IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

APPEAL CASE NO: A 118/2024
LOWER COURT CASE NO: B1027/2023

In the matter between:

B[...] M[...] T[...] Appellant

and

THE STATE Respondent

Date of Hearing: 25 July 2024
Date of Judgment: 31 July 2024

JUDGMENT

ANDREWS, AJ

[1] This is an appeal in terms of Section 65(4) of the Criminal Procedure Act [1] (hereinafter referred to as the CPA) against the decision of the Presiding Magistrate Mrs Belelie, on 11 April 2024 sitting at Goodwood Magistrate's Court to refuse the Appellant's release on bail pursuant to the Appellants application for bail on the basis of new facts.

Factual Background

[1] Act 51 of 1977.

[2] The Appellant was arrested on 7 December 2023, on charges of contravention of Section 55(a) of the Criminal Law (Sexual Offences and Related Matters Amendment Act, Act 32 of 2007 – attempt to commit a sexual act), assault with the intent to commit grievous bodily harm, contravention of Section 120(6) (a) of the Firearms Control Act, 60 of 2000 – pointing a firearm and robbery with aggravating circumstances as intended in Section 1 of the CPA.

[3] The complainant, Ms C[...] T[...], is the ex-wife of the Appellant. The Appellant and complainant are divorced. At the time of the incident the parties and the complainant's 2 minor children, were residing together at the erstwhile common home in Goodwood. The allegations levelled against the Appellant is that the complainant was in her son's room on 27 November 2024. The Appellant stood at the door of the room, with a cup in his hand and enquired from the complainant why she did not ask him to take her to church. A physical altercation ensued between the parties. It is alleged that the Appellant grabbed the complainant by the arm and began striking her with his fist against her head; flung her onto the bed and choked her. It is also averred that the Appellant tried to pull down the complainant's trousers, but was unsuccessful. He then pulled down his own trousers and tried to insert his penis into her mouth, which the complainant managed to divert. During this encounter, the Appellant referred to the complainant in derogatory terms using vile expletives.

[4] The complainant then left the room and went to her daughter's room to ask her to call 10111. A further physical altercation ensued when the Appellant tried to take the complainant's phone from her. During the course of events, the Appellant pulled the complainant by her neck, back into the room at some stage and got on top of her again. It is averred that the Appellant took out a firearm and placed it in the mouth of the complainant, advising her not to tell anyone because no-one will believe her.

[5] The Appellant then proceeded to pick up the shattered glass from the broken cup. He placed the broken cup in the complainant's hand and squashed it, causing serious injury that required medical attention. It is also alleged that the Appellant struck the complainant on numerous l occasions against her head. The complainant

then collected her clothing and proceeded to her vehicle. The Appellant blocked her and instructed her to transfer all her money from her account under duress. She did so in two tranches, each containing R7000 and R6600 respectively, totalling R13 600 altogether.

[6] Subsequently the complainant's sisters and police arrived. The complainant left the house and applied for a third protection order. The Appellant was eventually arrested on 7 December 2023. A formal bail application was heard on 14 and 18 December 2023 respectively. Bail was denied on 19 December 2023.

[7] The State opposed bail for the following reasons:

(a) That the Appellant posed a danger to the safety of the complainant and

(b) the seriousness nature of the charges.

[8] Subsequently on 20 March 2024 the Appellant launched another bail application on new facts, which was also refused. The Appellant now approaches this court to appeal the court *a quo* 's decision in this regard.

Legal Framework

[9] Section 65(4) of the CPA provides for the test of a Superior Court to interfere with a decision of the Lower Court to refuse bail.

> *'The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court/judge is satisfied that the decision is wrong, in which event the court or judge shall give the decision which in its opinion the lower court should have given'*

Grounds of Appeal

[10] The grounds of appeal as extracted from the Notice of Appeal are that:

(a) the Magistrate erred in concluding and finding that the Appellant had not made out a proper case that exceptional circumstances exist, warranting his release on bail.

(b) the Magistrate erred in finding that bail conditions cannot be monitored at all times, and further that there is no guarantee that bail conditions would be enforced, which finding was made without any factual evidential basis.

(c) the Magistrate erred in not considering, or properly considering, that the implementation of bail conditions, inclusive of house arrest and daily reporting at the closest police station, would achieve the result of avoiding contact between the Appellant and the complainant as well as address concerns that the Court had in respect of the complainant's safety, and that these would have the desired effect of ensuring authorities knew, at all material times, of the whereabouts of the Appellant whilst awaiting trial.

(d) the Magistrate erred in emphasizing the complainant's subjective say-so in respect of the Appellant's alleged contact with members of the South African Police Services and the Traffic Department and that these would enable him in not adhering to any bail conditions ordered.

(e) that the Magistrate erred in finding that bail conditions would be unenforceable.

(f) that the Magistrate erred in making a quantum leap in the judgment on new facts that the delay in arrest between the alleged incident on 27 November 2023 and the Appellant's actual arrest, followed as a result of the influence the Appellant had in the South African Police Services and/or traffic area in the area in which he works and resides as there was no objective evidence that the Appellant had played a role in delaying his arrest or that the delayed arrest was as a result of anything the Appellant had instigated.

(g) that the Magistrate erred in concluding that the Appellant's delayed arrest was due to the fact that the Appellant was a traffic officer. This conclusion was not supported by any facts neither in the initial bail application nor in the bail application based on new facts; apart from the complainant's subjective, unsubstantiated evidence in this regard.

(h) that the Magistrate erred in over-emphasising the fact that the Appellant had elected, at his initial bail hearing to remain silent, and his reasons therefore and, consequently that this counted against him.

(i) that the Magistrate erred in not considering or properly considering the Appellant's version of events, inclusive of the fact that he had indicated that he himself, had reported this to his divorce attorney.

(j) that the Magistrate erred by paying mere lip-service to the presumption of innocence.

(k) that the Magistrate erred in overemphasising the fact that the Appellant did not make mention of a second Protection Order in the bail application on new facts;

(l) that the Magistrate erred by not considering the evidence provided in the report of a Clinical Psychologist, Renier Naudè, which report, confirmed that the Appellant suffers major depression, complex emotional and cognitive challenges, inclusive of potential cognitive impairment.

(m) that the Magistrate, erred in coming to the conclusion that the Appellant who elected to provide a version in the second bail application on new facts, under oath, was in order to try and explain or cover for the injuries that the complainant had allegedly sustained, and in the process, totally ignored what the Court had been informed at the commencement of the bail application on new facts, namely that the Appellant had not consulted in depth with the previous legal advisers and simply accepted their advices to remain silent.

(n) The Magistrate erred in finding that the Appellant had, in his application on new facts, still failed to show that the State's case is weak, on a balance of probabilities and that he stands a chance of being acquitted. In doing so, the Magistrate failed to deal with the Appellant's injuries in the judgment which were formally recorded as well as the communications between the Appellant and his erstwhile divorce attorney about what had expired which is indicative of the fact that on trial, the Appellant's version may be reasonably possibly true.

(o) The Magistrate erred by failing to consider or properly consider at all the Appellant's version, yet reached the conclusion and findings indicating why the complainant's version was to be accepted above that of the Appellant.

(p) The Magistrate erred in finding that the fact that the Appellant had been dismissed from his employment was a moot point and did not carry much weight in deciding whether the Appellant should be granted bail.

(q) The Magistrate failed to consider that in order to refer his dismissal dispute to the Bargaining Council or the CCMA, the Appellant has to be out on bail and would not be able to manage these processes whilst in custody.

(r) The Magistrate erred in respect of not considering and/or properly considering the evidence provided by the clinical psychologist, Renier Naudè as set out in a second report, in response to the evidence provided under oath by the investigating officer in this regard.

(s) The Magistrate erred by failing to consider or properly consider the evidence of Renier Naudè as to why the Appellant's treatment in prison, given his current diagnosis, was not satisfactory or sufficient and why the Applicant requires proper medical and psychological intervention, which cannot be provided to him whilst he is incarcerated.

(t) The Magistrate misdirected herself in failing to consider the purpose of bail, which is concerned with the liberty of the Appellant, pending finalisation of the

merits, and focused solely on the complainant's evidence, resulting in the Magistrate ordering that the Appellant remain in custody.

(u) The Magistrate erred by incorrectly finding that no exceptional circumstances were present, given the totality of the evidence, and given that the only grounds for opposing bail by the State were the issues of the complainant's safety and the seriousness of the alleged offences.

Legal Principles

[11] Section 60 (11) of the CPA provides that; where an accused is charged with an offence referred to –

'Notwithstanding any provision of this Act, where an accused is charged with an offence referred to -

(a) *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 exceptional circumstances exist which in the interests of justice permit his or her release'*

[12] It is trite that the functions and powers of the court or judge hearing the appeal under Section 65 are similar to those in an appeal against conviction and sentence. In ***S v Barb***er[2], 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 and not as a substantive application. 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

[2] 1979 (4) SA 218 (D) at 220E – H.

view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly...'[3]

[13] The matter of ***S v Petersen*** [4] sets out the approach to bail applications on new facts as follows:

'[57] When, as in the present case, the accused relies on new facts which have come to the fore since the first, or previous, bail application, the court must be satisfied, firstly, that such facts are indeed new and, secondly, that they are relevant for purposes of the new bail application. They must not constitute simply a reshuffling of old evidence or an embroidering upon it. See S v De Villiers 1996 (2) SACR (T) at 126e-f. ***The purpose of adducing new facts is not to address problems encountered in the previous application or to fill gaps in the previously presented evidence.***

[58] ***Where evidence was available to the applicant at the time of the previous application but, for whatever reason, was not revealed, it cannot be relied on in the later application as new evidence.*** *See S v Le Roux en Andere 1995 (2) SACR 613 (W) at 622a-b.* ***If the evidence is adjudged to be new and relevant, then it must be considered in conjunction with all the facts placed before the court in previous applications, and not separately****. See S v Vermaas 1996 (1) SACR 528 (T) at 531e-g; S v Mpofana 1998 (1) SACR 40 (Tk) at 44g-45a; S v Mohamed 1999 (2) SACR 507 (C) at 511a-d.'* (my emphasis)

The First Bail Hearing

[14] Whilst this matter concerns the decision of the court *a quo* regarding the new facts bail application, it is apposite to deal with the findings of the court in

[3] See also *Killian v S* [2021] ZAWCHC 100 (24 May 2021) at para 7.
[4] 2008 (2) SACR 366 (C) at paras 57 -58.

the first bail hearing as there are issues that are interconnected. In addition, ***Petersen*** *(supra)* makes it clear that if the evidence is adjudged to be new and relevant, then it must be considered in conjunction with all the facts placed before the court in previous applications, and not separately.

[15] The Appellant, gave *viva voce* evidence at the bail hearing, but elected not to testify about the merits of the case. The complainant and investigating officer's *viva voce* testimony were also heard. The reasons provided by the court *a quo* for refusing bail were that:

(a) In terms of Section 60(4)(a) of the CPA, there was a likelihood that the Appellant would endanger the safety of the complainant;

(b) In terms of Section 60(4)(c) of the CPA, there was a likelihood that the Appellant may attempt to influence or intimidate the complainant and

(c) That the Appellant did not prove that exceptional circumstances existed indicating that it was in the interest of justice that he be released on bail.

[16] It bears mentioning that Counsel on behalf of the Appellant, when addressing the court, indicated that the Magistrate wasn't wrong to hold the view in the first application.

Bail Application on new facts

[17] The new facts bail application was predicated on Appellant's current mental status and/or condition as well as the imminent loss of his employment at the time. It is not disputed that the Appellant has in fact been dismissed from his employment a few days prior to the court *a quo* delivering judgment in the second bail application on new facts.

[18] The Appellant, during his first bail application, seemingly upon legal advice, elected to exercise his right to silence and did not provide the court with his version of events. No version was put to the complainant at the trial. Subsequent to

the Applicant's first bail application, he obtained new legal representation and was then advised that given the nature, *gravitas* and scope of the proceedings before Court, it was prudent to provide his version of events more particularly because of the allegations of domestic violence. The Appellant's version was then placed before the court *a quo* in the form of an affidavit.

[19] The Appellant's affidavit also addressed the new facts relating to his then prospective loss of employment, his state of mental health and financial situation. These aspects were suggested to be serious and having a detrimental effect on the Appellant in respect of his feelings of depression and anxiety as well as financially.

[20] Ms. Michelle Beukes, the Appellant's attorney, in her affidavit confirmed the commencement of disciplinary proceedings. A confirmatory affidavit by Psychologist, Reinier Naudè was submitted to court to which affidavit was annexed a medico-legal report. Mr Naudè also provided a supplementary report which dealt with the averments made by the investigating officer in an answering affidavit, which report was attached to a supplementary affidavit attested to by Ms Beukes.

Principal submissions on behalf of the Appellant.

[21] At the outset of Counsel's address, it was placed on record that the Appellant was not disputing the Schedule of the offence and neither that the offence is serious. It was submitted that regard is to be had that the firearm that was confiscated was a licensed firearm and is currently booked into the SAP13. The Appellant therefore has no access to it.

[22] It is not in dispute that the Appellant currently has no previous convictions, pending cases or outstanding warrants of arrest. The Appellant's employment has been terminated. It was submitted that the Appellant's ultimate dismissal ought to be regarded as a new fact given the reason for the dismissal was directly linked to his incarceration. It was argued that the Appellant's release would be critical insofar as the prospects of success of reinstatement procedures are concerned.

[23] The dismissal of the Appellant has a direct bearing on the Appellant's financial affairs as he no longer receives a salary. The most recent salary was received on 27 December 2023. In this regard, it was contended that the Appellant's funds have been exhausted and his family is unable to service the bond and as a result, he may be at risk of losing his property.

[24] The Western Cape Traffic Department had commenced disciplinary proceedings and it has progressed to the procedural stage. Despite representations made by his legal representatives, the Appellant has been dismissed from his employment due to his continued absence. As a consequence of the Appellant's dismissal, he is desirous to commence reinstatement procedures against his dismissal, which would be difficult, with little prospects of success should he remain in custody. It was contended that the only way for the Appellant to attempt reinstatement is to pursue the route of conciliation and arbitration, which procedural step can only be embarked upon if the Appellant is released on bail.

[25] The deterioration of the Appellant's mental health was a new fact placed before the court, which was corroborated by Mr Naudè. Mr Naudè confirmed in his medico-legal report that the Appellant had suffered from suicidal ideation, which prompted three sessions with a prison psychologist, Mr Terrence Townsend. In spite of the Appellant receiving the three therapy sessions, Mr Naudè opined that the Appellant's treatment was limited due to the prioritization of emergencies amongst awaiting trial prisoners.[5] A diagnosis of major depression was confirmed by both Mr Naudè and Mr Townsend. According to Mr Naude, the Appellant's

[5] Supplementary Index: Forensic Report, Naudè, Annexure "RN1", pages 5 – 6 *'Given reports of suicidal thought, Mr. T[...] underwent three sessions with Prison Psychologist Terrence Townsend. This is in line with his history of depression following his father's passing. He received antidepressant medication for six months at that time. Using the Zung Scale, Mr. T[...] scored 79, indicating a significant degree of depressive symptoms that require ongoing monitoring and treatment.*
Despite receiving three therapy sessions from Mr. Terrence Townsend, the prison psychologist, Mr. T[...]'s treatment was limited due to the prioritization of emergencies among awaiting trial prisoners. Mr. Townsend concurred with the diagnosis of major depression but has concluded contractual obligations with the Department of Correctional Services. Another psychologist will assume Mr. T[...]'s care. Mr. B[...] T[...]'s evaluation highlights complex emotional cognitive challenges, including major depression and potential cognitive impairment. The limited therapeutic interventions received within the prison environment underscore the need for ongoing comprehensive mental health support and medication management. It is recommended that Mr. T[...] be provided with intensive psychotherapy and appropriate medication under psychiatric care, possibly necessitating hospitalization in a psychiatric facility.'

evaluation highlights complex emotional and cognitive challenges, including major depression and potential cognitive impairment, and the limited therapeutic interventions received within the prison environment underscore the need for ongoing comprehensive mental health support and medication management. Mr Naudè in reference to the Diagnostic Manual[6], recommended that the Appellant be provided with intensive psychotherapy and appropriate medication under psychiatric care, possibly necessitating hospitalisation in a psychiatric facility. He concluded that the Appellant does meet the criteria for major depression as he presents with six of seven depressive symptoms set out in the DSM-5, and four additional criteria required for diagnosis is also present.

[26] It was further contended that this medical condition is most likely as a result of the traumatic effects of being incarcerated, given that for a period of eighteen years as a traffic officer, he had been involved in law enforcement and now finds himself in a situation where he is surrounded by criminals. This, it was contended must be overwhelmingly traumatic experience for the Appellant. Consequently, the rapid and abrupt deterioration of his mental health warrants urgent intervention. The Investigating Officer, in his opposing affidavit addressed this aspect which necessitated that an addendum report from Mr Naudè be filed which was attached to the supplementary affidavit of Ms Beukes, the Appellant's legal representative.

[27] The Appellant submitted that these factors, viewed within the totality of the evidence, amount to new facts which are exceptional in nature.

Respondent's grounds for opposing bail and principal submissions

[28] The Respondent opposes the appeal on the grounds:

(a) That there is a likelihood that should Appellant be released on bail he:

(i) Would be a danger to the safety of the complainant and

[6] DSM – 5 – TRT.

(ii) He may attempt to influence or intimidate her.

(b) That the trial court was correct in finding that some of the new facts on which the application is based:

(i) do not amount to new facts;

(ii) that the cumulative effect thereof does not outweigh the interest of the State and

(iii) that the issues raised can be addressed in other ways.

[29] It was submitted that the application for bail based on new facts does not address the court *a quo 's* findings in the original refusal of bail that there is a likelihood that the Appellant would be a danger to the safety of the complainant and a likelihood that he may attempt to influence or intimidate her should he be released on bail. In light thereof, it was contended that those finding ought to stand.

[30] The Respondent emphasised that the court *a quo* found that, based on the *viva voce* evidence of the complainant, which stood undisputed by election of the Appellant not to testify on the merits of the matter, showed a history of violent, abusive and manipulative behaviour, exhibited by the Appellant towards the complainant. It was submitted that the presence of the complainant's children and her mother, prior to being deceased, could deter the Appellant from such behaviour.

[31] It was emphasised that the complainant expressed her apprehension regarding the prospect of the Appellant being released on bail, even under strict conditions such as house-arrest. In this regard, the complainant articulated that she would not feel secure based on the Appellant's past conduct and his position as a member of law enforcement, which includes the connections he had in this field by virtue of his reputation. In further augmentation, the complainant's reservation is borne out by the manner in which members of SAPS dealt with the complaint when they attend at the erstwhile common home. This, is evidenced by:

(a) The fact that the SAPS members sat in the lounge with the Appellant, while she was in the room packing up her belongings.

(b) It was only when the complainant requested to speak to a SAPS member in private that she was free to indicate that she was desirous for the Appellant to be arrested.

(c) The Appellant was not arrested immediately, but some 3 days later, seemingly only after the complainant was discharged from hospital.

(d) The parties were asked who would be making a compromise in leaving the property.

[32] The evidence on record indicates that the Appellant has persuaded the complainant to withdraw 2 previous protection orders by using her feelings of guilt against her. It was emphasised that the Appellant had previously also asked the complainant not to let anyone know about his firearm. His firearm was also never kept locked in a safe and was easily accessible as it was kept in a draw. This was demonstrated by the fact that he had allegedly instructed the complainant's 12-year-old son to fetch it. Subsequent to the Appellant's arrest he was found to be in possession of 30 rounds of ammunition.

[33] In addition, it was submitted that the Appellant's manipulative behaviour, cements the court *a quo* 's findings in this regard in respect of the bail application on new facts:

(a) That the Appellant chose to disclose his version by way of affidavit and not by way of *viva voce* evidence;

(b) the denial of the presence of the children during the incident on 27 November 2023 and that the complainant had 2 protection orders against him prior to the incident;

(c) the manner in which the Appellant introduced who he is regarding his employment, standing in the community and character.[7]

[34] It was revealed that significant focus, in the affidavit in support of the new facts bail application, was directed to attack the character of the complainant by claiming that she was untruthful and that she was the cause of the difficulties in the marriage. The Respondent argued that the court *a quo* was correct in finding that despite the Appellant's election not to testify about the merits of the matter, that this should not have prevented him from disclosing some of the information relating to the character of the complainant. The Respondent furthermore contended that the Appellant did not take the court into his confidence as to why he was not arrested on the day of the incident.

[35] It was argued that the Appellants opinion about himself as he articulated his identity during his testimony, serves to corroborate the complainant's view of him that he is highly competitive and that everything centred around him. The Respondent averred that the cumulative effect of the circumstances of the matter as per the testimony of the complainant, remains relevant in that the Appellant is still intent on trying to manipulate the bail system to circumvent his having to testify on the merits, by opting to make submissions by way of an affidavit.

[36] In addition, it was highlighted that the Appellant knows where the complainant resides and works. The court *a quo* had regard to options of bail conditions but found that same would not ensure the safety of the complainant or prevent interference with the State's case. The Respondent submitted that the court *a quo* cannot be faulted for making these findings.

Considerations by the court *a quo*

[37] The bail application on new facts was informed by the following summarised factors, as extracted from the court's judgement: the onus that the

[7] "I am a traffic officer residing in the Goodwood area. I am very well known in the traffic fraternity, as well as in sporting circles and in the community itself. People know my character as a person that I am, B[...] M[...] T[...]. My character exceeds the allegations made against me and I just feel that I am being treated unfairly…"

Appellant was obligated to bear, the history of the matter in relation to the Appellant's initial bail hearing, the court's findings, and the State's opposition to bail. Other factors included, the applicable legal principles to be considered in Schedule 6 bail applications; whether bail conditions would protect the interest of the state; the history of the relationship between the Appellant and the complainant; the nature and seriousness of the charges. In addition, the court *a quo* considered the evidence of the complainant insofar as it pertained to the history of the domestic abuse (physical, verbal and emotional abuse) which culminated the complainant having obtained two prior protection orders, with particular reference to the anecdotes of certain specific incidences (home, church and work) as orated by the complainant. The reasons for the withdrawals of these protection orders were also contemplated. The court *a quo* concluded that the two previous protection orders indicated that there was a real likelihood of past abuse.

[38] Further considerations included that the presence of the complainant's late mother, who resided with the parties and the children did not deter the Appellant. Additionally, the court *a quo* considered the impact the domestic violence had on the children.

[39] The court *a quo* determined that the complainant was hospitalised for three days due to the incident. It also had regard to the fact that there was a delay in the arrest of the Appellant and that the Appellant's firearm was confiscated. Subsequent to the confiscation of the Appellant's firearm, he was found in possession of ammunition. The court *a quo* expressed concern that despite the serious nature of the assault that the Appellant, after speaking to the police on the day of the incident was not arrested. The court *a quo* concluded that this was indicative of *"the kind of influence the accused in fact has in the area in, which he works and resides*."[8]

[40] In relation to the new facts bail hearing, the court *a quo* had regard to the affidavit attested to by the Appellant as well as the complainant's views regarding the Appellant's release on bail and imposition of bail conditions. Consideration was

[8] Judgment, page 67.

given to the Appellants version on the merits, however, the court *a quo* pointed out that the complainant's evidence pertaining to the incident was not tested under cross-examination by the Appellant's erstwhile attorney in that for example it was never put to the complainant that the Appellant had been assaulted, or that he had photographs of his injuries. In this regard, the court *a quo* indicated that the complainant's undisputed evidence was that she had fought back. The court *a quo* also found that the evidence on a balance of probabilities favoured the complainant on her account of a past history of abuse.

[41] The court *a quo* remarked that the Appellant's conduct on the day of the incident is indicative that he was a real danger as it stood unchallenged. The court identified the relevant paragraphs in the Appellant's affidavit which was regarded as an attack on the complainant's character, reaching the conclusion that reference to the past conduct of the complainant was not new evidence as this was confirmed by the complainant herself when she testified.[9] The court held the view that the accused had sufficient opportunity to raise these issues in open court in the presence of the complainant. The court *a quo* found that the Appellant failed to show that that the state's case is weak, on a balance of probabilities. The court *a quo* found that there was a strong *prima facie* case against the Appellant.

[42] The court *a quo* referred to the clarification that was needed pertaining previous protections orders in light of the Appellant's instruction that there was no other protection order before the one issued in the year he wished to travel to Australia. The court *a quo* also referred to other factors that the court *a quo* deemed important that that were omitted from the affidavit of the Appellant such as that the Appellant in his first bail application had made no mention of his past history of depression.

[43] The court, having regard to the aforementioned factors, the Appellant's right to be presumed innocent and his personal circumstances, which included his employment status, financial position, medical condition; concluded that in considering the application on new facts, the evidence and reasons for refusal of bail

[9] Judgment, page 72, lines 10 – 20.

in the original application remained relevant. The court *a quo* found that that there were no exceptional circumstances that was placed before the court and that the interest of justice did not permit the Appellant's release more particularly:

(i) that there was a real likelihood that the Appellant would endanger the safety of a particular person (the complainant and her children);

(ii) that there was a real likelihood that the accused would either influence or intimidate the complainant regarding the case before court.

Discussion

[44] It is common cause that the Appellant has been arraigned on charges listed under Schedule 6. A Schedule 6 bail application, given the nature and seriousness of the offences for which it has been introduced, placed the onus on the Appellant by virtue of section 60(11)(a) of the CPA to prove on a balance of probabilities, that *exceptional circumstances* warranted his release on bail.

[45] The effect of section 60(11)(a) was exhaustively discussed and elucidated in the Constitutional Court's seminal judgment in ***S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*** [10]. It imposes an onus on the applicant for bail to adduce evidence to prove to the satisfaction of the court the existence of exceptional circumstances justifying his release on bail. The court must also be satisfied that the release of the accused is in the interests of justice. Section 60(4) of the CPA, sets out a list of circumstances in which it would be in the interest of justice to grant bail. The standard of proof is on a balance of probabilities.

[46] There is an abundance of case law dealing with the considerations taken by courts in determining what exceptional circumstances may be. In ***S v Mohammed*** [11] the Court held that "exceptional" circumstances had two shades or degrees; either meaning unusual or different, or markedly unusual or especially

[10] [1999] ZACC 8 (3 June 1999); 1999 (2) SACR 51(CC).
[11] 1999 (2) SACR 507 (C), page 515.

different. Comrie J placed the emphasis on the degree of deviation from the usual as it appears from a statement:

'So the true enquiry, it seems to me, is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the Applicant's release. And "sufficiently" will vary from case to case.'

[47] In ***Mazibuko v S*** [12] the court stated:

'[18] ...With respect, I am of the view that the emphasis should be placed on the degree to which any circumstance is present...

[19] For the circumstance to qualify as sufficiently exceptional to justify the accused's release on bail it must be one which weighs exceptionally heavily in favour of the accused, thereby rendering the case for release on bail exceptionally strong or compelling. The case to be made out must be stronger than that required by subsection (11) (b), but precisely how strong, it is impossible to say. More precise than that one cannot be.'

[48] In ***S v Mokgoje*** [13], the court was of the view that the concept referred to circumstances that were unique, unusual, and particular. In ***S v Scott - Crossley*** [14]it was held that:

'*Personal circumstances which are really 'commonplace' can obviously not constitute exceptional circumstances for purposes of section 60(11) (a)*.'

[49] In ***S v Petersen*** [15] the Court determined that *'"exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different.* In

[12] 2010 (1) SACR 433 (KZP) (19 November 2009) at pars 18 - 19.
[13] 1999 (1) SACR 233 (NC).
[14] 2007 (2) SACR 470 (SCA) at para 12.
[15] 2008 (2) SACR 355 (C) par 55.

Director of Public Prosecutions v Nkalweni [16] the word was given the meaning of "unique, unusual, rare and peculiar". In ***S v Ntoni and others*** [17]the Court held that:

> *'Generally speaking what may constitute exceptional circumstances in any given case depends on the discretion of the presiding officer and the facts peculiar to a particular matter. In the context of the provision of s60 (11) (a), the exceptionality of the circumstances must be such as to persuade the court that it would be in the interests of justice to order the release of the accused person. It requires the court to exercise a value judgment in accordance with all the relevant facts and circumstances.'*

[50] It is trite that a court determining a bail application affected by Section 60(11) of the CPA, is required to consider the mosaic of evidence and decide on whether it is sufficient to persuade the court that an exception should be made to the default position. Caution has been expressed in ***S v Yanta*** [18] where De Wet AJ, remarked:

> *'The right of an unsuccessful bail applicant to an opportunity to present new facts in order to secure their release on bail must always be carefully weighed against the principle that renewed bail applications, where old and previously known facts are simply restructured and no real new facts exist, amounts to an abuse of process.'*

[51] Numerous aspects of the court's findings are called into question by the Appellant in *casu*. The court *a quo* expressed concern that the Appellant had not been arrested on the day of the incident and determined that this was indicative of the extent of the Appellant's influence in the area where he resides and works. In this context, it was contended that this conclusion lacks a factual basis. In addition, it was suggested that the court *a quo* erred in overly relying on the complainant's subjective say-so in respect of the Appellants "alleged" contact with the members of the South

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[16] 2009(2) SACC 343 (Tk).
[17] (5646/2018P) [2018] ZAKZPHC 26 (22 June 2018) at par 32.
[18] 2023 (2) SACR 387 (WC) at para 1.

African Police Services and the Traffic Department and that these will enable him not to adhere to any bail conditions ordered.

[52] It was argued that although the evidence in this regard by the complainant was tendered at the first bail application, the Magistrate referred to this aspect in her judgment again in respect of new facts in the process of determining that bail conditions would be unenforceable. It was also argued that the Magistrate went to great lengths in her judgment, pertaining to new facts, to reiterate the fact that the Applicant had not provided a version of events during the first application, yet chose to do so during the second bail application on new facts, in circumstances where the complainant was unable to respond.

[53] As previously stated, it is trite that the court is enjoined to consider the new facts in conjunction with all the facts placed before it in previous applications and not separately as set out in the guidelines in ***Petersen*** *(supra)* that:

(a) The purpose of adducing new facts is not to address problems encountered in the previous application or to fill gaps in the previously presented evidence;

(b) Where evidence was available to the applicant at the time of the previous application but, for whatever reason, was not revealed, it cannot be relied on in the later application as new evidence.

(c) If the evidence is adjudged to be new and relevant, then it must be considered in conjunction with all the facts placed before the court in previous applications, and not separately.

[54] The matter of ***Petersen*** *(supra)* demonstrates that the purpose of adducing new facts is not to address problems encountered in the previous application or to fill the void in the previously presented evidence. This, therefore, poses the question as to whether the Appellant's legal advice during the first bail hearing, not to testify on the merits would fall into this category. It is clear, that the evidence was available to the Appellant at the time of the previous application but,

was not revealed, seemingly on incorrect advice. ***Petersen*** *(supra)* makes it clear that such evidence cannot be relied on in the later application as new evidence.

[55] Notwithstanding, the court *a quo* had regard to all the evidence as will be later dealt with in this judgment. The Appellant however, holds the view that the court *a quo*, went to great lengths to discard the veracity and probabilities on the Appellant's version, and in so doing, it was argued, usurped the Trial Court's function, paying mere lip service to the presumption of innocent. In this regard, the Appellant is in effect being punished as opposed to properly considering what the purpose and scope of bail and bail conditions are. I will return to these aspects later in this judgment.

[56] In ***S v Porthen & others***[19]***,*** Binns-Ward AJ (as he then was), remarked that '*there could be no quarrel with the correctness of the observations of Hefer J as a general position'.* Notwithstanding, Binns-Ward considered it necessary to point out that a court hearing a bail application (i.e. the court *a quo*), exercises a wide as opposed to a narrow (or strict) discretion. Binns-Ward also observed that it remains necessary to:

> ***'***be mindful that a bail appeal, goes to the question of deprivation of personal liberty. In my view, that consideration is a further factor confirming that s 65(4) of the CPA should be construed in a manner which does not unduly restrict the ambit of an appeal court's competence to decide that the lower court's decision to refuse bail was "wrong" …'[20]

[57] Binns-Ward J in ***Killian v S***[21] restated the nature of the discretion wherein he stated:

> *'As I pointed out in S v Porthen and Others 2004 (2) SACR 242 (C), however, certainly in respect of bail applications governed by s 60(11),*

[19] 2004 (2) SACR 242 (C) at para 7.
[20] At para 17.
[21] [2021] ZAWCHC 100 (24 May), para 8.

in which the bail applicant bears a formal onus of proof, the nature of the discretion exercised by the court of first instance is of the wide character that more readily permits of interference on appeal than when a true or narrow discretion is involved. I concluded (at para 15) "Accordingly, in a case like the present where the magistrate refused bail because he found that the appellants had not discharged the onus on them in terms of s 60(11)(a) of the CPA, if this court, on its assessment of the evidence, comes to the conclusion that the applicants for bail did discharge the burden of proof, it must follow (i) that the lower court decision was 'wrong' within the meaning of s 65(4) and (ii) that this court can substitute its own decision in the matter". That analysis was most recently endorsed in a decision of the full court of Gauteng (Johannesburg) Division of the High Court in S v Zondi 2020 (2) SACR 436 (GJ) at para 11-13.'

[58] It was contended that the court *a quo* made, what was referred to as a "quantum leap" in her judgment on new facts, implying that the delay in arrest between the alleged incident on 27 November 2023 and the date on which the Appellant was arrested a few days later was as a result of influence the Appellant had in the South African police Services and/or the Traffic Department which is an aspect not borne out by factual proof.

[59] Even if the court *a quo* made a proverbial quantum leap regarding the reasons why the Appellant was not immediately arrested. This factor, viewed cumulatively with all the other considerations, would not, in my view have tipped the scales in favour of the Appellant.

[60] It is trite that a court hearing a bail application is cloaked with a wide discretion. The court in ***Yanta*** *(supra)*[22] has succinctly summarised certain general principles for consideration: [23]

[22] At para 15.
[23] See Criminal Justice Review, No 2 of 2017, "New facts" for purposes of a renewed bail application: Principles, issues and procedures by Steph van der Meer.

'…

15.1 Whether the facts came to light after the bail was refused. Such facts can include circumstances which have changed since the first bail application was brought such as the period that an accused had been incarcerated;[24]

15.2 Whether the facts are 'sufficiently different in character' from the facts presented at the earlier unsuccessful bail application in the sense that it should not simply be a "reshuffling of old evidence";[25]

15.3 Whether the alleged new fact(s) are relevant in the sense that if received by the court, it would per se or together with other facts already before the court from the initial bail application, assist the court to consider the release of an accused afresh;

15.4 A court hearing an application based on alleged new facts, must determine, with reference to the evidence previously presented in the unsuccessful bail application, whether such facts are indeed new.[26] *In S v Mpofana 1998 (1) SACR 40 (Tk) at 44 g-45 a Mbenenge AJ (as he then was) explained that "whilst the new application is not merely an extension of the initial one, the court which entertains the new application should come to a conclusion after considering whether, viewed in the light of the facts that were placed before court in the initial application, there are new facts warranting the granting of the bail application"; and*

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[24] In S v Mousse 2015 (3) NR 800 (HC) at para 7 the court held that the passage of considerable time coupled with the state's failure to make progress with the investigation of the case can be qualified as a new fact. Also see in this regard S v Hitschmann 2007 (2) SACR 110(ZH) at 113b

[25] See S v Mohamed 1999 (2) SACR 507 (C) at 512 and S v Petersen 2008 (2) SACR 355 (C) at [57]

[26] See S v Vermaas 1996 (1) SACR 528(T) at 531*e-g* where Van Dijkhorst J reiterated the principles set out in S v Acheson 1991 (2) SA 805 (NmHC) 821 F-H, as "Obviously an accused cannot be allowed to repeat the same application for bail based on the same facts week after week. It would be an abuse of the proceedings. Should there be nothing new to be said the application should not be repeated and the court will not entertain it. But it is *non sequitur* to argue on that basis that where there is some new matter the whole application is not open for reconsideration but only the new facts. I frankly cannot see how this can be done. Once the application is entertained the court should consider all facts before it, ne w and old, and on the totality come to a conclusion".

15.5 Where evidence was known and available to a bail applicant but not presented by him at the time of his earlier application, such evidence can generally not be relied upon for purposes of a renewed bail application as 'new facts'. In this regard it was explained in S v Le Roux en andere 1995 (2) SACR 613 (W) at 622 that in the absence of such a rule, there could be an abuse of process leading to unnecessary and repeated bail applications and that an accused should not be permitted to seek bail on several successive occasions by relying on the piecemeal presentation of evidence. I agree with the opinion of Van der Meer[27] that this rule should not be an absolute or inflexible one and that a court should be willing to consider why relevant and available information was not place before the court in the initial application.'[28]

[61] The duty on the State in a bail application as described in ***S v Maja and Other*** [29] requires that:

'The State cannot simply hand up the charge sheet to show that the accused had been charged with a Schedule 6 listed offence and then rely on the accused's inability to show exceptional circumstances. This, in effect, is what happened in the Applicant's case. The magistrate was wrong in finding that the State had proved a prima facie case against the Applicant simply upon the State's tendering of the charge sheet in which the offences were dealt with. This cannot be the law.

…

Unchallenged, these averments, to my mind, constituted exceptional circumstances which justified the magistrate to consider the merits of the Applicant's bail application.'

[62] It is therefore incumbent for the State to put forth valid reasons why bail should not be granted to the Appellant. Once the proverbial *scale* has been tilted into the State's favour through the presentation of evidence, the onus displaces to the Defence to tilt the scales heavily in their favour; that is where the exceptional

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[27] Criminal Justice Review (*supra*)
[28] See *S v Nwabunwanne* 2017(2) SACR 124(NCK) where it was held at para 27, that a court "should not lightly" deny a bail applicant the opportunity to present new facts.
[29] 1998 (2) SACR 673, at 678*e*-679*c.*

circumstances come in on a balance of probabilities. Inasmuch as "*the State cannot simply hand up the charge sheet*" to prove its case (as quoted in ***Maja*** *supra*), it is implied that the Defence cannot simply criticise the State's case without providing some form of rebutting proof for their allegations in order to prove their case on a balance of probabilities.

[63] It was submitted that the court *a quo* did not properly consider the Appellant's version of events. In this regard, it was argued that little or no regard was had to the fact that the Appellant was assaulted and that he had reported such assault to his previous divorce attorney. It was also argued that the court *a quo* ignored the submission that the Appellant had not consulted in depth with his previous legal advisors and accepted their advice to remain silent.

[64] From the judgment of the court *a quo*, the court had regard to the fact that the Appellant was injured. This was not placed in dispute as the complainant's evidence served to corroborate same. It must however be emphasised that the burden of proof at a bail hearing is not proof beyond reasonable doubt, but whether a *prima facie* case has been established by the State. The matter of ***S v Branco*** [30] reinforces the position that a bail application is not a trial.

> *'The prosecution is not required to close every loophole at this stage of the proceedings. However, a factor favouring bail is whether the Appellant has established a defence which has a reasonable prospect of success at the trial.'*

[65] The court *a quo* had the benefit of the *viva voce* evidence of the complainant and the Investigating Officer and only had the version of the complainant at the first bail hearing. The strength of the State's case on a balance of probabilities was considered. In addition, although the children did not see the incidents, they were present in the house and will be able to provide collateral evidence to strengthen the State's case against the Appellant. It was placed on record that statements were already obtained from the children.

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[30] 2002 (1) SACR 531 (W).

[66] As previously mentioned, the consideration is whether the state has made out a *prima facie* case against the Appellant. This is to be weighed up against whether the Appellant has a valid defence which show on a balance of probabilities that he will be acquitted of the charge as stated in ***S v Mathebula*** [31]**:**

> *'…but a State case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge…'*

[67] In my opinion, the court's rationale for reaching its conclusions does not constitute a misdirection in the light of the fact that this information was accessible during the initial bail hearing, bearing in mind that the bail court is imbued with a wide discretion. There are a number of factors as earlier mentioned that a court must consider at a bail hearing. It requires of the court to ultimately make a value judgment on evidence placed before it.

[68] In my opinion, the emphasis placed on previous protection orders was not misplaced. It was contended that the Appellant's severe depression should have been taken into account. This would imply that complex cognitive, emotional, and behavioural challenges would be the standard, including the possibility of cognitive impairment.

[69] The emphasis on this aspect, when considered on a conspectus of the evidence, is relevant as the factual matrix and tumultuous history suggested previous incidents of domestic violence which culminated in protection orders being obtained. The failure by the Appellant to be forthright about the second protection order was in my view a relevant consideration, given that that there were allegations of manipulation that informed the withdrawal of those protection orders.

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[31] 2010 (1) SACR at para 12.

[70] Whilst it may be so that the diagnosis and findings of the clinical psychologist, Mr Naudè was not disputed, the Appellants Counsel placed factors on record, that provides cold comfort to this court concerning the Appellant's state of mind. To argue that the Appellant has "complex emotional and cognitive challenges"[32], leaves concerns as to what will trigger the Appellant given the history between the parties.

[71] In the matter of ***S v Mpofana*** [33]**,** whilst distinguishable on the merits as it deals with a detainee's ill-health due to the prison conditions, the court held:

> *'Upon a proper construction of s 35(2)(e) and (f) of the said Constitution, one whose detention has been pronounced lawful and in the interest of justice cannot simply resort to a further bail application merely because he has been detained under inhumane and degrading conditions or on the ground that his right to consult with a doctor of his own choice has been infringed. It is however, available to such person firstly to apply to the prison authorities concerned and call upon them to remedy whatever complaints he/she has with regard to the conditions of his/her detention. Should the prison authorities fail to remedy such complaints, it is available to the detainee concerned either to challenge the detention before a court of law as being unconstitutional or obtain a court interdict to force the prison authorities to comply with the law. In any event, in hoc casu, the magistrate has, quite correctly in my view, ordered that the prisons officials should afford appellant the right to consult with a medical practitioner of his choice and Appellant's concern in this regard should be laid to rest.'*

[72] During the initial bail hearing, the Appellant's history of depression was not raised. The Appellant's depressive condition was exacerbated by his incarceration, as explained by Counsel in his address to the court. It was further submitted that the treatment at Goodwood prison is substandard and that the Appellant needs urgent medical intervention. Mr Naudè who has the requisite experience in the prison environment, expressed that the Appellant was not in a

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[32] Appellants Heads of Argument, page 12. Para 39.
[33] 1998(1) SACR 40 (TK).

good space. It was placed on record that it would be submitted at the Appellant's pre-trial hearing that he would not be fit to stand trial.

[73] The Appellant has been able to consult with Mr Naudè whilst incarcerated. It is evident from the court *a quo*'s judgment that the Appellant's medical condition was considered. The Magistrate had regard to the fact that he had a previous depressive episode and that he has been diagnosed as major depressive, which the court acknowledged is a serious condition. The court *a quo*, indicated that there was no report from Mr Townsend. The court held the view that nothing bars Mr Naudè from prescribing the necessary medication, which is an issue that could be further pursued with the medical section of the prison. The court further indicated that the Appellant was not without recourse. The court *a quo* ultimately found that the Appellant's medical state did not constitute an exceptional circumstance.

[74] It is manifest that the Magistrate exercised her discretion, and had regard to the medical evidence and submissions regarding the Appellant's medical condition. I can find no misdirection by the court *a quo* in this regard. This court is not called upon to consider that Appellant's fitness to stand trial. The Appellant's fitness to stand trial may be addressed at the pre-trial hearing in due course.

[75] It was argued that the court *a quo* failed to properly consider that the Appellant has to be out on bail in order to challenge his dismissal. The court *a quo*, considered that that the Appellant was going to challenge the dismissal with the Bargaining Council or CCMA. In this regard, the court indicated that the Appellant may possibly be successful in his application for reinstatement which was not conclusive or guaranteed and it was for those reasons that the court could not attach the same weight to it as when "he was employed".[34]

[76] The consequences of the Appellants dismissal were considered. In this regard, the court *a quo* stated:

[34] Judgment, pages 78 – 79 of the record.

'Now since the previous application and before the conclusion of these proceedings the City of Cape Town has in any event moved forward as I have said with the process and has dismissed the accused. The accused at this stage is therefore now no longer employed. The concern that he will not have employment is therefore moot ***at this stage****. The accused is going to challenge the dismissal with the Bargaining Council or CCMA. He may therefore possibly be successful for reinstatement but it is not something that is conclusive or guaranteed and therefore the court cannot attach the same weight to it as when he was employed…'*[35] (my emphasis)

[77] It is evident from the judgment that the reference to "mootness" was expressed as being the *de facto* situation at the time of delivering the judgment as the Magistrate qualified what it meant by adding "at this stage". This factor was considered in conjunction with other factors. The Magistrate emphatically stated that even if the Appellant's employment status hadn't changed, this factor would not have tipped the scales in his favour as she had considered whether bail conditions would be effective. In contemplation, the court *a quo* had regard to the fact that the Appellant *"worked at the same environment as the complainant. That he had the habit of following the complainant and the court was therefore satisfied that bail conditions would not be effective".*[36]

[78] Although the Appellant and complainant are alleged to live at a considerable distance from one another, the Magistrate's apprehension is not without merit, as the parties have a contentious history that is beyond dispute. Counsel for the Appellant argued that stringent bail conditions could allay the court's concerns, however, from a logical perspective, and given the nature of the Appellant's employment, it would, in my view prove difficult to monitor the Appellant whilst he is at work. House arrest could be monitored effectively, but in view of the Appellant's intention to challenge his dismissal, it is evident that he is desirous to resume his employment if he were to be released on bail.

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[35] Judgement page 79 or the record.
[36] Judgment record, page 79, lines 7 -10.

[79] Regarding the Appellant's financial position being a moot point. This aspect is interwoven with the Appellant employment status. The court had regard to the impact his incarceration has on his ability to meet his financial obligation. The court held the view, that alternative arrangements could be made. It is trite that the court *a quo* is imbued with a wide discretion when deciding on an accused's release on bail. In my view, I can find no misdirection with regard to the Magistrate's findings in this regard.

[80] The court *a quo* was alive to the fact that it was enjoined to consider the Appellant's circumstances and the prejudice he may suffer if incarcerated. These are factors that cannot be analysed in isolation; rather, they should be incorporated into the overall context of the situation. These considerations included various factors which included the acrimonious relationship between the parties; the existences of previous protection orders and reasons for subsequent withdrawals thereof; the escalation of the Appellant's aggression over time, on the complainant's version, to the point that the Appellant wielded his firearm and then put it in the mouth of the complainant instructing her not to tell anyone. In addition, that the Appellant would stalk the complainant at her place of work and at times confront her at her workplace and the manipulation and influence of the Appellant.

[81] Regarding the court, *a quo*'s finding that the bail conditions would not be effective, I am satisfied that the court *a quo* anchored its findings which was predicated on the previous conduct of the Appellant to go the complainant's work environment. The court also found the bail conditions cannot be monitored at all times and that there was no guarantee that it will be enforced. This conclusion was reached to ensure the protection of "the state's interest".[37]

[82] Lastly, it behoves me to deal with the Appellant's right to be presumed innocent. The Appellant argued that a refusal of bail should never be used as a punitive measure. In this regard, reference was made to the matter of ***S v C*** [38] where the court held:

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[37] Judgment, page 80, line 19.
[38] 1998 (2) SACR 721 (C) at 723h.

'As far as the current case is concerned, the problem with section 60(11) of the Act is caused by the terms "exceptional circumstances". In the Spirit of the constitution and the common law, s60(11) may not be read as requiring more of a person awaiting trial than to prove the ordinary circumstances mentioned above. The moment more is required, it would be punitive. That would be utterly and completely unacceptable. Accordingly, all the legislature in my view stipulated in a clumsy fashion is that a court in dealing with schedule 6 offences should exercise exceptional circumspection in considering ordinary circumstances.'

[83] The Constitutional court remarked in ***S v Dlamini and Others; Joubert en Schietekat*** *(supra),* that:

'…There is widespread misunderstanding regarding the purpose and effect of bail. Manifestly, much must still be done to instil in the community a proper understanding of the presumption of innocence and the qualified right to freedom pending under s 35(1)(f). The ugly fact remains, however, that public peace and security are at times endangered by the release of persons charged with offences that incite public outrage.'[39]

[84] The unanimous court decided that the right to be presumed innocent is not a pre-trial right but a trial right. The court in ***Barense and Another v S*** [40] referred with approval to the matter of ***Conradie v S***[41] where the following was stated:

"The appellant's counsel also argued that the magistrate had failed to have sufficient regard in her evaluation of the evidence to presumption of innocence. In this regard counsel emphasised that the remark by Steyn J in S v Mbaleki and Another 2013 (1) SACR 165 (KZD) in para 14 that the Constitutional Court had decided in Dlamini supra, that 'the right to be presumed innocent is not a pre-trial right but a trial right' found no support in the text of the Dlamini judgment. It appears to be correct that the Constitutional Court did not express

[39] See also *S v Miselo* 2002 (1) SASV 649 (K) at para 23.
[40] See *Barense and Another v S* (A01/2023) [2023] ZAWCHC 125; [2023] 3 All SA 381 (WCC) (22 May 2023) at para 25.
[41] [2020] ZAWCHC 177 (11 December 2020) at paras [19]-[20].

itself in those terms. It is clear, however, that the Court considered that the provision of the Constitution most pertinent to its treatment of bail applications affected by s 60(11) of the Criminal Procedure Act was 35(1)(f), which provides that 'Everyone who is arrested for allegedly committing an offence has the right - ... to be released from detention if the interests of justice permit subject to reasonable conditions'. That is a qualified liberty right, not a fair trial right. The presumption of innocence is indeed a peculiarly trial-related right as evidenced by its entrenchment as one of the fair trial rights listed in s 35(3) of the Constitution. I therefore agree with Steyn J's stated view that the presumption of innocence does not play an operative role in bail applications.

A court seized of a bail application fulfils a very different function from a trial court. Its role is not to determine the guilt or innocence of the accused person. The bail court's concern with the interests of justice, in the sense of weighing in the balance 'the liberty interest of the accused and the interests of society in denying the accused bail', will however in most cases entail that it will have to weigh, as best it can, the strengths or weaknesses of the state's case against the applicant for bail. A presumption in favour of the bail applicant's innocence plays no part in that exercise. The court will, of course, nevertheless bear in mind the incidence of the onus in making any such assessment." [Emphasis added.]

[85] The court in ***Barense and Another v S*** [42] also referred with approval to the matter of ***Mafe v S*** *(supra)* where Lekhuleni J remarked as follows regarding the presumption of innocence:

> *"In summary, the presumption of innocence is one of the factors that must be considered together with the strength of the State's case. However, this right does not automatically entitle an accused person to be released on bail. What is expected is that in Schedule 6 offences the accused must be given an opportunity, in terms of section 60(11)(a), to present evidence to prove that there are exceptional circumstances which, in the interests of justice, permit*

[42] At para 26.

his release. *The State, on the other hand, must show that, notwithstanding the accused's presumption of innocence, it has a prima facie case against the accused. In reaching a value judgment in bail applications, the court must weigh up the liberty interest of an accused person, who is presumed innocent, against the legitimate interests of society. In doing so, the court must not over-emphasise this right at the expense of the interests of society."* [Emphasis added.]

[86] It is therefore pellucid that the presumption of innocence does not automatically entitle an applicant for bail to be released. The presumption of innocence is but one of the factors that must be considered. Whilst being forever mindful of factors such as the purpose of bail and the deprivation of an accused person's liberty, the onus remains on the Appellant to adduce evidence and persuade the court that exceptional circumstances exist that in the interest of justice warrants his release on bail. It is incumbent upon a court to consider this right together with the strength of the State's evidence. I agree with the court in ***Barense*** that *"[I]f the right to be presumed innocent was overarching it would mean that every bail applicant had to be released on the basis that he or she was presumed innocent. That could not have been the intention of the legislature"*.[43]

Conclusion

[87] There is a plethora of authorities that reaffirms the limitations and powers of a Court of Appeal. The ultimate consideration is whether the Magistrate, who had the discretion to grant bail, exercised such discretion wrongly. Only one of the considerations set out in Section 60(4) of the CPA need be present to refuse bail. In my view, the court *a quo*, cemented its decision to refuse bail on more than one of the factors listed in Section 60(4). It is evident that the court *a quo* 's refusal to grant was premised on the following considerations:

'…I am satisfied that at this stage even on the new facts placed before me, that the accused has not discharged the onus in the Schedule 6 bail application.

[43] At para 27.

There are no exceptional circumstances that he has provided to this court and I still find that the grounds in section 64(a) (sic) still exist that he is likely to endanger the safety of a particular person as well as the grounds in section 60(4) that he can influence and/or intimidate the complainant in this matter as has been seen in his past history to either withdraw the protection order and/or to withdraw the charges due to manipulation from his side and his fear of incarceration. I am therefore satisfied that the interest of justice do not permit his release at this stage.'[44]

[88] The court *a quo* was astute to state that she had considered all relevant factors, including the harm that could potentially be inflicted on the complainant and the children, and concluded that even on the new facts the Appellant did not discharge the onus.[45]

[89] In considering the factors considered by the court *a quo*, I can find no misdirection. I am satisfied that the court *a quo* considered the objective facts and applicable legal principles and correctly determined that the interest of justice does not permit the Appellant's release on bail. The Appellant's personal circumstances cannot outweigh interest of justice considerations. Moreover, I am not persuaded that the fears expressed by the court *a quo* can be dealt with by way of stringent bail conditions. Therefore, I agree with the findings of the court *a quo* that the interest of justice far outweighed any prejudices that may be suffered by the Appellant. Consequently, I am satisfied that the court *a quo* correctly denied the Appellant's application to be released on bail.

Order:

[90] In the result the Appellants appeal against the order by the court *a quo* refusing his application for bail on new facts is dismissed.

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P ANDREWS, AJ

[44] Judgment record, page 84, paras 10 -18.
[45] Judgment record, page 84, lines 4 -10.

Acting Judge of the High Court

APPEARANCES

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