THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 144/2018

In the matter between:

WILLEM JACOBUS ALBERTUS OOSTHUIZEN **FIRST APPLICANT**

THEO MARTINS JACKSON **SECOND APPLICANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Oosthuizen & another v S* (144/2018) [2018] ZASCA 92 (1 June 2018).

Coram: Navsa and Willis JJA and Schippers AJA

Heard: 28 May 2018

Delivered: 1 June 2018

Summary: Bail pending appeal – leave to appeal having been granted does not, per se, entitle a person to be released on bail - there has to be a real prospect that a non-custodial sentence will be imposed – provocation as a defence discussed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria, (functioning as the Mpumalanga Division, Middelburg) (Mphahlele J sitting as court of first instance):
The applicants' application for leave to appeal the refusal by the court below to grant bail is dismissed on the grounds that there are no reasonable prospects of success and there is no other compelling reason why an appeal should be heard.

JUDGMENT

Navsa JA (Willis JA and Schippers AJA concurring)

[1] This is an application for leave to appeal by two applicants, namely, Messrs Willem Jacobus Albertus Oosthuizen (Oosthuizen) and Theo Martins Jackson (Jackson),[1] against the refusal of bail by the Gauteng Division of the High Court, Pretoria, functioning as the Mpumalanga Division, Middelburg. The application was referred by this court for oral argument in terms of s 17(2)(*d*) of the Superior Courts Act 10 of 2013 (the Act). It concerns a case that has attracted national media and public attention because it has stark and disturbing racial connotations. In national public discourse the matter has been described as 'the coffin case'. Race as an historically destructive divisive factor, is something that no South African can be unaware of. It is an aspect to which I will revert.

[2] In referring the matter for oral argument the parties were directed to be prepared, if called upon to do so, to address us on the merits of the appeal against the refusal of bail. Submissions were made by the parties, both in relation to the application for leave to appeal and the merits. The background is set out hereafter.

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[1] Depending on the context, I will, throughout the judgment, refer to the applicants as 'Oosthuizen' and 'Jackson' or collectively as 'the applicants'.

[3] During 2017 Oosthuizen and Jackson faced the following seven charges in the court below:

'Count 1: the unlawful possession of a firearm in contravention of section 3 read with section 3, 103, 120(1)(a) and 121 of Act 60 of 2000 and further read with the provisions of section 51 of Act 105 of 1997;

Count 2: assault with intent to cause grievous bodily harm;

Count 3: assault with intent to cause grievous bodily harm;

Count 4: kidnapping;

Count 5: attempted murder;

Count 6: intimidation; and

Count 7: defeating or obstructing the course of justice.'

[4] For a better appreciation of the sequence of events and the facts alleged by the State, it is necessary to have regard, first, to the particulars in the charge sheet in relation to the charge of kidnapping (count 4), which read as follows:

'In that upon or about [17 August 2016] and/or near [Big House Squatter Camp in the district of Blinkpan], the accused did unlawfully and intentionally deprive Victor Rethabile Mlotshwa of his freedom of movement, forcing him into the back of a bakkie, tying his hands against the roller bar in the bakkie and drove him to a place unknown to the victim.'

[5] Second, the particulars in relation to count 5 sets out what, according to the State, occurred thereafter:

'In that upon or about 17 August 2016 and at or near Hendrina Power Station, in the district of Blinkpan, the accused did unlawfully and intentionally attempt to kill Victor Rethabile Mlotshwa by threatening to shoot him, hitting and/or beating him continuously with a knobkerrie to force him to climb into the coffin, threatening to put a snake inside the coffin and forcefully attempting to close the coffin and also threatened to pour petrol onto him whilst inside the coffin, and set him alight.'

[6] Following on the particulars in relation to count 4, set out above, the State's case in relation to the charge of intimidation (count 6) was that, one of the complainants, Mr Victor Rethabile Mlotshwa (Mlotshwa), was kidnapped, in order to prevent him from escaping and reporting the incident to the police and was threatened by Oosthuizen and Jackson. According to the charge sheet they threatened to shoot and kill him.

[7] In respect of count 2, it was alleged by the State that 'upon or about 17 August 2016 and at or near the Big House Squatter Camp, in the district of Blinkpan, the accused did unlawfully and intentionally assault Delton Sithole by hitting him with open hands and kicking him with booted feet with the intention of causing him grievous bodily harm'.

[8] Count 3 was also one of assault with intent to cause grievous bodily harm. It was alleged that upon or about 17 August 2016 the accused did unlawfully and intentionally assault the complainant by hitting him with open hands and kicking him with booted feet and fastening his hands with a cable-tie against a roller bar of the bakkie with the intention of causing him grievous bodily harm.

[9] With regard to count 1, namely the unlawful possession of a firearm, it was alleged by the State that on the day on which the events referred to took place, and at the location where the complainant was allegedly kidnapped, Oosthuizen was in unlawful possession of a firearm in contravention of s 3 read with sections 103, 120(1)*(a)* and 121 of the Firearms Control Act 60 of 2000 and further read with the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997.

[10] The particulars supplied by the State regarding count 7, which related to the defeating or obstructing the course of justice, are set out in the charge sheet as follows:

'[U]pon or during the months of October and/or November 2016, and at or near Broodsnyersplaas in the district of Blinkpan, the accused did unlawfully and with intent to defeat or obstruct the course of justice, burn to ashes a coffin that was used in the commission of the offence to conceal evidence, which act defeated or obstructed the course of justice.'

[11] The trial was conducted before Mphahlele J. Oosthuizen was acquitted on count 1. On 25 August 2017, both Oosthuizen and Jackson were convicted on counts 2 to 6. In addition, Jackson was convicted on count 7.

[12] The applicants were sentences on 27 October 2017. Oosthuizen was sentenced as follows:

'Count 2: (the assault with intent to do grievous bodily harm to Mr Delton Sithole, the first complainant) – 3 years' imprisonment.

Count 3: (the assault with intent to do grievous bodily harm to Mr Victor Rethabile Mlotshwa, the second complainant) – 3 years' imprisonment.

Count 4: (kidnapping) – 5 years' imprisonment.

Count 5: (attempted murder) – 7 years' imprisonment.

Count 6: (intimidation) – 6 years' imprisonment.

The sentence imposed in respect of count 3 is ordered to run concurrently with the one imposed in respect of count 6.

The sentence imposed in respect of count 4 is ordered to run concurrently with the one imposed in respect of count 5.'

The cumulative sentence of 16 years' imprisonment was ameliorated in that Mphahlele J ordered five years thereof to be suspended for a period of eight years on condition that Oosthuizen is not found guilty of any of the offences he was convicted of during the period of suspension. The effective sentence was thus one of 11 years' imprisonment.

[13] Jackson was sentenced as follows:

'Count 2: (the assault with intent to cause grievous bodily harm to Mr Delton Sithole, the first complainant) – 3 years' imprisonment.

Count 3: (the assault with intent to cause grievous bodily harm to Mr Victor Rethabile Mlotshwa, the second complainant) – 3 years' imprisonment.

Count 4: (kidnapping) – 5 years' imprisonment.

Count 5: (attempted murder) – 7 years' imprisonment.

Count 6: (intimidation) – 6 years' imprisonment.

Count 7; (defeating or obstructing the administration of justice) – 3 years' imprisonment.

The sentence imposed in respect of count 3 is ordered to run concurrently with the one imposed in respect of count 6

The sentence imposed in respect of count 4 is ordered to run concurrently with the one imposed in respect of count 5.'

As with Oosthuizen, Jackson's cumulative sentence of 19 years' imprisonment was ameliorated in that five years of his sentence was suspended for eight years on condition that he is not found guilty of any of the offences he was convicted of during

the period of suspension. His effective sentence is thus one of 14 years' imprisonment. Subsequently, the trial judge altered the period of suspension to 5 years. It is to be noted that in terms of s 297(1) of the Criminal Procedure Act 51 of 1977 (the CPA) a sentence of imprisonment cannot be suspended for a period exceeding five years.

[14] On 27 October 2017, applications for leave to appeal by Oosthuizen and Jackson in the court a quo, against their convictions and related sentences, proved unsuccessful. Consequently, both filed an application for leave to appeal the convictions and sentences in this court.

[15] On 7 December 2017, the applicants applied in the court a quo to be released on bail pending the outcome of the application for leave to appeal to this court. That application was refused. In refusing bail, Mphahlele J, inter alia, said the following:

'I am still of the considered view that there are no reasonable prospects of success in respect of the appeal. As I have already mentioned, the application is brought, pending the outcome of the petition, whatever the outcome of the petition and the subsequent appeal, should the leave to appeal the judgment and sentence be granted, taking into account the evidence that was presented in this court and the nature and seriousness of the offences the applicants were convicted of, it is likely that the sentences to be imposed on appeal would be custodial. The granting of the appeal, would be like delaying the inevitable.

Under the circumstances, the application for bail is hereby refused.'

[16] On 2 February 2018 this court granted the applicants leave to appeal against their convictions and the related sentences. This prompted the applicants to apply to this court for leave to appeal the refusal of bail by the court below.

[17] In their application for leave to appeal, the applicants criticised the court below, (Mphahlele J), for not considering whether the applicants, 'in fact and in law have a reasonable prospect of success' in relation to the merits of an appeal against their convictions and sentences and ignored what was described as systemic difficulties 'in expediting appeals in this court'. The court below was also criticised for subsequently amending the period of suspension referred to above on the basis that

the substance thereof was not altered and that it was nothing more than a typographical error.

[18] In respect of their prospects of success in relation to the merits of their appeal against the convictions and sentences, the applicants contended that it is clear from the record and especially from the objective evidence, such as a video recording which they took of the incident, that Mlotshwa did not sustain severe physical injuries. They submitted, further, that the State had failed to prove the requisite mens rea in respect of several of the charges faced by them. They contended that the evidence adduced in the court below favoured their version of events rather than the State's.

[19] In their applications for leave to appeal the applicants set out, in summary, the State's case and contrasted it with their version of events. The summary, in their words, bears repeating and is set out hereafter:

'17.2.1 <u>According to the state:</u>

- We, on 17 August 2016, caught Sithole and Mlotshwa without any apparent reason;
- Immediately commenced to viciously assault them;
- Then released Sithole for no apparent reason;
- Then took (abducted) Mlotshwa to a silage ditch close by where we attempted to murder him and intimidated him by threatening to kill him, should he inform the police; and
- Mlotshwa sustained serious injuries.

17.2.2 <u>On the other hand, our version is that</u>:

- We never met Sithole prior to his appearance in court;
- His evidence as a whole was introduced by either the state or perhaps Mlotshwa to support the state's version;
- We, on 7 September 2016, caught Mlotshwa as a result of his acting suspiciously;
- Mlotshwa had suspected stolen copper cable in his possession;
- We informed him that we were taking him to the police;
- Mlotshwa then threatened to burn our crops every year and to murder our families (who were alone at home during most of the day);
- Mlotshwa's threats provoked us and as a result, we took a decision to rather teach him a lesson by scaring him in order to deter him from carrying out his threats and to prevent him from stealing in future;

- We then took him to a nearby silage ditch;
- Jackson collected a coffin from his employer's farm;
- We instructed Mlotshwa to get into the coffin and then threatened to place a snake inside the coffin with him and to burn the coffin with him inside;
- We recorded the incident on our mobile phones to prove, if necessary, that he was neither assaulted nor injured; and
- Upon us noticing that he was crying and that he was really scared and we having achieved our objective, we released him without so much as a scratch.'

[20] In addition to their complaints set out above, the applicants contended that several of the offences, such as the assault on Mlotshwa, his kidnapping and attempted murder, were committed with the same intention and that the evidence required to prove one count also proved the others. In short, they complained that there had been a splitting of charges and a duplication of convictions.

[21] Before considering whether the application for leave to appeal against the refusal of bail should succeed, it is necessary to note the admissions made by the applicants in the court below in relation to the charges faced by them, the correctness of which was accepted before us. In relation to Oosthuizen, the following admissions were made:

'1. That he was present on 7 September 2016, along with the second accused and at or near the R25 Middelburg-Bethal Road in the Blinkpan District;

2. That he and the second accused encountered Victor Rethabile Mlotshwa;

3. That he and the second accused requested Mlotshwa to get onto the back of the bakkie driven by him;

4. That he took Mlotshwa to a silage ditch on the farm Blesbokvlakte;

5. That he and the second accused forced Mlotshwa to get into a coffin at the silage ditch;

6. That while Mlotshwa was in the coffin, he and second accused tried to close the lid of the coffin;

7. That while Mlotshwa was in the coffin, he and second accused threatened that

7.1 they would burn him with the coffin; and

7.2 they would put a snake with him inside the coffin.

[22] Jackson made the following admissions:

‘1. He together with the first accused were present at or near the Middelburg-Bethal Road in the district of Blinkpan on 7 September 2016;
2. He and the first accused there and then encountered Victor Rethabile Mlotshwa;
3. Mlotshwa was told to climb into a coffin whereafter they attempted to close the lid;
4. They threatened whilst Mlotshwa was in the coffin:
4.1 to burn him with the coffin; and
4.2 put a snake in the coffin with him.
5. He, during October 2016 and on the instructions of his employer and at the farm Blesbokvlakte, destroyed the said coffin in which Mlotshwa was placed, by burning it.’

[23] We are in the difficult position of being precluded from pronouncing finally on contested issues still to be adjudicated by fellow judges in this court in the appeal on the merits of the convictions and sentences. We thus limit ourselves to a consideration of that which is largely uncontested or common cause and on the relatively limited record presented to us.

[24] It was put to counsel on behalf of Oosthuizen that, on the admissions recorded in the court below and their contentions set out in paragraphs 21 and 22, the applicants could, at the very least, be convicted of kidnapping, assault with intent to do grievous bodily harm and that Jackson, in addition, could be convicted of defeating or obstructing the course of justice. The response was that provocation in the circumstances of the case could be relied upon to thwart a conviction. The provocation, in this instance, it was submitted, was that Mlotshwa arrogantly threatened to murder their families and annually burn their crops. Counsel on behalf of Jackson contended likewise. We refrain from making a credibility finding on whether, in the circumstances, where Mlotshwa was admittedly physically restrained by the applicants, he could have behaved as alleged.

[25] It was contended on behalf of the applicants that they were entitled to confront Mlotshwa and arrest him when they found him in possession of copper cables, the origins of which could not be precisely determined. Their explanation as to why they did not take him to the police was that he had begged them not to and was ready to subject himself to whatever they might have had in mind. This is an aspect on which I will comment later.

[26] Furthermore, it was put to counsel on behalf of both the applicants that in the circumstances, provocation might, at best, in the event of their version of events being accepted, perhaps be a mitigating factor rather than being exculpatory. The response was that, even then, it might result in a non-custodial or significantly reduced sentence and what had to be borne in mind, is that the applicants had already spent a year in prison and release on bail should be favourably considered.

[27] Counsel on behalf of both the applicants rightly conceded that race was a factor that impacted on the case. That concession has to be seen in the light of the following uncontested summary of the relevant part of Oosthuizen's testimony by the court below:

'He further testified that on one occasion he assisted De Beer, the first witness, to apprehend persons who were stealing maize. De Beer informed him that he had scared those individuals off with a coffin. Bearing this in mind, he asked the second accused whether they still had the coffin or not. He thought it wise to threaten Mlotshwa with a coffin so he could stop the threats and further deter him from stealing again. They then agreed that the second accused would go and collect the coffin and they would meet later on at the Hendrina-Pollens Hope gravel road.'

A little later, the judgment records the following additional part of his evidence:

'He further confirmed that the coffin was used on black people suspected of theft and those people never reported the incidents to the police.'

[28] For present purposes, I am willing to accept that there might be some merit to the contentions on behalf of the applicants in relation to the duplication of convictions, which will probably have some impact in relation to the severity of the sentences imposed by the trial court. There is also some force to the submission that alteration of the period of suspension is one of substance. These factors, no doubt, played a part in this court granting leave to appeal. The latter submission might, however, not have a direct impact on whatever sentence is ultimately deemed to be appropriate by this court.

[29] In *S v Masoanganye & another* [2012] ZASCA 119; 2012 (1) SACR 292 (SCA), this court held that the granting of an application for leave to appeal does not,

per se, entitle a person to be released on bail. There has to be a real prospect in relation to success on convictions and that a non-custodial sentence might be imposed, such that any further period of detention before the appeal is heard would be unjustified.[2] Counsel on behalf of the applicants were constrained to accept that a contrary conclusion on the facts of the present case militates against the application being successful.

[30] As stated earlier, great score on behalf of the applicants was placed on provocation, either as an exculpatory or a mitigating factor. I do not intend to embark on an exhaustive excursus on provocation, but limit the discussion to what, for present purposes, is required. Roman law and Roman-Dutch law did not regard anger, jealousy or other emotions as an excuse for any criminal conduct, but only as a factor which might mitigate sentence if the anger (emotion) was justified by provocation.[3] That used to be the position that pertained in most legal systems.[4] More recently there have been developments elsewhere[5] and there have also been developments in our law in relation to provocation.[6] There was a time when our law repeatedly recognised extreme provocation as a complete defence under the term 'non-pathological criminal incapacity'. Commentators have stated that since this court's decision in *S v Eadie* 2002 (3) SA 719 (SCA), provocation leading up to a lack of criminal capacity as a defence has been limited, if not dealt the death knell.[7]

[31] In the present case there is no indication that provocation was ever relied upon by the applicants in relation to a total lack of criminal capacity. There is also no indication in the record that the applicants placed any reliance on s 78(7) of the CPA, which provides:

'If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was

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[2] See para 14. See also *R v Mthembu* 1961 (3) SA 468 (D) and *S v Scott-Crossley* 2007 (2) SACR 470 (SCA).
[3] See J M Burchell et al *South African Criminal Law and Procedure* vol 1 (2011) 4 ed at 53.
[4] See J M Burchell et al *South African Criminal Law and Procedure* vol 1 (1997) 3 ed at 202.
[5] See Burchell fn 3 at 344-346 and 349-350.
[6] See Burchell fn 3 at 53-54 and 338-345 and, also, C R Snyman *Criminal Law* (2008) 5 ed at 236-242.
[7] See Burchell fn 3 at 53-54 and C R Snyman *Criminal Law* (2014) 6 ed at 232-233.

diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.'

Having regard to the admissions made by the applicants referred to above and to what was stated by them in their applications for leave to appeal, referred to in paras 19, 21 and 22 above, that position appears to have been adopted advisedly.

[32] C R Snyman *Criminal Law* (2014) 6 ed at 234, points out that provocation ought to operate as a ground for mitigation of sentence only if there are reasonable grounds for an accused's anger. The following dictum in *S v Mandela* 1992 (1) SACR 661 (A) at 665A-C is instructive:

'Wesenskenmerk van provokasie as versagtende faktor is die onmiddelikheid van die boosdoener se reaksie op die slagoffer se toornverwekkende handeling. Die boosdoener moet onverwyld en in die hitte van die oomblik tot sy geweldsdaad oorgaan. 'n Vertraagde vergeldingshandeling met voorbedagte rade is heeltemal die teengestelde van daardie momentele verlies aan of inkorting van selfbeheersing wat die waarmerk van provokasie dra. Waar, soos hier, die boosdoener eers na verloop van aansienlike tyd na die uittartende optrede, en nadat hy behoorlik geleentheid tot bedaring en besinning gehad het, sy slagoffer in koelen bloede om die lewe gebring het, kan daar van provokasie as versagtende faktor nouliks sprake wees.'[8]

[33] The following was said by Plasket J in *S v Ndzima* 2010 (2) SACR 501 (ECG), para 30:

'While it is a feature of provocation as a mitigatory factor that the criminal act that resulted from it is usually committed immediately after the provocative act, the extent to which it is mitigatory depends, essentially, on whether the accused's loss of control as a result of his or her anger would be regarded by an ordinary reasonable person – "'n gewone redelike mens" – as an excusable human reaction in the circumstances. In this matter, a reasonable person would baulk at the suggestion that the appellant's acts of executing his incapacitated victims were understandable in the circumstances, even though he was justifiably and understandably angry at having been assaulted and, no doubt, fearful when he fired the first

[8] 'A material feature of provocation as a mitigating factor is the immediacy of the wrongdoer's reaction to the victim's provocative act. The wrongdoer must have immediately and in the heat of the moment resorted to violent conduct. A delayed act of premeditated retribution is the complete opposite of momentary loss of or reduced self-control which carries the stamp of provocation. Where, as in this case, the wrongdoer, kills his victim in cold blood a considerable time after the provocative act and after having had time to calm down and come to his senses, provocation cannot be considered as a mitigating factor.' (My translation.)

shots. That he was provoked, and that the provocation was severe, is not in dispute. That the anger evoked by the provocation led him to shoot the deceased who was running away is also understandable. But then to execute both of the deceased, when he ought to have been able to reflect on what he had done and to realise that he was no longer in any danger, cannot be regarded as an excusable human reaction to the provocation.'

[34] In light of what is set out in the preceding two paragraphs, I now turn to what is set out in the applicants' heads of argument. The following are the written submissions on behalf of the applicants in respect of the assault convictions:

'16.2 In respect of a possible finding of assault, it is respectfully submitted that should it be held that applicants' version cannot be disregarded and therefore has to be accepted, that:

16.2.1 There was a sufficient provocation to warrant retaliatory action;

16.2.2 The retaliation occurred without premeditation and in the face of great and sudden anger;

16.2.3 The retaliation followed immediately upon the provocation; and

16.2.4 The retaliation was moderate, reasonable, and commensurate in nature with the provocation.

16.3 In the result it may be held that the accused's actions were not unlawful.'

[35] What has to be borne in mind is that when Mlotshwa was first encountered, on the applicants' version, he was in possession of copper cables which they suspected were stolen. Their explanation as to why he was not taken to the police, if they genuinely suspected him of theft, is not particularly persuasive. The justification proffered by them was that he begged them to do anything to him *but* deliver him to the police. As stated earlier, on their own version of events and on the basis of the admissions made, the applicants were, at the very least, guilty of kidnapping. They had unlawfully and intentionally deprived him of his liberty.[9] In their own words, they forced Mlotshwa into a coffin and 'then threatened to place a snake inside the coffin with him and to burn the coffin with him inside'. Even if one were to accept, as they alleged, that the State had not proved severe physical injuries, it is difficult to even begin to imagine the psychological torment that Mlotshwa must have suffered.

[36] In dealing with 'the intent to do grievous bodily harm', J R L Milton *South African Criminal Law and Procedure* vol 2 (1996) 3 ed at 432, said the following:

[9] See J R L Milton *South African Criminal Law and Procedure* Vol 2 (1996) 3 ed at 544.

'What is required is that X must have known, or at least foreseen the possibility, that his conduct (whether this took the form of the application of force or threats) might cause Y grievous bodily harm.'

In the Zimbabwean case, *R v Edwards* 1957 R & N 107, it was held that grievous bodily harm is 'harm which in itself is such as seriously to interfere with health'.[10]

[37] Even if one were to accept that Mlotshwa threatened the applicants in the manner set out above, one would have expected them to have taken him to the police. They, however, followed their prior instinct, which was to resort to their own brand of justice. They kidnapped Mlotshwa, drove him to a particular location, fetched a coffin, forced him into it and made the most horrendous threats, including fetching a lighter to make it seem that they would carry out their threats. Whatever else, their retaliation, if indeed it was that, can hardly be described as moderate, reasonable and commensurate, as submitted by their counsel. On their own version of events, this was vigilantism at its worst.

[38] The offences, which on the applicants' own version of events they committed, namely, that of kidnapping and the assault referred to above, are serious offences. There was rightly an acceptance on behalf of the applicants, that race was, in the circumstances of the present case, an aggravating factor. From the evidence referred to in para 27 above, there appears to have been a practice on the part of Jackson's employer, Mr De Beer, to use a coffin *in terrorem* against black persons. On Oosthuizen's own evidence he was aware of this. By their actions, the applicants associated themselves with the practice. The submissions advanced before us were indicative of no remorse on the part of the applicants. If anything, there appears to be a sense of justification and resistance. We were taken aback when counsel on behalf of Oosthuizen suggested that Mlotshwa's 'terrorism', which consisted of the threats he apparently made, could rightly be met with the 'counter-terrorism' he was subjected to. It was submitted on his behalf that it was regrettable that farm attacks and murders (presumably with white farmers and their families as victims) were not met with equal opprobrium. The court hearing the appeal on the merits will, no doubt, consider whether the full record demonstrates any degree of real remorse. It cannot be ignored that the video recording of Mlotshwa's ordeal was made by the applicants

[10] See also Milton at 433 and the authorities there cited.

and only they could have been the source of its publication which, in modern language, went viral, adding to Mlotshwa's further humiliation and the violation of his dignity. The seriousness of the offences and the probable sentences militate against releasing the applicants on bail.

[39] The applicants assert their right to liberty and to a fair trial and procedure whilst ignoring how they infringed on Mlotshwa's fundamental rights, including his right to dignity and physical integrity.

[40] Having regard to what is set out in the preceding paragraphs, a probable outcome of the appeal on the merits is that the offences admittedly committed by the applicants will attract significant custodial sentences, extending beyond the one year they have already spent in custody and beyond the time of the hearing of the appeal on the merits. This is like to occur, even if their version that they were provoked in the asserted manner is to be accepted. The applicants' concern about systemic failure in the administration of justice is not justified. Their counsel accepted that at the very latest, a hearing of the appeal on the merits could be arranged for the last court term of this year. They are also free to approach the President of this court for an expedited date during the next court term.

[41] In refusing to grant bail pending the application for leave to appeal, Mphahlele J stated that a custodial sentence was inevitable. We have come to the conclusion that a significant custodial sentence is probable. It is not in the interests of justice that the applicants be released, pending the hearing of their appeal on the merits.

[42] It is sad, as this case and others in the public eye demonstrate, that we as a nation have reached this stage of racial polarisation and that we have not yet overcome the deep divisions that our history imposed on us. It is the very antithesis of our constitutional compact. We cannot ignore the fact that racial intolerance is something that can be exploited by those intent on undoing and subverting constitutional values. Racist behaviour is absolutely unacceptable and courts can rightly be expected to deal with it firmly. Maya Angelou, the American author and poet, said the following:

‘Prejudice is a burden that confuses the past, threatens the future and renders the present inaccessible.’[11]

We cannot allow our futures and the future of our children and grandchildren to be undone.

[43] Lastly, and with apologies to a great American and a former justice of their Supreme Court, Thurgood Marshall, whose words I have adapted to apply to us as a nation, I pause to reflect that we should, each of us, consider and apply them:

‘I wish I could say that racism and prejudice were only distant memories. . . . We must dissent from the indifference. We must dissent from the apathy. We must dissent from the fear, the hatred and the mistrust . . . We must dissent because [South Africa] can do better, because [South Africa] has no choice but to do better.’[12]

[44] The following order is made:

The applicants’ applications for leave to appeal the refusal by the court below to grant bail is dismissed on the grounds that there are no reasonable prospects of success and there is no other compelling reason why an appeal should be heard.

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M S Navsa

Judge of Appeal

[11] iZQuotes https://izquotes.com/quote/5536 (accessed 30 May 2018).

[12] An extract from Thurgood Marshall's acceptance speech upon receiving the Prestigious Liberty Award on 4 July 1992.

Appearances:

On behalf of the first applicant:	W W Gibbs Instructed by: Marius Coertze Attorneys, Pretoria Symington and de Kok Attorneys, Bloemfontein
On behalf of the second applicant:	J G W Basson Instructed by: Marius Coertze Attorneys, Pretoria Symington and de Kok Attorneys, Bloemfontein
On behalf of the respondent:	R Molokoane Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein