IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No. 08/19**

In the matter between:

NDUMISO GAGASHI SIMELANE **First Appellant**

MENZI PATRICK MAVIMBELA **Second Appellant**

And

THE KING **Respondent**

Neutral Citation: Ndumiso Gagashi Simelane And Another vs The King (08/19) [2018] SZSC...71(23rd April, 2020.).

Coram : **SP Dlamini JA, MJ Dlamini JA and RJ Cloete JA**

Heard : **18th February, 2020**

Delivered : **23rd April, 2020**

SUMMARY: *Criminal procedure – Bail – Schedule 5 listed offence – Murder, premeditated and in furtherance of common purpose – Exceptional circumstances to be established by accused – Accused HIV positive and on Antiretroviral treatment.*

Bail – *Accused charged with premeditated murder in furtherance of a common purpose; Accused alleging to be HIV positive and on Antiretroviral medication and that HIV/Aids is a terminal illness and continued confinement in inhospitable Remand Centre likely to worsen his health status; Bail application denied by High Court;*

Held, *Accused failed to establish existence of exceptional circumstances as envisaged under section 96(12)(a) of the Criminal Procedure and Evidence Act, 1938, as amended, to justify his release on bail in the interests of justice. Bail application dismissed.*

JUDGMENT

MJ Dlamini JA

Introduction

[1] The narrative informing the arrest and charge of the appellants is that on or about the 29th day of April 2019, at or near KaPhunga area, the appellants, acting in furtherance of a common purpose, did intentionally and unlawfully kill one Zinhle Mndzebele, wife of the second appellant[1], by hanging her with a rope from the rafters of her house. Their application for release on bail was dismissed by Mamba J. who rejected the appellants' assertion that *"being on ART constitutes an exceptional circumstance"*, and that there was no likelihood that they would interfere with the Crown witnesses, Gcina Zwane and Austin Shabalala. [Another suspect in this tragedy is one Mbongiseni Ngoloyi Nkhambule who had not been apprehended at the time of the hearing *a quo*].

[2] The appellants' grounds of appeal are as follows –

[1] Note that Mamba J in paragraph [2] *et passim* in his judgment refers to the deceased as wife of the first appellant. Understandably, in some of the court documents the appellants have been interchanged.

"1. The court a quo *misdirected itself in law by finding and holding that being HIV positive and being on ART treatment does not constitute and exceptional circumstance.*

"2. The court a quo *erred both in fact and in law by finding and holding that there is a likelihood that the appellant (sic) may interfere with Crown witnesses when the Crown failed to establish the grounds in section 96 (7) (c) of the Criminal Procedure and Evidence Act of 1938 (as amended)".*

[3] In the course of dismissing the application, the learned Judge observed -

"[11] Both applicants state that they are on ART and this fact alone constitutes exceptional circumstances (sic) as defined in the relevant or applicable law.

[12] Their bail application is opposed by the Crown or respondent. It is denied by the Crown that being on ART constitutes an exceptional circumstance. I agree entirely with the rejection of this submission. Being on ART, when properly and faithfully taken and or administered poses no danger to life at all. Medical science has, it is now common cause, advanced in this field that although the relevant medication does not wipe out or eradicate the virus, it nevertheless suppresses it such that the person taking it suffers no immediate danger of dying from it".

[4] In his summary, the learned Judge *a quo* wrote *"[1] Criminal Law and Procedure – Application for bail on a charge of murder which is third schedule offence in terms of the Criminal Procedure and Evidence Act 67 of 1938 (as amended). Applicant to establish exceptional circumstances that he ought to be released on bail. Being on ART, generally, is not such. [2] Criminal Law and Procedure – Bail application – Overall consideration is, would the interests of justice be served by admitting applicant to bail. If not, bail must be refused".*

[5] It is true that the offence of 'murder' is found under the Third Schedule to the Criminal Procedure and Evidence Act No. 67 of 1938, as amended, as it is also found under

the Fourth and Fifth Schedules to that Act (CPEA). In the present case it seems to me that the reference to 'third' schedule by the learned Judge *a quo* as shown above was a typo. The offence charged could not be under the third schedule as the evidence shows that it was planned or premeditated and was committed by persons *"acting in the execution or furtherance of a common purpose or conspiracy"*. That is what the charge sheet in part stated. In the result the offence fell under the Fifth Schedule, having regard to (a) and (d) of that schedule. That being the case, the murder was regulated by section 96 (12) (a) in particular. Hence the requirement for the accused to establish exceptional circumstances for the purposes of bail. Similar mishaps however could be avoided if the Prosecution, in terms of section 96 (13) (a) and (b), confirms that the offence is in terms of a particular schedule. This could be on the charge sheet itself or in the opposing affidavit or in a formal confirmatory statement by the Director himself.

[6] Something else needs to be highlighted with respect to schedule 5 offences. Section 96 (2) (d) requires that where the prosecutor does not oppose bail application in respect of matters referred to in sub-sections (12) (a) and (12) (b) the court (High Court) should call upon the prosecutor to place on record the reasons for not opposing the bail application. In some cases, the provisions of this subsection have been ignored or overlooked. That should not happen as the consequent granting of the bail may very well be an irregularity or failure of justice. The requirement that the crown prosecutor must justify its non-opposition of bail underscores the legislator's commitment to rigorous control of subsection (12) offences. No accused charged under this subsection should win bail by default due to the laziness or incompetence of the prosecutor. Presiding judges and prosecutors in bail proceedings are notified.

The appellants' case

[7] In their different founding affidavits Ndumiso Gagashi Simelane, the first appellant, averred that the High Court had jurisdiction to hear the bail application *"by virtue of the Constitution Act, 2005, and the Criminal Procedure and Evidence Act 67 of 1938 (as*

amended)", while Menzi Patrick Mavimbela, second appellant, stated that the High Court had the necessary jurisdiction *"by virtue of section 95(1) of the Criminal Procedure and Evidence Act 67/1938 (as amended)"*. It appears that both founding affidavits were prepared by the same attorney. In their heads of argument, the appellants refer only to section 96 of Act 67 of 1938 and not to the Constitution or section 95.

(a) *First Appellant*

[8] Ndumiso Gagashi Simelane in his founding affidavit states that, having been arrested on 30 April 2019 at KaPhunga area, he was charged with murder. First appellant denies the charge and says he will plead not guilty on arraignment. He avers that he has *"great prospects of success"* and a *"good defence to the charge"*. First appellant says he is 'innocent of the charge' because he *"did not at any point participate in the murder of the deceased nor had we planned to go to KaPhunga to kill the deceased"*.

[9] First appellant, by way of 'defence', submits as follows-

"8.1 On the 28th day of April, 2019, I received a call from one Zwane, who is a traditional healer and requested that I come to see him at his home at Matsapha. Upon arrival at Matsapha, he asked me to help find some boys who would go and rob the home of the deceased at KaPhunga as she had received a lot of money through a loan. He had apparently learnt of such from one of his patients who is the husband of the deceased.

"8.2. Indeed, I went to look for people who would carry out the job and found one Ngoloyi Nkhambule who agreed to do the job. I took Ngoloyi to Zwane and Zwane transported us to KaPhunga. On that day we failed to get in the house of the deceased as there was no way in.

"8.3 On the following day, Zwane again transported us to KaPhunga after having fetched us from a drinking spot where we had spent the afternoon drinking and dropped us off at Tri-Cash.

"8.4 We hitch-hiked to KaPhunga and arrived at around 11.00 p.m. and proceeded to the deceased's home. We managed to gain entry and ransacked the house. Unfortunately, the deceased woke up and I panicked and ran away towards the exit.

"8.5 Ngoloyi was left behind and I heard the deceased shouting for help. I hid in the bush outside the house of the deceased waiting for Ngoloyi to exit before community members were disturbed by the noise until I had no choice but to return inside and call him.

"8.6 To my surprise, I found the deceased hanging on the rafters and Ngoloyi still ransacking the house. I shouted for him asking for him to leave and we ran away. We did not find any money at the home of the deceased.

"8.7 I did not at any point participate in the murder of the deceased nor had we planned to kill the deceased.

"8.8 I must bring it to the attention of the above Honourable Court that when the Police arrested me, I was in Matsapha together with Ngoloyi and we found the Zwane homestead. Upon seeing the Police, Ngoloyi ran away and I proceeded to them. Even the firing of warning shots did not stop him from escaping."

And concludes: *"9. I am advised and verily believe that for purposes of the present application the above defence suffices as a full one to the charge I am facing..."*

[10] The appellant goes on to state that there is no likelihood of him endangering the *"safety of the public or any particular person"* nor committing an offence listed in Part II of the First Schedule if released on bail. He also pleads that he would not *"attempt to evade trial"*; he has four minor children who depend on him for support and maintenance as their mothers are unemployed. Further, the appellant avers that he is a *"sickly person who is on ART treatment"* and that his *"condition requires that [he] be afforded a special diet"*, and that the special diet is not accessible at the Correctional Centre at Nhlangano with the result that he is *"currently taking [his] medication on an empty stomach"*. The

appellant also denies the likelihood on his part if released on bail that he may *"attempt to influence or intimidate witnesses as they are not even known to [him] because [he has] still not been provided with a summary of evidence containing their list and neither will [he] conceal or destroy evidence as [he does] not know its nature"*. The only witness allegedly known to the appellant was one Ngoloyi Nkhambule, then and still on the run.

[11] In paragraphs 10.6 and 10.7 of his founding affidavit First appellant denies any *"likelihood that if released on bail [he] may undermine or jeopardize the objective or the proper functioning of the criminal justice system, including the bail system as at all material times hereto [he] cooperated fully with the investigating officer in this matter"*, and that he did not attempt to run away from the police. That *"there is no exceptional circumstances(s) which may suggest that there is likelihood that my release on bail may disturb the public order or undermine the public peace or security"*, sic. Appellant then winds up his founding deposition by stating that as there are no grounds to justify his continued detention *"clearly the interests of justice favour that [he] be admitted to bail..."* And, finally, that the application is urgent since it pertains to his personal liberty by virtue of its constitutional nature, and also urgent because of the stated personal circumstance of the appellant. He foresaw no prejudice suffered by the Crown if released on bail and would not be afforded substantial redress in due course as he is innocent of the offence.

(b) Second Appellant

[12] The deceased was the wife of the second appellant at the time of the sordid event. Second appellant denies the charge, alleging a *bona fide* and valid defence in that he *"never intentionally and unlawfully killed the deceased"*. He then avers that at some time before the death of the deceased he had become "a sickly person" and decided to use the services of one Mr. Zwane, a traditional healer in Matsapha who told him that his *"sickness was a result of [his] wife who was bewitching [him] and who wanted [him] dead"*. Appellant alleges that Mr. Zwane also told him that deceased had *"previously attempted to hire some*

people to kill [him]", at a time when appellant and deceased were *"experiencing some marital problems [.....] emanating from a child [the appellant] had sired out of wedlock"*.

[13] Consequent upon the marital problems which appellant and deceased could not 'fix', second appellant alleges that the deceased left the matrimonial home and relocated to a house in Ngwane Park, Manzini City. There, one day the deceased *"invited me to come to sleep over at her house in Ngwane Park. This was after the revelations by my healer"*, appellant says and continues:

> *"8.5 Indeed I went to Ngwane Park and spent the night. In the middle of the night, there was a knock on the door but my wife refused to open up. I had informed her that Zwane had said she had hired people to kill me and that she had attempted to bewitch me and she had laughed it off as false.*
>
> *"8.6 The knocking persisted until my wife's phone started ringing non-stop. She refused to answer it and instead switched it off.*
>
> *"8.7 We argued about her behavior that night until she told me that indeed she had hired someone to come and kill me but she was afraid to go on with the plan hence her failure to open the door and to answer her phone that night. The motive for her wanting me dead was because she wanted a divorce but she did not want to leave the homestead we had recently purchased at KaPhunga since I was also refusing to move out.*
>
> *"8.8 I left the house in the middle of the night and returned to my workstation. I eventually forgave her but I did inform Zwane about this and I also informed him one day that my wife had received / taken a loan of about E100,000-00 which we were to use for the renovation of our home.*
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> *"8.9 I then gathered that Zwane became greedy and wanted a share of the money and hence he hired some people to go and rob my wife."*

[14] The second appellant, who apparently is the author of the murderous event, does not tell the court the date of the night visit to his wife at Ngwane Park. From the narrative it could have been days or weeks or even months before the deceased was killed on the night of the 28th April, 2019. After referring to the marital problems second appellant allegedly had with the deceased, second appellant narrates: *"8.4 My wife moved out of the matrimonial home to rent a house at Ngwane Park. We tried to fix our problems until one day she invited me to come to sleep over at her house in Ngwane Park. . . . "* Nowhere does second appellant expressly deny or admit being anywhere near the scene of the crime at about the relevant time of the killing of his wife. He does not even say where he was on the night of the killing which occurred at his home. Nor does he offer an explanation what the deceased might have wanted at KaPhunga when she was supposed to be at Ngwane Park. Instead, in paragraph 8.10 of his affidavit second appellant tells of an event that supposedly happened *"At around 14.30 hours on Friday the 26th day of July 2013"* at his shop at Nhlangano Town Centre. Surely whatever may have happened in 2013 could have no bearing on the murder occurring in 2019. Of interest however is how second appellant could so clearly recall the time, date, year and place of an event of some five years previously. Such an account rather detracts from the credibility of his story. Appellant's account is clearly unhelpful to his application for bail.

[15] Second appellant who was arrested on 29 April 2019 has moved the bail application *"in terms of both section 16 (7) of the Constitution, 2005 and section 96(1) of the Criminal Procedure and Evidence Act, 67/1938"*. He says that he is innocent of the charges laid against him as he never committed the 'said offences' and he will plead not guilty at the trial. He says he is entitled to bail as there is *"no likelihood that [he] will abscond trial or that [he] will breach any of [his] bail conditions or skip the country as [he is] currently employed by the Swaziland Government under the Ministry of Defence and ... based at Nkoyoyo"*. He also disowns any likelihood that if released on bail he might interfere with or attempt to influence or intimidate Crown witnesses as they are not known to him since he does not have the summary of evidence with the list of witnesses. Nor would he

endanger the safety of the public or particular persons or the proper functioning of the criminal justice system or disturb the public order.

[16] Section 96 (1) is subject *inter alia* to the provisions of the Fifth Schedule set out in terms of section 96 (12) (a). Second appellant is aware or advised that as he is facing a 5th Schedule offence, he is enjoined to establish the existence of "exceptional circumstances". He submits that such circumstances 'do exist' as he is *"a sickly person who is on ART treatment"* and that that *"condition requires that [he] be afforded a special diet"* which is not available at the Correctional Centre. Appellant finally submits that *"in view of the provisions of the Constitution Act 2005 in particular Sections 16(7) read with 21(1) matters pertaining to deprivation of personal liberties are urgent."* Section 21(1) of the Constitution is not relevant to this appeal. May it be noted, however, that section 16(7) of our Constitution is broadly similar to section 35(1)(f) of the South African Constitution of 1996.

[17] In a South African Constitutional Court case[2], the learned Kriegler J. states:

> *"[79] It should of course never be forgotten that the Constitution does not create an unqualified right to personal freedom and that it is inherent in the wording of s 35(1)(f) that the Bill of Rights contemplates – and sanctions – the temporary deprivation of liberty required to bring a person suspected of an offence before a court of law. The hypothesis, indeed the very reason for the existence of s 35(1)(f), is that persons may legitimately and constitutionally be deprived of their liberty in given circumstances. This clearly establishes that unless the equilibrium is displaced, an arrestee is not to be released. Section 60(11)(a) therefore does not create an onus where nothing of the kind existed before. It describes how it is to be discharged, and adds to its weight. As in the case of reliance on any other right in the Bill of Rights, if accused persons wish to rely on the provisions of s 35(1)(f), they must bring themselves within its ambit. The words 'interests of justice permit' form*

[2] **S v Dlamini; S v Dladla and others; S v Joubert; and S v Schietekat** 1999 (4) SA 623 (CC)

part of the definition of this right; they delineate its ambit. The court must be satisfied that 'the interests of justice permit' the release from detention. Where all the relevant facts are common cause, the matter is decided by the presiding judicial officer exercising a value judgment according to all the relevant criteria on the basis of these facts in the manner described in this judgment. If facts indispensable for establishing that the interests of justice permit the arrestee's release are not established, the arrestee is not entitled to the remedy under the subsection". [3]

The Opposition

[18] The respondent opposes the application for bail in respect of both appellants through an affidavit filed by the investigating officer:

Re: ***First appellant*** – (Simelane)

[18]1 In respect of the first appellant the investigating officer rejected most of the appellant's allegations asserting that it would not be in the interest of justice to have the appellant released on bail. The appellant was one of the hitmen transported by the two traditional healers, namely, Gcina Zwane and Mbhekeni Nkhambule, to the Tri-Cash area from where the hitmen hitchhiked to KaPhunga, where the murder took place. The officer rejected as fabrication the allegation by appellant that the appellant was invited by Zwane to find boys who could rob the deceased of money.

[18]2 Admitting that Mbongiseni Ngoloyi Nkhambule was at large, the deponent rejected first appellant's allegations that his being on ART was a condition meeting the requirement of exceptional circumstances and justifying his being released on bail. The deponent countered: *"11.1 I state that being on antiretroviral treatment is not an exceptional circumstance in that the HIV virus in the country is not an unusual condition. 11.2 I state that many prisoners awaiting trial and serving sentences are on ART"*. Deponent averred that it would not be in the interests of

[3] **Foot notes are excluded**

justice for first appellant to be released on bail *"in that he will interfere with police investigations"* which were not complete and as Mbongiseni Ngoloyi Nkhambule had not been apprehended. Further, on being released the appellants *"will interfere with Crown witnesses in that Jabulane Gcina Zwane told me he fears for his life if [appellants] are granted and released on bail in that they (appellants) know him very well and the role he played viz, divulging to the police the killing of the deceased"*. Further the first appellant has no fixed place of abode and may be found in various places: *"Thus, it will be easy for [first appellant] to abscond trial and leave the country"*, deponent averred as he prayed for the dismissal of both applications, (that is, the present appeal).

Re: ***Second appellant*** – (Mavimbela)

[18]3 Respondent states that it would not be in the interests of justice to release the appellants on bail as they will *"interfere with Crown witnesses who are Jabulane Gina Zwane and Mbhekeni Nkhambule. These two are traditional healers and were asked by the [second] appellant to hire hitmen to kill the deceased. The said Zwane and Nkambule found Ndumiso Gagashi Simelane [1st appellant] and Mbongiseni Nkambule. The [1st appellant] and Mbongiseni Nkambule were on 28 April 2019 taken by the said two traditional healers using [2nd appellant's] motor vehicle to Tri-Cash area for the said two hit men to proceed to KaPhunga area. At KaPhunga area, the two hitmen killed [2nd Appellant's] wife (the deceased)"*.

[18]4 Respondent further avers: *"5.3 I state that [2nd appellant] knows one Austin Shabalala who is [2nd appellant's] neighbor. [2nd appellant] asked Austin Shabalala to kill his wife (the deceased) and Austin refused [2nd appellant's] request. Thus [2nd appellant] proceeded to ask Jabulane Gcina Zwane. Austin Shabalala being [2nd appellant's] neighbour will be easily intimidated by [2nd appellant] if released on bail and no bail condition could deter [2nd appellant's] communication with Austin Shabalala and Jabulane Gcina Zwane."*

[18]5 The respondent, by the affidavit of the Investigating Officer, also opposes the application on the basis that the other hitman, one Mbongiseni Ngoloyi Nkambule, was still on the run and had not been arrested, and that therefore there was a *"high likelihood that [2nd appellant] will influence and intimidate witnesses or conceal or destroy evidence if released on bail"*. The respondent also challenged as fabrication second appellant's averments contained in paragraph 8 of the appellant's affidavit. The respondent further asserted that there was *"sufficient evidence that [2nd appellant] acting in common purpose with [1st appellant] and Mbongiseni Nkhambule unlawfully and intentionally killed the deceased"*, and that second appellant, on arrest and after being cautioned, informed the Investigating Officer that the second appellant killed his wife and that he hired first appellant and Mbongiseni Nkhambule for that purpose. The Investigating Officer further deposed that the second appellant stated that Jabulane Gcina Zwane facilitated the hiring of the hitmen, and that second appellant freely and voluntarily recorded a confession to the effect that *"he killed his wife and that he hired [1st appellant] and Mbongiseni Nkhambule through the help of Jabulane Gcina Zwane"*.

[18]6 The Investigating Officer also deposed to the effect that Jabulani Gcina Zwane had complained to him when he recorded Zwane's statement that Zwane was afraid that first and second appellants and Mbongiseni Nkhambule would kill him because it was obvious that he (Zwane) was the one who divulged to the police that first and second appellants and Mbongiseni Nkhambule killed the deceased.

[18]7 Whilst rejecting most of second appellant's averments, the Investigating Officer concluded that second appellant *"must prove the existence of exceptional circumstances"* for the success of the application. Respondent also denied that being on anti-retroviral treatment is an exceptional circumstance *"in that the HIV virus in the country is not an unusual condition"*, and there are many prisoners awaiting trial and serving sentences who are on ART (and are alive).

The applicable law

[19] The rights of a person arrested for an alleged criminal offence are regulated by the Constitution as well as the Criminal Procedure and Evidence Act, 67 of 1938 (CPEA) as amended. The constitutional provisions are as follows -

> *"16 (1) A person shall not be deprived of personal liberty save as may be authorized by law in any of the following cases –*
>
> *(e) upon reasonable suspicion of that person having committed or being about to commit a criminal offence under the laws of eSwatini.*
>
> *(3) A person who is arrested or detained -*
>
> *(b) upon reasonable suspicion of that person having committed or being about to commit a criminal offence,*
>
> *shall, unless sooner released, be brought without undue delay before a court.*
>
> *(7) If a person is arrested or detained as mentioned in subsection (3) (b) then, without prejudice to any further proceedings that may be brought against that person, that person shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that that person appears at a later date for trial or for proceedings preliminary to trial".*

[20] It may be highlighted, in passing, that the reasonable conditions on which an arrestee may be released on bail as anticipated by subsection (7) are conditions which would ensure that the person arrested stands trial or other necessary proceeding in due course. In this regard the Constitution would seem to lean in favour of custody rather than release where the appropriate conditions for release cannot be discerned. Where the

arrestee is released unconditionally that would ordinarily be a case in which the arrestee has been absolved of any wrong doing. Otherwise reasonable conditions are usually imposed where the arrestee is released on bail pending trial or further appearance in court.

[21] I only mention that section 95 of the CPEA regulates the ***"Power of the High Court regarding bail"*** while section 96 regulates ***"Bail application of accused in court"***. In subsection (1) section 95 provides: *"Notwithstanding any other law, the High Court shall be the only court of first instance to consider applications for bail where the accused is charged with any of the offences specified in the Fourth, the Fifth Schedules or under subsection 95(6)"*. The present appeal concerns mainly section 96.

[22] Relevant to the present proceedings, the CPEA in section 96 provides as follows:

> *"(1) In any court -*
>
> > *(a) an accused person who is in custody in respect of an offence shall, subject to the provisions of section 95 and the Fourth and Fifth Schedules, be entitled to be released on bail at any stage preceding the accused's conviction in respect of such offence, unless the court finds that it is in the interests of justice that the accused be detained in custody;*
>
> *"(4) The refusal to grant 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*
>
> > *(b) where there is a likelihood that the accused, if released on bail, may attempt to evade the trial;*
> >
> > *(c) where there is a likelihood that the accused, if released on bail, may attempt to influence or intimidate witnesses or to conceal or destroy evidence;*

"(7) In considering whether the ground in subsection (4) (c) has been established, the court may, where applicable, take into account the following factors, namely –

(a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;

(c) whether the investigation against the accused has already been completed;

"(12) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to -

(a) in the Fifth Schedule, 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; (My emphasis),

(b) in the Fourth Schedule but not in the Fifth Schedule...." [which is otherwise worded identically with paragraph (a) above, the accused is required to adduce evidence *"which satisfies the court that the interests of justice permit his or her release"*.

[23] It would appear then that under both paragraphs (a) and (b) of subsection (12), regulating respectively 5th and 4th Schedule listed offences, the burden is on the applicant to adduce the requisite evidence on a balance of probabilities as to the existence of exceptional circumstances or the interests of justice sufficient to permit the applicant's release on bail. Specifically, however, under paragraph (a), the applicant must satisfy the court not just that *"exceptional circumstances exist"* but the circumstances must be such as would *"in the interests of justice permit"* the applicant's release on bail, while under

paragraph (b) the applicant must present only such evidence as would satisfy the court that *"the interests of justice permit"* the applicant's release on bail. Accordingly, two elements are required under (a) while only one is required under (b). In other words, it is not enough that exceptional circumstances are shown to exist but those circumstances must be such as would in the interest of justice permit the release of the accused if charged for an offence listed under the Fifth Schedule or section 96 (12) (a)[4]. Section 96 (4) lays down grounds which would justify a court in denying bail to an applicant in the interests of justice. By section 96 (5), (6), (7), (8) and (9), the CPEA further qualifies the grounds set out under subsection (4) (a) to (e) indicating a variety of ways or examples by which those paragraphs could be satisfied in court proceedings.

[24] It was argued for the appellants that section 96(4) requires the Crown to establish one or more of the grounds (a) to (e) to justify refusal to grant bail in the interests of justice. Of the grounds listed under the subsection, at least three are shown by the evidence to be established, namely (b) in that first applicant is described as a person of no fixed abode and as such likely to abscond and evade trial by leaving the country; (c) the crown witness Gcina Jabulani Zwane told the investigating officer that he feared for his life if the accused in particular second appellant were released on bail. Zwane had also transported first appellant and an accomplice towards the place of the murder on the fateful night. There is reason to believe that appellants may attempt to influence or intimidate witnesses if granted bail; and (d) in that the appellants may undermine or jeopardise the objectives of the investigation which has not been completed having regard to the accomplice who still

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[4] However, in **S v Dlamini, S v Dladla and others, S v Joubert, S v Schietekat** 1999 (4) 623 (CC) Kriegler J states that: ***"[60] The difference between the two subsections, therefore, lies in the requirement that an accused on a sch. 6 charge must adduce evidence to satisfy a court that 'exceptional circumstances' exist which permit his or her release. An accused on a sch. 5 charge, while obliged to adduce evidence, need only satisfy the court that 'the interests of justice' permit his or her release. The main thrust of s 60 (11) was directed at the requirement of 'exceptional circumstances' in s 60 (11) (a)".***

large. In my view, on the evidence, the Crown has satisfied the requirements of section 96(4).

Exceptional circumstances – Section 96 (12) (a), CPEA

[25] Section 96 (12) (a) has been described[5] as substantially the same as section 60 (11) (a) of the South African Criminal Procedure Act, 1977 (CPA), as amended in 1997. Further explaining the South African provision Kriegler J states:

> *"[61] The subsection says that for those awaiting trial on the offences listed in sch. 6, the ordinary equitable test of the interests of justice determined according to the exemplary list of considerations set out in sub-ss (4) to (9) has to be applied differently. Under sub-s. (11) (a) the lawgiver makes quite plain that a formal onus rests on a detainee to* ***'satisfy the court'****. 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. In addition, the evaluation of such cases has the predetermined starting point that continued detention is the norm. Finally, and crucially, such applicants for bail have to satisfy the court that 'exceptional circumstances' exist..."*

[26] The appellants' first ground of appeal is based on appellants' deposition that being on antiretroviral treatment they meet the requirement of section 96 (12) (a) in that being HIV positive and on ART constitute an exceptional circumstance justifying their release on bail. This is so because – and so argue the appellants – HIV is a terminal illness. The appellants supported their argument by reference to cases such as **S v Jonas** 1998(12) SA SACR 667, **Joseph Mgungu Qwabe,**[6] **Selby Musa Tfwala,**[7] and **Wonder Dlamini and Another**[8]. As always under this section, the question is whether the appellants have discharged on a balance of probabilities the formal onus of establishing exceptional

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[5] Per MCB Maphalala J (as he then was) in **Selby Musa Tfwala v R** [2013] SZHC 146, para [9]
[6] **R v Joseph Mgungu Qwabe,** Crim.Case No.63/2003 (HC)
[7] **Ibid**
[8] **Wonder Dlamini and Another v R** Crim Case No 1/2013, [2013] SZSC 2

circumstances which in the interests of justice permit their release on bail. *In casu,* the question facing the Court is whether being on ART constitutes an exceptional circumstance such as would justify or permit release on bail as the appellants contended.

[27] In the **Wonder Dlamini** case, this Court held that an applicant who *"suffers from pneumonia and frequent bouts of sinus and requires high levels of ventilation and protection from colds"* and whose *"condition may be worsened by the living conditions at the Remand Centre where he sleeps on a mat which cannot protect him from attracting further illnesses"*, even without the support of a medical report, succeeded to establish exceptional circumstances for release on bail to be granted. In that case the Crown did not file any answering affidavit. The appellants were charged with two counts, to wit, armed robbery and attempted murder as well as contravening section 8 of the Opium and Habit-Forming Drugs Act, 1922 as amended. Attempted murder is a 4th schedule offence whilst armed robbery is of the 5th schedule, and are both offences referred to in sections 95 and 96 of the CPEA.

[28] In the **Wonder Dlamini** case, it is not stated why the Crown did not challenge the application. The Crown only took points *in limine* on the basis that armed robbery was a 5th schedule offence and as such the accused must be kept in custody unless he adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his release. It seems that the Court was of the view that the appellants' mere averment of suffering from bouts of pneumonia was sufficient to establish the existence of exceptional circumstances in the absence of opposition by the Crown. In para [22] the Court observed: *"....As was stated in the case of **Senzo Menzi Motsa** v **Rex*** (supra) *as well as the South African Constitutional Court case referred to above [9], the court has a duty in each bail application to determine whether the evidence adduced by the accused does constitute exceptional circumstances irrespective of whether or not the State has placed before court evidence opposing the bail application or evidence in rebuttal of the*

[9] **S v Dlamini, S v Dladla and Others, S v Joubert and S v Schietekat,** supra.

appellants' denial. . . . ". The Court, however, also stated in that same paragraph as follows: "*. . . However, and with due respect to Justice Horn JA in* ***S v Jonas*** *(supra), this does not mean that the unchallenged evidence adduced by the appellants would automatically constitute exceptional circumstances*".

[29] In **Selby Musa Tfwala** case the appellant contended that whilst he was employed in South Africa, he had contracted HIV and Aids and was put on antiretroviral medication. That continued incarceration at the Remand Centre exacerbated his health condition as he was forced to sleep on a mat on the cold floor with the result that he was exposed to further illnesses as his immune system was not strong. Trial date had not been set but was not within a reasonably short period of time. In support of his averments, appellant had attached a medical report which, however, had not been attached at first instance. In opposition, the Crown took points *in limine* and on the merits argued that the health-based contention did not meet the requirements of section 96(12)(a) in that the applicant was not the only sick inmate subjected to the alleged conditions; that the Remand Centre had qualified medical staff and a clinic to look after sick inmates. MCB Maphalala J (as he then was) observed: *"[6] It is apparent from the evidence that the Crown does not dispute or challenge the medical report or the fact that the applicant suffers from a terminal illness"*.

[30] In the above case, the Crown also did not dispute the alleged sleeping conditions at the Remand Centre. The court, however, did not address the issue of the other similarly placed inmates as the Centre. The medical report tendered was evidently on applicant's affliction with HIV and Aids and not on the possible worsening of the applicant's state of health as a result of the sleeping conditions at the Remand Centre. In my view, the Crown's position in that case must be understood to be that, notwithstanding the alleged conditions, other inmates similarly afflicted have survived through those conditions. Thus, something special and unique to the applicant needed to be shown to establish an exceptional circumstance in terms of section 96(12) (a). Applicant alleging to be on ART must then navigate the issue of exceptional circumstances beyond mere existence of the health

condition. Applicant must show that he is unlikely to survive in the Remand conditions as other inmates have survived. The applicant must show that the Remand living/sleeping conditions peculiarly affect him differently to the other HIV positive inmates who nevertheless live through those conditions. For, if others similarly afflicted survive a case for different treatment has to be made by an applicant.

[31] In the **Selby Musa Tfwala** case, para [9], MCB Maphalala J also states that in **Wonder Dlamini** at para [12], he quoted with approval, among others, the case of **S v Dlamini, Dladla and others, Joubert** and **Schietekat**, and pointed out that that case dealt with section 60(11)(a) of the South African Criminal Procedure Act No. 51 of 1977 whose wording was *"substantially the same as our section 96(12)(a) of the Criminal Procedure and Evidence Act, 1938"*, as amended. In para [9] of **Selby Musa Tfwala** and para [12] of **Wonder Dlamini** the Honourable MCB Maphalala J cited para [64] of **S v Dlamini, Dladla and others, Joubert and Schietekat** where Kriegler J had stated:

> *". . . 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 with the resolved interests of society in denying the 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 section 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".*

[32] In para [10] of the said **Wonder Dlamini** case, the learned Judge went on to observe that *"section 96 (12) (a) of the Act renders the granting of bail in respect of offences listed in the Fifth Schedule most stringent and difficult to obtain by placing the onus on the accused to adduce evidence showing the existence of exceptional circumstances"*, even as the court retains its discretion in the process, and continued: *"The retention of the court's*

discretion in this regard affords flexibility that diminishes the overall impact of the harsh and stringent nature of the requisite onus". In para [18] of the same case, this Court stated: "*[18] Section 16(7) endorses the general principle that bail is of discretionary remedy. For a person charged with an offence under the Fifth Schedule, section 96 (12) (a) of the Act requires that the court has to be satisfied that the applicant for bail has adduced evidence showing that exceptional circumstances exist which in the interest of justice permit his release. If the court is not satisfied, bail is refused. However, section 96(12)(a) of the Act does not take away the Court's discretion to grant bail...* " As already indicated above, the mere allegation of being on ART and suffering from a terminal illness should not without more meet the requirements of exceptional circumstances. The court in my view should not be *satisfied* by this bare allegation to grant bail so long as there are other inmates on ART in correctional facilities whose health conditions have not been shown to have significantly deteriorated on account of being so incarcerated.

[33] Even though Horn JA has been rightly criticized for saying that where the State had not placed before court any opposing evidence there was no way it could be argued that the accused had not shown the existence of exceptional circumstances: ". . . *Unchallenged, these averments, to my mind, constituted exceptional circumstances which justified the magistrate to consider the merits of the applicant's bail application",* the learned Justice of Appeal was no doubt correct where he said:

> *"The State cannot simply hand up the charge sheet to show that the accused had been charged with a Schedule 6 listed offence and then rely on the accused's inability to show exceptional circumstances... The magistrate was wrong in finding that the State had proved a prima facie case against the appellant simply upon the State's tendering of the charge sheet in which the offences are dealt with. This cannot be the law...."*

[34] The presiding officer is no doubt placed in a most unenviable situation where he must decide whether the accused has adduced such evidence, in terms of sub-section (12)(a) as

would satisfy the court that in the interests of justice the accused should be granted bail, on the one hand, and whether the prosecution has established a prima facie case beyond the mere charge sheet reflecting that the accused is charged with a 5th schedule listed offence, on the other hand. Because of the formal onus, the accused is called upon to adduce such evidence as would in the interests of justice permit his release on bail. It would seem that the required evidence is not necessarily superior to that of the prosecution. But, on the whole, that is, taking into account the various aspects and qualifications of the section, the accused's evidence must be such as, in the circumstances, trumps that of the prosecution. Finding the correct equilibrium must be very hard for the presiding officer at the best of times. Sub-section (12) (a) requires the court to be independently *satisfied* of the evidence adduced by the accused and says nothing about the evidence of the prosecution in rebuttal.

[35] The advantage of the prosecution in proceedings under the sub-section lies in that the sub-section enjoins the court to order the detention of the accused, . . . unless the accused, . . . adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit the release of the accused. As it is, the Crown is not called upon to adduce any particular type of evidence in rebuttal. As has been said elsewhere, the prosecution cannot just standby the charge sheet to oppose release on bail. For the prosecution to do that would amount to failing to tender evidence in opposition. In that case sub-section (2) would kick-in and the court should call upon the prosecution to place on record reasons for the non-tender of evidence in opposition. Unfortunately, we are not told what is to happen where the reasons so tendered by the prosecutor are not satisfactory. It should be clear, however, that with or without opposition by the prosecution, the court is still required to determine whether the accused has adduced the requisite evidence for his release on bail. This does not mean that the evidence of the prosecution in opposition or absence of it is meaningless: its worth or non-worth lies in the heart of the presiding officer.

[36] In **Wonder Dlamini,** as already stated, the Crown did not challenge the evidence of the applicants alleging spells of pneumonia and bouts of sinusitis. The court *a quo* did not

analyse the evidence but held that in the absence of a medical report supporting the allegations of the applicant exceptional circumstances had not been proved. But this Court disagreed. This Court correctly considered that the evidence tendered by the applicant for bail (for whatever it might be worth) must be analysed and assessed in order to determine if it disclosed existence of exceptional circumstances which in the interests of justice permitted the release of the applicant. Paras [22] and [23] refer. However, in considering the evidence of the appellants, as appears in para [24] of the **Wonder Dlamini** judgment, this Court merely stated: *".... In a democratic country such as ours, one would have expected that inmates be provided with at least mattresses and not sleep on mats placed on a cold cement floor. As the second appellant correctly stated, such a situation would inevitably attract various illnesses; to that extent it does constitute exceptional circumstances".* It does not appear how in that case the Court analyzed and assessed the evidence to come to the conclusion that the evidence established the existence of exceptional circumstances. This is particularly so since the applicants were not the only inmates exposed to the alleged cold floor conditions of the Remand Centre. And in the absence of a medical report how did the Court conclude that the said exposure would inevitably attract various illnesses. I do not see what democratic societies and their liberal expectations have to do with the existence or otherwise of exceptional circumstances as required by the sub-section.

[37] With respect, this Court did not analyse the evidence of the appellants in the **Wonder Dlamini** case. Even though the Crown had not filed opposing evidence, it was still the duty of the Court to analyse and assess the evidence of the appellants to determine if it met the requirements of the sub-section. If one follows the observation of the Court regarding the sleeping conditions at the Remand Centre one would conclude that all the inmates of the Centre were wrongly remanded when they should have been released on bail until some more conducive sleeping conditions as befit a democratic country were made available. A cold floor only covered with a mat is no friend of any inmate no matter their health condition. The Court's analysis of the appellants' evidence consisted in holding that the

malady of pneumonia and bouts of sinus constituted a condition that in the words of Magid AJA in **Senzo Menzi Motsa** was "more than unusual" and "one of a kind". Surely, how that was arrived at needed to be further articulated. In the **Wonder Dlamini** case, in my view, this Court should have returned the matter to the court *a quo* for the consideration of the evidence of the appellants to determine if it did show exceptional circumstances.

[38] The hearing of the **Selby Musa Tfwala** case followed closely on the trail of the **Wonder Dlamini** case. In that case, the applicant also pleaded a medical condition which would be worsened by continued incarceration in conditions such as allegedly existed at the Remand Centre, that is, appellant sleeping on a mat on the cold floor while nursing an immune system that was not so strong. In **S v Jonas** case Horn JA observed that the term 'exceptional circumstances' was nowhere defined. He noted that as a result *"there can be as many circumstances which are exceptional as the term in essence implies"*, so that *"an urgent serious medical operation necessitating the accused's absence"* and a *'terminal illness'*, may be examples of 'exceptional circumstances.' This apparently led the court in **Selby Musa Tfwala** to conclude that *"suffering from a terminal illness constitutes an exceptional circumstance as contemplated by Section 96(12)(a) of the Criminal Procedure and Evidence Act"*, accordingly, entitling an accused sufferer to release on bail. But is this really so or should it be really so. What this means is that whenever an accused alleges, even without a medical report, that he is HIV positive and on ART, that arrestee must be released on bail without further ado. Is that really what section 96 (12) (a) means? Rather, should the existence or otherwise of exceptional circumstances be not determined on a case by case basis? The section calls upon the court to carefully assess the conditions allegedly exacerbating the health status of the applicant and be satisfied that that is so and nothing could ameliorate the situation before the applicant may be said to have established a case of exceptional circumstances. Anything less demanding only pays lip-service to and subverts the provision.

[39] . The appellants aver that the court *a quo* misdirected itself in holding that being HIV positive and being on ART does not constitute an exceptional circumstance entitling the

appellants to be released on bail in the interests of justice. This Court has held that HIV and Aids is a terminal illness which requires the sufferer to avoid certain living and sleeping conditions such as were alleged of the Zakhele Remand Centre. The case of **Wonder Dlamini** was decided essentially on the basis that suffering from pneumonia with frequent bouts of sinus requiring high levels of ventilation was likely to be made worse by sleeping on a cold mat on a cement floor in not so well ventilated surroundings and as such passed for exceptional circumstance in terms of section 96(12)(a) and qualified the applicants for release on bail in the interests of justice. In the case of **Selby Musa Tfwala** the High Court came to the conclusion that being on ART coupled with sleeping on a mat on a cold cement floor constituted exceptional circumstances.

[40] The appellants claim that being on antiretroviral treatment and being at the Remand Centre would worsen their health, having regard to the eating and sleeping conditions at the Centre. On that basis they should be given bail in that their condition pass for an exceptional circumstance in terms of the CPEA. The bail application was opposed *a quo* and before this Court. The learned Judge *a quo* agreed with the Crown that being on ART, *"when properly and faithfully taken .... poses no danger to life at all"*. The learned Judge pointed out that medical science has so advanced that HIV and Aids is no longer such a deadly disease, incapable of being suppressed to sustain an almost normal life. I agree with the learned Judge in that merely being on ART should not establish an exceptional circumstance in terms of the CPEA. Something more would have to be alleged to make HIV and Aids an exceptional circumstance justifying the carrier to be excused on bail from being detained in a correctional facility. Indeed, if HIV and Aids persons were to be routinely absolved from correctional custody, then a new and separate facility might have to be established for such inmates in light of their numbers country-wide.

[41] It is true that the appellants have not been convicted of the offence charged: as such the appellants are innocent until proven guilty at the trial. But they are charged with an offence under the 5th Schedule. It is also true that bail is not an absolute right. Section 16(7) of the Constitution does not abolish reasonable incarceration of persons arrested for

criminal offences. Also, section 96(12)(a) does not do away with bail. The section only ups the ante and leaves it to the courts to finally determine the release or denial of release on bail. That being the case, it seems to me, fundamental to Chapter III of the Constitution is justice and related matters, that is, matters in the interests of justice. In a country under the rule of law, arrest and detention of persons is from beginning to end regulated by considerations of interests of justice for the arrestee and the public. The interests of justice will vary with varying offences and relevant circumstances. Section 16(7), regulating release on bail of an arrestee, is itself premised on the interests of justice; and so is section 96(12)(a) of the CPEA. The two sections are complementary; both allow provisional custody of accused.

[42] In the cases of **S v Dlamini, S v Dladla and others, S v Joubert and S v Schietekat,** Mr. D'Oliveira, counsel for the prosecution, it being contended that section 60(11)(a) of the CPA was unduly invasive of the arrestee's liberty, argued and relied, inter alia, on *"the fact that the requirement of 'exceptional circumstances' lent itself to particular application in particular cases, and therefore avoided the potential injustice of an outright ban on bail for certain types of offences"*, to which Kriegler J. reacted, at para [74]: *"I accept that that is so. Section 60(11)(a) does not contain an outright ban on bail in relation to certain offences, but leaves the particular circumstances of each case to be considered by the presiding officer. The ability to consider the circumstances of each case affords flexibility that diminishes the overall impact of the provision. What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not,* ***in the circumstances of a particular case****, bail should be granted"*. (My emphasis).

[43] With respect, Majid AJA's understanding of 'exceptional' as meaning *"something more than merely unusual but rather less than unique and as such being one of a kind"*, in **Senzo Muzi Motsa,** is itself an expression which needs to be disentangled for practical action. The *Concise* ***Oxford English*** *Dictionary* defines 'unique' as **1** *"being the only one of its kind; unlike anything else"*; **2** *"special or unusual"*. I guess, the evidence would be

unique in the sense that it is peculiar to the applicant, that is, it affects the applicant in a way different from others apparently similarly conditioned. It is in this sense that the circumstance is special or unusual or exceptional and to that extent it is one of a kind. And Horn JA in **S v Jonas** correctly stated: *"15... The term 'exceptional circumstances' is not defined. There can be as many circumstances which are exceptional as the term in essence implies. It would be futile to attempt to provide a list of possibilities which would constitute such exceptional circumstances"*. I agree. Thus, being on ART should not as a rule qualify an applicant to be released on bail. In my view, for instance, in the correctional facilities so long as there are inmates on ART there can be no justification for any similarly affected person to be granted bail on that account unless there is something peculiar and unique to the particular applicant that makes his case different from that of the other inmates on ART who are kept at the facility. That should call for closer attention to detail where an applicant alleges to be affected with a particular sickness.

Interference with Crown witnesses

[44] The other ground of appeal by the appellants is that the court *a quo* erred in finding and holding that there was a likelihood that the appellants would interfere with Crown witnesses even though the Crown failed to establish the grounds in section 96(7) (c) of the CPEA as amended. The subsection states that: *"In considering whether the ground in subsection (4) (c) has been established, the court may, where applicable take into account the following factors, namely - . . . (c) whether the investigation against the accused has already been completed"*. As stated above, section 96 (4) (c) provides that it would be in the interests of justice for the court to refuse bail where there is a likelihood that the accused may attempt to influence or intimidate Crown witnesses. If the investigation of the offence has not been completed, the chances of refusing bail would be further enhanced.

[45] The investigating officer on behalf of the Crown deposed that it would not be in the interests of justice to release the accused on bail in that the accused will interfere with Crown witnesses who are one Jabulane Gcina Zwane and Mbhekeni Nkhambule, being the

two traditional healers who were asked by second appellant to hire hitmen to kill the deceased and actually found and transported the first appellant to Tri-Cash from where he proceeded to KaPhunga on the fateful night. The second appellant is also a neighbor to one Austin Shabalala who was also asked by second appellant but refused to find hitmen. Further, *"if released on bail, the applicants will hinder police investigations which are not yet complete in that Mbongiseni [Ngoloyi] Nkhambule, the 2nd hitman, is still on the run and wanted by the police"* and *"There is a high likelihood that [2nd] applicant will influence and intimidate witnesses or conceal or destroy evidence if released on bail"*. Even Jabulane Gcina Zwane *"told me that he fears for his life if applicants are granted and released on bail in that they (applicants) know him very well and the role he played viz divulging to the police the killing of the deceased"*, says the investigating officer. Also, first applicant was said to have no fixed place of abode, was usually found all over places and had no known source of income, *"Thus, it will be easy for [1st] applicant to abscond trial and leave the country"*. Kriegler J. (supra) is pertinent:

> *"[63] Section 60 (11) (a) applies only when an accused is charged with one of the serious offences listed in sch. 6. It is true that the seriousness of the offence, and with it the heightened temptation to flee because of the severity of the possible penalty, have always been important factors relevant to deciding whether bail should be granted. So, too, have been the possibility of interference with the course of the case, and the accused's propensity to interfere in the light of his or her criminal record. Indeed, those are factors that are expressly mentioned in the list of 'ordinary' circumstances contained earlier in s. 60."*

[46] In paragraphs [15] to [18] the learned Judge *a quo* dealt with the issue of appellants' likely interference with crown witnesses. The Judge considered the fact that second appellant had the nerve to approach Mr. Shabalala with the request to find killers of his wife made it likely that he would interfere with Shabalala's evidence: *"The mere fact that the police have taken down a full statement from Mr. Shabalala does not in the circumstances make this possibility less likely or unlikely. The fact that the witness has*

committed himself to a particular statement or version is, experience has taught this court and taught it well, no guarantee or assurance that he would not be contaminated by the applicant." The Judge went on to observe that it is *"not actual interference but the likelihood of this occurring"* that the court has to consider and in doing so the court looks, among other things, at the relationship between the accused and the witnesses, and the gravity of the crime faced by the accused: *"Premeditated murder is, by all accounts very serious and attracts a heavy penalty in this jurisdiction"* stated the learned Judge. In **Wonder Dlamini** this Court observed: *"[9] The offences listed in the Fifth Schedule consist of serious and violent offences, and which upon conviction, are accompanied by severe penalties..."* And the Judge *a quo* concluded, on account of the issues both factual and legal, that there was a likelihood that the appellants would interfere with the crown witnesses in the person of Gcina Zwane and Austin Shabalala. I can find no fault in the finding and conclusion of the learned Judge that in the circumstances it would not be in the interests of justice that the appellants be released on bail.

Conclusion

[47] Care must be exercised in accepting as a general statement that *"suffering from a terminal illness constitutes an exceptional circumstance as contemplated by section 96(12) (a) of the Criminal Procedure and Evidence Act"*. The authorities[10] relied upon for the foregoing conclusion need to be properly interrogated before a finding is reached in any particular case because that cannot be true in every situation. As the respondent points out that there are inmates at the correctional facilities who are HIV positive and on ART but they live in the same Remand conditions condemned by the appellants. It seems to me that the correct statement should be that, depending on the specific facts of the particular case, suffering from a terminal illness *may* constitute an exceptional circumstance in terms of the sub-section. As it is, no statistics have been submitted to demonstrate that more persons suffering from a particular terminal illness have died in correctional facilities than outside.

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[10] **Referred to in Selby Musa Tfwala** [2013] SZSC 146

Only appropriate studies can justify the general conclusion that suffering from a terminal illness such as HIV/Aids constitutes an exceptional circumstance in terms of section 96 (12) (a) of the Act. To hold uncritically that it does would be to undermine the very meaning and manifest purpose of the sub-section (12)(a) to *"deter and control serious and violent crimes as well as to limit the right of an accused person to bail in the interest of justice"* and *"render the granting of bail in respect of these offences most stringent and difficult to obtain . . ."* In my view, only a terminal disease like the current contagious Covid-19 pandemic should be adjudged to constitute an exceptional circumstance as contemplated under the section. At the present stage of medical development HIV and Aids is certainly not in the same league as the Covid-19 pandemic. For how long this will be is of course presently uncertain.

[48] The respondent has opposed the application on the argument that being on antiretroviral treatment is not an unusual condition since there are many prisoners waiting trial and serving sentences who are on ART. It has not been pointed out that these awaiting prisoners are currently dying more rapidly than would be the case if they were not in custody. In any case, section 16(6) of the Constitution provides: *"Where a person is arrested or detained .... (c) that person shall be allowed reasonable access to medical treatment including, at the request and at the cost of that person, access to private medical treatment"*. Evidently, the medical treatment is free unless it is at a private doctor, which is usually not necessary in the case of persons on ART. Therefore, an accused person seeking release on bail on account of being on ART must also show that the free medical treatment provided in terms of the Constitution is for any reason not available or is ineffective. The simple fact, purpose and policy of section 96(12)(a) is that it should not be easy for persons accused of schedule 5 offences to obtain bail. As Kriegler J (supra) points out: *"[68] ...Parliament enacted section 60 (11) (a) with the clear purpose of deterring and controlling serious crime, an indubitably important goal. Its effect is to limit, to an appreciable extent, the right of an arrested person to bail if the interests of justice permit..."* The 1938 Act was amended to strengthen the arm of the State in dealing with

serious and violent offences with the consequent stringent requirement for bail in the form of exceptional circumstances in the interest of justice. This does not affect the constitutional right to bail of an arrestee. The Constitution does not prescribe any definitive and unqualified right to bail.

[49] It is important to consider the requirements of section 96 (12) (a) in light of the account given by the arrestees regarding the occurrence of the offence charged. First appellant's account is not at all plausible. Even though he pleads innocence of the offence be admits having been recruited to "rob the home of the deceased at kaPhunga" as the deceased was alleged to have received a lot of money by way of a loan. He agreed to the plan, and on a certain date proceeded with an accomplice to the home of the deceased: *"We hitchhiked to kaPhunga and arrived at around 11:00 pm and proceeded to the deceased's home. We managed to gain entry and ransacked the house. Unfortunately, the deceased woke up and I panicked and ran away towards the exit. . . . I heard the deceased shouting for help. I hid in the bush outside the house of the deceased waiting for Ngoloyi to exit before the community members were disturbed by the noise until I had no choice but to return inside and call him. To my surprise I found the deceased hanging on the rafters and Ngoloyi still ransacking the house. I shouted for him asking him to leave and we ran away. We did not find any money at the house of the deceased"*. This is part of the account given by the first appellant. He denies having killed the deceased but the evidence speaks for itself and clearly supports premeditation and or common purpose. First appellant also pleads to be on ART and as such unsuitable for extended life in custody. Nothing exceptional has been advanced by the appellant to show that it is in the interest of justice that he be released on bail.

[50] The second appellant, the husband of the deceased, does not place himself anywhere near the scene of the crime. Instead, the story he has deposed to referring to a location in Ngwane Park with his wife at some undisclosed date is irrelevant and palpably false. It is common cause or at least unchallenged that the wife died at her home in kaPhunga area. The second appellant was according to his own account arrested at kaPhunga on the same

date the deceased is alleged to have been killed. The story of a night visit at Ngwane Park, the unanswered knock at the door and unanswered cell phone of his wife in the middle of the night just does not add. The story is unbelievable. Without traversing the merits, the evidence to the contrary is more overwhelming. In the result, there is no way that this factual account of the offence as told by second appellant can bolster the alleged medical condition of the applicant to meet the statutory requirement of section 96 (12) (a). The second appellant is then left only with the story that he is on ART, which itself does not take the application any further. I have accepted the conclusion reached by the court *a quo* on this point. I find nothing exceptional to support release of both applicants on bail.

[51] It may be appropriate to conclude by restating one of the observations made by Kriegler J in the above referred to Constitutional Court case:

> *"[11] Furthermore, a bail hearing is a unique judicial function. It is obvious that the peculiar requirements of bail as an interlocutory and inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal court procedure, it is considerably less formal than a trial. Thus, the evidentiary material proffered need not comply with the strict rules of oral or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. An important point to note here about bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the inquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails in the main protecting the investigation and prosecution of the case against hindrance".* (Foot notes excluded)

[52] In the result. I agree with the decision of the High Court that the appellants failed to establish exceptional circumstances which would in the interest of justice permit their release on bail. The appeal stands to be dismissed. It is so ordered.

MJ DLAMINI JA

I Agree

SP DLAMINI JA

I Agree

RJ CLOETE JA

Ms. N Ndlangamandla	For the Appellants
A Matsenjwa	For the Respondent