

SOUTH AFRICA / JUDGMENT

Engelbrecht v S - Bail Application (CC76/2021) [2023] ZAWCHC 327 (22 December 2023)

[2023] ZAWCHC 327**COURT**

Western Cape High Court, Cape Town

BEFORE

Lekhuleni

CASE / FILE NUMBER

CC76/2021

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Policy**In**

**the High Court of South Africa
(Western
Cape Division, Cape Town)**

Case**No: CC76/2021****In****the matter between:**

**JULIAN
JANSEN ENGELBRECHT
APPLICANT
And
THE
STATE
RESPONDENT**

Heard:**18 December 2023****Delivered:****22 December 2023**

JUDGMENT**LEKHULENI J****Introduction**

- [1] This is an application for bail pending the finalisation of trial. The applicant, a 27-year-old male has approached this court in an application to be admitted to bail. He was arrested on 26 July 2022 and has remained in custody to date, a period of 17 months. He is the second accused in the main matter. The applicant and his co-accused are facing several charges including Murder, Robbery with aggravating circumstances, Rape and Housebreaking with intent to commit an offence unknown to the State. Upon his arrest on 26 July 2022, the applicant appeared at Bellville District Court where he requested to be released on bail. He subsequently abandoned his bail application before it could begin. The matter was thereafter transferred to this court for trial. The applicant has since launched this application in this court to be released on bail.
- [2] During the hearing of this application, the court was informed that the trial date for this matter has been scheduled for 24th January
2024. The applicant brought this application to be released on R1000 bail on the condition that he attends court on every date the matter is postponed and remains in attendance until the court excuses him. The State opposed the applicant's application in the main, contending that on the totality of the evidence placed before this court, the applicant has not shown any exceptional circumstances that, in the interest of justice, permit his release on bail.
- [3] At the hearing of this application, the applicant did not testify but submitted an affidavit in support of his application. In the sworn statement, the applicant has intimated that he will be pleading not guilty on all counts preferred against him and chose the right to remain silent.
- [4] On the other hand, the State opposed the bail application and presented the oral evidence of Sergeant Fortuin, the investigating officer of this case. Along with that, the State also submitted an affidavit from Sergeant Fortuin to oppose the applicant's bail application. A summary of the evidence provided by these witnesses is detailed below.

Factual**Background**

- [5] At the hearing of this application, it was common cause between the State and the defence that the applicant faced a schedule 6 bail application. Thus, the applicant, having been given a reasonable opportunity to do so, had to adduce evidence which satisfied the court that exceptional circumstances exist which, in the interests of justice, permitted his release.

- [6] The applicant, with the assistance of his legal representative, was accordingly given such an opportunity. To this end, he submitted an affidavit in which he asserted that he is 27 years old and resides at M[...] Farm, K[...] Road, Durbanville, in Brackenfell. He is unemployed and is dependent on his parents for daily living. Should he be granted bail, his parents advised him that they can afford R1000. He has no travel documents or assets in the Western Cape, nationally, or outside the borders of the Republic of South Africa. His parents, siblings, and extended family live in the Western Cape within a farm community.
- [7] The applicant stated that he has one previous conviction for possession of drugs dating back in
2017. He was cautioned and discharged on this count. The applicant further confirmed that there are no pending cases or outstanding warrants against him.
- [8] He asserted that he would not be a threat nor a danger to any public member as he would spend much time with his family. He would do his best not to be involved with the community during the trial hearing of this case. The applicant further asserted that he is not a flight risk, does not have travel documents, and is only used to living within his community and not used to going outside the area he grew up in. If he is released on bail, he will always attend court when required. During the trial, he will reside with his parents and siblings at the farm and not leave the Western Cape.
- [9] He stated that he would be of no threat to state witnesses and that he does not intend to talk to the witnesses directly or indirectly. His legal representative has informed him that the evidence against him is all scientific and is sealed and kept in a safe place by the police. The applicant stated that he is willing to report to the nearest police Station at least once a week as a condition of his bail. According to him, he is not violent and will not commit any offence whilst released on bail. He misses his family and wishes to spend time with his parents and younger siblings.
- [10] Regarding exceptional circumstances, the applicant asserted that he has been in custody for quite a while. Further, he understands that this matter, with many others, may end up being postponed on the trial date of January 2024. In addition, the legal representative of his co-accused in the last sitting indicated that she was merely postponing the matter, hoping that someone in her offices would be allocated the matter on the trial date since she was already booked on the same day to run another trial. Furthermore, he was informed that the State's case against him stands on shaky ground since there is no direct evidence against him but only what appears to be forensic evidence that he would challenge.
- [11] The investigating officer, Mr Dawid Fortuin, also testified. Mr Fortuin testified that he is a Sergeant attached to the Durbanville Detective Branch. He stated that on Monday, 06 June April 2020, at approximately 09h00, the lifeless body of a 62-year-old female was discovered inside her house on A[...], Farm, T[...] Road, Durbanville. The deceased was lying on her stomach at the entrance to one of the bedrooms, and her pyjamas were pulled down below her knees. The husband of the deceased was sleeping on the other side of the house from

where the victim's body was discovered. Since the deceased's husband suffered several strokes in the past, he was unable to speak, walked very slowly and was on sleeping medication. The deceased's husband discovered the body of the deceased and alerted neighbours.

- [12] Sergeant Fortuin testified that he investigated the crime scene with Captain Van Heerden, the Provincial crime investigators, and the pathology services. During interviews with the daughters of the deceased, he discovered that a music player was the only item missing from the house. The daughters of the deceased also informed him that the deceased complained to them before her murder about break-ins at her house.
- [13] Sergeant Fortuin attended the postmortem examination of the body of the deceased. The deceased had trauma to the neck area, and the cause of death was blunt force trauma to the neck. There was no evidence of defensive injuries. It was also discovered that there was forced penetration to the vagina and anal area of the deceased, indicating that she was raped vaginally and anally. A DNA swab was collected from various parts of the deceased's body and clothing.
- [14] During June 2020, he was informed by the daughter of the deceased that someone was using the WhatsApp account of the deceased. The number registered to the deceased WhatsApp account was 0[...]. He then stored this number on his phone and managed to obtain a photo of a person from the WhatsApp profile that was linked to the deceased's cell phone number. Later, he made inquiries on the farms in the vicinity of the crime scene and found that the person using the deceased's number was Calvin Saunders. He interviewed Calvin Sanders, who informed him that he bought the phone from the applicant in February 2020.
- [15] On 6th June 2020, he found the applicant at his place of residence and questioned him concerning the murder of the deceased and the allegation that he had the cell phone of the deceased. The applicant informed him that he did not break into the house of the deceased or kill the deceased. The applicant further explained to him that he picked up the cell phone not far from the deceased's house. The applicant further pointed to where he found the cell phone. This location was approximately 200 meters from the deceased's house and about 300 meters from the applicant's house. Sergeant Fortuin subsequently requested a DNA buccal sample from the applicant, which the latter provided willingly.
- [16] During July 2022, he received the DNA report from the Plattekloof Forensic Laboratory. According to the report, the DNA of the applicant was found on the thighs of the deceased. Subsequently, he arrested the applicant on 26th July 2022, took a warning statement from him, and explained his constitutional rights to him. He established that the applicant was known to the deceased and grew up in the same area where the deceased lived before, she was murdered. The applicant visited the deceased's residence when he was still a young boy as he was friends with the deceased's son, and they were in the same school.

- [17] Sergeant Fortuin further asserted that this information, together with the probability that the applicant stole the cell phone of the deceased two months before her death, meant that the applicant was familiar with the residence of the deceased as well as the situation regarding the medical condition of her husband.
- [18] Furthermore, Sergeant Fortuin noted that the applicant knew that the deceased and her husband were vulnerable individuals, and this influenced the decision to break into their house. He contended that the probability that the applicant would go to prison for a very long time should he be convicted could be enough reason for the applicant to want to avoid prosecution. According to him, the State has a strong case against the applicant as the applicant is linked to the murder charge through his DNA that was found on the thighs of the deceased.
- [19] It was Sergeant Fortuin's evidence that the witnesses in this matter were known to the applicant. In his view, there is a possibility that the applicant could try to influence or intimidate some of these witnesses as some of them are in the same vulnerable situation as the deceased. That was, in short, the evidence presented before this court.

Applicable Legal Principles and Discussion

- [20] Bail applications are regulated by section 60 of the CPA. Generally, an accused person in custody is entitled to be released on bail if the court is satisfied that the interests of justice permit. Section 60(1)(a) provides that: 'An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.' Section 60(4)(a) – (e) on the other hand, provides that the interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established, namely:
- (a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or
- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
- (c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or
- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.'

- [21] The grounds listed in paragraphs (b) and (c) above concern the impact that the granting of bail might have on the conduct of a particular case. In contrast, the remaining three grounds concern the effect that the granting of bail might have upon the administration of justice generally and the public's safety in particular. (See *S v Mabena and Another* 2007 (1) SACR 482 (SCA) para 4). The five grounds elucidated above are further expanded and developed in sections 60(5) to 60(9) of the CPA, which contain an extensive and detailed list of the potential factors for and against the grant of bail, to which a court must pay due regard in considering where the interests of justice lie. (See *S v Solomons* [2019] 2 AII SA 833 (WCC) paras 11-12).
- [22] Section 60(9) of the CPA sets out a weighing exercise which the court must do in determining where the interest of justice lies. Section 60(9) enjoins the court to balance the interest of justice against the accused person's right to personal freedom. This includes considering the potential harm that the accused person may suffer if he were to be detained in custody.
- [23] As previously stated, the charges levelled against the applicant involved offences listed in Schedule 6 of the CPA, and his application is to be determined in terms of section 60(11)(a) of the CPA, which provides as follows:
- ‘Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release.’
- [24] An arrested person is generally entitled to be released on bail if a court is satisfied that the interests of justice permit; however, the reverse applies where a person has been charged with a Schedule 6 offence. From the provision above, a court is obliged to order an accused's detention where he stands charged with Schedule 6 offences, and a court will only be empowered to grant bail in those instances provided the accused can advance exceptional circumstances why he should be released. (See *S v Jonas* 1998 (2) SACR 677 (SE) at 678C-D).
- [25] Thus, in a Schedule 6 bail application, the applicant has a clear and unequivocal obligation to persuade the court. Section 60(11)(a) places an onus on an applicant to satisfy the court by way of evidence and on a balance of probabilities that exceptional circumstances exist which, in the interest of justice, permit his release on bail. Before a court may grant bail to a person charged with a Scheduled 6 offence, it must be satisfied, upon an evaluation of all the factors that are ordinarily relevant to the grant or refusal of bail, that circumstances exist that warrant an exception being made to the general rule envisaged in section 60(11)(a) that the accused must remain in custody.

- [26] There is no definitive or exhaustive list of what constitutes 'exceptional circumstances' in the context of this provision. To the extent that this concept is not defined, there can be no one-size-fits-all approach in determining the existence of exceptional circumstances. Each case must be dealt with according to its merits. Exceptional circumstances do not mean that they must be circumstances above and beyond and generally different from those enumerated in subsections 60(4) –
- (9) of the CPA.
- [27] Reverting to the present matter, the applicant averred that he was arrested in 2021 and has been in custody for a while. According to him, this is one of the exceptional circumstances that this court must consider when considering his bail application. In addition, the applicant stated that the fact that the matter will take a long time to finalise should count in his favour as an exceptional circumstance. I disagree with this proposition. It must be noted that a trial date has been allocated for the hearing of the matter. In a month, this matter will be tried. It is expected that all legal representatives who confirmed their availability when the trial date was arranged should be prepared and attend court on the trial date.
- [28] It is also not correct that the applicant was arrested in 2021. Sergeant Fortuin testified that he arrested the applicant on 26 July 2022 after he received the DNA results from the Plattekloof Laboratory. He was not challenged in this regard. Whilst I note that the applicant has been in custody for more than a year, the suggestion that the applicant has been in custody for a long time is incorrect.
- [29] Furthermore, the applicant avers that the State's case stands on shaky ground since there is no direct evidence against him and the forensic evidence that the State relies on stands to be challenged at the trial. I am mindful that bail proceedings should not be treated as a rehearsal for the trial. During bail proceedings, the court is not required to make any findings, even on a provisional basis, about the applicant's guilt or any amendment to the bail conditions. All that a court must do is weigh the prima facie strength or weakness of the State's case, and such a decision ought not to be made regarding credibility findings so that bail proceedings do not become a dress rehearsal for the trial itself. *S v Viljeon* 2002
- (2) SACR 550 (SCA) at 25.
- [30] Notwithstanding, I believe the State has a strong case against the applicant. It must be borne in mind that the State alleges that the deceased was raped vaginally and anally. Sergeant Fortuin stated that when he found the deceased, she was lying on her stomach, and her pyjama pants were pulled down below her knees. Dr Pillay, the Pathologist, conducted a Postmortem on the body of the deceased, and DNA samples were uplifted from various parts of the deceased's body and on her clothing. According to Sergeant Fortuin, the State intends to present at the trial a DNA report, which found the DNA samples of the applicant on the thighs of the deceased. While there may be no eyewitnesses, that is not the end of the inquiry. Notably, the applicant has not given a version in these proceedings regarding the allegations made by the State. He chose to remain silent.

- [31] I am mindful that the defence intends to challenge the forensic evidence at the trial. At the hearing of this bail application, Adv Magona-Dano, who appeared on behalf of the applicant, submitted that there was a discrepancy in the number of swabs collected by the Pathologist when the Postmortem Report was conducted. According to her, there is no indication from the report of the Pathologist that there was a DNA swab taken from the thighs of the deceased. This was refuted by Advocate Van der Merwe, who appeared for the State. Ms Van der Merwe submitted that the DNA swab taken from the thighs of the deceased was contained in a seal guard swab, which consisted of various swabs taken from the body of the deceased.
- [32] In my view, the dispute on this issue is a matter which the trial court would be better placed to adjudicate. It is not an issue that this court is called upon to pronounce, lest it be accused of making provisional findings of guilt or innocence of the applicant.
- [33] Importantly, in *S v Mathebula* 2010
- (1) SACR 55 (SCA) at para 12, the Supreme Court of Appeal observed that in bail applications which fall within the ambit of Schedule 6 of the CPA, to challenge the merits of the State case successfully, the applicant must prove on a balance of probability that he will be acquitted of the charge. Until an applicant has set up a *prima facie* case of the prosecution failing, there is no call on the State to rebut his evidence to that effect.
- [34] As previously stated, the applicant did not challenge the State's case other than make a stand-alone sweeping statement that the forensic evidence against him stands on shaky ground.
- [35] I am of the view that the applicant dismally failed to discharge the onus placed upon him to show on a balance of probabilities that exceptional circumstances exist, which, in the interest of justice, warrants his release on bail. The personal circumstances of the applicant placed before this court are neither unusual nor such as singly nor together warrant his release on bail in the interest of justice. Parroting the terms of section 60(4) of the CPA, as the applicant did in this application, does not establish any of those grounds without the additional facts that add weight to his *ipse dixit*.
- [36] In the final analysis, I am of the view that the applicant has not established exceptional circumstances which, in the interest of justice, warrant his release on bail.

Order

- [37] In the result, the applicant's application to be released on bail is hereby dismissed.

LEKHULENI JD

JUDGE OF THE HIGH COURT

APPEARANCES FOR THE APPLICANT: ADV MAGONA-DANO INSTRUCTED BY: Legal Aid South Africa 60 St George's Mall Reserve Bank Building Cape Town FOR THE RESPONDENT: ADV. VAN DER MERWE INSTRUCTED BY: Director of Public Prosecutions Cape Town Western Cape

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