IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D12746/2022

In the matter between:

NHLAKANIPHO NKOSINATHI MGWABA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Hiralall AJ:

Introduction

[1] This is an appeal against the decision of the magistrate, Umlazi Magistrates' Court, dismissing the appellant's bail applications: an initial bail application and a renewed application based on new facts.

[2] The appellant was charged with two counts, namely, murder read with section 51(2) of Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1977, and defeating or obstructing the course of justice.

[3] In essence, the charge of murder implicates the appellant in the murder of an ex-girlfriend. It is common cause that at Engonyameni on the night of 14 October 2021, the dead body of Zamandosi Cele was found in the room of the appellant in the family homestead. It is not in dispute that the appellant is the only person with a key and access to the room. According to the State, the body of the deceased which had a stab wound, had been in the room of the appellant for 24 hours from the previous night. The finding of the body was reported to the police by a family member and the appellant was arrested.

[4] The appellant first applied for bail in November 2021. Thereafter he brought a renewed application for bail in January 2022. The applications were refused on 3 November 2021 and 28 January 2022, respectively. The parties were agreed that the appellant was charged with a schedule 5 offence and that the provisions of section 60(11)*(b)* of the Criminal Procedure Act 51 of 1977 (the CPA) were applicable, that is, the appellant had to show that the interests of justice permitted his release.

The issues

[5] The grounds of appeal can be summed up as follows:

(a) That in the renewed bail application the magistrate failed to consider all the facts, both old and new, as he was obliged to do;

(b) That the magistrate misdirected himself when he found that the appellant did not discharge the onus, applicable in schedule 5 offences, of proving that the interest of justice permitted his release on bail:

(i) That the magistrate misdirected himself, and his reasoning was flawed, in his finding that as the charges were very serious they might influence a person to evade trial if he anticipated that he might be convicted, and that therefor there was a likelihood to evade trial;

(ii) That with regard to the likelihood of the appellant influencing or intimidating witnesses, the evidence against the appellant was circumstantial;

(iii) That the investigations were complete and the matter set down for trial. There was therefore no longer a risk of interference with the investigations;

(iv) That the magistrate committed a serious misdirection when he found that section 60(4)*(e)* applied and that the appellant's release could disturb the public order or undermine the public peace or security; that the state failed to prove the jurisdictional requirements necessary in order to bring this subsection into play as no exceptional circumstances were shown to exist;

(c) That the magistrate ought to have considered that the appellant's personal circumstances are extremely favourable;

(d) That in respect of the concerns regarding whether the appellant may not stand trial and the concern over the safety of the witness, the magistrate failed to consider the imposition of suitable bail conditions as an alternative to refusing bail.

The judgments of the court a quo

The first bail application

[6] In his judgment in the first bail application, the magistrate dealt extensively with the evidence that was presented before him.

[7] He found that the appellant's bail affidavit merely detailed the appellant's personal circumstances: his state of health, which was not properly detailed save to say that he suffered from a renal disease; that he would be pleading not guilty without giving much information except that his father reported the finding of the deceased body to the police; and that he was employed by the SAPS and had no previous convictions or pending cases. With regard to the alternative addresses provided by the appellant, these were not properly conveyed to the investigating officer so that they could be verified timeously.

[8] He took into account that the State cited a number of reasons for opposing the granting of bail, such being *inter alia* that the appellant was likely to interfere with the State witnesses or tamper with the evidence of the prosecution, especially as the witnesses were his family members and neighbours, that it would be difficult to impose conditions in those circumstances, that the appellant was likely to interfere with evidence for the prosecution, seeing that the initial investigations and the crime scene had been interfered with by the fact that the appellant had not reported the death of the deceased, whose body was kept in his room overnight; that the charges against

the appellant were serious and one count involved gender based violence where the deceased was in a love relationship with the appellant.

[9] He went on to consider whether the interests of justice permitted the release of the appellant. The magistrate found that:

(a) there was no evidence that if the appellant was released on bail he would endanger the safety of the public;

(b) there was no evidence that there was a likelihood that he would attempt to evade his trial. However, these were very serious charges, which might influence a person to evade his trial if he anticipated that he might be convicted so there was a likelihood that he would evade his trial;

(c) as the witnesses were known to the appellant, the chances of influencing or intimidating the witnesses were quite high, and although conditions could be imposed, it would be difficult to monitor such conditions particularly when the witnesses were his family members;

(d) in terms of ss (4)*(e)*, that as this matter fell within those cases described as gender-based violence, the chances were that if the appellant was released on bail, the public might be of the view that the courts were not serious about trying to curb gender based violence;

(e) there was *prima facie* a strong case against the appellant. The deceased's body, with a stab wound to the chest, was found in his room, to which only he had a key. He was a policeman who had a legal duty to report a crime, but he did nothing to report the death of the deceased, or that the deceased's body was in his room.

[10] He weighed the interests of justice against the appellant's Constitutional right to freedom and considered *inter alia* the fact that the appellant has minor children, and the question as to *who* was currently looking after the children. He found that the children's mother and grandparents were looking after the children. With regard to financial support, it appeared that the appellant was suspended without a salary and even if he was released on bail there was no guarantee of his continued employment, as he would still be subjected to a disciplinary inquiry where he might be dismissed. Insofar as preparation for the trial was concerned, he found that there was evidence that there were consultation facilities at the Westville Prison. With regard to the appellant's medical condition, the appellant did not provide all the necessary details of

the seriousness thereof and the status of his condition, but the evidence was that there is a medical hospital in Westville Prison that provides treatment and in cases where it could not provide the treatment, this was outsourced to other hospitals.

The renewed bail application

[11] In the renewed bail application, the magistrate gave the following written reasons for not releasing the appellant on bail:

(a) That the illness of the appellant was not a new fact, that the appellant suffered from acute stress in July 2021 and was treated by a doctor as per the medical report, which was submitted, and that there was no evidence that he had sought medical attention whilst in the Westville Prison. The evidence of the investigating officer was that the prison hospital could provide psychological treatment, if the appellant reported such an illness.

(b) With regard to communication and consultation with his attorneys on his employment issues, the court found that the appellant could consult with his attorneys on labour matters in Westville Prison.

(c) The court found that the children were looked after by their mother in the absence of the appellant.

(d) The eldest daughter of the appellant had suffered from diminished mental ability long before the arrest of the appellant. The appellant had not changed her school to a special school or remedial school and this did not constitute a new fact.

(e) The court found that the State's case against the appellant was very strong at the time of the bail hearing.

The legal principles

[12] Section 60(11)*(b)* of the CPA, dealing with schedule 5 offences, stipulates that '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.'

[13] Section 65(4) of the CPA stipulates that a court hearing the bail appeal 'shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong'. The section stipulates further that in such an

event 'the court shall give the decision which in its opinion the lower court should have given'.

[14] A court of appeal will not lightly overturn a lower court's decision. In *S v Barber*,[1] the court stated as follows:

'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.'

[15] However, the court must be mindful that a bail appeal goes to the question of deprivation of personal liberty,[2] and in this regard the court in *S v Porthen and others*[3] stated that this is a 'factor confirming that s 65(4) of the CPA should be construed in a manner which does not unduly restrict the ambit of an appeal court's competence to decide that the lower court's decision to refuse bail was "wrong".' I consider the appeal on the basis of the authorities cited.

[16] The magistrate was required to apply the provisions of section 60(4)*(a)-(e)* which postulates that the

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

(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;

(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

(c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;

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[1] *S v Barber* 1979 (4) SA 218 (D) at 220E–H.
[2] *S v Porthen and others* 2004 (2) SACR 242 (C) para 17.
[3] Supra.

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security'.

[17] Section 60(5) - (8A) provides guidance in the application of sections 60(4)*(a)-(e)*.

[18] Section 60(9) further provides that the court must consider the question in subsection (4)

'by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely

(a) the period for which the accused has already been in custody since his or her arrest;

(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;

(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;

(d) any financial loss which the accused may suffer owing to his or her detention;

(e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;

(f) the state of health of the accused; or

(g) any other factor which in the opinion of the court should be taken into account.'

Evaluation

[19] Insofar as the renewed bail application is concerned, it was contended by the appellant that the magistrate did not consider both old and new facts in the renewed application as he was obliged to do.

[20] The appellant presented the following as exceptional circumstances in the renewed bail application:

(a) He stated that around July 2021 he had been undergoing therapy for acute stress at the consulting rooms of a counselling psychologist, and that his condition worsened at the time of his arrest to such an extent that he was unable to give proper instructions to his legal representative. It was therefore in the interests of justice that

he be released on bail in order to undergo therapy so as to ensure that at trial stage he would be fit to stand trial.

(b) With regard to the state of his employment he stated that around 23 November 2021 he signed a resignation letter because he was wrongly advised by his legal representative to resign so that he could have money to finance his legal representation fees. It was therefore in the interests of justice that he be released on bail so that he could solicit the assistance of a labour lawyer to reverse his resignation.

(c) As a result of his resignation his medical aid has been cancelled. His state of health presently demands that he should belong to a good medical aid.

(d) His incarceration and resignation from employment impacted negatively on the well-being of his children and their academic performance. They would miss school for the rest of the calendar year if he did not provide for them. His eldest child has a diminished mental ability as a result she has been expelled from two schools because of her condition. It would be in the interests of justice that he be released on bail so that he could ensure that his daughter was removed from mainstream education and taken to a special or remedial school because she was not coping.

(e) As at the date of the second bail application he had been in solitary confinement for more than three months. The State's case was weak and he was wrongly accused. Continued incarceration would only prejudice him.

(f) The investigating officer, Mr Zulu, made false claims that his parents and child were witnesses in the case. His erstwhile legal representative failed to challenge those false claims as well as the contention that he kept the body of the deceased in his room for 24 hours.

[21] The first question to be decided is whether the facts presented in the renewed application are in fact new as only when the facts presented are new will the court then proceed, on a renewed application for bail, to evaluate whether the interests of justice permit the release of the accused person on bail.

[22] In *Davis and another v S*[4], the court stated as follows:

'[2] . . . This concession accords with case law. In *S v Petersen* Van Zyl J held:

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[4] *Davis and another v S* [2015] ZAKZDHC 41.

"[57] When, as in the present case, the accused relies on new facts which have come to the fore since the first, or previous, bail application, the court must be satisfied, firstly, that such facts are indeed new and, secondly, that they are relevant to purposes of the new bail application. They must not constitute simply a reshuffling of old evidence or an embroidering upon it. See *S v De Villiers* 1996 (2) SACR 122 (T) at 126e-f. The purpose of adducing new facts is not to address problems encountered in the previous application or to fill gaps in the previously presented evidence.

[58] Where evidence was available to the applicant at the time of the previous application but, for whatever reason, was not revealed, it cannot be relied on in the later application as new evidence. See *S v Le Roux en Andere* 1995 (2) SACR 613 (W) at 622a-b. If the evidence is adjudged to be new and relevant, then it must be considered in conjunction with all the facts placed before the court in previous applications, and not separately. See *S v Vermaas* 1996 (1) SACR 528 (T) at 531e-g; *S v Mpofana* 1998(1) SACR 40 (Tk) at 44g-45a; *S v Mohammed* 1999 (2) SACR 507 (C) [1999] 4 All SA 533) at 511a-d."(My emphasis)

[3] The Court in *S v Le Roux en andere* dealt with new facts authoratively, and I agree with the sentiments expressed therein that new facts should be facts discovered after the bail application was heard and not merely an elaboration of facts presented at the first bail application. The Court *a quo* cannot be faulted in its finding that the facts presented were neither new nor discovered after the bail application was finalised on 28 August 2014.' (underlining in the original, footnotes omitted)

[23] The magistrate found, as recorded earlier, that the facts presented in the renewed bail application were not new facts. I am inclined to agree for *inter alia* the reasons stated below.

[24] Specifically with regard to the acute stress which the appellant stated he suffered from, the consultation with the counselling psychologist was in July 2021, which was a few months prior to the first bail application in November 2021. It was therefore not a new fact, but even if the appellant's arrest caused this condition to worsen, there is no mention of, nor any proof of, any further treatment requested by the appellant whilst he was incarcerated.

[25] Furthermore, with regard to the appellant's children, the evidence was that the children's mother and grandparents were caring for them. Insofar as the oldest child was concerned, it would appear that she was approximately 18 years old at the time and that her diminished mental ability was not new. According to the affidavits presented, she was in school for twelve years but only in standard 6 in 2021. There was no proof of the child's diminished mental ability or any evidence that this was ever attended to by the appellant or the school previously, although it was claimed that she was expelled from two schools in the past. There was also no explanation as to why this matter took on urgency only at this time.

[26] It was therefore not necessary for the magistrate to move to the next step of the enquiry. The judgment of the magistrate cannot be faulted. The appellant was correctly not released on bail.

[27] With regard to the initial bail application, it will suffice for me to state briefly, having regard to the final outcome of this appeal, that the magistrate erred in finding that there was a likelihood that the appellant, if he were released on bail, would evade his trial. There was no dispute that the appellant had a fixed address; owned a vehicle and a house on the family homestead; had four children, a fiancé and his parents to support; he had no family or business interests outside the Republic and his passport had expired. Until he resigned from employment, he was employed by the SAPS for a lengthy period. These factors must be weighed against inter alia the nature and gravity of the charge against him, and the strength of the State's case. The magistrate found that there was no evidence that the appellant would attempt to evade his trial, but that the seriousness of the charges might influence him to evade his trial if he anticipated that he might be convicted so there was for that reason a likelihood that he would evade his trial. I seriously doubt that the appellant would abandon his ties to his home and family to resort to becoming a fugitive from justice.

[28] The magistrate also erred in finding that as this matter fell within those cases described as gender-based violence, the chances were that if the appellant was released on bail, the public might be of the view that the courts were not serious about trying to curb gender-based violence, as section 60(4)*(e)* was applicable in this case. There was no evidence to support this finding. In arriving at this conclusion, I have

also had regard to the judgment in *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat,*[5] where the following was stated:

'It is important to note that ss (4)*(e)* expressly postulates that it is to come into play only "in exceptional circumstances". This is a clear pointer that this unusual category of factors is to be taken into account only in those rare cases where it is really justified. What is more, ss (4)*(e)* also expressly stipulates that a finding of such exceptional circumstances has to be established on a preponderance of probabilities ("likelihood"). Lastly, once the existence of such circumstances has been established, para *(e)* must still be weighed against the considerations enumerated in ss (9) before a decision to refuse bail can be taken. Having regard to these jurisdictional prerequisites, the field of application for ss (4)*(e)* and (8A) will be extremely limited. Judicial officers will therefore rely on this ground with great circumspection in the knowledge that the Constitution protects the liberty interests of all.'

[29] However, I do not believe that these misdirections warrant the setting aside of the decision of the magistrate to refuse bail for the reasons stated below.

[30] On account of circumstances peculiar to this case, the question whether there is the likelihood that the accused, if he were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence, assumes greater significance.

[31] The court in *Dlamini*[6] stated that paragraphs (4)(b), (c) and (d) are directed at 'protecting and promoting the integrity of the investigation and presentation of the case in respect of which the detainee has been arrested. Those are undoubtedly the primary and most commonly expressed objectives of the pre-trial detention. The interests of justice in regard to the grant or refusal of bail therefore do focus primarily on securing the attendance of the accused at trial and on preventing the accused from interfering with the proper investigation and prosecution of the case.'

[32] In respect of the ground in subsection (4)*(c)*, section 60(7) lists the following factors to be taken into account:

'*(a)* the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;

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[5] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC)para 57.
[6] Supra para 52.

(b) whether the witnesses have already made statements and agreed to testify;

(c) whether the investigation against the accused has already been completed;

(d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;

(e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;

(f) whether the accused has access to evidentiary material which is to be presented at his or her trial;

(g) the ease with which evidentiary material could be concealed or destroyed; or

(h) any other factor which in the opinion of the court should be taken into account.'

[33] The appellant is a policeman in the employ of the South African Police Service, or at least he was until he resigned from his post at some point. The charges against him are undeniably serious and particularly more so because of the second charge, that is obstructing the course of justice. The oral testimony of Mr Zulu went as follows:

'On the 13th October 2021 the deceased in this case left her home and she reported that she was called by the applicant to come and have few drinks with her. It was reported that on the same day at about 20:00 the deceased and the applicant had a quarrel. The applicant then stabbed the deceased, the deceased died at the applicant's room or house. The applicant did not seek any medical assistance for the deceased. The deceased remained in the room, in the applicant's room the whole night. On the following morning at about 6 o'clock the applicant left the house, leaving his room locked. The house remained locked until his arrival, that is on the 14th at about 17:00 with the deceased inside the room, the matter not being reported to the police or anyone else. When the applicant arrived at home he also did not report the matter to anyone until such time that one of the witnesses wanted to come to the applicant's room. The applicant did not allow anyone to come in as he denied to give that witness the keys to his room. When the applicant went to his room the witness was following him. As soon as the applicant entered the room when noticing that the witness was following him he quickly pushed the door like attempting to close it. The same witness noticed blood stains on the floor next to the door of the kitchen room in the applicant's room. And before the door was closed the witness noticed someone lying dead on the floor inside the kitchen. The witness, same witness reported to the elders who then called the police. At the time the applicant was inside his room. The police then arrived and discovered the deceased body then the accused was arrested.

. . .

It is on record that the deceased died on the 13th October at about 20:00 and her body was discovered on the following day at around the same time. That on its own is an interference

with the investigation. And to make things worse the person who is doing that is a police officer who exactly knows how to treat the scene of crime and till today we do not know what he was going to do with the body had it not been for the witnesses to see the blood and report the matter. The fact that the applicant is charged with defeating the ends of justice the primary motive, Your Worship, of defeating the ends of justice is to evade trial. . . ' (sic)

[34] According to Mr Zulu further, on the night that the deceased died, the family members of the appellant were present on the property. It was discovered during the post-mortem that the deceased's body had sustained several assault bruises on the face, and on one of her eyes, and that the cause of death was a stab wound to the left side of her chest. The murder weapon, a knife, was found in a drawer in the kitchen. The witnesses in the case are known to the appellant. They are his parents, children, and neighbours, and his friends from whom the deceased's cell phone was recovered. He stated that the applicant could therefor easily influence the witnesses and interfere with the investigations.

[35] This takes me to the appellant's affidavit in the renewed bail application, only three months after the initial application, where he stated that his eldest child N.M. has a diminished mental ability, that she was expelled from two schools because of her condition, and that it would be in the interests of justice if he was released on bail so that he could remove her from mainstream education to a special or remedial school because she was not coping. He also stated that his erstwhile attorney had failed to challenge Mr Zulu's false evidence that his parents and daughter were witnesses in the case.

[36] The appellant's father, Mzawankosi Zipathe Mgwaba, also filed an affidavit which was directed at Mr Zulu's claims that family members of the appellant were witnesses in the case. He stated as follows:

'4. It is also not true that we are witnesses in this matter because whatever information we have about this case was relayed to us by the accused. No one amongst us witnessed the murder as it occurred other than being shown a body by the accused.

5. It is also important to state that my granddaughter N. has a diminished mental capacity as a result she has been to school for twelve years but she is still in standard six as of October 2021.

6. It would have been prudent to let her make a sworn statement via an intermediary because of her intelligence quotient (IQ). It is important to further state that my granddaughter was twice expelled from two schools namely Skhwama and Nwabi High schools for making false and reckless statements.'

[37] In response to the court's concerns that the child witness referred to by Mr Zulu was N. M., Mrs Barnard stated that Mr Zulu had stated that she was not a witness in the case. It is noted that whilst Mrs Barnard was correct in this regard, when Mr Zulu was asked during cross-examination in the renewed bail application whether there was a child witness in the case, he said:

'I indicated to this court that I do but I am not in a position to disclose the name seeing that there has been a meeting that was held to check who the witness is within the family because they are saying there is no child who is the witness, means they asked every children in the house who is the witness then that puts that witness at risk.' (sic)

[38] Mrs Barnard also submitted that statements made by members of the appellant's family should not be taken into account in considering whether bail should be granted, as it is the accused's own conduct, and not that of his family, which should be assessed. Whilst Mrs Barnard is correct, the appellant's father's affidavit sought to bolster that of the appellant and it was presented by the appellant's attorney in support of the appellant's case for bail.

[39] Ultimately, whether it is N.M. or another child who is a witness in the case, although I do believe it is N.M. from the affidavit of the appellant's father, the point is that there is the strong likelihood that the appellant could influence the State witness/witnesses. Furthermore, this does not relate only to child witnesses. Mr Zulu also pointed out that he was opposed to the appellant being released on bail in light of the affidavit filed and the fact that the State witness had been approached by the defence.

[40] The magistrate found correctly that as the witnesses were known to the appellant, the chances of influencing or intimidating witnesses were quite high, and although conditions could be imposed, it would be difficult to monitor such conditions particularly when the witnesses were his family members.

[41] With regard to the appellant's contention that the investigations were complete and the matter set for trial, this factor does not detract from the likelihood that the State witnesses would be interfered with. There is still a risk of interference with the State witnesses.

[42] Against the facts presented, the magistrate found correctly that there was *prima facie* a strong case against the appellant. That the State relies on circumstantial evidence does not detract from the strength of the state's case. Notably, the appellant elected not to testify but instead submitted an affidavit setting out the basis of his application. The version of events presented by Mr Zulu was not challenged or disputed in cross-examination. The appellant only belatedly blamed his erstwhile attorney for this but when given an opportunity to adduce facts merely added that it was not true that he kept the body of the deceased in his room for 24 hours.

[43] Although the court hearing a bail application is not concerned with the guilt of an accused person, it is nonetheless concerned with the possible guilt of the accused person to the extent that it impacts on a determination as to where the interests of justice lie. The focus at the bail stage, as stated in *Dlamini*,[7] is to decide whether the interests of justice permits the release of the accused pending trial, and that entails in the main protecting the investigation and prosecution of the case against hindrance.

Order

[44] In the circumstances, I am not persuaded that the magistrate's decision to refuse the appellant bail was wrong, and I make the following order:

The appeal is dismissed.

HIRALALL AJ

DATE OF HEARING: 13 March 2023

DATE OF JUDGMENT: 5 April 2023

[7] *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC) para 11.

CASE INFORMATION

This judgment has been handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 15h00 on 5 April 2023.

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