Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

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

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

17 September 2024
_____
_____
DATE SIGNATURE

CASE NUMBER: A102/2024

In the matter between:

M[…] A[…] M[…] **Appellant**

and

THE STATE **Respondent**

Coram: DOSIO J
Heard: **11 September 2024**
Delivered: **17 September 2024**

ORDER

The appeal of the appellant is dismissed.

JUDGMENT

DOSIO J:

Introduction

[1] This is an appeal against the denial of bail in the Johannesburg Regional Court. The bail application commenced on 16 April 2024 and was concluded on 22 April 2024.

[2] The appellant was charged with unlawful possession of 1012 live rounds of ammunition, a contravention of s90 of the Firearms Control Act 60 of 2000 ('Act 60 of 2000'), as well as unlawful possession of one plastic hand grenade, a contravention of s28 of the Explosives Act 26 of 1956 ('Act 26 of 1956'). It is important to note that Act 26 of 1956 has been repealed and replaced with the Explosives Act 15 of 2003 ('Act 15 of 2003').

[3] The bail application was adjudicated within the ambit of Schedule 5 of the Criminal Procedure Act 51 of 1977, ('Act 51 of 1977').

[4] The appeal is opposed by the respondent.

[5] The appellant's grounds of appeal are based on the following:

(a) The Court a quo wrongly interpreted section 60(4) (a)-(f) of Act 51 of 1977 and failed to interpret this section in line with s39(2) of the Constitution.

(b) The Court a quo failed to justify the detention in terms of s36 of the Constitution, in that it is not justifiable to limit the appellant's right in terms of s12 of the Constitution.

(c) The Court a quo erred in finding that the appellant had not proved on a balance of probabilities that the interest of justice existed for him to be released on bail.

(d) The Court a quo placed undue emphasis on the appellant's expired permit, his previous conviction and the unfounded allegations that the ammunition was going to be used in illegal mining.

[6] The respondents counsel contended that the Court a quo exercised a discretion to refuse the appellant bail and that it correctly considered the provisions of s60(4)(a) with specific reference to the seriousness of the charges against the appellant.

Evaluation

[7] The provisions of ss60(4)-(9) of Act 51 of 1977 apply. These subsections must be construed consistently with s35(1)(f) of the Constitution, which guarantees the right of an arrested person 'to be released from detention if the interests of justice permit, subject to reasonable conditions'.

[8] In the matter of *S v Smith and Another,*[1] the Court held 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.'[2]

[9] In the matter of *S v Dlamini* [3] the Constitutional Court held that:

'… The interests of justice in regard to the granting or refusal of bail therefore focus primarily on securing the attendance of the accused at the trial and on preventing the accused from interfering with the proper investigation and prosecution of the matter.'

[10] In terms of s65(4) of 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.

[11] This Court must consider all relevant factors and determine whether individually or cumulatively they warrant a finding that the interests of justice warrant the appellant's release on bail.

[12] The personal circumstances of the appellant are as follows:

(a) He is 34 years old and was born on 13 February 1990 in Lesotho.

(b) He is married and has two children, aged 14 years and 4 years old respectively. The children stay in Lesotho with the mother.

(c) His highest level of education is grade nine which he completed in Lesotho.

(d) He is a Lesotho citizen with a valid passport.

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[1] *S v Smith and Another* 1969 (4) SA 175 (N)
[2] Ibid page 177 para e-f
[3] *S v Dlamini* 1999(2) SACR 51 (CC)

(e) He came to South Africa in 2006 and since 2019 resides with a girlfriend at the Booysens squatter camp in Gauteng.

(f) He has assets to the value of R20 000.

(g) Prior to his arrest he was self-employed as a vendor earning R3000 a month.

(h) He can afford bail of R2000.

(i) He has a previous conviction in 2014 of contravening s49(1)(a) of The Immigration Act 13 of 2000 ('Act 13 of 2000'), but has no pending cases against him.

[13] The appellant contends that there exists no likelihood that the factors referred to in s60(4)-(8) of Act 51 of 1977 will occur.

[14] Section 60(4) of Act 51 of 1977 states as follows:

'(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;

(b) where there is a 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.' [my emphasis]

[15] The respondents counsel argued that the appellant is a flight risk in that the appellant moves by foot easily between the Republic of South Africa and Lesotho. Counsel referred this court to an affidavit compiled by Naledzani Robert Mugeri ('Mr Mugeri') who is an immigration officer employed in the Department of Home Affairs. The attachment to this affidavit depicts that since 2018 the appellant has traversed by foot between Lesotho and the Republic of South Africa forty-six times. Counsel argued that it will be easy for the appellant to leave the Republic of South Africa. It was argued his address in Lesotho is also unknown and it will be difficult for the investigating officer to trace him if he absconds. It was further contended by the respondent's counsel that the appellant's wife, his children and his home are all in Lesotho.

[16] Section 60(6) of Act 51 of 1977 states the following:

'(6) In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors, namely-

(a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;

(b) the assets held by the accused and where such assets are situated;

(c) the means, and travel documents held by the accused, which may enable him or her to leave the country;

(d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;

(e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;

(f) the nature and the gravity of the charge on which the accused is to be tried;

(g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;

(h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;

(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or' [my emphasis]

[17] The appellant submitted that he has been staying in South Africa since 2006, however, when he was arrested for this offence he was on a 30-day visitor permit. The appellant also submitted in his affidavit in support of bail, that he is self-employed as a vendor and earns an amount of R3000.00 per month.

[18] The respondent's counsel argued that it is very strange that the appellant has remained in South Africa for 18 years but to date, has only managed to possess a 30-day visitor permit visa. Counsel argued that it is clear that no attempt has been made by the appellant in all these years to reside permanently in the Republic of South Africa. It was argued that in terms of s11(2) of Act 13 of 2000, the appellant who is a foreigner and on a visitor's permit, may not conduct work within the Republic of South Africa.

[19] The respondent's counsel argued that it is clear that apart from a girlfriend that lives in the Booysens squatter camp, all the emotional ties of the appellant are in Lesotho, as well as most of assets and that these are motivating factors for the appellant to return to Lesotho and avoid facing his trial. It was submitted that the appellant has no car and

no moveable asset of note, as he has been traversing to and from Lesotho by foot and can once again easily abscond by foot.

[20] The respondent's counsel submitted that the appellant's previous conviction of contravening s49(1)(a) of Act 13 of 2000 is relevant and supports the argument that the appellant is a flight risk. Furthermore, that the appellant's previous conviction demonstrates a propensity for committing schedule 1 offences.

[21] As regards the nature and gravity of the charge in which the accused is to be tried, the respondent's counsel argued that the appellant can in terms of s90 of Act 60 of 2000 be sentenced to fifteen years imprisonment for the unlawful possession of 1012 live rounds. Furthermore, that in terms of s29(1)(d) of Act 15 of 2003, the appellant as a first offender, can be sentenced to an additional fifteen years imprisonment for the unlawful possession or transportation of a plastic hand grenade.

[22] The respondent's counsel argued that there is a strong case against the appellant in that the investigating officer received information during operation Vala Umgodi, (which is an operation to tackle illegal mining), that there was an accused who was carrying ammunition. The police then found the appellant in possession of a white bag which contained live rounds and a plastic hand grenade. It was argued that the arrest of this appellant was not random as the police were acting on information it had received.

[23] In *S v Bruintjies* [4] ('*Bruintjies'*), the Supreme Court of Appeal stated that:

'(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.[5]

[24] In *S v Mathebula* [6] ('*Mathebula*'), the Supreme Court of Appeal stated that:

'In the present instance the appellant's tilt at the State case blunted in several respects: first, he founded the attempt upon affidavit evidence not open to test by cross-examination and, therefore, less persuasive.'[7]

[25] The appellant did not present viva voce evidence to discharge the onus. He sought to rely on an affidavit accepted as an exhibit in the bail proceedings.

[4] *S v Bruintjies* 2003 (2) SACR 575 (SCA)
[5] Ibid para 7
[6] *S v Mathebula* 2010 (1) SACR 55 (SCA)
[7] page 59 B-C

[26] In his affidavit he merely stated that the State's case is weak against him and that he is going to plead, not guilty. He stated that the charges are based on nothing but mere fabrication which holds no water. He also suggested there is no evidence to suggest that if he is released on bail he will attempt to evade his trial.

[27] As stated in the case of *Bruintjies* [8] and *Mathebula,* [9] evidence on affidavit is less persuasive than oral evidence. The denial of the appellant rested solely on his say-so with no witnesses or objective probabilities to strengthen his version. As a result, the State could not cross-examine the appellant to test the veracity of the averment in his affidavit. This affects the weight to be attached to the averments made in the affidavit as the probative value of the affidavit could not be tested.

[28] The investigating officer did not oppose the bail application and left it in the Court a quo's hands. Irrespective of this, s60(10) of Act 51 of 1977 stipulates that:

'Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice.'

[29] In terms of s65(4) of 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.[10]

[30] The appellant bears the onus to satisfy a court on a balance of probabilities that it will be in the interests of justice to release him on bail. A mere denial that the case against him is weak is not sufficient.

[31] In *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*,[11] the Constitutional Court held:

'In a bail application, the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to the bail, the focus at the bail stage is to decide whether the interests of justice permit the

[8] *Bruintjies* (note 4 above)
[9] *Mathebula* (note 6 above)
[10] See *R v Rawat* 1999 (2) SACR 398 (W))
[11] *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC)

release of the accused pending trial; and that entails, in main, protecting the investigation and prosecution of the case against hindrance.' [12] [my emphasis]

[32] While the strength of the State's case is an important consideration, it is not the only factor that a court should consider in determining whether to grant or refuse bail.

[33] After considering s60(4)(b) and s60(6)(a), (b), (c), (f), (g) and (h), together with the arguments raised by the respondent's counsel which are incorporated in paragraphs [15], [18], [19], [20], [21] and [22] supra, this Court does not find that it is in the interests of justice to release the appellant on bail.

[34] This Court also does not believe that releasing the appellant on bail conditions, as suggested by the appellant's counsel, will ensure the appellant's attendance in court.

[35] In the matter of *S v Masoanganye and another,*[13] the Supreme Court of Appeal held that:

'It is important to bear in mind that the decision whether or not to grant bail is one entrusted to the trial judge because that is the person best equipped to deal with the issue having been steeped in the atmosphere of the case.[14]

[36] After a perusal of the record of the Court a quo, this Court finds there is no persuasive argument to release the appellant on bail. The Court a quo was fully aware of the appellant's personal circumstances and considered them. The appellant has not successfully discharged the onus as contemplated in s60(11)(b) of Act 51 of 1977 that it will be in the interests of justice to release him on bail. Accordingly, there are no grounds to satisfy this court that the decision of the Court a quo was wrong.

Order

[37] In the result, the appeal of the appellant is dismissed.

[12] Ibid para 11
[13] *S v Masoanganye and another* 2012 (1) SACR 292 (SCA)
[14] Ibid para 15

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JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 17 September 2024.

APPEARANCES

ON BEHALF OF THE APPELLANT:	Adv. N Dludla Instructed by Mohale Attorneys
ON BEHALF OF THE SIXTH RESPONDENT:	Adv. B.F Adonis Instructed by the Office of the National Director of Public Prosecutions.