

SOUTH AFRICA / JUDGMENT

Killian v S (CC7/2023) [2024] ZAWCHC 318 (17 October 2024)

[2024] ZAWCHC 318

COURT

Western Cape High Court, Cape Town

BEFORE

M Sher

CASE / FILE NUMBER

CC7/2023

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FLYNOTES: CRIMINAL – Bail – Organised crime offences – Premeditated murder – Electronic tracking of victims prior to murders – Assassination – Pinging of victim's cell phone to track live location leading up to murder – Finger of implication points directly and squarely at accused – Failed to show any exceptional circumstances – Attempting to destroy material evidence – State witnesses and members of investigating team threatened – Not in interests of justice for accused to be released on bail – Application dismissed.

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Case no: CC7/2023

In the matter between:

ZANE KILLIAN

Accused/applicant

and

THE STATE

Respondent

JUDGMENT DELIVERED (VIA EMAIL) ON 17 OCTOBER 2024

SHER J:

1. This is the accused's second attempt at obtaining bail. He is currently standing trial in this court (before Henney J) together

with 14 co-accused. The charge-sheet contains an impressive array of 124 charges, which include racketeering, money-laundering and gang-related contraventions of the Prevention of Organized Crime Act,[1] 24 counts of the unlawful interception of electronic communications,[2] 19 counts of corruption-related offences,[3] 4 counts of murder, 10 of attempted murder and 8 of conspiracy to commit murder,[4] 3 counts of intimidation,[5] 7 counts pertaining to the unlawful possession of firearms, ammunition and explosives,[6] and several charges of fraud, extortion and kidnapping. The state alleges that the first accused, one Nafiz Modack, was the head of a criminal enterprise through which these various offences were committed, at his instance and direction, and his various co-accused acted in common purpose with him in carrying out these offences.

2. The 43 charges which the accused faces include racketeering and gang-related offences, the 24 counts of unlawful interception of electronic communications, a single charge each of murder, attempted murder and conspiracy to murder and fraud, and 13 counts of money-laundering. As far as the charge of murder is concerned it is alleged that Modack and the accused participated in the premeditated killing of Charl Kinnear, a Lt-Col in the police's Anti-Gang Unit. Insofar as the charge of attempted murder is concerned it is alleged that they attempted to kill William Booth, an attorney. As for the 24 counts of unlawful interception of electronic

communications it is alleged that the accused intercepted the transmission of communications from the cellphones of Booth and Kinnear and their wives, as well as several high-ranking members of the police, including Major-Generals Lincoln and Vearey, and several so-called members of the 'underworld'.

The background

3. The accused is 43 years old. He is divorced and has 2 minor children: a daughter aged 15, and a son aged 9 who has cerebral palsy and is autistic. At the time of his arrest in Springs, Gauteng on 22 September 2020 he was operating as a debt collector and private investigator. He claimed that his income averaged approximately R 20 000 pm and was derived principally from repossessing motor vehicles and tracing debtors.
4. The accused's arrest occurred 4 days after Kinnear was assassinated, shortly after 15h00 on the afternoon of 18 September 2020, by an as yet unidentified shooter, as he pulled into the driveway of his home in Bishop Lavis. At the time Kinnear was involved in high-profile investigations of alleged members of the 'underworld', including Modack, and their affiliates, amongst which were several high-ranking, allegedly corrupt police officers.
5. It is common cause that at the time of his murder Kinnear was being tracked by the accused, for and at the instance of Modack. The tracking was done electronically by means of a location-based tracking platform to which the accused subscribed, which was run by an ex-policeman, one Goldblatt. The accused bought bundles of search pulses or so-called 'pings' from Goldblatt, for thousands of rands per bundle. Each 'ping' allowed him to conduct a location search via the tracking platform on

the whereabouts of a particular cellphone, by sending an electronic pulse or signal to its number, which would return with the GPS co-ordinates of the phone, to the nearest cellphone tower.

6. The accused also had access to Goldblatt's account at Maris IT, a consumer tracing service, which allowed him to draw full, so-called consumer trace reports which provided an astonishing amount of information on the subjects thereof including their identity and cellphone numbers, residential and work addresses, immovable properties and motor vehicles registered in their names, and even photographic images of them.
7. The tracking platform which Goldblatt operated was programmed to alert him if a particular cellphone number was being excessively pinged by a user. On 1 September 2020 he was alerted that the accused was repeatedly pinged certain numbers. Goldblatt ascertained that they belonged to Kinnear and a colleague in the AGU, and Booth, who he noted had been the subject of an attempted hit on 9

April 2020, when shots had been fired at him at his home in Oranjezicht. The results of his enquiries caused Goldblatt to be concerned for the safety of these persons and he reported this to a police officer he knew, who served in a unit that dealt with crimes against the state. He was advised to continue to allow the accused to use the tracking platform. On 17 September 2020, the day before Kinnear was murdered, the accused repeatedly sought to get hold of Goldblatt via WhatsApp and calls, so that he could purchase an additional 100 pings, which he said he needed for an 'enquiry' that he was busy with at the time.

8. A few days after Kinnear was shot Goldblatt was called by the accused, who informed him that the police were raiding his premises and were seeking to confiscate his cellphones and laptop. The accused allegedly asked Goldblatt to delete all traces of his activity on the tracking platform and Maris IT and told Goldblatt that he had already 'deleted' what was on his cellphones.
9. The police seized the accused's 3 cellphones, downloaded the contents of what was stored on them, and carried out a detailed analysis thereof. They found that although the accused had sought to delete all personal data and WhatsApp messages that were on his phones, much of it could be recovered from his deleted folders, which he had failed to empty. Included in the data they recovered were WhatsApp images and screen grabs or screenshots, which remained on the devices. By cross-referencing the data and information they recovered to a list which was provided by Goldblatt of cellphone numbers which the accused had pinged, it was ascertained that the accused had pinged Kinnear over a period of some 5 months, between 20 April 2020 and the day he was killed on 18 September 2020, and one of his cellphones was pinged over 2400 times. On the day that Kinnear was assassinated the accused had pinged him a total of 35 times, starting from 02h32 a.m. From about 11h00 the frequency of the pings increased such that by 14h30, approximately 30 minutes before he was shot, Kinnear was being pinged at intervals of approximately 3 minutes at a time, until just before he was shot. After the shooting the accused only pinged Kinnear one final time, about 30 mins later. In addition, the investigation revealed that the accused had performed

several consumer trace reports on Kinnear and his wife and obtained photographic images of them from Maris IT, which he also forwarded to Modack. The accused had also previously pinged Kinnear during May and June 2020, when he was in Gauteng for an investigation into the alleged issue of fraudulent firearm licences by police officers to several persons, including Modack. On 17 May 2020 the accused provided the street address of the guesthouse at which Kinnear and members of his investigating team were staying in Sandton, to Modack, together with information pertaining to the security arrangements which existed at the premises, from which it appeared that he had been keeping Kinnear under both physical and electronic surveillance.

10. From the data which was collected the investigating team also determined that the accused had performed several 'time-distance' calculations as to how long it would take Kinnear to get from a particular address or point to where he was staying in Sandton, and to his home in Bishop Lavis, which were likewise provided to Modack.
11. Given the information which the police recovered, the investigating officer, Capt Joubert, concluded that the accused had been engaged by Modack in an 'intelligence gathering' exercise by way of electronic surveillance, which was used to facilitate the assassination of Kinnear.
12. The recovered data similarly established that the accused had also pinged Booth on some 650 occasions over a period of 6 months between 6 March 2020 and 18 September 2020, at the instance of Modack, and had performed consumer trace reports on Booth and his

wife, which were sent to him, together with particulars of Booth's home and work addresses. On 18 March 2020 the accused also sent Modack a 'time-distance' calculation he performed on how long it would take Booth to get to his home from a location in Vredehoek. And, as in the case of Kinnear, on the day that Booth was shot at the accused started ping his phone in the early morning hours (03h35) and continued to do so until about half an hour after the shooting.

The first bail application

13. In his first bail application, which was heard by the Bellville regional court, the accused chose not to testify but to rely on an affidavit which he presented. At the time he was facing only 4 charges, to wit charges of murder and conspiracy to murder Kinnear, a charge of unlawfully intercepting electronic communications from Kinnear's cellphones, and a charge of fraud, in that he had allegedly wrongfully misrepresented to the police, by way of a false certificate, that he was registered as a private investigator.
14. In his affidavit the accused acknowledged that as the charge of murder was a schedule 6 offence, he bore the onus of establishing there were exceptional circumstances present which, in the interests of justice, permitted his release on bail. Although he had been advised that he did not have to deal with the merits of the case against him he believed that it was appropriate for him to do so 'very briefly'. In this regard he sought only to respond to the charge of murder. He said that the state would not be able to present any objective

evidence proving that he had committed the offence. The only ‘alleged fact’ that linked him to it was that he had pinged Kinnear’s cellphone to locate him. But, so he said, Kinnear was ‘unknown to him’ and he had used ‘pinging’ to trace and repossess debtors’ motor vehicles.

15. He was able to do so by pinging their cellphones via a software platform to which he had been given access by Goldblatt. Neither the platform nor the user code he had been given for it was exclusive to him and other persons also used them, and some of the pings that he purchased had ‘disappeared’ from his account. Thus, he could not be linked to the murder. He had submitted photographs from CCTV footage he obtained which showed that he was in a chemist in Springs at the time thereof.
16. These averments constituted the sole response the accused provided to the charges he was facing. The rest of his affidavit was devoted to setting out his personal circumstances, including those pertaining to his children. He said that he had no previous convictions but had another criminal matter which was pending against him, which also involved him pinging ‘somebody’. He averred that his release on bail would not endanger the safety of the public or the functioning of the criminal justice system as he could not influence or intimidate any witnesses, or conceal or destroy any evidence, and he would comply with any bail conditions which were set.
17. In answer to the accused’s terse affidavit the state presented lengthy affidavits by the investigating officer Capt Joubert and Capt Du Plessis, a member of the investigating team. Capt Joubert outlined how Kinnear had been assassinated by a lone gunman, wearing a hoodie and mask, who fired 3 shots at his head as he pulled into his driveway. From the CCTV footage it appeared that

the hit was well-timed, and the assassin was waiting.

18. The investigation had led the team to a data analytics company in Gauteng which was run by Goldblatt, which provided a platform for the location-based tracking of cell phones. The software allowed users to establish the GPS co-ordinates of a specific cellphone in relation to the nearest cellphone tower, thereby allowing a tracker to determine the approximate location of the possessor of the phone. Capt Joubert confirmed that the accused had pinged 3 different cellphones used by Kinnear over several months, and on the day of his murder had started pinging him in the early morning hours, with increasing frequency, to the point where half an hour before Kinnear was shot he was being pinged every 3 minutes.
19. Capt Joubert said that when the accused was first questioned in the presence of his then attorney, one Eric Bryer, on 21 September 2020, he was unco-operative and evasive, and the decision was made to arrest him. While he was being transported to Cape Town the accused informed members of the police that he had connections to certain ‘underworld’ figures in Cape Town and asked for a pen and paper so that he could provide a written explanation for his pinging of Kinnear. The explanation was duly signed by him and appended to his warning statement.

20. The version which the accused gave in his explanation was that a person, known only to him as 'Mohammed', had requested his assistance in tracing and doing surveillance on his wife, who was having an extramarital affair in Cape Town, and her boyfriend. Mohammed supplied him with several cellphone numbers for the wife and her boyfriend so that he could trace and report back on their movements. He was requested to do this tracking at different times of the day and night. He duly carried out these requests from

March/April 2020 until 18 September 2020. He was paid between R 2000 and R 5000 weekly for this work.

21. In the week leading up to 18 September 2020 Mohammed informed him that the sheriff of the court was ready to seize his wife's vehicle, and he should accordingly be ready to respond immediately when requested to ping her. On the day Mohammed informed him that the sheriff was ready to proceed. The last pings that he made on Mohammed's request were that afternoon, at about 15h00, at which time he assumed that the motor vehicle had been seized, as Mohammed never contacted him again.
22. In providing this version the accused again maintained that he did not know Kinnear or even what he looked like. He said that from what he had read in the media it seemed as if Kinnear had many enemies, even amongst members of the police, and 'anybody' could have been responsible for his death.
23. After the accused was confronted in several further interviews his version changed. He revealed that Mohammed did not exist, and it was Modack who had asked him to ping Kinnear. The accused also admitted that he had pinged the cellphones of several other, high-ranking members of the AGU. He claimed that Modack told him that he had been harassed by Kinnear and these other members of

the police and they were out to kill him. When questioned regarding his pinging of Booth the accused elected not to provide an explanation.

24. In his affidavit, Capt Du Plessis confirmed what was found on analysis of the accused's cellphones and the data which had been retrieved from them, in relation to the tracking of Booth and Kinnear, and the time-distance calculations he had performed on them, to determine how long it would take them to get from one point to another, and to their homes. In his view, the tracking information which the accused supplied made it possible for the designated hitmen to be apprised, with a high degree of certainty, of the arrival or presence of Booth and Kinnear at their predetermined locations, thereby affording the hitmen the opportunity to 'orchestrate' a properly timed approach. In the circumstances, the role played by the accused in the murder of Kinnear and the attempted murder of Booth had been integral.

25. Capt Du Plessis pointed out that the cellphone analysis also revealed that, aside from Booth and Kinnear and officers of the AGU the accused had also pinged several other persons who were of interest to the police. These included Timothy Lotter (who had also been shot and killed following his tracking) and Saameer Vallie (the complainant in respect of charges of alleged extortion, kidnapping and intimidation by Modack, for whom Booth had obtained an interdict against Modack), as well as certain figures in the 'underworld' such as Ralph Stanfield (the alleged leader of the 28's gang in Cape Town on whom an attempted hit had also been carried out), and Jerome 'Donkie' Booysen (the alleged leader of the Sexy Boys gang on whom several attempted hits had been made), who was a competitor to Modack in the provision of security to nightclubs and restaurants in Cape Town. Given the accused's involvement in pinging these persons the police were of the view that he was part of an organised crime syndicate, and his release would endanger the community.
26. In a further affidavit Capt Joubert revealed that Goldblatt had been the victim of a drive-by shooting in December 2020 and a threat had been made to him on 5 March 2021. In addition, on 18 January 2021 Capt Du Plessis received a threatening call from a person who claimed that there was a bounty of R 1 million on his head. The call was traced to a person who worked for Modack.

Forensic investigations also brought to light that some R5.25 million odd had been deposited into one of the accused's bank accounts over the period between 19 June 2019 and 26 September 2020, R2.3 million of which was deposited in the last 6 months of that period i.e. from March 2020, when the accused started working for Modack.

27. In opposing the accused's release on bail Joubert and Du Plessis referred to the inconsistent versions which he had provided, which placed his credibility in issue, and pointed out that he had sought to delete evidence (the data and information on his cellphones) that was material to the investigations, and had asked Goldblatt, who was now a state witness, to delete all traces of his presence on the tracking platform and on Maris IT.
28. Consequently, they were of the view that if the accused were to be released there was a strong likelihood that he might attempt to influence or intimidate witnesses, conceal or destroy evidence, or otherwise undermine the investigation. They pointed out that, by his own admission, the accused was well-connected to certain figures in the underworld, including persons such as Modack, who was at the centre of what appeared to be a large criminal enterprise which had extended its reach to several criminal activities. Photographs of the accused were found on his cellphones in which he could be seen posing with firearms, in the company of Modack and some of the co-accused. They noted further that the accused was in possession of a passport and had travelled to Mozambique and Zimbabwe in 2019. Given the unexplained, large sums of money that were paid into his account, for which no explanation was provided, which were likely the proceeds of criminal activities, the accused had the means to flee the country and to evade trial.

29. In argument before the regional magistrate the accused's counsel nonetheless suggested that the following exceptional circumstances were present, which justified his release on bail, in the interests of justice: 1) he was suffering financially and emotionally every day that he was in custody 2) his disabled son was suffering because of his absence and was struggling to cope without him
- 3) his father was in poor health 4) he was a 1st offender at the age of 39, which indicated that he was a law-abiding citizen 5) he suffered from a bipolar mood disorder and 6) the state's case against him was weak.
30. The magistrate was of the view that the state's case, albeit based on circumstantial evidence, was not weak and not only had the accused failed to show that there were exceptional circumstances present, as the term is understood in law, but also that the various grounds listed in s 60(4)(a)-(d) of the Criminal Procedure Act[7] militated against his release on bail. In this regard she was of the view that there was a likelihood that, if he were to be released on bail the accused would endanger the safety of the public or particular persons, would attempt to evade his trial and influence or intimidate witnesses, and would endanger the proper functioning of the criminal justice system.
31. On appeal, Binns-Ward J held [8] that the magistrate was justified in finding that in the face of prima facie evidence which pointed to a 'knowing involvement' in the murder of Kinnear the accused's evidence was riddled with improbabilities and untruths and he had failed to discharge the onus of showing there were exceptional circumstances present which justified his release on bail. He was of the view that the evidence of Goldblatt stood as clear proof of the accused's propensity and readiness to interfere with evidence, if given the opportunity, and the magistrate had been correct in concluding that the electronic records linking the accused to the tracing and surveillance of several persons who had been victims of violence, suggested that he was involved in underworld activities.

The second and third bail applications

32. Prior to his transfer for trial in this court the accused launched a 2nd bail application in the regional court, when additional charges were preferred against him, which, on the advice of his legal representatives he apparently abandoned.
33. In his application in this court he filed a further affidavit, the contents of which he sought to amplify extensively in days of oral evidence. He also filed a supporting affidavit from his father, who confirmed that he was assisting to maintain the accused's disabled son *inter alia* by paying for his school fees and medication and providing him with food. He transported the child daily to and from school and cared for him in the afternoons until his mother collected him and looked after him over the weekends. Notably, in his affidavit the accused's father made no allegation that he was in ill-health.

34. In many respects the affidavit which the accused filed in this court is a repetition of the averments which he previously made in the affidavits he filed in the regional court. Thus, regarding his personal circumstances he repeated what he previously said in relation to his children and his medical condition, for which he is required to take medication daily. He confirmed that he has a passport, although he said he initially told his legal representatives that he did not have one. 'In the chaos of the arrest' it 'slipped his mind' that he had been issued with a passport in 2015, but he had never used it. How he was able to travel to Mozambique and Zimbabwe in 2019 without it was not explained and is a cause for concern.
35. As in his previous application, he said that although he was advised that he did not have to deal with the merits of the case against him he believed it was appropriate to do so 'very briefly'. He reiterated that, according to him, the state would not be able to present any objective evidence that would prove that he had committed murder, and he intended to plead not guilty to all the charges. The only 'alleged fact' that linked him to the murder of Kinnear was the allegation that he had pinged his cellphone. He had tracked individuals on the platform provided by Goldblatt, in the 'execution of his business' as a debt collector and repossessing agent. His use of the platform was not exclusive and pings he purchased had disappeared from his account.
36. He provided a list of other users to whom Goldblatt had provided access and the same user code and password, who had also pinged Kinnear, including a Brophy, Nel, and one Calvin Rafadi, who seemingly had also done so for Modack. He claimed that Goldblatt also sold pings to various 'Cape Underworld characters' (sic) and his evidence would not withstand judicial scrutiny. He contended that the state would not be able to produce a record of the specific pings that he had performed on the platform, and it was 'unlikely' that it would be able to prove the location of users of the platform, at the time when they pinged the various numbers which were recorded on the list which Goldblatt provided.
37. Contrary to his previous assertion, under oath, that Kinnear was 'unknown' to him, he now confirmed that Modack had engaged him to 'gather information' on him. He said Modack told him that Kinnear was a corrupt policeman to whom he

had paid money in the past and was in cahoots with Jerome 'Donkie' Booysen, and they were planning to kill him. Modack asked him to ping their cellphones at the same time to see if they were in the same location. On several occasions the results he obtained showed that they were indeed in the same vicinity or location, which gave credence to Modack's averments. Modack sent him a photo of an alleged police hit list, on which his (Modack's) name appeared. He also sent him a video which purportedly showed gates that had been forced open, dogs that had been shot and staff who had allegedly been assaulted by the police, when they raided his home.

38. On occasions when he pinged Kinnear's phone the GPS co-ordinates revealed that he was in Brakpan and Springs, where the accused's children were at school, and on one occasion it showed he was in the vicinity of Nigel, where the accused's ex-wife resided. This caused him to be concerned for his safety and that of his family. When he queried why Kinnear was in 'his area' Modack said he should not worry as he was there for a firearm investigation involving corrupt policemen.
39. Modack also told him that that Kinnear's car was up for repossession, and he wanted to humiliate him by participating therein. Modack had made the necessary arrangements with the sheriff and had a 'ground team' ready to assist him, and to this end requested the accused to ping Kinnear daily. However, the team always had an excuse for not carrying out the repossession. This frustrated and irritated the accused because he was constantly being asked by Modack to ping Kinnear in the early hours of the morning. He did not consider it strange to receive such requests late at night or in the early morning hours as Modack worked

in the nightclub security sector. The accused suggested that Modack pay for him to fly down to Cape Town so that he could

repossess the vehicle himself.

40. On 18 September 2020, the day Kinnear was shot, Modack asked him to ping his cellphone throughout the course of the day. He was not aware that there was a plot to assassinate Kinnear or that he might be taking part in it. The requests stopped at about 15h25, which was the last time that he pinged Kinnear's phone.
41. Shortly after Kinnear's assassination he received a voice note from Renier Van der Vyver, a 'close associate' of Modack, who expressed joy at the news, saying that Christmas had come early. He also received a call from Ziyaad Poole (accused no. 3) an associate of Modack, who told him to get rid of his cellphones. However, he did not do so and handed them over to the police when they came to search his premises. He then contacted Modack, who told him to contact his attorney Bryer, who in turn told him to exercise his right to remain silent. In a WhatsApp message Bryer told him not to say 'anything'. In a later

communication Bryer told him to keep himself, Bryer and 'the boss' i.e. Modack 'covered'. At some stage Bryer warned him that if he implicated Modack he and his family might as well 'pick out' their coffins. Bryer's legal fees were paid by Modack. Bryer told him Modack had said that he was to say that he pinged Kinnear at the request of a Mr Mohammed, and that was the version he accordingly provided to the police. However, he later admitted to the police that the person who had requested him to ping Kinnear was Modack.

42. In addition to admitting that he pinged Kinnear, the accused also admitted that he had pinged Booth, at the request of Modack, who told him Booth was an attorney who owed money to a client. He was likewise unaware that an assassination of Booth was planned.

43. The accused sought to assail the credibility of Goldblatt in various ways, inter alia by criticising his failure to timeously and properly inform the police of his alleged concerns. He denied that he requested Goldblatt to delete his profile from the tracking platform and Maris IT. He also devoted a large portion of his evidence to what he referred to as 'issues' he had with the police and their role in the matter. He referred to a copy of the report of an investigation which was carried out by the Independent Police Investigative Directorate ('IPID') into the circumstances surrounding Kinnear's death, which was highly critical of the police and the Directorate for Priority Crime Investigation (the 'DPCI' or 'Hawks' as they are commonly known), in particular. In this regard IPID was of the view that the DPCI had failed to act timeously regarding the threat on the life of Kinnear and the Crime Intelligence division had failed to conduct a proper risk assessment on him. The police had also acted inappropriately by prematurely terminating the additional security which had been provided to Kinnear, leaving him exposed at the time of his assassination.
44. In his evidence (which he led himself without any assistance from his attorney) the accused also emphasised the repeated reference in the IPID report to the doings of a so-called 'rogue unit' within Crime Intelligence, Western Cape, members of which had apparently been keeping Kinnear under surveillance and had been conducting 'investigations' into him and other senior members of the AGU, including Generals Vearey and Lincoln. He pointed out that the IPID report noted that Modack had provided a statement to the rogue unit, in which he had alleged that Vearey and Kinnear were corrupt and had attempted to defeat or obstruct the course of justice. In this regard the accused referred to allegations that Kinnear had sought to misappropriate drug monies which had been booked into evidence.
45. However, from a perusal of the IPID report it is notably apparent that what the accused failed to mention was that Modack was not prepared to co-operate with IPID in an investigation of these alleged offences, and IPID had recommended that members of the rogue unit should be charged. The IPID report also noted that Kinnear had opened several criminal cases in Gauteng pertaining to the fraudulent issue of firearm licences, in which Modack was the primary suspect, and there was a 'clearly corrupt' relationship between him and certain high-ranking police officers who had facilitated the issue of such licences to him and his family, in exchange for the payment of bribes.

An assessment

46. As the offence of premeditated murder is listed in Schedule 6 of the CPA, in terms of s 60(11) (a) of the Act the accused is required to be kept in custody unless he is able to adduce evidence which satisfies the court that exceptional circumstances exist which, in the interests of justice, permit his release.
47. In Dlamini [9] the Constitutional Court held that the provision places an onus on an accused, to prove, on a balance of probabilities, not only the existence of such circumstances which justify his release on bail, but also that it would be in the interests of justice for him to be released.

48. It is trite that what will constitute exceptional circumstances will depend on the facts of each particular matter, and in order to determine whether they have been shown to exist the court is required to consider and weigh up all relevant material which has been put forward by an accused, as a whole.[10] In essence, the court is required to make a value judgment based on the evidence which is before it.[11]

49. In *S v H*, [12] one of the early decisions that dealt with the meaning of the term, it was held that exceptional circumstances are not circumstances

which are found in an 'ordinary' run-of-the mill bail application, but which are 'out of the ordinary' or 'unusual', and in *Petersen*[13] a full bench of this division held that they are circumstances which are 'unusual, extraordinary, remarkable, peculiar or

different'. In *Scott-Crossley*[14] the Supreme Court of Appeal held that personal circumstances which are commonplace do not constitute exceptional circumstances.

50. That said, it has been held that showing exceptional circumstances for the purposes of s 60(11)(a) does not impose a standard that would render it impossible for an unexceptional but deserving applicant to make out a case for bail.[15] Exceptional circumstances therefore do not have to be circumstances 'above and beyond', or different, from those enumerated

in ss 60(4)-(9) of the CPA, to which regard is ordinarily had in bail applications. However, they should be 'compelling enough'

to take the case which is made for the granting of bail beyond the ordinary.[16] Thus, ordinary circumstances which are present to an exceptional degree may suffice.[17]

51. In my view the accused has failed to show that there are any exceptional circumstances present or that his release on bail would be in the interests of justice.

52. During argument the circumstances advanced by the accused's attorney as being exceptional were that 1) various persons other than the accused had pinged Kinnear 2) Capt Du Plessis had filed a further affidavit in September 2021 which revealed that one of these figures, Calvin Rafadi, had received monies from Modack, including a payment of R 180,000 shortly after Kinnear was shot

3) the contents of the IPID report cast the network of suspects far and wide, and included members of the police and those of a 'rogue unit' in Crime Intelligence, who had also been monitoring and tracking Kinnear 4) the accused's personal circumstances, including that he had been in custody for just short of 4 years and was no longer in a position to interfere with witnesses or evidence as the trial was underway, militated in favour of his release and 5) the inconsistent versions he had previously given were because he had been threatened to keep Modack 'covered' and he had made a clean breast of his involvement with Kinnear.

53. As far as the first 3 of these circumstances are concerned, as I see it, they are aimed at suggesting that there may be other persons who may have been party to Kinnear's assassination. I am mindful that, as this is only a bail application, the issue of the accused's

guilt and whether it will likely be proved beyond reasonable doubt in the criminal proceedings, is beyond my remit, and I should refrain from making any remarks which may impact on this aspect. So too it is beyond my remit to speculate as to whether persons other than the accused and Modack may have been involved in Kinnear's killing.

54. For the purposes of this matter I can and indeed need, to point out that there was no suggestion in the evidence (of either the accused or the state), that on the day that Kinnear was assassinated anyone else was also pinging him, and if there was, that they also did so throughout the day and with the regularity and increasing frequency which the accused did, from the early morning hours until minutes before Kinnear was fatally shot. As a result, on the evidence which is before me the finger of implication points

directly and squarely at the accused and Modack and no-one else.

55. As my brother Binns-Ward J held[18] in his appeal ruling on the accused's previous bail application, I too I am of the view that the accused's version

that he thought he was pinging Kinnear, on the day he was assassinated, because he was assisting Modack with the repossession of his vehicle, is risible. As I have it, the accused himself said, in an unguarded moment during his evidence, that in his time as a re-possessor he had been involved in 'very few' repossessions that were carried out in the very early morning hours. But, even if I misunderstood him in this regard, if the tracking he carried out on the day was for the purpose of repossession, and to this end he already established shortly after 02h32 a.m. that Kinnear was at his home, where most persons are at that time of the morning, why was it necessary to continue pinging him thereafter for several hours, confirming each time that he was still at his home, yet no repossession was seemingly carried out. And then, why was it necessary to continue pinging him throughout the course of the day, after he left his home and went about his business, up and until the time he returned to it in the early afternoon. This too was never explained and surely does not fit in with tracking for the purposes of a vehicle repossession. And then there is the remarkable coincidence of the 2nd last ping taking place minutes before Kinnear was shot by an assassin who was waiting for him, and then no more pings thereafter, save one, which unlike those which preceded the 2nd last ping (which were carried out at regular intervals), occurred 30 mins after the fatal shots were fired.

56. The accused's version does not gel with his claim that he initially pinged Kinnear at Modack's behest, because Modack was scared that Kinnear was out to kill him, and had asked the accused to track Kinnear to ensure that he could avoid him or take protective measures, if Kinnear came his way. If this was the case, why did the accused perform several time-distance calculations

of how long it would take Kinnear to get from a particular location to his home, rather than to Modack. One of these calculations was performed to determine how long it would take Kinnear to get to the guesthouse he was staying at in Sandton, at a time when, as I understand it, Modack was either in Cape Town or a considerable distance away.

57. Likewise, why did he perform time-distance calculations on how long it would take Booth to get to his home, one of which was done in respect of a location only 1.9 kms away from Booth's home. There was never any suggestion that Booth constituted a threat to Modack and the accused has never provided any explanation for why he performed such calculations on him. Of course, performing such a calculation would make sense in the context of facilitating the carrying out of a hit on Booth. And in this regard the evidence which was elicited from the accused in cross-examination was telling and significant.
58. On 8 June 2020 the accused sent Modack a photograph of Booth, which he had copied off a News24 article. He said he did so because Modack was in Gauteng at the time, for the purposes of a court appearance, and wanted to know whether Booth was also there. The accused did not know what Booth looked like, so he did a Google search for a photographic image of him and found one on a News24 article. In copying the image in order to send it to Modack the accused also copied certain words, or parts thereof, from the source article viz '...s 24' and '...e Town attorney William..'. These appear as an inscription below the photo of Booth on the IMG file which the accused sent Modack.
59. Capt Du Plessis submitted a further affidavit into evidence in which he said that he had established from News24 that the photo of Booth had only been used i.e. published by it in two articles, before 8 June 2020: one which was published on 17 October 2019 and one which was published on 9 April 2020, the day of the attempt on Booth's life. The headline of the article of 17 October 2019 was 'It is illegal'-former Bishops teacher's lawyer warns against sharing lewd video allegedly of client'. The headline of the article of 9 April 2020 was 'Cape Town attorney William Booth shot at in his garage, escapes unharmed'. It was therefore evident that the accused must have copied Booth's image and part of the wording from the headline of this article, which he then sent to Modack. Those words, or parts thereof, which appeared in the file he sent to Modack enclosing Booth's photo, particularly the phrase '...e Town attorney William' could not have been copied from the wording of the headline of the first article, or the contents of the article itself, as they do not appear in it. However, when this was put to the accused, he denied that the article of 9 April 2020 was the source of the photo and its accompanying inscription, even though he claimed he had never read the article he sourced the photo from.
60. Even if the accused did not read the article itself (which stretches credulity) and was not aware of the wide-spread publicity that was given by the media to the attempt on Booth's life 2 months earlier, he must surely have seen and noted the contents of the headline on 8 June 2020, when he copied the photographic image that appeared below or adjacent to it and some of its wording. And any person in the position of the accused, armed with this knowledge, would have realized there was a possible connection between the earlier attempt on Booth's life and his tracking, in other words, that Modack might have been involved in the previous attempt on Booth's life and/or his tracking of Booth was to possibly facilitate a further such attempt. When questioned on

this aspect the accused was thoroughly evasive and disingenuous. The obvious conclusion to draw from this evidence and the accused's

ducking and diving on this aspect, is that he realized that the photo which he sent, in the context of the words (or parts thereof) that appeared below it, would lead to the inference that he knew, as at 8 June 2020, that he was tracking an attorney on whom a previous attempt to kill had been carried out a few months earlier, and Modack may thus have had something to do with that, and/or that he might be tracking Booth in order to facilitate another attempt on his life. And of course, this also impacts on the accused's understanding of why he was pinging Kinnear.

61. In the circumstances (as Binns- Ward J held in relation to the assassination of Kinnear), the evidence that was elicited in the bail application also points to a 'knowing involvement' by the accused in Booth's attempted assassination, and/or a conspiracy to carry out a further such attempt, as is alleged in one of the charges.
62. In regard to the contention that the accused's mendacity must be ascribed to the fact that he was threatened by Modack (via Van der Vyver and Bryer) not to implicate him and to keep him 'covered', but that he has now been honest with the court, the accused's performance in the witness box, as was illustrated in relation to his evidence pertaining to Booth,

shows the contrary i.e. that he was still being mendacious and cannot be believed. In addition, the difficulty which I have with the contention is that it makes no sense: if the accused presented different, false versions to protect Modack, because he was

threatened and believed that he and his family were in danger if he should reveal Modack's involvement, in any shape or form, why then did he later come out with it when interviewed by the police and why was he freely able to testify at length about it in his bail application? In my view, the improbabilities in the version which he presented about what Modack allegedly told him about Kinnear and why he was to ping him, are ascribable to the fact that the accused is trying to exculpate himself and Modack and they are still in cahoots, and he has still not been forthright, open and honest about their dealings.

63. As for the accused's personal circumstances, if anything, these have paled. There is no suggestion that either of his children are not being properly cared for, in fact, the opposite: his daughter is being cared for by his ex-wife and his son is being cared for by her and the accused's father, who is also maintaining him. There is no suggestion that the accused is not getting access to the medication he needs for his bipolar disorder and over the week that he gave evidence before me he came across as healthy and strong.
64. In relation to the fact that he has now effectively been in custody for 4 years whilst awaiting trial, I was informed by the state that it envisages closing its case this term. All things being equal therefore, by early next year the accused will be able to put up their evidence, if any, in response to the state's case and the trial should be concluded, as far as the merits are

concerned, by the end of the 2nd term of next year i.e. in approximately 6-7 months' time. Given these circumstances and the seriousness of the offences which the accused is facing and the lengthy sentences he is likely to receive if convicted (on the charge of murder he is potentially facing a prescribed minimum sentence of life imprisonment) in my view it would not be in the interests of justice for him to be now released on bail. Furthermore, given his previous conduct in attempting to destroy material evidence and given that state witnesses and members of the investigating team have been threatened, it would be inimical to the interests of justice for the accused to be released on bail. In my view, given 1) his admitted connections to figures in the underworld 2) the fact that he was previously able to leave the country to go to neighbouring states without, seemingly, using his SA passport and 3) that he had access to large sums of money that were deposited into his account, from illicit sources related to criminal activities, in the event that he were to be granted bail there is every likelihood that he would seek to leave the country and to evade justice.

65. In the result, the application for the accused to be released on bail is dismissed.

M SHER

Judge of the High Court

(Digital signature)

Appearances:

For the accused: D Gouws (D Gouws Attorneys, Gqeberha)

For the State: Advs G Wolmarans and B Lazarus

[1] Act 121 of 1998.

[2] In contravention of the Provision of Communication-Related Information Act 70 of 2002.

[3] Contrary to the Prevention and Combatting of Corrupt Activities Act 12 of 2004.

[4] Contrary to the Riotous Assemblies Act 17 of 1956.

[5] In terms of the Intimidation Act 72 of 1982.

[6] Contrary to the Firearms Control Act 60 of 2002 and the Explosives Act 26 of 1956.

[7] Act 51 of 1977.

[8] Killian v S [2021] ZAWCHC 100 para 59.

[9] S v Dlamini; S v Dladla; S v Joubert; S v Schietekat 1999

(2) SACR 51 (CC).

[10] S v Mohammed 1999 (2) SACR 507 (C).

[11] S v Botha & Ano 2002

(1) SACR 222 (SCA) para 19.

[12] 1999

(1) SACR 72 (W) at 77e-f.

[13] S v Petersen 2008

(2) SACR 355 (C).

[14] S v Scott-Crossley 2007

(2) SACR 470 (SCA) para 12.

[15] S v Josephs 2001

(1) SACR 659 (C) at 668I; S v Viljoen 2002

(2) SACR 550 (SCA).

[16] Killian n 8 para 4.

[17] Dlamini n 9 para 76; Botha n 11 para 19; Rudolph v S 2010

(1) SACR 262 (SCA) para 9.

[18] Killian n 8 paras 60 and 63.

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