



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A156/2016

In the matter between:

PAULUS MOHAPI NTELEKI

Appellant

and

THE STATE

Respondent

CORAM: LEKALE, J

HEARD ON: 12 AUGUST 2016

JUDGMENT BY: LEKALE, J

DELIVERED ON: 19 AUGUST 2016

- [1] On 9 April 2014 the appellant, who was arraigned with five other accused on an aggravated robbery charge, appeared before the magistrates' court at Hennenman and his application for bail was dismissed on the grounds that he had failed to convince the court

that the state case against him was weak and that he was at the relevant time out on bail on a similar case in Welkom.

- [2] He felt aggrieved by the refusal to admit him to bail and approached this court on appeal. The matter served before my brother Kruger J who dismissed the appeal finding, *inter alia*, that the magistrate was not wrong in his finding to the effect that the case which was pending in Welkom indicated that the appellant had the propensity to commit violent crimes and that there was, as such, the likelihood that he would endanger the safety of the public if released on bail.
- [3] On 25 June 2015 the appellant again unsuccessfully approached the magistrates' court at Hennenman for bail on new grounds alleging that the robbery charge in Welkom had since been removed from the roll and he, as such, no longer had pending cases against him. On refusing bail the learned magistrate once again found that before bail could be granted in terms of section 60(11) (a) of the Criminal Procedure Act (the CPA) the court must be convinced that exceptional circumstances exist and that new facts placed before him did not carry enough weight to convince him to change the original decision.
- [4] The appellant is aggrieved by the latest decision and now approaches this court on appeal against the same on an urgent basis contending, *inter alia*, that the court *a quo* erred in finding that the likelihood exists that he would endanger the safety of the public or any particular person or shall commit a Schedule 1 offence if he were released on bail with Mr Stanley, appearing *pro*

bono for him, further submitting to, *inter alia*, the effect that there exists cause, on evidence before the court below, to grant bail.

- [5] On its part the state, through Mr Hoffman, opposes the appeal and supports the decision that no exceptional circumstances warranting bail were shown to exist.

- [6] On refusing to admit the appellant to bail the court below, further, noted that it was not clear at that stage whether the Welkom matter would stay of the roll or would be reinstated. The learned magistrate, furthermore, effectively found that a letter filed with the state by the municipal manager gainsaid the appellant's assertion that his employment with the Matjhabeng Local Municipality would be available should he be released on bail insofar as the letter in question clearly states that the appellant's **“failure to report for duty constitutes desertion and [he]... dismissed [himself] by operation of law.”**

- [7] In bail proceedings under section 60(11)(b) of the CPA and where the bail applicant relies on the weakness of the state case as an exceptional circumstance justifying his release, he is obliged to prove, on a balance of probabilities, that he would be acquitted of the charge. In that event the prosecution is not obliged to disclose full details of its case prematurely and before the time when the matter is ripe for trial. Until and unless the applicant has established a *prima facie* case that the prosecution would fail in its case against him, there is no duty on the state to rebut his evidence. The incarceration of an innocent person constitutes

exceptional circumstance warranting release on bail. (See **S v Mathebula** 2010 (1) SACR 55 (SCA) at par [12]).

- [8] In evidence during the original bail application the applicant, *inter alia*, advanced a contention that the state did not have a strong case against him as an exceptional circumstance justifying his release on bail and, further, testified that he had three minor children, was the breadwinner, was employed as shift commander at Odendaalsrus Fire Brigade and would attend his trial if released on bail.
- [9] During the bail application on new facts the appellant testified that he was identified by one of the complainants at the identification parade but that the complainant in question spent a considerable time before she could identify him and when she eventually pointed him out she remarked that she thought it was him. He, further, testified that the only other piece of evidence the state relies on against him was a pair of shoes allegedly found on the roof of his place on the basis of a confession made by one of his co-accused. He, further, testified that his release on bail would not endanger the safety of anyone and he would not intimidate witnesses. He, furthermore, testified that he, as at the date of the application, had been in custody awaiting trial for some 16 months and 16 days.
- [10] The duty of the court in a bail application is to assess the *prima facie* strength of the state case against the bail applicant as opposed to making a provisional finding on the guilt or otherwise of such an applicant. Bail proceedings are not to be viewed as a

full dress rehearsal for trial. The making of credibility findings of witnesses on the merits of the case against the accused is left to the trial court which is better placed to assess such witnesses. (See **S v Van Wyk** 2005 (1) SACR 41 (SCA) at par [6]).

- [11] It is clear from the record that the appellant relied not only on the nature of the state case against him in establishing exceptional circumstances justifying his release on bail in the application on new facts. He, *inter alia*, presented facts contemplated in section 60(4)(a) as well as in section 60(9) of the CPA contending, in effect, that his release on bail would not endanger the safety of the public or he would not commit a schedule 1 offence and, further, that he is not disposed to committing violent crimes insofar as the Welkom case has been withdrawn against him.
- [12] Where the facts in sections 60(4) and 60(9) of the CPA are relied upon in a bail application they are relevant and cannot be ignored. In deciding the issue in question the court is obliged to have regard to, *inter alia*, the period the bail applicant has already spent in custody since his arrest as well as any financial loss which he may suffer as a result of his detention. (See **section 60(9) of the CPA; S v DV and Others** 2012 (2) SACR 492 (GNP) at par [51] and **S Molefe and Others v The State** [2014] ZAFSHC1 at par [12]).
- [13] To the extent that the court below approached the second bail application on the footing that the issue before him only concerned the question as to whether or not the state case against the appellant was non-existent or weak without reference

to the appellant's personal circumstances relative to section 60(4) of the CPA and the relevant factors set out in section 60(9) of the CPA he misdirected himself.

- [14] It is further patent *ex facie* the record that the court *a quo* down played the effect of the fact that the appellant no longer had a pending similar case against him and attached no weight whatsoever thereto. The foregoing is evident from the learned magistrate's finding that:

"At this stage it is not clear whether this matter would stay off the roll or be put back on the roll by the state again."

- [15] Although it is true that in terms of section 6(a) of the CPA a charge withdrawn before an accused could plead to the same may be reinstated insofar as the accused is not entitled to a verdict of not guilty in such circumstances, the fact of the matter is that, as at the date of the bail application, the appellant had no such a charge pending against him. In ignoring that fact the court below again misdirected himself and appears to have felt vindicated by the fact that this court, effectively, confirmed his earlier decision on appeal and was, as such and most probably, reluctant to revisit the same in the light of new facts.

- [16] The onus on the appellant, as a bail applicant, was, in law, limited to showing, on a balance of probabilities, that there existed circumstances which render his case different to the extent of entitling him to be treated as an exception to the general position prescribed by section 60(11)(a) of the CPA which requires

Schedule 6 suspected offenders to remain in custody until their trials have been finalised and which, as such, permit him, in the interest of justice, to be admitted to bail. Such an onus does not, in my view, enjoin a bail applicant, in the position of the appellant, to absolutely convince the court of the existence of “**exceptional circumstances**” contemplated in that section of the CPA as found by the court *a quo*. The learned magistrate, therefore, misdirected himself to the aforesaid extent.

[17] It may be correct, as effectively contended for the state, that the appellant did not discharge the onus of showing, on a balance of probabilities, that he would not be convicted on the charge preferred against him, but his case for bail was simply not confined to the nature of the state case against him. The fact that there existed no evidence to gainsay his assertions before the court below to the effect that he has no pending cases, there is no likelihood that he would endanger the safety of the public or commit a Schedule 1 offence, that he is not a flight risk, that he had been in detention for more than 16 months at the relevant time, that he was suffering financial prejudice in the form of loss of more than R17 000 in monthly salary and that he would not interfere with or intimidate witnesses, was inconsistent with the finding that the interest of justice did not permit his release on bail regard being had to the provisions of section 60(4) read with section 60(9) of the CPA.

[18] As the court below correctly pointed out, it is always possible that there may be problems with state case with regard to the property allegedly found on the appellant's premises as well as his

identification by one of the complainants. The foregoing should, however, be seen in the light of, *inter alia*, the caution with which the courts, as of duty, approach identification evidence among others.

- [19] The court below, further, found that the letter from the municipal manager regarding the appellant's continued employment with Matjhabeng Local Municipality had some bearing on the bail application. In my view the fact of the relevant letter is, at best for the state, neutral insofar as, for an employee to be regarded as having absconded or deserted from work, there should be evidence that he had the intention not to return to work when he left. In the instant matter it is, in effect, common cause between the parties or undisputed that the only reason the appellant did not report for work was that he was in police custody following his arrest on the relevant charge. In labour law an employee in the position of the appellant is entitled and obliged to report for work soon or within a reasonable time after his release from custody to furnish satisfactory explanation for his absence from duty. If the explanation furnished is reasonable and acceptable the employer is obliged to reinstate such an employee. (See **Mofokeng v KSB Pumps** (2003) 12 BALR 1342).

- [20] In my opinion when bail was refused in 2014 the scales were tilted against the appellant because of, *inter alia*, the fact that he had a similar case pending against him in Welkom. Once that case was withdrawn the scales got adjusted and tilted in his favour with the result that the cumulative impact of his personal circumstances on the state case against him rendered his

circumstances exceptional to the extent of permitting his release on bail in the interest of justice.

[21] In my judgment the court below was, therefore, wrong in his decision refusing bail to the appellant and, as such, same falls to be set aside.

[22] At the end of the hearing and before judgment could be reserved the parties came together and agreed on the terms and conditions on which bail could be granted in the event of the court finding cause to interfere with the decision of the court below. There is, in my view, no fault whatsoever with such proposed conditions.

ORDER

[23] In the result the appeal succeeds.

[24] The decision of the court below is set aside and in its place and stead is substituted the following:

“Bail is granted to the applicant in the amount of R5000-00 on condition that should he pay the same he:

- a. shall report at the Welkom Police Station twice a week;**
- b. shall surrender his passport to the investigating officer Warrant Officer Dlamini as soon as he is released;**
- c. shall not directly or indirectly interfere with witnesses;**
- d. shall not go to the farm Paradise in the district of Hennenman;**

- e. shall appear in the regional court at Odendaalsrus on 30 August 2016 at 08H00 in the morning and shall remain in attendance until the matter is finalized.”

LJ LEKALE, J

On behalf of appellant:
Instructed by:

Adv. MP Stanley
Botha & De Jager
Westdene
Bloemfontein

On behalf of respondent:
Instructed by:

Adv. R Hoffman
Office of Director of Public Prosecutions
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