IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 5646/2018P

In the matter between:

DAVID NYAKALO NTONI	FIRST APPELLANT
MUZIWANDILE FLOYD XABA	SECOND APPELLANT
SANDILE LUNGISANI XABA	THIRD APPELLANT

and

THE STATE	RESPONDENT

ORDER

The appellants' appeal against the refusal to admit them to bail is dismissed.

JUDGMENT

HENRIQUES J

Introduction

[1] This is an appeal against the refusal by Magistrate Van Vuuren, presiding in the Pietermaritzburg Magistrate's Court on 15 March 2018, to admit the appellants to bail.

Offences

[2] The appellants together with their co-accused were charged with the following offences, namely:

(a) Possession of a firearm in contravention of s 3 of the Firearms Control Act 60 of 2000, being in possession of 4 semi-automatic firearms being 9 mm pistols, 2 Tokareve pistols, 1 x 9 mm star and 1 x C275 pistol;
(b) Possession of ammunition in contravention of s 90 of the Firearms Control Act; and
(c) Three counts of attempted murder.

[3] At the commencement of the bail proceedings it was agreed with the appellants' legal representative that:

(a) in respect of the first appellant, he bore the onus to satisfy the court that exceptional circumstances exist which in the interests of justice permit his release on bail as the offences fell under Schedule 6 of the Criminal Procedure Act 51 of 1977 (the CPA);[1]
(b) in respect of the second and third appellants, they bore the onus to satisfy the court that the interests of justice permit their release on bail as the offences

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[1] See s 60(11)*(a)* of the CPA.

fell under Schedule 5 of the CPA.[2]

[4] During the course of the bail proceedings the appellants did not testify and filed affidavits in support of their bail application. The respondent, in opposing the granting of bail filed the affidavit of the investigating officer, Constable Msizi Leonard Mkhize and no *viva voce* evidence was led by either party.

[5] In the judgment in the bail application, the court considered the affidavits filed by the appellants[3] and the investigating officer.[4] I may add that the investigating officer filed similar affidavits in opposing bail in respect of each of the appellants' application for bail, the grounds of opposition and circumstances of the arrest of each of the appellants being the same.

[6] In his judgment,[5] the magistrate held the following:

'A careful consideration of the affidavits has revealed that nothing has been placed before this Court which is of sufficient substance to cause a finding that insofar as the applicants 2 and 4 are concerned it should be found that it would be in the interest of justice for their release or that the situation regarding the applicant 2 that exceptional circumstance exist which would allow this Court to release him on bail. Circumstances do exist but not to the degree to which would allow the Court to grant their release.

Now, none of the applicants have discharged the onus which they carry on their shoulders by way of the Criminal Procedure Act 51 of 1977. The application in respect of each of the applicants fails, BAIL IS REFUSED.'

[7] The crux of the judgment is that the magistrate was of the view that none of the appellants had discharged the onus in terms of the CPA in respect of the granting of bail.

The first appellant

[8] The first appellant, in his affidavit,[6] dealt with his personal circumstances, his

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[2] See s 60(11)*(b)* of the CPA.
[3] Exhibits "A", "B" & "C".
[4] Exhibits "D", "E" and "F".
[5] Index pages 24-25 of the papers.

employment and his previous convictions. In addition, he indicated that he intended to plead not guilty and denied having committed any of the offences.[7] His affidavit goes on to deal with the requirements envisaged in terms of s 60(4) to 60(9) of the CPA, and, in paragraph 14 thereof[8] submitted that he had discharged the onus to show exceptional circumstances which in the interests of justice permits his release on bail.

[9] The exceptional circumstances he submits are the following: 'the collective effect of all his personal circumstances, he is in custody for an offence he did not commit, his incarceration will hamper the preparation of his defence and that the state has no prospects of succeeding in a prosecution against him. [9]

The second appellant

[10] In his affidavit filed in support of his application for bail,[10] the second appellant dealt with his personal circumstances and indicated that he intended to plead not guilty and denied any involvement in the commission of the offences. His affidavit then deals with the requirements envisaged in terms of s 60 of the CPA.

The third appellant

[11] The third appellant, in his affidavit filed in support of his application for bail,[11] apart from dealing with his personal circumstances indicated that he too intended to plead not guilty and denied any participation in the commission of the offences. Likewise, his affidavit dealt with the requirements in terms of s 60(4) of the CPA.

[12] All three appellants indicated that they could afford R1 000 as bail, that they did not pose flight risks as they did not have passports or other travel documents and thus, would not evade their trial.

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[6] Exhibit "A".
[7] Para 6, Index page 30.
[8] Index page 33.
[9] Index page 33, paras 14.1 to 14.4
[10] Exhibit "C". Index pages 41-46.
[11] Exhibit "E". Index pages 52-57.

[13] The investigating officer in his affidavit opposing bail for the appellants[12] confirmed their residential addresses and in respect of the first appellant dealt with his previous convictions.

[14] The investigating officer's / State's reasons for opposing bail for all three appellants are the same and are recorded as being the following:

'1. The accused may be considered a flight risk as the accused tried to flee the scene and evade arrest.
2. The accused fled from the police in full uniform and in marked police vehicles.
3. The accused may be considered a danger to the public as he was found in possession of an unlicensed firearm.
4. The state consider *(sic)* the accused very dangerous as they also shot at the police officials.
5. Accused is not gainfully employed and has not provided his proof of identity.
6. The accused may abscond trial as he might fear a heavy sentence that might be imposed.
7. Accused has multiple convictions similar to the committed offence and may be a repeat offender.'[13]

[15] The affidavit further records the following in respect of the circumstances under which the arrest of the appellants and their co-accused occurred:

'The facts of the case are as follows:

The accused x 5 were at Lincoln Road, Woodlands with motor vehicle vw (polo) with false number plates NP 67380 when the K-9 unit members tried to stop their vehicle as it had false plates but the accused tried to flee and fired shots at the police and police members also shot back and injured all five (5) accused who were then arrested and found in possession of unlicensed firearms (x4) and ammunition in each firearm.'

[16] The investigating officer indicated that the appellants were linked to the offences as they were found in possession of the firearms and ammunition and by witness statements.

Grounds of appeal

[12] Exhibit "E". Index pages 38-40.
[13] Para 6 of investigating officer's affidavit, index page 39

[17] The appellants noted an appeal against the refusal of bail and the grounds for such appeal are recorded in detail in the notice of appeal.[14]

Submissions of the parties

[18] In summary, Mr *Mbhele* acting on behalf of the appellants, submitted in his heads of argument that:

'18.1 The court did not properly consider the provisions of s 60 of the CPA, attached insufficient weight to the personal circumstances of the appellants and the devastating effect incarceration would have on them and their families;

18.2 Attached too much weight to the contents of the affidavit of the investigating officer;

18.3 Failed to attach due weight to the fact that the first appellant's previous convictions were older than ten years and he did not have any pending cases;

18.4 In relation to the second and third appellants, that they had no previous convictions and no pending cases.'

[19] Mr *Mbhele* further submitted at the hearing that the court a quo erred in not considering the merits of the matter. He stressed that two important factors to be considered in a bail application are the following, namely the strength of the State's case which in some instances can constitute an exceptional circumstance and secondly, whether the appellants will attend their trial. He submitted in argument that the State adduced no evidence to gainsay what the appellants indicated in their respective affidavits relating to the requirements of s 60(4) of the CPA. All three of the appellants had ties to the community, were gainfully employed and had no travel documents indicating that they posed a flight risk.

[20] He submitted that given the personal circumstances of the respective appellants, they had discharged the respective onuses for them to be released on bail.

[21] Ms *Dyasi* who appeared for the respondent, submitted that the court a quo did not err in any manner. The personal circumstances of the respective appellants were not out of the ordinary and were not exceptional in the case of the first appellant. She

[14] Index pages 62-64.

emphasized the circumstances under which the appellants were arrested and indicated that the appellants have not provided an explanation in relation to their arrest and possession of the respective firearms and ammunition. In light of the unchallenged evidence of the investigating officer detailing these circumstances and in the face of a bare denial from the appellants, there is evidence to suggest that they have an incentive to evade trial and pose a flight risk, as if they are convicted, they face a long term of imprisonment.

The bail appeal

[22] This appeal is brought in terms of s 65 of the CPA and this court must therefore consider the appeal in accordance with s 65(4) which reads as follows:
'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.'

[23] In applying the provisions of s 65(4), the court hearing the bail appeal must approach it on the assumption that the decision of the court a quo is correct and not interfere with the decision, unless it is satisfied that it is wrong.[15]

Schedule 5 offences

[24] In respect of Schedule 5 offences, the onus is on the second and third appellants to satisfy the court that the interests of justice permit their release on bail. In respect of the test for interests of justice, the bail application must start on the premise that the continued detention of the second and third appellants is the norm.[16]

[25] A presiding officer must weigh up the personal interests of the appellant against the interests of justice as it appears from all the evidence presented.

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[15] *S v Mbele & another* 1996 (1) SACR 212 (W) at 221h-i; *S v Barber* 1979 (4) SA 218 (D).
[16] Section 60(11)*(b)*. See also *S v Dlamini*; *S v Dladla & others*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC) at 84c-e and 85.

[26] This court must consider whether on the facts and the evidence presented in the court a quo, the magistrate misdirected himself or erred when he found that the second and third appellants had failed to satisfy the onus on a balance of probabilities that the interests of justice permitted their release on bail. The court was required to make a value judgment and evaluate the strength of the State's case.[17]

Schedule 6 offences

[27] Section 60(11)*(a)* of the CPA provides that an accused is to be detained in custody when charged with an offence referred to in Schedule 6, unless he adduces evidence to the satisfaction of a court that 'exceptional circumstances exist which in the interests of justice permit his or her release'.

[28] Our courts have refrained from providing an exhaustive definition of what constitutes exceptional circumstances.

[29] In *S v Jonas*[18] the court held 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 would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence which he did not commit could also be view as an exceptional circumstance. Where a man is charged with the commission of a Schedule 6 offence when everything points to the fact that he could not have committed the offence, eg that he has a cast-iron alibi, this would likewise constitute an exceptional circumstance.'

[30] In *S v Scott-Crossley*[19] the court held the following:

'Personal circumstances which are really 'commonplace' can obviously not constitute exceptional circumstances for purposes of section 60(11)(a);'

[31] In *S v Petersen*[20] the court held that '"exceptional" is indicative of something

[17] *S v van Wyk* 2005 (1) SACR 41 (SCA).
[18] *S v Jonas* 1998 (2) SACR 677 at 678e-g.
[19] *S v Scott-Crossley* 2007 (2) SACR 470 SCA para 12.
[20] *S v Petersen* 2008 (2) SACR 355 (C) para 55.

unusual, extraordinary, remarkable, peculiar or simply different.'

[32] Generally speaking what may constitute exceptional circumstances in any given case depends on the discretion of the presiding officer and the facts peculiar to a particular matter. In the context of the provision of s 60(11)*(a)*, the exceptionality of the circumstances must be such as to persuade the court that it would be in the interests of justice to order the release of the accused person. It requires the court to exercise a value judgment in accordance with all the relevant facts and circumstances.

[33] In *S v Yanta*[21] the court was of the view that a proper construction of s 60(11) of the Act involved the balancing of the interests of society and the proper and effective administration of criminal justice as opposed to the personal interests of an accused. In *S v Mokgoje,*[22], the court was of the view that the concept referred to circumstances that were unique, unusual, and particular.

[34] It has further been held that proof by an accused that he or she would probably be acquitted can constitute exceptional circumstances for the purpose of the section. See in this regard *S v Botha en 'n Ander*.[23] This was further reinforced in the decision of *S v Viljoen*.[24] . In *S v van Wyk* the Supreme Court of Appeal found that the absence of a prima facie case against an accused was relevant to the aspect of exceptional circumstances.

[35] In *S v Hudson*[25] the court held the following:

'. . .the expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the appellant to abscond and leave the country…

And further that [26] " where an accused applies for bail and confirms on oath that he has no intention of absconding due weight has of course to be given to this statement on oath. However, since an accused who does have such an intention is hardly likely to

[21] *S v Yanta* 2000 (1) SACR 237 (Tk) at 249c-e.
[22] *S v Mokgoje* 1999 (1) SACR 233 (NC).
[23] *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) para 21.
[24] *S v Viljoen* 2002 (2) SACR 554 (SCA) para 11.
[25] *S v Hudson* [1980] 1 All SA 130 (D) at 131.
[26] *S v Hudson* [1980] 1 All SA 130 (D) at 133

admit it, implicit reliance cannot be placed on the mere say-so of the accused. The court should examine the circumstances."

[36] In *S v Porthen & others*[27] the court held that where a bail applicant was not a flight risk, nor was there any evidence that he was likely to interfere with State witnesses and/or the investigation, the accused has discharged the burden of proof which rested upon him in terms of s 60(11)*(a)*.

[37] In *S v Schietekat*[28] Slomowitz AJ stated the following:

'Bail proceedings are *sui generis*. . .The State is thus not obliged in its turn to produce evidence in the true sense. It is not bound by the same formality. The court may take account whatever information is placed before it in order to form what is essentially an opinion or value judgment of what an uncertain future holds. It must prognosticate. To do this it must necessarily have regard to whatever is put up by the State in order to decide whether the accused has discharged the *onus*. . . .'

[38] In the case authorities that I have had regard to, the test appears to be whether there was a likelihood that the appellant would evade trial and a likelihood of something more than a mere temptation. The strength of the State's case and the probability of conviction, although an important consideration, does not displace the central issue which the court is required to decide, that is whether or not the interests of justice permit the release on bail of the second and third appellant[29] and whether exceptional circumstances exist which in the interests of justice permit the release on bail of the first appellant.

[39] I have had regard to the affidavits of the appellants and the court a quo's judgment. I cannot find that the court a quo misdirected itself in any way in reaching the conclusion that it did.

[40] In deciding whether the appellants had discharged the onus, one cannot read their affidavits in isolation and only have regard to their personal circumstances. One

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[27] *S v Porthen & others* 2004 (2) SACR 242 (C).
[28] *S v Schietekat* 1998 (2) SACR 707 (C) at 713h-714j.
[29] *S v Malumo & 111 others* (2) 2012 (1) NR 244 HC para 30.

must have regard to the affidavit of the investigating officer in relation to the offences and the circumstances of their arrest. One must weigh up their version of a bare denial as against the version put up by the respondent. This must be considered in deciding whether they had discharged their respective onus.

[41] In my view, the court a quo was correct in finding that when weighed against this evidence of the respondent, the appellants had not discharged the onus on a balance of probabilities.

[42] The appellants had a fair and reasonable opportunity to deal with the allegations contained in the affidavit of the investigating officer but elected not to do so. Apart from tendering bail in the sum of R1 000, none of the appellants made submissions in respect of bail conditions.

[43] The respondent had a prima facie case against the appellants. Despite the respondent opposing bail by way of affidavits, evidence was placed before the court a quo which stood uncontradicted in light of the appellants' bare denial. I cannot therefore fault the magistrate's reliance on and weight attached to the evidence presented by the respondent as opposed to that of the appellants whose affidavits were a bare denial.

[44] I am cognisant of the fact that in exercising a judicial discretion, a court must consider the totality of the evidence[30] and decide the matter on the probabilities.[31]

[45] This court of appeal, like the court a quo is fully cognisant that the Constitution of South Africa provides that no person ought to be deprived of his freedom arbitrarily, and if it is in the interests of justice to do so, an arrested person is entitled to be released from detention on bail. However, s 60 of the CPA has been promulgated to regulate the granting of release from detention in respect of serious crimes and must accordingly be implemented with due regard to the guidelines

[30] *S v Stanfield* 1997 (1) SACR 221 (C) at 226c-d.
[31] *S v Diale & another* 2013 (2) SACR 85 (GNP) para 14.

provided by the Act and the decided cases. As was held in *S v Green & another*:[32]
'It is clear from s 60(10) that the court's function in a bail application is intended to be more proactive than in normal criminal proceedings. As it was put in the *Dlamini* decision (at para [11]), "a bail hearing is a unique judicial function" and the "inquisitorial powers of the presiding officer are greater".'

[46] Having considered all the evidence placed before the court a quo, I was not persuaded on the merits of the appeal. I am also unable to find that the court a quo erred in the exercise of its judicial discretion in finding that the appellants had failed to discharge their respective onus permitting their release on bail.

[47] In the result the following order will issue:

The appellants' appeal against the refusal to admit them to bail is dismissed.

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HENRIQUES J

Case Information

[32] *S v Green & another* 2006 (1) SACR 603 (SCA) para 23.

Date of argument	:	13 June 2018
Date of judgment	:	21 June 2018

Appearances

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