

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

**Case number: A01/2023**

**Magistrate's Court case number: 4/770/2022**

In the matter between:

**EBRAHIM BARENDSE**

First appellant

**YUSUF BARENDSE**

Second appellant

and

**THE STATE**

Respondent

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**JUDGMENT DELIVERED ON 22 MAY 2023**

**VAN ZYL AJ:**

**Introduction**

1. The appellants formally applied for bail in the Wynberg Magistrate's Court.
2. At the time, the investigating officer deposed to an affidavit in which she opposed bail broadly on various grounds contained in section 60(4) of the Criminal Procedure Act 51 of 1977 ("the CPA"), including (1) that the appellants would commit further offences

were they to be released on bail; (2) they would intimidate witnesses if released on bail; (3) the public peace would be disturbed and the public would lose confidence in the criminal justice system were bail to be granted; and (4) the appellants' release would undermine the criminal justice and bail systems.

3. On 12 December 2022, the appellants' bail application was denied. They now appeal against the decision of the magistrate in terms of section 65(4) of the CPA.

### **The applicable legal principles**

#### **The appellants are charged with Schedule 6 offences**

4. The appellants stand accused of 13 counts including, *inter alia*, three counts of murder and three counts of attempted murder, alleged to have been premeditated or planned, and committed in the furtherance of a common purpose. The provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the so-called minimum sentence legislation) accordingly apply.

5. The offences were committed on 30 March 2022 at about 22:00. The appellants were arrested on 9 September 2022.

6. Section 60(11) of the CPA provides that: "*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.*"

7. Schedule 6 includes murder, when it was planned or premeditated, or where the offence was committed by a "*person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy*".

8. In the premises, it is common cause that the appellants have a burden to prove, on a balance of probabilities, that circumstances exist which permit their release in the interests of justice, and that such circumstances are exceptional.

9. A principle that requires particular focus in this appeal is that a bail application is not a trial. In *S v Branco*,<sup>1</sup> the Court held that a *“bail application is not a trial. The prosecution is not required to close every loophole at this stage of the proceedings.”*

10. In *S v Schietekat*<sup>2</sup> the Court held that bail proceedings are *“... sui generis. The application may be brought soon after arrest. At that stage all that may exist is a complaint which is still to be investigated. The State is thus not obliged in its turn to produce evidence in the true sense. It is not bound by the same formality. The court may take account of whatever information is placed before it in order to form what is essentially an opinion or value judgment of what an uncertain future holds. It must prognosticate. To do this it must necessarily have regard to whatever is put up by the State in order to decide whether the accused has discharged the onus of showing that 'exceptional circumstances exist which in the interests of justice permit his release'.”* [Emphasis added.]

11. What are exceptional circumstances? In *S v Petersen*<sup>3</sup> it was held as follows: *“Generally speaking “exceptional” is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference.”*

12. In *S v Mazibuko and another*,<sup>4</sup> it was held that: *“.. for the circumstance to qualify*

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<sup>1</sup> 2002 (1) SACR 531 (W) at 535 D-E.

<sup>2</sup> 1998 (2) SACR 707 (C) at 713 H-J.

<sup>3</sup> 2008 (2) SACR 355 (C) at para [55].

<sup>4</sup> 2010 (1) SACR 433 (KZP) at para [19]. See also *S v Scott-Crossley* 2007 (2) SACR 470 (SCA) at

*as sufficiently exceptional to justify the accused's release on bail it must be one which weighs exceptionally heavily in favour of the accused, thereby rendering the case for release on bail exceptionally strong or compelling."*

13. In *S v Josephs*<sup>5</sup> it was held: *"Showing 'exceptional circumstances' for the purposes of section 60(11) of the Criminal Procedure Act does not post a standard which would render it impossible for an unexceptional, but deserving Applicant to make out a case for bail."*

14. In the matter of *S v H*<sup>6</sup> it was held: *"... Exceptional circumstances must be circumstances which are not found in an ordinary bail application but pertain peculiarly ... to an accused person's specific application. What a Court is called upon to do so is to examine all the relevant considerations ... as a whole, in deciding whether an accused person has established something out of the ordinary or unusual which entitles him to relief under section 60(11)(a)."*

15. Against this background, how is an appeal court to approach the question of bail?

#### The appeal court's approach

16. Section 65(4) of the CPA provides in relation to bail appeals that *"[t]he 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*

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para [12]: *"As far as the appellant's personal circumstances are concerned, they are commonplace and not out of the ordinary — none of these factors constitutes exceptional circumstances."*

<sup>5</sup> 2001 (1) SACR at 659 (C) at 668I. The evidence against the applicant was purely circumstantial, and this was a factor which was taken in consideration by the Court in granting that applicant bail.

<sup>6</sup> 1999 (1) SACR 72 (W) at 77E–F.

should have given.”<sup>7</sup>

17. The interpretation of the section has often been the subject of deliberation. In *S v Barber*<sup>8</sup> the Court remarked as follows in the context of deciding an appeal in terms of section 65(4) of the CPA:

*“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.”* [Emphasis added.]

18. In *S v Porthen and others*,<sup>9</sup> this Court decided, with reference to *S v Botha*,<sup>10</sup> that the appeal court’s powers to consider an appeal against the refusal of bail in terms of section 65(4) of the CPA are not to be constrained by the decision in *Barber*. The appeal court is at liberty to consider its own analysis of the evidence in order to conclude whether an accused person has discharged the onus on him as set out in section 60(11)(a) of the CPA:

*“Insofar as the quoted dictum in S v Barber (supra) might be amenable to be construed to suggest that the appellate Court’s power to intervene in terms of s 65(4) of the CPA is strictly confined, in the sense of permitting interference only if the magistrate has misdirected him or herself in the exercise of his or her*

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<sup>7</sup> See *Mafe v S* [2022] ZAWCHC 108 (31 May 2022) at para [95].

<sup>8</sup> 1979 (4) SA 218 (D) at 220E–H.

<sup>9</sup> 2004 (2) SACR 242 (C) at paras [16]–[17].

<sup>10</sup> 2002 (1) SACR 222 (SCA).

discretion in the narrow sense, I consider that it would be incorrect to put such a construction on the subsection; certainly in respect of appeals arising from bail applications made in terms of s 60(11)(a) of the CPA. I am fortified in this conclusion by the manner in which the Supreme Court of Appeal dealt with the bail appeal in Botha's case *supra*. See paras [21] - [27] of the judgment.

It is clear that the Appeal Court undertook its own analysis of the evidence and came to its own conclusion that the appellants had not discharged the onus on them in terms of s 60(11)(a) of the CPA. ...Without in any way detracting from the courts' duty to respect and give effect to the clear legislative policy inherent in the provisions of s 60(11)(a) of the CPA (viz that save in exceptional circumstances it is in the public interest that persons charged with the class of particularly serious offences listed in Schedule 6 to the CPA should forfeit their personal freedom pending the determination of their guilt or innocence ...), it is still necessary to be mindful that a bail appeal, including one affected by the provisions of s 60(11)(a), goes to the question of deprivation of personal liberty. In my view, that consideration is a further factor confirming that s 65(4) of the CPA should be construed in a manner which does not unduly restrict the ambit of an appeal Court's competence to decide that the lower court's decision to refuse bail was 'wrong'. See s 39(2) of the Constitution of the Republic of South Africa Act 108 of 1996." [Emphasis added.]

19. Thus, even if the Court finds that the magistrate was wrong, the Court must then consider the facts before it afresh and determine whether the appellants have discharged the onus as set out in section 60(11)(a) of the CPA.

20. In *S v Petersen supra*<sup>11</sup> this Court confirmed the *Barber* approach as elaborated upon in *Porthen*: "In the *Porthen* case, however, Binns-Ward AJ ... expressed the view that interference on appeal was not confined to misdirection in the exercise of discretion in the narrow sense. The court hearing the appeal should be at liberty to undertake its

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<sup>11</sup> At para [62].

*own analysis of the evidence in considering whether the appellant has discharged the onus resting upon him or her in terms of section 60(11)(a) of the Act.”*

21. Another important aspect to consider is that there is no such thing as a perfect judgment. Merely because a certain aspect is not mentioned in a judgment does not necessarily mean that it was not considered. In *Director of Public Prosecutions: Limpopo v Molohe and another*<sup>12</sup> the Supreme Court of Appeal held that its “*function is not to seek to discover reasons adverse to the conclusions of the trial judge.... It is true that no judgment is perfect and all embracing, but it does not necessarily follow that, because certain aspects were not mentioned in the judgment, they were not considered.*”

#### The presumption of innocence

22. An aspect raised in the appellants’ heads of argument was that of the right to be presumed innocent. There has been much debate about whether this right plays any role in a bail application.

23. It is of course correct, as the appellants argue, that a bail appeal should be dealt with “*through the legal prism of the Constitution*”. As was stated in *Mafe v S supra*,<sup>13</sup> the Constitution “*does not take a leave of absence simply because the court is sitting with a bail application*”. That does not, however, detract from the fact that bail applications are *sui generis*, and are determined in a particular legislative context – constitutionally sanctioned.

24. In *S v Mbaleki and another*<sup>14</sup> the Court remarked as follows: “*I need however to also deal with the perception out there that the presumption of innocence had a role to play at the consideration of bail. In S v Dlamini, S v Dladla and Others, our*

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<sup>12</sup> 2020 (2) SACR 343 (SCA) at para [55], confirming *R v Dhlumayo* 1948 (2) SA 677 (A) at 706.

<sup>13</sup> At para [113].

<sup>14</sup> 2013 (1) SACR 165 (KZD) at para [14].

*Constitutional Court unanimously decided that the right to be presumed innocent is not a pre-trial right but a trial right. This has also been understood by the learned Magistrate.”*

25. In a judgment of this Division in the matter of *Conradie v S*<sup>15</sup> the Court followed suit:

*“The appellant’s counsel also argued that the magistrate had failed to have sufficient regard in her evaluation of the evidence to presumption of innocence. In this regard counsel emphasised that the remark by Steyn J in S v Mbaleki and Another 2013 (1) SACR 165 (KZD) in para 14 that the Constitutional Court had decided in Dlamini supra, that ‘the right to be presumed innocent is not a pre-trial right but a trial right’ found no support in the text of the Dlamini judgment. It appears to be correct that the Constitutional Court did not express itself in those terms. It is clear, however, that the Court considered that the provision of the Constitution most pertinent to its treatment of bail applications affected by s 60(11) of the Criminal Procedure Act was 35(1)(f), which provides that ‘Everyone who is arrested for allegedly committing an offence has the right - ... to be released from detention if the interests of justice permit subject to reasonable conditions’. That is a qualified liberty right, not a fair trial right. The presumption of innocence is indeed a peculiarly trial-related right as evidenced by its entrenchment as one of the fair trial rights listed in s 35(3) of the Constitution. I therefore agree with Steyn J’s stated view that the presumption of innocence does not play an operative role in bail applications.*

*A court seized of a bail application fulfils a very different function from a trial court. Its role is not to determine the guilt or innocence of the accused person. The bail court’s concern with the interests of justice, in the sense of weighing in the balance ‘the liberty interest of the accused and the interests of society in denying the accused bail’, will however in most cases entail that it will have to*

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<sup>15</sup> [2020] ZAWCHC 177 (11 December 2020) at paras [19]-[20].



weigh, as best it can, the strengths or weaknesses of the state's case against the applicant for bail. A presumption in favour of the bail applicant's innocence plays no part in that exercise. The court will, of course, nevertheless bear in mind the incidence of the onus in making any such assessment." [Emphasis added.]

26. In *Mafe v S supra*<sup>16</sup> the Honourable Justice Lekhuleni said the following regarding the presumption of innocence:

"In summary, the presumption of innocence is one of the factors that must be considered together with the strength of the State's case. However, this right does not automatically entitle an accused person to be released on bail. What is expected is that in Schedule 6 offences the accused must be given an opportunity, in terms of section 60(11)(a), to present evidence to prove that there are exceptional circumstances which, in the interests of justice, permit his release. The State, on the other hand, must show that, notwithstanding the accused's presumption of innocence, it has a prima facie case against the accused. In reaching a value judgment in bail applications, the court must weigh up the liberty interest of an accused person, who is presumed innocent, against the legitimate interests of society. In doing so, the court must not over-emphasise this right at the expense of the interests of society." [Emphasis added.]

27. What is apparent is that, if the right is found to apply, it does not automatically entitle an applicant for bail to be released. The presumption of innocence is merely one factor that must be considered, and must be considered in the context that it does not relieve the appellants of the burden to prove exceptional circumstances that would permit their release on bail. The right must also be considered in conjunction with the strength of the State's evidence. In the case of a Schedule 6 offence, as in the present matter, the norm is that applicants must remain in custody until they show exceptional circumstances. If the right to be presumed innocent was overarching it would mean that every bail applicant had to be released on the basis that he or she was presumed

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<sup>16</sup> At para [143] (in a dissenting judgment).

innocent. That could not have been the intention of the legislature.

### **The grounds of appeal relied upon by the appellants**

28. The appellants rely on seven grounds of appeal in their notice of appeal:

(a) Ground 1 is that the magistrate erred by not finding exceptional circumstances despite none of the grounds in section 60(4)(a) to (e) of the CPA being present. This ground is elaborated upon by way of the following averments:

- no evidence was led to establish a likelihood that the appellants would commit a Schedule 1 offence (section 60(4)(a));
- no evidence was led to establish a likelihood that the appellants would evade their trial if released (section 60(4)(b));
- no evidence was led to establish a likelihood that the appellants would interfere with witnesses or evidence (section 60(4)(c)); and
- no evidence was led to establish that the release of the appellants would disturb the public order or undermine public peace or security (section 60(4)(e)).

29. Ground 2 is that the magistrate erred in finding that the appellants interfered with State witnesses.

30. Ground 3 is that the magistrate erred in not regarding the appellants' alibis as constituting "exceptional circumstances".

31. Ground 4 is that the magistrate erred in refusing bail based on the seriousness of the charges, in other words, the magistrate over-emphasised the seriousness of the offence. The magistrate in essence ordered the appellants' continued detention as a

form of anticipatory punishment.

32. Ground 5 is that the magistrate did not consider that the incident occurred late at night, that the State's case relies on a single eye-witness, and that the appellants presented alibis.

33. Ground 6 is that the magistrate did not consider that the appellants were arrested five months after the incident had occurred and that, during that time, no State witnesses had been interfered with or threatened.

34. Lastly, ground 7 is that the magistrate erred by holding that the appellants had interfered with witnesses when affidavits were taken from witnesses at the "office of the Public Protector".

35. The magistrate was therefore wrong in refusing bail.

36. These grounds are discussed below. From the perspective of the decision in *Porthen supra*, the decision of the magistrate to refuse bail ought to be evaluated in the broader sense, meaning that this Court need not examine the content of the judgment under a microscope to look for errors, but that it should rather look at the decision to refuse and then look at the evidence itself holistically to determine whether the refusal was correct or not.

**Ground 1: the magistrate erred by not finding exceptional circumstances despite none of the grounds in section 60(4)(a) to (e) being present**

37. At first blush, the first ground of appeal conveys the impression that no evidence was led which could have resulted in a finding that any of the likelihoods in section 60(4) of the CPA were present. The appellants make specific reference in their grounds of appeal to section 60(4)(a), (b), (c), and (e) of the CPA.

38. The appellants do not contend, however, that there was no evidence led that would result in a finding that the ground in section 60(4)(d) was present. Section 60(4)(d) provides for “*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.*”

39. Section 60(4)(d) must be read with section 60(8) of the CPA, in particular (for present purposes) section 60(8)(a), which reads: “*the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings.*”

40. Both appellants raise, in their affidavits delivered in support of their applications for bail, complaints regarding the conditions of their detention at Pollsmoor Prison. Their complaints are framed in the same terms and comprise the following:

- (a) Their bodies are riddled with insect bites causing a lack of sleep.
- (b) There is a rat infestation in the prison.
- (c) The State is not doing enough to improve the conditions.
- (d) They are in a prison cell built for 30 inmates, but which houses double the number of inmates. There are 30 beds in the cell, with each single bed being shared by two inmates. On certain nights, they are forced to sleep on the floor.
- (e) There is only one shower for use by all of the inmates in the cell.
- (f) These conditions violate the appellants’ constitutional right in terms of section 35(2)(e) of the Constitution.

41. In response to these allegations, the investigating officer visited Pollsmoor Prison

and consulted with three correctional services officers, namely Mr Francois Ritter, Mr Clint Elders and Mr Anele Eric Mpete. The investigating officer has set out the content of her consultations with the three officers in her affidavit opposing the grant of bail.

42. As appears from the affidavit, Mr Ritter was responsible for the well-being of the appellants from the date of their admission into Pollsmoor Prison on 12 September 2022 at D-Section, to 1 October 2022 when they were moved to G-Section, overseen by Mr Elders. Mr Mpete is the Unit Manager of G-Section. At both of the sections registers are kept of complaints made, and the investigating officer made copies of the respective registers which were attached to her opposing affidavit. A perusal of the register shows that neither appellant complained about any of the issues raised in their affidavits to the relevant prison officials. Moreover, a co-accused (Mr Amardien) who was kept in the same prison cell as the appellants in G-Section, raised no complaints echoing those of the appellants.

43. It appears that the appellants' allegations as regards the prison conditions were not correct, as the true position is as follows in the G-Section where they are detained:

- (a) there is no rat infestation at the prison;
- (b) none of the appellants complained to the supervisors about anything;
- (c) their cell at G-Section can house 50 inmates;
- (d) there were never more than 32 inmates in the appellants' cell at G-Section;
- (e) their cell has 50 beds for 50 inmates; and
- (f) their cell has four showers.

44. The appellants, in order to bolster their bail application and in the words of section 60(8)(a) of the CPA, knowingly supplied false information during the bail proceedings. It was an unfortunate decision to do so, as there are various authorities regarding whether prison conditions can constitute exceptional circumstances.

45. In *S v Van Wyk*,<sup>17</sup> for example, it was held as follows:

*“Die appellant het in sy getuienis gekla dat sy aanhoudingstoestande ongunstig was vir konsultasie met sy regsadviseurs en die verkryging van getuienis. Hy het besonderlik gekla oor die verslegting van sy gesondheid sedert sy opsluiting. Mediese getuienis het aangetoon dat die appellant aan ‘n diabetiese toestand en hoë bloeddruk ly waarvoor hy medikasie en ‘n spesiale dieet benodig. Die appellant beweer dat by geleentheid het hy nie sy medikasie ontvang nie en by ander geleenthede het hy nie sy maaltye ontvang nie. Die gevangenisbeamptes wat getuienis afgelê het, het die teenoorgestelde beweer. Die waarheid lê moontlik iewers in die middel. Hoe dit ook al sy, insoverre as wat die appellant nie behoorlike aandag in bewaring ontvang nie, het hy ander regsmiddels tot sy beskikking en is borg in die algemeen nie die remedie vir die vergrype en versuime van die gevangenisowerhede nie.” [Emphasis added.]*

46. In *Solomons v S*,<sup>18</sup> this Court held that: *“I do not believe much can be made of the conditions of detention in a case such as the present one. Whilst unsatisfactory, I believe that the State is correct in its argument that the conditions of detention is really a separate issue which needs addressed through the Office of the Inspecting Judge or some other process. Such conditions cannot in my view constitute exceptional circumstances justifying the release of the Applicant.”*

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<sup>17</sup> 2005 (1) SACR 41 (SCA) at para [9].

<sup>18</sup> [2019] 2 All SA 833 (WCC) at para [30]. See also *Lin and another v S* 2021 (2) SACR 505 (WCC) at para [73]: *“...bail in general is not a remedy to the failures of prison authorities to detain inmates in conditions consistent with human dignity.”*

47. I agree with the submission made by counsel for the State that deplorable prison conditions do not constitute exceptional circumstances for the purposes of the grant of bail. This is so for obvious reasons: if bail was the appropriate remedy, every single accused person would be entitled to be released on bail based on the conditions prevailing in prisons.

48. Turning to the rest of the submissions made in the notice of appeal under ground 1, counsel for the State points out that the State never opposed bail on the basis that the appellants would evade trial (section 60(4)(b) of the CPA) or that they would commit, specifically, a Schedule 1 offence if released (section 60(4)(a) of the CPA). It is therefore not surprising that no evidence was led in this regard.

49. Counsel for the State submitted that it is, however, incorrect to state that no evidence was led regarding a *“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”* as contemplated in section 60(4)(c) of the CPA. It is also incorrect to argue that no evidence was led regarding *“the likelihood that the release of the accused will disturb the public order or undermine the public peace or security”* as contemplated in section 60(4)(e) of the CPA. This is because the investigating officer’s affidavit sets out sufficient evidence upon which a finding could be made that a likelihood had been established that there would be an attempt to influence or intimidate witnesses.

50. As regards section 60(4)(e), the State submits that sufficient evidence was led in order to establish the likelihood that the public order would be disturbed if the appellants were to be released on bail. Section 60(4)(e) must be read with section 60(8A) of the CPA:

*“In considering whether the ground in subsection (4)(e) has been established, the court may, where applicable, take into account the following factors, namely-*

(a) *whether the nature of the offence or the circumstances under which the*

*offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;*

*(b) whether the shock or outrage of the community might lead to public disorder if the accused is released;*

*(c) whether the safety of the accused might be jeopardized by his or her release;*

*(d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;*

*(e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or*

*(f) any other factor which in the opinion of the court should be taken into account.”*

51. The investigating officer explained in her affidavit that the incident from which the charges against the appellants arise occurred in an informal settlement (known as Victoria Lodge), where the community members live, so it seems from information received, in fear of the appellants and their father. The nature of the crimes – a triple murder, amongst other charges - induced a sense of shock and sent fear into the community. The community were, however, too afraid to sign a petition indicating their opposition to the appellants being released on bail.

52. A reading of the first ground raised in the notice of appeal is also gives the impression that the magistrate ought to have found exceptional circumstances due to the fact that the grounds in section 60(4)(a), (b), (c) and (e) had not been established. This ground is misplaced as the magistrate did find likelihoods present in terms of section 60(4)(c) and (e).



**Grounds 2, 6, and 7: the magistrate erred in finding that the appellants interfered with State witnesses (ground 2); the magistrate did not consider that the appellants were arrested five months after the incident had occurred and that, during that time, no State witnesses had been interfered with or threatened (ground 6); and the magistrate erred in holding that the appellants had interfered with witnesses when affidavits were taken at the office of the Public Protector (ground 7)**

53. These grounds are dealt with together, as they cover the same subject matter, namely the possible interference with witnesses.

54. Section 60(4)(c) of the CPA provides that one of the factors to be taken into account in the grant or refusal of bail is whether *“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.”*

55. Section 60(4)(c) must be read with section 60(7):

*“In considering whether the ground in subsection (4) (c) has been established, the court may, where applicable, take into account the following factors, namely-*

*(a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;*

*(b) whether the witnesses have already made statements and agreed to testify;*

*(c) whether the investigation against the accused has already been completed;*

*(d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;*

*(e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;*

*(f) whether the accused has access to evidentiary material which is to be presented at his or her trial;*

*(g) the ease with which evidentiary material could be concealed or destroyed; or*

*(h) any other factor which in the opinion of the court should be taken into account.”*

56. In the present matter, the appellants and their father know the identity of the witnesses. Their father knew which witnesses to take to Adv. Adams (purportedly at the Public Prosecutor’s office) in order for him to take statements from them, casting aspersions on the investigating officer. That the appellants know the witnesses appears from the affidavit of the investigating officer: she states that it appears from witness accounts that the appellants regularly visit the informal settlement, and that they also often take, without consent, cement, stones and paving material for their father’s business. Neither of the appellants in their affidavits denies knowing the witnesses – obviously so, as they obtained affidavits from those witnesses. The appellants’ father has since been arrested on charges of influencing and intimidating the witnesses after they had made statements to the police.

57. The State argues that bail conditions will be unenforceable as the witnesses all reside in an informal settlement where they are essentially without protection. The appellants live close to the witnesses, and would have easy access to them even through intermediaries, as has already been proven by their father’s conduct. I agree

with this contention. It appears from the evidence on record that the appellants' father is feared in the community. The fact that he is himself in custody following the interference with the witnesses is cold comfort to witnesses. He evidently has influence in the community.

58. Ground 2 states that the magistrate made an error when he held that the appellants interfered with the State witnesses. The magistrate stated in his judgment that *"2 and 3 [referring to the appellants] have, directly or indirectly, messed with state witnesses."*

59. Ironically, the appellants attached the statements of State witnesses (obtained by their father) to their applications in support of bail. They were therefore aware of the fact that those witnesses had been approached by their father, and taken to a lawyer (an Adv. Adams, purportedly employed at the Public Protector's office) to provide affidavits supposedly contradicting their witness statements previously made to the police. This is what the magistrate found to be untoward: that applicants for bail, where the safety of the witnesses must be considered, could attach affidavits from State witnesses in support of their bail applications. As indicated, the obtaining of those statements has led to charges against the appellants' father relating to the intimidation and interference of the State witnesses.

60. The appellants argue that no allegations of intimidation are levelled against either of them by the investigating officer. They are also not charged with the alleged intimidation of witnesses, and there is no allegation that any alleged act of intimidation can be attributed to them. Accordingly, there is no evidence that the appellants threatened any witnesses.

61. A consideration of the content of the statements taken as well as the surrounding circumstances indicates that the appellants' father is not an accused on the charges that the appellants are facing. His conduct was therefore aimed solely at attempting to do whatever he could to derail the prosecution of his sons. It is a logical conclusion that

this was done for the benefit of the appellants, and not for himself. I agree with the submission made by counsel for the State that interference with witnesses on the appellants' behalf by a family member as close as their father is as good as interference by the appellants themselves.

62. In these circumstances, the appellants have *“directly or indirectly messed with the State witnesses”*, in the words of the magistrate. In *S v Dlamini, Dladla, Joubert, Schietekat*<sup>19</sup> the Constitutional Court held that: *“...The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails, in the main, protecting the investigation and prosecution of the case against hindrance.”*

63. As indicated, the test at bail stage in terms of section 60(4)(c) is whether there is a likelihood that, if the appellants were released, that they would attempt to influence or intimidate witnesses. The Court merely needs to look at whether an attempt would be made to influence or intimidate. On the facts of the present matter, the witnesses have already been influenced and intimidated. I accordingly agree with the submission made by counsel for the State that there is a likelihood that the witnesses would again be influenced or intimidated if the appellants were to be released. The situation is aggravated by the fact that their father, too, is in custody, and would also benefit from the interference with witnesses. If the appellants are to be released on bail, then the main aim of *“protecting the investigation and prosecution of the case against hindrance”* would be defeated.

64. As to ground 6, it is correct that no State witnesses were interfered with from the date of the incident until the date of the appellants' arrest. There would be no reason for witnesses to be threatened if they did not identify any perpetrators. The investigating officer states in her affidavit that from the date of incident in March 2022, nobody came forward to identify the perpetrators until months later. When an identifying witness came forward, it was made known to the investigating officer that the witness was afraid of

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<sup>19</sup> 1999 (2) SACR 51 (CC) at para [11].

being killed. After the witness had come forward and provided a witness statement identifying all of the perpetrators, the witness' life was threatened.

65. The appellants were arrested on 8 September 2022. They appeared in Court for the first time on 12 September 2022, where the State informed the Court of its intention to oppose the release of all of the accused on bail. On 20 September 2022, the matter was postponed until 13 October 2022 for the opposed bail application to commence. This is where the attempts made by the appellants' father become obvious. His affidavit in support of the grant of bail is dated 26 October 2022, and attached various affidavits from witnesses. The affidavits of State witnesses, Mr Nadeem Pather and Ms Natasha De La Cruz, as well as Ms Delshae De La Cruz (who is not a State witness) are all dated 11 October 2022. The affidavit of Mathew Grace, who is also a State witness, is dated 23 October 2022.

66. This means that two days before the bail application was meant to commence on 13 October 2022, three affidavits were obtained from two State witnesses as well as one non-State witness. When the matter was postponed to 27 October 2022, another affidavit from a State witness was obtained on 23 October 2022. In other words, once the State had indicated its intention to oppose bail, the appellant's father made an effort to locate and interfere with State witnesses.

67. The appellants' father states in his affidavit in support of bail: *"After my son's (sic) arrest, I was approached by members of the community who informed me of their interactions with detective Jones from the Anti-Gang Unit, who is the investigating officer of the case. I was informed that there were approached by the detective to make false statements against myself and my sons implicating us in the murder docket she is investigating"*.

68. None of the affidavits that were obtained from the witnesses by the appellants' father are, however, from witnesses who identify the accused as the perpetrators.

69. The investigating officer sets out the different versions of the State witnesses, and her interactions with them, in her affidavit.

70. The affidavit of Nadeem Pather (obtained by the appellants' father) mentions that the investigating officer arrested him on 27 April 2022 at approximately 12:00 while he was working. She allegedly took him to the Diep River SAPS and threatened him to make a false statement implicating Mr Moegsien Barendse and his two sons in the shooting incident on 30 March 2022. He states further that he refused to give a statement to her as he was not willing to implicate Mr Barendse and the appellants. Mr Pather says that he was released on 28 April 2022. The investigating officer denies these allegations. Mr Pather also said that the investigating officer told him to stay in Wynberg for his own safety – this part, according to her, is true.

71. According to the investigating officer, information obtained indicated that Mr Pather could possibly have been involved in the commission of the offences. He was thus arrested on three murder charges on 25 May 2022. He was released on 26 May 2022 due to there having been insufficient evidence against him. According to the investigating officer's statement, Mr Pather said that he had not seen who the shooters were.

72. In Natasha De la Cruz's affidavit obtained by the appellants' father, she states that on 24 May 2022, the investigating officer approached her while she was in Worcester, and told her to accompany her (the investigating officer) and a colleague for a drive. She alleges that the investigating officer then took her to the Worcester SAPS and told her that if she did not talk, she would be locked up. When she allegedly told the investigating officer that she knew nothing, she was transported to Blue Downs Police Station. At their arrival there on 24 May 2022, the investigating officer gave her a page saying that she was charged with a triple murder. She states that she was kept at the Blue Downs SAPS for three days until 27 May 2022 without appearing in Court.

73. The investigating officer allegedly told her that she had to make a false statement

implicating Moegsien Barendse, to the effect that he was the shooter, and that she (the investigating officer) would then let Ms De la Cruz go. Ms De la Cruz refused to do so and said that she would be lying by saying that Mr Barendse and his two sons were the shooters. She states further that the investigating officer tied a black bag over her head and threw water over the bag while she was detained. On 27 May 2022, the investigating officer allegedly took her from the Blue Downs Police Station and dropped her at the BP Garage in Grassy Park. She had spent 72 hours in police custody.

74. In answer to this, the investigating officer confirms that she took Ms De la Cruz into custody in Worcester and transported her to the Mfuleni police station, which is next to the Blue Downs Magistrate's Court. At that stage, Ms De la Cruz was rude and aggressive, and refused to be interviewed. She was, as appears from the documents filed of record, charged with three counts of murder on the basis of information received that she might have been involved in the incident. The investigating officer states that she detained Ms De la Cruz at the Mfuleni police station from 8 June 2022 until 9 June 2022. After Ms De la Cruz was booked out of the Mfuleni police station, she was taken to the Anti-Gang Unit based in Eerste Rivier, where she was asked whether she was willing to co-operate. She was calmer than she previously had been, and agreed to speak to the investigating officer.

75. After questioning Ms De la Cruz, the investigating officer was satisfied that she had not been involved in the shooting incident, as alleged, and released her from detention on 9 June 2022. Ms De la Cruz told the investigating officer that she had fled to Worcester out of fear for the appellants' father. She does not, however, implicate the appellants or their father in the commission of the crime.

76. Mr Matthew Grace alleged in his affidavit obtained by Mr Barendse that the investigating officer picked him up on 12 or 13 September 2022 and took him to the Grassy Park Civic Centre, where they were alone. According to the affidavit, the purpose of meeting with him was to redo his initial statement, as it had allegedly been taken down incorrectly. He said that he had not witnessed the shootings but

was able to describe the shooter from his house. He alleged that the investigating officer threatened him to make a false statement implicating the appellants in the murders, which he refused to do. He was however forced to sign a document without having had a chance to read it.

77. The investigating officer, in her affidavit, states that the correct position is that the family of the deceased informed her that Mr Grace had informed them that he knew who the people were who had shot the three deceased. As a result of that information, the investigating office collected Mr Grace on 5 August 2022 at the Victoria Lodge informal settlement. One Warrant Officer Kleinbooï, in the meantime, had also collected the family members of the deceased and they all went to the Grassy Park Civic Centre. They did not go to the Grassy Park SAPS because Mr Grace did not feel comfortable going there, as he alleged that Mr Barendse had certain police officers on his payroll.

78. The reason why Warrant Officer Kleinbooï had picked up the family members of the deceased was because Mr Grace denied that he had told the families that he knew who was responsible for the shootings. When Mr Grace was confronted by the family members about this, he denied that he had said anything to them about who was responsible for the shootings. This resulted in Mr Grace and the family members becoming embroiled in an argument.

79. Thereafter, the investigating officer sat in her vehicle with Mr Grace, with the intention of going through his witness statement filed in the police docket which was taken down on 1 March 2022 by a member of the Diep River SAPS. During the interview, Mr Grace gave the investigating officer conflicting accounts regarding what had happened, which differed from his original witness statement. The investigating officer stated that she did not take any further statements from Mr Grace as she did not know which version *"to follow."* According to the investigating officer, in any event, Mr Grace has never implicated the appellants in the shootings.



80. Although these persons are State witnesses, they do not in their initial police statements identify the appellants as the gunmen. Ms Delshae De La Cruz has not provided the police with any statement at all because she said that she was too afraid of the appellants' father. It therefore makes no sense that, as the appellants ask this Court to believe, the witnesses were forced and threatened by the investigating officer to give statements implicating the appellants when the witnesses clearly do not identify the appellants as the responsible gunmen.

81. The appellants argue that there is no evidence that prior to their arrest, and, since their arrest, witnesses were threatened by them.

82. They point out that it is unclear from the investigating officer's affidavit whether any of the witnesses have been placed in witness protection, which would be an option in the event of the State fearing for lives of witnesses. Again, the appellants argue that they are not the ones who allegedly threatened the witnesses – it seems that their father did. They argue, therefore, that the State failed to establish the likelihood that the appellants would influence and intimidate witnesses. I disagree, for the reasons already discussed earlier.

83. It is common cause that the State does not aver that the appellants are flight risks. At the bail hearing, both the appellants undertook not to interfere with any witnesses, not to interfere with the investigation; not to destroy any evidence, and to adhere to any bail conditions imposed.

84. I do not regard this as sufficient for the purposes of section 60(11) of the CPA. Firstly, the fact that the appellants repeat the content of the provisions of section 60(4) does not assist them in establishing exceptional circumstances. Second, the circumstances in which the affidavits in support of their bail applications were obtained are unsatisfactory, for the reasons set out above.

85. In these circumstances, I agree with the argument on behalf of the State that the

fact that a few months went by after the incident in which none of the witnesses were interfered with, does not constitute “exceptional circumstances” as contemplated in section 60(11) of the CPA.

86. The content of ground 7 has effectively been dealt with in the discussion in respect of ground 2. The State points out that the formulation of ground 7 is, however, not an accurate reflection of the record. None of the affidavits taken by Adv. Adams from the State witnesses were commissioned in Cape Town. They were all commissioned in Grassy Park, where the Public Protector does not have any offices. Although Adv. Adams in his own affidavit states that he is employed by the Public Protector, he does not state that he acted in his official capacity, or that he was tasked by the Office of the Public Protector to investigate any complaint. Nowhere does he mention that he acted in terms of section 7 of the Public Protector Act 23 of 1994, or that he, in terms of section 9, offered the person affected by his investigation an opportunity to respond to the outcome of his investigation. He does not state that he has published any report open to the public in terms of section 8(2A) of the Act.

87. His involvement in the matter was therefore not as a result of an investigation conducted by the Public Protector. They were not deposed to at any office of the Public Protector. The affidavit of the appellants’ father states that he was responsible for arranging that the affidavits be drafted and commissioned. His affidavit, too, is commissioned by Adv. Adams. Both appellants attempt to make use of these affidavits to their advantage to be released on bail. In my view, the magistrate was correct in his approach to the matter.

88. An argument raised in the heads of argument delivered on the appellant’s behalf is based on the decision in *S v Stanfield*<sup>20</sup> They argue that a burden is placed on the State to adduce evidence to establish the likelihoods listed in section 60(4)(a) to (e) of the CPA. In support of this contention, reference is also made to the decision of *S v*

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<sup>20</sup> 1997 (1) SACR 221 (C).

89. The *Stanfield* decision, and its applicability in the current legislative context of bail applications, was discussed in *Conradie v S supra*.<sup>22</sup> I set it out in full because it is a judgment of this Court, to which I am bound if it is applicable to the present matter:

*“[15] The appellant’s counsel argued, with reference to .... S v Stanfield 1997 (1) SACR 221 (C), that the magistrate had erred in overlooking that the state had not established any of the grounds set forth in s 60(4) of the Criminal Procedure Act. In Stanfield, the learned judge held that ‘only if a court is satisfied that any of the four grounds set forth in sub-sec 60(4)[7] has been established as a probability, is a finding justified that the continued detention of the accused is in the interests of justice’.*

*[16] The judgment in Stanfield has, at least as far as my researches have found, not been referred to or relied on in any reported judgment for more than 12 years. This is understandable, not because there was any flaw in the judgment, but rather on account of the significant changes effected to the applicable legislation in the period after September 1996 when Stanfield was decided, including to both sub-secs 60(4) and 60(11). As far as its application in the circumstances of the current case is concerned, it also bears mention that the case in Stanfield was in any event concerned with a bail appeal by a person charged with a Schedule 5 offence, whereas the appellant faces a charge on a Schedule 6 offence. The bar for obtaining bail in the latter circumstances has always been higher than in the former.*

*[17] The approach enunciated in Stanfield has been overtaken by the legislative amendments and the Constitutional Court’s judgment in Dlamini supra, which, as pointed out earlier in this judgment, recorded that the effect of s 60(11), as*

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<sup>21</sup> 1998 (2) SACR 259 (C) at 269 E–F.

<sup>22</sup> At paras [15]–[18].

substituted by s 4(f) of the Criminal Procedure Second Amendment Act 85 of 1997 (with effect from 1 August 1998), is that sub-secs 60(4) to (9) have to be applied differently. The signal difference is the obligation placed on the applicant for bail to show exceptional circumstances justifying a departure from the legislative determination that continued detention should be the norm for persons charged with Schedule 6 offences. A court's evaluation of the facts with regard to the considerations in sub-secs 60(4) to (9) is required to be undertaken in accordance with the aforementioned statutory precept.

[18] The basis for the criticism directed by the learned judge in *Stanfield's* case at the magistrate's failure in that matter to have adequate regard to the state's failure to establish any of the considerations listed in s 60(4) just does not arise in the materially different circumstances of the current matter. On the contrary, the indications in the magistrate's judgment are that she adjudicated the bail application acutely conscious that the appellant had to satisfy the court of exceptional circumstances why it would be in the interests of justice that he be released on bail. It perhaps bears reiterating in that regard that the appeal court held in *S v Botha en 'n Ander ... 2002 (1) SACR 222 (SCA)* at para 18 that a mere denial by an applicant for bail affected by s 60(11)(a) of the probability of any of the considerations in s 60(4)(a) to (e) pertaining would be insufficient to show exceptional circumstances. More is required; the applicant is required to adduce convincing factual evidence to support any contention by him or her that the considerations do not apply in the circumstances." [Emphasis added.]

90. It is clear from *Conradie* that *Stanfield* is no longer applicable because it has been overtaken by the legislative amendments referred to in the former judgment. Apart from what is set out in *Conradie*, *Stanfield* is distinguishable from the present matter because it concerned a bail appeal based on a Schedule 5 offence. It dealt with a charge of dealing in drugs and not multiple murders, and the issue in *Stanfield* was whether the applicant would commit a further offence. It follows that the appellants

cannot merely state that State must prove the likelihood of the factors in section 60(4).<sup>23</sup>

91. It was also held in *S v Mathonsi*<sup>24</sup> that: *“The requirements of ss 60(4)(a)–(e) were never canvassed in court. But this is the responsibility of the applicant for bail, to place evidence before court to negative the existence of the grounds as tabulated. The appellant during the first bail application used an affidavit which was scanty inasfar as s 60(4) grounds were concerned. He did not even offer to testify under oath, where his testimony could be tested.”*

92. It follows that the appellants’ criticism of the magistrate’s decision on the basis of *Stanfield* has no merit.

**Grounds 3, 4, and 5: the magistrate erred in not regarding the appellants’ alibis as constituting “exceptional circumstances” (ground 3); the magistrate erred in refusing bail based on the seriousness of the charges, and in essence ordered the appellants’ continued detention as a form of anticipatory punishment (ground 4); the magistrate did not consider that the incident occurred late at night, that the State’s case relies on a single eye-witness, and that the appellants presented alibis (ground 5)**

93. Grounds 3, 4 and 5 are also interlinked. Ground 5 broadens ground 3 in claiming that the State’s case rests on a single identifying witness and that these circumstances, coupled with the appellants’ alibis, ought to be viewed as exceptional.

94. Both appellants state in their respective affidavits that their personal

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<sup>23</sup> See *S v Botha en ‘n ander* 2002 (1) SACR 222 (SCA) at para [18]: *“Die vereiste van ‘buitengewone omstandighede’ beteken dat die gewone oorwegings vir die verlening van borgtog wat in art 60(4)-(9) uiteengesit word, waar die aangehoudene se reg op vrylating opgeweeg word teen die faktore wat sy vrylating in die belang van geregtigheid sou verhinder, nie voldoende is om sy vrylating te verkry nie. ‘n Blote ontkenning van die waarskynlikheid van die gebeure in art 60(4) (a)-(e) sou dus nie voldoende wees nie.”*

<sup>24</sup> 2016 (1) SACR 417 (GP) at para [11].

circumstances are ordinary.

The first appellant's personal circumstances

95. The first appellant is 28 years old. He says that he is rooted in the Western Cape, where he has lived his entire life. He is unmarried and has no children. He supports his parents, who are dependent on him for financial assistance, as well as for moral, social and emotional support.

96. The first appellant is employed at First National Bank's Diep River branch as a loan specialist. He earns a nett salary of R15 000.00 per month. He runs the risk of losing his employment in the event of him being detained in custody.

97. He states that the conditions in jail are unbearable.

98. The first appellant has no previous convictions, no pending matters and no outstanding warrants for his arrest. He has never been arrested before, and these proceedings are his first encounter with the justice system.

99. He has no passport or other travel documents.

100. The first appellant states that he intends pleading not guilty to the charges against him. He deals with the merits of the State's case against him, mentioning that he has an alibi, in that, on the date and at the time of the incident, he was with his girlfriend (Ms Mieshkah Fortuin) at her residence in Wynberg. In support hereof, his girlfriend, as well as one Ms Fagmieda Adams, deposed to affidavits which were attached as annexures to his affidavit, and which were submitted to the magistrate's court when he applied for bail. In short, the affidavits confirm, *inter alia*, that the first appellant and his girlfriend were together on 30 March 2022 from approximately 16:00 to 23:00.

101. He states further that, given his alibi, the allegations against him, namely that he was involved in the murders, are false. He is confident that he will be acquitted.

#### The second appellant's personal circumstances

102. The second appellant is 24 years old and is also "rooted" in the Western Cape, where he has resided all his life. He has no children, but supports his parents, who are dependent on him for financial assistance, as well as for moral, social and emotional support.

103. The second appellant is currently employed at ESCO, Cape Town, as an engineer. He earns a nett salary of R8 500.00 per month, and runs the risk of losing his employment with ESCO in the event of him being detained in custody.

104. The second appellant states that the conditions in jail are unbearable.

105. He has no passport or travel documentation.

106. The second appellant has one previous conviction for the possession of drugs, in respect of which he paid an admission of guilt fine in the sum of R150,00 at the police station. He has no pending matters and no outstanding warrants for his arrest.

107. The second appellant intends pleading not guilty to the charges against him and has dealt with the merits of the State's case against him. He states that he has an alibi in that, on the date and at the time of the incident, he was at home with his mother, his father, and one Jason Engelbrecht. These persons deposed to affidavits which were attached as annexures to his affidavit in support of his bail application. The affidavits state that they were all together on 30 March 2022 at 22:15, being the date on and time at which the shooting incident occurred. Given these alibis, the second appellant says that the allegations against him as regards his involvement in the murders are false. He also states that he is confident

that, ultimately, he will be acquitted.

### The alibis

108. The appellants say that their general personal circumstances should be held to be exceptional if coupled with their alibis. With the concession that their circumstances are ordinary, it must be decided whether the alleged weakness of the State's case (in relation to the alibi defence) constitutes exceptional circumstances. The mere fact that the appellants say that they intend raising an alibi as a defence does not automatically convert their circumstances to "exceptional" circumstances.

109. In *S v Mathebula*<sup>25</sup> the Supreme Court of Appeal set out the test in relation to an attack on the strength of the State's case:

*"But a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge: S v Botha 2002 (1) SACR 222 (SCA) at 230h, 232c; S v Viljoen 2002 (2) SACR 550 (SCA) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the state is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see Shabalala & Others v Attorney-General of Transvaal and Another [1995] ZACC 12; 1996 (1) SA 725 (CC). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the state to rebut his evidence to that effect: S v Viljoen at 561f-g."*

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<sup>25</sup> 2010 (1) SACR 55 (SCA) at para [12].



[Emphasis added.]

110. Thus, when one relies on the weakness of the State's case in a Schedule 6 bail application as an exceptional circumstance, one has to prove on a balance of probabilities that one will likely be acquitted of the charges.

111. In *Conradie v S*<sup>26</sup> it was held:

*"The point of relevance in Mathebula in respect of applicable principle is the statement that if an applicant for bail in a matter affected by s 60(11)(a) seeks to rely on the weakness of the state's case against him as proof of the existence of 'exceptional circumstances', he must show on a balance of probabilities that he is likely to be acquitted; see Mathebula at para 12. The court in Mathebula cited S v Botha en Andere supra, at para 21, where Vivier ADCJ stated that proving a likelihood of acquittal would make out 'exceptional circumstances'."*

112. In *S v Dlamini supra*<sup>27</sup> it was stated that "...there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail."

113. Issues involving cautionary rules relating to single witnesses, identity, and so forth, are all issues that need be determined at a criminal trial, and have to be weighed up beyond a reasonable doubt at that stage. A bail Court does not have the benefit of hearing and observing witnesses give oral evidence, and is not equipped to determine to whether a witness' evidence has passed the required threshold. There are many cases where a single witness' evidence may lead to a conviction and there are many

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<sup>26</sup> [2020] ZAWCHC 177 (11 December 2020) at para [12].

<sup>27</sup> At para [11].

cases where such evidence may lead to an acquittal. These issues cannot be resolved in the course of a bail application.

114. In the present matter, the magistrate took account of this test at bail stage, namely that the question is not whether the State has proven its case beyond a reasonable doubt, but whether the State has put up a *prima facie* case against an applicant for bail. The magistrate, alive to this fact, stated that he had to determine whether there is a *prima facie* case against the appellants. He elaborated that he did not know whether the witness' evidence would survive at trial, but that was not for him to decide at bail stage. This was the correct approach (see *S v Viljoen*:<sup>28</sup> “*Kon dit ooit die bedoeling van die Wetgewer gewees het dat borgaansoeke 'n volle kleedrepetisie van die verhoor moet wees? Ek betwyfel dit ten sterkste.*”)

115. The magistrate stated, in determining whether the State had put up a *prima facie* case, that the eye witness clearly identified the appellants. The investigating officer explains in detail in her affidavit how the witness is familiar with the three accused (including the appellants), as well as how that witness identified the appellants as being part of a group of five shooters that he saw on the day. Detail is given as to where the appellants live, what their respective physical appearances are, that a vehicle similar to one belonging to the appellants' father was seen on the scene, and that both of the appellants appeared to have firearms in their hands. It is apposite to quote this evidence:

*“On 26/3/2022, a witness states that after hearing that Regan [a friend of Mr Moegsien Barendse] was stabbed, allegedly by a member of the sixbob gang, it was then reported to Moegsien Barendse. Moegsien Barendse immediately wanted to know where the sixbob gang member was and was told that he was close to the informal settlement there. The witness then heard the following day that Moegsien Barendse and other members of PAGAD G-Force had gone to assault members of the sixbob gang. This then ties in with the evidence of the*

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<sup>28</sup> 2002 (2) SACR 550 (SCA) at para [25].

*witness that laid charges against Moegsien regarding him being assaulted and pointed with a firearm as well as him seeing Moegsien and another two males assaulting Nadeem Pather who was said to have stabbed Regan.*

*This witness on 30/03/2020 then states the witness heard numerous gunshots going off and when the witness headed to where the shots were heard, the witness saw a white double cab bakkie driving away from the scene with no number plates on. When the witness got to the crime scene, the witness saw that the three deceased had been killed and that the second applicant [the first appellant] arrived there in the same double cab bakkie that the witness had a few moments ago seen leaving the crime scene. This is confirmed by numerous witnesses who all confirm his presence at the scene as well as further state that he took photographs of the three deceased with his cell phone before leaving. Moegsien Barendse owns a white Toyota Hilux bakkie.*

*A story spread that Moegsien Barendse was responsible for the killing of the three deceased, and that his sons were involved as well. It is necessary to note at this stage that applicant 2 and 3 [the appellants in this bail appeal] are both children of Moegsien Barendse and also belong to PAGAD G-Force.*

*According to an identifying witness, a few days before the three deceased was shot dead, one of the deceased, Ricardo de Jager got into an argument with Moegsien Barendse about a threat that was made to a friend of his. Moegsien Barendse told the deceased that he would see what will happen to him to which the deceased responded that he was not afraid.*

*The witness is familiar with Moegsien Barendse as well as his family. The witness says that Moegsien Barendse resides in [...] A[...], Grassy Park and that the witness had been to his house before. According to the witness, Moegsien Barendse has three sons.*

*While the deceased were sitting around the fire with other people, five men arrived there, each armed with a firearm. The witness initially thought it was gangsters until the witness heard one of the men shouting "jou ma se p--s, is SAPS staan vas." The witness then saw that the person shouting this was the second applicant [the first appellant]. The witness is familiar with the second applicant [the first appellant] as the son of Moegsien Barendse.*

*The witness identified the second applicant [the first appellant] as being light of complexion with black hair. Also, that he had on a black jacket with dark blue jeans. The second applicant [the first appellant] is alleged to have had a black firearm in his possession and was wearing a black bulletproof vest with the words SAPS written on it in yellow.*

*The third person the witness identified is described as the youngest son of Moegsien Barendse, the third applicant [the second appellant]. The third applicant [second appellant] according to the witness is also light in complexion and is built big, he had on a black hooded top with a black bulletproof vest with the words SAPS written on it in yellow and he had on a pair of blue jeans. He too was armed with a firearm in his right hand. ...*

*The witness then saw and heard numerous shots going off, and saw the five attackers get into a motor vehicle and leave the crime scene. The witness had then seen that the three deceased had been shot.*

*The very witness mentioned above's life has been threatened after the witness came forward. It took a tremendous amount of time and effort to trace the witness in the first place as the Court can note that this incident occurred in March 2022 already and I only recently managed to obtain a statement of the witness. The witness was afraid of coming forward as the witness would be killed."*

116. The appellants argue, with reference to *Zondi v S*,<sup>29</sup> that identification must not only be credible, but also reliable, and that the identification described by the investigating officer is doubtful at best. In *Zondi*, however, the issue of identification was the basis upon which the appellant had been convicted at trial. The case did not involve the considerations applicable at bail stage. I agree with the fact that the issue of identification falls to be dealt with carefully, but that will be done in due course, at trial.

117. Against this, and as indicated, both appellants as well as their alibis deposed to affidavits in support of the appellants' release on bail. How was the magistrate, in a matter where no oral evidence was led, meant to weigh up whether the appellants had discharged the onus of proving that they would likely be acquitted on a balance of probabilities? In *Killian v S*<sup>30</sup> the Court dealt with the dangers inherent in the use of affidavits in bail proceedings where section 60(11) of the CPA applies:

*“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.”* [Emphasis added.]

118. In a situation, therefore, where both parties elect to advance their case in the form of affidavits, the State’s version must be accepted where there is conflict, unless such version appears improbable. This is because the onus in a Schedule 6 bail application is on the applicant to show exceptional circumstances, and not on the State.

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<sup>29</sup> [2022] ZASCA 173 (7 November 2022) at para [14].

<sup>30</sup> [2021] ZAWCHC 100 (24 May 2021) at para [13].

Importantly, this is clearly not the introduction of the so-called *Plascon-Evans* rule,<sup>31</sup> applicable in civil motion proceedings, in bail proceedings. It is simply a consideration of whether the onus placed on the appellants has been discharged.<sup>32</sup>

119. In *S v Bruintjies*<sup>33</sup> the Court held that: “*The appellant failed to testify on his own behalf in the trial and no attempt was made by his counsel to have him testify at the bail application. There was thus no means by which the Court a quo could assess the bona fides or reliability of the appellant save by the say-so of his counsel.*”

120. In *Mathebula supra*<sup>34</sup> the Court was of the view that : “*In the present instance the appellant’s tilt at the state case was blunted in several respects: first, he founded the attempt upon affidavit evidence not open to test by cross-examination and, therefore, less persuasive: cf S v Pienaar 1992 (1) SACR 178 (W) at 180h...*” [Emphasis added.]

121. A consideration of the alibis presented by each of the appellants indicates that the relevant evidence could have been better dealt with by way of oral evidence. The first appellant says that he was with his girlfriend at her residence in Wynberg. They were sitting in his vehicle when they heard gunshots but could not tell the location of the shots. His girlfriend told him not to leave and they continued talking until he left at 23:00. The first appellant’s girlfriend, Ms Mieskah Fortuin, deposed to an affidavit where she says that, on 30 March 2022, she was with the first appellant at her residence at 8[.] B[... ] Road, Wynberg. She sets out the following timeline in very specific terms:

(a) At 16:23 they leave her residence for Cape Town CBD to have sushi.

(b) At 17:50 they check into the Cape Town City Lodge.

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<sup>31</sup> Set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635.

<sup>32</sup> See also *Kara and Others v S* [2022] ZAWCHC 258 (1 December 2022) at paras [9]-[12].

<sup>33</sup> 2003 (2) SACR 575 (SCA) at para [7].

<sup>34</sup> At para [11].

(c) At 21:12 they leave the Cape Town City Lodge and travel to her residence via the M3 highway.

(d) At 21:50 they arrive at her residence in Wynberg.

(e) They remain sitting in the first appellant's car, talking and smoking.

(f) They hear gunshots but do not know where the shooting is taking place.

(g) She tells him not to leave, for safety reasons.

(h) At 23:00 he leaves her residence.

122. Ms Fagmieda Adams, Ms Fortuin's grandmother who also resides at the Batts Road house, states that on 30 March 2022 the first appellant left with his "*friend*" at 16:23. She, with another friend, waited for them to arrive home, which they did at 22:00. They came inside to greet and then went outside and stood in front of the house, talking. When Ms Adams' friend left, Ms Fortuin and the first appellant remained outside standing and talking. He left her residence at 23:00.

123. The first appellant does not mention the date of 30 March 2022 in his affidavit. He mentions none of the details as to when and where they were at the various time periods set out by Ms Fortuin, apart from stating that "at the date and time of the incident" he was with her, and that he left her home at about 23:00.

124. Attached to Ms Fortuin's affidavit is a booking confirmation in her name for the Cape Town Lodge Hotel. This is not the same as Cape Town City Lodge. The closest City Lodge Hotel is situated at the V&A waterfront and not at 1[...] B[...] Street, Cape Town, where the booking had been made. It was an overnight booking from 30 March to 31 March, yet they spent the entire night at her residence in Wynberg. This is not

explained. Nowhere on the booking confirmation does it stipulate the year of 2022 (although 30 March 2022 was in fact a Wednesday, as indicated on the confirmation).

125. Ms Adams' evidence also contradicts the first appellant's evidence. According to the latter he sat in the car talking the entire time. According to Ms Adams, they were standing outside and talking and at some stage came inside. She does not mention having heard any gunshots.

126. The alleged alibi of the first appellant raises many questions and, in my view, does not pass the hurdle of satisfying the onus that rests on the first appellant, namely that he would, on a balance of probabilities, likely be acquitted on the basis thereof.

127. The second appellant, in turn, places reliance on his father, mother, and Mr Jason Engelbrecht (an employee of his father's) as alibis. The second appellant says that he was at home, in bed and busy with his cellphone. He also does not mention the date of 30 March 2022. His mother says that, on 30 March 2022 at 22:15, she was at home with the second appellant. Before 22:00, she walked past his bedroom and saw him in bed with his cellphone. Shortly after 22:00, one of her employees knocked on her bedroom window and asked if they heard gunshots. From the time that the second appellant arrived home from work on 30 March 2022, he was home, until 31 March 2022.

128. The second appellant's father (Mr Barendse) says that, on evening of 30 March 2022, when he arrived home after 21:00, the second appellant was at home. Mr Barendse pulled his vehicle in, and the second appellant then pulled his own vehicle inside. The second appellant then went to his room and relaxed on his bed.

129. Mr Engelbrecht, in turn, says that, on 30 March 2022, the second appellant was in his room. Mr Engelbrecht sat in the backyard and heard gunshots before 22:00 and thought that the gunshots came from Parkwood. He got up, knocked on Mr Barendse's window and told him about the gunshots. Mr Barendse went outside and the second



appellant was in bed, busy on his phone.

130. The second appellant's mother says Mr Engelbrecht spoke to her about the gunshots. Mr Engelbrecht says he spoke to Mr Barendse about the shots, and Mr Barendse does not say anything about any gunshots at all or about a knock on his window. Mr Barendse places the second appellant outside of the house pulling his vehicle in, but his mother creates the impression that he was inside the entire evening. It is unclear how Mr Engelbrecht could see that the second appellant was in his room when he (Mr Engelbrecht) sat outside, and knocked on Mr Barendse's window. In any event, and as indicated earlier, the appellants' father, who is an alibi witness, has nevertheless actively interfered with State witnesses even though it is alleged that they have strong defences.

131. The magistrate, in reliance upon *Killian supra*, concluded that the State's version is to be accepted as it is not improbable. This was the correct approach to adopt.

132. Ground 4 takes one comment made by the magistrate in his judgment out of context. The comment is as follows: "*Under the circumstances the Court must then find that all three the applicants do have circumstances, and if this was not murder, the Court would have given them all three bail.*" The appellants argue that the magistrate misdirected himself in making this comment, as the seriousness of the offence is already taken into account in the legislation underlying bail applications involving Schedule 6 offences. For this reason, they say, the magistrate effectively denied bail as a form of anticipatory punishment.

133. The comment is made by the magistrate at the end of his judgment, after he had already found that the appellants would attempt to influence or intimidate the State witnesses, and after he had found that the appellants did not prove that the alleged weakness of the State's case was an exceptional circumstance. He also states, shortly after the impugned comment, that: "*But in the circumstances that they have placed before me, all three of them, I cannot find that the circumstances are exceptional and*

*the law says if I cannot find they are exceptional I have to, I must, I do not have a choice but to deny all three accused bail”.*

134. The magistrate’s reference to “murder” is clearly a reference to the fact that the bail applications were made in the context of a Schedule 6 offence. As indicated earlier, the appellants admitted in their own evidence that their circumstances were ordinary, and that the only aspect that would elevate them to the level of exceptional would be if the Court accepted their alibis. The magistrate mentioned this in his judgment: “.. *all the circumstances put before the Court are normal circumstances.....It is accepted by the applicant that all of those reasons given are not exceptional, but that are normal, but that his alibi must be presented to an exceptional degree*”.

135. The impugned comment cannot be construed as saying that, despite a finding that they have directly or indirectly influenced or interfered with State witnesses, the appellants would have been granted bail if the charges were, by way of example, rape or robbery with aggravating circumstances. It cannot be construed as meaning that bail would have been granted in the case of any other Schedule 6 offence.

136. Where a discretion is properly exercised, the refusal of bail is not tantamount to anticipatory punishment. In *Dlamini supra* the Constitutional Court stated:<sup>35</sup> “*The subsection says that for those awaiting trial on the offences listed in Sch 6, the ordinary equitable test of the interests of justice determined according to the exemplary list of considerations set out in ss (4) to (9) has to be applied differently. Under ss (11) (a) the lawgiver makes it quite plain that a formal onus rests on a detainee to 'satisfy the court'. Furthermore, unlike other applicants for bail, such detainees cannot put relevant factors before D the court informally, nor can they rely on information produced by the prosecution; they actually have to adduce evidence. In addition, the evaluation of such*

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<sup>35</sup> At para [61]. See also *S v Rudolph* 2010 (1) SACR 262 (SCA) at para [9]: “*It contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail, will be resolved in favour of the denial of bail, unless 'exceptional circumstances' are shown by the accused to exist*”.

cases has the predetermined starting point that continued detention is the norm.”  
[Emphasis added.]

137. The legislative amendments read with the authority from the Courts<sup>36</sup> have made it clear that, in the case of a Schedule 6 offence, the norm is that an applicant for bail ought to remain in custody. It can thus not be said that when an applicant has failed to show exceptional circumstances, a Court - exercising its discretion in a proper manner - is punishing an applicant in anticipation of conviction and sentence.

138. The question arises whether the magistrate should have considered the release of the appellants on bail on strict conditions. The appellants rely on *S v Branco*,<sup>37</sup> which held that: “...a court should always consider suitable conditions as an alternative to the denial of bail. Conversely, where no consideration is given to the application of suitable conditions as an alternative to incarceration, this may lead to a failure to exercise a proper discretion.”

139. I agree with the State’s submission that the *Branco* decision is distinguishable from the current matter: The Court there dealt with a bail appeal based arising from a Schedule 5 offence. The appellant faced charges of dealing in drugs and not three murders, and the central issue was whether the appellant would evade his trial. The case is therefore not of assistance to the appellants.

140. In any event, in the present matter, the appellants have failed to prove any exceptional circumstances that would permit their release on bail.

## **Conclusion**

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<sup>36</sup> The appellants’ reliance on *S v Acheson* 1991 (2) SA 805 (Nm) at 822A does not assist them in the present context, although the principle set out in the judgment (that detention pending trial is not to be used as a form of anticipatory punishment) is of course correct. That case was, like *Stanfield*, was decided before the amendments to the CPA in relation to the grant of bail involving Schedule 6 offences.

<sup>37</sup> 2002 (1) SA 531 (W) at 637a-b.

141. In all of the circumstances set out above, I am of the view that the magistrate 's decision to refuse bail was correct. The appellants have to prove two things on a balance of probabilities in order to discharge the onus on them in the context of a Schedule 6 offence. First, they have to prove exceptional circumstances; and, second, that those exceptional circumstances permit their release on bail in the interests of justice.

142. On a consideration of the evidence before this Court (and with reference to the relevant *dicta* in *Barber* and *Porthen*), I am of the view that the appellants have not succeeded in discharging such onus.

### **Order**

143. It is accordingly ordered as follows:

**The appeal is dismissed.**

**P. S. VAN ZYL**  
**Acting judge of the High Court**

### **Appearances:**

**Counsel for the appellants:** R. Liddell,  
Instructed by Junaid Jumat Attorneys

**Counsel for the respondent:** N. R Adriaanse,  
On behalf of the Director of Public Prosecutions, Western Cape