

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT
PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ NO.

(3) REVISED: ☒

07/04/2009
DATE

[Signature]
SIGNATURE

DATE: 7/4/2009

CASE NR: A254/09

In the matter between:

AMBROSE SIKHETHO MATHEBULA

APPELLANT

versus

THE STATE

RESPONDENT

JUDGMENT – BAIL APPEAL

MAKHAFOLA, AJ:**INTRODUCTION:**

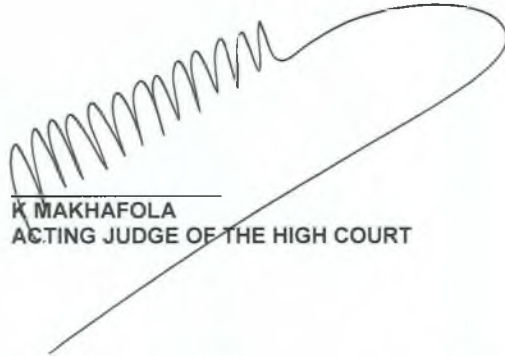
- [1] Sikhetho Ambrose Mathebula appeared in the district court of Bolebedu sitting at Ga-Kgapane as accused 4. The accused are facing one count of murder for allegedly killing one Lebeko Michael Malatji on or about 14 March 2008. The appellant applied for bail on 7 April 2008. The application was refused. On 25 July 2008 the appellant together with accused 3 appeared in court for the second time for bail application on new facts. The new facts relate to the evidence of the appellant's wife. In summary form she spelt out her health conditions of stress after the arrest of the appellant. She was 4 months pregnant at the time of her testimony and under cross-examination she had expressed her insistence that the appellant should be admitted to bail. She had also expressed her not being able to run the appellant's taxi business.

- [2] This application for bail falls to be decided under SECTION 60 (11) (a) of ACT 51 of 1977 because the appellant is facing a schedule 6 offence. On each occasion the state had vehemently opposed the bail.
- [3] The prime factor which the court considers in a bail application is whether the accused or applicant will stand or evade his trial.
Vide: S V VERMAAS 1996 (1) SACR 529 (T).
- [4] But the court hearing a bail application cannot ignore other factors tabulated in SECTION 60 (4) (a)–(e). The applicant in terms of Section 60 (11) (a) has an **onus** to be discharged on a balance of probabilities that **exceptional circumstances** exist that he or she be released on bail. That is, the applicant must show by evidence that it is in the interests of justice that he or she be admitted to bail.
- [5] In considering other factors for bail the court cannot ignore the strength or weakness of the state case against the applicant. This factor cannot be isolated from the fact of the seriousness of the case and the fact that if convicted the accused is likely to be sentenced to a long period of imprisonment. Other factors like the safety of the applicant, and the witnesses, the threat to placing the legal system into dispute and many other factors required to be met in terms of the Act all come into play.
- [6] Gleaned from the cross-examination of the appellant's wife the alleged killing involved hired and paid men from Hillbrow in Johannesburg. From that cross-examination it has emerged and it is on record that accused 3 has made a "confession" which in some parts confirms the "confessions" of accused 1 and 2 as the hired hitmen who were paid to carry the alleged killing.
- [7] With such pre-trial evidence on which the state firmly relies, the strength or weakness of the state case can be measured. In terms of that evidence the appellant has the money and capability to hire and pay hitmen without himself carrying out the actual killing. This factor on its own counters **exceptional circumstances**.

- [8] It is clear that no bail condition can restrict the appellant in any way from interfering with the witnesses. In terms of the "confessions" apparent from the cross-examination of Tsakani Shivambu the appellant did not need to be physically at the scene of the crime.
- [9] The appellant's wife did not show in which way the appellant, if released, would assist her to be healthy. She is also not on record to say in which way the appellant if released on bail, will comply with the conditions thereof. The new facts brought about by the appellant's wife did not advance **exceptional circumstances** required by SECTION 60 (11) (a) of the Act.
- [10] The following decided cases are to the point as far as new facts and factors that permit the release on bail are concerned:
- S V VERMAAS 1996 (1) SACR 528 (T)
S V ESSACK 1965 (2) SA 161 (D) at 162 C-E
S V DLAMINI 1999 (2) SACR 51 (CC) at 63 f – 64 a par. 11
S V VAN WYK 2005 (1) SASV 41 (SCA) par [16] at 44i-45c
S V VILJOEN 2002 (2) SACR 550 (SCA)
S V PORTHEN AND OTHERS 2004 (2) SACR 242 (C)
GADE V S [2007] 3 ALL SA 43 (NC).
- [11] I cannot fault the manner in which the court on both occasions had assessed and evaluated the facts before it when it refused to admit the appellant on bail. The appellant is facing a very serious crime of hired killing and this is based on common purpose with his other co-accused. SECTION 60 (10) of the Act requires that facts be weighed up against the personal interests of the appellant/accused and the interests of justice which was done by the court **a quo** and this is apparent from its judgment.
- [12] As a result I find as follows:
- (i) that the refusal of the bail on both occasions was justified because the facts before court do not meet the requirements of SECTION 60 (11) (a) of the Act;
 - (ii) that the cross-examination of the appellant's wife has revealed a strong state case against the appellant;

- (iii) that on both occasions the appellant has failed to discharge an **onus** he bears that the interests of justice permit his release on bail.

In the circumstances, I am of the view that the appeal should be dismissed and it is so ordered.



K MAKHAFOLA
ACTING JUDGE OF THE HIGH COURT

Advocate for Appellant:

Adv. RC Krause

Advocate for Respondent::

Adv. LA More

-oOo-