Reportable: **YES**/NO
Circulate to Judges: YES/NO
Circulate to Magistrates: YES/NO
Circulate to Regional Magistrates: YES/NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: CA &R 28/2018

Heard on 20/09/2018

Delivered on: 02/10/2018

In the matter between

ZONISELO RICHARD MAGAWU **Applicant**

And

THE STATE **Respondent**

JUDGMENT

PAKATI J

[1] The applicant, Mr Zoniselo Richard Magawu, applies for bail on new facts pending finalisation of the trial scheduled to start on 15 October 2018. He is one of six accused facing charges of murder, kidnapping and offences relating to the Firearms Control Act[1]. He has been kept in custody since his arrest on 19 August 2016 and is presently in the Kimberley Correctional Centre. The respondent opposes the application.

[2] It is common cause that murder is one of the offences listed in Schedule 6 of the Criminal Procedure Act[2] ("the CPA"). It means therefore that the applicant bears the

[1] Act 60 of 2000
[2] Act 51 of 1977

onus to satisfy the court that exceptional circumstances exist which in the interests of justice permit his release on a balance of probabilities. Section 60 (11) (a) of the CPA provides:

'(11) Notwithstanding any provision of this Act where an accused is charged with an offence referred to –

(a) In Schedule 6, 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 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.'

[3] After his arrest the applicant applied for bail in the magistrate's court, Postmasburg, which was dismissed on 25 September 2016. He brought another one on new facts which was also dismissed on 12 December 2016. He appealed against the said refusal and it was dismissed on 09 January 2017. On 13 November 2017 he brought a pre-trial application which was dismissed on 17 November 2017.

[4] The appellant placed the new facts by way of affidavits by himself, Ms Spangenberg, his Psychologist, and an *ex parte* address by his legal representative, Mr Pistorius. He states that he has appeared in court on several occasions but the trial was postponed for various reasons *inter alia*, that he and his co-accused were not ready to proceed with the trial due to the fact that their legal representation was uncertain. The trial was further delayed by the interlocutory applications namely, bail applications, appeal and pre-trial motion as alluded to earlier.

[5] In his affidavit the appellant alleges that his continued incarceration prejudices his right to fair trial as a result of which he suffers irreparable personal and physiological harm. Some of the new facts that he relies on can be summarised as follows:

5.1 He is diabetic and a chronic patient whose condition is exacerbated by the continued incarceration. He has been hospitalised and lost weight considerably. His eyesight has also deteriorated;

5.2 He does not receive the diabetic diet prescribed by his medical doctor and Correctional Services does not provide same;

5.3 The medical doctor diagnosed him of anxiety, depressed mood and a sleeping disorder. He says he suffers constant headaches and lower back pain which causes

depression. He has not received treatment for these problems save for the sleeping tablets prescribed by the doctor to alleviate his sleeping disorder. The poor conditions in prison contribute to his deteriorating physical and mental condition. He constantly feels tired and hopeless;

5.4 He has repeatedly requested to consult with a psychologist but the prison officials informed him that he is not entitled to such intervention as he is still awaiting trial;

5.5 The prison is overcrowded and TB patients are placed in the same cell with non-TB awaiting trial detainees. There is lack of hygiene and floor spacing is inadequate, no proper gym facility. He states that he suffers from stress and anxiety which leads to suicidal ideation;

5.6 He was segregated twice with maximum sentence detainees as a form of punitive detention without medical assessment in terms of section 30 of the Correctional Service Act 111 of 1988. He objected to this but to no avail.

[6] The applicant adds that telephonic access with his legal representative is limited and frustrates the preparation of his trial. The detainees are prohibited from using cell phones or any electronic means of communication. According to him Mr Pistorius has to travel from Pretoria for consultation and this has a financial burden on him. He states that he prefers to have Mr Pistorius as his legal representative rather than make use of the services of the Legal Aid South Africa. If he is not released on bail he will not be able to raise the necessary funds and effectively prepare for his trial. This is so because the correctional facility offers no unlimited consultation with his legal representation which makes the preparation of his defence virtually impossible. As things stand, it seems to him that he is forced to accept counsel appointed by Legal Aid South Africa. Moreover, he claims that he has not yet consulted with any Legal Aid counsel and is concerned about the adequacy of such counsel who is, according to him less concerned about the preparation of his case.

[7] The applicant further states that the prison has inadequate facilities for his legal representative to prepare for his trial in that he may not bring either documents or files. He contends that if released on bail he would consult with his legal team anytime and anywhere.

[8] The applicant submits that he has not been provided with the contents of the docket. According to Mr H Cloete, counsel for the State, the contents of the docket was made available to the applicant during the pre-trial application. The applicant in his bail application on new facts before the magistrate relied on its contents.

[9] The applicant submits further that his family (wife and children) has been negatively affected by his absence as their sole provider. His continued absence, so he argues, causes their relationship to deteriorate to such an extent that they frequently need counselling. He alleges that Lt Col Louwrence and W/O Van der Merwe and other police officials traumatise them as a result of which his wife suffers from emotional stress, panic attacks and fears abuse in their hands. His family visits him from time to time but the conditions are not conducive for the minor children who are negatively affected. He and his wife have decided to discontinue their visits to avoid seeing him in the emotional state that he is in. His wife applied for an interdict against Lt Col Louwrence for subjecting her to emotional, verbal abuse, arbitrary arrest and detention on 23 February 2017.

[10] The applicant states that during the previous bail application hearings Lt Col Louwrence instigated some of the witnesses including community members to create adverse atmosphere so that his bail application would be unsuccessful. Notably, there were no community members canvassing against his release when he appeared in this court. The allegation of bias towards him by the investigation team cannot stand after Williams J dismissed the pre-trial motion in relation to the alleged conduct of W/O Van der Merwe. It is undisputed that W/O Van der Merwe is currently not part of the investigation team.

[11] The applicant claims that if he remains in custody it would be impossible to maintain his political office as an administrator resulting in him losing the said position. He alleges further that if granted bail he would adhere to bail conditions as he has the

utmost respect for the criminal justice system. This allegation does not hold water taking into account his previous convictions and the pending case against him which the State confirmed has not been withdrawn.

[12] In support of his psychological condition the applicant filed a report compiled by Ms Tertia Spangenberg, a Clinical Psychologist, dated 22 August 2018. In paragraph 3 of the said report she states:

> '**3. EVALUATION**
>
> During the evaluation Mr Magawu was well orientated in terms of time, space and person. There was no indication of confusion or any other mental state that could potentially alter his sense of reality or could cause reason to question the validity of his responses.
>
> On Clinical observation it was clear that he is of above average intelligence. Since I could not conduct any psychometric testing, I base this observation on 25 years' experience of evaluating and observing people and being able to deduct a person's level of functioning through observation and evaluation.
>
> It was clear that as the evaluation progressed, he presented with signs of exhaustion and anxiety when he related certain circumstances and events. The anxiety was concurrent with traumatic events that he experienced during the timeline of events. The emotion portrayed was synchronic with the information provided at the time.'

[13] In opposing the application the respondent placed evidence by way of affidavit of Lt Col Louwrence, the investigating officer, *viva voce* evidence of Ms Onica Lerato Manaka, the Head of Kimberley Correctional Centre, and *ex parte* argument by Mr H Cloete, on behalf of the State.

[14] On 20 June 2018 the respondent filed a notice to oppose which records its grounds for refusal of the release of the applicant on bail which I summarise thus:

14.1 The grounds do not qualify as new facts;

14.2 The applicant's allegations are vague and unsubstantiated;

14.3 The allegations are incorrect and facts relied upon irrelevant; and

14.4 The applicant failed to lead evidence which satisfies the Court that exceptional circumstances exist which in the interests of justice permit his release.

[15] Ms Manake testified that during July/August 2018 she was on duty when Ms Spangenberg visited the applicant at the correctional centre. When she was brought

to her office Ms Manake informed her that as the head of the facility she was unaware of any private psychologist visiting the applicant. She explained to her the procedure to follow when a private psychologist visits a detainee. She said that an application by the detainee concerned should be made and handed to her. She would then contact the psychologist and an appointment would be arranged. This is so because the facility has its own psychologist who had consulted with the applicant twice already. In this regard she neither received a formal application from the applicant nor was an appointment made with Ms Spangenberg. Ms Manake told her that it would be impossible to consult with him without a formal application by the applicant. Therefore it was unnecessary for her to contact the centre until a formal application was made and fees for such service were paid.

[16] According to Ms Manake there was a stage when the applicant requested to consult Dr Nhlapho, a private doctor, and a psychologist. After he consulted with the said doctor he indicated that he did not need to see the psychologist but would formally apply if he changed his mind, which he did not do.

[17] Ms Manake testified that Dr Khantani prescribed the applicant's treatment for diabetes. During her testimony it became apparent that the applicant has a good relationship with her. She immediately attends to his complaints. It also transpired that he has confidence in her and is comfortable talking to her about his personal and family issues.

[18] Ms Manake states that the applicant had a problem with Mr Morgan, the kitchen supervisor, which involved his diet that had to include starch despite the doctor's instructions that it should be starch free. She intervened and changed his diet to accommodate his demand.

[19] Regarding access to legal representation Ms Manake explained that legal representatives have access to the detainees and are allowed to bring their files, books including laptops during consultation. She disputes that there is inadequate facility for a detainee to consult with his/her legal representative.

[20] Section 35 (2) (b) of the Constitution provides that everyone who is detained including every sentenced prisoner has the right to choose and to consult with a legal practitioner and to be informed of this right promptly.

[21] Ms Manake testified further that the applicant was twice found in possession of a cell phone in contravention of the prison rules. That was when he was housed in A Unit. After the cell phone incidents he was moved to segregation unit. She explained this as a unit where maximum offenders and those who infringe prison policies are kept. It is a single cell where a detainee is kept alone for his/her safety and protection. During November/December 2017 while in segregation the applicant engaged in a hunger strike but Ms Manake successfully talked him out of it and he was removed from the said unit.

[22] The appellant is required to establish that exceptional circumstances exist which in the interests of justice permit his release on a balance of probabilities. In **S v RUDOLPH**[3] Snyders JA, as she then was, had this to say about exceptional circumstances:

> "[9] The section places an onus on the appellant to produce proof, on a balance of probability, that 'exceptional circumstances exist which in the interests of justice permit his' release. It 'contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail, will be resolved in favour of the denial of bail, unless "exceptional circumstances" are shown by the accused to exist'. Exceptional circumstances do not mean that 'they must be circumstances above and beyond, and generally different from those enumerated' in ss 60 (4) – (9). In fact, ordinary circumstances present to an exceptional degree, may lead to a finding that release on bail is justified."

[23] In **S v MAUK**[4] the Court held:

> "When it falls to be considered whether an accused has succeeded in establishing 'exceptional circumstances', as contemplated in s 60 (11) (a) of the Criminal Procedure Act 51 of 1977, ie which permit his release in the interests of justice, it is a misdirection to adopt one or more of the following approaches: (a) insofar as the strength of the State's case arises for consideration, (b) to require that the State's case must be exceptionally weak before 'exceptional circumstances' can be found to exist, ie, to equate a higher degree of proof of the accused than proof on a balance of probabilities; and (c) to give no consideration to the need of the State to adduce rebutting evidence.
>
> An accused will succeed in proving 'exceptional circumstances' if he is able to show, by adducing acceptable evidence, that the State's case against him is non-existent, or subject to serious doubt. Where the accused's evidence stands alone, then the suggestion that the State's case is non-existent or doubtful becomes almost a forgone conclusion. If the State does not lead evidence in rebuttal, it is

[3] 2010 (1) SACR 262 (SCA) para [9]; See also S v Botha en n' Ander 2002 (1) SACR 222 (SCA) para [21] and S v Dlamini para [20]
[4] 1999 (2) SACR 479 (W) 481j – 482d

difficult to see how it can be said that the accused has not succeeded in discharging the *onus*. The fact that the evidence before court is infused with probabilities indicating that the accused may have been falsely implicated, especially where the State has adduced no significant rebutting evidence (as *in casu*), can scarcely be regarded as anything other than exceptional."

[24] The concept 'interests of justice' as used in s 25 (2) (d) of the interim Constitution is not defined and it means nothing more than the usual factors which ought to be taken into account in bail application.[5] In **S v DLAMINI; S v DLADLA AND OTHERS; S v JOUBERT; S v JOUBERT; S v SCHIETEKAT**[6] the Constitutional Court states:

"[48] That must also be the sense in which 'the interests of justice' concept is used in sub-s (4). That subsection actually forms part of a functional unit with sub –ss (9) and (10). Between them they provide the heart of the evaluation process in a bail application, ss (9) being predominant. If it is read first and 'the interests of justice' bears the same narrow meaning akin to 'the interests of society' (or the interests of justice minus the interests of the accused), the interpretation of the three subsections falls neatly into place. The opening words of ss (9) ('in considering the question in ss (4)') refer to the question whether bail should be refused. That question, so the presiding officer is told, is to be answered by weighing up the societal interests listed in ss (4) and detailed in ss (5) to (8A) against the personal interests adverted to in ss (9). And whatever the parties may contend, ss (10) obliges the presiding officer to ultimately assume responsibility for that evaluation."

[25] The proven circumstances have to be weighed in the interests of justice. According to Comrie J "the true enquiry is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the applicant's release. And 'sufficiently' will vary from case to case". When an accused adduces sufficient evidence of innocence and such evidence is so strong that it can be said that he has reasonable prospects of success at his trial, he has established "exceptional circumstances".[7]

[26] The issue to be determined is whether the factors advanced by the applicant including the psychological report by Ms Spangenberg in support of his application for release constitute exceptional circumstances. The applicant also has to prove that the interests of justice justify his release.

[27] It is undisputed that the State has been ready to proceed with the trial as early as March 2017. The State disputes that the applicant is severely physically and mentally affected by the continued incarceration due to diabetes, post traumatic depression and anxiety disorder. However, it alleges that there is a possibility that the applicant

[5] Commentary on the Criminal Procedure Act by Du Toit *et al* at 9-31
[6] 1999 (4) SA 623 (CC) para [48]
[7] Commentary on the Criminal Procedure Act by Du Toit et al

suffers emotional and financial stress due to the continued incarceration but that should be considered in the light of the fact that he still receives his salary and faces serious charges.

[28] In her report Ms Spangenberg states that the purpose of the assessment '*was to determine whether there is psychological motivation to recommend that bail be granted to Mr Magawu in his upcoming bail hearing in the High Court of South Africa.'* In assessing the applicant she took into account the effect of '*his emotional state on his health, as well as the effect of the already long term captivity on his psychological state on his emotions and psychiatric health*'.

[29] Notably, Ms Spangenberg does not disclose her sources of information which she says were consistent with the information given by the applicant. In paragraph 4 of her report she records:

> "During an assessment, consistency is an important aspect regarding the truthfulness of information provided, especially when a long period of time has expired. Inconsistency is an indication of selective memory and is often a reason to question the truthfulness of information supplied."

It is unclear what information is referred to that is consistent or inconsistent with the information given by the applicant as what the applicant mentioned to her is referred to as "*an abbreviated version of events up until the time that I interviewed him"*

[30] Before this matter was argued Mr Pistorius handed to me three affidavits by himself, Mr Andre Potgieter and Ms Spangenberg (Annexures "H", "I", and "J") respectively stating that he was accused by the prison officials of misrepresenting himself as a psychologist and Ms Spangenberg as an attorney.

[31] In her affidavit Ms Spangenberg confirmed that in previous occasions she never experienced problems accessing the applicant. The prison officials co-operated with her. Taking into account that the three affidavits were handed in just before the matter was argued, the State could not dispute the incidents mentioned therein. However, Mr Cloete indicated that those were isolated incidents due to some misunderstanding. There is no allegation by Ms Spangenberg that she followed the said procedures and still experienced difficulty consulting with the applicant. The

fact that she compiled the report is reason enough to conclude that she extensively consulted with him.

[32] The applicant alleges that the Department of Correctional Services does not have the capacity to address his concerns for example, (a) there is lack of adequate and professional nutrition; (b) the cell wherein he is kept is overcrowded; (c) He sleeps on the floor; (d) He does not have access to the toilet and/or has to share one with twenty three other detainees; (e) He is exposed to TB patients in a cell that accommodates more detainees than it can actually take; and (f) the condition of the cell is generally inhumane.

[33] According to the applicant his right to integrity, freedom from torture, inhuman detention, degrading treatment and dignity are rights protected by the Constitution. He states further that the prison facility violates these rights thereby affecting his right to a fair trial. Be that as it may, he has decided to refrain from engaging in an expensive litigation with the department in order to enforce his constitutional right to dignity, freedom and integrity.

[34] These rights are protected against anyone who seeks to undermine them. Section 35 (2) (e) of the Constitution states that:

> '(2) Everyone who is detained, including every sentenced prisoner, has the right-
>
> …
>
> (e) to conditions of detention that are consistent with human dignity, including at least exercise and provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.
>
> (f) to communicate with, and be visited by, that person's-
>
> …
>
> (iv) chosen medical practitioner.'

[35] Comrie AJA in **S v VAN WYK**[8] held:

> 'The function of the court in a bail application is to prima facie determine the relative strength of the State's case and not to make provisional finding of guilt or innocence.
>
> Insofar as an accused does not receive proper medical attention whilst in detention, she or he has other legal remedies at her or his disposal and, in general bail is not the remedy for the actions and

[8] 2005 (1) SACR 41 (SCA) at 42b-d

omissions of the prison authorities. What remains important is the fact that the restrictions of her or his detention and attendance at the trial are not ideal for a person in a weak physical condition. Naturally the interference with her or his freedom is an important factor which has to be given much weight when deciding on the interests of justice, but the medical condition of the accused must be weighed against other factors and must not be considered in isolation.'

[36] Mbenenge AJ in **S v MPOFANA**[9] held that:

"Upon a proper construction of s 35 (2) (2) and (f) of the said Constitution, one whose detention has been pronounced lawful and in the interests of justice cannot simply resort to a further bail application merely because he has been detained under inhumane and degrading conditions or on the ground that his right to consult with a doctor of his own choice has been infringed. It is, however available to such person firstly to apply to the prison authorities concerned and call upon them to remedy whatever complaints he/she has with regard to the conditions of his/her detention. Should the prison authorities fail to remedy such complaints, it is available to the detainee concerned either to challenge the detention before a court of law as being unconstitutional or obtain a court interdict to force the prison authorities to comply with the law."

[37] Van Zyl J in **S v PETERSEN**[10] expressed the following view regarding new facts:

"[57] When, as in the present case, the accused relies on new facts which have come to the fore since the first, or previous, bail application, the court must be satisfied, firstly, that such facts are indeed new and secondly, that they are relevant for purposes of the new application. They must not constitute simply a reshuffling of old evidence or an embroidering upon it. See *S v De Villiers* 1996 (2) SACR 122 (T) at 126*e-f*. The purpose of adducing new facts is not to address problems encountered in the previous application or to fill gaps in the previously presented evidence.

[58] Where evidence was available to the applicant at the time of the previous application but, for whatever reason, was not revealed, it cannot be relied on in the later application as new evidence. See S v Le Roux en Andere 1995 (2) SACR 613 (W) at 622a-b. If the evidence is adjudged to be new and relevant, then it must be considered in conjunction with all the facts placed before the court in previous applications, and not separately. See *S v Vermaas* 1996 (1) SACR 528 (T) at 531*e-g*; *S v Mpofana* 1998 (1) SACR 40 (Tk) at 44*g*-45*a*; *S v Mohammed* 1999 (2) SACR 507 (C) ([1999] 4 All SA 533) at 511*a-d*."

[38] In paragraph 3 of his replying affidavit the applicant states that Ms Spangenberg completed a comprehensive psychological report taking into account his '*current poor mental health'.* Ms Spangenberg concedes that certain important and standard findings in this kind of evaluation could not be taken into account. It is unclear what she meant when she said:

'It is clear that as the evaluation progressed, he [the applicant] presented with signs of exhaustion and anxiety when he related certain circumstances and events. The anxiety was concurrent with traumatic events that he experienced during timeline of events. The emotions portrayed were synchronic with the information provided at the time.'

[39] According to the internal memo compiled by Mr Sibisi of Kimberley Correctional Centre the TB patients complained of by the applicant were kept in isolation for a

[9] 1998 (1) SACR 40 (Tk) at 45f-h
[10] 2008 (2) SACR 355 (C) paras [57] & [58]; see also S v Nwabunwanne 2017 (2) SACR 124 (NCK) para [24]

period of two months under treatment until they tested negative. He states that in the communal cell wherein the applicant is kept there are twenty four awaiting trial detainees and that is the basic bed accommodation. His glucose levels had been tested and monitored and found to be normal. He was also unable to rebut the reports of Ms Kgobi and Mr Sibisi.

[40] The applicant informed Ms Spangenberg that the diabetic diet was not provided to him. This information cannot stand in the face of Ms Manake's testimony that the applicant's diet was prescribed by the doctor and the prison officials adhered to it until he demanded that mealie-pap be added in it despite the doctor's instructions that it should be starch free. He did not lead evidence challenging the fact that the prison officials were aware of his condition and catered for his needs. Ms Manake testified that in trying to comply with the doctor's instructions regarding his diet, taking into account the applicant's demands, they had to reduce his vegetable intake.

[41] The information compiled by Kimberley Correctional Centre dated 29 June 2018 is detailed and shows that since the applicant arrived from Kuruman Correctional Centre on 24 January 2017 he consulted with their in-house doctor who recorded his diabetic condition as stable. Even the treatment that was prescribed is recorded in his medical file. His complaints concerning his health were also recorded together with the prescribed medication. The prison officials ensure that he is well taken care of.

[42] What is significant from this passage is that Ms Spangenberg depended on the say so of the applicant and there is no detail of what she was informed. There is also no basis for her conclusions. She relies on a once-off evaluation with no follow up. She states that the applicant's concentration and memory are markedly impaired and that his ability to properly prepare for trial is even impaired. This is in stark contrast with what is stated earlier regarding his mental state **(**see paragraph 12 *supra*). The only reasonable inference that can be drawn from the assumptions arrived at by the Psychologist is that the applicant was not candid with her. I say so because the information given to her was not verified from the prison authorities. The report is

silent about taking into account any other factors save for the applicant's personal circumstances. Her recommendation that the applicant be released on bail is seen in the context of the initial purpose as to why the report was compiled. The report is clearly not objective and contradicts the objective facts of this matter.

[43] The applicant did not seriously challenge the State's allegation that there is a strong case against him. Horn JA in **S v JONAS**[11] held that the appellant would succeed in doing if he is able to show by adducing acceptable evidence that the State's case against him is non-existent or subject to serious doubt. This is not the case in the instant case. The applicant did not allege that the material aspects on the merits of the case, especially those relied upon by the respondent, are factually incorrect. For instance he alleges that the section 204 witness[12] made various contradictory statements. He says that the respondent relies on hearsay and fabricated statements of witnesses. This allegation is unsubstantiated.

[44] In terms of s 60 (11) of the CPA the appellant has to adduce adequate evidence to satisfy the court that he is entitled to release on bail. No argument was advanced that the case against him is weak or non-existent which would probably result in his acquittal during the trial. He merely proclaims his innocence and that it is in the interests of justice that he be released on bail. Lt Col Louwrence testified in detail concerning the evidence against the applicant during the previous bail application. Though he had an opportunity to do so, the applicant did not place any evidence in rebuttal. The State disputes that the investigating officer linked the applicant to the crimes by fingerprint evidence. If that was the case, this should have been brought to the attention of the court during the bail application in December 2016.

[45] Incarceration, under normal circumstances, affects anyone lawfully detained who is presumed innocent until proven otherwise. It is not a pleasant experience as it affects those concerned emotionally, physically and otherwise. It also affects those persons close to the detainee. The allegation that the appellant's wife was traumatised by Lt Col Louwrence and an interdict was sought against him for verbal torture, harassment, emotional abuse and subjecting her to arbitrary arrest was not

[11] 1998 (2) SACR 677 at 679h
[12] S 204 of the Criminal Procedure Act, 51 of 1977

corroborated by his wife. Moreover, no interdict was served on him advising him of the said allegations.

[46] In his founding affidavit the applicant concedes that he has access both to medical doctors and legal representatives of his choice. In this regard I consider the fact that previously Ms Spangenberg experienced co-operation during her consultation with the applicant on 11 August 2018, hence she managed to compile the report. I also take into account the evidence of Ms Manake regarding the procedure to be followed in respect of visits by private medical doctors and legal representatives. This also goes for the misunderstanding that took place when Mr Pistorius and Ms Spangenberg visited the prison looking for the applicant.

[47] The applicant alleges that if he is kept in custody he will not be in a position to secure funding for his legal representative and prepare for his trial. He does not play open cards with the court and mention how he intends to source funds for such a long trial when released on bail in a space of almost two weeks before the trial commences especially when he could not do that in two years. There is no indication whether Mr Pistorius would be available to continue with the trial from 15 October to 14 December 2018 as scheduled.

[48] The applicant alleges that he is not properly prepared for his trial because he has not consulted with the legal representative appointed by Legal Aid South Africa. It is so that every detainee has a right to choose and consult with his/her legal practitioner and to be informed of this right promptly. If such detainee has no funds he has a right to have a legal practitioner assigned to him/her by the State and at State's expense, <u>if substantial injustice would otherwise result</u>, and to be informed of this right promptly.[13] It does not mean that a legal practitioner appointed by the State does not do justice to their clients. Most detainees who cannot afford legal representation of their choice opt for counsel appointed by the State and they appear in our courts on a daily basis facing serious charges. There has never been an implication that they are not afforded fair trials. The treatment will not be different to the applicant *in casu* and he will suffer no prejudice. (My underlining)

[13] Section 35 (2) (c) of the Constitution

[49] Regarding consideration of the new facts it is clear that none of the facts raised by the applicant are new save for the deterioration of his medical condition. Although that may be so no medical reports accompany his application to confirm this version. Notably, he was treated by the in-house and private doctors. His medical condition cannot be considered in isolation but must be weighed against other factors in order to ascertain whether the interests of justice would be served if he is released on bail. His medical condition should be compared with the detailed information provided by the prison authorities regarding his treatment, diet, medication, and his physical condition and dates that he was regularly monitored. The report compiled on behalf of the Correctional Services Centre is inconsistent with his assertion that his mental health is currently poor. In my view, he exaggerates his condition. His failure to attach relevant medical reports in support of his alleged deteriorating medical condition compromises his application as he bears the *onus.* Mere and vague assertions are insufficient.

[50] It is of great significance to consider that the trial in this matter is due to commence in a few days. Dambuza J stated in **S v NAJOE**[14] thus:

> "[14] It is true that any length of time spent by an innocent person in custody is too long, and that the applicant has already spent over a year in detention. Reubenheimer's evidence was that the police investigations in this matter were finalised in three weeks. The delay in bringing the matter to trial is neither the fault of the state nor that of the defence. The problem is congestion of the court rolls. As things stand, the case will go to trial on 12 September 2012, just over three months from now."

[51] In the instant case the State was ready to proceed with the trial as early as March 2017 as alluded to earlier. According to Mr Cloete full discovery of the docket had been made at that stage already. The trial is scheduled to start in twelve day's from the date of this order. This matter has to come to finality in the interests of everyone concerned. This is also conceded by the applicant.

[52] Mr Cloete submits that the real reason why the applicant requests release on bail is to seek a postponement once he is out on bail under the guise of sourcing funding for his legal representative. This was disputed by the applicant. The State's

[14] 2012 (2) SACR 395 (ECP) at para [14]

submission is not far-fetched though because it seems impossible for the applicant to source funds for his trial in about 12 days from now. He does not take this Court into his confidence and say how this is possible.

[53] In the context of s 60 (11) (a) of the CPA the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for certain measure of flexibility in the judicial approach to the question.[15]

[54] I am not satisfied that the facts raised by the applicant are new and that the psychologist report does not establish exceptional circumstances for reasons already advanced. I am also not persuaded that he has discharged the *onus* resting on him to prove on a balance of probabilities that the interests of justice permit his release on bail.

[55] **The application is dismissed.**

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BM PAKATI
JUDGE-NORTHERN CAPE DIVISION, KIMBERLEY

On behalf of the Applicant:	*Adv PF Pistorius*
Instructed by:	*Andre Potgieter & Partners*
On behalf of the Respondent:	*Adv H Cloete & Adv K Ilanga*
Instructed by:	*Director of Public Prosecutions*

[15] S v Petersen (supra) at para [56] and cases quoted therein