IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: A30/2017

In the matter between:

DIKA MOSIKILI Appellant

and

THE STATE Respondent

HEARD ON: 12 MAY 2017

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 25 MAY 2017

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[1] The matter came to court by way of an appeal from the district court. The appellant appeals against the refusal of the court *a quo* to have him released on bail. The respondent opposes the appeal.

[2] An incident occurred at Bethlehem on Tuesday the 14 July 2015. A certain Mr Daniel Sekhoto was shot dead and five other persons who were also shot in the process sustained gunshot wounds. There were three assailants involved.

[3] The matter was reported to the police. The police investigation led to the arrest of three suspects. The appellant was wanted as one of the prosecution witnesses during their trial. However, on 9 August 2015 he could not be found.

[4] On 23 September 2016 the appellant was arrested. Two weeks later, on 7 October 2016 to be precise, Ms Maditaba Anna Sekhoto was also arrested. They were both arrested as further suspects in the aforesaid incident. Mr Mosikili and Ms Sekhoto were subsequently charged. Their prosecution is currently pending.

[5] They are facing the following charges:

Murder, 5 counts of attempted murder, unlawful possession of a firearm, unlawful possession of ammunition an conspiracy to commit murder. Mr Mosikili and Ms Sekhoto are charged as accused 1 and accused 2.

[6] On 10 November 2016 they applied in the district court for their release on bail. Their applications were opposed. The application of accused 2 was successful but that of accused 1 was unsuccessful. The refusal to let him out of custody on bail precipitated the present appeal.

[7] The appellant did not testify. Instead he's sworn statement was handed as his evidence. He did not call any witness.

[8] The respondent called detective Sergeant MP Gumbi. He testified against the appellant. The respondent did not call any further witness.

[9] The bail verdict of the court *a quo* was as follows:

The appellant was aggrieved.
The district magistrate's refusal precipitated the present application.

[10] The appellant's counsel, Mr Kambi, submitted that the prosecution case against the appellant was so weak that the interests of justice dictated that he should be released on bail pending his trial which will resume later towards the end of this year.

[11] The respondent's counsel, Mr Bontes disagreed. He submitted that the prosecution case against the appellant was so strong that the interest of justice required that he should not be released on bail.

[12] It was common cause on appeal that the bail application resorted under section 60(11)(a) of the Criminal Procedure Act 51/1977 as amended. Seeing that the charges included premeditated murder, an offence listed in schedule 6, the appellant had to show

on balance of probabilities that exceptional circumstances existed which in the interest of justice permit his release on bail.

[13] In opposing the application, the respondent could rely on any one, two or more of the several grounds as listed in sec 60(4). The general import of the section is that the interests of justice would militate against the release of an accused – if any of the listed grounds is proven. Those prohibitive grounds are:

> "(a) whether there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a scheduled 1 offence; or
> (b) whether there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
> (c) whether there is the likelihood that the accuse, if he or she is released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
> (d) whether there is the likelihood that the accuse, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system including the bail system; or
> (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security."

[14] It was therefore incumbent upon the appellant to persuade this court in terms of section 60(5) Act No 51/1977 that the magistrate's refusal to let him out of incarceration on bail was wrong. See **Mooi v The State** (162/12) [2012] ZASCA 79 (30 May 2012).

[15] Among others, the magistrate refused bail because the appellant might attempt to influence or intimidate witnesses. Of course, such acts would ordinarily undermine or jeopardize the objectives or the proper functioning of the criminal justice system. Naturally it would not be in the interest of justice to grant bail in a case where there is a reasonable apprehension that an accused might commit such acts.

[16] It was accepted, by both counsels in this court, that the determinant factor in the instant appeal as to whether the magistrate should have granted or refused bail was the strength of the prosecution case against the appellant. In determining the existence or otherwise of exceptional circumstances in the context of section 60(11)(a), the substantive strength of the prosecution case was held to be a material and relevant consideration – **S v Kok** 2003 (2) SACR 5 (SCA) par [15].

[17] There is a great variety of factors which a court may take into account in considering whether there is a likelihood of an accused evading his trial. Among other relevant factors the following are included:

the gravity of the offence; the strength of the prosecution case against him; the magnitude of the likely punishment in the event of him being convicted or any other factor which, in the opinion of the court, should be taken into account.

[18] The personal profile of the appellant was placed on record by his attorney. He was born on 31 August 1972. His national identity number is 720831 5343 08 9. His level of formal education did

not appear on the record. He resides at 2018 Thejane Street Bohlokong Bethlehem. His mother owns the residential property. He has been resident in that town since he was born. He earns his livelihood as a general dealer of some sort. He generates a monthly income of R2000 on average. He is an unmarried father of 2 dependent minor children who are 18 and 6 years of age.

[19] He has a previous conviction of assault. He has no pending cases. He was arrested on the 14 November 2015. He spent 160 days in custody. The case was withdrawn on 22 April 2016. He was re-arrested on the 26 September 2016. He does not know the state witnesses other than those that had already testified. Ms Sekhoto was his girlfriend. He is on chronic medication for a chronic illness. He did not wish to disclose the exact nature of his illness in an open court. He intended to plead not guilty. He had been advised not to deal with the merits of the case. The case against him was very weak. He was coerced to make a statement. He would not abscond should the court release him on bail. There existed exceptional circumstances which justified the conclusion that the interest of justice permit his release on bail. The appellant adduced the above evidence by way of an affidavit – see “exi a”. This completes the version of the appellant.

[20] The version of the respondent was narrated by one witness Detective Sargeant MP Gumbi on the 10 November 2016. He testified that he and Colonel Mokhothu were the investigating officers. The latter was his direct supervisor. The appellant had 3 previous convictions. These are: common assault 1997,

malicious damage to property 1997 and reckless driving 2012. He had no pending cases. He did not stay with his mother at 2018 Thejane Street Bohlokang. He was jobless. His car, a VW Polo was repossessed. In 2015 the 2 accused drove to Welkom to hire a hitman. A certain Pens Elias Lapi also known as Shakes rejected their offer to kill David Sekhoto, accused number 2's husband.

[22] Later the same year the 2 accused engaged 3 men namely, Napo Arthur Monaheng, Tsietsi Nkhatla and Thandoxolo Majwede to kill Daniel Sekhoto for the contract fee of R600 000. They killed the man. Following the killing they were arrested. They were convicted in the Bethlehem Circuit Court on the 13 September 2016. Their attorney furnished the police with their statements concerning the Sekhoto incident. The accused confessed his involvement in the Sekhoto murder in his warning statement. There was no pending case of assault opened by the appellant against Colonel Mokhothu. His statement was substantially the same as those of the three convicted killers. The witness was of the opinion that the case against the appellant was very strong.

[23] Besides the statements of the hitmen and the statement of the appellant himself, the police were also in possession of cellular data evidence which evidence incriminated the appellant. The firearm found by the police in the possession of one of the killers and seized by the police was positively linked to the crime scene at Bethlehem on 14 July 2015. The evidence in the police docket showed that the appellant had supplied the murder weapon to the contract killers.

[24] The investigating officer, Detective Sergeant Gumbi testified further that the appellant was supposed to be a state witness in the case of the **State v NA Monaheng & Others**; that he did not attend the court; that he disappeared; that the police searched for him everywhere without success; neither his mistress nor his mother could shed any light on his exact whereabouts; that a charge of defeating the ends of justice was then opened against him; that he then was re-arrested and that he doubted whether the appellant would attend his trial should he be released on bail. He feared that the appellant might influence his co-accused to abscond with him in view of the gravity of the charges and the repercussions of the conviction. He also found that the appellant might influence Pens Elias Lapi not to testify against him and his co-accused. He was also concerned about the safety of that witness as well as the other witnesses called Sello and Lefa.

[25] During cross examination the witness confirmed that the appellant did not know that he had to attend the trial of Monaheng and Others in order to testify. It also came to light that the deceased victim told one of the witnesses, shortly before he died, that he knew one of the assailants.

[26] The appellants stated as follows as regards the substantive merits:

> "I place on record that I was informed by my legal representative of the charge against me and do I place on record that I intend to plead not guilty to all of them. I place on record that I have been advised that I do not have to deal with the merits of the case for purposes of my bail, and do I hereby

choose to invoke my right to remain silent in terms of Section 35 (A) of the Constitution of the Republic of South Africa, Act (sic) 108 of 1996 with regards to the merits of the case."

[27] Besides indicating that he would plead not guilty to all the charges, the appellant did not disclose the substratum of his defence(s) let alone deal with the merits of the case. He did not touch the merits at all. Instead he chose to remain silent. He had earlier stated:

"I further submit the facts herein will indicate it is also reasonable and just that I be released on bail. I am making this affidavit out of my own free will and confirm that I have to (sic) been influenced or forced to make this affidavit. The facts contained herein fall within my personal knowledge and are both true and correct, unless the context indicates otherwise. The purpose of this affidavit is to provide this Honourable Court with my personal circumstances and factors that the Court have (sic) to weigh up as laid out in Section 60 (4) to (9) of that. (sic) I have been advised and understand that I bear the onus to show this Honourable Court that it is in the interest of justice that bail be granted to me. I will as indicated show that it is in the interest of justice that I be released on bail."

[28] Notwithstanding his understanding of the onerous burden of proof, the appellant somewhat strangely chose to avoid dealing with the substantive merits of the case against him. In an application of this type, he was obliged to do so. How else could he show the substantive weakness of the case against him? He certainly made no serious attempt, in his written sworn statement to discharge the onus as he was required by law. In **S v Botha & Others** 2002 (1) SACR 222 (SCA) par [16] the court, per Vivier ACJ, said:

"Die bewoording van die subartikel is duidelik en ondubbelsinnig en is vir net een uitleg vatbaar. Dit is dat die formulering van die aanklag in die akte van beskuldiging, indien nodig aangevul deur 'n skriftelike bevestiging ingevolge art 60(11A), beslissend is vir die vraag of 'n beskuldigde hom van die bewyslas in art 60(11)*(a)* moet kwyt om sy vrylating op borgtog te verkry."

[29] The respondent's witness, Detective Sergeant Gumbi, gave evidence. He thoroughly addressed the substantive merits of the case against the appellant and his co-accused. The material aspects of his evidence can be briefly condensed as follows:

- The accused in the pending case, namely: Mr Dika Piet Mosikili and Ms Maditaba Anna Sekhoto, were secret lovers;
- The deceased victim, Mr Daniel Sekhoto, was the husband to the appellant's mistress, Ms MA Sekhoto;
- The accused lovers conspired to eliminate the victim;
- They then approached a certain character by the name of Pens Elias Lapi also known as Shakes in Welkom to eliminate the victim but he declined to do so;
- Undeterred by Shakes' refusal, they travelled to Vereeniging where they clinched a deal with three exterminators;
- They undertook to pay R600 000 to the three contract hitmen;
- They maintained cellular contact with the contract hitmen over a period of time;
- They provided the hitmen with a firearm to shoot the victim;

[30] Let me pause for a second. I want to comment about the trial of the three contract hitmen. The police witness testified that although they initially pleaded not guilty, each of them changed

his plea; that they admitted that they were indeed involved in the incident and that, in their statements, they heavily implicated Mr Mosikili and Ms Sekhoto, the secret lovers, as their contract masters.

[31] It was indeed so that the appellant, through his legal representative, mounted some challenge to evidence given by the detective in the court *a quo*. In my view such reactive challenge was not enough to fill up the void in the appellants' affidavit created by his deliberate decision to remain silent with regard to the merits. The sporadic attacks subsequently launched against the version of the respondent did not materially compensate for the appellant's deliberate omission, to deal with the substantive merits or demerits of the case.

[32] I now turn to consider the submission made by Mr Kambi on behalf of the appellant. In the first place, counsel heavily relied on the fact that the court *a quo* granted bail to accused 2 notwithstanding the evidence of the respondent's witness. The line of argument was that because the court had rejected the evidence of Sergeant Gumbi in respect of accused 2 there was no rational basis for its acceptance of the same evidence in respect of accused 1, the appellant.

[33] The submission failed to impress me. Let me hasten to set the record straight. The court *a* quo did not really reject the evidence of the detective. All it did was to distinguish between the circumstances of accused 1 and accused 2. The point is this: If the court *a quo* erred in releasing one accused on bail, such error

or misdirection would not justify the release of a co-accused. It would be irrational to release on bail an accused person who has made out no proper case for his release merely because the court has released on bail a co-accused who, on the objective facts, also did not deserve to be released.

[34] During the course of considering the bail application of accused 2, Ms Sekhoto, the court *a quo* used the phrase:

"What you do on the left, you also do on the right."

Mr Kambi understood that to me that if the evidence was not good and strong enough to warrant the refusal to release accuse 2 then it could not have been good and strong enough to sustain the refusal to release accuse 1 as well.

[35] Before one can say what's good for the goose is good for the gander all things must be equal. Unless they are and they can truly be seen to be equal – what's done on the left cannot also be blindly done on the right. Where the eggs in the basket on the left are not the same as the eggs in the basket on the right - the chickens will never be the same. There can be no equation in such circumstances. In this instance, rightly or wrongly, the court *a quo* had some reservations concerning the permanence of the appellant's attachment to the district, his trustworthiness, his past criminal history, his occupation; the possible risk of his improper influence and his association with the actual killers. It seemed to me that on the strength of all those factors, the court considered the appellant to be a potential flight risk. The court did not have

similar or any concerns about his co-accused. However, none of those, singularly or collectively, was a determinant factor.

[36] In the second place, Mr Kambi submitted that the delay in the finalization of the trial constituted relevant circumstances which qualified as exceptional circumstances which indicated that it was not in the interest of justice to detain the appellant any longer. The phrase, "exceptional circumstances", is located in the wording of sec 60(11)(a) which reads:

> "Section 60(11)(a) of the CPA: '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 exists which in the interests of justice permit his or her release;"

[37] The nature of that onerous schedule 6 requisite, "exceptional circumstances" is not defined. In **S v Botha & Another**, *supra*, par [19] the court held:

> "Dit word nie vereis dat 'buitengewone omstandighede' verskillend van aard, of andersoortig moet wees as die omstandighede wat in subarts (4) - (9) genoem word nie. Gewoonlik, maar nie noodwendig nie, sal dit omstandighede wees wat daarop gemik is om die onwaarskynlikheid van die gebeure genoem in art 60(4)*(a)* - *(e)* te bewys. Met betrekking tot daardie gebeure, of andersins, moet die aangevoerde omstandighede, in die konteks van die besondere saak, van so 'n aard wees dat dit as buitengewoon aangemerk kan word (*S v Vanqa* 2000 (2) SASV 371 (Tk) op 376*b* - *d*). Dit is vir die hof om in elke saak in die besondere omstandighede van daardie

saak 'n waarde-oordeel te vel of die bewese omstandighede van so 'n aard is dat dit as buitengewoon aangemerk kan word."

[38] In **S v Dlamini and 3 Other** similar cases, 1999 (4) SA 623 (CC) the court found that the limitation in sec 60(11)(a) is reasonable and justifiable in terms of sec 36 of the constitution. The court found that:

"In requiring that the circumstances proved be exceptional, the subsection does not say they must be circumstances above and beyond and generically different from those enumerated. Under the subsection, for instance, an accused charged with a Schedule 6 offence could establish the requirement by proving that there are exceptional circumstances relating to his or her emotional condition that render it in the interests of justice that release on bail be ordered notwithstanding the gravity of the case."

[39] In **S v Botha & Another**, *supra*, par 18 the court found:

"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."

[40] Mr Bontes pointed out that on 24 April 2017 the trial was postponed to 6 November 2017. Counsel stressed two important facts about the postponement. Firstly, the trial was brought to a sudden halt at the request of the defence and not the state. Secondly, that the state was ready to have the hearing resumed

three months earlier, in other words during August 2017 but such earlier date did not suit the defence – hence it was postponed to 16 November 2017 at the request of the defence.

[41] In **S v Mooi** (162/2012) [2012] ZASCA 79 (30 May 2012) the court found that unexplained delays in the prosecution of a criminal trial qualified to be regarded as exceptional circumstances. It was then held, in view of the proven unexplained delays in that particular case, that exceptional circumstances existed which in the interests of justice required that the appellant be released on bail.

[42] In the instant appeal, it could not be fairly said that the delays were unexplained. They were explained. The respondent's explanation revealed that the delays complained of were occasioned by the requests of the appellant. Consequently, I am persuaded that there was nothing much for the appellant to complain about. It seemed to me that the gentleman was too happy to trim his sail to suit his cloth. Given the respondent's acceptable explanation, I am inclined to dismiss the submission.

[43] In the third place, Mr Kambi submitted that the evidence of the three hitmen would not strengthen the respondent's weak case against the appellant. Counsel's submission was premised on the fact that the three were convicts, whose evidence was of no probative value. In developing his argument, he contended that before they were convicted, their stance was that they did not know the appellant. However, after their conviction they said the opposite.

[44] Mr Bontes countered the above argument. He submitted that the three hitmen, now state witnesses, were the appellant's accomplices. It is trite that the evidence of an accomplice may be corroborated by other evidence aliunde or objective facts. Counsel indicated that the appellant's own warning statement was in corroborative harmony with the witness statements by the three convicts or hitmen or accomplices. He further indicated that further corroboration for the accomplices would be found in the testimony of Shakes, a witness from Reitz as well as the evidence by cellular data expert witness(es). I am persuaded by these submissions.

[45] In the fourth place, Mr Kambi submitted that all the evidence about the alleged corroboration of one accomplice by the other, by the witness from Reitz, by Shakes and by any cellular data expert was hearsay. Mr Bontes correctly submitted that, in bail proceedings, hearsay was admissible evidence.

[46] As it is in a bail application governed by schedule 6, our law places the onus on the detained person seeking to be released on bail to show that, on the evidence, he is likely to be acquitted at the end of the pending criminal trial. On the facts, the implicit finding by the magistrate that the onus was not discharged, is a finding which I cannot disturb on appeal.

[47] It must be borne in mind that the appellant did not adduce oral evidence to discharge the onus of proving that exceptional circumstances existed which warranted his release on bail. Instead he relied on his affidavit, not that it was wrong to do, but

such affidavit was devoid of any substance. Most of his affidavit generates much heat but little light on the cardinal question. On what substantive grounds can it be found that he is likely to be acquitted?

[48] Mr Kambi submitted that the deficiencies in the appellant's affidavit were cured by the cross examination of the state witness by the defence attorney. He relied on **S v Nkuna** (A82/2013) (2013) ZAHSA (NGP) (22.02.2013) par [10] that the respondent's case against the appellant was hopelessly weak. On the contrary Mr Bontes submitted that the respondent's case against the appellant was formidable. In **S v Nkuna**, *supra* Magardie AJ said the following:

> "10. In **S v Botha & Another** it was held that proof by the accused that he will probably be acquitted on trial can serve as exceptional circumstances. As already alluded to hereinbefore, although in his affidavit the Appellant did not contest the strength of the prosecution case against him, his legal representative dealt with the issue during cross-examination of the investigating officer."

[49] Considering that the appellant is facing, among others, a charge of premeditated murder, an offence legislatively listed in schedule 6; that the remaining charges were, after all, also not petty offences and that the bulk of the elements of evidence tends to point to the guilt rather than the innocence of the appellant – I am satisfied that it was justifiable in law to deprive the appellant of his civil liberty for the duration of his trial. He is standing trial on a crime of serious magnitude and moral turpitude. The decision in **S v Nkuna**, *supra* is clearly no authority for proposition that a bail

applicant, who bears the onus of proving that he will probably be acquitted on trial, can avoid dealing with the substantive strength of the case against him in his affidavit with the hope or belief that the substantive weakness of the case would be revealed by his legal representative's cross examination of the respondent's witness.

[50] The following passage is instructive:

> "Ingevolge beide art 60(11)*(a)* en *(b)* is daar 'n formele bewyslas op 'n beskuldigde wat om borgtog aansoek doen '**om getuienis aan te bied wat die hof oortuig**'. Die verskil in die twee subartikels lê in die vereiste dat **'n Bylae 6 beskuldigde getuienis moet aanbied wat die hof oortuig dat 'buitengewone omstandighede' bestaan wat sy of haar vrylating veroorloof**, terwyl 'n Bylae 5 beskuldigde slegs getuienis hoef aan te bied wat die hof oortuig dat die belang van geregtigheid sy of haar vrylating veroorloof. Artikel 60(11)*(a)* bevat twee afsonderlike vereistes waarvan die beskuldigde die hof op 'n balans van waarskynlikhede moet oortuig: eerstens dat daar buitengewone omstandighede bestaan wat sy of haar vrylating toelaat en, tweedens, dat sodanige buitengewone omstandighede die vrylating in die belang van geregtigheid verloorloof. Ek stem met die Hof *a quo* saam dat die vereistes nie in 'n bepaalde volgorde oorweeg hoef te word nie."

This the appellant failed to do so. For instance he did not expressly deny involvement. He did not explain the relationship, if any, between him and the killers. He did not say where he was on the day of the incident. Neither the appellant nor his legal representative ventured to disclose his defence. Instead his legal representative suggested a very remote motive why the hitmen might have killed the victim.

[51] The strength of the respondent's case against the appellant is likely to be derived from the following important factors:

- The alleged abortive attempt to contract Shakes a the hitman;
- The alleged cellular contact between the appellant and the now convicted killers;
- The alleged visit of the appellant to Vereeniging where they lived;
- The alleged version of each of the actual killers;
- The alleged statement made by the appellant to the police;
- The alleged consistent harmony between the statement by appellant and those by the actual hitmen or accomplices.

[52] In my view, not enough was done by the appellant's legal representative during the course of his cross examination of the respondent's witness to discharge the nous. The gravamen or the formidable strength of the respondent's case remained unshaken. In my view the facts which I have outlined above do not justify a finding that the appellant, as the accused, will probably be acquitted. **S v Botha**, *supra*. The court *a quo* also did not make such a finding. Moreover, I could find nothing in his personal circumstances, including but not, limited to his emotional or health condition, to objectively compel the conclusion that exceptional circumstances exist that render it in the interest of justice to have him released on bail notwithstanding the gravity and strength of the case against him.

[53] Accordingly I make the following order.

(a) The appeal against the magistrate's refusal to release the appellant on bail is dismissed;

(b) The decision of the magistrate is confirmed.

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M.H. RAMPAI, J

On behalf of appellant: Adv SS Kambi
Instructed by:
The Justice Centre
Bloemfontein

On behalf of respondent: Adv D Bontes
Instructed by:
Director of Public Prosecutions
Bloemfontein