

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: A251/23

In the matter between

LUNGISANI CEZULA

APPELLANT

AND

THE STATE

RESPONDENT

Heard: 23 February 2024

JUDGMENT delivered 08 March 2024

THULARE J

[1] This is an opposed appeal against the magistrate's refusal to grant appellant bail. The magistrate held that the appellant had not satisfied them that there were exceptional circumstances and it was in the interests of justice to permit the appellant's release. The appellant was accused 7 of 8 accused persons charged with 33 counts related to criminal gang activities as part of an organized group of criminals as envisaged in the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998) (POCA). The appellant was implicated in counts 1, 2, 3, 4, 5, 6, 7, 9, 14, 15, 16, 20, 21, 22, 23, 24, 30, 31, 32 and 33.

[2] The issue was whether the magistrate was wrong.

[3] The applicant submitted two affidavits in support of his bail application. He was 38 years and a South African citizen. He resided in Delft with his wife and four children aged 13, two aged 12 and one aged 9. He was the main breadwinner and his wife did casual

work. His wife was overwhelmed as a care-giver and she cannot cope with the children. His family was trying to help his wife and children but they were struggling. His incarceration was an exceptional loss to his family's livelihood. His employment relied on his presence. He had outstanding loans. He was arrested at work and left projects for which he was responsible. He did electricity work, including pulling wires, grinding for boxes for plugs and switches and installation. He worked for sub-contractors on housing developments in the township and small business developments. He earned approximately R10 000 per month but earned more if called for jobs outside the Western Cape. He was employed by LOM Trading Enterprise (Pty) Ltd as a general artisan. He was on bail when he was convicted for fraud previously. He had no passport and had no reason to travel abroad. He would like to leave the Western Cape for work requirements. He was assaulted at the time of his arrest and sustained serious eye damage. He became short-sighted. Other inmates smoke and the cells were unhygienic and overcrowded. He was advised that the trial will not be soon as the court rolls were overloaded and delayed by disruptions due to the Covid-19 pandemic and the exceptional circumstances of disaster management regulations. He intended to plead not guilty. Those who implicated him were themselves in trouble and misled the police. He was not arrested whilst in possession of any stolen items or unlawful devices. He did not know the complainants and he was advised that they did not know him as well. He co-operated with the police and was not a flight risk. His opinion was that the State case was weak and enfeebled with the lack of objective evidence, which was an exceptional factor in the interests of justice.

[4] In count 1 the State alleged that the appellant performed acts aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity. Count 2 was active participation or as a member of the gang aided and abetted criminal activity for the benefit of, at the direction of or in association with a criminal gang. Count 3 was malicious damage to property wherein a minibus was intentionally driven into the vehicle of a complainant. Count 4 was the kidnapping of the complainant whose vehicle was driven into in count 3. Count 5 was armed robbery, wherein a forearm was used, of that very complainant in count 3. Count 6 was unlawful possession of a firearm whose

caliber was unknown at the time of the commission of the offences referred to in count 4 and 5. Count 7 was assault threat, wherein a firearm was pointed to the head of the complainant in count 4 and 5 and was used to threaten to injure or kill him by shooting him causing him to believe the threat. Count 9 is attempted extortion where a relative of the complainant in counts 3 to 7 was threatened that that complainant would be killed unless ransom of R30 000 in cash was paid. Count 14 is kidnapping of a different complainant who was then transported to an unknown location and holding him until ransom was paid. Count 15 was assault threat where this complainant was threatened to be injured or killed. Count 16 is extortion of a ransom of R2 million demanded for the release of the complainant in count 14 and 15 which induced the payment of R490 000. Count 20 is extortion at the threat of kidnapping another and demanding payment of R20 000. Count 21 is robbery with aggravating circumstances where a bakkie and a cellphone were taken and cash was withdrawn from the complainant's bank account wherein firearms were used to threaten the complainant. Count 22 is unlawful possession of the firearm referred to in count 21. Count 23 is kidnapping. Count 24 is extortion wherein a ransom of R2 million was demanded with the threat of killing the kidnapped victim. Count 30 is kidnapping. Count 31 is attempted extortion of R10 million with the threat of killing the kidnapped victim. Count 32 is sexual assault and count 33 is unlawful possession of firearm.

[5] The State alleged that kidnapping for ransom has become prevalent in the Western Cape Province with a number of syndicates operating at once. During 2020 there were 30 cases reported, with 37 foreign nationals kidnapped. The victims feared the kidnappers and were reluctant to involve the police. It is against this background that the investigating officer held the view that the numbers were likely an understatement of how many kidnapping actually took place in 2020. The victims were taken by force, assaulted or threatened with death or assaulted and sexually violated. The core of the syndicate in which the appellant is alleged to be the member, was involved in ongoing criminal activity which targeted the Chinese community to the extent that the Chinese Embassy got involved and engaged both the Western Cape Provincial and the National Government. Although there were reports of the use of firearms, no firearms were recovered.

[6] There were six separate matters from which the charges against the appellant and his co-accused emanate. All involved Asian foreign nationals. On 13 July 2020 a Taiwan national was kidnapped and the suspects demanded R30 million for his release. His father was warned not to involve the police or they would kill the son. The father was one of the victims who informed the police and cases were opened for investigation. On 19 July 2020 the son escaped. On the same day the suspects called the family and still demanded ransom. It seemed the suspects thought the family was not yet aware of the escape. The family agreed, working with the police, to do a dummy drop off. Surveillance was done on the area where the suspects normally demanded the victims to drop the money. Newspapers, and not money, was put in the cooler box and dropped as directed by the suspects. The vehicle of interest to the police was observed, as well as accused 3 and 5, appellant's co-accused. A child went to fetch the cooler box and delivered it to accused 3 and 5. Accused 3 and 5 opened the cooler box, and left the scene. The suspects later phoned the father and swore at him and issued more threats.

[7] On 17 August 2020 suspects entered business premises armed with firearms and robbed the staff of their cellphones and cash. The owner of the business was kidnapped and robbed of R80 000. The suspects phoned his wife demanding R10 million for his release or that they would kill him. On 21 August 2020 the wife paid R490 000 in a drop off and the husband was released. The suspects continued phoning and threatening the victims demanding R500 000 from the husband and wife. In a separate matter, on 28 August 2020 the suspects smashed the window of a complainant with a hammer, and also kidnapped her. The husband was phoned the suspects demanded R5 million for her release. There was negotiations including on the amount and the husband was instructed to pay ransom of R18 000-00. The police kept surveillance and the vehicle of interest arrived at the drop off point. The occupants of that vehicle observed the area, but they received the R18 000-00 ransom. They demanded a further R20 000 and informed the victims that they would come pick the money at the victims' home when it was available. On 08 September 2020 the police kept surveillance of the home of the victims. The vehicle of interest arrived. Accused 5 and 6 who were appellant's co-accused alighted from the

vehicle and went to the victims' home. The husband opened the house and threw a bag towards accused 5. Accused 6 picked up the bag and the two accused left. The appellant and accused 8 were inside the vehicle of interest. Investigations through informants allowed the police to identify the actors of this syndicate, and the police started to monitor their movements. The identified members included the appellant and his co-accused.

[8] On 17 September 2020 a victim was kidnapped near a mall. The police checked the surveillance cameras in the immediate vicinity as well. The vehicle of interest was spotted on the footage viewed with accused 8 as the driver. The victim escaped from where he was kept by the suspects. The victim made reference to a description which matched appellant. At that stage, the police investigation had identified appellant as one of the leaders of the gang. Appellant was almost always the person who called the kidnapped victim's relatives and sought ransom. It was known to the police that he identified himself to kidnap victims and their relatives as Matthew. On 20 September 2020 the police were informed of an attempted kidnapping. The suspects fled the scene and abandoned their effort when a member of the public assisted the victim. The security company that in the area arrested one of the suspects and handed him over to the police. The arrested suspect was accused 4. Accused 4 was a Zimbabwean national. Accused 4 had been observed by the police when the drop off of ransom demanded was done, in two cases.

[9] On 25 September 2020 a businessman was travelling to work with his wife, brother and aunt. He was stopped, pointed with firearms and two ladies in the vehicle were kidnapped. The husband received a phone call and R10 million ransom was demanded for the release of his wife and aunt. The kidnappers also threatened to sexually assault and rape the women if the family did not pay the ransom. On 02 October 2020 one of the victims escaped. The victim took the police to where they had been kept. Accused 1, 2 and 3 were found inside the house. The kidnapped aunt was found hanging by her neck from a white cloth attached to a wooden beam. She was already dead. Accused 1 was recognized as one of the vehicle of interest when it scouted the ransom drop off areas.

[10] The police organized a photo identification. In the July matter, the appellant was identified as the person who made calls to the family to demand ransom. In the business robbery matter, the appellant and accused 5 were identified as those who called the family members to demand ransom. In the kidnapping near the mall the appellant was identified as one of the kidnappers. He was also identified as one who appeared to be the boss of the gang. In the armed robbery and kidnapping of two women. The victim identified appellant, together with accused 5, as those who came into the room where they were held and made the threats. Appellant also appeared to be in charge of the gang. At the time of the bail application only a preliminary investigation of the cellphones and data was done. The cellphone records of the accused, including the appellant, indicated that they were all in regular communication with each other, and on their cellphones the other accused are listed on the contact lists.

[11] The appellant had a pending case of fraud and a previous conviction of fraud and contravention of section 18 of ECTA. When the Special task Force stormed his home on 2 October 2020 to arrest him, the appellant evaded and fled to the Eastern Cape. During his period he failed to appear in the fraud matter pending against him at the Commercial Crimes Court in Bellville. A warrant for his arrest was authorized. The police looked into the validity of the sick notes that were presented to the Commercial Crimes Court, which sought to explain his absence. It was established that the medical certificates presented to court on two occasions, on 1 November and 26 November 2020 were not valid. The accused, including the appellant and other possible outstanding suspects, were familiar with the identities, addresses and contact details of the complainants and their families. Arising out of their experiences, the victims and their families are terrified of the accused, including the appellant. The victims and their families were encouraged to co-operate with the investigation following the arrest of the accused, including appellant.

[12] Section 65(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA) provided:

“65 Appeal to superior court with regard to bail

(4) 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.”

Section 60(11)(a) of the CPA provided:

“Bail application of accused in court

60(11) Notwithstanding any provision 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 interests of justice permit his or her release.”

[13] Foreign investor apprehension in respect of South Africa stem from amongst others security challenges, which include violent economic crimes and the response of the State to that challenge. The perceived high corruption levels in the criminal justice system are not helpful to South Africa’s cause and course of travel to economic freedom. In the principle of risk and return, it is not only the attractive features of a market that counts. The complexities of the institutional framework and business infrastructure, including certainty of its rule of law, are necessary considerations which the Chinese and other nationals took into account in the selection of South Africa as a country, in conducting business. In circumstances like the present, where the allegations against the appellant are that he was involved in the kidnapping of a female Chinese national, that during her detention she was threatened, by the appellant who was also in charge of the gang, with sexual assault and rape, and when the police arrived to rescue her, found her hanging by her neck from a cloth attached to a beam, South Africa in its legislation said such persons shall be detained in custody until he or she is dealt with in accordance with the law, unless he, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his release. This is the national policy position which the Executive developed, and

the Legislature made law. It is a promise which the criminal justice system, under the supervision of the Judiciary, must keep, unless there are justifiable reasons to have a different outcome than the one crafted for certainty. When it comes to matters with international implications, especially, it is necessary and important that in implementation and execution, the three arms of the State speak one message, consistently, boldly and eloquently. It is of outmost importance that our brothers and sisters, around the world, trust our word, secure in the knowledge that we mean what we say, and say what we mean, in our Statutes. It is generally the perception of a compromised criminal justice do not permit his release. It is generally the perception of a compromised criminal justice system which will not yield relief that discourages victims relief that discourages victims to report violent crimes. This is especially so where the public harbour a belief that officers and officials of the State are in the pockets of ring leaders. The belief, under those circumstances, is that reporting crime is equivalent to voluntarily signing up to be executed in a “hit”.

[14] The appellant only gave a bare denial. There is evidence by both members of the police who had the gang under surveillance for some time and monitored the movements of its members, including the appellant, as well as evidence of victims, which evidence implicates the appellant as an active member of the gang that created the problem of kidnapping and ransom demands from foreign nationals, and identified him as the leader. The State provided a special unit, the Special Task Force, to trace and arrest the appellant. This showed that the arrest of the appellant required a type of police unit that was created to deal with a certain problem that required specialized skills. This showed that the appellant was viewed by the State as a leader of a major criminal network that required high-risk operations that fell beyond the scope of ordinary or classical policing, in order to neutralise. The appellant succeeded to evade arrest from the operation of an elite police tactical unit of the South African Police Service. He evaded arrest and took flight to a different province, the Eastern Cape. This is a mainly rural province where a house number and street name, as details of identification of a residential address, is relatively unused and is an unknown concept, in the villages, except for those who have relatives and friends in the townships, towns and cities. The appellant did not attend court

in his other pending matter. He attempted to explain his absence in that court by using fraudulent medical certificates, twice, through those who conveyed the explanations to court. Clearly, for the appellant, the criminal justice system and especially the courts are unworthy of his respect.

[15] The appellant has placed classic but not exceptional circumstances before the court. The interest of justice do not permit his release on bail. I am unable to conclude that the magistrate was wrong. I am also unable to express myself better than an Afrikaner when they say: "*Slim vang sy baas.*"

For these reasons I make the following order:

The appeal is dismissed.

DM THULARE
JUDGE OF THE HIGH COURT