

SOUTH AFRICA / JUDGMENT

Miya v S (SS163/2015) [2024] ZAGPJHC 964 (27 September 2024)

[2024] ZAGPJHC 964

COURT

South Gauteng High Court, Johannesburg

BEFORE

Dosio

CASE / FILE NUMBER

SS163/2015

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

27

September 2024

CASE

NUMBER: SS163/2015

In

the matter between:

SIBONISO

GQAMANE NDABAZINHLE MIYA

Applicant

and

THE

STATE

Respondent

Coram:

DOSIO J

Heard:

2, 3 and 4 September 2024

Delivered: 27 September 2024
ORDER
Bail
is denied.

JUDGMENT

DOSIO J:

Introduction

- [1] This is an application by Siboniso Gqamane Ndabazinhle Miya ('the applicant') to be admitted to bail, pending the finalisation of his criminal trial, under case number SS163/2015. The trial commenced on 28 April 2016 before the Honourable Mr Justice Msimeki ('Msimeki J'). The trial has lasted eight years, and the State is yet to close its case. The applicant can afford R10 000-00 bail.
- [2] The applicant has been arraigned as accused number one together with four other accused, on charges of:
- (a) Count one – conspiracy to kill one Bassam Boutrous Issa ('Mr Issa') during July to September 2013, a contravention of s18(2) of the Riotous Assemblies Act 17 of 1956 ('Act 17 of 1956') read with s51(1) of the Criminal Law Amendment Act 105 of 1997 ('Act 105 of 1977').
 - (b) Count two - conspiracy to rob the deceased, Mr Issa, during or about July to September 2013, a contravention of s18(2) of Act 17 of 1956 read with s51(2) of Act 105 of 1997,
 - (c) Count three - robbery with aggravating circumstances of Mr Issa on 3 September 2013,
 - (d) Count four - unlawful possession of a firearm on 3 September 2013, a contravention of s3 of the Firearms Control Act 60 of 2000 ('Act 60 of 2000'),
 - (e) Count five - unlawful possession of ammunition on 3 September 2013, a contravention of s 90 of Act 60 of 2000,
 - (f) Count six - conspiracy to murder Mr Issa, this conspiracy having occurred during September to October 2013, a contravention of s18(2) of Act 17 of 1956, read with s51(1) of Act 105 of 1997,
 - (g) Count seven - the murder of Mr Issa who was shot in a stationary vehicle 30 times.;
 - (h) Count eight - unlawful possession of firearms during September to October 2013, a contravention of s3 of Act 60 of 2000, and
 - (i) Count nine - unlawful possession of ammunition during the period of September of October 2013, a contravention of s 90 of Act 60 of 2 of 2000.

- [3] It is common cause that due to count three and seven, the bail application falls within the ambit of a schedule 6 offence, in that the applicant is burdened with establishing the existence of exceptional circumstances which in the interests of justice would permit his release on bail.
- [4] The applicant is represented by advocate Kolbe SC and the respondent is represented by advocate Khumalo. Advocate Khumalo is also the counsel representing the State in the criminal trial before Msimeki J. The bail application commenced on 2 September 2024, and it was remanded to 3 and 4 September.
- [5] The applicant adduced evidence by way of written affidavits which were read into the record. These affidavits were marked exhibit 'A' and the applicant's supplementary affidavit was marked exhibit 'B'. The affidavit of the investigating officer, opposing bail, was marked as exhibit 'C' and the replying affidavit of the applicant was marked as exhibit 'D'.
- [6] The applicant states he is presently incarcerated at the Zonderwater Correctional Facility. Prior to his arrest he was a businessman and a taxi owner residing at number 568 Nazarine Street, King Dinuzulu Township, Eshowe, KwaZulu-Natal Province. According to the supplementary affidavit his secondary address will be 14 Bellairs Park Road, Cyrus Place, Northriding where he will be staying with his sister-in-law Babongile Wendy Dlamini.
- [7] The applicant has raised the following issues as exceptional circumstances which in the interests of justice warrant his release on bail, namely:
- (a) The trial was set down for twenty days but after almost eight years the State has not yet closed its case and the trial may drag on indefinitely.
 - (b) The State's case is extremely poor in that the State witnesses, who have testified, indicated that the applicant is not involved in counts one to five and the evidence implicating the applicant on counts six to nine is seriously suspect.
 - (c) There have been fundamental irregularities in the trial proceedings which will vitiate the proceedings.
 - (d) All investigations are complete and the applicant cannot interfere with the administration of justice.
 - (e) The applicant has no financial, family or other interests outside the borders of the Republic of South Africa, save for his eldest son who is studying in the United Kingdom. The rest of his family reside in South Africa.
- [8] It is common cause that the applicant was convicted of kidnapping, attempted murder and attempted dealing in drugs, in respect of which he was sentenced to an effective 15 years' imprisonment on 23 February 2016, under case number SS26/2014, Katlehong CAS number 212/10/2013. The applicant contends that he qualified for release on parole on 22 August 2023 and that his release on parole is jeopardised by his present incarceration in the matter before Msimeki J. The applicant's counsel contended that if the applicant is placed on

parole, he will be subjected to strict control and monitoring by the Correctional Services and that this in itself constitutes an exceptional circumstance.

Submissions of the applicant

In respect to the strength of the State's case

- [9] The applicant, alleges that the State has a weak case against him. He referred to the weak evidence of the s204 State witnesses that have already testified in the matter, namely, Luybomir Borislavov Grigorov ('Mr Grigorov'), Lucky Mokoena ('Mr Mokoena') and Jacob Nare ('Mr Nare'), Mondli Mbelo ('Mr Mbelo').
- [10] In respect to the evidence of Mr Grigorov, the applicant contends that Mr Grigorov testified that the applicant was not involved in the offences described in counts one to five. It was further contended that according to the evidence of Mr Grigorov, the robbery of Mr Issa was committed by one Mr Mokoena and his accomplice.
- [11] In respect to the evidence of Mr Mokoena, the applicant contends that Mr Mokoena confirmed that he and a friend were responsible for the robbery of Mr Issa and that the applicant was not present on the scene. It is also contended that Mr Mokoena has absconded before his cross-examination could be completed.
- [12] In respect to the evidence of Mr Nare, the applicant contends that Mr Nare was not an eyewitness to the murder of Mr Issa. Furthermore, the evidence of Mr Nare, stating that the applicant discussed the killing of Mr Issa with him and bragged about having killed Mr Issa, is to be disbelieved. It was contended that the evidence of Mr Nare is contradicted by the evidence of Mr Grigorov in respect of whom the driver of the Ford Ranger was, who and when the blue lights were fitted to the Ford ranger and who activated a tracking device on the vehicle of Mr Issa.
- [13] In respect to the evidence of Mr Mbelo, the applicant contends this witness did not implicate the applicant in the commission of any of the alleged offences.
- [14] In respect to the three eye witnesses, namely, Ntombifuthi Ntuli ('Ms Ntuli'), Themba Mqhuqho ('Mr Mqhuqho') and Zingiswa Msengu ('Ms Msengu'), the applicant contends that Ms Msengu implicates two occupants in the vehicle conveying the shooters and that these shooters were white persons. Mr Mqhuqho also identified the shooter as a non-English speaking European, which by implication, the description is that of Mr Grigorov and not the applicant.
- [15] The applicant contends that the evidence against him was manufactured and manipulated and that this explains why the only evidence against him are the alleged confessions made by the s204 witnesses, two of whom exonerated him as far as counts one to five are concerned. As a result, it was contended that the applicant's involvement is solely based on the evidence of s204 witnesses, whose evidence came into existence during the course of a compromised investigation and is contradicted by that of independent eyewitnesses. As a

result, the applicant contends that he will be acquitted of all the charges.

- [16] The applicant contends that in addition to no witness placing him on the scene, no murder weapon was found in his possession and there is no DNA or fingerprint evidence to implicate him. As a result, the applicant contends there is no evidence to convict him on counts one to five.
- [17] The applicant contends that except for the violence implicit in the charges against him, there does not exist any suggestion, or any likelihood on the facts, to suggest that he has threatened any person with violence, or that he harbours any resentment against any person, or that he has a disposition to violence or a disposition to commit schedule 1 offences.
- [18] As regards s60(4)(c) read with s60(7) of Act 51 of 1977, the applicant contends that there is no likelihood that if he is released on bail he will attempt to influence or intimidate witnesses or conceal and destroy evidence.
- [19] As regards s60(4)(d) read with s 60(8) of Act 51 of 1977, the applicant contends that he will not undermine the proper functioning of the criminal justice system, including the bail system, as he has never supplied false information at the time of his arrest or during the bail proceedings.
- [20] As regards s60(4)(e) read with s60(8) of Act 51 of 1977, the applicant contends that his release on bail will not disturb the public order or undermine the public peace or security.
- [21] As regards s60(9) of Act 51 of 1977, the applicant contends that he will suffer prejudice if he is further detained in custody, as he is being deprived of his freedom without having been convicted and that this constitutes an infringement of his right to freedom. It was contended that his continued incarceration disables him to conduct his business, or to earn an income to pay for his legal expenses, or to contribute to the maintenance of his children and his extended family.

Previous convictions

- [22] Apart from the cumulative sentence of 15 years imprisonment which the applicant received on 23 February 2016, under case number SS26/2014, he has a previous conviction in 1997 for theft for which he was fined R1 000,00 and a suspended sentenced of five years imprisonment. He also was convicted for a traffic violation in 2006, in respect of which he was fined R3 000,00.

The address of the applicant

- [23] A supplementary affidavit marked exhibit 'B' dealt with the applicant's alternative address in Johannesburg where he will stay pending his trial. This address is number 14 Bellairs Park Road, Syrus Place Complex, North Riding. The applicant's address in Natal where he will be staying, is number 568 Nazarine Street, King Dinuzulu Township, Eshowe.

Emotional structure

[24] The applicant submitted that the State's contention that he has no children is contrived and false. The applicant contends that he has eight children and has annexed supporting documentation confirming that the following four children are his, namely, Amani Snothando, Shlobile Miya, Aluta Luthando Ndakbankulu, Landiwe Mophumulo and Ayabonga Shaana Miya.

Evidence of Mr Jabu Mabena

[25] The applicant presented the oral evidence of Mr Jabu Mabena ('Mr Mabena'), who is the Head of the Parole Board at the Zonderwater Correctional Facility. This is where the applicant is currently detained as a sentenced offender. Mr Mabena's evidence was presented by reason of the dispute between the State and the applicant regarding whether or not the applicant, in respect of the sentence of 15 years' imprisonment, which he is presently serving, qualifies for consideration to be placed on parole.

[26] Mr Mabena stated that in terms of the provisions of s73(6)(a) of the Correctional Services Act 111 of 1998, ('Act 111 of 1998'), a sentenced offender may not be placed on parole before having served half of his sentence. Mr Mabena confirmed that the applicant's minimum detention period expired on 22 August

2023. Mr Mabena made it clear that this fact, together with a host of other factors, would be considered to determine whether the applicant should be placed on parole or not.

[27] Mr Mabena stated that the parole board would consider the GS344 form as well as the J7, (which is a detention warrant reflecting the pending matter, the charges he is facing, the next date of appearance and whether or not the offender had been granted bail).

[28] Mr Mabena did not concede that if bail is denied in respect of this pending matter, the applicant will not be placed on parole. However, it is clear that it is a factor that will be considered by the parole board.

Submissions

of the respondent

[29] The respondent's counsel contended that the applicant has failed to discharge the onus resting upon him that there are exceptional circumstances that in the interests of justice warrant his release on bail. The respondent's counsel argued that the applicant has no fixed address and that the lease which was handed up is of no value as the lease commenced on 28 March 2024 and will end on 28 September

2024. Counsel argued that in the absence of any further lease being handed up, it implies that once this lease ends, any further address in Gauteng is currently unknown. The respondent's counsel contended that annexure 'BBM5' depicts more than five addresses appearing on the personal profile of the applicant. Counsel argued that it will make it difficult, if not impossible, for the State to trace the applicant should he be granted bail.
- [30] The respondent's counsel stated that the application to stay the prosecution against the applicant and others, in the trial before Msimeki J, was opposed by the State. The application was eventually struck off the Pretoria High Court roll on 14 July 2020, due to the non-appearance of the applicants.
- [31] As regards the strength of the State's case, in the trial before Msimeki J, the respondent's counsel argued that it is a lie that the witnesses already called, namely, Mr Grigorov, Mr Mokoena, Mr Nare and Mr Mbelu have exculpated the applicant. Counsel argued that the murder weapon, an AK47 fully automatic rifle, was recovered and linked by way of ballistics to the crime scene, as being the firearm that discharged most of the bullets during the killing of Mr Issa. Furthermore, it was contended that the vehicle that was used in the murder of Mr Issa, was in the possession of the applicant when it was fitted, illegally with blue lights. In addition, it was argued that the applicant was the driver of this vehicle when the offence took place.
- [32] Counsel argued that the evidence further confirms that the applicant was the main coordinator of the hitmen and directly took instructions from accused four who is Mr Krejcir. Counsel contended that the investigation further places the applicant, including his co-accused and other suspects, in the company of Mr Issa from the night of 11 October into the morning of 12 October 2013. The respondent's counsel alleged that the State will prove that the deceased was shot and killed at the instruction of accused number 4, acting in common purpose with the applicant and his co-accused in this matter.
- [33] The respondent's counsel submitted that Mr Mbelo testified that he recovered the firearm which was brought by the applicant, and which was placed in the ceiling. As regards the evidence of Mr Gregorov, the respondent's counsel argued that Mr Gregorov was involved in the planning of the killing of Mr Issa and that according to his evidence, the applicant was definitely involved as well, together with accused two and three.
- [34] Counsel argued that the planning took place in September 2013 and the execution of Mr Issa occurred in October 2013. Accused four, namely Mr Krejcir, was the one who paid the applicant and others to execute the killing of Mr Issa. As regards the evidence of Mr Nare, counsel submitted that his evidence is not completed yet and he has to still return to be cross-examined. As regards the evidence of Mr Mokoena, counsel submitted that his evidence is also not completed and he needs to return so that his cross-examination can be completed.

- [35] The respondent's counsel argued that the applicant is aware who the remaining witnesses are who still need to testify. Counsel contended that to release the applicant on bail at this stage of the trial, will place the lives of these remaining witnesses in danger. The respondent's counsel referred to the intimidation of a witness in the pending Sandton matter with CAS number 180/01/2014, namely Mr Hoker, who was intimidated to change the statement that he made implicating the applicant. Counsel submitted that the applicant sent his brother to speak to Mr Hoker and that this shows how the applicant is able to intimidate witnesses whilst in custody.
- [36] The respondent's counsel stated that there are three State witnesses that have still not testified, this is excluding the investigating officer and Brigadier Ximba.
- [37] It was argued that there was an attempt to kill the witness Mr Mbelo and the applicant was charged. The respondent's counsel submitted that the applicant was acquitted on this matter, however, he was acquitted on a technicality. Counsel argued that by attempting to kill Mr Mbelo, it shows a propensity on the part of the applicant to attempt to weaken the trial evidence before Msimeki J.
- [38] As regards the sentences that can be imposed, the respondent's counsel stated that in respect to count six, the sentence is life imprisonment. In respect to count seven, life imprisonment can be imposed. In respect to count eight, 25 years imprisonment can be imposed, as the rifle is a fully automatic rifle. In respect to count nine, fifteen years imprisonment can be imposed.
- [39] Counsel submitted that the applicant is currently arraigned in the Protea Regional Court on CAS Meadowlands 267/12/2013, which is in respect to charges of attempted murder, robbery with aggravated circumstances and possession of an unlicensed firearm and ammunition. Although bail has been set in respect to the Meadowlands matter, it is the intention of the State to review the decision of the Regional Magistrate. Mr Nare, together with other witnesses, is to still testify in the Meadowlands matter. The same accused, including the applicant, who are standing trial before Msimeki J, are implicated in the Meadowlands matter.
- [40] Counsel referred this court to additional criminal matters pending against the applicant, which have not yet commenced. Counsel submitted that these cases could not commence due to the matter before Msimeki J not being finalised. These cases are:
- (a) Sandton CAS 180/01/2014, which is a matter pertaining to a conspiracy to kill forensic investigator Paul o' Sullivan and senior police officer Brigadier Ximba. Counsel submitted that on 9 January 2014, the applicant was arrested while he was trying to execute the instructions of accused 4, namely Mr Krejcir, to kill Paul o' Sullivan and Brigadier Ximba.
 - (b) Heidelberg case 269/07/2013, which is in relation to the murder of Phumlani. The Heidelberg matter has been consolidated with the Sandton matter. Mr Nare is also a witness in these matters and due to the threat to his life, he is currently under police protection in

the United Kingdom. The applicant is implicated in these matters together with the other accused standing trial before Msimeki J. The respondent's counsel argued that Paul o' Sullivan and Brigadier Ximba are involved in the investigation of the criminal matters against the applicant and his co-accused, which are all gang related matters. His release on bail will mean that the witnesses and targets like Paul o' Sullivan and Brigadier Ximba will have to leave the country and seek refuge elsewhere because the drug syndicates do not make idle threats.

- [41] The respondent's counsel referred this Court to more cases where the applicant is implicated namely, High Flats CAS126/12/2007, High Flats CAS 108/12/2007 and Mont Clair CAS 146/08/2011, which involves business robberies, possession of explosives, bombings of ATM's and theft of money from bombed ATM's. This Court was also referred to the matters of Johannesburg Central 1969/04/2024, which is a robbery with firearms where the applicant is directly involved, as well as Honeydew CAS 508/08/2003, which is a robbery where a firearm was used.
- [42] The respondent's counsel argued that all the current and outstanding matters against the applicant are all cases where there is a high degree of violence. It was submitted that the many outstanding charges, as well as his previous convictions, that the applicant has a propensity to commit violent offences, which he will continue to do if he is released on bail. It was submitted that citizens ought to be protected from individuals like the applicant and it is evident that the applicant cannot live in harmony with his fellow members in the community.

Legal principles

[43] Section 60(11)

(a) of Act 51 of 1977 states:

'Notwithstanding any provision of the Act, where an accused is charged with an offence referred to:-

- (a) In schedule 6, the Court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release on bail.'
- [44] In the context of s60(11)(a) of Act 51 of 1977, the concept 'exceptional circumstances', has meant different things to different people. In *S v Mohammed*,^[1] it was held that the dictionary definition of the word 'exceptional' has two shades of meaning: The primary meaning is simply: 'unusual or different'. The secondary meaning is 'markedly unusual or specially different'. In the matter of *Mohammed*,^[2] it was held that the phrase 'exceptional circumstances' does not stand alone. The accused has to adduce evidence which satisfies the court that such circumstances exist which in the interests of justice permit his or her release. The proven circumstances have to be weighed in the interests of justice. The true

enquiry is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the appellant's release on bail.

[45] In so far as the weakness of the State's case in a bail application is concerned, the Supreme Court of Appeal in the matter of *S v Mathebula*[3] held that:

'...In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge...'[4]

[46] In the matter of *S v Smith and Another*,[5] the Court held that:

'The Court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby'.

[47] In *S v Bruintjies*,[6] the Supreme Court of Appeal stated that:

'(f) The appellant failed to testify on his own behalf and no attempt was made by his counsel to have him testify at the bail application.

There was thus no means by which the Court a quo could assess the bona fides or reliability of the appellant save by the say-so of his counsel.'[7]

[48] In *Mathebula*,[8] the Supreme Court of Appeal stated that:

'In the present instance the appellant's tilt at the State case was blunted in several respects: first, he founded the attempt upon

affidavit evidence not open to test by cross-examination and, therefore, less persuasive'.[9]

Evaluation

[49] The applicant bears the onus to satisfy the Court, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his release.[10] A mere denial of the considerations and/or probabilities of events, as contained in Section 60 (4) to (9) of Act 51 of 1977, will not suffice in order to succeed in convincing the Court of the existence of exceptional circumstances, in order for bail to be granted.

[50] The applicant did not present viva voce evidence in order to discharge this onus. He sought to rely on the affidavits accepted as exhibits in the bail proceedings as well as the viva voce evidence of Mr Mabena. As stated in the case of *Bruintjies*[11] and *Mathebula*,[12] evidence on affidavit is less persuasive than oral evidence.

[51] The affidavits of the applicant where he denies his involvement in the charges before Msimeki J, rests solely on his say-so that the witnesses who have already testified have not incriminated him. The respondent's counsel, who is also the State advocate before Msimeki J, could not cross-examine the applicant. Although this Court cannot draw a negative

inference from the applicant proceeding by way of affidavit, as the respondent similarly adduced evidence on affidavit by the investigating officer, the fact remains that in terms of the provisions of s60(11)(a) of Act 51 of 1977, the onus is on the applicant and not the respondent to adduce evidence that there are exceptional circumstances that warrant the applicant's release on bail.

- [52] The hearsay evidence of the investigating officer remains hearsay evidence, however, in bail applications, the rules for admissibility of hearsay evidence are more lenient as opposed to trials.
- [53] A Court tasked to adjudicate a bail application is primarily concerned with whether there are sufficient grounds to grant bail and whether there is the likelihood that the applicant will abscond or commit further offences whilst released on bail. This enquiry allows a Court to consider a broader range of information to assess these factors, which includes hearsay evidence.
- [54] It is true that the strength of the State's case is one of the considerations that the Court must consider, but so too does this Court need to consider all outstanding matters upon which the appellant is still to be tried on. This Court has to consider this to determine the propensity to commit more violent crime, an incentive to abscond and a possibility of intimidating remaining witnesses who still need to testify before Msimeki J. As a result, apart from considering whether there are exceptional circumstances in this bail application, this Court has considered the provisions of ss60(4)-(9) of Act 51 of 1977.

[55] Section 60(4) of Act 51 of 1977 states that:

'The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

- (a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or
- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
- (c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;
- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security;' [my emphasis]

[56] In considering whether the grounds in s60(4)(a) have been established, s60(5) states that a Court may consider the following:

- ‘(a) the degree of violence towards others implicit in the charge against the accused;
- (b) any threat of violence which the accused may have made to any person;
- (c) any resentment the accused is alleged to harbour against any person;
- (d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;
- (e) any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct;
- (f) the prevalence of a particular type of offence;
- (g) any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; or
- (h) any other factor which in the opinion of the court should be taken into account.’ [my emphasis]

[57] The investigating officer’s affidavit alluded to the outstanding criminal matters which remain pending against the applicant. As stated supra these outstanding matters are:

- (a) Sandton CAS 180/01/2014,
- (b) Heidelberg CAS 269/07/2013
- (c) Meadowlands CAS267/12/2013,
- (d) High Flats CAS126/12/2007, High Flats CAS 108/12/2007 and Mont Clair CAS 146/08/2011
- (e) Johannesburg Central 1969/04/2024, and
- (f) Honeydew CAS 508/08/2003

Although the applicant’s counsel argued that there are at most only two matters outstanding, namely the matter upon which the applicant stands trial before Msimeki J and the Protea matter under CAS Meadowland 267/12/2013, the fact remains that in the absence of the applicant’s viva voce evidence denying their existence, the opposing answering affidavit of the investigating officer remains un-challenged. The applicant in his replying affidavit merely mentions that the outstanding cases have been opened to trump up the charges against him. This is not sufficient. This Court expected more from the applicant in denying their existence. There is no evidence before this Court that dockets have not in fact been opened in respect to the above outstanding matters. There is no evidence before this Court to suggest that discovery of the contents of these dockets was requested by the applicant and that the affidavits in these dockets exculpate the applicant. As a result, the affidavit filed by the investigating officer that these outstanding matters exist, remains unchallenged.

[58] As a result, the outstanding criminal matters alluded to by the investigating officer provides relevant information for this Court to assess and determine the bail application, in deciding whether the applicant is a flight risk and a danger to the community.

[59] From the submissions of the respondent's counsel, the applicant has a disposition to violence which is evidence from the current matter before Msimeki J as well as all the other outstanding matters referred to in paragraphs [40], [41] and

[57] *supra*. The previous convictions of drug dealing, kidnapping and attempted murder under Katlehong CAS 212/10/2013 further confirms this.

[60] In considering whether the grounds in s60(4)(b) have been established, s60(6) states that a Court may consider the following:

‘(a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;

(b) the assets held by the accused and where such assets are situated;

(c) the means, and travel documents held by the accused, which may enable him or her to leave the country;

(d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;

(e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;

(f) the nature and the gravity of the charge on which the accused is to be tried;

(g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;

(h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;

(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or

(j) any other factor which in the opinion of the court should be taken into account.’ [my emphasis]

[61] From the replying affidavit of the applicant, it is clear that he has no immovable property in his name as all his assets were seized by the State. As regards his emotional attachments, all his children, with the exception of his son who lives in the United Kingdom, reside in Kwazulu Natal. As regards the many addresses alluded to by the investigating officer, the applicant at paragraph 44 of his replying affidavit, admits that he has had many residential addresses over the years.

- [62] The applicant's counsel argued that the applicant has a fixed address in Natal. This may be so, however the fact remains that the applicant would have to stand trial in Gauteng on the current trial before Msimeki J and all the other outstanding matters. It is of no moment that he has a fixed address in Natal. It was imperative for a fixed address to have been given in Gauteng after 28 September 2024, which is when the lease expires. There is accordingly no verified address before this Court in Gauteng where the applicant will reside.
- [63] The applicant was given the opportunity to reply to the opposing affidavit submitted by the investigating officer and filed a replying affidavit in which he states that the investigating officer failed to address any of the aspects pertaining to paragraphs 14 to 74 of the applicant's founding affidavit. Paragraphs 14 to 74 relate to the strength of the State's case against the applicant. As a result, his allegations that the state's case against him is weak, remains unchallenged. The problem this Court faces, is that the record of the trial proceedings before Msimeki J, are extremely long and none of the typed transcripts of the evidence of the witnesses who testified, were placed before this Court. As a result, a determination of the strength's case cannot be made. Whether or not the evidence currently on record in the criminal trial implicates the applicant or not, this Court is not in possession of the court transcript and cannot reach any conclusion in this regard.
- [64] There are two versions before this Court. The applicant states that there is insufficient evidence to convict him, whereas the respondent argues there is strong evidence against him. The respondent's counsel did concede that in respect to counts three, four and five there is no case against the applicant. However, in respect to the remaining charges, the respondent's counsel stated that there is a strong case against the applicant. There is no reason for this Court not to believe the respondent's counsel or to find that the respondent's counsel has misrepresented to this Court that there is a strong case against the applicant on the remaining charges.
- [65] The onus is on the applicant to adduce evidence that there is a weak case. The onus could have been discharged by the applicant possibly calling one of the s204 witnesses, who have already completed their evidence, to confirm what the applicant has stated in his affidavit.
- [66] This Court finds that this burden has not been successfully discharged by the applicant.
- [67] From the submissions made by the respondent's counsel, this Court finds that the likelihood of the applicant not standing his trial is high due to the following factors:
- (a) There appears to be a strong *prima facie* case against the applicant in the matter before Msimeki J. It appears that not all the State witnesses have testified yet.
 - (b) Should the applicant be convicted in the trial before Msimeki J, he would most likely be sentenced to a few terms of life imprisonment.
 - (c) The applicant does not own any substantial assets.

[68] In considering whether the grounds in s60(4)(c) have been established, s60(7) states that a Court may consider the following:

- ‘(a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;
- (b) whether the witnesses have already made statements and agreed to testify;
- (c) whether the investigation against the accused has already been completed;
- (d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;
- (e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;
- (f) whether the accused has access to evidentiary material which is to be presented at his or her trial;
- (g) the ease with which evidentiary material could be concealed or destroyed; or
- (h) any other factor which in the opinion of the court should be taken into account.’

[69] Even though the applicant contends that the attempted murder charge in respect of Mr Mbelo, was trumped up against him and that he was acquitted, the fact remains, there must have been a reason for the State to relocate this witness to the United Kingdom and to place him in the witness protection program. The respondent’s counsel also argued that there is a witness in the Sandton matter CAS 180/1/2014, who has been intimidated to change his statement, thereby showing a propensity on the part of the applicant to intimidate not only remaining witnesses who still need to testify before Msimeki J, but also other witnesses

in outstanding matters against the applicant. In the absence of any contradictory evidence in this regard, this Court accepts this as being a strong possibility.

[70] In considering whether the ground in subsection 60(4) (d) have been established, s60(8) states that a Court may consider the following:

- ‘(a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;
- (b) whether the accused is in custody on another charge or whether the accused is on parole;
- (c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or
- (d) any other factor which in the opinion of the court should be taken into account.’ [my emphasis]

[71] Considering all the grounds alluded to by the applicant and the respondent's counsel, this Court does not find any exceptional circumstances that warrant the applicant to be released on bail. In fact, this Court finds that should the applicant be released he will undermine the proper functioning of the criminal justice system, including the bail system and that he will disturb the public peace.

Order

[72] In the result, bail is denied.

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JUDGE OF THE HIGH COURT

JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 27 September 2024 .

APPEARANCES

ON BEHALF OF THE APPLICANT : Adv. S Kolbe SC Instructed by Spangenberg Attorneys Inc. ON BEHALF OF THE RESPONDENT: Adv. S.J Khumalo Instructed by the Office of the National Director of Public Prosecutions

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

[2] Ibid

[3] S v Mathebula 2010 (1) SACR 55 (SCA)

[4] Ibid para 12

[5] S v Smith and Another 1969 (4) SA 175 (N)

[6] S v Bruintjies 2003 (2) SACR 575 (SCA)

[7] Ibid para 7

[8] Mathebula (note 3 above)

[9] Ibid page 59 B-C

[10] S v Mabena and Another 2007 (1) SACR 482 (SCA) and S v Van Wyk 2005 (1) SACR 41 (SCA)

[11] Bruintjies (note 6 above)

[12] Mathebula (note 3 above)

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