

**REPUBLIC OF SOUTH AFRICA****SOUTH GAUTENG HIGH COURT, JOHANNESBURG****CASE NO: 41210/2010****DATE:19/07/2011****REPORTABLE**

- (1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED.

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DATE

.....  
SIGNATURE

**In the matter between:****SANDI MAJALI****Applicant****and****THE STATE****Respondent**

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**J U D G M E N T**

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## **MOKGOATLHENG J**

- (1) After his bail application was postponed in the Johannesburg Commercial Court in terms of **section 50(6)(d) of the Criminal Procedure Act 51 of 1977**, the applicant launched an urgent bail application seeking his release from custody. At the conclusion of the urgent application I issued an order admitting the applicant to bail. I indicated that the reasons for the order would follow. These are the reasons predicated the order.

### **THE FACTUAL MATRIX**

- (2) The applicant alleges that on 20 October 2010 after reading an article in The Times newspaper that he was sought by the police as a suspect in a fraud investigation, he instructed his attorney to verify the report. The applicant's attorney established that the Johannesburg Commercial Court Prosecutor had instructed the investigating officer Captain Nhlapo to arrest the applicant for allegedly committing fraud.
- (3) The Prosecutor confirmed that the applicant would be charged with fraud. He added that he had no grounds of objecting to the applicant's release on bail because he was not considered a flight risk. He stated that he was in the process of verifying whether the applicant had pending criminal investigations, criminal charges, or warrants of arrest issued against him.
- (4) The applicant was duly arrested. At the inception of the bail proceedings, the Prosecutor made an application for the postponement of the proceedings based on the ground that he wanted to confirm whether the applicant had any pending criminal investigations, criminal charges, previous convictions or any outstanding warrants of arrests issued against him. He informed the presiding officer that the State had reason to believe that the applicant was facing similar fraud charges in other centres in the Republic of South Africa pertinently at Sandton in

Johannesburg, Durban and Cape Town, consequently, he needed the matter to be postponement to establish these exigencies.

- (5) The applicant's counsel countered the States application by making an application that the applicant be released on bail. In his affidavit in support of the bail application, the applicant stated that he was a reputable businessman, had fixed residential and business addresses, had no previous convictions, or warrants of arrest issued against him and was not aware of any pending criminal charges and undertook not to interfere with the investigation, witnesses or prejudice the administration of justice. He also undertook to attend his trial.
- (6) The applicant's counsel opposed the application for a postponement. He challenged the State to furnish the applicant with the relevant docket case numbers, and the names of the investigating officers of these alleged fraud investigations.
- (7) The applicant's counsel argued that the State could not lawfully justify the continued detention of the applicant, as it has had ample opportunity to have investigated these aspects, consequently, the purported lack of sufficient information could not be laid at the door of the applicant if the State was negligent or remiss in its investigation. When applicant's counsel made these submissions, Captain Nhlapo was present in court. He did not volunteer any information and was not called upon by the Prosecutor to counter these submissions.
- (8) Despite the fact that the Prosecutor did not adduce any evidence supporting what he categorised as the State's reasonable belief that the applicant may have previous convictions, pending criminal investigations, criminal charges, or warrants of arrest issued against him, the presiding officer acceded to the application for a postponement.

- (9) In the urgent bail application, Captain Nhlapo confirmed that he was not *per se* against the applicant being released on bail, however, he had received information that the applicant was implicated in other fraud charges – not related to the fraud the applicant was facing – which were the subject of investigation at other police stations, namely Sandton, Cape Town and Durban, consequently, he needed time to investigate and verify this information.
- (10) Captain Nhlapo stated that did not have any information regarding the nature of the fraud, or the names of the investigating officers in these criminal investigations, but had received information that the fraud charges against the applicant were investigated under four docket case numbers at the Sandton Police Station, and was informed that the Financial Services Board was the complainant in all these matters. He was not aware if any warrants of arrest were issued pursuant to the investigations in any of these matters. He did not know the details of the fraud allegedly committed by the applicant or the estimated fraud in monetary terms allegedly being investigated.
- (11) The applicant's counsel requested this Court to exercise its inherent jurisdiction and release the applicant on bail as there was no lawful reason justifying the continued detention of the applicant or the refusal to release him on bail.

### **THE FRAUD**

- (12) The basis of the fraud charge against the applicant is that on or about 27 August 2010 at Johannesburg and or Pretoria he together with other accused persons acting in furtherance of a common purpose unlawfully, falsely and with the intent to defraud, and to the actual or potential prejudice of Daphney Mashile Nkosi, and Brian Amos Nkosi and Kalahari Resources (Pty) Ltd and/or the majority shareholders put out and presented to the Companies and Intellectual Property Registration Office that The South African Community Government Union referred to as accused 6, was authorised to pass a special

resolution disqualifying Daphney Mashile Nkosi and Brian Amos Nkosi as directors of Kalahari Resources (Pty) Ltd and appointed the applicant together with four other accused as directors of Kalahari Resources (Pty) Ltd and the only persons authorised to exercise the powers and functions of directors over Kalahari Resources (Pty) Ltd.

### **THE APPLICABLE LAW**

(13) *Section 60* which governs the principles of bail provides:

***“Bail application of accused in court***

(1)(a) An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.

(b) Subject to the provisions of section 50(6)(c), the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of the Act until the accused appears in such other court for the first time.

(c) If the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether he or she wishes that question to be considered by the court.

(2) In bail proceedings the court—

- (a) may postpone any such proceedings as contemplated in section 50(3);
- (b) may, in respect of matters that are not in dispute between the accused and the prosecutor, acquire in an informal manner the information that is needed for its decision or order regarding bail;
- (c) may, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused, as the case may be, that evidence be adduced;
- (d) shall, where the prosecutor does not oppose bail in respect of matters referred to in subsection (1)(a) and (b), require of the prosecutor to place on record the reasons for not opposing the bail application.

(2A) The court must, before reaching a decision on the bail application, take into consideration any pre-trial services report regarding the desirability of releasing an accused on bail, if such a report is available.

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

- (14) A High Court has inherent jurisdiction to intervene in uncompleted bail proceedings commenced in a magistrate’s court, and also has supervisory power over the conduct of proceedings in the magistrates’ courts in both civil and criminal matters, to ‘*supervise the manner in which*’ the courts discharge their functions in order to ensure ‘*quality control*’. The jurisdiction to intervene exists at common law, and also subsists under **section 166 of the Constitution**. The power to intervene in unconcluded bail proceedings in lower courts is rarely exercised. It is only exercised in very special and peculiar cases, like the present where a grave injustice could occur if there is no lawfully justifiable reason to detain an arrested person

***Wahlhaus and Others v Additional Magistrate, Johannesburg and Another 1959 (3) SA 113 (A) at 119-20. S v Hlogwane 1989 (4) SA 79 T; Constitution of the Republic of South Africa Act 108 of 1996, s 166; Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening) 2002 (2) SACR 222 (CC) (2002 (5) SA 246) in paras [19]ff; Magistrate Stutterheim v Mashiya 2003 (2) SACR 106 (SCA);***

### **THE CONSTITUTION**

- (15) The common law inherent jurisdiction power to grant bail must be exercised consistently with the nature and purpose of the **section 39(2) of the Constitution**, which provides that a court “*must promote*” the spirit, purport and objects of the Bill of Rights and “*enjoins courts to develop the common law in the interests of justice*” when dealing with matters involving the fundamental constitutional issue of liberty. In this

context, to “*promote*” means to further or advance the constitutional imperative of taking into proper account the fundamental rights encapsulated in **sections 12(1)(a) and 35(1)(F) of the Constitution**. When interpreting **section 60 of the Criminal Procedure Act 51 of 1977**, every judicial officer is obliged to take full account of the **Constitution** in the light of the requirements of **section 39(2)**.

- (16) **Section 12(1)(a) of the Constitution** guarantees everyone’s right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause. The **Constitution** does not create an absolute right to personal freedom. Liberty is qualified and circumscribed by **section 35(1)(f)** which reads: *“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.”*
- (17) It is clear that the approach to bail by judicial officers must be considered within the prism of the **Constitution**. **Section 35(1)(f) of the Constitution** postulates a judicial evaluation of different factors that make up the criterion of the interests of justice. The application of constitutional norms to the law and practice of bail obliges judicial officers to harmonise **section 60** bail provisions with constitutional norms and imperatives. The purpose of bail is to strike a balance between the interests of society and the liberty of an accused person consequently, the basic objectives traditionally ascribed to the institution of bail, is to maximise personal liberty in accordance with the normative precepts of the Bill of Rights **S v Dlamini and Others; S v Joubert; S v Schietekat 1999 (7) BCLR 771 (CC)**.
- (18) A bail application should in principle be heard as a matter of urgency because it affects personal liberty. In **Magistrate, Stutterheim v Mashiya 2003 (2) SACR 106 (SCA)**, Cameron J held: *‘It is evident that finalising an application for bail is always a matter of urgency. ....And if bail is refused, the decision can be appealed. The*

*right to prompt decision is thus a procedural right independent of whether the right to liberty actually entitles the accused to bail.'* The deprivation of a person's liberty due to arrest pending trial is subject to judicial supervision and control. In exercising such oversight in regard to bail proceedings a court is expressly enjoined by the provisions of **section 60** not to act as a passive bystander but to take the initiative in the bail proceedings.

- (19) The prosecutor has a duty to place before Court all relevant information which the Court needs in order to exercise its discretion with regard to the postponement, the granting or refusal of bail. A bail hearing is inherently a unique urgent formal judicial process. Although bail application proceedings like a criminal trial, are essentially adversarial, the inquisitorial powers of the presiding officer are paramount.
- (20) In terms of **section 35(3) of the Constitution** every accused person has a right to a fair trial, which includes the right to be presumed innocent. In a bail application the presumption of innocence operates in favour of the applicant even where there is a strong *prima facie* case against him.
- (21) The presiding officer has a duty to investigate all aspects regarding the question of bail. If the parties do not of their own accord adduce evidence or otherwise produce information regarded by the court to be essential to the bail proceedings, a court in terms of **section 60(3)** must order that such information or evidence be placed before it.

#### **THE INTERPRETATION OF SECTION 50(6)(d)**

- (22) I now turn to consider the interpretation and applicability of **section 50(6)(d)** having regard to the constitutional template of maximizing an accused person's personal liberty, in order to establish whether the presiding officer in postponing the bail proceedings purely on the *ipse dixit* of the prosecutor, without the applicant who placed the information predicated the application for a postponement in dispute,



being accorded an opportunity to test the reliability of such information under cross examination, whether the presiding officer's decision to postpone the bail proceedings was judicially justifiable and correct.

(23) **Section 50 (6)(d)** provides:

*“(d) the lower Court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or Court, for a period not exceeding seven days at a time, on the terms which the Court may deem proper and which are not inconsistent of this Act if -*

*(i) the court is of the opinion that it has insufficient information disposal to reach a decision on the bail application;*

*(ii)*

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*(iii)*

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*(iv) It appears to the court that it is necessary in the interests of justice to do so.”*

(24) An application for a postponement by the State in bail proceedings is not for the asking. The State seeks an indulgence consequently, it must furnish cogent sustainable persuasive reasons justifying the granting of such postponement. The presiding officer is enjoined by the constitutional imperatives predicated **section 35(1)(f) of the Constitution** to have due regard to the cogency of the reasons underpinning the State's application for a postponement, to conduct and inquiry utilising his or her inquisitorial powers under **section 60 (3)**

to determine whether the State has placed all relevant information or evidence before Court to enable it to properly exercise its judicial discretion to postpone the bail application in terms of **section 50 (6)(d)**.

- (25) Although a bail application is less formal than a trial, it remains a formal court process that is essentially adversarial in nature. A court is afforded greater inquisitorial powers in such an inquiry to ensure that all material factors are investigated and established. The granting of a postponement necessarily requires a court to establish the content and reliability of the circumstances predicated the application for a postponement and to evaluate these against constitutional imperatives and traditional basic bail objectives. The form such an inquiry and evaluation should take is not prescribed **section 60(3)**, but a court reasonably informed of its constitutional imperatives should be aware of the essential form such a judicially inquiry should take. If there is a dispute regarding any issue it behoves that the prosecution and the applicant be given an adequate opportunity to be heard on the issue.
- (26) The presiding officer is enjoined in terms of **section 50 (6)(d)** to evaluate and weigh the cogency of the proffered reasons predicated the application for a postponement, and balance these against the liberty of the applicant and basic objectives traditionally ascribed to the institution of bail. The presiding officer is thereafter required to make a value judgment whether it would be in the interests of justice to accede to the postponement.
- (27) In evaluating the sufficiency of information or evidence where there is a contentious dispute raised by the applicant challenging the source and essence of the reasons predicated the State's application for a postponement, in our adversarial criminal law system predicated on a person's constitutional right to a fair trial, the presiding officer is enjoined in accordance with the prescripts of an impartial inquiry, to investigate the source of the information advanced by the State in support of the application for postponement in order to test the veracity

and reliability of such information to properly arrive at a considered conclusion whether the information is insufficient to enable the Court to reach a decision on the bail application, and consequently, whether it is in the interests of justice to postpone the bail application proceedings.

- (28) In the present matter the only information the presiding officer had at his disposal was the *ipse dixit* of the State prosecutor. Because the State seeks an indulgence to investigate or establish certain aspects relating to the applicant's criminal record it bears an onus to show that the belief – that there is a possibility that the applicant has previous convictions of a similar nature, pending criminal investigations or charges, or warrants of arrest issued against him, – is reasonably held, and that these factors have a direct bearing and consequences in relation to the charge the applicant is facing, consequently, that his release on bail was not in the interests of justice as it may affect or impede the administration of justice.
- (29) The applicant in his affidavit contradicts the State's information, predating its application for a postponement and places same in dispute. The Investigating Officer was present in Court but was not called upon by the State prosecutor or the presiding officer to proffer additional information, or adduce evidence in support of the State's application for a postponement, despite a direct challenge from the applicant's counsel attacking and disputing the very basis and essence of the State's invocation of a postponement in terms of **section 50(6)(d)**.
- (30) By opposing the State's application for a postponement the applicant in terms of **section 60(2)(c)** was in effect, impugning, and disputing the reliability of the State's information predating its application for a postponement, consequently, upon the applicant's challenge, it was incumbent on the presiding officer to invoke the provisions of **section 60(3)**. **Section 60(3)** is peremptory, it enjoins the presiding officer to

order that reliable or sufficient information or evidence be placed before the Court in order to enable it to reach a decision on the bail application, –which decision includes a postponement, the refusal or granting of bail,–after such information or evidence has been properly considered by the presiding officer.

- (31) The applicant unlike the State which can place information informally at the disposal of the Court, has an onus and is enjoined in terms of **section 60 11(a)** to satisfy the Court by adducing evidence that “*exceptional circumstances exist*” that “*it is in the interests of justice to release him on bail.*” The applicant in his affidavit in support of the bail application pertinently avers that such is the case in respect of his bail application.
- (32) In my view the State failed to place sufficient information or evidence at the disposal of the Court, except the disputed and challenged *ipse dixit* of the Prosecutor. In *casu* the presiding officer had evidence on oath from the applicant and informal information from the State at his disposal. Without conducting a formal judicial inquiry as enjoined by **section 60(3)**, and having regard to constitutional imperatives, the presiding officer could not rationally and properly exercise his judicial discretion to conclude that he had insufficient information or evidence at his disposal to reach a decision on the bail application and consequently, was obliged to postpone the bail application proceedings.
- (33) A bail inquiry is a judicial process that has to be conducted impartially and judicially and in accordance with relevant statutory and constitutional prescripts. A postponement or refusal of bail without lawful justification is an unlawful deprivation of a person’s liberty. The discretion to postpone a bail application should not be influenced by untested notions predicated on a premise to investigate an applicant’s previous convictions, pending criminal investigations or charges where the applicant under oath states that he has no previous convictions and

is not aware of any pending criminal investigations or charges, or warrants of arrest issued against him.

- (34) In my view the failure by the presiding officer to order that reliable or sufficient information be placed before the Court by the State in terms of **section 60(3)** and the subsequent postponement of the bail application proceedings in terms of **section 50 (6)(d)**, was a serious misdirection which resulted in the applicant's infringement of his constitutional right to a fair trial which includes a bail application. The presiding officer in postponing the bail application proceedings on the was arbitrary the State Prosecutor's *ipse dixit* had no rational basis and consequently the applicant's constitutional right to liberty was infringed.
- (35) The State is not entitled to detain an accused person in custody in order to complete an investigation. ***S v Bennett 1976 (3) SA 652 (C) at 655C; S v Du Preez (supra at 379F)***. Although it was held in ***Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 819G-820A*** that **section 50** contemplates further investigation after arrest, it is necessary to weigh up the applicant's right to apply for bail and the State's right to investigate rationally having regard to constitutional imperatives. The State is not entitled to detain the applicant in custody for purposes of investigation and consequently in so doing frustrate the applicant's constitutional right not to be detained without lawful and just cause. ***Novick v Minister of Law and Order and Another 1993 (1) SACR 194 (W)***.
- (36) In irregularly postponing the bail application or bail proceedings in terms of **section 50 (6)(d)**, the presiding officer ignored the applicant's **section 60(11)** evidence which in the absence of countervailing contrary rebuttal evidence, sufficed as proof beyond reasonable doubt that the applicant had proved that exceptional circumstances existed, which in the interests of justice, justified and permitted his release on bail. Consequently, in applying the High Court's inherent common law

and constitutional jurisdiction, I am satisfied that the applicant in his affidavit in support of the bail application has complied with and satisfied the requirements of **section 60 (11)** and is entitled to be released on bail.

### **THE ORDER**

(37) I consequently make the following order:

- (i) The applicant is released on bail in the amount of R10 000.00 (ten thousand rands). The applicant is to pledge his premises at 706 Adrian Street, Sandown within seven (7) days hereof as security for such bail amount.
- (ii) The applicant is to report at Sandton Police Station every Monday and Friday between 08:00am and 8:00pm.
- (iii) The applicant is not to leave the jurisdiction of the South Gauteng High Court without the permission of the Investigating Officer which permission may not be unreasonably withheld.

Dated at Johannesburg on the 18<sup>th</sup> July 2011.

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MOKGOATLHENG J  
JUDGE OF THE HIGH COURT

DATE OF HEARING: 23<sup>RD</sup> OCTOBER 2010

DATE OF JUDGMENT: 19<sup>TH</sup> JULY 2011

ON BEHALF OF THE APPLICANT: D NTSEBENZA SC  
INSTRUCTED BY: NGCEBETSHA MADANGA ATTORNEYS  
TELEPHONE NUMBER: 082-335-4189  
REF. NO.: MR J NGCEBETSHA  
ON BEHALF OF THE RESPONDENT: SK ABRAHAMS  
INSTRUCTED BY: THE STATE ATTORNEY  
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