

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case No: CC72/2021

In the matter between:

ZIMINGONAPHAKADE MAHLATHI

Applicant

and

THE STATE

Respondent

Date of argument: 28 May 2024

Date of judgment: 31 May 2024

JUDGMENT

ANDREWS, AJ

Introduction

[1] This is an opposed Schedule 6 Bail Application, brought by Mr Mahlathi (“the Applicant”). The Applicant approaches this court for the following relief *inter alia*:

(a) That bail in the amount of R5000 be fixed;

(b) That the Applicant is to reside at his alternative address situated at 5 K[...] Street, S[...], Delft;

- (c) That the Applicant is to report to the Station Commander at Delft South African Police Service Station on every Wednesday and Sunday between the hours 14h00 and 18h00 until the matter is finalised;
- (d) That the Applicant must not leave the province of the Western Cape without the written consent of the Investigating Officer.

[2] According to the indictment, the Applicant together with his co-accused are charged with 5 counts of murder, one count of attempted murder and one count of possession of an unlicensed firearm and ammunition. The charges fall within the ambit of Schedule 6 of the Criminal Procedure Act 51 of 1977 ("the CPA").

The evidence

[3] The Applicant, adduced evidence by way of affidavits marked Exhibits "A" and "C", respectively. The State adduced evidence by way of an affidavit attested to by the Investigating Officer, Sergeant Sizwe Ncaku ("Sgt. Ncaku"), received into evidence and marked as Exhibit "B".

The allegations

[4] The merits of this matter as summarised by Sgt. Ncaku, the Investigating Officer, in his affidavit, marked Exhibit B are as follows:

- '11. On 20 June 2020 the five deceased together with others were at 3[...] B[...] 4 Lower Cross Roads, Philippi East playing television games.*
- 12. At around 17h30 the Applicant together with others went there to confront them about an earlier accident.*
- 13. Some of the accused persons were armed with firearms. They started firing shots and 5 persons were shot and killed. One person survived. They fled the scene.*
- 14. A firearm has been recovered.'*

Legal Framework

[5] Section 60 (11) of the CPA", states as follows:

'Notwithstanding any provision of this Act, where an accused is charged with any offence

–

(a) Referred to in Schedule 6, the court shall order that the accused to 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 permits his or her release...'

[6] Section 60(4) sets out a list of circumstances in which it would not be in the interests of justice to grant bail to an accused person. The subsection provides as follows:

The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

- (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*
- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or*
- (c) 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*
- (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or*
- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.*

[7] Subsections 60(5) to (10) provide guidance on what factors should be taken into account when considering the factors set out in section 60(4).

Principal Submissions by the Parties

[8] Sgt. Ncaku, submitted that there is a strong *prima facie* case against the Applicant. The Applicant placed on record that he intends to plead not guilty to the charges levelled against him. The Applicant argued that the Investigating Officer does not, expound on his role in the commission of the offences. It is the Applicant's contention that more detail regarding the *prima facie* evidence they have against him should have been placed before this court. This information is to include, *inter alia*, details pertaining to the recovered firearm.

[9] It is alleged that the Applicant belongs to a group of persons calling themselves "2C" who fight, rob and extort people in the community of Philippi. The Applicant argued that there is no evidence to sustain this averment. In augmentation, it is submitted that the Applicant is not charged with any count of extortion or robbery which are some activities ordinarily associated with the said gang. The Applicant furthermore disputes any allegations that he has knowledge of or has participated in any gang-related activities particularly those of the said "2C" gang or how he is said to be linked to the said gang.

[10] The Applicant submitted that the interest of justice permits his release and then proceeded to deal with all the considerations and trite jurisdictional factors to be considered in this regard.

Personal Circumstances

[11] The personal circumstances of the Applicant are as follows:

- (a) He is a South African citizen;

- (b) He was born on 7 January 1997;
- (c) He has a fixed residential address where he has been residing since he was born;
- (d) He is unmarried;
- (e) He has no dependants;
- (f) He is unemployed;
- (g) He failed grade 12;
- (h) He owns no assets.

[12] Sgt Ncaku, verified the Applicant's date of birth, his marital status and confirmed that the Applicant has no children. The Applicant resides with his mother in Lower Cross Roads. His mother too is unemployed.

Section 60(4)(a) read with sub-section (5) of the CPA

[13] It was submitted that there is no evidence that the Applicant is a danger or threat to any specific person or that there is a likelihood that he will commit schedule 1 offences should he be released on bail, based on the fact that he has a clean criminal profile, namely, that he has no previous convictions or pending cases. He is not aware of any interim or final order issued against him in terms of the Domestic Violence Act 116 of 1998. He is not aware of any interim or final order issued against him in terms of the Protection from Harassment Act 17 of 2011. He is not on any form of parole under the Correction Services Act.

[14] Sgt. Ncaku confirmed that the Applicant has no previous convictions, pending cases or outstanding warrants for his arrest. However, it was brought to the

court's attention that the accused was arrested on a murder charge under Philippi East CAS 101/07/2018 on 14 January 2020. The allegations in that matter were that the Applicant instructed his co-accused to shoot the deceased, which was done. The police sought the Applicant for about 18 months before he was arrested, having made several visits to his home address. It was further illuminated that the Applicant was traced by chance when a vehicle in which he was travelling was stopped by the police. That matter was withdrawn against the Applicant on 4 February 2020 because the eye witnesses were shot and killed. The Applicant stated that he disputed the allegations made by Sgt. Ncaku regarding the merits.

[15] In light hereof, Sgt. Ncaku expressed that this previous arrest demonstrates a real likelihood that he will continue to commit schedule 1 offences if he is released on bail which should be considered in conjunction with the purpose of the group "2C" of which the Applicant is a member.

[16] In response, the Applicant placed on record that the aforementioned matter is not before this Court and as such he is not obliged to place his defence of this case before this Court. He indicated that notwithstanding, he would take the Court into his confidence, and highlighted that the offence was allegedly committed in July 2018 and that he was only subsequently arrested in January 2020. He does however go on to state that the witnesses in the Philippi East matter were not known to him and as such he could not have been in a position to interfere with the investigations or attempt to undermine or jeopardise the objectives or the proper function of the criminal justice system, in the manner alleged by the Investigating Officer. This is to be considered in light of the fact that the investigations in that matter were not yet finalised at the time when the matter was withdrawn. In this regard, the Applicant stated that he

was not presented with evidence which could have possibly led to his knowledge of the witnesses, and subsequently lead to interference. The Applicant stated that he played no role in the withdrawal of the matter.

[17] Furthermore, the Applicant disputed that he was sought for 18 months and contended that he was at all relevant times present in the jurisdiction of Cape Town. According to the Applicant, he was not informed that the police were looking for him and to what extent they were looking for him. It was argued that there is nothing to support the averment that the police visited his residential address.

Section 60(4)(b) read with sub-section (5) of the CPA

[18] It was submitted that the Applicant does not have a history of evading trial and as such there is no evidence that he is likely to evade his trial should he be released. In further amplification, it was contended that he does not have any travel documents that could enable him to leave the country and that he has no financial means to travel outside the borders of South Africa. Furthermore, it was contended that his entire family resides within the jurisdiction of the Court, thus reinforcing that he is firmly rooted within the jurisdiction of the Court.

[19] According to Sgt Ncaku, information was received that the Applicant was in Queens Town, Eastern Cape. A tracing operation was undertaken and the Applicant was arrested there on 8 November 2020. The Applicant informed that the reason why he was in the Eastern Cape to attend the funeral of his friend. Prior to his arrest he was always in Cape Town, at his residential address.

[20] According to the Applicant, the offence occurred in the earlier part of 2020 and the Applicant was only arrested in November 2020. The Applicant alleges that they do not know at what point the accused was linked to the offence, which will inform whether he was indeed evading his arrest. It was also submitted that there is just a blanket averment that efforts were made in respect of tracing the Applicant with nothing to support. This, it was argued could easily have been achieved through pocket book entries and even if the current Investigating Officer was not involved at the initial stages of the investigation, those attempts had to have been documented and placed before this court.

[21] It was clarified that the proposed bail amount of R5000 has been raised by the family of the Applicant. It was argued that the amount proposed is not intended to undermine the seriousness of the offence.

Section 60(4)(c) read with sub-section (7) of the CPA

[22] The Applicant submitted that there is no evidence that he is likely to influence and/or intimidate witnesses in this matter and neither that he has a history of influencing and/or intimidating witnesses. In addition, it was submitted that the investigation in this matter is completed and the Respondent has secured all its witnesses and/or all the evidence it intends to use in order to prove its case against him.

[23] Sgt Ncaku, contended that the Applicant knows the identity of the witnesses and it has come to his attention that during November 2022, Mr X, whose identity was withheld to protect his safety was approached by one "T D" at the request of the Applicant to tell him that he must not testify otherwise something bad would

happen. The witness feared for his safety. According to Sgt. Ncaku, the Applicant is well known to the witnesses as they grew up together and attended the same school.

[24] The Applicant disputes these allegations regarding the alleged attempts to intimidate Mr X. In support hereof, it was submitted that the Applicant was already in custody and had no knowledge of the content of the docket and as such would not have known who the witnesses are. Furthermore, he was not charged or prosecuted for intimidation.

[25] It came to light during the address by the Counsel for the Respondent that Mr X has since been killed on 25 June 2023. It was further argued that the passing of Mr “X” shouldn’t raise a red flag as his demise cannot be linked to the Applicant which is cemented by the fact that no criminal proceedings have been instituted against the Applicant. It was furthermore argued that the role of that witness has not been disclosed so as to establish a motive for the said witness’ murder. It was argued that the court has not been taken into the State’s confidence in this regard.

Section 60(4)(d) read with sub-section (8) of the CPA

[26] The Applicant submitted that there is no evidence that he is likely to undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system. In this regard, it was contended that there is no evidence that he had knowingly supplied false information to the police during or after the arrest in this matter. Moreover, it was placed on record that he had never in the past failed to comply with bail conditions nor is there any evidence that if he were released in this matter that he will be likely to violate any of his bail conditions.

Section 60(4)(e) read with sub-section (8A) of the CPA

[27] The Applicant submitted that there is no evidence that he would likely disturb the public order or undermine the public peace or security should he be released. In augmentation it was contended that there is no evidence that he is considered by the public to be a danger and or that he is perceived to be a threat by the public. Furthermore, that there has been no public protest or outcry against his release.

[28] The merits of this matter involve mass murder. It was contended that this type of offence is on the rise in the jurisdiction of the Court. Sgt. Ncaku stated that the community is living in fear and have lost faith in the justice system. It was further contended that they constantly protest over their children that are killed on a daily basis and threaten to take the law into their own hands.

Delays to finalise the matter

[29] The Applicant placed on record that since his arrest in 2020, he has yet to plead to the charges; which delays were not occasioned by him or his legal representative. No trial date has been allocated for this matter. It was contended that his constitutional right to have his trial begin and conclude without unreasonable delay is violated by the delays in this matter.

[30] It was suggested that bail conditions could be ordered in order to create a balance between what the accused wants and what the State wants.

Legal principles

[31] It is trite that the onus rests on the Applicant to adduce evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his release on bail.¹

[32] The approach to Schedule 6 bail applications have been aptly distilled in

Killian v S²

‘The import of the ‘exceptional circumstances’ test has been traversed in a number of judgments. In S v Jonas 1998 (2) SACR 677 (SE) at 678E-G it was held that the term does not posit a closed list of circumstances. Whether a court may be satisfied that exceptional circumstances exist depends on the facts and circumstances established in the given application. Whereas ‘exceptional’ denotes something ‘unusual, extraordinary, remarkable, peculiar or simply different’ (see e.g. S v Petersen 2008 (2) SACR 355 (C) at para [55]), it has been observed that ‘(s)howing “exceptional circumstances” for the purposes of s 60(11) of the CPA does not posit a standard that would render it impossible for an unexceptional, but deserving applicant to make out a case for bail’ (S v Josephs 2001 (1) SACR 659 (C) at 668I and S v Viljoen 2002 (2) SACR 550 (SCA)). They do not have to be circumstances ‘over and beyond and generically different from those enumerated in ss 60(4) -(9)’, which are circumstances to which regard is had in run of the mill bail applications not subject to the strictures of s 60(11). It is clear, however, that they must at least be compelling enough to take the case made out for the granting of bail beyond the ordinary.

A court determining a bail application affected by s 60(11) is required to consider the conspectus of evidence and decide whether it is sufficient to persuade the court that an exception should be made to the default situation, which is that an accused person detained on for trial on a Schedule 6 offence should remain in custody pending the outcome of the criminal proceedings. This involves the court in having to make a value judgment (‘waarde-oordeel’); cf. S v Botha en ’n Ander 2002 (1) SACR 222 (SCA) at para 19.’

¹ S v Dlamini; S v Dladla; S v Joubert; S v Schietekat [1999] ZACC 8 (3 June 1999); 1999 (2) SACR 51(CC).

² [2021] ZAWCHC 100, para 3 – 5.

Discussion

[33] The State argued that the crisp issue for determination is whether the Applicant's personal circumstances coupled with the delays amount to exceptional circumstances. It was argued that at no point does the Applicant challenge the merits of the State's case. The Applicant in response stated that they were not conceding that the State has a strong case.

[34] It was argued by the State that in the previous matter and the current matter witnesses have been eliminated. The fact that the accused may have been in police custody when the respective witnesses were killed does not detract from the fact that there is an uncanny coincidence.

[35] It is noteworthy that the accused abandoned his bail application in the lower court which was set down for hearing on 16 March 2021. On 8 February 2023, the Applicant, again abandoned his bail application in the High Court. It was argued that the objective facts require the Court to consider why the Applicant is vigorously pursuing bail now. The Respondent suggests it is because Mr "X" is no longer there. Counsel for the Respondent disclosed that they have secured another witness and the demise of Mr "X" does not weaken the State's *prima facie* case against the Applicant, which case has been established from the outset and not at a later stage as suggested by the Applicant.

[36] It was also argued that the delays in ensuring the speedy finalisation of this matter is occasioned by systemic challenges that are being addressed, owing to the overburdened court rolls. This, it was argued, is not sufficient reason to be considered as exceptional as there are others who have been awaiting for the

commencement of their matters for up to 6 years, through no fault of anyone in particular. The State is ready for trial.

[37] In a Schedule 6 bail application, the onus is on the Applicant to show that there are exceptional circumstances that exist which in the interest of justice permit his release on a balance of probabilities. It was argued that in order for the Court to decide on a balance of probabilities, the State is also to put something onto the proverbial scale for the court to be able to make such a determination. It has been held that it does not mean that the State can remain passive by not adducing evidence or sufficient rebutting evidence in the hope that the Applicant might not discharge the onus.

[38] In *casu* there are a number of aspects that raise some concern. According to the indictment, the offences occurred on or about 30 June 2020. The Applicant was arrested in November 2020. He is one of 5 accused who have been charged with multiple counts of murder. The allegations are that certain of the accused together with others, were armed with firearms and fired shots thereby fatally injuring 4 of the victims who died on the scene, another victim succumbed to his injuries in hospital and a 6th victim survived. The accused who have been charged were identified as the perpetrators of a mass murder.

[39] The Applicant suggested that he does not know at which stage he was linked to the offence, but does not challenge the merits of the State's case. This is furthermore uncanny as the Applicant was added to the case on 23 November 2020 where the record of proceedings reflects that he was linked by an eye witness who knows him from school days. Whilst it is his right to remain silent and not disclose the

basis of his defence, he has not taken the court into his confidence save for placing on record through his Counsel that they were not conceding that the State has a strong case. It therefore begs the question as to whether this is informed by the fact that Mr “X” has been eliminated. Whilst there is no direct evidence to suggest that the Applicant had anything to do with the demise of Mr “X”, the Court cannot ignore the fact that it has happened. This coupled with the eradication of the witness in the other case appears to be too coincidental. I interpose to state that I make no finding in this regard and that for the purposes of a bail application, these considerations are of importance and cannot be ignored.

[40] Of seminal importance is the manner in which the indictment reads, which suggests that the Applicant and his co-accused were not the only persons involved in the offences. It is apparent that only those who could be identified were ultimately arrested, meaning that there are other co-perpetrators who are at large. This is further to be viewed in the context of the averment that the Applicant and his co-accuseds are part of a gang who operates within the area. The fact that the Applicant has not been arrested and/or charged with these offences does not infer that there hasn’t been interference with witnesses in some way manner or form. The test applied for the purposes of the bail application is “balance of probabilities” and not “proof beyond reasonable doubt”. The allegation that the Applicant is part of a gang presupposes an affiliation with activities associated with such grouping.

[41] Whilst it can be understood that the Applicant had the other pending matter which may have informed the reason for not bringing a bail application at the same time as his co-accuseds. The record reflects that he had a bail application pending in the other matter on which he was held in custody. The Applicant in March

2021 abandoned his bail application yet the other matter was withdrawn in February 2021. Inasmuch as it remains his election to launch a bail application, the delay in doing so requires that the Court consider all factors, which in this instance, includes the eradication of witnesses in both matters as earlier stated as well as the election by the Appellant in bringing a bail application at this stage.

[42] In addition, the Applicant was at large for a long time on his previous matter and also for a few months on this matter before being arrested. The flight risks cannot be ruled out as the Applicant was traced in the Eastern Cape and not in Cape Town. Although there are assertions that the Applicant may have violated Covid-19 Regulations, that in and of itself is not the overarching consideration. Even if the court disregards that completely, there is no confirmation that the Applicant attended a funeral in the Eastern Cape.

[43] The Applicant's personal circumstances, which include that he is unemployed, unmarried and has no dependants, does not anchor him to his home. It is proposed that this concern can be overcome by ordering strict bail conditions and an order that the Applicant resides at an alternative address. This can only be done once the Court finds that the interest of justice permits the Applicant's release as a starting point. Furthermore, there is nothing put up to confirm that arrangements are in place for the Applicant to reside at the proposed alternative address and neither has there been a request that this option be followed up by the Investigating Officer. Granted, this could still be ordered by the Court if the Court is of the view that the interest of justice permits the Applicant's release.

[44] What is paramount is that the Applicant discharges the onus required in matters of this nature. It may be so that there is no evidence that he hasn't previously

complied with bail conditions, this factor on its own is not the overarching consideration and must be viewed in conjunction with all other factors.

[45] The Applicant furthermore suggested that he was at all times in the jurisdiction of his home, and that there is nothing forthcoming from the State to prove that the police had done home visits to locate him. The same could be said of the Applicant. He stated in his affidavit that he has been living at his mother's house all his life. In order to strengthen the force of his argument a confirmatory affidavit from his mother would have been sufficient proof as she could verify for example that no police officer came looking for the Applicant and/or that the Applicant slept at home during that period and/or that the Applicant travelled to the Eastern Cape to attend a funeral. Furthermore, the police had to undertake a tracing operation in Queens Town in order to ultimately arrest the Applicant.

[46] There is a myriad of case law that provides guidance as to what courts have regarded as exceptional circumstances. It is clear that each case will be determined on its own merits. Whilst continued detention of an accused is not ideal, the delay in the Applicant launching the bail application was a decision he has taken. If he had decided to bring a bail application in 2021, or 2023 when he had the opportunity to do so, he may have had an outcome sooner.

[47] In ***Mafe v S***³ Lekhuleni J, of this Division remarked as follows concerning the presumption of innocence:

'In summary, the presumption of innocence is one of the factors that must be considered together with the strength of the State's case. However, this right does not automatically entitle an accused person to be released on bail. What is expected is that in Schedule

³ *Mafe v S* [2022] ZAWCHC 108 (31 May 2022) at para [143] (in a dissenting judgment).

6 offences the accused must be given an opportunity, in terms of section 60(11)(a), to present evidence to prove that there are exceptional circumstances which, in the interests of justice, permit his release. The State, on the other hand, must show that, notwithstanding the accused's presumption of innocence, it has a prima facie case against the accused. In reaching a value judgment in bail applications, the court must weigh up the liberty interest of an accused person, who is presumed innocent, against the legitimate interests of society. In doing so, the court must not over-emphasise this right at the expense of the interests of society.'

[48] This court has a measure of understanding that there is uncertainty as to when the trial will commence. It is however apposite to mention that there is judicial oversight in this regard and a pre-trial date has been fixed for 23 August 2023 to ensure that interest of justice considerations, as well as the Applicant's entrenched constitutional rights are being monitored. Systemic challenges are being addressed with a view to ensuring that this trial commence as soon as possible.

Conclusion

[49] This court has regard to the provisions of Section 35(1)(f) of the Constitution that *'Everyone who is arrested for allegedly committing an offence has the right - ... to be released from detention if the interests of justice permit subject to reasonable conditions.'* The court is not concerned with determining the guilt or innocence of the Applicant at a bail hearing. It was aptly pointed out in **Conradie v S**⁴ that:

'The bail court's concern with the interests of justice, in the sense of weighing in the balance 'the liberty interest of the accused and the interests of society in denying the accused bail', will however in most cases entail that it will have to weigh, as best it can, the strengths or weaknesses of the state's case against the applicant for bail. A presumption in favour of the bail applicant's innocence plays no part in that exercise.

⁴ [2020] ZAWCHC 177 (11 December 2020) at paras [19]-[20].

The court will, of course, nevertheless bear in mind the incidence of the onus in making any such assessment.'

[50] As previously stated, the standard of proof is on a balance of probabilities. In **S v Branco**,⁵ the Court held that a '*bail application is not a trial. The prosecution is not required to close every loophole at this stage of the proceedings.*' It is furthermore incumbent on this Court, in reaching a value judgment in bail applications, that it is enjoined to weigh up the liberty interest of the Applicant against the interests of society. However, in weighing up the interest of justice considerations on the unique facts and circumstances of this case, I am not persuaded on a balance of probabilities, that the Applicant's personal circumstances viewed cumulatively, considering all other factors, amount to exceptional circumstances. Consequently, I am not satisfied that the Applicant has discharged the onus that there are exceptional circumstances that exist which in the interest of justice to permit his release on bail.

[51] In the result, after considering the submissions made by the Applicant and the Respondent, bail is denied.

ANDREWS, AJ
Acting Judge of the High Court, Western Cape Division

⁵ 2002 (1) SACR 531 (W) at 535 D-E.

Appearances

For the Appellant: Advocate GK Mhlanga

Instructed by: Prince Attorneys

For the Respondent: Advocate L Snyman

Instructed by: The Office of the Director of Public Prosecutions: Western Cape

Date of Hearing: 09 May 2024

Date of Judgment: 31 May 2024

NB: The judgment is delivered by electronic submission to the parties and their legal representatives.