEBEZE shall, before his release on bail, hand his passport and any other travel documentation to the Investigating Officer, to be retained by him until the trial is finalised or the case withdrawn, whichever occurs first;

[33.2.1.5] Mr IKE CHIDIEBEZE shall not, until the trial is finalised, leave the magisterial district of eMalahleni without the prior written consent of the Investigating Officer, which consent must be filed and kept in the case docket.

[33.3] Mr IKE CHIDIEBEZE shall report to the eMalahleni Police Station, or such Police Station as indicated by the Investigating Officer from time to time, in writing in the docket, and which address, and a copy of such endorsement by the Investigating Officer, shall be

handed to Mr IKE CHIDIEBEZE, on Mondays and Fridays, between 07h00 and17h00.

HF BRAUCKMANN.

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE APPLICANT: Ms S TSOTETSI

INSTRUCTED BY: TSOTETSI ATTORNEYS (info.tsotetsiattorneys@gmail.com)

REPRESENTATIVE FOR THE RESPONDENT: ADV BE MAOKE (BEmaoke@npa.gov.za)

INSTRUCTED BY: NATIONAL PROSECUTING AUTHORITY OF SOUTH AFRICA

DATE OF HEARING: NO HEARING DUE TO COVID-19 DIRECTIVES.

DATE OF JUDGMENT: 29 JUNE 2020.

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