

SOUTH AFRICA / JUDGMENT

Visagie v S (CC91/03) [2012] ZAGPPHC 367 (3 February 2012)

[2012] ZAGPPHC 367

COURT

North Gauteng High Court, Pretoria

BEFORE

P.M. Mabuse

CASE / FILE NUMBER

CC91/03

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IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: CC91/03

DATE: 3 February 2012

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

GP VISAGIE

APPLICANT

V

THE STATE

RESPONDENT

JUDGMENT

MABUSE I:

1. This is an application by the applicant, Mr. GP Visagie, the accused no. 17 in what has now become known as "Boeremag Trial", to be released on bail pending the finalisation of the said trial. The applicant, who has been in detention since his arrest in January 2003, having unsuccessfully brought an application to be released on bail on 12 July 2004, now brings this fresh bail application on what he regards as new grounds. Needless to say the respondent opposes this application.

2. It needs to be mentioned though that in applying to be released on bail, the applicant did not tender viva voce evidence and in the process subject himself to cross examination but chose instead, and which is permissible, to tender his testimony by way of affidavits.
3. According to his affidavit the first ground on which he brought the application for his release on bail was that he underwent a heart surgery at Zuid-Afrikaanse Hospital in Pretoria. In support of his ground, he relied on a certificate, not an affidavit, by one Dr. MS Stevens, a cardiographic surgeon whose certificate was attached to the founding affidavit as annexure "A". I will deal extensively with this ground and such other ground as may follow later in this judgment. He also relied on the following documentation: a letter from one Linda Strydom ("Strydom"), a biokineticist; a report by Dr. Van Wyk ("Van Wyk") and finally a letter by Dr. JJ Venter ("Venter"), his family doctor and an affidavit by his wife, Leonora Visagie.
4. On his discharge from hospital he was given a booklet containing guidelines on how to dress, exercise, and behave, among others. He had been advised to submit that the exercise facilities in the Pretoria Correctional Services where he was detained were not suitable for proper exercise in that the cell space available to him was not sufficient to enable him to walk about. According to the advices he had received, the applicant required more space than he had in which to walk about, if he was to avoid blood clots in his body. He complained that during winter, his cell can sometimes become unbearably cold and extremely hot in summer.
5. In terms on the booklet that he was given on his release from prison, he was required to follow a particular diet.
6. He was doubtful whether he would receive the correct medication while he was in detention.
7. The conditions in prison were not suitable for the rehabilitation of his health. In support hereof he contended that many inmates at the Pretoria Correctional Services have been infected by, and suffer from, contagious diseases which might be fatal to him. He complained furthermore that, despite the prison doctor's instructions to the contrary, less than 14 days after his bypass operation and before his feet could recover from the operation he was put into feet cuffs as a consequence of which he experienced severe pain and swelling.
8. In opposing the applicant's bail application, the respondent relied on the affidavit of one Johannes Hendrik Vreugdenburg ("Vreugdenburg"),

Lieutenant Colonel in the South African Police Services and the Chief Investigation Officer of the trial in which the applicant is accused, together with affidavits of other people from the Pretoria Correctional Services. One of the grounds relied on by the respondent was the concerted effort by the applicant's family in assisting him to evade the police before his arrest in 2003. The applicant was arrested in Hatfield Pretoria without any assistance from his family members. Vreugdenburg has very little confidence that the applicant, if released on bail, will attend his trial. His family,

according to him, cannot be relied on to assist the police if he decamps.

9. The second reason the respondent opposed the application is that on 31 May 2011, the applicant, together with a few of his co-accused in the said trial, attempted to flee from court during tea break. The details relating to the said attempt are contained and related in an affidavit, annexure 'JHV3' to the answering affidavit by Maphuti Johannes Selepe ("Selepe") and some of his colleagues. According to him on 31 May 2011 at about 11h30 while he was standing at the main entrance of the court, he saw five suspects of the "Boeremag" run towards him. Those suspects are Van Rooyen, Rudi Gouws, Mike Du Toit, Tom Vorster and Visagie. Visagie is the applicant in this matter. They pushed him aside and the said Van Rooyen sprayed him with an eye blinding substance. Some of them even tried to take control of his firearm. He is the one who grabbed the applicant and prevented him from escaping.
10. The same allegations about an attempt to escape made by Selepe in his affidavit were also made by Rebecca Raisibe Rasikwameng, Daniel Kialiboga Kokeng and Nicolaas Els, all members of the South African Police Services who had been posted at GD Court where the hearing of the case against the applicant and the others was in progress. Of course the applicant dealt, in his affidavit, with allegation that on 31 May 2011 he and others tried to break free. He denied that he tried to escape and stated that he was walking up and down between benches when he noticed what appeared to be a fight between some of his co-accused and the police. He was trying to settle the matter. He stopped at the entrance of the court where someone pushed him hard from behind and caused him to fall onto the fighting masses. Following his fall, his glasses fell and broke and he could not see any further.
11. The respondent disputes, in an affidavit by Heinz Peter Kramer ("Kramer"), the applicant's allegations with regards to the conditions in prison. According to him, the applicant has since 2 April 2011 being detained in what the Correctional Services Authorities call B-unit, which consisted of four separate cells, after having been transferred from C-Max Prison to the local prison. The applicant and some of his co-accused occupy the top floor of the said B-unit.
12. The floor consists of 39 cells. Of these 39 cells, two are allocated to each inmate. There is also ablution facilities and a room where a payphone is located. The passage between the cells is approximately 15 metres long and 3 metres wide. On the strength of the court order, the applicant and some of his co-accused have been separately detained from other inmates. The respondent admits that the prison is 136% over populated but contends that that fact does not affect the section where the applicant is detained. Compared to the section where there is 136% inmates population, the applicant is safely ensconced in the B-unit cells.
13. When the applicant does not go to court, his cell is unlocked at 07h00 and locked at 15h00 and it is locked at 16h30 on the days he attends court. The applicant has sufficient time in between 07h00 and 15h00 to move freely in the passages between the cells.

14. In terms of the prison regulations, each prisoner is allowed one hour to exercise in open courtyard. On such days as he has to attend court, the applicant is taken to the courtyard in order to exercise at 07h00 on each such days. He is taken to the courtyard daily to exercise between 11h00 and 12h00 on days he does not go to court. For his exercises, the applicant has, and uses, a pilatus exercise ball and an exercise mat. The respondent contends that the Prison Services provide the applicant with ample time to exercise.
15. According to the respondent, the Pretoria Local Remand Detention Centre houses approximately 3500 persons for whom special meals are prepared daily based on their religion or for medical reasons. Where a specific diet has been prescribed by a medical practitioner, the Department of Correctional Services obliges by separately preparing such inmates' meals according to the prescription. Indeed the applicant's meals are separately prepared in accordance with his prescribed diet.
16. The respondent also relied on the affidavit of one Louis Christian Marais ("Marais"), the assistant manager of the health care services in the Department of Correctional Services and stationed at Pretoria Local Remand Detention Centre and who has been in the service of the said department for thirty-one years. He is in charge of the medical department at the said detention centre and as such has unfettered access to all the detainees' medical files. Through his occupation he knows the applicant personally.
17. According to him, since his release at the hospital, the applicant has been under the medicare of members of his department. He contended that upon his arrival from hospital, his department received a prescription from Dr. CJ Van Wyk. On 12 July 2011 they received a further prescription from the same medical practitioner. Consequently his department is aware that the applicant should, in terms of the doctor's orders, be treated especially in so far as his prescriptions dictate. The department is prepared to treat the applicant in accordance with such prescriptions.
18. According to the policies of the Department of Correctional Services, a detainee may, at its own expense, and without any compensation from the department, consult a private medical practitioner. Should such a detainee not be able to cover his or her own private medical fees, he or she is at liberty to accept medical services offered by the department. The applicant used and has used such medical services offered by the department. He has consulted already with one Dr. Mahlalela who issued the same prescription as the one that was issued by Dr. Van Wyk with a slight difference. The said Marais contends that, in the place of "Cardura", which had been prescribed by Dr. Van Wyk and whose active ingredient is Doxazosin 4mg, Dr Mahlalela has prescribed "Carzin XL", which also has the same active ingredient as "Cardura". The reason he furnished for the department's choice was that Doxazosin was a generic of "Cardura" and that the department did not stock "Cardura".
19. When this application came before me, Mr. Engelbrecht, counsel for the applicant, made it clear to the Court that he was not going to add anything to the application as contained in the applicant's papers. Accordingly, in that manner, he regarded the applicant's

applications, as contained at the time, as everything that the applicant needed to have before the court. He was prepared for a

decision based on what he placed in writing before the court. I will come back to this point later. It will become clearer when I deal with the affidavits filed while I remark that the applicant was content with the court deciding the matter only on the affidavits

before it.

20. As submitted by the respondents, in their counsel's heads of argument, the applicant did not testify orally. This contention is, in my view, not correct as the applicant's application is supported by his founding affidavit. The applicant placed evidence before court by way of an affidavit. The procedure or method of placing evidence before court in bail proceedings by way of affidavits is part of our law.
21. In the first place, s. 60(1 l)(b) of the Criminal Procedure Act 51 of 1977 ("the CPA"), under which the applicant brought his application, requires him to "adduce evidence". Therefore he may place his evidence before court by orally testifying in his application or he may, as he has done in this matter adduce his evidence by way of affidavits. In *S. v Pienaar* 1992(1) SASV 178(W) at p. 180h and *S v De Kock* 1995(1) SACR 299(T) p 309, the courts approved the method of putting evidence before court by way of affidavits.
22. The method of putting evidence before the court by way of affidavits in bail seems however to be fraught with pitfalls. Firstly, it has not been prescribed by the legislature that requires the applicant to adduce evidence in bail applications. It is also so because of the phrase "adduce evidence". No time limits have been set within which to deliver affidavits and the same legislation does not prescribe the kind and number of affidavits that should be filed before a matter can be heard.
23. The problem, as it is the case in this matter, is that the applicant either forfeits any opportunity to reply to the contents of the respondent's affidavit or answering affidavits did not deem it useful to do so. I mean nothing prevented him from filing a further affidavit in reply to what is contained in the respondent's opposing affidavit.
24. It is important to remark that as what is contained in the applicant's affidavit is evidence, equally so is what is contained in the respondent's affidavit or supporting affidavit. In his evidence, the applicant made very serious allegations against the Department of Correctional Services here in Pretoria. The said department was not party to the application. No attempt was made by the applicant to serve a copy of the application on the department so that it could be afforded an opportunity to respond to the allegations. It is only through the initiative of the respondents that this court had before it the necessary response from the Department's personnel.
25. The contents of the applicant's affidavits are now directly contradicted by the contents of the affidavits filed on behalf of the respondent. The contention by the respondent, in particular Vreugdenburg that in the initial application the State produced evidence to show that the

applicant disappeared on 16 September 2002 after an unsuccessful attempt by a group of people to overthrow the Government remains unchallenged, so are the State's contention that the applicant not only had a common purpose with the group of people who were planning or had done so, to overthrow the Government but also participated in the said attempt. According to Vreugdenburg, the police launched a nationwide search for the applicant. They could not arrest him as soon as they had wanted to because of the role played by his family in frustrating the efforts. The respondent fears that if the applicant is granted bail there will be no guarantee that he will not disappear again for he has already shown his ability to do so and that if he does his family will again assist him to dodge the Court and the police. It must be recalled that one of the conditions of bail is that the accused should present himself at court on days to which the matter is postponed.

26. Although he has anticipated the respondent's contention that he and a number of his co-accused tried to escape, his reasoning does not seem to be sufficient, considering that the statements of witnesses to the attempts to escape speak in one voice. While he denied that he participated in the attempt to escape, and state that he noticed what to him appeared to have been a fight involving some of his co-accused and the police, that he tried to intervene by settling the matter and that he stopped at the entrance of the court where he was pushed, the police who were on duty at the time when this incident took place contradicted him and stated that he was part of the group that tried to flee. Fleeing from court shows, in my view, utter disrespect for the court.
27. As far as the other points that the applicant raised eg. his conditions of detention and medical conditions, I take the view that they have been ably and fully covered by the Department of Correctional Services. I have no reason to reject the evidence. What is dissatisfying about the applicant's affidavit is that, although he made such serious allegations against Pretoria Correctional Services, nowhere did he mention the efforts that he himself took to get the preferred treatment from them. Although it seems that he even consulted Dr. Mahlalela, this he has not stated or acknowledged in his affidavit. He has not submitted any other evidence or expert evidence that the treatment that he gets from the correctional services is not proper. I am satisfied that the applicant has, contrary to his averments, sufficient exercise facilities.
28. In the result I am not satisfied that the applicant has discharged the onus that rests on him to satisfy the court that the interests of justice permit his release on bail. The applicant bears the onus of proving on a balance of probabilities that if he is granted bail, the interest of justice will not be prejudiced by his absconding. Firstly, on all the evidence before the court there is a reasonable possibility that he would decamp and thereby frustrate the administration of justice. Secondly, in my view, reasonable and proper provision for both his prescribed diet, prescribed medical treatment and medical rehabilitation is made by the Pretoria Correctional Services. In the result the application ought to be dismissed.

I make the following order:

"The applicant's application to be released on bail is refused."

P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Applicant's Attorneys: Botes Attorney

Applicant's Counsel: Adv. J Engelbrecht

Respondent's Attorneys: Director of Public Prosecution

Respondent's Counsel: Adv. D van Rensburg

Date Heard: 25 November 2011

Date of Judgment: 3 February 2012

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