IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: A717/07

In the matter between:

NAJWA PETERSEN Appellant

and

THE STATE Respondent

JUDGMENT: 27 FEBRUARY 2008

VAN ZYL J:

INTRODUCTION

[1] This is an appeal against the refusal of the Wynberg Regional Court, to grant the appellant's second application for bail pending the finalisation of her trial. She and three other accused, namely Abdoer Raasiet Emjedi, Waahied Hassen and Jefferson Tion Snyders, are charged with the murder of the appellant's husband, one Abdul Mutaliep ("Taliep") Petersen, at his home on 16 December 2006. I shall refer to him as "the deceased". They are also charged on two counts of robbery, at the same time and place, of certain cell phones, watches and cash. These are offences referred to in schedule 6 of the *Criminal Procedure Act* 51 of 1977.

[2] The appellant was arrested on 18 June 2007 and brought an application for bail on 26 June 2007. The application was refused on 12 July 2007. An appeal against this decision was heard on 31 August 2007 and dismissed on 5 September 2007 by Whitehead AJ. On 11 October 2007 a second bail application was brought on the basis of new facts. On 10 December 2007 it was likewise refused.

[3] In the first application and appeal the appellant was represented by Mr C Webster. In the second application and the present appeal Mr H M Raubenheimer SC appeared for the appellant. Ms S Riley appeared for the respondent in both applications and appeals. The court expresses its appreciation to them for their able assistance in this matter.

THE STATE CASE

[4] The facts giving rise to the present proceedings have been fully dealt with in the

various judgments aforesaid and I do not propose to repeat them in any detail. The gist of the State case, as it appears from the evidence of Captain J Dryden, the investigating officer, is that the appellant hired one Faheem Hendricks for an amount of R100 000,00 to arrange for the murder of the deceased. Hendricks, who has since turned State witness and is presently under witness protection, approached the second accused to acquire the services of two so-called "hitmen", namely the third and fourth accused, to carry out the murder. It was initially intended that the murder would take place as a hijacking on 14 December 2006, when the deceased and the appellant were returning home from the airport after a visit to London. This could not be done because of the unavailability of the third and fourth accused. They were likewise not available the next day, 15 December 2006, when the deceased returned home from a performance at a theatre in Wynberg. The murder was finally scheduled for the night of 16 December 2006, when the deceased, the appellant and their young daughter, Zaynab, were at home.

[5] The State's case is further that the appellant gave the third and fourth accused access to the house by leaving the entrance gate and door open. They came upon the deceased in the television room. After beating and gagging him, they tied him up, apparently with the assistance of the appellant, who had joined them at that stage. With a view to creating the impression that the motive for the break-in was robbery, the third accused, who was armed with a firearm, asked the appellant where the safe was. She took him to the safe and handed him a bag of money and her watch. She then went with him to a bedroom where her son and daughter-in-law and their baby were sleeping. After indicating that they should not panic, the appellant apparently stood by while the third accused relieved them of cell phones, watches, a digital camera and cash before returning to where the deceased and the fourth accused were.

[6] It was alleged that the appellant then took the firearm of the third accused, covered it with a cushion and shot the deceased. During argument before us Ms Riley, as I understood her, indicated that the State would not, in the trial of the matter, rely on the allegation that the appellant had herself fired the fatal shot. Evidence would, however, be tendered that she had been actively involved in planning the murder. In this regard the State relied on confessions made by the third and fourth accused and on corroborative affidavits deposed to by the appellant's son and daughter-in-law. Further corroboration

appears from the fact that, on 19 December 2006, the appellant wrote out a cash cheque for R100 000,00, being the amount she had allegedly undertaken to pay Hendricks to arrange the murder of the deceased.

THE FIRST APPLICATION

[7] The appellant's first application for bail was brought in terms of section 60(11)(a) of the *Criminal Procedure Act* 51 of 1977 ("the Act"). This provides, in essence, that an accused charged with a schedule 6 offence must be detained in custody pending his or her trial, unless he or she "adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release."

[8] The exceptional circumstances relied on by the appellant in terms of this section were fourfold: firstly her history of severe psychiatric problems; secondly her "precarious mental state" which required on-going psychiatric care, medication and support; thirdly the inability of the prison services to provide such care; and, fourthly, the needs of her eight-year old daughter Zaynab. The State opposed her application on the grounds set forth in section 60(4)(a), (b), (c) and (e) of the Act, namely that there was a likelihood that she, on being released on bail, would endanger the safety of the public, attempt to evade her trial, attempt to influence or intimidate witnesses and disturb the public order or undermine the public peace and security.

[9] The appellant relied on the evidence of two psychiatrists, Dr B J Fortuin and Dr J C W George, to place exceptional circumstances relating to her precarious state of health before the court. It appears that she had been receiving psychiatric treatment from 16 March 2003 to 23 May 2006 and had been diagnosed by Dr Fortuin, in his report dated 25 June 2007, as suffering from a number of chronic mental disorders with psychotic features and recurrent relapses. Her normal occupational, personal, family and social functioning had deteriorated from 60% to 20%. She was admitted to various psychiatric wards between 21 February 2004 and 19 November 2006 and was treated with numerous forms of psychotropic medication while receiving regular psychotherapy. Despite this, Dr Fortuin was of the view that her condition had gradually deteriorated.

[10] In this regard Dr George, who has been treating her as from September 2006 up to the present time, stated in his report dated 20 June 2007 that she had been diagnosed as suffering from bipolar mood disorder. During August 2006, at the instance of Dr S Chetty, another psychiatrist, she was subjected to electro-convulsive treatment because she had not responded adequately to appropriate doses of medication. Dr George expressed the view, during the course of his evidence, that the stress induced by incarceration might negatively impact upon the appellant and even induce her to become suicidal. He did find it strange, however, that, as from his last telephonic consultation with her on 30 November 2006 up to the time of her arrest on 18 June 2007, she had not

seen a psychiatrist or experienced a relapse, despite the murder of her husband, the deceased, on 16 December 2006. Dr George saw her on four occasions between 20 and 30 June 2007 when she was being held in the Bellville South police cells. Although she was upset, tearful and agitated, there were no indications of any relapse. She complained of insomnia and he adjusted her medication, with fluctuating results.

[11] In her affidavit supporting the application, the appellant, who was in custody in the Breede River Correctional Facility in Worcester, emphasised her precarious state of health. Since her arrest she had, as she put it, been experiencing "severe psychological difficulty". She found incarceration unbearable. It had, she explained, had a "significantly negative impact" on her state of mind. Inasmuch as the correctional facility could not cope with patients suffering from mental problems, she urgently required the support and care which she would receive at home, together with the ongoing services of her psychiatrist. Her daughter, Zaynab, who had been severely traumatised by the death of her father, likewise needed her parental care. These factors, she submitted, constituted exceptional circumstances which, in the interests of justice, required her release on bail.

[12] The State countered the psychiatric evidence adduced by the appellant by submitting a report and evidence of Dr L A Panieri-Peter, a psychiatrist in the employ of the Western Cape Provincial Administration and attached to the Forensic Psychiatry Unit at the Valkenberg Hospital. The appellant had been referred to the hospital for observation in terms of section 79 of the Act. According to the report it was unlikely that the appellant suffered from bipolar mood disorder, as suggested by Dr George, and she was assessed as fit to stand trial. Her mental state was described thus:

Mrs Petersen impressed as an engaging and co-operative middle aged woman. She was able to give a good account of herself at all times. Her thoughts were clear, rational and logical. There was no evidence of mania, depression, suicidality or post-traumatic stress disorder during her admission.

[13] Dr Panieri-Peter testified in this regard that it was odd that the appellant had not required therapy during the period 30 November 2006 to 18 June 2007 and had in fact, on 6 February 2007 consulted a medical specialist in regard to cosmetic surgery which she wished to have performed on her. This justified the inference that her mental illness at the time could not have been too serious.

[14] Whether or not prison services could provide the medical and psychiatric care required by the appellant, was addressed by Dr Panieri-Peter and Mr A Joseph, the Regional Coordinator, Health Care, of the Western Cape Regional Department of Correctional Services, who is also a trained nurse. From their evidence it would appear that there was no reason why the appellant could not, while in custody, have regular access to her own psychiatrist and why the correctional authorities could not, on a controlled and monitored daily basis, ensure that she receive her prescribed medication

regularly. As for the suggestion that she might commit suicide, she would be safer in a correctional facility than at home, where she had already made several suicide attempts.

[15] In dealing with the allegations relating to the appellant's state of health and her need for medication and psychiatric treatment under acceptable circumstances, the regional court pointed out that there was no evidence of who would take responsibility for the care of the appellant should she be released on bail. Any such caregiver would have to be adequately trained and experienced in order to provide care similar to or comparable with that provided in a correctional facility. The court accepted that the treatment of mentally ill patients in a correctional facility would not be on the same level as in any recognised mental institution. Such patients could, however, always rely on their right to adequate medical care and access to a chosen medical practitioner in terms of section 35(2)(e) and (f) of the *Constitution* (Act 108 of 1996). As for the possibility of suicide, the court aligned itself with Dr Panieri-Peter's opinion that, if the appellant were indeed suicidal, sending her home would be a "high-risk" thing to do, particularly in view of her history of attempted suicide.

[16] On the issue of the parental care required by her daughter, Zaynab, the appellant pointed out in her affidavit that she was in the care of her sister, Mrs Fayruz Arendse, but was having great difficulty coping with the appellant's absence. On the occasions she had visited the appellant, she had been extremely emotional and had to be virtually physically removed at the end of the visit. Mrs Arendse had informed her that her sleep was disturbed and that she was emotional much of the time. She clearly needed her mother and it was in her best interests that the appellant should be released on bail.

[17] The regional court accepted that the incarceration of the appellant would deprive Zaynab of the parental care of a primary caregiver. Because of her mental condition, however, the appellant was barely able to look after herself, particularly if Dr Fortuin's assessment that her normal functioning had decreased from 60% to 20%, was correct. If she herself needed specialist care, how could she be expected to give normal parental care to her daughter? Even more disturbing was the possibility that she was suicidal, in which event her child would of necessity be at risk. In this regard the court was of the view that, because she had not sought assistance for Zaynab after the death of her father, she had been negligent in caring for her child's mental well-being. This behaviour was not consistent with what one would expect of a parent who genuinely had the interests of her child at heart.

[18] In considering the application the court made it clear that it was not its duty to debate the merits or demerits of the case against the appellant. It was, however, satisfied that the evidence of Hendricks would require "a lot of explaining" from the appellant. For the rest, her strong family ties with Namibia and the fact that she had a bank account there into which she had attempted to have the proceeds (some R5.3 million) of a life policy on the life of the deceased deposited, raised the question whether she intended to remain in South Africa permanently. The court was of the view that there was "a real likelihood" that she would attempt to evade her trial. The court likewise opined that it was likely that she would interfere with or influence witnesses, and that her release on bail would definitely undermine and jeopardise public confidence in the justice system. For these reasons the application for bail was refused.

[19] In his judgment on appeal against the court's refusal to grant bail, Whitehead AJ dealt fully with the court's reasons for such refusal, with specific reference to the various grounds raised by the appellant as exceptional circumstances in terms of section 60(11)(a) of the Act. He was in agreement with the court *a quo* that the appellant had failed to establish that her history of severe psychiatric problems or her precarious state of health at the time constituted exceptional circumstances as required by the said section. The same applied to her need for ongoing psychiatric care and the alleged inability of the prison services to provide appropriate care for her psychiatric problems. As for the parental needs of her daughter it appeared from the evidence of Mrs Arendse that the deceased had in fact played a pivotal role in raising the child and attending to her needs. The appellant had been unable to do so because of her ongoing ill-health. She had, for the most part, relied on two domestic assistants to act as primary caregivers, namely "Nanny", the housekeeper and *au pair*, and, to a lesser extent, one Koekie van Wyk. In addition the appellant's extended family, which was financially well-off and at that stage included her parents and two sisters, were close to the child and able to look after her.

[20] Not only was the appellant limited in her ability to give the child parental care, but there was also the question whether unlimited access to the appellant might prove stressful to the child. Dr Panieri-Peter observed in this regard that it was "exceptionally distressing for young children to see their parents psychotic or mentally unwell". A factor which could not be lost from sight in this regard was the so-called "stabbing incident" on 13 April 2006, when the appellant stabbed the deceased in the neck. With reference to this incident Dr Fortuin was unable to exclude a repetition of such conduct in the future. For these reasons Whitehead AJ concluded that the appellant had similarly failed to establish that her need to give parental care to her daughter constituted an exceptional circumstance in terms of section 60(11)(a) of the Act.

[21] After dealing with the evidence that the State proposed to place before the trial court, Whitehead AJ expressed the view that the State had presented "a reasonably strong *prima facie* case" against the appellant and that the appellant would have "a lot of explaining" to do. This would, of necessity, constitute a "weighty factor" in assessing the merits of her bail application.

[22] In regard to the regional court's finding that it was likely that the appellant would abscond in an attempt to evade going on trial, Whitehead AJ pointed out that the appellant had offered no satisfactory explanation as to why she had sought to arrange for payment of the proceeds of the life insurance policy on the life of the deceased into her Namibian account. The attempt by Mr Webster (the appellant's previous counsel) to suggest, during argument, that it was an interim measure directed at creating a trust fund for her daughter was, in Whitehead AJ's view, unconvincing, particularly if she planned to remain with her daughter in Cape Town.

[23] As for the other grounds of opposition upheld by the regional court, Whitehead AJ indicated that he might hold a different view on such grounds. He had not been persuaded, however, that the court had wrongly exercised its discretion in respect thereof. In the event he was not satisfied, as required by section 65(4) of the Act, that the decision of the regional court was wrong. The appeal was accordingly dismissed.

THE SECOND APPLICATION

[24] The second bail application, which was brought before the same regional magistrate as had heard the first application, was somewhat more substantial than the first. It was based on what were described as "various new factors and exceptional circumstances" requiring the court's consideration. In this regard the appellant adduced the evidence of a number of new witnesses and recalled Dr George to supplement his earlier evidence. She also relied on a number of affidavits and documents in support of what her counsel described as at least fifty aspects constituting totally new matter and exceptional circumstances as referred to in section 60(11)(a) of the Act. The State countered this by calling a number of new witnesses and recalling Captain Dryden.

[25] At the outset Mr Raubenheimer pointed out that the trial of the appellant and her co-accused has been set down for the period 25 February to 20 March 2008. This did not, he argued, take account of the fact that there were four accused and that the State proposed to call a large number of witnesses, while the defence would also probably call several witnesses. The allotted time was hence clearly inadequate for the matter to be finalised. With reference to other high-profile criminal matters recently heard by this court, the appellant suggested that the present matter might not be finalised before the end of 2008. If bail should not be granted, it would mean that she would remain incarcerated for some eighteen months before the trial was completed. It would also make it very difficult for her to consult with her lawyers and prepare for trial.

[26] Another aspect raised by the appellant as a new fact was that, since the previous application, she had been placed in possession of copies of the content of the police docket. This had raised a number of questions regarding the merits of the case against her and had apparently prompted her to reveal more of her defence. In this regard she set great store by the diary of the deceased from which important new facts appeared. In addition the various new affidavits deposed to by potential witnesses of the appellant disclosed "new and exceptional facts" which created a new perspective deserving of consideration.

[27] An example of such facts was the purported existence of certain cassette tapes, on one of which the appellant's voice could be heard. In support of this proposition Mr G Van Zyl testified as to what he observed after being appointed as supervisory attorney in execution of an Anton Piller procedure ordered by this court against one Mr Radyn. He had apparently sold the tapes to Mr W Ajouhaar, a friend of the appellant's family, who testified that he had recognised the "unusual" voice of the appellant on one of the tapes. This was in essence confirmed by Mr Radyn. In this regard it was suggested that Captain Dryden was involved in the transaction and that the evidence against the appellant was fabricated.

[28] Another new fact presented by the appellant was that Mr Ajouhaar and his spouse had undertaken to move into the home of the appellant with a view to assisting with Zaynab and ensuring that the appellant receive the necessary care. Nursing services would be available to her twenty-four hours daily and her psychiatrist and general practitioner would provide regular professional inputs. In this regard Dr George retracted his opinion relating to his diagnosis of bipolar mood disorder and was no longer of the

view that she was a suicide risk, or a threat to Zaynab, unless she had a relapse. Dr Fortuin's evidence, in the first bail application, that her mental function was at a level of 20%, was withdrawn on the basis that it was incorrect.

[29] Great emphasis was placed on the fact that the appellant had, on one occasion, apparently lost consciousness at the correctional facility in Worcester, thereby indicating that she would be better off at home. In this regard the deceased had meticulously recorded her state of health in his aforesaid diary. From this, it was suggested, it could be inferred that the deceased had had a good relationship with her and that her attempted suicide and the said stabbing incident should be viewed in a different perspective.

[30] It also meant that the appellant would be able to give Zaynab the parental care she required, particularly after the death, since the first bail application, of her maternal grandfather and one Mr Eksteen, a very close friend of the family, in a motor accident. In this regard the appellant relied strongly on the reports of Mr Rafiq Lockhat and Dr Rosa Bredekamp, who emphasised that Zaynab was in dire need of the appellant's presence at home for purposes of giving her parental care and carrying out her functions as her primary caregiver.

[31] On the issue of whether or not the appellant might attempt to evade her trial should she be granted bail, it was submitted that her family had given the assurance that they would not allow her to move to Namibia, where her family had extensive commercial interests. In this regard her brother, Mr Moegamat Yusuf Dirk, deposed to an affidavit confirming that the Dirk family would not allow her to become a fugitive from justice. In any event there were extradition arrangements between South Africa and Namibia which would prevent this. Mr Riley, the appellant's attorney, confirmed the existence of such arrangements.

[32] Ms Elizabeth Hacking, an attorney whom the appellant had consulted regarding the administration of the deceased's estate, and Mr Rafiq Saville, the financial advisor of the deceased, testified as to the good faith of the appellant relating to her proposed use of a Namibian account for purposes of depositing the proceeds of the life insurance policy on the life of the deceased. Her intention was primarily to benefit Zaynab by the creation of an *inter vivos* trust and to keep the money emanating from the policy separate from her money. In addition she wished to act in the interests of the deceased's children from his previous marriage. This, it was argued, placed the new application in a totally different perspective.

[33] The State called the investigating officer, Captain Dryden, on various aspects relating to the merits of the case against the appellant. Ms R H Neethling, the acting head of the Worcester correctional facility for women, was also called to testify as to the conditions in such facility. According to her there was appropriate medical care available to the appellant while she remained there. Sister Horne was a primary care practitioner and Sister August a psychiatric nurse who was also trained in psychology. In addition a psychologist and a psychiatrist in private practice made regular visits to the facility, in the sense that one would come the one week and the other the next. On one occasion the appellant had seen Dr George, her personal psychiatrist. He had prescribed medication for her, including tablets for insomnia. The nursing staff ensured that she take it at the prescribed times. When Dr George was unable to see her, she was quite happy to see Dr

Skinner, the psychiatrist who visited the facility fortnightly. Ms Neethling was on duty the evening when the appellant apparently fainted and lost consciousness while she was praying. She recovered within a short while, but complained of a severe headache and muscular pain. The next day she was taken to a local hospital because she still suffered from a headache. She was given medication for migraine and returned to the facility. There was no recurrence of the fainting spell.

[34] As for visitation rights, Ms Neethling arranged that Zaynab visit the appellant on Saturdays in order to prevent interference with her schooling. Although Zaynab would speak to her mother through a window, Ms Neethling allowed her to give her a hug at the end of her visits. For the rest there were appropriate consultation facilities and the legal team of the appellant was allowed to consult with her at all reasonable times, including on Sundays. She was also allowed to make photocopies provided she made payment for the copies. At no stage did she complain about the treatment she was receiving.

[35] Two sisters of the deceased, Mrs Matoema Groenmeyer and Ms Tagmieda Johnson, as well as his daughter, Ms Jowaya Petersen, also testified on behalf of the State. The gist of Mrs Groenmeyer's evidence was that she had always been very close to Zaynab, who had spent a number of weekends with her after the death of the deceased, but apparently ceased doing so when Mrs Groenmeyer had been accused by certain family members of turning against the appellant. Mrs Groenmeyer confirmed that the housekeeper of the appellant and deceased, known to them as "Nanny", had been Zaynab's primary caregiver, while the deceased had given her the parental care which the appellant had been unable to give because of her illness. Mrs Groenmeyer stressed that there was a strong bond between Zaynab and the appellant, but gave the assurance that, in the absence of the appellant, she would be cared for by her extended family on both the paternal and maternal side.

[36] Ms Johnson testified that she had been very close to the deceased who, though a private person, had always shared his problems with her. He had been a loving and caring person who did his best for Zaynab and his children from a previous marriage. After the stabbing incident his relationship with the appellant broke down and they no longer prayed or slept together. At that stage the deceased was contemplating a divorce from the appellant. Ms Johnson was of the view that the appellant's illness was not always genuine and that she was frequently acting or dramatising. After the death of the deceased, however, her health took a dramatic turn for the better.

[37] Ms Petersen, the second eldest daughter of the deceased from his previous marriage, testified that she had lived with the deceased and the appellant, but had left their home after the stabbing incident because she feared for her life. She confirmed Ms Johnson's evidence that, after this incident, the appellant and deceased slept in separate rooms and that Zaynab slept with the deceased. He took her to school and fetched her again, after which he would help her with her homework. Ms Petersen, who was twenty-one years old and on the point of graduating in psychology, gave the assurance that she would be happy to care for Zaynab, whom she regarded as her baby sister.

[38] In his argument before the court *a quo* Mr Raubenheimer stressed the good faith and correctness of the appellant's version relating to her medical condition, but questioned the strength of the State case, *inter alia* regarding the allegation that the

appellant had given the so-called "hitmen" access to the house by leaving the security gate and front door open for them. In this regard Mr Raubenheimer suggested that Koekie van Wyk, who had since left their employ, had also been in a position to facilitate access by intruders. Furthermore the appellant's version, namely that she had been locked up in her bedroom at the time the fatal shot was fired, was supported by Zaynab and other witnesses. These were new factors, Mr Raubenheimer submitted, as was the fact that the appellant's brother in Namibia had been granted bail in the amount of R100 000,00. Mr Raubenheimer rejected as unacceptable the reliance by the State on the video's purportedly made at the scene of the crime on the night of the murder and, by the same token, the so-called confessions by the third and fourth accused.

[39] Mr Raubenheimer was particularly critical of the evidence of Captain Dryden on the basis that, in the second bail application, he testified on matters which he had failed to disclose in the first application. This related, more specifically, to the allegation that the aforesaid confessions supported the appellant's alleged role in tying the feet of the deceased. It related also to the representation that the appellant had made several enquiries as to the progress of her insurance claim arising from the death of the deceased. Similarly Captain Dryden's suggestion that the appellant had been "play acting" could not be reconciled with the incidents when she suffered from loss of consciousness, or had spells of dizziness and fell down steps with resultant injuries. A further point of criticism was Captain Dryden's failure to mention the possibility that Koekie van Wyk could have given the intruders access to the house or that the access entrances had been open. He had likewise failed to bring the notes in the diary relating to diamond deals and foreign exchange transactions to the fore, despite their relevance to the merits of the case against the appellant. The fact that the diary was brought to the attention of the defence as recently as 23 October 2007 was, Mr Raubenheimer submitted, inexplicable.

[40] Among the further aspects raised by Mr Raubenheimer was the fact that several witnesses described the appellant and deceased as a happy couple and that both parents had consistently showed an interest in Zaynab's school performance. All these factors, he suggested, had given rise to a petition signed by a large number of people in support of the appellant's release on bail.

[41] In its judgment in the second bail application the regional court dealt firstly with the evidence relating to the appellant's state of health and the suggestion, which had played an important role in the first application, that she was no longer a suicide risk. This was at odds not only with the evidence of Dr Fortuin and Dr George in such application, but also with the appellant's first affidavit in which she stated that she was in a precarious mental state. In this regard the court held that the appellant had, in the first application, deliberately misled it as to her true state of health, and that she had failed to tender any explanation for this in the second application. It was significant that she had chosen not to testify in either of the applications and that both Mr Saville and Dr Bredekamp appear to have supported this finding.

[42] The regional court hence held that the credibility of the appellant, who bore the *onus* of proof in a bail application, had been seriously compromised, with the result that her version of the new facts, on which the second application was based, could not simply be accepted at face value. This was exacerbated by the evidence of Mr Saville

relating to the reason why the appellant chose to have the proceeds of the insurance policy paid into a Namibian bank account, namely to keep it separate from her money and to create a trust in favour of Zaynab. These facts had likewise not been revealed in the first application. In any event the Namibian account was also in the appellant's name and not in that of Zaynab or of a trust to be created for Zaynab. The appellant hence had full control of any deposit made into this account.

[43] In regard to the new regime to be created at the appellant's home, with the introduction of Mr and Mrs Ajouaar and round-the-clock nursing services, the court questioned the necessity for these arrangements in view of the fact that the appellant no longer professed to being in a precarious mental state. During the six months between the death of her husband and her arrest she appeared to have been in control of herself and did not require medical, psychological or psychiatric assistance. As for the information contained in the diary of the deceased regarding the health of the appellant, this was nothing new since she must have been fully aware of it, yet said nothing about it in the first application.

[44] The court then considered the position of Zaynab in the context of her best interests as enjoined by section 28(2) of the *Constitution* and with reference to the recent Constitutional Court decision reported as *M v S (Centre for Child Law Amicus Curiae)* 2007 (12) BCLR 1312 (CC). What complicated this aspect of the case was the conflicting evidence as to whether the appellant could be considered to be Zaynab's primary caregiver. Assuming that this was the case, the court held, it could not override all other considerations but had to be considered in the context of the case as a whole.

[45] In regard to the allegations relating to what the court described as the "mystery tapes", it held that Mr Radyn was a blatant liar who had manipulated and abused the position in which the appellant and her family had found themselves. The court was sceptical about Mr Ajouhaar's testimony relating to his hearing the appellant's voice on the one tape and held that little or no weight could be attached thereto. In any event the tapes had no bearing on the issues to be decided in the bail application. The same applied to certain inferences made from the diary and the alternative hypothesis as to the cause of the deceased's death. It was speculative and had no evidential value.

[46] The court cautioned Captain Dryden that his credibility concerning certain aspects of the bail application had been "severely tainted" by a lack of objectivity. This did not, however, assist the appellant, whose lack of good faith in the first bail application was sufficient reason for the second application to be refused. The court hence concluded that the appellant had failed to discharge the *onus* of proving exceptional circumstances which would, in the interests of justice, permit her to be released on bail. The court also made certain recommendations regarding Zaynab and her access to the appellant.

MAIN SUBMISSIONS ON BEHALF OF THE PARTIES

[47] In his argument on behalf of the appellant before this court, Mr Raubenheimer submitted that the regional magistrate had acted irregularly in dealing with the application in that he had lacked objectivity. He had insisted on evidence being given *viva voce* and not on affidavit, despite the fact that in bail applications a more relaxed

approach to evidence is applied than in trial matters. Furthermore he had made rulings relating to the admissibility of evidence tendered by the appellant and questions put to witnesses by appellant's counsel without giving counsel the opportunity to address him. One of the examples cited in this regard related to the opinion of the appellant's son that, after reading the diary of the deceased, he was convinced that she was not suicidal. In his haste to complete the second bail application, Mr Raubenheimer submitted, the regional magistrate had ignored more than fifty new facts placed before him. In this regard he referred to the full written argument placed before the court *a quo* and requested that the appeal should succeed and bail be granted, albeit on stringent conditions.

[48] In her argument on behalf of the respondent Ms Riley submitted that the decision of the regional court was in line with the authorities requiring that it consider all the facts before it, both new and old. She supported the court's finding that the appellant had failed, in the first application, to make important disclosures relating to her state of health. The new facts on which the appellant relied were known to her at the time of the first application and could hence not be regarded as new. And if they were new, she gave no explanation for her remarkable recovery since the first application. In any event, if she was functioning at the level of a normal person, why would she require continuous nursing services and the presence of Mr and Mrs Ajouhaar at her home?

[49] In this regard Ms Riley pointed out that the appellant had not seen any psychiatrist or suffered any relapse after November 2006, despite the vicious murder of her husband and her subsequent arrest on a charge of murdering him. Her decision to have cosmetic surgery at this time was not consistent with a person suffering from precarious mental health. The appellant's lack of transparency came to the fore with great clarity, Ms Riley submitted, in the suggestion that the emphasis in the first application on the appellant's being a suicide risk had "boomeranged" in that it prompted the court not to grant her bail.

[50] Ms Riley was critical of Dr Bredekamp's report regarding the need for the appellant to be reunited with Zaynab. She submitted in this regard that Dr Bredekamp had exaggerated the depth of the relationship between mother and daughter and had conducted selective interviews for purposes of compiling her report. As for Zaynab's propensity to befriend and attach herself to strangers, Dr Bredekamp attributed this inappropriate behaviour to the appellant's absence from home, despite the fact that Zaynab's teachers had noticed this years before. This, Ms Riley submitted, coloured her evidence and brought her objectivity as an expert witness into question.

[51] With reference to section 28(2) of the *Constitution*, Ms Riley submitted that, although the best interests of a child were paramount, this did not mean that they were absolute. In cases such as the present, two competing considerations had to be weighed by the court, namely the importance of maintaining the integrity of family care and the duty of the State to punish criminal misconduct. It was, she said, "profoundly in the interests of children that they grow up in a world of moral accountability where self-centred and anti-social criminality is appropriately and publicly repudiated". Ms Riley accepted that section 28(1)(b) of the *Constitution* ensures the right of every child "to family care or parental care, or to appropriate alternative care when removed from the family environment". If the primary caregiver is in custody, the court should consider whether steps should be taken to ensure that the child is adequately cared for. The

interests of children could not, however, be used for the benefit of parents or as a pretext for evading the consequences of their own conduct.

[52] In the present case, Ms Riley submitted, Zaynab's primary caregivers had in fact been the domestics, Nanny and Koekie, who cared for her physical and other needs in all material respects. Nanny was still in the employ of the appellant and would continue acting as primary caregiver. The deceased, again, had provided Zaynab with both physical and emotional care. After his death the extended family of the appellant and the deceased had rallied to Zaynab's cause and had demonstrated that they would be happy to provide fully and generously for her emotional and material needs.

[53] On the issue of the merits, and more particularly regarding the strength of the State case against the appellant, Ms Riley submitted that the appellant had not discharged the *onus* of proving exceptional circumstances by adducing strong, independent evidence pointing to her innocence (see *S v Mohammed* 1999 (2) SACR 507 (C) at 517*i-j*). The new facts upon which the appellant relied, she argued, were for the most part selective and highly speculative. They could, in fact, only be tested when the appellant presented *viva voce* evidence at her trial. It would then be for the trial court to assess the weight to be attached thereto in the light of all the evidence.

THE RELEVANT LEGAL PRINCIPLES

[54] Section 60(11)(*a*) of the *Criminal Procedure Act* 51 of 1977 reads:

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 …

From this section it is clear that the *onus* is on the accused to adduce evidence, and hence to prove to the satisfaction of the court, the existence of exceptional circumstances of such a nature as to permit his or her release on bail. The court must also be satisfied that the release of the accused is in the interests of justice.

[55] On the meaning and interpretation of "exceptional circumstances" in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration.

[56] In the context of section 60(11)*(a)* the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release

of the accused person. This may, of course, mean different things to different people, so that allowance should be made for a certain measure of flexibility in the judicial approach to the question. See *S v Mohamed* 1999(2) SACR 507 (C) at 513*f*-515*f*. In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all the applicable legal criteria. See in this regard the judgments in *S v H* 1999 (1) SACR 72 (W) at 77*b-i*; *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999(2) SACR 51 (CC) par [75]-[79] at 89*a*-90*h*; *Herbay v S* [1999] 2 All SA 216 (W) at 222*d-j*; *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) par [19] at 229*i*-230*d*; *S v Yanta* 2000 (1) SACR 237 (TK) at 241*f*-242*d*; *S v Bruintjies* 2003 (2) SACR 575 (SCA) par [6] at 577*c-i*.

[57] When, as in the present case, the accused relies on new facts which have come to the fore since the first, or previous, bail application, the court must be satisfied, firstly, that such facts are indeed new and, secondly, that they are relevant for purposes of the new bail application. They must not constitute simply a reshuffling of old evidence or an embroidering upon it. See *S v De Villiers* 1996 (2) SACR (T) at 126*e-f*. The purpose of adducing new facts is not to address problems encountered in the previous application or to fill gaps in the previously presented evidence.

[58] Where evidence was available to the applicant at the time of the previous application but, for whatever reason, was not revealed, it cannot be relied on in the later application as new evidence. See *S v Le Roux en Andere* 1995 (2) SACR 613 (W) at 622*a-b*. If the evidence is adjudged to be new and relevant, then it must be considered in conjunction with all the facts placed before the court in previous applications, and not separately. See *S v Vermaas* 1996 (1) SACR 528 (T) at 531*e-g*; *S v Mpofana* 1998 (1) SACR 40 (Tk) at 44*g*-45*a*; *S v Mohamed* 1999 (2) SACR 507 (C) at 511*a-d*.

[59] On the question whether or not an accused should, in the interests of justice, be released on bail, section 60(4) of the Act furnishes five grounds, the existence of one or more of which would preclude such release. In the first bail application the State relied on four of the five grounds, but in the second application suggested that all five might be applicable. For present purposes only the ground cited in section 60(4)*(b)* is, in my view, of any relevance, namely "where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial". Section 60(6) enumerates a number of factors which a court may take into account in this regard, including "any other factor which in the opinion of the court should be taken into account" (s 60(6)(j)).

[60] These provisions do not affect the right of an accused "to be released from detention if the interests of justice permit, subject to reasonable conditions", as provided in section 35(1)(f) of the *Constitution*. They are likewise not intended to increase the burden of proof resting on the accused to show, on a balance of probabilities, that there are exceptional circumstances justifying his or her release and that such release will not prejudice the interests of justice. See *S v Stanfield* 1997 (1) SA 221 (C) at 226*c*-227*b*; *S v Yanta* 2000 (1) SACR 237 (Tk) at 241*f-h*. Cf *S v Porthen and Others* 2004 (2) SACR 242 (C) par [14] at 249*c-d*.

[61] The appeal against the dismissal of the appellant's second application for bail comes before this court in terms of section 65(4) of the Act. It reads:

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 opinion the lower court should have given.

In *S v Barber* 1979 (4) SA 218 (D) at 220E-F Hefer J stated in this regard:

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 that would be an 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.

[62] This approach was endorsed in cases such as *S v Nqumashe* 2001 (2) SACR 310 (NC) par [20] at 314*f*; *S v Branco* 2002 (1) SACR 531 (W) at 533*i* and *S v Porthen and Others* 2004 (2) SACR 242 (C) par [3]-[7] at 246*b-j*. In the *Porthen* case, however, Binns-Ward AJ (in par [16] at 249*f-h*) expressed the view that interference on appeal was not confined to misdirection in the exercise of discretion in the narrow sense. The court hearing the appeal should be at liberty to undertake its own analysis of the evidence in considering whether the appellant has discharged the *onus* resting upon him or her in terms of section 60(11)*(a)* of the Act.

[63] When, as in the present case, the special circumstances relied on by the accused include the constitutionally protected interests of a minor child, this court must, in terms of section 28(1)(b) of the *Constitution*, take cognisance of the child's right "to family care or parental care, or to appropriate alternative care when removed from the family environment." Inasmuch as a decision in regard to the appellant's bail application and subsequent appeal to this court will, of necessity, impact upon a child, it may not be lost from sight that the child's best interests are, in terms of section 28(2) of the *Constitution*, paramount. This does not, of course, mean that such interests will simply override all other legitimate interests, such as the interests of justice or the public interest. It must, however, always be taken into consideration as a relevant factor and a general guideline in assessing such competing rights. See *Jooste v Botha* 2000 (2) SA 199 (T) at 210C-D.

[64] The case of *M v S (Centre for Child Law Amicus Curiae*) 2007 (12) BCLR 1312 (CC) dealt with the interests of children whose mother had been convicted of fraud and

sentenced to imprisonment. Although the present case deals with incarceration of the mother of a child pending trial, the interests of the child, it would appear, require consideration in the same way as if the mother had been convicted and imprisonment was being considered as an appropriate sentence. After discussing section 28(2) of the *Constitution* (par [12]-[26] at 1320-1325), Sachs J held (par [26] at 1325G-H):

Accordingly, the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited.

[65] On the interaction of section 28(2) and 28(1)(b) of the *Constitution*, Sachs J accepted the view that, when a custodial sentence for a primary caregiver was in issue, the court had a fourfold responsibility: (a) to establish whether such a sentence would impact on the child; (b) to consider the child's best interests independently; (c) to attach appropriate weight to the child's best interests; and (d) to ensure that the child would be cared for should the primary caregiver be imprisoned (par [32] at 1327B-D). The learned Judge continued (par [33] at 1327D-E):

These appear to me to be practical modes of ensuring that section 28(2) read with section 28(1)(b), is applied in a sensible way. They take appropriate account of the pressures under which courts work, without allowing systemic problems to snuff out their constitutional responsibilities. Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk …

He cautioned, however (par [34] at 1328A-C), that the issue was not "whether parents should be allowed to use their children as a pretext for escaping the otherwise just consequences of their own misconduct". Parents should serve as "the most immediate moral exemplars for their offspring". As primary caregivers they are expected to "make moral choices for which they can be held accountable".

CONSIDERATION OF THE PRESENT MATTER

[66] The point raised by Mr Raubenheimer as to the probable duration of the trial has, in my view, little or no relevance for purposes of considering the merits or demerits of the bail appeal placed before us. And even if it should be regarded as a relevant factor, it can certainly not, on a holistic approach to all the relevant facts and circumstances, bear any significant weight. It may, of course, be accepted that the appellant's continued incarceration for the duration of the trial will be inconvenient to her and her legal team as far as preparation for trial and ongoing consultation during the trial are concerned. Once again, however, this is not, holistically speaking, a weighty factor.

[67] As for Mr Raubenheimer's submission that the regional magistrate had acted irregularly in dealing with the application in that he had demonstrated a lack of objectivity in respect of the appellant, it may well be that he was, at times, somewhat impatient and even irritated with the manner in which the application was presented. Certain of his rulings relating to admissibility of evidence and of questions put to witnesses by the appellant's counsel might also have been questionable. In my view, however, it cannot be said that he lacked objectivity. The fact that he did not deal with each and every submission made to him by counsel simply indicates that he might not have regarded it as necessary to do so.

[68] On the face of it a number of new facts, which had not been available to the appellant at the time she brought her first bail application, were presented in the second bail application. I speak here more specifically of the content of the police docket, the diary of the deceased and the purported existence of certain cassette tapes in support of the allegation that the case against the appellant was fabricated. In regard to the tapes the credibility of Mr Radyn has been justifiably questioned. As for the content of the police docket and the diary, I have some difficulty in understanding to what extent this evidence has placed the defence of the appellant in a new or different perspective.

[69] The appellant's case relating to her precarious state of health, as presented in the first bail application, appears to have undergone a complete *volte face* in the second. What makes it particularly disturbing is the fact that Dr George was constrained to amend his initial opinion materially in respect of his diagnosis of the appellant's bipolar mood disorder and suicidal tendencies, whereas Dr Fortuin's suggestion that the appellant was functioning at a 20% level has now been withdrawn and abandoned as incorrect. In the process the credentials of Dr Fortuin and the reliability of Dr George's initial diagnosis have been brought into question.

[70] Even more disturbing was the startling submission, in the court below, that the allegations relating to the appellant's being suicidal had "boomeranged" in the first application and hence required to be restated. This creates the clear impression that the appellant had misrepresented, or failed to disclose, the true nature and extent of her medical condition. It also raises the question whether she has been totally frank, honest and in good faith regarding her state of health.

[71] In any event, even if the appellant has indeed made an almost miraculous recovery since the time the first application was brought, why would it be necessary for Mr and Mrs Ajouhaar to move into her house as caretakers and why would she need nursing services for twenty-four hours a day? In this regard the fact that she apparently did not require medical or psychiatric assistance from 30 November 2006 to 18 June

2007, when she was arrested, and the fact that she had consulted a plastic surgeon in February 2006 with a view to undergoing cosmetic surgery, militates against any suggestion that she is in need of the assistance of the Ajouhaar couple or requires continuous nursing services.

[72] In this regard it should also be pointed out that the appellant's fainting spell in the Worcester correctional facility does not appear to have had any repercussions. There has, indeed, been no indication at all that she has suffered any relapse or might, in the foreseeable future, be expected to suffer a relapse. Should this occur, however, it is clear from the evidence of Mrs Neethling, as supported by that of Dr Panieri-Peter and Mr Joseph in the first application, that the correctional facility will be able to provide her with the necessary medical and psychiatric assistance.

[73] On the question of Zaynab's needs, it goes without saying that her best interests, which are protected in terms of section 28(2) of the *Constitution*, are of paramount importance in the present case. More particularly she is entitled, by virtue of the provisions of section 28(1)(b) of the *Constitution*, "to family care or parental care, or to appropriate alternative care when removed from the family environment". It is clear from the judgments of the regional magistrate in both the first and second bail applications that he agonised over this issue and gave it careful consideration. In this court it has likewise been one of the most difficult aspects of the case in that it has required a careful and balanced weighing up of ostensibly conflicting interests.

[74] The regional magistrate assumed, with some reluctance, that the appellant was Zaynab's primary caregiver. On the evidence before us, however, I do not believe that this assumption can be justified. It seems clear that, at all relevant times, the role of primary caregiver was shared by Nanny, the housekeeper, and the deceased. This does not, of course, mean that the relationship between Zaynab and the appellant has not been a good one. I have no doubt that they are linked by a powerful bond of reciprocal love and affection. Yet it was Nanny and the deceased who, in general, provided for her material comforts and emotional needs on a day to day basis. Since the death of the deceased Nanny has continued playing this care-giving role, but she now shares it with other members of Zaynab's extended family, as appears clearly from a number of affidavits filed on behalf of the State.

[75] I tend to share Ms Riley's criticism of Dr Bredekamp's report. I was singularly unimpressed by the lengthy and to a large degree unnecessarily academic introduction to the underlying principles relating to the best interests of a child. This was followed by a rambling and frequently repetitive discussion of selected role players in Zaynab's life, and Zaynab's own story, as a preamble to Dr Bredekamp's recommendation that mother and daughter should be reunited as soon as possible. It was difficult to escape the impression that the report lacked balance and objectivity.

[76] I am mindful of the fact that Zaynab's apparent propensity to befriend and attach herself to strangers might become a complication. On the other hand I am quite satisfied that she is presently in excellent hands, under the supervision of persons who love and care for her and have voluntarily undertaken this duty since the appellant's incarceration, if not already from the time of the death of the deceased. Zaynab is, in my view, in more than appropriate alternative care, as envisaged by section 28(1)(b) of the *Constitution*.

[77] An additional aspect which must be borne in mind is the fact that, if the appellant should suffer a relapse, it may be preferable if Zaynab be given limited exposure to her rather than that she be allowed to suffer the possibly traumatising effect of having to be subjected to the negative aftermath of such a relapse. Under such circumstances the *status quo* should not be disturbed, but she should have regular and unimpeded access to the appellant at all reasonable times. This would, I believe, be in her best interests.

[78] The issue of whether or not there is a likelihood that the appellant may attempt to evade her trial remains a very real one. Despite the undertaking by her Namibian family that they would not allow her to become a fugitive from justice, it would be a simple matter for her to relocate to Namibia. The existence of extradition arrangements is no guarantee that she would, if she should relocate for purposes of evading her trial, in fact be extradited. The evidence of Ms Hacking and Mr Saville, relating to the proposed use of the appellant's Namibian account for purposes of depositing the proceeds of the said life insurance policy as a precursor to creating an *inter vivos* trust for Zaynab, raises more questions than it provides answers. I agree with the regional magistrate that this constituted information which the appellant should have revealed in the first bail application. More importantly, there is no guarantee that the money, if paid into the account, would be used for the creation of a trust. It would in fact be at the disposal of the appellant as a useful nest egg for future use.

[79] The question remains why it should be necessary for the appellant to make use of the Namibian account if she and Zaynab are to remain resident in Cape Town. It would be far more convenient to have the proceeds paid into an existing or new local account, to be kept there until the trust has been created. The suggestion that payment into the Namibian account would serve to keep the insurance money separate from the appellant's personal funds is absurd, to say the least. The unavoidable conclusion to which one must necessarily come is that there is a strong probability that the appellant would, if released on bail, attempt to evade her trial.

[80] The suggestion that the State case on the merits has been weakened as a result of new facts which have come to the fore, holds no water. It is clear from the proposed evidence that the State had no difficulty in placing a strong *prima facie* case before the regional court in the first bail application. At the present stage of the proceedings, namely on appeal against the refusal of the second bail application, the question is not whether the new facts averred by the appellant are sufficient to upset such *prima facie* case, but whether, taken together with the old or existing facts, they constitute sufficiently exceptional circumstances as to satisfy the court, in terms of section 60(11)(a) of the Act, that the appellant should, in the interests of justice, be released on bail. In any event, even if the question should be whether or not the new facts have upset the State's case on the merits, it is quite clear that they have not even managed to dent such case.

[81] The appellant has not, as correctly submitted by Ms Riley, discharged the *onus* of proving exceptional circumstances by adducing strong, independent evidence pointing to her innocence. On the contrary, she has selectively relied on highly speculative facts or on facts which she failed to reveal in the first bail application. Such facts are hence not new or relevant for purposes of the second bail application. The incontrovertible conclusion to which this court must come is that the so-called new facts constitute no

more than a reshuffling of existing facts with a view to addressing the problems uncovered in the first application. They are, for the most part, directed at supplementing or amending the unsatisfactory aspects of such application.

CONCLUSION

[82] It must necessarily follow that, on an analysis of the evidence as a whole, both old and new, the appellant has not succeeded in demonstrating that the decision of the court below was wrong and should be set aside. In the event the appeal must be dismissed.

D H VAN ZYL

Judge of the High Court

I agree. It is so ordered.

J M HLOPHE

Judge President of the High Court

I agree.

K E MATOJANE
Acting Judge of the High Court