



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

Case no: CC40/2020

In the matter between:

BULELANI YOSANA

APPLICANT

and

**THE DIRECTOR OF PUBLIC PROSECUTIONS,
WESTERN CAPE**

RESPONDENT

Heard: 28 March 2025 and 12 May 2025

Summary: Bail application based on new facts.

ORDER

The application is dismissed

JUDGMENT

Nziweni, J:

Introduction and background

[1] The applicant has brought this current bail application on the basis that new facts have arisen since the initial bail court [Regional Court] refused to admit him on bail, pending the finalisation of his trial. The applicant is currently facing a variety of offences arising out of an incident which occurred on 22 February 2022. The offences include a contravention of section 18 (2) (a) of the Riotous Assemblies Act, Act 17 of 1956 (conspiracy to murder) and murder.

[2] It is the applicant's contention that there are new developments that were not placed before the Regional Court Magistrate during his original bail hearing. The applicant further asserts that the new facts he is currently relying on create a change in the circumstances that led to his first bail application being refused on 07 July 2022.

[3] It is common cause that pursuant to the Regional Court Magistrate's refusal to admit the applicant on bail; he appealed that decision. On 23 January 2023, the

applicant's appeal was dismissed. Since the dismissal of the applicant's appeal, the applicant case has been transferred to this Division for the hearing of the trial. Hence, this second bail application is heard by this Court.

[4] In his notice of the application for leave to appeal, the applicant has set forth grounds that exist to support his application for bail on new facts. The applicant advanced three grounds, which he characterises as new facts:

- i. The fact that a state witness that deposed to an affidavit in terms of section 204 of the Criminal Procedure Act, Act 51 of 1977, subsequently deposed to a recanting affidavit recanting the allegation [he] made in the section 204 affidavit.
- ii. The fact that [the applicant's] bank account is facing closure due to non-compliance with Financial Intelligence Centre Act, Act 38 of 2001 ("FICA") and regulations; and
- iii. The fact that no trial date has been set.

[5] During the hearing of this bail application, the thrust of Mr Booth's [the applicant's attorney] argument centred mainly upon the ground related to the strength of the State's case. However, though Mr Booth put this submission at the forefront of his argument he also specifically mentioned that he has not abandoned the other two grounds.

[6] The application was initially heard in court on 28 March 2025, but it had to be postponed sine die for the applicant to obtain a missing part of the record. On 28 March 2025, the bail hearing was postponed sine die to afford the applicant to file a complete record. On 07 May 2025, the applicant and the State filed their supplemented papers. On 12 May 2025, after the parties filed their further papers and submissions, it was agreed that it was not necessary to go back to court for further hearing of the matter, and that I could further decide [the matter] on the papers.

Parties' submissions

[7] According to the applicant, the prevailing facts in the State's case are that there are evidentiary problems which affect the strength of the State's case. During the hearing, the essence of Mr Booth's argument was that the State's star and only witness linking the applicant to the case has since recanted his statement. The applicant further argues that the recanting version was never placed before the magistrate during the original bail hearing.

[8] According to the applicant, during the hearing of the bail application, the State in opposing the applicant's admittance on bail and in its attempt to show the strength of the State's case, submitted an investigating officer's affidavit. In the investigating officer's affidavit, the State relied mainly upon the existence of the witness [in terms

of the Criminal Procedure Act 51 of 1977] ("section 204 witness") whom the State intends to call to testify against the applicant in the trial.

[9] Mr Booth submitted that following the bail application, hearing and the appeal, they discovered a statement in which the section 204 witness recanted what he stated in his section 204 affidavit. According to Mr Booth, this recanting statement was never discovered by the State, and as such, it alters the overall picture of the State's case.

[10] In this [newly] discovered statement, the section 204 witness is recanting what he initially told the police about the involvement of the applicant in the commission of the offences the applicant is arraigned on. Mr Booth advanced the argument that the State case is based primarily on the evidence of the section 204 witness. Mr Booth's argument postulates that; if the section 204 witness has recanted his original police affidavit, wherein he originally implicated the applicant in the crimes, the necessary corollary is that the State's case has since been considerably weakened. According to the applicant, this discovery presents an insurmountable hurdle for the State.

[11] The State does not dispute that the section 204 witness has since recanted his first key pre-trial statement. According to the State's heads of argument, the section 204 witness filed a recanting statement after the residence of the witness was visited by the applicant and after the applicant's arrest. To this end, the State specifically contends that the recanting statement is a product of interference with a state witness.

[12] Equally, the State holds the view that notwithstanding the fact that the section 204 witness has since recanted, it [the State] still has a *prima facie* case against the applicant. The State holds the view that the section 204 statement is corroborated and supported by other specific and articulable objective forensic evidence, whereas the recanting statement is not. Thus, in these circumstances, the State argues that besides the section 204 witness account, it has other evidence which the prosecution proposed to rely upon.

[13] Mr Rudolph, on behalf of the State, further insists that though the section 204 witness filed two affidavits, only at the trial stage would the veracity of the statements and the viva voce evidence be tested. The State also argues that the section 204 witness would indicate during the trial why his second statement differs in certain respects from his initial statement.

[14] Mr Rudolph further asserts that the applicant is seeking this Court to make credibility findings that it cannot make as the section 204 witness did not testify before this Court. The State urges further that; if a section 204 witness disavows a previous statement made, that does not render it impossible for the State to proceed with prosecution against an accused implicated by such 204 witness.

[15] Mr Booth presented a counter argument to the State's submission and stated that there are no eyewitness accounts that place the applicant on the scene. Hence, it is the applicant's claim that due to the recanting statement there is insufficient evidence.

Evaluation

The change in applicant's personal circumstances

[16] As far as one can tell, it is well established canon that arbitrary deprivation of liberty is unacceptable. It should be noted that, apart from our Constitution's provisions that have measures that seek to ensure that the liberty of a person is protected, it is also paramount in terms of international law and human rights law, that there should never be arbitrary deprivation of liberty.

[17] Pre-trial detention has inherent disadvantages for an accused person and excessive trial delay exacerbates them.

[18] Deprivation of liberty is a grave violation of a very fundamental human right. Thus, it is of utmost importance that there should be valid grounds that justify the departure from a constitutional order and a continued deprivation of an accused person's liberty. No one can deny that the life of the applicant has been on hold since his incarceration and the delay in bringing the matter to trial causes some inherent prejudice.

[19] As it turns out, the applicant avers that Capitec Bank has issued a warning that his bank account will be closed unless he updates his FICA details. According to the applicant, he can only be able to update his FICA details by attending the bank

in person. The applicant further asserts that should his bank close his account this would jeopardise his family's well-being.

[20] Indeed, it was in this vein that, as I have previously observed, no one can deny that the time spent in custody awaiting trial is bound to cause certain disruptions in the applicant's life including his family and might place them at a disadvantage.

[21] The State is strenuously opposing this ground of the application. It is contended by the State that at no point was any postponement in this matter attributed to the State. Further, the State vehemently denies that prosecutors have been changed, and such change caused a further delay, that led to the pre-trial conference to be postponed to 23 May 2025. I bear in mind the importance attached by to the liberty of an accused person. In terms of section 12(1)(a) of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution"), a person cannot be deprived of his or her freedom arbitrarily or without just cause. Furthermore, the Constitution requires that an accused person should be released if it is in the interests of justice to do so.

[22] The first point of departure is that the initial bail court and the appeal court were of the view that the applicant's detention was necessary pending the finalisation of his trial. Obviously, the initial bail court struck a balance between the interests of the state vis-a-vis the liberty interests of the accused. As a result, its decision was confirmed by the appeal court. Thus, it cannot be said that there was arbitrary deprivation of the applicant's liberty. It does not follow either that the continued detention is automatically justified.

[23] At this point, I hasten to state that the immediate consequence of bail refusal is that an accused person is unable to live his normal life. It is very well-established that the detention of an accused person always comes with unfortunate and horrible consequences. Hence, there should be adequate justification for the limitation of the precious right of liberty. An accused person should be released if it appears that it is absolutely necessary and it is in the interest of justice of justice that the accused should be released.

[24] In *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), the Constitutional Court in para 17 stated the following:

“The phrase “interests of justice” denotes an equitable evaluation of all the circumstances of a particular case. In that evaluation an important test is whether the individual’s position is substantially better or worse under the final Constitution than under the interim Constitution.”

[25] In this case, it is difficult for the applicant to say he should be released from custody in order to go and sort out his banking business. The applicant is facing serious charges of violence. Surely, it would not be in the interest of justice to remove him to go and tend to his banking affairs whilst he is facing serious violent charges. Moreover, the fact that his ongoing detention affects his banking affairs in the context of this case does not mean that the applicant has set out a new fact. It is an inherent consequence of his detention, that even existed during the initial

bail application. In *Sanderson* (*supra*), these types of prejudice were called 'the non-trial related prejudice suffered by an accused'. According to Krigler J [in *Sanderson*], the central questions presented by this particular prejudice is whether a particular lapse of time is reasonable.

[26] In the *Sanderson* matter, the Constitutional Court further stated the following:

"The profound difficulty with which we are confronted in this case is that an accused person – despite being presumptively innocent – is subject to various forms of prejudice and penalty merely by virtue of being an accused. These forms of prejudice are unavoidable and unintended by-products of the system. In *Mills*, Lamer J explained that

"[a]s a practical matter . . . the impact of a public process on the accused may well be to jeopardize or impair the benefits of the presumption of innocence. While the presumption will continue to operate in the context of the process itself, it has little force in the broader social context. Indeed many pay no more than lip service to the presumption of innocence. Doubt will have been sown as to the accused's integrity and conduct in the eyes of family, friends and colleagues. The repercussions and disruption will vary in intensity from case to case, but they inevitably arise and are part of the harsh reality of the criminal justice process."

In addition to the social prejudice referred to by Lamer J, the accused is also subject to invasions of liberty that range from incarceration or onerous bail conditions to repeated attendance at a remote court for formal remands. This kind

of prejudice resembles even more closely the kind of "punishment" that ought only (and ideally) to be imposed on convicted persons".

[27] The important principle at play in this matter is to determine whether the continued detention of the applicant is justified. I am mindful that a key consideration for this Court in this application is that I must have regard to the impact and the reasonableness of the delay. However, I will later in this judgment discuss the aspect of the delay.

Strength of the State's case

[28] It is self-evident from the applicant's argument that amongst others, he attacks the strength of the State's case on certain aspects. It is true that an accused person should not be kept in custody awaiting trial unless there is a good chance of the State securing conviction. After all, when the State seeks or manages to have an accused person detained without bail pending the finalisation of the trial; the State must justify such detention. Hence, it follows that there is an evidential sufficiency test that is a hurdle that the State must surmount to be able to secure the detention of an accused person awaiting trial. As a logical corollary, the strength of the State's case is one of the factors of the justifications.

[29] Accordingly, the strength or weakness of the State's case is significant during bail proceedings. As a result, during bail application, the State must not fail to meet the standard of raising a *prima facie* case against the accused.

[30] Prima facie case is the test that should be satisfied. The prima facie case speaks directly to the strength of the State's case. It is clear; therefore, the strength of the State should not be based on speculation. In *P.M. and Others v S* (A59/2024) [2024] ZAGPJHC 875 (9 September 2024) the following was stated regarding the strength of the State's case:

“When the State has either failed to make a case or has relied on one which is so lacking in detail or persuasion that a court hearing a bail application cannot express even a prima facie view as to its strength or weakness the accused must receive the benefit of the doubt”.

[31] There is no doubt that the existence of a recanting statement presents considerable odds in the prosecution's case. Undoubtedly, the strength of the State's case is now called into question.

[32] It is appropriate at this stage to say something about the presumption of innocence. It should be observed that, according to the Constitution's principles, the bail court is deeply concerned with the right of a person who is presumed to be innocent, whose right to liberty is at stake. However, despite the right to be presumed innocent, there are instances where an accused person has to be detained pending the trial.

[33] As far as the section 204 witness is concerned, it is not in dispute that the 204 witness's new statement is substantially at variance from the 204 statement on material facts.

[34] According to the applicant, this recent discovery discloses and presupposes that the State's evidence is insufficient to support the convictions because the section 204 account cannot be credible.

[35] Ordinarily, the prosecution does not proceed with the case if there is no reasonable prospect of a conviction being secured on the available evidence. The question that the applicant seeks this court to decide is whether the discovery of the new evidence affects the State's prospects of securing a conviction.

[36] I wish to emphasise at the outset that it is important to note that it is now settled that the bail court is not tasked with the task of making provisional findings of guilt when considering bail, but to assess the *prima facie* strength of the State's case. I stress again, though the State is not required to prove its case during bail proceedings, the strength of the State case is a relevant factor in determining whether the applicant can be admitted on bail. In *S v van Wyk* 2005 (1) SACR 41 (SCA), it was stated that in order to successfully challenge the merits of the State's case in bail proceedings, the applicant must prove on a balance of probabilities that he will be acquitted (*S v Botha* 2002 (1) 222 SCA at 23H; *S v Mathebula* 2010 (1) SACR 55 (SCA)).

Credibility of a witness

[37] As noted earlier, the bail court's obligation is concerned primarily with the assessment of whether the State has the necessary minimum evidence to establish the crime/s preferred against the accused person. Of course, this begs the question as to whether there is likelihood that the recanting statement might be credible. In the circumstances, the existence of the recanting statement by necessity implicates the credibility of the state witness. Thus, the recanting statement has a potential of seriously undermining the credibility of the section 204 witness.

[38] As far as the recanting statement is concerned, the State is skeptical about it. According to the State, it has other evidence that calls the truthfulness and the reliability of the recanting statement into question. Furthermore, the State contends that there is additional evidence besides the recanted affidavit.

[39] Notwithstanding the fact that the strength and weakness of the evidence of the section 204 witness depends on the view to be taken of the witness's reliability; it is not for the bail court to weigh the evidence, to do so would be to usurp the task of the trial court. In addition, the trial court would need to consider the recanting statement in light of all the other evidence presented before it and the totality of the circumstances. I unhesitatingly accept that this is a province of the trial court.

[40] Issues arising from the credibility of a witness are always in the trial court's domain. It is also trite that it is for triers of the facts who are tasked with the difficult task of judging the credibility of a witness and determining the weight to be

attached to it. This is because the trial court also has the opportunity and advantage to observe them as they testify. It is clear therefore that the credibility of the 204 witness would be one of the primary considerations during the trial.

[41] Moreover, this Court does not have the latitude that the trial court would have. At this stage, this Court cannot say that the section 204 witness account is unworthy of belief or inherently not credible. It is not for this Court to determine that the recanting statement undermines the credibility of the 204 witnesses. This Court cannot make factual findings. As I have already mentioned, the task of this Court is limited to ascertaining the sufficiency of the State's case.

[42] It follows from all these considerations that there is an underlining sharp distinction between, on the one hand, the existence of a *prima facie* case and, on the other hand, the credibility and the reliability of the *prima facie* case. At the cost of repetition, the court hearing a bail application does not make factual determinations or evaluate the credibility.

[43] It is well to bear in mind that the question that arises here is whether the applicant is supposed to be released on the basis of recanting account of a key State witness. Obviously, the fact that the State, amongst others, relied on a section 204 witness played a role in deciding whether the applicant proved on balance of probabilities that he would be acquitted at the trial. It is therefore particularly important to remember that it is only when the matter actually comes on for trial that it will be possible to decide which statement of the section 204 witness to believe. It is well known that the evidence can come out very differently in court

from how it comes across in the police docket. Evidence can be undermined or strengthened by trial tools such as cross-examination.

[44] As far as the section 204 witness is concerned, it is not in dispute that he has recanted his original statement. As mentioned previously, the State holds the view that the reason behind the recantation is an attempt to obstruct the course of justice. Of course, as I have mentioned earlier, it is the duty of the trial court if called upon to do so, to determine whether the account of recantation is true or false. It is clear, therefore, that, at this juncture, the fact that the section 204 witness has recanted his [purported] account on an affidavit that he had deposed to, suggests that one of the statements is false. However, recantation by a state witness before the trial hearing does not necessarily mean that the accused is going to be acquitted. Whatever else might be said about the recanting statement depends upon the trial court's findings. Thus, at this juncture no actual proof may be given to any of the two statements.

[45] It is only when the matter actually comes on for trial that it will be possible to decide which version of the 204 witness to believe. To that end the trial court is the best court equipped to determine whether the recanting affidavit or testimony is reliable or truthful. It is the trial court's task to decide whether the recanting affidavit is some sort of perjury or newly discovered evidence, and to determine where the truth lies. In other words, it is the trial court that should determine as to which of the contradicting affidavits of the section 204 witness is credible.

[46] The 204 witness must still be challenged with the circumstances of his first statement. It is only during the trial proceedings that he would be asked whether he made such statements and be afforded an opportunity to explain them. The fact that the section 24 witness has made inconsistent statements does not necessarily mean that the trial court cannot find that there is an acceptable explanation for the inconsistencies or the otherwise unexplained recanting statement.

[47] It is as well to remind oneself at this stage that, after all, the credibility of every witness that testifies in a criminal trial, is open to question. As such, no witness is clothed with the indicia of credibility or reliability before the assessment of his or her testimony. As mentioned previously, of special importance in this case is the fact that it is the trial court that has duty to assess the weight to be accorded to the testimony of the 204 witness. Though, it appears that the credibility of the section 204 is crucial to the State's case, the credibility of the recanting affidavit still needs to be proved.

[48] As such the applicant cannot expect that this Court should simply take the recanting affidavit at face value. It is not for this Court to make a finding that the State's case is based upon a falsehood.

[49] There is thus a difference between newly discovered evidence and a recanting affidavit. No doubt the trial court that would hear all of the evidence would be able to conclude as to whether the recantation is meant as an endeavour to free the applicant from his charges.

[50] What is more, the applicant would like for this Court to believe that the recanting statement is a correction of the false affidavit. The existence of a recanting statement does not say, however, that an accused person is automatically entitled to be released. It also does not render the original statement automatically unworthy of belief. The contradictory statements do not affect the competency of the section 204 as a witness. And when the trial court has weighed up all the evidence and the credibility of the witness, may determine the sufficiency of the evidence.

[51] Before, an accused person can be released on bail based on new facts, it should be clear that the recanting statement would probably lead to an acquittal.

[52] At this juncture, I am not persuaded that the recanting statement lowers the strength of the State's case to a level less than it was before. Thus, it does not form a new fact.

Delay in the commencement of the trial

[53] Mr Booth had a yet further string to his bow, in case he fails in his first submissions. The applicant contends further that the delays in the commencement of his trial constitute new facts that warrant his release on bail. It is asserted that the applicant's constitutional right to a timely trial is being breached. It is common cause that on 22 June 2022, the applicant's matter was transferred from the Regional Court to this Court for trial.

[54] In *Sanderson* the Constitutional Court sounded a clear warning on approaching the use of foreign precedent by stating the following:

“Nevertheless, the use of foreign precedent requires circumspection and acknowledgment that transplants require careful management. Thus, for example, one should not resort to the Barker test or the Morin approach without recognising that our society and our criminal justice system differ from those in North America.”

[55] Most significantly for present purposes, it is so that unlike other jurisdictions, in South Africa, there are no time limits on pending trial or time limits upon which an accused person is supposed to be kept in custody. Instead, we have a procedure as contemplated in section 49(G) of the Correctional Services Act, Act 111 of 1998, that provides that the detention of remand detainees should not exceed a period of two years without the matter being brought to the attention of the relevant court by the Head of the Correctional Centre. The court would then determine as to whether the interest of justice warrants a further detention or release of an accused person. If the accused person is not released, then he should be brought again before court on an annual basis for reconsideration.

[56] Despite this, prolonged detention of an accused person may call the constitutionality of the detention into question.

[57] Krigler J, in *Sanderson supra* further states the following:

"It would be equally unrealistic not to recognise that the administration of our whole criminal justice system, including the law enforcement and correctional agencies, are under severe stress at the moment."

[58] It is settled that a delay that occurs between arrest and trial implicates the constitutional right to a speedy trial. Section 35(3)(d) of the Constitution guarantees justice that is administered speedily and without delay. Thus, in a constitutional democracy a prompt access to court is indispensable.

[59] Article 14 (3) (c) of the International Covenant of Civil and Political Rights [Adopted 16 December 1966 Entered into force 23 March 1976] entrenches the right to be tried without undue delay. The consequences of a lengthy delay before trial are without doubt harsh, especially for an accused person who is in custody. It is an unfortunate reality that delays always haunt the administration of justice. Hence, we have these much-cited ideals in the criminal justice system, "justice delayed is justice denied" and "justice is sweetest when it is freshest".

[60] In the Sanderson matter, the Constitutional court further stated the following at paragraph 30:

"The test for establishing whether the time allowed to lapse was reasonable should not be unduly stratified or preordained. In some jurisdictions prejudice is presumed – sometimes irrebuttably – after the lapse of loosely specified time periods. I do not believe it would be helpful for our courts to

impose such semi-formal time constraints on the prosecuting authority.
That would be a law-making function . . .”

[61] Pre-trial detention goes hand in hand with bail refusal. However, the detention should not be unreasonable. In Sanderson, the Constitutional Court stated the following:

“Be that as it may, adjudication of claims under section 25(3)(a) requires an assessment of whether there has been a trial within a reasonable time. Reasonableness is not a novel standard in South African law. Here, as in the common law context, one makes an objective and rational assessment of relevant considerations.”

[62] Surely, the absence of a trial date does not in itself warrant an accused person to be released on bail. The delay in the hearing of this matter is not by any means related to the investigation of the case.

[63] Mr Booth suggests that the lack of a trial date is a new fact that warrants the applicant to be released on bail. This Court cannot deny that there has been a lengthy delay in bringing this matter to trial. But the ‘delay’ cannot be determined in the abstract. It must be determined in relation to a set of facts and the accused person’s circumstances.

[64] Importantly, for this case’s present purposes, I observed that it does not follow, axiomatically, however, that the applicant is entitled to be released on bail merely because the resources available do not allow an allocation of trial date.

[65] Of special importance in this case is the fact that it can happen that there are also reasonably unforeseen and unavoidable circumstances that may lead to inordinate delays. For instance, the complexity of a matter or an unexpected development that may lead to a delay. In *Sanderson*, it was stated that the question is not whether the accused person wants to go to trial, but whether he has actually suffered prejudice as a result of the lapse of time.

[66] In 2020, the world was facing a pandemic caused by a novel coronavirus, SARS-CoV-2, responsible for an infectious respiratory disease called COVID-19. Lockdown was imposed as an emergency measure to prevent the spread of COVID-19.

[67] It is not difficult to understand why COVID-19 has been described as one of “exceptional and unforeseeable circumstances”. The pandemic called for exceptional steps to be taken to curb the spread of the virus. In light of the measures that were put in place to curb the spread of the virus, the pandemic became a burden on already overburdened trial courts. Thus, there are exceptional circumstances that justify a period of delay including the COVID-19 pandemic. Exceptional circumstances are unusual events beyond control of the court or authorities. They are reasonably unpredictable circumstances or unavoidable occurrences that impair a court's ability to swiftly commence and dispose of a trial.

[68] In *Sanderson*, the Constitutional Court stated that for a certain period of time, systemic factors are probably more excusable than cases of individual dereliction of duty.

[69] I recognise that this is not a new problem. In the case of *Lifman v Director of Public Prosecution Western Cape* 2024 (1) SACR 188 (WCC) (27 November 2023), the applicant applied to amend his bail conditions on new facts. The applicant raised two grounds in support of the application: First, that there will be an inordinate delay before the trial against him commences. The applicant further averred that the trial of this matter was initially scheduled for hearing from 28 February 2022 to 24 March 2022. The date was not adhered to, and the matter was further enrolled for hearing from 24 July 2023 to 30 September 2023. Regarding the inordinate delay, the investigating officer of the case testified inter alia, that the effect of COVID-19 had adversely affected the functioning of the High Court and caused a huge backlog in this court, which has not yet been cleared and ultimately led to the 6 remand of the matter for trial. Lekhuleni J, in his findings, was not satisfied that it was in the interest of justice to grant the application for the amendment of applicant's bail conditions.

[70] It is always desirable that a case should be brought to trial as quickly as reasonably and fairly possible. In this matter, it cannot be contended that the prosecution did not act with all due diligence and expedition to bring this case to trial. The applicant is on a cusp of getting a trial date.

[71] The intricacies of the criminal justice system and the competing pressures and burdens it faces are always there. It is a fact that the future always brings new and unexpected challenges.

[72] I take judicial notice of the pandemic and its ongoing effects on institutional resources such as the courts' roll. I venture to say, that in almost all the courts within the country, the pandemic created an increment of case load of its own. As such, the backlog created by the pandemic has overtaken the limited court resources. As a result, the increase in case load forced the courts to devote the scarce court resources to it.

[73] This has imposed demands beyond capacity. The avalanche of cases precludes the courts from adhering to a mandated timetable. This had unfortunate consequences of its own in terms of scheduling trial dates. Obviously, this should be exceptional, not routine, because the constitutional right of the accused person is impacted.

[74] Undeniably, COVID -19 had an unimaginable, serious and far-reaching impact and consequences on the administration and functioning of the criminal justice system. It also had numerous impacts upon how courts operated. The unfortunate part of the impact of COVID-19 is that it is not limited to those periods of time when the court had to adjourn scheduled cases or when trials were suspended.

[75] As a consequence of the introduction of measures to prevent the spread of the pandemic, the High courts were not spared from this, as they were also severely

affected by the pandemic. As a result, a large backlog of cases was created. Accordingly, in view of the foregoing, the lockdowns resulted in a situation that led to matters not being heard and other pre-trial procedures being delayed. For instance, attorneys could not consult with their clients.

[76] The courts were under extreme pressure due to mounting backlogs and ever-increasing caseloads. This placed an additional burden and pressure on the speed of finalising trials. It also inadvertently led to excessive delays in processing cases.

[77] It is true that when something like this [COVID -19] happens, together with an already existing ever-growing demand on the criminal justice system, there would be a huge ripple effect even on well-run institutions. As a consequence, the delay has had adverse repercussions with regard to the accused persons [particularly those who are detained in custody awaiting trial] and interest of society. Hence, I will have grave difficulty in understanding how in the circumstances it can be said that this type of unforeseen delay makes the applicant's continued detention unjustified. Such an argument will ignore the fact that the pandemic unfortunately set a new pace of criminal litigation. Accordingly, there was an inherent delay.

[78] In my mind there is justification as to why the trial has not commenced. Put differently, the delays in this matter are excusable. This Court also attaches weight to the fact that this Division responded to the unpredictable circumstances to reduce further delays caused by the pandemic. Since the pandemic, to avoid delays, in the interests of justice, trials are heard at special designated venues.

See *Davids v S* 2022 (2) SACR 544 (WCC) (28 July 2022). Various circuit courts were opened to deal with the backlog.

[79] There is an effective case flow management and case processing system in place. In this division there is data collected on the affected cases, the status of these cases, and age of the cases. Thus, it cannot be said that the backlog is attributable to the court's mismanagement.

[80] The objective of criminal proceedings is to determine the guilt or innocence of the accused person. To that end public interest demands an unrelenting search for the truth and to bring a case to finality. When regard is had to the issues, in relation to the interests of justice, I am satisfied that it would not be in the interests of the administration of justice to find that delay in bringing the matter to trial constitutes a new fact.

[81] In view of the foregoing this Court is of the firm opinion that in this matter, it cannot be said that there is no longer a 'just cause' behind the accused's detention. Though the prolonged detention of the applicant is regrettable, it cannot be said that the delay is unreasonable as such, it amounts to a new fact that warrants his release.

[82] In the determination of reasonableness of the delay, the Constitutional Court, in the Sanderson matter, further observed that there is some proportionality between the kind of sentences available for a crime, and the prejudice suffered by the accused person. Pre-trial incarceration of five months for a crime, the maximum

sentence for which is six months, clearly points in the direction of unreasonableness. In the present case, as far as reasonableness is concerned, the proportionality between the sentence the applicant is facing and the prejudice suffered is of no greater moment, as the applicant is facing life imprisonment if he is convicted. Further, the applicant in this case did not adduce evidence to show that the average systemic delay for this Court had been exceeded. I am in total agreement with the *Sanderson* matter, that in the absence of such evidence, courts may find it difficult to determine how much systemic delay to tolerate.

Conclusion

[83] In light of the above, it is evident that the applicant failed in the three issues that he raised. In the circumstances, the applicant failed to satisfy this Court that there are new facts that justify his release from custody pending the finalization of his trial.

[84] In the result, the following order is granted:

82.1 The applicant's application to be released on bail is hereby dismissed.


Judge C.N. Nziweni
Judge of the High Court

APPEARENCES:

For the applicant :

Mr William Booth

For the respondent :

Adv D Rudolf

Instructed by :

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