

SOUTH AFRICA / JUDGMENT

Mzobe and Others v S (D6375/20)

[2020] ZAKZDHC 58 (26 October 2020)

[2020] ZAKZDHC 58**COURT**

Kwazulu-Natal High Court, Durban

BEFORE

Mngadi

CASE / FILE NUMBER

D6375/20

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****KWAZULU-NATAL****LOCAL DIVISION, DURBAN****Case****No: D6375/20****In**

the matter between:

KENNETH
MNCEDISI MZOBE
FIRST APPELLANT
LINDANI
NDLOVU
SECOND APPELLANT
NKOSINATHI
MAKUSI MTHEMBU
THIRD APPELLANT

And

THE
STATE
RESPONDENT
ORDER

On

appeal from: The
Magistrate's Court, Verulam (Ms T Badal)

1.

The appeal against refusal of bail is
upheld.

2.

The order of the magistrate that bail is

	refused in respect of all the applicants is set aside and replaced
with the following:	'Bail is refused in respect of the first applicant, the second applicant and the fourth applicant. The third applicant, the fifth applicant and the sixth applicants are each granted bail in the sum of two
thousand (R2 000) rand each on the following conditions:	(a) To attend the court proceedings on the date and time the proceedings are postponed to until the verdict or until the proceedings are lawfully terminated, whichever is the earlier. (b) Not to interfere directly or indirectly with the State witnesses or the investigation of the case. (c) To remain in the physical residential address furnished to the State where each applicant shall reside until the proceedings are finalised. Not to leave the furnished address for a period exceeding three consecutive days without a written permission of the investigating officer or the prosecutor in charge of the matter. (d) The fifth applicant to surrender his passport to the investigating officer or the prosecutor in charge of the case before being released on bail.

JUDGMENT

Delivered on:

Mngadi J

- [1] The appellants appeal, in terms of s 65(1)(a) of the Criminal Procedure Act 51 of 1977 ('the CPA') against the decision on 22 July 2020 of the magistrate of the Verulam Magistrate's(Ms Badal) refusing the application for the release of the appellants on bail, pending the outcome of the criminal proceedings against them.

- [2] The appellants are charged with four other co-accused including a youthful accused whose matter was separated. The appellants are charged as accused 3, 5 and 6. In the bail application, the appellants were applicant 3, applicant 5 and applicant 6. One counsel represented the appellants and their co-accused in the bail application. The learned magistrate after hearing the application refused the application for release on bail against all the applicants.
- [3] The charge sheet in terms of which the appellants and their co-accused appeared contained two charges, namely; kidnapping and murder. In count 1, it states that on or about 28 April 2020 the accused did unlawfully and intentionally deprive Ndududzo Andile Mbuthu (Bobo) his freedom of movement by means of forcefully taking him in a motor vehicle from a certain tuckshop of Hambanathi to Magagula Lodge in Hambanathi in Tongaat. The accused acted in common purpose. The charge of murder alleges that it is murder read with the provisions of section 51(1) or 51(2) of the Criminal Law Amendment Act 105 of 1997 (the CLAA), in that upon or about the 28 day of April 2020 and at or near Hambanathi the accused did unlawfully and intentionally kill Nduduzo Andile Mbuthu (the deceased), a male person. The accused acted in common purpose.
- [4] The State, at the commencement of the bail application, handed in a notice in terms of s60 (11) (A) (a) of the CPA. In the notice, the Deputy Director of Public Prosecutions of KwaZulu-Natal confirmed that she intended to prosecute the accused with the offence referred to in Schedule 6 of the CPA, to wit, murder. The effect of the notice was that the bail application fell under 60(11)
- (a) of the CPA. The said provision places an onus on the accused to show on the balance of probabilities that there exist exceptional circumstances making it to be in the interest of justice the release on bail of the accused person pending trial.
- [5] The accused requested, prior to the bail application, in terms of s 335 of the CPA and s 32(1) (b) of the Constitution to be furnished with copies of any confession, and document relating thereto, copies of any pointing out and documents relating thereto and copies of any admission or any extracurial statement made by any of the accused. In addition, the accused requested copies of post-mortem report of the deceased, extracts from SAP 13 register of exhibits wherein relevant exhibits are recorded, copy of any document/book/papers seized from the accused and photo album pertaining to any identity parade or pointing out. The State objected to the request. It stated that s 60(14) of the CPA prohibits disclosure of the police docket during the bail proceedings stage. Secondly, there was no substantial application in compliance with the Rules of Court. Thirdly, the accused have placed on record on 11 May 2020 that they were assaulted and made to sign blank documents therefore the request does not advance their case for purposes of bail. Fourthly, the State does not rely solely on the statements purportedly made by the accused; it has eyewitness evidence and video footage implicating the accused. The State does not have any confession obtained in terms of s219 of the CPA nor does it have any information or document, to wit, post-mortem report, extracts from SAP 13 register, documents or thing seized from the accused or photo

album.

[6] The appellants together with applicant 4 applied to be released on bail on affidavit without adducing any oral evidence. The applicants 1 and 2 testified and they were cross-examined. The State opposed the application by an affidavit deposed to by Mjabulelwa Enock Thabethe(Thabethe) only. Thabethe was a detective Captain in South African Police Services and the investigating officer in the case. Thabethe at the request of the court also deposed to a supplementary affidavit.

[7] The evidence adduced disclosed the following. Accused 1 operates a business which included a butchery and a tavern called Magagula Lounge. The business was located at Hambanathi Township in Tongaat. On 28 April 2020 in the early hours, the business was broken into and a large quantity of liquor was stolen. The deceased in the murder charge who was the cousin of applicant 1 became a suspect. He was sought and he was found in a certain tuckshop in the township. He was taken to the business premises, which had been broken into. He was interrogated and assaulted in relation to the burglary to the business premises. He then accompanied applicant 1 and others to a house in the township where some of the liquor stolen during the burglary was recovered. The liquor was retrieved and it was taken back to the premises with the deceased. The deceased was again tortured and assaulted in order to obtain from him the whereabouts of the rest of the liquor and the identity and whereabouts of the other culprits. Applicant 1 on advice from the eyewitness called the police to the premises. The police arrived at the business premises and applicant 1 told them that the deceased was his relative and he was in the process of investigating and trying to recover the rest of the stolen liquor. He will open the

criminal charge later. The police then left.

[8] he deceased's sister learnt of what was happening to the deceased. She proceeded to the business premises to make enquiries. She was shown the deceased who was in a room and in an injured condition. She advised that she was going to find a motor vehicle to take the deceased to the clinic or hospital. She left and returned later with a vehicle. However, she did not find the deceased

in the business premises. She reported the matter to the police and she came back to the premises with the police. They did not find the deceased and it was conveyed to them that the deceased apparently escaped. A missing person docket was opened. The video footage of the deceased in an injured condition in the business premises went viral and put pressure to the police to find the deceased. After a few days, the deceased's burnt remains were found in a river.

[9] Thabethe in the main affidavit opposing the bail application stated as follows. Applicant 1 and applicant 5 fetched the deceased from the tuckshop to the business premises. Applicant 1 assaulted the deceased according to the statement of an eyewitness. After part of the liquor was recovered, all the accused assaulted the deceased using a plank, a stick, a golf club, a sjambok, hands and feet. This is according to the statement of an eyewitness who also participated in the assault on the deceased. Another witness attended and observed the

relentless assault on the deceased. Applicant 1 advised them to say their goodbye to the deceased.

- [10] Thabethe in his affidavit explains what happened to the deceased up to the stage when his body was burnt and the remains thrown into the river. Thabethe has not disclosed the source of this information. In my view, since the source of this information is not disclosed, it is not necessary to detail the information and to consider it. In essence, according to Thabethe's main affidavit, there are three episodes of assault on the deceased. The deceased was assaulted after he was found and brought to the business premises by applicant 1. The deceased again was assaulted after part of the liquor was retrieved. The deceased at that stage was assaulted by all the applicants and by the eyewitness. The last episode is the relentless assault on the deceased observed by the eyewitness who attended. The applicants including the appellants according to Thabethe are implicated in the second episode. One eyewitness implicates them. The eyewitness also participated in the assault.
- [11] Thabethe stated that he was opposed to the granting of bail to the applicants for the following reasons:
1. There is a strong case against the applicants. It is fortified by the objective DNA evidence, video footage depicting the deceased with grave injuries, eyewitness testimony, and extra curial statements of the applicants.
 2. The community is outraged. It has protested, petitioned, and threatened to harm the applicants if released on bail. The business premises in question have been burnt down.
- [12] The first appellant, in his affidavit, stated that on 28 April 2020 he was in the business premises. He was not involved in looking for the deceased as well as in fetching the deceased. He saw the deceased brought to the business premises but he did not take part in assaulting the deceased. He also saw the deceased's sister arriving in the business premises. She went and she talked to the deceased but he was not present. The deceased's sister told him that the deceased was injured. She said she was going to fetch a motor vehicle to take the deceased to the clinic. She left and she returned later with the police. They looked for the deceased but they did not find him. He did not after that see the deceased. He did not do anything to the deceased.
- [13] The second appellant in his affidavit stated that he went to fetch the deceased after it was reported that he had broken into the premises and stole liquor. He was driving the vehicle. The deceased was found in a tuckshop in the area. He voluntarily accompanied them back to the business premises. In the business premises, Miu talked to the deceased. Miu slapped the deceased. Philani kicked and punched the deceased and he asked him why he had stolen the liquor. He with Miu, Andile, Umshana, Siyanda and the deceased went to collect the liquor where the deceased had hidden it. They took the liquor back to the business premises. The deceased assisted in offloading the liquor. The deceased then picked up a

quarrel with him. They hit each other by punching and kicking. Umshana assaulted the deceased with a stick. He stopped him. He then left the business premises. He returned later to pick up the others.

He saw the deceased's sister with the police. They searched the premises but they did not find the deceased and they left. He then

with the others left the premises and they went to a braai.

[14] The third appellant stated as follows. He went to the business premises to let his friend the first appellant watch the videos he had recorded in a USB. He heard that the premises had been broken into and liquor stolen. He saw Miu, Lindani and others leaving the premises in a vehicle. They returned and they left again. They returned with the deceased and they later left with him. Sometime later, he saw the deceased's sister with other persons. They were in the business premises and they left. He then left and he went to his home.

[15] It is not surprising that the learned magistrate was not satisfied with the state of affairs looking at the contents of the main affidavit of Thabethe and comparing it to the contents of the affidavits of the appellants. The appellants were implicated by one eyewitness to the second episode of the assault of the deceased. The witness implicated them by a vague statement that all applicants assaulted the deceased. The same witness participated on the assault on the deceased but he apparently was not arrested and charged. In the supplementary affidavit of Thabethe, he refers to 'eyewitnesses who witnessed the deceased being forced into a vehicle to Magagula Lounge by accused 1 and accused 5 where after all the accused followed. Accused 1 started assaulting the deceased enquiring

about the theft and accused 1 then instructed all his staff to assault the deceased and they did so until such time that the deceased agreed to point out the stolen liquor. At this stage all the accused participated in the assault using hands, feet, sjambok, accused 2 used a plank, accused 3 used a chain, accused 6 and 7 used sticks'. The above contents of the supplementary affidavit contradict

the contents of the main affidavit. The main affidavit stated that it is one witness who witnessed the assault who had gone there to purchase beers. The supplementary affidavit refers to 'eyewitnesses' without stating how many and what was witnessed by which witness. The supplementary affidavit stated that the same eyewitnesses who witnessed the assault in the business premises described above witnessed when applicant 1 and applicant 5 took away from the tuckshop the deceased, which does not make sense. The assault

described above in the supplementary affidavit differs from the assault described in the main affidavit. In my view, the supplementary affidavit provided no clarity but contradicted the contents of the main affidavit.

[16] Thabethe in the supplementary affidavit stated that the second and third appellants who are accused 5 and 6 respectively made statements which were not confessions. He stated that second appellant made two statements but in both statements, he stated what he saw others

doing without implicating himself. The third appellant in his exculpatory statements he admitted that he assaulted the deceased with a broom. In my view, the contents of an accused person's police statement can only be used against him. It can't be used as evidence implicating the co-accused. Similarly, it does not help. As the state counsel attempts to do in his heads of argument, to try to discredit the versions of the applicants found in their affidavits by comparing it to the evidence of the applicants who gave oral evidence. The applicants in bail applications are pursuing distinct applications. The fact that the applications are

heard in one consolidated proceedings does not make them one bail application. The bail application is neither civil nor criminal

proceedings. It lacks the safeguards found in a criminal trial for testing the evidence of a co-accused against another co-accused

before in can be accepted.

- [17] The State case against the appellants is founded on the doctrine of common purpose. The common purpose is not founded on a prior agreement to kill the deceased but each applicant is held liable on common purpose based on his actual participation in the commission of the crime. His participation must show that he intended that the deceased be killed in the manner he participated in the assault for the intended purpose. In this matter, there is no evidence that each appellant intended that the deceased be killed. Evidence relating to each appellant's participation in the assault is vague and contradictory. It does not show participation in the assault justifying as the only reasonable inference an intent to kill.
- [18] The learned magistrate held that she was satisfied that the State has a strong prima facie case against the applicants. She found that they all acted with common purpose to kill the deceased. In my view, it is clear that the learned magistrate, with respect, misconstrued the application of the principles of the common purpose doctrine.
- [19] Except to what is claimed to be the State case, there was no evidence implicating the appellants to what happened to the deceased after he was seen by his sister. The appellants cannot have speculative hypotheses taken against them. The incident involving the brutal killing of the deceased and the defilement of his body by burning it and throwing the remains into the river is repulsive. The deceased was a relative of applicant 1 who operated the business. The severe assault meted out to the deceased resulting in his death was uncalled for. Even in death, the perpetrators would not respect the body of the deceased and grant to his relatives the right to bury his body. The community is justifiably angered and shocked by the incident. However, the community has to let the law take its course. The appellants have been in custody for about five months and raw emotions must have cooled. The community cannot take the law into their own hands. They must respect the administration of justice.

- [20] There was no evidence showing that the appellants were likely to interfere with state witnesses or with the investigation if released on bail. The learned magistrate held that due to the strong prima facie case against the appellants with the likelihood of life sentence imposed on them, it created a strong possibility that the appellants may evade the trial. She concluded that the appellants had not discharged the onus on a balance of probabilities that exceptional circumstances exist that it is in the interest of justice to permit the release of the appellants on bail.
- [21] The provisions of s60 (11) (a) of the CPA must be interpreted to be in accord with values enshrined in the Constitution. The Constitution frowns upon arbitrary deprivation of freedom. There is no definition of exceptional circumstances. However, the exceptional circumstances requirement need not necessarily be circumstances beyond and generally be different from factors, which are usually considered in an application for release on bail. Where it appears fairly safe to have an accused released on bail in that there is no likelihood of the accused evading trial or interfering with witnesses or the investigation and the release on bail will not undermine the administration of justice, exceptional circumstances would have been shown to exist that it is in the interest of justice to release the accused on bail pending trial. See *S v Dlamini & others* 1999(2) SACR 51 at paras 57 & 76. The purpose of bail is as far as possible to avoid subjecting to punishment a person who has not yet been convicted of a crime. See *S v Acheson* 1991 (2) SA 805(Nm) at 822A-B. *Mohamed J* held: 'An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court. The court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice.' It needs to be reiterated that the court should always grant bail where possible and should lean in favour of liberty of the subject if the interest of justice will not be prejudiced. See *S v Smith* 1969(4) SA 175 (N) 177E-F; *S v Hlongwa* 1979
- (4) SA 112(O) 113G-H.
- [22] The appellants are South African citizens. They have homes and families within the province of KwaZulu-Natal. They have stayed in the area for many years. The first and third appellants are 27 years old, and the second appellant is 22 years old. The appellants have no previous convictions and they have no other cases pending against them. The first and third appellants have no passports. All the appellants have limited means to leave the country.
- [23] The learned magistrate's refusal to release the appellants on bail was founded on the fact that the State had a strong prima facie case against the appellant. As shown above, there was no evidence sufficient to make such a factual finding. The appellants, therefore, have shown that exceptional circumstances exist that in the interest of justice they be released on bail pending trial.
- [24] In the circumstances, I make the following order:

1. The appeal against refusal of bail is upheld.
2. The order of the magistrate that bail is refused in respect of all the applicants is set aside and replaced with the following:

'Bail is refused in respect of the first applicant, the second applicant and the fourth applicant. The third applicant, the fifth applicant and the sixth applicants are each granted bail in the sum of two thousand (R2 000) rand each on the following conditions:

- (a) To attend the court proceedings on the date and time the proceedings are postponed to until the verdict or until the proceedings are lawfully terminated, whichever is the earlier.
- (b) Not to interfere directly or indirectly with the State witnesses or the investigation of the case.
- (c) To remain in the physical residential address furnished to the State where each applicant shall reside until the proceedings are finalised. Not to leave the furnished address for a period exceeding three consecutive days without a written permission of the investigating officer or the prosecutor in charge of the matter.
- (d) The fifth applicant to surrender his passport to the investigating officer or the prosecutor in charge of the case before being released on bail.

Mngadi, J

APPEARANCES

Case Number

: D6375/20

For the appellants

: Chris Gounden

Instructed

: Chris Gounden Incorporated

STARWOOD

For Respondent

: KM Shah

Instructed by

: Deputy Director Public Prosecutions

DURBAN

Respondent's Attorney : The Director of the Public Prosecution

Pietermaritzburg

Date of Hearing

: 23 October 2020

Date of Judgment

: 26 October 2020 (electronically)

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