



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: CC/07/2023

In the matter between

MOEGAMET TOUFIQ BROWN

APPLICANT

AND

THE STATE

RESPONDENT

Date of Hearing : 25 February 2025

Date of Delivering : 05 March 2026

JUDGMENT

THULARE J

ORDER

The application to be granted bail is dismissed.

[1] The applicant, known as Bubbles, is accused 4 alongside 14 others. The 15 accused were served with an indictment containing 124 charges. The applicant faces 10 of the 124 charges. The trial is partly-heard before another judge. 47 witnesses testified on behalf of the State. Whilst other accused applied for discharge in terms of section 174 of the Criminal Procedures Act, 51 of 1977 (the CPA), the applicant did not, and the court did not *mero motu* consider such application. Accused 2 testified and has been cross-examined. Accused 1 testified and is in the process of cross-examination.

[2] The 10 counts faced by the applicant are Count 2, participating in a criminal enterprise through a pattern of racketeering activities in contravention of the Prevention of Organised Crime Act 121 of 1998 (POCA); Count 28, promoting or contributing towards a pattern of criminal gang activity in contravention of POCA; Count 29, Conspiracy to commit murder of Mr William Booth (Booth), a practicing criminal law attorney; Count 30, conspiracy to commit murder of Nicolas Heerschap who was the father of an investigating police officer; Count 31, Murder of Nicolas Heerschap; Count 32, unlawful possession of an unlicensed firearm in contravention of the Firearms Control Act 60 of 2000 (the FCA); Count 33, unlawful possession of ammunition in contravention of the FCA); Count 34, money laundering in contravention of POCA; Count 35 Defeating the ends of justice in the burning of a Black Mercedes Benz which was used in the murder of Nicholas Heerschap and Count 47, the attempted murder of Booth the attorney.

[3] The State case is that Warran Officer Heerschap was a member of the Directorate for Priority Crime Investigation Unit, known as the Hawks and was involved in serious commercial crime investigation. He was investigating accused 1, Nafiz Modack (Modack), since 2016 and there were pending criminal trials against accused 1 at that stage. On the morning that his father was killed, he had to testify in a bail hearing against one of Modacks associates. Heerschap received several threats against his life and that of his family during the time that he investigated Modack. Heerschap maintained and believed that the threats and

eventual instruction to have him killed originated from Modack, and that his father was killed due to a mistake in identity. Heerschap lived with his father. On the morning that his father was killed, his father was reversing out of their residence's driveway about to take his grandchild to school, driving the Toyota Land Cruiser which was usually driven by Heerachap. The father was shot and killed at close range. CCTV footage recordings indicated that two men were dropped off close to the crime scene in a Black Mercedes Benz, approached the deceased's vehicle on foot and killed him by shooting him in the head. Ballistic examination revealed that the firearm used was a .38 calibre revolver.

[4] The same calibre firearm was used in count 47, the attempted murder of Booth. The suspects in Booth's matter were also dropped off close to the scene and approached him on foot. Four suspects were arrested in relation to the attempted murder of Booth. 3 of the four entered into plea agreements and pleaded guilty to five counts, to wit, willful aid and abetting criminal activity committed for the benefit of a criminal gang, conspiracy to commit murder, attempted murder, unlawful possession of a firearm and unlawful possession of ammunition. All the accused in that matter were found to be either members of the Terrible West Siders (TWS) gang or associated with the gang. In the plea agreement the accused in that matter admitted that the instruction to kill Booth came from a leader of the TWS gang who was in prison at the time of the attack. Bubbles is the leader of the TWS and his premises was well-known as a drug outlet where several arrests and drug seizures were made in the past, and several witnesses had testified to this effect.

[5] One of the three who pleaded guilty to Booth's matter was Bubbles wife. In her plea agreement she admitted that the instruction to kill Booth came from the leader of the TWS gang who was in prison at the time. She in turn instructed the other two accused in that matter to execute the murder. Bubbles was in Pollsmoor prison at the time of the failed assassination attempt on Booth. She was sentenced to 5 years Correctional Supervision in terms of section 276 (1)(h) of the CPA. Riyaad Gesant, also called Yatie, who was also accused 5 of the 15 accused in this matter, pleaded guilty to Booth's matter. In his plea agreement he admitted that the instruction to kill Booth came from a leader of TWS who was in prison, which instruction was relayed by Bubbles' wife. Yatie was sentenced to 8 years direct imprisonment of which 3 years was suspended for 5 years on conditions, in respect

of the Booth matter. Ebrahim Deare, known as Boerbul was the shooter in Booth matter who pleaded guilty and also in the plea agreement admitted that the instruction came from a leader of the TWS who was in prison and the instruction was relayed by Bubbles' wife. A section 204 witness who was the driver of the White Hyundai Creta dropped off Yatie and Boerbul close to Booth's residence for them to carry out the assassination. The witness confirmed this evidence also in evidence in the trial of the 15 accused.

[6] X was arrested 23 days after the murder of Nicholas Heerschap, in possession of the .38 calibre special revolver used to Kill Heerschap senior. X resided at the applicants residence, a stronghold of TWS gang whose members were convicted of the attempted murder of Booth. Yatie and Boerbul had admitted in their plea agreements that they are members of TWS and were acting on the instructions of the leader of TWS. X indicated that he was given the .38 calibre special revolver by accused 6. He was arrested whilst walking with Bubbles and accused 6. X was shown the CCTV video footage of the murder of Heerschap senior. He identified the Black Mercedes Benz used during the murder as well as the two persons who walked towards the deceased and killing him, as accused Yatie and another person, identified in the trial as A. X explained that accused 5, 6 and A were friends and members of TWS. X set out the link between Modack, accused 3 (Poole) and Bubbles. A testified in the trial. He was a 28 prison gang member and a member of TWS in Woodstock led by Bubbles. A told that he only knew after the shooting as to who it was that he had killed, which he did not know at the time of the killing. A spoke about his involvement in the killing of Heerschap senior, Josephs a truck-driver in Eersteriver, and the attempted murders of Andre Naude and Booth. A implicated accused 6. Bubbles, Yatie, Poole and accused 7 in the planned killing of Heerschap senior. Bubbles confirmed to them that he had been to the house where the murder must be done and that the person to be killed was there. A was with accused 5, 6 and 7 when he shot Heerschap. Only he and accused 5, Yatie, walked up to the deceased and A shot at the deceased. After the killing, they returned to Bubbles' residence. A only discovered later that he had killed the father of a Hawks detective. He was angry at this because the motto of the 28 gang was not to kill police officers. Bubbles told A that the hit was for Modack.

[7] A also indicated that the planned attempted murder of Booth was done on the instruction of Modack with the assistance of Bubbles and Zane Killian, accused 2. According to A, Modack wanted Booth dead as payback because Modack suspected that Mark Lifman and Jerome Booysen were behind the murder of Advocate Pete Mihalik who appeared for Modack. A was instructed by Modack, Poole and later Bubbles, to kill Booth. A followed Booth for several months but he was arrested before he could kill Booth. Bubbles made a call to A whilst both were in prison to discuss the killing of Booth. Bubbles and Yatie also spoke to A the night before the attempted hit on Booth. The cellphone records of Bubbles phone established that he had telephonic contact with his wife, accused 3 and Yatie on the day of the attempt on Booth's life. A pointed out including where they burnt the Black Mercedes Benz used in the killing of Heerschap on the instructions of Bubbles. A also pointed out where he killed the tow-truck driver and where he went to shoot at Andre Naude's house and other addresses related to the investigation. A's testimony implicated accused 1 to 7.

[8] The applicant has been in custody since April 2022. He had not applied for bail until now. He had before now elected to face trial and not apply for bail. It is after the state case that his opinion is that the case against him is not strong that his release on bail would be justified. He is married and has two minor children and two adult children in his marriage and two other children, one of which is a minor. His wife and children are struggling financially in his absence. Prior to his incarceration he operated an informal business selling clothing and earned between R20 000 and R30 000 per month. Although accused 2 has already testified, he was informed that he may call a defence witness. Accused 1 was still under cross-examination and had indicated that he will be calling numerous defence witnesses. Due to the multiple charges specifically against accused 1 his submission was that the trial will be lengthy and unlikely to finalise even this year. The case did not sit between 26 March 2025 and 6 October 2025. The lengthy postponement was itself an exceptional circumstance. The case against him was circumstantial. One witness, D said he heard him (Bubbles) speaking to a co-accused over the phone yet there was no phone record of a phone call at that time between him and the co-accused. A gave evidence placing him as part of a conspiracy to murder and attempted murder. The presiding judge noted that there were problems with that witness' evidence although the court accepted the evidence for purposes of section 174 but the threshold at the end of the trial was far more onerous on the State and

his counsel would argue that the evidence is not enough to convict him beyond reasonable doubt.

[9] He is prepared to comply with the conditions for bail. He will reside at an address which is his property. He has an alternative address which is his mother-in-law residence. He did not have a passport. He did not have the means to leave the country nor to leave Cape Town and had no intention of leaving as his roots were firmly established in Cape Town. He had one pending matter against him for possession of drugs. He was arrested with two other people including his previous legal representative while appearing in court for this matter in October 2024. He had no warrants against him. He had three previous convictions. Two attempted murder and one for possession of marijuana. He was diagnosed with high blood pressure which resulted in him getting black outs. He suffered stomach ulcer and used medication for both conditions and the correctional facility was not always able to provide the necessary medication for his stomach ulcer-acid. He experienced serious lower back pain which sometimes made it hard for him to walk. He sometimes had to use a wheelchair due to the severity of the pain. The correctional facility could not provide the cream he needed for the inflammation caused by the pain. Since he was in custody, he had lost weight dropping from 107 to 96kg and now taking sleeping tablets due to ongoing stress. There had been times when he was denied visits and this remained an ongoing battle. Conditions of awaiting trial prisoners, especially overcrowding, was something to be taken note of. He will be able to pay R5000-00 bail if granted.

[10] Section 60(1)(a) and (b) of the CPA read as follows:

60 Bail application of accused in court

(1)(a) An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.

(b) Subject to the provisions of section 50 (6) (c), the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time.

I understand the converse of section 60(1)(b) to be that bail applications shall be heard by the presiding officer in the trial court of an accused, save in the event

where the presiding officer may direct otherwise in the interests of justice. I also understand section 60(1)(a) read with 60(1)(b) to mean that for those matters pending before the High Court, the High Court may hear the bail application as a court of first instance. I do not understand the CPA to contemplate a situation where an applicant can go back to the Magistrates Court to apply for bail in a matter, during the trial in a High Court, or for a trial Judge to learn that an accused before them on trial is or was before another Judge applying to be granted to bail on the matter before them, without their direction.

[11] In *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* (CCT21/98, CCT22/98 , CCT2/99 , CCT4/99) [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC); 1999 (2) SACR 51 (CC) (3 June 1999) at para 5 it was said:

[5] The starting point of the exercise is s 35(1)(f) of the Constitution which provides the principal template against which Chapter 9 of the CPA must be measured. It reads as follows: “Everyone who is arrested for allegedly committing an offence has the right . . . (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.”

At para 6 it was said:

[6] Section 35(1)(f) in its context, makes three things plain. The first is that the Constitution expressly acknowledges and sanctions that people may be arrested for allegedly having committed offences, and may for that reason be detained in custody. The Constitution itself therefore places a limitation on the liberty interest protected by s 12. The second is that notwithstanding lawful arrest, the person concerned has a right, but a circumscribed one, to be released from custody subject to reasonable conditions. The third basic proposition flows from the second, and really sets the normative pattern for the law of bail. It is that the criterion for release is whether the interests of justice permit it. What that term means, both in the Constitution and in s 60 of the CPA, is central to much of this judgment, and will be thrashed out later. All that need be said at this stage is that s 35(1)(f) postulates a judicial evaluation of different factors that make up the criterion of the interests of justice, and that the basic objective traditionally ascribed to the institution of bail, namely to maximise personal liberty,¹⁵ fits snugly into the normative system of the Bill of Rights.

In para 10 it was said:

[10] The second general observation to be made about chapter 9 arising from the overview is that the grant or refusal of bail is unmistakably a judicial function. In that respect it ties up with chapters 4 and 5 of the CPA, dealing respectively with the various methods of securing the attendance of an accused person in court and with the most invasive of those methods, namely arrest. The underlying policy is plain. Although societal interests may demand that persons suspected of having committed crimes forfeit their personal freedom pending the determination

of their guilt, such deprivation is subject to judicial supervision and control. Moreover, in exercising such oversight in regard to bail the court is expressly not to act as a passive umpire. If neither side raises the question of bail, the court must do so. If the parties do not of their own accord adduce evidence or otherwise produce data regarded by the court to be essential, it must itself take the initiative.

[12] A bail application during a trial is an interlocutory application which seeks a temporary or non-final decision while a case is ongoing and cannot be used to resolve or test the resolution of the case. It must be used to determine the immediate and /or provisional issue of an applicant's liberty or custody arrangements that arise during litigation. It must add to allowing the case to proceed without delay and should not be an undue distraction. An order sought in such application is a non-final ruling designed to help manage the case, particularly the liberty of the applicant, efficiently while preserving the ability of the court to reach a final decision on the verdict. The liberty of an accused is a collateral to the issues to be decided through a verdict. The application tends to pause litigation during the trial and as such must be approached with caution. The order of the court made in such application while the trial in the matter is ongoing, has no bearing on how the case would be decided. It is an order whose lifespan ends when the verdict is pronounced.

“[13] Section 60(2)(c) of the CPA provides:

60. Bail application . . . in court

(2) In bail proceedings the court -

(c) may, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused, as the case may be, that evidence be adduced; ”

Whilst the use of the word "may" in legislation is generally construed as permissive, granting discretion or choice rather than imposing a mandatory obligation, if regard is had to the obligations imposed by section 60(11) on an applicant like Bubbles, the otherwise permissive term ‘may’ in section 60(2)(c), an empowering provision, should be interpreted as imposing a duty on the recipient of that power to act [Lisa Draga, *South African Law Journal*, Vol 138, Issue 3, pages 649-68]. An applicant for bail, during the trial, cannot simply serve a notice of set-down, and take the State and the Court by surprise in relation to the evidence

intended to be adduced in support of the application. The rules applicable to applications in the court in which the application for bail is intended to be brought, should apply. The directives, which include the exchange and delivery of heads of arguments, equally apply.

[14] At this stage where the applicant is applying for bail, during trial and when the State case was closed and the applicant is about to have his chance to answer the serious charges, two questions arise as primary for consideration, to wit, the risk of flight and the impact that the applicants release would have on the trial, the administration of justice and society. There is a high degree of violence in the charges faced by the appellant, which includes the loss of life, and the threat continues to exist, as the applicant is a self-confessed leader of a criminal gang, TWS, which is known for its brutality. The father of a member of one of the elite crime-busting institutions of the Republic, Heerschap, was killed in what is understood to be mistaken identity, where the Hawks investigator was targeted to be killed for doing his work, which was investigation of criminal gangs in the Western Cape. It is not surprising, on humanitarian grounds, that after his father paid the ultimate price for his work, the Hawks officer left the service. The other charge for which the applicant is arraigned related to targeting an attorney at law, Booth, admitted as an officer of the court to help the courts discern the truth from the facts.

[15] The applicant stands before the trial court for all intents and purposes arraigned including for targeting those representing the authority of the State, in furtherance of the ideals of an illegal parallel underground government by gangs in the Western Cape. Whilst awaiting trial and attending to the courthouse during the trial, he is alleged to have conspired with his then legal representative to smuggle drugs, through the courthouse, into prison. The killing of Booth was allegedly planned whilst he was in prison. The State case amounts to that Bubbles simply does not care what the law says and expect of him. The sense of peace and security prevailing among members of the public whilst Bubbles is in custody, will be jeopardized and undermined by his release. His release on bail will undermine the public confidence in the criminal justice system. It is not in dispute that Bubbles had tattoos which confirmed that he was a high-ranking member of the 26-prison gang, and a member of the TWS street gang and its leader due to his rank, which

was also confirmed by several witnesses. He wore a ring with the letters TWS which was an abbreviation for the street gang name. Underneath his top, at the time of his arrest, the applicant wore a long sleeve top which has the words Salute ek staan vir die nommer, (Salute I stand for the number), which signified that he was a staunch and active member of the prison gang. Flight may not be a consideration for Bubbles as a proud and high-ranking member of the 26-prison gang, but a reign of terror and brutality is a likelihood, if he is released on bail. This will not be in the interests of justice.

For these reasons I am making the order.

DM THULARE
JUDGE OF THE HIGH COURT