

Reportable: Yes / No Circulate to Judges: Yes / No
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Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: CA&R 117/07

Date heard: 2008-03-06

Date delivered: 2008-03-07

In the appeal of:

JAMESON DLAMINI

APPLICANT

versus

THE STATE

RESPONDENT

Coram: MAJIEDT J

JUDGEMENT ON BAIL APPEAL

MAJIEDT J:

1. The appellant, who appears in person, appeals against the refusal of his formal bail application by a magistrate at Postmasburg.
2. The appellant is accused no. 2 in a matter which is at this stage part heard in the Regional Court. He is standing trial with two other accused on a charge of robbery with aggravating circumstances. A

record of the part heard trial proceedings in the Regional Court did not form part of the papers before me. I have only had sight of the record of the appellant's unsuccessful bail application in the Magistrate's Court, which had been heard well before the commencement of the trial.

3. The appellant is a Zimbabwean citizen and has been resident in South Africa for 13 years. He owns a company known as *Africa Link* which, according to his evidence in the bail application, renders courier services throughout the Republic of South Africa and neighbouring countries such as Zimbabwe, Botswana and Lesotho. He alleged in evidence that he lived together with his wife and children at Bertrams in Johannesburg. He had two previous convictions, one for a contravention of the Aliens Act in 2003 where he was fined R1000.00 and also one for possession of dagga in 2004 where he paid an admission of guilt fine of R100.00.
 4. The appellant's further testimony was that he was not guilty of the offence of robbery with aggravating circumstances, since he had been innocently in the Postmasburg area to collect goods which he had purchased. Accused 1 was arrested with the appellant in the vehicle driven by the appellant at the time of the arrest (a Nissan bakkie) and appellant alleged that he had merely given accused 1 a lift.
 5. On behalf of the State the investigating officer, inspector Fernando Luis, testified. He gave details of the offence which the appellant
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and his co-accused were charged with, namely that it concerned an armed robbery at a branch of the First National Bank ("FNB") in Daniëlskuil where an amount of some R74 330.00 had been taken by force.

6. According to his evidence, 5 males armed with 9 mm pistols had perpetrated the aforementioned crime and had in the process assaulted one FNB staff member. Only the relatively small amount aforementioned had been robbed, because the robbers were unable to gain access to the safe due to the time delay locks on it. The evidence further was that the appellant's vehicle (the Nissan bakkie) and the getaway vehicle of the robbers at Daniëlskuil (a Toyota Hilux bakkie) were stored the previous night at a service station at Koopmansfontein. The staff there regarded the storage of these vehicles as suspicious and had reported it to the local police station. Both the manageress of the filling station and a policeman at Koopmansfontein had taken down the registration numbers of these two vehicles and these corresponded with that of the Nissan bakkie of the appellant and the Toyota Hilux bakkie used in the robbery. The last mentioned vehicle was later found abandoned in the veld near Lime Acres, which is some 15-20 kilometres away from Daniëlskuil.
 7. I have indicated that the appellant and accused 1 had been arrested in the Nissan bakkie driven by the appellant. This arrest was made near Postmasburg on the very day of the robbery at Danielskuil, a few hours after the commission of the offence. Both
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of them gave false explanations to the police. Accused 1 had indicated that he was on his way to visit his brother at the Lohatla army base, but was unable to furnish his brother's name or any further particulars. The appellant in turn had alleged that he was on his way to Postmasburg to pick up goods which he had purchased, but was unable to name the supplier or to furnish any further information in that regard.

8. Further incriminating evidence against the appellant is that a shirt with distinctive features which had been worn by a robber in another bank robbery in Douglas a few weeks earlier, was found in his vehicle. The appellant claimed that it was his shirt. There is also, according to inspector Luis, a pointing out and confession by a co-accused which implicates the appellant and his confederates in the commission of the offence. I hasten to add that the magistrate had, quite correctly, taken into account in his judgment in the bail application that the evidence of the said co-accused in his confession would be inadmissible against the other accused at a subsequent trial.
 9. Inspector Luis also testified that, while the appellant was in custody with him, he kept receiving missed calls and so-called "*please call me's*" on his cell phone. Subsequent investigations revealed that these missed calls and "*please call me's*" had been from accused 3. Inspector Luis also testified that accused 3 had been connected to various other armed robberies.
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10. The sum total of inspector Luis's evidence is that these robberies, including the one at Daniëlskuil, were perpetrated by a syndicate of robbers which consisted *inter alia* of Zimbabwean citizens. The evidence against the appellant consists mostly of circumstantial evidence. Inspector Luis also emphasized that it was very difficult to track the Zimbabweans once they flee across the border back to their country. He opposed bail on the basis that the State has a strong case against the appellant and that the appellant is a definite flight risk.
 11. The appellant, who appears in person, has submitted that the magistrate was wrong in the decision he had taken, because there was no evidence that the appellant was in fact a flight risk. I do not agree. The evidence is compelling that the appellant is part of a syndicate involved in armed robberies in the Northern Cape and Free State rural areas and that the members thereof consist *inter alia* of Zimbabwean citizens who flee back to Zimbabwe after they had perpetrated such robberies.
 12. While it is true that the State's case consisted of circumstantial evidence only at the stage of the bail application, it is undeniably so that in many instances circumstantial evidence constitutes a stronger case than where the State relies on eye witness evidence of dubious reliability.
 13. The offence which the appellant is charged with is an offence listed in Schedule 6 to the Criminal Procedure Act, 51 of 1977. The
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appellant therefore had to persuade the Court *a quo* on a balance of probabilities that exceptional circumstances exist to permit his release on bail. In my view the magistrate correctly found that there is a *prima facie* case, based as I have said on circumstantial evidence, which exists against the appellant.

An assessment of the strength of the State's case is germane to an enquiry as to the existence of exceptional circumstances.

See in this regard: **S v Kock 2003(2) SASV 5 (HHA)** at par 15 (11 i – 12 b) and cases cited there.

In the course of a bail application the presiding officer does not have to make a finding, even on a provisional basis, as to the guilt or innocence of an applicant for bail. All the Court has to do is to weigh the *prima facie* strength or weakness of the State's case and such a decision ought not to be made with regard to credibility findings in order that bail proceedings do not become a dress rehearsal for the trial itself.

See in this regard: **S v Van Wyk 2005(1) SASV 41 (HHA)** at par 6 (44 h – 45 b).

14. The appellant had to prove the existence of exceptional circumstances within the meaning of s60(11)(a) of the Criminal Procedure Act, 51 of 1977. In order to establish whether the appellant has discharged this onus, the magistrate was constrained to determine whether on the facts of the case the proven circumstances can be said to be "exceptional". This entails the making of a value judgment on the part of the magistrate.

See in this regard: **S v Botha en ander 2002(1) SACR 222 (SCA)** at par 19 (230 a-b)).

With regard to the discretion which a presiding magistrate exercises as to the existence of exceptional circumstances and the formal onus which

rests on a bail applicant in such cases, see generally further:

S v Porthen and others 2004(2) SACR 242(C) at par 14 (249 b-d).

15. In all the premises I am not persuaded that the magistrate was wrong in his refusal of the applicant's bail application. The appellant's false explanation for his presence in the Postmasburg area, the strong *prima facie* State case against him and the substantial flight risk involved should bail be granted, constituted cogent reasons for the refusal of bail, particularly since the onus was on the appellant.
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16. I make the following order:

16.1 The appeal is dismissed.

16.2 A copy of this judgment must be forwarded to the appellant at the Kuruman prison by the Registrar of this Court.

**SAMAJIEDT
JUDGE**

FOR THE APPELLANT : IN PERSON
FOR THE RESPONDENT : ADV W BAGANANENG AS INSTRUCTED BY
THE STATE

DATE OF HEARING : 2008-03-06
DATE OF JUDGEMENT : 2008-03-07
