

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number : CC: 113/13

In the matter between:

THE STATE

and

OSCAR LEONARD CARL PISTORIUS

Accused

**AFFIDAVIT BY THE ACCUSED FOR BAIL AS IS ENVISAGED BY SECTION
60(11)(b) OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977**

I, the undersigned:

OSCAR LEONARD CARL PISTORIUS

do hereby make oath and state that:

1.

1.1 I am an adult male and the Accused in this matter.

1.2 I reside at 230 Lawley Street, Waterkloof, Pretoria.

2. The facts herein contained fall within my personal knowledge, save where otherwise stated and are to the best of my belief both true and correct. Wherever I advance submissions on the law, I do so on the advice of my legal representatives, which advice I accept.

3. The Supreme Court of Appeal set my conviction of culpable homicide and the sentence imposed aside and substituted it with murder, with criminal intention in the form of *dolus eventualis*. The matter was referred back to the Trial Court to consider an appropriate sentence on the basis of *dolus eventualis*.

4. I am advised that:

4.1 the present conviction constitutes a Schedule 5 offence for bail purposes;

4.2 Section 60(11)(b) of the Criminal Procedure Act 51 of 1977 ("the CPA") applies;

4.3 in terms of the provisions of Section 60(11)(b) of the CPA, I must satisfy the Court that the interests of justice permit my release on bail.

5. **Personal circumstances:**

5.1 I am 29 years old. I was sentenced to 5 years' imprisonment in terms of Section 276(1)(i) of the CPA.

5.2 I served 12 months at Kgosi Mampuru II Prison, whereafter I was released on correctional supervision for the remaining 4 years.

5.3 I will make the conditions for correctional supervision separately available to this Honourable Court as I believe the conditions are

confidential.

5.4 I have enrolled at the London School of Economics for a B.Sc business with law degree. I study by way of correspondence and need daily access to the internet for this purpose.

6. **History of bail in this matter**

6.1 I was arrested on 14 February 2013 on the allegation that I had committed premeditated murder.

6.2 I made a formal bail application, which was considered as a Schedule 6 bail application.

6.3 Bail was granted on certain conditions, which included a guarantee of R1 million.

6.4 Certain of the bail conditions were amended on appeal.

6.5 When I was convicted in the Honourable Court on culpable homicide, I successfully applied for the extension of my bail for purposes of sentence.

6.6 When I was sentenced, I commenced to serve my sentence and the bail lapsed. The guarantee was cancelled. I do not have the financial means to again furnish the guarantee. I offer to be under house arrest for the duration, as set out in the Conditions of bail, annexed hereto as "B".

6.7 I am instructed that Adv. Roux agreed with Adv. Nel that the State would not oppose my application for bail on condition that I shall not leave the house unless I first obtain permission from the investigating officer.

6.8 I consent to the restriction;

6.9 I am instructed that Adv. Roux has informed Adv. Nel that, should I be able to obtain employment, I would approach the High Court to consider to amend the bail conditions accordingly.

6.10 The State agreed that I would not be arrested for purposes of the bail application on the basis that I continue to abide by the conditions of my sentence imposed until the bail hearing. I agreed and have continued with my correctional supervision as if that sentence still applied.

7. **Assets and income**

7.1 I have no income, but will continue to seek employment, subject to what I have stated above. It was difficult to obtain employment due to my conviction and correctional supervision conditions.

7.2 I have lost all of my assets and only possess my personal assets.

8. **Previous convictions**

My legal representatives have explained the provisions of Section 60(11B)(a) of the CPA to me. I respectfully make the following submissions in this regard:

8.1 I have never been convicted of any criminal offence, either in the Republic of South Africa or elsewhere, other than the present offence and the conviction by the Trial Court that I negligently discharged a firearm;

8.2 I am not out on bail on any offence.

BASIS OF BAIL APPLICATION

9. The application for bail will be made on the basis:

9.1 that bail be granted pending an application for leave to appeal to the Constitutional Court and, if leave were to be granted, pending the outcome of the appeal;

9.2 if leave to the Constitutional Court were to be unsuccessful or if the appeal were to be unsuccessful, pending the imposition of a sentence by the trial Court.

APPLICATION FOR LEAVE TO APPEAL TO THE CONSTITUTIONAL COURT

10. The basis of the application for leave to appeal to the Constitutional Court,

which is not exhaustive, will be:

- 10.1 that the Supreme Court of Appeal, with respect, impermissibly reconsidered the factual finding made by the trial Court that I genuinely and honestly believed that my life and that of the deceased were in danger when I discharged the shots;
 - 10.2 that the Supreme Court of Appeal, with respect, by reconsidering the factual finding by the trial Court that I had discharged the shots in the genuine and honest belief that my life and that of the deceased were in danger, effectively denied me the right to apply for leave to appeal in regard to the contrary factual finding made by the Supreme Court of Appeal, being that I did not genuinely and honestly believe that my life and that of the deceased were in danger, when I discharged the shots;
 - 10.3 that the Supreme Court of Appeal, with respect, introduced an element of objectivity in considering putative defence, other than objective factors to determine credibility;
 - 10.4 that the Supreme Court of Appeal, with respect, dealt with *dolus eventualis* as if the requirement of knowledge of unlawfulness, was distinct from the requirements of *dolus eventualis*.
11. Section 167(3)(b) of the Constitution provides that:

“(3) *The Constitutional Court-*

(a)

(b) may decide-

(i) constitutional matters; and

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and

(c) makes the final decision whether a matter is within its jurisdiction.”

12. An application for leave to appeal to the Constitutional Court must be filed within 15 days from the date of judgment, unless condonation is granted for the late filing. I am instructed that the application for leave to appeal to the Constitutional Court will be filed timeously and I agree that it may be made a condition of bail.

13. Concisely stated, the motivation for leave to appeal, as referred to above, will, *inter alia*, be on the following basis. *Dolus* consists of:

13.1 a will directed towards the commission of the act or the causing of the result. This will may be direct, indirect or a foreseen consequence with which an accused reconciled himself;

13.2 the act must be committed in the knowledge of the existence of the circumstances mentioned in the definitional elements of the relevant crime and in the knowledge of the unlawfulness of the Act. It must be proved that the accused intended to act unlawfully.

14. The Trial Court acquitted me on the State's main case that I had a so-

called direct intention to kill the deceased.

15. I am advised that to be convicted on the basis of *dolus eventualis*, the State had to prove beyond a reasonable doubt that:

15.1 I foresaw the possibility of death and reconciled myself with that possibility; and

15.2 I had knowledge of unlawfulness.

16. The above was aptly summarised by Dr Roche Steyn in a publication (<https://t.co/5Wpsxhflyl>):

“The confusion regarding the concept of dolus eventualis is partly due to its current incomplete explicit formulation. The current (incomplete) formulation asks the ‘simple’ two-step question: ‘Did he foresee the relevant consequence, and did he reconcile himself thereto?’

The crucial element that is missing in the basic two-step (i.e. ‘foreseeing and reconciling’) formulation is one that inherently forms part of criminal intent in South African Law.

It is the essential element of subjective ‘knowledge of unlawfulness’.

Such operative knowledge of unlawfulness is indeed an essential (albeit currently implicit) component of dolus eventualis. The full explicit formulation of dolus eventualis would be as follows:

- 1. X himself or herself (subjectively) foresees that the relevant consequence might ... result from his or her conduct. This is the first part of the cognitive element of dolus eventualis.*
- 2. X knows (underlying subjective awareness) that the conduct is ... unlawful. This is the second part of the cognitive element dolus eventualis.*

3. *X proceeds, reconciling himself to the foreseen result (and the related unlawfulness). This is the volitional element of dolus eventualis.*”

17. The trial Court found in relation to the cognitive and volitional elements of *dolus*, that I did not foresee the death of the deceased or the person in the toilet. In relation to the knowledge of unlawfulness component of *dolus* the Trial Court found that I genuinely believed that my life was in danger when I discharged the shots.
18. The legal consequence of this finding by the Trial Court was that I did not have the necessary intention to kill unlawfully.
19. The Supreme Court of Appeal considered the first two questions of law and found in my view in regard to the cognitive and volitional elements of *dolus*, that when I had discharged the shots, I foresaw and reconciled myself with the death of the person in the toilet. The Supreme Court of Appeal found that the first two questions of law in that regard should be answered in favour of the State.
20. I refer in this regard to paragraphs 21 to 40 of the judgment, a copy of which is annexed hereto marked as “A”.
21. In coming to this finding, the Supreme Court of Appeal, with respect, placed *inter alia* reliance on the evidence of Captain Mangena, to come to the conclusion that I had foreseen and reconciled myself with the death of the person in the toilet. Captain Mangena's evidence was relevant to the

cognitive and volitional elements of *dolus*, and not to putative defence (knowledge of unlawfulness).

22. The Supreme Court of Appeal, in paragraph 41, found the following about the third question of law:

"[41] Consequently, the first two questions reserved for decision must be answered in favour of the prosecution to the extent that I have indicated. I thus turn to the third question, namely, whether the trial court was correct 'in its construction and reliance of an alternative version of the accused and that this alternative version was reasonably possibly true'. The question as posed is vague. Questions reserved for decision under s 319 of the CPA should be clearly formulated so that this court can identify with precision the legal issue it is called upon to decide. At best for the State, the question asks no more than whether the accused's version accepted by the trial court was reasonably possibly true. This is a factual decision. As already set out, and on the strength of the authorities to which I have referred, a finding of fact falls beyond the scope of what this court may decide under s 319. In any event, in the light of my findings in regard to the first two questions, the third question, even if it can be construed as being a point of law, seems superfluous."

(emphasis supplied)

23. The Supreme Court of Appeal then proceeded to deal in paragraphs 52 to 54 of the judgment with the second leg of *dolus*, namely the knowledge of unlawfulness and found that I did not entertain an honest and genuine belief that I was acting lawfully, *i.e.* that I did not discharge the shots because of a genuine belief that my life and that the deceased were in

danger.

24. I am advised, which advice I accept, that in considering the second leg of *dolus* in respect of my knowledge of unlawfulness, the Supreme Court of Appeal, with respect, impermissibly rejected the factual finding by the Trial Court that I genuinely and honestly believed that my life and that of the deceased were in danger. My knowledge of unlawfulness had not been reserved as one of the questions for the Court to consider under Section 319 of the CPA.
25. The Constitutional Court will be requested to consider granting leave to appeal the judgment by the Supreme Court of Appeal on the basis that in considering the limited appeal in terms of Section 319 of the Criminal Procedure Act, that it was, with respect, impermissible for the Supreme Court of Appeal to reject the factual finding of the Trial Court that I genuinely and honestly believed that my life and that of the deceased were in danger when I had discharged the shots.
26. In fact, even if the Supreme Court of Appeal were to be of the view that the factual finding was wrong, the limited appeal in terms of the provisions of Section 319 of the Criminal Procedure Act had to be considered on the basis of the recorded and accepted factual finding.
27. The Supreme Court of Appeal in considering my knowledge of unlawfulness (putative defence) in regard to the intention to act unlawfully did not only, with respect, impermissibly reject the Trial Court's factual

finding in that regard, but also considered the knowledge of unlawfulness
leg of *dolus* on a factual basis as if it was a so-called “*open appeal*” and
not a limited appeal in terms of Section 319 of the Criminal Procedure Act.

28. In fact, with respect, the Supreme Court of Appeal reconsidered a factual finding in the face of its own finding that the third purported question of law relevant to my so-called alternative version, was a question of fact.
29. The Supreme Court of Appeal, with great respect, in rejecting the Trial Court’s factual finding, effectively denied me a right to a fair trial in the sense that my right to seek leave to appeal to the Supreme Court of Appeal against such a factual finding, was infringed as the Supreme Court of Appeal effectively stepped into the shoes of the Trial Court, but in circumstances where I am unable to seek leave to appeal that finding to the Supreme Court of Appeal. It also had the effect that my right to a fair trial in terms of Section 319 of the CPA was infringed.
30. The Constitutional Court will also be requested to consider whether the Supreme Court of Appeal correctly applied the principles relevant to putative defence by finding that “*It is inconceivable that a rational person could have believed he was entitled to fire at this person ...*” See in this regard paragraph 53 of the judgment. I respectfully submit that the Supreme Court of Appeal in this respect may have introduced an objective test in considering putative defence, which must be considered subjectively.

Dr Steyn, *supra*, aptly summarised the position to be as follows:

“In applying the law to the accepted facts, one must be very careful not to undertake an objective, diagnostic evaluation (as one would in determining unlawfulness as such, as opposed to the acute subjective appreciation thereof on the part of the accused), but indeed a subjective, prognostic evaluation (as one does in determining intent).

In other words, you must place yourself as the accused in the grip of the perceived high-pressure situation looking through the eyes of a man on his stumps whose rationality might be somewhat impaired by exaggerated fear.

Intent (including operative knowledge of unlawfulness at the time) is a purely subjective question in South African Law. In carefully evaluating the situation (from the accused's reconstructed subjective perspective), one must also separate the stages in the basic facts as accepted: most people would readily believe that, on the accepted facts, when the accused set out with his firearm (negligently not checking on the Deceased), he believed that he was doing so with the law on his side, defending their lives (in his subjective perception) in his own home.”

31. In paragraph 53 of the Supreme Court of Appeal judgment, the Supreme Court of Appeal found that my version was that I did not have the intention to shoot the person whom I felt was an intruder. The reference to this version, with respect, ignored the version found by the Trial Court. As such, the Supreme Court of Appeal, with respect, decided to rely on a version rejected by the Trial Court and ignored the version found by the Trial Court that I had genuinely and honestly believed that my life and that of the deceased were in danger when I discharged the shots. The difficulty with the rejection of my version is that if I did not believe that I discharged

the shots because of the perceived danger, and I did not have *dolus directus* , then why did I shoot?

32. I am advised, which advice I accept, that there is a probable prospect that the Constitutional Court will grant me leave to appeal to the Constitutional Court on the grounds as referred to above, as those grounds raise a constitutional point and arguable points of law of general public importance, which, with respect, ought to be considered by the Constitutional Court.
33. An appeal to the Constitutional Court will also clarify the scope of the procedure permitted under Section 319 of the CPA , which is a matter of great public importance and in the interest of justice.
34. If leave were to be granted, and if the appeal were to be successful, then the matter would be finalised and there would not be a reconsideration of the sentence by the Trial Court.

BAIL PENDING SENTENCE TO BE IMPOSED

35. If leave to appeal were to be refused or if the appeal to the Constitutional Court were to be unsuccessful, then the Trial Court would have to consider the imposition of sentence on account of the conviction of murder on the basis of *dolus eventualis*.
36. The process before the Constitutional Court may take a considerable time and it would be unfair to detain me in circumstances:

- 36.1 where I have at least a probable prospect of success to the Constitutional Court;
 - 36.2 where I had been released on bail on the Schedule 6 offence before on the basis that I had allegedly acted with premeditation in killing the deceased;
 - 36.3 where I had abided my bail conditions pending the judgment before the Trial Court;
 - 36.4 where I had been granted bail pending the imposition of sentence by the High Court;
 - 36.5 where I had abided my bail conditions pending the sentence.
37. Moreover, I offer to remain under house arrest, pending:
- 37.1 the final outcome of the application for leave to appeal and, if granted, the appeal to the Constitutional Court;
 - 37.2 the imposition of sentence by the Trial Court,
- subject to the restriction, as stated above.
38. **Ad Section 60(4)(a), read with Section 60(5) of the CPA:**
- 38.1 The trial on the merits has been finalised and there is no question of any possible interference with State witnesses.

38.2 I have not made any threats or any threats of violence towards any person.

38.3 I do not harbour any resentment against any specific person and I have no history of violence. I have successfully completed a course in anger management.

38.4 I submit that there is no likelihood that if I am released on bail:

38.4.1 I will endanger the safety of the public or any particular person; and

38.4.2 I will commit a Schedule 1 offence or any other offence.

39. **Ad Section 60(4)(b), read with Section 60(6) of the CPA:**

39.1 I respectfully submit that the facts set out above support my submission that I do not constitute a flight risk. I have no reason not to stand my trial for purposes of sentence in so far as that process will eventuate. I have shown a consistent commitment to letting justice take its course throughout this matter.

39.2 The nature and gravity of any punishment which can be imposed on me, play no part in my actions or decisions, as I believe that I will be successful in an appeal to the Constitutional Court. I am also aware that when the Trial Court sentenced me it had already taken into account that my conduct "*bordered*" on *dolus eventualis*.

39.3 If I attempt to flee, which I will not, I will be arrested and extradited to the Republic of South Africa. I am well known and it would be senseless to even consider to become a fugitive of justice.

40. **Ad Section 60(4)(c), read with Section 60(7) of the CPA:**

The factors herein do not apply as the trial on the merits has been finalised.

41. **Ad Section 60(4)(d), read with Section 60(8) of the CPA:**

41.1 As previously stated, I:

41.1.1 have no previous convictions;

41.1.2 at the time of the appeal, I was serving my sentence in terms of Section 276(1)(i) of the CPA.

41.2 I respectfully submit that there is no likelihood that I, if released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system.

42. **Ad Section 60(4)(e), read with Section 60(8A) of the CPA:**

42.1 I respectfully submit that, should I be released on bail, my release will not induce a sense of shock or outrage and will not disturb the public order or undermine the public peace or security. I further submit that my safety will not be jeopardised by my release on bail.

42.2 I was on bail for more than two years in this matter.

43. **Ad Section 60(9) of the CPA:**

I respectfully submit that the interests of justice do not require my incarceration. If I am incarcerated and my appeal is successful, a miscarriage of justice will have occurred.

44. **Ad Section 60(11)(b):**

I respectfully submit that on the basis of the facts set out herein, the interests of justice will be served by my release on bail.

45. **General:**

I stand to be severely prejudiced by my incarceration, particularly having regard to the anticipated delay before this matter may be finalised. This should be balanced against the fact that I do not pose a risk to the State or anyone else, nor do I pose a flight risk, should I be released on bail. I undertake to abide by my present conditions, including the limitation in regard to correctional supervision pending:

45.1 the outcome of my application to the Constitutional Court; and if successful the appeal; and

45.2 if successful, the imposition of sentence.

DEPONENT

I **CERTIFY** that the deponent has acknowledged that he/she knows and understands the contents of this affidavit which was signed and sworn to, before me, at _____ on this the ____ day of __ **DECEMBER 2015**, the Regulations contained in Government Notice No. R.1258 dated 21 July 1972 (as amended), Government Notice No. R.4648 dated 19 August 1977 (as amended) and Government Notice No. R.774 dated 23 April 1982, having been complied with.

COMMISSIONER OF OATHS