IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no:684/2024P

In the matter between

ROSHANLAL BANAWO **APPELLANT**

V

THE STATE **RESPONDENT**

JUDGMENT

PITMAN AJ

Background

[1] The appellant, Roshanlal Banawo, an adult male sixty-one-year-old "pensioner" (so he describes himself) appeals against the refusal to grant him bail by a magistrate in the Umzinyathi District Magistrate's Court held at Dundee on 14 December 2023. The appellant had been arrested on 26 November 2023 on a charge of conspiracy to murder a Major General Frances Slambert (Hereafter "the Major General") of the South African Police Services. The bail application commenced on 11 December 2023 with judgement being delivered on 14 December 2023. The appellant was represented by Counsel being Advocate Snyman and the State was represented by Advocate Truter. When the hearing commenced Advocate Truter placed on record that the legal representatives had agreed that the offence for which the appellant was charged was neither a Schedule 5 nor Schedule 6 offence. Advocate Snyman placed on record that there was no burden on the appellant to show that the interests of justice permit his release but rather that the State had to show that the interests of justice do not permit his release.

In limine

[2] During the bail application, Mr. Snyman read onto the record a statement that the appellant would apparently rely upon as evidence in his favour. After reading it he asked the appellant, in open court, to confirm that he intended it as an affidavit and that he considered the statement to be one *"under oath and binding on"* his conscience. It was then handed up to the magistrate. Advocate Truter and, it appears the magistrate, accepted it as such, and it appears as if it was admitted in evidence by the magistrate without further question. In her judgement the magistrate continues to refer to it as a *"statement"* but apparently accepted everything set out therein as constituting the evidence on behalf of the appellant for purposes of the bail application.

This appeal appeared before me initially on 16 February 2024. The same two Counsel appeared for the parties. Before commencing with any argument, I raised the question of whether the *"statement"* was in fact intended as an *"affidavit"* or just as an unsworn statement. I was concerned because the procedure followed by Counsel for the appellant at the bail application can in no way be described as being the correct manner in which a statement is commissioned in order to convert it into an affidavit. For Counsel to read out a statement and then ask the appellant, who was not in the witness box and accordingly had not been sworn in, in open court whether he considered the contents to be binding on his conscience does not, and cannot, amount to the lawful commissioning of that *"statement"* by a commissioner of oaths. Both Counsel agreed with me and indicated that they had, without further thought at the time, actually considered the statement to have effectively become an affidavit and had approached the matter on that basis. Upon reflection, in view of what I had brought up, they both agreed that it was not, in fact at the time, an affidavit.

[3] Advocate Snyman for the appellant argued that all parties understood it as such and that the appeal could proceed on that basis. I did not agree because in my view, and on what was before me, the appellant had placed no evidence under oath before the magistrate, and insofar as it appears that the magistrate seems to have accepted that to be the position, that was wrong.

[4] Both Advocates Snyman and Truter proposed that the bail appeal be adjourned until 23 February 2024 for the document to be properly commissioned.

Whilst *prima facie* there may be questions about adopting such a procedure I was satisfied from reading the record, and both Advocates agreed, that the bail application was in fact decided by the Court *a quo* on the basis that the statement handed up was an affidavit and no prejudice can result by its proper commissioning between 16 February 2024 and then. The magistrate, despite referring to it as a statement considered it as evidence on behalf of the appellant, did not object to the manner in which it was purportedly "commissioned" and treated the contents as if they were set out on affidavit.

[5] The appellant has in fact now delivered the statement duly commissioned by way of a notice of delivery dated 20 February 2024. There was no objection by Advocate Truter. I was therefore satisfied that in the interests of justice this appeal could continue on the record before me. Remitting it back to the magistrate would serve no sensible purpose.

[6] The appeal was accordingly argued on that basis on 23 February 2024. After hearing argument, I adjourned the matter until today for my judgement.

The merits

[7] Prior to any evidence being introduced Advocate Truter placed on record that the State was opposing bail on the basis that there was a likelihood that the appellant, if released on bail, would attempt to influence, or intimidate witnesses or to conceal or destroy evidence. He placed on record that the opposition was therefore *"limited to section 60 (4)(c) of the Criminal Procedure Act"*. (Hereafter "the CPA")

[8] As set out above the appellant provided the evidence set out in his statement/affidavit. The investigating officer, Col Engelbrecht testified for the State. The appellant's evidence, in brief summary, was that he was not guilty, he had a 1994 previous conviction for mishandling of a firearm to which he had pleaded guilty, he would stand trial if granted bail and that he would not influence or intimidate any witnesses or conceal or destroy evidence. He was not aware of witnesses who may have made statements against him, had always cooperated with the police in this matter and in the event that the court felt it was necessary, would comply with any conditions the court may deem necessary.

[9] Col Engelbrecht, a policeman for 40 years, testified that he is investigating officer. In summary he stated that he was stationed at the Provincial Task Team, Vryheid and that he was opposing bail on the basis set out by the State to which I have already referred. He stated that the appellant had been a police officer stationed at the Dundee Detective Services and had also done duties at the Dundee Court but was now, after being dismissed from the police service, a pensioner living in the Dundee area, buying, and selling cattle and earning from that endeavor, allegedly approximately 20,000 Rand a week. He has no pending cases against him. He stated that the case he has against the appellant is as follows:

a) The appellant is a friend of a man called Kader.

b) A protection order had been taken out against Kader by the Major General pursuant to a relationship the Major General and Kader had been involved in, in about 2023.

c) Kader had in turn written a letter of complaint against the Major General to the National Commissioner. It is not necessary that I deal with the merits of the protection order or letter of complaint.

d) Two other protection orders had also then been obtained by the Major General against Kader.

e) On 25 May 2023, and at court in connection with one of the protection orders, a photograph was taken of the Major General's white BMW vehicle with Kader's phone.

f) The appellant was with Kader at court when that photograph was taken.

g) After being requested to become involved in an investigation into threats against the Major General, he met with the appellant on 25 May 2023. He informed the appellant that there would be an investigation from that day onwards and that he should stay away from the complainant, not call her, not speak to her and not contact her at all.

h) On 26 May 2023 the appellant approached the magistrates court and obtained a protection order against the Major General who in turn obtained a protection order against the appellant alleging in her application that *"my life is in danger. I'm now convinced Banawo is going to kill me"*.

i) On 14 June 2023 he further received information that there is *"indeed"* a plot to kill the Major General.

j) He obtained statements from two witnesses to the effect that they had been hired by the appellant to eliminate and kill the Major General. One lived in Gauteng and the other in Dundee. The one who lived in Gauteng had his hometown in Dannhauser, about 30 km away.

k) The witnesses, who had both agreed to be a section 204 witnesses in due course, had met the appellant who had pointed out places where, inter alia the Major General worked so that they could carry out her elimination. The appellant had described to them the Major General's vehicle also.

l) Using the powers of section 205 of the Criminal Procedure Act he obtained cell phone records which indicated contact between one of these witness conspirators and the appellant and between that witness and the other accomplice. The information he got was that the Major General would be shot.

m) The witnesses would say that they had in fact attempted to carry out the elimination of the Major General but had been disturbed the first time round and on the second occasion, whilst physically standing in front of the Major General's gate, she did not come out as anticipated.

n) He testified that the witnesses are known to the appellant. They had stated that they had travelled in a white double cab vehicle with an NDE registration, like the vehicle he discovered the appellant in fact possessed.

o) In August, approximately two months later, he obtained a statement from another witness to the effect that this new witness had also been approached by the appellant to arrange a firearm and hitman and that at the time of the discussion with this witness the appellant had been in possession of a rifle in

the same type of double cab white vehicle. This witness also resides in Dundee. During a later search of the appellant premises a rifle was found and later identified by the witnesses as the rifle that was in the vehicle that day.

p) The three witnesses are prepared to testify but are severely concerned about their safety.

q) His investigation was approximately 95% complete. He had initially not wanted to arrest the appellant until the investigation was complete due to the sensitivity of it and the safety of his witnesses.

r) He made the decision to arrest the appellant on 26 November 2023 because on 23 November the appellant's vehicle was seen in the vicinity of the Major General's house. This was not her original home but one that she had moved to. The appellant's vehicle had driven slowly past the house and had occupants including the appellant. The witnesses confirmed that later on the same day the appellant's vehicle was seen driving past the workplace of the Major General, again very slowly.

s) Around 23 November 2023, he is not sure of the date, there was an incident at the Major General's house where she woke up with a laser beam shining through her window. Her alarm had been activated and the police responded. The laser beam incident is corroborated by an independent witness.

t) He then decided that the Major General's safety was paramount, and he had to make an arrest. He accordingly arrested the appellant.

u) He had concerns that the appellant will not stop with his unlawful conduct if granted bail. He remains concerned about the safety of his witnesses and the safety of the Major General. The witnesses have expressed that they are *"petrified"* of the appellant because as soon as the appellant knows (as he now does) that the people he hired were going to testify against him, he will kill them.

v) He conceded that he was not aware of any motive that the appellant may have had to kill Major General save that the appellant was close friends with a man who had a serious gripe against the Major General.

w) He testified that the appellant is *"generally feared in Dundee area"* and that the witnesses strongly believe that they will be eliminated by the appellant. He pointed out that even the original magistrate had not been prepared to be involved in this matter. In his view there was a likelihood that if released on bail the appellant will interfere with his witnesses and the Major General. He admitted that none had been interfered with or intimidated yet.

x) As regards possible conditions if bail was granted, in his evidence in chief the following exchange took place between Advocate Truter and the witness:

> *Prosecutor: Now, let's just deal with bail conditions. Ideally one wants to allow an accused person if it is in the interests of justice to be released on bail. You confirm that?*
>
> *Mr. Engelbrecht: Correct.*
>
> *Prosecutor: Your stance and my stance is that we rather want the Court to make a ruling in that regard by presenting a balanced approach to the Court?*
>
> *Mr. Engelbrecht: Yes, your Worship.*
>
> *Prosecutor: Should the Court find that bail conditions or that bail can be imposed, what conditions are you asking for to be considered?*
>
> *Mr. Engelbrecht: Your Worship, I should ask for the safety of the witnesses and also the complainant – take into consideration the complainant also because she will be a witness – is that if bail should be granted that the accused shouldn't stay in the Umzinyathi area and that perhaps he should report to the police station. And then I learned today…that he does have a passport which he told us that his passport has lapsed or expired, so I would like the passport to be handed in and*

then if he should then enter the area he should make prior arrangements with me or Warrant Officer Badenhorst if he should be available….He indicated at a stage during the investigation that he has got an alternative address…in Pietermaritzburg (250 km from Dundee)…He should leave the district.

y) Under cross examination as regards the possibility of conditions attached to bail, and when asked about *"witness protection"* he was sceptical on the basis that it is voluntary and he is personally aware of an incident where, notwithstanding witness protection, the witness was found and kidnapped and has since disappeared. He did not agree that there were any conditions which would in fact adequately safeguard his witnesses and the complainant. The following exchange took place:

Mr. Snyman: So, you would accept that bail conditions will do away with these threats of intimidation or concealment or destruction of evidence?

Mr. Engelbrecht: No. If the Court is granting bail, then I would say that that is a further precautious method to make sure that the witnesses, including the complainant, are safe.

z) He motivated this further by saying that conditions confining the appellant to a certain area were always inherently problematic in a case such as this because it could not be permanently monitored. It would also not stop the appellant from getting the assistance of others regardless of where he was resident or domiciled at the time in terms of the condition. He therefore concluded *"… It does not really satisfy me in the sense to say this will solve the problem".*

[10] After reviewing the evidence, the magistrate found that she was of the view that there was a *"prima facie"* case against the appellant. She accepted that the onus was on the State to show on a balance of probabilities that the interest of justice do not permit the appellant's release on bail. She understood that the opposition to bail related to the features and factors set out in section 60(4) of the CPA. She was alive to the fact that the investigation was almost complete and the matter would be ready

for trial shortly. Being fundamentally concerned about the safety of the witnesses and complainant, she finally concluded that the interests of justice demanded that he remain in custody and refused bail.

[11] The appellant's Counsel argued that the magistrate erred in:

a) Finding that there was a likelihood that witnesses would be intimidated or interfered with, in the light of Engelbrecht's evidence, that so far witnesses had not been intimidated.

b) Finding that just because the appellant may have known who they were, there was a likelihood that he would intimidate or interfere with them.

c) Failing to find that appropriate conditions attached to bail could protect against that danger. In this regard it is argued that she misdirected herself when she said that the appellant "was not keen to relocate" when his affidavit indicated that he would accept any necessary conditions.

d) Finding that the appellant failed to convince the Court that his further incarceration will detrimentally affect his life or wellbeing in any manner.

[12] Mr. Snyman argued further that there was insufficient evidence before the court to support a finding that there is a likelihood that the appellant will interfere with witnesses. He stated that the test required evidence that it would *"probably occur"*. He argued that conditions of bail requiring the removal of the appellant to outside the area of Dundee would suffice. He also argued, with reference to particularly S v Branco 2002 (2) SACR 531 (W) and S v Acheson 1991 (2) SA 805 (NmH), that the magistrate had not properly considered and investigated the issue of whether appropriate conditions of bail in order to maximise the argument in favour of personal liberty in a bail application where concerns are expressed by the State about possible interference with witnesses? According to the evidence of Engelbrecht, the hit was, to some extent, arranged via telephone calls.

[13] Mr. Truter argued that the crisp issue in this appeal was whether the magistrate correctly concluded that it was not in the interests of justice to release the appellant on bail. He submitted that as a matter of logical conclusion, the appellant

would, and does, know the 204 witnesses. That argument is of course unassailable. He accepted that there had been no intimidation or influence before the appellant's arrest and argued that that was obviously so because the appellant never knew of the progress of the investigation against him or that the witnesses were prepared to testify against him. That argument is also unassailable. He argued that Engelbrecht warned the appellant on 25 May 2023, not interfere with the Major General and to stay away from her. That is not disputed. On the available evidence the appellant thereafter did not do so. The evidence reveals that the appellant thereafter hired hitmen to kill her and actively took part in showing them her home and workplace. He twice approached hitmen and *"shows an astonishing persistence in securing the killing" of* the major General despite being warned by the police not to do so. He argued that that evidence points towards the likelihood of interference with the witnesses. Mr. Truter informed this court, as he had also set out in his heads of argument, that the investigation is complete, save for one cell phone analyst's statement. The case had, on 22 February 2024, been transferred from the District Court to the Dundee Regional Court for a first appearance in March 2024. He will prosecute the trial himself and had reserved dates for the trial in August 2024 with the Dundee Regional Court already. It indicated that the trial will proceed from the State's side.

[14] This Court's powers in a bail appeal are prescribed in section 65(4) of the CPA which provides that the court shall not set aside the decision, unless satisfied that the decision is wrong, in which event the court shall give the decision which, in its opinion, the lower court should have given. *See S v Barber 1979 (4) SA 218 (D) at 220 E.*

[15] I'm not convinced that the magistrate misdirected herself in relation to the appellant's evidence regarding the possible relocation condition. In his affidavit tye appellant says that he undertakes to abide any conditions, such as, reporting to the nearest police station, not contacting any State witnesses, and informing the investigating officer if any of the State witnesses attempt to contact him. The central submission in his affidavit, however, is that his continued detention would have a devastating negative effect on his financial affairs. Those financial affairs can only be what he describes as is *"trade in livestock from my residence".* Nothing was said by the appellant or his Counsel about how he could attend to those financial considerations if not in Dundee or its surrounds. The evidence of Engelbrecht had

indicated that the appellant had what was called “an alternative address” in Pietermaritzburg but the precise details thereof were not followed up by the appellant’s Counsel in cross examination or his address, nor was the tender made that the appellant would accept relocation to *that “alternative address”*. In his address on the matter in the court of quo the appellant’s Counsel, almost as a throwaway line, simply stated *“the question of whether or not setting a condition that he must reside in Pietermaritzburg will satisfy. We leave it to the court but submit that there is no real evidence advanced by the State why he should not be allowed to reside on his farm, outside of town”.* I have carefully considered the Branco and Acheson cases referred to by the appellants Counsel. Save for setting out general principles that may be relevant to this matter, they concern different allegations and facts. I do not consider the magistrate wrong in concluding as she did that conditions would not satisfy the interests of justice in this matter.

[16] I am of the view that although it was perhaps inelegantly phrased, the magistrate was not wrong when she said in her judgement *“but the applicant in his application was not keen to relocate or rather Court will say he did not raise the issue of being willing to relocate should the Court grant bail.”*

[17] On the issue of the likelihood of risk to the witnesses and the Major General, the magistrate carefully considered, in the circumstances of Engelbrecht’s evidence of three attempts by the appellant to kill the Major General, the safety of the Major General and the three witnesses who would implicate him.

[18] On the issue of whether his further incarceration would detrimentally affect the appellant’s life or wellbeing in any other manner, in my view, the magistrate was correct in concluding that the appellant had failed to set out facts justifying such a conclusion. All he had said in his affidavit was that he would stand to lose any potential income from his livestock, and it will be very difficult to maintain himself and comply with his financial responsibilities and expenses to the extent that his assets he would be attached and lost. In my view those are conclusions only. The facts to support them are not revealed. On his own version he gets a pension of R20 000,00 per month in any event.

[19] I am also not satisfied that the magistrate placed an onus on the appellant as argued by Counsel for the appellant. None of the portions of the record referred to justify that conclusion in my view.

[20] Whilst it does not appear to have been dealt with at the bail application I cannot lose sight of the fact that a charge of conspiracy to commit murder attracts a potential sentence equivalent to that of murder in the event of a conviction. Premeditated murder attracts a potential life imprisonment sentence. That consequence for the appellant, if he is convicted, is something that cannot be ignored when considering, together with all other evidence, an incentive on his part to avoid a trial.

[21] As a result, I have not been persuaded that the court *a quo* was wrong in its decision that the interests of justice do not permit the release of the appellant on bail. As far as the issue of the likelihood or probabilities around the potential for the appellant to influence or intimidate witnesses or conceal or destroy evidence if he is released on bail I am satisfied that such is established on a conspectus of the evidence in the bail application as a whole. Of significant relevance is the fact that that despite being warned by Col Engelbrecht in March 2023 to leave the Major General alone, the evidence that Col Engelbrecht as acquired from the accomplices, is that the appellant did anything but leave her alone. I do not lose sight of the fact that he claims he will plead not guilty, as is his right, and presumably will have a different version. He did not disclose such version at the bail application, however. Nevertheless, on the strength of Col Engelbrecht's evidence there is a real risk that the appellant has very little respect, if any at all, for law and order and particularly for complying with an instruction from an authority.

[22] That being so I am satisfied that the court a quo was quite correct in finding that the interests of justice do not permit the release of the appellant on bail.

As a result, the appeal is dismissed.

PITMAN AJ

Date reserved: 23 February 2024

Date delivered:	26 February 2024
For Appellant:	Adv Snyman
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