

SOUTH AFRICA / JUDGMENT

Dubule and Another v S (SS59/2023)

[2024] ZAGPJHC 383 (20 March 2024)

[2024] ZAGPJHC 383**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Noko

CASE / FILE NUMBER

SS59/2023

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Policy

IN THE HIGH COURT OF
SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
PALM RIDGE.

Case No: SS59/2023**(1) REPORTABLE: YES****/ NO****(2) OF INTEREST TO OTHER****JUDGES: YES / NO****(3) REVISED: NO****DATE:**

20 March 2024

SIGNATURE

In the matter between: LUYANDA
MZIZI DUBULE
First Applicant
BONGANI
FLOYD JELE
Second
Applicant
And
THE
STATE
Respondent

JUDGMENT

NOKO J

Introduction

- [1] The first and second applicant were arrested in August 2022 and are facing several charges including armed robbery, murder, attempted murder, charges relating to the Firearm Control Act.[1] Both parties deny all charges and intend to plead not guilty.
- [2] The first applicant has previously brought an application for bail which was refused and has now launched the application for bail on the basis of new facts. The second applicant did not bring an application for bail previously and this is his first application for bail since the arrest in 2022.
- [3] In this judgement I will set out the circumstances relating to the bail application by the first applicant and thereafter deal with the application by the second respondent as the applications were presented separately. The contentions and submissions put forward by the respondent were in one affidavit and will be dealt with partly under the same heading and separately where necessary.
- [4] The applications were presented through affidavit and not through viva voce evidence by the applicants. In addition, the decision was not preceded by oral arguments from the legal representative but based on the papers. The judgment will also not regurgitate word for word on the contents of the affidavits and or the written submissions/heads or arguments as same were elaborate and mosaicked comprehensively and uploaded on CaseLines.

First applicant

Background.

- [5] The applicant was arrested on 12 August 2022 on the charges referred to above. The bail application was launched before the magistrate court which was refused. A summary of the reasons for the refusal to admit the applicant to bail were that there was prima facie evidence in support of the charges against the first applicant and further that the first applicant has failed to prove exceptional

circumstances which in the interest of justice warranted the release on bail.

New facts

- [6] The application is predicated on the new facts as set out in the affidavit submitted in support of the application for bail. The new facts as stated by the applicant as are firstly, that the investigation has now been completed since the last bail application.
- [7] Secondly, that the first applicant's financial resources have not been depleted including his retirement savings and he needs to be released on bail to proceed with his business and generate income for the legal fees and also for the medical treatment desperately needed by his children. The applicant's son, L[...] has developed a speech problem and need speech therapist and other specialists. The applicant's other child, a 12-year-old son, L[...] has developed a behavioural problems and has become suicidal. His performance at school has dropped since the first applicant's incarceration.
- [8] There has not been any bonding for the past two years in respect of the first applicant with his 22-month-old child who is in his sensitive years of childhood development and may, if left unattended, show its negative impact later in his teen years. Due to the arrest and detention the children and applicant's fiancée living standard has been compromised.
- [9] The first applicant has further addressed the requirements set out in section 60(4)(a-e) and in terms of which he importantly contended that he was previously arrested and admitted to bail and his conduct was beyond reproach. Further that there no evidence to suggest that he is likely to act inconsistent with the provisions of the bail regulatory framework.
- [10] The first applicant further addressed the requirements for exceptional circumstances which in the interest of justice do permit his release on bail. The applicant stated that the right of his children as contemplated in terms of section 28 of the constitution have been negatively compromised by the incarceration. In this regards L[...]’s performance has dropped, he is experiencing nightmares and often calling the applicant at night. Furthermore L [...], shows a disruptive behaviour and excessive anger.
- [11] The arrest and detention has also contributed to his failure to discharge his obligations towards his fiancée and his three children. The situation is aggravated as his parents had to take the role as caregivers for the two older boys whilst the fiancée had to relocate to stay with her parents with the youngest child.

- [12] In addition, the court should have regard to the fact that our jurisprudence recognise the right to be presumed innocent until proven otherwise. To this end it is the burden to be discharged by the respondent to prove the applicant's guilt though at a later stage. Of utmost importance for the court, so the applicant submits, is to consider whether the first applicant will attend trial. The record demonstrates that the first applicant was not violent and complied with terms and conditions imposed whilst on bail in relation to his previous illicit encounters with the law.
- [13] The assertions by the applicant were supported in the confirmatory affidavits deposed to by N[...] H[...], L[...] H[...]’s mother.
- [14] The application was also supported by R[...] N[...] M[...] who has a 5-year-old son with the first applicant, named L[...] M[...]. She stated that she was still of a school going age at the time when L[...] was conceived and born. He then had to reside with the first applicant and subsequent to his incarceration L[...] had to reside with the first applicant's parents. R[...] M[...] is unable to take care of the child financially and emotionally.
- [15] In retort the respondent avers that an investigation into the claims made by the first applicant were denied by the school where the applicant's child was a student.
- [16] A report was compiled by Fikile R Ngwenya, the social worker who considered the circumstances of the first applicant, together with his children and his parents. The social worker gave the background of the first applicant and his parents. The grandparents are both pensioners and survives only on monthly pension pay-out and which is augmented by the children's grant paid for the maintenance of the children. She further confirms that L[...] has been diagnosed earlier in the year of a speech disorder and due to paucity of financial resources he has not been able to consult speech therapist. Further and regrettably that the waiting list in the state facilities is extremely long to arrest this illness.
- [17] The report further alluded to the fact that the children were negatively affected by the incarceration of their father. Further that the uncertainty of the case aggravates the children's anxiety.
- [18] The social worker then screened L[...] for anxiety having employed the Becks Depression Inventory Scale (BDI) and Becks Anxiety Inventory Scale (BAI) which are tools used to screen for depression and elevated anxiety respectively. Though both are a not diagnostic tools they showed that there is need for an in-depth investigation of the anxiety by clinical psychologist and a psychiatrist.
- [19] The first applicant contends that the case against him is weak on the basis that there is no evidence which links him to the alleged offence. Though the respondent avers that a bag with explosive and R5 rifle was found closer to where he was arrested but no forensic investigation was done to substantiate his alleged link to the said bag and or explosives.

- [20] The respondent in retort emphasised that the fact that the said bag (containing detonators and one 5.56 x 45mm calibre Dash prod rifle and two magazines and 4 cellphones) was found closer to him is close enough to make the link sufficient to sustain a case against the applicant. Noting that other three suspects died within his proximity.
- [21] The first applicant's personal information was also interrogated and investigated by the respondent, and it was established that the first applicant has not assets outside RSA, has no relative outside the country, he has no assets (either movable or immovables) he has no licence to possess a firearm. Though the respondent has alleged that the first applicant is linked to other possible offences elsewhere no decision has been made thereon and are irrelevant for the purposes of this application. The records indicates that the applicant was previously found guilty of theft and was sentenced to 4 years of which one year was suspended.

Submissions by the legal representative.

- [22] The counsel submitted that the evidence presented on behalf of the respondent is generally laced with incorrect information and to this end the investigating officer breached his public duty not to violate the applicant's freedom. This breach was considered in *Woji v The Minister of Police* (92/20120
- [2014] ZASCA 108 (20 August 2020)[2] where the court concluded that it justified the basis for civil claim for damages for unlawful detention.
- [23] The counsel further contends that the state failed to proffer any evidence to gainsay the contents of the report by the social worker in terms of which it was demonstrated that the incarceration of the first applicant led to the falling apart of the applicant's family which brought unto them stress. There was no evidence to contradict that the children need support from the first applicant and further that L[...]’s speech problems commenced as a result of the incarceration of the applicant. No evidence was also led to displace the inference drawn that speech problem should be construed as an exceptional circumstance and the need for bonding with the minor child, L[...].
- [24] In addition, the magistrate who denied the first applicant with bail erred in concluding that the applicant is facing a schedule 6 offence. No evidence was presented and tested in this regard. The records however indicates that the death of the three persons who were allegedly armed robbers in cahoots with the first applicant were in fact killed by the member of SAPS.[3]
- [25] The evidence submitted by the Investigating Officer from one's child school should not be admitted on the basis of the following reasons, firstly, it is not an affidavit, secondly, the child was not interviewed and thirdly, the contents thereof are of general nature.

- [26] The counsel further submitted that court should further have regards to the consequences of the detention pending trial. The detention should not be employed as a form of punishment and in weighing up the interest of justice as against the continued detention the court should also have regard to circumstances set out in section 60(9) of the Criminal Procedure Act (CPA), which includes inter alia the period for which the accused was in detention and the probable period of future detention until final disposal of the case. Noting further that the accused is entitled to the enshrined right to a speedy trial.
- [27] In relation to the accused being a flight risk no evidence has been presented to suggest this possibility and, in any event, it could be a condition of bail that the first applicant should wear a bracelet. There is also no case made to support a possibility that the applicant may intimidate, threaten, or interfere with witnesses. What had been presented by the respondent is only speculative.

Second applicant

Background

- [28] The second applicant deposed to an affidavit setting his personal circumstances and further that at the time when he was arrested, he was on parole which was granted in 2016 subsequent to the conviction and sentence of charges of murder and rape. There are currently no pending criminal cases against him. At the time of his arrest, he was self-employed and was buying and selling cars and generating an income of approximately R20 000.00 per month.
- [29] He has a child who suffers from Attention Deficit Hyperactivity Disorder (ADHD) an illness he was born with. He was also lately diagnosed with Autism Spectrum Disorder (ASD). The hospital record in support hereof are attached to the affidavit in support of the application for bail. The child is currently residing with the applicant's mother, Mbali Mazibuko who is unemployed and had at all times responsible for the expenses associated with the child's medical treatment. The medical service would readily be accessed from private facilities as there are always long queues and waiting periods in the public or government facilities.
- [30] The mother of the child, Mbali Charity Mazibuko deposed to a confirmatory affidavit and confirmed that indeed the child has been diagnosed with ADHD and has been undergoing speech therapy. Further that it was discovered that he is also autistic and has special needs. The second applicant has at all times been responsible for the medical expenses associated with the treatment of the child as the mother is unemployed. The medical records includes in a document marked annexure A, dated 10 October 2023 that the child attend the clinic and qualifies for a care dependency grant on grounds of ASD level 3.

- [31] The second applicant has not breached the parole conditions since his release in November 2016 and due to his good behaviour, he was ultimately taken off from the high- risk parolee to medium risk and ultimately to be classified as a low-risk parolee. In support to the good parole record the second applicant annexed the record from the parole officer which confirms the changed statuses were due the second applicant's good behaviour.
- [32] The continued incarceration is now negatively impacting on the section 28 constitutional rights of the child which according to the first applicant constitute an exceptional circumstance as envisaged in the applicable bail regime.
- [33] In support of exceptional circumstances warranting the release on bail in the interest of justice the applicant averred that despite being advised that it is not compulsory to enter into the merits of the case he contended that there is no evidence which link him to the charges proffered against him. In these regards, the second applicant contends that he is not linked to the charge through DNA results, possession of items linked to the offence, possession of firearm, ballistic evidence, fingerprints and or formal identity parade.
- [34] Further that the core of the state's case is predicated on the evidence of a certain police official who appeared during the time when he was interrogated by the police and claimed that he recognises the first applicant by his jacket as being the person who was shooting at him with a rifle whilst running away from the crime scene. This, the applicant construed and identified same as a "backdoor informal identity parade by the state".[4]
- [35] The second applicant has also filed a supplementary affidavit supported by confirmatory affidavit which set out the process undertaken by the investigating officer who confronted the mother of the children with a ploy to persuaded her to contradict the evidence she deposed with regards to the fact that the second applicant was responsible for the financial expenses associated with the medical treatment of the child. The child's mother states in her supplementary supporting affidavit that she found the questioning by the Investigating Officer Warrant Officer Mkhatswa (IO) on 14 February 2024 to be hurting. She referred the IO to access the hospital file at Baragwanath Hospital. She further stated in her affidavit that indeed the second applicant was responsible for the medical expenses associated with their child's treatment before his arrest and her parent took over subsequently though with difficulties.
- [36] The investigating officer has made enquiries on the claims that the second applicant had been responsible for the medical expenses associated with his child who need special treatment. He had established from the child's mother that the first applicant never made any contribution, and she was only assisted by her own parents.[5]

- [37] The investigating officer has further alleged that there was an attempt to resist arrest by the second applicant and with the object to gainsay such assertion the second applicant annexed to the supplementary affidavit the supporting statements from members of the JMPD, namely, Tumi Khoalibawe and Lucky Moerane who described ‘... how easy and peaceful they arrested...’ the applicant.
- [38] With the object of confronting the statement of an informal ID parade the second applicant further attached the redacted statements by Peter Maunatlala who witnessed the crime before the arrival of the police and stated that the suspect who committed the offence were about 10 and all wearing masks and balaclavas. This was also confirmed by Oliver Hendricks that the hijackers were wearing balaclavas and masks.
- [39] The personal particulars of the first applicant were investigated by the respondent, and it was established that the applicant has no assets outside the Republic, has no relatives and has never travelled outside the Republic. His home address was duly verified, and it was established that he resides at 1922 Mpane street, Orlando East Soweto where he was raised and resided with his parents since birth.
- [40] The legal representatives acknowledged in the heads of argument that the applicant is enjoined and bears the onus to satisfy the court that there are exceptional circumstances which in the interest of justice permits the first applicant’s release on bail.
- [41] The factors which were highlighted as alluded above are, the investigation is completed, there is no shred of evidence which links the applicant to the commission of the crime and the applicant’s child is diagnosed of Autism and speech problem with special needs.
- [42] The counsel referred the court to the judgment in *S v WC and Another*[6] where the court held that the deteriorating mental health condition of the accused’s child constituted exceptional circumstances that warranted release of the parent on bail. Another factor which was considered was the fact that the accused medical aid policy was suspended due to failure to make payment premiums and this was due suspension from work and subsequent to incarceration. In addition, the court held that the fact that the state may have a strong case may not necessarily lead to a conclusion that no bail should be granted.
- [43] In addition, regard must be had to the fact that section 35(3)(h) of the Constitution still presumes the accused person to be innocent until proven guilty. The fact that the accused has not been tried as yet should work in favour of the accused.
- [44] Reference was also made to the judgment in *Fourie* case[7] where the court held that where the State’s case is subject to some doubt, there being no likelihood that the accused may interfere with state witnesses and a low risk of re-offending constituted exceptional circumstances.

Submission by the Respondent

- [45] The respondent's counsel submitted that this application unlike for the first applicant is being brought for the first time. Having regard to the previous convictions the applicant has poured cold water to the opportunity given to him of freedom by being granted parole.
- [46] The contention that the applicant's child is sick was known by the applicant at the time when the offence was committed and should have not embarked on criminal activities. He alleges further that he has contributed to the expenses associated with the medical treatment for his child but failed to provide any evidence in support of the said allegations.
- [47] With regard to the strength of the state's case the respondent submitted that the applicant was identified as a suspect by a witness at the time when he was interrogated. In addition, the argument that the second applicant was arrested on a hearsay is unsustainable as the arrest was pursuant to intelligence and was correctly identified during interrogation.
- [48] His record demonstrate that he is a person who has the tendency to re-offend. Having be sentenced to 10 years for murder and whilst subsequently presented and sentenced to 10 years for kidnapping and rape. The applicant had the following previous convictions, namely, Robbery and was sentenced to 15 years imprisonment, murder sentenced to life imprisonment all under Cas 526/03/2019, Meadowlands, on 14 December
2000. Secondly, Rape and was sentenced to 10 years imprisonment under Orlando Cas Number 47/04/1999 and was sentenced to 4 years imprisonment.
- [49] The contention that there is no forensic evidence which could link him to the commission of the offence fails to acknowledge the fact that laboratories are generally overwhelmed by requests for analysis of DNA evidence. The difficulties would have in any event been encountered with the first applicant as he was taken out of the water stream and the second applicant could not have primer residue as he was arrested a few days after the incident.
- [50] The facts are that the second applicant was arrested pursuant to informants and thereafter identified by an officer who had been chasing him. The evidence against him should not be determined now and same will be comprehensively considered by the trial court. His request that he be dealt with in terms of section 62(f) of the CPA and be placed under monitoring as it was dealt with in Fourie's case is not sustainable. In the Fourie's case the accused was employed and owned properties and his evidence was corroborated by a state witness which confirmed that in fact at the time of the commission of the offence the accused was at work. The said case is therefore distinguishable.
- [51] In summation the prosecution submits that the strength of the state's case is not weak as alleged. In respect of the first accused he was followed by the police officers who arrested him and who never lost sight. There were weapons and explosives found in his surroundings. With regard to the second applicant, he was positively identified by an officer who identified him during the interrogation.

- [52] The contentions with regard to the ill-health of the children should not be employed as ploy to cause confusion. The applicants have been aware of their children's status as at time of the commission of the offences. There is no evidence that they assisted the children with the alleged medical expenses for their treatments. There is no indication either that the applicants were employed. Whilst the interest of the minor children are always of paramount importance in this case the applicants are not primary care givers. If the interest of the children health would be readily invoked this may imply that all parents in custody should be released to attend to their children's needs.
- [53] Both applicants have failed in discharging their obligations to prove that there are exceptional circumstances which warrant that they be admitted to bail in the interest of justice.

Legal principles.

- [54] It is trite that the concept of exceptional circumstance has not been defined to cater for all cases. Instead, the determination thereof would ordinarily be facts-dependent. The regulatory framework on schedule 6 was comprehensively chronicled by Dosio J in *M, M A v The State* (A153/2022)
- [2023] GJ (7 February 2023) as set out in the footnote below.[8] In addition, it has been re-affirmed by the courts that exceptional circumstance has not been defined but the following can be indicators, urgent serious medical operation, terminal illness, incarceration of an accused for the offence which is obvious was not committed.[9] In addition, depending on circumstances ordinary circumstance may turn to be an exceptional circumstance.
- [55] Despite the shortcomings, if any, in the case presented by the state the court is enjoined to give effect to the provisions of section 60(10) of the CPA which states 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 circumstances and the interest of justice.' Whilst reference to the merits of the case is allowed care should be taken of the fact that evidentiary material underlying the merits is not been tested.[10]
- [56] The strength and weakness of the respondent's case is important and where the evidentiary material presented before the court fail to assist the court in even presenting a *prima facie*[11] view then the accused must be given the benefit of the doubt.[12]
- [57] It is generally not a requirement for the State to disprove the exceptional circumstances which have been submitted by the applicants.[13]
- [58] The process on bail applications is guided by the provisions of section 60(4)(a-d) read with section 60(9) of the CPA. If one of the factors militates against granting the bail then it will not be in the interest of justice that the accused be admitted to bail. The factors identified in this section are not cast in stone or exhaustive and the presiding officer's constitutional powers to decide on the bail remain intact. Those factors were dealt with in different cases

and the court would, *inter alia*, in terms of section 60(4)(b) not grant bail where there is likelihood that the accused may evade trial. Pointers for the court's consideration would include the seriousness of the offence, the probabilities of a conviction, the nature of probable sentence and the ability to put up bail.[14] The court should have regard to the provisions of what is set out in section 60(6) to assist in determining whether the accused is likely to evade trial.

Analysis

- [59] The first applicant enjoins me to consider whether in compliance with the strictures of section 6(11)(a) of the CPA evidence has been adduced to determine whether exceptional circumstances exist which in the interests of justice permit his release on bail. The second applicant contends that his 5-year-old son, L[...] has developed a speech problem which requires a therapist and other occupational specialists. Furthermore, his twelve-year-old son has developed an anxiety and depression after his arrest. His performance at school has dropped since the incarceration and he has also become suicidal.
- [60] In support of the allegation of the speech disorder a report by the social worker states that L[...] was diagnosed with speech disorder. There is no supporting evidence to state as to who diagnosed the child and further that the said speech disorder is associated with the incarceration. What can be discerned from the report is that the therapy is unaffordable to the grandparents who are pensioners and the child's mother who is unemployed. In addition, the resources from the public institutions are not easily accessible. There is a referral letter submitted by Dr Nhlapo that L[...] need to be attended to by a speech therapist. There is no indication as to the link between the incarceration and the said diagnosis.
- [61] L[...] has also displayed suicidal thoughts as he was worried and anxious of the father's incarceration. The social worker has screened L[...] and determined that there is a need for investigation by a clinical psychologist and a psychiatrist. She conceded that the tools she employed in the screening are not diagnostic tools but did demonstrate the need for further investigation. To the extent that the social worker has declared that she is not qualified to make a diagnosis of what she suspect I am not persuaded

that evidence is adduced before me to conclude that the alleged conduct of L[...] has proper medical foundation.

- [62] Whilst cases have to be considered on own merits it would be worrisome and unsettling that on such narrow submissions the court should readily conclude that a parent need to be released on bail. This would in all probabilities be the case with most of the detainees whose children find the parent's incarceration unpalatable. The question is whether there would be any child who is happy to have his or her father detained. The answer is certainly no.

- [63] There is no evidence to support that the accused was making the income as suggested. There is further no evidence to support the allegation that the applicant has ever paid for the medical condition as alleged by the applicant.
- [64] The further complaints which the social worker alluded to without laying proper foundation if she is qualified to proffer an opinion on psychological causes of what the children are experiencing. The social worker has further determined that ‘... weighing up the potential long-term effects of this type of pretrial punishment can have a long-term effects on the children that are immeasurable in nature including how they perceive the justice system and police in their growing years. (underling added). The social worker’s view is lop-sided as she stated that she is less qualified to proffer a view on certain aspects and would defer to expertise of psychologist and psychiatrist. In addition, the said social worker has failed to set the foundation for alleging and engaging legal technical terms that the first applicant is being subjected to pretrial punishment. This appears to be gratuitous.
- [65] Even more startling is the failure by the social worker to put forward the facts setting out her qualification and the nature of her expertise to formulate a view to which the court would have to defer.

Second applicant.

- [66] The position with the second applicant is that medical conditions of the child should justify as exceptional circumstance warranting admitting the applicant to bail. There is no evidence to support the allegation that ASD is linked to the second applicant’s incarceration. In addition, there appears not to be evidence which suggest the circumstances which alluded to in S v Jonas that there is urgent serious medical operation, terminal illness, incarceration of an accused for the offence which is obvious was not committed.[15]
- [67] There is no evidence which was put forward by the applicant to demonstrate that he was at all times responsible for the medical expenses from private hospitals for the treatment of the child.
- [68] Both applicants’ cases appear to have been influenced by the judgment in S v WC[16] which is distinguishable as the evidence clearly demonstrated that the accused previously had a medical aid and the health of the child was deteriorating. The accused in that case had a fixed employment, she had assets, she was a mother and a caregiver, was in full time employment with SAPS at the time of incarceration. The health status of the child was deteriorating. In contrast the applicants’ standard of education would ordinarily not easily assist them in the absorption into the formal employment. There is no indication in the form of evidence as to how easily would it be for their businesses to be restarted and flourish. There are no assets acquired by the applicants despite the claim that they were making profits.

[69] Absent medical evidence substantiating indication that the health statuses of the children were deteriorating or need urgent serious medical operation or terminally ill then cadit quaesto.

General

[70] The foregoing exposition relates specifically to the applicants statements' that in view of the children medical conditions in their formidable pursuit to claim presence of exceptional circumstance warranting release on bail.

[71] One other factor is consideration of the strength of the State's case. The authorities cited above reaffirms that the strength or weakness of the state's case is factor to be considered in assessing whether there are exceptional circumstances. It is noted however that what is required is not a conviction or acquittal of the applicants. The states has stated that the members of SAPS who ran after the suspects have not lost sight of the first applicant. He was arrested close to where the bodies of the

other suspects were found. Close to him was a bag which had explosives, ammunition, and the rifle. All these factors present a

prima facie case which the first applicant must confront. The contention that the accused was just running as everyone was running from gunshots is not sufficient to persuade me that he is likely not be found guilty.

[72] There is a burden to be discharged as the accused should demonstrate that state's case is so hopeless and there are no prospects that the court will return an order for conviction, see *S v Mazibuko and Another* 2010(1) SACR 433 (KZP) at [23]. In addition, it is also to be noted in Mathebula's case that "[B]ut a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must proof on a balance of probabilities that he will be acquitted of the charge." [17]

[73] It is noted that the second applicant was identified and arrested by members of the SAPS through its own intelligence. The said applicant was positively identified by a member of SAPS during the interrogation, that notwithstanding the second applicant question the way in which he was identified. But at this point I am not invited to determine the veracity of the evidence underpinning the identification lest I construed as interfering in the province of the trial court.

[74] Whilst the fact that the applicants do not possess travel documents may weigh in their favour, it was noted in *Novella* by Le Grage that "the retention of the appellant's travel documents is also cold comfort as the lack of travel documents in recent times is hardly a deterrent to persons who are serious and the means to skip the country. Experience in court have shown that these documents can readily be obtained and one may depart the country with ease". The constitutional court observed further that "[I]s true that the seriousness of the offence, and with it the heightened temptation to flee because of the severity of the

possible penalty, have always been important factors relevant to deciding whether bail should be granted.”

[75] It is required that considering whether there is likelihood that the justice system may be undermined the court may have regard to the past conduct of the accused.[18] In this instance the second applicant was on parole when this offence was committed. It is noted that one may not necessarily be victimised on the basis of his past conduct, further factors maybe have to be put into consideration, including but not limited to, nature of charges. In this instance the second applicant was ‘... released on 2016/11/01, and was serving a life sentence for murder, robbery with aggravating circumstances/ rape/kidnapping...’ and parole having been revoked due to the incarceration. Admitting the applicant to bail in this instance would bring the justice system into disrepute.

Conclusion

[76] I therefore remain unpersuaded that the evidence presented before me justify the conclusion that the applicants should be admitted to bail in accordance with their applications. The conclusion is predicated, inter alia, on the basis that though section 60(4) identifies factors to be considered, the list need not to be exhausted and even if one of the factors militates against granting the bail then it will not be in the interest of justice that the accused be admitted bail.

[77] I therefore make the following order:

Applications for bail by the applicants are dismissed.

Mokate Victor Noko

Judge of the High Court

This judgement was prepared and authored by Justice Noko whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 20 March 2024.

Date of hearing:

on papers,

Date of

judgment:

20 March 2024

Appearances

For the first Applicant: Adv M Ives For the second Applicant Adv Mnisi For the Respondent: Adv RL Kgaditsi.

[1] The indictment to the following additional charges, 7 counts of attempted murder, eleven counts of contravention of the Firearm

Control Act, 3 counts of murder, one of unlawful possession of explosives, 3 counts of robbery with aggravating circumstances.

[2] See para 2 of the First Applicant's Heads of Argument at 9.

[3] I have not dwelled much into this issue as it was not raised in the applicant's founding papers but in the heads of argument. The evidence also presented less on are the reasons for the bail application to have been held in abeyance for a period in excess of a year.

[4] See para (xii) of the Applicant's Founding Affidavit.

[5] See para 14 of the Respondent's Answering Affidavit.

[6] S v WC and Another 2022

(1) SACR 159 (GJ)

[7] Fourie v S [2020] ZAGPPHC 260

[8] [9] Section 60(11)(a) of Act 51 of 1977 states that 'Notwithstanding any provision of the 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, give evidence which satisfy the Court that exceptional circumstances exist which in the interest of justice, permit his or her release on bail.'

[10] In the context of s60(11)(a) of Act 51 of 1977, the concept exceptional circumstances has meant different things to different people. In S v Mahommed 8 it was held that the dictionary definition of the word exceptional has two shades of meaning: The primary meaning is simply: 'unusual or different'. The secondary meaning is marked unusual or specially different'. The accused has to adduce evidence which satisfies the court that such circumstances exist 'which in the interest of justice permit his or her release'. The proven circumstances have to be weighed in interest of justice. So the true enquiry is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the appellants release on bail.

[12] In the matter of S v Kock 2003 (1) All SA 551 (SCA) the Supreme Court of Appeal stated that: in the context of s60(11)(a) of the Act the strength of the state case has been held to be relevant to the existence of exceptional circumstances'. S v Botha en Ander 2002(1) SACR 222 (SCA) at para [21], S v Viljoen 2002

- (2) SACR 550 (SCA) at para [11]. There is no doubt that the strength (or weakness) must be given similar consideration in determining where the interest of justice lie for the purpose of s 60(11)(b). when the State has either failed to make a case or has relied on one which is so lacking in detail or persuasion that a court hearing a bail application cannot express even a prima facie view as to its strength or weakness the accused must receive the benefit of the doubt’.
- [13] In the matter of S v Mathebula 2010 (1) SACR 55 (SCA) para 12 the Supreme Court of Appeal held that ‘... in order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge...’.
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- [9] See S v Jonas 1998
- (2) SACR 673 para 68 of the First Applicant’s Heads of Argument at 24.
- [10] See para 49 of the First Applicant’s Heads of Argument where reference was made of Litako and Others v S (548/2013)
- [2014] ZASCA 54 (16 April 2014).
- [11] Bearing in mind that the court has to prima facie assess the strength or weakness of the case and not to make a provisional finding of guilt or innocence S v Van Wyk 2005
- (1) SACR 41 (SCA). See para 65 of First Applicant’s Heads of Argument on 24.
- [12] S v Botha en ‘n Andere, 2002
- (1) SACR 222 at para 21 and S v Viljoen 2002
- (2) SACR 550 SCA para [11]]
- [13] See S v Mpulampula 2007
- (2) SACR 133 (E), S v Mabusela & Another (unreported, GP case no A909/2015, 9 February 2016) at [8], where it was stated that ‘...where an accused, taking into account what is already on record, does not even make out a prima facie case, there is no duty on the prosecution to present evidence in rebuttal’.
- [14] S v Pienaar 2017
- (1) NR 149 (SC) at [12].
- [15] See n 10 above.
- [16] Supra n 4.
- [17] Mathebula v The State (431/09)
- [2009] ZASCA 91 (11September 2009).
- [18] See section 60(4)(d) read with section 60(8) of the CPA.

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