

SOUTH AFRICA / JUDGMENT

Schyff v S (A94/22) [2024]

ZAWCHC 90 (25 March 2024)

[2024] ZAWCHC 90

COURT

Western Cape High Court, Cape Town

BEFORE

Thulare

CASE / FILE NUMBER

A94/22

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A94/22

In the matter between

FARIED VAN DER SCHYFF APPLICANT

AND

THE STATE RESPONDENT

Date of Hearing: 4 March 2024

Date of Judgment: 25 March 2024 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

- [1] This is an opposed application to be granted to bail on new facts. The applicant's application for bail was refused in the magistrates' courts on 14 March 2022 and his appeal against such refusal was dismissed by this court on 4 April 2023. The applicant was arrested on 27 October 2021 and had been in custody awaiting trial. It is now more than two years. Together with 8 others, he was set to stand trial on a number of charges which included racketeering, money laundering, fraud, forgery and uttering, contraventions of the provisions of the Value Added Tax Act, 1991 (Act No. 89 of 1991) (the VATA), the Tax Administration Act, 2011 (Act No. 28 of 2011) (the TAA) and the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998) (the POCA). It is a total of 711 charges.

[2] The applicant advances six reasons as new facts upon which this application is based, and these are:

A. That the State decided to take the other voluminous matter, to wit, S v N Modack and 14 others, case No. CC07/2023, to go to trial before his matter. Nafiz Modack (Modack) is accused number 2 in the matter for which the applicant is in custody.

B. The applicant cannot prepare properly for his defence in the matter whilst in custody due to the volume of documents involved in the matter.

C. The deteriorating health of the applicant's wife.

D. The deteriorating health of the applicant.

E. The deteriorating financial status of the applicants' family.

F. Section 49G of the Correctional Services Act 111 of 1998.

[3] The matter against the applicant first appeared in the High Court on 24 February 2023 and has since been on the pre-trial roll primarily for accused 2, Modack, to secure legal representation. At the time of the filing of this application, Modack had not yet secured legal representation in applicant's matter and the other matter (Modack's matter). At the time of the hearing of the application, the accused had pleaded in the Modack's matter. The Modack's matter's first pre-trial was on 5 May 2023. In that matter the accused are facing 3000 charges, which included counts of murder, extortion and contraventions of POCA. The State indicated that their intention was for the other matter to start first. The matter will take more than one year to finalise during which time the applicant would be in custody without any progress in his trial at all. An accused cannot have more than one matter on trial. The applicant's case was that this in itself constituted exceptional circumstances which in the interests of justice permitted his release on bail.

[4] The applicant alleged that the contents of the docket in the matter against him is voluminous and runs into some 16000 pages. It was said it would constitute approximately 56 arch lever files if printed. His case was that it would be impractical for such to be made available to him in prison, citing its storage, his access and the risk of loss or destruction. His case was that the prosecution proposed that an electronic device be made available to him, but could not succeed with the Department of Correctional Services. None of the State Departments and Institutions were prepared to pay for the costs of the device he needed or for the copies of the documents he needed. A steel cabinet had been installed in a cell next to a cell he shared with others, for hard copies of documents to be provided to him. It would be difficult to prepare in a room he shared with others. The room where the steel cabinet was installed was also used as a storeroom for cleaning material for his section. The cleaning products were highly toxic and he suffered from asthma. There was no ventilation in the cell and no light. There was no table to be used

as a work station. He needed another cell as a work station and was told it was impossible because of overcrowding. The steel cabinet

could not store all the files. He was told that all the paper in one place created a fire hazard. Whilst the prosecution has all the sources, he has none. His case was that for the trial to be fair he needed reasonable access to the contents of the docket including files and documents taken by SARS during search and seizure in order to be able to properly prepare for trial.

- [5] The applicant set out his wife's confirmed and suspected, as well as his own, medical conditions in his application. To give due respect to his dignity and privacy, as well as that of his wife, I deem it not necessary to repeat their health conditions in this judgment, suffice it to mention that I have considered them. The applicant alleged that they had to sell their home below its value to avoid a sale in execution, in order to settle the arrears on the bond. His wife bought another property which according to him was a bad decision as it was in an unsafe area for her to be alone. The other house which his wife owned face a foreclosure because of arrears. He was the breadwinner before his incarceration. He had to sell assets at major losses. His policies had lapsed. His car was repossessed. His overdraft was cancelled. There were outstanding doctors and hospital bills, security accounts and there were running costs for subsistence. His son had to sell some of his assets in order to help cover some bills. There were outstanding school fees for his other son and he was deprived of an opportunity to study further. His detention exceeded two years. His case was that the court could consider his release under conditions in terms of section 49G of the Correctional Services Act, 1998, (Act No. 111 of 1998).
- [6] The State introduced evidence regarding his alleged possession of cellphones in prison which could contribute to him committing further schedule 1 offences whilst in prison. His case was that despite the bail appeal on 22 march 2023, he had not been provided with any report in respect of the alleged use of the cellphone and further charges, except for charges relating to only possession of cellphones. His case was that there was no evidence of a cellphone being used as device to move funds or to commit further offences and that no risk of interfering with witnesses or with ongoing investigations of other criminal activities realized despite the period of time that lapsed. If granted bail he would reside with his wife at her property and look after her. He will restore his business which will be his main source of income and develop the other property as student housing. He restored furniture and properties. His father was a builder and he took interest in his father's business. He studied architecture and dropped in third year after breaking his arm. Lately he played a role in restoring the gym in prison. He and his family suffered greatly physically, mentally, emotionally, in their health and financially by his length of imprisonment in what he considered one of the world's worst prisons. According to him, this has been exacerbated by the media. He would not commit further similar offences while on bail. He was charged with offences which allegedly happened between 2011 and 2015 which was more than 8 years ago. He would not interfere with witnesses who mostly were in the employ of the State or private audit companies. He would not interfere with investigations which according to

the State had been completed. Appropriate conditions could be set for his release on bail to address any concerns of the State. He was aware that any breach of his bail conditions would lead to the immediate withdrawal of bail. Given these were the exceptional circumstances and the inevitable delay in the trial, he prayed to be granted bail with appropriate conditions.

- [7] In opposing the application, the Director of Strategy Operations Compliance (SOC) Unit in the Director of Public Prosecutions, Cape Town in the National Prosecuting Authority (the NPA) indicated that the contents of the docket in the case against the applicant amounted to 20324 pages. As standard practice the NPA only provided copies of the docket to legal representatives electronically, either on email, compact disc, memory stick or other removable storage device as the cost of producing hard copies in all cases would be prohibitive. The NPA did not have provision on its budget for providing hard copies. The NPA disposed of some 283 873 cases nationally in 2023 and 261 466 in 2022. The NPA could not provide hard copies to each accused in

every matter because of cost implications. A copy of the docket content in this case was provided electronically (on a compact disc) to the applicant's legal representative from Legal Aid South Africa (LASA) on 21 February 2023. Subsequent correspondence was exchanged with LASA in relation to the provision of an ink-reader to facilitate the accused having access to the docket contents whilst incarcerated. The NPA was not able to provide the ink-reader to the accused as the NPA would not be able to exercise control over the asset and could not procure such asset over which it did not have control, and also cited austerity measures. The NPA would provide another compact disc containing copies of the entire docket contents to applicant whilst in custody. LASA indicated that they were not able to provide the device. Austerity measures demanded that expenditure be limited to absolute necessities and further because the applicant and the Department of Correctional Services (DCS) would be the custodians of these devices and LASA would thus exercise little control over safeguarding the device.

- [8] DCS favourably considered the suggestion that the applicant be provided with an ink-reader solely for the purposes of studying the contents of the docket. However DCS would not provide the ink-reader. The applicant had declined accommodation in a single cell with a lockable storage cabinet in which to store the contents of the docket, preferring to share a cell with other detainees. The single cell had a window and an electric light and would be equipped with a desk and a chair for him to study his papers. There were no toxic or cleaning materials held in the cell. Steps were taken to ensure that the cell was suitable and safe to be used by a detainee for purposes of studying his papers. Arrangements were made for the applicant to consult with his lawyers from Monday to Thursday between 9H00 and 14H00 and Friday to Sunday between 8H00 and 13H00. The Head of the Remand Detainee Centre at Pollsmoor was personally the nodal point of communication during his period of detention. DCS was prepared to receive hard copies even if they were provided by the applicant's family or friends. The applicant would not have access to a computer

whilst in the facility, in accordance with security protocols. However, should his lawyers wish to show applicant any documents on their own laptop, arrangements were to be made in writing in advance, which written request would be subject to usual security procedures.

[9] A court which refused bail was not precluded from hearing a renewed application, provided the applicant showed the existence of new facts or changed circumstances [Bail, A practitioner's Guide, 3rd edition, John van den Berg at p. 73 para 7.7]. In *S v Acheson* 1991

(2) SA 805 (NmHC) 821 at F-H it was said:

"He also submitted that this Court had previously dismissed the appeal against the refusal of bail by the magistrate.

I am unable to agree with the suggestion that I am precluded from considering bail for the accused, merely because the accused was

previously unsuccessful in this Court.

Each application for bail must be considered in the light of the circumstances which appear at the time when the application is made. A Judge hearing a new application is entitled, and indeed obliged, to have regard to all the circumstances which impact on the issue when the new application is heard."

On a bail application with new facts, the court not only considers the new facts or circumstances, but also prior evidence and information

previously placed before it. The court considers all facts placed before it, new and old, and on the totality of the whole extensive

factors, come to a conclusion [Bail at p. 73 para 7.7; *S v Vermaas* 1996 (1) SACR 528 (T) at 531e-f); *S v Mohammed* 1999

(2) SACR 507 (C).

[10] The personal circumstances of the applicant are classic and present nothing exceptional. Almost every breadwinner who is incarcerated leave behind a financial void which adversely affect those who depended on such person. Similarly, the mystery of life is that all people live with one or other health issues. Life is so mysterious that some are actually dying from covert illnesses without even knowing it, until their death is pronounced. Many incarcerated persons have nucleus families with varying degrees of ailments, and some lose those family members and relatives whilst in custody and have no opportunity to join other blood relations in mourning or burial. It is one of the undesired consequences of being in detention. The applicant cannot refuse to be held in solitary confinement when offered, and then be heard to complain that he shared a cell with others when he was not in good health and seek to use his detention with others as a reason to be granted to bail.

[11] Of all the facts relied upon by the applicant, the only true factors that require some closer examination is the consequences of the decision to start another trial in which his co-accused is involved ahead of his, and the issues with his preparation for trial. The refusal of the applicant to take occupation of a cell where DCS took extra-ordinary measures to ensure that cell 514 was suitable and safe to be used by him for purposes of preparation for his trial is indicative that the applicant was not willing to play his part in ensuring that he was able to prepare for his defence. In fact he is deliberately making it impossible to be in a position to intelligibly engage with his legal representatives to prepare for his trial. When he was aware that resources are being sought to accommodate him, he complained of those still sought to be provided, like simple things as elementary as a table and a chair. This demonstrates how low the applicant was prepared to stoop with trivial things to avoid preparation. The start of the Modack matter before his trial pales into insignificance if regard is had to the fact that the applicant is himself not only yet ready, but is still unwilling to play his part to consider over 20 000 pages to prepare for his trial. Whilst the applicant was still playing hide and seek for his readiness, preferring to share a cell with others as opposed to taking occupation of a cell provided for his study of the papers, the trial in the other matter is continuing. The court is not here confronted with a situation where the applicant is ready to defend himself, and the State preferred another matter over his. The court has an applicant who does not earnestly want to be ready to defend himself. Under the circumstances, the delay occasioned by the selection of a matter that was ripe for hearing, in my view, was an inadequate reason to depart from the refusal of bail for the reasons already

given in that judgment.

[12] Section 22 of the Legal Aid South Africa Act, 2014 (Act No. 39 of 2014) (LASA, 2014) provides as follows:

“CHAPTER 5

GENERAL PROVISIONS (ss 22-27)

22 Provision of legal aid by direction of courts in criminal matters

- (1) A court in criminal proceedings may only direct that a person be provided with legal representation at state expense, if the court has-
 - (a) taken into account-
 - (i) the personal circumstances of the person concerned;
 - (ii) the nature and gravity of the charge on which the person is to be tried or of which he or she has been convicted, as the case may be;
 - (iii) whether any other legal representation at state expense is available or has been provided; and
 - (iv) any other factor which in the opinion of the court should be taken into account; and

- (b) subject to subsection (3), referred the matter, together with any report the court may consider necessary, for the attention of Legal Aid South Africa, for evaluation and report by Legal Aid South Africa and Legal Aid South Africa has made a recommendation whether or not the person concerned qualifies for legal representation, as provided for in subsection (2) (c) (i).
- (2)
 - (a) If a court refers a matter in terms of subsection (1) (b), Legal Aid South Africa must, in accordance with the regulations made under section 23 (1) and the Legal Aid Manual, evaluate and report on the matter.
 - (b) The report in question must be in writing and be submitted to the registrar or the clerk of the court, as the case may be, who must make a copy thereof available to the court and the person concerned.
 - (c) The report must include-
 - (i) a recommendation whether or not the person concerned qualifies for legal representation;
 - (ii) particulars relating to the factors referred to in subsection (1) (a)
 - (i) and (iii); and
 - (iii) any other factor which, in the opinion of Legal Aid South Africa, should be taken into account.
 - (3) A court may only refer a matter in terms of subsection (1) (b) if the person concerned-
 - (a)
 - (i) has applied to Legal Aid South Africa for legal representation at state expense;
 - (ii) has been refused legal representation at state expense by Legal Aid South Africa; and
 - (iii) has exhausted his or her internal right to appeal within the structures of Legal Aid South Africa against the refusal;
 - (b) has applied for legal representation and has not received any response to the application within a reasonable time; or
 - (c) has been refused legal representation at state expense by Legal Aid South Africa and the court is of the opinion that there are particular circumstances that need to be brought to the attention of Legal Aid South Africa by the court in a report referred to in subsection (1) (a) (ii).
 - (4)
 - (a) Any decision by Legal Aid South Africa in any criminal proceedings relating to-
 - (i) the particular legal practitioner to be assigned to any person;

(ii) the fee to be paid by Legal Aid South Africa to a particular practitioner;
(iii) the number of legal practitioners to be assigned to a particular person or group of persons;
or

(iv) the contribution, if any, to be paid to Legal Aid South Africa by the persons in question and when and the manner in which the fee is to be paid,

is subject to review by the High Court at the instance of the person affected thereby.

(b) Legal Aid South Africa may, in any review proceedings referred to in paragraph (a) (ii), not be required to pay more than the maximum amounts determined in the Legal Aid Manual in terms of section 24 (1) (c).

(5) Only a court in review proceedings may make an order relating to the matters referred to in subsection (4).

(6) In determining whether any person is entitled to legal representation at state expense and before any court orders the provision of legal representation at state expense, the legal aid applicant bears the onus of showing, on a balance of probabilities, that he or she-

(a) is unable to afford the cost of his or her own legal representation;

(b) has made a full disclosure of all relevant facts and documents pertaining to his or her inability to pay for his or her own legal representation;

(c) has a lifestyle that is consistent with his or her alleged inability to afford the cost of his or her own legal representation; and

(d) has cooperated fully with any investigation conducted by Legal Aid South Africa.

(7) No accused person may receive legal representation at state expense if that person has applied for the release of an amount for reasonable legal expenses in terms of section 44 (1) (b) of the Prevention of Organised Crime Act, 1998 (Act 121 of 1998), and where the court has turned down the application due to a lack of a full disclosure as required in terms of section 44 (2) (b) of that Act.”

[13] It is common cause between the Departments of State and Institutions, represented by the NPA in criminal proceedings [section 179(2) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996)] that either an ink-reader or a computer brought into the Correctional Facility by the legal representative of the applicant subject to security procedures, will assist and protect the rights of the applicant to prepare for trial. This fact and finding by the court, for purposes of this judgment, is the report that the court considers necessary, for the attention of Legal Aid South Africa, as envisaged in section 22(1) (b) of LASA, 2014. In my view, this is a matter where it is necessary for the court to refer the matter of acquisition of either the ink-reader or a laptop for use by Mr Brand, Attorney for the applicant, Legal Aid South Africa, in his consultation with the applicant in preparation for trial, to enable LASA to evaluate the need and report on the matter as envisaged in

section 22 (2) of the LASA, 2014. Mr Brand, in my view, is well positioned to advise the applicant of the provisions of section 22 (6) of LASA, 2014. On the facts, this is the intervention that is called for. I am not persuaded that the failure by the State to provide an ink-reader or a laptop for use by Mr Brand in his consultation with the applicant to prepare for trial, outweighs all the factors in the old and new application, which in my view negate the granting of applicant to bail.

[14] Both may be at the foot of the most scenic mountain range in Cape Town, but there is a vast difference between the purpose, offers, packages and facilities at the Twelve Apostles Hotel and Spa and Pollsmoor Correctional Facility. This is the simplest truth to which the applicant must awake. The second is that the applicant has a right to be informed of the charges with sufficient

details to answer it and to have adequate time and facilities to prepare a defence. The State owes him no more, under the

circumstances. The applicant's threat to the fiscus and the administration of justice remains. The applicant and a laptop in a prison facility is a danger to the fiscus and a threat to security in the facility. The interests of justice do not permit his release on bail. For these reasons I make the following order:

- (a) The application is dismissed.
- (b) Against the report as set out in paragraph 13 of this judgment to LASA, the court herewith refers the matter of acquisition of either the ink-reader or a laptop for use by Mr Brand, Attorney for the applicant, Legal Aid South Africa, in his consultation with the applicant in preparation for trial, to enable LASA to evaluate the need and report on the matter as envisaged in section 22 (2) of the LASA, 2014. The report on the matter is to be made within 60 days of this order.

DM THULARE

JUDGE OF THE HIGH COURT

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