

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA**

Case No: 2853/2011

In the matter between

DAVID MBALEKI

First Appellant

AFRICA MGQAMBI

Second Appellant

versus

THE STATE

Respondent

JUDGMENT

Delivered on: 1 April 2011

STEYN J

[1] This is an appeal against the refusal of the Durban district court, to grant the appellants in the court *a quo* bail.¹ The appellants are charged with murder and robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act, 51 of 1977.² The offences are schedule 6 offences in terms of the Act.

1 See case number 2853/2011.

2 Hereinafter referred to as 'the Act'.

[2] The appellants were arrested on 3 January 2011 and brought before the court for a bail application on 28 January 2011, which was refused by the district Magistrate of Durban. Appellants now appeal against this decision.

[3] On behalf of the appellants, Mr Mvume, submitted that the learned Magistrate erred in fact and law. It was submitted by him that the decision was *inter alia* wrong since the learned magistrate

- i) unduly invoked section 8A of the Act;
- ii) that she found that the appellants' alibi evidence was not corroborated;
- iii) that she attached undue weight to the pending cases against the appellants;
- iv) that she failed to duly weigh the evidence of the investigating officer, who did not oppose bail;
- v) not opposing (*sic*) herself of the possible delay in the investigations which would be far in excess of six months.
- vi) That she failed to consider that the factors that constituted exceptional circumstances.

In addition it is submitted that the learned magistrate erred by not showing that she had apprised herself of the presumption of innocence.

[4] Mr Koyana, acting on behalf of the Respondent, opposed the application on the basis that the appellants failed to convince the court *a quo* of any exceptional circumstances as required in terms of subsection 60(11)(a) of the Act. On behalf of the respondent it was further submitted that recently in *Mathebula v S*³ the SCA dealt with the fact that an application brought on affidavit is not open to be tested and challenged by cross-examination, and hence it is less persuasive.⁴

[5] It is evident that what the Act in terms of section 65(4) requires of this Court before setting any decision on bail aside, is that this Court should be satisfied that the lower court was wrong in its decision.⁵

3 2010(1) SACR 55 (SCA).

4 See *Mathebula* at para [11].

5 See subsection 65(4) of the Act that reads:

"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."
Also see *S v Barber* 1979 (4) SA 218 (D) 220E-H.

- [6] The record reveals that the learned Magistrate applied her mind to the burden cast upon the applicants in stating:

“[I]n considering all the above, I have got to give consideration to by weighting up the interests of justice against the rights of the accused of his or her personal freedom and in particular the prejudice that he or she is likely to suffer if he or she were to be detained in custody, taking into account various factors as indicated during the closing argument by the defence in the delay in respect of the alibi, and all other factors . . .”

- [7] The success of this appeal is dependent on whether the appellants, applicants in the court *a quo*, discharged the *onus* in terms of subsection 60(11) of the Act.

- [8] Bail is presently defined in s 58 of the Act and regulated by sections 58 to 71 of the same Act. It is also regulated by s 35(1)(e)-(f) of the Constitution, 1996, read with s 12 of the Constitution.

- [9] Previously an application for bail was regarded as *sui generis* and the accused bore the *onus* on a balance of probabilities to show why he should be released.⁶ After the commencement of the interim Constitution⁷ a host of decisions followed, all considering *onus* on the parties in a bail application.⁸

6 See *S v Hlongwa* 1979 (4) SA 112 9(D).

7 The interim Constitution of the Republic of South Africa, Act 200 of 1993.

8 See *Ellish v Prokureur-Generaal*, Witwatersrand Plaaslike Afdeling 1994 (2) SACR 579 (W); *Magano and Another v District Magistrate Johannesburg and Others* (1) 1994 (2) SACR 304 (W) *S v Mbele and Another* 1996 (1) SACR 212

[10] The Constitutional Court, however, in the matter of *S v Dlamini*; *S v Dladla and Others*; *S v Schielekat*⁹ did not resolve the issue of *onus*. Kriegler J dealt with it as follows:

*“For the present it is unnecessary to resolve the question whether there is an onus in bail proceedings and, if so, its incidence. The current cases are governed by subsection 11 where there is undoubtedly a burden cast upon an applicant for bail.”*¹⁰

[11] In the context of s 60(11)(a) it is however necessary for an applicant to persuade the Court that ‘exceptional circumstances’ are present that in the interests of justice permit his release. The concept, ‘exceptional circumstances’ not being defined, has meant different things to different people.¹¹ In my view, what is expected of a court is to exercise a value judgment in accordance with all the evidence and applying the relevant legal criteria.¹²

(W); *S v Vermaas* 1996 (1) SACR 528 (T).

9 1999 (2) SACR 51 (CC).

10 *Op cit* at para [45], footnote 74 of the judgment.

11 See *S v C* 1998 (2) SACR 720 (C); *S v H* 1999 (1) SACR 72 (W) at 77b-i; *S v Schietekat* 1999 (1) SACR 100 (C); *S v Mokgoje* 1999 (1) SACR 233 (NC); *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) at 2291 – 2300; *S v Bruintjies* 2003 (2) SACR 575 (SCA) at 577 c-i.

12 See section 60(4) of the Act that provides for the grounds to be considered:

- “a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or [Para (a) substituted by s. 4(c) of Act 85 of 1997.]
- (a) Where there is the likelihood that the accused, if he or she were

[12] In the present matter, the learned magistrate fully apprised herself of her duties and in doing so she summarily questioned the investigating officer, his answers in court reveal the strengths and the weaknesses of the state's case. In my view, the learned magistrate would have failed in her duty, had she merely accepted the attitude of both the state prosecutor and that of the investigating officer. It is evident from the record that neither are *au fait* with the implications of the amended bail legislation. The legislature considered it necessary to burden the accused with an *onus* in Schedule 6 cases, and hence the answer is very simple, did the appellant succeed in their onus. Neither of the applicants, nor the so called alibi witness, adduced any *viva voce* evidence. I fail to see how they could be convinced that they have discharged the *onus* that rested on them.

released on bail, will attempt to evade his or her trial; or

- b) *Where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or*
- (c) *Where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system;*
- (d) *Where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public or undermine the public peace or security; or [sic]".*

[13] It must necessary follow, that on an analysis of the evidence as a whole, the probative value of the statements produced by the appellants and the burden of 'exceptional circumstances' that rested on the appellants in the court *a quo*, that the appellants had not succeeded in demonstrating that the court below was wrong and that the decision should be set aside.¹³

[14] I need however to also deal with the perception out there that the presumption of innocence had a role to play at the consideration of bail. In *S v Dlamini, S v Dladla and Others*,¹⁴ our Constitutional Court unanimously decided that the right to be presumed innocent is not a pre-trial right but a trial right. This has also been understood by the learned Magistrate.

[15] In the event the appeal is dismissed.

13 See *S v Porthen and Others* 2004 (2) SACR 242 (C), at para [17].

14 1999(2) SACR 51 (CC).

Steyn, J

Date of Hearing: 1 April 2011

Date of Judgment: 1 April 2011

Counsel for the applicant: Adv Mvume

Instructed by:

Counsel for the first respondent: Adv M M Koyana

Instructed by: Director of Public Prosecutions,
Durban.