Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)

Saakno / Case number: **CA & R 114/2016**
Datum verhoor/Date heard: **24 / 01 /2017**
Datum gelewer/Date delivered: **31 / 01 /2017**

In the matter between:

ALEX NWABUNWANNE Appellant

and

THE STATE Respondent

Coram: Erasmus, AJ

JUDGMENT ON APPEAL

ERASMUS, AJ

INTRODUCTION

[1] The appellant lodged an appeal to this Court against the refusal by the Magistrate Kimberley to release him on bail. The appellant is accused number 2 in a pending criminal matter in which he and the another accused, face two charges of contravening the provisions of section 5(b) of the

Drugs and Drug Trafficking Act, No. 140 of 1992 ('the Act'), to wit dealing in an undesirable dependence producing substance as listed in Part III of Schedule 2 of the Act. It was alleged that on 13 August 2015 the appellant and his co-accused dealt in cocaine and methamphetamine and on 18 August 2015 dealt in cocaine. Although the weights of the substances are specified in the charge sheet, there was no reference to the alleged value thereof.

[2] The appellant was arrested on 10 June 2016. The initial bail application commenced on 30 June 2016 and was concluded on 29 July 2016.

[3] Adv. Nel, on behalf of the appellant and Adv. Ilanga, on behalf of the respondent, are in agreement that the evidence and facts that had been placed before the Court *a quo* in the initial bail application and the subsequent application based on new facts should be considered together for purposes of adjudication of this appeal. This approach appears to be in accordance with the law.[1]

THE INITIAL BAIL APPLICATION

[4] At the onset of the initial bail application on 30 June 2016, the prosecutor placed on record that it was a Schedule 5 bail application. With this he implied that it was an

[1] ***S v Vermaas*** 1996(1) SASV 528 (T) at 531e-f; ***S v Mohammed*** 1999(2) SASV 507 (K) at 511

application as envisaged in section 60(11)(b) of the Criminal Procedure Act, No. 51 of 1977 ('the CPA'). The attorney, representing the appellant, did not respond to the submission of the prosecutor and the learned Magistrate subsequently informed the appellant and his co-accused that "*this will be a Schedule 5 bail application which means it must be shown to be in the interest of justice that you get bail. The State will get an opportunity to present evidence why they says (*sic) *bail should be refused. You will get an opportunity through your attorney to show why you say it is in the interest of justice that you get bail."*

[5] The confusion pertaining to the legislative framework within which the bail application was adjudicated manifested itself during argument and in the judgment of the learned Magistrate.

[6] From the record it appears as if the parties, as well as the Magistrate, initially accepted that the bail application fell within the ambit of s 60(11)(b) of the CPA. On the other hand it appears as if the respondent accepted the *onus* and commenced proceedings by leading the evidence of the investigating officer, whereafter affidavits by the appellant and his co-accused and other confirmatory affidavits were presented in support of their bail applications.

[7] The prosecutor presented his argument first, without any reference to the applicable section, schedule or the onus. Only during argument by the legal representative of the appellant did he submit that "*it is going to be a Schedule 1 and in that instance, the State will bear the onus of establishing on a balance of probabilities that the interest of justice would not permit the release of the Accused".* The prosecutor was not afforded the opportunity to reply.

[8] In her judgment, with reference to the applicable schedule, the learned Magistrate remarked "*I am going to deal with this bail application as if it is just a plain and normal bail application where I consider all the facts. The reason being that my decision at the end of the day will be based on what I tell you I have taken into account."*

[9] After analysis, without reference to the incidence of the onus, the learned Magistrate found "*neither of you are suitable candidates for release on bail".* She found that "*there appears to be a very strong case*" against the appellant and his co-accused. She was satisfied that there was a propensity by the appellant and his co-accused to become involved in offences of this nature and given the seriousness of the offences, long term imprisonment was likely to be imposed. She stated that she "*personally believed*" the appellant to be a flight risk and concluded that neither of them were suitable candidates for release on bail.

[10] The procedure to be followed in bail applications which fall under Schedule 5 entails that an accused is burdened with an onus and will commence adducing evidence which has to satisfy the court, on a balance of probabilities, that the interests of justice permit his release.

[11] In bail applications, other than those envisaged in section 60(11) of the CPA, the onus is on the prosecution to show that the interest of justice do not permit the release of an accused on bail. The interests of justice will not permit the release on bail where the prosecution establishes the likelihood of one or more of the grounds listed in section 60(4) of the CPA occurring.[2] Even if the prosecution establishes this, it is subject further to the provisions of section 60(9) and the due consideration of an accused's constitutional rights. Edeling J in *Prokureur-Generaal, Vrystaat v Ramokhosi*[3] stated the position to be the following:

> *'Selfs waar bevind word dat een of meer van die voorgeskrewe gronde of enige ander soortgelyke grond wat aanhouding in belang van geregtigheid regverdig, as 'n waarskynlikheid bestaan, dan is dit slegs 'n voorlopige grond of gronde ter regverdiging van weiering van die borgaansoek. Subartikel 60(9) skryf in soveel woorde voor dat die "aangeleentheid" dws die vraag of dit finaal bevind kan word dat dit in belang van geregtigheid is dat borgtog nie toegestaan word nie, beslis moet word "deur die belang van geregtigheid op te weeg teen die beskuldigde se reg op sy of haar persoonlike vryheid. . .".*

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[2] *S v Tshabalala* 1998 (2) SACR 259 (C) at 269*e–f*

[3] 1997 (1) SACR 127 (O) 155*d–h*

[12] Edeling J[4] concluded that section 60(11) of the CPA "*only operates in respect of an accused charged with a definite, circumscribed and understandable offence".* Before an accused is thus burdened with the onus envisaged in section 60(11) of the CPA, the jurisdictional fact that the intended offence is one listed in Schedule 5 or 6, has to be established. This is done by either a certificate from the Director of Public Prosecutions issued in terms of section 60(11A) of the CPA or by means of full description of the charge in the charge-sheet. Section 60(11A) was enacted to make it easier for the prosecution to establish the objective jurisdictional fact which must exist before section 60(11)(a) or (b) can come into operation as such certificate constitutes *prima facie* proof of the charge to be brought against the appellant. [5]

[13] In this instance there is no reference in the charge sheet to the value of the dependence-producing substance and it can thus not be ascertained whether the offences fall within the ambit of Schedule 5. The prosecutor also did not hand in a written confirmation in terms section 60(11A) of the CPA, that the Director of Public Prosecutions intended to charge the appellant with a Schedule 5 offence.

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[4] 1997 (1) SACR 127 (O) at 156e
[5] *Gade v S* [2007] 3 All SA 43 (NC) at para [5]; Section 60(11A)(c)

[14] Mr. Nel submitted that the bail application should not have been approached on the basis of the provisions of section 60(11)(b) of the CPA and that the State had to show that the interests of justice did not permit the release of the appellant on bail. Ms. Ilanga submitted in her Heads that the offences fell within the ambit of Schedule 5.

[15] In *S v Josephs*[6] Binns-Ward AJ suggested that, given the drastic consequences for an accused if section 60(11) of the CPA applies, it is desirable that the procedural provisions of s 60(11A) of the CPA should be closely adhered to and that proof of the nature of the charges should occur with some formality, either at the commencement of proceedings or as soon thereafter as possible. I fully agree. This appeal illustrates the importance of proof of the nature of the charges. In this instance it was not done, which resulted in the confusion and uncertainty pertaining to the applicable section.

[16] Ms. Ilanga correctly submitted that the Court *a quo* did not have reliable or sufficient information before her to reach a decision on the bail application and should have ordered that information or evidence pertaining to the nature of the offences be placed before her. That is exactly what section 60(3) of the CPA envisages.

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[6] 2001 (1) SACR 659 (C) at 661*f–h*

[17] I am satisfied that the learned Magistrate had misdirected herself in respect of the procedure to be followed in the initial bail application.

[18] In terms of section 65(4) of the CPA, I shall not set aside the decision of the Court *a quo*, unless I am satisfied that the decision was wrong and then give the decision which, in my opinion, the lower court should have given. This does not necessarily mean that I should merely order that appellant should or should not be released on bail, but will depend on the circumstances of each case.[7]

[19] This matter before me is not one where I, on the facts before me, should order whether or not the appellant should be released. It cannot merely be accepted that the appellant or the respondent would have approached the bail application on the same basis, had there been clarity whether section 60(11)(b) of the CPA applied or not. On this basis alone the appeal should succeed and the matter remitted to the Court *a quo.*

NEW FACTS

[20] On 21 December 2016 the appellant approached the court *a quo* with a further bail application, based on new facts. The learned Magistrate indicated that the procedure to be

[7] *S v Green and Another* 2006 (1) SACR 603 (SCA) par [23] and [25]

followed was a two-legged enquiry; firstly to establish whether the facts were new facts and then, if found to be new facts, for her to hear what the evidence is. She required counsel for the appellant to address her on what the alleged new facts were and, indicated that if these facts were found to constitute new facts, the appellant would be allowed to present evidence.

[21] Counsel for the appellant raised several points during his address on the new facts in the Court *a quo*. I do not deem it necessary to deal with all of these for purposes of the appeal. Most importantly, it was averred that the evidence of the investigating officer in the initial bail application, pertaining to video footage, appeared to be false and that he had misled the Court. It was placed on record that, on perusal of the case docket that had been presented to the attorney of the appellant, it appeared there were neither video nor audio footage that linked the appellant to any of the two offences that he had been charged with. The person in the relevant video footage was not the appellant. The other photos relied upon merely showed him entering a salon and do not link him to any transaction. It was submitted that the only evidence against the appellant was thus circumstantial in nature.

[22] In response to the submissions above, the prosecutor submitted that the investigating officer had testified about video footage, photos and the evidence of the agent. The averments, made on behalf of the appellant, pertaining to the video footage and photos were not disputed.

[23] In her further judgment the learned Magistrate did not deal with the issues pertaining to the video footage and photos. She found that the strength of the State's case would only become clear at the end of a trial within a trial (in respect of the section 252A of the Criminal Procedure Act, No. 51 of 1977) in the criminal trial. She further indicated that '*presently much of the evidence still needs to be tested for its credibility or non credibility*'. She found that the appellant had not convinced her of new facts, thereby denying the appellant the opportunity to adduce evidence.

[24] New facts can and should be put before a magistrate by adducing oral evidence or submitting a document stating facts which are common cause.[8] The purpose of adducing new facts is not to address problems encountered in the previous application but should be facts discovered after the bail application.[9] The facts relied on by the appellant in this instance were discovered after the initial application.

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[8] *S v De Villiers* 1996 (2) SACR 122 (T); See also *S v Ho* 1979 (3) SA 734 (W) at 737G
[9] *Davis & another v S* (unreported, KZDLD case no 2888/2015, 8 May 2015) at [3] and also *S v Petersen* 2008 (2) SACR 355 (C) at [57]

[25] An accused should not lightly be denied the opportunity to present such facts by means of adducing evidence. The submissions by the appellant's counsel at least, *prima facie*, indicated that the evidence presented on behalf of the respondent during the initial bail application, may be compromised and that the State's case might not be as strong as the learned Magistrate assumed it to be. The respondent did not dispute what had been conveyed on behalf of the appellant in respect of the photos, the video and the audio footage.

[26] The strength or weakness of the State case is relevant in determining where the interests of justice lie in the context of section 60(11)(a) or (b) of the CPA.[10] It would also be relevant in a bail application other than one in terms of section 60(11)(a) or (b), where the prosecution is required to show that the interest of justice does no permit the release on bail.

[27] The learned Magistrate was wrong in ruling that the appellant had not established new facts, without having provided him the opportunity to adduce evidence in respect of the alleged new facts. I am satisfied thus that I am entitled to interfere with her decision.

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[10] *S v Kock* 2003(2) SACR 5 (SCA) at 11i-12a; *S v DV & others* 2012 SACR 492 (GNP) at [16] and [31]

[28] Given the misdirection in respect of the applicable section of the CPA that governed the initial bail application and that pertaining to the new facts in the further bail application, this matter should be referred back to the Court *a quo.* It is not a matter where I can and should substitute the finding of the learned Magistrate with my own. Legally there appears to be no objection to an order that the bail application be remitted to the court *a quo*.[11]

WHEREFORE I MAKE THE FOLLOWING ORDER:

1. **THE DECISIONS OF THE MAGISTRATE, KIMBERLEY, IN THE BAIL APPLICATION UNDER CASE NUMBER B336/2016 ARE SET ASIDE.**

2. **THE BAIL APPLICATION IS REMITTED TO THE MAGISTRATE, TO MAKE A RULING AS TO WHETHER THE BAIL APPLICATION IS TO BE ADJUDICATED IN TERMS OF THE PROVISIONS OF SECTION 60(11)(b) OF THE CRIMINAL PROCEDURE ACT, NO. 51 OF 1977.**

3. **THE APPELLANT IS TO BE AFFORDED THE OPPORTUNITY TO ADDUCE EVIDENCE IN SUPPORT OF HIS FURTHER BAIL APPLICATION OF 21 DECEMBER 2016 IN RESPECT OF THE ALLEGED NEW FACTS THAT HAD COME TO LIGHT AND/OR ANY NEW FACTS THAT HAD SUBSEQUENTLY COME TO LIGHT.**

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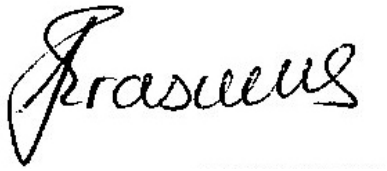
[11] *S v Kock* 2003 (2) SACR 5 (SCA) par [25]

4. THE RESPONDENT IS TO BE AFFORDED THE OPPORTUNITY TO ADDUCE FURTHER EVIDENCE IN RESPONSE TO ANY FURTHER EVIDENCE PRESENTED BY THE APPELLANT.

5. THE APPELLANT SHALL REMAIN IN CUSTODY PENDING THE FINALIZATION OF THE BAIL APPLICATION BY THE MAGISTRATE, KIMBERLEY.



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SL ERASMUS
ACTING JUDGE

For the Applicants:	Adv. I.J. Nel (oio Legal Aid Board)
For the Respondent:	Adv. K.F. Ilanga (oio NDPP)