IN THE NORTH WEST HIGH COURT, MAHIKENG

CASE NO: CAB 08/2019

In the matter between:

MLUNGISI LUPHUWANE Appellant

and

THE STATE Respondent

DATE OF HEARING : 09 MAY 2019

DATE OF JUDGMENT : 17 MAY 2019

COUNSEL FOR APPELLANT : ADV. KHALO

COUNSEL FOR THE RESPONDENT : ADV. CHULU

JUDGMENT – BAIL APPEAL

HENDRCIKS J

Introduction

[1] This is an appeal against the refusal of bail. Mr. Mlungisi Luphuwane, who according to the charge sheet is accused 3, are together with his four co-accused arraigned before the Regional Court, sitting at Stilfontein, on a

charge of murder read with the provisions of Section 51 (1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended, in that they acted in concert with one another in furthermore of a common goal or common purpose to bring about the death of the deceased.

[2] The appellant's legal representative presented an affidavit deposed to by the appellant as applicant, in support of the application to be admitted to bail. In this affidavit, the appellant outlined his personal circumstances. He is thirty (30) years of age, unmarried with no children. He stay at his parental home. He is a hawker and derive an income of approximately R1500.00 per month from selling fruit and vegetables. He owns no immovable property but has movable assets to the value of about R15 000.00. He is a RSA citizen and does not own travel documents nor does he have family outside this country. He suffers from peptic ulcers as a chronic decease and his condition is deteriorating. A medial certificate was handed to court in support of this contention. He does not have a previous conviction nor any other pending case against him. He denies any involvement in this case. He will plead not guilty during the trial and challenge the allegations levelled against him. He does not know the witnesses and will not interfere with any of them. He can afford bail in the amount of R800.00 (eight hundred rand).

[3] The State also did not present *viva voce* evidence. Like the appellant, it also presented an affidavit deposed to by the investigating officer **Sello Seoke** in opposition to the granting of bail to the appellant. In short this affidavit outline the circumstances under which the offence of murder was committed and the evidence which the State will adduce during the trial. Seoke states that the deceased was in the company of the two victims seated inside a shack made of corrugated iron sheets. The door was not properly closed but stood ajar. Whilst so seated, they heard a noise and people screaming. The door of the shack was kicked open and the corrugated iron sheets of the shack were forcefully ripped off by a group of men. The group were identified as the appellant and his co-accused. They are members of the **Vatos Logos** (VL's) gang. They were armed with dangerous weapons which they used to viciously

attack the deceased and the two victims who are eye witnesses and possible complaints. They then left.

[4] An ambulance was summoned and the deceased was certified death on the scene. The victims were taken to the hospital. This is a gang related matter. There is rivalry between the gang to which the appellant and his co-accused belongs namely **Vatos Logos** (VL's) and that of the deceased and the victims called **Money Lovers**. During the arrest of the appellant, he was on bail on a charge of murder but the case was subsequently finalized. The community of Jouberton is up in arms about the gang related violence in that township. This constituted the evidence presented.

[5] The Regional Magistrate in her judgment stated, quite correctly, that this is a Schedule 6 offence and that the onus was on the appellant as applicant to prove the existence of exceptional circumstances in order to be released on bail. Section 60 (11) (a) of the Criminal Procedure Act 51 of 1977, as amended, provides:

> *"Notwithstanding any provision of this Act, where an Accused is charged with an offence referred to-*
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> *(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."*

[6] The constitutionality of this section was decided by the Constitutional Court in **S v Dlamini**; **S v Dladla and Others**; **S v Joubert**; **S v Schietekat** 1999 (2) SACR 51 (CC). The position is that Section 60 (11) (a) is constitutional even though it places a formal onus (burden of proof) on the accused to adduce

evidence which satisfies the Court that exceptional circumstances exist which in the interest of justice permit his release. Although this limits the right contained in Section 35 (1) (f) of the Constitution Act 108 of 1996, it is a constitutionally permissible limitation in terms of the limitation provisions contained in Section 36 of the Constitution.

[7] In **S v Vanqa 2000** (2) SACR 371 (TK) at 376 h-j the following is stated:-

> *"The Applicant for bail is first enjoined to establish that his circumstances are exceptional as envisaged in section 60 (11) (a). Secondly, he is required to prove that such circumstances justify, in the interest of justice that bail be granted. It is the first leg of the enquiry that distinguishes the onus born by the Applicants in Schedule 6 cases from the proof required in Schedule 5 matters. It also appears to me that the enquiry relating to the second leg cannot even begin unless the first leg has yielded positive results"*

[8] The standard which the accused must satisfy is a civil one, to wit, a balance of probabilities. For example, an accused who alleges innocence and claims that he will ultimately be acquitted, must prove his future acquittal on a balance of probability. In **S v Mathebula** 2010 (1) SACR 55 (SCA) at [12] the following is stated:

> *"[12] But a State case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge: S v Botha en 'n Ander 2002 (1) SACR 222 (SCA) (2002 (2) SA 680; [2002] 2 All SA 577) at 230h, 232c; S v Viljoen 2002 (2) SACR 550 (SCA) ([2002] 4 All SA 10) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or*

perhaps not at all. But the State is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see Shabalala and Others v Attorney-General, Transvaal, and Another 1995 (2) SACR 761 (CC) (1996 (1) SA 725; 1995 (12) BCLR 1593). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the State to rebut his evidence to that effect: S v Viljoen at 561f - g."

[9] In **S v Petersen** 2008 (2) SACR 355 (C) at [55] the following is stated:-

"On the meaning and interpretation of 'exceptional circumstances' in this context, there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking, 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of these concepts. This depends on their context and on the particular circumstances of the case under consideration. The exceptionality of the circumstances must be such as to persuade a Court that it would be in the interests of justice to order the release of the Accused person. This may, of course, mean different things to different people, so that allowance should be made for a certain measure of flexibility in the judicial approach to the question. In essence the Court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all the applicable legal criteria."

Reference was made to the judgment of **S v Mohammed** 1999 (2) SACR 507 (C). In this case, it was stated that the true enquiry is whether the proven circumstances are sufficiently unusual or different in any particular case as to

warrant the applicant's release and that “sufficiently” will vary from case to case. Each case must be decided on its own merits.

[10] In **S v H** 1999 (1) SACR 72 (W) the following is stated:

> *“exceptional circumstances must be circumstances which are not found in the ordinary bail application but pertain peculiarity to an Accused person’s specific application. What a Court is called upon to do is to examine all the relevant considerations as a whole, in deciding whether an Accused person has established something out of the ordinary or unusual which entitles him to relief.”*

[11] In **S v Botha en ‘n Ander** 2002 (1) SACR 222 (SCA) the following is stated:

> *“[19] Artikel 60 (11) (a) meld nie die aard van die vereiste ‘buitengewone omstandighede’ nie. Dit word nie vereis dat ‘buitengewone omstandighede’ verskillend van aard, of anderssoortig, moet wees as die omstandighede wat in subarts (4)–(9) genoem word nie. Gewoonlik, maarnie noodwendig nie, sal dit omstandighede wees wat daarop gemik is om die onwaarskynlikheid van die gebeure genoem in art 60 (4) (a) – (e) te bewys. Met betrekking tot daardie gebeure, of andersins, moet die aangevoerde ornstandighede, in die konteks van die besondere saak, van so 'n aard wees dat dit as buitengewoon aangemerk kan word (S v Vanqa 2000 (2) SASV 371 (Tk) op 376b-d). Dit is vir die hof om in elke saak in die besondere omstandighede van daardie saak 'n waarde-oordeel te vel of die bewese omstandighede van so 'n aard is dat dit as buitengewoon aangemerk kan word. In die Dlamini-saak bet Kriegler R die volgende omtrent die vereiste van 'buitengewone omstandighede' gesê (paras 75 en 76):*
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> > *‘An applicant is given broad scope to establish the requisite circumstances, whether they relate to the*

nature of the crime, the personal circumstances of the applicant or anything else that is particularly cogent. . . . I do not agree that, because of the wide variety of 'ordinary circumstances' enumerated in ss (4)-(9), it is virtually impossible to imagine what would constitute "exceptional circumstances" and that the prospects of their existing are negligible. In requiring that the circumstances proved be exceptional, the subsection does not say they must be circumstances above and beyond and generically different from those enumerated. Under the subsection, for instance, an accused charged with a Schedule 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.'"

[12] The Regional Magistrate concluded that the personal circumstances of the appellant is not extra-ordinary and definitely not exceptional. These are the ordinary personal circumstances that are usually presented in bail applications. The Regional Magistrate then dealt with the ailment of the appellants in order to determine whether it qualifies as exceptional. A medical certificate issued by Dr. Leburu, which was presented on behalf of the appellant, was considered. The appellant was diagnosed with peptic ulcers decease for which he received treatment. Medicine was prescribed. The doctor stated that no other chronic medical illnesses were detected. He was considered fit to stand trial. The Regional Magistrate, quite correctly in my view, concluded that this medical condition of the appellant is not exceptional.

[13] The Regional Magistrate furthermore considered the interest of the community. In terms of the affidavit of the investigating officer, Seoke, the community is up in arms for the gang related violence that plague the community of Jouberton. The two rival gangster groups namely **Vatos Logos**

and **Money Lovers** are fighting each other. This case has as its origin gang related violence and the community had enough of it. Having regard to this, the Regional Magistrate, quite correctly in my view, found that it will not be in the interest of the community that the appellant be released on bail. It was found that there exist no exceptional circumstances to justify that the appellant be admitted to bail in the amount of R800.00, as submitted.

[14] I am of the view that the Regional Magistrate was correct in her findings. Her reasoning cannot be faulted. No exceptional circumstances were proven to exist which would entitle the appellant to be admitted to bail. The appeal against the refusal of bail should therefore fail.

Order

[15] Consequently, the following order is made:

The appeal against the refusal of bail is dismissed.

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R D HENDRICKS
JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG.