

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: CC91/2003

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

2011-04-29

DATE

SIGNATURE

JOHAN PRETORIUS

APPLICANT

AND

THE STATE

RESPONDENT

JUDGMENT

MABUSE J: (1) This is an application, brought on new facts, by the Applicant to be released on bail pending judgment. I will deal with the new grounds on which the Applicant, Johan Pretorius, brings this application. The Respondent opposes the application on grounds to which I will revert later in the judgment.

- (2) On 12 July 2004 and in case no: A1041/04 the applicant and three others brought an applications to be released on bail. In a written judgment that the Court handed down, the said applications for bail were refused.
- (3) The Applicant alone makes this application. The application is made on an affidavit made by the applicant. In the said affidavit, the applicant has listed seven grounds which he regarded as new grounds on the basis of which he had planned to move his application. Right at the commencement of the arguments, Counsel for the respondent expressed his dissatisfaction with some of the grounds on which the applicant sought to bring his bail application on the grounds that such grounds, in particular the first, second and fourth are the same; that, with regard to the third ground, the applicant made certain ("the CPA");, and that the sixth and seventh grounds amounted to speculation.
- (4) Counsel for the applicant conceded the dissatisfaction pointed out by the respondent's counsel. He agreed with the Respondent's Counsel's contention and indicated to the Court that he had only been briefed a few days before the application came before Court. He indicated however that under those circumstances he would only proceed to argue the application based on the third and fifth grounds. He also put it on record that the parties had agreed to proceed

with the bail application despite the fact that the record of the bail proceedings of 12 July 2004 was incomplete.

- (5) Counsel for the applicant argued that the determination of whether or not a ground on which bail is brought is new must be made against the background of the old application. The first ground that he relied on was the lengthy detention of the applicant. The Court ruled that this ground constituted new ground as the initial application was not premised on this ground. Accordingly it allowed the counsels to argue it.
- (6) In support of this ground, counsel for the applicant relied on the provisions of Section 35 of the Constitution of the Republic of South Africa Act No 108 of 1996 ("the Constitution"), in particular: (i) the rights to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay (s. 35(3)(d); (ii) the rights to be released from detention if the interests of justice permit, subject to reasonable conditions (Section 35(1)(f); and, lastly on the provision of section 39 of the Constitution. Counsel for the applicant argued that the applicant should, according to the Canadian Law, have been tried within a reasonable time or, according to the law of United States of America, have had a speedy of trial.

(7) According to him, the delay in the commencement of the trial was caused by the applications that the applicant had brought between May 2003 and October of the same year.

(8) The applicant relied on the following ground;

“BETREFFENDE DIE WAARSKYNLIKHEID DAT DIE BESKULDIGDE, INDIEN VRYGELAAT OP BORG, DIE OPENBARE VEILIGHEID OF DIE VEILIGHEID VAN ENIGE PERSOON SAL BEDREIG, OF ‘N BYLAE 1 MISDRYF SAL PLEEG”.

It was argued by the Counsel for the applicant that in 2004, the applicant regarded himself as a radical person but has since changed. The genesis of his change was said to be the following;

“5.1 Ek het erken ek was in ‘n gewapande stryd wat tot ‘n einde gekom het. In hierdie verband het die optrede van President Zuma, deurdat hy bereid was om ‘n gesprek te tree met organisasies wat die Boerevolk verteenwoordig, my oortuig dat daar wel ruimte is vir toekomstige diplomatiese resoluë van die kwessie van Boere selfbeskikking. Ek is oortuig dat hierdie weg die aangewese pad is om te loop. Hierdie was nie die geval ten tye van die bewind van Mnr Nelson Mandela nie.”

(9) In order to show that the applicant is now a changed person, in 2009 he made admissions in the trial before Jordan J. He only realised seven years later that he was wrong.

- (10) It was argued furthermore that there is no possibility of the applicant interfering with witnesses in view of the fact that all the State witnesses have testified and that the applicant, if granted bail, will be prepared to comply with any condition that the Court may deem fit to impose on him.
- (11) The respondent opposes this application, as I indicated earlier. Some of the grounds on which the respondent opposes the application were placed on record by the Counsel for the respondent while others appear clearly from the affidavit of Johannes Hendrick Vreugdenburg ("Vreugdenburg") which was used to oppose this application.
- (12) Counsel for the respondent did not dispute the argument by counsel for the applicant that the trial was heard over a rather long period. He conceded furthermore that up to date of this application it has not been concluded. He attributed the delay in the conclusion of the trial to the complexity of the matter and the numerous applications that were brought by some of the accused, including the applicant, in that case. He denied that the applications which were brought during the trial of the matter were confined to a period between May 2003 and October 2003. He argued that even after October 2003 several of the accused, including the applicant, brought numerous applications of a varying nature while the trial

progressed and that as a consequence of such applications, the trial could not proceed until each one of those applications had been determined.

(13) Furthermore, so argued Counsel for the respondent, there were a total of 22 accused in the matter and 161 witnesses. Each witness' testimony was followed by a lengthy cross-examination by counsel for the accused. For those reasons the trial became extended.

(14) He confirmed that the applicant himself only made admissions in the trial in 2009. He made himself available for cross-examination by the respondent's counsel by taking the witness box but thereafter, for no valid reason whatsoever, refused to testify further. He refused to subject himself to cross-examination by the State in the trial.

(15) Counsel for the State conceded that the ground upon which the applicant brought the application was indeed a new ground but argued that it was not sufficient to for the applicant *simpliter* to state the new grounds. He submitted that:

"daar moet gekyk word na die rede waarom hy (die applikant) inhegtenis vir so 'n lang tyd is."

He submitted that it was common cause between the parties in this matter that one of the possible reasons that caused the matter to be heard over a long period was its complexity.

(16) It was argued in the application that the evidence in the trial demonstrated that the applicant was untrustworthy. In the trial the applicant admitted that he had lied. He told the trial Court that it was his Counsel in that trial who advised him to lie.

(17) According to the affidavit of the investigating officer, Vreugdenburg, there is a threat that, if released on bail, the applicant will flee or delay the trial and make it difficult for the case to progress. The respondent is content that the evidence in the trial is strong and the chance that the applicant will be convicted is very strong.

(18) On the applicant's contention that he was radical during the reign of President Mandela, the respondent's view is that this is not correct. The applicant committed some of the offences he has been charged with in the trial during the presidency of Thabo Mbeki, after Mr Mandela had ceased to be the president of this country.

(19) It is common cause between the parties that the offence with which the applicant has been charged falls under Schedule 5 of the CPA. Section 60(11)(b) of the CPA provides that:

“Notwithstanding any provisions of this Act, where an accused is charged with an offence referred to-

(b) 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, adduces evidence which satisfies the Court that the interests of justice permit his or her release.”

(23) The duty rests on the applicant to satisfy the Court on the balance of probabilities that the interests of justice permit his release on bail. See *S v. Hlongwa* 1979(4) SA 112 (D); *S v. Vermaas* 1996(1) SACR 528 (T); *S v. Tshabalala* 1998(2) SACR 259 (C) and *Siwela v S* (2000)(1) ALL S. A. 389 (W).

(21) The aforementioned section provides that the applicant *“adduces evidence”*. Evidence in support of bail may be presented orally or by way of an affidavit. In ***S. v. Pienaar 1992(2) SASV 178 (W)*** the Court stated as follows:

“In my view therefore there is nothing in the Criminal Procedure Act that renders the use of affidavits in bail applications impermissible. Obviously an affidavit would have less probable value than oral evidence which is subject to the test of cross-examination. At the same time an affidavit will carry more weight than a mere statement from the Bar.”

(22) It was indeed so that before the amendment of Section 60 of the CPA, the accused who applied for bail took the witness box and gave viva-voce evidence whereafter he would be cross-examined by the prosecution. Adducing evidence by way of an affidavit developed from the interpretation of the word "*adduce*" in section 60(11) (a) and (b) of the CPA. The introduction of the word "*adduce*" was not intended to change the character of bail application proceedings but merely indicated that evidence could be put before Court in bail application proceedings by a way of an affidavit.

(23) The use of affidavits in bail proceedings, although permissible, does not exonerate the applicant from subjecting himself to cross-examination in the witness box. All that an accused or applicant who has chosen to adduce his evidence by way of an affidavit has to do get into the witness box, take an oath or affirmation and state that his evidence is all contained in an affidavit and that he adopts the contents of the affidavit as his evidence. The applicant in such a case does not have to give evidence of what is already contained in an affidavit. Cross-examination will then follow thereafter.

(24) In my view, the use of an affidavit by an accused person to place evidence before a Court in an application for bail, will only be of assistance to both the applicant and the Court in order to save time of listening to viva-voce evidence and furthermore in a case where the respondent, that is the State, does not intend opposing such a bail

application. Where it is clear that the State or respondent opposes the bail application the procedure of placing evidence before Court by using an affidavit without subjecting himself to cross-examination will put the application at risk. It is clear from **Mathebula v. S [2010] 1 All S.A. 121** at paragraph 11 on p. 124 that an applicant for bail can only be found to have discharged his onus if he opened himself to cross-examination. The said paragraph 11 states as follows:

"In the present instance the appellant's tilt at the state case was blunted in several respects: first, he founded the attempt upon affidavit not open to test by cross-examination and, therefore, less persuasive."

[25] The position is clearly set out in **Gade v. S. 2007 (3) ALL SA 43 NC** and, in my view, it sets out the correct approach:

"The position as described above was satisfied. The appellant's affidavit was formerly read into the record by his Counsel and he was thereafter cross-examined by the prosecution."

Accordingly an applicant for bail who merely uses an affidavit in his bail application but fails to subject himself to cross-examination thereafter runs the risk that the Court will find that he or she has failed to discharge his or her onus. Under such circumstances, the Court will inevitably dismiss such bail application.

(26) This is the case in the current bail application. The applicant, as I have already indicated somewhere *supra*, adduced his evidence by way of an affidavit. Although he was present in Court during the said bail application, for inexplicable reasons, he was never subjected to cross-examination. Of course he was never cross-examined by the respondent because he never made himself available for cross-examination. No explanation was proffered why the applicant could not be cross-examined. The result was that his evidence was never tested through cross-examination. In the premises the Court finds that the applicant has failed to discharge the onus that rested on him.

(27) I now turn to the grounds that the applicant relied on in his bail application. It is not in dispute, and the respondent was unable to dispute it, that the fact that the hearing of the trial, which has up to date not been concluded, was rather too long. That this was a new ground was manifested by the fact that it was never a ground or one of the grounds upon which the applicant brought his initial bail application in 2004. Counsel for the applicant indicated firstly, that by arguing that the trial was rather too long and that the applicant has been in custody since his arrest he did not put the blame at the door of the respondent.

(28) In his argument counsel for the applicant referred the Court to the case of **Moeketsi v. Attorney General, Bophuthatswana and another (1996)3 ALL SA 184(B)** relating

to the rights of the applicant in terms of the Constitution. Section 35 of the Constitution provides that:

“Every accused person shall have the right to a fair trial, which shall include the right-
(a) to a public trial before an ordinary Court of Law within a reasonable time.”

It is indeed so that, in terms of our law, an accused person, in this case the applicant, is entitled to a speedy trial. See **S. v. Geritis 1966(1) SA 753 (W)** where Vierya J stated the following at 745D:

“I do not, however, consider that the distinction make any difference to the proposition stated in Zackey’s case (supra) at 511, by Greenberg JA, that the decision is one within the discretion of a judicial officer presiding at the trial and that it must be a judicial discretion that I venture to suggest that in exercising such discretion two basic principles must be borne in mind. The one is that it is in the interest of society and accordingly of the State that guilty men should be duly convicted and not escape by reason of any oversight or mistake which can be remedied. The other, no less valid, is that an accused person, deemed to be innocent, is entitled, once indicted, to be tried with expedition.”

(25) Counsel for the applicant correctly pointed out, and he was supported by Counsel for the respondent, that in order to establish whether or not the trial was unduly long, the Court must consider and investigate the following factors: (1) the length of the

delay and (2) the reasons for the delay. Indeed in the said authority of **Moeketsi** the Court stated that:

“In determining and assessing the reasonableness between the charge and the trial a Court takes into account and considers and scrutinises the following circumstances and components:

- (1) The length of the delay.*
- (2) Reasons for the delay, commission of (i) delays due to the State (ii) special circumstances relating to the case (iii) delays in the intrinsic system of justice (iv) delays brought about by the accused.*
- (3) Waiver by the accused. The waiver must be clear and unequivocal, and must be proved by the State or may be inferred from the conduct of the case.*
- (4) Prejudice to the accused. Under this factor, an ongoing deprivation of liberty, impairment of the defence evidence, the age or illness of a witness, and the passage of time, particularly a long time, are some of the consideration taken into account.” See p. 208 a-d.*

[30] It was argued on behalf of the respondent that the matter took long because the case was complex, there were 22 accused involved in the matter, 161 witnesses who, having testified each was subjected to cross-examination by accused Counsel, and besides there were various applications launched during the trial which had

effect of prolonging the trial. It is clear that the said matter had not been allocated any specific time within which to be concluded.

(31) In his affidavit the investigating officer stated that:

“Die verdragings in hierdie saak kan hoofsaaklik voor die deur van hierdie applikant en sy broer Wilhelm Pretorius gele word. Hulle het die hof se tyd gemors met verskeie ongefundeerde aansoeke. Hieronder was ‘n totaal ongegronde aansoek vir rekusering van die verhoorregter, ‘n uitgerekte aansoek om artikel 174 ontslag ten spyte van oorweldigende getuienis teen hulle en die aansoek om krysgesvangenesstatus wat op sy eie 5 weke geduur het.”

In the circumstances the delay in the conclusion of the file must be sought in the conduct of the applicant.

(32) That the applicant is untrustworthy has not been denied. Accordingly I must accept the argument put forward by Counsel for the respondent that the applicant is **unreliable**. It would appear that his undertaking that if he is granted bail he will comply with any condition the Court may deem fit to impose cannot be relied upon.

In the end I am not satisfied that the applicant has discharged his onus of satisfying this Court that the interests of justice permit his release on bail.

Accordingly I make the following order:

“The application is refused”.



MABUSE J.

APPEARANCES

Counsel for the Applicant: Adv Manie Dempers

Counsel for the Respondent: Adv Pieter Luyt