

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

Case No: CC44/2021

Read with Case No: A71/2021

Read with Case No: 1/82/02/2020

In the matter between:

SITHEMBILE YANTA

Applicant

and

THE STATE

Respondent

Coram: De Wet AJ

Date of Reasons: An order was granted on 22 February 2023. The reasons for the order were handed down electronically by circulation to the parties' legal representatives by email. The date and time of handing down reasons is deemed to be 1 March 2023.

JUDGMENT

DE WET, AJ:

[1] The right of an unsuccessful bail applicant to an opportunity to present new facts in order to secure their release on bail must always be carefully weighed against the principle that renewed bail applications, where old and previously known

facts are simply restructured and no real new facts exist, amounts to an abuse of process.

[2] The applicant was arrested on 4 September 2020 and first applied for bail during October 2020 in the magistrate's court of Cape Town under case number 16/500/2020. The state and the legal representatives of the applicant agreed that the provisions of s 60(11)(a) of the Criminal Procedure Act 51 of 1977 ("the CPA") applied and that the applicant had the onus to adduce evidence that would show, on a balance of probabilities, that there are exceptional circumstances which, in the interest of justice, would permit the release of the applicant on bail.

[3] During December 2020 the bail application was refused and the applicant filed an appeal against such refusal in this court under case number A 71/2021. The bail appeal was refused during May 2021 by Lekhuleni AJ (as he then was).

[4] During November 2022, the applicant lodged an application for special leave to appeal in the Supreme Court of Appeal against the finding of Lekhuleni AJ under case number 026/2022. During January 2022 condonation for the late filing of the application was granted but the application for special leave to appeal was dismissed on the grounds that there are no special circumstances meriting a further appeal.

[5] The applicant then filed this application, based on alleged new facts, for his release on bail.¹ The record that was placed before this court is voluminous and contained all the documents (including the parties' respective heads of argument) in the previous bail application, which I carefully considered in light of the approach to be adopted in an application of this nature. I dismissed the application on 22 February 2023. These are the reasons for my order.

Factual background:

[6] The applicant was charged with murder, robbery with aggravating circumstances as defined in s 1 of the CPA, robbery with aggravating circumstances as defined in s 1 of the CPA, contravention of s 3, read with sections 1, 103, 117,

¹ The pending trial was transferred to this court.

120(1)(a), s 121, read with schedule 4 and s 151 of the Firearms Control Act, 60 of 2000, and further read with s 250 of the CPA (unlawful possession of firearm) and contravention of s 90, read with ss 1, 103, 117, 120(1)(a), s 121, read with schedule 4 and s 151 of the Firearms Control Act, 60 of 2000, and further read with s 250 of the CPA (unlawful possession of ammunition).

[7] It is alleged that on 22 February 2020, at about 11h30, the applicant and a group of seven other males entered the parking area of Orms Pro Photo Shop ("Orms") in R[...] Street, R[...] S[...], Cape Town in two motor vehicles, namely a white Polo with registration number C[...] 6[...] and a silver-grey Toyota Quest with registration number C[...] 6[...]. The male suspects exited the vehicles and approximately three of the males in the group approached Orms whilst the drivers remained in the vehicles. According to an employee of Orms, two men entered the shop, one of them took out a firearm, cocked it and pointed it towards him and instructed him and his client to get down on the floor. The suspects then proceeded to remove cameras and equipment from the shop. There were employees and members of the public present in the shop whilst the robbery took place.

[8] An armed response vehicle entered the parking lot whilst the robbery was taking place. One of the suspects approached the vehicle, took out a firearm and shot and killed the driver. The suspect proceeded to remove a firearm and ammunition from the armed response officer whom he had just shot. The armed response officer died from the gunshot wound. After the shooting incident all the suspects fled the scene in the vehicles.

[9] The applicant was identified through security video footage as the driver of one of the getaway vehicles and was in due course arrested, being known to the investigating officer from a previous similar case. According to the state the video footage shows the applicant sitting behind the steering wheel of the silver Toyota getaway vehicle. This is the same vehicle which a security officer saw four males climb out of before the robbery and, the same vehicle used to fled the scene.

[10] According to the affidavit of Luvuyo Theodoric Maki, a detective sergeant at the Provincial Organised Crime Unit in Cape Town, both vehicles used in the robbery

at Orms belonged to two Uber drivers, one of whom gave a statement to the police that he lent his vehicle to one of the suspects. Both these vehicles were fitted with tracking devices and were soon after the robbery traced to a car wash in Dunoon, Milnerton.

[11] The state relies on video footage obtained from the parking area and from inside the store, identity parades, ballistic evidence and cell phone data, placing the applicant in the vicinity of where the crime was committed.

Bail application based on new facts:

[12] In *S v Mpofana* 1998 (1) SACR 40 at 44(G – I) the court explained the approach to be taken in applications for bail based on new facts as follows:

“In considering an application for bail allegedly brought on the strength of new facts, the court’s approach is to consider whether there are, in the first instance, new facts and, if there are, reconsider the bail application on such new facts, against the background of the old facts.”

[13] In *S v Mohammed* 1999 (2) SACR 507 (C), the court stated that “it seems logical that any renewed application based on new facts or changed circumstances should only be able to be properly judged with reference to those facts and circumstances which were placed before the court in the first instance. There can of course be no *numerus clausus* as to the nature of new facts or changed circumstances that may legitimately warrant the grant of bail previously refused. The newly discovered evidence of a witness who may prove the accused’s innocence, as was in this case, is an example.”

[14] In the matter of *Davis and Another v S* (2888/2015) [2015] ZAKZDHC 41 (8 May 2015), it was held that: “If the evidence is adjudged to be new and relevant, then it must be considered in conjunction with all the facts placed before the court in previous applications, and not separately.”²

² See *S v Vermaas* 1996 (1) SACR 528 (T) at 531e-g; *S v Mpofana* 1998 (1) SACR 40 (Tk) at 44g-45a; *S v Mohammed* 1999 (2) SACR 507 (C) [1999] 4 All SA 533 at 511a-d.

[15] The CPA does not prescribe or define what constitutes new facts and there is no prescribed procedure for renewed bail applications,³ but it appears with reference to case law, that certain general principles have been identified as relevant, when a court is faced with an application for an accused's release on bail based on new facts.⁴ These can be summarised as:

15.1 Whether the facts came to light after the bail was refused. Such facts can include circumstances which have changed since the first bail application was brought such as the period that an accused had been incarcerated;⁵

15.2 Whether the facts are 'sufficiently different in character' from the facts presented at the earlier unsuccessful bail application in the sense that it should not simply be a "reshuffling of old evidence";⁶

15.3 Whether the alleged new fact(s) are relevant in the sense that if received by the court, it would *per se* or together with other facts already before the court from the initial bail application, assist the court to consider the release of an accused afresh;

15.4 A court hearing an application based on alleged new facts, must determine, with reference to the evidence previously presented in the unsuccessful bail application, whether such facts are indeed new.⁷ In *S v Mpfana* 1998 (1) SACR 40 (Tk) at 44 g-45 a Mbenenge AJ (as he then was) explained that "whilst the new application is not merely an extension of the initial one, the court which entertains the new application should come to a

³ See *S v De Villiers* 1996 (2) SACR 122 (T) at 124i – 125c

⁴ See Criminal Justice Review, No 2 of 2017, "New facts" for purposes of a renewed bail application: Principles, issues and procedures by Steph van der Meer.

⁵ In *S v Mousse* 2015 (3) NR 800 (HC) at para 7 the court held that the passage of considerable time coupled with the state's failure to make progress with the investigation of the case can be qualified as a new fact. Also see in this regard *S v Hitschmann* 2007 (2) SACR 110(ZH) at 113b

⁶ See *S v Mohamed* 1999 (2) SACR 507 (C) at 512 and *S v Petersen* 2008 (2) SACR 355 (C) at [57]

⁷ See *S v Vermaas* 1996 (1) SACR 528(T) at 531e-g where Van Dijkhorst J reiterated the principles set out in *S v Acheson* 1991 (2) SA 805 (NmHC) 821 F-H, as "Obviously an accused cannot be allowed to repeat the same application for bail based on the same facts week after week. It would be an abuse of the proceedings. Should there be nothing new to be said the application should not be repeated and the court will not entertain it. But it is *non sequitur* to argue on that basis that where there is some new matter the whole application is not open for reconsideration but only the new facts. I frankly cannot see how this can be done. Once the application is entertained the court should consider all facts before it, new and old, and on the totality come to a conclusion".

conclusion after considering whether, viewed in the light of the facts that were placed before court in the initial application, there are new facts warranting the granting of the bail application”; and

15.5 Where evidence was known and available to a bail applicant but not presented by him at the time of his earlier application, such evidence can generally not be relied upon for purposes of a renewed bail application as ‘new facts’. In this regard it was explained in *S v Le Roux en andere* 1995 (2) SACR 613 (W) at 622 that in the absence of such a rule, there could be an abuse of process leading to unnecessary and repeated bail applications and that an accused should not be permitted to seek bail on several successive occasions by relying on the piecemeal presentation of evidence. I agree with the opinion of Van der Meer⁸ that this rule should not be an absolute or inflexible one and that a court should be willing to consider why relevant and available information was not place before the court in the initial application.⁹

[16] Against this background, the new facts that the applicant requests this court to accept and consider, can be summarised as follows:

16.1. The investigation by the state is now complete;

16.2. The applicant no longer has any similar pending cases against him;

16.3. The applicant has been in custody for more than two years and he has consequently been unable to develop a relationship with his minor children which is to their detriment; and

16.4. The applicant’s continued incarceration has led to his ill health which will only deteriorate further should he not be released on bail.

Finalisation of the investigation:

⁸ Criminal Justice Review (*supra*)

⁹ See *S v Nwabunwanne* 2017(2) SACR 124(NCK) where it was held at para 27, that a court “should not lightly” deny a bail applicant the opportunity to present new facts.

[17] In paragraph 25 of the applicant's initial bail application affidavit, he stated that the investigation against him "may" (*sic*) have been completed, but that the police were still looking for other suspects.

[18] In the opposing affidavit to the initial bail application, detective sergeant Maki stated that he believed that the applicant, if released on bail, would hamper the investigation pertaining to the tracking of the other suspects. He further stated that the state has extensive evidence against the applicant such as video footage, eyewitness statements, cell phone data, evidence regarding the tracker systems, ballistics and medical evidence. The applicant did not in the initial bail application allege that he was at a disadvantage when he applied for bail and he has not alleged in the new affidavit that any information has come to light due to the investigation being complete which would cast doubt on the state's case as was the case in *S v Nwabunwanne (supra)*.

[19] No information was placed before me as to whether further suspects were indeed found. Be that as it may, it appears from the available information that the investigation was for all practical purposes complete when the initial bail application was heard. I do not regard the finalisation of the investigation to constitute a new fact for purposes of this application.

Pending cases:

[20] In the applicant's initial bail application, he stated that he only had one pending matter in the Bellville magistrates court for robbery with aggravating circumstances and further that the only time he had a warrant issued against him was when he could not attend court due to a health condition. I will return to this aspect later in the judgment.

[21] According to the opposing affidavit of Mr Maki, the applicant had two pending cases (there appear to have been some confusion regarding a further charge) for robbery with aggravating circumstances. In respect of one of these charges the applicant was allegedly the driver during an armed robbery at Camera World in

Bellville during 2019, where a group of suspects also stole expensive photographic equipment.

[22] The presiding officer hearing the applicant's initial bail application dealt with the issue of pending cases on the basis that the applicant had two pending cases and that he had allegedly committed the offences he is accused of in this case, whilst out on bail in those cases.

[23] From the new affidavit filed by the applicant, it is apparent that he indeed had two pending cases for similar offences and not one as stated by him initially.

[24] It appears that during August 2022 the Bellville matter under case number SH 5/230/2019 was withdrawn due to the complainant not being available and the applicant was acquitted in Bellville case number SH 5/108/2020.

[25] The state during argument conceded that the fact that the applicant no longer has any pending cases, amounts to a new fact and I will as a result consider this as a new fact for purposes of the renewed bail application.

The interests of the applicant's minor children:

[26] The issue of the impact on the applicant's minor children, should he not be released on bail, was raised in his initial bail application and was also considered by Lekhuleni AJ¹⁰ in the bail appeal.

[27] The interests of minor children were dealt with in S v Petersen 2008 (2) SACR 355 (C) and it was held at para 63 at 372i-373a that:

"When, in an application for bail, the special circumstances relied on by the accused include the constitutionally protected interests of a minor child, this court must, in terms of s 28(1)(b) of the Constitution of the Republic of South Africa, 1996, take cognisance of the child's right 'to family care or parental care, or to appropriate alternative care when removed from the family

¹⁰ Judgment, paragraphs 7.5 and 18, Case number A 71/21.

environment'. Inasmuch as a decision in regard to an accused's bail application and subsequent appeal (if the application is refused) will, of necessity, impact upon a child of the accused, it may not be lost from sight that the child's best interests are, in terms of s 28(2) of the Constitution, paramount. This does not, of course, mean that such interests will simply override all other legitimate interests, such as the interests of justice or the public interest. It must, however, always be taken into consideration as a relevant factor and a general guideline in assessing such competing rights."

[28] The applicant now submits that the fact that he has been in custody for more than two years due to the trial not being finalised, should be considered afresh in the context of his inability to form or maintain a bond with his very young children. The delay in the finalisation of the trial is an unacceptable but commonly found situation. No evidence was placed before me to indicate that the prosecution has been the cause for any delay, and I can only assume that the delay is mainly as a result of the overburdened criminal court rolls. I accept the applicant's continued incarceration amounts to changed circumstances and that his incarceration has an impact on his minor children, and I will consider this fact together with all the other facts before me.

The applicant's ill-health:

[29] The applicant states in his founding affidavit that whilst in custody he contracted tuberculosis in April 2022 and was hospitalised. He is now on medication and there is nothing to indicate that he is not receiving adequate medical care.

[30] Whilst I agree that, in principle a later medical condition may constitute a new fact for purposes of a renewed bail application, I am not convinced, given the factual situation set out by the applicant in his affidavit, that his medication condition would have any influence on the outcome of the renewed bail application. Insofar as it is a changed circumstance and was not before the presiding officer hearing the applicant's initial bail application, I will allow and consider the applicant's changed medical condition.

[31] In light of my findings that there are new facts and changed circumstances, the question is thus whether these new facts and circumstances, together with the facts already before the court, would justify the release of the applicant on bail.

Has the applicant shown, on a balance of probabilities, that exceptional circumstances exist, which, in the interest of justice, would permit his release on bail?

[32] The charges against the applicant fall in the category of the schedule 6 offences and the bail application in the court *a quo* was brought in terms of section 60(11)(a) which provides that:

“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 interest of justice permit his or her release.”

[33] As correctly pointed out by Binns-Ward J in the matter of Killian v The State¹¹ the effect of s 60 (11) (a) was exhaustively discussed and elucidated in the Constitutional Court’s judgment of S v Dlamini; S v Dladla; S v Joubert; S v Schietekat 1999(2) SACR 51 (CC) and an onus is imposed on an applicant for bail to adduce evidence to prove to the satisfaction of the court the existence of exceptional circumstances justifying his release on bail. Furthermore, the court must be satisfied that the release of the accused is in the interest of justice and the standard proof is on a balance of probabilities.

[34] It has further been held that exceptional denotes something “unusual, extraordinary, remarkable, peculiar or simply different (see S v Petersen 2008 (2) SACR355 (C) Se v Josephs 2001 (1) SACR 659 (c) at 6681 and S v Viljoen 2002 (2) SACR 550 SCA.¹²

¹¹ Case A 87/2021

¹² In S v Bruintjies 2003 (2) SACR (SCA) at paragraph 6 exceptional circumstances was defined as follows: “What is required is that the court consider all relevant factors and determine whether

[35] I do not intend to again summarise the personal circumstances of the applicant save to add that the applicant suffers from tuberculosis for which he receives medication. The personal circumstances of the applicant do not in my view constitute exceptional circumstances.

[36] For the reasons already on record, I agree with the findings of the presiding magistrate in the initial bail application, that the state, *prima facie*, has a strong case against the applicant. In this regard Lekhuleni AJ held as follows at para 20 of his judgment: “The record reveals that the magistrate in the court below considered the real evidence in the form of photographs, cell phone location based evidence, corroborating evidence in photograph identification parade which identified both appellants as the alleged perpetrators of the crime....The magistrate also considered the photograph identification parade which connected the appellants to the charges levelled against them and came to the conclusion that the State has a strong *prima facie* case against both appellants. In my view the finding of the court a quo in this regard is spot on and cannot be faulted. I agree with the view expressed by the court below that at least *prima facie*, the State case against both appellants is considerably strong”.

[37] More importantly in my view, is the fact the applicant had, *prima facie*, placed false evidence before the court in the initial bail application. In this regard it appears from the record that the applicant had raised an *alibi* defence and had stated that he did not commit the offences he is charged with as he was receiving treatment from a traditional healer at the time the robbery had taken place. In support of this allegation, he attached a medical certificate from a Mr Pama, which indicated that the applicant was receiving treatment from him for the period 22 January 2020 until 25 February 2020. On further investigation by the state, an affidavit was obtained from Mr Pama, and placed before the court during the initial bail proceedings. In the affidavit, Mr Pama states that the applicant’s mother had approached him as her son was in trouble for not attending court and that he had then issued the medical certificate on her request. It further transpired that the applicant had used this very

individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release ... If, upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant, consistent with the interests of justice, warrant his release, the appellant must be granted bail.”

same medical certificate in the proceedings which took place in the Bellville regional court, in order to prove that he was not wilfully absent from court in those proceedings on 24 January 2020.

[38] In the bail appeal the court held in this regard as follows: “It was argued that this court should not attach much weight to this statement as the credibility of Mr Pama is questionable and that the circumstances under which the statement was obtained are not known. In my view, this document forms part of first appellant’s defence. It was filed as an annexure to the first appellant’s affidavit and it forms part of this record. This affidavit was intended to be used by the first appellant in support of his *alibi* defence which in turn supported his averment that the State’s case against him is weak. If the first appellant intends to challenge the circumstances under which this statement was obtained, the first appellant is at liberty to do so during trial. In my considered view, and *ex facie* the document, I am in agreement with the findings by the court *a quo* that the medical certificate was obtained by fraudulent means in a quest to mislead the court. I also agree with the views expressed by the magistrate that the first appellant misled the Bellville regional court by submitting a medical certificate that he was sick when in fact he was not. This is indicative of the fact that if he is released on bail he is likely to evade (sic) justice”

[39] The serious charges the applicant is facing, originates from a robbery which took place whilst the applicant was on bail facing similar charges. It is in my view of little consequence that these charges had subsequently been withdrawn or that the applicant had been acquitted of the other pending charge. The fact remains that the applicant is accused, on strong evidence, of committing serious offences and further provided false information during both proceedings, all whilst out on bail.

[40] Section 60(4)(d) read with s 60(8)(a) of the CPA dictates that when an accused knowingly provided false information at the time of his or her arrest or during bail proceedings, it would show that there is a likelihood that an accused, if he or she were to be released on bail, would undermine or jeopardize the objectives or the proper functioning of the criminal justice system. The applicant supplied false information in his bail application and at a warrant enquiry as aforesaid. I therefore find that the state has established that s 60(4)(d) of the CPA is applicable insofar as

the applicant's release on bail would undermine the proper functioning of the criminal justice system. I further find that there is a likelihood that the applicant, if released on bail, would commit schedule 1 offences as contemplated in s 60(4)(a).

[41] The question of a detainee's ill-health due to conditions in our prisons was considered in the matter of *S v Mpofana* 1998 (1) SACR 40 (TK) and it was stated in this regard, as follows:

“Upon a proper construction of s 35(2)(e) and (f) of the said Constitution, one whose detention has been pronounced lawful and in the interests of justice cannot simply resort to a further bail application merely because he has been detained under inhumane and degrading conditions or on the ground that his right to consult with a doctor of his own choice has been infringed. It is, however, available to such person firstly to apply to the prison authorities concerned and call upon them to remedy whatever complaints he/she has with regard to the conditions of his/her detention. Should the prison authorities fail to remedy such complaints, it is available to the detainee concerned either to challenge the detention before a court of law as being unconstitutional or obtain a court interdict to force the prison authorities to comply with the law. In any event, in *hoc casu*, the magistrate has, quite correctly in my view, ordered that the prisons officials should afford appellant the right to consult with a medical practitioner of his choice and appellant's concern in this regard should be laid to rest.”

[42] The applicant on his own version is receiving adequate medical treatment and has placed no facts before the court to substantiate his statement that his health would deteriorate further should he remain in custody pending trial.

[43] As to the issue of the delay in the finalisation of the trial, I point out that new facts or changed circumstances will not have the same effect in every bail application on new facts as the cumulative effect of the facts in each bail application may differ. Whilst a delay in one matter may tilt the scales in favour of an applicant in some circumstances, it does not necessarily have the same effect in others.¹³ The

¹³ See for example *S v Acheson* (*supra*) and *S v Ali* 2011 (1) SACR 34 (ECP)

A De Wet
Acting Judge of the High Court

On behalf of the State: Director of Public Prosecutions: Western Cape
Adv. Gertse
CGertse@npa.gov.za