THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 373/06

In the matter between :

THE STATE Appellant

and

ABRAM MABENA First Respondent
(Accused 1 *a quo*)

OUPA FRANS BOFU Second Respondent
(Accused 2 *a quo*)

Before: **HARMS, STREICHER & NUGENT JJA**

Heard: **19 SEPTEMBER 2006**

Delivered: **17 OCTOBER 2006**

Summary: **Bail – Schedule 6 offences – bail not competent in absence of proper enquiry being made in terms of Criminal Procedure Act.**

Neutral citation: **This judgment may be referred to as The State v Mabena [2006] SCA 132 (RSA)**

REASONS FOR JUDGMENT

NUGENT JA

NUGENT JA:

[1] The respondents, who stand accused of the commission of serious offences, were granted bail by a judge of the High Court, Pretoria. The prosecution appealed against the order with leave granted by this Court. At the close of argument we upheld the appeal, set aside the order admitting the respondents to bail, ordered the Registrar of the High Court to issue a warrant for the arrest of the respondents, and indicated that the reasons for our decision would follow. These are the reasons.

[2] The Constitution proclaims the existence of a state that is founded on the rule of law. Under such a regime legitimate state authority exists only within the confines of the law, as it is embodied in the Constitution that created it, and the purported exercise of such authority other than in accordance with law is a nullity. That is the cardinal tenet of the rule of law. It admits of no exception in relation to the judicial authority of the state. Far from conferring authority to disregard the law the Constitution is the imperative for justice to be done in accordance with law. As in the case of other state authority, the exercise of judicial authority otherwise than according to law is simply invalid.

[3] The principles relating to bail, which are partly codified in chapter 9 of the Criminal Procedure Act 51 of 1977, were extensively considered by the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat.*[1]

[1] 1999 (4) SA 623 (CC).

Certain provisions of chapter 9 have been amended since that decision but they do not alter the principles that are relevant to the present case.

[4] The circumstances in which bail may be granted are provided for in s 60 of the Act. Some of the principles that are embodied in that section differ depending upon the gravity of the alleged offence. Generally an accused person who is in custody is entitled to be released on bail 'if the court is satisfied that the interests of justice so permit'.[2] Five grounds are listed upon which, if established, 'the interests of justice do not permit the release from detention of an accused'.[3] Two of those grounds concern the impact that the granting of bail might have upon the conduct of the particular case.[4] The remaining three concern the impact that the granting of bail might have upon the administration of justice generally and upon the safety of the public.[5] Then follows an extensive and detailed list of what were described in *Dlamini* as 'the potential factors for and against the grant of bail,[6] to which a court must have regard' in considering where the interests of justice lie.[7] That scheme for the granting or withholding of bail was held in *Dlamini* to be

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[2]Section 60(1)(a).

[3] Section 60(4). At the time *Dlamini* was decided that subsection provided that '[t]he refusal of bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established…'.

[4] Where there is a likelihood that the accused, if released on bail, will 'attempt to evade his or her trial' (para (b)), or will 'attempt to influence or intimidate witnesses or to conceal or destroy evidence' (para (c)).

[5] Where there is a likelihood that the accused, if released on bail, will 'endanger the safety of the public or any particular person or will commit a Schedule 1 offence' (para (a)) or will 'undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system' (para d)), or 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' (para (e)).

[6] The various factors are contained in ss 60(5) – (9).

[7]*Dlamini*, para 42, underlining added.

generally consistent with the constitutional right of an arrested person 'to be released from detention if the interests of justice permit.'[8]

[5] Graver offences (the offences listed in Schedules 5 and 6 of the Act) are subject to a more stringent regime. Only the regime that applies to Schedule 6 offences is relevant to this appeal. While an arrested person is generally entitled to be released on bail if a court is satisfied that the interests of justice so permit, the reverse applies where a person has been charged with a Schedule 6 offence. In those cases a court is obliged to

'order that the accused be detained in custody until he or she is dealt with in accordance with 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.'[9]

That reversal of the general rule was held in *Dlamini* to limit the constitutional right to bail but the relevant provision (s 60(11)(a)) survived a declaration of invalidity because the limitation was held to be 'reasonable and justifiable in terms of s 36 of the Constitution in our current circumstances'.[10]

[6] The 'potential factors for and against the grant of bail' listed in the Act are no less relevant to the assessment of bail in relation to Schedule 6 offences than they are in relation to lesser offences. Before a court may grant bail to a person

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[8] Section 35(1)(f) of the Constitution. While ss 60(4)(e) and (8A) of the Act were held to limit that right the limitation was held to be justifiable and reasonable and therefore valid (para 55).
[9] Section 60(11)(a).
[10] *Dlamini*, para 77.

charged with such an offence it must be satisfied, upon an evaluation of all the factors that are ordinarily relevant to the grant or refusal of bail, that circumstances exist that warrant an exception being made to the general rule that the accused must remain in custody. The effect of the subsection was described as follows in *Dlamini* (I have separated the sentences for emphasis):[11]

'(a) The subsection says that for those awaiting trial on the offences listed in Schedule 6, the ordinary equitable test of the interests of justice determined according to the exemplary list of considerations set out in ss (4)-(9) has to be applied differently.

(b) Under ss (11)(a) the lawgiver makes it quite plain that a formal *onus* rests on a detainee to 'satisfy the court'.

(c) Furthermore, unlike other applicants for bail, such detainees cannot put relevant factors before the court informally, nor can they rely on information produced by the prosecution; they actually have to adduce evidence.

(d) In addition, the evaluation of such cases has the predetermined starting point that continued detention is the norm.

(e) Finally, and crucially, such applicants for bail have to satisfy the court that 'exceptional circumstances' exist.'

And further:[12]

'[Section] 60(11)(a) does more than restate the ordinary principles of bail. It states that where an accused is charged with a Schedule 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

[11] Para 61.
[12] Para 64.

ss 60(4)-(9) (and required by s 35(1)(f) [of the Constitution]) in which the interests of the accused in liberty are weighed 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 'interests of justice' were to be applied.

[7] That legislative scheme for the grant of bail, whether generally or in relation to Schedule 6 offences, necessarily requires a court to determine what the circumstances are in the particular case and then to evaluate them against the standard provided for in the Act. The form that such an enquiry and evaluation should take is not prescribed by the Act but a court ought not to require instruction on the essential form of a judicially-conducted enquiry. It requires at least that the interested parties – the prosecution and the accused – are given an adequate opportunity to be heard on the issue. For although a bail enquiry is less formal than a trial it remains a formal court procedure that is essentially adversarial in nature.[13] A court is afforded greater inquisitorial powers in such an enquiry, but those powers are afforded so as to ensure that all material factors are brought to account, even when they are not presented by the parties, and not to enable a court

[13] *Dlamini*, above, para 11.

to disregard them.[14] And while a judicial officer is entitled to invite an application for bail, and in some cases is even obliged to do so,[15] that does not make him or her a protagonist. A bail enquiry, in other words, is an ordinary judicial process, adapted as far as needs be to take account of its peculiarities, that is to be conducted impartially and judicially and in accordance with the relevant statutory prescripts.

[8] The circumstances in which bail was granted in the present case were unusual. It was granted in the course of an enquiry that was underway in relation to the mental state of Mr Mabena before he and Mr Bofu had been called upon to plead. The delay in completing the enquiry featured prominently in the reasons that were given for granting bail and it is as well to understand why the delay occurred. The enquiry commenced against the following background.

[9] It is alleged in the indictment that on 19 November 2003 the respondents broke into the home of Mr and Mrs de Lange (who were 88 years old and 64 years old respectively) after cutting the burglar bars, overpowered the de Langes, bound them with wire and cable, including round their necks, stole certain property, and fled. Mr de Lange survived the ordeal but Mrs de Lange died of strangulation.

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[14]Section 60(3): 'If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.'

[15] Section 60(1)(c).

[10] The respondents were arrested soon after the offences were committed and were charged with housebreaking, robbery, attempting to murder Mr de Lange, and murdering Ms de Lange. Robbery and murder, if committed in the circumstances alleged in the indictment, are Schedule 6 offences.

[11] About a month after their arrest the respondents, who were legally represented, applied to a magistrate for bail. They both gave evidence in support of the application. In the course of their evidence they both readily admitted that they were indeed the culprits, but they said that they had not intended to kill Mrs de Lange who, they said, was alive at the time they left the house. Nothing substantial was placed before the magistrate to support the application for bail and it was refused.[16]

[12] In about September or October 2004 an enquiry into the mental state of Mr Mabena, who has a history of epileptic seizures, was directed in terms of ss 77 and 78 of the Criminal Procedure Act. Those sections, respectively, permit a court to direct such an enquiry 'whenever it appears to the court at any stage that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence',[17] or if it is 'alleged at criminal proceedings that the accused is by reason of mental illness or mental

[16]Although the record of these proceedings formed part of the trial record (s 60(11B)(c): 'The record of the bail proceedings . . . shall form part of the record of the trial of the accused following upon such bail proceedings') and although the judge was aware of the proceedings, he did not refer to them at any stage.
[17] Section 77(1).

defect . . . not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible'.[18] The relevance of the enquiry in the former case is that a person may not be tried while he or she is incapable of understanding the proceedings and must instead be detained in a psychiatric hospital or a prison until otherwise directed by a judge.[19] The relevance of the enquiry in the latter case is that a person who commits an act or omission amounting to an offence while suffering from a mental illness or mental defect that makes him or her incapable of appreciating the wrongfulness of the act, or acting in accordance with such an appreciation, is not criminally responsible for the act or omission.[20] In such a case a court must find the accused not guilty and direct that he or she be similarly detained.[21]

[13] An enquiry that is directed in accordance with s 77 or s 78 must be conducted and reported on by three psychiatrists.[22] If their report is unanimous, and is not contested by either the prosecution or the accused, a court may base its decision on the report alone.[23] Otherwise the court must decide the matter after evaluating evidence in the ordinary course.[24]

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[18] Section 78(2).
[19] Section 77(6)(a).
[20] Section 78(1).
[21] Section 78(6).
[22] Section 79.
[23] Sections 77(2) and 78(3) respectively.
[24] Sections 77(3) and 78(4) respectively.

[14] The psychiatrists who examined Mr Mabena (who were aware of his history of epilepsy) were unanimously of the opinion that Mr Mabena did not fall within the terms of either s 77 or s 78 and they reported accordingly. Their findings were not initially placed in dispute but matters took another turn on the day that the trial of the respondents was due to commence.

[15] The trial of the respondents was due to commence on 7 February 2005. Mr Mabena was represented by an attorney, Mr Pretorius, and Mr Bofu was represented by counsel, Mr Boshielo. Counsel for the prosecution was Ms Mogale. In his judgment refusing leave to appeal the judge recorded that 'from the very outset Mr Pretorius made application . . . for Mr Mabena] to be declared incapable of understanding the criminal proceedings and, therefore, unfit to stand trial on account of mental illness'. The record does not reflect such an application being made. What it records instead is the judge saying that he had been 'informed in chambers that [Mr Mabena] is not well. Mr Pretorius thinks he is not well, Mr Pretorius, you think he is not well, is it not?', to which Mr Pretorius replied in the affirmative. The judge then adjourned the matter to consider the report of the psychiatrists and a decision was made (it seems in chambers) that oral evidence should be heard. Counsel for the prosecution, acting in the belief that the defence had agreed that the findings of the psychiatrists would not be challenged, had not

arranged for the psychiatrists to be present, and arrangements were hurriedly made to secure the attendance of two of them.

[16] 'Mental illness' and 'mental defect' are morbid disorders[25] that are not capable of being diagnosed by a lay court without the guidance of expert psychiatric evidence. An enquiry into the mental state of an accused person that is embarked upon without such guidance is bound to be directionless and futile. The enquiry in the present case was initiated in the absence of any proper medical foundation for doubting the unanimous opinions of the three psychiatrists, and with no expertise to guide it, which accounts for the directionless course that it has followed, and its failure to be any closer to a conclusion some twenty months later.

[17] Two of the psychiatrists gave evidence in support of their findings. Each of them was questioned for almost a day on the basis of no more than a layman's understanding of the diagnosis of these conditions. The matter was then postponed to April 2004, when Mr Mabena's mother gave evidence to the effect that he had a history of aggressive behaviour for which he appeared to display no remorse. Mr Mabena's brother gave evidence to similar effect. At the conclusion of that evidence, on 19 April 2005, Mr Pretorius informed the judge that his 'feeling on the subject' was that Mr Mabena had 'probably suffered brain damage' as a result of a blow to the head (that he had suffered such a blow had emerged from the

[25] *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (RP 69/1967) para 2.4.

evidence of Mr Mabena's mother) and on that basis alone he was granted a further postponement to consult a neurologist. Mr Bofu, meanwhile, was being carried along with the tide. But his counsel informed the court that he had consulted with Mr Bofu concerning the possibility of separating the trials, and that Mr Bofu objected to a separation and wished to 'go along with his co-accused.'

[18] The enquiry has not made any material progress since then. Meanwhile it was postponed time and again, until the matter was once more on the court roll on Friday 23 September 2005 (the last day of the court term before the October recess). None of the parties, nor the judge, had any expectation that the enquiry would resume on that day (Mr Mabena had still not been examined by a neurologist). The matter was on the court roll only so that it could be postponed once again. Because that was a mere formality, which had been arranged amongst all concerned, the prosecution was represented on that occasion by Ms Mahanjana, who was not familiar with the matter.

[19] Ms Mahanjana informed the judge that it had been arranged that the matter should be postponed to 14 March 2006 (the earliest date that was available on the court roll). The judge noted the date to which the matter was to be postponed and matters then proceeded as follows:

'COURT: Yes. Mr Mabena and Mr Bofu, tell me – just sit down, please. Do they have previous convictions?

MS MAHANJANA: As it pleases the court, M'Lord?

COURT: Do they have previous convictions?

MS MAHANJANA: M'Lord, I do not have the docket with me.

COURT: I am asking this for a different purpose. You can trust, or not trust me, Mr Pretorius. I will tell you why I am asking this. I want to know, Madam, I want to know. It is too long a time now. I want to know why they cannot be released on bail.

MS MAHANJANA: M'Lord, I am checking ...(intervenes)

MR PRETORIUS: M'Lord, may I just approach the accused as to enquire from him what the situation is, maybe I can assist the court.

COURT: Yes, thank you.

MR BOSHIELO: M'Lord, may I do the same?

COURT: Yes. Let me stand down, but before I do that, let me just speak to Ms Mahanjana. Ms Mahanjana, is that the investigating officer?

MS MAHANJANA: That is correct, M'Lord.

COURT: What does he say to you?

MS MAHANJANA: M'Lord, the investigating officer has informed me that both accused have not got fixed addresses. That is why they were denied bail.

COURT: Now, there is no such thing. We will find out. This thing about human beings not having fixed addresses is not true, because in this matter I heard evidence of people who were able to communicate with their parents. There is no such thing as some people not having fixed addresses. In terms of a certain kind of style, yes, they have no fixed addresses. Do not tell me they do not know where to go to! ...(inaudible) can be established. Now Mr Pretorius and Mr Boshielo, would you please find out whether there is a way in which they can be found without

difficulty, and how so, because I propose we stand down and find out whether they can be released on bail, and also how much bail. They cannot forever be in prison now.

MR BOSHIELO: Indeed, M'Lord, that is correct.

COURT: And I would give Ms Mahanjana an opportunity to tell me why. She has already expressed her concern, it is a valid concern if they are vagabond. Now I shall probably need an assurance regarding that. Because if indeed there is a danger, then there is a danger. But I am always apprehensive about, it is very easy to say of African people who do not have mansions, they do not have addresses, and they get into some holes where they get found all the time, and the police arrest them. They do not get arrested in the air.

MR BOSHIELO: Correct, M'Lord.

COURT: I am going to stand down just for ten minutes and then come back.

MR BOSHIELO: As the court pleases.'

When the proceedings resumed Mr Pretorius informed the judge that Mr Mabena lived with his mother and he furnished her address. In reply to questions from the judge he also furnished certain personal particulars of Mr Mabena, the whereabouts of various family members, and informed the judge that there were no other cases pending against Mr Mabena. Mr Boshielo furnished similar information concerning Mr Bofu. Both legal representatives suggested that bail in the amount of R1 000 would be acceptable and the judge then turned to Ms Mahanjana:

'COURT: Yes, Ms Mahanjana, what is your position?

MS MAHANJANA: M’Lord, I have inherited this matter from Adv Mogale. M’Lord, I have been informed when I inquired from the investigating officer, that it was not easy for him to trace both accused persons. He was assisted by the brother of accused 1, who stays in town, who phoned him and gave him ...(intervenes)

COURT: He is still alive?

MS MAHANJANA: The brother, M’Lord?

COURT: Yes.

MS MAHANJANA: The brother is still alive, M'Lord.

COURT: So he will assist again, and I know that the police can arrest them. But I am going to put, if I give bail, I am going to give conditions which they will ...(inaudible) They don’t have passports, Madam. They may run away for six months.

MS MAHANJANA: M'Lord, I do not have those facts. I have inherited this matter.

COURT: They don’t come, I do not have to ask them. They do not have passports. Do you have a passport?

MS MAHANJANA: I do, M'Lord.

COURT: Well, luckily. I do not have one. I know not many Africans have passports. But I know very few who have passports. And it is not typical of a person in his position to have a passport. So ...(inaudible) actually be arrested. But what more harm can it do you? He will be arrested eventually. The ones I have given bail to where your office, maybe you as well, have objected, they have all come to court, and they have, some of them, been convicted too. You know that. Two of them have been convicted. They came every day. Some have been acquitted. You should know of those.’

The judge then related what had occurred in another case, in which, so the judge said, a person had been convicted of a serious offence, had been granted bail pending an appeal, and had not fled, and he then returned to the case before him:

'… But in this case I am looking at the circumstances of these persons, and I am asking this question. Apart from any such as you have, am I entitled to be concerned about the fact that these people are going to be postponed, their case is going to be postponed now, in September, to a date in March. Should I be concerned as a court?

MS MAHANJANA: The court should be concerned, M'Lord.

COURT: Should the state be concerned?

MS MAHANJANA: That is correct, M'Lord.

COURT: Should all human beings be concerned?

MS MAHANJANA: That is correct, M'Lord.

COURT: So we should find a way of easing their burden, isn't it?

MS MAHANJANA: Correct, M'Lord.

COURT: So the only issue is whether or not they will attend court. And that is all.

MS MAHANJANA: That is correct, M'Lord, and in addition to that, hence I have already indicated to the court that I do not know the facts of this case. This file was given to me just to postpone. I was going to request the court to afford me an opportunity for a formal bail application before this honourable court, where I have all the facts in this matter. Today I only came for a postponement. I was lucky to have the [investigating officer] in court today. Hence I am the one who requests ...(intervenes)

COURT: I have looked into the case. If you have not done so, if the state comes to court not bothering what is contained in the court and one takes over without bothering to see and just say

I am going in for a postponement, having known by now from the history of this case, now this is September, from January, that I am averse to people being kept in custody deliberately. That is one reason. But be obliged in terms of the Constitution to be concerned with people's concerns. Did not even think what might happen if it is postponed to that day. I am sorry, I have no sympathy for you. I am not talking about you individually. For the state. If the state is going to ask me now to postpone this case and I must find a date some time where I must hear the bail application, I am sorry, I am not going to do that. All I am going to assure to do my best, and I can never give you a guarantee anywhere that anybody will come to court. Nobody can ever do that. But I look at probabilities that suggest that they won't come back to court, and I see none. And Madam, I am sorry, I am not going to postpone this case. Already I have been indulging a lot. If I got mention in your case that when this matter, in an endeavour to accommodate the case, you and I arranged 1 and 2 December [apparently the date to which it was originally intended to postpone the matter] we are surely going to do everything in our best to shorten evidence. I was told in chambers that that information did not get to counsel, or the legal representatives of the two accused persons timeously for them to have come to me earlier and change the date to another date. So there are a lot of ...(indistinct) going on on the state's side which I cannot overlook. So I am sorry, if you need to go and study this case for a longer time, I am surely not going to give you that time.'

Mr Pretorius then intervened to inform the judge that the investigating officer had been present in court during the adjournment, and had been able to give counsel for the state whatever instructions she might have needed, but had since left, and matters proceeded:

'COURT: He has been away.

MR PRETORIUS: He has now left, but ...(intervenes)

COURT: Because he voluntarily on his own came to her. He knew that I am going to be raising this. He knew I was going to come back about this. He decided to be away.

MR PRETORIUS: That is the point, M'Lord. What I am trying to say is that, have these people tried to escape, have they resisted arrest. Have they tried to run away at any stage, or have there been any other factors, that could easily have been given to my learned friend.

COURT: And he knew that I wanted her to prepare, and he has left court now. I saw that too. I forgot to mention it to Ms Mahanjana. I do not play games with people's liberty. If others think by doing so I am playing games with justice, so be it. Let them think that way. That is not my interpretation of the situation. He fired two shots, just let him go anyway. I am going to put conditions and trust that my faith in them, in human beings and them, will not be let down. It has not been let down in the past. But one day somebody will let me down. But it has happened before that some eminent people who are coming from overseas after they had been away for many years and squandered huge funds, they have come back to face justice. People trusted them, they left. It cannot be helped.'

[20] The judge then delivered an *ex tempore* judgment:

'Gentlemen, I have on my own in terms of a duty that falls on me as a judicial officer, or a judge, to see to it that justice is done to all, decided to raise the question of your bail application. You will be released on bail. In some case (whose reference I do not have), *R v Hepworth*, many, many years ago, it is an AD case, and long, long before any of us here came on earth, including me, some judges or judge decided that the court cannot sit by and watch indifferently when people suffer, just because they are accused persons.

After recording that if it became necessary to give a full judgment in the matter he would set out in detail the authorities that he relied upon the judge continued:

To go back to this, gentlemen, because of that obligation then, I got concerned about the fact that this case has been postponed, and postponed for no fault of the two of you. Significant dates in the lives of young people, Christmas in particular, New Year, just keep going by and you are in prison and these delays are not your fault. You are, on the other hand, presently standing as being convicted of the charges preferred against you. At a later stage I have to determine whether or not you were properly convicted.[26] I have a sense that, in your case Mr Mabena, the conviction may well be sustained, if I remember well what your attorney has said from time to time – but this may be wrong. But nothing says that a person who has been convicted cannot be out on bail pending finalisation of his or her case.

The judge then related what had occurred in another case in which bail had been granted and continued:

This country, just this year alone, is full of endless examples of highly placed human beings in this country who were involved in serious crimes, some of which were pending and, in respect of others, where they had already been sentenced, but who were released on bail. I do not have to mention any names, all of you know them. I am one of those judges who do not believe that there is law for the rich and law for the poor or anything based on racial complexion or racial belonging rather. I believe that the circumstances of this case have created, if I need to go via that route, have created exceptional circumstances – for your release in terms of section 60 (I think it is) (11)(b) or (a). (I cannot remember but the relevant section). In other words, the situation has

[26] It is not at all clear why the accused, who have yet to be tried, were considered to have been convicted.

changed so drastically that, what Kriegler, J was reluctant to define exceptional circumstances, have arisen here.

After quoting two extracts from the judgment in *Dlamini* which dealt with arguments that had been advanced concerning the lack of precision in the meaning of 'exceptional circumstances'[27] the judge proceeded:

Now all I am saying here is that, the learned judge of the Constitutional Court, Kriegler, J, said, "Do not ask me to define exceptional, because if I do then it means I know what it is". Then he said the circumstances of every case will decide what is exceptional and at that stage the matter will be attended to. In my view, the circumstances in this case are – if that is the route – exceptional. Although, I could not attribute blame in this case to the state or the defence, there is a way in which this delay could in some way be viewed in the manner that is contemplated in section 342A [of the Criminal Procedure Act], but I must add that that section talks only about unreasonable delay. You had to find fault with some person or the other but the idea that a court must be concerned about a delay does not require section 342A. There is a delay beyond the accused person themselves, even though it may be explained in terms of one person or the other, it is just not appropriate.

He then authorised the release of the respondents on bail, which was set in the sum of R1 000, on condition that they reported to a nominated police station once a week, and did not talk to 'the witnesses . . . or their relatives and friends'.

[21] I find it necessary, for reasons that will become apparent, to deal briefly with certain subsequent events. The following week, during the court recess, the

[27] Paras 75 and the first three sentences of para 76 of the judgment in *Dlamini*.

prosecution applied for leave to appeal against the order, and for the suspension of the order pending the outcome of the intended appeal. In the absence of the judge who granted the order the matter came before the Judge President who postponed the application for leave to appeal to the next court term to enable it to be heard by the judge who had granted the order, and meanwhile suspended the order. The application for leave to appeal was heard in the new term.

[22] It is the right of every litigant against whom an appealable order has been made to seek leave to appeal against the order. Such an application should not be approached as if it is an impertinent challenge to the judge concerned to justify his or her decision. A court from which leave to appeal is sought is called upon merely to reflect dispassionately upon its decision, after hearing argument, and decide whether there is a reasonable prospect that a higher court may disagree. The record of what occurred in the present case is disturbing. Once more the prosecution, represented by Ms Mahanjana, was given no proper opportunity to be heard. Instead she was subjected by the judge to a relentless barrage of hectoring questions and assertions, to which she was expected to do little more than acquiesce, designed to demonstrate to those present, and in particular the press, that the judge's decision was justified. In the course of this hectoring the propriety of Ms Mahanjana's professional conduct, and that of the Director of Public Prosecutions in applying for leave to appeal, was called into question, and the

judgment that followed went so far as to question Ms Mahanjana's integrity. It needs to be said that I have found nothing in the record to warrant any of those imputations. On the contrary, Ms Mahanjana showed remarkable resilience and fortitude, in circumstances which she must have found both difficult and humiliating. Some of the incorrect concessions that she made in the course of the proceedings, which are apparent from the extracts that I have referred to, and which were latched upon by the judge to bolster his reasons for granting the order, are understandable in the circumstances in which she found herself. The record in relation to this aspect of the proceedings, taken together with the dismissiveness with which the prosecution was dealt with earlier, creates a distinct and disconcerting impression of hostility to and partiality against the prosecution that is out of keeping with the dispassionate impartiality with which judicial proceedings ought to be conducted.

[23] Earlier I drew attention to the remark in the *ex tempore* judgment that it would be expanded upon if it became necessary to do so. The lengthy judgment dismissing the application for leave to appeal adds nothing material to the reasons that were given at the time for granting bail. The judge dealt in some detail with each of the alleged procedural irregularities that founded the application for leave to appeal, which were persisted in during argument before us, and I refer to those irregularities below.

[24] It is indeed disturbing, as the judge has repeatedly observed, that at the time bail was granted seven months had passed since the respondents were due to be tried. It is even more disturbing that at the time the appeal was heard a further thirteen months had passed and the interlocutory enquiry was still far from being concluded. Indeed, it is poised, in effect, to commence all over again, because on 7 September 2006 it was ordered that the three psychiatrists must examine Mr Mabena again, and interview his mother and his brother, and that Mr Mabena must be examined by a neurologist at state expense.

[25] But we are not called upon in this appeal to consider what weight the delay deserved in an evaluation of whether bail was warranted. For until all the factors that are relevant to bail are brought to account, which has yet to occur, it is not possible to assess what weight is due to the various factors relative to one another. Nor are we called upon to consider each of the various alleged irregularities that were relied upon by the prosecution in advancing its argument before us. They are merely symptomatic of a failure that was more profound.

[26] I pointed out earlier in this judgment that what the law requires before bail is granted in relation to Schedule 6 offences is a proper judicial enquiry to determine whether the provisions of the Act have been met. What occurred in the present case did not constitute such an enquiry, not least of all because the prosecution was afforded no proper opportunity to be heard. Had the prosecution been afforded that

opportunity the various matters that gave rise to the specific alleged irregularities that were relied upon in argument before us would no doubt have been properly aired and dealt with.

[27] It is apparent from the record of the proceedings that on various occasions Ms Mahanjana pointed out that she had not prepared herself to deal with the question of bail. The observation by the judge to the effect that the prosecution was delinquent in not having prepared itself to deal with the question of bail is without merit. Ms Mahanjana was perfectly justified in not having familiarised herself with the matter, bearing in mind that the purpose of the hearing, to the knowledge of all concerned, was merely to attend to the pre-arranged formality of postponing the matter. Neither the prosecution, nor, indeed, the defence, had any forewarning that the question of bail would be raised. There were no grounds for summarily brushing aside Ms Mahanjana's protestations and her request for an adjournment to consider the question of bail.

[28] But quite apart from the fact that the proceedings were not conducted judicially they amounted to no enquiry at all as contemplated by the Act. What is called for by the Act is an enquiry that considers and brings to account all circumstances that are material to bail, and in particular those that are listed in the Act to the extent that they are relevant. Clearly there was no such enquiry at all. Indeed, the clear inference from the record of the proceedings is that the judge had

made up his mind, even before raising the question in open court, and without reference to any of the parties, that bail should be granted, provided only that various queries that he had were answered to his satisfaction, and he acted accordingly.

[29] Whether or not the respondents are entitled to bail, should they be minded to apply for it, does not fall to us to decide. That is a matter, should it arise again, that is capable of being determined only after proper enquiry has been made in accordance with the provisions of the Act. Thus far there has been no such enquiry: justice according to law failed completely. In the absence of the enquiry that is required by law[28] the judge had no legal authority to grant bail and consequently the order was a nullity. It is for that reason that we upheld the appeal, set aside the order, and ordered the arrest of the respondents.

.....
R.W. NUGENT
JUDGE OF APPEAL

HARMS JA)
) CONCUR
STREICHER JA)

[28] See, again, *Dlamini*, para 61.