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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION
MIDDELBURG**

CASE BA 21/2020

(1) REPORTABLE: **YES** / NO

(2) OF INTEREST TO OTHER JUDGES: **YES/NO**

(3) REVISED : **YES**

H.C. Jansen van Rensburg

Date: 30th July 2020

SIGNATURE

In the matter between

SIYABONGA THULANE SIKHAKANE

1ST APPLICANT

MUZIWENKOSI BHEKI SIBISI

2ND APPLICANT

MUZIWENDODA MNGUNI

3RD APPLICANT

AND

THE STATE

JUDGMENT : BAIL APPEAL

INTRODUCTION

[1]. The three applicants were arrested on or about 17th February 2020 near or at plot [...] V[...] Road in the District of eMalahleni in the regional division of Mpumalanga. The applicants were charge in case number 464/2020 and in terms of sections 1,8,11,12,14, and 15 of the *Stock Theft Act 57 of 1959* of stock theft of 28 goats and 3 sheep the lawful property of Yusaf Hajat, the unlawful transporting of live stock without a permit and robbery with aggravating circumstances as defined in section 51(1) of the *Criminal Law Amendment Act 105 of 1997* in that a fire arm was used in the robbery.

[2]. On 13th March 2020, the three applicants applied for bail in the Magistrates Court for the District of eMalahleni.

[3]. The applicants' bail application was denied by the *court a quo*. The legal representatives dispose of verbal arguments and agreed that the application be dealt with on the papers before the court.

THE FACTS

[4]. The applicants were arrested for alleged stock theft read with schedule 6 offence referring to robbery with aggravating circumstances in that a fire arm was used in the robbery of the live stock from the lawful owner Yusaf Hajat.

First Applicant

[5]. The 1st applicant testified that Jimmy contacted the applicant and informed the applicant that he needed some money. The applicant paid Jimmy an amount of R 6000 – 00 in advance for the life stock. The applicant borrowed a bakkie from a friend and proceeded to load the life stock.

[6]. The applicant was arrested some 300 meters from the place where he loaded the life stock. The SAPS searched the bakkie and did not find any firearm. The applicant informed the SAPS that the two other persons, now

applicant 2 and 3, was just accompanying applicant 1 during the transaction and the loading and transporting of the live stock.

[7]. When the applicant informed the SAPS to go to Jimmy and enquire from him as to the sale of the live stock. The SAPS declined to follow up with anybody as to the sale of the live stock. The applicant produced his permit to transport live stock and showed it to the SAPS. The SAPS took the permit and tear it up.

[8]. The applicant testified that he does not poses a firearm. It was put to the applicant that Jimmy would deny that he was the owner of the livestock. The applicant testified that he bought the live stock from Jimmy. The applicant denied that a firearm was found in the vehicle or that he is the owner of a fire arm.

[9]. It was put to the applicant that some of the live stock had ear tags on which would proof who the owner was. The applicant respondent that he bought the live stock from Jimmy.

[10]. The applicant testified that he was released on bail in the amount of R 1000 – 00 in the other matter. After he paid bail, he was returned to prison on the present case.

Second Applicant

[11]. Applicant 2 handed up an affidavit in the application for bail. ¹

[12]. The applicant confirmed that he went with the 1st applicant to assist in loading the livestock. The applicant confirmed that the 1st applicant spoke to the seller and paid him where after the livestock was loaded and they left.

¹ Page 102 of the bundle.

[13]. The applicant confirm that no fire arm was found in the vehicle which transported the livestock. A fire arm was found in another bakkie which was not used in the loading and transport of the livestock.

Third Applicant

[14]. The applicant submitted an affidavit in support of the bail application. ²

[15]. The applicant does not possess a fire arm.

[16]. The affidavit was entered as an exhibit.

APPLICANTS CASE

[17]. It was denied that the applicants committed the offences so charged or that a fire are was used in the commissioning of the offence. It was submitted on behalf of the applicants that the States' case was weak and that the applicants had a good defence in this regard.

[18]. From the submissions by the applicants the application of section 60(8A) of the *CPA 51 of 1977* would not be applicable.

[19]. The IO indicated that the applicant could report to the nearest SAPS station once or twice a week which pointed at the fact that the IO did not oppose bail.

STATES CASE

[20]. The State submitted that it had a *prima facie* case against the applicants. It was alleged that the applicants pointed a fire arm in the commission of the offence of stock theft. The State submitted that the applicant was found in possession of livestock which was allegedly stolen.

² Page 108 of the bundle.

[21]. The State submitted that the applicants must show '*exceptional circumstances*' in order to be granted bail where the offences relate to schedule 6.

[22]. The State alleged that the caretaker was scared and threatened to be killed. Arguments followed about the community, unrest and other related aspects.

THE JUDGMENT BY THE COURT A QUO

[23]. The *court a quo* summarized the evidence and then motivated the decline of granting bail to the applicants. The *court a quo* referred to the seriousness of the alleged offences and refers to some affidavit where it was alleged that the applicants pointed a firearm at the owner / care taker.

[24]. The *court a quo* refers to the ballistic report which is still outstanding whereas the fire arm was not linked to any applicants at that stage. ³ at this stage there is no evidence that a fire arm was found in any vehicle, other as allegations which stand to be dealt with in a court of law. No person who allegedly found the fire arm was called to confirm the same and to be cross-examined by the applicants.

[25]. The *court a quo* spends a lot of time in the judgment regarding the fire arm. The *court a quo* refers to '*a lot of money that has been stolen*'; there is no evidence thereof. Livestock were purportedly stolen; not money.

THE THEORY OF AN APPLICATION FOR BAIL

[26]. The pinnacle of an application for bail where serious offences has been committed lies in the interpretation of the requirements of schedule 5 and 6 of the CPA 51 of 1977. Depending on whether the offences are classified under section 5 or 6, the '*onus of proof*' will shift. Where the alleged offence falls

³ Page 80 line 19 to 25.

under schedule 6, the burden of proof would rest on the accused to show '*exceptional circumstances*' why he or she should be granted bail.

[27]. An application for bail in an '*enquiry to the circumstances*' and not a formal trial; the merit of the case has to be determined by a trial court. A court hearing an application for bail is not in a position to give a judgment and to sentence the convicted person in any manner.

[27.1.]. What a court in an application for bail must do is to determine the release or not of the detained person and the factors considered in its evaluation and conclusion thereof. It is expected of a court in this position to focus on the factors, the circumstances, the evidence [whether hearsay or not] before it and to apply its mind within the discretion of that court to grant or refuse bail.

[27.2.]. In a bail application, the inquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the '*interests of justice*' lie in regard to bail. The focus at the bail stage is to decide whether the '*interests of justice permit the release of the accused pending trial*' which entails in the main protecting the investigation and prosecution of the case.

[27.3.]. In all cases involving bail applications, the courts are guided by certain considerations and factors in assessing the promotion of the interests of justice and the protection of the right of the individual. In doing so the court should not be allowed to be influenced and replaced by the

legislative guidelines or the sentiment of the community and the public. These factors do not relieve the judicial officer of applying his or her mind to all the relevant facts and making an appropriate determination and thereby bridging the gulf between '*positivism and rationality*'.

[27.4.] In all other criminal charges, the person deemed to be '*innocent until proven guilty beyond reasonable doubt*'. In the case where the first bail application fails, the applicant may in terms of section 65 of the *CPA 51 of 1977*, appeal to the High Court in the normal appeal procedure to be heard a second time.

[28]. Section 65(4) prescribes that the High Court may not overrule the judgment of the *court a quo* unless the *court a quo* has misdirected itself in the dismissal of the bail or any other relevant matter thereto. The question is whether the *court a quo* has misdirected itself? The only opportunity where a High Court could rescind the bail proceedings in the lower courts is based where a finding that the *court a quo* has misdirected itself in the bail application in that court.

[29]. The aim of the bail application or bail appeal is to secure the freedom of the applicant on the one side and the weight of the case of the state on the other side with reference to section 60(6)(g) of the *CPA 51 of 1977*. The state's case cannot be classified as '*relatively strong*' as this would then implicate that all the states cases would inevitably be '*relatively strong*'. Even where the state's case is weak, it does not mean that the case cannot be turned around in some form or in certain circumstances. What this means is that an applicant can be successful in an application for bail, but during the trial, the applicant can be convicted on the evidence before the trial court. This is not the duty of the court in a bail application.

[30]. The aim of bail is envisaged by the Bill of Rights in the *Constitution of the Republic of South Africa Act 108 of 1996* being the following –

[30.1.]. The right to be presumed to be innocent until proven guilty.

[30.2.]. The right to enjoy the freedom of the body and not to unlawfully be arrested and detained.

[31]. Section 60(11) (a) of the *CPA 51 of 1977* reads as follows –

‘Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

‘(a) 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 ...’

[32]. In the case of *S v Barber* Hefer J held in this regard –

‘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.'

[33]. In the matter of *Porthen Binns-Ward* AJ expressed the view that interference on appeal was not confined to misdirection in the exercise of discretion in the narrow sense. The court hearing the appeal should be at liberty to undertake its own analysis of the evidence in considering whether the appellant has discharged the onus resting upon him or her in terms of section 60(11)(a) of the Act.

[34]. Following the dismissal of the application for bail by the *court a quo*, another application for bail came before the Court of Appeal in terms of section 65(4) of the Act. The section reads as follows –

'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 opinion the lower court should have given.'

[35]. As indicated this court may only intervene if the *court a quo* has misdirected itself with the application for bail and the evidence in that court. Reading the record in line with the State and the IO's position it is this court's view that bail should have been granted to the applicants by the *court a quo*. The refusal of bail by the *court a quo* was detrimental to the administration of justice and an unfair act against the appellant.

[36]. Section 12 of the *Constitution of the Republic of South Africa Act 108 of 1996* guarantees the freedom of movement of any person, so also the

presumption of innocence until proven guilty. A trial court will determine the guilt or not of an accused.

PESONAL CIRCUMSTANCES OF THE APPLICANTS

First applicant

[37]. The 1st applicant is 31 years of age, reside at L[...] M[...] street House 1[...] Mpumalanga and his second residence in in KZN at ward 10 Empangeni Walangezu Ematonojeni reserve. The applicant is a RSA citizen and have a passport and have no relatives outside the borders of SA. He is married to Phagamile Zikhale for one and half year and have six children in total.

[32]. The applicant is employed at Legend Logistics for three years as a driver and earn some R 20 000 – 00 per month. The applicant has no previous convictions but has another matter which was pending at the time of the bail application. The pending matter refer to the SAPS who found cows meat the premises of the applicant after he has been arrested for the present matter. The SAPS was searching the house for weapons but found none. The applicant is the sole bread winner of the family.

[33]. The SAPS did confirm the address of the applicant in KZN. The value of the property is between R 300 000 – 00 and R 350 000 – 00. The applicant confirmed that he would not interfere with the investigation and the witnesses in this case or the commit a schedule 1 offence. The applicant, during cross-examination confirmed that he did not have a permit to have transported the livestock at the time when he bought the livestock from

Second applicant

[34]. The second applicant is single, has a partner one minor child which is 6 years old. The applicant is a RSA citizen, has no passport and no relatives outside of the RSA. The applicant was employed as a cleaner at EMalahleni Waste Management and earned R4000-00 per month. The applicant is the

bread winner of the family. The applicant has no convictions other than another pending case in Blinkwater. The applicant is going to plead not guilty and has a good defence.

Third applicant

[35]. The third applicant is 36 years of age and resides at Emathonjaneni Kwadlangezwa Empangeni for the last 31 years (since 1989). The applicant is single but have 4 children. He is supporting his mother although the applicant is unemployed. The applicant earn some R2000 -00 per month and is the sole bread winner of the family.

[36]. The applicant has no previous conviction but a pending matter in Blinkwater. The applicant intends to plead not guilty and has a good defence.

ANALYSIS OF THE APPLICATION

[37]. I am of the view that the State elaborated extensively to convince the *court a quo* of the seriousness of the charges against the applicants in order to have the court a quo decline granting bail to the applicants.

[38]. One cannot just allege and based on the nature of bail applications then proceed to '*build a case*' against a suspect or accused. The mere fact of the bail proceedings is in my mind not enough to have declined the granting of bail to the applicants. The State had to place something more before the court in this regard. Although this matter is allegedly offences which fall under schedule 6 the applicants must proof exceptional circumstances to be released on bail.

[39]. In my view the personal circumstances does play a role as well as the allegations that no fire arm was found at the scene of the alleged offences. The rhetoric of section 60 referring to the community, interference with witnesses, threats and more was not sufficient to decline granting bail to the

applicants. Read herewith the threat of Covid – 19 I am not persuaded that refusing bail was appropriate under the circumstances.

ORDER

[40]. The following order is made –

[40.1.]. The refusal of granting bail to the applicants is upheld.

[40.2.]. The applicants bail conditions are as follows –

[40.2.1.]. Bail amount is set at R 2500 – 00 each.

[40.2.2.]. The applicants are ordered to report at the eMalahleni SAPS on each consecutive Mondays between 08:00 am to 18:00 pm as from the date of release until the finalisation or withdrawal of any further criminal proceedings in this matter against the applicants.

[40.2.3.]. The applicants are ordered to attend every court day on which the matter is heard, a failure which would result in a warrant of arrest being issued for the arrest of the appellant.

[40.2.4.]. The applicants are ordered not to threaten or to engage with any state witnesses in this matter, to tamper with evidence, engage in any communication with any state witnesses in anyway whatsoever.

[40.2.5.]. The appellant is ordered not to engage in any action which would jeopardise the investigation of the charges in this matter against the appellant, if any, by the SAPS in this regard.

[40.2.6.]. No order as to cost.

**H.C. JANSEN VAN RENSBURG
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

NO VERBAL ARGUMENTS PRESENTED

JUDGEMENT DELIVERD : 30th JULY 2020

APPLICANTS

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