REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Case No: 7032/11

In the matter between

Sibusiso Sithole	**First Appellant**
Cyril S Ngema	**Second Appellant**
Nkululeko Sithole	**Third Appellant**

and

The State	**Respondent**

JUDGMENT

19 August 2011

Steyn J

[1] This is an appeal against the refusal by the Ntuzuma district court, to grant the appellants bail.[1] The appellants are charged with one count of robbery with aggravating circumstances in terms of section 1 of the Criminal Procedure Act 51 of 1977.[2]

1 See case number M1305/11.
2 Hereinafter referred to as 'the Act'.

The offence is a listed schedule 6 offence in terms of the Act.

[2] The appellants were arrested on 10 May 2011 and brought before the court for a bail application on 23 May 2011. The application was refused by the district magistrate and the appellants now appeal against this decision.

[3] On 10 August 2011, I perused all the papers in the court file and noticed that counsel for the State failed to file any written heads of argument. What was filed on behalf of the State, is a notice to abide by the decision of the court. It was apparent that the State not only failed in their obligation to assist the court but also failed to adhere to the practice directives of this division. I informed the State counsel that I expected the State to comply with the directives more specifically Practice Directive 23,[3] which reads as follows:

> ***"23. Bail Appeals***
> *These are heard by a single judge both in Pietermaritzburg and Durban. While the judges of this Division recognise that these matters are inherently urgent, it is nonetheless necessary that appeals be put before the court in an orderly and structured manner. The following practice will henceforth be followed:*
> *23.1 When an appeal is ripe for hearing, that is to say, that the*

3 See Erasmus 'Superior Court Practice' Revision Service 36, Practice Manual: KwaZulu-Natal.

record of the proceedings has been transcribed and certified as correct, the magistrate's reply to the notice of appeal has been obtained and the record has been paginated and indexed the appellant shall be entitled to lodge such record with the registrar and at the same time apply for a date of hearing.

23.2 The registrar shall allocate a date which is not less that five (5) court days from the date of the application. The registrar shall then place the matter before the senior civil judge who generally speaking, will allocate it to the judge presiding in the motion court on that day. Where however the record of the proceedings before the magistrate is voluminous and in the opinion of the registrar will require extensive reading and preparation, the registrar shall allocate a date not less than 10 court days from the date of the application.

23.3 The parties shall lodge brief and concise heads of argument at least two court days before the hearing of the appeal." [footnotes omitted]

The State hereafter filed written heads albeit not in accordance with the time limit.

Ad the obligations and duties of prosecutors

[4] Before I deal with the merits of the appeal I wish to refer to a disturbing feature which I had occasion to experience in this matter and in another matter that recently served before me.[4] In both these matters the State acted with complete disregard for its duties and appreciation of its obligations.[5] It remains the duty of the State to put all relevant evidence before a court hearing a bail application. In this regard I align myself with the

4 See case number 2853/2011.

5 See *S v Nteeo* 2004 (1) SACR 79 (NC) para 5.

views expressed by Kgomo JP in *Nteeo* and the reference to the duties of a prosecutor. In the same vein Traverso J, as she then was, expressed the same sentiments in relation to a prosecutor's duties in *S v Van Huysteen*:[6]

> *"[D]ie plig om toe te sien dat reg en geregtigheid tydens enige hofverrigtinge geskied, rus op al die beamptes van die hof. Dit is nie 'n plig wat tot die voorsittende beampte beperk is nie. As die Staat nie alle feite voor die landdros plaas nie, kan reg en geregtigheid nooit geskied nie."*[7]

[5] I do not intend re-visiting the role that should be fulfilled by prosecutors in dealing with bail applications and bail appeals. It is however important to bear in mind what has been authoritatively stated by the Constitutional Court in *Carmichele v Minister of Safety and Security and Another*:[8]

> *"[72] …However, prosecutors have always owed a duty to carry out their public functions independently and in the interests of the public. Although the consideration of bail is pre-eminently a matter for the presiding judicial officer, the information available to the judicial officer can but come from the prosecutor. He or she has a duty to place before the court any information relevant to the exercise of the discretion with regard to the grant or refusal of bail and, if granted, any appropriate conditions attaching thereto.*
>
> *[73] In considering the legal duty owed by a prosecutor either to the public generally or to a particular member thereof, a court should take into account the pressures under which prosecutors work, especially in the magistrates' courts. Care should be taken not to use hindsight as a basis for unfair criticism. To err*

6 2004 (2) SACR 478 (C).
7 *Ibid* para 11.
8 2001 (10) BCLR 995 (CC).

in this regard might well have a chilling effect on the exercise by prosecutors of their judgment in favour of the liberty of the individual. There are far too many persons awaiting trial in our prisons either because bail has been refused or because bail has been set in an amount which cannot be paid. We can do no better in this regard than refer to the following passage which appears in the United Nations Guidelines on the Role of Prosecutors:

> *'In the performance of their duties, prosecutors shall:*
>
> *a) …*
>
> *b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect; . . ."*

[74] That said, each case must ultimately depend on its own facts. There seems to be no reason in principle why a prosecutor who has reliable information, for example, that an accused person is violent, has a grudge against the complainant and has threatened to do violence to her if released on bail should not be held liable for the consequences of a negligent failure to bring such information to the attention of the Court. If such negligence results in the release of the accused on bail who then proceeds to implement the threat made, a strong case could be made out for holding the prosecutor liable for the damages suffered by the complainant."[9] *[footnotes omitted]*

(My emphasis)

A close scrutiny of the *Carmichele* judgment shows that there is a duty on prosecutors to be pro-active in taking steps to protect the community against any criminal conduct and hence they should actively participate in the bail process.

9 *Ibid* at 1019D-1020E.

[6] The duties and obligations of the State should be assessed in the light of the aforesaid *dicta*. There can be no doubt that State counsel has a public duty to place all relevant facts before a court deciding an appeal and that the State in *casu* failed in its duty when it merely filed a notice to abide by the court's decision.

[7] The approach of the State from the time when the application was heard in the court *a quo* till the hearing of the bail appeal shows a clear disregard for its obligations. There is no doubt in my mind that in a traditional common law criminal justice system, prosecutors serve as the gate keepers of the system. Not only do they evaluate the conduct of the police and the strength of the State's case, they actively present the case to the court and represent the interests of the society throughout the proceedings.

[8] Given the State's accountability to the community in a democratic society and its responsibility for the protection of the rights of victims of crimes, it is to be expected that the State would act in accordance with such responsibility when putting the necessary facts before the court hearing the bail

application and hearing the bail appeal.

[9] Sadly in this case it was left to the presiding officer to act in accordance with the law and be accountable.

Ad the merits of the appeal:

[10] On behalf of the appellants, Mr Sibisi, submitted that the appellants proved the existence of exceptional circumstances permitting their release on bail because:

> *"(a) The State was not opposed to the release of the appellants on bail;*
> *(b) The investigating officer was not opposed to the release of the appellants on bail;*
> *(c) The appellants evidence (submitted by way of affidavits) was not contested by the State;*
> *(d) Except for the vague allegations against the appellants the evidence against them is weak. It is submitted that this weakness constitutes an exceptional circumstance."*

[11] Mr de Klerk, acting on behalf of the State, submitted that in light of the fact that the police did not oppose bail and in light of the evidence before the court *a quo*, the State equally does not oppose the appellants' appeal against the refusal of bail.

Interestingly, neither counsel for the appellants nor counsel for

the State even considered the approach followed by the presiding officer in evaluating the evidence before the court and whether the appellants succeeded in showing the existence of 'exceptional circumstances'. No criticism was levelled at the judgment or the reasons delivered by the learned Magistrate for refusing bail.

[12] It is evident that what is required of this court in terms of section 65(4) of the Act is that before setting aside any decision on bail, this court should be satisfied that the lower court was wrong in its decision.[10]

[13] The record reveals that the learned Magistrate applied her mind to the burden cast upon the applicants in stating:

> *"[T]aking into consideration the allegations facing the appellants, the gravity of the force used against the complainant, which was extreme. A firearm was used and furthermore she was tied up.*
>
> *Taking into consideration all the factors, the personal circumstances of the appellants the nature of the office and the allegations faced by the appellants, the appellants failed to show this court on a balance of probabilities the exceptional circumstances in which the interests of justice permit their release. In any event it is trite that in schedule 6 offences, where exceptional circumstances have to be proved, the use of affidavit evidence is insufficient to prove exceptional circumstances"*

10 *S v Green and Another* 2006 (1) SACR 603 (SCA); *S v De Abreu* 1980 (4) SA 94 (W).

[14] The success of this appeal is therefore dependent on whether the appellants, applicants in the court *a quo*, discharged the *onus*, in terms of subsection 60(11) of the Act.

[15] It is averred by the State in the charge sheet that the appellants unlawfully and intentionally assaulted the complainant, Thobeka Gumede, and robbed her of cash to the amount of R13 315, a watch and earrings, property belonging to her, and under aggravating circumstances where they pointed a firearm at the complainant.

The State in its affidavit listed the following brief facts that linked the accused, now appellants, with the alleged commission of the offence. In relation to the first appellant:

> *"He is the owner of the moter vehicle that was seen by the complainant on the scene of the crime. While (sic) the suspect after robbing the complainant run to and enter the car and drove away after robbing her cash amount of R13 315, a gold watch and gold earrings."*

In relation to the second appellant the following facts were listed:

> *"He was pointed out by his friend who is also an accused in*

this case as the person he was with and they robbed the complainant at his work environment and took R13 315, a gold watch and earrings. The gold watch and earrings were recovered at his place . . . ."

In relation to the third appellant the following was said:

"He was with the other suspects on 06/05/2011, who robbed the complainant at the work place and took R13 315, a gold watch and earrings."

The affidavits filed on behalf of the State leave much to be desired. The affidavits however do reveal that the evidence against the appellants, is everything but weak. I am not persuaded by Mr Sibisi's submission that it should be regarded as weak.

[16] In *S v Mathebula*[11] the Supreme Court of Appeal stated the following in relation to *onus*:

"[I]n 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:
. . .
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

11 2010 (1) SACR 55 (SCA).

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."[12]

(My emphasis)

[17] The 1997 bail legislation introduced new provisions to the Act and a new approach to the consideration of the factors playing a role at the bail hearing more than ever when it comes to offences listed in Schedule 6. Our Constitutional Court dealt with this approach definitively in *S v Dladla and others*, *S v Joubert, S v Schietekat*.[13]

"[64] These are factors, therefore, which in the past would have been considered in determining whether bail should be granted. However, s 60(11)(a) does more than restate the ordinary principles of bail. It states that where an accused is charged with a Sch 6 offence, the exercise to be undertaken by the judicial officer in determining whether bail should be granted is not the ordinary exercise established by ss60(4)-(9) and required by s 35(1)(f)) in which the interests of the accused in liberty are weighted against the factors that would suggest that bail be refused in the interests of society. 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 denial of bail, unless 'exceptional circumstances' are shown by the accused to exist. This exercise is one which departs from the constitutional standard set by s 35(1)(f). Its effect is to add weight to the scales against the liberty interest of the accused and to render bail more difficult to obtain than it would have been if the ordinary constitutional test of the 'interest of justice' were to be applied."[14]

(My emphasis)

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12 *Ibid* at para 12.

13 1999 (2) SACR 51 (CC).

14 *Ibid* at para 64.

[18] Previously, an application for bail was regarded as *sui generis* and the accused bore the *onus* on a balance of probabilities to show why he should be released.[15] After the commencement of the interim Constitution[16] a host of decisions followed, all considering *onus* on the parties in a bail application.[17] The 1997 legislation represents a conscious break from the practice that existed prior to the legislation coming into operation. It requires diligent prosecutors to present all relevant evidence before a presiding officer hearing the application so that the presiding officer can make an informed decision.

[19] It is true that the Constitutional Court, however, in *S v Dlamini*; *S v Dladla and Others*; *S v Schielekat*[18] did not resolve the issue of *onus*. Kriegler J dealt with it as follows:

> *"For the present it is unnecessary to resolve the question whether there is an onus in bail proceedings and, if so, its incidence. The current cases are governed by ss 11, where*

15 See *S v Hlongwa* 1979 (4) SA 112 (D).

16 The interim Constitution of the Republic of South Africa, Act 200 of 1993.

17 See *Ellish v Prokureur-Generaal*, *Witwatersrand Plaaslike Afdeling* 1994 (2) SACR 579 (W); *Magano and Another v District Magistrate Johannesburg and Others* (1) 1994 (2) SACR 304 (W); *S v Mbele and Another* 1996 (1) SACR 212 (W); *S v Vermaas* 1996 (1) SACR 528 (T).

18 1999 (2) SACR 51 (CC). For a critical discussion of the case see 'An Evaluation of the SA Constitutional Court's decision on bail' by Sankin, Steyn, Van Zyl Smit and Paschke in 'Resolving the tension between crime and human rights: An Evaluation of European and South African issues' Sankin *et al* (2001) at 217-241.

there is undoubtedly a burden cast upon an applicant for bail."[19]

[20] Despite the aforesaid it is necessary in the context of s 60(11)(a) for an applicant to persuade the Court that 'exceptional circumstances' are present that in the interests of justice permit his release. The concept 'exceptional circumstances', which has not been defined, has meant different things to different people.[20] In my view, what is expected of a court is to exercise a value judgment in accordance with all the evidence and applying the relevant legal criteria.[21]

[21] In the present matter, the learned magistrate fully apprised

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19 *Op cit* at para [45], footnote 74 of the judgment.

20 See *S v C* 1998 (2) SACR 721 (C); *S v H* 1999 (1) SACR 72 (W) at 77b-i; *S v Schietekat* 1999 (1) SACR 100 (C); *S v Mokgoje* 1999 (1) SACR 233 (NC); *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) at 2291 – 2300; *S v Bruintjies* 2003 (2) SACR 575 (SCA) at 577 c-I; *S v Josephs* 2001 (1) SACR 659 (C); *S v Viljoen* 2002 (2) SACR 550 (SCA) para 15.

21 See section 60(4) of the Act that provides for the grounds to be considered:

> *"(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence;*
> *(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or*
> *(c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or*
> *(d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system;*
> *(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security."*

herself of her duties and in doing so she considered the circumstances listed by the applicants including the strength of the State's case. In my view, the learned magistrate would have failed in her duty, had she merely accepted the attitude of both the state prosecutor and that of the investigating officer. It is evident from the record that neither were *au fait* with the implications of the amended bail legislation or seriously considered their obligations and their accountability to the community. The legislature considered it necessary to burden the accused with an *onus* in Schedule 6 cases, and hence the question is very simple, the appellants have not succeeded in discharging their onus. None of the appellants gave *viva voce* evidence. I fail to see how they could be convinced that they have discharged the *onus* that rested on them in terms of the legislation.

[22] It must follow that on an analysis of the evidence as a whole, the probative value of the statements produced by the appellants, and their burden of establishing 'exceptional circumstances', that the appellants have not succeeded in demonstrating that the court below was wrong and that the

decision should be set aside.[22]

[23] In the circumstances the following order is made:

1. The appellants' appeal to be released on bail fails and is accordingly dismissed.
2. The registrar is requested to forward a copy of this judgment to the Director of Public Prosecutions (KwaZulu-Natal) for consideration of the remarks made above concerning the duties of prosecutors in conducting bail applications.

Steyn J

22 C*f S v Porthen and Others* 2004 (2) SACR 242 (C), at para [17].

Date of Hearing:	12 August 2011
Date of Judgment:	19 August 2011
Counsel for the Appellants:	Adv Sibisi
Instructed by:	Mkhize Attorneys
Counsel for the Respondent:	Adv de Klerk
Instructed by:	The Deputy Director of Public Prosecutions, Durban