

SOUTH AFRICA / JUDGMENT

Khati v S (807/2021) [2021] ZAMPMHC 7 (15 March 2021) [2021] ZAMPMHC 7

COURT

Middelburg High Court, Mpumalanga

BEFORE

Brauckmann

CASE / FILE NUMBER

807/2021

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IN

**THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA
DIVISION, MIDDELBURG (LOCAL SEAT)
CASE**

NO: 807/2021

In

the matter between:

LESLEY SKHUMBUZO
KHATI
APPLICANT
And
THE STATE
RESPONDENT

JUDGMENT

BRAUCKMANN AJ

INTRODUCTION

[1] This is an application to be released on bail after the Supreme Court of Appeal granted the applicant leave to appeal against his conviction and sentence. Applicant was convicted by the High Court of conspiracy to commit robbery with aggravating circumstances, robbery with aggravating circumstances, kidnapping, attempted murder and malicious damage to property

[2] The applicant was sentenced is currently serving the sentence. The sentences passed were:

COUNT 1 - 5 Years imprisonment

COUNT 2 - 20 Years imprisonment

COUNT 3 - 2 Years imprisonment

COUNT 4- 2 Years imprisonment

COUNT 5 - 2 Years imprisonment

COUNT 6- 2 Years imprisonment

COUNT 11 - 2 Years imprisonment

His mother secured funds to enable his current attorney, Mr Coert Jordaan, to petition the Supreme Court of Appeal, which petition was successful, and to launch this application for bail.

JURISDICTION

[3] The Respondent argues that that this court does not have jurisdiction to hear the application for the release of the applicant on bail, in light of the order made by the Supreme Court of Appeal ("SCA"). The order annexed to the affidavit in support of this application specifically states that leave to appeal was granted to the Full Court of the Gauteng Division of the High Court, Pretoria. The order by the SCA was handed down one year after the establishment of the

Mpumalanga Division of the High Court on 1 May 2019, and consequently the application must be brought in the Gauteng Division.

- [4] The applicant states in his supplementary submissions, solicited by a directive issued by this Court on 12 March 2021 that the offences were allegedly committed in Emalahleni and the trial was conducted in Middelburg Mpumalanga. The application for leave to appeal in front of the Trial Judge was also heard in Mpumalanga. Mpumalanga's Criminal and Civil circuit courts had exclusive jurisdiction in respect of the causes of action arising from and crimes perpetrated in its jurisdiction. The Gauteng Division did not have concurrent jurisdiction[1].
- [6] Annexed to the applicant's supplementary "submissions" Mr Jordaan, applicant's attorney, attached an amended Court Order issued by the Registrar of the SCA on 12 March 2021. In terms of the amended order "leave to appeal is granted to the Full Court of the Mbombela (sic) Division of the High Court of South Africa, Middelburg". The Court have no reason to doubt the veracity of the averments as the relevant correspondence annexed to the "submissions"

is indicative of it.

- [7] The respondent's argument is rejected. The SCA's order is clear. The further fact that the trial was conducted in Mpumalanga in terms of the arrangement by the Judge President as alluded to earlier is further evidence that this Court has the requisite jurisdiction to hear the matter.
- [8] This is a new bail application by the Applicant within this Division after this Division became independent and on that basis alone, the Court in Pretoria has no jurisdiction. At the hearing of the application Advocate Rowles, on behalf of the State, correctly conceded that the court has jurisdiction.

THE JUDGE

- [9] This is not an application for leave to appeal in terms of Section 17
- (2) (a) of the Superior Courts Act. This is a bail application in terms of Section 321 of Act 51 of 1977.
- [10] Advocate Rowles then submitted that this court "does not have jurisdiction" to hear the matter due to the provisions of Section 17(2) (a) of the Superior Courts Act 10 of 2013. Section 17(2) (a) states:
- "Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division."*
- [11] He then argues that the Judge that presided at the trial, Justice Bam, is still readily available, and therefore this application must be brought in front of him as he "is in the best position to reach a decision concerning the release of the applicant on bail or not", referring to various judgments. The judgments state that the Judge that handled the trial is best suited to hear the application to be released on bail "because that is the person best equipped to deal with the issue, having been steeped in the atmosphere of the case"[2].

[12] Mpumalanga is a fully fledged, independent Provincial Division of the High Court. Justice Bam is a judge in the Gauteng Division and is not readily available in circumstances of urgent applications. It is a well-known fact that in order to have him available to hear an application in this Division might take some time, whilst a judge of this Division is readily available. The facts relied upon are fully set out in an affidavit in support of the application for Mr Khathi's release on bail. These facts are also not denied by the respondent at all. No opposing affidavit was filed. I must therefore accept the facts set out in his affidavit. Based on those facts and as will appear from the judgment, the application is not complicated and can easily be adjudicated upon by this Court. The second point in limine by the respondent is also not upheld.

THE LAW

[13] The crimes that Mr Khathi were convicted of are of such nature that section 60 (11) (a) of the Criminal Procedure Act, Act 51 of 1977 ("the CPA") applies to this application. The section reads:

"Notwithstanding any provision of this 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, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;"[Own emphasis]

[14] Although the Justices of the SCA did not provide reasons for granting Mr Khathi such leave, this Court must accept that leave to appeal could only have been granted on the merits thereof. Therefore we have to accept that, after having specifically applied their minds to the facts before them the Justices concluded that there are reasonable prospects that the convictions may be overturned on appeal[3].

[15] To find differently will be fallacious and fly in the face of the majority judgment in Rhode, supra[4].

[16] This Court must therefore decide whether Mr Khathi, in his affidavit in support of his application to be released on bail, disclosed exceptional circumstances which in the interests of justice permit his release.

[17] The directions of the Constitutional Court in *S v Dlamini*, *S v Dladla and Others*; *S v Joubert*, and *S v Schietekat*[5] are relevant. It provides guidelines for the approach to schedule six bail applications in respect of the "onus", an interpretation of the term "likelihood" and considerations of "exceptional circumstances". The Court refers to the following paragraphs of the judgment that are relevant: -

“[57] Incorrect application of the criteria listed in ss (4) by elevating one of them unduly, is a matter for the criminal justice system to remedy. It must do so by applying s 60(4)-(9) in the balanced manner prescribed and in accordance with 'the spirit, purport and objects of the Bill of Rights'. The limitation of the right is therefore as narrowly tailored as possible to achieve the compelling interests in maintaining public peace and meets the requirement of proportionality between this purpose and the nature of the right.”

LIKELIHOOD v POSSIBILITY:

“[53 Less obviously, but nonetheless constitutionally acceptable, a risk that the detainee will commit a fairly serious offence can be taken into account. The important proviso throughout is that there has to be a likelihood, i.e. a probability, that such risk will materialise. A possibility or suspicion will not suffice. At the same time, a finding that there is indeed such a likelihood is no more than a factor, to be weighed with all others, in deciding what the interests of justice are.”

STRENGTH OF STATE'S CASE:

“ [11] An important point to note here about bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails, in the main, protecting the investigation and prosecution of the case against hindrance.”

EXCEPTIONAL CIRCUMSTANCES:

“[75] An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant, or anything else that is particularly cogent. The contention was moreover that if one adds that those circumstances must 'in the interests of justice permit . . . release', the subsection becomes an insurmountable obstacle in the way of bail. In my view the contrary is true. In as much as we are not dealing with the obstacle itself but with ways of bypassing it, the wider the avenue, the more advantageous it is to freedom. A related objection that the requirement is constitutionally bad for vagueness falls to be rejected for basically the same reason. In any event, one can hardly expect the lawgiver to circumscribe that which is inherently incapable of delineation. If something can be imagined and outlined in advance, it is probably because it is not exceptional.

[76] Likewise I do not agree that, because of the wide variety of 'ordinary circumstances' enumerated in ss (4) to (9), it is virtually

impossible to imagine what would constitute 'exceptional circumstances', and that the prospects of their existing are negligible. In requiring that the circumstances proved must be exceptional, the subsection does not say they must be circumstances above and beyond, and generally different from those enumerated. Under the subsection, for instance, an accused charged with a

Schedule 6 offence could establish the requirement by proving that there are exceptional circumstances relating to his or her emotional condition that render it in the interests of justice that release on bail be ordered notwithstanding the gravity of the case.”

BURDEN TO PROOF:

“[78]All that the subsection does in this regard, is to place on an accused, in whose knowledge the relevant factors lie, an onus to establish them in a special kind of interlocutory proceeding not geared to arriving at factual conclusions but designed to make informed prognoses.”

In *S v C* the Court held as follows, and this view is shared by the court:

“Die problematiek in art 60(11) van die Wet word, wat die onderhawige saak betref, veroorsaak deur die uitdrukking 'buitengewone

omstandighede'. Artikel 60(11) mag in die gees van die Grondwet en die gemene reg nie gelees word om méér van 'n verhoorafwagtende te vereis as om die gewone omstandighede wat hierbo genoem word te bewys nie.

Die oomblik wat méér vereis word, word daar bestraffend opgetree. Dit sou geheel en al verwerplik wees. Al wat die Wetgewer myns insiens dus op 'n onbeholpe wyse bepaal het, is dat 'n hof by Bylae 6 misdrywe buitengewone versigtigheid aan die dag moet lê wanneer daar na die gewone omstandighede gekyk word.”[6][Own emphasis]

PREVIOUS ADHERENCE TO BAIL CONDITIONS:

[18] The Supreme Court of Appeal in the matter of *Siyabonga Mooi v State*[7] held: -

“ [10] According to the investigating officer’s evidence, the source of all of the evidence against the appellant became known on the day of the incident and therefore there could not have been any difficulty gathering it. No difficulty was pointed to on behalf of the State. The inordinate delay in presenting this asserted strong case on behalf of the State is unexplained. In the circumstances the delay since the trial started in November 2009, is significant and calls for an explanation that has not been forthcoming. On the contrary, when asked for one during his evidence, the investigating officer displayed an arrogant and obstructive attitude.

[12] The appellant has faced previous prosecutions, in the high court for a variety of charges, including murder, and also in a regional court in the Eastern Cape, for robbery. In each instance he was granted bail and he stood trial until its conclusion. These facts reveal an inclination contrary to reluctance to stand trial. In the circumstances the apparent weakness of the State’s case, taken together with a history of not avoiding his trial, the court below was wrong in not concluding that the appellant has succeeded in showing that exceptional circumstances are present that, in the interests of justice, permit his release.”

PERSONAL CIRCUMSTANCES:

- [19] Mr Khathi is an adult male South African citizen with identity number 7910[...]. He was born in Mbombela and matriculated at Valencia High School in Mbombela. He obtained further tertiary qualifications in cost and accounting at Technikon South Africa and in Business Law at Boston City Campus. He used to reside at No. 91 S[...] Street, S[...], Mbombela at a house owned by his biological mother MAUREEN KHATHI. He resided that house for 21 years.
- [20] At the time of his arrest and at the time when he was incarcerated after conviction, he had been working for Nokwanda Projects for 10 years. The Construction Company belongs to his mother and he states that he can immediately, upon being released on bail, start working in his original post and earn between R8 000, 00 and R10 000, 00 per month. This is confirmed by his mother in a “supplementary affidavit”.
- [21] Mr Khathi is not married but have four children aged 20, 17, 9 and 7 years of age respectively. Three of these children are currently living with his mother, but were living with him at the time of his incarceration. The fourth child is staying with his mother. He was responsible for the maintenance of all these children as well as his sister’s (who is unemployed) three minor children before he was sentenced.
- [22] All his assets were liquidated after his incarceration in order to maintain the children. The little savings he managed to accumulate was frozen and seized as a result of a seizure order made when he was convicted and sentenced. The banks then apparently closed his accounts.
- [23] He had a passport but does not know whether it is still valid. It was solely used for holiday travelling to Swaziland and Mozambique.

BAIL DURING THE TRIAL:

- [24] After his arrest in this matter, and on 24 June 2014, he was released on bail in the amount of R10 000, 00 with an additional bail condition to report weekly on Fridays at the Mbombela Police Station. He remained on bail until his conviction on 8 February 2018 where after he was incarcerated. During the almost four years that he was on bail he faithfully attended Court. There was never any warrant of arrest authorized nor issued for his absence nor for not adhering to bail conditions. His bail was never forfeited.

PREVIOUS CONVICTIONS AND OUTSTANDING CASES:

- [25] Since his incarceration in this matter he was not taken to Court for any other cases. He states that he does not have any knowledge about other pending matters against him in any Court whatsoever.

SUBMISSIONS

BY PARTIES AND DISCUSSION:

[26] Mr Khathi is a convicted inmate. There is no possibility of him interfering with state witnesses, or endanger the safety of any witness. The case against him have been finalised. The SCA will decide the appeal on the record and transcripts. His past behaviour is a strong indication that he did not act contradictory to his bail conditions in the trial.

[27] He does not have a disposition to violence, and have not previously been convicted of any offence where violence is an element, except in this case. He is 41 years old and his record prior to the conviction in this matter proves that he is not prone to commit a Schedule 1 offence

while on bail.

[28] All his emotional, family, property and community ties are in Mpumalanga except for his sister who lives in Johannesburg. He has been living in Mpumalanga all his life. He will be in fixed employment whilst on bail and do not have family outside of South Africa. His past conduct is an indication that he will attend to his responsibilities in this case.

[29] In bail applications the court is not called upon to weigh proven facts, but to speculate what could happen in future. It is true, furthermore, that that court must assess the applicant's future conduct in light of existing or historical facts and circumstances[8]. Taking into account the history of this matter, and the applicant's faithful compliance with the previous bail conditions, the Court is of the view that he is not a flight risk.

[30] He was convicted of very serious offences and sentenced to serve a very lengthy prison sentence. Despite that, it is a fact that the SCA deemed his prospects of success to be good. It will be unfair to the applicant if he eventually succeeds with his appeal to have remained incarcerated until the appeal is eventually heard by a full bench of this division. The applicant's estimation of the time it will take for this appeal to be heard is correct. The bail conditions with his initial release on bail were that payment of the amount of R10 000, 00 in terms of s 60(13) (a) of the CPA had to be made, as well as his reporting responsibilities as referred to earlier.

[31] This Court must accept that applicant has a strong case. If he did not have one, leave to appeal would not have been granted by the SCA justices. In *Rhode*, supra, the majority referred with approval to *S v Smith* [9] where it was stated:

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[32] The above, seen as a whole, justifies the applicants release on bail as he had proven, on a balance of probabilities, that exceptional circumstances exist.

[33] The state submits that the applicant failed to prove exceptional circumstances. I do not agree. There is no opposing affidavit dealing with the applicant's affidavits filed in support of this bail application. The Applicants' evidence regarding the provisions of Section 60 (4) is uncontested by the State and constitutes exceptional circumstances which justified the granting of bail. In *S v Crossberg*[10] it was held by the Full Court of the SCA that:

"The State filed heads of argument but no affidavit denying any of the material facts upon which the appellant relied. At the commencement of the hearing before us counsel for the State conceded that he had no basis upon which to oppose the present appeal."

"As noted earlier the State has not filed an affidavit in opposition and has therefore not indicated that the appellant is a flight risk. Furthermore, there is no factual basis on which one can conclude that it is not in the interests of justice for the appellant to be released pending the finalisation of his appeal." [Own emphasis]

[34] Taking into account the facts above the Court is of the view that the applicant have proved exceptional circumstances and that it is in the interest of justice to release him on bail, albeit on strict conditions. The amount of bail payable will increase and further conditions will be added.

[35] In the result the following order is issued:

[35.1] the applicant's application for bail pending his appeal to the Supreme Court of Appeal is granted.

[35.2] the applicant's release on bail is subject to the following conditions:

[35.2.1]The payment of the amount of R20 000, 00 in terms of section 60(13) (a) of the Criminal Procedure Act 51 of 1977; and

[35.2.2] the applicant shall reside at his residential address at No. 91 Suiderkruis Street, Steiltes, Mbombela until the appeal procedures are finalised; and

[35.2.3] should the applicant need to leave the Province of Mpumalanga, the written permission of the Investigating Officer must be obtained prior to leaving the Province, which written permission must contain the applicant's temporary address at his destination as well as the period of such absence, which absence may not include such day/s on which the applicant must report to the police station; and

[35.2.4] the applicant will only be allowed to change his residential addresses in exceptional circumstances, with the prior approval of the investigating officer. Such request from the applicant shall be in writing and the investigating officer's reply thereto shall also be in writing and must be retained in the case-docket, and

[35.2.5] The applicant shall prosecute his appeal in the manner and within the time periods as prescribed by the rules of court failing which his bail shall be cancelled forthwith, and

[35.2.6] the applicant shall report to the Mbombela Police Station between the hours of 06h00 and 18h00 on and Friday of each week' and

[35.2.7] The applicant shall notify the Registrar of this Court in writing, of any change of his residential address three days prior to any such change, and

[35.2.8] the applicant shall hand his passport/s and any other travel documents to the Investigating Officer and is prohibited from applying for any passport/s, and

[35.2.9] The applicant shall report to the Mbombela Police Station within 48 hours of a written notice to that effect being served on his attorney of record, Mr COERT JORDAAN INC ATTORNEYS, Unit 2, Corner House, c/o Russel – and Nel Street, Mbombela, Mpumalanga, Tel: (013) 752 4763; e-mail: admin@jorlaw.co.za should his appeal be unsuccessful or partially unsuccessful and he has to undergo a period of imprisonment; and

[35.2.10] this order must forthwith be made available to the South African Department of Home Affairs.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE APPELLANT: MR COERT JORDAAN

INSTRUCTED BY: COERT JORDAAN ATTORNEYS INC – admin@jorlaw.co.za; leon@lvdbinc.co.za

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DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' legal representatives by email on 15 MARCH 2021. It has been released to SAFLII. The date and time for hand-down is deemed to be on 15 March 2021.

[1] In Government Notice no 1226 published in the Government Gazette No. 39601 dated 15 January 2016 and Nedbank Limited v Rossouw NO and Others (47553/2016) [2016] ZAGPPHC 916 (24 October 2016).

[2] S v Masoanganye and Another 2012 (1) SACR 292 (SCA) page 296.

[3] Rohde v The State (1007/2019) [2019] ZASCA 193 (18 December 2019) 2020 SACR 329 (SCA) para 23.

[4] See footnote 1 above as well as the judgment quoted therein.

- [5] 1999
- (2) SACR 51 (CC).
- [6] 1998
- (2) SACR 721 C at 724 e – h.
- [7] (162/12)
- [2012] ZASCA 79 (30 May 2012).
- [8] In S v Tshabalala 1998 (2) SACR 259 (CPD) and Rozani and others v S, Case A 52/99.
- [9] 2012
- (1) SACR 567 (SCA) para 7.
- [10] Case No. 439/2007 SCA 93 (RSA) at para 11.
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