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**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

COURT CASE NO:CC2/2020

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

10 March 2023

In the matter between:

TSHEPO NTSIKI

First Applicant

ALBY MTHIMUNYE

Second applicant

ERIC KHAMBULE

Third applicant

And

THE STATE

Respondent

JUDGMENT

Coram NOKO AJ

Introduction

[1] The Applicants brought an application for bail in this court pending the finalisation of the criminal trial before the Vereeniging Circuit Court sitting in Palm-

Ridge. The applicants are charged of various charges together with other four accused. At the time of hearing of this application the state has completed and closed its case. The trial is now set down for 15 days during March 2023.

Background

[2] The case against the applicants relates to a conspiracy to execute a cash in transit robbery. The state's case is based on information from an informer. It is alleged that the applicants with other accused were monitored by the joint operation consisting of both members of South African Police service, intelligence and Johannesburg Metro Police Department on 7 June 2019. The accused gathered at Evaton Mall, allegedly for a meeting in different motor vehicles, to wit, a blue Audi S5, Silver VW Transporter, a black X1 BMW, a white Tata and a silver VW Polo. The convoy of the cars left the Mall towards Sebokeng and were followed by members of SAPS and other as set out above. The joint operation then decided to conduct a stop and search on the said convoy. In the process shooting ensued with the occupants of the Audi S5 as a result of which one of the occupants was killed. Two rifles were found in the said Audi S5. The applicants were arrested in the white Tata and whilst others fled the scene other accused were arrested at the scene and the applicants.

[3] The applicants were charged with contravention of section 18(2)(a) of Act 17 of 1956, the Riotous Act (conspiracy to robbery) read with the provisions of section 51(2) of Act 105 of 1997, Murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997, as amended, attempted murder, contravening the provisions of section 1, 103, 117, 120 (1)(a), section 121 read with schedule 4 and section 151 of Act 60 of 2000, The Firearms Control Act (Unlawful possession of prohibited firearm) further read with the provisions of section 51(2) of Act 105 of 1997 and with section 250 of Act 51 of 1977 alternatively, contravening the provisions of section 3 read with sections 1, 103, 117, 120(1)(a), section 121 read with schedule 4 and section 151 of Act 60 of 2000, the Firearms Control act (Unlawful possession of firearm) further read with the provisions of section 51(2) of Act 105 of 1997 and section 250 of Act 51 of 1977.

[4] The trial commenced before Thobane J and at the end of the state case four charges against the applicants were dismissed pursuant to the application in terms of section 174. The charges for which the applicants will be prosecuted for are now conspiracy to commit robbery, murder and attempted murder.

[5] The affidavits by the applicants in support of the application for bail were read out for the record by a set of two legal counsels. In brief the applicants' evidence is that they were traveling in the Tata Indica, a motor vehicle which was not identified by the informer at the beginning but allegedly joined the convoy. The said informer could not identify any of the occupants of the identified motor vehicles. There were many contradictions during the trial, no evidence was led proving conspiracy to commit the robbery as alleged and no evidence was led to prove common purpose amongst those who were arrested. There were no video recordings of the meeting which allegedly took place at the mall and further that there was no evidence of the content of the meeting.

[6] The first applicant's evidence was briefly that he is adult unemployed 35 years old male and has been in custody since 7 June 2019. He is a south african citizen and at the time of his arrest he was residing at 34 Tswaranang street, extension 6 Ebony, Tembisa and has been staying at that address for a period of three years. This address was verified by the investigating officer. He does not have passport and has never been outside of the Republic of South Africa.

[7] The first applicant further stated that the case has been delayed for a long time. Since the state case is closed there are no possibilities that there would be any interference with the state witnesses. His financial position is such that he cannot afford to abscond and risk losing the bail money. He submitted that the court will find circumstances which in the interest of justice will permit of his release on bail. He has not delayed the trial, he has no previous convictions, he has a fixed address and the strength of the state case is such that the release on bail is warranted.

[8] The second applicant's affidavit stated that he is an unemployed male of 58 years old and was residing at [...] Emfulweni section, Tembisa for a period of twenty years. He does not have a passport and has no business or family outside the

borders of the Republic of South Africa. His address has been verified by the investigating officer and he did not delay the prosecution of the matter. He does not have previous convictions, his right to a speedy trial has been prejudiced and the strength of the state's case warrant that in the interest of justice that he be admitted to bail. Due to his financial position, he will not afford to abscond and risk the bail money being forfeited to the state.

[9] Both applicants stated that they will not endanger the safety of the public or any particular person or their own safety, nor will commit any offence whilst on bail, they will not evade trial, they will not influence any of the state's witnesses, will not conceal or destroy evidence and finally that they will not undermine or jeopardise the objectives or the proper functioning of the criminal system including the bail system.

[10] The third applicant stated that he is an adult male resident at [...] Tshepiso, Phase 5 Sharpeville. He does not have fixed property; he is married with two children and has been working as a bricklayer since 1995. He earns 8000.00 per month and is a breadwinner with wife and two dependents' boys aged 33 and 26. Though he has a passport he does not have any foreign ties but has been to Malawi in 1993 and never travelled again since then. If granted bail he will be assisted by family and friend to raise the required money and is unlikely to risk it by evading trial. He has a previous record of armed robbery and was on parole at the time of his arrest.

[11] He further stated that the case against him is weak. It is based on circumstantial evidence and inferences. There is no real evidence, no recordings, perpetrators were not identified, no DNA or finger prints evidence, he was just a passenger and was on his way to Vaal mall to visit a business contact. He has not supplied any false information, he has no other charges, he has never failed to comply with any bail conditions. He will not undermine the bail system, and his release would not enrage members of the public. He will not disturb the public peace or security.

[12] He contended that there are exceptional circumstances upon which the court should put under consideration to grant bail. First, the state's case is weak, based on

circumstantial evidence and inferences, he has been incarceration for more than 3 years, and he is bread winner. In addition, he may lose prospects of future employment, lose all his assets and cannot prepare for trial due the high level of intimidation whilst in custody and consultation with attorneys in prison is not conducive. The counsels for the applicants thereafter closed their case.

[13] The prosecution proceeded and read the affidavit by the investigating officer, Leon Albertus Ras, wherein he stated that he has indeed verified the address of the accused. That Tshepo Ntsiki's application falls under schedule 5 whereas Alby Mthimunya and Eric Khambule fall under schedule 6. He stated further that applicant 1 has no previous conviction and applicant 2 has 4 previous convictions, namely, theft where he was sentenced for 2 years, robbery and possession of unlicensed firearm and ammunition and was sentenced to 10 years, 3 years and 6 months imprisonment, convicted under Drugs Act and fined R250.00 or 20 days imprisonment and for robbery for which he was sentenced to 10 years imprisonment.

[14] There were two previous attempts at bail application both of which were refused in respect of the first and second applicants. The state's case has been closed, accused 1 has led his evidence including one of his witnesses and the matter was set down for December 2022 but could not proceed as accused 3 skipped bail and ultimately arrested and the bail was revoked. The trial is now set down for 15 days in March and is likely to be completed.

[15] He is opposed to bail in view of the fact that the charges being faced may lead to the applicants being sentenced to a long prison sentence, being 15 years for count 1 and life imprisonment for count 2 and 5 to 10 years for count 3 and this may be an incentive for the applicants to abscond. At this point in time evidence has been established on prima facie basis that the applicants may have committed the crimes they have been charged with. Their release on bail may also undermine and or jeopardise the proper functioning of the criminal system.

[16] The prosecutions thereafter closed its case. The counsel for the 1st and 2nd applicants summarised the evidence of the applicants submitted that the applicants were travelling together in Tata motor vehicle which was not identified by the

informant at the initial stage in his report. The said report was in any event based on hearsay evidence. The evidence presented by the state against the applicants is weak. Whilst the charges are serious the state evidence indicates that there were vehicles which were identified at the mall where a meeting was held. Tata was not listed except that it allegedly joined the convoy which was later stopped by the police. The alleged informant could not identify the occupants of the motor vehicles which were allegedly involved in the crime. There is a charge of murder and conspiracy to commit murder and ordinarily these charges should have been pleaded in the alternative. The charges of murder or attempted murder will not be proven against the applicants as at the time of shooting the applicants were already arrested. There is also no evidence to support the allegation that there was common purpose between the parties. In principle there is just no evidence against the applicants. There is also at this juncture no evidence to indicate the possibility that the applicants will skip bail.

[17] The counsel for the applicants further contended that in bail proceedings unlike in the trial proceedings the court is enjoined to determine whether sufficient evidence exist for the applicants to be released on bail but not to judge the evidence which was presented before the trial court. The applicants have stable families and are unlikely to skip bail. In any event bail should not be used as a form of punishment. The trial has been delayed over time and even though it is scheduled for 27 March 2023 there is no guarantee that the trial will proceed and be completed within the allocated days.

[18] The applicants contended that the court a quo decided that there is no evidence against the applicants to prove association or common intention with the other co-accused. The evidence by the state was riddled with inconsistencies.

[19] The state witnesses could not identify the occupants of the suspected getaway car. The applicants were driving a Tata car at the time of the arrest. There has been a delay in finalisation of the trial as the first accused kept on changing legal representatives.

[20] The counsel for the 3rd applicant contended that bail should not be viewed as a form of punishment. The applicants do still have rights enshrined in the constitution and this regards importantly is the right to be presumed innocent. The statement read into the record by the prosecutions speak of possibilities and this is not sufficient to persuade court to refuse bail. The bail regime requires of the state to provide evidence to support the argument that there is a likelihood that the applicants will not attend trial if released on bail. The contention that there is an incentive for the accused not to attend trial is not based on any evidence. If anything, the evidence of the state is weak and as such there are reasonable prospects that the applicant will be acquitted. Furthermore, the delay in the trial cannot be attributed to any conduct on the part of the 3rd applicant.

[21] The third applicant has previous conviction and was on parole at the time when he was arrested. He has not breached any of the parole conditions and in support hereof reference was made of letter from the parole officer which confirmed that the third applicant complied with all conditions for his parole.

[22] It is on the basis of the above that it is in the interest of justice that the court is impressed to consider admitting the third applicant to bail subject to the conditions which the court deems appropriate.

[23] The prosecution on the other hand contended that the reason for the delay was due to the fact that the prosecutor who commenced the case in the process accepted appointment elsewhere and a new prosecutor had to be appointed. The said new prosecutor had to be given an opportunity to listen to the evidence which has been led. Being aware of the duration and length of the criminal trials it has been decided that the trials be scheduled to be heard during recess. The scheduled date for trial is allocated 15 days and will be in March at which time the matter will be in all probabilities finalised. There was therefore no malice on the part of the prosecutions to have caused delay for which the applicants submit were unduly dealt with.

[24] The applicants' contention that the state's case is now weak and that they have been discharged on some of the serious charges is unsustainable. It should be noted that the court has decided on the charges which were weak and held that the

remaining charges should remain extant. As such there is no longer speculation on those charges. It is noted however, so state proceeded, that the test is different when assessing evidence during the section 174 application being *prima facie* evidence in contrast to assessment at the end of the trial when the decision will be based on whether the state has proven its case beyond reasonable doubt.

[25] The applicants' submissions seem to suggest that this court need to review evidence as was considered by the trial court when assessing the strength of the case at the end of section 174 application. This would be without legal basis and such an invitation should be rejected by the court out of hand with no hesitation. This court has to consider whether sufficient evidence exist for the accused not to be released on bail. In respect of applicants 1 and 2 the court has to consider whether circumstances are present to justify their release and is on a balance of probabilities. It is noted that there were charges which remained after 174 application are serious and attract a minimum sentence of 15 years and further long sentences respectively. This may be an incentive for the applicants to skip bail. They are flight risks.

[26] The requirement for exceptional circumstances as required in schedule 6 charges was described differently by different courts. The full bench stated that generally speaking exceptional circumstance requires value judgment to the facts and circumstances of the case.

Legal analysis

[27] The general principle in bail application can be summarised as follows. It is required in terms of section 60(11) of the CPA they accused will be admitted to bail provided that the applicant demonstrate that it will be in the interest of justice that they be so admitted. The third applicant had previous convictions of armed robbery and was on parole at the time of the arrest. It is noted that he has not breached any of the conditions of parole. Despite this record the applicant still submitted that he has no prevalence towards commission of crimes.

[28] The parties appear to be in agreement that the accused three is charged with schedule 6 offences in terms of which the accused shall be detained in custody until

he 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 release. It follows that the applicants are required to demonstrate that there are exceptional circumstances which warrant the admitting the accused to bail. The fact that the State's case is weak or open to doubt can be considered exceptional circumstance¹ for the purpose of adjudicating over a bail application.

[29] The accused would have to prove that the grounds listed in section 60(4)² of the CPA do not exist failing which the interest of justice will not permit that the accused be released from custody. In adjudicating over the grounds as set out in section 60(4) the court would have to weigh, in terms of section 60(9) of the CPA, the interest of injustice as against the right of the accused to personal freedom and the extent to which detention will prejudice him. This exercise would have regard to the factors identified in section 60(9) (a – g). In summary “...*once exceptional circumstances have been established by the bail applicant, the enquiry must focus on the balance between the interest of the State as set out in section 60(4) – (8)A on the one hand and the applicant's interest in his personal freedom as set out in the section 60(9) on the other.*”³

[30] Whilst the court would ordinarily have regard to the fact that there are systemic difficulties which beset investigative and prosecutorial processes the court would not readily conclude in haste that the delay as a result recklessness on the part of the state. That notwithstanding the interest and the freedoms of the accused cannot be readily be held to ransom by the State. It is also to be noted that “[B]ut a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must proof on a balance of probabilities that he will be acquitted of the charge.”⁴

¹ *Mooi v State* (162/12) [2012] ZASCA 79(30 May 2012)

² Read with subsection 5 – 9.

³ See *Keevy v S* (A66/13) [2013], FS High Court, Daffue, J (2 April 2013)

⁴ *Mathebula v The State* (431/09) [2009] ZASCA 91 (11September 2009).

[31] With the application of the above principles to the facts in this case one would conclude that fact that the third applicant stated that he can only be assisted by family and friends may work against his case as he stands to lose nothing of his own if he skips bail.

[32] Further contentions by the third applicant that the state's case is weak has been determined by the court when it refused section 174 application and this court therefore find merits in the prosecution's submission that the invitation to review the judgment of the court who considered evidence should be declined. However, to the advantage of the applicant there is no likelihood or influencing and or intimidating the witnesses since the state has already closed its case.

[33] The charges being proffered are serious and do attract a possible sentence of 15 years and this may encourage one to skip bail. All these factors militate against the granting of bail. The applicant has not been able to present a cogent reason underpinning exceptional circumstance which will to persuade the court that he may stand trial.

[34] The process on bail application is guided by the provisions of section 60(4)(a-d) read with section 60(9) of the CPA. If one of the factors militates against granting the bail then it will not be in the interest of justice that the accused be admitted to bail. The factors identified in this section are not cast in stone or exhaustive and the presiding officer's constitutional powers to decide on the bail remain extant.⁵ Those factors were dealt with in different cases and apropos to this application is section 60(4)(b) enjoins the court not to grant bail which there is likelihood that the accused may evade trial. Pointers would include the seriousness of the offence, and with the heightened temptation to flee because of severity of the possible penalty, have always been important factors relevant to deciding whether bail should be granted. The court should have regard to the provisions of what is set out in section 60(6) to assist in determining whether the accused is likely to evade trial.

⁵ See *S v Dlamini*, *S v Dladla & Others*; *S v Joubert*; *S v Schitekat* 1999 (2) SACR 51 (CC)

[35] In the case before the court applicants have been in prison for a period in excess of 2 years and there would be no basis to argue that they are employed or even if they were employed before there is no indication that the previous employers have reserved their job for them or will re-employ them on their return.

[36] The applicant submitted that the case of the state's case is weak and provided nothing more. There is a burden to be discharged as the accused should demonstrate that state is so hopeless and there are no prospects that the court will return an order for conviction. Reference in this regard is made of *S v Mazibuko and Another* 2010 (1) SACR 433 (KZP) at [23]. The contention that the prospects are poor on the basis that other charges are dismissed does not necessarily avail the applicants. In addition, the contention that in view of the fact that the state evidence is based on circumstantial evidence, further that the applicants have been incarceration for three years and is a breadwinner do not discharge what the full bench stated that there should be something unusual for one to contend that his circumstances are exceptional.

[37] The second applicant also contends that in the basis of the state's case being weak it should then have a positive bearing in the outcome of the bail application. This argument fails to appreciate the state's contention that the dismissal of other charges after the section 174 application remained militates against the inference the applicant's request that the court should find the state's case to be too weak.

[38] Whilst the fact that the first and second applicants argue that they not possess travel documents may weigh in their favour, it was noted in *Novella* by Le Grange that *"the retention of the appellant's travel documents is also cold comfort as the lack of travel documents in recent times is hardly a deterrent to persons who are serious and the means to skip the country. Experience in court have shown that these documents can readily be obtained and one may depart the country with ease"*.

[39] There is nothing persuasive and or unusual from the testimony of the third applicant on what he alluded as the basis for exceptional circumstances the court is therefore not persuaded that admitting applicant on bail is warranted. Equally so the

evidence of the other applicant is not persuasive to justify that interest of justice permitted that they be admitted to bail.

Conclusion

[40] In the premises the court decides as follows:

“The applications for bail by the applicants are dismissed”.

Noko AJ,
GAUTENG DIVISION, PRETORIA

APPEARANCES

FIRST APPLICANT	: MR. M. BOTHA
SECOND APPLICANT	: MR. M. BOTHA
THIRD APPLICANT	: MR. J.P. FOURIE
RESPONDENT	: ADV. K. MASHILE
Date of hearing	: 22 February 2023
Date of judgment	: 10 March 2023