Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case No: CA& R 86/09
Heard on: 19-11-2009
Delivered: 04-12-2009

In the matter between:

MOJALEFA THEODORE KGAILE **1ST APPELLANT**

EMMANUEL FENASSE **2ND APPELLANT**

MAXWELL VUMAZONKE **3RD APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: MJALI AJ

JUDGMENT

MJALI AJ:

1. The three appellants had each unsuccessfully applied in the regional court to be released on bail pending trial. The first appellant's application was refused on 13 March 2009, and that of second appellant on 23 September 2009. The third appellant's bail applications of 29 July 2009 and the 2nd one based on new facts on 11 September 2009 were both dismissed. The reason for refusal of bail in all three applications was that there is a likelihood that when released on bail the appellants will intimidate the section 204 witness as well as her brother. They now

appeal against the refusal by the Regional Magistrates to grant them bail.

2. In view to the fact that the appellants will be prosecuted jointly in the High court on racketeering charges and that their grounds of appeal overlap the parties agreed that the appeals be heard jointly. Together with his notice of appeal the first appellant filed an application for condonation for the late filing of his appeal. I must mention that in the affidavit in support of his application the first appellant gave sufficient reasons for the delay. He deals with the question of the prospects of success on appeal. The application for condonation was not opposed by the state and I entertained the appeal.

3. This appeal, which is opposed by the State, is brought in terms of section 65 of the Criminal Procedure Act No. 51 of 1977 (CPA) which enables an accused who considers himself aggrieved by the refusal by a lower court to admit him to bail, to appeal against such refusal to the superior court having jurisdiction. In terms of section 65(4) of the CPA this court is not entitled to set aside the decision against which the appeal is brought unless it is satisfied that "*the decision was wrong*." That Section provides:

> *"The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, <u>unless such court or judge is satisfied that the decision was wrong,</u> in which event the court or judge shall give the decision which in its or his opinion the lower court should have given."* (My underlining)

4. The appellants based their appeal on the grounds that the courts a quo erred in not granting them bail as there was no finding that any of the factors mentioned in section 60 (a)-(e) of the CPA existed. For this reason Mr Nel who appeared for the appellants contended that it was not in the interests of justice to further keep the appellants in custody. A further attack on the findings of all the Magistrates is that they erred in concluding that there was a likelihood that the appellants would interfere with witnesses purely on the evidence of Captain Louis which does not link any of the appellants to the intimidation of the section 204 witness.

5. It was common cause between the parties that the offences for which the appellants will be prosecuted fall under Schedule 5 of the Criminal Procedure Act. From the outset the State approached the bail applications on the basis that section 60(11) (b) of the Criminal Procedure Act, 1977 applied to it. Section 60(11)(b) provides –

> *"Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –*
>
> *(a) . . .*
>
> *(b) in Schedule 5, but not 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 the interests of justice permit his or her release."*

6. This approach was in my view correct as it appears from the written authorisation by the National Director of Public Prosecutions as well as the indictment which form part of the record of their bail applications that the appellants will be prosecuted for offences relating to racketeering in contravention of Section 2 of the Prevention of Organised Crime Act No.

121 of 1998. The amount involved is in excess of R1000 000.00. Further it emerges from the evidence of one Captain Luis, who is part of the investigating task team and who testified in all the applications that the appellants are part of a syndicate and that the offences were committed whilst they were associated with an enterprise, and were carried out in furtherance of such enterprise's affairs through a pattern of racketeering activity.

7. In terms of section 60(11) (b) the appellants had to prove that it is in the interests of justice that they be released on bail. The appellants testified during their separate applications in the regional courts. What transpires from their evidence is the following. Mojalefa Theodore Kgaile, the first appellant is 25 years old and has been living with his mother at 3084 Lebe Street, Vergenoeg, Kimberley since birth. He is unmarried but has three minor children who are 6 years, 1 year and the third one was born on the day of his application for bail. Prior to his incarceration he was unemployed but would have started working at Echotech as a messenger a week after his arrest and would have earned between R2500 and R3000 per month. The mother of his children is unemployed. He has no previous convictions and except for this case he has no other pending trials against him. He intends pleading not guilty to the charges against him. He denies any knowledge of the intimidation of the section 204 witness.

8. Emmanuel Fenasse, the 35 year old second appellant was arrested on 17 March 2009 when he surrendered himself to the investigating officer in Kimberley. He stays at 178 Oliver Tambo Street, Klerksdorp, with his wife who is an inspector in the South African Police Service. They have been staying there for the past 3 to 4 years and the house belongs to them. He has two children from his marriage and one from an extra marital

relationship. The children's ages are 9, 7 and 6 years. He maintains the children from his businesses as a panel beater as well as that of buying and selling thatch grass. Prior to his incarceration he rented a flat at Wolmansranstad where he stayed with his concubine whilst on business there. He has two previous convictions, namely in 2002 he was fined for the unlawful possession of uncut diamonds. In 1999 he was fined for assault. Except for this case the appellant has no other pending case. His family is experiencing financial strain since his incarceration. He has a sister that attends university who depends on him. After his arrest his youngest son began wetting the bed and his daughter is not doing well at school. He had no part in the intimidation of the brother of the section 204 witness. He denied any involvement in the disruption of the identity parade. He undertook not to interfere with state witnesses should he be released on bail.

9. Maxwell Vumazonke, the 54 year old third appellant resides at No. 29983 Hillside View, Bloemfontein, in a house that he owns. He has been living there for approximately 25 years. The value of their house is more than R1 million and is fully paid. He is married and has 3 children who are attending school. His wife is a teacher in Bloemfontein and earns a net salary of R6000.00 per month. He was arrested on 26 May 2009. He has three previous convictions, namely in 1977 he was convicted of rape and sentenced to 7 strokes with a light cane. In 1996 he was given a suspended sentence of R500 or 6 months imprisonment for theft. On 9 July 2007 he was sentenced to 3 years imprisonment for theft. He was released from prison on 22 May 2009 four days prior to his arrest for the present offences. Apart from the present matter the appellant has a case pending in the regional court for an offence that was committed in 2004 for which he was granted bail of R1000.00. Prior to his incarceration he was a building

contractor and earned approximately R14 000.00 per month. His eldest son committed suicide as a result of his detention. The death of his son has added to the psychological stress as well as to the financial strain that his family is going through. Prior to his death his son worked at Spoornet and assisted the family financially. His wife suffers from diabetes and was admitted in hospital in September 2009 after she discovered the body of their son. He applied twice for bail and both applications were refused.

10. Captain Fernando Luis testified on behalf of the state in all the applications. The crux of his testimony is that he is part of the task team that was formed to investigate tender fraud. The modus operandi is the same in all the matters. The appellants posing as government officials in the Public Works Department, contacted businessmen throughout the country and invited them to board meetings held either at Government buildings or at hired hotel boardrooms where they would present the profile of their companies for the purposes of the award of tenders involving large sums of money. At such meetings the businessmen were asked questions relevant to the normal tender process such as their previous experiences in the relevant fields and their tax status. At the end of the meeting they were asked to pay a deposit. The amounts varied and in certain instances were as high as R400 000.00. Only hard cash was accepted and no cheques.

11. The businessmen were thereafter promised that they would be contacted regarding the success or otherwise of their tenders. In some instances the businessmen were also asked for donations for ANC meetings. The donations varied from R30 000 and more. The appellants are part of a syndicate and the offences that they are now facing were perpetrated in furtherance of the aims of such syndicate. All the appellants are linked to

the racketeering crimes by a section 204 witness who was also part of the syndicate. The brother of the section 204 witness received anonymous calls enquiring about the whereabouts of the witness. According to the report received the caller stated that they know what the witness is up to and that they would kill her. As a result of the intimidation the section 204 witness had to be placed under the witness protection programme. Mr Gift Musi who is the leader of the syndicate threatened to kill the section 204 witness. After the arrest of the appellants and their co-accused there was no report of intimidation as a result the witness is no longer under protection.

12. Luis testified further that the appellants will delay the hearing of their trial and will commit further crimes to finance their defence. He expressed concern that the second appellant might not stand the trial in that he travels around a lot and that even his wife did not know his whereabouts as well as his contact details when the police were searching for him. The third appellant committed crimes mentioned in counts 2 and 10 in the indictment whilst out on bail in respect of the matter that is now pending in the Regional Court. Incidentally his co-accused in that matter is Mr Gift Musi who is considered to be the leader of the syndicate and who has threatened to kill the section 204 witness. The same *modus operandi* was used in the perpetration of crimes for which the appellant is prosecuted in the Regional Court.

13.Against this background I turn to consider whether the findings of the various magistrates that it was not in the interests of justice to release the appellants on bail were wrong. Mr Nel, for the appellants in my view fairly and correctly made the following concessions;

13.1 that there is a risk of intimidation of witnesses (although he did not want to elevate risk to likelihood)

13.2 that the second appellant is a flight risk.

13.3 that the third appellant committed two crimes linked to racketeering activity whilst out on bail.

13.4 although he argued that the appellants did not play a leading role in the commission of the crimes he conceded that the part played by them was important in the operation of the syndicate.

14. I do not agree with Mr Nel's submission that risk does not amount to likelihood. The act does not define "likelihood" but the *"Thesaurus defines it as a "probability", "possibility", "chance", "risk", "odds". The Concise Oxford English dictionary, 10th Edition defines likelihood*" as *"the state or fact of being likely"*. Likely is defined as *"such as well might happen"*. Risk is defined as *"a situation involving exposure to danger"*, *"the possibility that something unpleasant will happen"*

15. Dealing with the meaning of "likelihood" in **Tshabalala v The State (1998) 3 ALL SA 411 (C) at 422.** Comrie J. stated:

"It will be noted that a successful attempt is not envisaged. The State is not required to run that risk. "Likelihood" in this context simply means probability". I am in full agreement with this view.

16. Mr Cloete, for the state argued that in the light of the evidence of the threats by Mr Gift Musi who is the leader of the syndicate as well as the intimidation that occurred prior to the arrest of the appellants there is a real risk of witnesses being harmed if the appellants are released on bail. He contended further that the mere fact that the Magistrates did not categorically classify the facts in terms of the factors mentioned in section 60 (a)-(e) of the CPA does not mean that they did not weigh the

existence or otherwise of such factors. In support of this contention he referred to the oft cited case of **R v Dhlumayo and another 1948 (2) SA 677 (A)** at 705–706. I agree. The findings of the Regional Court Magistrates are in consonance with section 60(4)(c) of the CPA.

17. Bearing in mind that the section 204 witness, Miss Deetlefs, was part of the syndicate she is well known to the appellants. The chances of Mr Musi exercising his influence over her, as her leader, through the appellants cannot be ruled as remote. She is the main witness who not only can testify in depth about the activities of the syndicate but also links the appellants to the offences. The motive for the appellants to interfere with her is thus strong. The second appellant had very close ties with the section 204 witness and her family. On a conspectus of the evidence I am satisfied that the present matter falls fairly and squarely within the ambit of section 60(4) (c) which contemplates a likelihood that an accused, if released on bail, will attempt to interfere with witnesses. In addition there is cogent evidence which Mr Nel was constrained to concede that the second appellant is a flight risk and that the third appellant committed racketeering crimes whilst on bail. That means factors mentioned in section 60 (4) (a) and (b) against the second and third appellants exist.

18. However the finding of the existence of factors mentioned in section 60 (4) (a), (b) and (c) of the CPA is not the end of the matter. Those factors must in terms of section 60(9) of the CPA be weighed against the right of the appellants to their personal freedom and the prejudice which they are likely to suffer in consequence of further detention. Whilst it is true that the appellants have been in custody for some months and that in view of the complex nature of the case against them, their trial will be protracted, in my view the interests of justice outweigh their right to

personal freedom and the prejudice which they are likely to suffer in consequence of further detention. The state was ready to go on trial in October and had earlier set this matter down for trial from 26 October 2009 until 11 December 2009 but due to the unavailability of their legal representatives' new trial dates had to be arranged for 8 until 26 February 2010.

19. Sight should not be lost of the fact that the appellants will be prosecuted for crimes relating to racketeering. The first appellant will be prosecuted on seven counts of which six are for fraud and one for defeating the interests of justice. The second appellant faces nine counts whilst the third appellant faces three counts. The amounts involved are in excess of R1000 000.00. Upon conviction the appellants could be liable to a fine not exceeding R1 000 million, or to imprisonment for life. The lengthy term of imprisonment and substantial financial loss are thus strong motives for the appellants to interfere with or intimidate State witnesses. It is clear from the evidence as well as the concessions made that the bail conditions might not be effective and enforceable.

20. I have not been persuaded that the Magistrates were wrong in holding that appellants failed to discharge the onus that it is in the interests of justice to grant them bail.

ORDER

Accordingly I make the following order.

The appeal is dismissed.

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G N Z MJALI

ACTING JUDGE

NORTHERN CAPE HIGH COURT

On behalf of the Appellant	Adv Nel
Instructed by	André Potgieter and associates
On behalf of the Respondent	Adv Cloete
Instructed by	Director of Public Prosecutions