

SOUTH AFRICA / JUDGMENT

Nkqayi and Others v S (CA&R 121/2022)

[2023] ZAECMHC 15 (28 March 2023)

[2023] ZAECMHC 15**COURT**

Eastern Cape High Court, Mthatha

BEFORE

FBA Dawood

CASE / FILE NUMBER

CA&R 121/2022

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN****CAPE DIVISION, MTHATHA)****CASE****NO: CA&R 121/2022****In**

the matter between:

SICELO
ABEL
NKQAYI
1st APPELLANT
ZAMIKHAYA
SONGCA
2nd APPELLANT
BONGANI
CIKOLO
3rd APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT

DAWOOD J:

[1]

Introduction

The appellants herein appealed against the decision of the learned magistrate's refusal of bail alleging inter alia in their grounds of appeal: -

- (a) That there was no hope of a conviction as there was no evidence to establish that the appellants unlawfully and intentionally made a misrepresentation which caused prejudice the Eastern Cape Development Corporation ("herein after referred to as ECDC").
- (b) That the respondent did not pin its faith on a possibility of evading trial in resisting the appellants release on bail as the appellants had handed themselves over to the police.
- (c) There was no evidentiary material upon which a conclusion could be reached that the appellants sought to endanger the safety of the public or attempt to intimidate and interfere with witnesses as witnesses had already made statements, investigations were complete and the matter was ready for trial, no intimidation was reported on the police.
- (d) There was no evidence that they had supplied false information to the police.
- (e) There was no credible evidence to show they would disturb public order or undermine public peace.
- (f) The offence did not involve the public at large but only ECDC.
- (g) The court based its judgment on rumours regarding the police vehicles that was not tendered as evidence and was not a ground for opposition to bail.
- (h) The court also considered the presence of the police during the proceedings as a factor that the appellants posed a danger to the public.
- (i) The evidence before court demonstrated that the interests of justice justify the grant of bail and the decision of the court a quo was arrived at wrongly.
- (j) The magistrate relied on the state's contention regarding the strength of the state's case.

[2] Magistrate's Judgment

2.1 In considering whether or not the appellants' grounds of appeal and their argument has any merit it is first necessary to have regard to the judgment of the learned magistrate.

2.2

- (a) The learned magistrate in his judgment commenced by indicating that the accused were all charged with a Schedule 5 offence.
- (b) He then stated that they were all married men with children and had means of living.
- (c) He stated that he would not dwell on their personal circumstances because they were almost the same.
- (d) He then went on to set out where the onus lies and what the considerations were.
- (e) This demonstrates that he: -
 - (i) was aware that the applicants were charged with a schedule 5 offence;
 - (ii) did have regard, although not fully set out in his judgment, to the personal circumstances of each of the accused;
 - (iii) was aware that the onus rested upon the accused to adduce evidence to satisfy the court that the interest of justice permits their release on bail.
 - (iv) having regard to the circumstances under which the interest of justice does not permit the release from detention of the accused.
 - (v) was aware that the interest of justice caters for the criminal justice system as well as the well-being of the applicants and both factors have to be weighed equally.
 - (vi) that the applicants had to convince the court that the interest of justice permits their release on bail.
- (f) He then went on to consider the evidence stating that the evidence led demonstrated:
 - (i) that the applicants occupy more than one property.
 - (ii) that they have no immovable property of their own.
 - (iii) applicant one had a passport which is lost.
 - (iv) applicant three has got his own passport;
 - (v) they are all family men;
 - (vi) that the applicants stated that their children will suffer if they are detained any longer.
 - (vii) the applicants before court have a pending matter.

2.3 The learned magistrate however went on to say that: -

- (i) the state alleged that the case is very strong against the applicants;
- (ii) that they are sure of a conviction;
- (iii) that the minimum sentence could be passed by the trial court;

(iv) this assertion by the state would in his view infuse a fear to the applicants not stand trial and it would be normal for any person to try to escape or flee;

(v) the applicants before court have a pending matter;

(vi) he then seems to consider that there is a likelihood of them endangering the safety of the public or will commit a schedule 1 offence or that if they were released on bail they will attempt to evade trial.

(vii) he re-iterates that because of the possible sentence, he is sure anyone can attempt to evade trial.

(viii) he then goes on to quote the provisions of subsection (d) and (e) and relies on the activities of the supporters of the applicants in protesting outside court and tearing the sails of the police van and making noise outside court, stating that the supporters were threatening the state so that the applicants are released not by the law but by their own liking.

(ix) He appears to be suggesting that the actions of their supporters in their protest action to have the accused released are undermining and jeopardising the objectives of the proper functioning of the criminal justice system including the bail system.

(x) He also appears to be suggesting that the supporters action creates the likelihood that the release of the accused will disturb the public order or undermines the public police or security.

(xi) He then concluded that as such they have not passed the threshold which is required by law that the interest of justice permits their release on bail.

2.4

(a) It is self-evident that the actions of the applicants' supporters cannot without more be attributed to the applicants.

(b) No evidence was led to say that the supporters were instigated by the applicants to act in the manner they did.

(c) In any event no evidence regarding their conduct was tendered in court save to say they were protesting outside court.

(d) No evidence as correctly pointed out by the appellants' counsel was led to the effect that they had damaged a police van.

(e) Furthermore as correctly pointed out by the appellants in their notice of appeal, the conduct of the appellants' supporters outside court was not a basis for opposing bail.

(f) There was accordingly no legitimate reason for the learned magistrate to consider the actions of the applicants' supporters outside court as a basis to refuse bail.

(g) This was correctly conceded by the state.

- (h) However, it was argued that this was not the sole basis for the magistrate refusing bail.
- (i) It was correctly argued by the applicant`s counsel that the learned magistrate failed to independently assess the evidence to determine whether or not the state indeed had a strong case.
- (j) The learned magistrate further failed to have regard to the peculiar circumstances of the applicants in this case to determine on the facts whether or not the applicants would evade trial.
- (k) The learned magistrate generalised by saying “because of the possible sentence, I am sure anyone can attempt to evade trial.”
- (l) The learned magistrate was given an opportunity to furnish reasons for his judgment but stated that he has no other reasons to refuse bail as the reasons were accompanying the judgment in the court record, despite being served with the notice of appeal indicating the challenges.

2.5 In this case it is evident that the learned magistrate has misdirected himself in the evaluation of facts and the application of the relevant legal principles by inter alia: -

- (a) failing to set out facts that he considered to demonstrate the strength of the state`s case, thereby failing to make an independent finding regarding the strength or weakness of the state`s case;
- (b) failed to state whether or not there was a likelihood on his assessment of the evidence that the applicants were likely to commit a schedule 1 offence.
- (c) failed to set out the facts that led him to conclude that these particular applicants were flight risks;
- (d) failed to state how the action of the supporters could be attributed to the applicants and could lead to the applicants undermining the objectives of proper functioning of the criminal justice system, including the bail system;
- (e) further failed to state how there was a likelihood that the release of the accused would disturb public order or undermine public peace and security having regard to the evidence before him. He again appears to have based the conduct of the supporters as being a factor that would disturb public peace and security without stating how this conduct can be attributed to the applicants or what evidence was led to establish this factor.

[3] Legal position

3.1 In order to determine whether or not to set aside the decision of the learned magistrate one has to have regard to the applicable legal position.

3.2 It was common cause that the charges fall in the category of offences listed in schedule 5 of the Criminal Procedure Act 51 of 1977 (“Act 51 of 1977”).

3.3 The onus accordingly rested upon the applicants to establish on a balance of probability that it was in the interest of justice to release them on bail.

3.4 Section 65(4) provides:

“the appeal court shall not set aside the decision against which the appeal is brought, unless the appeal court is satisfied that the decision was wrong.”

3.5 The decision in this instance was that their application for bail is dismissed.

3.6 The powers of a court sitting in an appeal in terms of the provisions of Section 65 of the Criminal Procedure Act have been crystallised as follows through various authoritative pronouncements by our courts:

“An appeal court shall not substitute its own decision for that of the court a quo, unless it is of the view that the magistrate has misdirected himself either in his evaluation of the facts or the application of the relevant legal principles;[1]

3.7 The appeal court will undertake its own analysis of the evidence and on the basis thereof decide whether or not the court a quo had made the correct decision regarding the discharge of the onus in terms of section 60(11) of the Criminal Procedure Act.”[2]

3.8 In this case it is evident that the learned magistrate had regard to irrelevant factors in assessing whether or not to grant the applicants bail and he further failed to evaluate the evidence to arrive at an independent conclusion regarding inter alia the strength of the state`s case and the other factors necessary to determine whether or not the applicants had discharged the onus resting upon them.

3.9 In the circumstances it is accordingly incumbent upon this court to undertake its own analysis of the evidence and on the basis thereof decide whether or not the court a quo has made the correct decision regarding whether or not the applicants had discharged the onus resting upon them to establish on a balance of probabilities that their release on bail was in the interest of justice.

3.10 The issue to be determined is whether or not the magistrate`s decision being the refusal of bail was wrong after evaluating the evidence presented and applying the relevant legal principles and authorities.

3.11

- (i) Section 60(11) (b) of the Criminal Procedure Act provides that an accused person charged with an offence referred to in schedule 5 shall be detained in custody unless the accused person adduces evidence which satisfies the court that the interest of justice permits his or her release.

(ii) In deciding whether or not the interest of justice permits the release of an accused on bail, the court must inter alia have regard to the considerations mentioned in paragraphs (a) to (e) of section 60(4).

(iii) In terms of that section the interest of justice would not permit the release of an accused person on bail if any one or more of the grounds mentioned therein are established. The grounds are listed as follows: -

“(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;

(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 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 of 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 public order or undermine public peace or security”

(iv) The provisions above were considered and interpreted by Hefer J in *S v Barber*[3] where he held,

“It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive

application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this

Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised

that discretion wrongly.”

(v) In *S v Porthen and Others*[4] Bins-Ward AJ focuses on the appeal court's right to interfere with the discretion of the court of first instance in refusing bail when he held,

“When a discretion... is exercised by the court a quo, an appellate Court will give due deference and appropriate weight to the fact that the court or tribunal of first instance is vested with a discretion and will eschew any inclination to substitute its own decision unless it is persuaded that the determination of the court or tribunal of first instance was wrong.”

(vi) In *S v Dlamini*

[5] the Constitutional Court held as follows:

“There is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails in the main protecting the investigation and prosecution of the case against hindrance.”

The Court held further that:

“If one were to read the opening sentence of ss (4) without regard to the provisions of ss 60(1)(a) and 60(9) of the Act and s 25(2)(d) of the Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution), it could possibly be understood as a mandatory injunction to a judicial officer to conclude that something is or is not in the interests of justice, irrespective of the officer's own conclusion. That certainly would constitute an objectionable deeming provision. But one must read the provisions together. Subsections (4)

- (9) are not intended as deeming provisions at all. What those subsections do is to list, respectively, the potential factors for and against the grant of bail to which a court must pay regard. Neither ss (4) nor ss (9) commands a court to come to an artificial conclusion of fact. On the contrary, courts are told that, if they find one or more of the factors listed in s 60(4) (a)-(d) to have been established, a finding that continued detention is in the interests of justice will be justified. Put differently, judicial officers are pointed towards categories of factual findings that could ground a conclusion that bail should be refused. By like token a court is not enjoined to accord decisive weight to the one or other or all the personal factors mentioned in ss (9). In short, the Legislature was providing guidelines as to what are factors for, and what are factors against, the grant of bail. Whether and to what extent any one or more of such pros or cons are found to exist and what weight each should be afforded is left to the good judgment of the presiding judicial officer. Such guidelines are no interference by the Legislature in the exercise of the Judiciary's adjudicative function; they are a proper exercise by the Legislature of its functions, including the power and responsibility to afford the Judiciary guidance where it regards it as necessary.[6]

Criterion of the 'interests of justice'

In s 60(4), (9) and (10) the drafters must have contemplated something closer to the conventional 'interests of society' concept or the interests of the State representing society. That must also be the sense in which 'the interests of justice' concept is used in ss (4). That subsection actually forms part of a functional unit with ss (9) and (10). Between them they provide the heart of the evaluation process in a bail application, ss

- (9) being predominant. If it is read first and 'the interests of justice' bears the same narrow meaning akin to 'the interests of society' (or the interests

of justice minus the interests of the accused), the interpretation of the three subsections falls neatly into place. In deciding whether the interests of justice permit the release on bail of an awaiting trial prisoner, the court is advised to look to the five broad considerations mentioned in ss (4)(a)-(e), as detailed in the succeeding subsections. And it then has to do the final weighing up of factors for and against bail as required by ss

- (9) and (10). Section 60(4), (9) and (10) should therefore be read as requiring of a court hearing a bail application to do what courts have always had to do, namely to bring a reasoned and balanced judgment to bear in an evaluation in which the liberty interests of the arrested person are given the full value accorded by the Constitution. In this regard it is well to remember that s 35(1)(f) itself places a limitation on the rights of liberty, dignity and freedom of movement of the individual. In making the evaluation, the arrested person therefore does not have a totally untrammelled right to be set free. More pertinently than in the past, a court is now obliged by s 60(2)(c),
- (3) and (10) to play a pro-active role and is helped by ss (4) - (9) to apply its mind to a whole panoply of factors potentially in favour of or against the grant of bail.[7]

Use of factors unrelated to trial in ss (4)(a) and (5)

Section 35(1)(f) presupposes a deprivation of freedom - by arrest

- that is constitutional. This deprivation is for the limited purpose of ensuring that the arrested person is duly and fairly tried. But s 35(1)(f) neither expressly nor impliedly requires that, in considering whether the interests of justice permit the release of that detainee pending trial, only trial-related factors are to be taken into account. The broad policy considerations contemplated by

the 'interests of justice' test can, in that context, legitimately include the risk that the detainee will endanger a particular individual or the public at large. Less obviously, but nonetheless constitutionally acceptable, a risk that the detainee will commit a fairly serious offence can be taken into account. The important proviso throughout is that there has to be a likelihood, ie a probability, that such risk will materialise. A possibility or suspicion will not suffice. At the same time, a finding that there is indeed such a likelihood is no more than a factor, to be weighed with all others, in deciding what the interests of justice are. That is not constitutionally offensive. Nor does it resemble detention without trial, the reprehensible institution really targeted when one speaks of preventive detention."

(vii) In *S v Pineiro and Others*

[8] Frank J held as follows:

"The overriding principles guiding an application of this kind are succinctly set out by Du Toit et al in Commentary on the Criminal Procedure Act and, in his notes to s 60 thereof at 9-8B, the following is stated:

'In the exercise of its discretion to grant or refuse bail, the court does in principle address only one all-embracing issue: Will the interests of justice be prejudiced if the accused is granted bail? And in this context it must be borne in mind that, if an accused is refused bail in circumstances where he will stand his trial, the interests of justice are also prejudiced.

Four subsidiary questions arise. If released on bail, will the accused stand his trial? Will he interfere with State witnesses or the police investigation? Will he commit further crimes? Will his release be prejudicial to the maintenance of law and order and the security of the State? At the same time the court should determine whether any objection to release on bail cannot suitably be met by appropriate conditions pertaining to release on bail. (See generally *S v Bennett* 1976 (3) SA 652 (C).)'

(viii) In *S v Dlamini*[9] Kriegler stated as follows:

"[49] ... the manner in which a court enquiry into bail is to be conducted, remain substantially unaltered. It remains a unique interlocutory proceedings where the rules of formal proof can be relaxed and where the court is obliged to take the initiative if the parties are silent; and the court still has to be proactive in establishing the relevant factors. More pertinently, the basic enquiry remains to ascertain where the interests of justice lie. In deciding whether the interests of justice permit the release on bail of an awaiting trial prisoner, the court is advised to look to the five broad considerations mentioned in paras (a) to (e) of ss (4), as detailed in the succeeding subsections. And it then has to do the final weighing up of factors for and against bail as required by ss (9) and (10)."

(ix) In *S v Schietekat* 1998 (2) SACR 707 (C) at 713 Slomowitz AJ stated:

"Bail proceedings are *sui generis*. The application may be brought soon after arrest. At that stage all that may exist is a complaint which is still to be investigated. The State is thus not obliged in its turn to produce evidence in the true sense. It is not bound by the same formality. The court may take account of whatever information is placed before it in order to form what is essentially an opinion or value judgment of what an uncertain future holds. It must prognosticate. To do this it must necessarily have regard to whatever is put up by the State in order to decide whether the accused has discharged the onus of showing that 'exceptional circumstances exist which in the interests of justice permit his release'.

(x) In *S v Lupuwana*,[10] Kahla AJ stated:

“As to whether there is a possibility that the appellant may be acquitted cannot be denied but the probabilities of a person being acquitted on trial will depend on the evidence to be adduced at the trial. This Court is not concerned with proving the guilt or innocence of the appellant, it only looks at pointers in the direction to arrive at a decision as to whether it can be said that the State's case is so weak or the State has failed to submit a prima facie case against the accused.”

(xi) In *Mathebula v S* [11] Heher JA held as follows although dealing with a schedule 6 offence:

“But a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge: S v Botha 2002

- (1) SACR 222 (SCA) at 230h, 232c; *S v Viljoen* 2002
- (2) SACR 550 (SCA) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the state is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see *Shabalala & Others v Attorney-General of Transvaal and Another* [1995] ZACC 12; 1996
- (1) SA 725 (CC). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the state to rebut his evidence to that effect: *S v Viljoen* at 561f-g.”

[4] Facts of the case and evidence led

4.1 In determining whether or not the magistrate's decision was correct based on inter alia the legal principles and authorities set out above one has to have regard to the evidence led in this matter that encompasses both the personal circumstances of the applicants and the evidence led in respect of the merits.

4.2 Personal circumstances of the applicants

- (i) The first appellant inter alia testified with regard to his personal circumstances as follows: -
 - (a) He was 44 years of age;
 - (b) He resided at 1[...] O[...] Street, Fortgate since May 2022 (this address was conceded by him to belong to the complainant in his pending trespassing and housebreaking charge);
 - (c) That he is self-employed owning A[...] N[...] F[...] S[...] and A[...] N[...] T[...] P[...];
 - (d) He earns R15 000 from each company per month from being the director of these two companies;

- (e) He is also a healer and earns about R25 000 per month from donations to him as a healer;
- (f) He is a pastor and does charity work;
- (g) He has five children, two from his first wife and three from his second wife;
- (h) his first wife is unemployed and his second wife works at his f[...] s[...].
- (i) His eldest child receives funding from NSFAS as he is at university but he pays for his books;
- (j) He pays for school fees for three of the others and the youngest is only 4 months old;
- (k) He owns livestock, 13 cows, 76 sheep and 18 goats. He is not certain of the numbers as there is a person who takes care of his livestock and his elder brother also assists in taking care of them at D[...] V[...].
- (l) If he is released on bail he would be able to continue his businesses and church responsibilities and support his children whereas if he remained in custody his companies would close and his employees would be left jobless.
- (m) His initiates would not be able to complete their initiation training.
- (n) His children would not go to school because he takes care of their transport. The person who takes care of his livestock will stop working because he will not be paid.
- (p) His livestock would be stolen when his brother goes looking for jobs.
- (q) He would not be able raise funds for his private attorney.
- (ii) The second appellant stated inter alia the following as his personal circumstances: -
 - (a) He is 39 years of age;
 - (b) He is married and had two adopted children aged five and two and he also takes care of his mother and nephew and nieces;
 - (c) His wife is unemployed;
 - (d) He has a fixed address in Southridge and Sibangweni and at his ancestral home;
 - (e) He takes care of the minor children financially;
 - (f) He is a businessman doing pig farming and earns R17 000 to R18 000 per month in 2018;
 - (g) He wants to be released on bail because his mother, since she heard of his incarceration her diabetes is rising very high;
 - (h) His businesses are failing and his wife and children are suffering;
 - (i) The child that is schooling is having difficulty because he was the one who from time to time took the child to school;
 - (j) His wife tells him that the child is saying a lot wanting his father;

- (k) His mother`s health is up and down and deteriorating because she has lost hope now that he is incarcerated;
 - (l) His child was supposed to start school but because of the operation (the search and seizure of documents) he lost the child`s birth certificate;
 - (m) He wants to be released so that he can properly prepare for trial or pay for his private.
- (iii) Third appellant stated inter alia the following as his personal circumstance: -
- (a) He is 49 years of age, married with 2 children aged 16 and 12 years, doing grade 9 and 5, eldest at a private school and he pays the school fees. He pays R5200 per month in respect of the eldest and R3500 in respect of the younger one. He pays rental of R11500 in respect of the place they are renting in KwaZulu Natal.
 - (b) His wife is also studying and he pays for her studies as well and she resides with the children in Durban.
 - (c) He then stated that he is estranged from his wife and his children are unaware of this.
 - (d) He could not recall the address he resided at in Fortgate and requested permission to ask his wife then said it was at 9 Terrance Lowry Street, Fortgate since 2018.
 - (e) He stated that he also has an address in Nkululekweni and in the rural areas Nquba at Ngqeleni and his mother also has a home at Ziphunzana Location in Libode.
 - (f) He does not own any of his residences.
 - (g) He works as a contractor and owns his security company S[...] C[...] and S[...] S[...] and C[...] S[...]
 - (h) The company generates R65000 to R68000 per month.
 - (i) He is the sole director of S[...] C[...]and there is no one able to manage everything so the employees would not be paid as the company cannot operate without his presence.
 - (j) There is no one who would be able to pay his children`s school fees and rentals if he was not granted bail.
 - (k) He has a previous conviction of housebreaking. He had been arrested in 2009 but was sentenced in 2012.
 - (l) He has a passport and he has a brother living in London.
 - (m) He has not left the country in the past 5years.
 - (n) His family and employees and their children will suffer if he is not released.
 - (o) His elder child is seeing a psychologist and his condition will be worsened if he knew that his father was in prison.

(p) He has a sickly elderly mother.

4.3 Evidence led on the merits

4.3.1 (i) First Applicant when questioned regarding the merits of the matter inter alia stated: -

- (a) That he was told on the day of his arrest when he presented himself at PRD building that he was being charged with fraud and theft.
- (b) That he met with ECDC's new board as the National Treasurer of Public Assets Community Based Tenants and Owners Association (hereinafter referred to as PACTOA).
- (c) He denied receiving any monies personally which is rental due to ECDC in the stead of ECDC.
- (d) It was put to him that PACTOA was in control of ECDC property and the preamble was read to him from the memorandum of agreement which reads as follows, when he said that the agreement was only in respect of flats and not other properties:

"We have concluded that as PACTOA members as we occupy ECDC properties we will hand over those properties to ECDC as there is a new executive who can sit and listen to us. So after we hand over those properties we will sign new leases."[12]

He elected to disclose his defence in this regard at trial.

- (e) He failed to state exactly what would prevent his second wife from running his business as she is employed there. Her not being a director clearly is not a cogent reason to say she is unable to run his business.
- (f) He admitted being in occupation of the very property that was the subject matter of the pending criminal trial in respect of trespassing and housebreaking and in fact furnished that address to the police. He conceded that it belonged to the complainant, in the pending criminal matter against him.
- (g) It was put to him on the basis of that that it was likely that he would interfere with state witnesses since he was occupying the house of the complainant in another matter, the very house that formed the subject matter of the charges against him in that matter.
- (h) It was also put to him that on that basis he had no fixed address as he had only furnished the police with that address that belonged to the complainant, Mr Nkhola and not to him.
- (i) It was put to him that the voice note was circulated on behalf of all of them saying they were going to Dubai when they became aware of the intended arrest. It was stated that for this reason he was also considered a flight risk. He initially denied that the second applicant had the right to circulate the voice note and the second applicant would answer but denied that he was a flight risk then said that on most things Mr Songca had or was given the authority as the spokesman especially on issues involving the police to speak on their behalf.

- (j) He stated to his knowledge PACTOA does not collect rentals from persons occupying buildings belonging to ECDC.
- (k) When he was questioned about receipts issued by PACTOA his response was that there was nothing that showed that it was in respect of ECDC property nor were persons' names on it.
- (l) He, however declined to state what the monies were paid to them for saying he would state his position when the matter came to trial.
- (m) It was put to him that the investigating officer would testify that these monies were rental monies he collected from the occupants and / or residents of the houses, buildings or flats that belonged to ECDC. His response was that none of the documents that he was shown speaks about rentals or the name of the building or flat.
- (n) It was put to him that the Xu family was renting from ECDC. They as PACTOA caused the Xu family to pay them the rentals. The Xu family had made statements and are state witnesses and will confirm that the building does not belong to them but to ECDC. He responded that that was a lie and that the building belonged to Mr Xu and that the lady that is there is new and perhaps the investigating officer threatened her to write such statements.
- (o) When he was asked whether those tax invoices were for maintenance he elected not to respond saying that when the matter comes to trial he will have his own documents to divulge.
- (p) When he was questioned about the lease agreement concluded between PACTOA as Lessor and Mr Xu as lessee dated 22 November 2018 (exhibit 4), he again stated that he did not wish to answer at this stage but reserves his right for when the matter is tried saying he had information and notes regarding the agreement with Mr Xu.
- (q) It was put to him that the title deed showed that the building belonged to ECDC. His response was that if he was released he would be in a position to bring his own documents which will show that the building belongs to the Xu`s.
- (r) It was put to him that Mrs Xu had furnished them with a statement and the lease agreement with PACTOA saying that she was leasing the hotel from PACTOA. He asked to skip that question and deal with it at trial.
- (s) He confirmed that his signature appeared on the lease agreement but not on the receipts.
- (t) When it was put to him that there is a statement from the Xu family that he was the one who was collecting the monies from them and signed those documents he again asked to deal with that at trial.
- (u) It was put to him that all witnesses would say that they were initially paying rentals to ECDC and they would come with 18-20 members of PACTOA and when the tenants of ECDC would say that they were paying rent to ECDC they would violently inform the person, by pushing them out of the building and telling them that if they did not pay rental to PACTOA they

would be substituted by other people and their locks would be changed. His response was that it was not true and that the witnesses had not said this and if it was true they should have gone to the police to report it.

- (v) When it was put to him that if the witnesses did not comply they would take out all their belongings from the building, he again asked to skip that question and that he would respond when that matter was tried.
- (w) It was put to him that some of the witnesses were coerced to succumb to their violence and ended up being PACTOA`s tenant. He asked to skip that question as well.
- (x) It was put to him that the witnesses were afraid of him because of this modus operandi. He said fear was normal and he feared the prosecutor.
- (y) It was put to him that the three of them were the brains and head of PACTOA and their members were protesting outside because they cannot function without them. He again asked to skip that question.
- (z) When it was put to him that there is a likelihood of him being found guilty even if he pleaded not guilty and that the state had a strong case against him, he initially said he could not dispute that then said that perhaps if he could be released and produce his own documents, the prosecutor is likely to be found guilty then disputed that the state had a strong case.
- (aa) When it was put to him that based on the evidence thus far, the state`s case stands alone, unchallenged. He again asked to pass that.
- (bb) It was put to him that the fact that he may be sentenced to 15 years` direct imprisonment would be incentive for him to evade trial and go to Dubai. He denied this.
- (cc) It was put to him that having regard to the interest of the victims of PACTOA, the public members, his release would jeopardise the public confidence in the criminal justice system and they will lose confidence in the court.
- (dd) He asked to skip the question when it was the converse that was asked of him about the suffering of the victims and the victims` family because of his release when he asked the prosecutor "are you advocating that in order to protect those people, our families must suffer..."
- (ee) It was put to him that the trial was ready and would be finalised within a short space of time. He again said he did not wish to respond to that.
- (ff) He again did not wish to respond to the allegations that they had been collecting rentals from 2017 to 2022, a period of 5 years.
- (gg) When it was put to him that by collecting rentals on a monthly basis he had developed a propensity to commit the same crime on a monthly basis for 5years. He again said that this did not require a response.

(hh) It was put to him that a likelihood existed that he was going to commit a schedule 1 offence if he was released on bail. He again stated that he was not going to respond saying he does not know whether the state has got a right to think of an action that he is still going to take or will take.

(ii) It was put to him that the cash they collected was not put into the account of PACTOA. He again asked to skip that question.

(jj) It was put to him that he knew his conduct of collecting rentals due to ECDC was not lawful. He stated that he had no answer.

(ii) On the merits the second applicant stated inter alia as follows: -

- (a) He explained why he did not come to the police on the Friday after he had undertaken to do so and his explanation regarding his fears due to his prior traumatic experience when he was shot with rubber bullets by the police was regarded as a reasonable explanation by the state advocate despite it being said that no threats or attacks took place on that Friday.
- (b) His only involvement with ECDC was him entering into the Memorandum of Agreement with them on behalf of PACTOA.
- (c) He confirmed that he had sent a voice note as the spokesperson of PACTOA. The purpose was to make the members aware that the office had been broken into and that they must come and fetch their belongings.
- (d) According to him he told people as a norm that he is in China or Dubai because most of the leaders of the country mentioned Dubai. He factually has not gone further than East London.

He was trying not to be understood by the people he had led despite being close to them (His reason for mentioning he was in Dubai makes no sense.)

- (e) He did not know he was going to be arrested when he made the voice note (this confirms the investigating officer's version that he had not mentioned to them that they were going to be arrested).
- (f) His version was that the investigating officer had broken into the office and he was told by members that this was done without a warrant.
- (g) He stated that he did not understand or speak English, which is belied by the record at page 204 when the proceedings commence it appears he answered in English prompting the magistrate to note “.. Yes .. if he wants to speaks English it is ok but for the purposes of the people there it must be interpreted into Xhosa, after he has responded...”

There are numerous instances where he responded before the questions were interpreted into Xhosa demonstrating his knowledge and understanding of English.

- (h) It was put to the second applicant, Mr Songca that he had sent a WhatsApp message to PACTOA members before coming to court and the contents of the WhatsApp message were read to him:

“Greetings everyone. You are kindly requested to stay calm during this trying and testing times. It is times like this where we have to demonstrate true leadership of which you are all leaders. You are urged not to shift focus. The primary and urgent task is to make sure bail money is available to mobilize legal fees and pay them at appropriate time.

NB: It is estimated that litigation will not be less than R2000 per person with a flat. Including R300 for bail. Legal fees arrangements will be made with the lawyers “njengesiqhelo”(as usual). However, it is worth noting that they will request litigation fees (hlalani nilungile) – (stay ready) But all this will not inconvenience members financially. You will form part of the discussions that will put a final stamp to this. We humbly apologise to everyone who got offended by the first message [VN]. That was never the intention. We call for unity and discipline among all members [Ngomso sinelungiselelo lokudiban kwiinkundla zoMzantsi Afrika kwinkundla kamantyi eMthatha, kwinkundla yexesha 08:30 kusasa. Nkosi (Tomorrow we have an arrangement to meet in the courts of South Africa at Mthatha F Court in the court of law and then thank you, at half past 8.”

- (i) He denied being the owner of the whatsapp message saying he does not write English and does not understand what is written there. He admits that the voice note emanated from him. It was then put to him that this WhatsApp speaks about the voice note. He did not respond to that question and appears to have merely smiled.
- (j) There was again no audible response when it was put to him that the interest of his wife and family have to be weighed against the interests of the victims and the modus operandi that was utilised in committing the offences.
- (k) It was put to him that the victims were the Xu family, the occupants of S[...] Street, Shop No. [...] V[...] Heights, Mr Chips at S[...] and M[...] Street. He asked to pass the question saying the prosecutor was cooking something.
- (l) It was put to him that the victims had made statements claiming that PACTOA was a violent organisation.
- (m) He confirmed that the documents indicated that they are collecting rentals and that there is no document contesting that there is no collection of rental stating that this is because they are incarcerated.
- (n) It was put to him that the WhatsApp message confirmed the perpetuation of a schedule 1 offence in that it asked for payment of rentals. His response was that he will hear.
- (o) It was put to him that he had the propensity to collect rentals and will collect rentals if he was released on bail. His response was that he never collected rentals.

- (p) He did not dispute the veracity of the memorandum of agreement, the lease and the receipts.
- (q) He disputed that Windsor Hotel belonged to ECDC and said at trial he would have his own documents that are against the investigating officer.
- (r) He stated that PACTOA does not own any buildings of its own but merely were bringing about equity between the government and them.
- (s) When it was put to him that the memorandum of agreement confirms that PACTOA is in charge of buildings owned by ECDC his response was that he does not dispute anything here.
- (t) It was put to him that at least three witnesses confirmed that they were collecting rentals from them on a monthly basis.

His response was that that is not so and he will cross that bridge when the witnesses appeared and said so.

- (u) It was put to him that the witnesses were fearful of them as they came with a group of people and would threaten to lock their places and lock them out. He denied that.
- (v) He denied demanding rentals from the Xu`s in a group of plus minus 20 persons and pushing the Xu`s and their employees out of the shop prompting the Xu`s to pay him out of fear or duress. He stated that he was not in the cabinet at that time he knows nothing about all those things.
- (w) It was put to him that it was strange and improbable that persons who had been paying ECDC suddenly stopped paying rentals to ECDC and PACTOA was in charge of such building. His response was that he does not know.
- (x) It was put to him that his bail and the legal costs would be paid by the occupants of the flats on their behalf and not by them according to the WhatsApp message. His response was that he does not even know how to write English and he knows nothing about this. (He did not say that the investigating officer was the author of the WhatsApp as put to the investigating officer by his legal representative)
- (y) It was put to him that on their first appearance at court they were found in possession of their cell phones and it was confiscated from them. His response was that on their arrival at Central they gave their phones for safekeeping and it was returned to them when they went to court.
- (z) It was put to him that they were not permitted to have their cell phones when coming to court and that is one of the reasons the state was alleging that the police in Mthatha were captured. His response was that everyone attending court is given his cell phone.

(aa) It was put to him that he jeopardises the bail system and the administration of justice and that it would not be in the interest of justice that he be released on bail. His response was that he did not dispute that because the bible says that they should let those that are in authority.

(bb) Under cross-examination he stated that he is an illiterate person and does not understand what the interests of justice means and that inter alia there was no one picketing against their release on bail.

(iii) The Third Applicant`s testimony relating to the merits was briefly inter alia as follows: -

(i) The third appellant on his version was informed of the charges and told he was going to be arrested for fraud and theft of approximately R40million when he went to meet Colonel Booysen at PRD on the Monday;

(ii) he confirmed that when they first went to Windsor they thought that the building belonged to the government.

(iii) He did not initially believe that Mr Xu was the owner of the building until he was shown some paper when he became the chairperson (which was on his version in 2019).

(iv) According to him Mr Xu explained that he was having difficulties obtaining rentals from his tenants who were foreign nationals and it was at that stage that the chairman at the time offered him assistance.

(v) when the summons wherein Mr Xu had sued one of the tenants were put to him he indicated that he was unaware of that particular one.

(vi) He stated that he had attended a meeting and explained why properties belonging to ECDC were under their control (thereby confirming that they had taken control of ECDC property).

(vii) He stated that he did not know that ECDC owned Windsor Hotel. He believed that the property belonged to the Transkei Government.

(viii) He initially appeared to state it as a fact that the reason Mr Xu was referred to as the tenant in the lease concluded with PACTOA was so that they as locals could deal with the foreign tenants then under cross-examination stated that he was not privy to the drafting or signing of the lease agreement between PACTOA and Mr Xu as he was not in the executive at the time but he is assuming that this was the reason.

(ix) According to him PACTOA assisted families and the police by patrolling the streets, stopped robberies and assisted people in not having their goods removed illegally. They assisted lots of people.

(x) When the lease agreement between ECDC and Mr Xu that was concluded in 2015 was put to him he stated that he elected not to comment now but would like to go to trial with the issue.

(xi) It was put to him that the three of them had sent someone to collect R43450 from the Xu family. He said he does not have a response.

(xiii) It was put to him that they had the propensity to collect rentals and to thus commit schedule 1 offences which is fraud and or theft from ECDC and that he would continue collecting rentals from the occupants of ECDC properties and that it was not in the interest of justice to release him on bail. His response was that he knew nothing about that and that it was in the interest of the prosecutor.

(xiv) he requested to pass on the issue of ownership of the property when it was put to him that the Windsor Hotel had been transferred to ECDC on the 13 June

2018. (He accordingly did not testify as to whether or not he was informed by ECDC that it belonged to them. Accordingly, the question put to the investigating officer that they were not told by ECDC that Windsor Hotel belonged to ECDC is incorrect and does not accord with their evidence)

(xv) It was put to him that the very same people who he alleges are saying are owners made statements to the effect that they were renting from PACTOA and that the state's case against them is strong. His response was that he doubts it and will wait to see the documents coming from Xu.

(xvi) It was put to him that Xu would not collaborate his version and will say the Xu's never owned Windsor Hotel. They will accordingly be found guilty on their own version. His response was that let them dispute documents that they signed themselves.

(xvi) On being told that a 15year sentence would be incentive for him to escape, his response was that he would not be such a coward as to run away from where he grew up and having children and taking care of children.

(xviii) It was put to him that PACTOA was a violent entity and that even his testimony establishes that other organisations regarded PACTOA as a violent organisation. He said that was not true.

(xix) It was put to him that PACTOA had been collecting rentals from 2017 until November 2022 (the month during which the bail application was taking place and post their arrest in October 2022). It was put to him that the state was opposing bail on the basis that should they be released on bail they would continue collecting rentals thereby committing schedule 1 offences. His response was that it is not like that and that he did not know that PACTOA was collecting rentals in the first place.

(xx) He confirmed that it was only the three of them that are members of PACTOA that are presently busy with bail when questioned regarding the WhatsApp message.

(xxi) He confirmed that the three of them were in leadership roles in PACTOA and their absence left a gap and that it may not function optimally but stated that they could be replaced and other members elected.

(xxii) It was put to him that witnesses were afraid of them and that if they were released they will endanger the safety of the public and in particular the state witnesses, which he denied.

(xxiii) It was put to him that Mr Nkhola`s (the complainant in the pending case) version regarding the firearm differed from his version regarding dispossession and that according to Nkhola he was dispossessed of his firearm after he had been hit on the head and was lying semi or unconscious on the ground at the time he was being chased out of his factory. He denied this and denied that PACTOA collected money saying PACTOA is a non-profit organisation which saved property belonging to the government by renovating it and making it better.

(xxiv) It was put to him that he was part and parcel of the people who collected rentals in 2017 and that he committed an offence whilst still on parole. His response was that he did not commit any offence.

(xxv) It was put to him that he occupied property belonging to ECDC without paying rentals.

(xxvi) It was put to him that they do not have a fixed address and have multiple addresses. His response was that no one has one address.

(xxvii) That concluded his evidence and the applicants` case.

(iv) The testimony of the investigating officer in respect of his opposition to the granting of bail on behalf of the respondent was inter alia the following: -

- (a) He is attached to the DPCI (Directorate for Priority Crime Investigation) with 34 years of experience in the South African Police Service (SAPS).
 - (b) According to him he had a search warrant for PACTOA`s office at Windsor Hotel and a warrant of arrest for the three applicants.
 - (c) He spoke to the second applicant in English without divulging anything to him regarding the warrant of arrest and the second applicant told him he is on his way in very good English. One of his team members told the second applicant that they had a search warrant to search the office of PACTOA. When the second applicant did not arrive the door was broken to the office and they gained entry. No one was assaulted in his presence and no reports of assaults were made and no personal documents such as birth certificates were amongst the documents that were confiscated.
 - (d) The applicants were only informed about their arrest when they came to the PRD offices.
- (1) According to him: (a) regarding the addresses of the applicants: -
- (i) The information he obtained demonstrates that each of them has five different addresses.
 - (ii) The first applicant failed to give the address of 2[...] V[...] V[...] where he resided and which was an ECDC property and the address he gave when he was arrested in June 2022.
 - (iii) The first applicant did not even give the police his address in this matter when he was arrested but gave Mr Ndwayi`s address which is not his address.

(iv) The second applicant also has five addresses that are ECDC properties and No. [...] O[...] in Port Elizabeth does not exist it is an open space.

(v) None of them have fixed addresses.

(2) Threats

(i) He personally was prevented from accessing premises belonging to ECDC to obtain statements from these witnesses / occupants by a group of 18-20 persons. One person had made a phone call to Mr Nkqayi and told him that there was a gentleman who was doing investigation for ECDC. He did not hear the response from the person on the other side but the person who had made the call told the crowd that Mr Nkqayi had told them to remove him and he was forced to leave.

(ii) He was unable to obtain the statements thereafter as he was told by the residents of the other flats that they were told not to speak to the police or ECDC but only to PACTOA.

(iii) All the tenants told him that they were scared for their lives and they collaborated each other saying that those guys are very dangerous and would victimise them and that is why they do not wish to testify in court.

(iv) He said he was better able to do his work now that they are in custody although there are still messages coming from prison from numbers belonging to specifically the first and the second applicants telling tenants not to talk to the police.

(v) The appellants were found in possession of their cell phones in the grills despite there being a standing order that nobody is allowed to have cell phones in court and he had personally handed over their cell phones to Mthatha Central when he booked them in.

(vi) Mrs Xu told him she was afraid.

(vii) He himself is afraid to stay in Mthatha and according to the information he received members of the police, justice, correctional services, politicians, lawyers, doctors etc. are registered on PACTOA data base.

(3) The strength of the state`s case / schedule 1 offence perpetuation

(a) He stated as follows regarding the strength of state`s case and the likelihood of the applicants committing a schedule 1 offence:

(i) According to him the state witnesses collaborate each other that the three applicants as well as others that he still needs to arrest are involved in pocketing the rentals for themselves;

(ii) They collect rent and monies are being paid into their banking accounts without it being paid over from their bank accounts to ECDC.

(iii) The first applicant`s bank account demonstrates that tenants` monies are paid into his account as rent Ndlovu rent, B[...] Room 2[...] on a monthly basis.

- (iv) Each of the applicants withdrew the monies shortly after it came into their account.
- (v) He also obtained a cash book where the applicants wrote in their own handwriting the money that came in and that they paid between themselves.
- (vi) The Xu`s all corroborated each other that they paid rentals to PACTOA. Mrs Xu is in South Africa although afraid she and her son are clear that they pay rentals to PACTOA.
- (vii) All the tenants paid rental for November 2022, whilst the applicants were in custody.
- (viii) The first applicant specifically sent a message to one gentleman saying “do not pay into my account anymore, pay cash, somebody is going to come to you, give the money to that person.”
- (ix) The WhatsApp message regarding payment by each person for their bail and legal representation came from the second applicant`s phone and he will get the proof from the service provider. He has the number for the phone.
- (x) The applicants according to him would commit a schedule 1 offence if released on bail.
- (xi) They would endanger the public considering the threats that they had made and assaults on some of the tenants that were unwilling to pay them.
- (xii) There is a likelihood that they would evade trial according to him if they had known he would arrest them and the charges and the likely sentence they would never have handed themselves over based on his experience.
- (xiii) They will intimidate or influence witnesses having regard to the messages that emanates from their cell phones to the tenants whilst they are in custody.
- (xiv) Mr Xu had told him that he had no choice but to enter into an agreement with PACTOA who Mr Xu described as hooligans saying that they would collect the rentals and then particularly the first applicant would come again in the middle of the month for more money. The first applicant collected monies from him and issued him with receipts.
- (xv) The first applicant would first come alone but if Xu was unable to pay because business was bad, they would come in their numbers, grab him, throw him out of his shop and lock his shop up and put their own locks until he paid.
- (xvi) There was another incident where they beat up a tenant regarding rentals and when he went to the police they were unwilling to assist him and PACTOA returned and took his monies that he had kept for something else.
- (xvii) According to him the interests of the victims outweighed those of the interests of the applicants` families.

(xviii) It was put to him that at no stage did ECDC inform PACTOA that they owned the Windsor Hotel so the applicants could not have formed an intention to defraud ECDC since they were unaware of their ownership of the property. His response was that ECDC would need to deal with that. (in any event this was not the version of the applicants when they testified.)

(xix) According to him Mr Xu's statement that had been obtained three years prior was collaborated by the documents that he obtained when they searched and seized documents from PACTOA's office and he was adamant that it was in terms of a valid search warrant although he did not produce it at court saying that the defence counsel would need to bring an application to court for access to it since:

(i) it formed part of B clip and not A clip;

(ii) only A clip documents were provided to the defence counsel ordinarily.

(xx) He denied that the evidence was obtained illegally and unconstitutionally. He stated that he came from a high ranking department that did not work outside the law when it was put to him that he concocted the WhatsApp message and sent it himself to falsify his opposition to the bail and he further said that he would be able to prove that it emanated from the prison. (This again was not the version of any of the applicants that is that the investigating officer who concocted the WhatsApp message)

(xxi) He re-iterated that the instruction came from the prison that rent must be paid for litigation and was accompanied by a message that they were not to talk to the police.

(xxii) He stated that the fact that the applicants already during the bail hearing collected rent was indicative of the fact that they were committing schedule I offences even whilst incarcerated and that must be stopped.

(xxiii) He denied the version that was put to him that the persons were paying support fees (this again did not emanate from the appellants who stated that they would deal with the monies that were paid at trial).

(xxiv) In any event his response was that all the witnesses submitted affidavits to the fact that they were paying rent every month. He re-iterated that monies are being paid into all three of the applicants' bank accounts clearly reflected as rental monies in the statements.

(xxv) When he was asked about how ECDC entered into a lease with Mr Xu in 2015 when they only took transfer of the property in July 2018 his response was that ECDC would need to answer that.

[7] Evaluation of evidence

(a) The charge sheet demonstrates that the charge is not simply restricted to ECDC but includes the tenants as well. This accordingly

demonstrates that contrary to the contention by the applicants it does involve members of the public and is not limited to a state

entity.

- (b) The evidence of the investigating officer demonstrates that indeed the state does have a strong case as illustrated by inter alia:
 - (i) The uncontroverted lease agreement concluded between PACTOA as lessor and Xu`s as lessees in circumstances where it was confirmed that neither PACTOA nor the appellants personally owned any property. The applicants reserved their rights to challenge this document at trial and thus adduced no acceptable evidence at the bail hearing to gainsay or bring into question in any meaningful way this document. The third applicant eventually conceded that his attempts to challenge it was based on assumptions he was making since he was not in the executive at the time it was concluded but he was aware of the existence of the documents;
 - (ii) The investigating officer indicated that the bank statements of the individual applicants indicated the receipt of rentals and names of persons which he says will tie up to ECDC properties. The description on their bank statements is rentals in contrast with their testimonies that they never received rentals and also viewed in light of their contention that they owned no immovable property thus they were not entitled to any rentals.
 - (iii) The receipts also show PACTOA receiving large sums of monies and when questioned with regard to why these monies were paid to PACTOA or them for PACTOA there was again an election on their part to disclose that at trial.
 - (iv) The investigating officer also gave evidence regarding the modus operandi of the applicants in causing the tenants of ECDC to become 'tenants' of PACTOA by using force and threats and in some instances assaulting the victims to force them to pay over monies.
 - (v) The memorandum of agreement handed up by the applicants themselves demonstrates that they were in control of property belonging to ECDC.
 - (vi) Their assertion that Windsor Hotel belonged to the Xu`s flies in the face of the lease agreement that they concluded as lessors and Xu`s as lessees, as well as the statements attributed to the Xu`s and the title deed which was not challenged in any meaningful manner. This demonstrates that at the time of the conclusion of the lease between PACTOA and the Xu`s the registered owner was ECDC ex facie the title deed that remains unchallenged at this stage.
 - (vii) Whether or not ECDC had the right to enter into a lease agreement with the Xu`s in 2015 does not detract from the fact that at the material time PACTOA entering into the lease agreement the property was owned by ECDC. This is clearly something ECDC must explain at trial. It does not cast doubt upon the veracity of the title deed and the issue of ownership at the relevant time at this stage.

(viii) None of the applicants testified on whether or not they were told by ECDC that the property belonged to them, they merely related what was told to them by the Xu`s and that is belied by the existence of their own lease agreement, which none of them could explain.

(ix) Accordingly no weight can be attached to the assertion put to the investigating officer by their legal representative that they were not told by anyone at ECDC that the property belongs to them since this was not testified to by them.

(x) The investigating officer states that the witness statements demonstrate that Xu told them that they were leasing the property

from ECDC as did the other tenants of ECDC. That demonstrates that they knew who the owners of the building were when they entered into their own agreement or at least were made aware of the fact that ECDC owned those buildings that they were taking control off and according to the witnesses entering into their own agreements on behalf of PACTOA in respect of those properties and collecting rentals from the occupants or tenants of those properties.

(xi) They did this using force and unlawful means according to the evidence available to the investigating officer and forced these

people to pay rentals to them in circumstances where they were on their own version not the owners of the property and neither was PACTOA.

(xii) There is no need to go further suffice to say that the state had demonstrated that it had a strong case against the applicants, based on what was presented to court and being alive to the fact that the state is not obliged to produce evidence in the true sense. The court of necessity at this stage is merely prognosticating on what is presently before it.

(xiii) The applicants were given ample opportunity to deal with the strength or weakness of the state`s case and as correctly argued by the respondent`s counsel they elected to disclose their defence at trial. There is accordingly no merit in the proposed further ground of appeal seeking a remittal of the matter to the court a quo on the basis that the applicants were not given an opportunity to adduce evidence regarding the strength of the state`s case. This not only was not one of the grounds of appeal but is not correct. This court has evidence before it and the applicants` responses to the state`s evidence that was put to them the court is in a position to determine the strength or weakness of the state case, based on the evidence led in the court a quo.

(xiv) I do not accept the applicants` counsel contention that the state had to establish the strength of the state`s case on a balance of probabilities. The onus was actually on the applicants inter alia to establish that the state`s case was weak when it had to discharge the onus resting upon it, on a balance of probabilities.

(xv) The state has in any event adequately demonstrated on the evidence that was tendered that it has got a strong case against the applicants so even if the onus had rested upon the responded, they would have discharged the same.

(xvi) I do not wish to say more as the merits and the guilt or innocence of the applicants falls squarely in the domain of the trial court and this court is merely taking cognisance of information that was placed before the court a quo in the bail proceedings.

(xvii) The state has adequately demonstrated the probability that the applicants would commit a schedule 1 offence by:

- (a) demonstrating that rentals were collected on a monthly basis for a prolonged period indicating the propensity to commit schedule 1 offenses;
- (b) by demonstrating the existence of the WhatsApp message from the second applicant that not only shows that the applicants were, even whilst in prison, communicating with potential witnesses but that they had caused rentals to be paid during the month of November whilst they were in custody;
- (c) The investigating officer had confirmed that he had been informed that the first applicant had personally contacted a “tenant”

and told him not to pay into the first applicant`s account but that someone would come and collect the monies, and indeed those rentals were paid.

- (d) The Xu`s also confirmed that monies were collected from them on behalf of the applicants in November.
- (e) He was also informed that they told them not to communicate with the police.
- (f) There is accordingly a probability having regard to the foregoing that the applicants would commit schedule 1 offences if released on bail.
- (g) The violent conduct attributed to their organisation demonstrates that it is unlikely that they would be deterred by any bail condition considering their conduct of having rentals collected whilst in custody. (h) No bail conditions would prevent the likelihood of this criminal conduct being perpetuated if they were released on bail considering that even their incarceration was not a deterrent to them committing further offences whilst in custody during the bail proceedings, by having rentals collected on their behalf.
- (i) The second applicant`s denial of the WhatsApp message emanating from him because he does not speak or write English, was demonstrated as improbable considering his answering in English and answering before questions were interpreted as well as the investigating officer`s testimony to the effect that he would prove that it came from prison from the second applicant`s phone. There was no gainsaying evidence that was presented during the bail hearing.
- (j) This demonstrates that one of the grounds mentioned in section 60 (4)(a) is present whereby the interest of justice would not permit the release of bail in that there is a likelihood / probability of them committing a schedule 1 offence and the perpetration of this offence even whilst in custody demonstrates that no bail condition

would serve as a deterrent to them committing schedule 1 offences if released on bail. Their personal circumstances and that of their families and employees are outweighed by the presence of a strong case and the likelihood of them perpetrating a schedule 1 offence.

- (k) The presence of any one of the factors listed in subsection 4 is sufficient to make a finding that it is not in the interest of justice to release the applicants on bail.
- (l) The presence of the likelihood of the perpetuation of a schedule 1 offence is in my view a sufficient basis to deny the applicants bail having regard to the facts of this case.
- (m) I accordingly will not go into further grounds despite the fact that the presence of interference with witnesses also appears from the WhatsApp message that tells them not to talk to the police and the fear of victims is also evident from the testimony of the investigating officer that the applicants do not have a fixed abode. The police were unable to find them on their own despite searching for them according to the investigating officer.

(xv) Interest of justice

- (a) The applicants are charged with schedule 5 offences and although the applicants do not have to overcome the higher hurdle of proving exceptional circumstances, as required in a schedule 6 offence, the burden to prove that it is in the interests of justice is not negligible and necessitates a proper and careful evaluation by this Court. In considering this appeal, even if this Court has a different view, it should not substitute its own view for that of the court a quo, because that would be an unfair interference with the court a quo's exercise of discretion.
- (b) It is after all the court a quo that would have been best equipped to deal with the question of bail, steeped in the atmosphere of the case.
- (c) This court must consider all relevant factors and determine whether individually or cumulatively they warrant a finding that the interests of justice warrant their release.
- (d) I have duly considered all the relevant factors and the personal circumstances of the applicants and that of their families who will undoubtedly be adversely impacted by the continued detention of the applicants.
- (e) The personal circumstances of the applicants are neither unusual or such as singly or together warrant the release of the applicants in the interests of justice.
- (f) My sympathies lie with their families, however their interests have to be weighed up against the strength of the state's case,

probability of the applicants committing a schedule 1 offence and all the other evidence that has been tendered in court.

- (g) The personal circumstances of the applicants are completely outweighed by these factors and taking into account all the relevant

considerations no bail condition in the circumstances of this case would address the legitimate concerns of the state particularly the probability of the applicants committing a schedule 1 offence. That alone is a sufficient basis to find that it is not in the interests of justice to release the applicants on bail.

[8] The applicants have accordingly failed to discharge the onus resting upon them to establish that it is in the interests of justice for them to be released on bail.

[9] The magistrate's conclusion in refusing bail was accordingly correct for the reasons advanced above based on inter alia: -

(i) the strength of the state's case;

(ii) most importantly the propensity of the three applicants to commit a schedule 1 offence and the probability that they will commit such an offence, and

(iii) their failure to demonstrate that it is in the interests of justice to release them on bail, having regard to all the relevant factors and authorities listed above.

[10] There is accordingly no reason to interfere with the learned magistrate refusal of bail which was the decision appealed against.

[11] The learned magistrate's refusal was justified having regard to the facts of this case and the findings made above and having regard to the relevant authorities.

[12] In the result the following order is made: -

(i) The Bail Appeal is dismissed.

FBA DAWOOD

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellants: Adv Kessler Perumalsamy Instructed by: SR Mhlawuli & Associates Suites 318 & 325 ECDC Building Mthatha For the Respondents: Adv Thenjwa Sellem Instructed by: The Director of Public Prosecutions No. 94 Sisson Street Mthatha Date heard 27 February 2023 Filing of Supplementary Submissions: 06 March 2023 Judgment delivered: 28 March 2023

[1] S v Barber 1979 (4) SA 218 (D) – 220E-H.

[2] S v Porthen and Others 2004 (2) SACR 242 (C).

[3] 1979

(4) SA 218 (D) at 220E – H.

[4] 2004 (2) SACR 242 (C) para 4.

[5] S v Dlamini 199 (4) SA 626 – 627.

- [6] Paragraphs [41], [42] and [43] at 653 G/H-654A/B and 654E-I/J.
- [7] Paragraphs
- [47] – [50] and [101] at 656H-657B/C, 657E/F-658A and 680H-J.
- [8] S v Pineiro and Others 1992 (1) SACR 580 (Nm).
- [9] S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999(2) SACR 51 (CC) at 78d-f.
- [10] S v Lupuwana 2015 JDR 0455 (ECP).
- [11] Mathebula v S 2010 (1) SACR 55 (SCA) at para 12.
- [12] Page 51 of the record.
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