IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
SIGNATURE	DATE: 7 February 2022

Case No: A01 / 2022

In the matter between:

SIPHO LUCAS SELAHLE Appellant

and

THE STATE Respondent

JUDGMENT

WILSON AJ:

1 The appellant, Mr. Selahle, is charged with several counts of attempted murder, assault with intent to do grievous bodily harm, extortion and kidnapping.

2 On 31 January 2022, I upheld Mr. Selahle's appeal against the Regional Court's refusal to grant him bail. I ordered his release on a bond of R15 000, subject to a number of further conditions that were agreed between Mr.

Selahle and the State. I indicated that I would give my reasons in due course. These are my reasons.

3 Mr. Selahle owns property in Orlando West, Soweto. In 2017, he rented that property out to a man identified on the record as “Samson”. The State alleges that the property was used to detain and hold to ransom several foreign nationals. It also alleges that Mr. Selahle knew about the purpose to which the property was put, and participated in the scheme to kidnap the various hostages, to extort ransom from their relatives, and to subdue them while they were in detention.

4 For his part, Mr. Selahle denies any knowledge of what was allegedly going on at the property. The property is, he says, part of a portfolio of houses and shops he lets out. He says he has not personally visited the property for some time. Apart from extending the buildings on the property in 2018 at Samson’s request, Mr. Selahle says he has had little to do with it aside from collecting the rent owed.

5 Mr. Selahle applied for bail in the Regional Court on 9 November 2021. It was accepted by all concerned that the application had to be dealt with in terms of section 60 (11) (b) of the Criminal Procedure Act 51 of 1977 (“the Act”). It is not clear to me, however, that the State ever actually established that this was the applicable provision. Section 60 (11) (b) applies where an applicant for bail is charged with an offence mentioned in Schedule 5 of the Act. Neither attempted murder, nor kidnapping, nor assault with intent to do grievous bodily harm are, in themselves, Schedule 5 offences, although they may be dealt with in terms of Schedule 5 if the bail applicant has previously

been convicted of them. Extortion is a Schedule 5 offence, but only if the amounts involved exceed the thresholds Sechdule 5 sets out. The State did not provide the particularity necessary to establish either that the offences charged were Schedule 5 offences in their own right, or that they fell to be dealt with as Schedule 5 offences because of the value of the money involved. Nor did the State lead the evidence necessary to prove that Mr. Selahle had been previously convicted of any of them.

6 I will nonetheless accept, for present purposes, that the bail application was properly dealt with in terms of section 60 (11) (b). That being so, Mr. Selahle was required to adduce evidence which satisfied the Regional Court that the interests of justice permitted his release. In using the word “permit” section 60 (11) (b) requires no more than evidence that demonstrates to a court’s satisfaction that a bail applicant’s release is consistent with the interests of justice. It is not required that the grant of bail would actively promote the interests of justice, or would otherwise be an attractive prospect.

7 Mr. Selahle presented his evidence in the form of an affidavit that was read into the record. The material parts of that affidavit demonstrate that Mr. Selahle has strong links to the local community; that he does not possess a passport; that he has six children who are dependent on him for financial and emotional support; that he is self-employed as a “publican and property mogul”; and that he is married in community of property. Mr. Selahle also, as I have said, denies any knowledge of the use to which the property he rented to Samson was allegedly put.

8 The State led no evidence to contradict any of these allegations. The prosecutor communicated his instructions from the investigating officer about the content of the docket as it then stood, and quoted from or summarised statements in the docket. It was alleged that the hostage-taking was part of a network of racketeering activity which spreads across South Africa. It was also contended that three of the people allegedly held hostage at Mr. Selahle ’s property identified Mr. Selahle as taking an active role in counting and subduing the hostages.

9 Critically, however, there is no indication that any of the material necessary to support these allegations was produced at the bail hearing or that it was disclosed to the defence. Nor was the investigating officer called to testify. The prosecutor simply conveyed the gist of the State’s evidence to the court.

10 That is not acceptable. Where the State seeks to rebut evidence that is led to discharge the onus on an applicant in a bail application dealt with in terms of section 60 (11) (b), utterances from the prosecutor about the undisclosed content of the docket are not admissible.

11 Section 60 (2) of the Act permits facts relevant to a bail application to be canvassed informally from a prosecutor only where those facts are not in dispute (section 60 (2) (b)). Where the facts adduced are in dispute, then the State must lead evidence (section 60 (2) (c)). (See also *S v Mwaka* 2015 (2) SACR 306 (WCC), paragraph 12). It follows that, where a bail applicant leads evidence to discharge the onus on them in terms of section 60 (11) (b), the State may only rebut that evidence with admissible evidence of its own. The *ipse dixit* of the prosecutor is not sufficient.

12 When seeking to rebut evidence tendered under section 60 (11) (b), the State has an election: either disclose the evidence on which it relies at an early stage, or accept that it cannot rely on that evidence for the purposes of resisting a bail application. The State is obviously not required to disclose the whole docket to a bail applicant. At a very early stage of the investigation, it may also wish reasonably and legitimately to protect the identity and information concerning the whereabouts of those who have given it statements. However, in that event, the investigating officer may give evidence about the content of the docket under their control, and subject themselves to cross-examination.

13 In this case, however, the State led no evidence of its own. It follows that the only admissible evidence before the Regional Court in this case was that contained in Mr. Selahle's affidavit.

14 Mr. Selahle admitted two previous convictions on a charge of theft and on a charge of unlawful possession of a firearm. Both of these convictions are nearly four decades old. Mr. Selahle denied another eight convictions the State alleged, for which there was no evidence presented other than the prosecutor's say-so. As the Regional Court itself noted, the State did not produce the relevant SAP69 forms normally required to prove previous convictions.

15 Accordingly, there was nothing before the Regional Court to gainsay the evidence Mr. Selahle adduced. The Regional Court nonetheless refused bail, making the startling assertions that there is "an extremely strong case" against Mr. Selahle, and that Mr. Selahle "constitutes an extreme danger to

the community" because he is linked to "an organised syndicate operating in a very organised manner". As should be abundantly clear by now, the problem with these conclusions is that there was absolutely no evidence before the Regional Court to support them. Mr. Ngobeni, who appeared for the State before me, very fairly and appropriately conceded this. It follows that the Regional Court erred when it drew the conclusions that it did.

16 The Regional Court ought, in my view, to have been satisfied on the evidence Mr. Selahle tendered that the interests of justice permit his release on bail. Mr. Selahle has strong links to the local community, no passport, substantial property interests that he is unlikely to abandon, and a large family to support. Although the charges in this case are plainly serious, it was not possible, on the evidence before the Regional Court, to make any informed assessment of the strength or weakness of the case against Mr. Selahle .

17 In all of these circumstances bail ought to have been granted. I invited Mr. Ngobeni, and Mr. Baloyi, who appeared for Mr. Selahle, to agree on reasonable bail conditions. I was satisfied that the conditions they agreed were both reasonable and adequate to protect the interests of justice.

18 It was for these reasons that I upheld the appeal, set aside the order of the Regional Court, and released Mr. Selahle on bail.

S D J WILSON
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 7 February 2022.

HEARD ON:	31 January 2022
DECIDED ON:	31 January 2022
REASONS:	7 February 2022
For the Applicants:	R Baloyi Instructed by Tshabalala Attorneys
For the First Respondent:	HS Ngobeni Instructed by the National Prosecuting Authority