

SOUTH AFRICA / JUDGMENT

Moiloa and Others v S (A139/11)

[2011] ZAFSHC 115 (7 July 2011)

[2011] ZAFSHC 115**COURT**

Free State High Court, Bloemfontein

BEFORE

Van Zyl

CASE / FILE NUMBER

A139/11

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case number : A139/11

In matter between:-

N.I. MOILOAFirst Appellant

M.L. NTAJESecond Appellant

M. MAQANEThird Appellant

O.E. MPHIRIMEFourth Appellant

T.S. MOEKETSIFifth Appellant

J.M. SKOSANASixth Appellant

M.I. FINGERSeventh Appellant

K. MUNSAMYEighth Appellant

and

THE STATERespondent

CORAM: VAN ZYL, J

HEARD ON: 19 MAY 2011

DELIVERED ON: 20 MAY 2011; 7 JULY 2011

This is a judgment in an urgent bail appeal against the refusal to grant bail to the appellants by the Regional Court, Ficksburg, on 29 April 2011 in case number SH16/2001.

This matter served before me during the afternoon of 19 May 2011. Because of the inherently urgent nature of a bail appeal, I deemed it necessary to give an order in the matter as soon as was practically possible. I therefore made the following order on 20 May 2011 and indicated that I will provide the reasons for my order in due course:

“1. Appellante se appèl teen die Hof a quo se weiering om aan appellante borg te verleen, slaag, en die gemelde bevel word tersyde gestel.

2. Borg word aan appellante verleen op die volgende voorwaardes:

2.1 Borggeld ten bedrae van R1 000.00 is deur elke appellant betaalbaar.

2.2 Sodanige appellante as wat in besit is van ’n paspoort, moet dit onverwyld aan die ondersoekbeampte oorhandig.

2.3 Geen appellant mag die landdroshofdistrik van Bloemfontein verlaat sonder die voorafverkreeë toestemming van die ondersoekbeampte nie.

2.4 Geen appellant mag die landdroshofdistrik van Ficksburg besoek anders as vir doeleindes van die bywoning van verdere hofverrigtinge in die hangende saak teen hulle onder saaknommer SH16/11 nie.”

Consequently this judgment contains the reasons for the said order.

Background and the findings of the Court a quo:

All the appellants are employed by the South African Police Service and they are all attached to the Public Order Policing Unit in Bloemfontein. On 13 April 2011 there was a protest march by members of the community of the Meqheleng area of Ficksburg in relation to their dissatisfaction regarding the lack of service delivery by the various municipality agencies. The appellants were part of a group of police officers who were at the time deployed in the Ficksburg area in their official capacity to oversee the protest march. At a certain stage the protest march became unruly and violent, during which events the members of the Public Order Policing Unit, including the appellants, then intervened and during their actions mr. Andries Tatane was fatally injured. It is as a result of this incident that the appellants were arrested.

The eight appellants are accused numbers 1 to 8 in the said pending case against them in the Court a quo. It should however be noted that in the Court a quo second appellant is accused number 3, whilst third appellant is accused number 2. Likewise, seventh appellant is accused number 8 in the Court a quo and eighth appellant is accused number 7. The necessity to point this out is because it is evident from the charge sheet, p. 28 of the record, that only accused numbers 1 and 2, hence first and third appellants, are charged with murder. The other appellants are seemingly only charged with assault with the intent to do grievous bodily harm. Mr. Nel, on behalf of the appellants, pointed this out at the outset of his oral argument before me and mr.

Chalale, on behalf of the State, did not indicate nor argue anything to the contrary. Contrary to the aforesaid, the learned Magistrate recorded the following in his judgment at p. 124, line 23 to p. 125, line 2 of the record:

“At the outset of this bail application I was informed by mr. Mahloko that the State and the Defence is ad idem that the offence relevant here is a so-called Schedule 5 offence.” [sic]

This is clearly wrong, because although the charge of murder is indeed a Schedule 5 offence, the charge of assault with the intention to do grievous bodily harm is not. This had the result that the Court a quo wrongly applied the statutory prescripts in the Criminal Procedure Act, 51 van 1977 (hereinafter referred to as “the Act”)

applicable to Schedule 5 offences to second appellant and fourth to eighth appellants. (I deem it necessary to record that mr. Nel did not represent the appellants in the Court a quo.)

Section 35(1)(f) of the Constitution of the Republic of South Africa, 1996 determines as follows:

“Everyone who is arrested for allegedly committing an offence has the right ... to be released from detention if the interests of justice permit, subject to reasonable conditions.”

Section 60(1)(a) of the Act provides the following in this regard:

“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.”

The Court a quo correctly pointed out that in order to determine under what circumstances it will not be in the interests of justice to release an accused person from detention, the stipulations of Section 60(4)(a) to (e) of the Act should be considered, which read as follows:

“(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
- (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.”

[7] In his consideration of Section 60(4)(a) to (e), the Magistrate found in his judgment, in my view correctly so, that right from the beginning of the bail application

“it became abundantly clear that:

“(1) there is absolutely no likelihood that if released on bail any of the accused will endanger the safety of the public or commit any other offence;

(2) that there is no likelihood that if released on bail any of the accused will attempt to evade his trial;

(3) there is no likelihood that if released on bail any of the accused will influence or intimidate any witness or conceal or destroy evidence; and

(4) there is no likelihood that if released on bail any of the accused will undermine or jeopardise the objectives or proper functioning of the criminal justice system.”

These findings of the learned Magistrate stand unchallenged and based on the evidence before me, I also confirm the correctness of these findings by the Court a quo. It is therefore not necessary to deal with Sections 60(5), (6), (7) and

(8) of the Act.

The learned Magistrate then continued by dealing with the only remaining ground on which it could have been found that it will not be in the interests of justice to release the appellants on bail, being the ground referred to in Section 60(4)(e), which I again quote for the sake of convenience:

“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.”

In his consideration of the aforesaid ground, the learned Magistrate referred, correctly so, to Section 60(8A) of the Act, which determines as follows:

“(8A) In considering whether the ground in subsection (4)(e) has been established, the court may, where applicable, take into account the following factors, namely –

(a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;

(b) whether the shock or outrage of the community might lead to public disorder if the accused is released;

(c) whether the safety of the accused might be jeopardized by his or her release;

- (d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;
- (e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or
- (f) any other factor which in the opinion of the court should be taken into account.”

In my view it is clear from the aforesaid statutory provisions that with regard to second appellant and fourth to eighth appellants, the State had a practical burden or onus to adduce evidence or information to establish the existence of the circumstances in Section 60(4)(e) and furthermore the likelihood of it happening. See *S vs TSHABALALA* 1998(2) SACR 259 (CPD) at 269 D to F. Such a finding needs to be made on the probabilities. Unless it can be found that the consequences, or one of the consequences, stipulated in Section 60(4)(e) will probably occur, detention of the said appellants is not in the interests of justice and the said appellants should then be released on bail.

When dealing with the application of first and third appellants, being the appellants who are being charged with murder, the position is however different. With regard to them, the provisions of Section 60(11)(b) of the Act are applicable, which read as follows:

“(11) Notwithstanding any provisions of this Act, where an accused is charged with an offence referred to –

- (a) ...
- (b) in Schedule 5, but not 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 the interests of justice permit his or her release.”

From the aforesaid it is clear that Section 60(11) in fact imposes an onus of proof on first and third appellants of satisfying the court on a preponderance of probabilities that the interests of justice permit the granting of bail. See *S vs TSHABALALA*, supra, at 269 G to 270 A. (I deem it necessary to record that I am well aware that the last-mentioned judgment was given at a date before the latest amendments of Section 60 of the Act. However, the stated principles regarding onus were, in my view, not affected by the amendments to Section 60 of the Act which were effected after the delivery of the said judgment.)

The learned Magistrate failed to make the aforesaid differentiation between the legal position of second appellant and fourth to eighth appellants from that of first and third appellants. In this regard the following was recorded in his judgment at p. 132, line 13 to 16 of the record:

“It is with these facts in the back of my mind that I have to decide whether appellants managed to succeed to satisfy me, the Court, that it is in the interests of justice to release them on bail.”

He therefore approached the bail application on the basis that all the appellants had the burden or onus to satisfy the court that it is in the interests of justice to release them on bail, which is clearly wrong.

The learned Magistrate then stated that he is “acutely aware that a Court of law should be extremely cautious to rely solely on Section 60(4)(e) and 60(8)(A) of the Criminal Procedure Act to refuse bail”. He also referred to the judgment in *S vs DLAMINI; S vs DLADLA AND OTHERS; S vs JOUBERT; S vs SCHIETEKAT* 1999(2) SACR 51 (CC) and recorded “what is important to bear in mind is that the Constitutional Court also said that section 4(e) was only to come into play in exceptional

circumstances and the finding to this effect had to be established on a preponderance of probabilities”. The learned Magistrate then posed the following in his judgment at

p. 134, lines 3 to 8 of the record:

“The question is: can I therefore find that the circumstances surrounding the death of Andries Tatane, the way in which he was killed, the outrage in the broader community and the threats of violence constitute such exceptional circumstances as envisaged in S v Dlamini in the Constitutional Court.”

The learned Magistrate eventually came to the following conclusions and finding (hereinafter referred to as the “final conclusions and finding”) in his judgment, reflected at p. 135, line 23 to p. 136, line 19 of the record:

“After having considered the totality of the evidence, the relevant legislation and the case law I have reached the following conclusion:

- (1) That this is indeed a case where exceptional circumstances as envisaged by Section 60(4)(e) of the Criminal Procedure Act is a reality.
- (2) That there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security, especially in the light of the standing of Mr. Tatane within the community.
- (3) The brutality of the killing of Mr. Tatane clearly induced a sense of shock and outrage in the community.
- (4) That there is a real possibility that the sense of peace and security and members of the public will be undermined or jeopardized if the accused are released on bail.
- (5) That there is a real possibility that the release of the accused will undermine or jeopardize the public confidence in the criminal justice system.

I therefore find that at this stage it will not be in the interest of justice to release the accused on bail. Bail is therefore denied for all the accused.” [sic]

The merits of the appeal:

In considering this appeal, I am mindful of the stipulations of Section 65(4) which are applicable in an appeal with regard to bail:

“The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.”

It appears from the record, p. 85, lines 16 to 17, that the parties agreed in the Court a quo, that the State will start with the presentation of evidence. In this regard the State handed in an affidavit by one Mr. Glen Angus, dated 25 April 2011, which affidavit was accepted as Exhibit A. From the said affidavit it is evident that Mr. Angus is employed at the Independent Complaints Directorate, Kimberley, Northern Cape as the Deputy Provincial Head. At the time he deposed to the affidavit, he was appointed to assist in and lead the investigation pertaining to the incident which forms the topic of this bail application.

The State then further presented the viva voce evidence of one Mr. Makgeta Philip Seloko, who resides at Meqheleng, Ficksburg and who has been a resident of Ficksburg for about forty six years. Mr. Seloko is the deputy principal at Katlesong Secondary School. He is furthermore a member of the executive committee of Meqheleng Concerned Citizens, which he explained is a community council who serves as a link between the community of Meqheleng and the Sitoto Municipality. In the time period preceding the day of the incident, the Meqheleng Concerned Citizens, on behalf of the community of Meqheleng, had been trying to engage with the municipality over lack of services, especially basic services like poor water supply, the overflowing of sewerage and poor road conditions, but without any success. On the day of the incident members of the Meqheleng Concerned Citizens, as well as members from the community of Meqheleng, marched to the offices of Sitoto Municipality, after having applied for and given permission to march as such. He testified that they were informed regarding the rules and regulations of the march, which they understood. The march started at Meqheleng in the morning. It was a peaceful march which was monitored by members of the South African Police Services, both at the front and at the back of the marching group. Mr. Seloko then testified as follows, as it appears from the record, p. 88, line 7 to p. 89, line 8:

“We marched until we reached the municipality offices. The purpose of us marching to their offices was to get the answers pertaining to all the concerns from the community, which they never answered as yet. On that particular day the mayor was granted an opportunity to respond on those concerns which were reflected on the memorandum. As he was responding on the memorandum, Your Worship, there was a squeeze bottle as well as an apple appearing from the second floor of the municipality building which was thrown into the crowd.”

Let us not get into details of what step by step transpired. Basically you said the march itself was peaceful and now I hear you talking about some squeeze bottles throwing. My understanding is it then turned violent? ... Indeed Your Worship, it turned violent as a result of those people who dropped the squeeze bottle and the apple into the protestors and they turned violent. Then the protestors also retaliated by throwing stones at the municipality building.

Sir, will I be correct to say at the end of the day there was one person who was killed out of the whole incident of that day? ... Indeed Your Worship, one person died.

Do you know who this person is? ... Yes, Your Worship.

Yes? ... His name is Andries Meleka Tatane, Your Worship.

Was he a resident locally? ... Yes, he was a resident in Meqheleng, Your Worship.”

From his further evidence it was evident that mr. Tatane had very positive attributes as a person which he exercised in favour of his community. He was therefore considered to be a “gold coin” in the community of Meqheleng. He was not a member of the executive committee of the Meqheleng Concerned Citizens, because he was registered to be an independent councillor. However, he was an ordinary member of the Meqheleng Concerned Citizens and also an assistant in this regard. Mr. Seloko testified that he attended the funeral of the deceased.

With regard to the evidence of mr. Seloko, the learned Magistrate made the following relevant remarks and/or inferences in his judgment, p. 46, line 2 and further of the record:

“It was during this protest march that started peacefully but became violent when somebody threw objects to the crowd, or into the crowd that mr. Andries Tatane was killed by the police during their actions.

Mr. Seloko then told the court about the exceptional attributes of the late mr. Andries Tatane ... I do not find it surprising

therefore that mr. Seloko referred to him as a ‘gold coin’.

Mr. Seloko further testified and explained that the members of the community here in Ficksburg was severely shocked and outraged by the death of mr. Tatane.

Some of the community members also juveniles got out of control. Shops were looted and the library where mr. Tatane gave his lessons as well as other buildings were burned down. Roads were barricaded and there was general conflict between the community and the members of the South African Police Service.

Mr. Seloko also testified that after the arrest of the first six accused the community all indicated their opposition to bail for the accused. Songs were sung outside the court building and also in the streets.

Mr. Seloko further testified and said and those were his words ‘that he guarantees that if bail is granted the community will turn violent and be out of control’.

He further stated that the community will lose confidence in the judiciary if bail is granted, especially because of the fact that the accused are policemen.

Mr. Seloko was thoroughly cross-examined by Mr. De Beer, a very experienced criminal law attorney. The witness did concede that criminal elements within the community might exploit this situation in Ficksburg. ... Mr. Seloko never got upset during his evidence in chief or during cross-examination. He remained calm and he answered all questions posed to him.

In general mr. Seloko made a very good impression on me as a witness. He, like mr. Tatane is clearly an outstanding citizen in the community of Ficksburg.

I firmly believe that although there might be rogue elements amongst the protestors the vast majority are decent citizens who were fed up with inferior service delivery and utterly shocked by the death and more especially the way that mr. Tatane was killed on the 13th of April at the hands of, apparently on the prima facie evidence, members of the South African Police.

It is clear that at this point in the history of our country there is widespread dissatisfaction with service delivery in various communities.

It is my impression that also decent citizens many who stay in Ficksburg are extremely upset about that state of affairs. Furthermore it would only be an extremely uninformed citizen who is not aware of the current public outcry and debate about the police misconduct and brutality.”

With regard to the affidavit of mr. Angus, the learned Magistrate referred to the following parts thereof in his judgment at p. 128, line 18 and further of the record:

“Mr. Angus in his statement made it clear that there is enormous media interest in this matter, even internationally so. Furthermore that there was clearly a sense of shock about the killing of mr. Tatane within the community of Ficksburg and in his words, and I quote: ‘a disturbing loss of confidence in the SAPS’.

Mr. Angus further alluded to the protest by the community where they clearly voiced their opposition to bail for the accused in particular and towards the SAPS in general. The extent of the media interest in this matter was clear for everyone to see here at court.”

[19] In my evaluation of the affidavit of mn. Angus and the evidence presented by mr. Seloko, as well as the rest of the evidence that served before the Court a quo, I came across a number of very important issues which were either not dealt with by the learned Magistrate in his consideration of this matter or which were, in my view, wrongly dealt with. I will now deal with the most important of these:

19.1 The prosecutor in his re-examination of mr. Seloko elicited evidence from mr. Seloko to the effect that he would have presented the very same evidence in court even if he was not an acquaintance or friend of the late mr. Tatane. In my view this piece of evidence can however not change the real facts of the matter, being that it is very clear that mr. Seloko and the late mr. Tatane were friends, that they actively served in the same community, that they were both part of

the march against bad service delivery and that this very same executive committee of which mr. Seloko is the deputy chairperson, has a direct, self-serving interest in trying to maintain the support of the rest of the community. This subjective interest which mr. Seloko and his committee have or had in the outcome of the bail application, is very evident from the following passage from his evidence at p. 94, lines 9 to 14 of the record:

“If that (referring to the granting of bail to the appellants) happens as a concerned group will you be able to contain them (referring to the members of the community)? ... We definitely cannot Your Worship, since we had already seen what they are able to do when they are bending their anger. There is also a likelihood Your Worship that the community can turn against us and will choose us to be sell-outs.” (Own emphasis)

In my view the Magistrate erred in failing to realise that mr. Seloko was therefore probably biased and that his evidence was probably tainted as a result of his personal and subjective interests in the matter.

19.2 As already cited in paragraph 17 above, the learned Magistrate apparently attached severe weight to the evidence of mr. Seloko to the effect that if bail was to be granted to the appellants, the community will turn violent and be out of control. However, it is evident from the evidence of mr. Seloko as reflected in paragraph 16 above, that the community members who participated in the march had already turned violent before mr. Tatane was killed. This is also confirmed in paragraph 8 of the affidavit of mr. Angus at p. 79 of the record, where he stated the following:

“It is alleged that the protest march became unruly and stones were pelted on the municipal offices, damaging the property. It is alleged in the attempts to subdue the situation, persons were detained for public violence...”

In my view the learned Magistrate failed to take the last mentioned, very important, fact into consideration and consequently erred in apparently over-emphasising the role which the incident during which mr. Tatane was killed, played in the violent conduct of some of the members of the community.

19.3 In reaching his conclusions, the learned Magistrate made the following remark (already quoted within context in paragraph 17 above) in his judgment at p. 131, line 22 to p. 132, line 4 of the record:

“I firmly believe that although there might be rogue elements amongst the protestors the vast majority are decent citizens who were fed up with inferior service delivery and utterly shocked by the death and more especially the way that mr. Tatane was killed on the 13th of April at the hands of, apparently on the prima facie evidence, members of the South African Police.” (Own emphasis)

In paragraph 3 of the learned Magistrate’s final conclusions and finding in his judgment at p. 136, lines 9 to 10 of the record (already quoted within context in paragraph 13 above), he also stated that:

“The brutality of the killing of mr. Tatane clearly induce a sense of shock and outrage in the community.” (Own emphasis)

After a careful perusal of the whole record, I was unable to find a single piece of evidence which could have substantiated the Magistrate’s aforesaid finding about “the way that mr. Tatane was killed” and “the brutality of the killing of mr. Tatane”. No evidence whatsoever was lead as to how and in what way mr. Tatane was killed. It unfortunately seems that the learned Magistrate allowed his personal knowledge of what he probably heard and saw in the media to have influenced his thoughts and his conclusions in this regard. In addition he, in my view, also erred in referring to other incidents of alleged police misconduct and brutality that are not linked and/or related to the incident at hand. In this regard the following is reflected in his judgment at p. 129, lines 5 to 10 of the record:

“Furthermore reporting in the media was so widespread and extreme that judicial cognisance can be taken of this fact. Reference to police brutality and misconduct by the police are made in the media during the last four days, or last few days. It is not surprising therefore that emotions are running extremely high.”

In any event, the learned Magistrate’s reference to alleged police misconduct is totally misplaced, because a bail application is and should not be concerned with the question of guilt. In *S vs DLAMINI*; *S vs DLADLA AND OTHERS*; *S vs JOUBERT*; *S vs SCHIETEKAT*, supra, the following dictum in this regard is stated at 63 G to the judgment:

“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.”

From his judgment as a whole, it is evident that the learned Magistrate greatly emphasised the service delivery issue, to the extent that he actually referred to the “widespread dissatisfaction with service delivery in various communities” (at p.132, lines 6 to 7 of the record, and already quoted within context in paragraph 17 above), the occurrence of which is obviously irrelevant for purposes of the adjudication of this matter, moreover so with regard to any such problems in other communities. In my view he failed to distinguish between violent conduct that had erupted or will again erupt as a result of the poor service delivery issue from the actual question at hand, being the likelihood of the community turning violent as a result of the appellants being released on bail.

As previously pointed out herein, mr. Angus in his affidavit (which, it should be remembered, was presented as evidence on behalf of the State) noted the following in paragraph 8 thereof regarding the surrounding circumstances that lead to the unfortunate death of mr. Tatane:

“It is alleged that the protest march became unruly and stones were pelted on the municipal offices, damaging the property. It is alleged in the attempts to subdue the situation, persons were detained for public violence and the deceased was also in the process of being detained when he resisted, resulting in a scuffle and the subsequent death of the deceased.”

It is consequently clear that on the State’s own version, mr. Tatane was not only just part of the protestors, but he allegedly participated in the acts of public violence and when he was in the process of being detained, he resisted, resulting in a “scuffle” and his subsequent unfortunate death. Nowhere from the judgment of the learned Magistrate does it appear that he took these very important facts into consideration in reaching his conclusion. In this regard the Magistrate also overlooked and/or ignored similar allegations which were made by all of the appellants in paragraph 12 of their respective affidavits, which more or less all read similar. I quote paragraph 12 from the affidavit of third appellant, which reads as follows:

“I will plead not guilty. I will deny that I am guilty of murder. I was deployed in a riotous situation. The deceased was violent and he attacked inter alia one of my colleagues. The SAPS members’ involvement was aimed at protecting my colleagues and to effect an arrest. I deny any allegation of murder. At all relevant times my actions were lawful.”

Instead of taking the aforesaid very relevant circumstances into consideration, the learned Magistrate did the contrary by referring to the judgment in S vs MISELO 2002(1) SACR 649 (CPD), with regard to which he gave the following (correct) summary of the relevant facts of that matter in his judgment at p. 134, line 16 to p. 135, line 1 of the record:

“In the case of S vs Miselo the accused was charged with attempted murder against the backdrop of serious taxi violence or taxi wars in the Cape Town area. Based mainly as I understand this decision on the prevailing taxi violence at the time the court in Miselo found that exceptional circumstances for applying Section 60(4)(e) do exist that the release on bail would disturb the public order or undermine the public peace or security and that the circumstances under which the offence took place is likely to induce a sense of shock or outrage in the community where the offence was committed.”

The Magistrate then went further and quoted the following particular paragraph from the judgment:

“Right minded people were aghast in my view, at what took place in the Western Cape and how callous the perpetrators were to achieve their unlawful goal.”

The learned Magistrate therefore clearly used this judgment in support of his final conclusions and finding. The background circumstances of that case were however vastly different to the circumstances in the current instance. Some of the relevant background circumstances were summarised as follows at 650 G to I of the judgment:

“[3] Last year the Western Cape was shaken with the ‘war’ which raged between the taxis and the Golden Arrow bus drivers.

- [4] Innocent people were killed or maimed, property was damaged and the whole of the Western Cape was in an uproar.
- [5] Predominantly people from lower social- economic groups were affected – these were, in the main, innocent people attempting to use a transport system so that they could get to and back from work so as to earn a living. It has been suggested that taxi owners waged this ‘war’ so as to deter people from using such bus service and compel them rather to use a taxi service.”

In the current instance, contrary to the situation in the aforesaid judgment (although I should definitely not be understood to make any finding regarding the merits of any conduct which lead to the unfortunate death of mr. Tatane), the protestors who became violent were the ones acting unlawful at the time and the members of the police service, which included the appellants, were actually the ones who were deployed in order to bring the unruly situation and unlawful conduct of the protestors under control.

The learned Magistrate apparently failed to take the last mentioned very relevant circumstances into consideration and failed to distinguish the facts in the Miselo- judgment from those in the current instance. In so far as the Magistrate’s conclusion that the killing of mr. Tatane induced a sense of shock and outrage in the community was based on the Miselo-judgment, this finding is in fact unsubstantiated. The events in the current matter are a far cry from the events that occurred in S vs MISELO.

19.6 It is common cause that all the appellants are resident in Bloemfontein and not in the Ficksburg area. They are attached to the Public Order Policing Unit in Bloemfontein and the only reason why they were in Ficksburg at the time, is because they were deployed there on official duty. These very important common cause facts were never mentioned or considered in the judgment of the learned Magistrate. In this regard the following evidence appears from the cross-examination of mr. Seloko, at p. 105, line 1 to 5 of the record:

“Sir the community quite simply does not want to see these eight policemen be employed here in Ficksburg again, correct? ... Indeed, Your Worship.

If they don’t sit foot here again you will be happy? ... Yes, Your Worship.”

The Magistrate completely failed to take into consideration that if and when the appellants were to be released on bail, they would not be finding themselves within the Ficksburg area and they will therefore be removed from the Ficksburg community.

In S vs DLAMINI; S vs DLADLA AND OTHERS; S vs JOUBERT; S vs SCHIETEKAT, supra, the learned Judge, in his discussion of Section 60(4)(e) and 60(8A) of the Act, made the following remarks at 80 F to 81 A:

“The ugly fact remains, however, that public peace and security are at times endangered by the release of persons charged with offences that incite public outrage. ... Experience has shown that organised community violence, be it instigated by quasi-political motives or by territorial battles for control of

communities for commercial purposes, does subside while ringleaders are in custody. Their arrest and detention on serious charges does instil confidence in the criminal justice system and does tend to settle disquiet, whether the arrestees are war-lords or drug- lords. ...ss 60(4)(e) and (8A) ... (are) reasonable and justifiable in the prevailing climate in our country.” (Own emphasis)

Although I am in respectful agreement with the aforesaid case law, the prevailing facts in the current matter are again distinguishable from those underlying the aforesaid stated principles. In the current instance, the appellants are in fact the “outsiders” who do not form part of the community nor of the community violence that erupted as a result of poor service delivery.

The Magistrate consequently furthermore erred in this regard by not considering that appropriate bail conditions can prevent contact between the appellants and the community members of Ficksburg. In this regard mr. Angus also stated in paragraph 7 of his affidavit at p. 79 of the record, as follows:

“Further the investigation team is of the view that the safety of the accused is not a risk, provided that they are not deployed on official duty or remain in the Ficksburg area in their personal capacity. They are not resident in the area and there is therefore no reason, other than to attend to the court proceedings that would require them to be in the Ficksburg area. Due to the fact that the accused were on duty at the time of the alleged offences, they can and should be provided with the required protection to attend court, if they feel that this is in their best interests, yet the ICD does not wish to elaborate on this as SAPS management will need to consider this in consultation with the accused.”

It never was the case of the State, nor was any evidence presented in this regard, that when the appellants do have to attend the pending court case in Ficksburg, the police services will not be able to control the members of the community and/or manage any possible outbreak of violence.

[20] Because of the (prima facie) conclusion the learned Magistrate reached in his judgment to the effect that it will not be in the interests of justice to release the appellants on bail, he then referred to the duty on a court to consider the provisions of Section 60(9)(a) to (g) of the Act. He continued by stating that in doing so, he will endeavour to weigh the interests of justice against the right of the appellants to be released and the likely prejudice they might suffer while detained in custody. The learned Magistrate then considered two factors, being:

The fact that two of the appellants suffer from diabetes, but he came to the conclusion that it is evident from the affidavit of mr. Angus that the said appellants were detained at Bainsvlei Police Station where their medical condition can be catered and cared for.

20.2 The fact that the appellants were recently arrested and that the investigation is receiving high priority and should be completed within a month or so.

[21] The said Section 60(9) of the Act reads as follows:

“(9) In considering the question in subsection(4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely –

- (a) the period for which the accused has already been in custody since his or her arrest;
- (b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
- (c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
- (d) any financial loss which the accused may suffer owing to his or her detention;
- (e) any impediment to the preparation of the accused’s defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
- (f) the state of health of the accused; or
- (g) any other factor which in the opinion of the court should be taken into account.”

[22] The interaction between Section 60(4) and Section 60(9) of the Act were explained by Edeling J in *PROKUREUR-GENERAAL, VRYSTAAT vs RAMOKHOSI* 1997(1) SACR 127 (O) at 155 D – H:

“Selfs waar bevind word dat een of meer van die voorgeskrewe gronde of enige ander soortgelyke grond wat aanhouding in belang van geregtigheid regverdig, as ’n waarskynlikheid bestaan, dan is dit slegs ’n voorlopige grond of gronde ter regverdiging van weiering van die borgaanzoek. Subartikel 60(9) skryf in soveel woorde voor dat die ‘aangeleentheid’ d.w.s. die vraag of dit finaal bevind kan word dat dit in belang van geregtigheid is dat borgtog nie toegestaan word nie, beslis moet word ‘deur die belang van geregtigheid op te weeg teen die beskuldigde se reg op sy of haar persoonlike vryheid ...’.

Die bepalings van subart 60(9) is in ’n mate verwarrend, maar meen ek dat dit sinvol is indien die woorde ‘prima facie’ ingelees word in die inleidende sin van subart 60(4) tussen die woorde ‘in bewaring is’ en ‘in die belang van geregtigheid’ waar dit daarin voorkom. Die sin sal dan as volg lees:

‘(4) Die weiering om borgtog toe te staan en die aanhouding van ’n beskuldigde in bewaring is prima facie in die belang van geregtigheid waar een of meer van die volgende gronde vasgestel word:’

Waar sodanige prima facie situasie wel ontstaan weens vasstelling van die voorgeskrewe vereistes, moet dit dan opgeweeg word teen die beskuldigde se reg op sy of haar persoonlike vryheid soos voorgeskryf en bedoel in subart 60(9) alvorens ’n finale bevinding gemaak kan word.”

- [23] In paragraph 57 of the judgment in *S vs DLAMINI; S vs DLADLA AND OTHERS; S vs JOUBERT; S vs SCHIETEKAT*, supra, the following was stated by the learned Judge regarding the extremely limited field of application for Sections 60(4)(e) and 60(8A) of the Act:

“It is important to note that ss (4)(e) expressly postulates that it is to come into play only ‘in exceptional circumstances’. This is a clear pointer that this unusual category of factors is to be taken into account only in those rare cases where it is really justified. What is more, ss (4)(e) also expressly stipulates that a finding of such exceptional circumstances has to be established on a preponderance of probabilities (‘likelihood’). Lastly, once the existence of such circumstances has been established, para

- (e) must still be weighed against the considerations enumerated in ss
- (9) before a decision to refuse bail can be taken. Having regard to these jurisdictional prerequisites, the field of application for ss (4)(e) and (8A) will be extremely limited. Judicial officers will therefore rely on this ground with great circumspection in the knowledge that the Constitution protects the liberty interests of all. Incorrect application of the criteria listed in ss (4) be 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.”
- [24] When I apply the aforesaid dictum to the facts in this matter, and considering my criticism of the learned Magistrate’s evaluation of the available evidence, his misdirections on some of the relevant facts with his consequential wrong application of the legal principles on those (incorrect) facts, as already alluded to in paragraph 19 above, as well as his incorrect approach regarding the onus of second appellant and fourth to eighth appellants, already alluded to in paragraph 11 above, I am satisfied that if the words “prima facie” are to be read into the introductory sentence of Section 60(4) as suggested in *PROKUREURS-GENERAAL, VRYSTAAT vs RAMOKHOSI*, supra, no such prima facie case has been made out in the current instance. The following dictum in *S vs TSHABALALA* 1998(2) SACR 259 (CPD) at 269 F is therefore applicable:

“In cases not governed by s 60(11), therefore, it seems to me that there must be a practical burden on the State to adduce evidence or information going to show that such a ‘likelihood’ exists, and to do so convincingly. If the State fails that hurdle, ss

- (9) will seldom be of any assistance to it, because the factors mentioned in ss (9) mainly favour the accused.”
- [25] In addition to the aforesaid, I am of the view that the learned Magistrate did in any event not properly apply his mind to the provisions of Section 60(9) of the Act and failed to properly consider all the relevant factors listed therein. In this regard I wish to refer to the following:

25.1 The Magistrate took into consideration, correctly so, that it was evident from the affidavit of mr. Angus that the appellants were recently arrested and that the investigation is receiving high priority and should be completed within a month. However, when properly considering Section 60(9)(b) it refers to the probable period of detention until the disposal or conclusion of the trial. In this regard mr. Angus also stated in his affidavit that after the completion of the investigation, the prosecution will have the opportunity “to fully consider and prepare the case for presentation to a court for trial”. No indication was given of the time period which this process will necessitate. There is a huge difference between the period of time necessary for the completion of the investigation and the period of time that it will take until the completion of the trial, which was not at all considered by the learned Magistrate. Furthermore I deem the following quotation from Commentary on the Criminal Procedure Act, Du Toit et al, at

p. 9-34 to be applicable in this instance:

“Section 60(9)(a) should be interpreted in the light of the following remarks made in The People (Attorney- General) vs O’Callaghan 1966 IR 501 (as cited by Nel Borgtoghandleiding (1987) 112):

‘The possibility of a speedy trial is relevant to the extent that if there is no prospect of a speedy trial, a court may very well allow bail where it might not otherwise have allowed it. It cannot be too strongly emphasized, however, that the prospect of a speedy trial is not a ground for refusing bail where it ought otherwise to be granted.’”

The learned Magistrate completely failed to attach any weight to the factor mentioned in Section 60(9)(d), being any financial loss which the appellants may suffer owing to their detention. This will obviously include a determination of the extent to which the respective appellants need to continue working in order to meet their financial obligations. From the respective affidavits of the appellants it is clear that all of them are receiving a fixed and stable financial income per month, which they use to support and maintain their families and/or their extended families. They also have a long and stable career history as members of the South African Police Service. In this regard the learned Magistrate apparently also overlooked the following relevant part of paragraph 4 of the affidavit of mr. Angus:

“... according to the knowledge of the ICD investigation team, (the accused) have not been suspended from official duty, although this is an internal process of the SAPS management, and not a matter for the ICD to deal with. It is also known that some of the accused are married and that all the accused have dependants which they support in some or other manner.”

From the aforesaid it is in my view evident that all the appellants need to continue working in order to meet their financial obligations. If they are to be detained until the disposal or conclusion of the trial, they will probably not be receiving their monthly income, which will be hugely prejudicial to them and their families.

- [26] I consequently conclude that with regard to first and third appellants, they discharged their onus by proving on a preponderance of probabilities that the interests of justice permit their release on bail. With regard to second and fourth to eighth appellants, I find that the State did not discharge its onus of establishing the existence of the circumstances in Section 60(4) (e), read with Section 60(8A), and/or the likelihood of it happening and therefore I am satisfied that the interests of justice permit also their release on bail.
- [27] I am therefore satisfied that the learned Magistrate was wrong in his final conclusions and finding and in his decision not to grant bail to the appellants.

The bail money and the conditions of bail:

- [28] Section 60(13)(a) of the Act provides that the court releasing an accused on bail in terms of Section 60, may order that the accused pay a sum of money determined by the court in question. All the appellants indicated in their affidavits that they can afford an amount of R1 000.00 bail, which they will raise by means of cash withdrawals from the bank and also loans from family members. They also indicated that they consider the said amount of money to be substantial in their circumstances. No evidence to the contrary was put before me by the State, except that mr. Chalale argued that should I release the appellants on bail, a higher amount of bail should be determined.
- [29] As I have indicated at the beginning of my judgment, it is as good as common cause between the parties that there is no likelihood that any of the appellants will attempt to evade their trial. Furthermore I also bear in mind that the intention should be to encourage release where the Court has in principle decided in favour of bail and therefore it will be inappropriate and without justification to determine a higher amount of bail money in the circumstances of this particular matter.

- [30] With regard to the conditions of bail, Section 60(12) of the Act determines as follows:

“The court may make the release of an accused on bail subject to conditions which, in the court’s opinion, are in the interests of justice.”

As I have indicated earlier in my judgment, I deem it imperative that the appellants do not visit the district of Ficksburg other than for purposes of their pending trial. I therefore consider it appropriate to ensure this by means of a condition to this effect. The other conditions of bail are in accordance with the type of conditions which are normally applicable in most cases and in any event, both mr. Nel and mr. Chalale agreed that should bail be granted, the said conditions should be imposed.

- [31] For the aforesaid reasons I made the relevant order on 20 May 2011.

C. VAN ZYL, J

On behalf of appellants: Adv. J. Nel

On instructions of:

Office of the State Attorney

BLOEMFONTEIN

On behalf of respondent: Adv. S. Chalale

Director of Public Prosecutions

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