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**REPUBLIC OF SOUTH AFRICA
THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: A206/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES NO

(3) REVISED:

DATE: 18/08/23

SIGNATURE

In the matter between:

SIVIWE SOLOMON SKOSANA

APPLICANT

AND

THE STATE

RESPONDENT

JUDGEMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 18 August 2023.

BOKAKO AJ.

1. This is an appeal in terms of the provisions of section 65 of the Criminal Procedure Act, Act 51 of 1977 (the Act) against the decision of the Magistrate Mogagabe from the Magisterial District of Merafong seating at Fochville, under case number A247/2023. The application for admittance to bail was dismissed on 4 April 2023. The State opposes the appeal.
2. Before the court a quo, the Appellant, Siviwe Solomon Sikhosana, a male who was 27 years of age at the time he was arrested, applied to be admitted to bail. The charge sheet in the Magistrate Court currently contains no details of the allegations against the appellants. However, from the record of the proceedings and as it was alleged that the appellant is charged with attempted murder: in that upon or about 12 March 2023 and at or near 2[...] E[...], the regional division of Gauteng, the accused did unlawfully and intentionally attempt to kill Lulama Manzi a female person by shooting her with a firearm. Therefore the charge will relate to an offense as envisaged in section 5 of the Criminal Procedure Act 51 of 1977 (the Act).
3. As a result, the provisions of section 60(11)(b) of the Act apply to any bail application. Section 60(11) provides as follows:

"Notwithstanding any provision of this Act, where an accused is charged with an offense referred to – (a) (not applicable) (b)

In Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until the law deals with them unless the charge, having been given a reasonable opportunity to do so, adduces evidence that satisfies the court that the interests of justice permit their release."

4. In the court a quo, the applicant's application for his release on bail was based solely on affidavits and the arguments advanced by his legal representative.

5. The appellant raised the following grounds of appeal :

The grounds for appeal

5.1. As contended by the appellant that the Magistrate erred in finding that the appellant's release was not in the interest of justice. Further claiming that the reasons provided by the Magistrate in refusing the bail application were errors or misdirections.

5.2. In as far as they relate to the facts placed before the Magistrate and the applicable law on bail, the reasons that the Magistrate stipulated is that the appellant has no strong ties with the jurisdiction of the court in that he might lose his employment which this is the only tie with the jurisdiction of the court.

5.3. That the appellant has no alternative address as the sister provided the alternative address provided.

5.4. The appellant is facing severe charges despite the complainant contemplating in withdrawing charges against the appellant.

5.5. The Magistrate erred in finding that the accused might be dismissed from his employment and he will not have any ties with the court's jurisdiction.

6. The State called one witness, the investigating officer Mr. Thwasha. His evidence briefly relates to the arrest of the appellant. He told the court that the police arrested the appellant after they received a complaint that he had shot his girlfriend. This incident happened in their commune, where they stayed together. The victim, Ms. Lulama Manzi, was in the dining room on the night in

question, and the appellant had gone out for drinks. Later that evening, the appellant arrived with a friend. Subsequently, the appellant asked the victim to go to the bedroom, but she refused. He kept on insisting that they go to the bedroom she declined.

7. The appellant-accused Ms. Manzi that she made a mockery out of him; he stormed out of the house and went to his car, which was parked outside in their yard. He returned inside the house and said nothing; Ms. Manzi heard what sounded like a firearm being cocked. The victim heard two gunshots go off inside the house, she then ran towards the door. That is, when she fell when she touched the right side of her upper body, she felt that she was shot, and when she checked, she saw that she was bleeding. She was bleeding on the upper back on the right-hand side, and when this firearm went off, some people were still in the house, including a 9-month-old baby; they were still seated in the sitting room; she then managed to get up and ran towards the door and ran outside the door. As she ran out, two more shots were fired; fortunately, the appellant could not shoot at her, but the projectiles landed on the door frame, where she ran out. It seems like the appellant was shooting at Ms. Manzi when she was running away, further telling the court that the appellant has a licensed firearm issued in November 2022.
8. Ms. Mazi ran into the neighbor's house, who drove her to the Medical Center since they were in the same commune. On their way to the medical center operating out of the yard, they saw the appellant and his vehicle driven at a very high speed. They did not know where the appellant was rushing to; they had just passed this vehicle after he went into the ditch he lost control of his car. When the appellant was arrested, police found him sleeping ; he was arrested at his residence.
9. The investigating officer further informed the court that the Security officers of the complex saw the appellant after he ditched his car and confiscated his firearm. The investigating officer also told the court that the appellant had failed to disclose all his previous convictions; he disclosed only one and that last conviction had to do with driving under the influence of alcohol. It was

also highlighted by the investigating officer that there was another previous conviction of assault common which happened in the Eastern Cape. Though it wasn't clear from the investigating officer all the details that pertain to this particular conviction, it was difficult for him to provide the court with the dates of this conviction and the particularity or element of this conviction, but what was stated that the appellant had actually paid an admission of guilt of R200.00 and the complainant in the matter was a female as well.

10. Regarding an alternative address of the appellant, the investigating officer told the court that he verified the address, which was said to be a friend of the appellant's sister. However, he did not physically verify this premises. He confirmed that the appellant is a general worker at Kusasalethu Mine. He resides in the premises of the mine where it is strictly prohibited to discharge a firearm, meaning that the appellant disturbed the public order when he discharged his firearm in the area; he told the court that the community would be outraged if the appellant could be released on bail because he has caused such a public disturbance and also that he had already jeopardized the proceedings when he tampered with the crime scene after shooting the victim, He took the cartridges. He threw them away and could not recall where he threw the cartridges, but then the crime scene was revisited, and one cartridge was found under the sofa where the incident had happened, and according to the appellant, he only shot twice inside the house and twice outside. The witnesses that are willing to testify, according to the investigating officer, all reside in the same commune, and all work in the same mine, meaning that should the appellant be released, he might influence the witnesses or intimidate them, and that the appellant owns no property within the place of jurisdiction, the only ties he has with the area is his place of work that is the only thing that shows connections.

11. The investigating officer was cross-examined relatively extensively. His cross-examination, in short, revealed that, in essence, he was opposed to the granting of bail to the appellant., The Magistrate had also put several questions to the investigating officer. His answers revealed that the appellant was a flight risk. He told the court that the appellant did not possess a

passport. He was also of the view that there was a possibility that the appellant if released on bail, could interfere with Ms Manzi as a possible State witness.

12. The Magistrate then evaluated the evidence dismissing the applicants' bail application and offered brief reasons. The Magistrate found that the State had a watertight or prima facie case against the appellant, that the appellant would endanger public safety, and that the appellant did not have an alternative accommodation. There is a likelihood that he might be dismissed at work, which was an excellent incentive for the appellant to flee his trial and that it was contrary to the interests of justice to release him on bail.
13. In applications of this nature, the onus was on the applicant to satisfy the court that, on a balance of probabilities, the interests of justice demanded their release on bail. The result was that it was left to the State to lead evidence in opposing the bail applications of the appellant, which evidence provided a broader picture of the issues to be determined. However, the applicant's fate is not doomed in this court.
14. The onus once more was on the appellant to demonstrate to me, on a balance of probabilities, that the decision of the Magistrate in refusing him bail was wrongly decided and that the court's discretion a quo was exercised improperly. In this connection, I am confined to the four corners of the record of the proceedings in the Court a quo as supported by the grounds of appeal and as well as the submissions made on his behalf before me.
15. In terms of section 60(4) of the Act, I am entitled to refuse to release the appellant on bail from custody in the interests of justice if one or more of the following grounds are established: (a) Where there is the likelihood that the appellant, if he were released on bail, will endanger the safety of the public or any other particular person or will commit a schedule 1 offence; or (b) Where there is the likelihood that the appellant if he were released on bail will attempt to evade his trial; or (c) Where there is the likelihood that the appellant if released on bail

will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or (d) Where there is a likelihood that the appellant if released on bail, will undermine or jeopardise the objectives of the proper functioning of the criminal justice system; including the bail system; or (e) Where in exceptional circumstances, there is a likelihood that the release of the appellant will disturb the public order or undermine the public peace or security.

16. In dealing with the above factors in *S v Branco* 2002 (1) SACR 531 (WLD) on page 533, Cachalia AJ (as he then was) said the following: "The factors which the court may take into account in determining whether any of the grounds described in section 60(4) Have been established, are set out in section 60(5), section 60(6), section 60(7) and section 60(8) of the Act. These factors are merely guidelines in assisting the court in arriving at a just decision; they are not 'numerous clauses of the factors that a court may consider. (See *S v Stanfield* 1997 (1) SACR 221 (C) at 226c-d.) Nor are any of the factors individually decisive. Some of them may be weightier than others, depending on the circumstances of the particular case. The court must judicially exercise proper discretion considering the totality of the circumstances."

17. Counsel for the State in opposing the granting of bail in this court contended that the opinion of the investigating officer, in this case, was not decisive in matters of this nature. I agree with him, however, it would equally be unreasonable to ignore his opinions wholly, as reflected in his evidence in this case. After all, he was intimately involved in this matter from inception. He investigated and continues to investigate the allegations against the appellant. Finally, he was the only witness to testify at the bail hearing of the applicants in the court a quo.

18. The Magistrate has, with respect, wholly misevaluated and drawn incorrect conclusions on the evidence of the investigating officer. For this judgment, I can avoid dealing with every such wrong approach to his evidence. He could not advance any reasons why the appellant would not stand his trial or interfere with evidence as the appellant's firearm was confiscated already. I am, however, reluctant to completely ignore the investigating officer's

reservations that the appellant, if released on bail, will interfere with possible State witnesses, i.e., Ms. Manzi, his girlfriend, who has come forward and expressed her views in withdrawing charges against the appellant. The contention by the State is that the victim's safety will be compromised. It is not a call for this court to determine whether Ms. Manzi's views or assertions in withdrawing charges against the appellant are material or not. The trial court will deal with this aspect. The rest of the investigator's reservations, such as the possibility that the appellant would lose his job or be dismissed at his workplace, were based on speculation.

19. In addition, his evidence has demonstrated that numerous aspects of this case still have to be investigated. I need not expatiate in this regard. It is all on record. What is worthy of mention, however, is that some of the investigations will require some time, if not longer, to complete.
20. Investigator's reservations that the appellant will likely interfere with witnesses are genuine and well-founded. However, I was informed by counsel for the appellant that the victim, Ms. Manzi, has approached him and the State to withdraw charges against the appellant, which was conveyed to the Magistrate.
21. Investigator's concerns that the appellant was likely to continue to harass the victim remain a possibility, even though remote. If granted bail and the appellant engage in such activity, he will be doing so at his peril. It is imperative that the investigating officer physically verify the alternative accommodation. I'm of the view that he failed in his investigation processes to satisfy the court that, there were developments regarding an alternative accommodation but chose not to finalise this aspect. Verification of an alternative accommodation is one crucial aspect during bail proceedings and is part and parcel of investigation.
22. On the whole and viewed in its totality, the evidence of the investigating officer did not establish unequivocally that the State had a watertight case against the appellant as found by the Magistrate. In any event, the appellant has thus

far exercised his constitutional rights and steered clear of the allegations against him. In this regard, the Magistrate had misdirected herself by concluding that the State had a strong case against the appellant.

23. The fact that certain aspects of the case were still to be investigated should maintain the appellant's rights as guaranteed by section 35 of 11 of the Constitution of the Republic of South Africa. The continued detention of an accused to complete police investigations should be discouraged and frowned upon. In *S v Acheson* 1991 (2) SA 805, Mohamed J (as he then was) said the following on page 822A-B: "An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The law presumes that he is innocent until his guilt has been established in court. The court will, therefore, ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice."

24. Having concluded that the decision of the Magistrate was incorrectly arrived at and having considered all the facts and circumstances of this case, balancing the interests of justice against those of the appellant, I have exercised my discretion in favor of the appellant and decided that he ought to be released from custody on bail. The only issues to be resolved were the quantum of the bail amount and the conditions to be attached to it. Both counsels made no submissions to any state to the granting of bail, and I have found no reason not to do so.

25. The allegations levelled against the appellant are indeed severe. I am also painfully aware that I should not fix a high amount of bail that could be interpreted as amounting to the refusal of bail to the appellant.

26. In the end, I make the following order:

26.1 The appeal succeeds.

26.2 Magistrate's order refusing bail to the appellant is hereby set aside.

26.3 Bail is hereby fixed in an amount of R10 000,00 (ten thousand rands) subject to the following conditions:

(a) The appellant shall not interfere or communicate with any State witnesses, including Ms. Lulama Manzi.

(b) The appellants shall report three times, that is, on Mondays, Wednesdays, and Fridays weekly, to the South African Police at the Carletonville Police Station between the hours of – (i) 07h00 and 19h00;

(c) The appellant shall refrain from leaving the Republic of South Africa or his respective place of residence without the written consent of the investigating officer or his/her duly authorized delegate or successor, save for 13, reporting to the South African Police Station by the conditions of bail;

(d) The appellant shall, if not yet surrendered, surrender any passports or travel documents that he might have in his possession or under his control to the investigating officer immediately;

(e) The Appellant shall, if not yet surrendered, surrender his firearm which he might have in his possession or under his control to the investigating officer immediately;

(f) Finally, the appellant shall refrain from engaging with Ms Lulama Manzi.

T BOKAKO

*Acting Judge of the High Court
Gauteng Division, Pretoria*

REFERENCES

For the Appellant:	Adv. Molefe
For the State:	Adv. Machevele

Instructed by:	NDPP
Heard on:	26 July 2023
Judgment delivered:	18 August 2023