IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: CC91/2003

DATE: 14/4/2008

REPORTABLE

IN THE MATTER BETWEEN

THOMAS VOGEL VORSTER APPLICANT

AND

THE STATE

JUDGMENT

MAKHAFOLA, AJ

INTRODUCTION

[1] The applicant has approached this court for bail application on affidavit. The application is opposed by the state by an affidavit deposed to by Superintendent Johannes Hendrik Vreugdenburg who is the chief investigating officer in this case under: *S v Du Toit en Andere* CC91/2003, which is commonly known as the "Boeremag" case.

COMMON CAUSE FACTORS

[2] Gleaned from the three affidavits filed it is clear that the following are common cause factors:

It is common cause that the applicant's bail application stands to be decided in terms of section 60(1)(b) of the Act which places the *onus* on the applicant for bail to be discharged on a balance of probabilities that it is in the interests of justice that he be admitted to bail. It is also common cause he is applying for bail for the first time. That he has no previous convictions.

That his and other accused's application in terms of section 174 of the Act has been dismissed and that the trial court has ruled that the state has a *prima facie* against him.

[3] The applicant is accused 11 in the trial. He has never applied for bail before the present application. He placed his personal circumstances before court as follows:

(a) he was born on 17 November 1950 and he is at present 57 years old;

(b) he has been married to his spouse for thirteen years;

(c) at the time of his arrest on 4 November 2002 he was the breadwinner in the house;

(d) he owns a security business called "Ystervuis" which he has been running full time with his spouse;

(e) his spouse is 58 years old;

(f) he has no previous convictions and there is no outstanding case against him.

[4] He avers that he is facing forty two charges in the trial and the main charge is treason with various alternative charges including terrorism, sabotage, one count of murder, one count of attempted murder, unlawful possession of explosives, ammunition and firearms.

[5] The state case is closed and accused 2 is busy testifying. He disputes the state case against him. He has not as yet testified. He does not make any admissions because he denies all allegations against him. He did not take part in the original planning of the overthrow of the state; he came late to the scene; he was not physically involved in the planning and planting of explosives; he was already in custody when the explosives were found; at the time when the explosives were planted by the six bomb-planters he was considered a traitor by the section 204 witness one Crouse who was one of the six bomb-planters.

[6] Against the state evidence, he disputes that he is a flight risk because when he went to the American Consulate in Johannesburg he was fearing for his life and wanted to be arrested there. He admits that he was on the run from the police.

[7] The applicant has annexed to his founding affidavit a letter marked B from "HATNED" authored by Dr Elmie Nel. It explains the operation the applicant's wife is to undergo. After the operation involving removal of pressure on the median nerve running through the carpal tunnel into the hand, she will resume the function of her hands within two to three weeks thereafter. He avers that he needs to attend to his wife who is alone at home. He also wants to resume his work as the breadwinner in the house. The house is six months in arrears. He does not want to incur more costs for the care of his spouse who suffers also from depression. Annexure "C" gives admission date as 14 April 2008 at 08:00.

[8] Since his arrest on 4 November 2002 he has been in custody for five years now. His financial position has become critical and he needs to resume work to earn income. Eight of the twenty two accuseds are on bail and they adhere to the bail conditions. He will also not evade his trial. His passport has been handed in. The conditions in prison are depicted clearly in the Jali Commission as being bad.

[9] There will be no interference with any state witnesses because the state has closed

its case. There will be no interference with further investigations because of that and that the safety and security of the state will not be endangered because since the applicant had been in custody no planting of explosives had occurred. This was contended on behalf of the applicant.

[10] 0n the other hand the opposing affidavit of Superintendent Vreugdenburg is used to oppose this bail. His averments are based on the state evidence already given in the trial court and from his investigations.

[11] In point here is the evidence of Van Zyl according to which the applicant had summoned him to the farm "Kruieboer" in Mokopane which belonged to accused 20, that he hands over to him a recipe for manufacturing an explosive. The planning of the take-over of the National Government was done on this farm by accused 11 and 21.

[12] Later on the applicant shifted his planning office to the farm of accused 3 named Annatot I as a basis used by the group. 0n this farm during July 2002 a meeting was held by the applicant and the members had to take "die eed van getrouheid" which is attached to the opposing affidavit as annexure "B" written in the applicant's handwriting.

[13] Further, during this meeting the applicant bestowed upon himself the rank of "drie

kasteel kommandant" and accorded the other members various ranks. The applicant had announced that the take-over of government will begin when explosives are simultaneously planted at nine key-buildings in Gauteng. The said buildings are clearly spelt out in paragraph 10 of the opposing affidavit. And this operation would be known as "0perasie Popeye".

[14] 0perasie Popeye was planned under the leadership of the applicant in a farm of Mr Tom Sassenberg in Limpopo Province. The premises are known as Annatot II. The applicant gave instructions that satellite phones, taxis, premises where bombs may be planted and the manufacturing of explosives should be obtained.

[15] Further the applicant made "proklamasies" signed with false names. The proclamations had given an ultimatum to the ANC government to create "Boere Republieke", declaration of war if the ultimatum is not complied with. The interim military government was to be installed. The full details of "Proklamasie I" are annexed to the opposing affidavit as annexure "B1" on a letterhead of the Interim Government of "die Suid-Afrikaanse Boere Republiek".

[16] 0n paragraph 7 of the opposing affidavit it is averred that there is evidence of the involvement of the applicant in the Boeremag during January 2002 at a meeting held on the farm of Henk van Zyl known as "Aartappelskuur vergadering" outside

Bethlehem in the Free State. In this meeting the applicant became the new leader of the organisation. Those who were present were sworn in by the applicant as members of "Boeremag" and a vow was taken, *inter alia*, and the contents thereof were that the enemy "the ANC government and its hangerons" must be banished. This was the beginning of the planning of state overthrow and installation of certain regional and branch leaders. At this meeting it was announced that "traitors" must be summarily killed.

[17] Further to the state evidence is the fact that whilst the applicant was on the run from the police he went to the American Consulate in Johannesburg to obtain documents in order to flee from the police by leaving the country.

[18] Count 22 in the trial court relates to attempted murder on the former President Nelson Mandela. The accused including the applicant attempted to plant explosives in a motor vehicle used by the former president when he was to open a school in Limpopo Province. The charge is formulated in the alternative to relate to an incident in Pretoria.

THE LAW

[19] Section 60(1)(a) of the Act provides that the accused is entitled to be released on bail if the court is satisfied that the interests of justice permit.

[20] In *S v Vermaas* 1996(1) SACR 528 (T) the court stated that the "prime consideration" in a bail application is whether the applicant or the accused will stand trial.

[21] Section 60(5)(a) of the Act provides that where applicable the court may take into account the degree of violence towards others implicit in the charge against the accused.

[22] In *S v Van Wyk* 2005(1) SASV 41 (SCA) paragraph [6] at 44i-45c the court stated that the function of the court at bail application is *prima facie* to determine the strength of the state case and not to make a provisional finding of guilt or innocence.

[23] If there exists *prima facie* indications that the proper administration of justice and the safeguarding thereof will be defeated or frustrated if the applicant is admitted to bail the court will be justified to refuse bail. *Vide: GADE v S* (2007) 3 All SA 42 (NC) at 48 paragraph [28]; *S v Dlamini* 1999(2) SACR 51 (CC) at 63f-64a paragraph [11].

[24] Section 60(11)(b) of the Act places an *onus* to be discharged by the applicant on a balance of probabilities, that it is in the interests of justice that he be granted bail.

[25] In *Ellish v Prokureur-Generaal, WPA* 1994(2) SACR 579 (W) which is an appeal two learned judges held that bail proceedings were *sui generis* proceedings.

EVALUATION

[26] There is no doubt that at bail proceedings the burden of proof should rest on the state. The state should lead evidence first in order to discharge the *onus* placed on it if bail is to be refused by the court. But this situation has been altered by section 60(11)(a) and (b) of the Act. In cases governed by section 60(11) the *onus* is placed on the applicant or the accused to place before court on a balance of probabilities that it is in the interests of justice that he be admitted to bail.

[27] The party on whom the *onus* rests should start to lead evidence. In terms of section 60(11)(a) "exceptional circumstances" must be placed before court by the applicant. What these circumstances entail is discussed in *S v Jonas* 1998(2) SACR 677 (SEC) at 678e-f.

[28] Where section 60(11)(b) is applicable the applicant does not have to show "exceptional circumstances" for him to be released on bail. The *onus* is on him, on a balance of probabilities, to satisfy the court that it is in the interests of justice to permit for his or her release. This section relates to offences under Schedule 5.

[29] If the state relies on a case that is lacking in detail and does not *prima facie*

require the applicant to answer then the court hearing bail application will be in a position to measure the strength or weakness of the state case.

[30] In the present trial which the applicant is facing a ruling in terms of section 174 of the Act has already been made, declaring that the state has made a *prima facie* to which the applicant must answer. For the purposes of section 60(11)(b) the strength or weakness of the state case must be considered in determining the existence of the interests of justice. *Vide: S v Kock* 2003(2) SACR 5 (SCA) at 11i-12a.

[31] There appears to be a strong case against the appellant regard being had to the serious and damning averments made in the opposing affidavit. The applicant elected in the replying affidavit to make casual denials without pertinent attacks on relevant averments made by Superintendent Vreugdenburg. In paragraph 2 of the replying affidavit the applicant sums up his reply by saying the following: "Ek ontken verder enige inkriminerende bewering deur die ondersoekbeampte in sy verklaring teen my gemaak. Al hoe ek betrokke was by hierdie hele aangeleentheid was uit 'n huis-en-haard beskermings-oogpunt."

[32] The replying affidavit does not appear to attack paragraph 7 of the opposing affidavit which clearly states that the applicant became the new leader of the "Boeremag" in January 2002. Further, it does not appear that paragraph 10 of the

answering affidavit is pertinently denied. This paragraph states that the copy of the "eed van getrouheid" is in the handwriting of the applicant.

[33] From these factors and the others in the affidavits namely: the admission by the applicant that before arrest he was on the run from the police is a crucial factor to be considered. When the applicant took refuge at the American Consulate in Johannesburg, as he alleges, he was fearing for his life. But he fails to detail to the court who the threat of his life was: the police or members of his organisation. If it were the police his fear arose what had he heard they would do to him on sight or when they arrest him. The grounds of his fear for his life are unconvincing.

[34] The operation to be performed on the applicant's spouse is acknowledged by this court. But the applicant does not tender evidence in his affidavits to the effect that seriously without him his spouse will not cope in the two to three weeks after the operation. If this factor was so serious for the consideration of this court the applicant would have taken it further by advancing strong reasons for the court to realise his importance to be with his spouse.

[35] The strong case against the applicant is also that if found guilty on count 10 in the absence of compelling and substantial circumstances he will face life imprisonment.

[36] During argument by counsel it was contended on behalf of the applicant that I should individualise his case and not consider it in the context of common purpose.

[37] 0n the other hand the state argued that the applicant is facing serious charges including conspiracy and quoting *S v Ramgobin and 0thers* 1986 1 SA 68 (NPD) at 79F-H and other cases, the state submitted that the applicant and his co-accuseds have had a single aim at the time they committed different offences at different places.

[38] 0n behalf of the applicant unreported cases like *Fourie and Two 0thers v S* A126/2004 were relied upon. His family and friends are prepared to collect money for his bail. The state also submitted that the applicant was a flight risk in that if admitted to bail he would easily go to America where he had previously lived for ten years before coming to South Africa. This point in argument was not pertinently disputed on behalf of the applicant. And that at the time of his arrest he was looking for travel documents to leave the country.

[39] I am of the view that the applicant did not discharge the *onus* on a balance of probabilities that the interests of justice permit his release on bail. The respondent has succeeded to establish that the grounds set forth in section 60(4)(a)-(e) exist

for this court to refuse to admit the applicant to bail. Because of his past conduct of evading the police before being charged when one could say he did not officially know why the police were looking for him.

[40] Now that he knows the charges he is facing and that if he is convicted he may face a long term of imprisonment, the likelihood to evade his trial exists.

ORDER

[41] The application for bail is dismissed.

K MAKHAFOLA
ACTING JUDGE OF THE HIGH COURT

CC91-2003

HEARD ON: 31/3/2008
FOR THE APPLICANT: ADV B VAN DER MERWE
FOR THE STATE: ADV P C B LUYT