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

CASE NO: A37/22

In the matter between

OLWETHU MOTSI APPELLANT

V

THE STATE RESPONDENT

Date of Hearing: 25 May 2022
Date of Judgment: 25 May 2022

REASONS FOR THE ORDER delivered 15 August 2022

THULARE J

[1] This was an opposed appeal against the decision of the magistrate to dismiss the appellant's bail application. The parties were agreed that it was a schedule 5 offence and that the provisions of section 60(11) (b) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA) were applicable. I gave the order immediately after argument, with reasons follow later. These are my reasons

[2] The issue was whether the decision of the magistrate was wrong.

[3] In order to do justice to the matter, one has to cite extensively and verbatim from the record as opposed to a simple summary, as regards the first day of the bail application. It is also convenient to deal with the first day of the proceedings on 10 September 2020 distinct from the second day, which next day was 11 September 2020.

THE PROCEEDINGS OF 10 SEPTEMBER 2020

[4] The record of 10 September 2020 reads as follows:

"PROCEEDINGS ON 10 SEPTEMBER 2020

PROSECUTOR: Thank you, Your Worship. Your Worship, this case is on the court roll for a bail application. It is a matter for the accused he is in custody. The state is opposing bail, Your Worship.

COURT: Mr Gangathele.

MR GANGATHELE: Thank you, Your Worship. Your Worship, I do confirm my appearance on behalf of the accused Your Worship, also confirm that the defence have drafted an affidavit in support of the bail application, Your Worship. If I may read it into the record?

COURT:What else do we have?"

[5] There was an interruption and the discussion was around other matters that were still outstanding on the court roll of that day. After the Prosecutor had briefed the magistrate in respect of the other cases, the magistrate directed that Mr Gangathele proceed:

"MR GANGATHELE: Thank you, Your Worship. Your Worship, may I read the affidavit of the accused before Court on record?

COURT: Ja, We are recording.

MR GANGATHELE: As the Court pleases, Your Worship.

COURT: Yes.

MR GANGATHELE: "I the undersigned Olwethu Motsi understand my rights in terms of Section 60(11) (b) of Act 51 of 1977 and make the following statement under oath. That I am an accused in this matter. I confirm that this is an application in respect of Schedule 5 offence. I am an adult male of 33 years of age currently residing at 02786 Mthunza Street, Numbama. I have lived at the above address for the past four years and I live at that address alone."

I do have an alternative, Your Worship. However, I cannot at this stage provide the exact address, Your Worship, which is the address that my client wishes to, if the bail is granted, to live in, Your Worship, alternative address Your Worship. We are still trying to get that alternative address, Your Worship. I will provide same. As the Court pleases.

"I am not married. I have two dependents of age ten years and five months old. I am currently employed as a police officer. Where I earn R7000 per month after deductions. I do not have a passport or any travelling documents. I have been informed by my legal representative that I am obligated to disclose all my previous convictions pending my past outstanding warrants, as well as the fact that should I not disclose the above information and be found guilty, I will be liable for an offence for which I can receive up to 2 years' imprisonment, with or without an option of a fine. I therefore declare as follows: I have no previous convictions. I have no pending matters. I have no outstanding warrants.

I would like to bring the following facts under the Court's attention. That my release on bail will not endanger the safety of the public, or any particular person and will not disturb public order, or undermine public peace or security. That my release will not undermine or jeopardise the objective of proper functionality of the criminal justice system, including the bail system. That I will not influence or intimidate any witness. That I will not conceal or destroy any evidence. That I will not evade my trial upon release on bail. That I would obey my bail conditions and attend all court dates until the case is finalized.

I am charged with murder, but dispute the charges against me. Furthermore, in regard to this statement I do not deal with the merits of this case, which should not be seen as an admission of any kind. I plead not guilty to the charges against me. I humbly request my bail application to be considered for the following reasons. I do have a child which is attending school here in Strand. But due to Covid-19, he went to the Eastern Cape. I now wish to be out so that I can facilitate the transfer process so that he can continue with school in the Eastern Cape. Furthermore, I am the primary caregiver of my children, also a breadwinner as it was only me that was working. The grandmother of my children the two they are with her in the Eastern Cape. She is not working as well. I was responsible for supporting her.

I wish and pray to be outside so that I can make arrangements for the deceased to be buried. The deceased has been in the mortuary since her passing and her family said will not bury her. I wish to have her buried as she has been in the mortuary for the past 21 days.

Furthermore to the above said, the cost of keeping her in the mortuary Your Worship, it is increasing each and every day and becoming more expensive.

It is my respectful submission that the interest of justice will not be adversely affected by my release on bail. I therefore humbly request this honourable Court to consider my bail. I can afford bail in the amount of R2000 and it will be paid by my brother."

It is signed at Strand on 10 September 2020 by the applicant and duly commissioned, Your Worship. If I may hand in the affidavit, Your Worship?

COURT: You confirm the contents of this statement as correct?

APPLICANT: Confirm, Your Worship.

COURT: EXHIBIT A

MR GANGATHELE: As the Court Pleases.

PROSECUTOR: Court pleases.

COURT: Yes, Ms Van Zyl?

[6] The Prosecutor did not lead any evidence and went straight into addressing the court on the application.

"PROSECUTOR: Thank you, Your Worship. Your Worship, this is a very serious offence. It is indeed already instructed by the state to go to the High Court, Your Worship. The reason why the State is not opposing bail today Your Worship, the fact that the accused has no previous convictions, no pending matters and no outstanding warrants of arrest. And the case as it stands against the accused is also not particularly strong, Your Worship.

There is one confession from the accused wherein he refers to the address of his girlfriend where he says, he first claimed in the confession that it was a robbery gone wrong Your Worship, that she was shot dead in that manner. Later he changed in the same confession Your Worship, the version to that he hired someone, Your Worship to kill his girlfriend. It is the same girlfriend he had been referring Your Worship, who he wants to get out of the mortuary. Your Worship, on his evidence state currently he has security Your Worship with either confession. We are obviously still waiting for ballistic evidence and passport are present Your Worship, to possibly confirm that his version is correct.

The state is requesting R2000 bail to be set today, Your Worship. State is also requesting 24 hours house arrest Your Worship, for this accused. It has been discussed with the defence and they indicated they have no objection. The accused did inform the Court by his affidavit Your Worship, that he is a SAPS official, but he is currently not working Your Worship, I believe

he has been suspended. By …(indistinct) he will return to duty Your Worship with this charge pending. Either should that change, I did advise Legal Aid that he will approach the Court Your Worship, and statement … (indistinct). State will further request … (indistinct) for further investigation.

COURT; So how did the deceased die?

PROSECUTOR: She was shot, Your Worship.

COURT: Yes, how, where?

PROSECUTOR: She was shot in the premises Your Worship, they obviously found the body in … (indistinct) Your Worship and they have, as indicated in respect of evidence at that stage Your Worship, is the confession of the accused before court. There is no eye witnesses Your Worship of that nature at this stage, Your Worship.

COURT: And shot with firearm?

PROSECUTOR: Yes, Your Worship.

COURT: Whose firearm?

PROSECUTOR: That is what we are still trying to determine Your Worship, at this stage. As indicated, ballistics are being done, Your Worship.

COURT: So where was the body found?

PROSECUTOR: In the house, Your Worship.

COURT: Yes, where in the house?

PROSECUTOR: If the Court will give me a moment, Your Worship. Your Worship, they do not list the room in the house, Your Worship.

COURT: Hey?

PROSECUTOR: They do not say specifically the room in the house, Your Worship. Court pleases.

COURT: So the accused and the deceased lived together?

PROSECUTOR: Yes, Your Worship.

COURT: And the children?

PROSECUTOR: Your Worship, that is in the docket … (indistinct) Your Worship. I am not sure Your Worship. Unfortunately I do … (indistinct). Court pleases.

COURT: And she was shot where on her body?

PROSECUTOR: Your Worship, it is difficult at this stage. The State is not in possession of the *post mortem,* Your Worship. State also … (indistinct) understand, but do not think they specifically indicated where in her body she was shot, Your Worship.

COURT: Then you will roll till tomorrow to get that information.

PROSECUTOR: Court pleases, Your Worship.

MR GANGATHELE: As the Court pleases.

COURT: The matter will proceed tomorrow. You will be in custody until then, September 11th.

PROSECUTOR: Your Worship, the state … (indistinct) the Court will would like to know how many times she was shot?

COURT: Yes, where was the body found> I mean they have a body what is so difficult to look at the body and see where the gunshot wounds, how many gunshot wounds. And I mean, they are not living in an island. Where is the neighbours, anybody heard the gun going off. He is issued a firearm. I am sure as a police person. Was it his firearm? What is so difficult? I mean violence against women is rife now. You would not expect the Court to just release with not knowing much.

PROSECUTOR: Court pleases.

COURT: You may stand down.

PROSECUTOR: Thank you, Your Worship. Your Worship, so the Court would like to know how many times she was shot, where her body was found?

COURT: Where on her body was she shot.

PROSECUTOR: As the body … (indistinct) and I think the Court also asked about the children, Your Worship.

COURT: Yes, were they there, are there neighbours, was any investigation done? Is this now a case where the police is going to do nothing, because it is a police officer that is charged.

PROSECUTOR: I hope they will do more, Your Worship.

COURT: Well they will only do more if the state instructs them to do more. If the DPP is involved why are so relaxed – I mean, why is the situation so easy with it, you know, so many questions that there is not, just because there is a confession is that now actually put you on another route?

PROSECUTOR: No, Your Worship.

COURT: They must still do it, they must still do it.

PROSECUTOR: Court pleases. Is there any other queries, Your Worship.

COURT: Okay.

PROSECUTOR: Court pleases, Your Worship.

COURT: Now the firearm that was used is it a police issue, was it issued to him? Have they found the firearm. Have they spoken to the neighbours, did they hear anything, was a silencer used, you know. Somebody must have heard or seen something.

PROSECUTOR: Your Worship … (indistinct) at this stage they are not sure whether he himself did it, or whether someone was … (indistinct) Your Worship.

COURT: Even worse, if it is conspiracy then it is schedule 6.

PROSECUTOR: Your Worship, we will now confirm … (indistinct). But I will ask the investigating officer to follow-up with that, Your Worship.

COURT: We are taking a tea break.

PROSECUTOR: Court pleases, Your Worship."

[7] The feeling of being upset, annoyed or disappointed as a result of being unable to achieve or fulfil constitutional obligations is a discernable emotional response from the magistrate. It is grounded on the perceived resistance of the National Prosecuting Authority (NPA) and the SAPS, to the magistrate's fulfilment of their constitutional duty. The questions of the magistrate reveal frustration, which manifested in what may seem like aggression, hostility or impulsivity. The frustration is founded by two failures on the part of the State. First, it is the failure to have the applicant, and by extension the court, informed of the particulars of the reason for his further detention or of the charge against him. Secondly, it is the failure to observe the new ideological, philosophical and jurisprudential nature of a bail application.

Particulars of the charge

[8] Section 50 of the CPA provides that a person who is in detention following an arrest for allegedly committing an offence, shall be informed of his right to institute bail proceedings [section 50(1)(b)] and to be brought expeditiously before court for such purpose [section 50(1)(c)]. Section 50(6)(a)(i) provide as follows:

"Procedure after arrest

50(6)(a) At his or her first appearance in court a person contemplated in subsection (1)(a) who-

(i) Was arrested for allegedly committing an offence shall, subject to this subsection and section 60-

(aa) be informed by the court of the reason for his or her further detention; or

(bb) be charged and be entitled to apply to be released on bail."

[9] Section 1 of the CPA defines "charge" as including an indictment and a summons. In terms of section 144(3) of the CPA, an indictment shall be accompanied by a summary of the substantial facts of the case that, in the opinion of the Director of Public Prosecutions (the DPP), are necessary to inform the accused of the allegations against him and that will not be prejudicial to the administration of justice or the security of the State. It is the utmost demonstration of a lack of common sense and absurd to have a bail application when an applicant has not been fully informed of the case against him.

[10] It is bizzare, fanciful and implies the character of seeming unable to use discretion and good sense to expect a magistrate to make a just pronouncement on a bail application, when the State did not place before such magistrate information which answer three important questions, which are:
(a) What allegedly happened?
(b) What did the applicant allegedly do in what happened, which caused him to be arrested for allegedly committing an offence(s)?
(c) What are the charges preferred against the applicant?

[11] An applicant for bail reasonably need the information upon which the State relies, which answers the three questions. The failure to provide the particulars which answer these questions is prejudicial to an applicant. A judicial officer who lacks knowledge and is not aware of the information in respect of the case against an applicant, is uneducated and functionally undeveloped, therefore not fit for purpose to decide on the application. The essentials of a charge is not limited to the description of the offence. Section 84(1) of the CPA provides that a charge shall set forth the relevant offence in such manner and with such particulars as may be reasonably sufficient to inform the accused of the nature of the charge. Having said that, there may be circumstances where the description of the offence would be sufficient, like in statutory offences in criminal proceedings [section 84(3)].

[12] In my view, at the first appearance of an accused person, or at any bail application, the prosecutor has a duty to address the court. It is expected that the public prosecutor should address the three questions as a necessary, desirable and prudent performance of their duty. Although it may be a short description, it must however provide a general outline with sufficient particularity. In this way all the parties, including the court, are able to form a general summary of the State case. Section 150(1) of the CPA provides as follows:
“Prosecutor may address court and adduce evidence
150 (1) The prosecutor may at any trial, before any evidence is adduced, address the court for the purpose of explaining the charge, and indicating, without comment, to the court what evidence he intends adducing in support of the charge.”

[13] A bail application is also a formal examination of the evidence and the law by a judicial officer in order to arrive at a decision on a dispute. The extension of the word 'trial' in section 150 of the CPA to extend to bail applications would not be un unnecessary and prejudicial judicial overstretching of language. In *Mafe v S* (A49/22) [2022] ZAWCHC 108 (31 May 2022), writing for the majority, at para 70 and 71 I said:
"[70] In my view, fairness and justice call for the State to put the substantial facts upon which its charge is founded, first, and that the accused then has an opportunity to provide an answer and show exceptional circumstances where applicable, and if needs be the State gets an opportunity to rebut. In that case a court can be well-informed to form an opinion whether it has reliable, sufficient or important information to reach a decision on the bail application, as envisaged in section 60(3) of the CPA, without infringing on the responsibilities and rights of the State and of an accused. In *Naude and Another v Fraser* 1998(4) SA 539 (SCA) at 563E-G it was said in the context of a civil matter:
"It is one of the fundamentals of a fair trial, whether under the Constitution or at common law, standing co-equally with the right to be heard, that a party be apprised of the case which he faces. This is usually spoken of in the criminal context, but it is no less true in the civil. There is little point in granting a person a hearing if he does not know how he is concerned, what case he has to meet. One of the numerous manifestations of the fundamental principle is the subrule that he who relies on a particular section of a statute must either state the number of the section and the statute, or formulate his case sufficiently clearly so as to indicate what he is relying on: *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G. As the proposition itself indicates there is no magic in naming numbers. The significance is that the other party should be told what he is facing."

In his book, "The Land is Ours", Penguin Books, 2018, Adv. Tembeka Ngcukaitobi, SC, on page 1 of "Introduction" said:
"The Judiciary must protect the Bill of Rights, enforce its promises and monitor the conduct of government. Yet, despite the admiration of the world, many promises contained in the Constitution remain a hollow hope."

[71] The State is required to put all the necessary and relevant substantial facts before the court for the purposes of upholding the right of a bail applicant to be apprised of the case which he faces, in the bail application. This will enhance the impartiality of the courts and their independence in exercising their judicial functions. It also adds to the flavor of bail proceedings being *sui generis*. A bail application is unique and special. Its inquisitorial characteristic is one manifestation. In my view, the other manifestation of its unique and special character are that

the interests of justice demands that the State begin and apprise the applicant and the Court of the case which the applicant has to face, especially in section 60(11) proceedings where the so-called reverse onus is found. The further manifestation is that the applicant bears the onus to satisfy the court on a balance of probabilities that the interests of justice do not require their detention [*S v Branco* 2002(1) SACR 531 (W) at 532E-G]. The onus on the applicant and the State bearing the duty to begin and adequately inform the court of the substantial facts, are not mutually exclusive in a unique procedure specifically designed to administer justice. The prosecutor is *dominus litis* and is responsible for the charges. In *S v Sehoole* 2015(2) SACR 198 (SCA) at para 10 the Supreme Court of Appeal said the following:

"[10] The State as *dominus litis* has a discretion regarding prosecution and pre-trial procedures. For instance the State may decide, inter alia, whether or not to institute a prosecution; on what charges to prosecute; in which court or forum to prosecute; when to withdraw charges and so forth.""

Failure to observe the new ideological, philosophical and jurisprudential nature of a bail application.

[14] The science behind the ideas of a bail application, or the ideology, has shifted. The initial theory appears to have been that the State as *dominus litis,* was in charge of the criminal justice system. The SAPS and the Prosecuting Authority, representing a Republic with a parliamentary supremacy arrangement and as responsible functionaries for law, order, State security and justice, had a big voice that caused the magistracy to shiver. A study of the theoretical basis of knowledge on a bail application or simply its philosophy, reveals that the Republic now has the supremacy of the constitution and the rule of law as one of our founding values. It will also reveal that the judicial authority is vested in the courts, which are independent and subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice. The legal system or jurisprudence of the Republic on a schedule 5 bail application is that it is the court, and not the SAPS or the NPA, that shall order the detention of an accused unless the accused presented evidence that satisfies the court that the interests of justice permitted his or her release.

[15] This case indicated that there are SAPS members, including commissioned officers, and prosecutors in the NPA, who have not yet made the paradigm shift on the ideology, philosophy and jurisprudence of bail applications. They still believe that the further detention of an accused or his or her release on bail is their decision, and the

magistrate, when the matter goes to court, should just take notes and parrot their views under the pretence of a court order. A mindset that informed the reaction to the 1976 uprisings cannot continue into a democratic and constitutional South Africa with a bill of rights, supremacy of the constitution, the rule of law and an independent judiciary.

The response of the magistrate

[16] The magistrate should be commended for standing their ground in asserting judicial independence and the rule of law. It was the magistrate's state of active attention, awareness, courage, being watchful and prompt to meet the danger, which caused the magistrate to come down on the side of the applicant, the victims, the society and the interests of justice, and pound for pound, confronted an otherwise serious dereliction of duty by members of the SAPS and the prosecutor. Considering the nature of the offence alleged against the applicant, the magistrate sought to know the value, quality and the strength of the case against him. All that I would call for, is a measure of judicial restraint. Section 60(3) of the CPA provides as follows:

"Bail application of accused in court

60 (3) If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court."

[17] The court may insistent and authoritatively ask, without being brusque, that the prosecutor addresses the court in respect of the three questions referred to earlier in this judgment. I do not understand section 60(3) to be an authority for the magistrate to take over the prosecution, and basically dictate to the prosecutor in court, the instructions that the NPA should direct to the SAPS in the further investigation of the matter. It must be kept in mind that the evidence or information that the magistrate may source, through section 60(3), is limited to that which the court needs to reach a decision on the bail application. The section remove the use of irony to mock or convey contempt to the DPP and the SAPS, from consideration. It is preferable that the magistrate set out, in a simple, frank, honest and straightforward way, the information or evidence sought.

THE PROCEEDINGS OF 11 SEPTEMBER 2020

[18] On the second day the State called the investigating officer, Wynand Carelse (Carelse), a Sergeant in the South African Police Service (SAPS). He gave *viva voce* evidence. Members of the SAPS were called to the applicant's flat on 12 August 2020 at around 20:55. The members found the applicant inside the police vehicle sitting on the driver's seat. The vehicle was parked in front the flat. The applicant had booked out a different vehicle, which was reported as broken down and he was granted another vehicle which was what he was found in. The applicant was crying when he was found.

[19] The applicant reported to the officers that responded to the call that two unknown African men entered the flat where he was staying with his girlfriend. The unknown men threatened him and his girlfriend and demanded a firearm. The applicant and his girlfriend denied that they had a firearm. He and his girlfriend were asked to kneel. He then heard a gunshot and the two men ran out of the house. The applicant went to his safe and took out his official firearm, cocked it, ran out to establish if he could find the two men. He saw them running a distance from him and he fired shots at them. He emptied the magazine which loaded 15 rounds in that chase.

[20] The applicant then went back to the flat, and noticed that his girlfriend was on the floor and was full of blood. He realized that the shot that went off hit his girlfriend. He noticed that she had passed away and he went to the police vehicle from where he called the SAPS Control for assistance. That is where the members who responded found him. The officers who responded to the scene, when they entered the house, found the deceased on the floor in a kneeling position. The deceased was near the bed in the one room flat. She had one gunshot wound to the head. She was shot from behind and the bullet went out through her eye. The position in which she was found and the manner she was shot at was called execution style. There was an empty magazine near the deceased. That is when one of the officers asked for the applicant's official firearm, a 9mm caliber, which the applicant handed over. The firearm was sent for ballistic investigations and the results were still outstanding. The deceased was shot with a 9mm caliber firearm.

[21] The applicant had been issued with a temporary authorization for a firearm issued to him. Carelse discovered that the period on that authorization had been tampered with. The period had lapsed and was changed without authorisation. The applicant was issued with a permit for the period 17 April 2020 to 30 April 2020. The second permit, which was tampered with, was for the period 15 to 30 June 2020. The month 06 was changed to 08. The officers who dealt with firearm authorisations had under oath confirmed that they did not bring about the amendments that were on the dates. The applicant was appointed in the SAPS on 1 March 2016 and held the rank of Constable. Carelse was not the first investigating officer and did not know why the applicant was arrested 7 days after the incident.

[22] Carelse was yet to interview the neighbours to establish if they had any information that could help the investigation. The applicant and the deceased were engaged and they had only one 5 month old baby. The baby was found on the scene inside the flat. The applicant's version was that he was holding the baby and the mother was preparing food for the baby when the incident occurred. There was however a statement from a friend of the deceased. The friend alleged that the deceased had confided, before her death, that she was afraid of the applicant. The deceased wanted to leave the applicant but had not done so at the time of her death.

[23] The applicant had made a statement in which he alleged the robbery. In the same statement, however, he had also changed his version. He had further alleged that he had met one Bongani before and that they had agreed that Bongani would fix a problem which the applicant had for R3000. The two planned that on a specified evening, the applicant would leave the burglar gates open and that Bongani would then come in and do the job that the applicant wanted done. The plan happened, Bongani came in and Bongani shot the deceased. Carelse had not checked the applicant's bank records for any leads on the alleged payment to Bongani. Carelse did not know whether the statement that the applicant made was taken in accordance with the law. Carelse indicated that he, together with Captain Snyman at Lwandle SAPS and after discussion with the prosecutor it was decided not to oppose bail. After learning of the magistrate's questions the previous day, they decided that bail should be opposed.

[24] The reasons for the opposition was that the matter was a gender-based violence matter. The reaction of the community in Nomzamo, Lwandle to the offence raised the issue of the safety of the applicant. The applicant may commit suicide or his life may be in danger from the family of the deceased. Carelse considered the seriousness of the offence and especially having regard to what the accused said, if accepted, showed a premeditated murder. The applicant was a member of the SAPS, should have known better and according to Carelse that was aggravating.

[25] The challenges that the State was facing at the laboratories was one of the factors that the State had considered in not opposing bail. Carelse said that it normally took between three to four months to get a report. They were told that there was a chemical used at the lab which was not available and this resulted in delays in getting the reports. The applicant was charged with unlawful possession of a firearm and ammunition after it was discovered that there was interference with his authority to be in possession of a firearm. 8 Cartridges were found on the street. A projectile was found in the flat where the deceased was lying, and the firearm which the applicant handed over to the police had live rounds of ammunition in it. An empty magazine was found next to the deceased. The magazine found in the firearm was full. The applicant was tested for gunpowder residue and the results were still outstanding. Carelse was not aware of the relationship between the deceased and her family.

[26] Section 65(4) provides as follows:

"Appeal to superior court with regard to bail

65 (4) 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."

[27] A worrying practice is developing and increasingly becoming larger and greater over time in the magistrates courts, by persons represented in bail applications especially those as envisaged in section 60(11) of the CPA, which are serious crimes. For inexplicable reasons, these accused persons who are generally lay persons, in a written statement confirmed under oath or affirmation for use as evidence in court, suddenly assume the position of University professors who write a study guide for

magistrates, on section 60(4) of the CPA, simply regurgitating the provisions of sub-subsections (a) to (e). The applicant in this matter also did the same. Sometimes this unnecessary lecture covers the whole of section 60 from subsection 4. This practice should be nipped in the bud. There is a distinction between an affidavit in support of a bail application and heads of arguments submitted in such an application.

[28] The essentials of a bail application includes addressing the relevant offence if the applicant so elects, and such particulars as may be reasonably sufficient to satisfy the court, in this instance that the interests of justice permit the release of the applicant. The affidavit must be intended to result in that the court is fully informed of the facts. I understand section 60(11)(b) to mean that a bail application is an opportunity for an applicant to adduce evidence to meet the onus on such an applicant. In my understanding, the 'evidence' envisaged in section 60(11) for which a bail application is an opportunity to adduce, refers to the available body of facts and information which indicate that the proposition by an applicant that the interests of justice permit their release, is a valid and true proposition. The Legislature could not have intended that an applicant can simply repeat the findings which the Legislature set out for consideration., and not provide the facts upon which such findings could be made. Parroting the terms of section 60(4), without facts which have weight, did not establish any of those grounds [*Mathebula v S* 2010 (1) SACR 55 (SCA) at para 15].

[29] If a return is made to basics, the unique particulars of each case would crystallise which of the grounds would draw specific or general attention. The regurgitation of the law in the affidavit, generally serves no purpose. From the facts of the present application, section 60(4)(d) and (e) called for specific attention. No facts were placed before the magistrate which would found a conclusion of the grounds as envisaged in sub-subsections (a)-(c) of section 60(4). The speculative opinions of an investigating officer are not sufficient. It must be understood in the context that the central question was whether the accused will appear at the trial [*Hiemstra' s Criminal Procedure,* Issue 1, page 9-10 under the heading "Bail hearing and trial"].

[30] Section 60(4)(d) and (e) read:

"Bail application of accused in court

(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:
(d) where there is a likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system.
(e) where in exceptional circumstances there is a likelihood that the release of the accused will disturb the public order or undermine the public peace or security."

[31] There are issues around the authority for the applicant to use the state vehicle and the state issued firearm. The admissibility of the alleged statements made by the accused at the time of his arrest, against the background that they were made in what the State perceived to be a confession, is a disputed matter which is best left for the trial court. If the State case is correct, the execution of the deceased, which is what the community of Lwandle suspect and which according to Carelse caused some instability, the offence induced shock and the release of the accused on bail may undermine the public confidence in the criminal justice system. In my view, however, the public confidence may be jeopardized only on the eyes of those who do not understand court processes and hasten to pronounce themselves before they had an opportunity to read the judgments of our courts and the reasons provided for their decisions. The appellant elected to give a bare denial of the offence.

[32] In *Hiemstra* page 24-50, the following was said about section 217 of the CPA:
"Summarised briefly, section 217 means the following: the primary and indispensable requirement for the admission of a confession is that it be made freely and voluntarily by a person in sound and sober senses who was not unduly influenced into making it. If the confession was made to a peace officer (who is not a magistrate or justice), it is not admissible, irrespective of how freely it was made, unless it is confirmed and put in writing in the presence of a magistrate or justice."

[33] A peace officer includes any police official, in the definitions in section 1 of the CPA. Section 217 (1)(a) of the CPA provides:
"Admissibility of confession by accused
217 (1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be

admissible in evidence against such person at criminal proceedings relating to such offence: Provided:

(a) That a confession made to a peace officer, other than a magistrate or justice or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice;"

[34] Carelse's evidence suggests that in the applicant, the SAPS may be having a criminal, and a cold-blooded killer who executed his wife in the presence of their 5 month old child, in its blue uniform. The applicant's conduct around the authority to use the state vehicle and firearm at the time of the killing of his girlfriend, was sufficient to call an SAPS committed to deter and investigate crime, especially gender-based violence in our current context, to do more than just display a lackadaisical attitude to the investigation including preparation for a bail application. Carelse may be correct that a premeditated murder is suspect. But he should have led the investigation by example and sourced facts, and not depended on his explanations and opinions.

[35] The State did not provide any evidence to show that the police officer to whom the applicant made the statement, was the one envisaged in section 217(1)(a) of the CPA. In particular the State did not provide evidence that that police official was the one holding the rank which the Minister of Justice (Minister) had declared a peace officer for the purposes of conferring the power to have a confession made before them, as envisaged in section 334 of the CPA. Section 334(2)(b) provides that a power exercised contrary to the provisions of paragraph (a) shall have no legal force or effect. This includes the taking of a confession by a police official who does not hold a declared office or rank. Furthermore, section 217 (1)(a) of the CPA requires a confession made to a peace officer who is not declared by the Minister, to be confirmed and reduced to writing in the presence of a magistrate or justice. The evidence of Carelse is silent hereon. If the confession was made to an officer as envisaged in section 334 or was reduced to writing before a person holding an appropriate office as envisaged in section 217, this would have formed part of Carelse's evidence, as it was material to the alleged confession.

[36] There are serious doubts about the admissibility of the alleged confession. In the absence of the confession, the State case relied on circumstantial evidence. The industry of the SAPS and the prosecutor in this matter leaves much to be desired. It is not for this court to speculate whether it is laziness, inexperience or lack of training. Whatever its foundations, unless there is intervention by the respective superiors, this case is very typical of its kind and a classic and outstanding example of how our criminal justice system can fail victims of crime, especially women in gender-based violence if officials are not diligent. If the evidence of the deceased's friend is proved at trial, as part of the circumstantial evidence, the deceased may be found to have been executed in gender-based violence. The evidence of the friend on its own is not sufficient. In this bail application the State relied on a murky case with a dark and gloomy confession due to the failures of morally questionable functionaries which resulted in obscure facts of what happened.

[37] It will be a sad day if the case was deliberately dealt with in a clumsy and unskillful way simply because the applicant was one of those who served in the criminal justice system as a police official. It was only at the bail appeal stage that the state indicated that the applicant will be tried in the High Court and stood to be charged with 5 counts which were:
(a) Murder (read with section 51(1) of Act No. 105 of 1997. That is a premeditated murder.
(b) Contravention of section 3 of the Firearms Act, No. 60 of 2000 - unlawful possession of a firearm.
(c) Contravention of section 90 of the Firearms Act, No. 60 of 2000 – unlawful possession of ammunition.
(d) Fraud
(e) Defeating the ends of justice.

[38] There was no objection for the court being approached on appeal in a matter where, all things being equal, the State currently must know more than it did at the time of the bail application, which new information may have tilted the scales in favour of the strength of the State case. On the record of the bail proceedings, on the whole, the State case was subject to some serious doubt. The State case was not sufficient

to tilt the scales against the appellant's right to be presumed innocent. I understand *Mathebula* at para 12 to be referring to a weak and delicate case and not an uncertain State case. I was persuaded that the interests of justice permitted the release of the applicant on bail. The appellant established that the decision of the magistrate was wrong.

[39] For these reasons I made the order as follows:

1. The appellant is granted to bail in the amount of R10 000-00 on condition:
   1.1 He attends court on the next date and to any further date to which this matter is postponed and remain in attendance until excused by the court or dealt with in accordance with justice.
   1.2 He informs the Investigating Officer of his whereabouts at any stage that he has to leave the Cape Town Metropolitan Municipal area and also when he for any reason whatsoever changes his residential address.

DM THULARE
JUDGE OF THE HIGH COURT