

SOUTH AFRICA / JUDGMENT

Plaatjies v S (CA&R 51/2024) [2024] ZAECBHC 38 (12 November 2024)

[2024] ZAECBHC 38

COURT

Eastern Cape High Court, Bhisho

BEFORE

Jolwana

CASE / FILE NUMBER

CA&R 51/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, BHISHO)

CASE

NO.: CA &R 51/2024

In

the matter between:

ISAAC

PLAATJIES

Applicant

and

THE

STATE

Respondent

JUDGMENT

JOLWANA J:

Introduction

- [1] This is an application for bail on new facts. The applicant's two previous bail applications were unsuccessful in the magistrates' court. Consequent upon the dismissal of the said bail applications, the applicant pursued appeal processes. The appeal in respect of the first bail application failed in the High Court, the Supreme Court of Appeal and the Constitutional Court. The appeal in respect of the second bail application which was an application for bail

on new facts, also failed in the High Court and the Supreme Court of Appeal. The applicant instituted appeal processes in the Constitutional Court. For reasons that are not altogether very clear, the application for leave to appeal to the Constitutional Court was withdrawn about a week or so before this application was heard.

Background.

- [2] On 17 November 2023, the applicant was arrested as a result of investigations into the spate of attempted murders of certain senior executive members of the University of Fort Hare (the University), being the Vice-Chancellor, the Deputy Vice-Chancellor and the murders of the University's Transport Manager, Mr Roetz and the Vice-Chancellor's protector, Mr Mboneli Vesele. All these attempted killings and killings appear not to have been random acts of criminality. The indictment and some of the evidence that police have gathered point to an execution that was done with some degree of precision. In his affidavit filed in support of his initial bail application, the applicant accepted that his bail application fell under the provisions of section 60(11)(a) of the Criminal Procedure Act (CPA)[1]. He was charged with the premeditated murder and as co-perpetrator in the killing of Mr Vesele as a result of which his charge fell within the scope of Schedule 6. He therefore accepted that he had to satisfy the court as to the existence of exceptional circumstances that permitted his release on bail in the interests of justice.
- [3] In his affidavit the applicant placed before court the following information. He was a lead investigator against corruption, maladministration and fraud at the University. He was directly involved in the investigation against suspects allegedly involved in criminal offences relating to the murder of potential witnesses.

He assisted the Task Team of the police tasked with investigations into the murders and attempted murders of senior-level personnel of the University. As such he sat in high-level discussions on the investigations conducted by the Task Team. He had several

meetings and consultations with the prosecutor, the Vice Chancellor and the Task Team. He therefore had intimate knowledge of the investigations involved and possessed information pertaining to the investigations which he kept on his laptop computer and cell phone. It would therefore be hardly surprising for the police to find highly sensitive information including hit lists, photographs and contact details which could have come into his possession or his personal assistant's possession as a result of his involvement in the investigations into all these matters. There was no direct evidence linking him to the murder of Mr Vesele. The State was apparently drawing inferences from his cell phone activities on the day of Mr Vesele's murder.

- [4] The applicant cited the following personal circumstances which, as I understand his averments, brought him within the ambit of section 60(11)(a) of the CPA. He was 56 years old, married to his wife of 18 years. There are two sons born of the marriage, one daughter and two grandchildren. His eldest son was born in 1990 and stayed at the family home in Buffalo Flats. His second son was born in 1992 and resides in Johannesburg. His third son

was born in 2001 and is still studying at East London College. He pays school fees for his third son and for his rented accommodation

in Braelyn in East London. The monthly rental for the said rental accommodation is R6000.00. His third son has a two-year-old

son. He also provides financial support for his two stepchildren. One of them is a second-year student at UNISA and

has a two-year-old child. He owns two properties both of which are bonded with financial institutions and pays monthly instalments

of R12 000.00 and R14 000.00 respectively for each property.

[5] He was employed at the University earning a salary of R145 000.00 a month. He was considered the right-hand man of the Vice-Chancellor. He had bodyguards due to security threats on his life. He was not a flight risk. He was the former head of a prison in East London. He has an emotional attachment to the Eastern Cape and would never run away. He would comply with all bail conditions if released subject to such conditions and

has no history of not complying with bail conditions. On his arrest, the police searched him and also searched his house after which he was detained. He would not destroy evidence or interfere with witnesses. He did not have pending cases.

His only previous conviction which was related to a family dispute dates back 35 years ago. In that case, he was arrested and convicted of possession of suspected stolen property. His release on bail would not prejudice the bail system and the criminal justice system. He is a national leader of the South African National Civil Organisation (SANCO). At the time of his arrest, he was going to attend a national conference of SANCO which was scheduled for the week beginning on 23 November 2023 in KwaZulu Natal. He was going to stand for nomination for the position of the national organiser at the said conference.

[6] The investigating officer, Sergeant Mokoena deposed to an affidavit opposing the release of the applicant on bail. He stated that he is attached to the executive services of the South African Police Services National Task Team in Pretoria. He is a detective with more than 15 years in the service, ten years of which he has been in investigations. He has extensive experience in investigations of murder, possession of unlicensed firearms and ammunition, house robberies and housebreaking with intent to steal and theft. The applicant was facing two charges of premeditated murder for his participation in the killing of Mr Roetz and Mr Vesele. These two murders were preceded by a shooting incident at the home of the Vice-Chancellor which he shared with his bodyguard, Mr Vesele and another shooting incident at the home of the Deputy Vice-Chancellor.

[7] There was evidence linking the applicant to the murders. In the killing of Mr Vesele, three vehicles were involved being two Suzuki vehicles and a maroon Jeep vehicle (the Jeep). The drivers of the vehicles were as follows. Accused No. 4 was driving the Jeep. Accused No. 9

was driving one of the Suzuki vehicles and the second Suzuki vehicle was driven by an outstanding suspect. The police records and witness statements showed that Accused No.6, 7, 8 and 9 hired the Suzuki vehicles at Mthatha Airport. Accused No.7 and 8 secured accommodation at Palm Tree B & B in

East London. Accused No. 6, 7 and 8 were responsible for funding the hiring of the two vehicles which were hired by Accused

No. 9.

[8] On the day of Mr Vesele's murder, the hitmen first went to accused no.1's township in Ginsberg near King Williamstown where they spent an hour. A few hours later the applicant visited the hitmen being accused no.4, 5, 9 and one Sipho and others in their B & B accommodation before the killing of Mr Vesele. After Mr Vesele was killed the Jeep was abandoned a few kilometres from the crime scene. Fingerprints of accused N-o.4 and 5 were

lifted from the Jeep. Police discovered a hit list hidden in the boot of the Jeep. Police also recovered cartridges in this vehicle which were later linked to the scene of Mr Vesele's murder. Those cartridges were also linked to the projectile found in Mr Vesele's body. Mr Roetz, the Vice-Chancellor and the Deputy Vice-Chancellor were among 13 people on the hit list.

[9] The cell phone confiscated from the applicant at the time of his arrest was the source of the hit list. The applicant sent photos of the 13 people on the hit list to accused No.9. Before sending the photos applicant had a number of telephone conversations with accused No.9. He first sent him a message asking him if he was on WhatsApp communication platform so that he could send him the photos. The photo of Mr Roetz was among the photos the applicant sent to the hitmen. The team investigating the murders analysed the cell phone billing of accused No.9. They came across the applicant's cell phone number which indicated that the applicant called the hitmen on the day of Mr Vesele's murder. One of the photos in the list was a bullet-riddled Mercedes Benz vehicle of a recently slain Mr Nceba Ncunyana. The said photo was one of the photos sent by the applicant to accused No.9. Mr Ncunyana's death resembled the other killings in this case in that all the victims died in their vehicles.

[10] Sergeant Mokoena further averred that the witnesses in the hit list would not be safe if the applicant was released on bail. Recently, the investigating officers, constable Ndlovu and himself were sent threatening messages suggesting that they must be killed together with the State advocate. The applicant played the role of an overseer in the killings while portraying himself as heading the investigations which he was in fact misdirecting. He sent his own photo to accused No.9 suggesting that he was also a possible victim. He continued arranging for the protection of some of

the victims whilst at the same time he was talking to the hitmen. The applicant showed that he would interfere with the investigations. In one of his conversations with accused No.9, he was asked by accused No. 9 if there could be cell phone

investigations. The applicant responded that there would be cell phone investigations and that accused No. 9 must delete the information and throw the phone in the sea.

The court's findings.

[11] After an analysis of the evidence placed before him, in particular, the personal circumstances of the applicant in discharging the onus of establishing the exceptional circumstances, the presiding magistrate concluded that the applicant's personal circumstances did not fall under what can appropriately be called exceptional circumstances. The court concluded that the applicant has intimate knowledge of the State's case as he was involved in and assisted during the investigations. Therefore, he might interfere with State witnesses, destroy evidence or intimidate State witnesses. The court further concluded that the applicant's release on bail could endanger the lives of the Vice-Chancellor, the Deputy Vice-Chancellor, the members of the team investigating this case and the lives of other witnesses. It therefore concluded that he failed to meet the requirements of section 60(11)(a) of the CPA and dismissed his application to be released on bail.

The first bail application on new facts.

[12] Just over a month after the dismissal of his bail application, the applicant launched a renewed bail application on the basis that since his initial bail application, he was now in a position to place certain facts before court which were new facts. He stated that initially he did not have the phone billing of the calls of accused no.9's cell phone number and he did not have accused No.9's cell phone number. Even at the date of his application for bail on new facts, the State had still not disclosed accused No.9's cell phone number and his attorney's request to be furnished

with that number by the prosecutor was refused. In his refusal to furnish the applicant with accused No.9's cell phone number, the prosecutor relied on section 60(14) of the CPA[2]. The applicant contended that such refusal was unreasonable on the basis that investigations against accused No.9 were completed early in November 2023. Secondly, at the time he applied for bail on new facts, it had been two months since his arrest on 17 November

2023. By 6 December 2023, his telephone records were retrieved from his work cell phone and relied on during his initial bail application.

[13] The applicant stated that at the time of his arrest, he demanded a search and seizure warrant which the police did not produce. The police never asked him for the password to his seized cell phone. His premises in Cambridge were forcefully entered into without a warrant to search the said premises. He was then only charged with the killing of Mr Vesele and was not informed that he was also being arrested for the murder of Mr Roetz. His counsel was only informed of the charges relating to the killing of Mr Roetz on 5 December 2023 at which time the State also confirmed that its evidence was limited to telephonic evidential material. It was only after the delivery of the judgment in respect of his initial

bail application that it became clear that the State was intent on also charging him with all the charges preferred against accused

No.9.

- [14] Between 17 November 2023 and 13 December 2023, he was unable to gather crucial evidence in his favour so as to deal with the allegations of the State against him. In particular, the allegation that on 6 January 2023, before and after the killing of Mr Vesele, he made several calls to accused No.9; that before he made the calls he sent a short message to accused No.9 asking him whether he was on WhatsApp so that he could send photographs of the people that were to be killed; that he sent photos of those people to accused No.9; that he organised the hit on Mr Ncunyana; that he had a WhatsApp conversation with accused No.9 in which the latter asked if telephone records could be traced and he said they could be traced; that he advised accused No.9 to throw the phone to the sea; and that he could be traced through a Telkom Tower to have been around the Palm Tree B & B where the suspects allegedly met on 6 January 2023 before the killing of Mr Vesele and therefore he visited the said B & B.
- [15] The applicant then details the additional charges which had been preferred against him since the refusal of his initial bail application in respect of which it was alleged that in committing all the offences, he acted in concert and common purpose with all the other accused. The applicant said that at the time of his initial bail application, the charges he faced relating to the premeditated murder of Mr Vesele and Mr Roetz were clear. The other charges against him were a new fact. There was no evidence to support the additional charges against him with the State relying on nothing more than inferences. Such inferences, he alleged, were based on his alleged telephone communication with accused No.9 on 6 January 2023; the short messages with accused No.9 and the sending of a hit list and photographs to accused No.9. The inferences were further based on his alleged visit to Palm Tree B & B based on his work cell phone being traced to the area around the said B & B and his alleged instructions to accused No.9 to throw his phone to the sea.
- [16] He denied visiting the Palm Tree B & B on 6 January 2023 saying that he did not know where that B & B is located. He did not know accused No.9 and never had any dealings with him and never made any telephone calls to him or sent short messages or a hit list and photographs to him. The applicant explained that the reason he did not place before the court any of these denials was that he was confused at the insistence of the State that he had sent a hit list and photographs to accused No.9 on his work cell phone. He needed to get technical assistance to trace the owners of the cell

phone numbers which appeared in the itemised billing of his work cell phone. He could not do so until 8 January 2024 when he obtained the evidence. He attached the evidence which he said proved that it was not true that he ever telephoned accused No. 9's cell phone number on 6 January 2023. He stated that none of the cell phone numbers he was alleged to have called on his work cell phone number on 6 January 2023 belonged to accused No.9. He contended that the above circumstances also constituted new facts.

[17] He had since gathered evidence which showed that the cell phone calls of some of the executive members of staff at the University were interfered with. He contended that it was highly probable that due to interference with his calls and communications, his phone was hacked as the interference with phones at the University was never resolved. In this regard, he attached an email sent to his attorney by Professor Tladi on 16 December 2023. The email attached to Professor Tladi's email is dated 10 August 2020 and refers inter alia, to what is referred to as the cross-lines of some senior executives or interferences on their cell phones. The applicant's name appears in that email with five other names. The applicant also attached an affidavit deposed to by Anna Smith, his former personal assistant. Ms Smith raised in some detail

the same issue of interference with work the cell phones including that of the applicant.

[18] The applicant contended that the State had not established any motivation for his involvement in any of the crimes. He did not have to kill Mr Vesele as he could have just suspended him as Mr Vesele reported to him. He and the Vice-Chancellor had together been involved in the clean-up of the University from the negative reputation of its production of fraudulent degrees for highly connected individuals. His employment contract was attached to that of the Vice-Chancellor and if the Vice-Chancellor was killed, he would have to leave the University. He did not have any motive to kill the Vice-Chancellor and none was proved by the State. He had personally retrieved the CCTV footage of the people who attacked the Vice-Chancellor's residence and he gave it to the police. He had deposed to numerous affidavits which he submitted to the Vice-Chancellor, the DPCI and the SIU on academic fraud and corruption at the University. It therefore did not make sense that he could be involved in the murder of the witnesses who assisted him in exposing criminal activities at the University.

[19] He had provided the information that led to the arrest of his co-accused for their alleged involvement in the murder of Mr Roetz after he had obtained such information from one of his bodyguards. The charges against him were trumped up so as to remove him from the investigations of academic fraud, fraud and corruption at the University. He had personally suspended accused No.1 after gathering evidence of fraud against him. It was therefore bizarre that he allegedly acted in furtherance of a common purpose with him. He contended that he was being framed by the police for crimes he never committed. He had been advised by accused No.9 when they met in prison whom he did not even know that the police wanted accused No.9 to implicate him. The threat to his life caused him to get a place of safety in Nahoon, East London for which he was paying a bond of R14 000.00 per month.

[20] The State elected not to give any evidence in rebuttal of the applicant's averments. The merits of the applicant's bail application on new facts were argued and the court dismissed the application. It found that the applicant was, throughout, aware that the State relied on his telephone records. He therefore knew the type of evidence in possession of the State. The court was not convinced that his own cell phone records only came to light after the refusal of the court to grant him bail. He had failed to make use of that evidence during his

initial bail application.

It concluded that the cell phone records contained nothing new. It found that the evidence presented by the applicant was not new and dismissed his application. The applicant's appeal against the court's refusal to release him on bail based on new facts to the High Court and the Supreme Court of Appeal was unsuccessful. He withdrew his appeal to the Constitutional Court not long before the hearing of this application.

The second application for bail on new facts.

- [21] Subsequent to the referral of the criminal trial to this Court, the applicant instituted a further application for bail on new facts in this Court. The applicant raised no less than five issues under the rubric of new facts. After the court asked some clarity-seeking questions in respect of four of those five alleged new facts, counsel for the applicant conceded that they were either not new facts or unmeritorious, and elected to abandon four of them. For the sake of completeness, and to make the point that I did consider them, I mention them briefly hereunder. The first one is the long period in which the applicant has been in incarceration. There is no suggestion that the delay in the commencement of the actual criminal trial was a result of dilatoriness on the part of the State. In fact, counsel for the applicant placed on record that the applicant's focus has been on being released on bail all along and the appeal processes subsequent to the refusal of his two previous bail applications. The second new fact the applicant raised is the lack of evidence implicating him. This issue was raised in both the initial bail application and the first bail application on new facts. Raising the same issue for the third time is inappropriate and ill-advised.
- [22] The third alleged new fact is based on the applicant's contention that there was no evidence linking him to the murder of Mr Vesele. He contends that there was therefore no basis for charging him with premeditated murder. The contention is that the applicant should not have been charged under Schedule 6. The first observation to make is that from the onset, the applicant was charged under Schedule 6. The basis on which the charges should now be watered down to a lower Schedule is not clearly articulated or laid out in the applicant's affidavit. The second difficulty is that I was not referred to any authority for the proposition apparent in this challenge that this Court can decide on behalf of the Director of Public Prosecutions with which offence may an accused be charged. It seems to me that any such proposition would, without more, be egregious in the extreme and would fly in the face of the provisions of section 179 of the Constitution as well as the National Prosecuting Authority Act 32 of 1998. Neither in the applicant's affidavit nor in both the heads of argument and the supplementary heads of argument does any of this legislation receive mention. After hearing evidence during the trial, the court is empowered and enjoined to determine if the evidence presented by the State establishes premeditation for purposes of conviction, not prematurely. This alleged new fact is just yet another misguided attempt at creating something new. In any event, in his two previous bail applications, the applicant never challenged the schedule under which he was charged or the fact that the murder of Mr Roetz and Mr Vesele was premeditated. The fourth new fact relied upon was the

constitutional rights provided for in sections 12 and 35 of the Constitution. There was, however, no elaboration on how any of these rights were somehow contravened by his incarceration through the legitimate investigative and prosecutorial functions of the relevant State agencies. Counsel for the applicant could not explain how the arrest and detention of the applicant were arbitrary as the applicant seemed to allege.

The applicant's medical condition.

[23] The only new fact of substance which is indeed new is the applicant's medical circumstance. The applicant says that since June 2024, he has been trying to get permission from the prison authorities to be afforded specialist medical treatment at his own cost. His examination by a private medical practitioner only occurred on 13 September 2024 at the King Williamstown Correctional Centre by Dr Tyler, a specialist urologist in private practice based at Life Beacon Bay Hospital in East London. He was diagnosed with a significant bladder outflow obstruction caused by a urethral stricture and an enlarged prostate gland.

[24] Dr Tyler's report is dated 19 September 2024 and reads as follows:

"To whom it may concern

RE: MEDICAL REVIEW – MR ISAAC PLAATJIES (ID NUMBER ... 083)

I am writing to inform you that Mr Isaac Plaatjies recently underwent a medical consultation in the King Williamstown Prison. The examination revealed a significant bladder outflow obstruction caused by a urethral stricture and an enlarged prostate gland.

In light of these findings, it was deemed necessary for Mr Plaatjies to undergo a urethral dilation procedure to alleviate his symptoms.

He will need regular or monthly urology consultations moving forward.

Should you require any additional information or clarification regarding Mr Plaatjies' medical condition please do not hesitate to contact me directly."

[25] The applicant states that he saw Dr Tyler after receiving consistent medical treatment from the prison hospital. He had been seen by nursing staff and examined by general practitioners at the correctional centre hospital since his admission thereat. The treatment that was prescribed for him did not help. Since his detention, he has had to constantly visit the ablution facilities and in many instances, no urine would come out. This caused him untold pain and the situation has gotten worse as a result of which he struggles to sleep. Even after paying R20 000.00 to Dr Tyler and making arrangements for him to come, the head of the correctional centre did not allow him to be seen by Dr Tyler. It took a threat of an urgent application by his attorney for Dr Tyler to be allowed to see him after he had to comply with certain procedural requirements.

[26] His detention has resulted in him running out of funds to defend himself and to pay for private health care. He has had to seek assistance from friends but no further assistance was forthcoming. He accepted that the Correctional Services Department is unable to afford to pay for such expensive medical services, procedures, and regular and monthly urologist consultations. In all these circumstances, he contended that his situation is an exceptional case for him “to be released so that I can be able to work and raise funds to save my life.”[3] It was common cause that the applicant was dismissed from his job at the University on 18 January 2024. It is clear that the applicant wants to be released so that he could look for a job in order to work and raise funds to save his life. I asked counsel for the applicant if the applicant’s health condition was as serious as he suggested in his affidavit, how he was going to look for a job; get the job and be able to work considering his medical condition with the seemingly debilitating effects he described in his affidavit. Counsel was unable to assist the court with any coherent and insightful submissions to these concerns.

The basis of the State’s opposition to the release of the applicant.

[27] Detective Sergeant Mokoena has gone into some detail in his affidavit explaining how the applicant was linked to the offences in this matter. I do not intend to get into the details of all the evidence that was uncovered by the police and how the applicant was said to be linked to these crimes. What is very clear though is that by all accounts, these offences were carefully planned and executed. A lot of that evidence has been considered by our courts in the context of the two previous unsuccessful attempts by the applicant while some may have been uncovered during further investigations. There is no need to further regurgitate any of it now save to point out that the applicant has not come up with anything new that would tilt the scale in his favour. If anything, there is now further detailed evidence that police investigations have uncovered which, instead of casting doubts as to the strength of the State’s case against the applicant, does the direct opposite in showing that the applicant may have a serious prima facie case to answer.

[28] With regard to the applicant’s medical condition, the first observation is that Dr Tyler’s report is in the form of a letter as against a deposition under oath. This is not an ideal way of presenting evidence in court. In any event, even if one were to accept the letter without demure, as counsel for the State pointed out, it does make it clear that all the applicant requires is the “regular” (which is not explained) “or monthly urology consultations moving forward.” In this regard and with reference to an affidavit deposed to by Ms Andiswa Martin-Adam, Detective Sergeant Mokoena contends that the prison personnel are capable of monitoring the applicant’s medical condition. Ms Martin-Adam is the operational manager for health care services at the King Williamstown Correctional Centre.

[29] She explains that the centre has a sick bay manned by professional nurses. When professional nurses are unable to treat a condition in which an inmate suffers, such an inmate is referred to a sessional doctor who normally comes once per week on Wednesdays. However, where a condition is deemed to be urgent, they do not wait for the sessional doctor. The inmate is immediately referred to Grey Hospital which is the hospital nearest to

their correctional centre. If Grey Hospital cannot treat an inmate's medical condition, such an inmate is referred to either Cecilia Makiwane Hospital or Frere Hospital. When an inmate would rather be treated by a private medical doctor at his own expense, they have policies to deal with that situation. The private health care treatment can be arranged subject to an application to and approval by the head of the prison. She emphasises that they do have means to access medical facilities to cater for all inmates and their individual and varied medical conditions. These include, at the inmate's own expense, treatment at a private hospital subject to being guarded by correctional officials.

Analysis.

[30] I have captured much of the applicant's case which he presented in the initial bail application, the first application for bail on new facts and some of the factual matrix pertaining to the further application for his release on bail based on new facts in this Court. This is despite the fact that both earlier applications for the release of the applicant failed as did his appeals all the way to the Constitutional Court as I said before. I considered it necessary to do so because the application for the release of an accused person on bail based on changed circumstances is not determinable independently of and without regard to earlier application/s. In Vermaas[4] the court stated this legal position as follows:

"[A]n accused cannot be allowed to repeat the same application for bail based on the same facts week after week. It would be an abuse of the proceedings. Should there be nothing new to be said the application should not be repeated and the court will not entertain it. But it is a non-sequitur to argue on that basis that where there is some new matter the whole application is not open for reconsideration but only the new

facts.

I frankly cannot see how this can be done. Once the application is entertained the court should consider all the facts before it, new and old and on the totality come to a conclusion. It follows that [the court] will not myopically concentrate on the new facts alleged."

[31] It is difficult to fathom how there can be any talk of new facts unless the old facts have also been brought into the equation and reconsidered together with the new facts. This is done, not to venture into an impermissible disguised review or appeal against the earlier rulings by the lower court but to do justice to the accused person on whom the onus lies and to see if it would be in the interests of justice for an accused to be released on bail in light of the circumstances which may have changed. This also helps the court hearing bail on new facts to relook at the question whether in fact the accused person does face or is not facing a potentially strong case which he must answer in due course. This evaluation would be based on further developments as the State's case with which he was earlier confronted may have gone through changes as a result of the investigative work of the police. It could very well be that investigations which were ongoing cast doubt on the strength of the State's case or even strengthen the case the accused applicant for bail has to answer.

[32] Before the court made the observations it did in Vermaas, with which I respectfully agree, it looked at the interplay between subsection 60(11) of the CPA and its preceding subsections. It then expressed itself as follows:

“Significant is the difference in the wording between s 60(11) and the subsections which precede it. Section 60 is of general application but s 60(11) is an exception to the general rule. The general rule set out in s 60(1)(a) is that the accused is entitled to be released on bail unless the court finds that it is in the interests of justice that he be detained in custody. That wording in my view, creates an onus. The onus rests upon him who asserts that the accused should not be released, that is the State. In cases of doubt the accused goes free. The converse is the case where s 60(11) is applicable. It is expressly worded as an exception by the use of ‘notwithstanding any provision of this Act.’ ... It is imperative, ‘the court shall order the accused to be detained’. The accused is called upon to satisfy the court that the interests of justice do not require his detention in custody. Clearer wording cannot be sought for an onus on the accused.”

Has the applicant discharged the onus of establishing exceptional circumstances?

[33] The one new fact that was conceded by the State as being a new fact, the applicant’s medical condition, is not without challenges or difficulties, putting it mildly. On the contrary, it is fraught with problems as I demonstrate hereunder. The reading of the applicant’s affidavit creates an impression of a critically ill inmate who, at times, even struggles to sleep due to the regular and constant need to go to the ablution facilities to relieve himself.

This causes him “untold pain”, he says. However, a closer look at the letter from his doctor appears to contradict this impression. It specifically says that all that the applicant needs is regular or monthly urology consultations. I understand this to mean that the applicant must be given at least one specialist urology consultation a month or as required by the medical team that is looking after him subject to the regulatory framework of the department. In one place in his affidavit, the applicant embellishes his doctor’s letter and makes a misleading and alarmist self-diagnosis that he is in danger of progressing towards prostate cancer. Nowhere in his letter does the doctor even remotely make such a conclusion. The applicant baldly makes this magnification and creates the impression that his life is in danger if he remains in custody and that he needs to be released on bail in order to save his life.

[34] In the same vein, the applicant pleads poverty due to having run out of funds to defend himself and to pay for the specialist urologist treatment and consultations. He then contends that his health condition is an exceptional case for him to be released “so that he can be able to work and raise funds to save his life.” Yet another confusing magnification and covet embellishment of his situation and health condition. He is now, on his own reckoning, fit enough to look for a job; get the job; work and save money so that he can have funds to defend himself and to pay for specialist monthly urologist consultations and treatment. Putting aside the question of the availability of a job for the 56-year-old, whose nature is unclear, I am more than certain that all the awaiting trial inmates would relish the opportunity to be released from custody so that they may compete in the job market; raise funds to fund their trial related expenses; access to private medical facilities and treatment

and even support their families while the trial process is dragging on. This goes to show that the applicant's health condition at present is far from being an exceptional case for purposes of his release from pre-trial incarceration. This is especially so if regard is had to the detailed affidavit of Ms Martin-Adam regarding the departmental policies that are specifically designed to cater for the inmates under their care and their varied health conditions some of which may be very serious and even life-threatening.

- [35] The seriousness of the offences with which the applicant has been charged; the evidence already in the police docket which the applicant has or can have access to which is captured in quite some detail in Sergeant Mokoena's affidavit; the precision with which the offences were planned, funded and executed leading to at least two fatalities at the time the applicant was arrested all suggest, at least at a prima facie level, that the applicant has a very serious case to answer. That being so, the danger that his release from custody may potentially pose to State witnesses cannot be ignored or underestimated and militates very strongly against his release on bail in the interests of justice. The alleged threat to the lives of some of the members of the investigating team and the applicant's very intimate knowledge of the investigating methods of the police in this case due to his earlier involvement and his deeply intimate knowledge of some of the State witnesses; and how critical some of their evidence may be, all point to the release of the applicant on bail not being in the interests of justice. The applicant's health condition does not change this concerning picture in my view.

Conclusion.

- [36] As I conclude, something more needs to be said about the constitutional rights that the applicant asserts in his affidavit. In explaining the tension between the right to freedom and all other rights contained in the Bill of Rights and the need for those arrested for alleged complicit in certain categories of serious crimes, I can do no better than the eloquent articulation of Kriegler J in *Schietekat*[5], in which, writing a unanimous judgment of the Constitutional Court, the learned judge said:

"It should of course never be forgotten that the Constitution does not create an unqualified right to personal freedom and that it is inherent in the wording of s 35(1)(f) that the Bill of Rights contemplates – and sanctions – the temporary deprivation

of liberty required to bring a person suspected of an offence before a court of law. The hypothesis, indeed the very reason for the existence of s 35(1)(f), is that persons may legitimately and constitutionally be deprived of their liberty in given circumstances. This clearly establishes that, unless the equilibrium is displaced, an arrestee is not to be released. Section 60(11)(a) therefore does not create an onus where nothing of the kind existed before. It describes how it is to be discharged, and adds to its weight. As in the case of reliance on any other right in the Bill of Rights, if accused persons wish to rely on s 35(1)(f), they must bring themselves within its ambit. The words 'interests of justice permit' form part of the definition of this right; they delineate its ambit. The court must be satisfied that 'the interests of justice permit' the release from detention. Where all the relevant factors are common cause, the matter is decided by the presiding judicial

officer exercising a value judgment according to all the relevant criteria on the basis of these facts in the manner described in this judgment. If facts indispensable for establishing that the interests of justice permit the arrestee's release are not established, the arrestee is not entitled to the remedy under the subsection."

[37] In all the circumstances and having regard to all the evidence placed before me, I am not satisfied that the interests of justice permit the release of the applicant on bail. This is because the applicant has failed to discharge the onus resting upon him to establish exceptional circumstances that, in the interests of justice, permit his release from pre-trial incarceration. It stands to reason therefore that the applicant's application to be released on bail based on new facts must fail.

The result.

[38] In the result, the following order is issued:

1. The applicant's application to be released on bail based on new facts is dismissed.

M.S JOLWANA

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Appellant : Adv J. Korkie

Instructed by

: Makhanya Attorneys

East London

Counsel for the Respondent : Adv N Ntelwa

Instructed by

: Deputy Director of Public Prosecutions

Makhanda

Heard on

: 17 October 2024

Judgment

Delivered on : 12 November 2024

- [1] Section 60(11)(a) reads: Notwithstanding any provisions of this Act, where an accused is charged with aa offence referred to (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release.
- [2] Section 60 (14) reads: Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police official charged with the investigation in question, unless the prosecutor otherwise directs: Provided that this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for purposes of his or her trial.
- [2] Section 60 (14) reads:
- Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police official charged with the investigation in question, unless the prosecutor otherwise directs: Provided that this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for purposes of his or her trial.
- [3] My emphasis.
- [4] S v Vermaas 1996 (1) SACR 528 (T) at 531 e-f.
- [5] S v Dlamini, S v Dladla and Others; S v Jubert, S v Schietekat 1999(4) SA 623 (CC) at 670 E-H

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Prepared on 12 October 2026 · Esheria