IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

_____ _____
DATE SIGNATURE

CASE NUMBER: A14/2016

In the matter between:

MAKWAKWA, ITUMELENG APPELLANT

And

THE STATE RESPONDENT

JUDGMENT

DOSIO AJ:

INTRODUCTION

[1] This is an appeal against the refusal of bail by the Regional Magistrate Mr Mhlare sitting in Kempton Park Magistrates Court on the 15th of February 2016.

[2] The matter is currently partly heard before the Regional Magistrate Mr Manyathi wherein Appellant is accused number two (2).

BACKGROUND

[3] It is common cause that the Appellant was arrested on the 5th of February 2012 in the company of co-accused. They were all arraigned before the Kempton Park Magistrates Court on the following charges, namely; Count 1-Robbery with aggravating circumstances, Count 2- Possession of a firearm, Count 3-Robbery with aggravating circumstances, Count 4-Theft of a motor vehicle, Count 5-Theft of a Motor Vehicle, Count 6- Robbery with aggravating circumstances, Count 7-Kidnapping, Count 8-Contravention of section 68 of Act 68 of 1995 (making false representations or pretending to be a member of the South African Police Service), Count 9-Contravention of section 66(1) of Act 68 of 1995 (wearing and using uniforms, badges etc of the South African Police), and Count 10-Possession of a firearm.

[4] The Appellant made his first appearance on the 7th February 2012. He was released on bail of R7000,00 on the 29th of February 2012. The Appellant failed to appear before court on the 3rd of December 2012. A warrant for his arrest was authorised and his bail money was provisionally forfeited to the State until the 18th of December 2012. The Appellant failed to appear on the 18th of December 2012 and his bail money was finally forfeited to the state.

[5] His attorney informed the court that the Appellant was arrested on another matter in Krugersdorp. The matter was then remanded to the 29th of February 2013 so that he could be traced. The Appellant appeared on the 1st of February 2013 and was kept in custody due to his bail money being forfeited. The Appellant brought a new bail application on the 30th of January 2014 and was granted bail in the amount of R7000,00. On the 27th of November 2015, the accused failed to appear, and a warrant for his arrest was authorised and his bail money was provisionally forfeited to the state until the 19th of January 2016.

His attorney informed the court that the Appellant was involved in a motor vehicle accident. His bail money was finally forfeited to the state on the 19th of January 2016. The Appellant appeared in court on the 8th of February 2016 and the matter was remanded to the 15th of February 2016 for a formal bail application. The bail was formally denied and the Appellant is hereby challenging that decision.

[6] The Appellants affidavit contained the following averments, namely;

1.That he is residing at House no [2…..], [G……] [P……], [C……], [A…..].

2.That his personal circumstances which were incorporated in his original bail application be incorporated for purposes of the new bail application.

3.That after he was released on bail he failed to appear in court on the 27th of November 2015. That the reason for his failure to appear in court was due to him being involved in a motor vehicle accident. He also attached a medical certificate.

[7] The State led the evidence of Luitenant Van Der Walt, the investigating officer, who testified that the Appellant was arrested on the 5th of February 2012 together with a co-accused at Modderfontein and that in their presence was a gentleman who had been handcuffed and who it was later established was kidnapped from Katlehong. His vehicle had also been hijacked by the Appellant. The Appellant and his co-accused introduced themselves to the police as being police members who were busy with investigation. The Appellant and his co-accused failed to produce any appointment certificates. The Appellant and his co-accused were arrested and it was established that they were in possession of two hi-jacked vehicles as well as blue lights, a firearm, reflective jackets, police insignia and police equipment including a police siren and handcuffs. After the arrest a stolen vehicle was also recovered at a spare shop in Phomolong which belonged to the Appellant and his co-accused. This further vehicle had been stolen in Lyttelton.

[8] Counsel for the Respondent contended that the refusal to admit the Appellant to bail by the Court *a quo* was correct in that the Appellant failed to discharge the onus resting upon him to adduce evidence that there were exceptional circumstances which in the interests of justice permitted his release on bail.

LEGAL PRINCIPLES

[9] It is common cause that the charges fall in the category of offences listed in schedule 6 of the Criminal Procedure Act 51 of 1977.

[10] Section 60(11)(a) of Act 51 of 1977 states the following:

> "(11) 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 on bail"

[11] The onus in respect of an application falling within the ambit of a schedule 6 offence, rests upon the Applicant on a balance of probabilities. In *S v Moeti* 1991 (1) SACR 462 (B), the learned Hendler J held at 463E-F:

> "…for the applicant to succeed in this application there is an onus upon him to show on a balance of probabilities: … (d) that the interests of justice will not be prejudiced if bail is granted."

[12] In the case of S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC), the Constitutional Court held at page 63 that:

> "…The focus at the bail stage is to decide whether the interest of justice permit the release of the accused pending trial, and that entails, in the main, protecting the investigation and prosecution of the case against hindrance".

[13] In terms of section 35 (1)(f) of the Constitution 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.

[14] The learned Harcourt J in the case of *S v Smith and Another* 1969 (4) SA 175 (N) at 177 e-f stated that;

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

[15] In *S v Bruintjies* 2003 (2) SACR 575 (SCA) at 577 para [7] the learned Shongwe AJA, stated:

"(f) The appellant failed to testify on his own behalf and no attempt was made by his counsel to have him testify at the bail application. There was thus no means by which the Court *a quo* could assess the *bona fides* or reliability of the appellant save by the say-so of his counsel."

[16] In *S v Mathebula* 2010 (1) SACR 55 (SCA) at 59b-c the learned Heher JA stated at para [11]:

"In the present instance the appellant's tilt at the State case was blunted in several respects: first, he founded the attempt upon affidavit evidence not open to test by cross-examination and, therefore, less persuasive".

[17] In *S v H* 1999 (1) SACR 72 (W), the learned Labe J stated at 77 e-f that;

"Exceptional circumstances must be circumstances which are not found in the ordinary bail application but pertain peculiarly….to an accused person's specific application. What a court is called upon to do is to examine all the relevant considerations…as a whole, in deciding whether an accused person has established something out of the ordinary or unusual which entitles him to relief under s 60 (11) (a)"

[18] In *S v Petersen* 2008 (2) SACR 355 (C) on the meaning and interpretation of exceptional circumstances in the context of Section 60 (11) (a) of the Criminal Procedure Act, the Court remarked that generally speaking 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different.

[19] In terms section 65(4) of the Criminal Procedure Act 51 of 1977, the court hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong. In *S v Rawat* 1999 (2) SACR 398 (W), it was said at page 400 f-g:

"The powers of this Court in an appeal against the refusal of a magistrate to grant the appellant bail are limited - the real question being whether it can be said that the magistrate, who was vested with the discretion to grant bail, exercised that discretion wrongly. The functions and powers of the Court in an appeal such as the present are similar to those in an appeal against the conviction or sentence…Section 65(4) of the Criminal Procedure Act 51 of 1977 provides that the magistrate's decision against which the appeal is brought shall not be set aside unless the Court is 'satisfied that the decision was wrong'."

EVALUATION

[20] In considering this appeal, even if this Court has a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the court *a quo's* exercise of his or her discretion.

[21] It is after all the court *a quo* who would have been best equipped to deal with the question of bail, steeped in the atmosphere of the case and the observance of the witness that was called to testify against the refusal of bail.

[22] This court has also been mindful of the fact that where the High Court finds that an Appellant has succeeded in establishing 'exceptional circumstances' as contemplated in section 60 (11) (a) of the Criminal Procedure Act, the High Court itself is entitled to determine bail.

[23] The Appellants affidavit dated the 15th of January 2016, in support of his bail Application, alluded to the personal circumstances which were placed on record previously at his initial bail application. These personal circumstances are not before this Court. Counsel for the Appellant was unable to elaborate in respect to why these personal

circumstances were not incorporated in the affidavit.

[24] During the bail proceedings the Appellant did not present *viva voce* evidence in order to discharge the onus. He relied solely on an affidavit. The state was accordingly unable to cross-examine the Appellant or to test the veracity of the averments which were made in his affidavit. Accordingly the weight to be attached to the averments made in the affidavit are less persuasive than had he taken the stand and given *viva voce* evidence.

[25] Counsel for the Appellant argued that because bail was set previously on two occasions, and the fact that bail was finally forfeited to the State on two previous occasions, that this is sufficient punishment for the Appellant and should be viewed as exceptional circumstances.

[26] This court is not of the same view. This is a schedule 6 offence and the duty is solely on the shoulders of the Appellant to convince this court that there are exceptional circumstances. As argued by the Counsel for the Respondent, the strength of the case against the Appellant is very strong. The fact that bail was set previously has puzzled the Respondent's Counsel as it was argued that bail should have been denied from the inception. Counsel for the Respondent argued that the Appellant was caught red-handed.

[27] It was the duty of the Appellant to ensure that all the relevant factors be placed before the court *a quo* and this Court. In addition the full record as to why bail was granted previously in the court *a quo* is also not before this court.

[28] Due to the fact that this Court must decide this bail appeal on the information at hand, it is the duty of the Appellant to adduce evidence that there are exceptional circumstances that dictate his release.

[29] This Court is mindful of the fact that the case is partly heard and that three (3) state witnesses still need to testify. However as stated in the prosecutor's address, the three witnesses that still need to testify will be finalised in one day. The delays in finalising this case are solely attributable to the Appellant' absence, as the three witnesses have been at court previously to testify, but the Appellant was absent.

[30] The Appellant has remained silent in respect to the strength of the State's case against him. Counsel for the Respondent on the other hand has stated there is a very strong case against the Appellant. This is a factor which this court has considered in finding no exceptional circumstances warranting the Appellant's release.

[31] In addition, in terms of section 60(4)(d) of the Criminal Procedure Act 51 of 1977, the interest of justice do not permit the release from detention of an accused where there is the likelihood that the accused, if he were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system.

[32] The Appellant's behaviour is demonstrative that he does not take the legal system seriously. He has failed to appear in court thereby delaying the finalisation of this matter. He has also refrained from contacting the Investigating officer for a period of two months after he failed to appear in court on the 27th of November 2014. He appeared on the 8th of February 2016 only after the investigating officer had been to his residence to look for him. Only then were the two medical notes produced. No proper explanation was given as to why he failed to appear since November 2015. The trial court also had to hold an enquiry on the 11th of November 2014, in terms of section 342A of the Criminal Procedure Act against the Appellant and his co-accused as they were delaying the finalisation of this trial.

[33] On the probabilities this court does not find that the Appellant has successfully discharged the onus as contemplated in section 60 (11) (a) of the Criminal Procedure Act. He has failed to show that exceptional circumstances exist which in the interest of justice permit his release on bail.

[34] The factors referred to in respect to the Appellants' affidavit are not exceptional, or out of the ordinary. This court finds that the court *a quo* correctly refused bail to the Appellant.

[35] There are no grounds to satisfy this Court that the magistrate's decision was wrong. The requirements of sections 65(4) of the Act were thus not met.

ORDER

[36] In the result, the Appellant's application for bail is dismissed.

_____

D DOSIO
ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the APPELLANT	Adv J.C VAN AS
On behalf of the RESPONDENT	Adv M.M. RAMPYAPEDI
Date Heard:	17 May 2016
Handed down Judgment:	18 May 2016