

SOUTH AFRICA / JUDGMENT

Mathebula and Another v S (CC40/2020)

[2024] ZAGPPHC 1351 (9 December 2024)

[2024] ZAGPPHC 1351**COURT**

North Gauteng High Court, Pretoria

BEFORE

Mosopa

CASE / FILE NUMBER

CC40/2020

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****Case number: CC40/2020****(1)****REPORTABLE: YES/NO****(2)****OF INTEREST TO OTHER JUDGES: YES/NO****(3)****REVISED: YES/NO****SIGNATURE:****DATE: 09/12/2024****In**

the matter between: MUZUKHONA
 MATHEBULA
 1ST APPLICANT
 NJABULO
 NCANANA
 2ND APPLICANT
 And
 STATE
 RESPONDENT

JUDGMENT

MOSOPA, J

1. This is a bail application brought when the trial of the bail applicants had already commenced in this court on the 11 April 2022, sitting in the Palm Ridge Court. The applicants are in total arraigned on ten counts, the first applicant on all counts and the second applicant on 6 counts. The first applicant, Muzukhona Mathebula, is arraigned as accused number 3 in the trial matter, whereas second applicant, Njabulo Ncanana, is arraigned as accused number 8.
2. Applicants are arraigned on charges that relates to robbery with aggravating circumstances, read with the provisions of section 51(2) of Act 105 of 1997, possession of unlicensed firearms, murder, attempted murder, malicious injury to property read with the provisions of section 51(2) of Act 105 of 1997. All the applicants pleaded not guilty to all the charges they are arraigned with, emanating from three different crime scenes.
3. At the commencement of the trial proceedings, it came to my attention that despite the fact that the first applicant was requisitioned for appearance, he was not brought to court for the bail hearing. It was agreed between the parties that the bail hearing can proceed in his absence, as he has deposed to an affidavit and considering the fact that he is legally represented. I must also pause to mention that when the applicant filed their bail papers in 2023, the matter could not be allocated a Judge immediately for reasons that are not clear to this court. It was only after the re-issuing of the bail application in 2024 that this court was allocated the matter for the hearing. The second applicant, for the purpose of these proceedings used the affidavit he filed in the 2023 bail application.
4. The first applicant in his affidavit in support of bail application, averred that:
 - 4.1. That he is currently aged 33 years, and his identification number is 9[...] and born on the 07 March 1991;
 - 4.2. He left school in grade 11, because of the financial difficulties his family endured;
 - 4.3. He is not married, but has two minor children, a boy aged 9 years old and a girl aged 7 years old and both are currently residing with their respective mothers;

4.4. He is currently residing at stand number 9[...], Extension 7b, Orange Farm, Vereeniging, which is his parental place. He has been residing at that address since 1994. The address is confirmed by the Investigating Officer as positive;

4.5. He is not permanently employed but survives on temporary work earning an amount of R1000,00 per fortnight;

4.6. He was arrested by the police on the 27 September 2018 and charged with offences as indicated in the indictment and has been in custody since that time;

4.7. He has no previous convictions and has no pending cases against him; he does not have relatives outside the Republic of South Africa and does not have any traveling documents; and

4.8. He is currently in custody awaiting the finalisation of the trial matter and he has not personally or contributed to the delay in the finalisation of his trial matter.

5. The second applicant also deposed to an affidavit and averred as follows:

5.1. That he is 30 years old and married with three children who are three, four and eight years old. He is currently residing with his wife;

5.2. He is self-employed in the business of manufacturing bricks and selling them, his income was approximately R6000,00 per month;

5.3. If granted bail, he is going to reside at his brother's address, which is 5[...] Extension 8, Ndabane. The address has been confirmed by the Investigating Officer as positive and in addition to that his brother provided the Investigating Officer with his contact numbers;

5.4. He does not have traveling documents, neither does he have businesses nor families outside the borders of the Republic of South Africa;

5.5. He has one previous conviction of possession of firearm without licence and was sentenced to a period of five years imprisonment in

2016. He has since finished serving such sentence;

5.6. He does not have any pending cases and no outstanding warrants;

5.7. He was arrested on the 22 May 2019 at his home and charged with murder, attempted murder and robbery with aggravating circumstances;

5.8. He pleaded not guilty in his trial matter and raised a defence of alibi. The state has already led evidence of two witnesses and none of the witnesses implicated him, including the video footage which was admitted into evidence;

5.9. The trial matter is unnecessarily being delayed by his co-accused as most of them are serving imprisonment terms. The trial has been postponed on several occasions at their request; and

5.10. State witnesses are unknown to him and as such cannot interfere or communicate with them.

6. I must also pause here, to state that the second applicant for the purpose of this bail hearing, filed an affidavit which he deposed to in 2023 as already mentioned elsewhere in this judgment. Since that, further witnesses have testified and one of those witnesses implicated him in the commission of the offences. The information was presented by Mr Kgagara from the bar, representing the second applicant and he is also representing the applicant in his trial matter.
7. The state led the evidence of Sergeant Sthembile Sithole, the Investigating Officer in the matter based at the Provincial Head Office, attached to the murder and robbery unit, based at Wynburg. She testified that she does not have the problem with the bail applicants being granted bail, but the problem is that they have been in custody for very long time, and they now want to apply for bail when the case is almost nearing its end.
8. The first applicant, Mr Mathebula has many cases, he is involved in robbery committed at Rathanda Shoprite on the 12 July 2018. In the robbery matter, even though he was not arrested immediately after its commission, he appears in the video footage depicting the crime scene. He was also identified as one of the robbers in the identification parade which was held after his arrest. It appears that he was part of the same syndicate which was robbing Shoprite.
9. He was also involved in the robbery committed at Rathanda Shoprite on 20 July 2018 and in that robbery, a Shoprite security officer was shot and killed, there was also an attempt to kill a police officer after he was shot. The first applicant appears in the video footage depicting the crime scene. He was also positively identified as one of the robbers at the identification parade.
10. The third robbery that he is involved in is the robbery committed at Usave, Heidelberg on the 27 September 2018. The third crime scene is not far from Rathanda and the two places are separated by a town and estimated distance between the two places being a kilometre. The distance between the two places is within a walking distance. He appears on the video footage and he was also identified at the identification parade.
11. Immediately after the robbery was committed, employees of Usave alerted the police officers who were doing patrol duties of such an incident, and they chased the robbers. The applicant was arrested after scaling over the wall of the Correctional Centre and was arrested by the police with the assistance of the prison warders. The applicant was found in possession of an unlicensed firearm and a plastic bag with money allegedly robbed at Usave. Since his arrest, no other robberies were committed in that area.
12. Second Applicant has a previous conviction of two counts of possession of unlicensed firearms and two counts of possession of

unlicensed ammunition and sentenced on 07 March 2017. He was released on parole at the time of the commission of the robbery of 20 July 2018, which also involved the murder of a security officer. One of the suspects was shot and killed who was driving a Tazz motor vehicle which was involved in the commission of the offences and the driver was found naked inside that vehicle.

13. Investigations also revealed that the driver who died was also the owner of that vehicle, Mkhize. The applicant is also visible in the video footage, and there is one witness who is yet to testify and is going to identify the applicant on that video footage. Also, there is a witness who made a statement about the clothes that the applicant was wearing and such clothes are visible on the video footage. There is one suspect who was turned into a section 204 witness after his arrest, Bheki Nxumalo who has since been killed. Both applicants were already arrested and in custody when Nxumalo was killed.
14. The applicant was taken to an identification parade, but he refused to participate in that parade and did not provide reasons for such refusal.
15. In cross-examination on behalf of the first applicant, it was put to her that the fact that she does not have a problem with applicant being admitted to bail and that she positively identified his address, as such she will not have a problem in locating the applicant should he default on his bail conditions. She was further asked about the alleged money that was found in possession of the applicant on his arrest and whether or not was it registered in the SAP13, in her response she said that she does not know what happened to that money, but was informed that the police officers who arrested the applicant returned the money to Shoprite.
16. On behalf of the second applicant, it was put to her that he was only taken to the identification parade two years after his arrest and it was after he had already made several court appearances, wherein there is a likelihood that the state witnesses were in attendance. In her response, she testified that the applicant did not inform the officer in charge of the identification parade of his reasons for refusal to participate in that identification parade. She also denied that the applicant is not visible in the video footage.
17. It is agreed between the parties that this bail application resorts under Schedule 6, which makes the provision of section 60(11)(a) of Act 51 of 1977 to be applicable which provides as follows:

“[11] Notwithstanding any provisions of this Act, where an accused is charged with an offence –

- (a) 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 permits his or her release.”

18. Adducing of evidence intended in this subsection is not only restricted to oral evidence but also to affidavits (see *S v Sibuyi* A115/2020 (4 June 2020) ZAGPPHC 217 at para 20). The party who is called upon to adduce evidence in terms of the normal “relaxed rules of evidence” permitted to do that by is means of presenting affidavits, which have been traditionally applied in bail applications (*S v Hartsliet* 2002 (1) SACR 7 (T)).
19. The concept “exceptional circumstances” to which the subsection makes a requirement for the bail applicant to adduce to the satisfaction of the court before his release on bail, is not statutorily defined. In *Mooi v S* [2012] ZASCA 19 (unreported, SCA case no 161/12) (30 May 2012), the court when dealing with the concept, stated that , “the delay in concluding its case, the lack of explanation for the delay and the absence of evidence of the alleged strong case, undermines the assertion by the State and the finding by the magistrate that there is such a substantial case against the appellant that it would serve as motivation for him not to stand his trial were he to be released on bail....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.”
20. Also what need to be considered before the bail applicant is released on bail jurisdictional factors listed in section 60(4)(a)-(e) of Act 51 of 1977, which provides:

“[4] The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

 - (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 [Para. (a) substituted by s. 4 (c) of Act 85 of 1997.]
 - (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;
 - (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. In *S v Diale and Another* 2013 (2) SACR 85 (GNP) at para 14 when dealing with grounds under section 60(4), Kubushi J, stated:

“[14] A court cannot find that the refusal of bail is in the interest of justice merely because there is a risk or possibility that one or more of the consequences mentioned in s 60(4) will result. The court must not grope in the dark and speculate; a finding on the probabilities must be made. Unless it can be found that one or more of the consequences will probably occur, detention of the accused is not in the interest of justice, and the accused should be released.”

22. Despite the state opposing the release of the bail applicants on bail, it was not clear from the evidence of the Investigating Officer whether or not she is opposing bail. At one stage she did not have a problem with the applicants being granted bail but later changed her version and testified that the applicants are dangerous and the witnesses are afraid of the applicants. Section 60(10) of Act 51 of 1977 provides as follows:

“[10] 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 interests of the accused against the interests of justice.; Provided that the interests of justice should be interpreted to include, but not limited to the safety of any person against whom the offence in question has allegedly been committed.”

23. The court hearing a bail application is enjoined by the above subsection to weigh up the personal interests of the bail applicant

against the interest of justice even if the prosecution does not oppose the granting of bail (*S v Gade* [2007] 3 ALL SA 43 (NC)). The Investigating Officer struck me as a person who does not take her duties serious or lacks interest in the matter and failing to protect the interests of the people that she must protect, which are state witnesses. She came to court ill-prepared and could not answer some of the questions asked, despite having inherited the docket in 2018 after the commission of the offences the bail applicants are charged with.

24. The conundrum faced by this court is why the Investigating Officer is of the view that the applicant be permitted to bail whereas the prosecution is opposing bail. No convincing reasons were provided by the Investigating Officer as to why the applicants should be permitted to bail. In *S v Green and Another* [2006] ZASCA 3; 2006

- (1) SACR 603 (SCA) Farlam J stated that;

“It is clear from s 60(10) that the court's function in a bail application is intended to be more proactive than in normal criminal proceedings. As it was put in the Dlamini decision (at para [11]), 'a bail hearing is a unique judicial function' and 'the inquisitorial powers of the presiding officer are greater'. On a proper consideration of the case on which the State relied, any reasonable court must have concluded that it lacked reliable and important information necessary to reach a decision, notwithstanding that such information was apparently readily available.”

25. However, it is my considered view that the conduct of the Investigating Officer in casu did not necessitate the court to invoke the provisions of section 60(3) to request further information. Neither the parties did make a request for the court to invoke the provisions of section 60 (3).

26. Section 60(11)(a) burdens the bail applicant with onus to prove the existence of exceptional circumstances in his or her case. The fact that a bail applicant bears the onus in terms of section 60(11) does not mean that the state can remain passive by not adducing evidence, or sufficient rebutting evidence in the hope that the bail applicant might not discharge the onus (see *S v Branco* 2002 (1) SACR 531 (W)). The standard of proof is a balance of probability. (*S v Tshabalala* 1998 (2) SACR 259 (C)).
27. Both bail applicants contends that the state case is weak against them, this contention cannot be correct in the light of the following uncontested evidence;
- 27.1. The first applicant was arrested immediately after the commission of the robbery by the police who were doing the patrol duties after being alerted of his presence by the employees. When the applicant was arrested, he was running away because he scaled over a wall of the Correctional Centre and was found in possession of a firearm;
- 27.2. He is visible in all video footages where the robberies were committed and also positively identified by the witnesses at the identification parade;
- 27.3. The witnesses are afraid of him together with his co-accused;
- 27.4. The second applicant was arrested on the 22 May 2019 through the involvement of the informers in the KwaZulu-Natal province, months after the commission of the offences;
- 27.5. One of the witnesses gave a description of the clothes that he was wearing to the police in his statement and the person matching the description of clothes provided is visible on the video footage depicting the crime scene;
- 27.6. There is a police officer who is yet to testify and he is going to point out the applicant on the video footage, because of his prior knowledge of the applicant; and
- 27.7. There is a witness who had already implicated him in the commission of the offences in the trial matter.
28. Second applicant undermines the criminal justice system, as at the time of the commission of the offences he was released on parole for the sentence which was imposed on him in 2017. Chances of him committing Schedule 1 offences if released on bail are high, having regard to his conduct after he was released from prison on parole. This will also have the effect of undermining the bail system if he is permitted to bail.
29. Further conduct of undermining the justice system by the second applicant was displayed when he refused to participate in the identification parade. He did not give proper reasons for his refusal to the officer in charge of the parade, but this version is only put now when the applicant is applying for a bail as to why he refused to participate in the identification parade. Section 35(3) of the Constitution enshrines the applicant's rights which includes pre-trial proceedings; however, such rights are not absolute but subject to limitation clause in terms of section 36 of the constitution.

30. It is not clear whether or not the applicant was legally represented at the identification parade, but those are the reasons that he could have provided to the officer in charge of the parade.
31. Both the applicants are implicated already by the state witnesses in the commission of the offences in their trial matters. The video footage which is admitted in evidence implicates the first applicant and a witness is going to implicate the second applicant through that video footage. The sentences that can be imposed in the event of conviction ranges from 15 years imprisonment to life imprisonment. This can serve as an incentive for the applicants not to attend their trial matters if released on bail.
32. The first applicant's address was verified by the Investigating Officer and according to the applicant it is his parental place. When the Investigating Officer visited the address, she met with the sister of the applicant who confirmed that he is a resident in that address. The problem the Investigating Officer has is that the address is in the informal settlement and the RDP house he is staying in is very small. An inference can be drawn that given the location of the address, she will have difficulties in tracing the applicant if he defaults on his bail conditions.
33. The second applicant's address is in the KwaZulu-Natal province, but avers that if released on bail he is going to reside in the address of his brother. Such address was positively verified by the Investigating Officer in the Gauteng province,

however, taking into consideration the time that the police used to arrest him and the involvement of informers in his arrest, it shows that if he defaults it cannot be easy for the police to trace him.

34. In the circumstances and having regard to the above, keeping the applicants in custody pending their trial matters, cannot be

construed as a form of anticipatory punishment. The delay in the finalisation of their trial matters is not at the instance of the state, but the applicant's co-accused. Instead, the applicants have a remedy under such circumstances to invoke the provisions of section 342A. The interests of justice do not permit the release of the applicants on bail because of the existence of the grounds listed in section 60(4)(a)-(e). I also find that the applicants failed to adduce evidence that satisfies this court that there is existence of exceptional circumstances in their cases. This bail application ought to fail.

ORDER

35. In the result, the following order is made:

1. Bail application of the first and second applicants is hereby refused.

M.J. MOSOPA

JUDGE OF HIGH COURT,

PRETORIA

APPEARANCES:

FOR THE FIRST APPLICANT : ADVOCATE BOSIKI

INSTRUCTED BY

: LEGAL AID SOUTH AFRICA

FOR THE SECOND APPLICANT : ADVOCATE KGAGARA

INSTRUCTED BY

: LEGAL AID SOUTH AFRICA

FOR THE RESPONDENT : ADVOCATE MORE

Date of hearing : 03 December 2024

Date of Judgment : 09 December 2024

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