THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 9/5/2008
CASE NR: A356/08

In the matter between:

NICHOLAS MAHLANGU	1st APPELLANT
CAIPHUS MOGALE	2nd APPELLANT
LEWIS SEANEGO	3rd APPELLANT

and

THE STATE	RESPONDENT

JUDGMENT – 9 MAY 2008

MAKHAFOLA, AJ

INTRODUCTION:

The Appellants appeared in the Ellisras Magistrate Court as Accuseds 2, 4 & 6, charged with robbery. They applied for bail. Appellant 1 applied for bail by giving oral evidence and was subjected to cross-examination. The 2nd and 3rd Appellants applied by way of affidavit.

The State opposed the application of the 1st Appellant and did not oppose the granting of bail to Appellants 2 and 3.

In a one and a half pages judgment the court refused to admit all the Appellants to bail because it found no existence of exceptional circumstances.

The applications were brought under Section 60 (11) (a) because the offence with which the Appellants are charged falls under Schedule 6. Yet the charge-sheet does not clearly state that the robbery is with aggravating circumstances and that it falls under Act 105 of 1997. That is lacking in the charge sheet.

The personal circumstances of Appellants were placed before court and it was the duty of the court hearing bail to weigh the personal interests of the Appellants against the interests of justice as contemplated in subsection (9).

Vide: Section 60 (10) of the Act.

Where bail application is considered in terms of Section 60 (11) (a) the onus rests upon the accused or the applicant to discharge the onus on a balance of probabilities that there are exceptional circumstances, and that the interests of justice permit his release on bail.

All the Appellants have no previous convictions and there are no pending cases, against them; they have fixed residences and are employed.

There are glaring non compliances with the procedures and the provisions of Section 60 of the Act which regulates bail applications.

1 The court failed to act in terms of Section 60 (2) (d) relating to Appellants 2 and 3 because the State was not opposing their applications;

2 The Judgment of the court does not allude to any provisions of Section 60 (4) (a) - (e) in conjunction with requirements of exceptional circumstances. The evidence of Inspector Phampha has sombre grounds in terms of Section 60 (4) (a) – (e) for the refusal of bail as far as Appellant 1 is concerned. There are "likelihoods" as required by the subsection to be considered. This was not done. The court deprived itself of the opportunity to weigh the evidence of Phampha and the 1st Appellant to decide about the "likelihoods".

Nowhere in the record does it appear that the Court a quo did act in terms of Section 60 (5) (a) of the Act by taking into account the degree of violence towards others implicit in the charge against the Appellants. In terms of the charge-sheet there is no clarity as to the violence ever being exerted by the Appellants to the robbery victims.

The prima facie relative strength or weakness of the case against the Appellants without making a provisional finding on guilt or innocence appears to have been considered negatively. What appears on page 58 of the record is a provisional finding in the following words: "The accused did not place any independent evidence of innocence on record",
Vide: Record: Page 58 paragraph 2 thereof. In this regard the applicable authority is SV VAN WYK 2005 (1) SASV41 (SCA) par [6] at 44i – 45c.

In SV VILJOEN 2002 (2) SACR 550 (SCA) the Court expressed the sentiments that: "caution must be had not to turn every bail application into drawn-out trial before the criminal trial", and also that the hearing of bail application is to be kept within the reasonable limits, subject to the provisions of legislation and the rights of the accused.

Pronouncing that the Appellants did not place any independent evidence of innocence on record is the domain of the trial court on the merits. For the bail court to pronounce that is a misdirection whether this pronouncement is a finding or a reason to refuse bail.

The "prime consideration" in bail applications is whether the applicant or the accused will stand trial or not.
Vide: SV VERMAAS 1996 (1) SACR 528 (T)

The Court could not even find in which way "prima facie" the proper administration of justice and the safe-guarding thereof will be defeated or frustrated if the Appellants were admitted to bail which would justify the refusal thereof.
Vide: GADE VS [2007] 3 ALL SA 43 (NC) at 48 paragraph 28

SV DLAMINI 1999 (2) SACR 51 (CC) at 63f – 64a paragraph 11

During the arguments both counsel for the Appellants and the State were ad idem that had the court a quo followed the provisions of the Act to the letter there would not have been omissions or misdirections.

It is indeed so that had the Court followed and allowed itself to be guided by the Act authority and precedent it would have been placed in a better position to decide over the bail applications.

As of now, on account of non compliance with some provisions of the Act and procedures, the Court lacked the opportunity to weigh the personal circumstances and interests of the Appellants as against the interests of justice. Had this been done the Court would have found exceptional circumstances, and that all the Appellants had discharged the onus on a balance of probabilities and that the interests of justice permit their admission to bail.

Consequently, the appeals should succeed and the following order is made.

ORDER:

1 The Appeals are upheld;

2 Each Appellant is to pay the amount of R3000=00 for bail payable at Magistrate Ellisras;

3 Appellant 1 is to report once a week at Pretoria North Police Station between 06:00 – 18:00;

4 Appellant 2 is to report once a week at Mamelodi Police Station between 06:00 – 18:00;

5 Appellant 3 is to report once a week at Gilead Police Station between 06:00 – 18:00;

6 The Appellants should not communicate with the state witnesses with the intentions to intimidate, or influence them in any manner.

7 The Appellants should not interfere with the state witnesses through their cell phones or through any other persons.

8 The Appellants are to attend Court on the dates or postponed dates set by the trial court.

_____

MAKHAFOLA K,
ACTING JUDGE OF THE HIGH COURT