IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

**CASE NO: A58/2023**

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

18 May 2023
Date Signature

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In the matter between:

**BETHUEL NGOBENI** **APPLICANT**

**And**

**THE STATE** **RESPONDENT**

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**JUDGMENT**

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**KHWINANA AJ**

**INTRODUCTION**

[1] This is an appeal against the judgment of the District Magistrate Court held at Oberholzer, Gauteng, which refused the appellant's application to be granted bail, on 20 December 2022.

**ISSUE**

[2] At the heart of this appeal is whether the decision to refuse to grant the bail of the appellant was wrong.

**BACKGROUND**

[3] The appellant is charged with six counts, in particular, for contravening section 143(1) of the Mining Rights,[1] as well as one count for contravening section 4 of the Prevention of Organised Crime Act (POCA),[2] and one count for contravening section 49(1)(a) of the Immigration Act.[3] The charges are related to the possession, refining and disposing of unwrought precious metals (gold) for personal benefit and laundering the profits at Casinos and into the financial system by purchasing motor vehicles, and luxury items. The appellant's status in the country is disputed and he is also charged with fraud.

[4] The appellant was born on 8 February 1984 and is alleged to be a South African citizen residing in Khutsong. He is self-employed as a salon owner and trading in second-hand cars making about R65,000 per week. The appellant has a passport and has handed it to the Investigating Officer. The appellant is married to two South African ladies and has seven children. The appellant owns an immovable property and four motor vehicles. The appellant has one previous conviction of (theft). That he has bank savings in excess of R1 million Rands.

[1] 20 of 1967.

[2] 121 of 1998.

[3] 13 of 2002.

[5] The appellant was arrested on 4 October 2022 and on 5 October 2022, he appeared before the honourable court. The application was not proceeded with as the state was not ready to proceed. It was postponed to 19 October 2022 for bail application. On 19 October 2022, the appellant abandoned the bail application. On 27 October 2022, the matter was remanded for bail application of the appellant on 23 and 24 November 2022. On 23 November 2022, an application for the Honourable Magistrate Raath to recuse himself was granted. The matter was remanded to 29 November 2022, 02 December 2022, and 6 December 2022 for bail application before another presiding officer.

[6] On 12 December 2022, the honourable Magistrate Thupaatlase heard the bail application. The appellant submitted an affidavit in support of his bail application. The state called Mr Goodhope Letsogo and handed his affidavit as an exhibit and annexures thereto. He was subjected to cross-examination by the appellant's attorney Mr F. Mashele. The state prosecutor re-examined Mr Letsogo. The state prosecutor proceeded to call the investigation officer Mr Kgomotso Galetlole whose affidavit was submitted as an exhibit and he was subjected to cross-examination by the appellant's attorney. He was re-examined by the state prosecutor. The state proceeded to close its case. Mr F. Mashele for the appellant addressed the court and Advocate Sekhonyana replied.

[7] The honourable Magistrate postponed the matter for judgment to 20 December 2022 and remanded the appellant in custody. On 20 December 2022, the honourable Magistrate gave his judgment wherein he denied the appellant bail. The matter was remanded for further investigations until 7 March 2022.

**GROUNDS OF APPEAL**

[8] The appellant noted an appeal against the refusal of bail and the grounds as follows:

That he is a South African citizen and his evidence was supported by the affidavit taken as Exhibit C which has been corroborated by witness Mr Letsogo who testified that the Appellant is still a South African and still holds a South African ID. That a school principal assisted with late registration of birth. That the witness is confusing the application for late birth registration with that of an application for an ID. That there is nothing in page 111 to even suggest that, as the witness says, the "alleged mother" assisted the Appellant to apply for his ID in 2007 when he was 20 years old. That the appellant has been residing at 4949, Ext 2, Khutsong, Carletonville for many years.

**BACKGROUND**

**APPELLANT'S AFFIDAVIT**

[9] During the course of the bail proceedings, the appellant did not testify but filed an affidavit in support of his bail application. The appellant submits in his affidavit that his name is Bethuel Eddie Ngobeni,, an adult male person, born on 8 February 1984. He was born in Bushbuckridge, Mpumalanga Province. He is a South African Citizen. He has seven children with two wives. He is self-employed, he runs a Salon business and trades in used motor vehicles wherein he buys, fixes and sells them. He earns a sum of R 65000.00 per month from both businesses. He owns two houses at Khutsong. He has a vacant piece of land at Potchefstroom. He has

four motor vehicles namely Volkswagen Amarok, Audi A3 x2 and Volkswagen T-rock. He is a gambler who has R 1 million in his bank account. He has proof of the winnings. His assets are worth R 4 million.

[10] He has a previous conviction of a theft-related charge of fifteen years ago and no pending cases. He was arrested on 4 October 2022 at his house. He was informed that he is charged with contravention of the Precious Metals Act.[4] The appellant submits he was informed that investigations were conducted against him for some time and there are video materials implicating him. He submits that he will not endanger the public and will not endanger himself. He does not harbour any resentment towards anybody. He will not evade trial and has a fixed address. He resides with his family and will stand trial.

[11] The appellant submits investigation officer is in possession of his identity document and passport. He does not intend to become a fugitive of the criminal justice system. He will not apply for travelling documents until this matter is finalised. He submits he has strong family and emotional ties with the community. He says the state does not have evidence against him, that he will evade trial nor does he have a history of absconding. He says he will not interfere with witnesses as well as evidential material. He does not know which witnesses the state intends to call nor the evidence it intends to present. He undertakes to abide by any conditions that the court may impose.

[12] He will not jeopardise the functioning of the criminal justice system or the bail system. The public is not opposed to him being released on bail. The bail application has lots of appellant supporters. There are no exceptional

[4] 37 of 2005.

circumstances that he may disturb public order or peace. He is presumed innocent until proven guilty. He will suffer irreparable harm should he not be released on bail and his business will collapse. He is not able to enjoy the amenities of life due to incarceration and no amount of money can make good to the harm. The respondent would not suffer any prejudice if he is released on bail. The appellant's dignity is trampled upon due to detention. He says the matter will take a while therefore this will prejudice him personally, his business and his family. He is responsible for the upkeep, maintenance, food, school and transport of his children.

[13] He says the state is under political pressure thus his arrest and there is no evidence against him. He has nowhere to flee to and all his economic, religious and family ties are in Gauteng. He says it is important that he be released on bail to enable him to prepare his defence and collect evidence to prove his innocence. He does not mind reporting to the police station and he can afford the sum of R 20 000.00 as bail. He says further incarceration will serve no purpose as it is a form of punishment. He says he discharged his onus and factors in terms of section 60 4 (a) to (e ) are not at risk to be violated. The arrest emanated from section 252(A) entrapment and four years of investigation.

[14] He says the state case is very weak because of the time, place, persons, precious metals were sold to, details of transactions, value, quality, weight and relationship with co-accuse have not been disclosed and section 35(3) (a) has not been complied with. He says there are multiple legal practitioners and that will make it impossible to dispose of the matter. He says he has a right to a speedy and fair trial in terms of section 35(d).

**RESPONDENT'S EVIDENCE**

[15] The State opposed the bail application. The state called two witnesses to testify, an Immigration Officer from the Department of Home Affairs, Mr Mothusi Goodhope Letsogo, and the Investigating Officer Lieutenant Colonel Kgomotso Galetlole. Mr Letsogo is stationed at Lindela Deportation Facility and seconded at special investigation and Joint operations at the Department of Home Affairs. He is responsible for the investigation of cases which relate to the Immigration Act and all legislation. He has access to the Movement Control System, National Population Register, SQL and records controlled by Department of Home Affairs. On 30 March 2021, he was requested by the South African Police Service (SAPS) to run personal details of Betuel Ngobeni, a suspected Mozambican national. The appellant's notice of birth (BI24),revealed that the appellant's alleged mother is Ms Thandy Patricia Ngobeni and she is resides in Casteel Mapulaneng, Bushbuckridge.

[16] The Immigration Officer traced and found the appellant 's alleged mother with a maiden name Ngobeni. The alleged mother denied knowing and assisted the appellant in obtaining any South African documents. She denied being the mother of the appellant. The Immigration Officer testified that Ms Thandy Ngobeni (Mashiso) has a son by the name Bethuel Tumelo Ngobeni and he was born sometime in 1985 and she is living with him. The Immigration Officer testified that the identity document of the appellant was obtained fraudulently and through misrepresentation. The Immigration Officer testified that the appellant has

contravened sections 49(1)(a) and section 49(14) of the Immigration Act.[5] Affidavits of Ms Thandy and her son were filed as exhibits.

[17] The Immigration officer testified that on 27 October 2022, the appellant was served with a notice to cancel his identity document due to the extensive investigation that revealed that his Identity document was obtained fraudulently. Furthermore, the appellant was advised that within 30 days he must furnish the Department of Home Affairs with an explanation, failing which the Director-General is empowered in terms of section 19(4) of Identification Act[6] to cancel the identity document.

[18] The second witness Investigating Officer Lieutenant Colonel Kgomotso Galetlole testified that he has 27 years of experience in service at SAPS. with 27 years of service 23 in detective and 13 in TPCI known as HAWKS. He read from his affidavit about Project Gillet. The Investigating officer testified that the appellant is involved in the project dealing with gold and money laundering wherein the appellant is an accused. He testified that the appellant is also facing fraud charges in terms of Immigration Act. It is alleged the appellant acted together with unknown persons to buy gold illegally. It was to be processed gold materials into nuggets and send them to unknown persons. The appellant would then give gold nuggets to an associate of the syndicate. The said person was known through an intercept communication X70 as Thabo Sechele accused number three. The Investigating Officer said permission to intercept was granted by a judge. He said that evidence will be applied for, to be used during the trial.

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[5] 13 of 2002.

[6] 68 of 1997.

[19] Investigating Officer testified that the conversation intercepted revealed that accused number three would take the nuggets to a Company in Southgate (upper levels buyers). Later accused number two and number five were also identified. The Investigating Officer testified that the evidence had revealed that accused number two was a Zimbabwean national also as per his statement. He tried to solicit information through Interpol but did not get cooperation. The second option that the investigation officer tried is that of fingerprints. The Investigating Officer conceded that he is in possession of the appellant's passport even though it was handed over after the statement had been obtained. The Investigating Officer testified that the appellant's real name is Zingaiyi Diliwayo with citizenship from Zimbabwe, and he was born in a village called Chipinda. Therefore, the appellant is not a South African national. The Investigating officer confirmed the appellant's residential address in South Africa and that the appellant is unemployed. The Investigating Officer testified that the appellant is not legally married however, he has three life partners and several children. One of the partners resides in Zimbabwe and another one he resides with.

[20] The Investigating officer testified that the appellant lives beyond his means, he is in the business of money laundering; as he waits by Gbets and makes bets. The Investigating Officer testified that the appellant would put R22 million from 2019 to 2022 in Gbets. He has people he works with at the establishment that inform him of the winners and that he would give cash in exchange for his name being put in the system as though he is the one that won. This resulted in his winning coming to one million.

[21] The Investigating Officer testified that the appellant does not own immovable assets but owns more than four motor vehicles. These motor vehicles are registered in other people's names and have been bought on cash basis. There are car dealership statements, and bank statements that show how the motor vehicles were purchased. The appellant has bought a motor vehicle for a prosecutor and the matter is being investigated.

[22] The Investigating Officer testified that the appellant speaks Tsonga of Maputo. In their intercepted conversations they were speaking the language which will be interpreted into English for transcribers. The Investigating Officer testified that the appellant and his co-accused are described as a syndicate that worked with *zama zama* miners who would melt the Amalga which is estimated at millions a loss. He says this negatively affected the economy of the country of South Africa. He obtained section 252(A) authorisation to infiltrate the syndicate and establish the modus operandi by appointing three agents.

[23] The agents were introduced to the appellant and they established that the appellant and other persons were dealing in unlawful raw materials. The appellant's place was the meeting place. The appellant and accused number two were responsible for raising the money and collecting gold. The appellant was identified as the Kingpin. The appellant would meet the agent and proceed to co-accuse to perform the process of extracting Amalga into a nugget. The nugget would be weighed and a price negotiated. The parties would proceed to another area where the agreed price would be paid.

[24] There are six transactions that took place with the appellant, accused number 2 and 5. The first transaction was on 6 October 2018, the price of the nugget was

R460 per gram which amounted to R 58 200.00. The second time was on 21 November 2018 at R470 per gram which amounted to R24 415.00 and the third time was on 18 August 2020, at R710 per gram which amounted to R 110 000.00. The fourth time was on 5 November 2020 at R600.00 per gram which amounted to R 32 000.00, the fifth time was on 13 August 2021 at R230 per gram which amounted to R 356 000.00 and the last transaction was on 30 August 2021 at R630 per gram which amounted to R154 000.00.

[25] All these transactions have been captured on video and there is audio. These include the purchasing, negotiating, place they meet at, where they smelt, those smelting the smelting, and the shared money. He says the appellant and his co-accused would pay after negotiating which showed that they have access to amounts of money in a short space of time. The appellant's name is Zingaiyi Diliwayo a kingpin of the syndicate. The appellant would meet and introduce the agent or the prospective buyer. The appellant is the one who would test if the person can be trusted and if he has financial power.

[26] The Investigating Officer testified that the appellant might flee and not stand trial. Furthermore, in terms of section 60(4)(a) -(e ) the appellant should be considered a danger to the public and the individual safety. The Investigating Officer testified that says the syndicate has a history of violence fighting for territory in stealing gold. The operation was taken down on 4 October 2022. Additionally, they were pictures that were found at the appellant's residence which he could not explain. The Investigating Officer concluded that the appellant might evade trial. He reiterated that the appellant is not a South African citizen and his attorney has not approached him to solicit documents. The appellant knows the identity of the state

witnesses, especially the witness in the fraud matter as well as his son. The appellant is linked to the police and prosecutors in Carletonville and Khutsong. A corruption case has been opened and it is being investigated against a police officer.

[27] Mr Mashele proceeded to cross-examine the Investigation officer. He denies that the appellant is Zimbabwean. The investigation officer says fingerprints were sent to the embassy and results are still not available. The appellant was kidnapped by Basuto nationals and a ransom was demanded for his release. The fight was about territory. The investigation officer says he would not know whom to look for if the appellant was granted bail. He reiterated that hearsay evidence is admissible which was obtained from people who said they grew up with the appellant. He reiterated that Home Affairs await them to assist in providing evidence that will rebut that which they have in their system. He says the appellant does not have much invested in South Africa. The public outcry is that appellant is not to be released on bail but no petition was secured.

*Before this Court*

**SUBMISSIONS BY COUNSEL FOR APPELLANT**

[28] He submits that on the evidence of Mr Letsogo, the appellant is a South African Citizen, and Dept of Home Affairs, could not prove otherwise. There is no evidence that proves that the appellant is a criminal who is on the run. The facts show that the Appellant has been living at his current address with his wife and children for over 10 years. The appellant contends that there is no evidence whatsoever that the Appellant is a violent person. He submits that there is no evidence whatsoever

from which the Honourable Court can conclude that the Appellant is a danger to the criminal justice and the bail systems.

[29] Counsel argues that the court can only make a finding on a factual basis, not on speculation because none of the factors mentioned in section 60(4)(d) of the Criminal Procedure Act[7] (CPA has been proved by the state. He submits that the is no evidence that he will interfere with state witnesses. He submits the investigation officer merely speculates that there is such a risk and that is not sufficient to conclude that it's factual. The applicant submits that the Magistrate has not adequately considered the question as to the imposition of effective bail conditions as an alternative to incarceration and that section 35(1)(f) of the Constitution compels the court hearing the bail application, must consider bail on conditions. He submits that the bail amount may be set with stringent but reasonable conditions. He submits that the State does not have a strong case against him and the offences he is charged with are not violent.

[30] The appellant's counsel addressed the court from the bar when questioned by the court during the bail appeal proceedings with regard to the evidence given regarding the Appellant's "mother" and the applicant's legal representative stated that there is another Thandi Ngobeni who is the mother of the Appellant. Advocate Huysamen during the bail appeal proceedings conceded that "we do not know if the id is false or not".

**SUBMISSION BY RESPONDENT'S COUNSEL**

[7] 51 of 1977.

[31] Counsel contends that the identity of the Appellant is in dispute. She submits that the Appellant is from Zimbabwe, that he acquired his South African identity fraudulently, and that this can be verified from Exhibit H of (Mr Letsogo). She submits the Appellant did not rebut any of the evidence presented by Mr Letsogo regarding Ms Thandi Ngobeni (alleged mother) and her son Bethuel Ngobeni's affidavits disputing his identity in the court a quo. She submits that when the Appellant was denied bail, the provisions of section 60(4)(a)-(e) were properly considered and there is no need for this court to interfere with the decision of the court a quo.

[32] She submits that the Appellant has access to large amounts of money, and that he is the one who arranged for the selling of gold between him his co-accused, and the agents. She quotes one of the transactions, where an amount of R356 000 was paid at short notice within the same day.) She submits that the Investigating Officer testified that there was an interception of communication in terms of the Interception of Communications and Provision of Communication-related Information Act,[8] which the police conducted on the phones of the accused, which led to the establishment of "Project Gillet" which commenced in 2018 until 2022 when the accused were arrested called accidental.

[33] The investigation officer testified that a Section 252(A)[9] authorisation was obtained from the Director of Public Prosecutions and agents were used to infiltrate a syndicate that was unlawfully dealing with unwrought precious metals (gold). The Investigating Officer testified that the state is in possession of audio and video material linking the Appellant to the offences for which he has been charged. In

[8] 70 of 2002

[9] Criminal Procedure Act 51/1977

addition, there are statements of the agents who were used in the entrapment. It has been submitted that the Appellant was identified as the “kingpin” of the syndicate. Additionally, an appellant who applies for bail has an onus to disclose true information voluntarily and not disclose information in response to what the state has discovered. She also submitted that the applicant is a flight risk and if the applicant is released he will evade trial the police will not be able to trace him.

[34] The appellant was given an opportunity to make representations to the Department of Home Affairs regarding the investigation into the legality of his citizenship, which he failed to do. He never made any attempt to rectify the evidence adduced by the state regarding the legality of his citizenship. He does not explain this because he elected not to testify despite the monumental challenges in his case. The onus is on him to satisfy the court that the Appellant is not the person he purports to be. Therefore, should the applicant be released on bail, there is a likelihood that he will undermine or jeopardise the proper functioning of the criminal justice system, including the bail system.

[35] Even in the court a quo the Appellant did not include in his affidavit that he was a licensed/registered second-hand car dealer. The Appellant alleges that he is married to two South African women, yet no proof was provided that the marriages are registered nor any letters from the families as proof that a customary marriage exists between the Appellant and his “wives”. This aspect was also not put to Mr Letsogo to comment on. It is submitted by the Respondent that the Appellant faces a long term of imprisonment if convicted. This would be sufficient incentive to interfere with the witnesses as well as to evade his trial.

[36] The Appellant has filed the judgment of the bail appeal of his co-accused Dumisa Moyo. The personal circumstances of Dumisa Moyo are different from that of the Appellant. Furthermore, the Respondent submits the Investigating Officer did not testify in the Moyo bail application.

**APPLICABLE LEGAL PRINCIPLES**

[37] This appeal is brought in terms of section 65 of the CPA[10] and this court must therefore consider the appeal in accordance with section 65(4) which reads as follows:

> "The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.'

[38] In applying the provisions of **section 65(4)**, the court hearing the bail appeal must approach it on the assumption that the decision of the court a quo is correct and does not interfere with the decision unless it is satisfied that it is wrong.[11]

> "It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I submit that it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly."[12] (My emphasis)

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[10] Criminal Procedure Act 51/1977 as amended

[11] *S v Mbele & another* **1996 (1) SACR 212** (W) at 221h-i; *S v Barber* **1979 (4) SA 218** (D).

[12] S v Barber 1979 (4) SA 218 (D)

[39] A bail application is a formal review of the facts and the law by a judicial officer in order to resolve a dispute. In terms of section 35 (1)(f) of the Constitution,[13] states an accused has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. It is therefore the duty of the state to prove that it is not in the interests of justice that the accused be released on bail. The State is required to put all the necessary and relevant facts before the court for the purposes of upholding the right of a bail applicant to be apprised of the case which he faces, in the bail application.

Schedule 5 offences

[40] In respect of Schedule 5 offences, the onus is on the appellants to satisfy the court that the interests of justice permit his release on bail,

> "In terms of Schedule 5, but not 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 the interests of justice permit his or her release."

[41] Section 60(4) (a) to (e) of the Criminal Procedure Act 51 of 1977 lists the grounds to be taken into consideration whether the interests of justice permit the release of the Appellant on bail. Section 60 (5) to (9) of the Act[14] lists the grounds the court can take into account to determine if the factors mentioned in Section 60(4) (a) to (e) of the Act are indeed present. Section 60(4)(b) of the CPA reads:

> "Bail application of accused in court

[13] Constitution of the Republic of South Africa

[14] Ibid

(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or

In *S v Acheson*,[15] the court held as follows:

"An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been 9 established in court. The court will therefore ordinarily grant bail to an accused unless this is likely to prejudice the ends of justice."

[42] Section 60(6) of the CPA provides a list of factors that the court needs to consider when determining whether the ground in sec 60(4)(b) of the CPA has been established. A presiding officer must balance the appellant's personal interests against the interests of justice as revealed by the evidence.[16] This court must consider whether, on the facts and the evidence presented in the court a quo, the magistrate misdirected himself or erred when he found that the appellant had failed to satisfy the onus on a balance of probabilities that the interests of justice permitted their release on bail. It was upon the court a quo to make a value judgment and to evaluate the strength of the State's case.

[43] In*S v Yanta*[17] the court was of the view that a proper construction of section 60(11) of the Act involved the balancing of the interests of society and the proper and effective administration of criminal justice as opposed to the personal interests of an accused. In*S v Mokgoje*,[18] the court was of the view that the concept referred to circumstances that were unique, unusual, and particular.

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[15] 1991 (2) SA 805 (N),

[16] Ntoni and Others v S (5646/2018P) [2018] ZAKZPHC 26 at para 25.

[17] **2000 (1) SACR 237** (Tk) at 249c-e.

[18] 1999 (1) SACR 233 (NC).

[44] In *S v Hudson*[19] the court held the following:

> '. . .the expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the appellant to abscond and leave the country…

And further that

> "where an accused applies for bail and confirms on oath that he has no intention of absconding due weight has of course to be given to this statement on oath. However, since an accused who does have such an intention is hardly likely to admit it, implicit reliance cannot be placed on the mere say-so of the accused. The court should examine the circumstances."

[45] In S v Savoi **2012 (1) SACR 438** Heher JA, stated the following:

> " By contrast an increase in the number and seriousness of the charges that an accused faces, may itself be a relevant factor as exercising a new influence on a previously complainant accused. So also might be the proximity of a trial in which an accused faces a real prospects of a term of imprisonment."

[46] In *S v Schietekat* [20]Slomowitz AJ stated the following:

> 'Bail proceedings are *sui generis*. . .The State is thus not obliged in its turn to produce evidence in the true sense. It is not bound by the same formality. The court may take account whatever information is placed before it in order to form what is essentially an opinion or value judgment of what an uncertain future holds. It must prognosticate. To do this it must necessarily have regard to whatever is put up by the State in order to decide whether the accused has discharged the *onus*. . .

[47] In **S v Mathebula 2010 (1) SACR 55 SCA par 12**, where Hefer JA had the following to say:

> **"**But a State case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order to successfully challenge the merits of such

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[19]**1980 (1) ALL SA 130 (D), at 133,** S v Nichas **1977 (1) SA 257** C)

[20] **1998 (2) SACR 707** (C) at 713h-714j.

a case in bail proceedings, an applicant needs to go further: he must prove on a balance of probability that he will be acquitted on the charge".

[48] In the matter of **Legau v State: Appeal case no: A1020/10 North Gauteng High Court: Pretoria:** at paragraph 24 Mavundla J held that:

> "The appellant is facing serious offences which were committed between 5 February 1999 and 25 May 2005, a total of 24 counts. This in my view, is an aspect that demands that a stricter approach be taken in balancing the interest of the appellant against that of society."

[49] In *S v Green & another*[21]

> 'It is clear from s 60(10) that the court's function in a bail application is intended to be more proactive than in normal criminal proceedings. As it was put in the *Dlamini* decision (at para [11]), "a bail hearing is a unique judicial function" and the "inquisitorial powers of the presiding officer are greater".'

[50] In S v Branco 2002 (1) SASV 531 (W) the following was stated:

> "A bail application is not a trial. The prosecution is not required to close every loophole at this stage of proceedings. However a factor favouring bail is whether the Appellant has established a defence which has a reasonable prospects of success at the trial."

**ANALYSIS**

[51] This court of appeal is cognisant of the Constitution of South Africa in so far as it articulates that freedom should not be arbitrarily taken. It is imperative to mention at the outset that the offences that the appellant is facing are schedule 5. I have mentioned supra the that in terms of schedule 5 the state must prove that it is not in the interest of justice that the appellant be released on bail.

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[21] **[2006] ZASCA 3**; **2006 (1) SACR 603** (SCA) para 23.

[52] The Magistrate that dealt with this bail application alluded to the sentence for offences contemplated under sections 4,5, and 6 as a fine not exceeding R 100 million or imprisonment not exceeding 30 years imprisonment and that this matter is in terms of schedule 5. He reiterated that the appellant would have had to adduce evidence that it was in the interest of justice that he be released on bail. What is imperative is the term of imprisonment that the appellant is likely to face in the event of conviction. However, I will also pause and say that one would have to consider the other factors.

[53] These factors have been alluded to in section 60(4)(a-e). The said factors concern the impact that the granting of bail might have on the conduct of the case. They are the likelihood that if the appellant is released on bail, will attempt to evade trial, influence or intimidate witnesses or conceal or destroy evidence, will impact negatively on the proper conduct of the trial, or will jeopardise the trial. The remaining three factors are (c-e) the administration of justice, the safety of the public or any particular person or will commit a Schedule 1 offence or will undermine or jeopardise the objectives of proper functioning of criminal justice.

[54] It is proper to look at the facts in this case in order to determine the alluded facts. In this case, we have an appellant whose name is recorded as Bethuel Ngobeni. The immigration officer testified that his identity document has been obtained fraudulently and it was upon him to disprove same. There are two affidavits that have been submitted that say that the appellant is not the son of Thandi Ngobeni and the brother of Bethuel Tumelo Ngobeni. Counsel for the appellant submitted from the bar that there is another Thandi Ngobeni but that piece of evidence was

never brought to the attention of the Magistrate that heard this bail application. Furthermore, there is no affidavit from the said Thandi Ngobeni to confirm that she is the mother to the appellant which will confirm that he was indeed born and bred in South Africa.

[55] There is concerning evidence that the appellant was registered late by a school principal for his birth certificate. It is also recorded that another Ngobeni assisted him to register for his identity document. The evidence that has been presented thus far by the respondent in so far as it relates to the identity of the appellant had not been controverted. The appellant was informed of the process that he will be required to follow in order to prove his identity. I specifically asked counsel for the appellant if bail is granted who will it be granted to, taking into account the evidence by the respondent in this matter.

[56] There is evidence that the appellant is a Zimbabwean national from Chipinda Village and his name is Zingaiyi Diliwayo. The Investigating Officer testified that the Appellant's real name is Zinghayi Dhliwayo. Even in the intercepted conversations (Act 70 of 2002) the people who spoke to the Appellant referred to him as Zinghayi when addressing him. Counsel for the appellant contended that if the appellant is a foreigner should he be denied bail. Bail cannot be denied only on the basis of the fact that the appellant is a foreign national. However, it is imperative that the appellant is honest with the police and the court in order to come to an informed decision. The purpose of granting bail is to ensure that the person comes back to court. It is also important to know where will this person be found in the event they default and do not come back to court. The fact that the identity of the appellant is in dispute already is concerning. I would say even a person whose identity is

known can evade trial what more where you do not know who you are dealing with and the police do not know where to start looking.

[57] The evidence that was alluded to that there is video and audio of the dealings has not been disputed. It was also submitted that investigations are ongoing in a matter where a prosecutor has been bought a motor vehicle allegedly by the appellant. It was also not disputed that a police officer was called to solicit information regarding a motor vehicle which turned out to be that of the police. It was also mentioned that some immovable properties were bought cash and police are involved. Having read all that on record and I must say I echo the same sentiments with the Honourable Magistrate when he said “he is satisfied the appellant is part of a criminal syndicate that is well-run that is willing to corrupt state officials and persuade illegal mining activities which involve violence in the fight for territorial domination. He says these activities have a negative effect on the economy of the country”. The Magistrate says he carefully considered the evidence presented. Therefore, there were objective facts before the magistrate to draw an inference that the appellant is a flight risk.

[58] Additionally is also uncontroverted evidence that the appellant was once kidnapped by the Basotho nationals for ransom, and this was a fight over territory. The investigation officer submitted that violence is there in these offences as the fight is about the territory. It is also important to recall that agents were used who are known to the appellant as he was the one that was dealing directly with them. The evidence of this case depends on the audio, video and the agents that were used in those transactions. It is important that they are protected in order not to undermine the administration of justice. State witnesses are imperative for the

finalization of this matter as it is evident that evidence was collected through agents. It inferred that the syndicate may have got wind that they were under surveillance and wanted to eliminate a perceived threat against their operations.

[59] It is so that a more stringent approach is adopted in dealing with schedule 5 or 6 bail applications. In this case, as the Honourable Magistrate mentioned the state witness was subjected to cross-examination whereas the appellant was not. It is his right to present his case in the form of an affidavit. However, the fact that the appellant had an onus to show that it was in the interest of justice that bail be granted remained. It is imperative to pause and mention that the appellant did not give evidence that does not prejudice him but what is alluded to in the affidavits must be facts for the factual conclusion[22] (my emphasis) not regurgitate the law. The legal Representative can state the law during an argument.

[60] The evidence presented regarding the accumulation of wealth does not tally with the type of business alluded to. There is uncontroverted evidence of deposits made to a car dealership by the appellant. The Magistrate was unable to disagree with the investigation officer that registering properties in the names of their life partners was not to hide the proceeds of crime and to try to evade detection. There is no corroborating evidence as to the financial institutions. The investigation of the appellant and his co-accused happened over four years. Public resources and funds have been used in securing information. All these factors point out the fact that there is a strong case against the appellant.

[22] State v Mathebula 2010 910 SACR 55

[61] Counsel for the appellant submitted that bail conditions can be set which submission I requested counsel for the respondent to deal with. In *casu* I am unable to consider stringent conditions as suggested taking into account all the factors that have been alluded *supra*. It is important that the state resources that were used in investigating this syndicate do not go to waste. All those that have been entangled and are tainted with the commission of the offence must see their day in court. Bail secures attendance but is never a guarantee.

[62] The Appellant made submissions that the offences he is charged with are not violent, however, I must acquiesce with counsel for the respondent that this does not negate the seriousness of the offences with which he is charged. The offences which the Appellant is charged with are serious and prevalent in South Africa. The Contravention of the Prevention of Organised Crime Act attracts a minimum sentence of imprisonment.

[63] I must again agree with counsel for the respondent that there were few instances where advocate Huysamen alluded to information that does not appear anywhere on the record: He alluded to the fact that the Appellant was aware that the police were conducting an investigation against Accused 2 and 4 (co-accused of Appellant). This does not appear on the record, and the appellant's affidavit and the record are silent on this aspect. The defence also alluded to the fact that the seized vehicles are part of the vehicles which are being bought and sold by the Appellant, this also was not raised during bail proceedings and does not form part of the record. Counsel Huysamen gave evidence from the bar on behalf of the Appellant.

[64] In my view, the court a quo was correct in finding that when weighed against this evidence of the respondent, the appellant did not discharge the onus on a balance of probabilities. Having considered all the evidence placed before the court a quo, I was not persuaded on the merits of the appeal. I am also unable to find that the court a quo erred in exercising its judicial discretion in finding that the appellant had failed to discharge his onus permitting his release on bail.

[65] In the result, the following order is made:

1. The appellant's appeal against the refusal to admit him to bail is dismissed

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ENB KHWINANA

ACTING JUDGE OF GAUTENG HIGH COURT

**APPEARANCES**:

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| Counsel for Appellant | Adv. J. Huysamen |
| Counsel for Respondent | Adv T. Sekhonyana |