REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

CASE NO: A211/2019

DATE OF HEARING: 2020/01/16

(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
(3)	REVISED.
PP	12/02/2020 .....
SIGNATURE	**DATE**

In the matter of:

KATLEGO NKONOANE — **FIRST APPELLANT**

BAFANA DLAMINI — **SECOND APPELLANT**

and

THE STATE — **RESPONDENT**

JUDGMENT

N N Bam AJ

1. This is an appeal against the decision of the Magistrate's Court for the district of Ekurhuleni North, held at Tembisa.

2. Broadly stated, appellants were charged with robbery with aggravating circumstances (in that a firearm had been used); possession of unlicensed firearms and live ammunition (live ammunition in the case of the first appellant); and possession of stolen property. It is common cause between the parties that the offences reside within schedule 6 of the Criminal Procedure Act, CPA[1]. Thus, the appellants both undertook the Herculean task of adducing evidence to satisfy the court that exceptional circumstances existed, which in the interests of justice permitted that they be admitted to bail. The two appellants had employed one counsel to represent them. The state on the other hand opposed bail. Neither party tendered *viva voce* evidence and so evidence before court was placed by way of affidavits. The court *a quo* was not satisfied that the appellants had discharged the onus and refused bail.

3. Fresh bail proceedings were launched once again during September 2019 on the basis that new facts existed. The court once again dismissed the bail application not

[1] Act 51 of 1977

without observing that there was, in fact, no new evidence other than an unsubstantiated allegation that the investigating officer was not opposing bail.

4. The appeal in this court is founded on three points. They can be phrased as: the court *a quo* had not properly exercised its discretion; the state's case is weak, thus exceptional circumstances exist; and the investigating officer did not specifically opposed bail. On behalf of the state it was submitted that judicial discretion was properly exercised; the appellants had failed to discharge the onus placed on them by law, thus the bail appeal ought to be dismissed.

5. It perhaps may assist to first sketch out the background to the charges: On 1 March 2019 at about 20h00 the complainant was robbed at a tuck shop in Ivory Park at gunpoint. On 29 May 2019 the investigating officer received information from an informer which led him to the home of the first appellant in Tembisa. A search of his home yielded the recovery of the key to the stolen motor vehicle, a Nissan SP 200, (Nissan) and two firearms, both of which were found under the appellant's bed where he was sleeping. One of the firearms was linked to a reported case of a robbery and stolen firearm under Rabie Ridge, case number 159/11/2018. Upon being interviewed, first appellant led the police to the home of the second appellant in Tembisa. A firearm with a filed off serial number was recovered under the pillow where second appellant was sleeping.

6. Further enquiries with the two appellants led the police to a place known as 204 Makolong in Tembisa where the Nissan, was parked in the home of one Anelle Thasi-

yane (Anelle). Anelle informed the police that he rents out parking to anyone at the rate of R500 per month. He further informed the police that the vehicle had been parked there by two of his friends. As he was explaining, the two appellants passed by and he pointed them out to the police. All three were taken to the police station.

7. On 30 May 2019 an identification parade was arranged where the first and second appellant were identified by the complainant. They were subsequently charged as mentioned in paragraph 2 of this judgement.

8. The version proffered by the appellants differed in material respects to that of the state. Electing to disclose the basis of his defence, first appellant avowed that on the night in question he was asleep at home with his girlfriend when the police came in and began searching his home. When the search had yielded nothing, they went to a backroom, which is rented by one Mabena who was not there at the time, and found weapons. The police asked him to take them to his friend, the second appellant's home. They asked them about a stolen vehicle. They both did not know anything about a stolen vehicle. They were then both taken to Mokolong section where the police found the stolen vehicle. There they were assaulted, and the police took their photographs using mobile phones. The police, according to the appellants informed Anelle that he should implicate them because the police 'wanted them' (referring to the two appellants). They were transported to the police station where they protested before the identification parade was carried out.

9. During the bail application, and in addition to dealing with the information pertaining to the requirements of section 60 (4) (a) to (e) of the CPA, the following important information emerged from the first appellant's affidavit: he was 27, had three children who resided with their mother, and he resided in his sister's house. He is self-employed and is able to generate between R4000 and R5000 per month. He has a previous conviction of robbery in respect of which he was sentenced to one year. According to the first appellant, the state's case is weak. He vowed to plead not guilty should the matter proceed to trial. He concluded that he had shown that exceptional circumstances exist. He further conveyed to the court that he could raise an amount of R2000 for bail.

10. Second appellant's affidavit was drawn along the same lines as that of the first. He stated that he is 32 years old, he resides in his mother's house and has been residing there since he was born. He has no previous convictions, pending charges nor outstanding warrants. He is self-employed with two children who reside with their mother. He avowed that he knew nothing about the robbery and stolen motor vehicle. He denied having been found with weapons. He too claimed that the police had told Anelle to implicate them, and confirmed they had been assaulted and that the police had their photographs before the identification parade using mobile phones . He concluded that the state's case is weak and accordingly drew the conclusion that he had demonstrated that exceptional circumstances existed which in the interests of justice permitted his release.

The law

11. Section 65 (4) of the CPA provides that 'the court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.'

12. It needs to be restated that a court, in entertaining the question of bail, exercises judicial discretion[2]. It was for the appellants to adduce evidence to **satisfy the court** that exceptional circumstances existed, which in the interests of justice permitted their release. What amounts to exceptional circumstances is to be judged according to the circumstances of each case[3].

13. While it is accepted that the thrust of bail proceedings is not the guilt or otherwise of the applicant, but possible guilt only in so far as it relates to where the interests of justice lie in relation to bail[4], it can ,in this case, be said that the state has made a prima facie case for the appellants to answer. Thus, the bald statement made that the state's case is weak cannot assist the appellant. Even if it is the court's view that the state's case is weak (which is not the case in the present application), it does not amount to exceptional circumstances. What is required is that the circumstances of the case weighed either individually or cumulatively, must determine whether excep-

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[2] S v Faye (A122/2008) [2008] ZAECHC 211; 2009 (2) SACR 210 (Tk) (24 December 2008) para 10
[3] Ntoni and Others v S (5646/2018P) [2018] ZAKZPHC 26 (21 June 2018), para 32
[4] S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat (CCT21/98, CCT22/98 , CCT2/99 , CCT4/99) [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771 (3 June 1999)

tional circumstances exist[5] . After all, an appellant who relies on the weakness of a state's case is required to go further and establish that he is likely to be acquitted[6].

Application

14. Three submissions were made in this court, namely, that the court *a quo* had not properly exercised its discretion; the applicants had discharged the onus resting upon them that exceptional circumstances exist in that the state's case is weak; and, lastly, the investigating officer was not opposed to bail. Beginning with the last submission, in the court *a quo*, counsel for the appellants had failed to substantiate this claim. In this court, nothing more was advanced other than the claim on its own. In any event, the question whether to grant bail or refuse it is a matter of judicial discretion which can never be decided solely on the basis of whether the investigating officer opposes, or supports, the grant of bail. The first two submissions take the case of the appellants no further as they are completely unsupported. I accordingly conclude that the applications in respect of the two appellants were appropriately dismissed and there is no basis for this court to interfere with the court *a quo's* decision.

ORDER

15. Accordingly, the appeal in respect of both appellants is dismissed.

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[5] S v Bruintjies (676/2002) [2003] ZASCA 4 (25 February 2003), para 6
[6] Mathebula and The State (431/09) [2009] ZASCA 91 (11 September2009, at para 12

NN BAM

ACTING JUDGE OF THE HIGH COURT,

GAUTENG LOCAL DIVISION

APPEARANCES

APPELLANTS:	**MKHONTO & NGWENYA INC** **144 MONUMENT STREET, LYTTLETON** **AVENUE, PRETORIA**
RESPONDENTS:	**DIRECTOR FOR PUBLIC PROSECUTIONS**
DATE OF JUDGMENT	**12 February 2020**