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**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION- MBOMBELA (MAIN SEAT)**

CASE NO: BA23/2025

In the matter between:

**SIFISO VUSUMUZI SIBANYONI
APPELLANT**

and

THE STATE

RESPONDENT

JUDGMENT: BAIL APPEAL

Vukeya J

[1] The appellant, Mr Sifiso Vusumuzi Sibanyoni, appeared in the Magistrate's Court, Mbombela on charges of Conspiracy to commit Murder and Murder read with the provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997¹. He was arrested on 08 July 2025 and brought his formal bail application on 15 July 2025, which was opposed by the respondent.

[2] Because of the Murder charge, the bail application followed the procedure in terms of section 60 (11) (a) of the Criminal Procedure Act 51 of 1977.² This section provides that where an accused is charged with an offence referred to in Schedule 6, the court shall order that he or she be detained in custody until he or she is dealt with in accordance with the law, unless the he or she, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which, in the interests of justice, permit his or her release.

[3] This section places the onus on the accused to prove to the court that there are exceptional circumstances which, in the interests of justice, permit his release on bail. To discharge the onus placed on him by section 60 (11) (a), the appellant adduced evidence by filing his affidavit and that of his girlfriend Thulile Ntshangase. The state led the *viva voce* evidence of Constable Sindisiwe Precious Nyaka, the Investigating Officer, to rebut the evidence of the appellant.

¹ Section 51(1) Act 105 of 1997. Discretionary minimum sentences for certain serious offences:

(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life.

² Act 51 of 1977 - Section 60 (11) - Notwithstanding any provision of this Act, where an accused is charged with an offence referred to -

(a) in Schedule 6, 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 interests of justice permit his or her release;

[4] The appeal lies on the strength of section 65 (4) of the Criminal Procedure Act 51 of 1977³ which 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. This means that, even if this Court finds that the Magistrate was wrong, it must consider the facts before it afresh and determine whether the appellant has discharged the applicable onus.

[5] In *S v Barber*⁴ 1979 (4) SA 218 (D) at 220 E-H it was said that:

“It is well-known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this court may have a different view, it should not substitute its own view for that of the magistrate because it would be unfair interference with the magistrate’s exercise of his discretion. I think it should be stressed that, no matter what this court’s own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly...”

[6] The appellant’s evidence at the hearing of the bail application as tendered by way of an affidavit can be summarized as follows: He is 39 years old and has been residing at 2[...] S[...] Crescent in Mbombela for the past four (4) years. He has been residing within the district of Ehlanzeni for at least 37 years. The appellant stated that he was married to the deceased. He has four minor children. He possesses a

³ Section 65 (4) Act 51 of 1977 - 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 *S v Barber* 1979 (4) SA 218 (D) at 220 E-H.

Nursing Certificate obtained from Ekufundeni Nursing College. At the time of his arrest he was self-employed as a diesel supplier and also has property let out for accommodation. His profit from these businesses is R80 000, 00 per month.

[7] The appellant told the court that he was arrested by members of SAPS at his residential address and, when arrested, he gave his full co-operation. There were no pending cases against him and he did not have previous convictions. He stated that he does not have any relatives outside the borders of the Republic of South Africa, neither does he have a passport. The appellant's evidence is that he owns six immovable properties situated within the Ehlanzeni District. He averred that there were exceptional circumstances which in the interests of justice permitted his release.

[8] Amongst the factors he mentioned is an allegation that the state's case is weak. He stated that on 20 November 2024 he was never at the scene of crime at Virgin Active, Riverside, he was at his residential place sleeping. According to the appellant, it will be impossible for the state to bring evidence that he committed the offence as he was not at the scene of the crime and also because he did not commit the crime. The appellant stated in his affidavit that from 19 November 2025, around 19h00 to 20h00 he was already in his house with his family, namely, his partner (not the deceased), his son and his younger brother. He never left the house until the next day on 20 November 2024 05h00 when he went to witness what had happened at the scene of crime as informed by some doctors.

[9] The appellant denied that he conspired with anyone to kill the deceased and does not know the people it is alleged he conspired with to commit the crime. He stated that he did not act in common purpose with any person. What was also of concern to the appellant is that his businesses will be affected by his further incarceration which will in turn affect his right to legal representation. This is because

he would like to instruct very capable and experienced attorneys to represent him, which he may not be able to afford if his business is affected. Ms Thuli Ntshangase only confirmed the evidence of the appellant that- he was at home on 19 November 2024 in the evening until the next morning when he was informed about the incident.

[10] Evidence led on behalf of the respondent, as tendered by Constable Sindisiwe Precious Nyaka, can be summarized as follows: On 20 November 2024, the deceased was shot in a parking lot at Virgin Active, Riverside and she attended the scene afterwards. She became the Investigating Officer of the Murder case. During her investigations, she discovered that the deceased and the appellant had been married and that they were going through a divorce. She also discovered that there was a protection order against the appellant, and that the applicant was the deceased.

[11] Nyaka further testified that she had two witnesses who stated that they had been approached by the appellant and informed them that he wants his wife killed. These witnesses informed Nyaka that they travelled with the appellant in two vehicles to Nelspruit where they left the appellant's vehicle at Sonpark parking lot and proceeded to the deceased's uncle's place. The deceased resided there. The appellant pointed out this residence and then they proceeded to Rob Ferreira Hospital where the deceased was employed as a doctor. The appellant informed the witnesses that the deceased leaves home around 05h00 to go to the gym and then goes to work as a daily routine. According to these witnesses, the appellant also showed them a picture of the deceased.

[12] On realising that the witnesses have not executed the plan to kill the deceased, the appellant called them to enquire why they had not executed the plan, they demanded payment before doing so. He told them that he had given some people R75 000, 00 to kill the deceased, but that they had absconded with the

money without having kept their end of the deal. He then demanded that they first execute the plan before he pays them. It would seem that these witnesses did not execute the plan but stated that they only wanted some money from the appellant.

[13] It was the evidence of Nyaka that as she proceeded to investigate the matter, she discovered that there was a protection order against the appellant in which he was ordered, amongst others, not to threaten the deceased that he was going to kill her. Furthermore, she discovered that the couple had been at the divorce court during November 2024 and that the deceased had filed a Notice of Intention to Defend the divorce action, demanding her 50% share of the estate. According to Nyaka, a section 205 investigation revealed that the appellant made calls to the two witnesses on 8 November 2024. It was Nyaka's evidence that the records revealed that the appellant and the witnesses contacted each other on 20 November 2024, on the date of the deceased's shooting.

[14] In his decision not to grant bail, the Magistrate was of the view that the facts before him relating to the strength of the state's case showed that there was a *prima facie* case against the appellant. His view was that there was evidence linking the appellant on both charges. Furthermore, the Magistrate's view was that the delay in arresting the appellant after the death of the deceased was not to be regarded as evidence of a reasonable suspicion on the part of the state. He did not regard this as being exceptional because it was an opportunity for the police to investigate the allegations levelled against the appellant.

[15] On the submission made that the appellant needed to prepare for the trial and had to obtain legal representation out of funds which should be generated by his businesses, the Magistrate was of the view that no proof had been provided to the court of the existence of the businesses mentioned by the appellant. He was also of the view that had such information been given to the Investigating Officer, she would

have confirmed the existence of these businesses to the court. He took into consideration that although there was a protection order against him, the appellant still told the two witnesses that he wanted the deceased to be killed.

[16] Although the Magistrate was of the view that the appellant was not a flight risk because he has a fixed address and his children and relatives reside within the jurisdiction of Ehlanzeni, he was of the view that the appellant, if released, would interfere with the state witnesses as they were known to him. Furthermore, his view was that the nature of the offence and the circumstances under which it had been committed, were likely to induce a sense of shock and outrage in the community where it was committed. He had also observed that every time the case for the appellant was on the roll, there was chanting and singing by members of the community outside the court, and the inside of the court was always full.

[17] Lastly, the Magistrate also considered the prevalence of crimes involving domestic violence committed between people who were in a domestic relationship with each other. He further considered that the case was of public interest and that the appellant's release would undermine or jeopardise the public confidence in the justice system or the proper administration of justice. Based on the above reasons, the Magistrate dismissed the application as he was of the view that the appellant had failed to discharge the onus he had to show on a balance of probabilities that there were exceptional circumstances which, in the interests of justice, permitted his release.

[18] The appellant, having been aggrieved by the Magistrate's decision dismissing his application to be released on bail, approaches this court on appeal and contends that the Magistrate erred, as follows:

- 18.1. By discussing the requirements of bail in relation to the interests of justice and then thereafter not applying the same to the facts of the case and refused bail.
- 18.2. By not considering any of the arguments and authorities referred to by the appellant's attorney.
- 18.3. In refusing bail only because of the seriousness of the charges and the alleged strength of the state's case and finding that there are no exceptional circumstances.
- 18.4. By not considering or by ignoring the fact that the appellant might be falsely implicated.
- 18.5. By not evaluating the evidence of the appellant but merely summarising it.
- 18.6. By failing to attach sufficient weight to the personal factors of the appellant and the prejudice that the appellant will suffer as a result of the refusal of bail.
- 18.7. By failing to consider the imposition of suitable bail conditions and relying on mere suspicion that the appellant may interfere with or intimidate the state's witnesses. By finding that there are no exceptional circumstances present, and therefore refusing bail. By setting the bar with reference to exceptional circumstances so high that no person will ever be able to get bail in circumstances of such a nature.
- 18.8. By not finding that there are exceptional circumstances in the interests of justice to grant bail to the appellant. By failing to take into account that the presumption of innocence operates in favour of the appellant even where there is a *prima facie* case.
- 18.9. By not considering that the case against the appellant is very weak, as none of the witnesses implicate the appellant at the actual time and

place where the incident happened. According to the appellant, the evidence presented is weak, contradictory, and in several respects hearsay. There is no evidence linking the appellant to the actual shooting.

18.10 By not considering and giving sufficient weight that the appellant has four minor children and that he is the main breadwinner.

18.11. By rejecting the evidence that the appellant has a lucrative business and that his businesses will suffer severely if bail is refused.

18.12. By not considering the fact that there is no real likelihood established in the evidence adduced by the respondent that:

18.12.1. The appellant will flee;

18.12.2. He will interfere with investigations, witnesses, bail proceedings, the legal or criminal justice; and

18.12.3. That the appellant will commit further crimes and that his release on bail will disturb public order.

18.13. The Magistrate should have considered that the appellant has a fixed address and strong family ties and is willing to comply with strict bail conditions.

[19] What was common cause between the parties at the bail hearing was that the appellant was not at the scene of the shooting, that he was arrested 6 months later and that he had a fixed address.

[20] What needs to be determined in this appeal is the question of whether the Magistrate's finding that the appellant failed to establish on a balance of probabilities that there were exceptional circumstances in which the interests of justice, permitted his release and that the subsequent decision to refuse bail was wrong.

[21] The principle of “*interests of justice*” is to be applied in accordance with the grounds as found in Section 60 (4) of the CPA, which provides that:

“(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;

(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or

(c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security;...”

[22] It is important, at this point, to start with the applicant’s contention that the Magistrate failed to consider that the case against the appellant is very weak as none of the witnesses implicate him at the actual time and place the incident happened. His further contention was that the evidence presented is weak, contradictory, and in several respects, hearsay-based, and that there was no

evidence linking him to the actual shooting. Kriegler J in *S v Dlamini, S v Joubert; S v Schietekat*⁵ stated that:

“It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application, the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails in the main, protecting the investigation and prosecution of the case against hindrance.”

[23] Bail applications are distinct and unique in nature, as they do not fall strictly under civil or criminal proceedings. As a result, the rules of evidence typically followed in trial actions are not rigidly enforced, and the presiding officer possesses greater inquisitorial powers. This procedure allows for the admissibility of hearsay evidence without the formalities applicable under the normal evidence rules applicable in a trial.

[24] The nature of the evidence itself and the manner in which the crimes were allegedly planned and committed does not require the presence of direct evidence. The Magistrate did not err in concluding that there was *prima facie* evidence that the appellant may have committed the offence. This, after having considered the hearsay evidence of the presence of witnesses who were, according to the evidence of the investigating officer, hired by the appellant to execute the killing of the deceased. Furthermore, the Magistrate accepted evidence that the appellant had hired other people, other than the witnesses, whom he paid R70 000, 00 but failed to execute the plan.

⁵ 1999(2) SACR 51 (CC), CCT21/98, CCT22/98, CCT2/99, CCT4/99) [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771 (3 June 1999).

[25] The contention that the Magistrate failed to consider that the appellant was not at the scene of the crime when the shooting happened is neither here nor there, as that is not what the state alleged as a fact. The circumstantial evidence is sufficient to arrive at a conclusion that, even with the material the state had at the time of the bail application, the state's case against the appellant was strong. In terms of section 60 (4) of the CPA, the interests of justice do not permit the release from detention of an accused where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial.

[26] When making a determination whether the interests of justice do or do not permit the release of the accused, Section 60(6) becomes relevant, and the court may consider, where applicable, the strength of the state's case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial. For purposes of the above, the Magistrate cannot be faulted for having accepted that the circumstantial evidence available at the time of the bail application was sufficient and relevant to be taken into account.

[27] It is trite that an accused person is presumed to be innocent until proven guilty. In *S v Essack*⁶, the court stated that the court hearing the bail application must express a balanced value judgment considering the factors mentioned in Section 60(4). This therefore means that the presumption of innocence operates in favour of an applicant even where there is a strong *prima facie* case against him. In *S v Acheson*⁷, Mahomed J remarked as follows (at 822A–B):

“An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court. The court will therefore ordinarily

⁶ *S v Essack* 1965 (2) SA 161 (D) 162C.

⁷ *S v Acheson* 1991 (2) SA 805 (Nm).

grant bail to an accused person unless this is likely to prejudice the ends of justice.” [My underlining]

[28] In determining the question of bail, too much emphasis cannot be placed upon the presumption of innocence; that is not what was intended in *Acheson* (supra). The interests of justice still play a pivotal role in the decision whether to grant bail or not. In other words, the accused’s right to be presumed innocent until proven guilty takes the backseat where the interests of justice do not permit his release. The court hearing a bail application is not precluded from considering other relevant factors to be able to maintain a balanced value judgment between the presumption of innocence favouring the applicant and the interests of justice.

[29] When dealing with the question whether the interests of justice permitted the appellant’s release, the Magistrate conceded that the appellant was not a flight risk but was more concerned that the appellant knew the witnesses and, therefore, if released, there was a likelihood that the appellant would threaten or intimidate them. He was right, and I cannot fault him. A likelihood is a reasonable probability that can be based on the surrounding circumstances to calculate the risk.

[30] In *S v Dlamini, S v Joubert; S v Schietekat*⁸

“[53] Section 35(1)(f) presupposes a deprivation of freedom - by arrest - that is constitutional. This deprivation is for the limited purpose of ensuring that the arrestee is duly and fairly tried. But s 35(1)(f) neither expressly nor impliedly requires that in considering whether the interests of justice permit the release of that detainee pending trial, only trial-related factors are to be taken into account. The broad policy considerations contemplated by the “interests of justice” test, in that context, can legitimately include the risk that the detainee will endanger

⁸ Supra at footnote 5.

a particular individual or the public at large. Less obviously, but nonetheless constitutionally acceptably, a risk that the detainee will commit a fairly serious offence can be taken into account. The important proviso throughout is that there has to be a likelihood, i.e. a probability, that such risk will materialise. A possibility or suspicion will not suffice. At the same time, a finding that there is indeed such a likelihood is no more than a factor, to be weighed with all others, in deciding what the interests of justice are. That is not constitutionally offensive. Nor does it resemble detention without trial, the reprehensible institution really targeted when one speaks of preventive detention.”

[31] The fact that the state witnesses were some of the people he is alleged to have conspired with or made an attempt to get them to kill the deceased, the fact that they did not execute the plan, the fact that he knows them and most importantly, the fact that they seem to be the only witnesses that link him to the alleged commission of the crime of murder which he vehemently denies, are all factors pointing to the direction that a real probability exists that he will attempt to threaten or intimidate them if released⁹. It is also a real probability that if released, the appellant will endanger the safety of these two witnesses¹⁰.

[32] Section 60(4)(e) provides that; where, in exceptional circumstances, there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security, the interests of justice do not permit the accused's release¹¹. The Magistrate was criticised by the appellant for taking into consideration the fact that the case was of national interest and that the appellant's

⁹ Section 60 (4) (c) Where there is the *likelihood* that the accused, if he or she were released on bail, will *attempt to influence or intimidate witnesses or to conceal or destroy evidence*.

¹⁰ Section 60 (4) (a) Where there is the *likelihood* that the accused, if he or she were released on bail, will *endanger the safety of the public or any particular person or will commit a Schedule 1 offence*.

¹¹ Section 60 (4) (e) reads-where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

release would undermine or jeopardise public confidence in the justice system or the proper administration of justice.

[33] Section 60(4)(e) must be read alongside Section 60(8A), which provides that in considering whether the ground in subsection (4) (e) has been established, the court may, where applicable, take into account the following factors, namely –

- (a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;
- (b) whether the shock or outrage of the community might lead to public disorder if the accused is released;
- (c) whether the safety of the accused might be jeopardized by his or her release;
- (d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;
- (e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or
- (f) any other factor which in the opinion of the court should be taken into account.

[32] The prevalence of offences pertaining to domestic and gender-based violence offences was one of the reasons why the Magistrate was of the view that the interests of justice do not permit the release of the applicant. It must be noted that this was not the main reason why the application was refused. Nevertheless, his remarks were that every time the matter was on the roll, the court was full to capacity and members of the community were singing and chanting outside the court building. The case was of national interest as according to the Magistrate, even the proceedings were broadcasted.

[33] In *S v Miselo*¹² the Court held that Section 60(8A) enjoined the Court to, in considering the question whether the release of the accused would disturb the public order or undermine the public peace or security, take into account a number of factors. Two of these factors were whether the nature of the offence or the circumstances under which the offence was committed was likely to induce a sense of shock in the community where the offence was committed, and secondly, whether the sense of peace and security among members of public would be undermined or jeopardised by the release of the accused. The Court held further that it had to exercise great caution before placing reliance on the sections and that they were only to come into play in 'exceptional circumstances'. It considered the circumstances of the matter it was dealing with to be exceptional, having regard to what had taken place over a lengthy period in the Division. The Court found that there was a likelihood that if the appellant were to be released pending his trial, such release would 'disturb public order or undermine the public peace or security'. It was clear that the nature of the offence which the appellant had committed and the circumstances under which it was committed was likely to induce a sense of shock or outrage in the community where the offence had been committed. It found that the release of the appellant would certainly undermine or jeopardise the public confidence in the criminal justice system. It dismissed the application.

[34] I am inclined to agree with this approach. In *casu*, the Magistrate correctly considered the nature of the offence, its prevalence, the manner in which it was committed, the fact that it was getting media coverage and that it had attracted a lot of interest from the community where the offence had been committed. Because of the domestic relationship that existed between the appellant and the deceased, the view of the Magistrate was that it was a pandemic in the society. This was correctly stated. Gender-based violence and domestic violence are a horror which does not only affect individuals, it has an impact on families and communities across all races. It is a human rights issue which should not be viewed lightly. These, in my view, are exceptional circumstances which permit the court to consider that the appellant's

¹² *S v Miselo* 2002 (1) SACR 649 (C).

release will undermine or jeopardise public confidence in the justice system or the proper administration of justice.

[35] The appellant was aggrieved by the fact that the Magistrate failed to consider that his businesses would suffer if his incarceration is continued, and he will not be able to afford legal representation of his choice out of a lack of funds, which would have been generated by his business. The Magistrate's reasoning was that the appellant had shown him no proof of the existence of such businesses and that, had such information been given to the Investigation Officer, she would have confirmed the existence of these businesses to the court. The Magistrate has not erred in his reasoning. The application was dealt with by way of filing an affidavit, which meant that the appellant could not be cross-examined regarding the existence of these businesses and the potential loss he stood to suffer because of his continued incarceration. Whether the businesses existed or not, it was not known to the Magistrate. Moreover, whether they generated reasonable income as suggested was not tested in cross-examination. No bank statements were presented to the court and no documentary proof of their existence was made available to the court for perusal. I am therefore disinclined to agree with the appellant that the Magistrate erred in this regard, as the appellant did not provide him with sufficient evidence to make that determination.

[35] While recognizing the appellant's Constitutional right to be presumed innocent until proven guilty, the interests of justice must still permit his release. In these circumstances, my view is that the Magistrate did not err in dismissing the application. He was able to maintain a balanced value judgment when he considered the factors contained under Section 60(4)(a) to (e) and Section 60 (8A), and came to the conclusion that the appellant has failed to discharge the onus he had on him to establish exceptional circumstances which in the interests of justice permitted his release.

[36] In the result, the following order is made:

36.1. The appeal against the refusal to grant bail is dismissed.

Appearances:

For the Appellant

Adv NJ Du Plessis

Instructed by:

Coert Jordaan Inc Attorneys

For the Respondent:

Adv I Phatudi

Instructed by:

Office of the Director of Public
Prosecution