

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)**

CASE NO:BA01/2024

Court a quo: DCA688/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED

Signature:

Date: **09th JULY 2024**

In the matter between:

JOHN KENECHUKU OBINYELUBA

APPELLANT

And

THE STATE.

RESPONDENT

JUDGMENT ON BAIL APPEAL

MONENE AJ

[1] This is an appeal against the decision of His Worship Magistrate Madavha of the Polokwane District Court taken on 24 April 2024 in terms of which the Learned Magistrate denied the appellant's application to be admitted to bail on new facts which application had been prosecuted in terms of section 65 of the Criminal Procedure Act 51

of 1977 ("the Act") as amended.

[2] The initial application preceding the application for bail on new facts which had been denied was unsuccessfully appealed before Muller J of this division on 12 January 2024.

[3] Pithily the new facts relied upon by the appellant before the lower court and sought to be seen as grounds for his admission to bail on appeal before this court are the following:

3.1 That his continued detention, as a breadwinner for his family, visits economic hardships on his family in the form of bond repayment hiccups and school fees shortfalls for his offspring.

3.2 That he is suffering from an undisclosed chronic illness.

3.3 That his wife is pregnant, and he needs to be there for his wife during the pregnancy.

[4] The appeal is opposed by the respondent on the general ground that none of the averments hoisted by the appellant as new facts qualify as new for the purposes of a finding that the appellant deserves admission to bail.

[5] The backdrop to all these is that the appellant is currently detained following his being arrested and charged with two counts of dealing in drugs and one count of corruption being offences for which an accused bears the onus to, in terms of section 60(11)(b) of the Act prove on a balance of probabilities that it is in the interests of justice that he be granted bail.

THE APPLICABLE LAW AND ITS APPLICATION IN BRIEF

[6] Section 65 of our criminal code provides inter alia that:

“(1) (a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting...

(2) An appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts are first placed before the magistrate or regional magistrate against whose decision the appeal is brought, and such magistrate or regional magistrate gives a decision against the accused on such new facts.”

[7] It being clear from section 65 that new facts in the context of a bail application are not listed anywhere in the Act but are defined by the legislature as facts which “arise or are discovered after the decision against which the appeal is brought”, it behooves of this court to briefly look into what law has developed in our courts as to the concept of new facts.

[8] In **S v Yanta (CC44/2021) {2023} ZAWCHC 23 (1 March 2023)** at paragraph 15 it was held that the Criminal Procedure Act (“the Act”) does not prescribe or define what constitutes new facts and further that there is no prescribed procedure for renewed bail applications. It was further held that that with reference to case law certain general principles have been identified as relevant, when a court is faced with an application for an accused’s release on bail on new facts. These are:

8.1 Whether the facts indeed arose or came to light after the denial of bail.

8.2 Whether the said new facts are sufficiently new in character, distinguishable from facts earlier presented and are not merely a reshuffling or embroidery of evidence already tendered in the initial bail application.

8.3 Whether the “new facts” are relevant in that when considered with the facts averred in the initial application, they militate for reconsideration of the bail application.

8.4 Whether in the light of the new facts read with the facts already adduced in the initial application the onus applicable to the offences implicated is discharged.

8.5 That care should be taken to avoid the abuse of the bail application procedure by piecemeal presentation of evidence in repetitive bail applications where some facts which were known or ought to have been known earlier is doled out in tranches as if it is new.

[9] In **S v Mpošana 1998 (1) SACR 40 (Tk) at 44g-45a** it was held per Mbenenge AJ (as he then was) as follows:

“...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 were new facts warranting the granting of the bail application.”

[10] In **S v Mohammed 1999(2) SACR 507 (C)** it was observed and again emphasized that there indeed is no *numerus clausus* as to the nature of new facts which may warrant the granting of bail previously refused.

[11] Looking at the three grounds listed *supra*, and further regard being had to the submissions of the appellant's counsel before me, I am unable to find that the magistrate exercised his discretion wrongly in finding that the appellant had not adduced any new facts which militated for his admission to bail. That is so because of the following considerations:

11.1 Economic hardships being visited upon a person denied bail and/or upon his kith and kin are an expected consequence of denial of bail. They do not suddenly unexpectedly befall an accused person denied bail and like in all matters where bail is denied they do not arise nor are they discovered as a novelty after the denial of bail. This alleged new fact is just a non-starter. That is this court's finding regardless of the appellant's gallant but ill-advised attempt at taking refuge behind the interests of his child and arguing that his continued detention harms his child's best interests regarding school fees et cetera. While the best interests of the child must be catered for and must weigh heavily on any court deciding a matter where children are involved, I do not, to put it bluntly, understand our law to be that bail should only be denied against those that have not sired or given birth to offspring. In **S v Peterson 2008(2) SACR 355(C) at para 63** it was held as follows:

"When, as in the present case, the special circumstances relied on by the accused include the constitutionally protected interests of a minor, this court must, in terms of section 28(1)(b) of the Constitution of the Republic of South Africa take cognizance of the child's right 'to family care or parental care, or to appropriate alternative care when removed from the family environment'. In as much as a decision in regard to an accused's bail application and subsequent appeal (if the application is refused) will, of necessity, impact upon a child of the accused, it may not be lost sight that the child's best interests are, in terms of section 28(2) of the Constitution, paramount. This does not, of course, mean that such

interests will simply override all other legitimate interests, such as the interests of justice or the public interest. It must, however, always be taken into consideration as a relevant factor and a general guideline in assessing such competing rights.”

11.2. Looking at the fact that the appellant’s child, although currently without the father, still has the gainfully employed mother and juxtaposing that with the charges faced by the appellant about which the default position in the interests of justice is that one accused thereof must be held in custody unless he adduces evidence militating for his release, I am unable to fault the magistrate’s decision to decline the application for bail on new facts.

11.3 The appellant’s ill-health ground is shrouded in mystery as to what exactly it is, with the court not being taken into his confidence as to what it is other than it being referred to flippantly as chronic. Worse still it was not proven by evidence nor at least averred by the appellant that the detaining authorities are incapable of or failing to avail requisite medical attention to the appellant in attendance to his “chronic” ailment.

11.4 Furthermore, the pregnant wife ground while perhaps a new discovery by the appellant post his being refused bail, can hardly be deemed to tip the scales in the interests of justice for the appellant’s admission to bail. As correctly argued by the respondent’s counsel, it is to be expected that spouses of persons lawfully in custody would be alone whether pregnant or not and that if pregnant, they can avail themselves to the support and care of not only medical practitioners but their available kith and kin. It surely cannot be that our courts are seen to be sending an unintended message that all a would-be-criminal has to do to ensure post arrest release on bail is to ensure that he leaves a spouse expectant with child. Something more in the form of newness regarding this ground was needed to persuade this court that the fact of a discovered pregnancy seen in the light of

the evidence previously led militate for the admission of the appellant to bail in the interests of justice. From the record none such is forthcoming. In this regard therefore and perhaps even regarding the breadwinner angle reflected upon supra, counsel for the respondent was correct to point this court to paragraph 16 of **S v Lekgau 2011 JDR(GNP)** where it was, inter alia, stated as follows:

“...the magistrate considered the marriage and his business and concluded, relying on S v Van Wyk these are not new facts. I agree with the finding of the magistrate in this regard. An incarceration of a married person has a potential of placing strains on the marriage right from the very moment of arrest. This is an inherent and perennial problem those who expose themselves against the law face.”

CONCLUSION

12. Interacting the powers of a court of appeal in bail matters Bins-Ward AJ (as he then was) in **S v Porthern and Others 2004(2) SACR 242 (C)**(“Porthern”) held as follows:

“...an appellate Court will give due deference and appropriate weight to the fact that the court or tribunal of first instance is vested with a discretion and will eschew any inclination to substitute its own decision unless it is persuaded that the determination of the court or tribunal of first instance was wrong.”

13. In the same vein at para 17 of **Porthern** Justice Binns-Ward held that it remains necessary to be mindful that a bail appeal goes to the question of deprivation of personal liberty stating further that:

“In my view, that consideration is a further factor confirming that section 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.”

14. For all the reasons stated above, I am not persuaded that His Worship Magistrate Madavha exercised his discretion wrongly. That is so notwithstanding the high premium this court places on liberty; it also being so that section 35(1)(f) of the constitution does bestow the right to be released on bail as one bestowed on “everyone”. There were simply no new facts before the magistrate a consequence of which is that the appeal must fail.

15. In the result I make the following order:

15.1 The appeal is dismissed.

M S MONENE
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on : 28 June 2024

Judgment delivered on : 09th July 2024

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