REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: SS028/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

...23 June 2023... .....
DATE SIGNATURE

In the matter between:

WALTER DUMISANI KHUMALO **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGEMENT: BAIL PENDING APPEAL

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[1] The Applicant appeared in the Gauteng Division of the High court, Johannesburg, on the following charges:

1.1 Count 1 - Murder read with the provisions of section 51(1) and schedule 2 of the Criminal Law Amendment Act 105 of 1997;

1.2 Count 2 – The unlawful possession of a firearm in contravention of section 3 of the Firearms Control Act 60 of 2000;

1.3 Count 3 – The unlawful possession of ammunition in contravention of section 90 of the Firearms Control Act 60 of 2000

[2] He was legally represented. Despite his plea of not guilty, was found guilty on all 3 counts. He was sentenced to life imprisonment for murder, and a cumulative sentence of 15 years imprisonment on counts 2 and 3, which were taken together for the purpose of sentence.

[3] He applied for leave to appeal the conviction and sentence which was refused. He was however granted leave to appeal to the full court on petition to the Supreme Court of Appeal.

[4] He has now approached this court for bail pending appeal, which is opposed by the State.

[5] In support of his application, the applicant deposed of an affidavit dated 22 July 2022. Besides the normal circumstances that are akin to most bail applications, he declared that:

5.1 His release on bail after his arrest was unopposed due to exceptional circumstances, and he stood his trial throughout;

5.2 The trial Court found that there were substantial and compelling circumstances;

5.3 There is a reasonable prospect of success of his appeal – he was granted leave to appeal on petition;

5.4 He is not a flight risk;

5.5 He was in custody for 6 months pending finalization of the trial which lasted more than 2 years;

5.6 He will not endanger the public or disturb the public order;

5.7 The Director of Public Prosecutions failed on several occasions to enrol his matter for hearing in the Supreme Court of Appeal.

[6] In argument Adv Mosoang for the applicant argued, in relation to the allegation of the applicant that he has a reasonable prospect of success of his appeal, that the evidence for the State is based on a confession, and that the State provided no evidence to corroborate it.

[7] In considering whether an applicant in a bail application pending appeal has discharged the onus resting on him, a mere address from the bar, or even an affidavit of which the contents cannot be challenged in cross-examination, is not always sufficient. A person charged with a Schedule 6 offence must show that exceptional circumstances exist that justify his release on bail. A person who has been convicted of a Schedule 6 offence and applies for bail pending appeal, carries the same burden and most probably a higher one, than an accused who have not yet been convicted, in whose case the presumption of innocence still prevails. It is not sufficient in such cases for council to apply from the bar for bail pending appeal without leading evidence, or hand in affidavits where the contents are disputed.

[7] The State did not adduce evidence in opposition to bail, but relied on what was already on record, and by addressing the court from the bar.

[8] As far as the evidence of the applicant is concerned, his attempt to mislead this court has not succeeded. He declared that the trial Court found that there were substantial and compelling circumstances present, which is not true.

Had the court found such circumstances, it would have deviated from the minimum sentence that was applicable, which was ultimately imposed.

[9] He relies on the fact that the Supreme Court of Appeal granted him leave to appeal, to substantiate his allegation that he has a reasonable prospect of success of his appeal.

[10] In S v Bruintjies 2003 (2) SACR 575 (A), the Court remarked as follows at par [6]: “The main thrust of the appellant's counsel's submissions before us was that the grant of leave to appeal on the merits presupposed the existence of a reasonable prospect of success in the appeal. Such a prospect, said counsel, of itself, constituted an exceptional circumstance within the meaning of the section. If that were so, however, the great majority of persons facing charges involving schedule 6 offences would have to be released on bail pending their trial without regard to other important considerations such as, for example, the public safety.

“The mere fact that the trial court considers that the appellant has a reasonable prospect of succeeding on appeal does not of itself amount to an exceptional circumstance. What is required 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 his or her release. 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 and which serve at least to mitigate the serious limitation of freedom which the legislature has attached to the commission of a schedule 6 offence. The

prospect of success may be such a circumstance, particularly if the conviction is demonstrably suspect. It may, however, be insufficient to surmount the threshold if, for example, there are other facts which persuade the court that society will probably be endangered by the appellant's release or there is clear evidence of an intention to avoid the grasp of the law. The court will also take into account the increased risk of abscondment which may attach to a convicted person who faces the known prospect of a long sentence. Such matters together with all other negative factors will be cast into the scale with factors favourable to the accused such as stable home and work circumstances, strict adherence to bail conditions over a long period, a previously clear record and so on. 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 and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail."

[11] What is of crucial importance in evaluating the application and considering whether the applicant will be acquitted, is the fact that the he was convicted by a competent Court on admissible evidence that was presented, and that his evidence as well as that of his witness were rejected. His guilt was proved by his confession which was supported by *aliunde* evidence. After conviction he was sentenced to the minimum mandatory sentence. He produced no evidence to explain on what grounds his reasonable prospect of success of his appeal is based. The applicant has not persuaded the court that the he will be acquitted on the counts for which he had been charged,

convicted, and sentenced.

[12] He has not proved that he is not a flight risk. A “PO Box” is not a physical address where he is capable of being located. He states in paragraph 6 that PO Box 834 is the address where he was born, but he does not reveal the physical address. He fails to reveal what his current address is, and only mentions an alternative address. The alternative address is in itself contradictory as it mentions Johannesburg and Etwatwa in the same address. Bearing in mind that the applicant has the onus to prove his allegations on a balance of probabilities, the allegations that he made in an “APPLICATION FOR BAIL PENDING IN TERM OF SECTION 60(11)(a) ACT 51 OF 1977” (sic) carries no weight as it was not made under oath or attested to.

[13] He does not mention why the length of the trial should be regarded as an exceptional circumstance, and gives no particulars for his allegation that the Director of Public Prosecutions failed on several occasions to enrol his matter for hearing in the Supreme Court of Appeal.

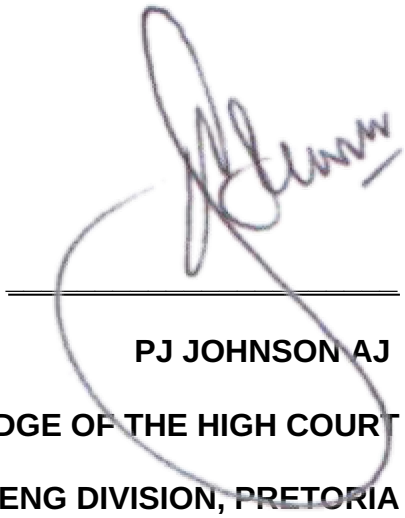
[14] Although he declared that he will not endanger the public or disturb the public order, he did not address the evidence of Warrant Officer Gildenhuys, who testified during the trial that some of the witnesses in the matter were killed and/or refused to cooperate with the State after the release of the Applicant on bail. The question that lingers is, who else but the applicant would want the witnesses not to testify?

[11] An exact description of the term “exceptional circumstances” has thus far not been given. Whether there are such circumstances, is left to the judicial

discretion of presiding officers in bail applications. An exceptional circumstance that has crystalized over time, is the weakness of the state's case. The applicant fell far short of proving that the case against him is weak, and that he will be acquitted on appeal. His mere allegation that he has a reasonable prospect of success of his appeal is lacking in substance. He preferred to make this vague, less persuasive allegation upon affidavit which was not open to cross-examination (*S v Pienaar* 1992 (1) SACR 178 (W) at 180h).

[12] The applicant did not to prove that exceptional circumstances exist which in the interests of justice permits his release on bail.

[13] The application for bail is dismissed.



PJ JOHNSON AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

Heard on	:	12 June 2023
For the Appellant	:	Adv. Mosoang Johannesburg local Office 3rd floor 56 Main street Marshalltown Johannesburg Lebohangm1@legal-aid.co.za
For the State	:	Adv. Nel Office of the Director of Public Prosecutions Innes Chambers Cnr Pritchard & Kruis Street Johannesburg, 2000 pnel@npa.gov.za
Date of Judgment	:	12 June 2023