REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case no:ss133/17

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

DATE: 7/09/2020 SIGNATURE OF JUDGE

ISAAC DITHLAKANYANE **APLICANT**

and

THE STATE **RESPONDENT**

JUDGMENT

MTATI AJ

Introduction

[1] The applicant approaches this Court to be admitted to bail pending the hearing of his appeal. The application for leave to appeal was granted by the court *a quo* on 24

June 2015. A series of events took place frustrating the ultimate prosecution of the appeal. Indeed a sad state of events. The applicant applied to be released on bail soon after leave to appeal was granted which application was refused. He now approaches this Court on new facts submitting that the delay in prosecuting the appeal lies squarely on the hands of the Department of Justice and Correctional Service (DoJ).

[2] In this application the Court will consider if there are any new facts presented by the applicant which facts were non-existent in previous applications. Secondly, the Court will determine if the new facts are persuasive to admit the applicant to bail pending the hearing of his appeal.

Background facts

[3] The applicant was charged, together with nine others, in this division of the High Court with various schedule 5 offences including fraud, theft and other offences involving racketeering and money laundering. On 18 June 2015 the applicant was sentenced to 541 (five hundred and forty one) years imprisonment with the effective sentence being 50 (fifty years) direct imprisonment. Included in the charges preferred against the applicant was a charge of attempting to escape from Police custody wherein the applicant was sentenced to 4 (four) years direct imprisonment.

[4] In summary, the case for the State was that the applicant was a leading member of a syndicate that managed to steal almost R 2 million from various accounts held by members of the public with the Post Office. The syndicate, through the assistance of employees of the Post Office would obtain details of account holders and balances in each of the accounts. The details would then be used by the syndicate to open new accounts and issue cards and savings books through fraudulent identity books and

passports to deprive the rightful owners of their savings. The appellant with his co-accused used this methodology for a period spanning over three years.

[5] The new facts advanced by the applicant are that he has had no joy in obtaining the full transcribed record from the Director of Public Prosecutions (DPP). It is so that the applicant bears the responsibility to prepare the appeal record but the apparent rift between the DOJ and the then service provider who was contracted to prepare such records makes it impossible for the applicant to obtain the record.

[6] It appears from the correspondence filed of record that on 29 May 2017 the office of the DPP sent a five page list in their letter to the Registrar of this Court advising them of the incomplete record. Again on 12 February 2020 the office of the DPP sent a letter to the Registrar of this Court indicating that a complete record was still outstanding. The Registrar of this Court sent a letter of response to the DPP informing them that there *"...is an impasse between the department [DoJ] and the service provider regarding issues of procurement, which is unfortunate, because this office is bearing the brunt of all the delays."* It is also mentioned in the letter of the Registrar that the matter has been escalated to the highest authority within the DoJ. According to the applicant, the contract between the service provider and DoJ was terminated and this termination took place when he has paid for his records in full. I am satisfied that there have been reasonable efforts made by both the Registrar and the DPP to obtain a complete record to enable the appeal to proceed.

[7] The Court is not privy to the contractual relationship between the DoJ and the service provider suffice to say, if the applicant has paid for the transcribed record in full, it appears to me that a contractual relationship has been created between applicant and the service provider which entitles applicant to a right to his records. If I

am correct in my view, then the applicant has every right to enforce his right in obtaining the record from the service provider.

[8] The issue delaying the prosecution of the applicant's appeal is the administrative processes that the DoJ is engulfed in. The State's attitude is that the challenge facing the DoJ should not be an overriding factor in granting the applicant bail pending his appeal. It was also submitted to the Court that all the outstanding volumes of documents are now ready but for the resolution of the disagreement between the service provider and DoJ. On the other hand it was argued on behalf of the applicant that there is no certain date proffered on when the full record will be available.

Issues for determination

[9] In my view, the only issues for determination are:

9.1. If the applicant was able to persuade the Court on existent of new facts and, if so

9.2. are the new facts persuasive to conclude that it is in the interests of justice to admit the applicant to bail.

Evaluation

[10] The applicant applied for bail pending the hearing of his appeal after being granted leave to appeal against both conviction and sentence. It is not difficult to conclude that the skirmishes surrounding the availability of the transcribed record only came after the refusal of the bail application. I am persuaded therefore that the facts brought into the fore in this application are indeed new facts. However, the finding of existence of new facts are not by themselves indicative of a prospect to be admitted to bail. The applicant is still required to demonstrate to the Court that it is in the interests of justice

to be released on bail. I now turn to the requirements of section 60(4) which outline various grounds to be considered by the Court before the release of the applicant on bail.

Sec 60(4)(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;

[11] The submission by the State that the applicant has previously been found guilty of fraud was not disputed. He is accordingly a repeat offender.

Sec 60(4)(b) - Where there is a likelihood that the accused, if he or she were to be released on bail, will attempt to evade his or her trial;

[12] The applicant has been found guilty of attempting to escape after his arrest. I do not see why he will not attempt to escape especially after being released on bail with all opportunities to plan his escape. I am not persuaded that after attempting to escape from lawful arrest anything will change his mind with a better opportunity to do so. Furthermore, the applicant has now been sentenced to 50 years direct imprisonment.

Sec 60(4)(d) – Where there is the likelihood that the accused, if he or she were to be released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;

[13] It was found by the Magistrate in one of the bail applications that the applicant had lied together with his wife about the circumstances leading to the death of his step daughter. It in fact appeared that the real reason for her killing and the killing of his sister was as a result of other criminals who were threatening the applicant.

Sec 60(4)(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;

[14] It has already been mentioned before that the offences upon which the applicant was convicted relate to depriving of members of the public their hard earned savings. The majority of the persons whose monies were stolen are vulnerable people in the form of pensioners. The Post Office still needs to reimburse the victims of these crimes and it cannot be said the members of the public will not have a sense of shock in establishing that the applicant has been admitted to bail.

The legal position

[15] The release of the applicant on bail is governed by section 60(11)(b) of the Criminal Procedure Act, 51 of 1977 which provides that:

> *"(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-*
>
> *...*
>
> *(b) in Schedule 5, but not in Schedule 6, the court shall order that the accused 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 the interests of justice permit his or her release."*

[16] The Court has already dealt with various grounds that have to be taken into consideration in determining if it is in the interests of justice to order such release. The

Supreme Court of Appeal in the matter of ***S v Rudolph 2010 (1) SACR 262 (SCA) at paragraph 16*** had the following to say:

> *"When all the allegations are weighed up at least two of the grounds listed in section 60(4) have been established. In those circumstances the release on bail of the appellant is not permitted".*

[17] In the case before Court, I am of the view that the State has been successful in demonstrating that there exist four grounds which precludes this Court from releasing the applicant on bail. In the matter of ***S v Bruintjies 2003 (2) SACR 575 (SCA) at paragraph 6***, the Supreme Court of Appeal expressed its view on the likelihood or inherent risk of abscondment where a person faces a long term imprisonment and said:

> *"The court will also take into account the increased risk of abscondment which may attach to a convicted person who faces the known prospect of a long sentence".*

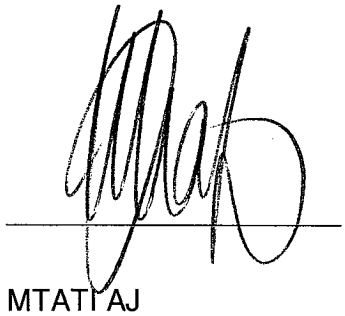
Conclusion

[18] The Court has looked at all the circumstances of this case and in particular the unfortunate delay in prosecuting the appeal which appears to be outside the control of the applicant. Indeed these are new facts that came to the fore after the granting of the leave to appeal. The Court hopes and trusts that the impasse between the DoJ and the service provider will be resolved as soon as possible. It is my view that the delay of prosecuting the appeal is tantamount to trumping the applicant's right to have his trial, in this case the appeal, being determined and finalised speedily.

[19] The Court has also looked at the various grounds as envisaged in section 60(4) in determining if the applicant should be admitted to bail pending his appeal. In

weighing up the reason for the delay together with all other factors as argued on behalf of the State, I am not persuaded that it is in the interests of justice to release the applicant on bail pending the finalisation of his appeal.

[20] As a result, the application for bail pending appeal is dismissed.



MTATI AJ

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING:26 AUGUST 2020

DATE OF JUDGMENT:07 SEPTEMBER 2020

APPEARANCES

FOR APPELLANT:ADV NGOBENI

FOR THE STATE:ADV VOS