

Case number: 2/2016

DATE: 15/9/2016

In the matter between:

SIBUSISO SEBEKO

1st Applicant

TEBOGO MAHLANGU

2nd Applicant

STEMBISO MTHEMBU

3rd Applicant

TSHEPO SEBEKO

4th Applicant

and

THE STATE

Respondent

.JUDGMENT: BAIL APPEAL

MNGQIBISA-THUSI, .J

[1] The applicants are appealing against the decision of Mr Nkomo in the Wolmaransstad Regional Court, handed down on 22 March 2016, dismissing their application for bail.

[2] The applicants have been charged with aggravating circumstances. The aggravating factor being that a firearm was used.

[3] The offence for which the applicants have been charged falls within the offences listed under schedule six of the Criminal Procedure Act ¹ (the Act).

[4] Section 60 (1 1) of the Act provides that:

"Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

(a) in schedule six, 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 exceptional circumstances exist which in the interests of justice permit his or her release." ²

[5] At the hearing of the bail application in the court *a quo*, none of the applicants gave oral evidence. The applicants filed affidavits in which they set out their personal circumstances and the reasons why they feel they should be granted bail.

[6] The applicants' personal circumstances set out in their respective affidavits are as follows:

Sibusiso Sibeko (1st Applicant)

6.1 He is 36 years old married with eight children, aged between eight years and three months. His address is [3...] Zamotalingisa Street, Emdeni, Soweto. He went to school up to Grade 11 and is a taxi

¹ Act 51 of 1977.

² Section 35 (1) (t) of the Constitution provides that: "Everyone who is arrested for allegedly committing an offence has the right- to be released from detention if the: interests of justice permit. subject to reasonable conditions."

owner with a monthly income of approximately R6 000. He is the sole breadwinner as his wife is unemployed. He has no valid passport. He has a previous conviction for robbery but no pending case. Mr Sibeko further alleges that he will be able to pay bail for RS 000.

Teboho Dumisani Mahlangu (2nd Applicant)

- 6.2 He is 34 years old and married with two children, aged two years and six months. His wife is employed as a police officer. He stays at [3..] Extension 1, Lenasia. He went up to Grade 9 at school and has studied electrical mechanic at Molapo FET College. He further alleges that he is employed as a part-time consultant by Old Mutual, Johannesburg, with a salary of approximately R3 500 per month. Mt Mahlangu further alleges that he runs a business of buying and selling vehicles. He does not have a passport. He has one previous conviction for robbery and has no pending cases. He further alleges that his current surname is Mteche, although he has applied to the Department of Home Affairs to change his surname to Mahlangu.

Stembiso Mthembu (3rd Applicant)

- 6.3 He is 39 years old, single with seven children, with ages ranging between two and 17 years. The children, however, live with their mothers who are self-employed. His residential address is 1607 Mhlongo Street, Mofolo, Soweto. He passed Grade 11 at school and is self-employed as a taxi driver owner, earning approximately R6 000 per month. He also runs his own bakery. He does not have

a passport. He has two previous convictions for housebreaking and one for theft (1997). Mr Thembu further alleges that at the time of their arrest, they were traveling in his kombi which was driven by a certain Fixo.

Tshepo Sibeko (4th Applicant)

6.4 He is 33 years old, married under customary law and has four children, ranging in age from six months to 12 years. His residential address is indicated as [1..] Tsenele Street, Emdeni, Extension 2, Soweto. He is self-employed, transporting learners to school and his income is as approximately R8 000 per month. He does not have a passport. He has two previous convictions of receiving stolen property and at the time of his arrest he was on parole. He also has one pending case. He can afford bail in the amount of R.5 000.

[7] The reasons given by the applicants as to why it would be in the interest of justice that they be released on bail and the circumstances leading to their arrest are set out in the affidavit of the first applicant. The other three applicants align themselves with the reasons set out by the first applicant in his affidavit. The following reasons are given:

7.1 he does not pose a threat to the community:

7.2 he will not evade their trial:

7.3 he is prepared to abide by any bail conditions set by the court, for instance, reporting to a police station;

- 7.4 the prison conditions are not conducive to consultation with his legal representative;
- 7.5 he will not interfere with any witnesses.

[8] With regard to the circumstances leading to their arrest and which would not lead to his conviction, the first applicant alleges that:

- 8.1 on the day of the alleged commission of the offence, he together with the other applicants \Vas travel ling to Schweizer-Renecke in his kombi which was driven by Fixo. The purpose of going to Schweizer-Renecke was to buy a kombi which they were informed was cheap;
- 8.2 they met Fixo in Soweto and on their way to Schweizer-Renecke, they stopped at Wolmaransstad where they bought alcohol before travelling to Schweizer-Renecke;
- 8.3 as it was rain ing, Fixo suggested that they take a shortcut; and
- 8.4 they were stopped by a group of white people who assaulted them with sticks and firearms and some of them were shot. However, nothing was found in their possession.

[9] The applicant contended that the case against them was weak in that their arrest is due to mistaken identity and they were likely to be acquitted at their trial.

[10] In tum, the investigating officer, warrant officer Lorry Lawrence, gave evidence for the State. In brief: his evidence is as follows. On 18 November 2015 (on a Wednesday) at around 17h00, a certain Mr Barney Fourie was driven off the road by a vehicle which came from the front.

In order to avoid colliding head-on with this vehicle, he swerved his vehicle (a double cab bakkie) to the left. However, his vehicle was hit at the rear right side by the oncoming vehicle. As a result of the collision he momentarily lost consciousness. When he regained consciousness, he saw smoke and steam coming from the bonnet of his vehicle. When he opened the door to climb out of his vehicle, he was met by a person who pointed a firearm (a rifle) at his face. He was ordered to lie on the ground next to the bakkie. He was dispossessed of his firearm and a safety box which contained diamond gravel. He was then dragged across the road. Other people whom he cannot identify were made to lie next to him. Within three minutes, he realised that the robbers had left the scene with his bakkie.

- [11] As information relating to the incident involving Mr Fourie had been circulated and community farm patrols blocked off all back roads in the area. One of the patrol vehicles recognised Mr Fourie's vehicle and the occupants pursued it. When the occupants in Mr Fourie's vehicle realised that they were being followed, they stopped and started shooting at the patrol vehicle. When fire was returned, the robbers climbed into their vehicle and sped off. However, the vehicle in which the robbers were travelling got stuck in mud as it was raining and its occupants fled into a nearby maize field. The applicants, including a fifth suspect who has since passed away, were arrested by members of the community and handed over to the police. The following morning, with the assistance of their dogs, the police found three firearms, two AK47s and a 9mm. The diamond gravel stolen from Mr Fourie was also recovered.

[12] Mr Lawrence also testified that ,witnesses ,were afraid to attend an identity parade or give evidence. Furthermore, it was Mr Lawrence evidence that despite the applicants' assertion that they were going to buy a kombi, no large sum of money was found on them to make the possibility of a purchase real.

[13] In dismissing the applicants application to be released on bail, the court a quo stated that³:

·But we are sitting here with nothing which can produce except that the accused have been claiming all of them that they have identity as the issue in question. Nothing el se was said how this identity is mistaken, how this identity could be misinterpreted we do not know because the accused could not enter the witness box tell us exactly why do we say the identity is not right when we say this and this and this and this. That is the problem. the coult is having. If that was not the problem the coult would have said okay we release you on bail but definitely I will be doing an injustice to the society if I say the accused qualify for bail on the basis of what has been said."

[14] As alluded to in paragraph 4 above, the offence with which the applicants have been charged is a schedule 6 offence. Therefore, the applicants bear the onus of proving, on a balance of probabilities, that exceptional circumstances exist which justify in the interests of justice their release on bail.

³ Page 201:line 17- 202.line 4.

[15] In *S v Dlamini: S v Dladla & others: S v Joubert: S v Schietekat*⁴ the constitutional court in relation to what is meant by exceptional circumstances under section 601 (11) stated that:

"An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant, or anything else that is particularly cogent. ...In any event one can hardly expect the lawgiver to circumscribe that which is inherently incapable of delineation. If something can be imagined and outlined in advance, it is probably because it is not exceptional."

[16] Mr Pistorius, counsel for the applicants submitted that the personal circumstances of the applicants amounted to exceptional circumstances in that they had fixed addresses which were confirmed by the investigation officer and that the applicants were unlikely to evade their trial in that the State's case was weak, mainly because there was no positive identification of the applicants as the perpetrators of the offence. Mr Pistorius argued that because the State's case was weak, in all likelihood the applicants would be acquitted during their trial⁵.

[17] On behalf of the State Mrs Roos argued that the appeal should be dismissed in that the applicants had failed to provide evidence that exceptional circumstances existed permitting their release in the interest of justice. Mrs Roos argued that the State's case against the applicant was strong enough in that a conviction was likely to follow. Further, it strength of the State's case has been held to be relevant to the existence of 'exceptional circumstances,'.

⁴ 1 999 (2 J SACR 51 (CC) at[75].

⁵ In *S v Kok* 2003 (2) SACR 5 (SCA) at [15], the court held that "in the context of section 60(11) (a) of the Act the

was argued on behalf of the State that should the applicants be convicted, they were faced with prospects of long term imprisonment and would therefore be inclined to evade their trial.

[18] In *S v Scott-Crossley*⁶ the court held that an applicant for bail's personal circumstances do not constitute exceptional circumstances in the context of section 60(11)(a) of the Act.

[19] In as much as there is no direct evidence in which the applicants are positively identified as Mr Fourie's assailants, I am of the view that the applicants have not shown that the State has a weak case against them which will invariably lead to their acquittal during their trial. According to the evidence of the investigating officer, the applicants were arrested in a maize field in which the people who had robbed Mr Fourie had disappeared into. The police found not only the gravel robbed from Mr Fourie, but also rifle. According to the investigating officer, Mr Fourie was pointed with a rifle when he got out of his vehicle after the collision he was forced into. It is for this reason that I am of the view that the State does have a *prima facie* case against the applicants.

[20] Taking into account the serious nature of the offence the applicants are faced with, their previous convictions and the likelihood that should they be convicted, they are likely to face long terms jail sentences, I am not convinced that the applicants would not evade their trial. I am satisfied

⁶ 2007 (2) SACR 470 (SCA) at para [12].

that the applicants have failed to show that there are exceptional circumstances justifying their release on bail.

[21] Accordingly the appeal is dismissed.

f/ NP MN, QIBISA-THUSI
Judge of the High Court

Advocate Pistorius, instructed by Schoeman Steyn Attorneys appeared for the applicants and Adv Roos appeared for the State.