IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A195/2021

In the matter between:

LUYANDA LONZI	First Appellant
AWONKE ZIQU	Second Appellant
SICELO MUSE	Third Appellant
NDYEBO DOTWANA	Fourth Appellant

and

THE STATE	Respondent

Coram: Justice J Cloete

Heard: 18 November 2021

Delivered electronically: 25 November 2021

JUDGMENT

CLOETE J:

[1] This is an appeal against the refusal of bail for all four appellants by the magistrate at Worcester on 29 June 2021. *Mr Mafereka* appeared for the first to third appellants and *Mr Njeza* for the fourth appellant. *Ms Buffkins* appeared for the respondent ("the State"). In the pending trial the first appellant is accused no 1; the second appellant is accused no 3; the third appellant is accused no 4; and the fourth appellant is accused no 2.

[2] The appellants face two counts, namely murder and robbery with aggravating circumstances, arising from an incident in which the late Mr Charl Munnik was fatally wounded by a gunshot to his head during an armed robbery at his jewellery store in High Street, Worcester, at around 10.00am on Friday 29 January 2021. The charge sheet and testimony of the investigating officer during the bail application indicate that the State intends relying on the appellants having acted in the execution or furtherance of a common purpose or conspiracy.

[3] The charges faced by the appellants are thus Schedule 6 offences in terms of the Criminal Procedure Act 51 of 1977 ("CPA"). The applicable legal principles were succinctly summarised in the recent judgment of Binns-Ward J in *Killian v S* [2021] ZAWCHC 100 (24 May 2021) as follows:

> *'[2] The principal charge faced by the appellant is in respect of an offence listed in Schedule 6 of the Criminal Procedure Act 51 of 1977. His application for bail therefore fell to be adjudicated subject to s 60 (11)(a) of the Act, which provides as follows:*
>
> > Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been

> given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release.

[3] The effect of s 60(11)(a) was exhaustively discussed and elucidated in the Constitutional Court's seminal judgment in S v Dlamini*;* S v Dladla*;* S v Joubert*;* S v Schietekat *[1999] ZACC 8 (3 June 1999); 1999 (2) SACR 51(CC). It imposes an* onus *on the applicant for bail to adduce evidence to prove to the satisfaction of the court the existence of exceptional circumstances justifying his release on bail. The court must also be satisfied that the release of the accused is in the interests of justice. The standard of proof is on a balance of probabilities.*

[4] The import of the "exceptional circumstances" test has been traversed in a number of judgments. In S v Jonas *1998 (2) SACR 677 (SE) at 678E-G it was held that the term does not posit a closed list of circumstances. Whether a court may be satisfied that exceptional circumstances exist depends on the facts and circumstances established in the given application. Whereas* "exceptional" *denotes something* "unusual, extraordinary, remarkable, peculiar or simply different" *(see e.g.* S v Petersen *2008 (2) SACR 355 (C) at para [55]), it has been observed that* "*(s)*howing "exceptional circumstances" for the purposes of s 60(11) of the CPA does not posit a standard that would render it impossible for an unexceptional, but deserving applicant to make out a case for bail" *(*S v Josephs *2001 (1) SACR 659 (C) at 668I and* S v Viljoen *2002 (2) SACR 550 (SCA)). They do not have to be circumstances* "over and beyond and generically different from those enumerated in ss 60(4)-(9)"*, which are circumstances to which regard is had in run of the mill bail applications not subject to the strictures of s 60(11). It is clear, however, that they must at least be compelling enough to take the case made out for the granting of bail beyond the ordinary.*

[5] A court determining a bail application affected by s 60(11) is required to consider the conspectus of evidence and decide whether it is sufficient to persuade the court that an exception should be made to the default situation, which is that an accused person detained for trial on a Schedule 6 offence should remain in custody pending the outcome of the criminal proceedings. This involves the court in having to make a value judgment ('waarde-oordeel'); cf. S v Botha en 'n Ander *2002 (1) SACR 222 (SCA) at para 19.*

[6] Section 60(4) sets out a list of circumstances in which it would not be in the interests of justice to grant bail to an accused person. The subsection provides as follows:

> 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

(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or

(c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; 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.

Subsections 60(5) to (10) provide guidance on what factors should be taken into account when considering the factors set out in section 60(4).

[7] It is evident from the result of the bail application that the court a quo was not satisfied that the appellant had discharged the onus of satisfying it that there were exceptional circumstances that in the interests of justice justified his release on bail. In terms of s 65(4) of the Criminal Procedure Act, this court may not set aside the regional magistrate's decision unless it is satisfied that it was wrong. When it comes to the import of s 65(4), the observation of Hefer J in S v Barber *1979 (4) SA 218 (D) at 220E-H is often cited. In that matter the learned judge said* "It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly."

[8] As I pointed out in S v Porthen and Others *2004 (2) SACR 242 (C), however, certainly in respect of bail applications governed by s 60(11), in which the bail applicant bears a formal onus of proof, the nature of the discretion exercised by the court of first instance is of the wide character that more readily permits of interference on appeal than when a true or narrow discretion is involved. I concluded (at para 15)* "Accordingly, in a case like the present where the magistrate refused bail because he found that the appellants had not discharged the onus on them in terms of s 60(11)(a) of the CPA, if this

court, on its assessment of the evidence, comes to the conclusion that the applicants for bail did discharge the burden of proof, it must follow (i) that the lower court decision was 'wrong' within the meaning of s 65(4) and (ii) that this court can substitute its own decision in the matter". *That analysis was most recently endorsed in a decision of the full court of the Gauteng (Johannesburg) Division of the High Court in* S v Zondi *2020 (2) SACR 436 (GJ) at para 11-13…*

[13] Bail applications are sui generis. To an extent they are inquisitorial and, in general, there is no prescribed form for introducing evidence at them. But in cases where s 60(11) applies and there is consequently a true onus on the applicant to prove facts establishing exceptional circumstances, an applicant would be well advised to give oral evidence in support of his application for bail. This seems to me to follow, because - differing from the position in which the Plascon-Evans rule is applied – the discharge of the onus is a central consideration in s 60(11) applications. If the facts are to be determined on paper, the state's version must be accepted where there is a conflict, unless the version appears improbable. Reverting to the example in the current case used to illustrate the proposition, the probabilities are neutral on whether the appellant gave the police a consistent explanation or various conflicting ones. Applying the approach I have just described, as I believe it was bound to do in the circumstances, the court a quo was obliged - if it chose not to exercise its power of its own accord to require oral evidence - to accept the police evidence on the point. The example given was not chosen idly. Whether the accused supplied false information at the time of his arrest or thereafter is a material consideration in bail proceedings (see s 60(8)(a)).'

[4] The first and fourth appellants testified during the bail proceedings. The second and third appellants elected to file affidavits. The investigating officer, Sergeant Michael Pretorius, testified on behalf of the State.

[5] Although the onus is on the appellants to show exceptional circumstances, it is convenient to briefly summarise the salient aspects of the investigating officer's testimony since it gives context to the role allegedly played by each appellant in the commission of the offences.

[6] Pretorius testified that he arrived at the scene shortly after 10am. He was informed by one of the employees that there was CCTV footage from cameras installed both inside the store and just outside the front entrance. Pretorius gave fairly detailed evidence of what he observed on that footage, including the presence of four male perpetrators in the store, the armed robbery and fatal shooting of the deceased, and the four men climbing into a blue Honda motor vehicle after exiting the premises. It bears emphasis that his unchallenged testimony was that the camera placed outside the entrance was head height and the faces of the perpetrators were clearly visible as a result although, as far as can be ascertained from the record, one of them had a Covid-19 protective mask over his face.

[7] As to the alleged identification of the appellants, Pretorius testified that the third appellant was identified by one of the deceased's employees as the man he assisted after he entered the shop. He then compared his own observation of the faces of the perpetrators from the CCTV footage with a photograph of the third appellant already in the SAPS system.

[8] Pretorius traced the first appellant through a previous arrest record of the third appellant, as well as information received from a warden at Brandvlei Correctional Centre, who recognised the first appellant as a previously sentenced prisoner released on parole from the CCTV footage which was circulating on social media. According to Pretorius, and based on his own observation of the CCTV footage, it was the first appellant who fired the fatal shot during the

robbery and who thereafter immediately took possession of the deceased's firearm.

[9] The registration plate of the blue Honda was visible in the CCTV footage but was discovered to be false. Once the correct registration plate was traced the Honda was spotted at the home of one M, who eventually admitted having loaned it to the fourth appellant on the day before the incident.

[10] It was M who informed Pretorius of the fourth appellant's alleged knowledge of the crime, although it is common cause that the fourth appellant was not present during the incident itself (the fourth man involved is seemingly still at large). It was also M who informed Pretorius that prior to the arrest of the first to third appellants they (along with the fourth unidentified perpetrator) threatened to kill him if he disclosed any information, and it was the fourth appellant who instructed him to "stick to his story" and to dispose of the Honda's hubcaps. Pretorius had also listened to WhatsApp voice messages from the fourth appellant on M's cell phone in which M was given these instructions and warned not to disclose any information.

[11] Pretorius testified further that during an interview with the first appellant he informed him that he travelled to Worcester on the day in question (along with two others) to meet up with the fourth appellant. They travelled to and from Worcester in a silver-grey Polo Vivo vehicle. This vehicle was traced to the second appellant and his photograph located in the SAPS system.

[12] Comparing this photograph to the CCTV footage Pretorius formed the opinion that the second appellant bore a strong resemblance to one of the perpetrators. On 9 February 2021 the second and third appellants were apprehended in the Polo Vivo and the deceased's firearm found hidden in its dashboard. M also identified the second appellant from a photograph as one of the people at the fourth appellant's home who threatened him when he collected his blue Honda on 29 January 2021.

[13] It was also Pretorius' testimony that a Warrant Officer Keyser, a facial comparison expert, compared stills of the CCTV footage of the perpetrators with photographs taken after their arrest, and found certain characteristics matching those of the first to third appellants.

[14] After Pretorius had commenced his testimony about the CCTV footage the appellants' legal representative at the time, *Mr Dunga*, stated that he wished to bring an application for the defence to view the footage and peruse the report of the facial comparison expert so as to enable him to prepare properly for cross-examination in light of the onus resting upon the appellants to show exceptional circumstances.

[15] The State indicated that it had no objection, but would only make the expert report available to the defence once Pretorius had testified about it. The magistrate expressed the view that she did not know whether the State would seek to admit the CCTV footage and/or report into evidence, and suggested to

Mr Dunga that his application be brought *'when we actually get to that point'*. He agreed with this approach.

[16] As it turned out the State did not seek leave to admit either into evidence, which it was not obliged to do given that it bore no onus. However the fact of the matter is that it was nonetheless open to the defence to have renewed the application for access to the footage and report when it became clear how much reliance was placed on the footage by Pretorius, and after Pretorius had testified about the Keyser report. For reasons which are not apparent from the record the defence did not do so. Indeed, and perhaps tellingly, not a single question was put to Pretorius about the footage or the report, despite comprehensive cross-examination by *Mr Dunga* who appears to be an experienced and competent lawyer. Accordingly the evidence of Pretorius in regard to both stood uncontested.

[17] It was contended on behalf of the first to third appellants that the State was *'secretive'* about the contents of the video footage, which should at least have been shown to the Court, especially given, so it was submitted, that it was contested by the defence. However the record shows the opposite to have been the case. It was also submitted on behalf of these three appellants during argument that, given the inquisitorial nature of bail proceedings, it was incumbent on the magistrate to have viewed the footage herself in order to be satisfied that the testimony of Pretorius was true.

[18] To my mind, in the particular circumstances of this case, it could not reasonably have been expected of the magistrate to go this far in order to assist these appellants in discharging their onus, particularly where they seemingly ultimately elected not to rely on the footage themselves. In any event the strength of the *prima facie* case against the appellants was but one of a range of factors which the magistrate was obliged to take into account, and she was furthermore required to consider all of the evidence and not only isolated aspects thereof.

[19] It was also contended on behalf of the first to third appellants that the magistrate should have drawn an adverse inference from the investigating officer's failure to convene a formal identity parade (whether physical or photographic). This may be an issue in the forthcoming trial but such a parade is an investigative tool, and nothing more, at this stage.

[20] While at trial the State bears the onus to prove the guilt of the appellants beyond reasonable doubt, at bail stage all that the magistrate needed to be persuaded about – in the context of determining the strength of the State's *prima facie* case – was whether the evidence that was adduced was sufficient for this purpose. To my mind, as far as the first to third appellants are concerned, this threshold was met. Different considerations apply to the fourth appellant, and I deal with these hereunder.

The first appellant

[21] During his testimony the first appellant confirmed his presence in Worcester on the day of the incident and that he travelled to and from Worcester in the Polo Vivo. He also confirmed having met up with the fourth appellant and knowing the other appellants. He denied any involvement in the commission of the offences. According to him, he arrived in Worcester at around 10am and had already returned to Cape Town by 3pm. When it was pointed out that he was spotted in the Polo Vivo on CCTV footage at just before 3pm while still in Worcester, he attributed this to him having been mistaken about the time.

[22] It is common cause that the first appellant was previously convicted of murder along with the third appellant during 2012, and sentenced to an effective 14 years imprisonment. He was released on parole on 26 February 2019 with the expiry date thereof being 31 July 2025. He is classified as a high risk parolee.

[23] The first appellant was arrested on the current charges on 1 February 2021. According to him, a parole official(s) indicated that his parole might be reinstated if he is granted bail in the present case. He did not identify the individual(s) who allegedly gave him this information and nor did he call anyone to confirm this under oath.

[24] During argument criticism was levelled against the magistrate for failing to call these – unidentified – individual(s). This however is a neutral factor, since Pretorius testified that he established from the parole authorities that the first appellant's parole has been permanently revoked. Indeed *Mr Mafereka* confirmed in argument that the first appellant (as well as the third appellant) are

currently serving the remainder of their previous sentences. This means that the first appellant will in all probability remain in custody until 31 July 2025.

[25] There is nothing in the record to refute this, and as far as I am concerned, that is the end of the first appellant's appeal. In addition Pretorius' unchallenged evidence was that his investigation, under direction of the DPP, was all but complete when he testified on 4 June 2021. Accordingly, despite the complaint made on behalf of the first to third appellants that there is no indication as to when the trial will commence, it is obviously open to the first appellant to renew his bail application in the highly unlikely event that this has not eventuated 3 ½ years from now.

[26] In any event the first appellant's personal circumstances, accurately recorded by the magistrate in her judgment, are unexceptional. He complains of having to support dependants, yet his employment itself is sketchy. During argument in the court a quo *Mr Dunga* informed the magistrate that all the appellants have savings which can be used to pay bail of more than R5 000 each if necessary. If that is indeed the case then they are able to contribute, at least in the short to medium term, towards the maintenance of their dependents from these savings.

The second appellant

[27] Given the second appellant's election not to testify, coupled with his bald denial on affidavit that he was not involved in the commission of the offences, the court

a quo was obliged to accept the investigating officer's testimony in relation to the second appellant.

[28] At the time of deposing to his affidavit on 19 April 2021 the second appellant surely knew about his Polo Vivo's "involvement" and that when he and the third appellant were apprehended in that vehicle the police found a firearm (with the serial number erased) concealed in its dashboard. Yet in his affidavit the second appellant made no attempt to explain these circumstances or even to provide some sort of alibi. Indeed he swore on oath that *'…to this date, I do not really know how it is that I am linked to the commission of this offence'.* This is hardly indicative of an attempt to advance exceptional circumstances.

[29] Moreover the evidence of Pretorius established that upon his arrest the second appellant informed him that he was unemployed, but in his affidavit claimed the opposite without providing any substantiation of such alleged employment. The testimony of Pretorius also indicated that the second appellant was one of the men who threatened to kill the State witness M if he disclosed any information about the commission of the crimes. Weighed against all of this are the unexceptional personal circumstances of the second appellant which are accurately summarised in the magistrate's judgment. I am persuaded, in light of the aforegoing, that the second appellant failed to discharge his onus.

The third appellant

[30] Most considerations in relation to the first appellant apply also to the third appellant. It is common cause that he too was released on parole during 2019. The parole expiry date is 10 April 2026. From the record it may be fairly assumed that his parole expiry date is later than the first appellant's because – and this is important for purposes of this appeal – he was also convicted of escaping from custody while awaiting trial in the previous murder case for which he was sentenced to a year's imprisonment in October 2011.

[31] Again it was Pretorius' unchallenged evidence that he established from the parole authorities that the third appellant is classified as a high risk parolee and his parole has been permanently revoked following his arrest on the current charges. He is thus serving the balance of his sentences for his two previous convictions and again, in my view, that is the end of his appeal, at least for the foreseeable future, for the same reasons which I have given in respect of the first appellant.

[32] Moreover the third appellant knew about the circumstances of his arrest when he deposed to his affidavit on 19 April 2021 and yet, like the second appellant, he elected not to take the court into his confidence about how he came to be in the second appellant's vehicle with a firearm hidden in its dashboard.

[33] Although not strictly relevant given his current incarceration as a sentenced prisoner, the third appellant's personal circumstances as summarised in the magistrate's judgment are unremarkable, and his family's alleged financial

prejudice, which is entirely unsubstantiated, should be adequately addressed by using his savings, at least until they are depleted.

The fourth appellant

[34] It is common cause that the fourth appellant has no previous convictions, pending cases or outstanding warrants. It is also common cause that during the bail proceedings the fourth appellant was not placed at the crime scene. However according to Pretorius, M's information links the fourth appellant to the offences themselves, as do his WhatsApp voicemail messages to M as described above.

[35] What also weighs against the fourth appellant is M's wife's statement about which Pretorius testified confirming that, despite the fourth appellant's denial, the vehicle which he swopped with M for the blue Honda was still at the M residence on the morning of the incident; and Pretorius' evidence about the fourth appellant's initial denial to him upon his arrest, in the presence of the first appellant, that he knew the latter. Accordingly on the State's version the fourth appellant misled Pretorius and instructed M to mislead the police. He also instructed M to dispose of the Honda's hubcaps which, potentially at least, would have been evidence.

[36] When asked to explain his principal objection to the fourth appellant being granted bail Pretorius responded *'…the assumption or suspicion that he… planned this whole incident'.* Pretorius explained that he was awaiting cell phone

records of the first and fourth appellants which he had not been able to procure at the time of testifying due to an administrative backlog.

[37] During argument in the court a quo the prosecutor submitted that, given the fourth appellant's alleged threat to M, there was a likelihood that he would interfere with him if released on bail, particularly given his knowledge of where M resides, which is in close proximity to the fourth appellant's home. The prosecutor also submitted that, given the lengthy prison term he faced if convicted, the fourth appellant might abscond. He further placed reliance on a petition signed by about 2900 individuals, both locally and abroad, expressing their outrage at the deceased's murder and objecting to the release of any of the appellants on bail.

[38] However as submitted by *Mr Njeza* the State has a fundamental problem when it comes to the fourth appellant. It lies in the prosecutor's failure to put the State's version on crucial aspects to the fourth appellant when he testified. These relate to the information allegedly provided to Pretorius by M in respect of the threat made by the fourth appellant to him; the instruction to dispose of the Honda's hubcaps; the WhatsApp voice messages to which Pretorius had listened which would have served as objective evidence; and Pretorius' testimony that the fourth appellant initially denied that he knew the first appellant. All that was put to the fourth appellant was that portion of M's statement in which the fourth appellant allegedly communicated his knowledge of the robbery and shooting to M.

[39] Accordingly the fourth appellant was not afforded the opportunity to respond to these allegations although the prosecutor must surely have been aware of them since he referred to M's statement itself when he cross-examined the fourth appellant. On these crucial aspects therefore the magistrate could not have exercised her discretion to accept the evidence of Pretorius over that of the fourth appellant's.

[40] In addition, and what made it even more necessary for the fourth appellant to be given the opportunity to respond, is the evidence of Pretorius that M was initially interviewed as a suspect and conveyed certain false information at the first interview.

[41] In addition, during cross-examination of the fourth appellant it emerged that he was previously arrested on a charge of bombing an ATM in the area in which he resides and incarcerated as an awaiting trial prisoner for some time. The evidence is unsatisfactory since it is sketchy at best, but from what can be gleaned from the record, and vaguely confirmed by Pretorius when he testified, it appears that at some point the fourth appellant was released on bail and thereafter attended all court appearances until the matter was removed from the roll.

[42] In her judgment the magistrate did not specifically distinguish the position of the fourth appellant from those of the other appellants. It is not in dispute that he has a fixed address from which he operates his mother's taxi/transport business, and has dependents who rely on him for financial support. Although she found that

there is a very real likelihood that all four appellants would interfere with or intimidate State witnesses, when it comes to the fourth appellant this would probably only apply to M, and possibly his wife, given that the fourth appellant was not present during the commission of the crime and could thus not be identified by the witnesses present.

[43] Having regard to the above I am compelled to conclude that the magistrate misdirected herself in placing the fourth appellant in the same category as the other appellants, and that the fourth appellant has met the threshold of "exceptional circumstances". I emphasise that the position might well have been different if the fourth appellant had been given the opportunity to fairly present his case.

[44] However strict bail conditions must be imposed. In this regard I cannot ignore Pretorius' evidence that the fourth appellant previously threatened M, and the alleged objective evidence of the WhatsApp voice messages about which he testified. Indeed M's evidence, and hence the need to protect him from threats and influence, is pivotal to the State's case against the fourth appellant.

[45] One of the main grounds upon which the fourth appellant's bail application was based is that he is needed to resume the taxi/transport business which operates in the very area in which M resides. Clearly he cannot be permitted to return to that area while awaiting trial. This was raised with *Mr Njeza* in argument, and both he and *Ms Buffkins* undertook to provide me with an agreed draft order (after obtaining input from Pretorius) containing suitable conditions in the event

that the fourth appellant was successful in his appeal. This was duly provided and is incorporated in the order which follows.

[46] **In the result an order is made in terms of Annexure "X" hereto.**

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J I CLOETE