IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: **CA & R 38/24**

COURT *a quo* CASE NO: **SR 30/21**

DATE HEARD: **O1 OCTOBER 2024**

DATE DELIVERED: **25 OCTOBER 2024**

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

ROSEN, VINCENT Appellant

and

THE STATE Respondent

Coram: Nxumalo, J

JUDGMENT

***Per* NXUMALO, J:**

[1] This is an urgent opposed appeal against the decision of the Court *a quo* to decline the appellant's application for bail on 31 October 2023. The

appellant, who at all material times hereto was legally represented, is accused number 17 in the criminal trial *in casu* and held a corresponding number as applicant *a quo.* He was first arrested on 02 September 2022, more than a year ago. He was initially charged with 7 counts of attempted murder and the unlawful possession of firearms and ammunition. He thereafter applied for bail and was granted same in the amount of R1 000.00. Upon payment of the said amount, he was released on 04 November 2022.

[2] On 04 May 2023 the appellant was re-arrested on additional charges allegedly arising from the same facts and circumstances pertaining to the original charges. It is therefore common cause that none of the allegations against which the additional charges are predicated pertain to the period during his bail. It is also so that at all material times hereto, he complied with the said bail terms and conditions, until he was re-arrested. One of the conditions of the said bail was house arrest.

[3] The charges pertaining to the appellant are Counts 1 to 3, 7, and 30 to 37. It was common cause between the parties from the genesis of the bail application *a quo* that the implicated counts fall under Schedule 5 of the **CRIMINAL PROCEDURE ACT**, 51 of 1977 ("**the *CPA***"), and not Schedule 6 thereof.

[4] On 23 October 2023 the appellant deposed to a founding affidavit in support of his bail application *a quo*. This affidavit was admitted in those proceedings as Exhibit "**F**". The respondent, for its own part, mounted its opposition on the affidavit of one Captain Riaan Baartman of the South African Police Services. Captain Baartman is the lead investigator of the multi-disciplinary team under the command of one Brigadier SJ Mojela. Significantly, it is so that Captain Baartman's affidavit is dated 29 August 2023, which predates the appellant's. A brief overview of these affidavits is imperative and will be done in due course.

[5] Presently, it may only be pertinent to point out that Counts 1 to 3, which pertain to all 21 accused are the following: Aiding and abetting criminal gang activity in contravention of Section 9(1)(a), read with Sections 1, 10 and 11 of the **PREVENTION OF ORGANISED CRIME ACT** 121 of 1998 ("**the *POCA***"); bringing about or performing acts of violence or criminal activity by a criminal gang; and causing or contributing to a pattern of gang activity. Count 7 is attempted murder. Counts 30 to 37 range between pointing of a firearm; malicious injury to property; common assault and assault with intent to do grievous bodily harm; and unlawful possession of firearms and ammunition. The latter counts arise from incidents which allegedly happened on 03 August 2021.

[6] The following can be surmised from Exhibit "**F**", in relevant parts. The appellant is single, and a locally born and bred citizen of the Republic. He was born on 08 August 1989, which means he is currently 35-years of age. His highest educational qualification is grade 12. Post-matric, he obtained a certain security grading, which qualified him to work as a security officer.

[7] During 2017, whilst employed at Vermeulen's Hardware Shop, Kimberley; he sustained serious injuries to one of his legs. As a result, he is currently disabled and on a disability grant which he received monthly until his first arrest on 02 September 2022. His father died when he was only 4-years old. He is a father to a 10-year-old girl-child who is currently staying with her grandparents in Roodepan.

[8] He was maintaining the said child whilst employed. Before his re-arrest, he resided in a backyard flat at 1[...] C[...] Road Kimberley, for a period of 3 years. He was, however, informed whilst in custody after being re-arrested, that some people broke into the main house at the said address, stole and damaged some moveable properties and also damaged the said premises. For this reason he undertook to reside with his mother if he were to be granted bail. He averred, without contradiction on the part of the respondent, that his mother is currently residing at 3[...] T[...] Street,

Jacksonville, Kimberley. She is employed as a general worker at the Department of Public Works for the past 10 years.

[9] He also averred that when he was first arrested on 02 September 2022, he was informed that the charges proffered against him were only 7 counts of possession of illegal firearms and ammunition allegedly committed on 17 June 2021. When he was arrested with some of his co-accused in this matter, a certain lady and one Felicia Peters, the latter whom he is informed has turned State witness, had already appeared for more than one year in Court. The additional charges proffered against him are discharging a firearm in a public place and the possession of illegal firearm and ammunition.

[10] Whilst in his first bail application mention was made of some of the additional counts, he was then not charged with same. He is of the opinion that the State does not have a strong case against him on any of the counts. He denies being a member of any gang or group of people; organisation or association with the aim of committing criminal offences. He therefore intends pleading not guilty to all the charges brought against him.

[11] He has no previous convictions; was not under any correctional supervision or parole nor has he breached any interdict. Neither has any interdict been issued against him, at all material times hereto. He does not have a passport, nor has he ever been outside the borders of the Republic. He was advised that to the extent that Counts 1 to 3 fall under Schedule 5 of the CPA, he only had to show that his release on bail was in the interest of justice.

[12] Since he has been seriously injured in the past, as alluded to above, he is still suffering pain and cannot obtain the necessary medical attention expeditiously as and when necessary because of prison overcrowding. He was informed that the matter is to be transferred to this Court for trial and that the respondent is yet to obtain the requisite authorisation to sustain

Counts 1 to 3 from the National Director of Public Prosecution ("**the *NDPP***"); regard being had to Section 2(4) of **POCA**. He has also been advised that same has not been done yet and might take a while. He has further been advised that a trial involving the 21 co-accused could take years to be finalised because of its inherent complexities and that consultations, whilst possible, are tedious in prison.

[13] He has no previous convictions or any pending matters. He is of the opinion that the offences of which he is charged are not likely to induce any sense of shock or outrage in the community where the offences have allegedly been committed. He averred that his release on bail would not lead to public disorder or jeopardise public confidence in the criminal justice system. That his release on bail would also not jeopardise his safety or undermine peace and security among members of the public. He also averred that if he is granted bail he would be able to pay an amount of R2 000.00. Furthermore, if the amount is higher, his family could help him to raise the difference.

[14] If he is granted bail he is willing to accept any bail condition that the Court may decide upon. He undertook to attend all proceedings until the matter is finalised; never to put the safety of the public or any person in danger and never to commit any offence. He further undertook not to intimidate or influence any witness involved in this case or communicate with any witness in this case; withhold from doing anything that will undermine or jeopardise the criminal justice system; report once a week at the nearest police station or periodically if ordered to do so; and not to change his given address without notifying the investigating officer of his intention to do so. That he has been advised and understands the consequences of not complying with any of the conditions imposed.

[15] The above factors cumulatively, and the fact that there is no likelihood that any of the factors set out in Section 60(4)(a) to (e) of the **CPA** will occur, constitute exceptional circumstances warranting in the interest of justice that

bail be granted to him pending the finalisation of the trial. In the premise, he submitted that there is no reason why he must stay in prison any longer.

[16] In his evidence before the Court *a quo*, Captain Baartman, for his own part, did not seriously contradict any substantial aspect of the appellant's evidence. The only factor he sought to gainsay is the veracity of the appellant's address; the strong evidence against the accused as a whole; the seriousness of the alleged crimes and the concomitant sentences. He, *inter-alia*, also confirmed the applicant's previous address and that same is no more being occupied and that when the appellant was granted his first bail, he was placed under house arrest at 1[...] C[...] Roads, Rhodesdene; an alternative to his previous address.

[17] Significantly, in paragraph 11 of his affidavit, Captain Baartman baldly and generically submits that the mere fact that some applicants gave their previous address as their current addresses, at all material times hereto, made it likely that they would become involved in crime again. It is common cause that the alternative address suggested by the appellant was never denied or verified by the respondent, who could have easily and speedily done so during the bail application proceedings *a quo*. This, to date, unfortunately has not been done.

[18] The impugned judgment in relevant part runs as follows:

"Wat beskuldige nommer 17 betref, Meneer Vincent Rosin (sic) word sy omstandighede uitgesit in bewysstuk F, ***dit is ook n misdryf wat val onder Skedule 6 van die Strafproseswet… In die omstandighede is ek van mening dat dit 'n bepaalde risiko sal inhou om beskuldige nommer 17… dan op borgtog, verdere borgtog vry te laat en in lig van sy optrede in die verlede en sy borgaansoek word dan ook deur die hof***

afgewys. Ek is van mening dat daar nie buitengewone omstandighede bestaan wat sy vrylating regverdig nie."[1]

[19] The appellant's grounds of appeal, which were delivered on 04 July 2024, are in sum that the Court *a quo* erred in the following respect:

19.1. finding during the judgment stage that the appellant is charged with offences that fall under Schedule 6 of the Schedules regulating bail application, while it was agreed between the parties before the application commenced that the applicable schedule for the application of the appellant is Schedule 5;

19.2. not taking into account and/or underemphasising the fact that the appellant was already granted bail on the counts of attempted murder and the possession of firearms and ammunition and that the respondent later decided to join him with other accused and consequently to join him in Counts 1 to 3, and added offences that were allegedly committed during 2021;

19.3. finding that there will be certain risks in granting bail to the appellant and therefore found that it is not in the interest of justice to grant him bail;

19.4. not taking into account and/or to underemphasise the fact that while the applicant was out on bail for more than one year, he complied with all the conditions that were applicable to his release;

19.5. not finding that to release the appellant in the circumstances on bail will be in the interest of justice; and

19.6. not granting bail to the appellant pending the finalisation of his trial.

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[1] Emphasis supplied

[20] As alluded to above, it is so that the appellant intends to plead not guilty and denied that any of the factors contemplated in Section 60(4) of the **CPA**, is likely to occur, if he is released on bail. The said Section expressly stipulates as follows:

> *"60(4)* ***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, any person against whom the offence in question was allegedly committed, or any other 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*
>
> *(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; or*
>
> *(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."*

[21] The nub of the appellant's argument is therefore that the Court *a quo* misdirected itself in finding that the offences proffered against him fall under

Schedule 6 of the **CPA**. That this finding stands in stark contrast with what has been agreed between the parties from the very genesis of the bail proceedings that same fall under Schedule 5. That the Court *a quo* materially misdirected itself in refusing bail to the appellant on the sole ground that there are "certain risks" involved in releasing him on bail. That in the premise, the impugned decision and order were so materially wrong that same fell to be overturned on appeal.

[22] The foregoing contention is predicated against the following factual backdrop, according to the appellant. He was initially arrested on 02 September 2022 on 7 counts of attempted murder and other counts of possession of illegal firearms and ammunition. That these offences were allegedly committed on 17 June 2021- more than one year before his arrest. Some of his co-accused at that stage had already repeatedly appeared for almost one year in the case. They were at that stage not charged with attempted murder. The charges were then predicated against the **FIREARMS CONTROL ACT** in that *contra* this Act, they were found in possession of firearms and ammunition without licenses and discharged the said firearms in a public area.

[23] When he was arrested on 02 September 2022, the charges were amended to attempted murder and only 7 counts of attempted murder. A further count of attempted murder is now added in this case to the charges which allegedly occurred as far back as 17 June 2021. That whilst during his bail application on these charges, mention was made of incidents that happened far back on 03 August 2021, no charges were proffered against him for these alleged incidents. He was thereafter released on R1000.00 bail on strict conditions, including house arrest, on 04 November 2022.

[24] During May 2023, the respondent decided to consolidate all the cases against him and his co-accused in the current case and to refer same to the High Court for trial. New charges of gang-related activities, the extra count of attempted murder with regard to the incidents that allegedly occurred on

17 June 2021, as well as other charges for the incidents that allegedly occurred on 03 August 2021, were only then formulated and added to the counts against him. This notwithstanding the fact that all these allegations were already known and referred to during the first bail application.

[25] That it is nowhere alleged that he was involved in any further unlawful activities after he was released on bail on 04 November 2022. That it is so simply because he complied with all his bail conditions until he was rearrested in 2023. That the Respondent solely relied on the affidavit of the Investigating Officer, Captain Baartman[2] of which the following aspects are of importance. In his statement he deals with the incidents that occurred in separate compartments and refers to them as gang-related in Counts 1 to 9. He is implicated only in the third and the fifth alleged occasions.

[26] The appellant maintained as follows: that bail is opposed simply because of the alleged seriousness of the offences and the alleged strength of the respondent's case. That the applicant would become involved in crime again, solely because he has given his erstwhile address as his permanent address. That there is no indication anywhere that he is a flight risk or that he may interfere with investigations or influence witnesses. The appellant also strenuously decried the fact that the Court *a quo* ignored and/or underplayed the fact that he was granted bail previously on the same facts. That it is so simply because, notwithstanding this, the Court *a quo volte-face* refused to grant him bail on the sole basis that there were "certain risks" in granting him bail this time around.

[27] It is common cause that the charges proffered against the appellant in this matter fall within the ambit of Schedule 5 of the **CPA**, as opposed to Schedule 6, thereof. It is so since the former expressly regulates any offence referred to in Sections 2, 4, 5, 6 or 9 of the **POCA**, of which some, if not all, are implicated with regard to the charges the appellant is currently

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[2] "Baartman"

facing. So much was correctly conceded from the onset of the bail proceedings in the Court *a quo* and again in this Court on behalf of the respondent. It therefore was never in dispute that the appellant's bail falls within the ambit of Schedule 5 of the **CPA**. This notwithstanding, the Court *a quo* queerly found that the bail application of the applicant falls within the ambit of Schedule 6 of the **CPA**.

[28] The respondent, for its own part, *inter-alia* submitted as follows. That the appeal stood to be dismissed because regard being had to the facts and circumstances of this case, the Court *a quo* ultimately did not misdirect itself in refusing the appellant bail. It maintained that it is so because the error of the Court *a quo* notwithstanding, the appellant did not discharge the *onus* of proving on a balance of probabilities that his release on bail would be in the interest of justice and therefore the second and third ground for appeal should be dismissed.

[29] Notwithstanding that in its judgment the presiding Magistrate erroneously referred to Schedule 6, as well as the finding that the appellant bore the onus of proving exceptional circumstances, the Court *a quo*, in deciding whether the applicant should be released on bail, considered all the personal circumstances of the appellant. That the facts which were highlighted during the bail proceedings weighed more than the personal circumstances of the appellant. The Court *a quo* correctly found that there are no exceptional circumstances present in the case of the appellant.

[30] That there is a very strong case against the appellant because the State will not only rely on the evidence of a Section 204 witness, but also on that of other eye witnesses. The matter was dealt with in terms of Schedule 5 from the onset, notwithstanding the fact that the presiding magistrate applied the wrong schedule during his judgment.

[31] That there is no confirmed address for the appellant. That it is so because whilst in his statement, he indicated that he will reside with his mother at

3[...] T[...] Street, Jacksonville, Roodepan, should bail be granted. This address had not been confirmed by the Investigating Officer, as it was only made available during the bail application proceedings. The Investigating Officer indicated that the appellant gave 1[...] C[...] Road as his place of residence. This address was linked to the gang activities of the Hollanders, a gang which the appellant is a member of. The mere fact that the appellant gave this address indicates a likelihood that he will commit further offences.

[32] That it is apparent from the judgment of the Magistrate that he considered a broader spectrum of factors which led him to come to the conclusion that the appellant was not a suitable candidate to be admitted to bail. Having regard to all the abovementioned factors cumulatively, the Magistrate was not wrong in finding that the interests of justice do not permit his release on bail. That it is so since the evidence led dealt with the onus in terms of Section 60(1)(a) of the **CPA**.

[33] That in any event there is no need for remitting the matter to the Court *a quo* for reconsideration because this Court is in a position to determine the issues and to give the decision which the lower Court should have given. In doing so under the circumstances of this matter, the appellant will not be prejudiced, and no injustice will be occasioned.

[34] Firstly, it behoves emphasis that the appellant, like everyone else, is equal before the law and has the right to equal protection and benefit of the law. Coterminous to the foregoing is the right to the full and equal enjoyment of all rights and freedoms entrenched in the Constitution. These rights obviously include the right to be released from detention if the interests of justice permit, subject of course to reasonable conditions.[3] It is also so that the right to freedom and security of the person is coterminous to the right not

[3] See ss 9 and 35(1)(f), of the Constitution of the Republic of South Africa, 1996 ("**the *Constitution***")

to be deprived of freedom arbitrarily and without just cause and not to be detained without trial.[4]

[35] Secondly, it is so that these rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom; taking into account all relevant factors; including those listed in Section 36(1) of the Constitution. Thirdly, the appellant is to be presumed innocent until the contrary is proved beyond reasonable doubt by the State. Fourthly, except as provided in the said section or any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.[5]

[36] Section 60(1)(a) of the **CPA**, for its own part, expressly stipulates as follows with regard to bail applications of accused in Court:

"An accused who is in custody in respect of an offence shall, subject to the provisions of Section 50(6), ***be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the Court is satisfied that the interests of justice so permit."***[6]

[37] Section 60(11)(a) and (b) of the **CPA**, for its own part, discretely and unambiguously stipulate as follows, in turn:

"(11) Notwithstanding any provision of this Act, where an accused is charged with an offence-

(a) referred to ***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***

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[4] *See s 12,* ***ibid***
[5] *See 36(2),* ***ibid***
[6] Emphasis supplied

given a reasonable opportunity to do so, adduces evidence which satisfies the Court that exceptional circumstances exist which in the interests of justice permit his or her release;

(b) referred to ***in Schedule 5, but not 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 which satisfies the Court that the interests of justice permit his or her release."***[7]

[38] In ***S v Branco*** 2002 (1) SACR 531 (W) Cachalia AJ, enjoined that:

*"The fundamental objective of the institution of bail in a democratic society based on freedom is to maximize 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 interest of justice will not be prejudiced thereby'.****"*[8]

[39] Our Courts are thus obliged, when seized with the question of whether or not to release a detainee on bail, to approach the matter from the perspective that freedom is a precious right entrenched in the Bill of Rights *vide* Section 35(1)(f) of the Constitution. This right should only be lawfully derogated if, and only if, the interests of justice deems meet. They should thus always consider suitable conditions as alternative to the denial of bail.

[40] Section 60(11)(b) and (c) of the **CPA** discretely and expressly stipulate that notwithstanding any provision in the **CPA**, where an accused is charged with an offence referred to in Schedule 5, the Court shall order that the accused

[7] Emphasis supplied
[8] Emphasis supplied

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 which satisfies the Court that the interests of justice permit his or her release."*

[41] Whilst it is so that a bail application for offences under Schedule 5 clearly places the onus upon an applicant to adduce evidence which satisfies the Court that the "interests of justice" permit his or her release, it is further so that bail application for Schedule 6 offences also places the onus upon the applicant to adduce evidence which satisfies the Court that "exceptional circumstances" exist which in the interests of justice permit his or her release. Apart from that, the exercise to determine whether bail should be granted is no different to that provided for in Section 60(4) to (9) of the **CPA**, or required by Section 35(1)(f) of the Constitution. It thus remains clear that an accused on a Schedule 5 offence will be granted bail if he or she can show merely that the "interests of justice" permit such grant and not on evincing "exceptional circumstances" as contemplated in an application regulated by Schedule 6 of the **CPA**- ***S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*** 1999 (2) SACR 51 (CC) (1999 (4) SA 623; 1999 (7) BCLR 771; [1999] ZACC (8) per Kriegler J.

[42] It can be deduced from the foregoing that what remains at the heart of this appeal is whether the Court *a quo* exercised its discretion wrongly in any material way in relation to either fact or law in refusing the appellant bail on the bases that there will be "certain risks" in granting him bail this time around and that he did not evince any exceptional circumstances for the Court to do grant him bail.[9]

[43] It is so in our law that it is desirable, given the drastic nature of the refusal of bail and, constitutionally speaking, it is imperative that all peremptory procedural provisions should be closely adhered to by our Courts. To this

[9] ***S v Barber*** 1979 (4) SA 218 (D) at 220E-H

extent it is indeed mandatory 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"- ***S v Joseph*** 2001 (1) SACR 659 (C); ***S v Nwabunwanne*** 2017 (2) SACR 124 (NCK).

[44] It is trite that it is only through the correct procedure that just decisions are generally reached. The interests of justice thus cannot be divorced from the procedure through which the impugned decision was arrived at. It is so since the proper identification of the right schedule is fundamental to the question whether it was in the interest of justice for the appellant to be released on bail or not.

[45] It is also so that in our law a Court cannot find that the refusal of bail is in the interest of justice merely because there are certain unidentified risks or possibility that one or more of the consequences mentioned in Section 60(4) will result. A finding on the probabilities must be made. The Court cannot grope in the dark and speculate because justice cannot be conceived in the dark – it is not a cloak and dagger issue. Unless and until 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 the accused should be released- ***S v Diale and Another*** 2013 (2) SACR 85 (GNP).

[46] In ***S v Dlamini; S v Dladla and Other; S v Joubert; S v Schietekat*** 1999 (2) SACR 51 (CC) the Constitutional Court held on page 79 paragraph 53:

"… The important proviso throughout is that there has to be a likelihood, i.e. a probability, that such risk will materialise. A possibility or suspicion will not suffice. At the same time, a finding that there is indeed such a likelihood is no more than a factor, to be weighed with all others, in deciding what the interests of justice are."

[47] It is clear from the quotation by the Court *a quo* that it moved from the wrong premise. It is the very same wrong premise that made it concentrate only on

the seriousness of the offence, without dealing with the case of whether, if released on bail, the appellant would not stand trial. It should be remembered that the appellant is to be presumed innocent until the contrary is proved. It bears emphasis that, even where the evidence appears to be strong, one should still be mindful of the fact that one does not have to deal with a bail application as if guilt has already been proved.

[48] *Prima facie* evidence is subject to being tested during trial. The impact of such *prima facie* evidence, in a bail application should be seen to be minimised by lack of evidence of the likelihood that, if released on bail, the accused will attempt to influence or intimidate witnesses or attempt to or destroy evidence. The likelihood of the appellant evading trial, other than to suggest a strong case against him, was not established.

[49] This misdirection is all the more material, regard being had to the fact that the appellant fully abided with all the bail terms and conditions imposed after being granted the first bail and put under house arrest at an address other than his erstwhile. It is so in our law that it is incumbent on any Court determining whether it is in the interests of justice to permit the release of an accused on bail, to grant him a reasonable opportunity to adduce evidence which satisfies such a Court that the interests of justice permit his or her release. It also so that such a court may in respect of matters that are not in dispute between the accused and the prosecution acquire in an informal manner, the information that is needed, for its decision or order regarding bail. It follows therefore that that such a Court should always consider suitable conditions as an alternative to the denial of bail.

[50] In ***S v Acheson*** 1991 (2) SA 805 (NM), Mahomed AJ (as he then was) for his own part, emphasised as follows; 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 an accused person unless this is likely to prejudice the ends of justice…"[10]

In ***S v Branco*** 2002 (1) SACR 531 (W*)* at 537 A-B, the Court observed thus:

"Finally, a Court should always consider suitable conditions as an alternative to the denial of bail. *Conversely, where no consideration is given to the application of suitable conditions as an alternative to incarceration, this may lead to a failure to exercise a proper discretion"*[11]

[51] It is also clear from the quotation by the Court *a quo* above that it moved from the wrong premise that the appellant's pending charges fell under Schedule 6 and not 5 of the **CPA**. No doubt it is that wrong premise and nothing else that clearly led it to erroneously conclude that the appellant failed to prove the existence of exceptional circumstances justifying his release on bail. It can also be deduced from the decision of the Court *a quo* that it did not for a moment grant the appellant a reasonable opportunity to verify his mother's address or whether she was prepared to accommodate him. This address was neither denied nor confirmed by the respondent. The parties were in agreement during this hearing that this could have been done expeditiously. The Constitution enjoins all constitutional obligations to be performed diligently and without delay.[12]

[52] it should be noted that if a court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.[13] As alluded elsewhere, the court a quo did not invoke these powers to verify or debunk the appellant's proposed address. Neither

[10] Emphasis supplied
[11] Emphasis supplied
[12] See Section 237 of the Constitution
[13] See s60(3), CPA

does the court a quo seem to have given any serious consideration to the appellant's state of health.

[53] The appellant was therefore not given a reasonable opportunity to adduce evidence which satisfies the Court that the interests of justice permit his release mainly due to the fallacy that it is incumbent on him to evince "exceptional circumstances", instead of whether it is in the interests of justice that he be released on bail. The Court *a quo* could thus not be said to have considered all reasonable or suitable conditions as alternatives to the denial of bail.

[54] Our courts are enjoined to defend not only the Constitution generically, but in particular to uphold those fundamental rights entrenched in it. The Apex Court in ***S v Senwedi*** 2022 (1) SACR 229 (CC) seminally opined as follows, in this regard a**t** paragraph 27; to *wit*:

"Our Courts must defend and uphold the Constitution and the rights entrenched in it. ***One of the most important rights, from a historical perspective, is unquestionably the deprivation of an individual's liberty. This Court said in Ferreira that '(c) conceptually, individual freedom is a core right in the panoply of human rights.'*** *The apartheid regime repulsively and capriciously deprived people of their freedom under illegitimate legislation that paid no respect to the rights to freedom and security of the person. We are therefore constrained to jealously guard the liberty of a person under our Constitution, particularly in terms of s 12 of the Bill of Rights."*

[55] Given the facts and circumstances of this case, this Court is of the considered opinion that the Court *a quo* exercised its discretion wrongly in a material way in relation to both fact and law in refusing the appellant bail on the bases that there will be certain unidentified risks in granting him bail this

time around and that he did not evince any exceptional circumstances for the Court *a quo* to do grant him bail.[14]

[56] In the premise, the following order must issue:

(a) THE APPEAL IS UPHELD.

(b) THE COURT *A QUO'S* ORDER REFUSING THE APPELLANT BAIL IS HEREBY SET ASIDE.

(c) THE APPELLANT IS HEREBY GRANTED BAIL IN THE AMOUNT OF R10 000.00 (TEN THOUSAND RAND) ON THE FOLLOWING CONDITIONS:

i. THE APPELLANT SHALL ATTEND COURT AT ALL TIMES, UP UNTIL THE FINALISATION OF THE TRIAL.

ii. THE APPELLANT SHALL NOT APPROACH, CONTACT, COMMUNICATE, INTIMIDATE AND/OR INTERFERE DIRECTLY OR INDIRECTLY BY ANY MEANS WITH ANY PERSONS APPEARING ON THE WITNESS LIST THAT THE INVESTIGATING OFFICER, CAPTAIN BAARTMAN SHALL SERVE ON HIM, FROM TIME TO TIME.

iii. THE APPELLANT SHALL NOT INTERFERE DIRECTLY AND/OR INDIRECTLY WITH ANY EVIDENCE RELEVANT TO THE MATTER, UNTIL SAME IS FINALISED.

iv. THE APPELLANT IS HEREBY PUT UNDER HOUSE ARREST AT 3[...] T[...] STREET, JACKSONVILLE, KIMBERLEY FROM THE DATE OF HIS BAIL BEING

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[14] See ***S v Barber*** 1979 (4) SA 218 (D) at 220 E-H

POSTED, TILL THE MATTER IS FINALISED; PROVIDED THAT THE SAID ADDRESS IS VERIFIED BY THE INVESTIGATING OFFICER AND THE APPELLANT'S MOTHER CONSENTS TO THE APPELLANT RESIDING AT THE SAID ADDRESS IN TERMS OF THIS ORDER.

v. **THE APPELLANT SHALL NOT LEAVE THE ABOVE MENTIONED ADDRESS, WITHOUT WRITTEN PERMISSION OF THE ABOVEMENTIONED INVESTIGATING OFFICER.**

APS NXUMALO
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
NORTHERN CAPE DIVISION
KIMBERLEY

For Appellant:	**ADV VAN HEERDEN**
On instruction of:	*Written Heads of Argument by Mr IJ Nel* *Mathewson and Mathewson Inc, Kimberley*
For Respondent:	**ADV E KRUGER**
On instruction of:	*The Director of Public Prosecutions*