

In the High Court of South Africa
KwaZulu-Natal Local Division, Durban

Case No 12779/15

In the matter between :

Sabelo Ntoyakhe

First Appellant

Mthokozisi Sifiso Buthelezi

Second Appellant

and

The State

Respondent

Judgment

Lopes J

[1] The appellants in this matter, who are Sabelo Ntoyakhe aged 29 years and Mthokozisi Sifiso Buthelezi aged 32 years, were both arrested on the 3rd November 2015. They are charged with one count of robbery with aggravating circumstances, the aggravating circumstances being the use of a firearm during the commission of the offence, and one count of housebreaking with intent to steal and theft.

[2] On the 17th November 2015 and in the District Magistrates' Court in Durban they applied for bail. They were both refused bail by the learned magistrate and this matter comes before me in terms of s 65 of the Criminal Procedure Act, 1977.

It is pertinent to note that s 65(4) of the Act provides :

'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.'

[3] It was common cause during the Magistrates' Court hearing, and before me, that the offence with which the appellants were charged falls under Schedule 6 of the Act.

S 60(11) of the Act provides :

'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;

...'

[4] At the outset of the hearing in the Magistrates' Court, Mr *Barnard*, who appeared for both appellants, handed in affidavits deposed to by each of the appellants setting out their personal circumstances.

[5] With regard to the personal circumstances of the Mr Ntoyakhe :

- a) he has been residing at Flat 6 Berendene, 8 Union Lane in Pinetown for the last five years. He rents the premises;
- (b) he is married and lives together with his wife and two children, and is responsible for their financial support;
- (c) he achieved a Grade 12 level of education and is self-employed as a grass-cutter earning approximately R5 000 per month;
- (d) he has no previous convictions, and no cases pending against him;
- (e) there was no evidence suggesting a likelihood that he posed a risk in respect of what are described in the affidavit as 'any of the traditional bail issues'.

[6] With regard to Mr Buthelezi, his circumstances are as follows :

- (a) he lives at his parents' home in Shongwe Road, Ntuzuma, Durban and has been residing there for 30 years;
- (b) although not married, he has three children who live with their mother and they are aged ten years, seven years and five years respectively. Mr Buthelezi contributes towards their maintenance;
- (c) he has achieved a Grade 12 level of education, and is employed as a taxi driver earning approximately R4 000 per month;
- (d) he has no previous convictions and no cases pending against him;

- (e) there is no evidence which suggests that he poses a risk in respect of any of the traditional bail issues.

[7] The evidence against the two appellants may be summarised as follows :

- (a) that Mr Ntoyakhe made a confession to Captain Hlongwa, the police officer who arrested him;
- (b) both the appellants were identified at an identification parade on the 4th November 2015.

[8] Both the appellants indicated that they intend to plead not guilty at the trial. They deny any involvement in the robbery. Both the appellants maintain that on the 3rd November 2015 and at the Brighton Beach Police Station where they were detained, a certain Warrant Officer Slabbert took photographs of them using his cellphone. This was despite the fact that they refused to have their photographs taken, as they had already been informed that arrangements were being made for them to attend the identity parade the next day. Both the appellants raised further concerns which they had with the fairness of the holding of the identity parade.

[9] At the bail hearing in the Magistrates' Court, the prosecutor introduced into evidence two affidavits deposed to by the investigating officer, Warrant Officer Grobler, in his very brief affidavit dealing with Mr Ntoyakhe, Warrant Officer Grobler stated that the appellants were charged with the theft of, inter alia, R2,5M. This is in

contradiction to the charge sheets which indicate that they are being charged with the theft of approximately R270 000 in cash. Mr Grobler states in his affidavit that Mr Ntoyakhe was pointed out by Mr Buthelezi, and in addition by both the complainant and a witness at the identification parade. Warrant Officer Grobler also mentioned the oral confession made by Mr Ntoyakhe to Captain Hlongwa.

[10] Warrant Officer Grobler opposed bail in the case of Mr Ntoyakhe, because he needed to obtain DNA samples for comparison, and Mr Ntoyakhe had refused to provide DNA samples. In addition he stated that the previous arrest record and pending cases of Mr Ntoyakhe needed to be verified because he had refused to hand over his identity documents. In addition Warrant Officer Grobler pointed to the fact that there was a possibility that Mr Ntoyakhe could again commit the crimes for which he was charged and alleged that he had a pending housebreaking case under Durban North CAS 329/1/15.

[11] With regard to Mr Buthelezi, Warrant Officer Grobler made the same allegation of R2,5M having been stolen, and suggested that Mr Buthelezi had been pointed out by Mr Ntoyakhe and also identified by the complainant and a witness at the identity parade. In opposing bail for Mr Buthelezi, he relied on the need to obtain DNA samples, the verification of his previous arrests and pending cases, the fact that Mr Buthelezi was pointed out at the identity parade, the fact that Mr Buthelezi was a flight risk and that he may again commit the crimes for which he is charged.

[12] Warrant Officer Grobler also referred to an affidavit deposed to by Captain Hlongwa stating that when he had arrested Mr Ntoyakhe in the early hours of the 3rd November 2015, he had told Mr Ntoyakhe that he was being arrested in connection with an ATM bombing. In discussing the matter Mr Ntoyakhe allegedly told Captain Hlongwa that he, Captain Hlongwa, was confusing cases and that Mr Ntoyakhe could not have been involved in the ATM bombing because at the time he was committing the robbery on the Bluff. According to this confession approximately R2,8M in cash was stolen. Captain Hlongwa told Mr Ntoyakhe that he had no knowledge of the other case, and confirmed that there was such a case with the police officials at the Brighton Beach Police Station.

[13] At the hearing in the Magistrates' Court, and after the affidavits were handed in, Warrant Officer Grobler testified. He described the circumstances of the robbery which involved a 60 year old female and her helper. Six men, all armed with firearms entered the premises at night and took away two safes and other items. The safes allegedly contained the money which the State alleges was taken by the appellants.

[14] In his evidence Warrant Officer Grobler stated that after Mr Ntoyakhe was arrested, he had taken Captain Hlongwa to point out Mr Buthelezi, who was then also arrested. In addition he gave the names of the four other person involved in the house robbery. They have not been located.

[15] During the cross-examination of Warrant Officer Grobler :

- (a) he was unable to dispute that another charge, which had been brought against Mr Ntoyakhe had been withdrawn, and that there were no pending cases against Mr Ntoyakhe. According to Warrant Officer Grobler he had been unable to finalise his investigation with regard to the outstanding cases faced by Mr Ntoyake 'due to the festive season duties'. When pressed on this Warrant Officer Grobler gave the excuse that this was not the only case he was working on.
- (b) Warrant Officer Grobler's statement that the appellants had refused to co-operate with the taking of DNA samples was challenged by Mr *Barnard* who pointed out that samples had been taken by one Mr Fink, in the presence of Warrant Officer Grobler. Warrant Officer Grobler appeared to deny that this had happened in his presence, but nonetheless admitted that DNA swabs had been taken by Mr Fink, but because he was not trained to take those samples, they were not used. Mr *Barnard* made it clear that both appellants consented to having DNA samples taken and would provide them if requested to do so by the police officials.
- (c) With regard to why no proper confession had been taken from Mr Ntoyakhe, Warrant Officer Grobler stated that he had been arrested in the early hours of the morning and police officials wanted to get the identity parade done, presumably that day. When they had discussed the issue of a confession with both appellants, they had denied any involvement in the matter and refused to make any written confession.

- (d) It was pointed out to Warrant Officer Grobler by Mr *Barnard* that the ATM bombing matter had happened in August of 2015, whereas the robbery for which the appellants stand charged occurred in October of 2015;
- (e) Although fingerprints were taken at the scene of the crime and sent away on the 4th November 2015, they had not been returned.
- (f) With regard to the production of their ID documents, Mr *Barnard* produced the identity document for Mr Buthelezi and handed it to Warrant Officer Grobler at the bail hearing. With regard to Mr Ntoyakhe, Mr *Barnard* also put to Warrant Officer Grobler that the identity document of Mr Ntoyakhe was still in possession of the police officers at Durban Central Police Station.

[16] According to Warrant Officer Grobler, the docket has been fully investigated and the only matter outstanding are the results of the fingerprint analysis. In his heads of argument, and in argument before me, Mr *Barnard* submitted that there was no evidence whatsoever to suggest that the appellants were likely not to stand trial, or to interfere with the witnesses. Mr *Barnard* submitted that Mr Ntoyakhe had appeared at each of the hearings in the matter in which he had previously been charged. Mr *Barnard* relied on the authority of *Mooi v S* [2012] JOL 29148 (SCA) for the proposition that where an appellant had faced previous prosecutions and had attended court, that was an inclination contrary to a reluctance to stand trial.

[17] The circumstances in *Mooi* are somewhat distinguishable from the present circumstances. *Mooi* had been in custody for a considerable period of time and the

State had not concluded its case. The court held that the apparent weaknesses in the State case, together with the history of the accused in not avoiding standing trial, constituted exceptional circumstances showing that it is in the interests of justice that he be released on bail.

[18] In her judgment on bail in this matter, the learned magistrate focussed on the following aspects :

- (a) that the appellants had been identified at the identification parade;
- (b) that Mr Ntoyakhe had allegedly made a confession to Captain Hlongwa and given Captain Hlongwa information which he, Captain Hlongwa, was unlikely to have been in possession of when the confession was made to him.

The learned magistrate found in the circumstances that the appellants had not shown that exceptional circumstances existed which, in the interests of justice, permitted their release on bail. The learned magistrate was of the view that the circumstances placed before the court by the appellants were ordinary circumstances and not peculiar to the appellants. House robberies had reached endemic proportions in the whole of South Africa, and the release of the appellants would undermine or jeopardise the objectives or proper functioning of the criminal justice system including bail. The interests of justice in her view far outweighed the interests of the appellants. Bail was accordingly refused.

[19] Mr *Barnard* submitted that it is significant that Mr Ntoyakhe denied the confession he had made to Captain Hlongwa at the first opportunity given to him. Mr

Barnard pointed to the improbability, as he put it, that the appellants would choose to become fugitives for the rest of their lives rather than dealing with a matter that seemed capable of being challenged at the trial. It is also significant, in my view, that the appellants both challenged the holding of the identity parade on the basis that a certain Warrant Officer Slabbert had taken photographs of them using his cellphone on the day of the identity parade and prior to it being held. These allegations were not in any way dealt with at the bail hearing, and no reason was given by the State as to why those matters could not have been dealt with. If Warrant Officer Slabbert denied having taken the photographs, it would have been a simple matter for him to have been called, and for him to have said so. If he had taken the photographs he could have proffered his reasons for doing so and explained that to the court. None of this occurred.

[20] In *S v Dlamini, S v Dladla and Others, S v Joubert, S v Schietekat* 1999 (2) SACR 51 (CC), the Constitutional Court dealt with the concept of bail and described the starting point as being s 35(1)(f) of the Constitution which provides that any person who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit it, and subject to reasonable provisions. The Constitutional Court stated that s 35(1)(f) made three things plain :

- (a) that the Constitution expressly acknowledges and sanctions that people may be arrested for allegedly having committed offences, and may for that reason be detained in custody;

- (b) that notwithstanding lawful arrest, any person has the right to be released from custody subject to reasonable conditions, albeit that the right is a circumscribed one; and
- (c) the criterion for release is whether the interests of justice permit it. The court emphasised that a bail application is concerned with the question of an accused's guilt only to the extent that that may indicate where the interests of justice lie in regard to bail. The primary focus in this aspect is to protect the investigation and prosecution of the case against hindrance.

[21] In analysing the provisions of s 60(11)(a) of the Act dealing with Schedule 6 offences, the court stated that the sub-section contemplated an exercise in which the balance between the liberty interests of the accused and the interests of society in denying bail, will be resolved in favour of the denial of bail unless 'exceptional circumstances' are shown by the accused to exist. The effect of this is to make bail more difficult to obtain than it would ordinarily otherwise be.

[22] At paragraph 76 of *Dlamini*, the court stated :

'In requiring that the circumstances proved must be exceptional, the sub-section does not say that they must be circumstances above and beyond, and generally different from those enumerated.'

In the final analysis, a judicial evaluation must be made involving an examination of substance, and not form.

[23] In the present case the appellants were given every reasonable opportunity to place evidence before the court which would satisfy the court that the necessary 'exceptional circumstances' existed.

[24] In these circumstances, I might find myself hesitant to suggest that the appellants should be released on bail. In this matter, however, the State led no evidence whatsoever to suggest that the appellants would pose a flight risk. On the contrary the appellants put up evidence which demonstrated that they had lived in their current residences for five and 30 years respectively and that they had employment and families.

[25] There was also no evidence to suggest that the appellants would interfere with the State case or pose a risk to witnesses. In this regard Warrant Officer Grobler recorded that the investigation of the case had been finalised, save for the fingerprint evidence. I find it surprising that the fingerprint comparisons had not been carried out by the time the bail application was heard. Indeed, it may well be suggested that the entire bail application was somewhat shoddily dealt with by the State representatives. Warrant Officer Grobler gave vague and contradictory information, and what may be viewed as unacceptable reasons for being unable to obtain information. That criticism may be somewhat unfair insofar as it may be suggested that police officers carry a heavy caseload which makes the prompt resolution of their investigations difficult. Unfortunately no evidence in this regard was placed before the learned magistrate.

[26] In my view the learned magistrate erred in focussing on the nature of the crime allegedly committed and paid insufficient attention to the improbability of the confession to Captain Hlongwa given the dates of commission of the alleged offences, and the fact that Warrant Officer Slabbert was not called, when it was open to the learned magistrate to have done so.

[27] In all the circumstances I would conclude that the learned magistrate was wrong in finding that the appellants had not demonstrated exceptional circumstances which, in the interests of justice, would have warranted their release on bail. The view I have taken is based solely upon the facts of this matter and I do not consider that the matters set out above which demonstrate the personal circumstances of the appellants would, in every case, constitute exceptional circumstances.

[28] In anticipation of the possibility that I might grant the appeal, Ms *Vahed* who appeared for the State kindly provided me with a draft order which she and Mr *Barnard* had agreed upon in the event that the appeal were to be upheld. It is that order that I grant.

[29] I accordingly make the following order :

1. The appeal against the learned magistrate's refusal to grant bail in case no 23/19618/15 is hereby upheld.

2. The appellants are granted bail in the sum of R10 000 (ten thousand rand) each, subject to the following conditions :
- (a) that the appellants appear in the Durban Magistrates' Court or such other court on all dates and times to which this matter is postponed until it is finalised.
 - (b) that the first appellant shall report to the Pinetown Police Station, and the second appellant shall report to the Ntuzuma Police Station, every Monday and Friday between 6am and 6pm until the trial is finalised.
 - (c) that the appellants shall not leave the region of KwaZulu-Natal without the prior consent of the investigating officer nor shall they enter the Bluff, Treasure Beach, Westville and Austerville suburbs in Durban, until this matter has been finalised.
 - (d) the appellants shall not directly or indirectly communicate or attempt to communicate with any State witnesses.
 - (e) the appellants shall not, for the duration of the proceedings, change their residential addresses from Flat 6, Berendene, 8 Union Lane, Pinetown in respect of the first appellant, and G256, Shongwe Road, Ntuzuma in respect of the second appellant, without first informing the investigating officer of such intended change.

Counsel for the Appellants : L Barnard (instructed by Ncama Zungu and Associates).

Counsel for the Respondent : Ms Y Vahed (instructed by the Director of Public
Prosecutions).

Date of hearing : 18th December 2015

Date of judgment : 22nd December 2015