

**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No: SS 046/18

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

23 June 2022

In the matter between:

ZWELI HUDLA

1ST APPLICANT

SIBONISO SITHOLE

2ND APPLICANT

And

STATE

RESPONDENT

JUDGMENT

Coram NOKO AJ

Introduction

[1] The applicants brought an application for bail which was allocated a date by this court for 27 May 2022. The legal representatives for both the parties were notified to file papers¹ on 30 May 2022. The applicants' application was based on the affidavits and at the time of the providing the date the respondent had not as yet uploaded either its opposing papers or heads of arguments. The respondent sent by

¹ For both affidavits and heads of argument.

email an unsigned statement opposing the bail together with the heads of argument. The application had to be re-scheduled to Thursday, 1 June 2022 to enable the respondent to upload a properly commissioned statement.

[2] The applicants' affidavits were read into the record and consisted of the first applicant's founding affidavit which was handed up and accepted as exhibit A, first applicant's supplementary affidavit marked B and second applicant's affidavit marked C. The respondent's affidavit was handed up and was marked exhibit D. The contents of the affidavits were read into the record.

[3] The affidavit of the first applicant which was duly commissioned read as follows:

I, the undersigned,

ZWELI CRESSWELL HUDLA

Do hereby make oath and state as follows:

1.

I am the Applicant in this, an application for bail, an adult male aged 45 years old with the following personal particulars and background:

1.1 Identification no:

My identification number is [....]. My identity document may be made available to the Honourable Court during this application hearing.

1.2 Date of birth:

I was born on 17 April 1976.

1.3 Citizenship:

I am a South African citizen from birth.

1.4 Travel documents:

I do not possess a valid passport, nor do I possess any other travel documents.

1.5 Previous travel or residence in foreign countries:

I have not travelled to, nor have I been resident in any other foreign country.

1.6 Relatives resident outside of the RSA:

I do not have any relatives who are resident outside of the Republic of South Africa.

1.7 Assets outside of RSA:

I do not possess any assets outside of the Republic of South Africa.

1.8 Personal background:

1.8.1 Place of birth:

I was born in L [...] on 17 April 1976.

1.8.2 Schooling:

I attended N [...] High School. The highest grade I attained was Grade 11 in 1996.

1.8.3 Tertiary and/or other training:

I do not have any tertiary training and/or other training.

1.8.4 Work history:

I was unemployed between 1996 and 1998.

From 1999 to 2004, I was employed as a security guard at Ukhozi Protection Services.

I thereafter left my employment at Ukhozi Protection Services and started a taxi business, where I was self-employed between 2005 and 2008.

I was consequently in custody during 2008 and 2015 pending outcome of trial proceedings against me on a charge of armed robbery.

I thereafter continued in the taxi business industry from 2015 till present.

1.8.5 General remarks regarding background and permanency:

I have been living in the Johannesburg area for almost 23 years. I operate my business in Johannesburg and my family is situated here. Furthermore, I do not have the financial means, nor the intention of living my life as a fugitive.

1.9 Current status:

1.9.1 Address:

I stay at Room No. [...] in N [...] 2 H [...], P [...], Soweto.

1.9.2 Marital status and general particulars of spouse:

I am married to my wife, Mrs. B [...] T [...] according to African customary law for approximately 22 years.

1.9.3 Dependents:

I have 6 children from my marriage to my spouse aged 25, 22, 17, 9, 3 and 1 year old. All my children are dependent on me for financial and emotional support. I pay for their schooling (including school uniforms), clothing, food and provide for their basic needs. My spouse and mother are also dependent on me for financial support. I am the sole breadwinner in my family and am heavily relied on in this regard.

1.9.4 Occupation:

I currently own a taxi business and I am self-employed in this regard.

1.9.5 Income from occupation:

I earn approximately R 60 000.00 per month.

1.9.6 Other sources of income:

I operate a mobile fridge business, whereby I hire a mobile fridge to individuals during family functions. I earn approximately R 8 000.00 per month from this business.

1.9.7 Assets (Movable/savings etc: Immovable: etc)

I own seven (7) taxis, being two 2011 model Toyota Quantum's and five Zola Budd Siyaya Taxis. These vehicles form part and parcel of my business operations. I own three personal vehicles being a 2012 model BMW 130i, a 2009 model Golf 5 GTi, and a 1999 model Toyota Hilux.

I also possess a property in L [...], which is valued at approximately R 300 000.00.

I further possess furniture and various household effects to the approximate value of R 100 000.00.

1.9.8 Availability and sources of funds for bail:

I submit to the Honourable Court that I am able to afford a reasonable amount for bail.

2.

History of anti-social behavior:

2.1 Previous convictions:

I was convicted and sentenced to a 7 years wholly suspended sentence for a period of 5 years in 2015 for, inter alia, committing the crimes of robbery with aggravating circumstances, attempted murder, theft, possession of a firearm at Kempton Park Regional Court.

2.2 Pending criminal cases:

I have no pending cases against me.

2.3 *I declare that I have not been released on bail in respect of any other charges against me.*

2.4 *I also declare that I have no knowledge of any outstanding warrants against me.*

2.5 *I further declare that I do not have an order against me as contemplated in S.5 or S.6 of the Domestic Violence Act of 1998, nor do I have an order against me as contemplated in S.3 of S.9 of the Protection from Harassment Act 2011, or any similar order in terms of any other law.*

3.

Arrest and factual background thereto:

3.1 ***Date of arrest:***

I was arrested on the 30th of June 2021.

3.2 ***Offences charged with:***

I am being charged with two counts of robbery with aggravating circumstances, murder, three counts of attempted murder, unlawful possession of firearm and ammunition.

3.3 ***Intended plea:***

I intend pleading not guilty to the charges proffered against me by the State.

3.4 ***Defence:***

I have been advised that I have the right to remain silent and not reveal the basis of my defence, but should I reveal the basis of my defence, it may be used against me at the ensuing trial. I have, however, decided to reveal the basis of my defence herein under.

3.5 *I deny any involvement in the commission of the alleged offences.*

3.6 *I deny that I was present at the scenes of any of the alleged offences.*

3.7 I will contend that I was arrested whilst I was an innocent pedestrian walking in the street.

4.

Submissions regarding factors to be considered when deciding whether bail should be granted:

4.1 Schedule of the Criminal Procedure Act 51 of 1977 which the matter resorts under:

I have been advised that this matter falls under Schedule 6 of the Criminal Procedure Act No. 51 of 1977. I have further been advised that I bear the onus to convince this Honourable Court on a preponderance of probabilities that there are exceptional circumstances present that would render it in the interest of justice to release me on bail.

4.2 Consideration in terms of section 60 (4) (a) to (e):

4.2.1 Section 60 (4) (a) – Danger to public or individual safety:

I respectfully submit that there is no likelihood that my release on bail will endanger the public safety or that of any particular individual. I hold no grudge against anyone either. I also will not commit any offences against any person in a domestic relationship as defined in S1 and S5 of the Domestic Violence Act 1998, or any offence referred to in the Protection from Harassment Act 2011.

4.2.2 Section 60 (4) (b) – likelihood of evasion of trial:

I respectfully submit that there is no likelihood that I will attempt to evade my trial. I submit that this is evident from my conduct since the inception of the investigation. I have not supplied any false information, nor have I supplied any false information for purposes of this application. I undertake to attend court faithfully on each and every

occasion to which this case might be postponed to. I have no intention to live the life of a fugitive.

4.2.3 Section 60 (4) (c) – interference with witnesses or evidence:

I do not know any of the potential state witnesses. There has not been any allegation that I have attempted to influence or intimidate witnesses. I therefore respectfully submit that there is no likelihood that this subsection is at risk to be infringed upon should I be admitted to bail. I am however willing to comply with any reasonable conditions of bail, in this regard, should the Honourable Court deem it appropriate to impose such conditions.

4.2.4 Section 60 (4) (d) – Jeopardy to the functioning of criminal judicial system or bail system:

I submit respectfully that there is no likelihood that this subsection is potentially to be infringed upon should I be released on bail. I have not furnished any false information to the investigating officer, nor have I furnished false information for purposes of this application.

4.2.5 Section 60 (4) (e) – Exceptional circumstances (presence or absence) which may lead to undermining public order or peace:

I was advised by my attorney, which advice I accept, that this factor is not applicable to my application.

4.2.6 The provisions of Section 60 (9) – The interest of justice in relation to the right to be released on bail:

4.2.6.1 *I respectfully submit that there are exceptional circumstances present in this matter which would render it in the interest of justice to release me on bail. My contentions in this regard are based on the following:*

4.2.6.1.1 *My attorney of record and I have now been furnished with the Indictment as well as copies of the relevant police dockets. A*

perusal of the relevant docket has revealed several shortcomings/defects in the state's case. I do not wish to elaborate in detail but will highlight a few pertinent aspects;

4.2.6.1.2 At the outset I wish to point out that no identification parade has been held and I have not been pointed out by any of the complainants or other state witnesses;

4.2.6.1.3 The police docket contains no forensic evidence of any nature that link me to the commission of any of the offences. There is no DNA evidence or fingerprints to link me to the alleged crime scenes, the stolen vehicles or the firearms recovered by the police at the alleged scenes;

4.2.6.1.4 It is particular noteworthy to note that no primary residue had been found on my hands. This must be seen against the background of the allegations by the arresting officers that I had been involved in a shootout with the police and was arrested shortly thereafter with the firearm in my possession;

4.2.6.1.5 The same applies to fingerprints on the firearm. No fingerprints have been found on the firearm that link me to the relevant firearm;

4.2.6.1.6 There are serious discrepancies as to where the firearms had been recovered;

4.2.6.1.7 It is alleged that my co-accused had been driving a Toyota Corolla, the subject of Count 1. Yet, no forensic evidence has been adduced which link either of us to the alleged stolen/hijacked vehicle;

4.2.6.1.8 More significant is the following, according to the affidavits in the police dockets my co-accused and I were arrested at

or near the place where the Toyota Corolla had been abandoned after a shootout with the police. However, the affidavits reveal that we were arrested by two separate teams of policemen. What is disturbing about this is the fact that these different policemen make no mention of each other in their affidavits. An objective analysis of these policemen's affidavits reveals that this simply cannot be correct;

4.2.6.1.9 I was arrested whilst walking in the street. When I heard the sound of gunshots I started running because I was afraid and did not know where the shots had been fired from. I was then stopped by some policemen whom I do not know;

4.2.6.1.10 I did not know my co-accused prior to the day of my arrest. I was not in his presence before then and do not know under what circumstances he had been arrested;

4.2.6.1.11 I therefore deny any involvement in the alleged offences;

4.2.6.1.12 In view of the above I submit that the state case is weak or at least questionable and open to some serious doubt. I further submit that there is a real possibility that I might be acquitted at the ensuing trial;

4.2.6.1.13 This affidavit should not be seen as exhaustive of all the issues relevant to this bail application.

4.2.6.2 I respectfully submit that I will be prejudiced in the event of being further detained in that the conditions in prison are appalling. In this regard I request the Honourable Court to take into account the period I have already spent in custody. I also urge this Honourable Court to consider the period that I might be detained until this matter is finalized and the fact that criminal trials can take a considerable period of time before they are finalized.

4.2.6.3 *Apart from the fact that the period of detention cannot be estimated with any form of precision at the moment, I request the Honourable Court to take into account that I will not earn any income whilst so detained. I therefore stand to suffer considerable financial hardship and loss.*

4.2.6.4 *I also urge upon this Honourable Court that, should I be detained and refused bail, I would be prejudiced in the preparation of my defence. It is extremely difficult to consult with a legal representative inside prison and I have no doubt that my continued detention will seriously jeopardize my preparation for trial.*

4.2.7 Other relevant factors to be considered by the court:

As was indicated herein before, I am the sole breadwinner in my family. My family is fully financially and emotionally dependent on me. Since my arrest on 30 June 2021, I have been unable to work and therefore unable to generate an income to support my family.

5.

In the premise and taking into consideration the relevant schedule the charges resort under, I respectfully submit that I have on a preponderance of probability proved existence of exceptional circumstances and that it would be in the interests of justice that bail be granted to me in an appropriate amount and with such conditions attached as the court may deem fit.”

[4] The affidavit of the second applicant which was duly commissioned was read into the records and its contents are as follows:

I, the undersigned,

SIBONISO SITHOLE

Do hereby make oath and state as follows:

1.

I am the Applicant in this, an application for bail, an adult male aged 30 years old with the following personal particulars and background:

1.10 Identification no:

My identification number is [....] .

1.11 Date of birth:

I was born on 3rd day of June 1992 in Tugela Ferry.

1.12 Citizenship:

I am a South African citizen from birth.

1.12.1 Travel documents:

I do not possess any travel documentation.

1.12.2 Previous travel or residence in foreign countries:

I have not travelled to any foreign country, nor have I been resident in any foreign country.

1.12.3 Relatives resident outside of the RSA:

I do not have any relatives who are resident outside of the Republic of South Africa.

1.12.4 Assets outside of RSA:

I do not possess any assets outside of the Republic of South Africa.

1.13 Personal background:

1.13.1 Place of birth:

I was born in Tugela Ferry, Kwa-Zulu Natal on 6 April 1992.

1.13.2 Schooling:

I attended M [...] High School, Tugela Ferry, Kwazulu Natal. I attained Grade 11 in 2007. I did not matriculate.

1.13.3 Tertiary and/or other training:

I have not attended any tertiary training.

1.13.4 Work history:

From 2007 to 2014 I worked for my father looking after the cattle in our homestead area at Tugela Ferry, Kwazulu Natal.

In 2015 I worked as a paper wrapper for a paper company, which name I cannot recall, in Johannesburg.

From 2016 to date I worked as a cue marshal in the taxi industry for Sizwe Taxi Association in Johannesburg.

1.13.5 General remarks regarding background and permanency:

As can be seen from the above, I have been living in the Johannesburg area for approximately 7 years. I do not have the intention, nor the financial means to live my life as a fugitive. Furthermore, my wife and minor children are fully dependent on me and are situated in Johannesburg.

1.14 Current status:

1.14.1 Address:

I currently reside at No. [...] Held R [...], Meadowlands, Soweto.

1.14.2 Marital status and general particulars of spouse:

Although I am not married I am living with my girlfriend since 2015.

1.14.3 Dependents:

I have four (4) children aged 8, 5, 3 and 2 years old respectively, My children are all financially dependent on me. I provide them with all

their basic needs being inter alia food, clothing, school fees and uniforms.

1.14.4 Occupation:

I am currently employed as set out in par. 1.4.4 above.

1.14.5 Income from occupation:

I earn approximately R 10 000.00 per month.

1.14.6 Other sources of income:

I have no other sources of income.

1.14.7 Assets (Movable/savings etc: Immovable: etc)

I possess only household and furniture effects to the approximate value of R 80 000.00.

1.14.8 Availability and sources of funds for bail:

I would be able to pay and afford a reasonable amount for bail out of my own funds.

2.

History of anti-social behavior:

2.1 Previous convictions:

I have no previous convictions.

2.2 Pending criminal cases:

I have no pending cases against me.

2.3 *I declare that I have not been released on bail on respect of any other charges against me.*

2.4 I also declare that I have no knowledge of any outstanding warrants against me.

2.5 I further declare that I do not have an order against me as contemplated in S.5 or S.6 of the Domestic Violence Act of 1998, nor do I have an order against me as contemplated in S.3 or S.9 of the Protection from Harassment Act 2011, or any similar order in terms of any other law.

3.

Arrest and factual background thereto:

3.1 Date of arrest:

I was arrested on the 30th of June 2021.

3.2 Offences charged with:

I was informed that I am being charged with 2 counts of Robbery with aggravating circumstances, Murder, 3 counts of Attempted Murder and Unlawful Possession of Firearm and Ammunition.

3.3 Intended plea:

I intend pleading not guilty to the charges proffered against me by the State.

3.4 Defence:

I have been advised that I have the right to remain silent and not reveal the basis of my defence, but should I reveal the basis of my defence, it may be used against me at the ensuing trial. I have, however, decided to reveal the basis of my defence herein under.

3.5 I deny any involvement in the commission of the alleged offences.

3.6 *I deny that I was present at the scenes of any of the alleged offences.*

3.7 *I will contend that I was arrested whilst I was an innocent pedestrian walking in the street.*

4.

Submissions regarding factors to be considered when deciding whether bail should be granted:

4.1 *Schedule of the Criminal Procedure Act 51 of 1977 which the matter resorts under:*

I have been advised by my legal advisor that my bail application will resort under Schedule 6 of the Criminal Procedure Act No. 51 of 1977, due to some of the charges I am charged with.

4.2 Consideration in terms of section 60 (4) (a) to (e):

4.2.1 *Section 60 (4) (a) – Danger to public or individual safety:*

I respectfully submit that there is no likelihood that my release on bail will endanger the public safety or that of any particular individual. I have no history of violent behavior nor do I have any pre-disposition to commit offences referred to in Schedule 1 of the Criminal Procedure Act, Act 15 of 1977. I hold no grudge against anyone either. I also will not commit any offences against any person in a domestic relationship as defined in S1 and S5 of the Domestic Violence Act 1998, or any offence referred to in the Protection from Harassment Act 2011.

4.2.2 *Section 60 (4) (b) – likelihood of evasion of trial:*

I respectfully submit that there is no likelihood that I will attempt to evade my trial. I submit that this is evident from my conduct

since the inception of the investigation. I have not supplied any false information, nor have I supplied any false information for purposes of this application. I undertake to attend court faithfully on each and every occasion to which this case might be postponed to. I have no intention to live the life of a fugitive.

4.2.3 Section 60 (4) (c) – interference with witnesses or evidence:

Although I was provided of a list of witnesses when the indictment was served on me at Court, I do not know any of the potential state witnesses. There has not been any allegation that I have attempted to influence or intimidate witnesses. I therefore respectfully submit that there is no likelihood that this subsection is at risk to be infringed upon should I be admitted to bail. I am however willing to comply with any reasonable conditions of bail, in this regard, should the Honourable Court deem it appropriate to impose such conditions.

4.2.4 Section 60 (4) (d) – Jeopardy to the functioning of criminal judicial system or bail system:

I submit respectfully that there is no likelihood that this subsection is potentially to be infringed upon should I be released on bail. I have not furnished any false information to the investigating officer, nor have I furnished false information for purposes of this application.

4.2.5 Section 60 (4) (e) – Exceptional circumstances (presence or absence) which may lead to undermining public order or peace:

I was advised by my attorney, which advice I accept, that this factor is not applicable to my application.

4.2.6 The provisions of Section 60 (9) – The interest of justice in relation to the right to be released on bail:

4.2.6.1 *I respectfully submit that there are exceptional circumstances present in this matter which would render it in the interest of justice to release me on bail. My contentions in this regard are based on the following:*

4.2.6.2 *My attorney of record and I have now been furnished with the Indictment as well as copies of the relevant police dockets. A perusal of the relevant docket has revealed several shortcomings/defects in the state's case. I do not wish to elaborate in detail but will highlight a few pertinent aspects;*

4.2.6.3 *At the outset I wish to point out that no identification parade has been held and have I not been pointed out by any of the complainants or other state witnesses;*

4.2.6.4 *The police docket contains no forensic evidence of any nature that links my co-accused or me to the commission of any of the offences. There is no DNA evidence or fingerprints to link me to the alleged crime scenes, the stolen vehicles or the firearms recovered by the police at the alleged scenes;*

4.2.6.5 *It is particular noteworthy to note that no primary residue had been found on my hands. This must be seen against the background of the allegations by the arresting officers that I had been involved in a shootout with the police and was arrested shortly thereafter with the firearm in my possession;*

4.2.6.6 *The same applies to fingerprints on the firearm. No fingerprints have been found on the firearm that link me to the relevant firearm;*

4.2.6.7 *There are serious discrepancies as to where the firearms had been recovered;*

4.2.6.8 *It is alleged that my co-accused and I had been passengers in a Toyota Corolla, the subject of Count 1. Yet, no forensic evidence has been adduced which link either of us to the alleged stolen/hijacked vehicle;*

4.2.6.9 *More significant is the following, according to the affidavits in the police dockets my co-accused and I were arrested at or near the place where the Toyota Corolla had been abandoned after a shootout with the police. However, the affidavits reveal that we were arrested by two separate teams of policemen. What is disturbing about this is the fact that these different policemen make no mention of each other in their affidavits. An objective analysis of these policemen's affidavits reveals that this simply cannot be correct;*

4.2.6.10 *I was arrested under the following circumstances. I was walking in the street when I heard the sound of gunshots I started running because I was afraid and did not know where the shots had been fired from. Whilst running I realized that I had been shot in my arm and thereafter ran into an unknown property to hide. I was inside of this property at the backyard and was arrested by some policemen whom I do not know;*

4.2.6.11 *I did not know my co-accused prior to the day of my arrest. I was not in his presence before then and do not know under what circumstances he had been arrested;*

4.2.6.12 *I therefore deny any involvement in the alleged offences;*

4.2.6.13 *This affidavit should not be seen as exhaustive of all the issues relevant to this bail application.*

4.2.7 Other relevant factors to be considered by the court:

I am the sole breadwinner in my family. Since my arrest in 2021, I have been unable to provide for my family with the little income that I do earn. I respectfully submit that I have proved above herein that the State's case against me is weak and that there is a high probability that I might be acquitted should this matter proceed to trial and that it therefore constitutes exceptional circumstances.

5.

In the premise and taking into consideration the relevant schedule the charges resort under, I respectfully submit that I have on a preponderance of probability proved existence of exceptional circumstances and that it would be in the interests of justice that bail be granted to me in an appropriate amount and with such conditions attached as the court may deem fit.

[5] The respondent called the investigating officer, Sgt Dlamini who took the stand and testified. The Investigating officer was accordingly sworn in and read his affidavit into the record. The contents of the affidavit of the investigating officer are as follows:

Sandton CAS 581-06-2021

Bail Statement

Nkosinathi Njabulo Dlamini state under oath in English

I am a black African male and employed at SAPS Gauteng PHO Taxi Violence Unit rat 714 -3rd Street Wynberg – as D/Sgt persal no 7108558-1 att 0797764432

I'm the investigating officer, Sandton Cas 581-06-2021 of murder and attempted murder, Sandton Cas -583-06-2021 of car hijacking, Ivory Park Cas 661-06-2021 of possession of unlicensed firearm and Ivory Park Cas 656-06-2021 of attempted murder; possession of unlicensed firearm and ammunition.

The scene of crime started at Woodmead next to Makro by the Robot where the suspects were driving a white Ford Ranger, Reg [...] but on the vehicle registration it was [...] and a Toyota Corolla Reg [...].

When the robot was red, they started shooting the victims with firearm rifles AK47. The target was the deceased S [...] M [...] 1 who was inside a Toyota Corolla and he was also being escorted by body guards.

They were four (4) body guards in total who were on that escort one vehicle of the gauds was leading in front and S [...] M [...] 1 the deceased was a Deputy chairman of ARMSTA Taxi Association, they were on the way to the office of the association.

After shooting S [...] M [...] 1 he was declared dead on the scene by paramedics and the body guards were uplifted by a helicopter to Milpark Hospital the Uber driver was shot since he was next to them and the other vehicle that was passing was shot but the driver was not injured.

And the suspects fled the scene on feet, they left both their vehicles they came with on the scene and walked down the freeway M1 North and the hijacked two vehicles a Toyota Corolla Reg [...] and Hyundai Sonata Reg [...] and the Hyundai was later found in Midrand.

And the Hyundai was found abandoned with a firearm inside a AK47 rifle and the lookout was done about the shooting at Woodmead and the hijackings and the owner of the owner of the Toyota Corolla Reg [...] he activated the tracker.

And the said vehicle was recovered at Ebony Park with 4 suspects who were inside and there was a shoot-out between police and the suspects and 2 suspects ran away and 2 were arrested on the scene and (4) four rifles AK47 were recovered with ammunition.

And the name of the suspects as per Zweli Hudla and Siboniso Sithole and concerning bail to both accused persons Zweli Hudla gave an address as N [....] 2 H [....] Soweto he was not sure about the exact room and full details of the address where he was residing and Mr Hudla gave or provided his ID number [....] which was used for profiling on his criminal status.

And I can confirm that Mr Hudla is not a first-time offender. He also has previous conv as per Sebenza Cas 161-12-2008 where he was sentenced on 2015-07-31 imprisonment 7 years of which 7 years was suspended for 5 years for armed robbery.

And Siboniso Sithole provided that he was residing at Soweto Meadowlands only and he also provided a date of birth of 1992-04-03 and when profiling he had nothing under his name and his real ID number [....].

He has a warrant of arrest as per Brakpan Cas 255-06-2018 of armed robbery and I can confirm that the state has strong case against both accused persons and for the interest of Justice and for fact that both accused they were hired to be hitmen kill Deputy Chairman S [....] M [....] 1.

All that was well planned even the weapons and vehicles that were used. It was only the rifles firearms only and the vehicles the Ford Ranger was stolen from Pretoria and the number plate was changed not the disc as per Pretoria meet Cas 158-01-2021 and the Toyota Corolla also.

Still under investigations by VIS Heneton JHB not yet disposed the vehicle tags were tempered with. They were no longer original and, in this case, there were many people who were seriously injured.

I am opposing any application of both accused to be granted bail for the five stated above and further to restore faith in the justice system and lives of the witnesses might be in danger if they are released, even in the taxi industry as whole they are also being affected.

[6] The counsel for the respondent thereafter asked clarity seeking questions. The investigating officer averred that he was in Voslosrus on the day of the incident and was called to the scene of the crime in Ebony Park, situated near Tembisa Township. Upon reaching the area he was informed that the team of members of SAPS who were in an unmarked car together with Metro officials identified a corolla which was earlier reported to have been stolen in Woodmead where it was hijacked after a shoot-out where deputy chairperson of a taxi association was gunned down. They pursued the corolla and, in the process, called for a back-up. It appears that the occupants of the corolla became aware that they were being followed and made a U-turn and on approaching the unmarked police car they alighted and started shooting with AK47s. The four suspects (including two applicants) were overpowered and started running towards different directions. The first applicant was arrested first not too far from the corolla. The second applicant jumped over the wall into the house alongside the road and was accosted by another team of members of SAPS, shot on the hand and was ultimately arrested. The police seized four AK 47 rifles and a pistol. They also retrieved Identity document, driver's licence and the jersey in the corolla. The corolla was also identified by its owner as his car which was hijacked earlier in Woodmead area.

[7] The Investigating officer re-stated that State's positions that that no bail should be granted to the applicants. The first applicant was convicted of, inter alia, armed robbery and was sentenced to 7 years imprisonment which was suspended for 5 years. The 5-year period of suspension ended in 2021. The said sentence was quite lenient and the first applicant was not appreciative of how light he was treated by the court which convicted and sentenced him. The refusal for bail should be also be extended to the second applicant who initially could not disclose his identity number to the members of the police. The ID number was only availed to SAPS by the applicants' attorneys a week before the hearing of the bail application from which it was discovered that there is a warrant of arrest (Brakpan Cas 255-06-2018) which

was issued in 2018 against him. The said warrant was issued after the second applicant failed to appear in court while he was on bail.

[8] The applicants' counsel contended during cross examination that the arguments against bail are unsustainable as the State's case is weak and there are decided cases which held that the weakness of the state case can be considered exceptional circumstances upon which the court may decide in favour of the applicants. He further advanced the argument that the fulcrum of the applicants' contention that the state's case is weak is based on the fact that there have not been finger prints taken and tested, ballistic testing was not done and ID parade is not done. In retort the investigation officer stated that there has been delay in obtaining the outcome of investigations and tests done in respect of the fingerprints and the ballistic reports. In addition, the finger prints of the second applicant were found to be linked to the finger prints which were taken from the left-hand side door of the corolla. The information linking the second applicant was discovered only after receiving the correct ID number a week earlier before the hearing.

[9] In summation the counsel for the defence reiterated that in view of the lack of reports there is no substantive evidence which link the applicants to the crime they are being accused of. The applicants were walking at the time of shooting and decided to run after hearing the gun shots. There are no details with regard to the warrant issued in respect of the second applicant and the court should therefore not lend credence of the assertion of a warrant existing. There is no basis to contend that the first applicant may commit crime, he has been clean since his previous sentence in 2015.

[10] The respondent's counsel on the other hand contended that the contention of weakness of the case is unsustainable regard had to the fact that as said out during the testimony the results of the tests are not out and deciding on such issues would be presumptuous for the court to make a pronouncement. Members of SAPS and Metro police partook in the shoot-out and the arrest of the accused and they will testify to that effect and the evidence is that of the witnesses and should be persuasive. The contentions on behalf of the first applicant that he has not been prone to commit further crimes is because he has been in custody during the period

before 2015 and further that during the subsequent period, he was on suspended sentence till 2021. The first applicant's conduct is consistent with someone who was alive to the possibility of a direct imprisonment if he commits a crime during the period of suspension. There is a warrant of arrest issued against the second applicant and ordinarily once cannot be granted bail whilst there is a warrant issued against him. The contention of the defence's counsel from the bar that the court ignore the warrant is unsustainable.

Analysis and discussion

[11] The parties appear to be in agreement that the accused are charged with schedule 6 offences in terms of which the accused shall be detained in custody until he 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 release. It follows that the applicants are required to demonstrate that there are exceptional circumstances which warrant the admitting the accused to bail. The fact that the State's case is weak or open to doubt can be considered exceptional circumstance² for the purpose of adjudicating over a bail application.

[12] The accused would have to prove that the grounds listed in section 60(4)³ of the CPA do not exist failing which the interest of justice will not permit that the accused be released from custody. In adjudicating over the grounds as set out in section 60(4) the court would have to weigh, in terms of section 60(9) of the CPA, the interest of injustice as against the right of the accused to personal freedom and the extent to which detention will prejudice him. This exercise would have regard to the factors identified in section 60(9) (a – g). In summary “...*once exceptional circumstances have been established by the bail applicant, the enquiry must focus on the balance between the interest of the State as set out in section 60(4) – (8)A on*

² *Mooi v State* (162/12) [2012] ZASCA 79(30 May 2012)

³ Read with subsection 5 – 9.

*the one hand and the applicant's interest in his personal freedom as set out in the section 60(9) on the other."*⁴

Exceptional circumstances

[13] The first applicants argued that there are various factors which militates against the possible inference being drawn that the state has a strong case against the accused.⁵ To this end reference is made of the fact that there are no ballistic tests which undertaken, there was no Identity parade held, there is no DNA evidence or finger prints linking the first applicant to the crime scenes, stolen vehicles or the firearms, there are serious discrepancies as to where the firearms have been recovered. there are versions from two teams of police officers who were involved in their which do not complement each other. The first applicant did not know the second applicant prior to the arrest of the parties. The state retorted that there are awaiting the outcome of the tests and investigations and there are backlogs. The accused were identified during the exchange of shooting with the accused by the members of SAPS and Metro police. The first applicant was not present in court or through a replying affidavit to refute the averments of the investigating officer in this regard. The defence did not request postponement to reply hereto but opted to proceed without a reply from the applicants.

[14] The averments by the applicants are allegedly based on affidavits and other documents in the docket and the said affidavit/ documents are not presented to the court for the court's benefit and also to have the investigating officer being cross examined thereon. To the extent that the veracity of the said affidavits or contents of the dockets which were relevant to the case of the applicants the probative value of the evidence by the applicants hang in the balance.

[15] Whilst the court would ordinarily have regard to the fact that there are systemic difficulties which beset investigative and prosecutorial processes the court not readily conclude in haste that the delay in obtaining tests result is reckless on the part of the state. That notwithstanding the interest and the freedoms of the accused

⁴ See *Keevy v S* (A66/13) [2013], FS High Court, Daffue, J (2 April 2013)

⁵ These factors are catered in the affidavit under paragraph 4.2.6 with the caption "The provisions of Section 60(9) – the interest of justice in relation to the right to be released on bail."

cannot be readily be held to ransom by the State. It is also to be noted that “[B]ut a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must proof on a balance of probabilities that he will be acquitted of the charge.”⁶ (sic). The State has retorted that they are awaiting results and it may be presumptuous of this court to make a conclusion or pre-empt the contents of the reports which are still outstanding. The invitation by the defence to decide the strength or weaknesses of the state’s case under the circumstances appears to be tall order.

[16] It follows therefore for the foregoing exposition that the contention that the State’s case is weak is premature and unsustainable. This apply to both the first and second applicant as their affidavits in this regard are similar.

Section 60(4) of the CPA

[17] The first applicant averred that, as required by section 60(4)(a), there is no evidence that they would pose danger to the public or of a particular individual. Section 60(5)(d) provides that the court in assessing the grounds in section 60(4)(a) the court should have regards to “...any disposition to violence on the part of the accused, as is evidence form his past conduct.”⁷ The first applicant has previous conviction of robbery with aggravating circumstances, attempted murder and unlawful possession of firearm.⁸ In this regards the statement of the first applicant is incomplete and perverts the truth.⁹

[18] The first applicant further averred that there is no likelihood that he will evade trial and he had not supplied any false information¹⁰. Strangely the investigating officer stated in his affidavit, which was not gainsaid by the first applicant that the first applicant “...was not sure about the exact room and full address as N [....] H [....]

⁶ *Mathebula v The State* (431/09) [2009] ZASCA 91 (11 September 2009).

⁷ Curiously this aspect was included in the affidavit of the second applicant (see para 4.2.1 of the second applicant’s affidavit) and not disclosed in the first applicant’s affidavit.

⁸ Ordinarily clean previous record will enure to the benefit of the applicant and conversely the previous conviction should tilt against the granting of bail, see *S v Colbert* 2015 JDR 0325 (LT).

⁹ The first applicant seems not to have told the truth as one of his children aged 9 was born in 2013 whilst the first applicant was in jail between 2008 and 2015.

¹⁰ In terms of section 60(4)(b).

Soweto he was not sure about the exact room and full details of the address he was residing...”¹¹.

[19] The provisions of section 60(6) set out factors which the court may consider in determining whether grounds under section 60(4)(b) is established. The factors relevant to this application is subsections (f) and (h), in terms of which the court is enjoined to consider, first, the nature and gravity of the charge on which the accused is to be tried, secondly, the nature and gravity of the punishment likely to be imposed. The offences fall under schedule 6 and are very serious offence unlike schedule 5 which are less serious¹² and possible sentences is between 15 years and imprisonment for life for premeditated or planned murder. These factors are likely to dissuade the applicants to attend trial if admitted to bail. The constitutional court observed in this regard that “*[I]t is true that the seriousness of the offence, and with it the heightened temptation to flee because of the severity of the possible penalty, have always been important factors relevant to deciding whether bail should be granted.*”¹³

[20] The investigating officer having averred that the accused were hired to be hitmen to kill deputy chairperson S [...] M [...] 1, which was well planned and having used rifles and AK 47s was indicative of what is commonly referred as taxi wars or violence. He further averred that their release on bail may weaken the trust in the judicial system and the taxi industry as a whole will be affected. In this regard the provisions of section 8A(a-e)¹⁴ are implicated. In a similar vein it was observed by Kriegler J, that “*[T]he ugly fact remains, however, that public peace and security are at times endangered by the release of person charged with offences that incite public outrage. Schietekat is a good example. Dladla again exemplifies a different type of situation where continued detention is in the interest of the public peace. Experience has shown that organised community violence, be it instigated by quasi-political motives or by territorial battles for control of communities for commercial purposes, does subside while ringleaders are in custody. Their arrest and detention on serious*

¹¹ See 12th paragraph of the investigating officer’s statement.

¹² See S v Dhlamini; S v Dladla; S v Joubert; S v Schietekat 1999 7 BCLR 771 para13

¹³ Ibid at para 63.

¹⁴

*charges does instil confidence in the criminal justice system and does tend to settle disquiet, whether the arrestees are war-lords or drug-lords.”*¹⁵ The reasoning in this quotation is referred to on the basis of parity.

Interest of Justice

[21] Section 60(9) of the CPA provides that the court would have to weigh the interest of justice in relation to the right of the accused to his personal freedom and particularly the prejudice he is likely to suffer due to continued detention. The section identified certain factors to be taken into consideration by the courts. Apropos this application and those which were canvassed by the parties are as set out below.

[22] The first applicant stated that the conditions in the prison are appalling without making any details thereof and leaves this court to guess in what respect such conditions are appalling. Without any further details the applicant is inviting the court to exploit its wits in the realm of conjecture.

[23] The first applicant has further averred that the court should take into account the period he spent in custody. He has already stated that he had been in custody for 11 months and now fails to elaborate the basis for which the period stayed in prison on its own accord prejudices his right. He had an option to apply for bail earlier and chose not to.

[24] The first applicant further stated that “*I also urge this Honourable court to consider the period that I might be detained until this matter is finalised and the fact that criminal trials can take a considerable period of time before they are finalised.*” These assertions are scanty, characterised by paucity of details and particularity to assist the court in making a conclusion on the impact of the detention. Even if it could be found that the continued detention is prejudicial to the applicant it is still incumbent on the court to weigh such a factor “*...against other factors, such as the likelihood of accused absconding...*”.¹⁶ It has been stated earlier that the nature of

¹⁵ Ibid n10 at para 55.

¹⁶ *S v Thornhill* (2) 1998 (1) SACR 177 (C).

the charges and possible sentence coupled with record of previous conviction of the first applicant will dissuade the applicant to stand trial.

[25] The first applicant further confirms that it is difficult to earn income whilst in custody. His evidence is that he is in the taxi business and owns 7 taxis. It is obvious that the first applicant cannot claim to be driving all the taxis and in fact an inference could be that he is managing the business. Whilst he exercised his choice not to apply for bail¹⁷ earlier there is no clear account as to what happened to the business in the past 11 months whilst he was in detention. There is no bank statements furnished to court to countenance the argument that the taxi business was unable to generate income in the past one year he has been in detention. The first applicant started taxi business before his first detention between 2008 and 2015 and one would have expected that the experience with the taxi business during that time should have shaped how he handled the business in the last 11 months. If his absence would ordinarily make the business suffer, he would have applied for bail earlier. The failure of the business, if any, can therefore be construed as self-inflicted. Daffue, J observed in *Keevy's* case that “[T]here is certainly no reason why appellant could not make provision for the appointment of a manager to oversee his business in his temporary absence in co-operation with his wife. However, this is also a not on its own an aspect that could be regarded as exceptional circumstance. If this was the case, all business owners and private practitioners such as doctors, advocates and the like would be able to rely on the fact that their practices would be seriously undermined if detained.”¹⁸

[26] The first applicant further averred that the continued detention would prejudice him in the preparation of his defence. The affidavit clearly specifies that his defence is that he was a pedestrian and had to run after the shooting and subsequently arrested. The statement by the first application do not detail the extent to which the detention will affect the preparation of the defence, except to state that he has no doubt that the continued detention will prejudice the preparation. This fails to account

¹⁷ Section 35(1)(f) of the constitution provides that “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.”

¹⁸ *Keevy's* case at para [22].

for the fact that the docket has been discovered and the matter is trial ready. The first applicant could have stated in what respect is the detention frustrating the preparation, e.g. his struggle to trace witnesses, struggling to consult with his legal representatives.

Second applicant

Exceptional circumstances

[27] The explanation set out above in respect of the first applicant would apply as the facts stated in their respective affidavits regarding exceptional circumstances on the basis of alleged weaknesses of the state case are the same. It therefore follows that the contention in this regard cannot be sustained.

[28] In addition to the foregoing the finger prints of the second accused have been linked to the finger prints obtained on the left passenger door of the corolla. This was not gainsaid by the second applicant and it also follows that the case against him is even stronger.

Section 60 (4)(b)

[29] The legal position as expounded with regards to the first applicant would also apply here. The charge are serious and long sentence are likely to be imposed in the event of conviction. To this end the second accused is unlikely to be encouraged to stand trial.

[30] The second applicant avers that he has not provided false information. The evidence of the investigating officer is that the second applicant failed to provide his identity number at the time of the arrest and he also did not have details of his address. To this end it is clear that the second applicant was not been candid with the members of the police. In addition, the second applicant lied under oath by stating that *"I declare that I have not been released on bail on respect of any other charges against me."* This is against the assertion (not gainsaid either) that there is a warrant issued against the second applicant.

[31] The criminal judicial system or bail system would be jeopardised more particularly because the second accused skipped bail and warrant of arrest has been

issued. Granting bail to someone against whom a warrant of arrest has been issued will make a mockery out of the justice system.

Interest of justice

[32] The second applicant failed to make any reference to factors set out in section 60(9) of the CPA above except to state that he is a breadwinner and further that since his arrest he has been unable to provide them with an income. He fails to take court into his confidence to explain what has happened in the past 11 months, bearing in mind that he has no obligation to exercise his constitutional right to apply for bail. If he had another source of income for the family what is the nature of the source and if it has been exhausted. In principle the court is therefore hamstrung to weigh the accused's rights as against the interest of justice.

Conclusion

[33] Having regards to the factors alluded above the applicants have failed to present exceptional circumstances and even if this is not the correct there are grounds as envisaged in section 60(4) of CPA which exist which militates against granting of bail. It would therefore not be in the interest of justice to admit the applicants to bail. In the circumstances I am not persuaded that the applicants are suitable candidates to be admitted to bail.

[34] In consequence, I make the following order:

The bail application by the first and second applicant is dismissed.

Noko AJ,
GAUTENG LOCAL DIVISION, JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties /

their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **23 June 2022**.

APPEARANCES

Applicants	Adv C Meiring, Johannesburg.
Respondent	Adv SJ Khumalo, DPP, Johannesburg.
Date Hearing	2 June 2022
Date of judgment	23 June 2022