

SOUTH AFRICA / JUDGMENT

Mokodutle v S (CC 03/2017) [2021] ZAMPMHC 4 (19 February 2021)

[2021] ZAMPMHC 4**COURT**

Middelburg High Court, Mpumalanga

BEFORE

Brauckmann

CASE / FILE NUMBER

CC 03/2017

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Policy**IN**

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

REPORTABLE:

**NO
OF
INTEREST TO OTHER JUDGES: NO**

REVISED:

**YES
19/2/21
CASE NO: CC
03/2017
In**

the matter between: DAVID
 LEBAKENG MOKODUTLE
 Applicant
 (Accused
 5 in indictment)
 and
 THE
 STATE
 Respondent

RULING

ON BAIL APPLICATION

BRAUCKMANN AJ

INTRODUCTION

- [1] This is an application by accused number 5 in this matter, Mr Mokodutle (“the applicant”), to be released on bail pending the trial in the matter. A trial date have currently not been allocated to the case as a “fresh” indictment containing 179 charges of amongst other robbery, murder and racketeering were handed to the accused’s legal representatives and the Court was informed that further particulars would be sought by most of the accused in the matter regarding the indictment and charges contained therein. It seems therefore that the trial in this matter will not start or be finalised soon.
- [2] The applicant was arrested on 30 September 2018 and the case against him (in Bloemfontein) was withdrawn in 2019. However, on the same day, he was arrested again in respect of a Sandringham Case of alleged murder of three policemen. He appeared in the Johannesburg Court, and the case was transferred to this Division’s Circuit Court in Delmas before it eventually was transferred to Middelburg. The case therefore has a long history. Mr Mokodutle have been in detention since September 2018 without the matter being placed for trial.
- [3] The applicant is facing fifty one counts in this matter as indicated in the indictment, which was served on his legal representatives shortly before his appearance in this Court on 25 January 2021. These charges include one count of contravening section 2(1)(e) of the Prevention of Organized Crime Act 121 of 1998, conducting an enterprise through a pattern of racketeering activity, one count of contravening section 2(1)(g) of the Prevention of Organized Crime Act 121 of 1998, managing an enterprise and contravening section 18(2) of the Riotous Assemblies Act 17 of 1956, conspiracy to commit a crime of robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977.

- [4] The applicant is further charged with three counts of murder, twelve counts of attempted murder, 10 counts of robbery with aggravating circumstances, two counts of attempted robbery with aggravating circumstances, four counts of contravening section 3 of the Firearms Control Act 60 of 2000, unlawful possession of a firearm, four counts of contravening section 4 of the Firearms Control Act, unlawful possession of prohibited firearms, four counts of contravening section 90 of the Firearms Control Act, unlawful possession of ammunition, three counts of contravening section 5 of the Explosives Act 26 of 1956, five counts of malicious injury to property, and one count of contravening section 120(6) of the Firearms Control Act, unlawful pointing of a firearm.
- [5] It is common cause that the charges against the applicant for murder and the ten counts of robbery with aggravating circumstances, fall within the ambit of schedule 6 of the Criminal Procedure Act, Act 51 of 1977 ("The CPA"), which places an onus of a burden of proof on the applicant to prove, on a balance of probabilities, that exceptional circumstances exist, which would make his release on bail, in the interest of justice.
- [6] There are thus two requirements. Firstly, the applicant must establish the existence of exceptional circumstances and secondly his release should not be against the interest of justice. Thus, the factors in s 60(4) (a)-(e) of the CPA.
- [5] The applicant raises, for the first time at the bail application on 28 January 2021, that this Court lacks jurisdiction to hear the matter. The common cause facts surrounding the transfer of the case to the Mpumalanga Division of the High Court are common cause. The applicant appeared in Bloemfontein Regional Court on 4 September 2019 for trial. The matter was withdrawn by the State and the applicant was immediately arrested and transferred to Johannesburg where he appeared in the Johannesburg Regional Court in respect of a Sandringham incident. The withdrawal of the matter in Bloemfontein was initiated by Adv. Hein van der Merwe (DPP's office, Pretoria).
- [6] The applicant appeared in Johannesburg Regional Court several times and on 8 November 2019, the matter, upon the request of the State, was transferred to the Mpumalanga Division of the High Court at Delmas to be joined with the accused which appeared following an alleged incident at Kriel (Ganala). The request was founded on an instruction issued by Advocate Hein van der Merwe, Deputy Director of Public Prosecutions, Gauteng Division, Pretoria in the form of a letter dated 7 November 2019.
- [7] Upon this instruction the Sandringham - matter (alleged murder of three members of the South African Police Services) was transferred to this Division of the High Court. The legal question, according to Adv Potgieter on behalf of the applicant is whether the transfer was procedurally correct in terms of the law. If not, so the argument went, it follows that the matter ought not to be entertained further on this Court's roll and struck off in respect of the applicant.

[8] In the light of my findings in respect of the bail application, I am not going to dwell on the legal arguments in too much detail.

[9] Section 22 of the National Prosecuting Authority Act (Act 32 of 1998) determines the functions of the National Director which is instructive. Section 22(3) is relevant: -

“Where the National Director or a Deputy National Director authorised thereto in writing by the National Director deems it in the interest of the administration of justice that an offence committed as a whole or partially within the area of jurisdiction of one Director be investigated and tried within the area of jurisdiction of another Director, he or she may, subject to the provisions of section 111 of the Criminal Procedure Act, 1977 (Act 51 of 1977), in writing direct that the investigation and criminal proceedings in respect of such offence be conducted and commenced within the area of jurisdiction of such other Director.”

[10] In terms of Section 111 of The CPA

“

(1) (a) The direction of the National Director of Public Prosecutions contemplated in section 179 (1) (a) of the Constitution of the Republic of South Africa, 1996, shall state the name of the accused, the relevant offence, the place at which (if known) and the Director in whose area of jurisdiction the relevant investigation and criminal proceedings shall be conducted and commenced.”

[11] Applicant submitted that only the National Director and / or a Deputy National Director authorised in writing could have issued the direction that the case of the applicant be transferred to the Mpumalanga Division of the High Court. Both Advocates GL Roberts and / or Hein van der Merwe lack authority to issue such an instruction. It follows that if they could not have issued the direction which they clearly could not have, that the transfer of the matter was irregular, and the continued detention of the applicant would be unlawful. Hence the Court is requested to find that the transfer was irregular, and the applicant's matter is not proper before the Court and ought to be struck from the court roll.

[12] This is a bail application and not a trial. The applicant is not tried or investigated by this court at this stage. The relevant stage to object to the jurisdiction of this Court will be before or during the applicant's plea before the trial court in future, and it will be for that court to determine the soundness of the special plea.

[13] Both Applicant and Respondent elected to tender evidence by way of affidavit and not to testify in person or through witnesses. Applicant deposed to an affidavit and the respondent used an affidavit by Warrant – Officer PAUL JOHANNES HOLTZHAUSEN, the co-investigating officer in the matter. Applicant applied for a postponement when the application was heard in order to file a replying affidavit to respondent's affidavit.

- [14] The applicant is a South African citizen who was born bred in the Free State. He operated a car wash business at Thaba Nchu, sells ladies weaves and refurbished motor vehicles which he then sells for a profit. He earned approximately R20 000, 00 per month. He is in possession of an expired passport and previously visited Lesotho where he had a relationship with a lady. He has two boys (25 years and 13 years) who live with the mothers but depends on him for their support. One of the boys, T[....], is asthmatic and although he gets his medicine from a Government hospital, at times when there is no medicine available, he needs to buy him medicine from private pharmacies. His mother and siblings also depend on him for a living. He lives with only one kidney and is very vulnerable to be infected by the COVID 19 virus in prison where there is no social distancing.
- [15] The applicant has a single previous conviction for theft and no pending cases for which he has been released on bail. In the case where he was convicted of theft he was released on bail pending finalisation of the trial, and consistently attended Court until finalisation. He also stated that he was previously arrested for armed robbery, released on bail, and attended until finalisation of the matter whilst also being represented by Mr Potgieter.
- [16] Applicant proposes the following to be exceptional circumstances. He submits that the State's case is doubtful, his personal circumstances is exceptional especially living with only one kidney.

All the circumstances proposed ought to be considered cumulatively.

- [17] Applicant is a South African citizen and resides at [....]. The house belongs in ownership to the applicant.
- [18] Applicant do have a previous conviction. On 25th February 2013, and at Bloemfontein, he was convicted for theft and sentenced to 7 years imprisonment wholly suspended for 5 years on conditions that he is not convicted of theft, attempted theft or any offence of which dishonesty is an element committed within the period of suspension.
- [19] Applicant has no pending case for which he was released on bail.
- Although he was arrested for armed robbery approximately ten years ago, and released on bail, he diligently attended the court hearings until the matter was finalised.
- [20] Applicant have an expired passport and further confirms that he have travelled to Lesotho previously. He does not have any other travel documents, family, or friends living outside the Republic of South Africa considers South Africa as his permanent home. He has no friend and/or relatives currently living abroad. His identity document was seized by the SAPS after his arrest. For what it is worth, he also tenders his passport to the SAPS until finalisation of this matter.
- [21] Applicant is not married, but the father of two children. The eldest

a boy, L[....] K[....] L[....] is 25 years of age and T[....] N[....] also a boy, is 13 years of age. They are from different mothers and reside in Bloemfontein with their mothers.

[22] Before his arrest he operated a car wash business at [....],

THABA NCHU, sold ladies weaves to informal hairdressers and private persons and bought and refurbished used motor vehicles to sell for a profit. He earned approximately R20 000-00 (Twenty Thousand Rand) per month.

[23] Applicant submits that the State's case against him is open to some doubt and that his denial of involvement is sustainable considering the evidence the State wishes to rely on. He specifically

denies that the State will be able to link him to the robberies or the murders. He denies any involvement in the Sandringham murders. He states that from the discovered case docket, the alleged DNA comparison is the only suggestion of his involvement in the alleged murders and also amounts to circumstantial evidence. He is not linked to this incident by any other real evidence and / or eye-witness statements. Applicant further testifies that a very important factor is that two persons were already tried and convicted of the offences in the High Court, Johannesburg. Both made confessions and he was not implicated in any of the confessions. The conclusion drawn by the investigation officer, so the argument went, that the presence of blood in the vehicle that from which the police officers were allegedly shot, indicates that the person whose blood it is, was a passenger in the vehicle at the time of the robbery and participated in the shooting is equally without substance and mere speculation to create some atmosphere with the Court.

[24] Applicant denies that he is in custody in respect of the following matters: -

- Ivory Park CAS 594/03/2015, (never charged)
- Parkweg CAS 1114/10/2017, (Withdrawn)
- Boithuso CAS 40/07/2018, (Withdrawn)
- Sabie CAS 42/07/2017, (never charged)
- Olievenhoutbosch CAS 216/09/2017. (Withdrawn was part of Parkweg and Boithuso matters in Bloemfontein)

According to him he was arrested for and in custody only in respect of Sandringham CAS 261/03/2015.

[26] Applicant denies that the allegation by the respondent that he absconded after being released on bail in the Khutsong CAS 130/06/2014 matter. During his appearance in the Carltonville Court in respect of the matter, he was treated by a Psychiatrist in Kimberley and was not well to appear in Court on 17th May 2018. A medical note from the doctor was handed to his attorney, Mr. Magampa from Johannesburg, and the warrant of arrest was cancelled. The matter was subsequently withdrawn. A copy of the warrant of arrest issued

on the day and which was cancelled was annexed to the reply.

- [27] Applicant denies having committed three cash in transit robberies as alleged or that he harboured Wellington Cenenda (a co-accused in the matter before this court) whilst he absconded his bail. Applicant testifies that Cenenda was not arrested in his presence, nor at his residence. The applicant was arrested on 2nd October
2018. Cenenda was arrested on the 21st February 2019. There is therefore no factual basis for this false statement by the respondent.
- [28] Applicant denies that his release on bail will jeopardise the proper functioning of the justice system, including the bail system. He testifies that In the Sabie case CAS 42/07/2017, two accused persons are due to appear in the High Court in Graskop in April 2021 for trial. They are ELVIS MAKHUBELA and LEHLOHONOLO TLEKETLE. Both made confessions in which the applicant was not implicated in the crime. Elvis Makhubela is currently on bail in the matter notwithstanding the confession. Copies of the confessions were annexed to applicant's reply.
- [29] The respondent alleges, in a supplementary affidavit deposed to by Captain van Zyl, that applicant planned to assassinate two of the investigating officers. No names are provided, and no proof of the alleged conspiracy/planning is provided. If the allegation is true, it is an offence, and one will expect Captain van Zyl, or any other victim, to approach the police with the complaint. If this allegation was considered to be serious the police would certainly have approached the applicant where he is incarcerated for the last couple of years, awaiting a trial date to be allocated and a final indictment to be eventually handed to him. An indication that the allegation is without substance is the fact that the information apparently became available during September 2020, and to date hereof no complaints have been laid in this regard. In the Court's view, and if the police officials were serious about the allegations, it would have been included in Holtzhauzen's original affidavit resisting bail.
- [30] The unreasonable delay by the respondent to have this matter brought to trial is unacceptable. In terms of section 35 (3) (d) of the Constitution, Act v108 of 1996, the applicant (and all accused persons) has the right to a fair trial which includes the right to have their trial begin and conclude without unreasonable delay. The Court is very concerned about the delay in this matter. More than a year lapsed since the case was transferred to Mpumalanga Division. No explanation is provided by the Investigating officer for the delay in this matter. This matter served before me on 26th February 2020, and was postponed to April 2021. I accept that the Covid 19 pandemic caused an uncontrolled delay, but it remains an unreasonable delay if one accepts that applicant was arrested in 2018 already. Many matters against him have been withdrawn an apparently re-instituted. There is no indication when this matter will be tried. Further, with the Covid 19 pandemic, further lockdowns cannot be ruled out at all, which will inevitably cause further delays. There are 179 counts in the indictment which means that this matter will likely be very protracted when the trial eventually starts.[1]

[31] Section 60(4) of the CPA reads as follows:

“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 jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system; or
- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.”

[32] The directions of the Constitutional Court in *S v Dlamini*, *S v Dladla and Others*; *S v Joubert*, and *S v Schietekat* [2] (“Dlamini”) is of utmost importance when considering bail. It provides guidelines for the approach

to schedule 6 bail applications in respect of the “onus”, an interpretation of the term “likelihood” and considerations of “exceptional circumstances”.

[33] In *Dlamini*, the Court with reference to the application of section 60

(4) of the CPA stated:

“[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.”

“[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 Sch 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.”

“[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.”

[34] What this court have to decide is whether the applicant proved exceptional circumstances that it is in the interest of justice to grant bail. I am of the view, as stated in various judgments, that the evidence of the applicant, read with that of the respondent, must be considered as a whole. The seriousness of the alleged crime/s and strength of the state’s case are but two of the factors to be taken into account in this consideration.

[35] The respondent dealt with the requirements of section 60 (4) and attempted to indicate that the applicant is a person with a propensity to violence, will not stand his trial and that he will likely interfere with the witnesses in the matter. The respondent failed to deal with any of the factors that should be taken into account as set out in section 60 (9) of the CPA. I have dealt with the strength of the state’s case above and are of the view that the state might have some prospects of success, but taking into account the history and possible evidence that will be tendered by the applicant, some doubt is cast on these prospects.

[36] In all the cases that were opened against the applicant, and in which he was initially arrested, a withdrawal took place (except Sandringham). The respondent does not explain the reasons for these withdrawals and the Court are only favoured with the reasons proffered by applicant.

[37] There is also no explanation or reasons provided by the state why the finalisation of this matter is unduly delayed. The applicant have been detained for more than two years already. No probable period of detention is provided by the respondent until the disposal of the matter. As stated earlier herein, the applicant might be detained for a further extended period, equal to, if not longer than the period up and until this application was heard.

- [38] It is not disputed that the applicant lives with one kidney, and that Covid 19 ravaged the country. The respondent's argument that the pandemic did not break out in one of the country's correctional facilities since the initial outbreak, and that it is therefore safer inside one of them than outside is not based on any evidence. The court, sitting in Breyten experienced many delays in matters where inmates tested positive and the accused could not attend court. The argument is not based on any evidence at all and should be rejected.
- [39] A very important consideration is whether the applicant will attend court for his trial. The evidence tendered by respondent in this regard, and the attempt to indicate the applicant failed to attend court in the past was disposed of by the applicant in the reply. I accept the applicant's evidence in this regard. The respondent failed to convince the court that applicant absconded and failed to attend court while on bail in the past.
- [40] Applicant's family and financial ties are well rooted in the Free State. He owns the property that he occupies and can return to earn an income to sustain himself and his children. The court does not deem him a flight risk.
- [41] His release on bail might cause an outcry amongst the investigating officers, but will not do so amongst the public. Many accused in our country that allegedly stole or defrauded the Government are released on bail subject to strict conditions. The amounts involved in those matters are vast and the damages done to the public immeasurable.
- [42] Taking all the above into account, the Court is of the view that the applicant acquitted the onus to prove that exceptional circumstances exist which in the interest of justice permit his release on bail, but subject to certain conditions.
- [43] Mr Potgieter indicated that the applicant, at a previous hearing confirmed that he will be able to afford an amount of R 40 000.00 as bail. I am of the view that this amount, which was contemplated in the past, is insufficient. The order/ruling below will reflect the amount to be paid by applicant before his release on bail.
- [44] I accordingly make the following

ruling:

[44.1]

David Lebakeng Mokodutle is hereby granted bail on the following conditions:

[44.1.1] that he pays an amount of R 100 000.00 cash as bail money and he shall be released upon payment of the amount after which he shall reside at [...] until the trial is finalised; and

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

[44.1.3] he shall not interfere with or be in contact, directly or indirectly,
with any of the state witnesses;

[44.1.4] any and or all travel documentation, including any passports held by him (whether valid or not) issued to him must be handed to the Investigating Officer or such officer to whom the bail amount is paid.

[44.1.5] He must report to such Police Station as indicated by Warrant –

Officer Holtzhauzen, which Police Station shall be the closest Station to his residence from time to time on every Monday and Friday

between 07h00 and 18h00 until the trial is finalised.

[44.1.6] He shall not contact any of his co-accused in this case directly or
indirectly, whether in person or via electronic/virtual means, until the trial is finalised

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE APPLICANT: ADV H POTGIETER

INSTRUCTED BY: NOT DISCLOSED

REPRESENTATIVE FOR THE RESPONDENT: ADV D ROWLES

INSTRUCTED BY: NATIONAL PROSECUTING AUTHORITY

DATE OF HEARING: 28 JANUARY 2021 & 08 FEBRUARY 2021

DATE OF JUDGMENT: 19 FEBRUARY 2021

[1] S v DV AND OTHERS 2012 (2) SACR 492 (GNP)

[2]

[1999] ZACC 8; 1999 (2) SACR 51 (CC)

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