

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

Case No. A46/2025

|                  |                                     |
|------------------|-------------------------------------|
| (1)              | REPORTABLE: YES / NO                |
| (2)              | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3)              | REVISED: YES/NO                     |
| <u>5/10/2025</u> |                                     |
| DATE             | SIGNATURE                           |

In the matter between:

**THE STATE**

Applicant

and

**MOGADITSWE, DAWID TUMELO MOHAU**

First Respondent

**LETSATSI, KGOSIETSILE KINGSLEY**

Second Respondent

**NGWENYA, SAMKELO NTOKOZO**

Third Respondent

**NTELEZA, BOITUMELO JONATHAN**

Fourth Respondent

**MATLOU, PAULO S KGAMANE**

Fifth Respondent

**WAMBI, SUNNYBOOI PINNY**

Sixth Respondent

**MASHEGO, HERBERT DILEBOGO**

Seventh Respondent

**LECHOENYO, SEHULARO SOLOMON**

Eighth Respondent

**VAN DEVENTER, EDWARD ALBERT**

Ninth Respondent

**MOKOENA, MOJALEFA JACOB**

Tenth Respondent

MPOPETSI, REBI RICHARD

Eleventh Respondent

OLYN, KEVIN LENARDUS

Twelfth Respondent

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**JUDGMENT - LEAVE TO APPEAL.**

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**STRYDOM, J**

- [1] This is an application by way of notice by the State for leave to appeal against the decision of the Learned Regional Court Magistrate ("the magistrate") whereby she granted bail to the twelve respondents. The thirteenth accused in the main matter is a corporate entity.
- [2] The Court received submissions, from all the respondents opposing the application for leave to appeal. After the notice to apply for leave to appeal was filed by the State, the Court issued two directives. The purpose of the first directive was to set a date when the matter would be considered by me. This was necessary to set a timetable for the exchange of documents. The second directive was to inform the parties that pursuant to section 310A of the Criminal Procedure Act 51 of 1977 ("CPA"), the application for leave to appeal would be considered in chambers without a formal hearing.
- [3] Section 65(A)(1)(a) of the Act provides that the State may appeal to this Court against the decision of the lower court to release an accused on bail. Sub-section (1)(b) cross-references to section 310A, which provides for the procedures to follow, and to section 65, which provides for the test to apply to consider a bail appeal. Section 65(4) provides that the court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.
- [4] It is common cause that the respondents were charged with, *inter alia*, counts of murder falling within the ambit of Schedule 6 which rendered section 60(11)(a) of the CPA applicable. This section provides that the court shall order that the

accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release.

- [5] The magistrate granted the respondents bail following her finding that the State has a weak case against them. This, according to the magistrate, established exceptional circumstances whereby the respondents were able to discharge the onus placed on them. As far as the ninth respondent was concerned his health was also considered to be a further exceptional circumstance.
- [6] Dissatisfied with this decision, the State filed a notice of leave to appeal stating many grounds of appeal why the magistrate's decision is wrong. I do not intend to repeat all the grounds of appeal suffice to mention a few. In the main, the State alleges that the magistrate placed a duty or onus on the State to present evidence to prove the strength of the State's case. This is opposite to what is required in terms of section 60(11)(a), which places an evidentiary burden on an accused to show exceptional circumstances on a balance of probabilities. It is alleged that the magistrate relied on statements from the bar whilst there was no evidence to substantiate such allegations. It is further alleged that the magistrate wrongly found that the State has a frail case, whilst the magistrate failed to have proper regard to the strong circumstantial evidence. Further, that the State has shown that there is a likelihood that the respondents will attempt to influence or intimidate witnesses. It was stated that the respondents' bare denial of complicity was not enough to discharge the burden to establish exceptional circumstance.
- [7] It was stated in the respondents' submission that on a proper construction of section 65A of the CPA an appeal by the State against the granting of bail lies only against points of law. This, it was submitted, is what the position is with appeals from a lower court by the State, after a decision in favour of the accused persons was made.
- [8] I do not agree with this submission. Section 310 of the CPA specifically provides for an appeal by the State to be limited to decisions on points of law, whilst section 310A, dealing with bail appeals, has no such qualification. The question in bail

appeals will simply be whether the magistrate went wrong in his or her decision. The wrongness may either be on a point of law or on the factual findings.

- [9] When an application for leave to appeal is considered in a bail matter, the question would be whether there is a reasonable prospect that a court of appeal may conclude that the magistrate who granted or refused bail exercised his or her discretion wrongly. In this instance, the question would be whether the respondents adduced sufficient evidence to satisfy a court that exceptional circumstances existed which, in the interests of justice, permitted their release on bail.
- [10] The magistrate acknowledged that exceptional circumstances were to be shown by the respondents that would warrant their release on bail.
- [11] The magistrate acknowledged that the weakness of a State's case against bail applicants may constitute exceptional circumstances to grant bail.
- [12] The magistrate made a finding that the circumstantial evidence shown by the State, upon which the State would rely for the conviction of the respondents, is unlikely to be sufficient to secure a conviction.
- [13] The exceptional circumstance found by the magistrate, which she relied upon granting the respondents bail, was primarily based on her finding that the State's case against the respondents is weak. In *S v Kock* 2003 (2) SACR 5 (SCA) the court held as follows:

*"[15] In the context of section 60(11)(a) of the Act the strength of the State's case has been held to be relevant to the existence of 'exceptional circumstances'. S v Botha en 'n Ander 222 (SCA) at para [21]; S v Viljoen 2002 (2) SACR 550 (SCA) at para [11]. There is no doubt that the strength (or weakness) must be given similar consideration in determining where the interest of justice lie for the purpose of s 60(11)(b)(sic). When the state has either failed to make a case or has relied on one which is so lacking in detail or persuasion that a court hearing a bail application cannot express even a prima facie view as to its strength or weakness the accused must receive the benefit of the doubt."*

- [14] The question in this matter, where the strength or weakness of the State's case has become the primary enquiry, would be whether there is sufficient evidence presented by the State to at least persuade the Court that on a *prima facie* basis it has a case against the individual respondents. This does not mean that the State bears an onus as the overall onus to adduce evidence remains on the respondents in a section 60(11)(a) bail application, to show that there exist exceptional circumstances to permit in the interest of justice their release on bail. It speaks for itself that the respondents had to adduce evidence first to show exceptional circumstances for their release. The State is then afforded an opportunity to rebut the allegations. In a case where the issue in dispute is the strength or weakness of the State's case, the State would rebut allegations pointing to a weak case by establishing on a *prima facie* basis the case which it intends to prove against bail applicants. A *prima facie* basis is far from proving a case. It rather means that if the evidence presented by the State is accepted it may lead to a conviction.
- [15] If in a bail application, pursuant to the terms of section 60(11)(a), where there is circumstantial evidence against an accused, which, when considered by a court, may permit an inference of guilt to be drawn against an accused, such accused, bears the onus to prove that such inferences could not be drawn, as the only reasonable inference to be drawn, from the circumstantial evidence. Only if an accused on a balance of probabilities could show, by adducing evidence, that an inference of guilt could not be inferred, then it could be found that the evidence against a particular accused is weak.
- [16] Whether inferences can be drawn from proven fact is a factual question. All evidence would have to be considered. A finding that such inferences could or could not be drawn remains a decision on the facts. It cannot be expected of the State to place all available evidence implicating an accused before the bail court, as bail proceedings are not a trial. Moreso, in a case where an accused failed to adduce sufficient evidence requiring rebuttal from the State.
- [17] The granting or refusal of bail should be individualised. Each applicant's application should be considered on its own merits. Especially in a case where circumstantial evidence forms the backbone of the State's case against an

accused. This evidence may implicate individual accused to different degrees or, even, not at all.

[18] The State indicated that it would rely on the doctrine of common purpose for the conviction of all the respondents. The doctrine of common purpose allows for the imputation of the conduct of one party to another or others. Firstly, it can be established by prior mandate or agreement, which, can be express or implied. Secondly, even if there was no actual agreement it can be inferred in a case where a party actively associated himself with the conduct of the party performing the unlawful act. That a common purpose existed to commit crimes could be inferred from the evidence when the crime was committed and/or from circumstantial evidence. For this, a trial court would have to consider all the evidence presented during a trial. This could not be fully considered in a bail application and insufficient evidence at a bail hearing, in this regard, should not be used to conclude that the case of the state is weak. If the circumstantial and other evidence provided in a bail application indicates that a finding that perpetrators might have acted in the furtherance of a common purpose this would be sufficient.

[19] Counts 4, 5 and 8 are the counts which brought the bail applications of the respondents within the ambit of section 60(11)(a). Counts 4 and 5 concern the alleged killing of two victims who were allegedly kidnapped from the Mall of Africa ("the Mall") and killed. The eleventh respondent is not charged with these counts. He is, however, together with the second, third, sixth, eighth, ninth, tenth, twelfth and thirteenth respondents charged on count 8. This count concerns the killing of the previous investigating officer. The State relied on circumstantial evidence to implicate the various respondents, but as not all respondents are charged with the three murders, different circumstantial evidence applies to the murder victims allegedly kidnapped from the Mall and the murder of the investigating officer. In certain instances, the strength of the State's case may differ. In this case the first, second, fourth, fifth, sixth, seventh and eighth respondents explained their presence at the Mall by stating under oath that they were engaged in the activities of the Special Force of the Military. The fourth respondent stated that on the day in question he was not at the Mall at all. The ninth respondent also stated he was

not at the Mall. The allegations pertaining to the secret operations at the Mall remained untested as the respondents elected not to testify.

- [20] In section 60(11)(a) bail applications where an onerous evidentiary burden is placed on an accused to adduce evidence, evidence tendered by way of affidavit will have less probative value. It remains untested. See *S v Botha* 2002 (1) SACR 222 (SCA); *S v Viljoen* 2002 (2) SACR 550 and *S v Mathebula* 2010 (1) SACR 55 (SCA) at paragraph [12]. In this matter it was held as follows:

*"But a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge: S v Botha 2002 (1) SACR 222 (SCA) at 230h, 232c; S v Viljoen 2002 (2) SACR 550 (SCA) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the state is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see Shabalala & Others v Attorney-General of Transvaal and Another [1995] ZACC 12; 1996 (1) SA 725 (CC). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the state to rebut his evidence to that effect: S v Viljoen at 561f-g."*

- [21] Apart from an attack by the State pertaining to factual findings, the grounds of appeal include legal points. The notice of appeal raises the legal issue as to what evidence, if any, the State had to produce to establish the strength of its case against accused applying for bail in a matter which resorts under section 60(11)(a). In my view there exists a reasonable prospect that a court of appeal would find that it is not expected of the State to show its full hand upfront and only have to rebut allegations made by an accused if acceptable evidence pointing to the innocence of such an accused was adduced. But what constitutes *acceptable evidence* in a bail application with reference to section 60(11)(a)? In this instance it would require adducing evidence which would counter inferences

of guilt to be drawn from circumstantial evidence. Bare denials in an affidavit would not be sufficient. Also, not unsupported and untested allegations contained in the document submitted by respondents with the heading "General Officer Commanding South African Special Forces. Instructions, operations, familiarization exercise of 2020 until 2025".

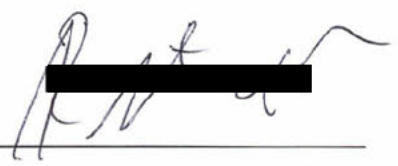
- [22] A reasonable prospect exists that an appeal court may find that the magistrate erred by not finding that the respondents failed to deal with circumstantial evidence pointing to their guilt in rebuttal and not by way of legal argument which does not amount to evidence. The most effective way to present evidence in a bail application in matters resorting under section 60(11)(a) is by way of viva voce evidence, which can be subjected to cross-examination. For instance, the respondents failed to deal with the question why was the vehicle of the victims removed from the Mall using a parking ticket paid by the sixth respondent; two vehicles return to the Mall to remove the vehicle of the victim, driven by the fifth and sixth respondent; why was a signal obtained for the cell phone of one of the victims close to the military base of the respondents and why was Sergeant Selowa asked to lie to the victims' family members about the ownership of the vehicles registered in the name of accused 13? As far as the murder of the investigating officer is concerned the sixth respondent was seen in a BMW vehicle which followed the vehicle of LT Col Mathipa. These are but some of the issues raised by the State in the affidavit of Captain Olivier.
- [23] The respondents failed to address the charges of obstructing the course of justice and fraud. These charges required an explanation as what was alleged is that this was done to conceal the evidence pertaining to other counts.
- [24] In my view there exists a reasonable prospect that a court of appeal may find that the learned magistrate applied the wrong test and placed an onus on the State to prove the strength of its case. If such a finding is made it would mean that she misdirected herself. There is a reasonable prospect that an appeal court may decide that the respondents failed to adduce sufficient evidence to show the existence of exceptional circumstances why their release on bail would be in the interest of justice. This in the face of circumstantial evidence, if considered holistically, may lead to a conviction of all the respondents. A court of appeal may

find that the magistrate wrongly found that the State has a weak case against the respondents and that they discharged the onus on them to show the existence of exceptional circumstances. The appeal court may find that the magistrate should have considered the bail applications of the respondents individually as the circumstantial evidence may be stronger against, for instance the sixth respondent, than against others.

[25] Accordingly, I am of the view that leave to appeal against the decision of the magistrate to grant bail to all the respondents should be granted.

**Order**

1. Leave to appeal against the magistrate's granting of bail to the respondents is granted.

  
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**R. STRYDOM**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, JOHANNESBURG**

Judgment reserved:

29 August 2025

Delivered on:

5 September 2025

Appearances:

For the Applicant:

Adv. R. Williams

Instructed by:

National Prosecuting Authority

For Respondents 1- 8 & 10 -12:

Adv. M. Ramaili SC

with: Adv. D. Magadlela

Instructed by:

Moshoeshoe Attorneys

For Respondent 9:

Mr. M.H. Schulte

Instructed by:

Schulte Attorneys