

SOUTH AFRICA / JUDGMENT

Ditlhakanyane and Others v S

(SS43/2012) [2014] ZAGPJHC 210; 2015 (1) SACR 437 (GJ) (4 August 2014)

[2014] ZAGPJHC 210

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mokgoatlheng

CASE / FILE NUMBER

SS43/2012

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT
OF SOUTH AFRICA
(GAUTENG LOCAL
DIVISION, JOHANNESBURG)
CASE
NO: SS43/2012

DATE:

04 AUGUST 2014
REPORTABLE
In the matter

between:

ISAAC
DITLHAKANYANE AND EIGHT OTHERS.....Applicants
And
THE
STATE.....Respondent

JUDGMENT

MOKGOATLHENG J

INTRODUCTION

- (1) The applicants have instituted an application pursuant to section 49 G (3) of The Correctional Services Act 111 of 1998(as amended) (The Act) to be released from the remand detention facility in which they are presently incarcerated whilst awaiting the finalization of their trial.

THE FACTUAL MATRIX

- (2) The first to the seventh applicants were arrested on 1 and 2 June 2011, the eight applicant on 12 July 2011, and the ninth applicant on 31 March 2012. Subsequent to their arrest the applicants were charged with contravening section 2(1)(e)(f) read with sections 1,2(2),2(3),2(4) and 3 of the Prevention of Organized Crime Act 121 of 1998 by “managing and conducting an enterprise through a pattern of racketeering activity, money laundering, corruption, fraud and theft involving an amount of R2 million rand.”
- (3) Subsequent to their arraignment the applicants unsuccessfully launched bail applications. The first, second and eighth applicants appeals against the refusal of bail were also unsuccessful. On 26 August 2013, the first to eighth applicants launched an application in terms of section 49 G (3) of The Act. The application was dismissed. The trial which commenced on 27 January 2014 is proceeding and has not been finalized.

THE LEGAL FRAME WORK

- (4) Section 49G (1) of The Act provides: “the period of incarceration of a remand detainee must not exceed two years from the initial date of admission into the remand detention facility, without such matter having being brought to the attention of the court concerned in the manner set out in this section:...” ; and

(i)section 49G (3) provides: ‘any remand detainee whose detention will exceed the period stipulated in subsection (1) must be referred to the relevant court by the head of the remand detention facility or correctional centre, as the case may be, to determine the further detention of such person or release under the conditions appropriate to the case.’

(5)In terms of article 2(b), Justice Crime Prevention and Security Protocol (JCPS) the objective is “to ensure that the further detention of a remand detainee is considered by a court before the expiry of a period of two years, and is reconsidered at least annually each 1 year thereafter,... ;

(i)article 6(2) provides: “In considering the further detention of the remand detainee, the normal considerations and processes relating to bail in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) apply; and

(ii) article 8(1) regarding the role of presiding officers provides: “The normal principles and requirements relating to bail, as set out in the Criminal Procedure Act, 1977 (Act 51 of 1977), apply when the further detention of or release of a remand detainee is considered in terms of the requirements of section 49G of the Correctional Services Act.”

THE RESPONDENT’S PRIMA FACIE CASE

- (7) The respondent’s opposition to the application is predicated on the affidavit of Captain Jacobus Hansen, the investigating officer. The applicants - except the fourth and sixth applicants who presented their evidence on affidavit, - made submissions through their counsel from the bar.
- (8) The respondent’s case is set out in Captain Jansen’s affidavit in which states: “The applicants were arrested after the discovery of a syndicate whose members have allegedly stolen R2 million from banking accounts held by the public at various Post Office outlets. The first applicant is allegedly the leader of the syndicate. Through the assistance of Post Office employees, the first applicant obtained details of Post Office banking accounts in which vast amounts of money were deposited and held. Identity documents and passports were allegedly falsified to access and divert the funds deposited in such banking accounts whereafter, the funds held in the said banking accounts were unlawfully depleted through the connivance of the second to ninth applicants who were formerly in the employ of the Post Office.
- (9) The details of some of the targeted banking accounts including references to the Post Office banking account numbers, balances, account holder’s names, surnames, identity numbers and residential addresses were allegedly discovered stored in the applicants’ cell phones.
- (10) The discovery of the various banking account holders personal details are allegedly linked to the 2008 investigation conducted by the Post Office when a number of fraudulent banking accounts allegedly opened and overnight inflated with thousands of rands were allegedly discovered. The details relating to these 2008 unlawfully opened Post Office banking accounts were found on the cell phone in the first applicant’s possession. After his arrest, the first applicant allegedly attempted to bribe Post Office Officials to release him. Thereafter the first applicant allegedly on two occasions attempted to escape from custody.
- (11) The first applicant was convicted of using different names in committing fraud and has three previous convictions for fraud. The first applicant has allegedly committed fraud for a continuous period of 3 years against the Post Office, consequently, the possibility of the first applicant engaging a further criminal conduct is a very real probability.
- (12) The first applicant has access to persons who are able to fraudulently issue falsified identity documents and passports. The evidence of a former member of the syndicate a certain David Motsowane in the fraudulent acquisition of forged documents implicated the first applicant. The possibility that the first applicant can obtain falsified documents to flee the Republic of South Africa cannot be excluded. The first applicant alleged that he owns

property 793 Vlakfontein but same is not registered in his name. Only the sixth and ninth applicants own the properties they resides at. The rest of the applicants have leased the properties they resided at. The second and ninth applicants have been dismissed by the Post Office following a disciplinary inquiries.

- (13) The applicants are charged with serious offences and face the possibility of lengthy imprisonment. The respondent has a strong case against the applicants based on documentary evidence which allegedly shows their involvement in commission of the offences obtained from Post Office branches where the applicants were employed. Incriminating evidence of the particulars of the banking account holders was allegedly found on the second to ninth applicants' cell phones.
- (14) Cell phone communications between the applicants shows that they knew each other and contacted with each other. The applicants are familiar with the identity of the witnesses which include the lawful banking account holders, and the Post Office employees who allegedly collaborated with the applicants in the commission of the offences.
- (15) The case is at a crucial point in the proceedings. The respondent intends to lead evidence of the verbal and written communications between the applicants. If one of the applicants should abscond at this stage of the proceedings, the respondent will be severely prejudiced and hampered in the presentation of its case. The Presiding Judge has requested that the case be finalized in the third term."

THE FIRST APPLICANT'S CASE

- (16) Counsel argued that the first applicant disputes that the respondent has established a prima facie case against him and believes that he will be acquitted. He admits that he has three previous convictions for fraud. He has a fixed place of abode and owns immovable property which generates an income of R30 000.00 per month.
- (17) He will not conceal or destroy evidence. He will not intimidate or influence the witnesses. There is no credible evidence to substantiate the allegation that he would undermine the functioning of the criminal justice system. If he is released on bail in the amount of R75 000 or R1000 000 he undertakes to stand his trial and comply with any bail conditions the court may impose.

THE SECOND APPLICANT'S CASE

- (18) Counsel submitted that the second applicant will abide the court's decision. He joined in the initial section 49 G (3) application because at that stage the trial had not yet commenced. The trial has now commenced, consequently, there is no cogent reason to launch a second section 49 G (3) application.

THE THIRD, FIFTH AND EIGHTH APPLICANTS CASE

- (19) Counsel elected to address the court on the interpretation of section 49G, the conjunctive applicability of sections 12 and 35 of The Constitution and sections 60 and 342A of The Criminal Procedure Act 51 of 1977 of The Act, and in determining whether the release of the applicants would not prejudice the interests of justice.

Further counsel elected not to present the personal particulars and circumstances of the applicants to the court. However, argued that there was no legal justification for the further detention of the applicants, because if released on bail they undertake to stand their trial and comply with any bail conditions the court may impose.

.

THE FOURTH APPLICANT'S CASE

- (20) In July 2011 she unsuccessfully launched a bail application. On 26 August 2013 she instituted a section 49 G (3) application before AJ Naidoo who held that her further detention was warranted. In November 2013 she unsuccessfully launched a bail application predicated on new facts.
- (21) Although the trial commenced on 27 January 2014 and is set down for the entire third term, the respondent has indicated that it intends to call further twenty witnesses, consequently the trial will endure for a considerable time before it is finalized. The respondent has preferred nine charges against her and is only implicated in three transactions. In her capacity as the acting branch manager at the North Riding Post Office she instructed a teller to execute these transactions.
- (22) Her release will not endanger public peace and security. She is not a flight risk. She does not possess any travelling documents. She has no family outside the borders of South Africa. She has no previous convictions or outstanding cases against her. The investigation has been completed. She will not influence or intimidate witnesses. She will stand her trial.
- (23) She is a single parent. Her prolonged incarceration is infringing her 13 years old daughter's constitutional right to parental care. She has a fixed place of abode. Her further detention is not necessary. She can afford to pay bail in the amount of R5 000 and undertakes to comply with any bail conditions imposed by the court.

THE SIXTH APPLICANT'S CASE

- (24) In July 2011 she launched an unsuccessful bail application. In August 2013 she instituted a section 49 G (3) application before AJ Naidoo who held that her further detention was warranted. In November 2013 she instituted an unsuccessful bail application predicated on new facts.

- (25) Although the trial has commenced it is evident that it will endure for a considerable period of time before it reaches finality. She is innocent and disputes the charges against her. She is charged with 9 counts. Although the respondent alleges that she was involved in two transactions amounting to R19 000, there is no prima facie case established against her. She is innocent and disputes the charges against her.
- (26) The prolonged trial is extremely frustrating to her and her family. She does not pose a danger to public peace, order and security. She is not a flight risk. She does not possess travelling documents. She will stand her trial. She has no previous convictions or outstanding criminal cases against her. The investigation has been completed. She will not influence or intimidate witnesses.
- (27) Due to her prolonged incarceration her husband has instituted divorce proceedings against her. She has two children born of the marriage, a daughter and a son aged seventeen and seven years respectively who stay with her husband and mother.
- (28) She is unable to provide for her children whilst in remand detention. Her mother is a pensioner and is struggling to maintain her children.

Her husband is not assisting her mother with the maintenance of her children. She has a fixed place of abode. Her further detention is not necessary. If released she can afford to pay an amount R5 000 in respect of bail and undertakes to comply with any bail conditions imposed by the court.

- (29) The respondent alleges that she and the fourth applicant contravened the prevention of Organized Crime Act, in pursuance of an enterprise or syndicate no prima facie case has been established against them. Although the respondent alleges that their cell phone records constitute prima facie proof that they communicated with the other applicants, no evidence has been adduced that shows that their cell phone numbers linked them to the alleged syndicate. Although she is charged with being involved in six transactions, she only executed three transactions.
- (30) Although the respondent alleges that it has a strong case, against her there is no documentary evidence linking her with the offences. The respondent relies on the execution of transactions during the course and scope of her duties as a teller, but there is no evidence that as a teller she knew that the persons involved in the withdrawal of the funds were not the lawful Post Office banking account holders. The respondent alleges that the cell phone records show that there was communication between the applicants but has not shown or established the existence of the alleged syndicate.

THE SEVENTH AND NINTH APPLICANTS CASE

- (31) Counsel elected not to place the seventh applicant's personal particulars and circumstances before court. Counsel submitted that the respondent is obliged to furnish reasons for the seventh applicant's continued incarceration. Although the respondent alleges it has incriminating evidence found on the seventh applicant's cell phone records after forty five days of evidence adduced at the trial, there is no evidence linking the seventh applicant to any of the charges.
- (32) The ninth applicant is married in community of property and has two children aged eleven and eight years respectively. He resides at his father's house. He was employed as a teller at the Hillbrow Post Office outlet. He launched an unsuccessful bail application. He is not flight risk. He has no family outside the country. There is no legal justification for his further detention. If released on bail he will comply with any bail conditions imposed by the court.

THE LEGAL SUBMISSIONS BY THE APPLICANTS COUNSEL

- (33) The court in a section 49 G (3) application has a duty to enquire whether there is legal justification for the further detention of the applicants. The court is obliged not only to consider and evaluate the prejudice the respondent may suffer, it must also equally consider and evaluate the prejudice the applicants may suffer as a result of their further detention by having due regard to applicants constitutional rights enshrined in section 35 of The Constitution and the Bill of Rights in Chapter 2 of The Constitution.

Counsel further submitted that there was no onus reposing on the applicants to justify their release from further detention, the onus rested on the respondent to lawfully justify the applicants continued detention.

THE SCOPE AND AMBIT OF SECTION 49 G

- (34) The enactment of section 49 G of The Act has as its basis, the protection of the rights contained in the Bill of Rights, Chapter 2 of the Constitution of the Republic of South Africa, namely the right to freedom and security and the right not to be deprived of freedom arbitrarily and without just cause. This section was introduced as an overarching monitoring mechanism which empowers the heads of detention facilities or correctional centres to exercise proactive oversight authority over awaiting trial detainees in order to ensure that their constitutional rights to liberty, human dignity, physical health or safety and the speedy prosecution and conclusion of their trial are not infringed.
- (35) The purpose of section 49 G is to strike a balance between the interests the accused's constitutional right to liberty and the interests of justice because pending the finalization of an accused's trial, he or she is presumed to be innocent until proven guilty. Section 49G of The Act enjoins the court to conduct proactive interlocutory judicial enquiry to determine and establish whether the continued further detention or the release of an accused who was previously denied bail as an awaiting trial detainee or was denied bail after his or her trial had commenced would be in the interests of justice.

- (36) Pursuant to 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.”
- (i) section 35(2) provides for “The right of a detained person to challenge the lawfulness of his/her continued detention; and
- (ii) section 35 (3)
- (d) provides for “the right of an accused person to have his or her trial begin and conclude without unreasonable delay.”
- (37) The continued further detention of an accused after an unsuccessful bail application although constitutionally contextualized amounts to a deprivation of liberty, it does not imply an imposition of a penal sanction, because such continued further detention is non-penal in essence and purely incidental to the dictates of the interests of justice.

It follows that although section 35 of The Constitution maximizes personal liberty section 36 limits a person's liberty which is protected by section 12 of The Constitution. In *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (2) SACR 51 (CC), the Constitutional Court held:

“... the presumption of innocence operates in favour of an accused even when there is a strong prima facie case against him or her.

While the presumption of innocence is critical it is one of the factors the court has to consider in evaluating whether the release of an accused from detention will not prejudice the interests of justice.”

THE STRENGTH OF THE RESPONDENT'S CASE

- (38) In the determination whether the applicants should be released from remand detention pursuant to section 49 G (3) of The Act, the constitutional imperative of an accused's presumption of innocence until proven guilty does not absolutely bar the court from conducting an inquiry into the merits of the sustainability of an accused's defence against the charges he or she is facing.
- (39) The charges against the applicants are serious because if convicted the applicants are liable to be sentenced to lengthy terms of imprisonment. A court in considering the release of the applicants pursuant to section 49 G (3) has to ensure that despite the strength of the respondent's case and the probability of conviction, the consideration of the release or further detention is predicated on whether the interests of justice will not be undermined.
- (40) In considering the release or further detention of an accused, the overriding constitutional question is, is it in the interests of justice that the applicants who have a constitutional right to liberty and the presumption to be innocent until proven guilty be released from detention in spite of the fact that their invocation of the right to be presumed to be innocent is to a

substantial extent dissipated or extinguished due to the unanswerability of the strength of the respondent's case. In my view, the strength of the respondent's case, the probability of conviction due to the unmeritorious unsustainability of the applicants defence are relevant factors to be considered in a section 49 G (3) application.

- (41) Because of the inquisitorial nature of a section 49 G application, the court is obliged to consider the reasonable prospects of success of the probative sustainability of the applicants defence as to whether objectively considered and having regard to the strength of the respondent's case (and without pronouncing on the guilt or innocence of accused) can it be said that the accused's defence is sustainable having regard to the defence's paucity of sustainability because such palpably unsustainable defence no longer operated in favour of the applicants. Should the inquiry reach such conclusion, the inference would objectively justifiably be persuasive that the release of the applicants would not be in the interests of justice.
- (42) Because the applicants are obliged to establish a defence which has reasonable prospects of success at the trial, where an accused carries the burden of proof pursuant to section 49 G (3) of The Act, having regard to the conjunctive applicability of the provisions of section 60(11)(a) of the Criminal Procedure Act 'it is insufficient for an accused who...wishes to rely on the weakness of the State's case to simply show that the State's case is weak. The accused must go further, ie show that the case is exceptionally weak and this must be done by showing on a balance of probabilities that [he] or she will be acquitted' (S v Mazibuko & Another 2010 (1) SACR 433 (KZP) at [23].
- (43) The court is obliged to investigate and determine whether there was a delay or a failure in diligently prosecuting the case, or whether such delay was due to the dilatoriness, negligence or mala fides of the respondent. The inquiry is similar to that provided for in terms of section 342 (A) of The Criminal Procedure Act. The further inquiry is whether the applicants have presented new, special or extraordinary circumstances or facts which have arisen and which militating against the continued further detention of the applicants.
- (44) The cardinal issue is that the respondent has led evidence and contends that such evidence is cogent and credible and has the possibility of establishing an unassailable case against the applicants who in response thereto in their defence the applicants only make bald denials without the specificity of such defence being set out. In assessing the prima facie strength of the respondent's case the court is constraint not to make a provisional finding of guilt or innocence. The applicants have all made admissions in terms of section 220 of The Criminal Procedure Act pursuant to which it has been proven that they were in possession of the names, surnames, addresses, account numbers and other details of the persons whose Post Office banking accounts were defrauded.
- (45) The respondent through cellular telephone records apparently has the possibility of establishing that the applicants communicated with each other, consequently, the inference may be drawn that the applicants because they allegedly communicated with each other and

allegedly had in their possession the particulars and details of the Post Office banking account holders in their cellphones, allegedly colluded in the alleged fraudulent establishment of the fraudulent Post Office banking accounts and the alleged fraudulent transfer of the deposits allegedly held in those Post Office banking accounts into the allegedly fraudulently established Post Office banking accounts, and the alleged subsequent fraudulent withdrawal and appropriation of the funds from the fraudulently opened Post Office banking accounts, the probability cannot be excluded that the applicants were allegedly members of a syndicate allegedly conducting an enterprise.

- (46) The applicants except the second applicant who will abide the court's decision, blandly espouse their innocence by claiming that the respondent has as yet not proven a prima facie case against them. None of the applicants have set out a probable sustainable defence against the allegations made by the investigating officer Captain Jansen in his affidavit.

Having regard to the strength of the respondent's case and the probability of conviction and the imposition of a lengthy custodial sentence, the applicants carry the burden to prove that their release would be in the interest of justice. It is insufficient for the applicants to blandly state that the respondent's case is weak or that thus far the respondent has not led incriminating evidence against them. The applicants are obliged to show that the respondent's case is exceptionally weak, that on the balance of probabilities they will not be convicted.

- (47) A court in considering the release of the applicants pursuant to section 49 G

- (3) of The Act has to ensure that the fact that the strength of the State's case and the probability of conviction may be probable, this does not displace the central issue, of whether the interests of justice permit release of the applicants on bail. See *S v Malumo & 111 Others* (2) 2012 (1) NR 244 (HC) at [30].

- (48) The factual status quo matrix since the 20 August 2013 section 49 G (3) application before AJ Naidoo has not changed. The applicants have not contended that since 20 August 2013 there are new facts or circumstances which have arisen except that the duration of the applicants detention has endured for a further year. The applicants do not dispute the fact that the delay in the prosecution of their trial was not attributable to the negligence, fault or mala fides of the respondent in the conduction of the prosecution of the case.

- (49) In considering whether the release of the applicants would not be prejudicial to the interests of justice the court has taken into account:

(a) the probable period of time the trial is still to endure until finalization;

(b) the reasons predicated any delay in the prosecution and finalization of the trial;

(c) the nature and the gravity of the charges the applicants are facing;

(d) the strength of the case against the applicants and the probability that the applicants as a consequence thereof may attempt to flee or evade to stand their trial; and

(e) the severity of the sentence likely to be imposed should the applicants be convicted.

(50) The interests of justice do not permit the release from detention of an applicant were:

(a) there is the likelihood that the applicants were to be released from detention they would undermine or jeopardize the objectives of the proper functioning of the criminal justice system.

THE ORDER

(51) In the premises the court finds that it would not be in the interests of justice to release the applicants from remand detention facility, consequently the application is dismissed.

Thus done and made on 4 August 2014

JUDGE OF THE SOUTH GAUTENG HIGH COURT

TO:

THE REGISTRAR OF THE COURT

JOHANNESBURG

Date of Hearing: 14 July 2014

Date of Delivery: 4 August 2014

For the Respondent: Adv. Williams

The First Applicant: Adv. Lawlor

The Second Applicant: Adv. Baloyi

The Third Applicant: Adv. Nobengula

The Fourth Applicant: Adv. Roestof

The Fifth Applicant: Adv. Nobengula

The Sixth Applicant: Adv. Roestof

The Seventh Applicant: Adv. Pillay

The Eight Applicant: Adv. Nobengula

Seventh Applicant: Adv. Nobengula

Ninth Applicant: Adv. Pillay

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2014/210.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ditlhakanyane-and-others-v-s-unknown-topic-agpjhc-2014>

Prepared on 14 October 2026 · Esheria