

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

REPORTABLE/NOT REPORTABLE

Case No: CA&R 15/2019

In the matter between:

NONTUTHUZELO MAJOLA

Applicant (Accused 3)

and

THE STATE

Respondent

JUDGMENT

MAKAULA J:

A. Introduction:

[1] This is an application for bail in terms of section 60(11) of the Criminal Procedure Act¹ (the CPA) brought before me, allegedly on new facts. The applicant initially, brought two bail applications before the magistrate court, i.e. on 31 May 2018 and 27 August 2019, respectively. On both occasions, bail was refused. On 4 December 2019 the applicant brought an appeal against such refusal before this court. For reasons not pertinent herein, that appeal was either withdrawn or abandoned. The matter then served before me on affidavits based on new facts.

[2] The applicant was according to her papers arrested on 11 May 2018 on numerous charges which relate to Schedule 6 offences amongst others robbery with aggravating circumstances. It is inevitable that I should revisit the two formal bail applications she initially brought in order to determine the new facts relied upon before me.

B. The First Bail Application:

[3] In the first bail application, the applicant relied on the following facts amongst others.

“I have been informed as follows:

- That I have been linked to this offence via cellphone tracking, phone calls received/made and messages to the co-accused who were directly involved in the robbery.

I will respond further after the State has led their evidence should it be necessary if any further evidence needs to be disputed.

I wish to place a defence before the Court. In my bail application I have been advised that what I say can be used against me in a trial:

- (i) During the period of late April 2018 I received a phone call from the person who is unknown to me, but identified himself as Gcuwa, and he informed me that he is calling to enquire about a job. He informed me that he got my number from my brother-in-law who stays in Johannesburg.

He kept on calling me asking for a job for him. I thought he meant a job at Fidelity. I said to him that I do not know of a job for him and I do not work at Fidelity anymore. He said I

¹ 51 of 1977.

must not play games and that he knows I still work at Fidelity. I then hung up the phone and got worried and fearful as this person seemed to know a lot about me.

This man kept on calling me and I became worried. I then decided to seek advice from my crewman Samba who I work with. He told me that the next time he calls that he will speak to him.

The man then phoned again. I gave the phone to Samba. They then spoke for a while on the phone. Samba then informed me that they want to rob us. I told him they cannot do that. He told me to shut up and not tell anyone as these people will harm me and possibly kill me. He said I must just do nothing and it will be fine and no harm will come to me. Out of fear I did nothing, and I was not sure if it was the truth and if it was really going to happen.

A few days later, the day of the robbery, this man called early in the morning and asked for Samba. I said I was not with him. They then told me to tell Samba to call them when I am with him. I told Samba and he called them.

I carried on with my work during the day, and when we got to the garage Samba asked me for my phone and sent a message. I then realised that they are going to do the robbery now. Samba said I must do nothing and just let them rob him. He said that they are not going to shoot anyone if I cooperate and that they will not shoot me. Out of fear and duress I then cooperate and did nothing. I did not want to be shot and killed by these people or get Samba or other people shot.

They committed the robbery and then Samba came to me and he said I must pretend to chase them as there is cameras. We then chased them but they got away.

I heard the police caught them . . .

. . . and shot one of them and he died. I am still very fearful of these people and I do not want to say much more unless I can be protected by the State. I am further willing to help the State as much as I can if I am protected.

I wanted to tell the magistrate what happened after I was arrested, but I got emotional and scared. I therefore deny that I was involved in this robbery . . ." (*Sic*)

. . . Sorry . . .

"And all I did was not act, out of fear. I request the court to understand that in my type of employment there is always this underlying fear that robbers will shoot and kill us. It is a reality in South Africa and this has happened too many of my colleagues.

Based on my defence briefly described above, I have confidence in my defence and therefore will not flee from Court". (*Sic*)

[4] In summary, the applicant highlighted the exceptional circumstances prevailing then as follows:

“The State only links me to this offence via cellphone data. There is no witnesses that identifies me or links me to the commission of this offence, and or links me to the common purpose with the co-accused. The CCTV footage of the robbery will clearly show that I played no active role in the robbery. I have actively taken the decision to disclose my defence to the Court and not hold my cards close to my chest. I only failed to act out of fear for my life and duress”. (*Sic*)

[5] In response to the allegations by the applicant, the State tendered the evidence of the investigating officers Zane Bosch. In summary, his evidence was a response to the applicant’s affidavit. He stated that there is a strong case against the applicant based on direct and circumstantial evidence. The cellphone records established that there was communication between the applicant and some of the suspects prior and immediately before the commission of the robbery, so he testified. He further rejected the evidence by the applicant that her cellphone was used by Samba because the latter was at the back of the security vehicle. He stated that the applicant played an integral part in the planning of the robbery. The applicant should have rammed the robber’s motor vehicle as expected in terms of their protocol but she failed to do so, so stated the investigating officer.

[6] The applicant was given a right to file a “replying affidavit” by the magistrate wherein she stated that the State failed to precisely mention how she colluded with the other accused. She further stated that the confession made by the other accused which allegedly implicates her, is inadmissible against her. She admitted that the State was correct in saying she did communicate with some of the accused before the robbery. She repeated that she was approached by some people to be part of the robbery but she refused. She did not report that to the police because she feared for her life and that of her family. She admitted that she became emotional when she appeared before a magistrate who was to obtain a confession from her. The magistrate abandoned taking the confession.

[7] The magistrate, having had regard to the principles of bail, in particular the onus of proof being on the applicant to establish exceptional circumstances on a balance of probabilities refused the application. No appeal was lodge pursuant to his or her ruling.

C. The Second Bail Application:

[8] On 13 September 2019, Mr Harker, who appeared on behalf of the applicant before me, brought another bail application before the same magistrate on new facts. He highlighted the new facts as reflected on the applicant's affidavit. Though the new facts are prolix, I shall deal with them as they appear in the papers. The reason shall be clear when I evaluate the evidence on new facts before me. The affidavits in part reads:

"That I applied for bail on new facts as my legal representative received the docket and the new facts that have arisen therefrom are the statement of Mr Saba, the polygraph tests of Sabo and myself, the attempted confession to the magistrate, the affidavit of Constable Quboka and the affidavit of investigating Officer Zane Bosch. . .

That I would like to bring an application on new facts therefore on the following grounds:

That while evidence is led of the video footage of my not chasing the robbers in the affidavit of Sabo referred to as Samba in the bail proceedings, it does not state anything from which a negative inference can be drawn regarding how I pursued the robbers and co-accused herein.

The State contended that from the video footage it can see that I did not make a genuine attempt to pursue the robbers. In this regard I annex hereto Annexure B which is what Andile Sabo stated in his statement that traffic had obstructed my ability to pursue the robbers.

That Stefanie Louw, the owner of the garage stated that the robbers wore no masks and gloves from which it is evident there was no need for anyone to assist them, least of all me as they were not concerned about hiding their identity and the manner in which the robbery was conducted could have been done without any information or assistances by simply observing the daily pick-ups.

That I could not have been accused or participated in such planning or execution of such a robbery and therefore deny that I have conspired with the robbers in this matter.

That it is therefore evident that this evidence corroborates my version of events of my being under duress, and that under these conditions I acted out of fear for my very life in the sense that I felt that if I reported the incident they would kill me as they would go to any lengths. . . .

That the reason why the State has identified and charged me is that of the telephone communication between my mobile phone and that of the co-accused Gcuwa and the polygraph test in which I was judged to be dishonest, which was administered on the 17th May 2018 and is annexed as Annexure C.

That the two reasons mentioned above in light of exceptional circumstances and the interests of justice are very relevant as is the confession that the magistrate declined to complete. . . .

That the content of the confession taken down in front of the magistrate is a complete fabrication created by the police and thus I burst into tears because I was bullied into the situation.

That in respect of the polygraph test the following is pertinent:

That in respect of the polygraph test annexed as Annexure D that I contend that I answered the questions as best I could despite being under duress not only from the co-accused but also from the employer as I stood to lose my job, which in fact did occur. A polygraph test is administered by a polygraphist and measures the physiological indicators such as blood pressure, pulse, sweat glands and cardiovascular responses when a series of questions are posed to the subject. The test is used to verify the truthfulness of the subject's answers to the questions posed.

That the State made no mention of this polygraph test in the original bail application.

That a polygraph test is not regulated by law in our country and the judicial or presiding officer I am informed has a discretion to admit such evidence and with regards to what weight should be attached to such evidence.

That I felt that the polygraph test infringed my right to be presumed innocent and my right not to incriminate myself but if I didn't subject myself to the polygraph test I would be dismissed from employment. That the confession of my co-accused, Mr Sonwabo Gcuwa, as obtained by the investigating officer was not (indistinct) evidence by means of section 217(1) of the CPA which provides that such a confession shall be admissible into evidence if it is proved to have been freely and voluntarily made by a person in his sound and sober senses and without having been unduly influenced thereto.

It will be contended that this confession or admission cannot be used in evidence by one co-accused against another at the trial, and that this will further weaken the State case against me. . . .

That on the 11th May 2018 I was taken to Shirley Street and interviewed and arrested by Mr Zane Bosch of the SA Police Services, that I was verbally abused and treated threateningly, resulting in the statement that was made under duress and which I then did not confess to the events as stated in the would be confession before the magistrate. . . .

That I would need and am entitled to the facilities to prepare my defence which facilities can only be realistically achieved when one is not confined to imprisonment.

That I feel that I am being used as a scapegoat by the SAPS but no motive is advanced as to why I would participate in a robbery and place my career in jeopardy under the current economic conditions in our country". (Sic)

[9] The State opposed the application by filing an affidavit by the investigating officer. The State argued that there were no new facts presented by the applicant.

[10] The magistrate in his judgment reasoned as follows:

"In the matter before the court polygraph testing was and attempt (indistinct) of the applicant to make a confession to the magistrate. Advocate argued that these were new facts. I disagree with this submissions, these facts were addressed by the State. See the affidavit of the investigating officer in the first bail application.

As it is stated in the case of PETERSEN the court has to be satisfied that the facts the applicant relies on the fact that the applicant relies on are indeed new facts and that they are relevant to the purpose of a new bail application. Such facts are not constitute or reshuffling (indistinct) of an old evidence or embroidering on it. Furthermore, the purpose of adducting new facts should be not to address the problems in a previous application or to fill in gaps in the previously present evidence.

There has been nothing new which comes to the fore after the first application (indistinct) to the evidence presented in court in the first application regarding the exceptional circumstances of the applicant. . . .

It is therefore the finding of this court that the application of the applicant has failed to present new facts and therefore her application for bail on new facts has failed and is REFUSED". (Sic)

[11] No appeal lies against the judgment of the magistrate even in respect of this judgment.

D. The Bail Application in this Court:

[12] The application before me is purportedly premised on facts which were not canvassed in the two previous occasions. It would be a far cry if I were to find that new facts have been presented before me. For purposes of illustration I shall not extensively refer to the founding affidavit as I did to the previous applications before the magistrate.

[13] The founding affidavit be in this matter repeats all the facts the applicant alluded to in the two previous application especially in regard to when she started to work for Fidelity Security Services, how she was contacted by unknown people who recruited her to be part of the robbery, what took place before and after the robbery. She again stated that she acted under duress as she feared for her life and that of her family members. She repeated how Saba sent messages using her cellphone in communicating with the robbers. She again spoke to the fact that the State case was not strong against her, especially if one had regard to the cellphone records, the polygraphy test result, the procedural injustice in the manner in which her statements and confession to the magistrate were obtained. She again addressed the issue of common purpose, the planning before the robbery was perpetrated and the implication of the confession made by her co-accused about her. The detail and the argumentative manner provided in presenting those issues is unnecessary in bail applications. I shall refer to a few instances where such is glaring in his affidavit. The applicant stated:

"22. That in respect of the telephonic records the following pertinent.

- 22.1 In respect of the telephone communication, I am duly informed that it falls within the classification of similar fact evidence as every person who has communicated with the robbers cannot all be conspirators nor have a common purpose.
- 22.2 That consequently it is imperative that the content of text messages and telephone calls be placed before the court regarding conspiracy.
- 22.3 For this reason, the investigating officer who has failed to provide the text messages showing my assisting to plan a robbery as well as no contents proving any conspiracy must be considered by the court as an unproven version of events.
- 22.4 That I further cooperated with the police as much as I could despite their interrogations and handed over my mobile phones despite the fact that I was not informed of my right to legal representation beforehand.
- 22.5 That the contents of text message and telephone calls are not in existence although there are two references to them by the state in the affidavit of Mr Zane Bosch, the investigating officer.
- 22.5.1 That the state does not show that there was any planning on my part nor what the planning involved.
- 22.5.2 That since the state has indicated a conspiracy, what exactly was planned and how did I conspire as I did not provide any material information and nor was any necessary for the perpetrators to have committed the robbery.
- 22.5.3 That I deny that I was involved in any planning and that I deny that I was in conspiracy with any persons or my co-accused and did not stand to gain any advantage.
- 22.5.4 That the content of the confession taken down in front of the magistrate is a complete fabrication and thus I burst into tears because I was bullied into the situation.
- 22.6 That the state made no mention of a polygraph test in the original bail application, which was administered, and the result made known before my being interviewed by the SAPS.
- 22.7 That I felt that the polygraph test infringed my right to be presumed innocent and my right not to incriminate myself but if I didn't subject myself to the polygraph test I would be dismissed from my employment.

- 22.8 That the confession of my co-accused Mr Sonwaba Gcuwa as obtained by the investigating officer was not placed into evidence by means of section 217(1) of the CPA, which provides that such a confession shall be admissible into evidence if it is proved to have been freely and voluntarily made by a person in his sound and sober senses and without having been unduly influenced thereto.
- 22.9 It will be contended that this confession or admission cannot be used in evidence by one co-accused against another at the trial and that this will further weaken the state's case against me.
- 22.10 I am duly informed that the test for accepting evidence is not on a balance of probabilities but on whether the state has proven beyond a reasonable doubt, a much higher standard which has to be met".

[14] The issues stated above were repeated again in ensuing paragraphs with almost the same detail. The applicant went home detailing the aggression on the part of some of her co-accused in an effort to highlight the reason why she decided not to report these planned robbery to the police. Under the cloak of new facts the applicant repeated her personal circumstances with the same vigour as she did in her first two applications. In essence, she repeated the factors concerned by section 60(4) of the CPA dealt with previously. In sum there is not a single new factor which the applicant dealt with.

[15] I cannot fathom out the reason why the applicant raise the issue of the confessions and the polygraph tests. These issues are not relevant to the bail proceedings and even for trial for that matter. She did not confess to anything and the State does not even rely on it to establish that it has a strong case against the applicant. The outcome of the polygraph test is also not relied upon by the State and bears no relevance in this matter. In any event, as I already found, they were raised before and the court rejected them. In *S v Peterson*² 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.

² 2008 (2) SACR 355 (C) at par [57].

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”.

[16] For those reasons, the applicant has failed to establish new facts and the application stands to be dismissed.

[17] I make the following order.

The application for bail is dismissed.

M MAKAULA
Judge of the High Court

Appearances:

Counsel for the Applicant: *Adv B Harker*

Instructed by: *Wayne MacGear, Aneesah Campbell Attorneys.*

Counsel for the Respondent: *Adv Z Swanepoel, Director of Public Prosecution*

Port Elizabeth.

Date of hearing: *2 June 2020*

Date judgment reserved: *2 June 2020*

Date judgment delivered: *25 June 2020*