Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

CASE NO: CA&R 124/16

In the matter between:

MODISAOTSILE DISEKO	**1st Appellant**
THABISO RAMABUSA	**2nd Appellant**
BONGANI NOMTSHEKE	**3rd Appellant**

AND

THE STATE	**Respondent**

Coram: Lever AJ

JUDGMENT

L Lever AJ

1. This is a bail appeal that comes before me in circumstances where the three appellants brought a bail application on new facts to the Magistrate's Court Kimberley. This was the second bail application on new facts. Said bail application was brought before the Magistrates Court Kimberley on the 29 August 2016 and such court delivered its judgment denying bail on the 7 September 2016. The matter was argued before me on the 24 November 2016.

2. The record before me comprised: the record of the original bail application, which was refused by the Magistrates Court Kimberley on the 14 December 2015; the record of the first bail application on new facts brought on the 26 February 2016 and denied by the said court on the 29 February 2016; the record of the second bail application on new facts brought on the 29 August 2016 and denied by the said court on the 7 September 2016. This second bail application on new facts is the subject of the present appeal.

3. It is common cause that the appellants were arrested in the environs of Kimberley on the 16 November 2017. The investigating officer Colonel Mathipa Solomon Makgato gave oral evidence at the first bail application in December 2015. The investigating officer described the circumstances of the appellants' arrest on that day. The circumstances of their arrest are: that on the day in question an armoured cash delivery van belonging to G4S was robbed of a large amount of cash; the robbery was executed by about 8 to 10 men, who it is alleged mostly wore blue Transnet overalls; they wore various forms of headgear to cover their faces; a red Nissan 1400 bakkie was parked in front of the armoured vehicle and a green Honda Ballade sedan was parked behind the motor vehicle; a number of shots were fired and a large amount of money was taken from the armoured vehicle; the robbers used the Honda and the Nissan bakkie to escape with the money; the police were contacted; they came across the robbers in the

Honda Ballade, gave chase and lost them; the Honda was later found abandoned; shots were fired at the police during this chase; the police then came across the Nissan Bakkie and chased it; the Nissan Bakkie came to a halt and the occupants fled in several directions; appellant number one (referred to as accused number one on the record) was seen jumping the fence of a house in the vicinity; appellant number one was apprehended and taken back to the house where he had jumped the fence; in a back room on the said property the police discovered a .38 revolver, blue overalls and hand gloves together with a head dress; appellant number two (who was referred to as accused number three on the record) was identified as the driver of the Honda and it is not clear from the record where he was arrested; it appears that in arresting one of the other alleged robbers who is not involved in the present bail proceedings and retracing his movements, a 9mm pistol was recovered together with some other items; appellant number three (referred to in the record as accused five) was identified as the driver of the red Nissan 1400 bakkie; appellant three attempted to hide himself in the crowd; as the police approached appellant number three fled; appellant number three was apprehended and taken back to the said bakkie; in the bakkie a rifle, two loaded magazines, boxes of money and the trolley that G4S used to transport the money boxes were found.

4. Subsequently, at some time before the last bail application on new facts and at one of the court dates to postpone the matter, appellants one, two and three were informed that DNA evidence linked them to certain items recovered in the process of their arrest. The DNA of appellant one was linked to the handle of the 9mm pistol and its trigger as well as a hat that was recovered in the process of arresting the suspects. The DNA of appellant two was linked to a glove. The DNA of appellant three was linked to a handkerchief. The arguments on the relevance and importance of this DNA evidence will be considered later.

5. It is common cause that the appellants face charges that fall under schedule 6 of the Criminal Procedure Act[1] (CPA). Thus s 60(11)(a) has always applied to their various bail applications and this is true of the present appeal as well. The effect of s 60(11)(a) of the CPA is that the appellants always bore the onus of adducing evidence that showed on a balance of probabilities that exceptional circumstances exist where the interests of justice allowed them to be admitted to bail.

6. Appellant number one has two previous convictions. In 1996 he was convicted of theft and was sentenced to four years imprisonment which was wholly suspended. In 2005 he was again convicted of theft and sentenced to a fine of R500.00 or six months imprisonment. He

[1] Act 51 of 1977.

apparently also has a case pending against him. The present status of this pending matter will be dealt with below.

7. Appellant number two has no previous convictions, but he does have a pending case of armed robbery against him. The investigating officer at the time of the first bail application, stated that this pending matter was with the Senior Public Prosecutor for a decision. The present status of this pending matter will also be dealt with below.

8. Appellant number three has no previous convictions and no pending matters against him.

9. An identity parade was conducted shortly before the second bail application. This was the new fact that was raised in such bail application. It transpired that there was no room with a one-way mirror available, in which to conduct the said identity parade. Only two of the potential five eye-witnesses available were prepared to participate in the identity parade in those circumstances. The others feared being identified as witnesses and refused to participate in the identity parade.

10. The above statement of facts represents a fair summary of the factual matrix within which the first two bail applications were decided. To this we must add the new facts that the appellants raised in the third bail application, the subject of the present appeal. The new facts raised by

the appellants, in essence consisted of, a re-emphasis of their personal circumstances. The fact that they had been incarcerated for nearly a year at the time that the third bail application was launched. Their continued detention appeared to be indefinite as there appeared to be no prospect of their trial being started before the end of this year and that the crowded roll of the courts made it unlikely that the trial would be commenced in the foreseeable future. In support of this perception they contended that a request had been made for the docket on their behalf. This request was denied as the matter was still being investigated.

11. In these circumstances, they perceived their continued detention as being punitive in nature. They and their families are ordinarily resident in Bloemfontein. Their detention had made it difficult for family members to visit them. It was placing stress on their relationships with their partners and wives. Those that had children could not maintain their relationship with their children. They were out of touch with their businesses, which no longer provided an income. These factors caused them severe emotional stress, anxiety and psychological harm. This emotional stress and anxiety was also raised as a new fact in the last bail application. Furthermore, appellant two was diagnosed as a diabetic between the second and third bail application and he complained that it was difficult for him to obtain a regular supply of the correct medication.

12. Although a formal charge sheet has not yet been drawn up, Mr Hollander who appeared for the respondent, indicated that the appellants had been arrested on charges of robbery with aggravating circumstances, attempted murder and theft. Mr Hollander indicated that a decision had been made to transfer the matter to the Regional Court and that a date had been arranged for January 2017. At this court date the charge sheet would be presented to the appellants and they would be given access to the docket.

13. Turning to the law that governs the present position. As already stated, it is common cause that s 60(11)(a) of the CPA applies. Furthermore, as this is an appeal against the refusal of bail in the third bail application, the provisions of s 65(4) of the CPA applies. Section 65(4) of the CPA provides: “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 should have given.”

14. As already set out above s 60(11)(a) requires the appellants to adduce evidence that satisfies the court on a balance of probabilities that the

necessary exceptional circumstances exist[2] that the interests of justice permit their release.

15. The court entertaining the bail application should consider all the facts that arise in the new bail application together with those that arose in the previous bail applications.[3]

16. Section 60(11)(a) does not prohibit bail for certain offences. It allows the court the flexibility to assess each case on its merits in order to make a decision on whether it is in the interests of justice to award bail in the particular circumstances of each case.[4]

17. The requirement of "exceptional circumstances" in s 60(11)(a) has been applied as a flexible concept that is open to judicial interpretation on a case by case basis. Circumstances that may be considered as ordinary in one case may be interpreted as exceptional in another.[5] In Mohammed's case Comrie J in dealing with the manner in which s 60(11)(a) was to be approached stated: "So the true enquiry, it seems to me is whether the proven circumstances are sufficiently unusual or different in any particular case to warrant the applicant's release. And 'sufficiently' will vary from case to case."[6]

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[2] S v Yanta 2000 (1) SACR 237 (TkH) at 241 g.
[3] S v Vermaak 1996 (1) SACR 528 (T) at 531 e-g.
[4] S v Dlamini 1999 (2) SACR 51 (CC) at p 88h-i; S v Sivela 1999 (2) SACR 685 (W) at 705f-g.
[5] S v Mohammed 1999 (2) SACR 507 (C) at 514a-d; S v C 1998 (2) SACR 721 (C).
[6] Mohammed's case above at 515d.

18. The question of the constitutionality of s 60(11)(a) of the CPA has been settled by the Constitutional Court in Schietekat's case[7]. Although the question of constitutionality is not an issue in the present appeal, Schietekat's case gives guidance in the manner in which s 60(11)(a) is to be applied.

19. Schietekat's case[8] reaffirms that in cases other than those that fall under s 60(11)(a), the starting point in considering when to grant bail is s 35(1)(f) of the Constitution[9], which entrenches the right to bail, subject to reasonable conditions if the interests of justice permit. However, in cases that fall under sub-section (11)(a), the starting point is that continued detention is the norm.[10]

20. In Schietekat's case, the Constitutional Court was at pains to point out that there is a fundamental difference between the "…objective of bail proceedings and that of the trial. In a bail application the enquiry 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

[7] S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (2) SACR 51 (CC).
[8] Schietekat's case above at para 5.
[9] Act 108 of 1996.
[10] Schietekat above at p 84d-e.

accused pending trial; and that entails, in the main, protecting the investigation and prosecution of the case against hindrance."[11]

21. Sub-section 60(11) singles out persons facing serious charges as set out in schedules 5 and 6 for more stringent treatment.[12]

22. In relation to the phrase "interests of justice", the Constitutional Court points out that:

> "It is a useful term denoting in broad and evocative language a value judgment of what would be fair and just to all concerned. But while its strength lies in its sweep, that is also its potential weakness. Its content depends on the context and applied interpretation. It is also, because of its depth and adaptability, prone to imprecise understanding and inapposite use."[13]

23. In s 60(4), (9) and (10) the phrase "interests of justice" is intended to have a narrower interpretation, which aligns itself to the 'interests of society' or "…(…the interests of justice minus the interests of the accused)"[14]. Whereas in s 60 (1), (11) and (12) the meaning assigned to that phrase is the broader one contemplated in the constitution.[15]

24. In setting out what s 60(11)(a) entails, the Constitutional Court in Schietekat's case stated:

> "Section 60(11)(a) contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail will be resolved in favour of the

[11] Schietekat above at p 63g to 64b.
[12] Schietekat above at p 65b.
[13] Schietekat above at p 76h to 77b.
[14] Schietekat above at p 78a to c.
[15] Schietekat above at p 77e.

denial of bail, unless 'exceptional circumstances' are shown by the accused to exist."[16]

25. In dealing with examples of what might constitute 'exceptional circumstances' as contemplated by s 60(11)(a) of the CPA, the Constitutional Court set out:

> "In requiring that the circumstances proved must be exceptional, the subsection does not say they must be circumstances above and beyond, and generally different from those enumerated. Under the subsection, for instance, an accused charged with a Sch 6 offence could establish the requirement by proving that there are exceptional circumstances relating to his or her emotional condition that render it in the interests of justice that release on bail be ordered notwithstanding the gravity of the case."[17] (footnote omitted) … "In the final analysis, the evaluation is to be done judicially, which means that one looks at substance, not form."[18]

26. The term exceptional circumstances holds no hidden meaning and is to be applied judicially.[19]

27. The appellants in their various bail applications stated that they intended to stand their trial and any fears that they would not stand their trial could be adequately dealt with by imposing appropriate conditions of bail.

28. The appellants in the third bail application, the subject of this appeal, restated their personal concerns relating to their respective businesses, their personal relationships with family members and

[16] Schietekat above at 85c-d.
[17] Schietekat above at 89e-f.
[18] Schietekat above at 90a.
[19] Schietekat above at 100f.

finally that as a result of their incarceration for almost a year at the time that the said bail application was heard their emotional distress and anxiety. It is common cause that at the time this appeal was heard that the appellants had been incarcerated for more than a year.

29. The learned magistrate in dealing with the bail application, to which this appeal relates, dealt with the issues raised by the appellants globularly under the rubric of personal circumstances. The learned magistrate came to the conclusion that whilst there was a difference in emphasis, there were no new facts set out in the said bail applications. In adopting this approach globular approach, he failed to appreciate that the emotional stress and anxiety raised by the applicants in their respective affidavits was new and raised for the first time in the bail application being the subject of this appeal. To this extent, Mr Hollander who appeared for the applicants, correctly conceded that the learned magistrate erred.

30. In these circumstances, the next step is for this court to consider whether the emotional stress and anxiety raised by the appellants in their respective affidavits constitutes exceptional circumstances that permits their release on bail. At the time of writing this judgment the appellants had been incarcerated for just over a year. There was no indication on the record as to when the appellants could expect to come to trial. Despite applying in writing for access to the docket the respondent had refused such access. Mr Pistorius, who appeared on

behalf of the appellants, referred to their respective affidavits and stressed that the appellants perceived their continued detention in such circumstances as indeterminate and punitive.

31. Mr Hollander on behalf of the respondent indicated that a decision had been made to transfer the matter to the regional court and that a date had been set for January 2017. Furthermore, Mr Hollander indicated that the date in January 2017 was merely for presenting the appellants with a formal charge sheet, making the docket available to them, finalising the legal representation of the accused in the matter and setting a date for the commencement of the trial. Mr Pistorius pointed out that the regional court did not have a continuous roll and that even with the date now provided by Mr Hollander and having regard to his personal experience of the congested roll in the Kimberley regional court he did not expect the matter to be finalised before the end of next year.

32. Throughout these proceedings the only ground of opposing the applications for bail was that the appellants were accused of a serious offences covered by schedule 6 and that they had a strong case against the appellants. The investigating officer did raise other issues, but failed to establish a factual basis for these concerns.

33. Other than that, it was never seriously contended that the appellants were a flight risk and that they would not stand their trial. The

Investigating Officer confirmed their respective addresses and family ties to Bloemfontein. It is only appellant one who is in possession of a passport and the Investigating Officer disclosed that he made enquiries with the Department of Home Affairs and there is no record of appellant one ever having left the country.

34. Mr Pistorius conceded that the appellants had a prima facie case to answer in regard to the DNA, the circumstantial and other evidence that appears to be available to the State. However, Mr Pistorius submitted that the appellants had not yet had access to the docket to determine or assess how strong the case against them is. In any event he submitted that the even though the charges were serious and covered by schedule 6 the appellants were still entitled to be presumed innocent.

35. It now appears that the investigations are complete. The State presumably has statements from its witnesses and has secured the evidence it requires to proceed with the trial. There was no evidence to suggest that any of the appellants had or would interfere with witnesses or evidence.

36. The previous convictions of appellant one are old and cannot be said to show a propensity to threaten anyone. In any event there is no

evidence that would suggest that any of the appellants would or had threatened anyone.

37. It is necessary to briefly mention the issue of the pending matters against appellant one and two. It appears from the record that appellant one disclosed the matter pending against him to the Investigating Officer. The investigating officer states that appellant two did not disclose the pending matter against him. However, from the record it is evident that the Investigating Officer concedes that at some point this pending matter against appellant two was withdrawn by the State and the Investigating Officer states that it was now with the Senior Public Prosecutor for a decision. Presumably, this refers to a decision on whether to reinstate such charge.

38. The record does not establish that appellant two knew that a decision was pending from the Senior Public Prosecutor. In the circumstances, appellant two must be given the benefit of the doubt. The pending matter against appellant one dates back to 2011. If it has been pending for 5 years and nothing has come of it to date, it is doubtful as to whether it will ever materialise as a charge against appellant one. Similarly, with appellant two, while the court does not know why the relevant charge was withdrawn, it is fair to infer that if there was a reasonable case against him and the State was ready to proceed with the trial such charge would not have been withdrawn. In these circumstances, such pending matters cannot count for much against

appellants one and two. Appellant three has no previous convictions and no pending matters.

39. At this point the appellants have been incarcerated as awaiting trial prisoners for just over a year. Mr Hollander submitted that the State was not responsible for any delays and that the court was kept up to date with the progress relating to the forensic evidence and the further accused that were added to the trial. This may be so, but from the record the appellants cannot be held responsible for the delays either. They have been deprived of their liberty for over a year.

40. They state in the bail application, being the subject matter of this appeal that as a result of their lengthy incarceration and the fact that there was apparently no sign of the matter coming to trial that they perceived their detention as indeterminate and punitive. That this caused emotional distress and anxiety at various levels. The Investigating Officer investigated physical ailments with the nursing staff where the appellants are incarcerated, but it is evident that the Investigating Officer made no effort to investigate the emotional or psychological wellbeing of the appellants. In these circumstances, the evidence of the appellants relating to their emotional stress and anxiety must be accepted as uncontested.

41. It was only at the hearing of this bail appeal that the appellants were informed of the court date in January 2017.

42. In these circumstances the issue of the emotional stress and anxiety coupled to the lengthy period of their incarceration as well as the cumulative effect of the other factors mentioned above, does in the present circumstances constitute ‘exceptional circumstances’ that would permit the appellants to be awarded bail despite the fact that they are facing charges under schedule 6 of the CPA. Any fears that the appellants may not stand their trial could be minimised as far as possible by appropriate bail conditions.

43. At the hearing of this appeal I put to Mr Pistorius that in the event of my upholding the appeal I was considering whether it was desirable to refer the matter back to the magistrate to hear evidence on the appropriate bail conditions and the amount at which bail was to be set.

44. Mr Hollander supported the proposal of referring the matter back to the magistrate if I upheld the appeal. Mr Pistorius suggested that I should set bail at an amount in the region of R20 000.00 to R30 000.00 and order that the appellants report to their local police station on a daily basis. I believe the reason why Mr Pistorius proposed that I deal with setting the bail and the appropriate conditions is to avoid further unnecessary incarceration of the appellants. I believe there is some value in those concerns. However, I informed Mr Pistorius that I had in mind setting bail at R30 000.00 each but that I had no idea if this was realistic for the appellants. Mr Pistorius asked his instructing

attorney to contact the appellants' families and find out if the appellants would be able to raise such amount. After taking an instruction, Mr Pistorius informed that the appellants would be able to raise R30 000.00 each for bail in the matter.

In the circumstances the following order is made:

1) The bail appeal of each of the appellants is upheld.
2) Bail is set for the appellants in the amount of R30 000.00 (thirty thousand Rand) each.
3) The first appellant is to surrender his passport to the Investigating Officer before being released on bail.
4) The appellants are to report to the police station nearest to their residence on a daily basis between the hours of 7 am and 7 pm.
5) The appellants are to inform the Investigating Officer in writing, within 24 hours of being released on bail, which police station is nearest to their residence and to which they will be reporting on a daily basis.
6) Save for attending the trial in this matter the appellants are not to leave the magisterial district of Bloemfontein without first obtaining the prior written consent of the Investigating officer.

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Lawrence Lever

Acting Judge

Northern Cape High Court, Kimberley

On behalf of Appellants :	Adv P.Pistorius
	Mzuzu Attorneys
On behalf of Respondents:	Adv Q Hollander
	DPP
Date of hearing:	24 November 2016
Date of Judgment:	29 November 2016