

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT EIZABETH

CASE NO: CC 11/2016
Date heard: 1 September 2016
Date delivered: 2 September 2016

In the matter between

PHUMELA ELIZABETH HOLLAND

Applicant

And

THE STATE

Respondent

JUDGMENT ON BAIL APPLICATION

GOOSEN, J.

1. This is a substantive application for bail brought by the applicant, who is accused
2 in the matter presently pending before this court. The applicant is one of six
accused charged with several offences including conspiracy to commit murder; two
counts of murder; unlawful possession of a firearm and unlawful possession of
ammunition.

2. The relevant portion of the indictment, insofar as the charges against the applicant is concerned, alleges that during 2014 and while accused 6 (Mawethu Khaka) was in custody, he telephonically contacted a certain Mapheta, Accused 5 and Accused 3 to request them to kill a witness. It is alleged that Accused 3 solicited the assistance of Accused 1. It is further alleged that Accused 6 telephonically contacted his then girlfriend, Accused 2, who is the applicant, to obtain a vehicle to be used to transport the conspirators to Kwanobuhle in order to execute the witness. According to the indictment the applicant approached Sindiswa Bembe to request her to rent a motor vehicle on the pretext that applicant's mother needed the vehicle to travel to a funeral. Once the vehicle was rented the applicant is alleged to have provided it to her brother, Accused 3. It is alleged the vehicle was used on 31 March 2014 when the witness, Madlakane, and another woman were shot and killed.
3. The applicant previously made a substantive application for bail which the state opposed. Bail was denied. It appears that subsequent to this the applicant again approached the magistrate's court for bail, alleging the existence of new facts. Bail was again refused and a still further application, also based on the existence of the alleged new facts was brought, and also refused. The applicant then appealed against that finding. The bail appeal was heard by Bloem J, who delivered judgment dismissing the appeal on 11 December 2015.
4. I was referred by both counsel to the content of Bloem J's judgment as containing a summary of facts relevant to the nature of the state case as well as the personal circumstances of the applicant.

5. The applicant now brings a further bail application in which it is alleged that new facts fall to be taken into account. Before dealing with those alleged new facts it is worth noting that the application was prosecuted on the basis of an affidavit deposed to by the applicant. Annexed to this affidavit were several documents which included Bloem J's judgment aforementioned; a judgment by Revelas J in a bail application brought by Accused 3 in which bail was granted; certain extracts of the previous bail application of the applicant before the magistrate, as well as what appears to be the complete investigation docket which has been made available to the applicant. The state opposed the application. In this regard the evidence of detective warrant officer Arnolds, who is the investigating officer, was presented.
6. The affidavit filed by the applicant founds the applicants case for bail upon what was stated to be new facts not previously considered by the court dealing with bail. These, it was submitted, are the following:
 - (a) That the applicant has been in custody since 2014, a period now in excess of two years.
 - (b) That Accused 3 in the case was admitted to bail pursuant to a judgment by Revelas J in which the learned judge made an adverse finding regarding Captain Mayi, the erstwhile investigating officer in the matter. The finding relates to Mayi having misled the magistrate in Accused 3's bail application.
 - (c) That the state witness Sindiswa Bembe, whom it is alleged will have provided evidence implicating the applicant in the hiring of the motor vehicle which was allegedly used in the commission of the offences, was apparently shot and killed in May 2016, apparently in a hijacking.
 - (d) That a further state witness Luyanda Mafani, who was employed by the car rental company and who would also provide evidence relating to the applicant's involvement in the rental of the vehicle, also recently died. I should mention that

this ‘fact’ was presented by the applicant on the basis of hearsay, she having heard that this is so. The investigating officer Arnolds had no knowledge of this, had not made enquiries and therefore could not dispute the allegation.

7. These then are the new facts upon which the applicant relies. In argument, Mr Nel, who appeared for the applicant, sought to suggest that these new facts cast a new light on the alleged strength of the state’s case against the applicant. When the ‘weakening’ of the case is considered in conjunction with the length of time that the applicant has spent in custody and when regard is taken of the fact that the trial is scheduled to proceed in the fourth term of this year, it was argued, this court should find that the applicant is entitled to bail.
8. Mr Nel sought to place great weight upon the finding by Revelas J, that Mayi misled the court hearing the bail application in respect of Accused 3. This finding suggested, so it was argued, that the entire case to be presented by the prosecution was ‘tainted’.
9. It is common cause that the applicant, in order to be admitted to bail, must establish that there are exceptional circumstances present which would warrant her release on bail. Proof by an accused person that he will probably be acquitted at his trial may constitute such “exceptional circumstances” (*S v Botha and another* 2002 (1) SACR 222 (SCA) at par [21]).
10. In *S v Peterson* 2008 (2) SACR 355 (C) at par [57] it was held that:

When, as in the present case, the accused relies on new facts which have come to the fore since the first, or previous, bail application, the court must be satisfied, firstly, that such facts are indeed new and, secondly, that they are relevant for purposes of the new bail application. They must not

constitute simply a reshuffling of old evidence or an embroidering upon it. See *S v De Villiers* 1996 (2) SACR 122 (T) at 126e-f. The purpose of adducing new facts is not to address problems encountered in the previous application or to fill gaps in the previously presented evidence.

11. In order for this court to grant bail it must be shown that the new facts relied upon are relevant to determining the strength of the state's case. It must also be shown that the consequence is that the state case is exceptionally weak and that, on a balance of probabilities, the applicant will be acquitted (*S v Mazibuko and another* 2010 (1) SACR 433 (KZP) at par [23]).
12. The length of time that a person is in custody awaiting trial and the reason for the delay are factors to be taken into account in the overall assessment as to whether it is in the interests of justice that the accused person be released on bail. The length of detention is not, properly considered, a new fact which warrants reconsideration of the order as to bail by a court re-considering a bail application. In this instance the fact of the detention and the fact that the trial has been subject to various delays, and is only likely to proceed during the fourth term of this year, fall to be considered in the light of the broader attack upon strength of the state case which the applicant is advanced in this application. In the event that it is found that the state case is established to be exceptionally weak and that there is a balance of probability which favours a finding that the applicant is likely to be acquitted, then in that event the length of detention will weigh heavily in favour of an order releasing the applicant on bail. The converse is equally true. In the event that it is found that the applicant has not discharged the onus which rests upon her to establish that the balance of probabilities favours a finding that she is likely to be acquitted at trial, then period of detention will weigh less heavily in favour of admitting the applicant to bail.

13. The adverse finding made by Revelas J regarding Mayi is not, in my view, to be considered as a new fact. Revelas J's finding was based on the assessment of Mayi's assertion that independent witnesses implicated Accused 3 whereas, once the docket had been disclosed, it was established that he was only implicated in statements made by co-accused persons. Revelas J accordingly assessed the evidence against Accused 3 on that basis, and found that the case against him was weak. Revelas J went on to comment on an aspect of Mayi's evidence, where he referred to independent witnesses and found that he had not disclosed that the witnesses were co-accused and that he ought to have done so.
14. Mr Nel sought to argue that the same could be found in relation to his testimony regarding the case against the applicant. I disagree. I was only provided with extracts of the record in the bail proceedings in which Mayi had testified. Those extracts of the record reflect that Mayi refers to the nature of the evidence against the applicant in the context of reference to the affidavits of witnesses. At that stage the docket contained statements made by both Sindiswa Bembe and Luyand Mafani, the two witnesses who have since died. Mayi's evidence at the bail proceedings, therefore, that he was in possession of affidavits to support the state's case is accordingly correct and not subject to the criticism directed at him by Revelas J in relation to other evidence he tendered.
15. Mr Nel, in addition, sought to suggest that because there had been an adverse finding against Mayi the entire prosecution case was "tainted" by reason of the fact that he was, at that stage, the investigating officer who was directing the investigation and prosecution of the accused. There is, in my view, no basis for such a submission.

16. Insofar as the attack on the strength of the state case is concerned, in the light of the death of the two witnesses, Mr Nel submitted that it was “weakened” as a result. This was so, he argued because the evidence that the two witnesses could have given can now only be presented by relying upon s 3 of the Law of Evidence Amendment Act, 45 of 1988, in terms of which hearsay evidence may be admitted at the trial.
17. The fact that the evidence may only be admitted in terms of the exception to the hearsay rule. Indeed, points to a constraint on the production and admission of the evidence. There is however no absolute bar to the production of the evidence. On the contrary, the provision of the Act specifically countenances a situation such as that which now attains. Whether the evidence is to be admitted is of course a question to be determined by the trial court, having regard to the interest of justice.
18. For present purposes I am required to decide whether the state case against the applicant is exceptionally weak. That requires a decision in regard to the probabilities of admission of evidence by the trial court. There is however nothing in the evidence before me, which suggests that the probabilities weigh in favour of a finding that the trial court would not receive the evidence. The legal principles which govern the application of the Act are well established as are the circumstances in which it may be relied upon. Mr Nel did not seek to suggest that it was improbable that the evidence would be received. I must proceed on the basis that the evidence relating to the applicant’s involvement in the hire of the motor vehicle is still available to the state, notwithstanding the death of the two witnesses. That is so because the docket contains their detailed statements as well as documents relating to the transaction. The assessment of the strength of the state case must therefore proceed upon the basis that such evidence is available and not

on the basis of the probability of the reception of such evidence in the light of the death of the witnesses. This is not an instance, as *Revelas J* found in relation to Accused 3 that the only evidence is that of a co-accused implicating an applicant for bail, where the legal principles are such as would justify a finding that the admissibility of such evidence is improbable.

19. In the circumstances, the evidence before me establishes the existence and availability of precisely the same evidence that was evaluated during the previous bail application and which *Bloem J* found, on appeal, to constitute a strong case against the applicant. There is no basis for me to find that the “new facts” have altered the basis for such finding.

20. It follows that the new facts adverted to by the applicant and upon which this application is founded, including the reliance upon the period of detention, do not justify a finding that the applicant has discharged the onus which rests upon her. In the result the application for bail cannot succeed.

21. I make the following order:

The application is dismissed.

G. GOOSEN

JUDGE OF THE HIGH COURT