

SOUTH AFRICA / JUDGMENT

Sibanda and Others v S (096/2016) [2024] ZAGPJHC 955 (23 September 2024)

[2024] ZAGPJHC 955

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mavundla

CASE / FILE NUMBER

096/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: 096/2016

1.

REPORTABLE: YES / NO

2.

OF INTEREST TO OTHER JUDGES: YES/NO

3.

REVISED: YES/NO

In

the matter between:

SIBANDA

SIKHUMBUZO

1ST

APPLICANT

NDEBELE STRIKE

4TH

APPLICANT

MAKHUBU MDUDUZI

5TH

APPLICANT

NDLOVU THEMBA

6TH

APPLICANT

NXUMALO XOLANI
7TH
APPLICANT
NTULI BAFANA
8TH
APPLICANT
NKOMO NKOSANA
9TH
APPLICANT
DUBE LUCKY VUSI
10TH
APPLICANT
and
THE STATE

JUDGMENT

MAVUNDLA J.

- [1] The applicants in this matter, are applying for bail pending appeal, after this court convicted them on various offences, 32 in number, inter alia, racketeering, robbery with aggravating circumstances, possession of firearms, attempted murder etc. The trial commenced on 18 August 2016. This court convicted the accused on 17 October 2019 on several counts, and sentenced each of them on 24 January 2019, inter alia, to life imprisonment, and various imprisonment terms. Needless to state that the life imprisonment sentence has the efficacy of swallowing all the other imprisonment sentences, so to put it, and make all of them to run concurrently with the life imprisonment sentence.
- [2] This court, after imposing sentences, mero moto granted all the applicants leave to appeal against both conviction and sentence. This decision was taken in order to spare other judges in having to go through a voluminous record to decide the question of leave to appeal, regard being had to the fact that the presiding judge was about to retire from service.
- [3] The applicants embarked on a wide and wild spree of armed bank robberies, spanning over a period of several months, starting in 2013, until they were eventually arrested in 2014, by a special tusk team that was charged to bring the culprits of the bank robberies to book. The applicants since their arrest were not admitted to bail and have been in custody since then.
- [4] The applicants testified in motivating for their release on bail pending appeal. I do not intend to chronicle in detail their evidence but suffice to confine myself to the essential facts of their evidence.
- [5] Mr Skhumbuzo Sibanda is 55 years old, hails from Zimbabwe. He came to South Africa in 2013 to look for work. He had a valid passport which expired in 2018 while he was already in custody. He was staying at his sister's place at 4[...] P[...], R[...] Street Germiston. On being granted bail, he contends that he will continue to stay at the aforesaid place. He can report

at the nearest police station in Germiston, if granted bail. His sister is running a creche and will, together with his family members, one of whom is staying in Cape Town, assist him in paying the bail amount of not more than R10, 000. 00. He has a daughter who is 25 years old, and whose mother is a South African citizen. He has a previous conviction of armed robbery, for which the sentence was 3,930 days. He was subsequently deported back to Zimbabwe, but returned to South Africa illegally, and eventually arrested in 2014. He will seek work in South Africa in the taxi or Uber industry for driving. Only when the case has been finalized and being unable to get work locally, and only when the appeal is unsuccessful, he will then return to Zimbabwe where he will do farming. He is aware of INTERPOL and will surrender himself to the authorities if the appeal is unsuccessful.

- [6] Applicant 4 Mr. Strike Ndebele testified inter alia that: he is 51 years old, was staying at 6[...] N[...] B[...] C[...] B[...] and C[...], J[...] P[...] Johannesburg. He originates from KwaZulu Natal and is a South African citizen. He does not have a passport, nor been outside the borders of the country. Were he to be granted bail, he will reside at 4[...] M[...] Street, W[...], Pretoria. He has three children in marriage and two outside marriage. He will be able to afford to pay bail in the amount of R5000,
00. He will report to the nearest police station in Loate or Mabopane, if granted bail. He was arrested in February 2014, charged with five counts of robbery but sentenced on six counts. He has witnessed a traumatic incident in prison, where someone was stabbed. He has attended various courses while in prison. He will surrender himself were his appeal to be unsuccessful. He bemoans the quality of food in prison. Exhibit F1-5 was handed in, is an official confirmation letter dated 2024/09/17 confirming that Strike Ndebele's sentence is life sentence.
- [7] Applicant 5 is Mr. Makhubu Mduduzi, a South African adult male aged 66 years and qualifies for old pension. Prior to his arrest, he was staying at 3[...] Block 1[...] S[...] P[...], D[...] in Soweto. His new address is 3[...] B[...] [...] T[...] S[...] P[...], D[...]. The address he has provided is his brother's house. He is not married but has children and grandchildren whom he wants to spend time with. He does not have a passport, nor relatives outside the borders of the country. Besides the present matter, he does not have previous convictions. He was convicted only on two counts. He walks on crutches as the result of a back injury he sustained in prison when he was intervening in a fight between inmates. He is on medication and attended Baragwanath Hospital periodically. He is involved in various programs in prison. He has endured hardship in prison and does not know the charges he was convicted of. He was arrested on 18 September 2014.
- [8] Applicant 6 Mr. Themba Innocent Ndlovu, testified that he is 50 years old and hails from Zimbabwe. He came to South Africa in 2013, and had a passport then, which has since expired in June 2024. He was self-employed by then, selling goods before leaving Zimbabwe. His address is 1[...] S[...] Street in Y[...] Johannesburg. He has three teenage children and has been married for 20 years. He has attended self-enrichment programs in prison. He was arrested in February 2014, and not admitted to bail, and has been in custody since his arrest.

He will work for or with his nephew to sustain himself if admitted to bail. He will report to the nearest police station. He can afford bail in the amount of R5000.00.

- [9] Applicant 7 Mr. Xolani Nxumalo (Thulani Knoxman Mtungwa) vide exhibit F4-5) took an oath as Thulani Knoxman Mntungwa and testified that, these were his real names. The names of Xolani Nxumalo were as the result of an informer. When he tried to correct the names, the police told him that he will do that at Court. He is 50 years old and born in South Africa. Were he to be admitted on bail, he will stay at 1[...] A[...] S[...]...He completed his senior certificate in prison in December 2020. He is a South African citizen, and has two teenage daughters, who live with their maternal grandmother, due to the fact that their mother has mental health challenges. He is suffering from health issues from a bowel obstruction and is periodically receiving medical treatment at Baragwanath Hospital. He was convicted on three other bank robberies, where accused 8, 9 and 10 were the co-accused, except from the present matter. He was arrested on 18 September 2014 and has been in custody ever since and was not admitted on bail. Were he to be admitted on bail, he will surrender himself to the authorities to serve the remaining sentence, if his appeal is unsuccessful. He has a code 10 driver's license and will ask his nephew to give him a car so that he can work. He was arrested on 18 September 2014 at Klerksdorp. The three other cases were not centralized, whereas they ought to have been. He will afford to pay bail in the amount of R10,
000. 00. Exhibit H is a handwritten letter with the official Gauteng Province Health Department Logo from Chris Baragwanath Academic Hospital and an official date stamp, dated 01 Feb 2024, confirming the health bowel problem of Mr. Xolani Nxumalo.
- [10] Applicant 8 Bafana Ntuli (Robert Ncube) testified that: He is 55 years old. He hails from Zimbabwe, and in South Africa legally. His passport is in the possession of the Hawks. He will reside at 1[...] M[...] S[...] T[...], at his uncle's place. He was arrested on 18 September 2014. He has children. His family will assist him in paying the bail amount. He will afford bail in the amount of R10,000.00. There were other charges, besides the present matter. In one of those matters, he was convicted and sentenced on a bank robbery to 15 years, imprisonment. In another matter he was with Xolani Nxumalo and Khumalo Nkomo, who were then separated from him. The period in custody was not taken into account when sentences were imposed on him. He knows about INTERPOL, which can fetch him from Zimbabwe, if need be. He will surrender himself, if granted bail and the appeal were to be unsuccessful. He will have no difficulty in getting another passport. He has improved himself academically while in prison. He will sustain himself while on bail through buying and selling clothes. He also has a driver's licence.
- [11] Applicant 9, Mr. Thulani Dube (Alias Nkosana Nkomo) took the stand and testified that: he is 50 years old, and a South African citizen. Before his arrest he was staying at 6[...] B Zone [...] T[...] Street, M[...]s. His other address is E[...] Extension [...] A[...], at his wife's place. He has a son and two daughters. He does not have a passport. He will afford to pay bail in the amount of R5 000.00. The nearest police station he can report to is Annadale police station. He used

the name Nkosana Nkomo, names that were used by the informer who preferred charges against him. Besides the present matter, he was convicted and sentenced on two other bank robberies, where accused 7 and 8 were his co-accused. He was arrested on 18 September 2014. He has two teenage children. Before his arrest he was a DSTV installer and also does welding. He was arrested on 30 March 2016 and has since spent 10 years and a half year in custody since his arrest and subsequent conviction and sentence in this matter.

[12] Applicant 10, Lucky Vusi Dube testified, inter alia, that: he is 50 years old. He is married and has two children. He is a South African citizen born in Soweto, and his identification number is 7[...]. He has no travelling documents. His address is 1[...] K[...] V[...] Extension [...] Midrand, which is his elder brother's house. His elder brother stays at this address. The nearest police station to his address is Midrand Police station. He has two children. He has no property under his name. Except this matter, he was convicted and sentenced on two other bank robberies, where accused 7 and 8 were his co-accused. The charges in these matters, were one continues process with the current matter, therefore amounting to racketeering and ought to have been consolidated. He was sentenced to 15 years in one of those matters, and the sentence is not running concurrently with the sentence in the present matter. He has improved himself academically while in prison and handed in exhibit A1-5. He has been in custody since his arrest on 30 March 2016. He will surrender himself to the authorities, were he to be released on bail and his appeal being unsuccessful.

[13] Various Exhibits were handed in on behalf of the applicants, namely:

Exhibit A1-5 various certificates of Lucky Dube obtained whilst in prison.

Exhibit B copies of various certificates awarded to Ndebele Strike whilst in prison.

Exhibit C, copies of various certificates of Robert Ncube, indicating his high pass rate, Certificate of Achievement, sentence details, General Education and Training Certificate, inter alia, NI Engineering Statement of Results from JHBTVET.

Exhibits D;

Exhibit E Correspondence from and to the Legal Aid.

Exhibit F copies of the Department Correctional Services admission Details Johannesburg MED Corrcent of (Strike Ndebele (South African) (Accomplices Dube Lucky Robert, Ndlovu Themba END; Mduduzi Makhubu; Nkomo Nkosana, Nxumalo Xolani;

Xolani Nxumalo; Bafana Robert Ntuli (immigrant); Department Correctional Services Leeuwkop MAX Current Admission Details of Lucky Dube South African); Department Correctional Services Johannesburg Nkosana Nkomo (immigrant). Department Correctional Services Lucky Dube; Dube Robert, Ndebele Strike, Ndlovu Themba END; Nduduzi Makhubu, Nkomo Nkosana, Nxumalo Xolani;

Exhibit G (is a response letter of the Deputy Director of Public Prosecutions Gauteng Local Division, Johannesburg GL Roberts, SC dated 26 July 2016 directing that: “Xolani Nxumalo and Ntuli Bafana must be prosecuted on various matters Vereeniging Cas 108/03/2014, Langlaagte CAS 43/04//2024; Douglasdale CAS 10/04/2014; Standerton 17/05/2024; Vosloorus cas 11/6/2014; Langlaagte CAS 132/07//2024 and Thohoyando CAS 270/07/2014 in Johannesburg Regional Court on the following charges:

1. Robbery with aggravating circumstances,

1.2 Contravening section 3 read with section 1, 103, 117, 120 (1) (a), 121, and section 212 read with schedule 4 of Act 60 of 2000, further with section 250 of Act 51 of 1977 as amended (Unlawful Possession of a firearm (as per attached draft charge sheet) ...

Alternatively.... (possession of an imitation firearm with the intent to commit an offence) ...

2. I decline to prosecute Nkosana Nkomo on Vereeniging Cas 108/03/2014, Langlaagte CAS 43/04//2024; Douglasdale CAS 10/04/2014; Standerton 17/05/2024; Vosloorus cas 11/6/2014; Langlaagte CAS 132/07//2024 and Thohoyando CAS 270/07/2014,

3. However, Nkosana Nkomo should be prosecuted in the Johannesburg Regional Court on Langlaagte CAS 132/07/2014, in a separate trial, for the following offences:

3.1 Robbery with aggravating circumstance:

3.2 Contravening section 3 read with section 1, 103, 117, 120 (1) (a), 121, and section 212 read with schedule 4 of Act 60 of 2000, further with section 250 of Act 51 of 1977 as amended (Unlawful Possession of a firearm with the intent to commit an offence)

Alternatively, Contravening section 120 (10) (b read with sections 1,103, 117, 120(1)(a), 121 read with schedule 4 of Act 60 of 2000, and further read with section 250 of Act 51 of 1977 (Possession of an imitation firearm).”

Exhibit H a handwritten letter from Gauteng Province Health Department dated with an official stamp of 01Beb 2014 confirming the health bowel challenges of Xolani Nxumalo.

[14] In casu, the applicants have since spent five years in prison, unable to execute their appeal, not because of their own doing. In this regard, they called a witness, an admitted counsel, by the name of Adv E A Guarneri, of the High Court Unit Manager Legal Aid SA, Johannesburg Local Office. He explained, inter alia, that in 2021 they were provided with a record, and appointed counsel, and the record was checked and found to be incomplete. After various steps taken and proved to be unfruitful, in 2024 they approached the Judge President of this Division, who subsequently requested that this court should make itself available to assist in hearing both the transcript reconstruction and the bail applications. The trial itself was over a period of six months, resulting in 57 Volumes of the typed transcript. The reconstruction itself required that the State counsel, Adv Stellenberg, who was involved in the matter had to be recalled from another Division, to come and assist in the reconstruction of the record. Adv Mokgotsi, who was one of the defense counsel for

some of the applicants in the trial, also had to be re-engaged to participate on behalf of the accused in the reconstruction of the transcript, as well as in the bail

applications. This court is greatly indebted to both counsel for their valuable assistance in regard to the reconstruction of the

transcript and the bail applications. It was decided that one composite bail application for all the present applicants be done.

The reconstruction has since been concluded, hopefully, the applicants will be now in a position to expeditiously and without any

delay proceed with their appeals against both conviction and sentences, as they indicated, during their bail application.

[15] The personal circumstances of the applicants, their addresses of abode and the nearest police stations to which they will report have also been placed on record, and the amounts they can afford for bail.

[16] The State called one of the investigating officers, Lieutenant Colonel Chauke who testified, but did not challenge the addresses furnished by the applicants. Neither was he in principle opposed to bail pending appeal being granted, save that in his opinion a substantial amount of bail should be fixed, in the discretion of the court. As to whether the applicants should be granted bail, he wisely, left that decision to the discretion of the court.

[17] The legal representatives of both the applicants and the State have addressed me fully, each submitting that the court makes an order in favor of their respective parties. I do not intend to restate their respective submissions, save to state that I am alive to their respective submissions.

[18] Before dealing with the bail application, I need to deal with one side issue. Some of the applicants, have been convicted and sentenced to custodial imprisonment in other courts, regional courts, of inter alia, armed robberies. I understand that they want to execute appeals against both their conviction and sentences in those matters, and that such appeals be lumped together with their appeal(s) in this matter so as to have one composite appeal of all the relevant

matters. The reason advanced for this novel approach, is to save those appellants the tedious and expensive process of dealing

individually with all the respective appeals.

[19] I must hasten to state that there is no formal application in regard to the said request, save that it was brought over the bar. Whilst I appreciate the financial constraints the potential applicants will be burdened with in executing individually the respective matters, and the fact that this court has an overall inherent jurisdiction in matters arising within its jurisdiction. However, its inherent jurisdiction does not permit it to pronounce on speculative issues,

which have not been formally placed before it. In doing so, it will be opening a door to an unwieldy path of convenience or inconvenience, without any boundaries, ushering, for lack of better word, nothing else but chaos. I therefore refuse to even pronounce, within the parameters of this application for bail pending appeal, any order in this regard.

- [20] It is trite that the court has an inherent jurisdiction to grant, even a convicted accused, bail pending appeal; vide section 35(1)(f) of Act 108 of 1996; etc the judgment of Ngcobo J as he then was, in *S v Thornhill* 1998 (1) SACR 177 at 180h-181c. However, such discretion, in my view, is not there for a take. The court must balance the interest of the applicant, as well as that of the public, represented by the State. Such discretion must be exercised judicially, on the facts placed before it, by both the applicant(s) and the State. The court must also have regard to the nature of the crime, the sentence imposed, the personal circumstance of the applicant(s), the risk of absconding; and walk the balancing pole, before deciding one way or the other, guided by the applicable principles.; vide *State v Egling* 2003 JD 0267 (W)—page 15.
- [21] The offences the applicants were convicted of, lend them within the purview of Schedule 5 of the Criminal Procedure Act 51 of 1977, because they have not only committed, but have been convicted of offences referred to in section 2 of the Prevention of Organized

Criminal Act of 1998.

- [22] In terms of section 60(11)(b) of the Criminal Procedure Act of 51 of 1977, where an accused is charged with an offence referred to in schedule 5, but not 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, adduce evidence which satisfies the court that the interest of justice permits his or her release. In the matter of *S v Botha and Another* 2002 (2) SA 680 (SCA) at 690B the Supreme Court of Appeal held that:

“[20] In terms of both s 60 (11) (a) and (b) there is a formal onus on the accused who brings bail application, to adduce evidence that convince the court’. The difference in the two sub-paragraphs lies in the requirements that a Schedule 6 accused must adduce evidence which convinces the court that “exceptional circumstances “exists which permit his or her release, while a schedule 5 accused must only

adduce evidence which convince the court that the interest of justice permits his or her release.”

- [23] The applicants have all stated that were they to be admitted to bail pending appeal, they will surrender themselves to the authorities, were their appeal to be unsuccessful. This supposition must be looked at through the glass prism which reflects the future. Such glass prism first reflects the previous conduct and then reveals the future conduct of the person projected into the future.

- [24] The first applicant, has a previous conviction of armed robbery, having served portion of his sentence, then was deported to Zimbabwe, but returned to South Africa illegally, and thereafter embarked on the wide and wild spree of armed bank robberies, which landed him before this court. He has been sentenced to, inter alia, life imprisonment sentence. He too bemoans the conditions and the bad food in prison. His say so word that he will voluntarily return to prison, if need be, is not persuasive, regard being had to his previous conduct. With the prevalent scarcity of work opportunities in the Country, and the notorious sorry sad economic situation in Zimbabwe, his advanced age, the probability of getting work at his age, look very deem, thus leaving him with reverting to crime for survival.
- [25] Applicant 4 Ndebele Strike, too has been sentenced to life imprisonment.
- [26] Applicant 5 Makhubu, Mduduzi too has been sentenced to life imprisonment.
- [27] Applicant 6 Ndlovu Themba testified that he is 50 years old and hails from Zimbabwe. He came to South Africa in 2013, as he had a passport then, which has since expired in June 2024.
- [28] Applicant 7 Nxumalo Xolani, Bafana (Mntungwa Thulani Xolani vide exhibit 4-5) South African previous conviction of bribery, He also used two different names, and this, in my view, reveals a trait of dishonesty and preparedness to avoid accountability at all cost. This is also demonstrated by the use of different names and cannot be trusted in his word that he will surrender himself to the authorities, if need be.
- [29] Applicant 8 Ntuli Robert Bafana (Robert Ncube) hails from Zimbabwe and his passport has since expired. He also has inter alia, a previous conviction of bribery, and he too used different names, and that, in my view, reveals a streak of preparedness to corrupting officials to avoid consequences of his shortfall.
- [30] Applicant 9 Nkomo Nkosana. Thulani Dube (Alias Nkosana Nkomo), hails from Zimbabwe besides the life imprisonment sentence in this matter, was convicted and sentenced on two other bank robberies, where accused 7 and 8 were his co-accused. He was using an alias name. He ascribes the use of the alias name to an informer. In my view this explanation, is flimsy and demonstrate that he was trying to avoid being discovered that he had other criminal offences. That dishonesty, leads one to doubt his statement that he will present himself to the authorities, were he to be released on bail.
- [31] Applicant 10 Dube Lucky Vusi, He too was convicted and sentenced to life imprisonment in this matter. He also has a previous conviction under case number 41/559/2017 R/C CAS 190/06/17, was declared not fit to possess a firearm.
- [32] It brooks no argument that, the life sentence imprisonment the appellants have been sentenced to, is one of the harshest sentences that can be imposed to an offender. All the appellants are kept in the maximum sections where they are being incarcerated. They are all complaining of the prison conditions, inter alia, the type of food they receive. Although some complain of their health conditions as well, they have testified of receiving medical

treatment and being referred to the Baragwanath Academic Hospital. They have all asserted willingness to voluntarily return to prison in the event of their appeal being unsuccessful, if admitted on bail.

[33] Some of the applicants are expatriates and others are local citizens. Looking at how these robbery cases were committed, I am of the view that they were committed by a syndicate, consisting of a group of people who came together, and formed units, and decided to execute the robberies at various stages through certain units. The units consisted of expatriates and locals, executing at different and varying times and places. The expatriates are like a stranded person without shelter, you receive him at your place with warm hands over overnight, and in the morning, he spits in your face, typical ingrate. The locals who connive with expatriates in committing crimes, lack patriotism, and cannot claim that they be treated differently from the expatriates. They must be treated the same, for they all deserve harsh punishment. Offenders must understand that when they commit crime and are consigned to prison, they leave their civil liberty and rights at the doorsteps of prison. Inside prison they must be prepared to suffer the consequences prevailing in prison, out of their own choice. If we are to succeed in curbing the for ever rising wave of crime, the courts must adopt a harsher stance towards criminals in general, and their approach towards bail must be strict.

Taking into account the following facts: i. some of the applicants are immigrants, ii. most of them are repeat offenders; iii. they all colluded with one another in the respective robberies they were convicted for. iv. They are all not satisfied with the prison

conditions; v. they all can afford bail in the amount of R10 000. 00 / R5000.00 or less; vi. in my view, the amounts they can afford are too meagre to compel them to return to prison; vii. releasing them on bail will cause the indignation of society, regard being had to their sentences; x. they have not satisfied this court that it is in the interest of justice that they be released on bail:

Accordingly, this court concludes that the application for bail pending appeal should be dismissed.

[34] In the result the following order is issued:

1.The application for bail pending appeal in respect of all applicants is hereby dismissed.

NAME OF JUDGE

JUDGE OF THE HIGH COURT

JOHANNESBURG

DATE OF JUDGMENT: 23 September 2024

For the Applicant:

Adv. Mogotsi

For the Respondent/ State: Adv. Stellenberg

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