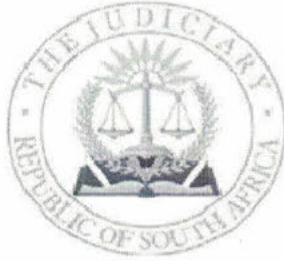


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

28/8/2023
DATE

CASE NUMBER: A66/2023

In the matter between:

NKOSINATHI DANIEL ZONDI

1ST APPELLANT

HLANGANANI STANLEY NDLOVU

2ND APPELLANT

MUSANI NDLOVU

3RD APPELLANT

ANDILE AYANDA JACK NGOBESE

4TH APPELLANT

BAVUMILE MASELENI SETSUBI

5TH APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

MAKUME J:

- [1] The 5 Appellants together with 6 others appeared before the Regional Court Magistrate at Booyens and applied to be released on bail. Their application was refused. They now

come before this Court on appeal that I should find that the Regional Court Magistrate erred in law and on facts in dismissing their application to be released on bail.

[2] The Appellants are charged with the following offences:

- (i) Robbery with Aggravating Circumstances
- (ii) Unlawful Possession of Firearms
- (iii) Unlawful Possession of Ammunition
- (iv) Attempted Murder
- (v) Two counts of murder

[3] The allegations are that a number of men entered the premises of a factory in Thulisa Park Johannesburg and there allegedly attempted to rob and remove solar batteries from the factory. They failed in their attempt. Gun shots were fired and 11 (eleven) of them were arrested in the vicinity of the factory. Two of the robbers were shot dead whilst the other 11 were arrested in and around the vicinity of the crime scene.

[4] This is an application in terms of Section 60 (11) of the Criminal Procedure Act 51 of 1977 which states the following:

- (ii) notwithstanding any provisions of this Act where an accused is charged with an 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 interest of justice permit his or her release."

[5] The offences which the Appellants are charged with fall within the category of offences set out in Schedule 6. For an accused to succeed on his or her bail application the onus rests on him to advance sufficient and satisfactory evidence firstly that there exist exceptional circumstances and secondly that as a result of those exceptional

circumstances it will be in the interest of justice that he or she be released on bail pending the outcome of the trial.

- [6] This being an application by the Appellants the choice remains with them as to how they elect to present evidence to prove and demonstrate exceptional circumstances whether by way of affidavit or by oral evidence. In this instance all the Appellants preferred the route of affidavit as in motion proceedings. A litigant who chooses to present evidence by way of affidavit cannot be subjected to cross-examination in order that his or her version be tested for veracity.
- [7] The Appellant's main ground of appeal is that the state's case is weak the Appellant say that the Magistrate erred and misdirected himself in failing to attach sufficient weight on the fact that the some of the Appellants were never pointed out in the Identification parade also that those who were at the ID parade were subjected to an ID parade which was invalid.
- [8] The onus to proof the existence of exceptional circumstances lies with the Appellants on a balance of probabilities. That onus never shifts. It is therefore a fallacy as argued by the Appellants that the Court failed to conduct a proper enquiry into the existence of exceptional circumstances. Section 60(11) (a) is clear and unambiguous it reads:
- "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 interest of justice permit his or her release."
- [9] Section 65(4) of the Criminal Procedure Act reads as follows:
- "The Court or judge hearing the appeal shall not set aside the decision against which the appeal is brought unless such Court or judge is satisfied that the decision was wrong in which event the Court or judge shall give the decision which in its or his opinion the lower Court should have given."
- [10] The Constitutional Court in the matter of: **S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (4) SA 623 at paragraph 75 and 76** dealt with the concept of exceptional circumstances as follows:

"An Applicant is given broad scope to establish the requisite circumstances whether they relate to the nature of the crime, the personal circumstances of the Applicant or anything else that is particularly cogent.... I do not argue that because of the wide variety of ordinary circumstances enumerated in SS (4) – (9) it is virtually impossible to imagine what would constitute "exceptional circumstances" and that the prospects their existing are negligible. In requiring that the circumstances proved be exceptional the subsection does not say they must be circumstances above and beyond and generically different from those enumerated. Under the subsection, for instance an Accused charged with a schedule 6 offence could establish the requirements by proving that there are exceptional circumstances relating to his or her emotional condition that render it in the interest of justice that release on bail be ordered notwithstanding the gravity of the case."

- [11] The facts in this matter as they appear from the statement one witness are that all the Applicants were arrested at the scene of the robbery. The officer who arrested Zondi and Ndlovu who are first and third Appellants stated as follows in his affidavit:

"I then followed the lead and at corner street I noticed five African males fitting the description, I was given at the main scene running towards is it GAPI Street and I then chased after them and at the Department of Infrastructure building they all jumped there and me and my colleagues followed them and they entered inside the toilet at the back of the Department of Infrastructure building. I then called back up from security to penetrate the toilet and they came and assist. I then tactically approached the toilet and I ordered the suspects to come out and the door was closed. I then kicked open the door. I found five suspects and I ordered them to lie on the ground. Then they complied. I then asked them why are they running away from us. They failed to answer. I then started to search the suspects while my crew was cuffing them. While searching I found one revolver Taurus 357 Magnum filled with five life ammunition and one used cartridge case next to urinal base. I found 9 millimetres with 15 life ammunition and one magazine. I then asked them about the ownership on the firearm and all of them refused to talk. I also noticed 5 of them have scratches all over their bodies which shows that they were jumping walls."

- [12] In yet another statement a witness gave a description of how 2 others were arrested as they jumped over a fence that was Accused no 4 and 6 who are Hlanganani Ndlovu (Appellant 2) and Andile Ngobese (4th Appellant).

- [13] The Appellants placed evidence by way of affidavit in which they disputed the fact that they were arrested in the manner as described in the statement referred to above. They also dealt with their personal circumstances. In my view the facts set out above do not

justify a finding that the Appellants were not arrested in the manner as detailed in the statements. In addition to that the personal circumstances of the Appellants do not amount to exceptional circumstances.

[14] The SCA in *S v Mathebula* 2010 (1) SACR 55 (SCA) held that the Appellant who on his application for release on bail relied on an affidavit which was not open to test by cross-examination was less persuasive. It further held that the Appellants denial of complicity and his alibi defence rested solely on his say so with no witnesses' corroboration to strengthen it. The Court found in conclusion that the Appellant had not contributed anything to establish the existence of exceptional circumstances.

[15] This appeal rests on all fours with the Mathebula decision (supra). The Appellants have not shown any exceptional circumstances in the result the appeal must fail.

Order

1. The appeal is dismissed.


M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING	:	17 AUGUST 2023
DATE OF JUDGMENT	:	AUGUST 2023
FOR APPLICANT	:	ADV MHLANGA
INSTRUCTED BY	:	Edward Sithole & Associates
FOR RESPONDENT	:	ADV ZUMA
INSTRUCTED BY	:	National Prosecuting Authority

