

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 10216/2020

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>30/04/20</u>	
Date	ML TWALA

In the matter between:

MARSLAND, TIMOTHY GORDON

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS,  
JOHANNESBURG

FIRST RESPONDENT

THE HEAD OF MODDERBEE  
CORRECTIONAL CENTRE

SECOND RESPONDENT

THE MINISTER OF JUSTICE AND  
CORRECTIONAL SERVICES

THIRD RESPONDENT

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## JUDGMENT

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### TWALA J

- [1] The applicant, a 53 year old man, brought an application before this Court on urgent basis seeking an order for his immediate release from the Modderbee Correctional Centre owing to, amongst others, a threat of being infected with the Coronavirus. It is only the first respondent who filed its opposition to this application.
- [2] It is worth noting at this stage that the founding affidavit in this case was deposed to by the attorney for the applicant. The reason advanced is that there is no access to the applicant as he is in detention and the Regulations published in relation to Covid-19 has curtailed the movement of people drastically. However, the applicant managed to depose to a confirmatory affidavit.
- [3] It is apparent from the record that the applicant was arrested and detained in July 2019 in Benoni under the provisions of section 5 of the Extradition Act, 67 of 1962. The applicant has on two occasions applied to be released on bail which applications were refused by the Magistrate. An appeal against the decision of the Magistrate refusing to admit the applicant to bail was launched with this Court and His Lordship Acting Judge van der Westhuizen dismissed the appeal. Then the applicant approached the Full Court of this Division seeking an order reviewing and setting aside the decision of the Magistrate authorising his further detention and this application was also dismissed by the Full Court. The applicant has however, petitioned the Supreme Court of

appeal in this instance and the appeal is now pending before the Supreme Court of Appeal.

- [4] The contentious issue in this matter is whether the matter is of such a nature that it deserves to be heard in the Urgent Court.
- [5] It is contended by Advocate Harms SC and assisted by Advocate Thompson that the applicant is bringing this application on urgent basis as the regulations in relation to Covid-19 provide for social distancing to avoid the infections of the virus and this is impossible in the crowded circumstances of the Modderbee Correctional Centre. Further, that the regulations prohibit the hearing of bail applications unless the applicant is appearing for first time in the Magistrate Court. Although there is no reported cases of any infections at Modderbee for now, so it was argued, there is a huge likelihood that there are cases of infection but because of lack of testing they have not been tracked.
- [6] It was argued further on behalf of the applicant that, because of his age and the underlying conditions in his health, he is most vulnerable to contract the virus and has no alternative remedy since his inhibitions predisposes him to death if he contracts the virus. What complicates things for the applicant, so it is contended, is the riots that are simmering in Modderbee and the applicant being a heavily built white male, will be the target in these riots. These are new facts which were not presented in the two previous bail applications. However, these facts cannot be presented before the Magistrate now due to the regulations of the Covid-19 prohibiting any bail application be heard unless it is the applicant's first appearance in that Court.
- [7] To put matters into the correct perspective, I deem it necessary to refer to the relevant Regulations of the Disaster Management Act, 57 of 2002 published

in the Government Gazette No. 43191 on the 31<sup>st</sup> of March 2020 which provides as follows:

*“Definitions:*

*‘Matter’ – means an urgent or essential court application and hearing including a bail application in case of first appearance of an accused person, or a matter which, if not enrolled during the state of disaster, will lead to substantial injustice;*

*Regulation:*

2. *Restricted access to the court, court precinct and all justice service points:*

(a) .....

(b) *Entry into the courts and court precincts may only be allowed in respect of urgent and essential matter.”*

[8] I am unable to agree with the applicant that this matter deserves the urgent attention of this Court because of the pending threat of the Coronavirus if he remains in prison. Firstly, the applicant is detained in terms of the law of general application – hence he is not in unlawful detention as contended by Advocate Harms. Secondly, much as the order of the Full Court of this Division has been appealed against, he is still detained in terms of the operation of the law until the order of the Full Court is set aside. It is therefore disingenuous of the applicant to attempt reliance on section 35 of the Constitution of the Republic of South Africa, 108 of 1996 (*“The Constitution”*).

[9] Section 36 of the Constitution provides the following:

*“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –*

- a) The nature of the right;*
- b) The importance of the purpose of the limitation;*
- c) The nature and extent of the limitation;*
- d) The relation between the limitation and its purpose; and*
- e) Less restrictive means to achieve the purpose.*

[10] It is apparent from the record that the applicant has, since his arrest and detention in July 2019, on more than one occasion failed in his attempt to be released on bail. Now the applicant is attempting to use the Coronavirus pandemic and the rioting in prisons as an emergency justifying it bringing this matter before the urgent Court. I hold the view that there is no urgency in this matter since the applicant is detained in terms of the law of general application.

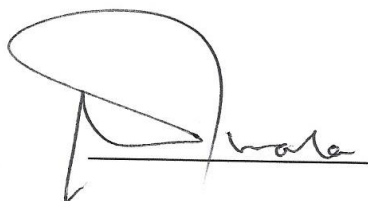
[11] I agree with Advocate Schutte for the first respondent that, since the issue of the coronavirus and the riots in prison was never raised in the previous two bail applications by the applicant, the applicant may bring another bail application in the Magistrate Court contending that there are new facts to be considered which entitles him to be released on bail.

[12] I do not agree with the applicant that it has no alternative remedy since regulation 2 only provides for accused persons who are making their first appearance in the Magistrate Court to apply for bail. As indicated above, the

regulation provides for a matter which, if not enrolled during the state of disaster, will lead to substantial injustice. The irresistible conclusion is therefore that it is for the applicant to demonstrate to that Court that it will suffer substantial injustice if the matter were not to be heard during this time of the lockdown.

[13] Having regard to the foregoing, I am of the considered view that applicant has failed to demonstrate that this matter is urgent and therefore falls to be struck from the roll for lack of urgency.

[14] In the circumstances, I make the following order:  
The matter is struck from the roll for lack of urgency.



**TWALA M L**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION**

**Date of hearing: 29<sup>th</sup> April 2020**

**Date of Judgment: 1<sup>st</sup> May 2020**

**For the Applicant: Adv C Harms SC  
Adv CE Thompson**

**Instructed by: De Vries Attorneys  
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**For the first  
Respondent:**

**Adv P Schutte**

**Instructed by:**

**Director of Public Prosecutions,  
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