Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **CC23/2018**

In the matter between:

HORATIO SOLOMONS Applicant/Accused

and

THE STATE

Hearing: 18 March 2019
Judgment: 29 March 2019

JUDGMENT

De Waal AJ:

[1] The Applicant is charged jointly with 11 others on various counts of planned or premeditated murder, contraventions of the Prevention of Organised Crime Act 121 of 1998 ("**POCA**"), and drug dealing. There are 71 counts in total.

[2] The Applicant was arrested on 22 August 2017. The matter was pending in a lower court until 16 May 2018 in order to finalise bail proceedings and aspects of the investigation.

[3] The matter was subsequently transferred to the High Court and the trial is scheduled to start on 6 May 2019.

[4] The Applicant is Accused 1 in the matter. Accused 4 and Accused 6 brought bail applications in the Cape Town Magistrates' Court during January 2018, which were denied. Bail was further refused on appeal for these accused by the High Court. Accused 5 brought a bail application in the Magistrates' Court which was successful.

[5] The Applicant elected not to bring his bail application in the Magistrates' Court. Instead, the Applicant launched motion proceedings in this Court on 5 March 2019 aimed at his release on bail, pending the finalisation of the trial. This Court is accordingly hearing the Applicant's bail application as Court of first instance.

[6] The background is an investigation into the operation of criminal gangs in the police precincts of Blue Downs, which includes, amongst others, Delft and Belhar. Allegations of criminal activities by a gang called the "*Terrible Josters*" were, in particular, closely examined. In a related matter, currently pending before the High Court, other alleged Terrible Josters members are prosecuted on 202 counts of criminal gang activity under POCA.

[7] I now turn to deal with the requirements for bail in a case such as the present one, where some of the charges relate to offences listed in Schedule 6 of the Criminal Procedure Act 51 of 1977 ("**CPA**").

The requirements for bail in respect of Schedule 6 offences

[8] The statutory framework and legal principles applicable to bail applications where the applicant is charged with a Schedule 6 offence were comprehensively analysed by the Constitutional Court in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC). In this matter a challenge to the constitutionality of the CPA's provisions relating to bail, in particular the regime applicable to Schedule 6 offences, was rejected by the Constitutional Court.

[9] Whilst *Dlamini* remains the leading case, the legal principles have been developed in subsequent decisions, including a number of SCA judgments. I refer to these below, to the extent necessary.

[10] The circumstances in which bail may be granted are provided for in s 60 of the CPA. Generally, an accused person who is in custody is entitled to be released on bail "*if the court is satisfied that the interests of justice so permit*".[1]

[11] Five grounds are listed in s 60(4)(a) – (e) which, if established, means that the interests of justice do not permit the release of the accused from detention. Each of the five grounds are further developed in ss 60(5) to 60(8A) and 60(9), which contain an extensive and detailed list of the potential factors for

[1] *S v Mabena* 2007 (1) SACR 482 (SCA) para 4

and against the grant of bail, to which a Court must pay regard in considering where the interests of justice lie.[2]

[12] In the present instance, the relevant subsections are s 60(4), (5), (8A) and (9) of the CPA:

12.1. The relevant parts of s 60(4) provides as follows (my underlining):

> *"The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:*
>
> *(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; or*
>
> ...
>
> *(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."*

12.2. Section 60(5), which elaborates on s 60(4)(a), provides as follows (my underlining):

> *"(5) In considering whether the ground in subsection (4) (a) has been established, the court may, where applicable, take into account the following factors, namely-*
>
> *(a) the degree of violence towards others implicit in the charge against the accused;*
>
> *(b) any threat of violence which the accused may have made to any person;*
>
> *(c) any resentment the accused is alleged to harbour against any person;*

[2] *Mabena* para 4

(d) *any disposition to violence on the part of the accused, as is evident from his or her past conduct;*

(e) *any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct;*

(f) *the prevalence of a particular type of offence;*

(g) *any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; or*

(h) *any other factor which in the opinion of the court should be taken into account."*

12.3. Section 60(8A), which elaborates on s 60(4)(e), provides as follows:

"(8A) In considering whether the ground in subsection (4) (e) has been established, the court may, where applicable, take into account the following factors, namely-

(a) *whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;*

(b) *whether the shock or outrage of the community might lead to public disorder if the accused is released;*

(c) *whether the safety of the accused might be jeopardized by his or her release;*

(d) *whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;*

(e) *whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or*

(f) *any other factor which in the opinion of the court should be taken into account."*

12.4. Section 60(9), which provides for the weighing exercise to be done in determining where the interests of justice lies, provides as follows (my underlining):

> *"(9) In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely-*
>
> *(a) the period for which the accused has already been in custody since his or her arrest;*
>
> *(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;*
>
> *(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;*
>
> *(d) any financial loss which the accused may suffer owing to his or her detention;*
>
> *(e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;*
>
> *(f) the state of health of the accused; or*
>
> *(g) any other factor which in the opinion of the court should be taken into account."*

[13] Graver offences (the offences listed in Schedules 5 and 6 of the CPA) are subject to a more stringent regime. While an arrested person is generally entitled to be released on bail if a Court is satisfied that the interests of justice so permit, the reverse applies where a person has been charged with a

Schedule 6 offence.[3] In such a case, s60(11) of the CPA provides that a Court is obliged to "*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*".

[14] The reversal of the general rule was held in *Dlamini* to limit the constitutional right to bail, but the relevant provision (s 60(11)(a)) survived a declaration of invalidity because the limitation was held to be "*reasonable and justifiable in terms of s 36 of the Constitution in our current circumstances*".[4]

[15] The "*potential factors for and against the grant of bail*" listed in the CPA (ss60(4) – (9)) are no less relevant to the assessment of bail in relation to Schedule 6 offences than they are in relation to lesser offences. However, before a Court may grant bail to a person charged with a Schedule 6 offence it must be satisfied, upon an evaluation of all the factors that are ordinarily relevant to the grant or refusal of bail, that circumstances exist that warrant an exception being made to the general rule that the accused must remain in custody.[5] Differently put, exceptional circumstances do not mean that they must be circumstances above and beyond, and generally different from those enumerated' in ss 60(4) – (9): "*ordinary circumstances present to an exceptional degree, may lead to a finding that release on bail is justified*".[6]

---

[3] *Mabena* para 5
[4] *Dlamini* para 77
[5] *Mabena* para 6
[6] *S v Rudolph* 2010 (1) SACR 262 (SCA) para 9

[16] What is required in respect of Schedule 6 offences is that the Court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify the release of the accused. What is exceptional "*cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstances which remove the applicant from the ordinary run*".[7]

[17] The effect of subsection 60(11) was described as follows in *Dlamini*:[8]

> *"(a) The subsection says that for those awaiting trial on the offences listed in Schedule 6, the ordinary equitable test of the interests of justice determined according to the exemplary list of considerations set out in ss (4) – (9) has to be applied differently.*
>
> *(b) Under s (11)(a) the lawgiver makes it quite plain that a formal onus rests on a detainee to 'satisfy the court'.*
>
> *(c) Furthermore, unlike other applicants for bail, such detainees cannot put relevant factors before the court informally, nor can they rely on information produced by the prosecution; they actually have to adduce evidence.*
>
> *(d) In addition, the evaluation of such cases has the predetermined starting point that continued detention is the norm.*
>
> *(e) Finally, and crucially, such applicants for bail have to satisfy the court that "exceptional circumstances" exist."*

[18] The form that a bail enquiry should take is not prescribed by the CPA, but it requires at least that the interested parties – the prosecution and the accused – are given an adequate opportunity to be heard.[9] Although a bail inquiry is less formal than a trial, it remains a formal court procedure that is essentially adversarial in nature. A Court is afforded "*greater inquisitorial powers in such*

---

[7] *S v Bruintjies* 2003 (2) SACR 575 (SCA) para 6
[8] *Dlamini* para 61
[9] *Mabena* para 7

an inquiry, but those powers are afforded so as to ensure that all material factors are brought to account, even when they are not presented by the parties, and not to enable a Court to disregard any of the factors" listed in s 60 of the CPA.[10] A bail inquiry, in other words, "*is an ordinary judicial process, adapted as far as need be to take account of its peculiarities, that is to be conducted impartially and judicially and in accordance with the relevant statutory prescripts*".[11]

[19] Although not specifically listed in ss 60(4) to (9), proof by an accused that he will probably be acquitted can serve as "*exceptional circumstances*" for the purposes of s 60(11)(a) of the CPA.[12]

[20] However, in order to successfully challenge the merits of the State's case in bail proceedings pertaining to a Schedule 6 offence, the applicant needs to prove on a balance of probability that he will be acquitted of the charge.[13] Until an applicant has set up a *prima facie* case of the prosecution failing there is no call on the State to rebut his evidence to that effect.[14]

[21] This may well be a difficult and risky route for an accused, especially since the State is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence. It is risky because the accused will almost invariably have to reveal his version of the events and to an extent sacrifice his right to silence. But it must be kept in mind that an attack on the prosecution case is not necessary to discharge the

---

[10] *Mabena* para 7
[11] *Mabena* para 7
[12] *S v Botha* 2002 (1) SACR 222 (SCA) para 21; *S v Viljoen* 2002 (2) SACR 550 (SCA) paras 14-15
[13] *Mathebula* para 12
[14] *Mathebula* para 12

onus set in s 60(11). The applicant who chooses to follow that route does so out of choice and "*must make his own way and not expect to have it cleared before him*".[15]

[22] It is not the function of the Court hearing a bail application to analyse the evidence regarding the merits of the charges in great detail. If the evidence is extensively analysed it would become a "*dress rehearsal*" for the trial to follow. Findings made at the bail stage might also create an untenable situation for the Court hearing the trial.[16]

[23] It is further relevant whether or not the applicant for bail testifies *viva voce* or not. If not, there is no means by which the Court can assess the *bona fides* or reliability of the applicant.[17] In general, a case founded upon affidavit evidence, not open to test by cross-examination, is less persuasive.[18]

The Applicant's case for bail

[24] I now turn to deal with what I believe to be the gist of the Applicant's case for bail.

[25] The Applicant deals in a single paragraph with the reason why he did not bring a bail application earlier in the Magistrates' Court. According to him, it was only after his legal representatives were provided with the case dockets that he was advised about the lack of evidence against him and the presence of exceptional circumstances justifying bail in his case. In my view, this

[15] *Mathebula* para 12
[16] See *S v Scott-Crossley* 2007 (2) SACR 470 (SCA) para 7
[17] *Bruintjies* para 7
[18] *S v Mathebula* 2010 (1) SACR 55 (SCA) para 11

explanation does not excuse the delay. As was stated above, with reference to the SCA's decision in *Mathebula,* an accused has no right of access to the police docket for purposes of a bail application. It is accordingly no excuse for the delay. An accused may of course wait until the docket is provided before bringing a bail application but the fact that the trial is then around the corner may then count against him.

[26] It follows that the Applicant's choice to wait until he was granted access to the docket now negatively affects his bail application because there is no little more than a month left before his trial starts.

[27] It was also not contended on behalf of the Applicant, nor could it, in my view, that there has been inordinate delay by the State in bringing to trial an alleged strong case against the Applicant. The matter is accordingly distinguishable from *S v Mooi* [2012] ZASCA 79 (30 May 2012), where this was an important factor.

[28] Turning to the Applicant's personal circumstances. These are set out in some detail in the founding affidavit:

28.1. The Applicant is 29 years of age and has 7 biological children. In his affidavit, he identifies the biological mothers of 6 of his children. He claims to contribute to the maintenance of these 6 children as well as 2 others who appear to be the children of former girlfriends of his. He claims that due to the fact that he is in custody, he is no longer able to support these children financially and emotionally.

28.2. The Applicant himself is unmarried and he has resided with his mother for most of his life.

28.3. The Applicant is self-employed and claims that he ran three businesses before he was taken into custody. The three businesses are the following:

26.3.1 A taxi business, which is registered in his mother's name but which he manages as a business of his own. This generated an income of about R10 000.00 per month.

26.3.2 The buying of cars at auctions and reselling them at a profit, which generated an income of about R15 000.00 per month.

26.3.3 The buying and selling of fish which generated an income of between R3 000.00 – R5 000.00 per month.

28.4. The Applicant owns three immovable properties, one in Delft, one in Belhar and one in Kleinmond.

[29] These considerations are relevant to the question of whether the accused, if he is released on bail, will attempt to evade his trial, i.e. s 60(4)(b) read with s 60(6)(a) and (b). What is of further relevance is the financial loss which the accused may suffer owing to his detention (s 60(9)(d)), and the impact that this may have on his dependants. However, due to the delay in bringing the bail application, the financial impact is to a great extent diminished. I should

add that little detail is given about the Applicant's businesses. Are they licenced and registered for tax, for instance?

[30] In his affidavit, the Applicant complains about the conditions of his current detention. He claims that he is in a prison cell with 45 other people even though the cell has a maximum holding capacity of 30 people. There are only 30 beds in the cell. The Applicant further claims that the prison is invested with rats, fleas and other insects. There is only one shower and one basin and both are in a state of disrepair. The State accepts that the detention facility does experience rats, fleas and other insects but contends that the Department of Correctional Services entered into a contract with a service provider on pest control to quarterly conduct fumigation. The State further admits that the overcrowding situation at Pollsmoor presents a challenge and that some inmates are sleeping on the floor. The facility awaits the delivery of mattresses. A contractor has been awarded a tender for the provision of these goods. I do not believe much can be made of the conditions of detention in a case such as the present one. Whilst unsatisfactory, I believe that the State is correct in its argument that the conditions of detention is really a separate issue which needs addressed through the Office of the Inspecting Judge or some other process.[19] Such conditions cannot in my view constitute exceptional circumstances justifying the release of the Applicant.

---

[19] See *Panayiotou v S* (CA&R 06 /2015) [2015] ZAECGHC 73 (28 July 2015) (my underlining):

> *"[40] The appellant argued that the magistrate had brushed aside the deplorable conditions in St Albans and ignored the judgment of Roberson J in Jacobs. The argument is without merit. As already indicated it is clear from a reading of the magistrate's judgment that she considered the principle which was accepted in Jacobs and found that the conditions of detention serve as a factor to be weighed in the scales to determine whether exceptional circumstances exist. The fact that the magistrate did not cite the judgment is of no consequence. Jacobs in any event does not constitute authority for the proposition that*

[31] The Applicant further claims that while he is in custody, he will not be able to have proper access to his legal representatives and, in particular, he will not be able to properly consult with them in respect of the numerous and complicated charges levelled against him. According to the State, legal visits can be made at any time subject to prior arrangement and any restriction on access should be taken up with the Pollsmoor Correctional Centre Management or the Office of the Inspecting Judge. The State doubts the seriousness of the situation and points out that this issue was never raised at the pre-trial meetings. Detention invariably constitutes an impediment to the preparation of the accused's defence. However, in my view, the impact will be less drastic in a matter such as the present one. I say this because even though there are apparently 13 dockets to deal with, one is not dealing with complicated financial misconduct and the analysis of copious documents but rather with a who done what, where and when kind of case.

[32] The Applicant states that he has no previous convictions and no outstanding cases. He also states that he is not aware of any outstanding warrants for his arrest. He states that even though he was arrested on two previous occasions, he has never interfered with any police investigation, made no attempts to flee and has not intimidated any witnesses. In my view, the fact that the Applicant has no previous convictions, is certainly a factor that needs to be taken into account, as is also provided in s 60(5)(e). But it cannot be concluded that the facts support the submission, made with reference to

---

deplorable conditions of detention necessarily favour an accused persons release on bail. The approach which was set out in S v Van Wyk 2005 (1) SACR 41 (SCA), namely that release on bail is not the remedy for the failures of correctional services to ensure detention in conditions of humanity."

Mooi,[20] that past conduct of the Applicant reveal "*an inclination contrary to reluctance to stand trial*". In the *Mooi* matter, the accused faced previous prosecutions for a variety of charges in the High Court and the Regional Court. The same cannot be said in the present matter.

[33] The Applicant then deals with the charges against him. I shall revert to this aspect below. For the moment it suffices to mention that the thrust of the Applicant's attack on the State's case is that it is based on the version of an s 204 CPA witness who is a self-confessed murderer, drug dealer and gunrunner and whose evidence is allegedly contradictory in material respects.

[34] Finally, the Applicant's mother deposed to an affidavit to which she annexed a list of 293 names and surnames as well as addresses and contact details of people living in Delft who indicated that they have no objection to the Applicant being granted bail. I do not believe that anything can be made of this petition. To begin with the State annexed evidence of some 260 members of the community in Rosendaal signing a petition against the release of the accused. In my view the community's perception, i.e. whether they will be shocked and outraged if the Applicant is released (s 60(8A)(a)) or whether it will jeopardise the public confidence in the criminal justice system, cannot be determined with reference to the number of people who sign such petitions. This may be relevant in particular cases but the factors listed in s 60(8A) remain to be decided by the Court through a value judgment based on the facts before it.

---

[20] *Mooi* (*supra*) para 12

The State's case

[35] The State's case in the present matter can be summarised as follows:

35.1. The Applicant has not adduced evidence, as required by s 60(11) of the CPA, which could satisfy the Court that exceptional circumstances exist which in the interests of justice permit his release.

35.2. The interests of justice do not permit the release of the Applicant because there is a likelihood that he will endanger the safety of the public and the matter is exceptional in that there is a likelihood that the release of the Applicant will disturb the public order or undermine the public peace or security. Section 60(4) of the CPA does not permit the release of the Applicant if one of those two grounds is established.

35.3. In any event, in performing the weighing exercise required by s 60(9), the interests of justice outweighs the right of the Applicant to his personal freedom and the prejudice he is likely to suffer if he was detained in custody.

[36] Mr Menigo, who appeared for the State, contended that there should be a two-stage analysis: first into the question of whether the Applicant adduced evidence regarding exceptional circumstances and thereafter the weighing exercise. I do not agree. It seems to me that the SCA cases referred to above envisage only one enquiry, even in Schedule 6 cases. The difference is that in Schedule 6 cases the applicant bears the onus to show that there

are exceptional circumstances, having regard to all the factors in ss 60(4) – 60(9).

The attack on the merits of the State's case

[37] I think it is fair to say that the case sought made to be made out by Mr Liddell, who appeared for the Applicant, is that the circumstances are exceptional because even though the charges against the Applicant are extremely serious, the State's case is, on a proper analysis, very weak. Moreover, whilst the State is trying to depict the Applicant as some kind of monstrous gang leader, he is in fact someone who has never been convicted before, has no "*gang tattoos*", and has never attempted to interfere with an investigation against him. Accused 5, it was further argued, is also alleged to be one of the leaders of the Terrible Josters gang and yet he was released on bail.

[38] Much of the bail hearing, which lasted from 10h00 in the morning until 15h30 in the afternoon, was spent on an analysis of the State's case against the Applicant. In this regard, it is helpful to break down the various charges against the Applicant into three groups:

38.1. Counts 1 – 2 are for contraventions of s 9(2)(a) and (b) of POCA which concerns allegations that the Applicant incited, instigated, commanded, aided, advised, encouraged or procured other persons to commit, bring about, perform or participate in a pattern of criminal gang activity. This is not a Schedule 6 offence but a Schedule 5 offence.

38.2. Counts 9 – 13; counts 18 – 21; counts 26 – 34; counts 35-38; counts 43 – 46; and counts 50 – 54 relate to incitement to commit murder, murder, attempted murder, possession of firearms and possession of ammunition. In each of these six groups of charges, the allegation is, broadly speaking, that the victim was murdered on the instructions of the Applicant or that the Applicant participated in the planning or the execution of the murder. These are Schedule 6 offences.

38.3. Count 71 stands separate to the others as this is a charge of dealing in drugs, which is also not a Schedule 6 offence.

[39] An initial question which arises is whether one should have regard to the strength / weaknesses of the State's case in respect of the Schedule 6 charges or all charges. In my view, the merits of all the charges should be assessed, bearing in mind what was stated above, i.e. that the accused bears the burden to make out a *prima facie* case of weakness in respect of the Schedule 6 offences.

[40] Against this background, I turn to discuss the evidence before me on the papers.

Criminal gang activity

[41] The State relies on this aspect on the evidence of a s 204 CPA State witness who claims that he was a highly placed gang member. After he was arrested, this individual began giving material information as a source to the authorities

at Goodwood Correctional Centre. He was released from prison on bail on 6 November 2015. Afterwards the charges against him were withdrawn and he was placed in a witness protection programme.

[42] The s 204 witness estimates that the Terrible Josters has a membership of at least 10 000. According to him the name of the gang has its origins in the founding member whose nickname is loosely translated into English as "*Terrible*" and also in his membership of the "*Josters gang*", active in Eldorado Park, Gauteng during the 1990s. The s 204 witness further contends that the criminal activities of the Terrible Josters are mostly focused on the sale of illegal drugs, namely "*tik*" and mandrax in certain areas of the Western Cape. The 204 witness claims that he was a close friend of the Applicant. He is the brother of one of the other accused in the matter.

[43] The State annexed several photographs depicting gang graffiti which is aimed at confirming the presence of the Terrible Josters in the areas mentioned by the s 204 witness. The s 204 witness also claimed that the Terrible Josters make use of a certain hand sign. The State annexed photos to their papers, showing the hand sign allegedly used by the Terrible Josters.

[44] The State alleges that the Applicant lives in an area dominated by the Terrible Josters, both in Delft and in Kleinmond. The State further points to a large number of connections between the Applicant and others suspected of gang activity and in particular those who either shot and killed or were shot and killed as part of gang-related activities. In this regard, three allegations stand out. The first is that the Applicant was in a relationship with one Jayde Daniels who was assassinated in October 2014. She was pregnant at the

time and was shot four times in the chest and twice in the stomach. It is alleged that the murder was a gang hit aimed at the Applicant. The second is that the Applicant himself was shot at 15 Vuurlelie Street on 17 February 2017 in another alleged gang related activity. The third is that a minibus taxi registered to his mother was found at 28 Vuurlelie Street containing firearms and drugs.

[45] The Applicant responded in a sweeping manner to the detailed allegations made by the State. He did so despite the fact that, by the time that he deposed to the founding affidavit, he had access to the police dockets containing the evidence against him.

[46] For instance, the Applicant claims that Daniels was murdered by her ex-boyfriend, who was extremely jealous of her moving on. She had apparently been attacked by him before. The Applicant does not provide any further basis for his belief or whether or not charges were laid against the ex-boyfriend. He offers no explanation for why he was shot.

[47] The Applicant also does not attempt to deal with the alleged connections between himself and other alleged gang members. He simply denies being a member of any criminal gang and contends that hand gestures are not, in and of themselves, indicative of so-called gang association. In this regard he annexed photographs to the founding affidavit which show a soccer player using a similar hand sign to the one allegedly used by the Terrible Josters.

[48] In light of the paucity of evidence produced by the Applicant, I cannot conclude that the State's case in respect of counts 1 – 2 is weak. On the

contrary, as things stand, it seems to me that the State has a fairly strong case on these counts. Even though there is no onus on the Applicant in respect of these charges to show that the State's case is frail, the probabilities on the papers favour the State on counts 1 – 2.

The premeditated murder and related charges

[49] These are the Schedule 6 offences.

[50] The first set of charges relate to the murder of Levert Seekoei ("**Seekoei**").[21] The State alleges that the Applicant directed Accused 2 to commit the murder. The s 204 witness himself claims that he was instructed by Accused 5 to partake in this murder. According to the s 204 witness, he shot Seekoei in the chest and Accused 2 then emptied the contents of his magazine into the deceased. The Applicant criticises the State's case because an independent witness initially implicated two other persons, namely Tyrone Constable ("**Constable**") and Michael Solomon ("**Solomon**") in the murder.[22] The State however contends that that witness now says that he was coerced by two police officials to falsely implicate Constable and Solomon. These allegations are part of a separate investigation into possible police corruption.

[51] The second set of charges relate to the murder of Brandon Dickson ("**Dickson**").[23] In respect of this murder, the s 204 witness claims that the

[21] Counts 9 – 13
[22] I was referred by the Applicant's counsel to S v *Scott-Crossley* 2008 (1) SACR 223 (SCA) para 18 relating to contradictions. The Applicant's counsel further submitted that the fact that there was a murder cannot be used as corroboration for the version of the s 204 witness. I do not believe that these *dicta* are relevant at this stage. *Scott-Crossley* dealt with evidence at trial. I do not believe that it is necessary or appropriate to delve into the detail at this point. Even if there is a contradiction, I fail to see on what basis I can conclude that this will be fatal to the State's case at trial.
[23] Counts 18 – 21

Applicant instructed Accused 2 to collect a firearm from a hiding place which was then handed to Accused 9 to kill Dickson. This was done as the Applicant and others believed that Dickson shot and killed one Hilton Adriaanse ("**Adriaanse**"). In respect of these charges, the Applicant contends that the s 204 witness initially claimed that a Mr Ishmaeel Ockerts ("**Ockerts**") was present when the murder was planned. However, it later came to light that Ockerts was incarcerated at the time of the alleged planning of the murder. This was meant to show that the s 204 witness' version in respect of the Dickson murder is unreliable. Although relevant, the mistake does not relate to the crux of the account of the s 204 witness on these charges. The mistake appears to relate only to the allegation that Ockerts was present. According to the State, the s 204 witness may have been wrong regarding his presence, but this is not material.

[52] The third set of charges relate to the murder of Leon Davids ("**Davids**").[24] The s 204 witness claims that Davids was initially targeted by Accused 5 but when the latter's people did not deliver the Applicant at a meeting indicated that "*they should watch what happens*". Accused 2 and Accused 8, driven by Accused 4, then committed the murder and reported back to the Applicant who then remarked to the s 204 witness that "*his people never miss*". In respect of this murder, the Applicant denies any knowledge of the alleged death of Davids. He further contends that the s 204 witness was not present at the alleged murder and that his version is therefore hearsay evidence which will not be admissible at the trial. Hearsay evidence is however admissible in

[24] Counts 26 – 34

a bail application, although it will carry less weight than if the person having personal knowledge of the facts were themselves to testify.[25]

[53] The fourth set of charges concern the murder of Vernon Bothes ("**Bothes**").[26] In respect of this murder, it is alleged by the State that Nizaam Meniers ("**Meniers**") and Efraim Presence ("**Presence**") pretended to be buying drugs from the deceased but then killed him. One of the deceased's friends observed a grey Audi motor vehicle speeding from the scene. A police van pulled up next to the friend and then gave chase to the Audi. The Audi stopped and two persons jumped out of the rear passenger seats and ran away. One of these was Meniers, who was eventually arrested. The Audi itself was pulled over and Accused 2 was found to be driving with the Applicant in the passenger seat. A fourth suspect was eventually arrested and identified as Presence. In respect of this murder, the Applicants points out the charges against him were initially withdrawn on the basis of a lack of evidence against him. The State however claims that at the stage of his arrest there was no positive residue test and the firearm used was not yet found. The Applicant's matter was then not placed on the Court roll on the instruction of a prosecutor. This was however subject to the condition that if further evidence was obtained, the Applicant would be added to the case. The matter was eventually reconsidered by the Director of Public Prosecutions ("**DPP**") who reviewed the decision of the prosecutor and directed that charges against the Applicant had to be included. It is noteworthy that, in respect of this murder, the Applicant has not attempted to

[25] *S v Tshabalala* 1998 (2) SACR 259 (C) at 265f; *S v Yanta* 2000 (1) SACR 237 (Tk) at 246
[26] Counts 35-38

provide an explanation for why he was found in the passenger seat of the getaway vehicle.

[54] The fifth set of charges relate to the murder is of Aubrey Johannes ("**Johannes**").[27] In respect of this murder, the State alleges that the s 204 witness was told by Accused 5 that he and the Applicant and others were made to kill Johannes because the "*Sexy Boys*" had used Johannes' vehicle to transport certain assassins during another murder. Parts of the s 204 witness' account of the events were confirmed by CCTV stills and a bystander, who saw the person believed to be the shooter get into a vehicle which partially matches the appearance of the Applicant's vehicle. On this murder, the Applicant alleges that the witnesses identified different cars alleged involved in the incident. One identified a grey Ford Focus whilst the s 204 witness identified a white VW Golf. I refer to what I stated above regarding this kind of contradiction between witness statements. It can hardly be considered to be destructive of the State's entire case at the bail stage. The State also pointed out that the important part of the s 204 witness statement is the "*green monster*" sticker on the car that he identified.

[55] The sixth set of charges relate to the murder of Lorenzo de Kock ("**De Kock**").[28] The State alleges that the s 204 witness was at the home of the Applicant and present when the latter told Accused 7 and 8 that he had a suspicion that a school boy who was a friend of Accused 7 was spying on behalf of the "*Dixie Boys*" gang and indicated that this boy needed to be killed. Accused 7 and 8 then arrived back a short while later and confirmed that the

[27] Counts 43-46
[28] Counts 50-54

deed was done. On this set of charges, the Applicant states that he was arrested some three years after the incidents are alleged to have occurred and that he was arrested solely on the strength of the s 204 witness' account. He denies that he planned to or murdered De Kock.

[56] Having assessed the above, it is my view that the Applicant fell substantially short of establishing that the State's case is weak in respect of the Schedule 6 charges. Yet again, his affidavits lack specificity. He does not deal, for instance, with the fact that he was found sitting in the passenger seat of a getaway car. He further elected not to subject himself to cross-examination. This also weakens his case, as explained above.

[57] The Applicant's main points appear to be that the s 204 witness deposed to the affidavits long after the events took place and that he lacks credibility. Such a conclusion cannot in my view be drawn at this stage. As with the Applicant's case, one has only seen the State's case on paper. The Applicant chose to come to Court on paper. I can hardly make a credibility finding against the s 204 witness in motion proceedings; or find that his recollection of the events is unreliable even though I only have written statements before me. I also agree with the State that it must be borne in mind that in instances of gang-related violence, evidence against leadership figures is unlikely to come from anybody but a member. If such cases are considered weak merely because the s 204 witness was also a participant, then these crimes will never be prosecuted. It is also so, as contended by the State, that there is no absolute rule that requires that evidence of an accomplice must be

corroborated. The Court should seek some safeguard reducing the risk of the wrong person being convicted but this need not be corroboration.[29]

The drug dealing charge (count 71)

[58] This charge relates to events which took place on 14 December 2016. The State alleges that on this day a member of the DPCI was on a personal errand when he received information that there was a large shipment of drugs being packaged at 44 Drakenstein Road, Durbanville for distribution to the community. This is the address where the Applicant's mother lives. The officer went to the address and identified himself to a lady visible through a window. He then observed objects being thrown over a wall. He forcibly entered the house which was duly searched. At various places in the house and on the neighbour's premises, packaged and loose mandrax tablets were found along with R30 000.00 cash. The Applicant and Accused 2 were amongst those present at the premises and arrested. The Applicant and Accused 2 were positively linked to the packaging of drugs by fingerprints.

[59] In respect of this charge, the Applicant contends that he was released and the charges were withdrawn. The State, however, points out that the charges were not withdrawn due to a lack of evidence but in order that the counts be added to the charges of the present indictment. This was done because the DPP was of the view that the drug dealing forms part of the pattern of criminal gang activity.

[29] *S v Mhlabathi* 1968 (2) SA 48 (A)

[60] The Applicant makes much of the fact that he was released at a stage where the s 204 witness statements were already available to the State. It however was contended on behalf of the State, that considerable cross-checking and investigations followed after the s 204 witness statements were finalised. The veracity of the statements made by the s 204 witness had to be verified. The investigating officer also had to deal with some 23 other accused. It is accordingly not a case where the State suddenly changed its mind about the need to detain the Applicant but rather one where the State did not have its ducks in a row at the time when the drug arrest took place.

[61] The same applies to the Applicant's argument that the State only arrested the Applicant approximately one year after the last affidavit was deposed to by the s 204 witness. An arrest could not be effected immediately for reasons already described.

[62] What is more important, at this stage, is that Applicant has made no attempt to explain why his fingerprints were found on the packaging. In these circumstances he can hardly contend that the State's case is weak.

[63] The Applicant's counsel referred to *Dlamini*, at para 100, where it is stated that it would be proper for an arrestee when testifying in support of bail to refuse to answer certain questions. This part of *Dlamini* however relates to prosecutors being allowed to abuse the right to cross-examine an accused, especially when the bail application is not brought on the basis that the State's case is weak. *Dlamini*, read as a whole, is all about the exercise of choices: when a bail applicant elects to motivate his bail application almost solely on the basis of the weakness of the State's case then he would be required to

deal with pertinent aspects thereof. I accordingly do not find the Applicant's argument persuasive.

Conclusion

[64] For all these reasons, I do not believe that the State's case on the charges is weak to the extent that it constitutes exceptional circumstances within the meaning of s 60(11) of the CPA. It must be borne in mind that s 60(11) requires the applicant for bail to satisfy the Court that exceptional circumstances exist and he must do so by "*adducing evidence*". This means that there was a burden on the Applicant in the present matter to adduce evidence to demonstrate that the State's case is weak. In my view the Applicant has failed to do so. The State's case was criticised in sweeping terms or in immaterial respects whilst pertinent evidence against the Applicant was not dealt with.

Weighing the interests of justice against the right to personal freedom

[65] The weakness in the State's case was the main argument advanced on behalf of the Applicant. However, as explained above, the Court must nevertheless have regard to the totality of relevant factors in order to determine whether there are exceptional circumstances which justify the release of the Applicant.

[66] In the present matter, the State relies on s 60(4) read with s 60(5) as well as s 60(4) read with s 60(8A) as the reasons why bail is not in the interests of justice.

[67] I deal with the relevant parts in turn.

[68] Section 60(4)(a) (the safety of the public) is relied upon by the State because of the degree of violence towards others implicit in the charges levelled against the Applicant. This is undoubtedly the case. The offences were committed, at least in some instances, in the presence of and without regard for innocent bystanders. Multiple shots were fired as part of the crimes and bystanders were in fact hit by some of these.

[69] It is further alleged, on behalf of the State, that the Applicant, as a member of a criminal gang, is likely to continue hostilities with opposing gangs if released on bail. Gang related shootings is an immense problem for communities in the Cape Flats. It appears, further, that since the incarceration of the Terrible Josters criminal gang members, there has been a de-escalation of gang violence in these areas.[30] One can also take into account, as suggested by the State, that when members of the Terrible Josters appeared in the Bellville Court in August 2017, they allegedly assaulted a member of an opposing gang, which then lead to that gang opening fire on the group, leaving bullet holes in the Bellville Court glass entrance. Some eight cartridges were later collected at the entrance of the Court.

[70] As far as s 60(4)(e) is concerned (the release of the accused will undermine public peace or security), the State alleges that communities continue to express shock and outrage at the constant gang related violence in their

[30] The Constitutional Court remarked as follows in *Dlamini:*

> "[55] ...Experience has shown that organised community violence, be it instigated by quasi-political motives or by territorial battles for control of communities for commercial purposes, does subside while ringleaders are in custody. Their arrest and detention on serious charges does instil confidence in the criminal justice system and does tend to settle disquiet, whether the arrestees are warlords or druglords. In my view, open and democratic societies based on human dignity, equality and freedom, after weighing the factors enumerated in paras (a)-(e) of s 36(1) of the Constitution, would find ss 60(4)(e) and (8A) reasonable and justifiable in the prevailing climate in our country."

areas; and that the safety of the Applicant might be jeopardised by his release given the surge in assassination attempts on prominent gang leaders and particularly those of the Terrible Josters (some 11 killings are listed as well as the shooting and injury of the Applicant himself and Accused 7). Against this background, the State contends that the circumstances are exceptional,[31] as is evidenced by the constant request for the deployment of the defence force to curb gang violence. The State contends that the confidence of the community and the criminal justice system is already at an all-time low and there is a belief that accused arrested for gang related crimes are too easily released on bail.

[71] I believe that the State has also made out a case for exceptional circumstances under s 60(4)(e) and that it is not within the interests of justice to grant bail. The fact of the matter is that, despite the lack of previous convictions, the serious problem with gang-violence on the Cape Flats, to which the Applicant has been linked, outweighs the right of the Applicant in the present instance.

[72] This is particularly so because the Applicant's trial is about to commence on 6 May 2019. This is little more than a month from now. As stated above, the Applicant was not entitled to the police dockets in order to substantiate his bail application and he carries the blame for the delay. In any event, regardless of whose fault it is that the bail application was not considered earlier, it remains a factor that the Applicant is only to be detained for approximately one more month until he can prove his innocence in a criminal trial.

---

[31] As was recognised in *S v Miselo* 2002 (1) SACR 649 (C)

[73] Reliance was sought to be placed on the fact that Accused 5 was released on bail. I do not believe that I can take this fact into account. The record of those bail proceedings were not placed before me nor do I believe that such a record would be relevant. Each case must be determined on its own facts.

[74] In all the circumstances, I believe that the factors advanced by the State weigh more heavily than the personal freedom of the Applicant in the present matter and the prejudice he is likely to suffer due to the continuation of custody pending the trial.

[75] In the circumstances the application for bail is dismissed.

H J DE WAAL AJ
Acting Judge of the High Court
Cape Town
29 March 2019

APPEARANCES

Applicant's counsel: Mr R Liddell
Applicant's attorneys: Liddell Weeber & Van der Merwe, Wynberg

The State's counsel: Mr M Menigo
The State's attorneys: Director of Public Prosecutions, Western Cape