THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: A24 / 2023

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 06 June 2023

SIGNATURE

In the matter between:

HENRY DLAMINI **APPELLANT**

and

THE STATE **RESPONDENT**

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 06 June 2023.

J U D G M E N T

RATSHIBVUMO J:

[1] Introduction:

The 18th day of October 2022 was a memorable day for Michelle Emelda Jones, the Deputy Sheriff in Mbombela. For it was the day she finally had a house registered in her names. Like any new home owner, she was very excited. She decided to go and observe her house at no. 4[...] C[...] Street, Nelsville in Nelspruit. The excitement would not be fulfilling enough unless she was in the company of her paraplegic partner, Julio Cohen. After all, they both signed the offer to purchase. The two were however ill prepared for the hostility meted out by the man who claimed the house belonged to his grandmother. He also told them he would hurt anyone who buys that house. He was also prepared to do life in prison for that, so he huffed.

[2] Although the house was already sold to these new owners, this man's items were still in there. Ms. Jones was willing to let him remove them peacefully, before she could move in. However, this man wanted more than that. He was fuming and threatening to shoot the two. He even took from under the bed, what seemed to be a firearm. The threats were so serious that the man who was hired to change the locks, abandoned his work and fled for his life. Ms. Jones also thought of fleeing, the way she was frightened. She only decided against it because that would mean leaving her paraplegic partner exposed to harm as he could not run. Luckily, this man did not harm them, at least for that day. Perhaps it was the phone call that distracted him as he left while engaged on it. He was however able to tell the two that he will come back for them.

[3] Ms. Jones and her partner were so terrified that their first stop from their new house could only be at the police station. There, a police officer advised them to rather apply for a protection order at the Magistrate' Office. Two days later, she applied and was granted a protection order at Mbombela Magistrates Court, issued in terms of the Protection from Harassment Act, No. 17 of 2011. That order was to be served on the man who threatened to kill her for buying his grandmother's house. That man is Henry Dlamini – the Appellant in this case.

[4] Sadly, Ms. Jones did not live to have the protection order served on the man who terrorised her and her partner. On 20 October 2022, the same day she was granted a protection order, she died when a motor vehicle she was traveling in came under a hail of bullets. That ended her dream to one day occupy a house registered in her own names. At the time of the shooting, the motor vehicle was parked at a shopping centre in Nelspruit. She was in the company of her partner in the car and they were waiting for a third passenger who had briefly gone to the shops. The third person was on his way back to the car when he saw the Appellant shooting at this stationary motor vehicle. Both Ms. Jones and her partner were in the motor vehicle and they sustained injuries. Although Ms. Jones was fatally injured, she was survived long enough to help the police in their investigations by identifying the assailant before she could succumb to her injuries in hospital. Her partner, Mr. Cohen survived. He also identified the Appellant as the man who shot at their motor vehicle, thereby injuring him and killing the deceased.

[5] Some five days later, the Appellant was arrested. He was brought before the Mbombela Magistrate Court (court *a quo*) where he applied for bail. The State and the Defence informed the court that the crime with which the Appellant was charged, fell under Schedule 5, meaning he had to be kept in custody until the trial was finalised, unless he was able to satisfy the court that the interests of justice permit his release on bail. He tendered evidence by means of an affidavit. Bail was refused by the court *a quo* as it held that the interests of justice did not permit that he should be admitted to bail. He now appeals against that order.

[6] The law.

Section 60(11)(b) of the Criminal Procedure Act, No. 51 of 1977 (the Criminal Procedure Act) provides,

> "(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to

(b) in Schedule 5, but not 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 the interests of justice permit his or her release."

[7] Section 60(4)(a) of the same Act further provides,

"(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:

(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;"

[8] Following the amendments introduced by section 4(d) of Criminal and Related Matters Amendment Act, no. 12 of 2021, section 60(5) of the Criminal Procedure Act now reads:

"(5) In considering whether the grounds in subsection (4) *(a)* have been established, the court may, where applicable, take into account the following factors, namely-

(a) the degree of violence towards others implicit in the charge against the accused;

(b) any threat of violence which the accused may have made to a person against whom the offence in question was allegedly committed or any other person;

(c) any resentment the accused is alleged to harbour against a person against whom the offence in question was allegedly committed or any other person;

(d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;

(e) any disposition of the accused to commit-

(i) offences referred to in Schedule 1;

(ii) an offence against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998; or

(iii) an offence referred to in-

(aa) section 17 (1) *(a)* of the Domestic Violence Act, 1998;

(bb) section 18 (1) *(a)* of the Protection from Harassment Act, 2011; or

(cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, as is evident from his or her past conduct;

(f) the prevalence of a particular type of offence;

(g) any evidence that the accused previously committed an offence-

(i) referred to in Schedule 1;

(ii) against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998; or

(iii) referred to in-

(aa) section 17 (1) *(a)* of the Domestic Violence Act, 1998;

(bb) section 18 (1) *(a)* of the Protection from Harassment Act, 2011; or

(cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, while released on bail or placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998;" [My emphasis].

[9] The Appellant submitted on appeal that the court *a quo* erred in refusing bail on the basis that he failed to show on the balance of probabilities that the interests of justice permit his release on bail. He submitted further that he demonstrated that he will attend court and not skip bail and that he will not interfere with the evidence. The court further erred, so he argued, in placing more emphasis on the strength of the case for the State and the submissions by the State to the effect that if released on bail, the community may harm him or that there could be fights and unrests between the community and the Appellant. For those reasons, he argues that the appeal court should set aside the court *a quo*'s decision and set bail for him.

[10] In opposing the appeal, counsel for the Respondent submitted that the court *a quo* did not misdirect itself and that its findings in refusing bail cannot be categorised as being wrong. I suppose when making this submission, counsel had in mind the provisions of section 65(4) of the Criminal Procedure Act which provides,

"[T]he 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."

[11] In *S v Barber*[1], Hefer J interpreted the above provision as follows,

> "[I]t 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. 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 views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail but exercised that discretion wrongly… Without saying that the magistrate's view was actually the correct one, I have not been persuaded to decide that it is the wrong one."

[12] I was also referred to a judgment delivered by this court in *S v Nhantumbo*[2], where the following was said,

> "[A]s the court *a quo* noted, the Appellant did not only choose to present his evidence by way of affidavit, which is generally less persuasive than *viva voce* evidence, as an affidavit cannot be cross-examined;[3] but he also chose to say nothing about the merits of the case or what his defence shall be when the matter goes on trial. While exercising the right to remain silent remains his prerogative, the challenge an applicant for bail faces when he chooses to say nothing, is when the State presents evidence on merits that shows that there is a strong case for him to answer, as it happened *in casu*."

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[1] 1979 (4) SA 218 (D) at 220E–H
[2] (A21 / 2023) [2023] ZAMPMBHC 26 (10 May 2023) at para 12.
[3] See *S v Mathebula* 2010 (1) SACR 55 (SCA) at para 11 and *S v Mbaleki* 2013 (1) SACR 165 (KZD) at para 4.

[13] The passage above finds relevance in that just like in *Nhantumbo*, the Appellant *in casu* also gave evidence by way of an affidavit and chose to say nothing in respect of the merits of the case, except to say he will deny the allegations against him.

[14] Applying facts to the law.

The decision by the court *a quo* should be seen with the following on the background. According to his affidavit, the Appellant was 34 years old, married and a father of four children. He has two residences, one being no. 1[...] M[...] and another being no. 4[...] C[...] Street in Nelsville which is a house "registered in [his] grandmother's name, and is where [he] grew up." He owns an immovable property being a house at no. 1[...] M[...]. He is self-employed as a meter taxi owner from which he makes about R5 700 per month. He has never been convicted of any offence and there were no pending cases against him. As hinted above, he denied the allegations against him. He however chose to remain silent when it comes to the basis of his defence.

[15] It will be noted that the second residential address given by the Appellant as having been registered in his grandmother's names, is the same address that the deceased was excited to have it registered as her property on 18 October 2022. This information is contained in the affidavit she made in support of her application for a protection order. No title deed was produced by the Appellant to prove his ownership of the property or that of his grandmother. In fact, his assertions seem to confirm the allegations by the deceased, regarding his refusal to allow new owners access into that property. He also made no elaboration as to his ownership of the other house. The court *a quo* remained in the dark on whether the property was bonded or if it was fully paid up.

[16] It also turned out when the Investigating Officer testified that, unlike what the Appellant alleged in his affidavit, he had a previous conviction of assault for which he was cautioned and discharged by the Nelspruit Magistrate Court on

23 September 2009. Again, on 18 October 2010, he paid an admission of guilt fine of R300 on a charge of theft. His legal representative confirmed on record that the Appellant was indeed convicted as reflected by the SAP 69. If the Appellant could not be truthful about his past, the court a quo found it very concerning as to how truthful he can be about the future undertakings he made in his affidavit.

[17] Whereas the Appellant undertook not to threaten any State witness, his conduct was found to negate this undertaking. This is not only because he carried out what he had threatened to do to the deceased; but also because of the threats made after he was arrested. The Investigating Officer testified that he had a statement in the docket made by a person who alleged that he received threats from the Appellant through a phone call. The call was made from a cell phone belonging to the Appellant.

[18] According to the Investigating Officer, although he initially confiscated the Appellant's phone upon his arrest, when he was moved from the police station to prison, he gave it back to him. This he did because he believed that it is the Correction Services facilities where they keep all the prisoner's belongings, and not at the police station. This must have enabled the Appellant to make the alleged threats using his cell phone. This piece of evidence was not disputed by the Appellant in cross examination of the Investigating Officer.

[19] Other aspects considered by the court include the public interest in the case. The court room was always full to capacity and on several occasions, the court had to be cleared because members of the public were agitated and impatient with the Appellant and the court's processes. The threats to the accused were not just the say-so by the Investigating Officer. The Appellant himself testified on his application for bail on new facts that there is a day that one member of the public gave a knife to one of the inmates so that he could stab him with it. The details thereof are sketchy, but it seems this happened in one of his court appearances and the Magistrate was made

aware of it the day it happened. The knife in question was confiscated by the court orderly.

[20] The Appellant averred in his affidavit that he was not a flight risk as he handed himself over to the police. The Investigating Officer testified that the police visited the Appellant's residence on the date of the shooting and they could not find him. They also searched his house for a firearm but they could not find it. The Appellant was only arrested on the fifth day after the Investigating Officer involved his (the Appellant's) legal representative. On 25 October 2022, the Appellant called him and asked that they meet in White River. He proceeded there and found the Appellant whom he arrested.

[21] With all the above, I am unable to find any misdirection on the part of the court *a quo* or that it was wrong in finding that the Appellant failed to show on balance of probabilities, that the interests of justice permit his release on bail.

[22] **Irregularities**.

The Respondent contended that it was irregular for the court *a quo* to continue to treat the charge faced by the Appellant as a schedule 5 offence even with overwhelming evidence suggesting that it fell under Schedule 6. The defence raised its concerns that for the Public Prosecutor to allege in closing address that the murder was premeditated is suggesting a shift on the schedule. The learned magistrate then indicated that since the offence was said to be a Schedule 5 offence when the application started, the court would treat it as such up to the end, irrespective of the evidence led suggesting otherwise.

[23] The Appellant seems to agree with the Respondent on this submission. He contends that it would be very unlikely for the court which hears the bail application to treat the offence as a schedule 5 even though evidence led suggests that it was a Schedule 6 offence. He however contends that the moment the evidence was led that showed that the offence falls into a

category of Schedule 6 offences, then the Appellant should have been warned and given an opportunity to supplement his affidavit.

[24] The relevant passage from the record is reflected at the beginning of the judgment when the *court a quo* said,

> "The court was informed that it was a Schedule 5 offence, and the court proceeded with the application on that basis. During the course of the proceedings, it transpired that it might be a Schedule 6 offence and Mr. Maseko on behalf of the Applicant / Accused; Applicant raised a concern that they are being ambushed and that the State is now pursuing the issue as on Schedule 6. That is however not the position. The State submitted that the murder might be premeditated, because of the content of the harassment application. But never was it intimated to this court that the court must now consider the evidence in the application as a Schedule 6 offence. The application was started as a Schedule 5 offence application and will be completed as such." [My emphasis]

[25] It appears very clear from the paragraph above that the Magistrate became aware when evidence on premeditation of murder was led that she could be dealing with a Schedule 6 offence; but she proceeded with the inquiry as a Schedule 5 offence merely because the parties had submitted at the beginning of the hearing that the offence fell within the ambit of Schedule 5. She justifies this stance because there was no such application from the State to treat the offence as a Schedule 6 offence.

[26] This reasoning is flawed in my respectful view. I am in full agreement with Petersen J in *Kula v S*[4] when he says the role of a judicial officers in bail applications is more than just sitting as an umpire who watches a game

[4] (CAB 02/2023) [2023] ZANWHC 35 (4 April 2023) at para 11.

between two sides and declare a winner. He quoted with approval *R v Hepworth*[5] where the court of appeal said,

> "[A] criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."

[27] In *S v Nwabunanne,*[6] the court dealt with the question on how to approach the schedule under which the offence fell in bail applications. The court agreed with the suggestion made in *S v Josephs* [7]when it said,

> "In *S v Josephs,* Binns-Ward AJ suggested that, given the drastic consequences for an accused if section 60(11) of the CPA applies, it is desirable that the procedural provisions of s 60(11A) of the CPA should be closely adhered to and that proof of the nature of the charges should occur with some formality, either at the commencement of proceedings or as soon thereafter as possible."

According to *Kula*[8], this measure is achieved by affording the Public Prosecutor to secure a certificate from the Director of Public Prosecutions regarding the Schedule, or to adduce evidence of the Investigating Officer if the schedule is disputed.

[28] In fact, the role of a judicial officer goes deeper in bail applications than in criminal trials in the court is allowed to consider evidence that otherwise

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[5] 1928 AD 265 at p. 277.
[6] 2017 (2) SACR 124 (NCK) at para 15.
[7] 2001 (1) SACR 659 (C) at 661F-H.
[8] *Supra*, at para 22.

would be inadmissible in a criminal trial. Jafta AJ (as he then was) was quoted by Van Zyl J in *S v Yanta*[9] as having said,

> "'In bail applications the court is not called upon to weigh proven facts but to speculate on what could happen in future. Secondly, bail applications are neither civil nor criminal proceedings and consequently the rules of evidence applied in trial actions are not strictly adhered to. The role played by the presiding officers in bail applications is totally different from the one they play in trial actions. They are not precluded from descending into the arena. In fact, they are expected to get actively involved in the proceedings. In *S v Schietekat* 1998 (2) SACR 707 (C) at 713*h*-714*a* Slomowitz AJ stated: 'Bail proceedings are *sui generis.* The application may be brought soon after the arrest. At that stage all that may exist is a complaint which is still to be investigated. 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 into 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* of showing that 'exceptional circumstances exist which in the interests of justice permit his release.' This is driven home by ss (3)." [My emphasis].

[29] Van Zyl J concluded by saying, "[t]he consideration of "whatever information" placed before court must apply to all bail applications where investigations are not complete. The basic issue being that the court has information before it on the basis of which it can reasonably conclude that there is a likelihood of the interests of justice being prejudiced by the release of the accused. The

[9] 2000 (1) SACR 237 (Tk) at 246C-G, where Van Zyl J quoted from the unreported judgment of *Rozani and Others v S* (case No A52/99) from the then Transkei High Court). See also *S v Tshabalala* 1998 (2) SACR 259 (C).

court is not so much concerned with the rules of procedure regarding evidence but with the cogency of the information."[10]

[30] With the above, I conclude therefore that although, both the State and the Appellant had agreed at the beginning of the hearing, that the Appellant faced a Schedule 5 offence, the Magistrate was entitled to alert the Appellant the moment it appeared that the schedule of the offence could change to Schedule 6. This would have afforded him an opportunity reconsider his position regarding exceptional circumstances that would now be expected from him.

[31] The Appellant's legal representative and the Public Prosecutor cannot escape the criticism since they also had a duty to submit to the court that the schedule under which the offence was categorised could change in light of the evidence led on the application for a protection order by the deceased. Their quietness in light of the obligation they harbour to help the court in arriving at a just decision is too deafening. I am therefore of a view that the Magistrate's failure to deal with this application with the understanding that the Appellant faced a Schedule 6 offence; wherein the provisions of section 60(11)(a) of the Criminal Procedure Act would apply, was irregular.

[32] However, it bears repeating that, while some irregularities may result in a failure of justice and an unfair trial, not every irregularity has that effect.[11] In *S v Shaik*,[12] the Supreme Court of Appeal said,

> "The right to a fair trial requires a substantive, rather than a formal or textual approach. It is clear also that fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment. A fair trial also requires — fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the

[10] *S v Yanta* (Supra) at 246H-I
[11] See *S v Zuma and Another* 2022 (1) SACR 575 (KZP) at para 267.
[12] 2008 (1) SACR 1 (CC) para 43.

accused, as well as those distressed by the audacity and horror of crime."

[33] Once the court finds that there was an irregularity, it has to further determine if the said irregularity renders the trial or the bail inquiry, unfair. The Magistrate was able to deal with the application on the basis that the Appellant had to satisfy the court that the interests of justice permit his release on bail, without expecting him to show exceptional circumstances that in the interests of justice, permit his release on bail. For this reason, I am not persuaded that this irregularity rendered the bail inquiry or hearing, unfair.

[34] The Appellant further submitted that the learned Magistrate erred in allowing the counsel who was on watching brief on behalf of the deceased's family (Adv. Ngwenya), to take part in the bail proceedings. The Appellant's legal representative raised his reservations on this, immediately after the watching brief counsel made the closing address saying, he feels like he was facing two public prosecutors. The Magistrate downplayed those concerns saying, if he had reservations, he should have raised them at the beginning of the hearing when she indicated that she would allow the watching brief to take part in the proceedings.

[35] Interestingly, the Magistrate chose not to deal with those concerns in her judgment, or at least, why she allowed watching brief to participate in the hearing. Unfortunately, Adv. Ngwenya who wanted to respond to these concerns as raised by the Appellant's legal representative, was not allowed to address the court. Had she allowed him, perhaps the court would have an understanding of the basis on which he agreed to actively participate in bail application. On the other hand, had the Magistrate given the reasons for her decision, the appeal court would now be able to deal with them since that decision is now being challenged.

[36] On appeal, the Appellant's legal representative submitted as follows.

> "Furthermore, Datuk Mahadev Shakar JCA, remarked the following in his article, 'Watching Briefs – Indulgence, Right or Potential Estoppel?' [1991]1 MJL clxi: 'In a trial, whether criminal or civil, the only persons directly concerned with the process are the combatants. Only they have the right to tender evidence and make submissions. They alone will be bound by the orders of the judge and become liable for the costs of litigation. In such a scenario, a watching brief has no right whatsoever to do anything except watch the proceedings. He cannot be permitted to lead evidence nor can he question any of the witnesses. Nor can he address the judge on the merits of the case. All this for the simple reason that his client is not a party to the dispute, even if he has an interest in the outcome.'"

[37] Counsel for the Respondent agreed with this assertion saying,

> "there is no provision in our legal system which allows watching brief Counsel to be a participant in criminal proceedings, whether bail hearing or trial. It is only the State prosecutor that has a title to prosecute and represent the interests of the victims of crime in all criminal proceedings as provided by section 20(1) of the National Prosecuting Authority Act, No, 32 of 1998… The Respondent therefore, concedes that by allowing the watching brief Counsel to participate in the proceedings, although minimally so, such flexibility by the court a quo rendered the proceedings to be irregular."

[38] The court *a quo* allowed watching brief counsel to fully participate in the bail hearing, to the extent that he was also allowed an opportunity to cross examine the only witness who testified being, the Investigating Officer. This opportunity was however not utilised by Ms. Madua who stood in as watching brief on behalf of Adv. Ngwenya who was not in that day. It is not clear as to why she chose not to ask any question. It could be that she just did not have questions, or she thought, that it was not her space to do so. When the opportunity to make closing argument was extended to Adv. Ngwenya who was present this time around, he wasted no time. He

addressed the court at length as to why bail should not be fixed for the Appellant.

[39] In *Van Heerden & Seuns BK And Others v Senwes Bpk And Others,*[13] Majiedt J heard representations by counsel holding a watching brief. Counsel applied for leave to question his client after cross-examination, in a procedure described as a type of re-examination. It was submitted that the witness had rights as such which could only be exercised with the assistance of counsel. The court found no precedent for such procedure and that cases relied upon did not amount to authority therefor. The application to take part in the trial was therefore dismissed. Watching brief counsel was as such only allowed to be present and watch the proceedings.

[40] There is therefore no doubt that the watching brief counsel is exactly what the name says. It is counsel who is briefed to watch the proceedings. Allowing watching brief counsel to do more than to watch the proceedings was an irregularity. Having found this, the question should now focus on whether this irregularity renders the proceedings unfair. This question should be approached with the understanding that at the time of the hearing of this bail application, the law pertaining to bail had just been amended. Section 60(2A) of the Criminal Procedure Act now provides,

> "(2A) The court must, before reaching a decision on the bail application, take into consideration
>
> *(a)* any pre-trial services report regarding the desirability of releasing an accused on bail, if such a report is available; and
>
> *(b)* the view of any person against whom the offence in question was allegedly committed, regarding his or her safety." [My emphasis].

[13] 2005 JDR 0946 (NC).

[41] If the court *a quo* intended to implement this section, I think it took it too far as the above provision is limited to allowing courts to consider the views of persons against whom the offence in question was allegedly committed, regarding their safety. That cannot entail allowing them to cross examine witnesses in person or through watching brief counsel. Their views can be acquired directly from them, through the Public Prosecutor who can address the court after consultation with them, or even best, through evidence tendered by the Investigating Officers who would have consulted with them.

[42] Thankfully, *in casu*, the address by Adv. Ngwenya came in after the Appellant had finished his submissions. Furthermore, the submissions by Adv. Ngwenya were to the effect that that "attempts to influence or intimidate State witnesses… are serious factors which have to be taken into account…" He went on to address the court about the surviving victim who was injured and whose safety had to be considered. He also reminded the court that a firearm that was used had not been recovered. For these reasons, he reasoned that the Appellant had failed to show that the interests of justice permit his release on bail.

[43] From the above provisions, it would appear therefore that watching brief focused on what the court was entitled to hear anyway in light of section 60(2A) of the Criminal Procedure Act. At the stage that the watching brief counsel addressed the court, the Appellant had already presented his case. His legal representative had an opportunity to address the court in reply, and if he wanted, he could have requested that the Appellant's case be reopened in order for him to lead evidence to counter what the watching brief counsel had said, and he chose not to do so. For these reasons, I am of the view that the participation of watching brief in addressing the court did not render the bail inquiry unfair.

[44] I cannot find with the facts above that the Learned Magistrate was wrong in finding that the Appellant failed to demonstrate on balance of probabilities that the interests of justice permit that he should be released on bail.

[45] In the result the following order is made:

Appeal against the refusal of bail is dismissed.

TV RATSHIBVUMO

JUDGE OF THE HIGH COURT

FOR THE APPELLANT	**: MR. MP MASEKO**
INSTRUCTED BY	**: MP MASEKO INC**

MBOMBELA

FOR THE RESPONDENT	**: ADV. TS MSIBI**
INTRUSCTED BY	**: DIRECTOR OF PUBLIC PROSECUTIONS MPUMALANGA MBOMBELA**
DATE HEARD	**: 23 MAY 2023**
JUDGMENT DATE	**: 06 JUNE 2023**