IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A465/07

DATE:5 SEPTEMBER 2007
In the matter between:

NAJWA PETERSEN Appellant

and
THE STATE Respondent

JUDGMENT

WHITEHEAD, AJ

On 12 July 2007 the Regional Magistrate (whom I shall refer to as the Magistrate) at Wynberg refused the Appellant's application to be released on bail.

The Appellant now appeals against that decision. She was arrested on 18 June 2007. She (and three others) are to be charged with the murder of her husband on the night of 16 – 17 December 2006 at their home; and at the same date and address robbing her son of cell phones, watches and R1 600 in cash.

These are offences referred to in schedule 6 of the Criminal Procedure Act 51 of 1977 (the Act).

The bail application before the Magistrate commenced on 26 June 2007. Evidence from both the State and the Appellant was heard over the five days. The record consists of 141 pages of exhibits, 527 pages of evidence and a further 130 pages of argument and the Magistrate's judgment. This appeal was argued – essentially for a full court day – on 31 August 2007. Advocate Webster appeared for the Appellant and Advocate Riley for the State. I record my appreciation to both counsel for their heads of argument and respective presentations of their oral argument.

Section 60(11)(a) of the Act provides;

> "(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to – (a) In schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release."

The onus is on the Appellant to establish the "exceptional circumstances" referred to in Section 60(11)(a) of the Act. As described by the Constitutional Court "unless there is sufficient material to establish that the interests of justice do permit the detainee's release, her detention continues". S v Dlamini 1999(2) SA50(CC) at 76g.

It was also held by the Constitutional Court in that case that applicants for bail "actually have to adduce evidence. In addition, the evaluation of such cases has the predetermined starting point that continued detention is the norm" (at 84c-e). Furthermore Section 60(11)(a) "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 exit" (at 85c-d).

Broadly described exceptional circumstances are unusual, or out of the ordinary which relate to the crime, the applicant's personal circumstances or any other cogent circumstances. S v Dlamini supra at 89 b Herbay v S 1999(2) All SA 216 (W) at 222 e-h. S v Botha 2002(1) SACR 222 (SCA) at 229i – 230a. S v Bruintjies 2003(2) SACR 575 (SCA) at 577e – g.

Section 65(4) of the Act provides:

> "The Court or Judge having 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 will give a decision which in its or his opinion the lower court should have given."

In considering the effect of Section 65(4) it has been held 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 view are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly "S v Barber 1979(4) SA 218 (D) at 220 E – H. See also S v Porthen and Others 2004(2) SACR 242 (C) at 249c – 250b."

At the bail application the State relied on four grounds in opposition, a likelihood that the Appellant, if released on bail, would:

endanger the safety of the public (Section 60(4)(a) read with Section 60(5) of the Act);

attempt to evade her trial (Section 60(4)(b) read with Section 60(6) of the Act);

attempt to influence or intimidate witnesses (Section 60(4)(c) read with Section 60(7) of the Act);

disturb the public order or undermine the public peace or security (Section 60(4)(e) read with Section 6)(8)(A) of the Act);

Section 60(9) of the Act, in addition, records 7 factors that have to be taken

into account.

At the bail application the following five grounds were "advanced" – as described in the heads of argument drafted by Advocate Webster on behalf of the Appellant – as constituting the necessary exceptional circumstances which in the interests of justice permitted her release on bail. It was argued at the bail application and again in this Appeal that the Appellant: has a long, well documented history of severe psychiatric problems; and was in a precarious mental state at the time of the application; and needs appropriate psychiatric care, medication and support on an ongoing basis; and will not be provided with the type of care that she needs from the Department of Correctional Services; and needs to look after her eight year old daughter.

At the bail hearing a detailed history of the Appellant's psychiatric problems and the treatment she had received was provided through the evidence of the psychiatrists Drs Fortuin and George. Advocate Webster submitted that their evidence and their reports, Exhibits "C" and "E" respectively set out a history of severe psychiatric problems from 16 March 2003 to the present (my emphasis).

This submission is not correct. Dr Fortuin treated the Appellant from 16 March 2003 to 23 May 2006 as recorded in his report (Exhibit C) and clarified in evidence. From 8 September 2006 Dr George treated the Appellant after

she was admitted to Crescent Clinic. Thereafter until 20 September 2006 he prescribed eight electro-convulsive treatments and medication detailed in his report (Exhibit C). She responded positively to the treatment and medication. After her discharge from that clinic on 20 September 2006, the Appellant consulted Dr George on an out-patient basis on 26 October 2006. On that occasion "she seemed to be appropriate and happy with her mental state" On 30 November 2006 he had a telephonic consultation with her.

Cross-examination of Dr George established that from 30 September 2006 till her arrest on 18 June 2007, the Appellant had not seen a psychiatrist – despite the murder of her husband on 16 – 17 December 2006. Dr George testified that he had wondered if the Appellant would have a relapse after her husband's murder. He assumed she had not because it may have been "a perpetuation of the beneficial effects of the ECT that stabilised her". Dr George is referring here to the eight electro-convulsive treatments that the Appellant received in September 2006. On further questioning from the magistrate, Dr George conceded that it was "uncommon or strange" that the Appellant had not suffered a relapse.

Dr Panieri-Peter is a psychiatrist working at the forensic unit at Valkenberg Hospital. She testified on behalf of the State. Her evidence on this aspect on, enquiry initiated by the Magistrate, was "from 20 September until her arrest and every time she was seen she didn't require hospitalisation, and in

fact only saw her treating psychiatrist once in that time. Most people would say that when one sees the patient six-monthly they are considered to be stable". Furthermore "it is odd that she did not require her psychiatrist, who she knew very well and who she had a therapeutic relationship with and who clearly was very available. It is odd that if her condition was so severe she did not require to see that person from 30 November onwards. That's all I can say with certainty. And it is odd that if someone has such a severe bipolar mood disorder that they can't be held in a standard place where people awaiting trial are held, that the death of her husband in front of her eyes wasn't sufficient to cause relapse."

In re-examination of Dr Panieri-Peter it was established that the Appellant had on 6 February 2007 consulted a medical specialist in regard to cosmetic or lipo-suction surgery. Dr Panieri-Peter then drew the inference "at the time that she consulted that particular doctor that her mental illness wasn't as bad as has been described and it was likely that she wasn't mentally ill then for the same reason as she didn't consult her psychiatrist. "On the evidence this was the only medical practitioner that the Appellant had consulted after 26 October 2006 until her arrest on 18 June 2007.

After her arrest on 18 June 2007 Dr George on 20 June 2007 at her family's initiative "evaluated" her at the police cells at Bellville South. The Appellant was upset, tearful and agitated but there was no sign of an obvious relapse.

On a second visit at the police cells Dr George was concerned about her and he adjusted her medication to make it a bit stronger because she was not sleeping. Under cross-examination he conceded that the Appellant's insomnia could have been attributed to the fact that she had been charged with a serious crime and that there was a possibility of a prison sentence.

On a third occasion at the police cells on 26 June 2007 Dr George testified that she seemed to be better. The Appellant looked better and said she was feeling better. There was no sign of a relapse.

On his fourth visit to the police cells on 30 June 2007 the Appellant was not communicative. She lay crying and did not respond to him. Dr George adjusted her medication. Her main complaint was again insomnia. Over the four visits he described the sort of pattern he had seen in the Appellant from a psychiatric point of view as fluctuating, unpredictable and unresponsive to medication.

This limited analysis of the relevant evidence illustrates why Advocate Webster's submission that the Appellant has a history of severe psychiatric problems from 16 March 2003 "to the present" is incorrect. It also establishes that Advocate Webster's further submission that the Appellant's precarious mental state at the time of the bail application was not refuted, is

similarly incorrect. The high watermark of the Appellant's case on these two grounds was the evidence of Dr George that the Appellant's continued incarceration was likely to cause ongoing deterioration in her mental state as he had discerned signs that Appellant was on the verge of a psychotic relapse and saw this as a likely consequence of ongoing incarceration. The evidence relied on by Advocate Webster in this context was speculative and improbable. The Appellant's insomnia, lability and agitation manifested after Dr George's second visit to her in the police cells. I have already referred to the concession that Dr George has made in this regard – she could have exhibited these features because she had been charged with a serious crime and faced a possible prison sentence.

The Appellant has accordingly failed to establish that her history of severe psychiatric problems is an exceptional circumstances as referred to in Section 60(11)(a) of the Act. She has similarly failed to establish that her mental state at the time of the bail application was so precarious as to constitute an exceptional circumstance.

The third ground advanced on behalf of the Appellant as constituting an exceptional circumstance was that she needed appropriate psychiatric care, medication and support on an ongoing basis. In arguing this ground Advocate Webster relied primarily on the evidence of Dr George.

Dr George testified that the Appellant's detention whilst awaiting trial would increase the risk of her committing suicide. He was of the opinion that were she to be sent home where she would have access to the support of her family, the support of her psychiatrist and access to appropriate psychiatric facilities if needed she would be at less risk of suicide than if she was kept in custody.

Advocate Webster argued further that the history of her care in the past demonstrated that: she had had access to proper professional consultations; she received the appropriate medication and she was admitted to the appropriate facilities where necessary. He also argued that the evidence of Dr George was that she had been supported and cared for by her family.

The Magistrate dealt with this argument in his judgment as follows:

> "Of crucial importance is the fact that the accused whilst in the care of her family and whilst receiving treatment had indeed tried to commit suicide on previous occasions, and if she would be released would necessarily eliminate that risk of suicide. Now the only evidence before this Court with regards to this point is that her late husband, the deceased, took responsibility for her care, it seems. This is what Dr George and Dr Fortuin referred to in evidence when they talked about "family members". Both these doctors, and more especially Dr George, say that they have spoken to the deceased who

> had taken it upon himself to care for the accused and no one else. Apart from a general untested assertion there is no evidence before this Court as to who would take responsibility for the care of the accused. There is no evidence that there is someone better trained and it seems that you need a trained person as far as I am concerned, or a person who is adequately equipped to take care of the accused than a person better trained or with a similar training than a nurse or any other person in a State institution like Correctional Services who deals with situations like this."

The Magistrate in doing so correctly and accurately evaluated the relevant evidence on this point.

Advocate Webster also argued that it was common cause on the evidence of all three psychiatrists that the Appellant needs: access to appropriate and regular psychiatric care; to receive the correct medication which is controlled and monitored on a daily basis; and a supportive environment.

The difficulty with this submission is that there was no evidence as to what would be "appropriate and regular psychiatric care" after she was detained. In cross-examination of Dr George it was put to him that "inmates can also have their own psychiatrist seeing them at Pollsmoor as an outpatient." Dr George was unaware of this fact and testified that he would have to consider whether he would treat her at Pollsmoor because he has "a busy psychiatric

practice and to go to Pollsmoor and consult with a patient if you go through the admission procedures travelling it can take two or three hours out of a day".

There is also limited evidence as to what medication the Appellant requires and how it should be controlled and monitored on a daily basis. The medication Dr George prescribed when he visited the Appellant at the police cells is detailed in the second paragraph at page 2 of Dr George's report (Exhibit E at page 49). The only relevant evidence of Dr George is that she requires "close daily monitoring". On enquiry as to how close it should be, Dr George replied "someone needs to be aware each day of what medication she is having, what's her mental status at the time, whether she's going to take it all in one shot or whether she's going to take it properly." On further enquiry, as to whether each dose of the medication has to handed to her effectively, Dr George replied "no, not necessarily, she can get a day's medication." Dr George also confirmed that while the Appellant was held at the police cells "the staff on duty give her her day's medication then she takes it further. The main amounts are held by the officer on duty and then she is given her daily medication."

The Appellant has accordingly also failed to establish that her need for ongoing psychiatric care constituted an exceptional circumstance.

The fourth ground advanced on behalf of the Appellant as constituting an exceptional circumstance was the inability of the Department of Correctional Services to provide her with the appropriate care for her severe mental problems.

Advocate Webster correctly submitted that the evidence relating to the medical facilities within the female section at Pollsmoor Prison revealed a dismal and disturbing picture. In fact the Magistrate accepted that:

> "……the treatment and care for patients with mental illnesses will be less than satisfactory and not nearly at the same level as the care any patient would get at any recognised mental institution."

He however reasoned that:

> "People with mental illnesses belong in an institution that cater for that and not in a prison. A prison is primarily an institution where people are detained in order to protect the public. They however have rights in terms of Section 35(e) and (f) of the Constitution to adequate medical care and access to a chosen medical practitioner. The Constitution demands no more of the prison authorities. If they should fail in their duty to give this care any detainee will have recourse to ensure that these rights are provided. Although a Court seized with a bail application can take cognisance of the conditions in

> prison and has a duty to ensure that the liberty of any individual is not unduly restricted, it cannot sidestep or abdicate its responsibility to order the detention of a person because of inadequate conditions in prison. No Court can do that and it is not the responsibility of the Court. It would then mean that people suffering from mental illness like the accused can never be detained even if they are a danger to society because of inadequate conditions in prison. This is totally unacceptable and the Court cannot accept that in argument, even more so where a case has been made out that someone like accused number 1 is a danger to herself and who is prone to suicide needs to be contained to protect her from herself in order to keep her alive so that she could stand trial."

As Advocate Riley for the State argued the Supreme Court of Appeal has, to an extent, endorsed the approach taken by the Magistrate. S v van Wyk 2005(1) SACR 41 (SCA) at 45g-j.

In cross-examination of Dr Panieri-Peter it was put that the Appellant would be a suicide risk if she was detained in prison. She provided a motivated explanation of why she disagreed with that proposition in the following terms.

> "If your motivation for sending her home is to keep her alive, in other words to prevent her dying at her own hand, then that is actually the question. It is, can we try to the best of whatever

> facility to prevent committing suicide, and I would argue that a facility even inadequate, has a higher likelihood of keeping an individual safe – not comfortable, not happy, but safe from suicide – not at home, where they have access to any mechanisms by which to kill themselves."

She was then asked;

> "And without psychiatric care, without appropriate medication."

She replied;

> "Well we are talking about with appropriate medication, but even even if you are using as your test for keeping her alive then I have to say that sending her home is the high risk thing to do. If you are talking about keeping her optimally well then that is not the same. But your argument is that she is going to die at her own hand – more likely in a prison cell than at home – and I would say that at home her likelihood is especially in a fact that nothing predicts the future like the past, she has already attempted that under the supervision of her family."

The Appellant's failure to establish the first three exceptional circumstances referred to above also limits the impact of the argument advanced in respect

of the fourth exceptional circumstance to relied on. As argued by Advocate Webster the fourth ground is constituted by the Department's inability to provide the appropriate care for the appellant's "severe mental problems." If, as I have found, her mental problems after her arrest were not severe she has also then failed to establish that exceptional ground relied on.

The fifth and final ground advanced on behalf of the Appellant as constituting an exceptional circumstances was that she needs to look after her eight year old daughter.

It is understandable that the Appellant's daughter, after the murder of her father and the arrest of the Appellant is, as explained by the Appellant's sister, Mrs F Arendse;

> "She is traumatised, she can't sleep at night, she cries for her mother at night and when she visits her mother when she comes back then I have trouble with her, the questions that she asks, when is her mother coming home and things like that."

However, in evidence in chief Mrs Arendse was not lead on the role that the Appellant played in looking after her daughter. In cross-examination it was established that the deceased had played a leading parental role in attending to the child because the Appellant "was never able to do that, she was sick

all the time."

Further cross-examination also established that the child's primary careers were two domestic assistants. Advocate Riley also submitted that the Appellant has an extended family. Her parents are still alive and she has two other sisters. The child is close to her siblings from the deceased's first marriage as well as a paternal aunt. Furthermore the Appellant's family is financially well-off and is able to look after the child.

Advocate Webster argued that Dr Panieri-Peters evidence was that it was in the child's interests to have her mother care for her. This argument was countered by Advocate Riley who emphasized that Dr Panieri-Peter's evidence on this aspect had been qualified in the following terms:

> "The question about whether access to her child is relevant to her mental state remains in question. Certainly someone that is of such a high risk and are likely to kill themselves, you can argue it is a very stressful thing to impose on a child and that actually to have a child be part of that is certainly when we have people who are admitted to a psychiatric hospital, not as part of any forensic facility we actually limit access to family members because it is exceptionally distressing for young children to see their parents psychotic or mentally unwell. This is a seriously distressing thing for any child."

Advocate Webster's argument also overlook that on 13 April 2006 the Appellant had stabbed her husband in the neck. Dr Fortuin was referred to this incident in cross-examination. He was asked if it was possible that the Appellant could do so again. He was unable to answer because he had not assessed her for "homicidal intent". He conceded that there was a "likelihood" that it could happen again. He subsequently testified that there was a possibility that the Appellant might have another episode where she might stab or hurt somebody.

The Magistrate dealt with this argument as follows:

> "In this case however the accused because of her mental condition is barely able to look after herself. That is the evidence that was given here. You have to have somebody that has to look after her let alone her child. According to the evidence which is presented by the defence is that her normal functioning deteriorated from 60% to 20%. She could barely function as a person because of her mental condition. It is also part of her case that she is suicidal. This in itself poses a risk of harm to a young child. That was also the evidence that was presented here by the State."

In doing so he again correctly and accurately evaluated the evidence adduced on behalf of the Appellant on this point. The Appellant has similarly failed to establish that her need to look after her daughter constituted an

exceptional circumstance.

Advocate Riley argued that if the Appellant was released on bail there is a likelihood she will endanger the safety of the public as provided for in Section 60(4)(a) read with Section 60(5) of the Act. She relied primarily on the occasion on 13 April 2006 when the Appellant stabbed the deceased. As the Magistrate did not deal with this ground of opposition in his judgment there is merit in Advocate Webster's counter argument that it can be inferred that he found no basis to conclude that the Appellant's release on bail would endanger the safety of the public.

The second ground of opposition raised by the State as provided for in Section 60(4)(b) read with Section 60(6) of the Act is that there is a likelihood that she would attempt to evade her trial if she was granted bail.

Advocate Riley in her argument focused on Section 60(6)(f) which referred to the nature and gravity of the charges on which the Appellant is to be tried; and section 60(6)(g) which refers to the strength of the State's case against the accused.

It has been held "Dit is gevestigde reg om ook in gevalle waar Artikel 60(11)(a) van toepassing is, met ander woorde afgesien van die waarskynlikheid dat die beskuldigde sal poog om sy verhoor te ontduik, die sterkte van die Staat se saak relevantheid te geen onder die rubriek van buitengewone omstandighede." S v Viljoen 2202(2) SACR 550 (SCA) at paragraph 11.

In this regard Advocate Webster has argued that the Appellant is implicated primarily by the evidence of Fahiem Hendricks who is an alleged accomplice. He has already provided conflicting versions under oath according to the investigating officer. The submission in evidence that this witness had received a significant financial incentive namely R250 000 to testify against the Appellant went unanswered, despite the State specifically taking time to investigating this aspect. The State's failure to address this aspect on resumption was telling. Advocate Webster further argued that the State case suggests no connection between the Appellant and her co-accused in that they had made no contact with each other whatsoever and had never met each other before the deceased was murdered.

The Magistrate however correctly found that the evidence against the Appellant is not limited to the witness Hendricks. The evidence of the investigating officer was that in November 2006 the Appellant asked a close friend to obtain Hendricks' telephone number. Her friend did so. The Appellant then contacted Hendricks. He visited her at her residence. She asked him if he knew of anyone who could do a "hit" for which she would pay R100 000. He demurred. The Appellant thereafter repeatedly phoned him. He visited her again and said he had found someone. The Appellant told him she did not want to know the individuals who would perform the "hit". She also told him that the cameras around her home would be off and she would

push the buzzer to allow the hit men access to the residence.

The investigating officer, Captain Dryden, testified that he had a detailed billing of cell phone records of calls from: the Appellant to Hendricks; and Hendricks' to accused number 2; and accused number 2 to accused number 3. He also had other statements which supported Hendricks' version.

There had been two previous unsuccessful attempts by the Appellant to arrange the "hit". On 14 December 2006 the deceased returned from London. The Appellant telephoned Hendricks from the airport to enquire if he could organise a hijacking. Hendricks was unable to do so. On the following day the Appellant again telephoned Hendricks to enquire if the "hit" could be done when the deceased was to leave the Luxurama Theatre that evening. Hendricks' was again unable to do so.

The Appellant's last cell phone call to Hendricks was at 11.26 pm on the night of her husband's murder. Five to ten minutes later the two "hit men" (accused 3 and 4) entered the Appellant's home. The billing record established that accused number 3 was in the vicinity of a Judge's previous offices when he practiced as an attorney in Athlone.

Accused 3 and 4 then entered the Appellant's home as she had arranged with Hendricks. Both these accused have made confessions. There had also

been a pointing out at the scene by accused number 3.

Accused number 3 had a firearm. They finally entered the lounge where the deceased was. Accused 3 ordered the deceased to put his hands in the air. Accused 3 and 4 approached and grabbed the deceased from both sides. The Appellant then arrived. Thereafter the deceased was bound – the Appellant assisted.

Accused 3 then asked the Appellant where the safe was. He and the Appellant went to the safe. She handed him a bag of money. Accused 3 then asked the Appellant where the jewellery and cell phones were so that it could appear that there had been a robbery. The Appellant took off her watch and gave it to accused 3. She then led accused 3 into a bedroom where her son, daughter-in-law and their baby were sleeping. She walked ahead of accused 3. She put on the light, walked up to her daughter-in-law and with her finger on her lip said do not panic. Accused 3 then took cell phones, watches, a digital camera and cash.

Captain Dryden took statements from the appellant's son and daughter-in-law which corroborated this part of accused 3's version.

The Appellant and accused number 3 returned to where the deceased and accused 4 were. The Appellant finally took accused 3's firearm, covered it in a cushion and shot the deceased.

The deceased was buried the following day, on 17 December 2006. On that day the Appellant wrote out a cash cheque for R100 000. On 18 December 2006 she asked a business partner to cash that cheque. The Appellant told her partner – who has also given a statement to Captain Dryden – that if the police enquired about that payment her partner should say that the Appellant owed her that amount. However the Appellant in error had made the cheque out for R100. On 19 December a further cheque was written out by the Appellant for R100 000. It was cashed. The cash was delivered to the Appellant.

Under questioning, Hendricks' first explanation for the number of cell phone calls between him and the Appellant was that he had borrowed money from her. His second explanation has that he and the Appellant were having an affair. The Appellant under questioning in Hendricks' presence confirmed that they had had a little affair.

Hendricks thereafter explained that the reason for the number of calls was a legal diamond deal between himself and the Appellant. Hendricks subsequently, in the company of his attorney, told Captain Dryden that here was not such a deal.

In cross-examination of Captain Dryden it was put that in 2006 the Appellant had done business with Hendricks in connection with diamonds. This was

subsequently clarified in the following terms. I quote a proposition put by Mr Webster to Captain Dryden in cross-examination;

> "Ek moet dit aan u stel dat die telefoniese kontak wat plaasgevind het tussen beskuldigde 1 en Mnr Hendricks was in verband met geld wat geleen is in verband met diamante waarmee hulle besigheid gedoen het."

Captain Dryden's answer was;

> "Nie heeltemal, dit is nie net oor die diamante nie Edele, dit was oor die moord."

The effect of this proposition is that the Appellant's telephone calls to Hendricks on 14 and 15 December and at 11:26pm on 16 December were in relation to money lent and a diamond business in which the Appellant and Hendricks were involved. No explanation has been provided as to why the Appellant telephoned Hendricks at 11:26 pm on 16 December 2006, five to ten minutes before her husband's murderers entered their residence. No explanation has been provided as to why the Appellant's son and daughter-in-law have provided statements explaining what the Appellant did on the night her husband was murdered. No explanation has been provided as to why on the day after her husband's murder the Appellant was so concerned to cash a cheque for R100 000 – particularly on false pretences.

The Magistrate was thus fully justified in finding that the State's case as presented at the bail hearing "would need a lot of explaining" from the Appellant.

In my judgment the Appellant accordingly has "a case to meet" as it cannot be disputed that the State has a reasonable strong *prima facia* case. This has held to be a "weighty factor" S v Branco 2002(1) SACR 531 (W) at 535 b-c.

When I raised these issues which required explanation with Advocate Webster in argument, he submitted this evidence was superficial hearsay and its reliability and accuracy had not yet been tested. However as held by the Constitutional Court a bail application "remains a unique interlocutory proceedings where the rules of formal proof can be relaxed" (S v Dlamini supra at 78 d-e.) I stress that the issues which I have summarised as requiring explanation were not challenged in cross-examination of Captain Dryden. Advocate Webster's attempt in the course of oral argument to minimise the impact of these features was accordingly unsuccessful.

Advocate Webster also argued that there might be an innocent reason for the telephone contact with Hendricks. This argument is both unhelpful and unpersuasive as the reason for the Appellant's telephone contact between the Appellant and Hendricks was as set out above put in detail during the cross-examination of Captain Dryden.

Advocate Webster has submitted that it is significant that the Appellant had been questioned as early as January 2007 in connection with the matter. Had she wished to flee, so he argued, she had ample opportunity to do so. It is telling, he argued, that she did not do so but remained in Cape Town where her family, her roots and her assets are based. Advocate Riley has countered correctly, in my judgment, by submitting that the argument that she could have absconded a long time ago also holds no water. It is clear that the Appellant kept tags on the progress in investigation by constantly enquiring from witnesses what was said to the police at all relevant times.

Advocate Riley also argued that no satisfactory explanation has been provided as to why the Appellant requested that the proceeds of R5.3million on an insurance policy on the life of the deceased should be paid into a Namibian bank account. She submitted that the explanation by Advocate Webster from the bar that it was an interim measure since she wanted to create a trust fund for her daughter is unconvincing – particularly if the Appellant, and presumably her daughter, intend to stay in Cape Town. The Magistrate was again justified in relying on this feature.

The third ground of opposition raised on behalf of the State is provided for in Section 60(4)(c) read with Section 60(7) of the Act in that there is a likelihood that she would attempt to influence or intimidate witnesses if she was released on bail.

Advocate Riley has submitted that the Appellant has shown that she is not adverse to interfering with the investigation in this matter. She has also

referred to the Magistrate's reliance on the evidence that the Appellant told her business partner on the morning of 17 December 2006 to tell the investigating officer an untruth about the cheque she was asked to cash the day after the deceased was murdered.

Although I may have a different view on this ground of opposition, I am not persuaded the Regional Magistrate wrongly exercised his discretion in upholding that ground.

The fourth and final ground of opposition raised on behalf of the State is provided for in Section 60(4)(e) read with Section 60(8A) of the Act. Again, although I may have a different view on this ground of opposition, I am similarly not persuaded that the Magistrate wrongly exercised his discretion in upholding that ground.

In conclusion I am not satisfied – as required in terms of Section 65(4) of the Act – that the Regional Magistrate's decision was wrong. The APPEAL IS ACCORDINGLY DISMISSED.

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WHITEHEAD, AJ

05:09:2007/ds