

SOUTH AFRICA / JUDGMENT

Thulo v S (A514/98, 45/95) [1998] ZAGPHC 2 (5 August 1998)

[1998] ZAGPHC 2**COURT**

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

A514/98

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Source record**NOT****REPORTABLE****IN****THE HIGH COURT OF SOUTH AFRICA(WITWATERSRAND LOCAL
DIVISION)JOHANNESBURG****CASE****NO.: A514/98****DATE:1998.06.05****The****Magistrate MR A ROUX****CASE****NO. :45/95****In**

the appeal of:

ISAAC

KGABISE

THULO.....

Appellant

and

THE

STATE.....

Respondent

JUDGMENT

WILLIS. A J: This is an appeal against the refusal of bail in terms of section 65 of the Criminal Procedure Act, 51 of 1977 (as amended) , to which I shall hereinafter refer to as "the Act" .

The accused, Mr Isaac Thulo, 44 years of age, has been held in custody as a result of his arrest for being in unlawful possession of unwrought gold valued at R50 000,00 and being in unlawful possession of foreign currency, namely Australian Dollars. The value thereof is the equivalent of R252 814.

The accused has been charged in terms of section 143.(3), read with sections 1, 153(1) and 155 of the Mining Rights Act, 20 of 1967

insofar as the unlawful possession of unwrought gold is concerned.

It is common cause that the offence in respect of which the accused has been charged is not an offence which falls under either schedule 1 or schedule 5 of the Act. No evidence was led by the State to the effect that there was any serious risk that the accused would interfere with potential witnesses or in any way hamper the investigation of the case. There was also no evidence led to suggest that the accused was in any way a person prone to violent tendencies and in that sense posed a real potential danger to the community.

Essentially the learned magistrate made such findings pertinently and the fact upon which the State relied in opposing the grant of bail was essentially twofold. Firstly that the accused had already been charged twice before the magistrate's court in Klerksdorp for similar offences and that the fact that there was a prima facie case. The magistrate found that:

"It would be irresponsible of this court to release the appellant on bail under these circumstances. There is a likelihood and in fact a real risk that the appellant would, once released on bail, continue with this type of conduct. It is the view of this court that it would not be in the interests of justice to release the appellant on bail and that it would be prejudicial to the interests of justice to release him on bail."

Notwithstanding the recent amendments to the Act, making it more difficult for accused persons in certain circumstances to obtain bail, and notwithstanding the justifiable concern of the community that dangerous criminals should not easily be released on bail, the fundamental principles upon which bail is normally considered remain unaffected. I would refer to the Case Of S v du Plessis. 1993 (2) SACR 379 (T) at 384-385, where the court said:

"Die toets by 'n borgaansoek is dat dit toegestaan moet word indien die regspleging nie daardeur benadeel sal word nie. Dit is al gese so lank terug soos R v McCarthy. 1906 TS 657 op 659. Die grondslag van die reel is dat vermoed word dat 'n beskuldigde onskuldig is en dat dit onbillik is dat onskuldiges in aanhouding sit. Die belangrikste vrae wat beantwoord moet word is:

(a) sal die beskuldigde sy verhoor bywoon,-

- (b) sal die beskuldigde die regspleging benadeel deur met getuies in te meng of die polisie ondersoek in die wiele te ry."

In terms of section 60(4) the Act provides that: "The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established:

- (a) there is a likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or the public interest or commit a schedule 1 offence;
- (b) where there is a likelihood that the accused, if she or he were released on bail, would evade or attempt to evade his or her trial; or
- (c) where there is a likelihood of the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses

or to conceal or destroy evidence or where there is a likelihood of the accused, if he or she were released on bail, will undermine or jeopardise the objectives of the proper functioning of the criminal justice system, including the bail system." If I understand the record correctly it seems clear that the State and indeed the learned magistrate accepted that considerations (a) to (c) in subsection 4 do not apply. They considered, however, that releasing the accused on bail would undermine the objectives or the proper functioning of the proper criminal justice system, including the bail system. I shall deal with this aspect later.

I wish to emphasise that, if anything, it seems clear that the accused would stand trial, as he has had charges pending against him in Klerksdorp since November 1996 and there has been no difficulty in securing his attendance at the various adjourned hearings of that particular trial.

In terms of section 60(8) of the Act:

"In considering whether the ground in subsection (4)(d) has been established the court may, where applicable, take into account the following factors, namely:

- (a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;
- (b) whether the accused is in custody on another charge or whether the accused is on parole;
- (c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or
- (d) any other factor which, in the opinion of the court, should be taken into account." Quite clearly (b) and (c) are not relevant to this particular appeal.

Of significance in the bail hearing is the following evidence, appearing at page 111 of the transcript that:

"Video toon nie dat beskuldigde, nadat aan die deur geklop is, voor stoof in die kombuis gaan staan nie." It is common cause that the area where the unwrought gold and the cheques were found had been monitored by secret video recordings authorised by this court. The accused had been unaware of these secret video recordings. One would have expected that if the accused, beyond reasonable doubt, had a guilty frame of mind that he would have attempted to remove the goods from the stove.

The accused also presented evidence that the flat in which the items were found had been occupied from time to time by a friend of his who had free access thereto. This person's name is a certain Mr Cassim. That evidence was not challenged.

The charges are still under further investigation and there is no indication as to when they will be completed. I am not convinced that the learned magistrate was correct in finding that there was a prima facie case. In saying this, I do not wish to express any opinion as to the likely outcome of the criminal trial, as much will depend on what further evidence is led and cross-examination of the various witnesses, including the accused. Suffice it to say in my opinion it is not certain that the accused would indeed be convicted on the evidence presently available.

It also seems common cause that although the accused had previous convictions, some of which related to theft and others which related

to dealing in what is commonly known as dagga, all these convictions occurred more than ten years ago. I therefore believe it only correct to assume that if the accused is indeed found guilty of the charge there is a reasonable probability that he will not receive a direct custodial sentence. In other words it is reasonable to assume that depending on the nature of the evidence that may be led regarding the facts of the case as a whole, and depending on the evidence that is led in mitigation, that the accused would receive a fine together perhaps with a suspended sentence.

Weighing all these factors in account I come to the view that the decision to refuse bail to the accused was wrong. The bail conditions which in my opinion the lower court should have given have been settled between the representatives of the State and the accused. I must emphasise, after I had indicated that I would in all probability interfere with the decision of the learned magistrate, these conditions seem to me to be fair in all the circumstances and I shall make them the order of the court.

In the result my judgment is as follows:

1. The appeal by the accused against the refusal by the learned magistrate to grant bail succeeds.
2. Bail in the amount of R100 000 is fixed and extended on the following conditions:
 - 2.1 that the accused shall appear in the Regional Court Johannesburg on 28 August 1998 at court 13;

2.2. that the accused shall thereafter appear at any place, date and time to which the proceedings relating to the offence in respect of the accused is released on bail, are adjourned, and stay in attendance until a verdict is given by a court in respect of the charge to which the offence in question relates or where a sentence is not imposed forthwith after a verdict and the bail in question is extended until sentence is imposed;

2.3 that the accused shall personally report to the police station in Klerksdorp every Monday between the hours of 08:00 and 16:00;

2.4 that the accused shall surrender any passport or travel documents permitting him to leave the country.

ON BEHALF- OF APPELLANT: ADV B ROUX

INSTRUCTED BY: PUNA MOROKO ATTORNEYS

DATE OF HEARING: 29 JUNE 1998

DATE OF JUDGMENT: 8 JULY 1998

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