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IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDELBURG

CASE NO: BA 14/2024

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE 20 /02/2025

SIGNATURE

In the matter between:

KLEIBOY PRINCE MOGOTO **APPELLANT**

and

STATE **RESPONDENT**

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10:00 on 20 February 2025.

BAIL APPEAL JUDGMENT

Phahlamohlaka AJ

This is an appeal against the refusal of bail by magistrate Mr Gololo sitting at Middelburg Magistrates' Court, in the District of Steve Tshwete ("the court *a quo*"). The application was dealt with in terms of section 60(11)*(a)* of the Criminal Procedure Act 51 of 1977 ("the CPA").

[1] The appellant was charged with three counts of rape, and according to the state, in one of the charges the complainant is a child under the age of 16 years. It became common cause between the parties that the offences, or at least one of them falls within the ambit of Schedule 6.

[2] In bail applications falling within the ambit of Schedule 6, the applicant has a duty to adduce evidence that satisfies the court that there are exceptional circumstances present that in the interest of justice justify the granting of bail.

[3] In support of his application to be admitted to bail, the appellant presented evidence in the form of a sworn affidavit. In the sworn affidavit the appellant placed the following personal circumstances on record:

3.1 He is residing at stand 3[...], P[...] [...], D[...], Middelburg, Mpumalanga Province. He resides at the address with his wife with whom he is married in community of property, and they have been residing there since 2020.

3.2 He has nine children, the oldest being 14 years of age and the youngest 1 year old. He is maintaining all the nine children. He also maintains his 67-year-old mother.

3.3 He is self-employed, with an income of approximately R30 000.00 per month, and he employed three people in his business.

3.4 He has the following assets:
3.4.1 A house valued at about R500 000.00.
3.4.2 A 5-ton truck valued at about R400 000.00 registered in the name of the business, and a Mazda CX5 motor vehicle valued at plus minus R450 000.00.
3.4.3 Monthly financial obligations in the amount of R36 500.00.

[4] The state presented evidence of the investigating officer, Sergeant Mandla John Mahlangu, who testified that the appellant was charged with three counts of rape and the victim in one of the counts was 14 years of age at the time of the commission of the offence. Sergeant Mahlangu detailed the *modus operandi* of the

person who allegedly raped the three victims in that he would offer them a lift in his motor vehicle and thereafter rape them. According to Sergeant Mahlangu the appellant is linked, among others, through DNA to the offences. The vehicle that was used by the alleged perpetrator was identified as belonging to the appellant's brother. When the appellant's brother was confronted, he informed the police that indeed the vehicle belonged to him, but it was used by the appellant.

[5] The appellant raised a number of grounds for his appeal, and I do not intend to deal with each of them individually because of the prolixity thereof, but I will deal with those that are critical to the appellant's case.

[6] Section 65(4) of the CPA provides that:

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

[7] In *S v Barber*[1] the Court held that:

> "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 for bail. 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 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."

[8] In my view, the judgment of *Barber* does not preclude the appeal court from evaluating the evidence and making a determination on whether exceptional

[1] *S v Barber* 1979 (4) SA 218 (D) at 220E-F.

circumstances are present, which in the interests of justice permit the appellant's release on bail. The court can therefore interfere with the discretion of the court *a quo* if it is of the view that the interests of justice permit the appellant's release on bail.

[9] As alluded to *supra,* the application was dealt with in terms of the provisions of section 60(11)*(a)* of the CPA which provides that:

> *"*Notwithstanding any provision of this Act, where an accused is charged with an offense –
> (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 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."

[10] The onus is therefore on the applicant in the bail application to adduce evidence that satisfies the court that there exist exceptional circumstances which in the interests of justice permit his or her release.

[11] In *S v Bruintjies*[2] exceptional circumstances were defined as follows:

> "What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release."

[12] In *S v Peterson*,[3] Van Zyl J interpreted the meaning of exceptional circumstances as follows:

> "[55] On the meaning and interpretation of 'exceptional circumstances' in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking,

[2] *S v Bruintjies* 2003 (2) SACR 575 (SCA) para 6.
[3] *S v Peterson* 2008 (2) SACR (C) 355; [2008] 3 All SA 301 (C) para 55.

‘exceptional’ is indicative of something unusual, extraordinary, remarkable, peculiar or simply different.”

[13] In this appeal, the appellant relied on a sworn statement to try and satisfy the court *a quo* about the existence of exceptional circumstances. The state, on the other hand, adduced evidence of the investigating officer who was put under rigorous cross-examination. It is not wrong for the applicant in a bail application to present a sworn affidavit in support of his application. However, the danger of not giving oral testimony is that the evidence on the affidavit is not open to scrutiny through cross-examination. Weighed against the state’s evidence, which is given under oath and tested through cross-examination, the scale will tilt against such evidence that was not tested through cross-examination.

[14] The risk of using an affidavit in bail proceedings was laid bare in *Kilian v S*[4] where Binns-Ward J said the following:

“[13] Bail applications are *sui generis*. To an extent they are inquisitorial and, in general, there is no prescribed form for introducing evidence at them. But in cases where s 60(11) applies and there is consequently a true onus on the applicant to prove facts establishing exceptional circumstances, an applicant would be well advised to give oral evidence in support of his application for bail. This seems to me to follow, because - differing from the position in which the Plascon-Evans rule is applied – the discharge of the onus is a central consideration in s 60(11) applications. If the facts are to be determined on paper, the state’s version must be accepted where there is a conflict, unless the version appears improbable. Reverting to the example in the current case used to illustrate the proposition, the probabilities are neutral on whether the appellant gave the police a consistent explanation or various conflicting ones. Applying the approach I have just described, as I believe it was bound to do in the circumstances, the court *a quo* was obliged - if it chose not to exercise its power of its own accord to require oral evidence - to accept the police evidence on the point. The example given was not chosen idly. Whether the

[4] *Kilian v S* [2021] ZAWCHC 100 para 13.

accused supplied false information at the time of his arrest or thereafter is a material consideration in bail proceedings (see s 60(8)(a)).”

[15] The first ground of appeal raised by the appellant was that the court *a quo* misdirected itself by finding that the state has established that there exists a strong case against the appellant.

[16] In bail applications the state does not need to prove its case beyond reasonable doubt. It must also be noted that it is not for the state to prove the nonexistence of exceptional circumstances permitting the released of the applicant on bail. If the appellant relies on the weakness of the state’s case against him, the onus vests on him to satisfy the court on the balance of probabilities that the state’s case against him is weak. In my view, the appellant failed to show that the state case against him is weak, and therefore the court *a quo* did not misdirect itself by finding that there exists a strong case against the appellant.

[17] Another ground of appeal was that the court *a quo* erred in finding that the appellant is linked through a registration notice of a motor vehicle by one of the victims, but that the motor vehicle belonged to the brother of the appellant. Hearsay evidence is admissible in bail applications, therefore the court *a quo* did not misdirect itself by admitting evidence by the investigating officer that the brother of the appellant told the police that although the motor vehicle, namely the Mazda CX3, belonged to him, it was in the possession of the appellant.

[18] In one of the grounds for appeal, the appellant takes issue with the DNA evidence. In a surprising submission the appellant contended there is a possibility that his DNA can be similar to that of another person, be it a relative or a sibling. This argument is misplaced, it belongs to the trial proceedings and not the bail application proceedings. It is sufficient for the prosecution to state what evidence connects the appellant to the offence or the offences of which he has been charged.

[19] The appellant further submitted that the court *a quo* failed to take into account that the victims are unknown to the appellant and as such no danger exists for the

appellant to interfere with them, and that the court *a quo* failed to take into account that the state failed to establish that the appellant is a flight risk.

[20] Section 60(4) of the CPA provides as follows:

> "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;
> *(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 court *a quo* concluded that there is a likelihood that the appellant if he were to be released on bail, will commit a Schedule 1 offence. This finding was not challenged in the appellant's grounds of appeal, and therefore I cannot find any misdirection.

[22] In the premises, I am not persuaded that the court *a quo* was wrong in its refusal to grant the appellant bail. There is no reason to interfere with the discretion of the court *a quo* because it was not exercised wrongly. For these reasons the appeal stands to fail.

[23] In the result I make the following order:

The appeal is dismissed.

KF PHAHLAMOHLAKA
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MIDDELBURG

APPEARANCES

For the Appellants:	Adv S S Mabilane
Instructed by:	B S Silubane Attorneys
For the Respondent:	Adv Mtsweni
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Date judgment reserved:	20 January 2025