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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

NOT REPORTABLE

Appeal no. **A69/2024**

In the matter between:

VICTOR MUKWEVHO

FIRST APPELANT

TSHEPO SAMUEL MALEKA

SECOND APPELLANT

JABULANIDOUGLASBANDA

THIRD APPELLANT

and

THE STATE

RESPONDENT

Judgment by: VAN RHYN J

Heard on: 31 MAY 2024

Delivered on: 14 JUNE 2024

ORDER

On appeal from the Magistrates' Court for the District of Bloemfontein,
held at Bloemfontein.

1. The appeal is dismissed

JUDGMENT

[1] This is an appeal by three appellants, Victor Mukwevhu ("Mukwevhu"), the first appellant (Accused 2 in the court a quo), Thsepo Samuel Maleka ("Maleka"), the second appellant (Accused 6 in the court a quo) and Jabulani Douglas Banda ("Banda"), the third appellant (Accused 5 in the court a quo) against the refusal by the Magistrate, Mr Peyper, presiding in the District Magistrates' Court held at Bloemfontein on 8 December 2023, to admit the appellants to bail.

[2] The appellants are charged With the following offences, namely:

- (a) Five (5) counts of attempted murder;
- (b) Two (2) counts of robbery with aggravating circumstances;
- (c) Contravention of section 27(1) of the Explosives Act¹;
- (d) Three (3) counts of contravention of section 120(1) read with section 4(1)(a) of the Firearms Control Act², to wit the unlawful possession of three (3) prohibited firearms which are fully automatic assault rifles;
- (e) Contravention of section 120(1) read with section 3(1)(a) of the Firearms Control Act, to wit the unlawful possession of one (1) semi-automatic firearm;
- (f) Contravention of section 6(2). read with section 6(1) of the Explosives Act and read with section 51(2) of the Criminal Law Amendment Act³, to wit the unlawful possession of three(3) packs of commercial explosives, six (6) detonators and a piece of cortex; .

¹ Act 26 of 1956.

² Act 60 of 2000.

³ Act 105 of 1997.

(g) Contravention of section 120(1) read with section 90 of the Firearms Control Act, to wit the unlawful possession of 495 live rounds of ammunition.

[3] Bail applications and bail appeals are by their very nature urgent. In **S v Banger**,⁴ the Supreme Court of Appeal held that an accused person should not be deprived of his or her constitutional rights to freedom and to freedom of movement for longer than is reasonably necessary.

[4] It is common cause that the bail application of the appellants (and their three co-accused) in the district court was heard in accordance with the provisions of Schedule 6 of the Criminal Procedure Act⁵ (the "CPA"). The Bail application was therefore heard with the understanding that the onus is on the appellants to show that exceptional circumstances exist which, in the interests of justice, permit their release on bail.⁶ In discharging this onus, the appellants adduced evidence under oath. The respondent, in opposing the granting of bail, filed the affidavit of the investigating officer, Warrant Officer Eben van Zyl (Van Zyl) employed by the South African Police Service, Bloemfontein. The respondent furthermore presented the oral testimony of Van Zyl during the bail application. The appellants and two of their co-accused were denied bail. The fourth accused's application was successful and he was released on bail.

[5] The following is a summary of Mukwevhu's testimony:

(a) He was 37 years old at the time of his bail application. He was born on [...] J[...] 1986 at Nzhelele, Limpopo Province;

(b) He has been a resident of 6[...], Block XX, Soshanguve East for the past 30 years;

(c) He is not married. He has a son aged 15 years, a son aged 12 years and a daughter aged 9 years. The children are staying with their respective

⁴ 2016 (1) SACR 115 (SCA) para 14.

⁵ Act 51 of 1977

⁶ Section 60(11)(a) of the Criminal Procedure Act.

mothers. Mukwevho is responsible for their support. He is taking care of his mother who was 73 at the time of the bail application in December 2023. She is suffering from high blood pressure and is on medication which he provides for her;

(d) Mukwevho is the owner of a tavern and slot machines. His income is around R20 000 per month. He pays rent and employs four people at the tavern. His nett income is about R10 000 per month;

(e) He does not have previous convictions nor cases pending against him. He will not try to evade the trial and does not know any of the witnesses in the matter. He risks losing his business in the event of bail being denied. He instructed the employees to close the tavern while he is remanded in custody pending the trial. He owes an amount of R 22 000 to S A Brewery;

(f) He does not have a passport;

(g) He was called by Maleka and requested to accompany him to Banda's residence at Thembisa. Banda asked them to accompany him to the Free State Province with the view of taking a vehicle to Bloemfontein. Banda was driving the particular vehicle while Maleka and Mukwevho followed in another vehicle, a Nissan NP300 bakkie ("Nissan bakkie") with a canopy. The plan was to return on the same Sunday, however due to problems with payment due to Banda, the return trip was delayed until the following day. The following morning, they returned to Gauteng with the Nissan bakkie. Maleka was driving and Banda was seated on the passenger seat. Mukwevho was seated at the back.

(h) On the way they picked up two more people who were standing along the road. They also sat in the back with Mukwevho. Thereafter they picked up accused 4. After leaving Welkom the Nissan bakkie was stopped by the police. They were pointed with firearms and instructed to alight the Nissan bakkie and lie on the ground. Mukwevho did not see anything that was found by the police in the Nissan bakkie. He furthermore had no knowledge of a cash in

transit robbery. He was forced to sign documents while plastic covered his face.

[6] The following is a summary of the Maleka's testimony:

(a) Maleka was 39 years old at the time of his bail application. He was born on 1[...] J[...] 1984 at Pretoria;

(b) He has been residing at 2[...] K[...] Avenue, The Orchards, Pretoria North for almost 3 years prior to his arrest;

(c) He is married. His wife is unemployed. He is the father of two boys who are 17 and 14 years respectively. He has two girls, who are both aged 12 years. The girls have got different mothers. Three of the children are staying with him and the one girl is staying with her mother at Rustenburg;

(d) Maleka is self-employed. He does carpentry and aluminium work. His income is around R14 000 - R16 000 per month.

(e) He does not have previous convictions and will not evade the trial. He does not know any of the witnesses in the matter. He does not have any pending cases against him. He can afford R800 for bail. He is the breadwinner at home. He pays rent and risks losing his business in the event of bail being denied. He provides work and an income to his employees and if bail is denied they will also suffer financially;

(f) He does not have a passport;

(g) He is on medication for epilepsy as well as for [...]. He has not received medication for these conditions while being incarcerated at Grootvlei Correctional Centre at Bloemfontein.

(h) Banda requested him on Sunday, 12 November 2023 to drive Mukwevho's Nissan bakkie to Bloemfontein. Banda was driving a Mercedes

Benz vehicle to Bloemfontein. Unknown people in Bloemfontein took the Nissan bakkie and they only received the Nissan bakkie the following morning whereafter they returned to Gauteng. Maleka confirmed the version presented by Mukwevho when he testified. On their way to Bothaville, they were stopped by members of the SAPS and arrested. He also failed to notice the items found inside the Nissan bakkie by the members of the SAPS.

[7] The following is a summary of Banda's testimony:

(a) He was 44 years old during November 2023. He was born on 1[...] A[...] 1979;

(b) He has been a resident at 1[...] E[...] section, Sekhakhane Street at Thembisa for the past 30 years;

(c) He is married. His wife is employed. He has a son aged 19 years, a son aged 10 years and a daughter aged 8 years. The oldest child resides with Banda and his wife while the two younger children stay with their maternal grandmother during the week and with the parents during weekends. He is responsible for their support.

(d) Banda earns an income of approximately R8000 -R12 000 per month as a loan shark.

(e) He does not have previous convictions. He has one pending case at Boksburg. The charges consist of conspiracy to commit business robbery. He was arrested on 18 August 2020. He will not try to evade the trial and does not know any of the witnesses in the matter. Banda contends that the exceptional circumstances that he is relying on to be released on bail is due to the fact that his eldest son was involved in an accident when he was years old. Due to complications regarding his medical condition the child needs constant caring. Banda and his wife agreed that he should therefore remain unemployed and take care of their eldest child. He furthermore takes care of his sisters' three children. Hi sister has passed away.

(f) He does not have a passport;

(g) Banda confirmed that he requested Maleka to accompany him to take a Mercedes Benz motor vehicle, the property of Ntshebe to Bloemfontein. Banda borrowed Ntshebe an amount of R10 000 but took the Mercedes as security. Ntshebe agreed to pay for the costs to travel to Bloemfontein, not only in respect of the Mercedes but also for fuel for the Nissan bakkie. Maleka and Mukwevho followed in the Nissan bakkie. They left on a Sunday evening and arrived at Bloemfontein where they met Ntshebe. Problems to obtain payment in full from Ntshebe ensued and their departure from Bloemfontein was delayed until the next morning. On the way back they picked up the other three accused. The members of SAPS pulled them off on the road leading to Bothaville. They were arrested.

(h) Similar to the testimony of Mukwevho and Maleka, he did not notice any balaclavas, detonators, explosives or firearms in the Nissan bakkie. He furthermore had no knowledge of a cash in transit robbery. He did not sign a warning statement.

[8] The application for bail was opposed by the State, *inter alia*, on the grounds that the accused failed to show the presence of exceptional circumstances that will merit their release on bail. Van Zyl read his affidavit into the record and elaborated on some of the aspects during his testimony. At the time of the bail application, which commenced on 27 November 2023, the investigation by the members of SAPs was incomplete. During the hearing of the bail application further information came to hand regarding video footage of the appellants and their co-accused (excluding accused 4). The investigating officer envisaged that the ballistic comparison of the firearms found in the Nissan bakkie in respect of the spent cartridges found at the crime scene, will in all probability strengthen the strong *prima facie* case against the appellants and their co-accused.

[9] The background facts regarding the commission of the crimes as placed on record by Van Zyl are as follows: On Friday, 13 November 2023 at 06h45, members

of GSS, a cash in transit security company were travelling in an armoured vehicle along Vooruitsig Street, Hamilton, Bloemfontein when the armoured vehicle was rammed by a Mercedes Benz. The armoured vehicle came to a stop and was fired upon by between 10 to 14 suspects. The suspects forced the members of G4S out of the armoured vehicle and robbed them of three 9 mm semi-automatic pistols. The suspects opened the armoured vehicle with the use of explosives and robbed an undetermined amount of cash from the armoured vehicle. Members of SAPS appeared on the scene and were fired at by the suspects. The suspects fled the scene in a Toyota double cab and Isuzu double cab. Numerous cartridges were recovered at the scene commonly used in AK-47, R5 and R4 assault rifles.

[10] The SAPS received information that some of the suspects were travelling in a Nissan NP300 single cab bakkie to Gauteng. The Nissan bakkie was pulled off by SAPS near Bothaville and the driver and 5 passengers were arrested. The Nissan bakkie was searched and the following exhibits were found:

- (a) one R5 rifle and two AK-47 rifles found underneath the vehicle tied to the suspension with cable ties;
 - (b) one 9mm semi-automatic pistol barrel and breach block;
 - (c) three packs of commercial explosives;
 - (d) six detonators and a piece of cortex;
 - (e) an undetermined amount of cash;
 - (f) 18 AK-47 and RS magazines, several balaclavas and gloves;
- Items (b) - (f) were found hidden in the tailgate of the Nissan bakkie.
- (g) one AK47 magazine was found behind the seat;
 - (h) 495 live rounds of ammunition were found in the engine compartment.

[11] Van Zyl explained that the explosives, detonators, balaclavas, gloves and assault rifles found inside the Nissan bakkie are utilised by perpetrators in the commission of cash in transit robberies. The suspects used a hijacked Mercedes Benz to ram the armoured vehicle. Witnesses place between 10 and 14 suspects on the scene. These crimes are committed by loosely affiliated criminal groups who operate nationally across the provincial borders. In this matter all the arrested suspects including the three appellants are from Gauteng. Several of the suspects including the appellants have been arrested previously in respect of other cases as referred to by the investigating officer.

[12] Van Zyl explained that Mukwevho provided a different address at Soshanguve as his place of residence. A search was conducted and it was found that no such address existed. A check on the SAPS system identified another address, namely 6[...], Block XX Soshanguve. At this address Mukwevho's adoptive mother was located who informed the SAPS that her son is not married and unemployed. Mukwevho informed the SAPS that he is married. According to his mother he has three children who resides with their respective mothers. His mother indicated that she is unaware of the fact that her son provides for his children as he is unemployed. According to Van Zyl the concern with Mukwevho relates to his use of different surnames, being Mokoena and Mukwevho. He has two vehicles registered in his name.

[13] Maleka informed the investigators that he is single, yet at his address his wife was located. She informed the SAPS that they have been residing at the address at The Orchards since 12 March 2021. According to his wife, Maleka has two children aged 17 and 21 who resides with them. She furthermore confirmed that her husband is unemployed. Maleka has immovable property registered in his name which he purchased during January 2021 for R940 000. He has one 2015 model vehicle registered in his name.

[14] In respect of Banda, Van Zyl testified that he provided his residential address as 1[...] E[...], Sekhakhane, Dennilton. The SAPS at Dennilton denied the existence of the said address. A search on the SAPS system revealed another address being 1[...] E[...] Section, Sekhakhane Street Thembisa. At this address Banda's mother was located who confirmed that he has been residing at this address

since his birth. Banda indicated to the SAPS that he is married which was contradicted by his mother. According to the mother, Banda has one child aged 20 who resides with his mother at a different address. According to the mother her son is unemployed. Banda has no immovable property or vehicles registered in his name. He is on bail pending an attempted robbery case at Boksburg.

[15] The appellants noted an appeal against the refusal of bail and the grounds for such appeal are recorded in the notice of appeal. Mr Tshole, who appeared on behalf of the appellants, argued that the appellants discharged the onus resting upon them and that their personal circumstances and the fact that the case against the accused is based upon circumstantial evidence ought to have been regarded as a combination of exceptional circumstances and, as such, qualify as exceptional circumstances warranting their release on bail.

[16] On behalf of the appellants it is submitted that there are no eye witnesses or any other form of independent forensic evidence that places the appellants on the crime scene. Mr Tshole argued that the court *a quo* misdirected itself in failing to find that the appellant's personal circumstances, specifically Banda's circumstances regarding the caring of his son as the primary care giver, qualify as exceptional circumstances warranting their release on bail.

[17] An appeal against the refusal of bail is governed by section 65(4) of the CPA which provides that:

"The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court shall have given".

[18] The approach of a court hearing a bail appeal is trite. In **S v Barber**⁷ it was held as follows:

"It is well-known that the powers of this Court are largely limited where the

⁷ 1979 (4) SA218 (D) at220 E-H.

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 it 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 ... "

[19] It is unnecessary, for purposes of this judgment, to set out all the considerations listed by the Legislature that should be taken into account when assessing bail applications. Suffice to say that, while the magistrate was required to consider them all, he retained a discretion to decide the weight to be given each.

[20] In **S v Porthen and Others**⁸ Binns-Ward AJ held as follows:

"On the issue on the existence of 'extraordinary circumstances' within the meaning of s 60(11)(a) of the CPA, there is a" formal *onus*' of proof on the applicant for bail. The ordinary equitable test of the interests of justice determined according to the exemplary list of considerations set out in s 60(4)-(9) of the Act has to be applied differently. See *S v Dlamini* (*supra* in para [61]. In my view, a court making the determination whether or not that *onus* of proof has been discharged exercises a discretionary power in the wide sense of discretion. The appellate Court is, in terms of s 65(4) of the CPA, enjoined to interfere with the lower court's decision of a bail application if it is satisfied that the lower court's *decision* was wrong"⁹

[21] Ms Moroka, counsel on behalf of the respondent, contended that the investigation has been completed and the indictment in respect of the matter is being finalised. The matter has been remanded to 20 June 2024 and a trial date will be determined within the near future. On behalf of the respondent it was argued that the appellants' personal circumstances, regarding being breadwinners, their employment

⁸ 2004 (2) SACR 242 (CPD).

⁹ Porthen (*supra*) at [14].

or lack of formal employment and the fact that their continuous detention will affect such employment or business and the wellbeing of their families and children do not qualify as exceptional circumstances. Their personal circumstances and medical conditions are not of such a nature that it will be in the interest of justice that they should be released on bail.

[22] I now turn to consider if the court a quo misdirected himself in finding that there were no exceptional circumstances which in the interests of justice permitted the appellants' release on bail. I approach this question conscious of the fact that where an accused adduces strong, independent evidence pointing to his innocence, in so doing, he establishes exceptional circumstances.¹⁰

[23] The court a quo dealt with the medical conditions of the appellants and their co-accused and concluded that medication for [...] was provided at Grootvlei Correctional Centre. If the name of any required medication for other illnesses has not been revealed to the medical officer at Grootvlei Correctional Centre, this fact can hardly be regarded in itself as exceptional circumstances as there was no evidence before the court a quo that the appellants have been deprived of such medication.

[24] The magistrate dealt with the testimonies of the appellants regarding the fact that they in effect aver to be the breadwinners and not the primary caregivers of their respective children. The testimony of Banda, that he takes care of his son who has special needs, was also taken in to consideration by the court a quo. With reference to case law the court a quo, remarked that it is concerning that, although Banda was supposed to take care of his son, he left his child at home and travelled to Bloemfontein. I agree with the finding of the magistrate that it can therefore only be assumed that somebody else was indeed available to care for his son during his absence.

[25] I am of the view that the State's case against the appellants and their co-accused, appears to be *prima facie*, reasonable strong. There is no onus on the

¹⁰ S v Mohammed supra

State to disprove the existence of exceptional circumstances. I agree with the finding by the court a quo that the facts presented by the appellants do not give rise to the presence of exceptional circumstances which show that the appellants should be released on bail.

[26] I therefore cannot find any misdirection on the part of the court a quo in finding that there were no exceptional circumstances, which in the interests of justice permitted the appellants' release on bail.

[27] In the result the following order is made: The appeal is dismissed.

I VAN RHYN
JUDGE OF THE HIGH COURT,
FREE STATE DIVISION, BLOEMFONTEIN

On behalf of the Appellants: **ADV. M E TSHOLE**
Instructed by: THABO MALGAS ATTORNEYS
BLOEMFONTEIN

On behalf of the Respondent: **ADV. M MOROKA**
Instructed by: THE DIRECTOR OF PUBLIC PROSECUTIONS,
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