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

CASE NO: A143/22

In the matter between

NCEBA DINGEZWENI APPELLANT

AND

THE STATE RESPONDENT

Date of Hearing: 12 September 2022
Date of Judgment: 05 October 2022 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

[1] This is an appeal against the decision of a magistrate to grant the appellant to bail. The appellant was charged with one count of murder and one count of attempted murder. The State alleged that the commission of the offences were premeditated.

[2] The issue is whether the magistrate was wrong to refuse bail.

[3] The applicant was a 39 year old and a sergeant in the South African Police Service (SAPS). He was in the SAPS since 2008 and was suspended arising out of the allegations which led to his arrest. Since 2019 he lived at the SAPS barracks, NY121 in Gugulethu. He had lived with his ex-wife, the deceased, at the barracks. His brother also lived in Makhaza, Khayelitsha and that was another available residence for him in Cape Town.

[4] He comes from Centani, a rural village outside Umthata in the Eastern Cape. He was left with the parental home in that rural village and keep sheep there looked after by a shepherd. There are other blood relatives living in the village. His brothers and sisters lived in the Western Cape. It is only his youngest daughter that is in the Eastern Cape. He had one child in his marriage but in total had five minor children who were still in school and which he supported. He had no fixed property in the Western Cape. He only has a vehicle. His child with the deceased was affected by his absence. He had no previous convictions and no pending cases or warrants. He had been in custody for three weeks before his bail application.

[5] He was arrested on 3 May at around 10 at night. He was sleeping at the barracks with a cousin who had come to visit him after hearing of the killing of his ex-wife. There was a knock at the locked door and a colleague, Captain Hendricks from Gugulethu was the one knocking and introduced himself. He opened the door and saw three people. Hendricks and Warrant Officer Jardim were in SAPS uniform. The third, who he did not know, was not in uniform but was also a coloured person who introduced himself as Captain Martin. Captain Martin arrested him for the murder of his ex-wife and the attempted murder of a male person. It was the first time that all three came to his room and he did not know who showed them his room. He co-operated fully with the investigating officer. He intended pleading not guilty. He did not want to testify about the merits of the case or to answer questions thereon.

[6] He used chronic medication for two medical conditions and although he still had some, he needed a top-up soon. It is medication he should use for the rest of his life and not using it may be life threatening and fatal. He did not have a passport and did not know the witnesses. He was aware that his ex-wife was killed at the residence of one of the witnesses. This he knew because after his ex-wife was killed, his ex-wife’s

brother called him and asked him to go there. The brother was at the scene and called and directed him to the scene. It was around 10am. He did not know the place and did not know the face of the witness. Whilst in custody, he met two people who he had arrested, both for murder. Whereas one understood that he was only doing his job, the other had to be restrained by other inmates when he tried to attack him. He complained to the correctional officials and was moved to a private section.

[7] In cross-examination it came to light that he told the investigating officer that he had only one child. His explanation was that it was because he was interviewed when he was still stressed and did not talk about his other children. He only referred to the one born in the marriage. It was also revealed that around 1999 and 2000 he was arrested for murder in the Eastern Cape, but the case was withdrawn. There were also pending cases of attempted murder and assault around 2014, which he said were withdrawn. He was not arrested but was given a date to appear in court in respect of the assault. In respect of the attempted murder, his service pistol was taken and was never returned back to him.

[8] He did not stay with his wife between 2011 and 2019 as they separated and in 2016 he divorced her. They reconnected in 2019 and started living together again in January 2020. They went together to the Eastern Cape for holidays just prior to her death as he was on leave. Whilst they were together in the Eastern Cape, he came across communication on her phone which indicated that she was cheating. When he confronted her, she left his home and escaped to her parental home. He came back alone from the Eastern Cape whilst she was still at her home. They communicated telephonically attempting to sort out the problem.

[9] They agreed and he sent her the money for her to travel to Cape Town. He sent the money on Saturday. She was to leave the Eastern Cape the Sunday and he expected her back with him on Monday. The Sunday late afternoon at around 6 she phoned indicating that they were in Queenstown. That was the last time that he spoke to her. She was to arrive around 4 or 5 the Monday morning. She did not arrive on Monday and when he called her, the phone took him to voicemail. He did not see her until he was called by her brother to come and see her after she was killed.

[10] The Monday morning he was called by one of his colleagues who told him that his ex-wife was at the police station and needed police assistance to go and collect her cellphone, ID, bank cards and other things. He was surprised because she had left the Eastern Cape but had not arrived back home. She had reported him to the police. He had not taken the things from her forcefully. She had left them with him when she left his home at the time that he questioned her about the whatsapp messages on her phone. She had used her mother's phone when they communicated thereafter. He had also used her mother's account when he sent her money to come back to Cape Town. That was on Saturday 30 April 2022. It was only on Monday 2 May that he heard that she was at the police station, around 12 during the day. Thereafter he received a call from her mother and later from his own brother, both requesting him to hand over her property back to her. He then agreed with his brother that his brother will come and fetch her property to hand over to her. He had taken these personal belongings of the deceased when he left his parental home and travelled with them back to Cape Town.

[11] He did not know the person who lived in the shack where his ex-wife was killed. He did not know what his ex-wife was doing in there. It was the first time that he saw the shack when he went there after he was directed to the scene. He was arrested on the 3rd of May in the evening. He had left the Eastern Cape the week before. He had left the Monday and arrived in Cape Town the Tuesday leading up to the end of April. For the whole of that last week he had been in communication with the deceased, who was using her mother's cellphone. It was during these conversations that they agreed that he would deposit money for her and he would use to travel back to him in Cape Town. He did not want to hand over her items when he was requested by his colleague at the police station after the deceased reported him. It was because he was shocked and surprised that she would do this to him after he had sent her money to come back to him, but later he handed them to his brother.

[12] Linda Dingezweni (Linda) was the cousin of the appellant who resided for the past 10 years at an address in Khayelitsha. Linda stayed with his mother and sister. Linda was willing to accommodate the appellant at his home for the duration of the case and would ensure that the appellant complied with any bail conditions which may be imposed. The deceased was at the police station on 2 May when she phoned Linda

and asked him to go and fetch her items from the appellant. She had also called Linda to come and collect some money from her. Linda went to the deceased in Nyanga and met her at Mom's Place where she was sitting and drinking with a friend.

[13] Sergeant Thozamile Ntabane has 17 years experience in the SAPS, is attached to the organized crime unit and is the investigating officer. The victim on the attempted murder charge was a male. The victim was in an intimate relationship with the appellant's ex-wife. On the morning of 3 May the victim and the girlfriend were in his shack. They had spent the night together. According to the victim, there was no longer a relationship between the appellant and the deceased. The deceased was in a relationship with the victim. Early that morning the victim took a bath, using a bathtub, as part of his preparation to go to work. After the bath, the victim opened the door of the shack, carrying the bathtub in order to throw away the bath water. He left the door to the shack open as he moved out. It was around 5H05am. The victim only had shorts on.

[14] As the victim walked further from the door to throw out the water, he saw the appellant approaching him. The appellant drew a firearm. The victim called the appellant by name and asked the appellant what he was doing. As the appellant pointed the firearm at the victim, the victim dropped the bathtub. The appellant started shooting at the victim. The victim ran away and jumped over a perimeter fence. The victim was hit twice on his left leg, once on the left arm and once on the right leg before he escaped. The victim knew the appellant as the former husband of the deceased. He also knew him as a police officer who he used to see patrolling in his area.

[15] The victim did not run far off as he became worried as to what was going to happen to his girlfriend, the appellant's ex-wife who was still in the shack. The victim heard several gunshots emanating from his shack, from where he had ran leaving the appellant with a firearm in his hand, and the appellant's ex-wife alone in the shack. Although Ntabane had not yet obtained a written statement, there was another witness to whom he had spoken, who was outside and heard the gunshots, who saw the appellant leaving the victim's yard after the gunshots from the shack that early morning. This witness resided in one of the three shacks in the same yard as the victim. In order to reach the gate, the appellant passed by this witness' shack. This

witness knew the appellant by name and that the appellant was a police officer working at Gugulethu Police station. In total there were three witnesses who saw and identified the appellant on the scene. There were no cartridges found on the scene.

[16] Ntabane's investigations had revealed that the deceased was no longer in a good intimate relationship with the appellant. The deceased's brother and the deceased's best friend informed Ntabane. Amongst others, the deceased had disclosed how on one occasion the appellant had pointed her with a firearm. The deceased however did not want to open a case or a protection order as the appellant was a police officer and it would according to her turn into a big issue. The deceased had received threats from the appellant, some of which were in writing using a phone. The deceased had forwarded some of these threats from the appellant to her own brother. This included in one instance, where the appellant mentioned killing her. In another instance the appellant sent a picture of a firearm and said that he was going to kill her. It was not a state issue official firearm picture that was sent. This picture was also shown to the deceased's brother. The deceased feared the appellant. The deceased's brother was also fearful. Both knew that the appellant had access to a firearm, from the messages sent by the appellant to them.

[17] Before the incident, the victim had received threats from the appellant. In the threats the appellant had said that he was looking for the victim. After the incident, whilst at the hospital and including contemporaneous with the bail application, the victim received threats. The threats were that he should not think that he had won, and that they were going to get him. From a private number, the victim was told that he must know that the appellant will win the case, get out and that they were going to kill the victim. The victim was told that because the appellant was in custody, he should not think that he was a free man, anything could happen to him and his life was not free at all. The victim fled and was no longer staying at the shack. The firearm that was used in the commission of the offence had not been recovered. The appellant, during his interview with Ntabane, wanted the identity of the witness who identified him, disclosed to him. When Ntabane asked him what he wanted to do therewith, the appellant said he will see about that once the name is disclosed.

[18] The investigation was almost complete. Ntabane was awaiting the photos of the scene, the post mortem report and arrangements for and in respect of affidavits by persons who wanted to provide statements but did not want to be named as they said that the appellant was dangerous. The appellant had two pending cases, the one for attempted murder and the other for assault common, which were with the Independent Police Investigative Directorate (IPID). In the attempted murder charge, the allegations against the appellant were that he had shot at his own colleague. It is this incident which led to the issue of the firearm to the appellant being withdrawn. He was provided with a bulletproof but not a firearm, at work.

[19] The allegations against the appellant, if proved, will establish that the appellant knew the victim and where the victim stayed. He went to the victim's residence. He knew about the affair between the victim and the deceased and that the deceased was there at the time. This explained why he shot at the victim and the deceased. This shooting happened after the appellant and the deceased had been in the Eastern Cape, where the appellant had spent some time during his annual leave. The investigating officer, however, had received reports of assault in which a hammer was mentioned, whilst the deceased and the appellant were in the Eastern Cape during that visit.

[20] The victim's identity is known and the threats indicated clearly that his life was in danger. The other witnesses were potentially available but feared for their lives, and they specifically feared the appellant. They were afraid to get involved in the matter as they feared the appellant. There was concern that the release of the appellant on bail would affect the ability of the investigating officer to obtain the co-operation of available witnesses and their availability to testify against the appellant. The release of the appellant on bail would influence the witnesses. Amongst these witnesses, was a witness who met the appellant at the time that the appellant walked to the victim's shack before the shooting, and to whom the appellant spoke. The appellant asked him what time it was and the witness was able to identify the appellant.

[21] The evidence of the identity of the appellant appears very strong. One witness met the appellant when the appellant was walking towards the shack. The appellant spoke to the witness and the witness recognized and identified the appellant. The

victim met the appellant, spoke to the appellant and identified the appellant before fleeing the scene. After the shots were fired in the shack where the appellant's ex-wife had spent the night with the victim, another witness saw the appellant walk away from the shack towards the gate of the yard. The evidence suggested that the witnesses were in close proximity to the appellant.

[22] From the available facts, the main issue between the State and the appellant would be identity. Section 65(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA) 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."

[23] Section 60(11)(a) of the CPA provides:

"Bail application of accused in court

60(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

(a) In Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release."

[24] The appellant had a constitutionally entrenched right to be presumed innocent, to remain silent and not to testify about the merits of the case in his bail application [section 35 of the Constitution of the Republic of South Africa, 1996 (Act No.108 of 1996) (the Constitution)]. These rights do not protect an applicant in the position of the appellant from an evidentiary burden which the appellant must discharge where the State adduced evidence that called for an answer. This is in circumstances where there is evidence upon which a court might find for the State. Such evidence placed an evidentiary onus on the appellant to refute the State case [*To speak or not to speak, that is the question: Does a prima facie evidence place an evidentiary burden on the*

accused to lead evidence? Mahlunbandile Ntontela, *De Rebus,* September 2022, pages 13 and 14].

[25] In *S v Boesak* 2001 (1) SA 912 (CC) at par 24 the Constitutional Court put it this way in the context of a trial:

"The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in *Osman and Another v Attorney general, Transvaal,* when he said the following:

'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.'"

[26] This approach was confirmed in *S v Thebus and Another* 2003 (2) SACR 319 (CC) at para 56. Again in the context of a trial it had been expressed as follows in *Scagell and Others v The Attorney General, Western Cape and Others* 1996 (2) SACR 579 (CC) at para 12:

"[12] It is well established in our law that, when an evidential burden is imposed upon an accused person, there needs to be evidence sufficient to give rise to a reasonable doubt to prevent conviction."

In a bail application like the present, where the evidence placed an evidential burden upon the applicant, and he did not answer with facts which if proved would refute, his failure is a factor to be considered in his overall duty to satisfy the court that exceptional circumstances exist which in the interests of justice permit his release.

[27] South Africa is steadily moving towards a standing amongst the most dangerous country in the world for women to live. Advocacy initiatives related to women's rights to highlight the vulnerability of women in the country have not made any serious

inroads into structural machismo which disrespects and are an existential threat to the women population. The strong and aggressive masculine pride, perceived as power which was often coupled with a minimal sense of responsibility and disregard of consequences, needs to be met at all fronts. The toxic machismo should be met from *isango*, ran after *ethafeni,* chopped *eziko,* bound *ebuhlanti,* exposed *kugumbi lokulala* and dug out *emasimini.* It must have no place to hide, including during bail proceedings.

[28] Oxymoronous narcissism, which thrives in appearing intelligent, smart and grandeur in public; but manipulative, abusive and dishonest in private; and claims of innocence, conspiracy and victimization when caught out to account and face consequences, should never have a place in our constitutional and democratic society. The evidence showed the strength of the State case against the appellant. There is a clear impression that his release would threaten the lives of the witnesses and their decisions to come forward and be willing to present their evidence to the courts. There is a likelihood that his release on bail would influence the witnesses and that he will intimidate them. The firearm used was never recovered and the risk that he will conceal or destroy other evidence is very real. In my view, there is also the likelihood that his release will endanger the safety of the witnesses and that he may commit a schedule 1 offence.

[29] Nothing placed before the court by the appellant made the State case subject to some serious doubt [*S v Mathebula* 2010 (1) SACR 55 (SCA) at para12]. All the factors and personal circumstances of the appellant, cumulatively, do not qualify, on a balance of probabilities, as exceptional circumstances. At best for the appellant, the evidence suggests a serious inability to perceive, control and evaluate his emotions. Whether that ability can be learned and strengthened, or it is an inborn characteristic which allow one to handle interpersonal relationships emphatically is one thing that our generation should research and understand as part of the strategy to camp gender-based violence and machismo. The interests of justice do not permit the release of the appellant on bail. The appellant did not establish that the decision of the Magistrate was wrong.

For these reasons I make the following order:

The bail appeal is dismissed.

DM THULARE

JUDGE OF THE HIGH COURT