

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

**CASE NO: SS013/2021**  
REPORTABLE  
OF INTEREST TO OTHER JUDGES  
REVISED  
DATE: 04/08/2021

In the matter between:

**W[....] C[....]**

First Applicant

**N[....] S[....]**

Second Applicant

and

**THE STATE**

Respondent

**JUDGMENT**

**MABESELE, J:**

[1] This is an opposed application for bail on the new facts. The first applicant is W[....] C[....]. The second applicant is N[....] S[....]. Both the applicants are in the employ of the South African Police Service. Amongst the charges the applicants are facing a charge of murder. This charge falls within the ambit of schedule 6 of the Criminal Procedure Act, 51 of 1977 in terms of which the applicants must show that the exceptional circumstances exist that justify their release on bail.

[2] The applicants were denied bail in the magistrate court on 22<sup>nd</sup> September 2020. Thereafter the matter was transferred to this court for trial. It is for this reason that this application is entertained in this court.

[3] This application is opposed on the two main grounds. The first ground is that the facts placed by each applicant before this court are not new. Secondly, the respondent argues that in the event the court is of the view that the facts are new, they do not constitute exceptional circumstances that justify their release on bail.

[4] It is trite law that if the application on the new facts do not constitute “new facts”, the application should fail without considering the old evidence presented in the earlier bail application. This is emphasised in *S V Vermaas*<sup>1</sup> as follows:

*‘Obviously an accused cannot be allowed to repeat the same application for bail based on the same facts week after week. It should be an abuse of the proceedings. Should there be nothing to be said the application should not be repeated and the court will not entertain it. But it is a non sequitur to argue on the bases that where there is some new matter the whole application is not open for reconsideration but only the new facts. I frankly cannot see how this can be done. Once the application is entertained the court should consider all the facts before it, new and old and on the totality come to a conclusion’.*

[5] The initial application was dismissed for the following reasons: (i) the likelihood that the applicant will interfere with the investigations and intimidate the witnesses (ii) the strength of the state case against the applicants (iii) the threats allegedly made by the second applicant against the first applicant. (iv) anger by the community of E[....] Park and the likelihood of disturbance of public peace (v) failure by the applicants to prove the existence of exceptional circumstances that justify their release on bail<sup>2</sup>.

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<sup>1</sup> 1996(1) SACR 528(T) at 531 e-f. See also, Vander Berg Bail- Practitioner’s Guide 3<sup>rd</sup> (2012) at 73

<sup>2</sup> Judgement of the court *a quo* (Case no: 43/795/2020)

[6] The first applicant argues that the police investigations have been finalised and the trial is set down for hearing on the 4<sup>th</sup> to 29<sup>th</sup> October 2021. She argues that since the dismissal of her initial application the mental health condition of her child has deteriorated. She explains the condition of her child as follows:

*'Since I was arrested, my child, K[....] W[....] had been struggling with extreme nightmares. Although she suffered from these before my main bail application, these attacks had now become debilitating. She is also being severely prejudiced by her peers for being my child as my case is receiving significant media attention. She is suffering from anxiety and because my income and medical aid is suspended, I cannot afford the necessary medical care for her. As a mother, I need to be there for my child and assist her to come to terms with what transpired on the events that occurred in our lives.*

*The child is struggling emotionally and it has now affected her school progress. If I were to be released on bail, I will be in a position to care for her and to assist her with her anxiety attacks. The reason for her anxiety is my absence and her fear and uncertainty regarding the future. I will approach FAMSA to assist my child and I in group therapy to deal with her emotions. My mother is too elderly and cannot take care of my child.....'*

[7] The first applicant says that she was placed on suspension without pay after the initial application failed and her suspension without pay affected her medical aid funds adversely.

[8] To sum up. The first applicant successfully raised the three issues which constitute the new facts. These are: (i) the police investigations which have been finalised (ii) deterioration of the mental health condition of her child which requires her urgent attention (iii) suspension from work without pay and its impact on her medical aid which her child would no longer have access to, thereby necessitates her release on bail so that she is able to see how best she can organise funds to assist her child.

[9] The question is whether these new facts constitute the exceptional circumstances for the release of the first applicant on bail.

[10] Our courts have refrained from providing an exhaustive definition of what constitutes exceptional circumstances. In *S V Jonas*<sup>3</sup> the court said the following:

*‘The term “exceptional circumstances” is not defined. There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused’s absence is one that springs to mind. A terminal illness may be another. It should be futile to attempt to provide a list of possibilities which constitute such circumstances,.....’*

[11] Obviously, the personal circumstances which are common cannot constitute exceptional circumstances for purposes of section 60(11) (a) of the Criminal Procedure Act<sup>4</sup>. Regard should be had though that the practice of culture, although common in certain communities, may constitute exceptional circumstances for the purposes of this section. What comes to mind is the need for the accused to participate in a family cleansing ceremony. However, this factor should be considered together with the other factors.

[12] The new facts raised by the first applicant in paragraph 8 above, without doubt, constitute exceptional circumstances. The first applicant intends pleading not guilty.

[13] It is beyond dispute that the state has a strong case against the first applicant in that she fired a shot at the deceased and killed him. However, this factor, weight against the new facts raised by the applicant is not sufficient to prevent her release on bail.

[14] The magistrate, in his judgement, was of the view that the detention of the first applicant protects her against the threats directed at her by the second applicant and the drug lords and community of E[....] Park. The magistrate said the following:

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<sup>3</sup> 1998(2) SACR 677(SEC) at 678 e-g

<sup>4</sup> 51 of 1977, as amended

*'The community in E[...] Park is up in arms and angry about the conduct of the three<sup>5</sup> applicants. The community demands answers as to why this young boy, innocent as he was, unarmed, was shot and killed. If released on bail I have no doubt in my mind that there is a likelihood that this will disturb public order and security. This is demonstrated by the level of anger in the community at E[....] Park. At some point members of the community went and marched to the police station threatening to set the police station alight.....'*

[15] The court should not succumb to the pressure of the community at the expense of the right of the accused to freedom. The duty of the court is to establish whether the interest of justice permits the release of the accused on bail based on the facts before it.

[16] In the present case the deterioration of the mental health condition of the child of the first applicant which requires urgent attention of the applicant constitutes exceptional circumstance which justify the release of the first applicant on bail. Anger and public outcry cannot outweigh the right of a child to parental care.<sup>6</sup>

[17] Similarly, the argument raised by the second applicant that the birth of his child whom he had not seen constitutes the exceptional circumstance that justify his release on bail has merit<sup>7</sup>.

[18] The concerns raised by the magistrate with regards to the alleged threat directed at the first applicant by the second applicant and others can be easily resolved by the first applicant by reporting the matter to the police.

[19] In the result, the following order is made:

1. The application for bail on the new facts is granted.

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<sup>5</sup> The third accused was released on bail before this application was launched.

<sup>6</sup> Section 28(1) (b) of the Constitution provides that every child has a right to family care and parental care.

<sup>7</sup> See note 6 above

2. The first applicant is granted bail in an amount of R 1000.00 (One thousand rand)

3. The second applicant is granted bail in an amount of R1000.00(One thousand rand)

4. Each applicant shall not interfere with the state witnesses.

5. The second applicant shall report to the Lenasia South Police Station every Friday between 8:00 and 16:00 until his trial is finalised.

6. The second applicant shall not leave the province of Gauteng without the permission of the investigating officer Mr Mathoko.

**M. M MABESELE**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

Date of hearing : 23 July 2021

Date of judgment : 26 July 2021

On behalf of first applicant : Adv. S.Tshivhase

Instructed by : No information in the papers.

On behalf of Second applicant : Adv. M. Mnyatheli

Instructed by : Feke-Myeko Attorneys, Johannesburg

On behalf of the respondent

: Adv. Badenhorst

Instructed by

: DPP, Johannesburg