Republic of South Africa

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

Case number: A87/2021

Before: The Hon. Mr Justice Binns-Ward
Hearing: 18 May 2021
Judgment: 24 May 2021

In the matter between:

ZANE JOHNATHAN KILLIAN Appellant

and

THE STATE Respondent

JUDGMENT
(Delivered by email to the parties' legal representatives and by release to SAFLII. The judgment shall be deemed to have been handed down at 10h00 on 24 May 2021.)

BINNS-WARD J:

[1] The appellant is charged with the murder of Lieutenant-Colonel Charl Kinnear and various related offences. Colonel Kinnear was a senior officer in the police Anti-Gang Unit. He was shot by an as yet unidentified assailant in his motor vehicle when arriving at his home on the afternoon of 18 September 2020. In these proceedings the appellant comes on appeal from the decision of the regional magistrate in the court below to refuse his application for bail.

[2] The principal charge faced by the appellant is in respect of an offence listed in Schedule 6 of the Criminal Procedure Act 51 of 1977. His application for bail therefore fell to be adjudicated subject to s 60 (11)(a) of the Act, which provides as follows:

> *Notwithstanding any provision of this Act, where an accused is charged with an offence referred to 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*.

[3] The effect of s 60(11)(a) was exhaustively discussed and elucidated in the Constitutional Court's seminal judgment in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* [1999] ZACC 8 (3 June 1999); 1999 (2) SACR 51(CC). It imposes an *onus* on the applicant for bail to adduce evidence to prove to the satisfaction of the court the existence of exceptional circumstances justifying his release on bail. The court must also be satisfied that the release of the accused is in the interests of justice. The standard of proof is on a balance of probabilities.[1]

[4] The import of the 'exceptional circumstances' test has been traversed in a number of judgments. In *S v Jonas* 1998 (2) SACR 677 (SE) at 678E-G it was held that the term does not posit a closed list of circumstances. Whether a court may be satisfied that exceptional circumstances exist depends on the facts and circumstances established in the given application. Whereas '*exceptional'* denotes something '*unusual, extraordinary, remarkable, peculiar or simply different*' (see e.g. *S v Petersen* 2008 (2) SACR 355 (C) at para [55]), it has been observed that '(s)*howing "exceptional circumstances" for the purposes of s 60(11) of the CPA does not posit a standard that would render it impossible for an unexceptional, but deserving applicant to make out a case for bail*' (*S v Josephs* 2001 (1) SACR 659 (C) at 668I and *S v Viljoen* 2002 (2) SACR 550 (SCA)). They do not have to be circumstances '*over and beyond and generically different from those enumerated in ss 60(4)-(9)*', which are circumstances to which regard is had in run of the mill bail applications not subject to the strictures of s 60(11).[2] It is clear, however, that they must at least be compelling enough to take the case made out for the granting of bail beyond the ordinary.

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[1] *Dlamini* supra, at para 61 and 78-79.

[2] Id para 76.

[5] A court determining a bail application affected by s 60(11) is required to consider the conspectus of evidence and decide whether it is sufficient to persuade the court that an exception should be made to the default situation, which is that an accused person detained on for trial on a Schedule 6 offence should remain in custody pending the outcome of the criminal proceedings.[3] This involves the court in having to make a value judgment ('waarde-oordeel'); cf. *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) at para 19.

[6] Section 60(4) sets out a list of circumstances in which it would not be in the interests of justice to grant bail to an accused person. The subsection provides as follows:

> *The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:*
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> *(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or*
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> *(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or*
>
> *(c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or*
>
> *(d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or*
>
> *(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.*

Subsections 60(5) to (10) provide guidance on what factors should be taken into account when considering the factors set out in section 60(4).

[7] It is evident from the result of the bail application that the court a quo was not satisfied that the appellant had discharged the onus of satisfying it that there were exceptional circumstances that in the interests of justice justified his release on bail. In terms of s 65(4) of the Criminal Procedure Act, this court may not set aside the regional magistrate's decision unless it is satisfied that it was wrong.[4] When it comes to the import of s 65(4), the

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[3] Id para 45.

[4] Section 65(4) provides: '*The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.*'

observation of Hefer J in *S v Barber* 1979 (4) SA 218 (D) at 220E-H is often cited.[5] In that matter the learned judge said '*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.*'

[8] As I pointed out in *S v Porthen and Others* 2004 (2) SACR 242 (C), however, certainly in respect of bail applications governed by s 60(11), in which the bail applicant bears a formal onus of proof, the nature of the discretion exercised by the court of first instance is of the wide character that more readily permits of interference on appeal than when a true or narrow discretion is involved.[6] I concluded (at para 15) '*Accordingly, in a case like the present where the magistrate refused bail because he found that the appellants had not discharged the onus on them in terms of s 60(11)(a) of the CPA, if this court, on its assessment of the evidence, comes to the conclusion that the applicants for bail did discharge the burden of proof, it must follow (i) that the lower court decision was 'wrong' within the meaning of s 65(4) and (ii) that this court can substitute its own decision in the matter*'. That analysis was most recently endorsed in a decision of the full court of the Gauteng (Johannesburg) Division of the High Court in *S v Zondi* 2020 (2) SACR 436 (GJ) at para 11-13.

[9] The appellant chose to bring his application for bail by means of an affidavit and the state responded with answering affidavits. Each side in effect submitted two sets of affidavits. In the result the court a quo was called upon to determine the bail application on what were in substance motion proceedings. I question whether it is wise or desirable for a party bearing a formal onus to seek to discharge it by adducing its evidence on paper, especially when the evidence is likely to be challenged or disputed, as was the case in the current matter.

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[5] Recent instances are in *S v Bader* 2020 (2) SACR 444 (GP) at para 13, *S v Mququ* 2019 (2) SACR 207 (ECG) at para 4 and *S v Nel and Others* 2018 (1) SACR 576 (GJ) at para 3.

[6] Cf. *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 800C-J, *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 360D-362G (and the authority cited there) and *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (A) at 402B-C.

[10] The difficulty may be illustrated by reference to a single but important aspect of the evidence in the current matter. The appellant averred that when the police descended on him after the shooting of Colonel Kinnear he had informed them that he had been tracking the deceased at the instance of a certain Mr Mohammed, whom the appellant understood wished to recover a vehicle from the person he had been asked track. The police, on the other hand, testified, also on affidavit, that the appellant gave a variety of mutually inconsistent explanations for his tracking activities.

[11] Neither side applied to offer oral evidence in support of its version or to cross-examine the deponent to the version in conflict with its own. How was the court a quo to deal with the conflicting evidence on paper?

[12] In civil proceedings, there are rules to deal with that sort of situation. In terms of the so-called Plascon-Evans rule,[7] where final relief is sought on paper and there is a conflict on the facts, the version asserted by the respondent prevails unless it is obviously far-fetched or untenable. The rule operates in that manner irrespective of incidence of the onus.[8] Where interim or interlocutory relief is sought, the court makes a determination on the probabilities as they appear from the papers.

[13] Bail applications are sui generis. To an extent they are inquisitorial and, in general, there is no prescribed form for introducing evidence at them. But in cases where s 60(11) applies and there is consequently a true onus on the applicant to prove facts establishing exceptional circumstances, an applicant would be well advised to give oral evidence in support of his application for bail. This seems to me to follow, because - differing from the position in which the Plascon-Evans rule is applied – the discharge of the onus is a central consideration in s 60(11) applications. If the facts are to be determined on paper, the state's version must be accepted where there is a conflict, unless the version appears improbable. Reverting to the example in the current case used to illustrate the proposition, the probabilities are neutral on whether the appellant gave the police a consistent explanation or various conflicting ones. Applying the approach I have just described, as I believe it was bound to do in the circumstances, the court a quo was obliged - if it chose not to exercise its

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[7] *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), at 634E-635C.

[8] *Ngqumba en 'n Ander v Staatspresident en Andere* 1988 (4) SA 224 (A). As Harms DP, with reference to *Ngqumba*, remarked in National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at para 27 '(i)*n motion proceedings the question of onus does not arise*'.

power of its own accord to require oral evidence[9] - to accept the police evidence on the point. The example given was not chosen idly. Whether the accused supplied false information at the time of his arrest or thereafter is a material consideration in bail proceedings (see s 60(8)(a)).

[14] The appellant advanced his case for bail in his supporting affidavit (*jurat* 15 December 2020) on the following lines. He averred that the only objective facts linking him with the murder of Colonel Kinnear was that he had pinged the cell phone of the deceased in order to determine his location. He said that he had obtained the wherewithal to trace people from a certain Goldblatt from whom he purchased the pings that he used for tracking purposes. He had subsequently discovered that some of the pings he had purchased had disappeared from his account. When he complained about that they were replaced free of charge. He said '*it is my respectful submission that other individuals were using the same platform and code, therefore the record of this code cannot link me to the crime. The deceased is unknown to me. I live in Gauteng and he used to live in the Western Cape*'. The clear implication in that statement, read contextually with the other content of the affidavit, was that someone other than the appellant must have used his code to ping Kinnear. The statement had to be weighed contextually with other evidence that I shall describe presently that clearly linked the appellant to the tracking of Kinnear over a period of time. The appellant also averred that there was CCTV footage showing that he was in a pharmacy in Springs at the time that Kinnear was shot in Bishop Lavis, Cape Town, but that was of no significance because it was not suggested by the State that the appellant had been the shooter.

[15] The appellant testified that he had a fixed residential address from which he worked as a debt collector earning an average of R20 000 per month. He has two young children, one of whom is autistic and has special needs. The child with 'high functioning autism' has taken the appellant's incarceration badly and is reported to have had 'some severe meltdowns as a result of [the appellant's] absence'.

[16] The appellant averred that he suffers from bi-polar disorder and requires medication. He said that he had forgotten that he possessed a passport until his memory was jogged by the content of an affidavit by Captain Joubert (an apparent reference to an affidavit by Joubert, *jurat* 3 March 2021, opposing bail, which the appellant must have been given in draft before

[9] Section 60(2)(c) of the Criminal Procedure Act.

he made his bail application). He said that he had obtained the passport for the purpose of travelling on a rugby tour, but had actually never used it.

[17] He averred that he had no previous convictions. He undertook not to influence or intimidate any witnesses or to conceal or destroy any evidence and stated that he would attend his trial. He denied that his release on bail would prejudice the public order. He indicated that he would be able to afford to pay bail fixed in the sum of R5000.

[18] The state filed affidavits by Captains Pieter Joubert and Edward du Plessis as evidence in support of its opposition to the bail application.

[19] Captain Joubert is attached to the Directorate for Priority Crimes ('the Hawks') in the National Priority Violent Crimes Unit, Organised Crime. He is the investigating officer in the Kinnear murder.

[20] Captain Joubert testified that Colonel Kinnear had been attached to the Western Cape Anti-Gang Unit and at the time of his killing was involved in '*several high profile investigations featuring well-known underworld gang members ... as well as alleged police corruption matters*'.

[21] He described how investigations had led the police to a cellular and data analytics company based in Gauteng that was able to carry out location-based station tracking of cellular devices. The method used is referred to colloquially as 'pinging'. It was established that the appellant had pinged three different cellular telephone numbers used by Colonel Kinnear on several occasions between 20 April 2020 and the date of Kinnear's murder. One of the numbers had been pinged a total of 2 408 times. On the date of the fatal shooting, the pinging of Kinnear had commenced at 02h32 in the morning and continued until approximately 15h25. Colonel Kinnear was shot at approximately 15h00. From about 13h20 the pinging was repeated at more or less 10-minute intervals, which increased in frequency to approximately three-minute intervals from 14h35.

[22] Captain Joubert deduced from the pattern of pinging most proximate to the time of the shooting that it must have been related to the need to closely track the deceased's movement in the lead-up to his killing and was, in Joubert's opinion, part of 'meticulous planning' to that end.

[23] The appellant was arrested after initial questioning. He was thereafter transferred in custody from Gauteng to Cape Town. During the journey to Cape Town, the appellant confided to the police officers accompanying him details of his connections to various

members of the Cape Town underworld. Joubert stated that the appellant had confirmed this information in writing on certain signed notes that have been attached to his warning statement. The notes were signed in Joubert's presence.

[24] Captain Joubert testified that the appellant had initially claimed to have acted on the instructions of a certain 'Mr Mohammed' who had requested surveillance of his (Mohammed's) wife and a man with whom she was suspected to be having an illicit affair. The appellant told the police that he would receive telephonic instructions to ping Kinnear's numbers and was remunerated weekly by eWallet transfers into his bank account. He said that Mohammed had told him on the day of Kinnear's murder that the sheriff was ready to seize his wife's vehicle. He claimed to have pinged the number for the last time between 12h00 and 13h00, and that thereafter, having heard nothing further from Mohammed, he had assumed that the vehicle had been successfully seized.

[25] Subsequent investigation showed that there had been only seven eWallet transfers into the appellant's bank account and that those had occurred between 29 January and 14 April 2020. On being confronted with that information, the appellant changed his story and confessed that the character he had referred to as Mr Mohammed did not exist. He then admitted to having acted on the instructions of a person that Captain Joubert was not willing to name because of the sensitivity of the ongoing investigations and called only by the name 'M X'. At the hearing of the bail appeal, the identity of Mr X was disclosed from the bar, without objection, as a certain Mr Modack. The appellant is currently arraigned in the Blue Downs regional court on a number of apparently related charges as a co-accused with Modack and various other persons.

[26] The appellant reportedly stated that about 90% of all the pinging that he did was on Modack's (or as the court a quo understood it, Mr X's) instruction. According to Captain Joubert, the appellant admitted to being aware that some of the targets of his pinging were members of the police force. He told Joubert that he had been led to believe that Mr X feared for his life from these police members and that he needed to know '*when they were on their way to some of his* [Mr X's] *properties*'.

[27] According to Captain Joubert, the appellant had said that he did not know Kinnear or what he looked like. It was, however, ascertained from the information recovered from the devices confiscated from the appellant that he had accessed a photo identification confirmation of Kinnear.

[28] Joubert testified that investigations undertaken using subpoenas authorised in terms of s 205 of the Criminal Procedure Act had revealed that deposits totalling over R5,25 million had been made into one of the appellant's banking accounts in the period between 19 June 2019 and 26 September 2020.

[29] It was also discovered that the appellant had obtained a consumer trace report on one Timothy Lotter, who had been shot and killed on 6 January 2020 in a matter that at one stage was being investigated by Colonel Kinnear. He had also pinged the cellular telephone number of an attorney, William Booth, 658 times between 6 March and 18 September 2020.

[30] An attempt on Booth's life, when shots were fired at him in the garage at his residence on 9 April 2020, was given extensive coverage in the media at the time. On the day in question, the appellant had commenced pinging Booth's phone from 03h55 and continued doing so until about 45 minutes after the shooting incident, which occurred at about 7h00. On the day following the attempt on Booth's life, the appellant obtained a consumer trace report on the attorney. The appellant had declined to make a statement when invited to do so in respect of the investigation into the attempted murder of Booth. The appellant maintained he did not know Booth.

[31] The appellant had also pinged the cellular telephone number of one Jerome Booysen, who was described by Joubert as '*a well-known underworld figure and alleged to be leader of the Sexy Boys gang*', between 6 March and 17 September 2020 on 193 occasions.

[32] He had also pinged the phones of certain other police officers who worked with Kinnear.

[33] Captain Joubert expressed concern that there was danger that the appellant would attempt to influence or intimidate witnesses or to conceal or destroy evidence if he were released on bail. He testified that the appellant's conduct around the time of his arrest supported his concern in this regard. He referred in this regard to the evidence of a witness who was at that stage unidentified, but whose identity was revealed in a later exchange of affidavits before the bail application was heard as one Bradley Goldblatt.

[34] Mr Goldblatt made an affidavit on 21 October 2020. He testified that he ran the business that provided the software to the appellant that enabled the latter to ping the cellular telephones of third parties.

[35] Goldblatt testified that he had first met the appellant in November 2018 when the appellant had approached him to obtain a system that would assist him in his business doing

'bank repossessions on vehicles'. Initially, the appellant would purchase 50 pings a month from Goldblatt's business at a monthly cost of R2100 (which translates to R42 per ping), and he would generally not use that amount of pings during the period concerned. Goldblatt also gave the appellant access, at a fee of R5000 per month, to Goldblatt's account with Marisit Credit Services, which is a consumer tracing business. The appellant was able to use the facility to undertake up to 100 searches per month.

[36] Goldblatt reported that the pinging system was set up in such a way that he received an automatic alert if any number was being repeatedly pinged. On 1 September 2020, he received an alert that indicated that the appellant was repeatedly pinging certain numbers. He audited the appellant's account and identified that the numbers being repeatedly pinged were those of Colonel Kinnear, that of another police officer in the Anti-Gang unit, and that of Mr William Booth. His Google searches on the identified individuals and his perusal of some of the online articles concerning them led Goldblatt to infer that the appellant was using the system for purposes related to '*a Gang War*'. Goldblatt consequently made contact with a police officer (whose name was scratched through in the copy of the affidavit in the court record) to whom he provided the information that he had gathered.

[37] Goldblatt said that on the day before Colonel Kinnear's murder the appellant had made frantic efforts to contact him to purchase additional pings. The appellant had sent him 22 WhatsApp messages and made three missed calls to him for this purpose. After eventually making contact with Goldblatt, the appellant purchased 100 hundred additional pings.

[38] Goldblatt heard of Kinnear's murder late on 18 September 2020. He contacted the police officer to whom he had earlier provided the information concerning the appellant's activity to ask how it could have happened. He was told that he would be contacted by the investigating team.

[39] Goldblatt further testified that on the evening of 20 September he was telephoned by the appellant at approximately 21h30. The appellant told Goldblatt that his house was swarming with 40 members of the Hawks who were confiscating his handsets and laptops. Goldblatt asked the appellant why the Hawks were there. The appellant replied that there was 'trouble'. Goldblatt asked 'What trouble?', to which the appellant replied that it did not matter but that Goldblatt should listen to him carefully. He then told Goldblatt to delete all traces of him having used the pinging or consumer tracing systems to '*make it look like he*

never used any of the systems'. Goldblatt reported the telephone conversation to the unnamed police officer with whom he had been in contact since 3 September and provided the officer with the telephone number from which the appellant had called him.

[40] Goldblatt stated that he had further analysed the appellant's usage of the services provided and ascertained that the appellant had obtained photo verification reports in respect of Colonel Kinnear and Mrs Kinnear and an 'auto asset enquiry on William Booth'. He also determined from his analysis of the location based services '*with regard to the data received on Lt Col Kinnear and Adv* (sic) *William Booth*' (i) that '(t)*he amount of pings done on both individuals indicates that a movement patter*(?n) *was established on the individuals*', (ii) that '(o)*n both incidents* [ie. the shootings] *the frequency and the time the pings started was earlier as* (sic) *the other days (Just after 03:00 in the morning)*', and (iii) '(o)*n both incidents the pings stopped immediately after the shootings*'.

[41] Captain du Plessis is also a member of the investigating team in respect of the murder of Colonel Kinnear. He analysed the 'the official downloads' from all the handsets confiscated from the appellant. He was also able to retrieve deleted WhatsApp conversations and images and screengrabs from the devices.

[42] He determined that the appellant had obtained a consumer tracing report that disclosed William Booth's residential address on 10 March 2020 (a month before the attempt on Booth's life). The appellant had done a Google search for Booth's work address on the same date. On the evening of 18 March, the appellant had done an exercise showing the time it would take to travel from the location at which Booth had been pinged at an address in Vredehoek to Booth's residence in Gardens, Cape Town. The information had been sent on to another WhatsApp user.

[43] Du Plessis gave details of the pinging by the appellant of William Booth's phone on the day of the attack on the latter. He advanced the following proposition based on the information that his investigation had brought to light: '*Taking all of this into consideration and the fact that the attack on the life of William Booth happened on 9 April 2020, it is clear that* [the appellant] *knew who William Booth was at the time of the incident and yet continued to ping the cell phone number of Booth. The attack on William Booth made national headlines and was covered on television as well.*'

[44] Captain's Du Plessis' analysis of the information on the appellant's handsets turned up quite extensive information that had a bearing on the investigation into the murder of Colonel Kinnear.

[45] The appellant had obtained consumer tracing reports in respect of both Kinnear and Mrs Kinnear on 20 April 2020, including photo verification reports. These had been transmitted by the appellant on the same day to another WhatsApp user. That date corresponded with the date on which the appellant commenced pinging one of Kinnear's telephone numbers.

[46] It was clear that by the middle of May 2020 the appellant had obtained the particulars of four cellular telephone numbers associated with Kinnear and was aware that he was attached to the police Anti-Gang Unit. It was established that during that month the appellant had tracked Colonel Kinnear while the latter was on a working trip to Gauteng and had kept him under physical surveillance when Kinnear was staying at a guesthouse in Sandton. A recovered WhatsApp conversation revealed that the appellant had been in contemporaneous communication with a third party concerning the security measures for entry into the guesthouse property. The investigation revealed that the appellant had also undertaken physical tracking surveillance on Kinnear during another visit by the latter to Gauteng in June 2020.

[47] Du Plessis' affidavit gave substantiated detail on a number of other tracking exercises done by the appellant pinging Kinnear's phone, some of which were connected with WhatsApp conversations between the appellant and a third party suggesting that calculations were being made as to the timing of Kinnear's anticipated arrival in Bishop Lavis from wherever he was at the particular time.

[48] Du Plessis concluded on the Kinnear case as follows (at para 29 -30 of his affidavit):

> 29. On the date of Lt Colonel Kinnear's murder, he was pinged on 35 occasions from 02:32 until 15:25 when he stopped pinging him. [The appellant] stopped pinging him after 15:25. The accused completely ceased all pinging of the phone/s of Lt Col Kinnear approximately 15 minutes after the murder.
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> 30. Taking all of this in consideration and the fact that the murder of Lt Col Kinnear happened on 18 September 2020 it is clear that [the appellant] knew who Lt Col Kinnear was at the time of the incident. The same modus operandi followed in the William Booth matter was also used to determine the estimate time of arrival of Lt Col Colonel Kinnear to (sic) his Bishop Lavis home from different locations. I

> submit that the advantage of this "intelligence gathering" is self-evident: it makes it possible for a designated hitman to be informed, with a high degree of certainty, that his target's arrival at a predetermined location is imminent. This allows the perpetrator an opportunity to fully prepare himself ahead of time and to orchestrate his own timeous approach to the scene of the crime.
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> Put simply. [The appellant] performed "intelligence gathering" by way of electronic surveillance to best facilitate the intended murder of Lt Col Kinnear. In the commission of this crime the role played by [the appellant] was integral. It was not merely the supply of vague and/or raw data; it was target specific and time sensitive. By way of example: it would have been easy to determine that Lt Col Kinnear was settled inside his home at a certain stage based on his ping location. That information, although useful, is not critical to the execution of the murder. It is certainly less desirable to attempt to attack a policeman inside his own home and/or to wait outside not knowing exactly when the police member is going to step outside his house. However, [the appellant] delivered information that revealed at what time the target would arrive at his house. Kinnear would be at his most vulnerable, seated behind the wheel of his vehicle. An easy target.

[49] Du Plessis also placed a copy of the following WhatsApp conversation on 11 August 2020 with a third party (TP) recovered from the appellant's devices before the court a quo:

> 'n Informant bel my nou. Apperently soek klomp mense my... Andre Naude se blykbaar ek sal nie Crismis sien nie. Hulle se ek is jou right hand man
> MACS blykbaar soek my ook.
> [TP] Lol
> [TP] Is jy dan bang
> Fok hulle
> Masepiesse
> [TP] Hou op Na poes lusiter
> [TP] As hule on raak skiet almal vrek
> Blykbaar soek almal my oor my alliance met jou
> Klomp poesse
> Ek sal gun moet kry iewers
> Daai goed in hulle poes skiet as ek moet
> Jy moet net altyd my rug he

It hardly needs stating that that is hardly consistent with the nature of a conversation that might be expected between a debt collector and a creditor interested in recovering its motor

vehicle. As I put to the appellant's counsel, it has all the hallmarks of an exchange between figures in a gangland context.

[50] Du Plessis identified two police dockets that had been opened in respect of attempts on André Naude's life in July and September 2019, respectively.

[51] The appellant filed an affidavit in response to those of Captains Joubert and Du Plessis.

[52] With regard to the evidence concerning the report obtained from Mr Goldblatt (whom it will be recalled had not been named in Joubert's first affidavit), the appellant stated '*Captain Joubert motivates this objection* [ie. the likelihood of the appellant interfering with witnesses or evidence] *by referring to an unknown witness whom I supposedly have contacted to remove the LAD and MarisIT from his/her phone. I do not know who this witness is and did not request anyone to delete LAD or MarisIT from their phone*'. I find the answer somewhat disingenuous. It is plain from the context given earlier in this judgment that the appellant must have known that the only persons who could have provided the police with that information would have been his service provider, and therefore probably Goldblatt. It is notable that the appellant did not respond, when that information was provided in the later exchange of papers, to the evidence concerning the telephone number from which Goldblatt testified that the appellant had contacted him.

[53] The appellant's counsel argued that Goldblatt's evidence should be approached with scepticism because he was a person that had been engaged in what counsel characterised as an unlawful business. Counsel also pressed the inherent improbability that the appellant would have been able to contact Goldblatt while the appellant's house was reportedly swarming with police officers.

[54] It is indeed difficult to see how the appellant could have been allowed the opportunity to telephone anyone while the police were at his house in large numbers and presumably carrying out a search for devices. The inherent improbability is so obvious however that anyone making up a story is unlikely to have included it in a false or manufactured version of events. Factors counting strongly in support of Goldblatt's credibility are the fact that it was he who first contacted the police, more than two weeks before Kinnear's murder, concerning the appellant's pinging of Kinnear and Booth, and secondly, that he was able to provide the telephone number from which the appellant had contacted him. He was no doubt able to do

that because the number was recorded on the device on which he received the call. He would have appreciated that that could be checked and a tracing done on the number.

[55] In all the circumstances, I consider that the court a quo was entitled to accept the evidence given by Goldblatt for the purposes of its determination of the appellant's bail application.

[56] The appellant's counsel further submitted that in any event the electronic evidence implicating his client had already been collected and that there was no manner in which the appellant would now be able to hide or destroy it. That might hold true in respect of the evidence that has already been collected, but there is nothing to say that the state's case against the appellant will rest entirely on the evidence gathered from his handsets. It is clear that the direct evidence against the appellant is circumstantial and that therefore much will depend at the trial on how that evidence fits with the other pieces of the jigsaw. The significance of Goldblatt's evidence is that stands as proof of the appellant's propensity and readiness to interfere with the evidence if given the opportunity. The passage from the appellant's replying affidavit quoted in paragraph [52] above serves to indicate that the appellant was less than candid about his interaction with Goldblatt. It is conceivable that even an innocent person in his position might have made the request he directed to Goldblatt in panic when the police descended on him, but I would expect that an innocent person would make a clean breast of things once he had discovered that the police knew about the telephone conversation and had had the opportunity to reflect on his position.

[57] The appellant denied that he had given contradictory versions to the police. I have already discussed above the manner in which the magistrate was obliged to treat the conflicting evidence on paper. As I noted there, the magistrate was in the circumstances of the current case obliged to accept the state's evidence concerning the contradictory versions given by the appellant. The fact that the appellant had given conflicting versions was a factor bearing on his credibility and is a feature that the magistrate was entitled to take into account in assessing how his explanations for his pinging and surveillance might be regarded as his trial; in other words, it bears tangentially on the court's assessment of strengths and weaknesses of the state's case. It also bears on the appellant's honesty and trustworthiness, which was something the magistrate had to consider in weighing the appellant's promises of good behaviour if he were released on bail.

[58] The appellant also gave explanations of the production of a certificate by his then legal representative at an earlier stage of the proceedings that purported to show that he was a licenced private investigator. The certificate was shown to be a forgery. The appellant's explanation was that the certificate had been used to enable him to travel on the roads during the lockdown period. It is difficult to understand though, why if that were the case he did not speak up to correct the mistaken impression the court was being brought under when the certificate was handed in. Even accepting the appellant's explanation, it painted him in a poor light.

[59] The appellant denied that his release would endanger the safety of the public. The magistrate appears to have taken a different view. There were sufficient features in the evidence to justify her assessment. The electronic records linked the appellant's tracing and surveillance activities with several persons who became the victims of violence. They also suggested that he was involved in underworld activity. The WhatsApp conversation quoted in paragraph 49 above might reasonably be taken as evidence indicative of a willingness by the appellant to resort to violence in a gangland context if he thought it necessary for his purposes. The scourge of gang-related violence in the Western Cape is notorious. And although the appellant is a resident of Gauteng, the person he said had threatened that the appellant would not see Christmas, André Naude, would appear to be based in the Western Cape as the investigations into both attempts on Naude's life are being undertaken under Bellville and Durbanville police docket numbers.

[60] The appellant denies that he played any role in organised crime, but his denial rings hollow having regard to his documented activities. His endeavour to revert to the version that he thought he was tracking all the individuals that he pinged for the purposes of debt collection and the recovery of motor vehicles was risible. Not only by reason of the identity of the persons he pinged and the exceptional intensity with which he pinged two of them on the days that they were shot at, but also because he has not identified his principal other than to say (which he latterly sought to deny) that it was Mr Modack. The appellant's physical surveillance of Colonel Kinnear in Gauteng and the character of the contemporaneous WhatsApp conversations in connection therewith are not readily reconcilable with his claim to have been on a car recovery exercise. It is also inherently improbable that any creditor would have been willing to expend tens of thousands of rand on tracking the whereabouts of persons such as Kinnear and Booth, whose places of work and residence could easily be ascertained if the object was to collect a debt or recover a vehicle from them.

[61] In his replying affidavit, the appellant averred that Captain Joubert's statement that the appellant functioned within a criminal group that was financially profitable to him was speculation unsupported by any evidence. He stated that his bank account was available to corroborate his financial situation. His evidence was that the balance in his bank account was only R7 000 at the time of his arrest. He failed, however, to deal at all with the evidence that large amounts of money were paid into his bank during the period that he was intensively pinging persons such as Kinnear and Booth. He also failed to explain why his statement that the payments he received were made by eWallet accounted for only a small proportion of his receipts, the last of which was recorded as having taken place several months before his arrest. In his reply, he stated only that he received payments for amounts of under R3 000 by eWallet. It is obvious that very many payments in such relatively small amounts would have been required to compensate him for even just the cost price of the pings used to track Kinnear and Booth.

[62] The appellant also emphasised the circumstantial nature of the case against him and argued that it would not be possible for the trial court to hold on the evidence described by Captains Joubert and Du Plessis that the only reasonable inference was that he had known or foreseen that his tracking was intended to assist in a murder. His evidence in this regard went as follows in his replying affidavit (underlining in the original):

> Although the charge of murder against me is serious, I submit that the State's case is very weak and is based on weak circumstantial evidence. The evidence I refer to are (sic) the facts that I allegedly sent the trace reports, photos and "pings" of the person that I was requested to trace, to another person. I submit that the only reasonable inference based on these facts <u>is not</u> that I knew or foresaw that a person will get killed if I do a trace report and forward the persons photo and/or pinned location to another person. I am in the job of debt collecting and repossessing vehicles and in the process, tracing people to repossess vehicles, I cannot foresee that the identity or XDS report I provide would lead to a murder.
>
> The only evidence against me is that I pinged people's cell phones. I submit therefore that there is <u>not</u> a strong likelihood that I will be convicted of murder and therefore there is for me no reason to invade my trial.

[63] The magistrate was, of course, not called upon to determine the guilt or innocence of the appellant. That will be the function of the trial court. She was, however, entitled to take into account the apparent strength or weakness of the case against the appellant as far as that could be determined at that stage. I do not think that she was bound to accept that the case against the appellant was as weak as he would have it. I have already explained why I

consider the magistrate was entitled to consider that the appellant's explanation that he believed that he been engaged in debt collection and car recovery was risible. She was also entitled to understand that a case that depends on circumstantial evidence is one that that falls to be determined only at the end of the trial after all the evidence is in. As Eksteen JA expressed the position in *S v Ntsele* 1998 (2) SACR 178 (SCA) at 182, '*Ons reg vereis ... nie dat 'n hof slegs op absolute sekerheid sal handel nie, maar wel op geregverdigde en redelike oortuigings – niks meer en niks minder nie (S v Reddy and Others 1996 (2) SASV 1 (A) op 9d-e). Voorts, wanneer 'n hof met omstandigheidsgetuienis werk, soos in die onderhawige geval, moet die hof nie elke brokkie getuienis afsonderlik betrag om te besluit hoeveel gewig daaraan geheg moet word nie. Dit is die kumaltiewe indruk wat al die brokkies tesame het wat oorweeg moet word om te besluit of die aangeklaagde se skuld bo redelike twyfel bewys is (R v De Villiers 1944 AD 493 op 508-9).*'

[64] There are certainly many features in the evidence put up by the State before the magistrate that make out the basis of a prima facie case. It was readily foreseeable in the circumstances that the manner in which appellant deals with the evidence at his trial will play an important role insofar as the ultimate effect of the evidence incriminating him is concerned. As the appeal court noted in *S v Boesak* 2000 (1) SACR 633 (SCA) at para 46-47 –

> 46. It is trite law that a court is entitled to find that the State has proved a fact beyond reasonable doubt if a prima facie case has been established and the accused fails to gainsay it, not necessarily by his own evidence, but by any cogent evidence. We use the expression 'prima facie evidence' here in the sense in which it was used by this court in *Ex parte The Minister of Justice: In re R v Jacobson & Levy* 1931 AD 466 at 478 where Stratford JA said at 478:
>
> > 'Prima facie evidence in its more usual sense, is used to mean prima facie proof of an issue the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus'
>
> 47. Of course, a prima facie inference does not necessarily mean that if no rebuttal is forthcoming, the onus will have been satisfied. But one of the main and acknowledged instances where it can be said that a prima facie case becomes conclusive in the absence of rebuttal, is where it lies exclusively within the power of the other party to show what the true facts were and he or she fails to give an acceptable explanation. In the present case the only person who could have come

> forward to deny the prima facie evidence that he had authorised, written or signed the letter, is the appellant. His failure to do so can legitimately be taken into account.

[65] The appellant's counsel's attempt at this stage of the proceedings to rely on the principles of deduction in criminal cases famously enunciated by Watermeyer JA in *R v Blom* 1939 AD 188 at 202*fin*-203 was misconceived because it was premature. The cardinal rules of logic to which the learned judge referred there cannot be applied until the end of the trial; *a fortiori* not in a bail application when the police investigation is still in progress.

[66] It did occur to me, however, that it was more than passing strange, in the context of the State's heavy reliance on the evidence concerning the appellant's pinging and tracing of both Booth and Kinnear and the similarities in the appellant's modus operandi on the days that those individuals were attacked, that charges were preferred against the appellant only in respect of the assault on Kinnear and not in respect of that on Booth. When I raised this with counsel for the State at the hearing of the bail appeal, he informed me, after taking instructions, that it had been an omission and that the appellant would face a charge in respect of the attempted murder of Booth in the consolidated charge sheet being drafted for the intended trial of the appellant together with a number of co-accused.

[67] It is not only the apparent similarity of the appellant's modus operandi in relation to the two incidents that appears to be material. I would imagine that the appellant's knowledge of the widely publicised attack on Booth and his necessary appreciation of its contemporaneity with his intensive pinging of the subject, would, coupled with the evidence concerning the source of his instructions, also be a critical issue at his trial concerning his state of mind in respect of his activity in the lead up to the fatal shooting of Kinnear. Both of these questions will no doubt be parts of the mosaic that the trial court will have to review to determine whether the State has established its case on the charges on which the appellant is to be tried.

[68] The appellant's counsel sought to identify 15 irregularities or misdirections by the magistrate. I do not find it necessary to deal with each and every one of these. Suffice it to say that I agree that the magistrate misconstrued the evidence in certain regards and made some findings, for example that the appellant's release on bail would conduce to public disorder or unrest, that were unjustified. I also consider that the magistrate was misdirected in holding that the appellant had failed to adduce convincing evidence concerning his child's disability. As counsel correctly conceded, however, the identified misdirections do not, of themselves, mean that the appeal against the magistrate's refusal of bail can succeed. The

appeal can succeed only if this court comes to the conclusion that the magistrate's decision to refuse the application was wrong.

[69] In my judgment, for the reasons I have discussed, I do not think that the magistrate was wrong in being unpersuaded that the appellant had shown exceptional circumstances justifying his release on bail in the interests of justice. On the contrary, I consider that the magistrate was justified in finding that in the face of prima facie evidence pointing to a knowing involvement by the appellant in the murder of Colonel Kinnear, the appellant's evidence in support of his bail application was riddled with improbabilities and untruths. He consequently failed to discharge the onus to prove that, exceptionally to the statutorily ordained default position applying to persons charged with Sixth Schedule offences, he should be granted bail. In the context of the public interest considerations related to the serious nature of the offence with which he stood charged and the potentially negative effect his release might have on the investigation and prosecution thereof, the personal circumstances put up by the appellant in support of his application were, in my view, not sufficient to tip the balance in his favour.

[70] In the result, the appellant's appeal against the order by the court a quo refusing his application for bail is dismissed. An order will issue accordingly.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Counsel for the State:	**G.D. Wolmarans** **Office of the Director of Public Prosecutions, Western Cape**
Appellant's counsel:	**M. Botha**
Appellant's attorneys:	**Eric Bryer Attorneys** **c/o MacGregor Erasmus Attorneys** **Cape Town**