



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A61/2023

In the appeal between:

JIM MOHAU NTSASA

Appellant

and

THE STATE

Respondent

CORAM: VAN ZYL, J

HEARD ON: 28 APRIL 2023

DELIVERED ON: 12 MAY 2023; 29 MAY 2023

- [1] This is an appeal against the decision of the court *a quo* to cancel the appellant's bail in terms of section 68 of the Criminal Procedure Act, 51 of 1977 ("the Act") during proceedings in the Magistrate's Court, for the district of Mangaung, held in Bloemfontein.

Order:

[2] On 12 May 2023 I made the following order in this appeal:

- “1. The appeal against the withdrawal of the bail of the appellant on 16 March 2023, succeeds.
2. The order of the court a quo in the Magistrate’s Court for the district of Mangaung, held at Bloemfontein, under case number 20/712/2022, dated 16 March 2023, is set aside.
3. The bail of the appellant is reinstated on the same terms and conditions as when it was granted on 4 November 2022.
4. In addition to the aforesaid terms and conditions, the following bail conditions will also apply:
 - 4.1 The appellant is prohibited from having any contact of whatsoever nature and in whatsoever manner, directly or indirectly, with any employee of and/or any person attached to the office of the Director of Public Prosecutions, Bloemfontein.
 - 4.2 Should the investigating officer provide the appellant with the names of any additional potential state witnesses, as provided in paragraph 5 hereunder, the appellant is also prohibited from having any contact of whatsoever nature and in whatsoever manner, directly or indirectly, with such witnesses.
5. Should there be any further potential state witnesses, who fall outside the ambit of the groups of people already described in the original bail conditions, read with the additional bail conditions, the investigating officer is ordered to forthwith provide the appellant with the names of such additional potential state witnesses.”

[3] I hereby provide the reasons for the said order.

Applicable legal principles:

[4] The cancellation of bail is tantamount to a refusal of bail and is consequently appealable. See **S v Porrit** 2018 (2) SACR 274 (GJ) at para [9].

[5] An accused has an automatic right of appeal against a lower court's decision to cancel bail in terms of section 68 of the Act. See **S v Nqumashe** 2001 (2) SACR 310 (NC) at para [14].

[6] Sitting as a court of appeal with regard to the order of the court *a quo* to cancel the appellant's bail, I may only interfere with the said order if I am convinced that it is wrong. See **S v Nqumashe**, *supra*, at para [20]. See also **S v Petersen** 2008 (2) SACR 355 (C) at paras [61] – [62].

[7] However, one also has to remain mindful of the right of an accused "*to be released from detention if the interests of justice permit, subject to reasonable conditions*", as provided in s 35(1)(f) of the Constitution.

[8] Section 68 of the Act determines, *inter alia*, as follows:

"Cancellation of bail

(1) Any court before which a charge is pending in respect of which bail has been granted may, whether the accused has been released or not, upon information on oath that-

(a) the accused is about to evade justice or is about to abscond in order to evade justice;

(b) the accused has interfered or threatened or attempted to interfere with witnesses;

(c) the accused has defeated or attempted to defeat the ends of justice;

(cA) the accused has contravened any prohibition, condition, obligation or order imposed in terms of-

- (i) section 7 of the Domestic Violence Act, 1998;
- (ii) section 10 (1) and (2) of the Protection from Harassment Act, 2011; or
- (iii) an order in terms of any other law,

that was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused;

(d) the accused poses a threat to the safety of the public, a person against whom the offence in question was allegedly committed, or any other particular person;

(e) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail;

(eA) the accused has not disclosed that-

- (i) a protection order as contemplated in section 5 or 6 of the Domestic Violence Act, 1998;
- (ii) a protection order as contemplated in section 3 or 9 of the Protection from Harassment Act, 2011; or
- (iii) an order in terms of any other law,

was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused and whether such an order is still of force;

(eB) the accused has not disclosed or correctly disclosed that he or she is or was, at the time of the alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998;

(f) further evidence has since become available or factors have arisen, including the fact that the accused has furnished false

information in the bail proceedings, which might have affected the decision to grant bail; or

(g) it is in the interests of justice to do so,

issue a warrant for the arrest of the accused and make such order as it may deem proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings.”

- [9] Section 66 of the Act is similar to section 68, but section 66 deals with the failure by an accused to observe a condition of bail. In this regard section 66(1) of the Act determines as follows:

“66 Failure by accused to observe condition of bail

- (1) If an accused is released on bail subject to any condition imposed under section 60 or 62, including any amendment or supplementation under section 63 of a condition of bail, and the prosecutor applies to the court before which the charge with regard to which the accused has been released on bail is pending, to lead evidence to prove that the accused has failed to comply with such condition, the court shall, if the accused is present and denies that he or she failed to comply with such condition or that his or her failure to comply with such condition was due to fault on his or her part, proceed to hear such evidence as the prosecutor and the accused may place before it.
- (2) ...
- (3) ... if the court finds that he failed to comply with such condition, the court may, if it finds that the failure by the accused was due to fault on his part, cancel the bail and declare the bail money forfeited to the State.
- (4) ...”

- [10] The *onus* is upon the State to satisfy the court on a balance of probability that there are sufficient grounds for cancellation of

bail in terms of section 68 of the Act. See **S v Ngumashe**, *supra*, at 314C – 314F.

- [11] There is a connection between sections 68 and 60, in that the grounds that can lead to cancellation of bail are related to the criteria considered in terms of section 60(4) at the initial consideration of bail. See **S v Kyricou** 2000 (2) SACR 704 (O) at 711A – B.
- [12] The following extract from **Du Toit: Commentary on the Criminal Procedure Act**, E du Toit *et al*, Revision Service 69, 2022, Jutastat, at RS 63, 2019 ch9 – p. 45, deals with section 60(4)(c), read with section 60(7) of the Act, which principles are, in my view, also applicable to section 68, especially in the particular circumstances of the present matter:

“Van der Berg *Bail—A Practitioner’s Guide* 3 ed (2012) at 146-7 observes as follows (emphasis in the original):

‘In assessing the risk of interference with state witnesses (and, if bail is granted, in formulating bail conditions) the court must *identify* the state witnesses. It is submitted that it is correct to include all *potential* witnesses, but not co-accused. It is unacceptable to leave it to the accused to speculate who the witnesses might be, and to expect him to regulate his conduct in accordance with such speculation. Regrettably, a trend has developed whereby prosecutors tend to withhold witness statements and the names of proposed witnesses from the accused under the guise of implied threats of intimidation of the witnesses. This places the accused in the impossible position of having to guess with whom he should refrain from communicating. The underlying reasoning of such prosecutors is, of course, fundamentally flawed: if it is alleged that the accused has threatened a witness, it follows as the night the day that he must

be aware of the identity of the witness! The practice suggested in *Dockrat* whereby the accused should be given a list of names of persons with whom he should not communicate about the case is commendable and should be followed.’ (My emphasis added)

Gade v S [2007] 3 All SA 43 (NC) is an example of a case where the court—granting bail to the accused on condition that there should be no interference with or intimidation of State witnesses—specifically ordered the prosecution to supply the accused with a list of prosecution witnesses (at [33]). ...”

- [13] I am very mindful of the fact that the withdrawal of the bail in the present matter was done in terms of section 68 of the Act and not due to the failure to have complied with a bail condition as provided for in section 66 of the Act. However, in my view certain of the principles relating to bail conditions are very applicable to the matter *in casu*. In **Commentary on the Criminal Procedure Act**, *supra*, at RS 63, 2019 ch9-p89 the following applicable principles are stated, with reference to relevant case law:

“*Secondly*, bail conditions should be neither vague nor ambiguous (*S v Budlender* 1973 (1) SA 264 (C) 271A; *Ex parte Huysamen* 1902 SC 393; *S v Russell* 1978 (1) SA 223 (C) 226E). Clear formulation of conditions is necessary ‘to avoid misunderstandings regarding compliance’ (Mokoena A *Guide to Bail Applications* 2 ed (2018) 135). ...

In the ordinary course of events a condition which prohibits communication with a ‘State witness’ should be taken to include ‘potential State witness’ (*R v Dockrat* 1959 (3) SA 61 (D) 62). *S v Josephs* 2001 (1) SACR 659 (C) 669 is an example of a case where the witnesses concerned were identified by name. The court may order the prosecution to furnish the successful bail applicant with a list of State witnesses. This was done in *Gade v S* [2007] 3 All SA 43 (NC) at [33]. It is submitted that for the sake of clarity a bail condition prohibiting communication with State witnesses ought to refer to

direct as well as indirect communication (as was done in *Jacobs & others v S* [2004] 4 All SA 538 (T) at [19]).

Referring to what Harcourt J said in *S v Casker & another* 1971 (4) SA 504 (N) at 510 as regards State witnesses, Mokoena A *Guide to Bail Applications* 2 ed (2018) 139 observes as follows:

'Clearly the phrase "state witnesses" casts the net too wide for comfort. It would not be remiss for the State to provide a list of all the persons who are regarded as State witnesses and who should, therefore, not be communicated with. This list of witnesses can then be relayed to the accused, either at the initial release or during the course of any subsequent remand. In such circumstances, the accused cannot be heard to say that he or she was not aware of the identities of the witnesses. It should be noted, however, that identification of the State witness by name only may not be sufficient.'

- [14] In **R v Dockrat** 1959 (3) SA 61 (N) at 62 H – 63 A the following was stated in respect of the desirability that bail conditions are to be properly and clearly stated and that consideration should be given to provide the names of potential state witnesses to an accused when prohibiting communication or contact with state witnesses:

"This application underlines the difficulties which may arise if the conditions of bail are not very carefully stated. It might prove much better in the interests of all concerned if, for example, the condition was that an accused person was not to communicate with persons whose names were given to him by the investigating officer and also any persons who had given a written statement to the Police. I do not presume to lay anything down as to what must be done but suggest that more careful statements of conditions of bail seem to be desirable." (My emphasis)

Consideration of the proceedings in the court *a quo*:

[15] It is trite that for purposes of the adjudication of this appeal, as is the case in all other appeals in respect of legal proceedings, the parties and I are restricted to the record of proceedings in the relevant court *a quo*. We are not at liberty to take any facts or circumstances beyond those reflected on the record, into consideration.

[16] In this particular appeal I deem it necessary to quote extensively from the transcribed record of the relevant proceedings on the respective dates in the court *a quo*. Furthermore, I deem it practical and apposite to record my remarks with regard to certain parts of the record in between my quotations from the record, so as to exclude the necessity of having to unnecessarily repeat parts of the quotations from the record later in my judgment.

[17] The record of the proceedings of 4 November 2022, reflects that the following bail conditions were requested by the prosecutor:

“The first condition, Your Worship, is that the accused is not allowed to enter the office of the Director of Public Prosecutions as the investigations are still ongoing.

The second one Your Worship, is that the accused is not allowed to go to the Puma Garage in Glen Road, Hilton or have any contact with petrol attendants or the manager of Puma Garage.

The third one is that the accused may leave the district of Bloemfontein if he informs the investigating officer in the matter which is Warrant Officer Pule.

Those are the three conditions Your Worship, that we request they be attached to the bail application.”

[18] When the appellant was asked by the presiding Magistrate whether he has any objections to the aforesaid bail conditions, the appellant stated that he had no objection and he furthermore, *inter alia*, stated that “[L]ike they stated I am not going to any of those places that they have mentioned”.

[19] The record reflects that the presiding Magistrate thereupon fixed bail at R1500.00 and further stated the following to the appellant:

“Conditions are added that you may not enter the offices of the DPP.

You may not enter Puma Garage, Glen Road, Hilton and you may not contact the manager or the employees.

You may not leave the Bloemfontein district without the consent of the investigating officer, Warrant Officer Pule.”

[20] The subsequent proceedings were on 9 December 2022 when the matter was on the roll for further investigation and during which proceedings the prosecutor requested another postponement for further investigation. On face value of the record these proceedings served before a different presiding Magistrate and prosecutor than the previous proceedings, although a certain part of the transcribed proceedings creates the impression that it was the same presiding Magistrate. The record reflects the following proceedings relevant to the present appeal:

“PROSECUTOR: Then lastly Your Worship, although the State is not making an application in terms of section 68, that maybe the Court may warn Mr Ntsasa, Your Worship, to refrain from sending messages to the witnesses. There was such which was reported prior to this sitting, Your Worship, and secondly, Your Worship, that when he leaves Bloemfontein he informs the investigating officer. Yesterday the investigating officer found out that he was in Botshabelo and as part of the bail conditions is it that if he leaves Bloemfontein he must inform the investigating officer, Your Worship. If he can just be warned, Your Worship.

...

COURT: The bail conditions, during the bail when you are granted bail, I also gave that to you, the conditions.

ACCUSED: Yes.

COURT: Yes. And one of those conditions was that you must not have any contact with the witnesses in this matter. **[This is not correct. The condition which prohibited contact with persons was only in relation to the manager and the employees of the Puma garage, Glen Road, Hilton.]**

ACCUSED: Okay

COURT: Furthermore, do not have any contact with witnesses in this matter, interfere with the police investigations and not evade your trial.

ACCUSED: No problem, but in terms of the region, because I thought Botshabelo and Thaba Nchu we are still in Mangaung, so they were supposed to explain to me.

...

Ja, Botshabelo because we are one municipality.

COURT: Good.

ACCUSED: Yes.

COURT: Now I am going to warn you to hear if the Court says that you must not have any contact with the witnesses or complainants, it says, WhatsApp, Twitter, Message, Telegram, meaning all the social medias of the world.

...

Not to have any contact whatsoever with the witnesses in this matter.

[I accept that this warning constituted a valid warning by the Court, irrespective of the fact that it was not a bail condition.]

...

- [21] The record of the proceedings held on 16 March 2023 reflects the hearing in terms of section 68 for the withdrawal of the bail of the appellant. On face value of the record it seems that the same Magistrate who initially presided when bail was granted to the appellant on certain conditions, presided over the said hearing. The prosecutor was a different person than on the two previous occasions.

- [22] The State called the investigating officer, Warrant Officer Pule, as a witness. It is necessary to quote extracts from his evidence:

“PROSECUTOR: Your Worship. Warrant Officer, how long have you been in the police service?

MR PULE: I have got 20 years in the service.

PROSECUTOR: To which unit are you attached?

MR PULE: I am working for DPCI, Serious Corruption Investigation Unit.

PROSECUTOR: ... Okay, thank you. Warrant Officer, you are the investigating officer in this Navalsig CAS 12/11/2022. Sir, in this matter bail was granted on 4 November 2022 with conditions that the accused should not make contact or should not contact the witnesses or the people at the DPP’s office. What happened after 4 November 2022? **[This is not correct. There was no bail condition that the appellant should not “contact the witnesses or the people at the DDP’s office”. The condition was that he was not allowed to enter the DPP’s office.]**

MR PULE: Your Worship, after 4 November 2022 the accused was read the bail condition to him and he agree with them, then he was released on

bail. One of the conditions was that he must not contact any witnesses in this case; he must not be at DPP's office. **[This was not a bail condition.]** ...

On 6 November after the accused was released on bail, I was called by Mr Lemmer Ludick who is the Director at DPP's office. He is the head of the support. Mr Ludick called me, and he explained that they received the SMSs from the accused person. However, I brought the matter to Mr Lieb and Mr Bathi as they are the Prosecutors that I am working with. However, they explained to me that let us give him chance so that on the next court date Your Worship can warn him again.

Indeed, on 9 December 2022 the bail conditions were read to him again as per the charge sheet, that he must not consult with any witnesses, direct or indirect. **[This was not a bail condition. However, as indicated earlier, the appellant was warned by the court in this regard on 9 December 2022.]** In between there Your Worship, I explained to

the prosecutor that someone called me and explained to me that the accused person was in Botshabelo. I explained to the prosecutor that they must explain these things thoroughly to him that he must understand that. They did explain that however, during December, late December, the accused person sent me an SMS saying to me he will be going to Botshabelo. That was the last time when he said that to me. Recently now I received a call on 3 March 2023 from one of the witnesses. The witnesses just explained to me that the accused person called him on her cell phone. While interviewing the witness, because the witness was aware of the bail conditions, I asked the witness what number did she receive the call from. I physically looked at the phone of the witness and the number that called the witness, it was 082 and that number I recognise it because it is there in my docket that I was given by the accused person on his arrest. I verified that number; for surely it was the accused's number. There was a communication between the two and I obtained a statement in that regard. The statement was saying that you must ensure the little house that you are having because I am going to burn it down. Furthermore the statement was talking about the sisters of the witness. That is the statement that I obtained on the 13th, and I took that statement to Adv Lieb to explain this

issue to him and Chief Mahloko, who encourage me to file a statement and we went to the magistrate. The magistrate issued a J50 for the accused. The very same the 13th we went to arrest the accused as per the allegation. That is where we are before this Court today.”

[23] Warrant Officer Pule continued and presented evidence as to what transpired during the arrest of the appellant. According to his evidence the appellant resisted arrest. Warrant Officer Pule testified that during his arrest the appellant was informed that he was arrested for having “*violated the bail conditions by calling Ms Fouché, which is the witness*”.

[24] During cross-examination on behalf of the appellant, the witness was asked whether the appellant was informed who the witnesses are, where after the following evidence transpired:

“MR PULE: Your Worship, the accused is quite clear. He is quite aware who are the witnesses. It is very unfortunate Your Worship, the person that I wanted her to print the messages that I can present before the Court that was sent on the 16th, he was very aware. If Your Worship can allow me, I can take my phone and read them so that the Court can be aware of that.

COURT: Yes, thank you, you can do that.

MR PULE: I can do so, Your Worship. Your Worship, the first message I will read it was forwarded from Mr Lemmer Ludwick.

‘The official complaint that Mr Ntsasa is pestering them, can I do something? He also Whats App'd me but do not reply.’

That is the first message. The second message it reads as follows.

‘Please find out if it is possible to work at TTC office and facilities duties only while policemen looking information at fleet.’

I will read the third one.

'I fail to understand why you open a criminal case against me instead of disciplinary or written warning to start inside with regards to NPA regulations, but it is fine. You choose that route. God will preserve me because he knows me. Every day I pray for God protection and save my job because I need that job for my family and the Church of God.'

Number 4.

'I ask Lord every hour all expectations of my advisories forever frustrated.'

That is the message that I received from Mr Ludwick.

...

[25] At that stage the court adjourned to move to a different court in order to listen to the audio recordings of the proceedings on 4 November 2022 and 9 December 2022 respectively. When everybody returned to the court where the section 68 application was being heard, the presiding Magistrate placed the details of the aforesaid proceedings which were relevant to the section 68 application, on record, where after the hearing proceeded.

[26] Thereafter the appellant testified under oath.

[27] He testified that he was arrested at the offices of the DPP on 4 November 2022 and that he was taken to court. The appellant further testified that the bail conditions were stated to him in court on the same date, 4 November 2022. With regard to the 5th of November 2022, the appellant testified as follows:

"Marlene Fouché on the 5th of November she sent me a WhatsApp, here it is an exhibit on my phone, but I did not respond to it. I blocked her on that time because I did not know which one is a witness, which one is not a witness." (My emphasis)

- [28] The appellant was asked whether he knows who opened the case against him, to which he responded as follows:

"APPLICANT: Not at all. I do not have any idea. What I heard only is only the Chief Prosecutor that, down the line there was a media briefing that one, two, three, somebody was arrested. I do not know. I thought it is him, the Chief Prosecutor. There he is sitting there.

...

I do not have any idea who opened, because all this time I thought it is the Chief who opened that case, because he is the one, apparently, he sent the warrant of arrest. I thought it is him. I do not, all along my mind is that."

- [29] The evidence continued as follows:

"MR MASUNYANE: So now during the proceedings of the court when the bail conditions were read, were you, was it explained to you who are the witnesses?

APPLICANT: Not at all; not at all."

- [30] The appellant was subsequently asked as to what happened on 13 March 2023 which lead to his arrest, to which he responded as follows:

"APPLICANT: Yes. The 13th of this month I did call Marlene Fouché because last year I, early this year I wrote exam and then I did not have my books. Remember, on the 4th of November I was arrested by almost eight officials of Hawks. I did not have taken even my study materials. I left the office to Bainsvlei to court on that day. Then along the way they say I am arrested regarding one, two, three, and then I was still shocked and asking myself what happened. Then even the Chief knows that I do have a good relationship with our employee, and I do assist all out."

- [31] The cross-examination of the appellant then followed.
- [32] The prosecutor enquired from the appellant whether he understands what the charge against him is, to which the appellant testified that he was *“still confused, because I still want to know what are the charge against me, because they talk about the fraud they talk about some other, I saw it on that paper when they write it there. I am not quite sure. Would you please explain to me so that I can understand it right now?”*
- [33] The prosecutor then read the *“annexure to the charge sheet”* to the appellant form which it appears that counts 1- 3 against the appellant are fraud, forgery and uttering, with theft as an alternative to count 1, which were allegedly committed between 31 March 2022 to 29 July 2022. From the said annexure it further appears to be the State’s case that the appellant was appointed at the National Prosecuting Authority, Bloemfontein, as an administrative clerk. His responsibilities included, amongst others, fleet management. As fleet manager he had access to petrol cards used as part of the NPA’s vehicle fleet. It is further alleged that the three counts originate from, *inter alia*, the allegation that the appellant filled his personal vehicle, to wit a Isuzu, with fuel during the alleged period of time to an amount of R110 000.00 with a petrol card for fleet vehicles of the NPA on the alleged different dates between 31 March 2022 to 28 July 2022. The said annexure to the charge sheet further contains allegations that counts 1, 2 and 3, as well as the alternative count to count 1, were committed against *“National Prosecuting Authority and / or Lemmer Ludick”*.

- [34] The prosecutor then posed it to the appellant that the nature of the aforesaid counts makes it evident why one of the bail conditions was that the appellant is not allowed to enter the offices of the DPP. The prosecutor further stated the following:

"PROSECUTOR: And the witnesses of the National Prosecuting Authority, you were warned not to make contact with the witnesses. Obviously the people of the National Prosecuting Authority that worked in your office would be witnesses." **[Insofar as this statement was meant to state that the appellant was specifically warned not to make contact with the witnesses of or the people at the DPP's office, it is not correct. He was only warned in general not to make contact with the witnesses or the complainants.]**

The appellant responded as follows:

"APPLICANT: Yes, like I said, I read the SMS from Marlene and I do not know whether Marlene is a witness, because she is my colleague. She sent me a SMS. ..."

- [35] The appellant was confronted with the fact that he sent messages to Mr Ludick, whilst Mr Ludick is the complainant. The appellant explained that he did not know at the time that Mr Ludick is the complainant, he thought that it was the Chief prosecutor who opened the case. He testified that Mr Ludick still sent him messages on the Friday, the day of his arrest, enquiring whether the appellant was coming to work. Mr Ludick was his supervisor and he trusted Mr Ludick. The record further reflects the following:

PROSECUTOR: That on the 9th of December they said you should not make contact with the witnesses.

APPLICANT: Did I, do I know the witnesses? When I look at you, do I know the witnesses? I said to the Court now I knew it is the Chief who opened the case because there was a media briefing after I was arrested. I thought it is him, not Lemmer. I did not know it is my supervisor who opened the case at all. I do not have any idea of who or what, so I ..[intervenes]

PROSECUTOR: You obviously knew you were arrested for something that went wrong in your workplace, is that correct?

APPLICANT: Yes.

PROSECUTOR: So the logical explanation would be there is a problem at your workplace, your witnesses, the people at your workplace would obviously be the witnesses. Now you are making contact with them.

APPLICANT: The thing is he contact me on Friday morning. I did not know if there was something like this. I did not know at all. What I see, looking at it, it is Lemmer who opened the case. I did not have any idea at all. I am honest.

PROSECUTOR: Okay, and now in December when you were warned not to make contact with the witnesses, you still made contact with Ms Fouché.

APPLICANT: Yes, you know what, like I said, on the 5th of November Fouché contacted me. I was responding to her message because I did not respond to her messages. I was responding to what she said.

PROSECUTOR: The 5th of what date? When was it?

APPLICANT: The 5th of November. I think it was Saturday, he contacted me and console me one, two, three ..[intervenes]

PROSECUTOR: Okay, [intervenes]

APPLICANT: And then I did not, I did not entertain it.

PROSECUTOR: Yes.

APPLICANT: And then because she is my subordinate, we have got good relationship with her, and I you know I have also got a relation with you and also with the Chief. You know that.

...

Then I was, I did not respond to that message, that SMS on the 5th. Now I was, because I was looking my study material and she is very close to me. We have got a very good relationship with Marlene. I wanted to look

for my study because I am writing the exam, to assist me to give one of the employees my study material so I am writing now in, now, now, now in April and May.

...

PROSECUTOR: Ja, but you were told not to contact the witnesses. That you were told clearly in court. ... Ja, but we are just trying to be logical. I can for no reason see why you are contacting a witness, and now you are saying you are asking for the study material. She said, she gave an affidavit saying that you threatened her. You told her you hope that her house is ensured (*sic*) because you are going to burn it down, and you also mentioned her sisters.

APPLICANT: No. No, not at all. I will not, I will never do that. You know me. How can I do that? I used to work with you. We have got good relations with you. The entire court here, we can call them. Even next-door Telkom building you can call them. Ask about me. Ask the Prosecutor here about how I, how I conduct myself, my relations with them.

PROSECUTOR: Sir, we are not leading character witness about what you are wrong. ... It was said clearly that you should not make contact with witnesses, and you made contact subsequent to that. That is the problem.

APPLICANT: When I respond to you, I said I did not know the witnesses, who are the witnesses. I was honest with you, like now I am honest with you. I really do not know who and who is the witnesses. do not know. I do not know whether you are standing there you are the witness. I really do not know."

- [36] With regard to the appellant's contact with Ms Marlene Coetzee, he explained, *inter alia*, as follows:

"APPLICANT: All along I heard now, recently now it is Lemmer Ludick who opened the case, and I was not surprised on the 5th when Marlene sent me a SMS saying one, two, three. And this year when I wanted to respond to that now, it is something which is making a big noise now."

[37] At that stage of the proceedings the presiding Magistrate interrupted and started confronting the appellant about the fact that he was warned not to make contact with the witnesses and that he did not ask the Court who the witnesses are and even put it to the appellant that he did not ask the Court about the identity of the witnesses because he knew the witnesses. The responses which came forth from the appellant during this questioning by the presiding Magistrate, were, *inter alia*, the following:

"It is fine; I understand My Lady. Like I said, my colleague Marlene Fouché she contact me in the first place and now I was responding to that one.

...

I did not know who is the witnesses. To be honest, like now, I do not really know.

...

The Court did not tell me any, who is the name of the witnesses.

...

At all. Like you ask me now, did the Court explain to you, tell you who is the witnesses, I said no, I do not know the witnesses at all.

...

Yes, but I do not know who are the witnesses...

...

I know, I do not know because Marlene sent me a SMS. I thought she is not any witness, because she is my subordinate, and I work with her most of the time. I do not, I did not think she is a witness, to be honest with you. I really do not know, heavenly Father knows that."

[38] Immediately after the aforesaid evidence of the appellant, the Presiding Magistrate indicated that she needs to clarify something. She then confronted the appellant with alleged

differences in his evidence as to why he blocked Ms Marlene Fouché's number on his cell phone.

- [39] Thereafter the cross-examination of the appellant by the prosecutor was concluded with the following:

PROSECUTOR: So Mr Ntsasa, the long and the short, you contravened the bail conditions and on the 13th March Marlene said you called her. The investigating officer confirmed the call that she received was from you. **[It was not a bail condition that the appellant was not to make contact with employees of the DPP's office; although he was indeed later warned not to make contact with the witnesses.]** She said that she was concerned. You threatened her and that was what

subsequently led to the J50. That is why you are arrested today. So you broke the bail conditions.

APPLICANT: Like I said, I did call her to request my study material. I did not use any vulgar language to threaten her or whatsoever what is being stated there. I do not have any idea of that.

PROSECUTOR: So you had contact with a witness.

APPLICANT: Who is the witness, is it Marlene?

PROSECUTOR: Ja.

APPLICANT: Like I, I hear you say it is a witness, Marlene, like she stated now-now, she is a witness, but I said I did not know she is a witness."

- [40] After the conclusion of the aforesaid cross-examination the presiding Magistrate again deemed it necessary to question the appellant, this time about what motive Ms Marlene Fouché could have had to falsely implicate the appellant regarding the alleged threats and the improbability thereof in the circumstances. The appellant responded, *inter alia*, as follows:

"COURT: Now she turns around and says you threatened her.

APPLICANT: I was surprised and right now I am still shocked now to hear that. To hear that, I am so shocked now to hear that. I want to be honest with you.

...

You can say so. You can say so, but I do not know why, what is the motive behind. I do not know what is the motive behind.

...

Because I do not know what she thinks. I do not know. I am not in the office now. I do not know what do they say about me. I really do not know."

[41] The following evidence was presented during re-examination:

"Mr MASUNYANE: Mr Ntsasa, was Marlene, Ms Fouché the only person that you blocked?

APPLICANT: No, I did block a lot of people on my phones. My colleagues on the phone, or yes.

MR MASUNYANE: So is it correct that the only reason that you blocked Marlene and other colleagues is because of the irritating questions that they were posing on you?

APPLICANT: Yes, yes.

MR MASUNYANE: All right. So Mr Ntsasa, tell me, did you threaten Ms Marlene, Mrs Fouché, on the 13th of March when you called her?

APPLICANT: No, no, no, no. She is my darling. I will not threaten her at all.

MR MASUNYANE: All right, so Mr Ntsasa, [intervenes]

APPLICANT: Even the Prosecutor, I will not threaten her.

MR MASUNYANE: So Mr Ntsasa, tell me what might be the reason for Ms Marlene as even the magistrate asked, what might be the reason that Ms Marlene will not (sic) turn her back on you?

APPLICANT: Like I said, I, I do not know what is in her mind. I really do not know what, what is the story at the office, what, what do they say about me? I really do not know.

MR MASUNYANE: So okay, so is it correct that if it happens that the honourable Court finds you guilty on the trial, not on this hearing, that Ms Marlene will be the next person for your concession, is that correct?

APPLICANT: Yes, yes.

MR MASUNYANE: No further questions, Your Worship."

Arguments and submissions on behalf of the parties:

- [42] Mr Dlamini, who appeared on behalf of the appellant, submitted that the Court *a quo* erred by finding that the State proved that the appellant made contact with Ms Fouché whilst knowing that she was a witness and that he threatened her and thus also erred in finding that "*the safety of Ms Fouché is now involved in this whole bail application*".

- [43] Mr Dlamini submitted that it is evident that the appellant did not know who the witnesses are and more specifically, he did not know that Mr Ludick and Ms Fouché are state witnesses. It was the State's duty to have informed the appellant of the identity of the state witnesses, which it failed to do. Ms Fouché in any event made contact with the appellant before he did.

- [44] With regard to the alleged threats directed at Ms Fouché, Mr Dlamini pointed out that no affidavit of Ms Fouché confirming the alleged threats, was presented in evidence by the investigating officer. Mr Dlamini further contended that if the appellant had in fact threatened Ms Fouché in the manner alleged, one would have expected that she would have opened a case of intimidation against the appellant, which she failed to do.

- [45] Mr Dlamini further pointed out that from page 47 up to page 57 of the record of the proceedings, with the exclusion of one question by the prosecutor, the presiding Magistrate was the one who was interrogating the appellant. Mr Dlamini submitted that the conduct of the presiding Magistrate in this regard was improper.
- [46] Mr Dlamini submitted that the order of the presiding Magistrate granting the application and withdrawing the bail of the appellant was consequently wrong and is to be set aside.
- [47] Mr Harrington, who appeared on behalf of the state, sternly defended and supported the findings and order of the presiding Magistrate, imploring me not to uphold the appeal.
- [48] Mr Harrington submitted that it is evident from the record of the proceedings of 9 December 2022 that it is to be accepted as a fact that the appellant was warned in general by the Magistrate who was presiding at the time, that he was not to have contact with the "*witnesses and the complainants*". Since the charges against the appellant emanated from his workplace (being the Fleet Department at the Offices of the Director of Public Prosecutions, Bloemfontein), which the appellant on his own version knew, it is logical that employees from his workplace would be state witnesses. Mr Harrington consequently submitted that it is highly improbable that the appellant would not have known that Mr Ludick, who was his supervisor, and Ms Fouché, who was his immediate subordinate (he was her supervisor) would be state witnesses. In this regard Mr Harrington emphasised that I should consider the said submission against

the background of the appellant being an educated person who was in a management position.

[49] It was further the contention of Mr Harrington that considering the good relationship which existed between the appellant and Ms Fouché, it is improbable that Ms Fouché would falsely implicate the appellant.

[50] Mr Harrington also submitted that if it is to be accepted that the appellant did indeed threaten Ms Fouché, then logic dictates that the appellant must have known that Ms Fouché is a state witness, moreover one of the state witnesses who probably would be requested to compile available evidence against the appellant from their offices, otherwise the appellant would not have had any reason to threaten Ms Fouché.

[51] Mr Harrington submitted that the appellant's conduct during his arrest on 13 March 2023 was violent and obstructive, which is a further indication of his guilt pertaining to his conduct in relation to Ms Fouché.

[52] It was Mr Harrington's contention that the fact that the appellant left Bloemfontein without informing the investigating officer in direct breach of one of his bail conditions, shows his inclination not to adhere to court orders and warnings issued by a Magistrate.

[53] Mr Harrington submitted that it is consequently evident that the order of the presiding Magistrate was not wrong and therefore

cannot and should not be interfered with by means of this appeal.

Judgment of the court a quo:

[54] The court *a quo* correctly interpreted section 68 of the Act that it is not a prerequisite that there had to be a bail condition prohibiting contact with state witnesses before bail can be cancelled when such contact occurs.

[55] It is common cause that the bail conditions which were conveyed to the appellant on 4 November 2022 by the Magistrate who presided at the time, were the following:

1. The appellant may not enter the offices of the DPP.
2. The appellant may not enter Puma Garage, Glen Road, Hilton and may not contact the manager or the employees.
3. The appellant may not leave the Bloemfontein district without the consent of the investigating officer, Warrant Officer Pule.

[56] Although there was no bail condition in respect of contact with state witnesses, it is common cause that Magistrate who presided on 9 December 2022 warned the appellant not to have “*any contact with the witnesses or complainants, it says, WhatsApp, Twitter, Message, Telegram, meaning all the social medias of the world. ... Not to have any contact whatsoever with the witnesses in this matter.*”.

[57] The court *a quo* stated in its judgment that the accused received a telephone call from Ms Fouché, but that he refused to talk to her. This is not completely correct. The evidence of the appellant was that on 5 November 2022 Ms Fouché sent him a WhatsApp message, but that he did not respond to it.

[58] The court *a quo* further stated as follows in its judgment, at p. 65, lines 8 – 13:

“He refused to talk to her and in his own words he said to the court the reason why he did not want to communicate with her was not because people were being irritating and asking him a lot of questions, but because he did not know if she is a witness or not so that is why he blocked her.

From this it is quite clear that the accused was fully aware that he may not contact witnesses, being it threatening them, intimidating them or making contact with them. That is why he blocked her according to him, he was uncertain if she was a witness or not. It is a possibility that she was a witness.”

[59] The aforesaid statement that *“in his own words he said to the court the reason why he did not want to communicate with her was not because people were being irritating and asking him a lot of questions, but because he did not know if she is a witness or not so that is why he blocked her”* is not a correct reflection of the appellant’s evidence.

[60] It is correct that the appellant initially testified that he blocked Ms Fouché when he received her WhatsApp because he *“did not know which one is a witness, which one is not”*. At a later stage, when the prosecutor put it to the appellant that *“obviously the*

people of the National Prosecuting Authority that worked in your office would be witnesses”, the appellant responded as follows:

“Yes, like I said, I do not know whether Marlene is a witness, because she is my colleague. She sent me a SMS.”

- [61] It is very important to note that shortly after the aforesaid answers, still during cross-examination by the prosecutor, the record reflects the following questions and answers, which I also cited earlier in the judgment:

“PROSECUTOR: Okay, and now in December when you were warned not to make contact with the witnesses, you still made contact with Ms Fouché.

APPLICANT: Yes, you know what, like I said, on the 5th of November Fouché contacted me. I was responding to her message because I did not respond to her messages. I was responding to what she said.

PROSECUTOR: The 5th of what date? When was it?

APPLICANT: The 5th of November. I think it was Saturday, [s]he contacted me and console me one, two, three. [intervenes]

PROSECUTOR: Okay, [intervenes]

APPLICANT: And then I did not, I did not entertain it.” (My emphasis)

- [62] The cross-examination by the prosecutor continued and the appellant persisted with his version that he did not know who the state witnesses are. As indicated earlier, at that stage of the proceedings the presiding Magistrate intervened and started questioning the appellant. I unfortunately deem it essential to quote a substantial part of the record as to the questioning by the presiding Magistrate that followed thereafter, from page 51 to 55 of the record:

“COURT: Okay. Please excuse me for interrupting, but I have to clarify it as it comes.

PROSECUTOR: Thank you, Your Worship, no problem.

COURT: You now say you did not know that Marlene is a witness.

APPLICANT: Correct.

COURT: Right. Now I am going to go back to your evidence today when you testified.

APPLICANT: Yes.

COURT: You said to the Court, when Marlene contacted you on. [intervenes]

APPLICANT: The 5th.

COURT: On the 5th, what did you do?

APPLICANT: Because I was still in shock, remember [intervenes]

COURT: No, no, no. [intervenes]

APPLICANT: I did not respond. [intervenes]

COURT: What did you do?

APPLICANT: I did not respond on that time, to be honest.

COURT: You blocked her.

APPLICANT: Come again?

COURT: You blocked her.

APPLICANT: Yes.

COURT: Why did you block her?

APPLICANT: Because I, I did not want, everybody was phoning me on that time, what, why are you arrested, what is going on, and they ask me a lot of questions about. [intervenes]

COURT: No, no, no. [intervenes]

APPLICANT: The court.

COURT: Marlene.

APPLICANT: Yes.

COURT: Why did you block her? You told me in court today. [intervenes]

APPLICANT: Yes.

COURT: I blocked her.

APPLICANT: Yes.

COURT: Because I was not sure whether she is a witness or not, and I may not interfere with the witnesses. **[The underlined part was never the evidence of the appellant.]** That is why I blocked her. Do you

understand the implication of what you said? Marlene contacted me.
[intervenes]

APPLICANT: I, I did not only blocked Marlene, I blocked. [intervenes]

COURT: I blocked her because I did not know. [intervenes]

APPLICANT: I blocked several, several employees.

COURT: No. Just give me a moment to finish my sentence. Your evidence today in court is when Marlene contacted you, you did not want to talk to her, you blocked her because you knew, you did not know if she is a witness or not, so you rather blocked her. So in your mind obviously you knew this is a possible witness, because we are working together. She is my subordinate. [intervenes]

APPLICANT: You know what happened, she said to me... [intervenes]

COURT: That I cannot speak to her.

APPLICANT: She said to me, "Foeitog, Jimmy, I am sorry".

COURT: No, I do not want to know about that.

APPLICANT: Yes, I must just for the purpose of the record intervenes

COURT: No. Do not avoid... [intervenes]

APPLICANT: And then because I did not want to hear any negative words. Remember, when you are stressed, you do not need to listen to the negative words.

COURT: Okay, please, listen.

APPLICANT: Yes.

COURT: Do not avoid the issue by talking about all the other little things.

APPLICANT: Okay.

COURT: What I am saying to you is, just let us concentrate on that part. Your evidence today in court is, Marlene phoned me. I blocked the call. I did not want to talk to Marlene because I did not know if she is a possible witness.

APPLICANT: Yes.

COURT: So in your mind you thought, I do not want to talk to because she could be a witness and I could be in breach of my bail conditions. I will rather block the call. Is that not so? That is by implication what you told me today.

APPLICANT: Okay.

COURT: So you knew she is a possible witness. [intervenes]

APPLICANT: Never, I [intervenes]

COURT: She is your subordinate.

APPLICANT: I did not know at all.

COURT: Why did you block her call then?

APPLICANT: Because I was. I can show my phone, all my colleagues at the DPP they, a lot, it is not only Marlene.

COURT: No, no, no [intervenes]

APPLICANT: Even, even [intervenes]

COURT: Let us talk about Marlene.

APPLICANT: Even, ja, even Pinkie. Marlene she is subordinate, Pinkie, she is subordinate to Pinkie. She asked me a lot of questions, what, what, you see. All those things.

COURT: Sir.

APPLICANT: Yes.

COURT: Forget about Pinkie. Let us talk about Marlene.

APPLICANT: Yes, what about Marlene?

COURT: Why did you block her call?

APPLICANT: I said to you because I did not want have, I did not want to have a lot of noise because I had a lot of noise from my colleague from DPP, sorry Jimmy, what happened. I, I blocked most of them.

COURT: 'Marlene Fouché sent me a WhatsApp. I did not respond to that, I blocked it because I did not know who is a witness and who is not a witness.' That is what you said to me in court. It is not something that I am sucking out of my thumb. I am going to leave it at that, but please, if we are asking you questions, just stick to the question that was asked and do not come and elaborate on stuff that is really irrelevant.

APPLICANT: Okay, it is fine.

COURT: Thank you, please proceed."

- [63] Returning to the court *a quo*'s statement in its judgment cited in paragraph 59 above, it is, in my view, evident that the appellant definitely did not state that "*the reason why he did not want to communicate with her was not because people were being irritating and asking him a lot of questions, but because he did*

not know if she is a witness or not so that is why he blocked her". He clearly advanced both reasons for the fact that he did not respond to the message of Ms Fouché – not the one to the exclusion of the other. Furthermore, the reason he advanced why he did not respond to Ms Fouché's message and that he blocked her number and also the numbers of many other colleagues, being that their sympathy and questions were emotionally too much for him to handle, ties in with his earlier evidence that the message from Ms Fouché was to "*console*" him. It was consequently not a matter of him fabricating same out of the blue during the cross-examination by the presiding Magistrate.

- [64] With regard to the aforesaid questioning of the appellant by the presiding Magistrate, as well as the subsequent questioning by the Magistrate, referred to and cited in paragraph 40 above, I unfortunately have to refer to and deal with the judgment of **Gade v S** [2007] 3 All SA 43 (NC), which judgment was also referred to in paragraph [10] above, although for a different reason. The said matter was an appeal against the refusal of bail by the Magistrate's Court and therefore principles similar to the matter *in casu* were applicable. The following principles were stated and applied at paragraphs 18 and further of the said judgment:

"Questioning by the court

15. The general principle about questioning a witness by the court is noble and sound. The court has the right to question any witness at any stage of the proceedings the main purpose being to clarify and clear up points which are still obscure.

16. The record indicated that the appellant's wife is employed by Algoa Bus Company and that she is a bus driver. This was indicated already in the first application for bail when the appellant's affidavit was read into the record. ... There is nothing obscure about where the appellant's wife works and in what capacity she works. The manner of asking the questions depicted on page 100 lines 24–25 and pages 101–102 of the record clearly reflects cross-examination by the court.

17. In *Hamman v Moolman* 1968 (4) SA 340 (A) at 344D–G the learned Judge of Appeal (Wessels, JA) expressed regret that, the court *a quo* did not at all times conform to the generally accepted norm. The following is stated:

'He sought from time to time to expedite the hearing of the matter by virtually taking over from Counsel both the examination and cross-examination of witnesses. In doing so, it appears that he may at times have overlooked the Judge's usual role in our system of civil trial procedure, and to have associated himself too closely with the conduct of the case, thereby denying himself the full advantage usually enjoyed by the trial judge who, as the person holding the scale between the contending parties, is able to determine objectively and dispassionately, from his position of relative detachment, the way the balance tilts. The limits which a judge should observe in intervening in the conduct of proceedings over which he presides were dealt with by this court in *R v Roopsingh* 1956 (4) SA 509 (AD).'

18. Lord Green (MR) had the following to say on the subject:

'The judge who himself conducts the examination ... descends into the arena and is liable to have his vision clouded by the dust of conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation.'

Vide: Yuil v Yuil [1945] 1 All ER 183 (CA) at 189.

19. The sentiments expressed in the above-cited cases remain salutary and state in no uncertain terms the limits of a presiding officer when questioning a witness to clarify points which are still obscure in his or her evidence.
20. ...
21. Although bail application proceedings are *sui generis* and inquisitorial in nature (Vide: *Ellish v Prokureur-Generaal* (WAA) 1994 (2) SACR 579 (T) at 596e [also reported at 1994 (5) BCLR 1 (T) – Ed]) they remain court proceedings and unless the law stipulates otherwise, the time-tested procedures and practice that maintain fairness and justness of procedures should be adhered to.
22. From the record it is clear that the Magistrate did enter the arena. This manner of conducting the proceedings is irregular because it compromises the impartiality of the presiding officer. ...
- ...
30. ...
 - (4) That the magistrate did enter the arena to the prejudice of the appellant.
- ...
32. ... I now pronounce that the decision of the Magistrate is wrong in refusing to admit the appellant to bail and that decision is accordingly set aside.” (My emphasis)

[65] The **Gade**-judgment was followed and applied in the judgment of **S v Phiri** 2008 (2) SACR 21 (T) at 24 C – 25 B:

“Questioning by the court

In *S v Gade* [2007] 3 All SA 43 (NC) at 46 para 15 the following is stated:

‘The general principle about questioning a witness by the court is noble and sound. The court has the right to question any witness at

any stage of the proceedings the main purpose being to clarify and clear up points which are still obscure.’

Taking over any examination or cross-examination of a witness by the court is not to conform to the generally accepted norms. ...

In *S v Schietekat* 1998 (2) SACR 707 (C) (1999 (2) BCLR 240) at 716e the learned judge said the following in regard to the conduct of the presiding officer:

‘A judicial officer wields enormous power. Gowned, sitting on high and surrounded by the trappings of his office he cuts an imposing and terrifying figure. Consequently, he must constantly ensure that every courtesy is extended to those who appear before him. To stand accused of a crime is a frightening ordeal. No person should be allowed to feel intimidated in the orderly presentation of his case.’

In *S v Rall* 1982 (1) SA 828 (A) at 831H the learned judge of appeal expressed the following sentiments relating to the conduct of a trial:

(‘1) According to the above-quoted *dictum* of Curlewis JA the Judge must ensure that ‘justice is done’. It is equally important, I think, that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused ...’

In *S v Omar* 1982 (2) SA 357 (N) at 359 the learned judge made remarks about the conduct of the magistrate, despite the appellant having been represented by counsel.

“The magistrate in his reasons in reply to criticism observes that the appellant was represented by counsel who could have objected had he considered the manner of cross-examination to be unfair. This is correct, so far as it goes. I am constrained to remark, however, that the fact that the accused is represented by counsel does not absolve the presiding officer from ensuring that he receives a fair trial ...”

[66] Although the presiding Magistrate, at the time when she interrupted the questioning by the prosecutor, indicated that she needed to “clarify”, her line of and manner in which she questioned the appellant went way beyond clarification. In my view, the presiding Magistrate not only virtually, but literally took the cross-examination of the appellant over from the prosecutor. During her questioning (cross-examination) of the appellant, the presiding Magistrate intervened and prevented the appellant from finishing his answers (whilst the appellant was attempting to answer questions) whenever his answers did not entail what she wanted to hear, namely answers advancing the State’s case. The presiding Magistrate finished some of the sentences of the appellant for him, by interrupting him and putting words in his mouth, or at least attempting to do so.

[67] The presiding Magistrate, at p. 55 of the record, lines 4 – 8, uttered the following remarks to the appellant:

“That is what you said to me in court. It is not something that I am sucking out of my thumb. I am going to leave it at that, but please, if we are asking you questions, just stick to the question that was asked and do not come and elaborate on stuff that is really irrelevant.”

[68] With all due respect, I consider the remark about not sucking the relevant part of the evidence from her thumb, to be an inappropriate expression or remark unbefitting the office of Magistrate when presiding in a matter, especially considering that it was addressed to an accused and the context within it was made. Adding to that the “warning” which the presiding Magistrate directed at the appellant “*not to come and elaborate*

on stuff that is really irrelevant” when he merely attempted to present his version regarding highly relevant issues, which the presiding Magistrate was preventing him from doing. The presiding Magistrate was not only condescending in her conduct towards the appellant, she also hampered him in the proper presentation of his case.

[69] Unfortunately, the presiding Magistrate descended into the arena in an improper and irregular matter. As correctly pointed out by Mr Dlamini, the interrogation of the appellant by the presiding Magistrate stretched over 10 pages of the transcribed record.

[70] The irregularity is exacerbated by the fact that it is the very evidence which the presiding Magistrate obtained from the appellant during this process which she subsequently used as the fundamental basis for her conclusions.

[71] The presiding Magistrate subsequently stated the following in her judgment, at p. 66 of the record, lines 3 – 6:

“He then decided to phone Ms Fouché, the same person that he thought was a witness and that he does not have contact with.” (My emphasis)

[72] The aforesaid is factually incorrect. The appellant very specifically testified that he did not know whether she was a witness or not; he did not testify that he thought that she was a witness. Unfortunately the evidence obtained during the irregular cross-examination of the appellant already dealt with above, is again raising it’s head, firstly because the non-contact with Ms

Fouché is ascribed to the finding of the presiding Magistrate that he thought she was a witness and secondly because the non-contact is not at all considered on the basis of his evidence, which the presiding Magistrate constantly interrupted, being that he did not entertain her contact with him because he could not cope with all the questions and words of empathy from his colleagues, including Ms Fouché, at the time.

- [73] The presiding Magistrate continued her judgment and stated and concluded the following:

“The person that he contacted was somebody that worked with him, his subordinate, so clearly when he was facing a charge emanating from the office where he was working in close relationship with this same person Fouché, he must have realised that she is also a state witness. It is clear from his evidence that he knew that.” (My emphasis)

- [74] I cannot agree with the aforesaid underlined conclusions made by the presiding Magistrate. Throughout the proceedings the appellant was consistent and persistent with his version that he did not know who the state witnesses are. I have already quoted the relevant parts of the record in this regard. The presiding Magistrate, throughout her judgment and in making her findings, relied on one sentence from the totality of the appellant's evidence, being when he said, with reference to Ms Fouché, that he *“blocked her on that time because I did not know which one is a witness, which one is not a witness”*. The presiding Magistrate clearly considered this sentence in isolation when she concluded that it means that *“he must have realised that she*

is also a state witness” and that “it is clear from his evidence that he knew that”.

[75] In my view, even when considered in isolation, that is not the only meaning that can be attached to it. It may just as well be interpreted to merely mean that he did not know who the state witnesses are, nothing more and nothing less. In fact, when this sentence is considered in the context of the totality of his evidence, like it should be, the last mentioned interpretation is wholly in line with the totality of the appellant’s evidence, being:

1. That he did not know who the state witnesses are; and
2. The reason why he did not respond to the message of Ms Fouché and blocked her number at the time was because he was unable to deal with all the questions and empathy from his fellow-employees.

[76] Whilst being on the issue of the appellant’s alleged reason why he did not entertain the message from Ms Fouché and blocked her number at the time, the appellant specifically in his evidence in chief offered access to his phone when he testified *“Marlene Fouché on the 5th of November she sent me a Whats App, here it is exhibit on my phone...”*. During the interrogation by the presiding Magistrate of the appellant when he attempted to explain why he blocked the number of Ms Fouché, whilst the presiding Magistrate continuously interrupted him, he explained that the message from Ms Fouché read *“Foeitog Jimmy, I am sorry”*. When he was a bit later again asked why he blocked the *“call”* of Ms Fouché, the appellant responded as follows:

“Because I was, I can show my phone, all my colleagues at the DPP they, a lot, it is not only Marlene.”

Despite the aforesaid evidence by the appellant, nobody took his phone to ascertain, to his advantage or his detriment, whether the contents of the phone confirmed or contradicted his aforesaid evidence. I am duly aware that the appellant was legally represented and that his legal representative should have, at least during the appellant’s evidence in chief, requested the court and the State to take a look at the contents of the appellant’s phone or the message should have been printed and presented with the phone to the court and the State, where after the printed version of the message could at least have been handed in as an exhibit. However, in view of the failure of the appellant’s legal representative to have done so, it was in the interest of justice that the presiding Magistrate should have requested to see the contents of the appellant’s phone, which she failed to do. Like it was stated in the Phiri-judgment, already quoted above, *“the fact that the accused is represented by counsel does not absolve the presiding officer from ensuring that he receives a fair trial ...”*

- [77] In her judgment the presiding Magistrate referred to the evidence of the appellant that he contacted Ms Fouché in order to obtain his books for studying purposes, since they have always been on good terms with each other and they had a good relationship. The appellant only wanted his books. The Presiding magistrate further stated as follows:

"She turns around and says he phoned her and threatened her that he is going to burn her house down, so she must make sure that the insurance are in order, and also involved his sister in these threats."

Then followed the paragraph already cited earlier which reflects the conclusion that the appellant must have realized that Ms Fouché is a state witness and that it is clear from his evidence that he knew that. The following paragraph then follows:

"I am indeed satisfied that the accused made contact with a witness; that he actually threatened her, because I can find no reason why she would fabricate these threats. Therefore there are sufficient to (*sic*) withdraw his bail and the reason for withdrawing the bail is not only the fact that he contacted her and threatened her, but because he is now threatening that he will damage her property and now he is a risk, and the safety of the witness is now involved in this whole bail application."

- [78] The presiding Magistrate made the aforesaid conclusion without having once referred to the fact that the onus of proof is on the State and/or that such an onus is to be discharged on a balance of probabilities.

- [79] The only reason which the presiding Magistrate relied upon in support of the aforesaid conclusion was that she can find no reason why Ms Fouché would fabricate the version with regard to the threats. This is despite the fact the fact and principle that it is not necessary for an accused person to show a motive as to why a witness would present false evidence against him/her. Be that as it may, the presiding Magistrate herself confronted the appellant about a possible motive for Ms Fouché to have falsely implicated him, but when a possible motive was eventually

presented during re-examination, namely that she was next in line for the appellant's position at work, the presiding Magistrate apparently chose to ignore it in her judgment.

[80] In my view the presiding Magistrate also completely failed to consider the flipside of the aforesaid argument she raised, being the improbability of the appellant threatening the very person with whom he had a very good relationship at work and who, if he knew she was to be a state witness, would rather have maintained their good relationship.

[81] It is trite that since bail proceedings are regarded as neither criminal nor civil proceedings, the rules of evidence are not strictly adhered to and consequently hearsay evidence is generally admissible at bail proceedings. See S v Yanta 2000 (1) SACR 237 (Tk). However, in my view, it is essential to keep in mind why the aforesaid approach is being followed. In Yanta at 246 D – E the following *dicta* are stated:

"In an unreported decision of this Court in *Rozani and Others v S* (case No A52/99) Jafta AJ dealt with the admissibility of hearsay evidence in bail proceedings and stated at p 19 to 20 of the judgment that:

'In bail applications the court is not called upon to weigh proven facts but to speculate on what could happen in future. Secondly, bail applications are neither civil nor criminal proceedings ...'" (My emphasis)

[82] Contrary to the aforesaid, it is crucial to have regard to the fact that in an application in terms of subsection 68(1) "*information*" relating to the factors enumerated in the subsection must be

given “*on oath*”. (My emphasis) Furthermore, in the judgment of Oehl v Additional Magistrate, Bellville 2005 (2) SACR 14 (C) at 19 I – 20 C the following principles are stated in relation to section 68 of the Act:

“It is self-evident that where the State is of the opinion that any of the factors listed in s 68 is present, it must, if it proceeds in terms of s 68(1), approach the court before which the accused faces the criminal charge in respect of which he has been granted bail and, if the court is satisfied with the evidence provided it could make any order, which could include placing additional conditions on the bail already granted or, in an extreme case, cancelling the bail and ordering the accused to remain committed in custody pending the finalisation of his criminal hearing.

Does s 68(1), however, require that a trial process be undertaken where witnesses provide the information and are liable to be cross-examined and the accused is present in court? This must be so. The possible consequences of an application in terms of this section are extremely severe: If the accused's bail is cancelled, the accused is not able to apply for bail and consequently will not be released until his criminal trial is finalised. In an application in terms of s 68(1) the State must satisfy the court on a balance of probabilities that further restrictions are placed upon the accused who has been granted bail, or his bail be cancelled and he or she placed in custody. For the court to be satisfied that the State has discharged the *onus* it bears, a full and proper hearing has to take place.”
(My emphasis)

- [83] Therefore, contrary to an application for bail, in an application in terms of section 68 of the Act, a court is not speculating about what could happen in future, but needs to deal with information and facts under oath about what has indeed happened by means of which the State has to discharge its onus on a balance of probabilities.

[84] With the aforesaid in mind, I now return to the “evidence” with regard to the alleged threats:

1. The investigating officer presented the allegations regarding the alleged threats in a manner which out and out constituted hearsay evidence.
2. No reason was advanced as to why Ms Fouché was not also called as a witness to present evidence.
3. The investigating officer testified that he obtained a statement from Ms Fouché with regard to the alleged threats. Despite this evidence, he did not even attempt to place that statement before court by means of and as part of his evidence.
4. A proper or *verbatim* version of the alleged threats was not even presented to court. With regard to the sisters of Ms Fouché, the investigating officer only testified that “*the statement was (furthermore) talking about the sisters of the witness*”. No evidence was even presented as to whether the sisters of Ms Fouché lived with Ms Fouché in the said house or in which way they were allegedly threatened.

Conclusions:

[85] In my view the State failed in discharging its required onus on a balance of probabilities.

- [86] In view of the totality of the principles, facts, circumstances and my findings dealt with above, I am convinced that the order of the court *a quo* cancelling the bail of the accused, is wrong and stands to be set aside.
- [87] The bail of the accused is to be re-instated on the same terms and conditions as when it was granted on 4 November 2022. However, in order to clarify the conditions of the appellant's bail and his general obligations whilst being on bail, I deem it appropriate that further clear and unambiguous bail conditions are to be added to the present conditions.
- [88] For the aforesaid reasons I made the order already cited at the beginning of the judgment.

General observation:

- [89] This matter is a typical example of the reasons why bail conditions and other similar warnings issued by Court should be clear, unambiguous, properly formulated and also properly recorded. The proceedings in this matter were riddled with incorrect references to alleged bail conditions which were in fact not bail conditions and references to imposed bail conditions of which the contents were incorrectly stated during questioning and cross-examination. The State has a duty to give due and proper consideration to required bail conditions and to request same to be imposed.



C. VAN ZYL, J

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