REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

30 July 2019 .....

CASE NO: A80/19

In the matter between:

THANDILE FIKENI **APPELLANT**

And

THE STATE **RESPONDENT**

J U D G M E N T

GRANT, AJ:

INTRODUCTION

[1] The bail application was rejected by the court *a quo* and the above Honourable Court is called upon to determine whether the learned Magistrate erred in refusing bail.

BAIL APPEAL

[2] I am informed, of course, ultimately by the Constitution of the Republic of South Africa,1996 (hereinafter referred to as the Constitution). I am informed in particular by the imperative specified in section 39(2) of the Constitution of the Republic of South Africa which reads as follows:

> 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

[3] The Constitutional Court took account of this provision as it applied then to the common law in the matter of *Carmichele v the Minister of Safety and Security and Another.*[1] *Carmichele* concerned the failure of police and prosecution[2] for their failure to protect a woman who was being stalked by a repeated sex offender.[3]

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[1] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC). Judgment by Ackermann et Goldstone JJ for a unanimous court (Chaskalson P, Kriegler J, Madala J, Mokgoro J, Ngcobo J, Sachs J, Yacoob J, Madlanga AJ and Somyalo AJ concurring).

[4] The Court was seized with the question of whether to develop the common law test of wrongfulness to include the apparent negligent failure of the SAPS and prosecution to safeguard various complainants and ultimately the ultimate complainant in this case, *Carmichele*. The complainant who was then, following on the failure of the SAPS and prosecution to act, brutally attacked and left for dead. She however survived and pursued a damages claim against the Minister of Police and the Minister of Justice and Constitutional Development. She succeeded in this case and the matter was referred back to the High Court to consider the facts. However, the critical point that was decided in this case was that the test for wrongfulness and unlawfulness had to change and had to be interpreted in light of the rights and values found in the Constitution. The issue in this case was specifically to take account of the fact that the complainant was a woman who sought the protection of the SAPS and the prosecution service – and ultimately, through them, she sought protection from our Courts.

[5] The Court in *Carmichele* proceeded by taking account of the fact that special protection must be afforded to woman, in particular, as a vulnerable category in our society. Not only did this follow from our constitutional jurisprudence and our Constitution[4] but also by virtue of our international law obligations taking account of

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[2] The conduct of the Magistrate in this case was not challenged – but it appears that the court would have been prepared to entertain such a challenge (see ibid paragraphs 70-71).

[3] See paragraphs 5-24 of ibid.

[4] Sections 7(1), 8(1), and 39(2) of the Constitution of the Republic of South Africa.

the Convention on the Elimination of All Forms of Discrimination against Women, ratified by South Africa on 15 December 1995.

[6] Our Constitution and our international obligations place us under an obligation to protect woman in our society. The Court observed:

> South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights.[5]

[7] It is quite plain that the Constitutional Court in *Carmichele* took this to be an injunction and imperative to discriminate, to treat men and woman differently as fair discrimination given the fact that woman had been subjugated for so long and that continues to be the case.

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[5] Original footnote: The Convention on the Elimination of all Forms of Discrimination against Women, commonly known by its acronym CEDAW, was adopted in General Assembly Resolution 34/180 on 18 December 1979. See arts 1, 2, 3, 6, 11, 12 and 16. The Convention was signed by South Africa on 29 January 1993 and ratified on 15 December 1995. The United Nations Committee on the Elimination of Discrimination against Women, which was established under the Convention, recommended in 1992 that:

> 'States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.'

See General Recommendation 19, UN GAOR, Committee on the Elimination of Discrimination against Women, 11th sess (1992).

[8] The Constitutional Court recognised that:

> ... [C]onstitutional obligations are now placed on the State to respect, protect, promote and fulfil the rights in the Bill of Rights and, in particular, the right of women to have their safety and security protected.[6]

[9] The Constitutional Court went on discussing, in the context of sexual violence, the special obligation to protect woman:

> In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence.

[10] Regrettably, the law on bail has not been infused by this decision and to my knowledge; no court has interpreted the right to bail in line with or honouring this obligation. I do so now.

[11] I take account of the fact that the main complainant in this case, is a woman who is asking for protection from our criminal justice. I consider the various criteria that I must consider, but I am looking at them through the lens that is demanded of me by section our Constitution – as determined by *Carmichele*.

[12] Let me make it very clear, I am very aware of the fact that I am proposing different standards and I am clearly postulating that if the victim had been a man, my

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[6] *Carmichele*, paragraph 57.

decision may well have been different. In my view, that is what is demanded by fair discrimination.

[13] When I consider the factors that I must, and let me assure you, I have considered the sub-considerations to each of those factors listed in section 60(4) of the Criminal Procedure Act 51 of 1977, and when I weigh them up against the personal interests of the accused as set out in subsection 9, I believe that the court *a quo* was right to reject the bail application. I believe that it adequately considered the personal factors or considerations in favour of the accused but regarded them as insubstantial given the other risks.

[14] The court *a quo* could only, of course, have addressed the personal considerations that were put to it. If the evidence is consulted, it would appear that only two personal considerations were really placed before the court. The Court's attention was drawn to the fact that the appellant is the owner of a business, in addition, it was mentioned that he is the father of two children.

[15] I find it difficult to see how the court *a quo* could have otherwise engaged or addressed each of the subsections, as counsel for the appellant has required, because they are mostly utterly inappropriate. As per section 60(9)(a), the period which the accused had been in custody is not applicable as he had just been arrested. The Court addressed itself to the prospect of the trajectory of the case which is the consideration under section 60(9)(b). Section 60(9)(c) relates to the

reason for any delay – but there had been no delay because the Appellant had only just been arrested.

[16] Section 60(9)(d) relates to whether he would suffer financial loss. There was no suggestion of that. The only aspect placed on record was that he was the owner of a company with 17 employees. For the sake of completeness section 60(9)(e) relates to whether there would be any impediment to the preparation of the accused's defence. There was no suggestion of this put by defence counsel nor was there any evidence relating to the accused's state of health or presumably, his ill-health, put to the court - (under subsection 9(f)).

[17] In any event, the court clearly considered and dismissed all of the factors that could possibly favour the accused under one heading referring to them as his personal circumstances or interests and it is by no accident that they may be grouped as such. Under section 60(10) all of these considerations are grouped under exactly that name: "personal interests".

[18] Then as to whether I may or must take a view, the answer is: I absolutely must. This is provided for under section 60(2)(c) which provides that in bail proceedings the court may in respect of matters that are in dispute between the accused and the prosecutor, require the prosecutor or the accused, as the case may be, to adduce evidence. That is what has happened in this case and to propose that this court may not form a view of the picture that emerges from the conflicting evidence , because this is a bail proceeding, appears therefore to be clearly wrong.

[19] I say this however mindful of the fact that I am not called upon to decide the guilt or innocence of the appellant and that he remains presumed innocent. I am however required to form a view of what happened and has happened since, in order to answer the questions that are required of me under Section 60(4).

[20] I am required to consider whether there is a likelihood that the appellant if he is released on bail will endanger the safety of the public or any particular person or will commit a schedule 1 offence. Let me say in this respect that I do read this with subsection 60(4)(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. Based on the above, I have had to formulate a view as to the events as relevant to answer these questions. I have considered the affidavits, photographs, message printouts and a printout from the main complainant's phone indicating a call from the appellant's previous attorney that was placed before me.

[21] They are of course utterly irreconcilable, but I am placed in the difficult position that I must take a view as to whether for instance threats were uttered, without taking a view for the purposes of determining the guilt of the appellant.

[22] Whether threats were uttered during the conduct in question, I accept without question that the appellant indeed did utter threats to the effect that he intended to kill the main complaint based particularly on her affidavit to that effect. Her affidavit is largely supported by that of the co-complainant and without expressing a view as to his criminal liability and mindful of the fact that this decision

is one only for the purposes of answering the section 60(4) questions, it appears to me that the preponderance of probabilities favour the complainants version almost without exception but certainly in all material respects.

[23] I accept that the main complainant and the appellant's relationship ended and that the appellant was trespassing and in doing so harassing and intimidating the main complainant. The relevance of this goes to both subsection (a) and (c).

[24] When both complainants' affidavits and appellant's affidavit are taken account of and one takes account of the text messages where a very clear picture emerges - perhaps even clearer than necessary for my purposes. I again restrict myself to a balance of probabilities but when I consider the question whether the appellant is a threat, and he is supposedly a threat by virtue of the fact that he had trespassed on to the main complainant's property after their relationship had ended, one sees from the text messages a consistent picture with the complainant's concerns, one which is inconsistent with the appellant's version.

[25] The printout reads on 10 May 2019 at 1h00 as follows, 'why is your phone off'. On the appellant's version this is supposed to be to one's girlfriend and on the main complainant's version it is a text message from an estranged lover. This text message is far more compatible with her version. The text messages continue 'you fucking other guys', one should remember that this is somebody who needs us to believe on his affidavit that when he entered into her premises it came as a complete surprise to him that his 'girlfriend' was sleeping with someone else.

[26] The messages continue: 'really why you not at home' this is from somebody who on his version was completely surprised by his girlfriend now dating somebody else. She responded at 1h05 saying 'I'm here' again consistent with her version.

[27] Her version is supplemented by photos which show an individual and a person having been severely assaulted whereas the appellant submitted nothing, no J 88, no photo, no statement from anyone to the effect that he suffered any injuries whatsoever.

[28] The question is asked, if the complainants were assaulted as they claim, why did the police not arrest the appellant. Regrettably, our police often have their hands full and this comes as no surprise to anybody.

[29] There is also a picture of a door, again I'm not determining the appellant's guilt for the purposes of the criminal charges but it features and it's in dispute as to whether he is the sort of person who, if released on bail, would take account of legal or even physical barriers. The Complainants allege that the door was broken by the appellant. This was placed in issue and on a balance of probabilities, it seems to me consistent with everything I have before me to favour the version of both complainants. It appears to me – on a balance of probabilities - that the appellant had not been invited or not welcome at all but had used his access card to gain entry to the estate and broke the door to retrieve a key from inside. In addition, the second complainant's version continues to the effect that even in the presence of the police the appellant continued with his assault.

[30] I use the word assault advisedly, I am not finding him guilty, I do not purport to, it is a version of the facts which informs whether he should be regarded as a person who if released may commit another schedule 1 offence or interfere with the safety of the public of any particular person or will attempt to intimidate witnesses, conceal or destroy evidence and it appears to me quite clearly that this is the sort of person that, even if a police officer is standing right there, may well do just that.

[31] The main complainant goes on to explain how the appellant continued to hound her at the hospital and continued to attempt to visit her at her home. I reject the suggestion that he was doing so simply in an attempt to retrieve his belongings. When the learned magistrate questioned the appellant as to what belongings he required, he could only specify a toothbrush.

[32] It is my view, having considered all of the required considerations, in particular those mentioned in section 60(4)(a) through to (e) as elaborated in subsection 65 and weighing that against the appellant's personal circumstances which I believe the court *a quo* in fact did, and honouring the demands of *Carmichele,* that we need to start to create a society in which the woman amongst us are safe.

[33] I am prepared to say that if this interpretation creates a slight imbalance against a male accused person and in favour of protecting a female complainant, it is my view that that is demanded by the Constitution and by *Carmichele*.

[34] It is time that we live up to what we tell our children when we say you do not hit girls and we do not strike woman. The appeal is rejected.

IT IS THEREFORE ORDERED THAT:

1. Bail Appeal dismissed.

ACTING JUDGE GRANT

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING: **25 JUNE 2019**

DATE OF JUDGMENT: **25 JUNE 2019**

APPEARANCES:

FOR APPELLANT: WB NDLOVU

INSTRUCTED BY: ET PAILE INC ATTORNEYS

FOR RESPONDENT: ADV M MOKWATEDI

INSTRUCTED BY: NATIONAL PROSECUTING AUTHORITY