IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF KWAZULU-NATAL

CASENO:41/1660/2014

HELD AT DURBAN IN THE SCCC2 SITTING IN T COURT

IN THE MATTER BETWEEN:

THE STATE

And

ALVIN PATHER

THE APPLICANT

Coram : Davis RM

Heard: 13, 14, 21, 22 and 29 February 2024.

Date of Judgment and Order: 29 February 2024

The following order is granted:

Bail pending the review of the proceedings in the regional court under case number 41/1660/2014 is refused

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REASONS

Introduction

[1] On 4 October 2018,the applicant was convicted of 16 counts of fraud in the regional court, sitting as a specialised commercial crime court,. Eight months later on 27 June 2019 he was sentenced to a wholly suspended sentence of eight (8) years imprisonment. The imprisonment was suspended for five years on condition he was not convicted of a crime where dishonesty was an element committed during the period of suspension[1].

[1] Although the sentence on all the counts is not precise it appears that the counts were to run concurrently.

[2] The state appealed the sentence in terms of section 310 A (1) of the CPA. On 25 November 2022, Olsen J with Balton J concurring, upheld the appeal against sentence and imposed an effective term of eight years imprisonment.[2] Shortly after this sentence was imposed on appeal, the applicant pursued appeal remedies available to him, firstly to the SCA, then to the president of the SCA and when those applications failed, then sought leave to appeal to the constitutional court.

[3] With the decision of the constitutional court whether to allow the applicant access to the apex court pending, the applicant on 6 November 2023 enrolled a review application[3] at the KZN high court sitting at Pietermaritzburg[4] seeking to review and set aside the conviction and sentence imposed by regional magistrate Ms. Mazibuko[5].

[4] This application for bail pending review is heard some nine years two months after the applicant first appeared in the regional court. This court hears the matter as directed by a high court order.

Chronology

[5] This matter has been in the criminal justice system since November 2014, in excess of nine years. Due to the material canvassed during the arguments, previous appeals and in view of the the state's submission that these proceedings are in fact an abuse of process, it is necessary to set out, in some more detail, the history of this matter.[6]

1. The applicant was summonsed and appeared in the commercial crimes court in Durban on 18 November 2014 charged with various counts fraud, forgery and uttering.
2. There were a number of interlocutory applications brought on behalf of the applicant; on 11 April 2016 a request for further particulars made consisting of seven typed pages. In December this was followed by a request for further and better particulars. On 7 July 2017 the applicant filed a request for further and better particulars.

[2] There were 16 counts of fraud that the applicant was convicted of, there were three complainants all registered banking institutions, the high court grouped the sentences in line with the fraud committed against these institutions. The high court sentenced the applicant as follows; on counts 1 to 9 (taken as one for the purpose of sentence) the accused is sentenced to twelve (12) years imprisonment, four years of which are suspended for a period of five (5) years on condition that the accused is not convicted of fraud committed during the period of suspension. The same sentences were imposed on counts 16 -19 and counts 26-28. The sentences were ordered to run concurrently. The effective term was eight years.

[3] Case number AR 392/2023P

[4] There is some dispute as to the dates and manner of its service.

[5] The presiding officer retired at the end of 2018.

[6] The information is sourced from the charge-sheet, the indexed bundle of documents filed in the urgent application in the high court dated 2 February 2024 and the judgment of Olsen J in *DPP v AP [2022] ZAKZPHC 76; 2023 (1) (SACR) 203 (KZP)*

3. On 13 December 2017 the applicant indicated he would make written representations to the state for them to consider. Representation were made to the DPP-KZN and to the NDPP. On 6 July 2018 the applicant was advised that all representations were unsuccessful.
4. On 4 October 2018, almost four years after first appearing in court, the applicant pleaded guilty to 16 counts of fraud. The applicant confirmed a section 112 (2) statement read out on his behalf by his advocate J. Howse SC in which, he in detail set out the facts and circumstances under which he committed the offences that he pleaded guilty to. This included in some detail the factors that influenced the commission of the offence.
5. In response to questioning from the regional magistrate the applicant confirmed its correctness, that it was made and signed by him feely without undue influence, that the statement was made with both his attorney and counsel present.[7] The State accepted the facts as contained in the plea[8] and the applicant was convicted as pleaded of 16 counts of fraud. The statement contained little reference to the amounts defrauded, how the money was actually spent. This was subject to criticism by the high court on appeal, referring to it as an attempt at obfuscation.
6. The matter was postponed to 2 November 2018 for sentence.
7. On that date the state advised that they were leading three witnesses from the complainants, the banks ABSA, First National Bank [FNB] and Mercantile Bank and the matter was postponed.
8. On 12 February 2019 the state led the evidence of only two witnesses employed by FNB and Mercantile Bank in aggravation of sentence, thereafter Mr Howse SC argued for a term of imprisonment to be imposed but its operation suspended. Ms. N Letsholo for the state argue for direct imprisonment.
9. Sentence was imposed on 27 June 2019, the court imposed an eight year term of imprisonment which was wholly suspended on certain conditions.
10. Dissatisfied with the sentence imposed the state applied for leave to appeal the sentence in accordance with section 310 A of the CPA. The application was opposed.
11. Notwithstanding this opposition, leave to appeal was granted by the high court on 29 August 2019.
12. There was a long delay before the matter was eventually argued before Olsen J and Balton J on 14 October 2022. Mr. Letsholo argued the appeal on behalf of the state and Mr Howse for the applicant[9].
13. On 25 November 2022 Olsen J, with Balton J concurring, upheld the appeal, set aside the sentence of the regional magistrate and imposed an effective term of eight years imprisonment.

[7] Page 3 of the transcribed record attached to the charge-sheet of proceedings on 4 October 2018.
[8] The plea and its contents were analysed in some detail when the State appeal against sentence was heard.
[9] I am unsure of why the matter took three years before the appeal was heard. There is no explanation in the papers for this delay.

The judgment on appeal.

[6] It is apposite at this stage to set out the key findings of the high court and the factual matrix of this matter:

[7] During 2011 to 2012 the Applicant set up an Intensive Care Unit at his home in order to provide full time care for his sister. She was a medical doctor employed by the KZN department of health and contracted a drug resistant strain of tuberculosis in the course and scope of her employment. Following the department of health's apparent refusal to assist in her treatment the applicant decided to do whatever was necessary to try to save her, This represented a huge expense which was met by Biotrace, the applicants company. Notwithstanding his efforts she died in 2012.

[8] The applicant knew that the Debtors Book and other securities ceded to the banks were not a true reflection of the amounts due and payable to Biotrace, the applicant.

[9] The applicant knew that the bank would not have extended the credit needed for the ICU project on the correct 'financial statements, quite simply on the risk assessment conducted by financial institutions before they extend credit or loans. Neither the applicant nor Biotrace qualified for the amounts required.

[10] He then decided to submit false information that inflated the entity's financial worth and the section112 (2) statement confirms that the applicant knew at all relevant times what he was doing was wrong and unlawful. Although the applicant believed that the entity could service the credit afforded to him by the banks he confirmed that he submitted the false information to induce the banks to approve the loans and that they would not have otherwise done so.

[11] The fact that he believed that the entities would be able to service the loans is not relevant to a conviction of fraud on these facts. There is nonetheless a recurring message in all the various applications filed that had the 'whistle-blower' not alerted the banks and had the banks not 'foreclosed' their would have been no loss. With respect, on the full facts of this matter it reflects the applicant's lack of insight

[12] On the basis of these misrepresentations the complainant banks extended a line of credit to the applicant that they would not have otherwise done. The institutions thereby exposed themselves to risk and in terms of the elements of fraud this suffices as potential prejudice.

[13] The judgment is critical of the lack of information of how much money was spent on the project and more particularly on how it was spent on the project is contained in the plea statement. The s 112 (2) statement does not deal with the prejudice to the complainants or the amounts of the fraud, the potential prejudice to the three complainant banks and the actual prejudice.

[14] The economic cost of such crimes was ignored by the magistrate, the related societal interest in crimes of this large magnitude were ignored as the magistrate focussed almost solely on the applicant's personal circumstances and ignored both the victims interest in sentencing and societal interest. There seems to be an acceptance that but for the foreclosure of the loans they would have been serviced with no loss being sustained by the bank. The magistrate ignored the banks evidence in aggravation of sentence that the source payment testing revealed that the money being paid stemmed from the applicant and they could not quantify what the real turnover of the business.

[15] The charge-sheet stated potential prejudice in the amount of 109 056 000 million rand, Olsen J found even the most favourable estimate relying completely on the applicant's version of events, was that the potential prejudice caused to the three banks as a result of the fraudulent conduct of the applicant was R 70 906 000[10].

[16] When the banks became aware that the 'financials' were inflated and information supplied to it false, they cancelled the agreements. Evidence in aggravation revealed that First National Bank suffered actual prejudice of R16 million and Mercantile Bank R15.2 million. No evidence was placed before the court as to the ultimate loss sustained by ABSA Bank. Olsen J after considering the amounts advanced by ABSA said "It seems unlikely that it suffered an ultimate actual loss significantly different to that suffered by the other two banks"[11].

[17] Concerning the fraud counts, the applicant admitted that the submission by on behalf of his company, Biotrace Trading 221 (Pty) Limited ("Biotrace"), of false documents purporting to reflect the financial condition of Biotrace, was done with a view to securing, on each occasion, more credit for Biotrace from the bank concerned, that would otherwise have been granted by the banks if the true financial position of the company had been revealed. The Applicant confirms in his affidavit supporting the review application and indeed in the affidavit supporting this application that this was done.

[10] S v AP (supra) at [3]
[11] *State v A.P Pather* (supra) at [5]

[18] The irony is that he wishes the original proceedings to be set aside in order that he can go on trial pleading not guilty but his version is exactly the same as described in his plea statement in which he admitted guilt in the regional court[12].

[19] Each of the counts on their own fell within Part II of Schedule 2 to the Criminal Law Amendment Act 105 of 1997, rendering a sentence of 15 years imprisonment on each count compulsory in the absence of substantial and compelling circumstances.

[20] Olsen J held that 'the effective sentence imposed in this matter was disproportionately low by a very considerable margin.'[13]

[21] The high court found substantial and compelling circumstances present due to the terminal illness to the applicant's sister and the distress that this occasioned but cautioned:
"I adopt this view not because I in any way endorse the proposition that a court should allow what might be called a "Robin Hood defence". Illness and death are incidents of human life. The vast majority of people cannot afford medical care in excess of that provided by the State in order to ward off the worst outcomes of severe illness. Those who have the wherewithal are free to choose to spend their money to save a loved one. But it is another thing altogether for a court to sanction fraud, robbery or theft as a means of acquiring the funds necessary to meet such expenses[14]".

[22] The effective term of imprisonment imposed on appeal was eight years imprisonment with an additional four years imprisonment suspended for five years.

Chronology Resumes

[23] Aggrieved the applicant then took the follow steps:

> 14. The applicant filed an application to appeal to the SCA in terms of section 16 (1) (b) of the Superior Courts against the order of the High Court imprisoning him.
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> 15. He was released on bail pending the application by virtue of a consent order taken before Mngadi J on 8 December 2022[15].

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12 I am aware that an accused has a constitutional right to plead guilty and have the state prove its case beyond a reasonable doubt.

[13] *S v AP (supra) at [11]*

[14] *S v AP (supra) at [27]*

[15] In my view bail granted by the taking of a consent order before a presiding officer is problematic, the discretion to grant bail rests with the presiding officer hearing the matter irrespective of the attitude of the litigants before him, the duty of the presiding officer is to ascertain whether the provisions of the Act have been met. Secondly evidence has to be adduced where the offence falls within the ambit of section 60 (11) (a) or (b), as it does here, release without the adducing of evidence renders the proceedings a 'nullity.' S v Mabena, (373/06) [2006] ZASCA 178. Nugent JA.

16. On 10 March 2023 the SCA refused leave to appeal[16].

17. An application was thereafter made to the president of the SCA in terms of section 17(2)(f) of the Superior Courts act.

18. Pending this application, bail was extended by consent by P. Bezuidenhout J on 3 April 2023.

19.The application for leave to appeal to the president of the SCA was refused by Petse AP on 14 June 2023.

20. On 14 July 2023 the applicant approached the constitutional court seeking leave to appeal to the apex court.

21.Bail was increased to R20 000 by the KZN High court[17].

22. On 6 November 2023 the applicant filed an application to review and set aside the proceedings in the regional court.

23. The constitutional court refused the application for leave to appeal to the constitutional court on 31 January 2024, the applicant had, in terms of the conditions of bail, three days to surrender and commence serving his sentence.

24. This led to the urgent application in the high court on 2 February 2024 that resulted in the order taken by consent that this court hear an application for bail pending review[18].

[24] The application on 2 February 2024,[19] after the constitutional court declined to hear any appeal against sentence on 31 January 2024,[20] was brought as an urgent[21] application and sought relief, which included an extension of bail pending the outcome of this review application. This court is seized of the matter in compliance with a consent order made by Gabriel AJ on Friday 2 February 2024.

[25] The Order verbatim;

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[16] Per Mothle JA and Mali AJA on Page 105 of the application heard in the PMB High court on 2 February 2024.
[17] Order not in the papers, see affidavit of applicant and the application for bail pending the approach to the constitutional court. Apparently also by way of consent order.
[18] This matter has thus been in the court system since November 2014,in excess of nine years two months.
[19] The order is dated 2 February 2024 but is date stamped by the registrar as 5 February 2024, case number AR1490/24P
[20] Page 105 of the indexed bundle in the application to suspend the imposition of the sentence pending the finalizing of the review bearing case number AR392/23P
[21] The order was taken by consent with no apparent consideration of whether the urgency was self-created, with state's later contention of breach of process suggests this was a germane consideration.

1. It is directed that a new bail application must brought in respect of the pending review application in AR 392/2023[22].
2. The issue of bail is referred to the Regional Court and the applicant is warned to appear in the Specialized Commercial Crime Court-T, Durban at 10-30 on 6 February 2024.
3. The Applicant's bail, granted in case number AR 336/2021, is extended on the following conditions:

    3.1 The Regional Court Magistrate hear the bail application to determine whether the applicant ought to be released on bail pending the finalization of his review.

    3.2 The bail application must be concluded no later than 23 February 2024, unless otherwise ordered by the Regional Court Magistrate.

4. The order under appeal number AR 336/2021 is stayed pending the finalisation of the order in paragraph (3) herein.

[26] At the hearing in T regional court on 6 February 2024 the application for bail pending review was postponed to 12 February 2024 for hearing. The parties have been represented by counsel, Ms Athmaran, Ms. Moodley and finally by Van Schalkwyk SC for the applicant. the State has been represented by Mr Kisten.

[27] The application for bail pending review is opposed.

[28] This court hears this matter in accordance with the order of the high court. The plea proceedings and imposition of sentence was done before another regional magistrate[23] who has retired.

[29] Before being advised of the order taken by consent of Gabriel AJ, I expressed my wish to be addressed on the issue of jurisdiction, as no magistrates court had fixed bail for the applicant. This is no longer a germane concern due to the order of the high court.

[22] The allocated high court case number.
[23] Regional magistrate, Ms Mazibuko. She retired at the end of 2018, she completed the matter while retired. With respect, in light of the grounds of review she is, in all likelihood precluded from hearing the application anyway.

[30] The advantage of this court hearing this application is that it allows for an opportunity of oversight by the high court in accordance with chapter 12 of the CPA. As Seegobin J said in *Bailey v State*:[24]

"It would seem to me that the High Court always has the power to control its own proceedings. Inherent in this is the power to grant bail which is an incident of its common law power to control its own judgments. This is not to say that in every instance the High Court would be obliged to consider an application for bail. This would depend on the facts and circumstances of each case. The general rule, however, is that bail applications should be pursued in the court of first instance because it is that court that is best equipped to deal with the issue, having been steeped in the atmosphere of the case. A refusal of bail in that court could result in that decision being taken on appeal to the High Court and thereafter to the SCA if necessary. As a matter of practice this is the route that should be followed. The peculiar circumstances of a case however, may dictate otherwise".

Bail pending review test

[31] As a consequence of the amounts involved the application falls within the ambit of schedule 5[25] and therefore section 60 (11) (b) of the CPA, Act 51 of 1977 ordinarily applies. This provides;

Notwithstanding, any provision of this Act, where an accused is charged with an offence referred to-
"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 satisfied the court that the interests of justice permit his or her release."

[32] The application proceeded by way of the filing of affidavits in support of the application and the state filed affidavits in opposition to the application. A replying affidavit was filed by the applicant and the state then filed a further affidavit by Caitlyn Grey a creditor of the entities that the applicant has an interest in. This affidavit and accompanying documentation concerned itself with the liquidation and business rescue proceedings affecting the entities. On 29 February 2024 the applicant filed further affidavits responding to this material.

[33] This is an unusual matter, this court has not presided over a matter where bail pending a review application has been sought after the appeals process has been finalised or perhaps more accurately when the finalisation of the appeals process is imminent. This is the first time where a bail application is heard by this court pending a review only.

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[24] *Bailey and others v S [2013] ZAKZPHC 72 at [22]*

[25] Any offence relating to exchange control, extortion, fraud, forgery, uttering, theft, or any offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004- (b) involving amounts of more than R100 000,00, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy;

[34] In my view, with respect, the test at this stage is, has the applicant discharged the onus to show the interests of justice permit his release pending the review application[26]. In discharging the onus on a balance of probabilities, the applicant must convince this court on proper grounds that he has prospects of success on review and that those prospects are not remote[27], but have a realistic chance of succeeding. Once this has been done, the second question is, has he shown that the interests of justice permit his release from custody?

[35] *Smith*[28] stated, 'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[36] Prospects of success on appeal do play a role in determining whether or not bail ought to be granted pending appeal. The same, I believe must also apply to review proceedings. The fact that leave to appeal might be granted, on its own does not constitute sufficient ground for granting bail pending appeal or review, for bail to be granted the court must be satisfied that the applicant has discharged the onus that it is in the interests of justice to grant bail.

[37] Notwithstanding whether or not there are prospects of success on review, 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; then bail should be refused.

[38] As a result of the state arguing that the application is an abuse of process and that all the issues in this matter have already been adjudicated proper consideration needs to be taken of the lateness of the filing of the application and its chances of success. At the time this matter was re-enrolled in the regional court, the applicant has exhausted all of his appeals in the high court, appellate courts including the apex court.

[39] It is against that backdrop that I set out the approach I take to the consideration of the application and the test to be satisfied by the applicant before he

[26] S 60 (11) (b) of Act 51 of 1977.
[27] *S v Smith [2011] ZASCA 15; 2012 (1) SACR 567 (SCA)*
[28] *S v Smith (Supra) at [7]*

is released. I can find no precedent directly on point, most cases read instead dealing with leave to appeal, petition or where a hybrid appeal/review is pending[29].

[40] Noting, of course, that if he can show that the state reneged on the agreement to abide by an informal plea agreement there is a strong likelihood that the matter would start de novo. In Van Eerden[30] "one of the elements of the notion of basic fairness and justice is that the State shall be held to a plea bargaining agreement. Daffue J in S v Roberto31 said in such circumstances that 'the only fair and logical outcome of the predicament being faced is to review and set aside the whole proceedings in both matters.' An appeal prosecuted to its finality does not preclude a successful review or for that matter the institution of review proceedings, the one is a consideration of the merits of the matter the other is a scrutiny on these facts that a gross irregularity ex facie curiae has occurred[32], namely incompetence of counsel by convincing the applicant to plead guilty and the state reneging on the informal plea agreement.

[41] Generally while courts would always lean in favour of granting bail to an accused person pending his or her trial, different considerations apply after conviction and sentence. This was pointed out by the court in S v Williams[33] where the following was stated:
"Different considerations do, of course, arise in granting bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find it seems that it is putting it too highly to say that before bail can be granted to an applicant on appeal against conviction there must always be a reasonable prospect of success on appeal. On the other hand even where there is a reasonable prospect of success on appeal bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding.

[42] To apply this test it is necessary to balance both the likelihood of the applicant absconding and the prospects of success. Clearly, the two factors are inter-connected because the less likely the prospects of success are the more inducement there is on an applicant to abscond. In every case where bail after conviction is sought the onus is on the applicant to show **why justice requires that he should be granted bail."** [my emphasis] The obvious contention being that the more advanced the appeals or review process is then the greater the inducement to abscond would be.

[43] Precedent directs that if the applicant has no prospect of avoiding imprisonment, then a court should not allow bail procedures to frustrate punishment

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[29] *Bailey and others v S (AR 371/13) [2013] ZAKZPHC 72 Per Seegobin J*
[30] *Van Eeden v The Director of Public Prosecutions, Cape of Good Hope* 2005 (2) SACR 22 (C) at [23]
[31] *S v Roberto In re S v Cumbe* [2022] ZAFSHC 133; 2022 (2) SACR 442 (FB) (9 June 2022)
[32] *S v De Villiers* 2016 JDR 0550 (SCA); 2016 ZASCA 38 at [14] and [18] where the complaint pertains to the methods of the trial as opposed to the merits then review is necessary.
[33] *1981 (1) SA 1170 (ZA) at 1171H – 1172B.*

procedures which have been formalised and more so when appeal processes have finalised.[34]

[44] Flemming DJP in S v Hudson[35] stated:

"The interests of the accused generally turn upon extant facts and intentions, but it remains the chances that the administration of justice may be harmed which may justify the impact of detention despite a pending appeal.[36]"

[45] I am mindful that the merits of any appeal are no longer germane, the applicant has no further appeals available to him, he seeks to review the matter only. Therefore he must show that there is a reasonable possibility on reasonable grounds that the review could succeed. Further he must prove that the interests of justice permit his release, then bail should be granted. Despite the late stage that the application is brought this is not a bar in itself to bail being granted. The stage at which this application was brought is but one of the factors to be taken into account.

[46] The proper administration of justice falls to be considered, especially as the appeals process has been finalised by the constitutional court. The merits of the proceedings as they played out firstly in the regional court and then before the high court, with the SCA and the Constitutional Court then rejecting the applicant's petition to appeal the sentence imposed by Olsen J, all appeal processes are finalised.

[47] The general approach that it is desirable that sentence be served as soon as possible, if there are no reasonable prospect of success on appeal[37]. In S v Mabapa the court further held[38] that:
"But, as cautioned by Kriegler J in S v Dlamini, the Constitution does not create an unqualified right to personal freedom. If such a right may even be limited or removed before conviction, the principle applies even more strongly after conviction pending appeal. Although the opportunity for interfering with evidence is not that real at this stage, the possibility that a convicted person may abscond when on bail pending the appeal, is increased. Of course, all the other factors mentioned in s 60 of the Criminal Procedure Act must be considered and if the conclusion under that section remains that bail should not be granted."

[48] In S v Masoanganye[39], Harms AP pointed out;

"[s]ince an appeal requires leave to appeal which, in turn, implies that the fact that there are reasonable chances of success on appeal, is on its own not sufficient to entitle a convicted person to bail pending an appeal: R v Mthembu 1961(3) SA 468 (D) at 417 A-C. What is of

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[34] S v Hlongwane 1989 (4) SA 79 (T) at 102 E-G."
[35] 1996 (1) SACR 431 (W) at 432 d-g.
[36] Hudson (supra) at 433 e-f:
[37] Bailey and others v S [2013] ZAKZPHC 72
[38] Supra at [8]
[39] [2011] ZASCA 119 at [14] 2012 (1) SACR 292 (SCA)at [14]

more importance is the seriousness of the crime, the risk of flight, real prospects of success on conviction, and real prospects that a non- custodial sentence might be imposed."

[49] The administration of justice is a relevant consideration in a bail application. In S v Ndou,[40] Maumela J held;

'it can only be logical that the court takes into account the increased chances of the Appellant absconding now that he stands convicted, much as he stands sentenced to a term of imprisonment as compared to the situation where he was merely awaiting the outcome of the trial or for sentence to be imposed. The applicant, stands no longer covered by the presumption of innocence as provided by the Constitution of this country.' This is because he now stands convicted and sentenced, with the appeal process exhausted.

The Review and the Prospects of success

[50] Whereas the applicant in his papers refers to three grounds of review, in my view the second and third grounds are inextricably linked and I will deal with them together. The two grounds are the incompetence of his legal representation, in the conduct of his senior counsel and attorney. He was advised to plead guilty in return for a non-custodial sentence, if he had not been advised to accept this proposal he would never have pleaded guilty. He always wanted to plead not guilty and challenge the state case against him.

[51] The second ground is that the state reneged on this informal agreement between his legal representatives, the prosecution and the magistrate. Instead the state called witnesses in aggravation of sentence and argued for a period of imprisonment to be imposed. Notwithstanding this the regional magistrate imposed a suspended sentence. In further acts contrary to the original agreement to accept that a suspended sentence be imposed the DPP filed an appeal against the sentence and vigorously prosecuted that appeal.

[52] The affidavits filed by the state effectively deny being involved in any informal plea bargaining with the applicant or his legal team wherein they agreed that in an exchange for a guilty plea to fraud then the regional magistrate would impose a suspended sentence.[41] Affidavits in response to the review application pending in the high court have not yet been filed.

[53] I am aware that the purpose of these proceedings is primarily to adjudicate the question of bail and not decide the merits of the review; the prospects of success

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[40] *S v Ndou and Others [2022] ZAGPJHC 842 (27 October 2022) at [8]*

[41] The parties to the review application are Alvin Pather the applicant, the respondents are the National Director of Public Prosecutions, the prosecutor in the regional court, Nolwazi Letsholo. The third respondent is the regional magistrate Ms. C Mazibuko. The fourth respondent is the prosecutor who argued the appeal in the high court, Tumetsi Letsholo. The fifth respondent is the Director of Public Prosecution Kwazulu-Natal.

of the review are always a consideration when determining an appeal or review after conviction. This requirement is arguably more important when all the appeal remedies have run their course, it demands some analysis of the grounds of review in so far as it impacts upon the question of bail.

Condonation

[54] As the review papers filed by the applicant confirm the applicant requires Condonation for the late filing of the review is also required. Review proceedings should be brought within a reasonable time, the right to review or appeal a matter does not give an applicant the right to file a review whenever he is so inclined. Rights of review and appeal are to be exercised diligently.[42]

[55] The two principal reasons for a court having the power to refuse to consider a review are that an unreasonable delay may cause prejudice to the other parties and that it is both desirable and important in respect of judicial and administrative decisions for finality to be reached within a reasonable time[43].

[56] In considering whether to refuse a review application because of delay, a court is called upon to conduct two enquiries – firstly, whether, in the light of all the relevant circumstances, the lapse of time was unreasonable and, secondly, if the delay is found to have been unreasonable, whether in the light of all the relevant circumstances it should be condoned. The first enquiry is purely factual while the second entails the exercise of a judicial discretion[44]

[57] I deal here only with the issue of the lapse of time in the filing of the application. I deal later with the relevant circumstances under the heading prospects of success.

Delay

[58] The delay in filing the review applying to set aside the proceedings in the magistrate's court is protracted. The proceedings in the magistrate's court completed on 27 June 2019. In respect of the grounds of review the applicant states that his legal representatives failed to act in accordance with his instructions to contest the charge on or shortly before, 4 October 2018 the date of the plea.

[59] The state's reneging on the "informal plea and sentence agreement" was known to the applicant no later than 28 November 2018. This is when his counsel informed the court that the state, without notice to them, had decided to call witnesses in aggravation of sentence. Only on 6 November 2023, nearly five years later did the applicant file this application for a review complaining of this action by the state.

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[42] Kriegler Johann 1993 *Hiermstra Suid Afrikaanse Straf-Proseses* 5ed at P.761
[43] *Radebe v Government of the Republic of South Africa* 1995 (3) SA 787 (N) at 798.
[44] *Liberty Life Association of Africa v Kachelhoffer NO & Others* 2001 (3) SA 1094 (C) at 1112 D – F a

[60] When asked about the delay Ms Athmaran gave the, in my view, unfortunate explanation that the applicant was waiting for the outcome of the proceedings in the regional court. It was only after the high court had corrected the regional court sentence that it became an issue. Nonetheless he elected to wait while his legal team had pursued the appeal options available to him. E-mails between the applicant indicate that on 30 November 2022 he was already actively considering a review but waited just over eleven months to file the review.

[61] During argument it was suggested by Ms. Athmaran that there was no issue with the applications been brought so late in the proceedings. Whereas there is no bar to that route this choice does come with dangers. Late filing of reviews and applications are not without consequences.

[62] In *Pennington,* Chaskalson P[45] in a matter where the appellants sought leave to appeal a decision of the SCA said;

"Even if the delay occurred without fault on the part of the appellants, it could not be said to have had any bearing on the convictions and sentences imposed on them. To grant them the relief they seek would be contrary to the public interest and would bring the administration of justice into disrepute. To say that guilty persons are excused from serving the sentences imposed on them because of delays associated with unsuccessful appeals, would be consistent neither with fairness nor justice…. There is no reason why the two appellants, as a result of an unsuccessful appeal, should escape the punishment imposed on them".

[63] This matter started on18 November 2014, the delays pre-sentence are largely at the behest of the applicant, he is also the one responsible for the belated filing of the review proceedings. I am aware that the proper forum for the adjudication of the condonation application is the high court but prospects of success are a proper consideration for the bail court at this point in the proceedings.

[64] I am mindful that "condonation is not just for the asking"[46] The prejudice, if any, suffered by the state and the proper administration of the criminal justice system also needs to be considered.

Evidence of the applicant

[65] The applicant proceeded by way of affidavit. By the conclusion of these proceedings he had filed three affidavit, a replying affidavit[47] and then on 29 February 2024 he filed an affidavit responding to the affidavit and evidential material

[45] *S v Pennington and another [1997] ZACC 10 at [41]*
[46] *The chairperson of the North West Gambling Board and another Sun International (SA) Limited* (1214/2019) ZASCA 176 (14 December 2021) at [23]
[47] Exhibit E

attached thereto by Caitlin Gray of Emerald Capital[48]. In addition affidavits of Hendrik Bezuidenhout[49] and Courtney Pillay[50] were handed in.

[66] The applicant was summonsed to court after the state investigation was complete. He has attended court on each and every occasion and is not a flight risk. The last part of the statement is not entirely correct, a perusal of the charge-sheet reveals warrants were issued for him on 17 April 2014, he mis-diarised the date, on 13 April 2016, he was ill and did not attend. On 13 October 2017, he was away on business and a further stayed warrant was issued.

[67] He states that the finalisation of his matter was delayed because he requested further particulars to the charge and thereafter made representations to the state through his legal representatives. From his first appearance in court on 18 November 2014 until he pleaded on 4 October 2018 the matter was postponed 29 times before the plea was taken[51].

[68] Every conceivable interlocutory application other than an objection to the charge was bought. All but four of the 29 postponements were at the behest of the applicant, the remaining four are by consent.

[69] The matter was marked final for pre-trial conference on three occasions and no fewer than seven advocates[52] appeared for him at these interlocutory applications. The matter was postponed for a long period due to the voluminous nature of the request for further particulars and then for further and better particulars to the charge.

[70] He avers that after his final representations were refused, there was an agreement between his legal representatives and the prosecutrix that he would plead guilty to sixteen counts of fraud. This plea would be premised on his version of the circumstances under which the offences were committed. He was told that in return it had been agreed with the prosecution and the magistrate that a non-custodial sentence would then be imposed.

[71] He only agreed to plead guilty on the basis that there was an agreement between the magistrate, the prosecution and his legal team that he would receive a non- custodial sentence. He states that had he known that the state could appeal the sentence agreed he would not have pleaded guilty.

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[48] Exhibit F
[49] Exhibit G
[50] Exhibit H
[51] See page 175-199 of the charge-sheet
[52] Howse SC, J Naidu SC, A Moodley, L Naidoo, P Govender, M Dass, Van Schalkwyk SC

[72] As he did in the review papers and in his section 112 (2) statement he confirms the manner in which he dealt with the banks. I do not propose to repeat it in detail at this juncture but the key aspects of it in brief are:

1. His sister was terminally ill.
2. In an effort to care for her he built an ICU at his home.
3. It was to be paid for by his company Biotrace.
4. He knew the current financials would not satisfy the banks.
5. He inflated and misrepresented to the bank the financials.
6. He believed Biotrace would be able to service the loans
7. He agrees that these bogus financials induced the banks to grant the loans.
8. The banks foreclosed when they found out their loans were granted on a falsehood.

[73] I pause to note that his anger seems to be at the person who alerted the bank, his own mendaciousness seems to pass him by. He seems to blame the banks for foreclosing on discovery of the false information supplied on the application. He believes that had the banks not foreclosed he would have been able to repay the loans, no loss would have been suffered by the complainants. The innuendo seems to be that the banks brought any loss sustained on themselves. Not only is this inconsistent with true insight it could never constitute true remorse for purposes of sentence.[53]

[74] He maintains he had no intention to 'steal the money,' he believed Biotrace would service the loans. None of this constitutes a defence to a charge of fraud and is merely indicative of a lack of insight and an unwillingness to accept accountability.

[75] The unusual and tragic origin of the offence was fully taken into account by Olsen J in the appeal matter, it is the reason he found substantial and compelling circumstances to be present. The reason why the applicant made those misrepresentations to the banks have been properly considered, what is not forthcoming in the evidence presented in this application is exactly how the applicant wished to defend the matter other than, as is his right, to have the state to prove the case against him. Whereas it is a serious irregularity for counsel to force or coerce an accused person to plead guilty most instances reported on review deal with the non- disclosure of a recognised defence to the charge, such as in this case that the plea of guilty was not voluntarily made.

[76] His belief that the 'whistle-blower' was mala-fide but whether or not the Biotrace could service the loans is irrelevant, in law as soon as the misrepresentation was made with the applicant knowing this to be so and that this was done to induce the banks to extend credit, when the banks were so induced to extend credit to the applicant, the actus reus of fraud was complete. At no stage

[53] *S v Matyityi* [2010] ZASCA 127

either in the affidavit in support of this application or in the review application does he proffer a defence to the charges, merely that he wished to plead not guilty.

[77] It lends credence to the suggestion that his legal team were involved in what has become known as 'lawfare[54]'

[78] The applicant is 45 years of age, resident in Zimbali Estate and has an interest in another property in Zimbali. His **residence is owned by his parents** who live in Sunningdale. He is married with two young children, aged ten and eight. His wife is employed as a pathologist. He plays a significant role in the maintenance of the daughter of his sister who died of tuberculosis.

[79] Shorn of meaningful background facts, he avers he is the CEO of Polymeric (Pty) Ltd which manufactures ink for the printing trade. The business has achieved significant growth and is the leading ink manufacturer in South Africa. He is fully committed to this operation. He submits that he is not a flight risk. The business is linked to another business 'Nano-ink' and they are at a stage whereby it is imperative that he be involved in the business. His original affidavit stated that his father S Pather was the sole director of these entities.

[80] The state in their opposing affidavit disputed the address that the applicant resides at and that the businesses of the applicant were successful. The applicant responded in a replying affidavit by explaining the advertising of the business on a rental app was for purposes of accruing income as the estate was a sought after holiday rental destination. Even in this affidavit he did not disclose that the residence is actually owned by 'Polymeric' and not by his parents. At the time he deposed to the replying affidavit on 12 February 2024 his father had relinquished or 'sold' his interest or directorship to Bezuidenhout 0n 10 February 2024.

[81] In respect of the businesses of the applicant he forthrightly, in his replying affidavit dated 12 February 2024, averred:

1. Polymeric Africa (Pty) Ltd is not in business rescue or liquidation.
2. He is not a director due to his sequestration.
3. He is the CEO of Polymeric.

In respect of Nano Inks (Pty) Ltd:

1. He is similarly not a director as he is sequestrated.
2. The entity is in business rescue which the business rescue practitioner [BRP] confirmed the prospects of recovery.

[54] The strategic use of legal proceedings to intimidate, hinder or obstruct an opponent- Collins English dictionary, in criminal law in SA, sometimes referred to as the 'Stalingrad defence'

3. The BRP, an attorney Mark Pienaar deposed to an affidavit that he was of the view that from the information at his disposal on 5 December 2023 there was prima facie reasonable prospects of a successful business rescue[55]. Pienaar later repudiates that prima facie view in attachments to Gray's affidavit.

[82] It is apposite to deal with the state's response to this at this juncture. The state responded to this replying affidavit with an affidavit from Caitlin Gray a legal advisor at Emerald Capital (Pty) Ltd. They are a creditor of the entities that the applicant appears to have an interest in and she confirms they instituted liquidation proceedings against the entities that the applicant has an interest in. She confirms that 'Emerald Capital' withdrew liquidation applications against both entities based on the understanding that the Polymeric group of companies would be consolidated into a group business process to commence immediately under the supervision of a Business Rescue Practitioner.

[83] She has since received updates from the BRP[56] dated 9, 13 and 16 February 2024 respectively. These updates disclose that from 22 January until 7 February the BRP was communicating with a Mr. Bezuidenhout who had expressed an interest in acquiring the group of companies that the applicant has an interest. As the business was in business rescue Bezuidenhout was advised that he would have to engage with the BRP directly and not with the creditors of the entities under business rescue.

[84] On 5 February, the BRP sent by email the documents necessary for the BRP to commence a composite business rescue, to the applicant and his father. Unknown to the BRP the applicant's father had transferred all the shares held by him to Bezuidenhout, resigned as a director of Polymeric and caused the appointment of Bezuidenhout as the sole director. The same process is repeated in respect of Nano Inks.

[85] The BRP states that both Polymeric and Nano are woefully insolvent and requests for the documentation underlying the agreements between Bezuidenhout and the entities have been refused by the Pathers' and Bezuidenhout apparently on the grounds of confidentiality.

[86] Contrary to the undertaking to undergo business rescue under the supervision of the BRP, the applicant has conducted unauthorised trading from their site in Durban. No consideration for the unauthorised trading has been forthcoming to the BRP. The representative of the BRP appointed to preserve the assets of the company was denied access to the premises.

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[55] This affidavit was filed in the KZN high court matter of Emerald Capital Proprietary Limited V Nano Inks proprietary Limited, Case number D 12550/2023, an application for the winding up of the respondent.

[56] Common acronym for Business Rescue Practitioner

[87] According to the attached documents, the Pather family misrepresented to the BRP by understating the creditors of the company. The major debtor to Nano inks is, in fact, Polymeric which has no apparent means to pay its debts. They will be approaching the high court for an order that business rescue be terminated and that the company be placed under liquidation. Criminal charges are being considered in respect of the unauthorised trading uncovered by the BRP.

[88] On 29 February 2024, the applicant now represented by Mr Van Schalkwyk SC filed the three affidavits in response to these claims. I am not going to deal with the affidavits in great detail. As counsel for the applicant correctly pointed out the affidavits deal with a limited issue. The evidentiary material placed before the court through the affidavit of Gray attacked the bona-fides of the applicant in respect of two aspects, the ownership of the home of the Zimbali estate and the performance and interest that the applicants has in the various entities mentioned in these papers.

[89] Briefly the home in Zimbali is owned by Polymeric, that means as of 10 February 2024 the home is controlled by the owner of Polymeric which is Bezuidenhout. It was not owned by the applicants parents as stated in the founding affidavit but by the entity. Secondly the applicant's replying affidavit dated 12 February specifically dealt with issues surrounding Polymeric but failed to disclose that as of two days prior his father was no longer the sole director or a director for that matter of Polymeric. The omission on the surrounding facts, is with respect, inexplicable. It ought to have been disclosed especially as the entities are central to the applicant's submission that he is required to provide support to his parents who are elderly.

[90] In his replying affidavit he informed the court that as he has been sequestrated he is not a director of Biometric, bearing in mind that less than forty-eight hours before his father relinquished all ownership of Polymeric and other entities that this omission is an indication of, at least, that the applicant is not playing open cards with the court. It cannot be explained away by the submission that it was not really in issue at the time.

[91] On the merits of the proposed review he in the review papers, at [22] states that he instructed his legal representatives that 'I did not wish to plead guilty as…the loans taken with the banks were being serviced.

[92] The fact that they were being serviced has no bearing on the conviction for the offence of fraud. The fact, that until the whistle blower's exposure of the false information supplied to the banks, is relevant only as to sentence and was indeed dealt with in detail by the appeal court.

[93] Indeed from paragraphs 36-39 of his review application, the founding affidavit outlines why he misled the banks, if he did not they would not have released the funding he required. The applicant seeks a review for an order for the matter to start de novo before another magistrate, the irony is that he wishes to run the trial on what

appears to be exactly the same facts as the trial which he states in his affidavits is the 'truth[57]'.

[94] Although he avers incompetence of counsel, this incompetence is seemingly limited only to the coercing of the applicant to plead guilty. This is, if facts permit, an acceptable ground of review.

[95] The assertion of incompetence of counsel does not extend to the manner in which counsel conducted either the merits of the plea proceedings and the appeal hearings. Indeed he achieved at least initially the result he wanted, namely a non-custodial sentence.

[96] Indeed, on the principals involved in a consideration of white collar crimes and sentences imposed in such matter OlsenJ's conclusion that a sentence of imprisonment had to be imposed in the circumstances, and that this was so, by a considerable margin, is correct. Not because this inferior court says so but because the appeal process has vindicated the decision of Olsen J.

Evidence of the State

[97] The State initially filed two affidavits in opposition, one from Ms N Lestsholo the prosecutrix in the court a quo and the investigating officer A Moloi, unit commander of the Directorate of Priority Crime Investigations.[DPCI]. Moloi's affidavit to a degree deals with concerns over the applicant's interest in his residence in Zimbali estate.

[98] The key aspects contained in the prosecutrix's lengthy affidavit is her submission that the review application has no reasonable prospects of success and that the risk of the accused absconding is now very high. She denies any wrongdoing in the conduct of the trial in the regional court. In the context of her affidavits in the appeal matters and in the bail affidavit.[58]

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[99] In her view the proceedings in this court and the review are a desperate attempt designed to delay the serving of the sentence imposed by Olsen J.

[100] The applications are launched with the purpose of frustrating and thwarting the administration of justice and constitute nothing more than an abuse of process. The plea placed the applicant and his actions in a favourable light sufficient for the sentencing court to find the existence of 'substantial and compelling' circumstances. These are the exact facts that the applicant places in his affidavit seeking review and the facts that the state accepted at plea stage.

[57] Paragraph 46 of the founding affidavit I the review application.
[58] Exhibit B 14-16, 25,

[101] She denies any mala fides when dealing with the matter and has complied with her obligations as the prosecutrix in the matter and denied that the applicant's fair trial rights were infringed. The affidavit concludes with the submission that as the constitutional court has refused the application for leave to refuse, all avenue of appeal are exhausted and the possibility of him absconding is high.

[102] I deal with the evidence of the creditors of the applicant and the material attached to the affidavit of the legal representative of "Emerald Capital" under the heading of the evidence of the applicant as it makes the reading of the ruling on this aspect more coherent.

Prospects of success coercion by counsel and attorney to plead guilty

[103] The applicant submits that his prospects of success are good. He maintains if his legal representatives had informed him of the state's right to apply for leave to appeal the sentence imposed by the regional court he would not have pleaded guilty.

[104] He is adamant that he had instructed his legal representatives that he wished to plead not guilty. This is so, despite the reality his instructions to his legal representatives seem to admit the *actus reus* of the crime of fraud. These same averments appear in his application for review.

[105] A legal representative coercing an accused to plead guilty is obviously a ground of review and a ground that has been successfully used in our courts as it constitutes a fundamental breach of the accused's constitutional right to a fair trial, to the extent that it vitiated the entire proceedings[59].

[106] The facts in *S v De Villiers*[60] are not far removed from this matter,

At [9] "The appellant's case is that in his own mind he had not committed any offence or, at least, the offences of fraud or theft (there is some vacillation on his part on this aspect) and he had never intended to plead guilty. Representations were made by his legal team to the Director of Public Prosecutions (the DPP) to accept a plea on a lesser charge, namely the statutory offence in count 3, and for a non-custodial sentence to be agreed upon. These representations were clearly made to secure a plea agreement with the State in terms of s 105A of the CPA. The DPP, however, declined to enter into a plea agreement on these terms and the plea of guilty on theft eventually followed. The record reflects that there were numerous adjournments in the matter, some of them for the purpose of the representations to the DPP to be finalised and at least one other for the finalisation of the plea of guilty.

[107] On the basis that he was advised by his legal representatives that should he not plead guilty a prescribed minimum sentence was applicable and that he had an

[59] *De Villiers v S* and another [2016] ZASCA 38 Per Majiedt JA
[60] *De Villiers* ibid

80/20 chance of avoiding guilty he felt obliged to accede to his representatives suggestion that he plead guilty.

[108] I align myself with the dicta of Majiedt JA[61]:
"An accused person's constitutional right to representation by a legal practitioner would be rendered meaningless by incompetent representation or, as is alleged in this case, a complete failure to execute the accused's mandate and instead compelling the accused to act against his or her will in a criminal trial. It is equally well established that a legal representative never assumes total control of a case, to the complete exclusion of the accused. An accused person always retains a measure of control over his or her case and, to that end, furnishes the legal representatives with instructions. As Van Blerk JA expressed, it in a separate concurring judgment, in *R v Matonsi*: '. . . die klient dra nie volkome seggenskap oor sy saak onherroeplik aan sy advokaat oor nie'. While the legal representative assumes control over the conduct of the case, that control is always confined to the parameters of the client's instructions. The other side of the coin is that, in the event of an irresolvable conflict between the execution of a client's mandate and the legal representative's control of the case, the legal representative must withdraw or the client must terminate his or her mandate where such an impasse arises. An accused person cannot simply remain supine until after conviction.

[109] Almost totally on point Majiedt JA says at [23]:
"It was contended on behalf of the appellant that ..the legal team failed in their duty to advise the appellant that he had the ultimate choice whether or not to plead guilty and that in the event of an impasse they should have withdrawn. The facts of this case, however, do not support these submissions. The various unsuccessful applications for leave to appeal against the conviction were all premised on the fact that the plea was freely and voluntarily made without any undue influence. The primary contention in those applications was that the plea explanation did not encompass all the material elements of the crime of theft. In particular, it was submitted that the appellant had not admitted that he had intended to permanently deprive Ms Wiese of her money. In these circumstances it does not behove the appellant to argue, as was done before us, that the admission as to voluntariness cannot be taken into account in these proceedings. The appellant's pursuit of leave to appeal on this basis places him in an untenable position in this review application. It is self-evident that the same plea cannot be voluntary for purposes of one application but alleged to have been made under duress for purposes of another application. The ineluctable conclusion which follows that the plea was not made under duress is buttressed by other facts. First, the plea explanation itself bears out that it had been made freely and voluntarily".

[110] In this matter the facts are remarkably similar, but on the transcribed report the applicant at three different times informs the court that the plea is voluntarily made, the facts upon which it is made is present, even the fact that he believed his company would be able to service the loan is present. The appeal process was followed and the same 'truth' was ventilated over and over again. As Majiedt JA said;

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[61] *De Villiers* (supra) at [19] Also see generally; 9 See generally: *S v Tandwa & others* (538/06) [2007] ZASCA 34; 2008 (1) SACR 613 (SCA) para 7 and *S v Dalindyebo* (090/2015) [2015] ZASCA 144; [2015] 4 All SA 689 (SCA) paras 22 and 23.the client does not irrevocably hand over complete control over his case to his counsel.' *R v Matonsi* 1958 (2) SA 450 (A) at 458A-B.

"the same plea cannot be voluntary for purposes of one application but alleged to have been made under duress for purposes of another application."

[111] The probabilities suggest the prospects of success on this point is remote.

The Informal Agreement

[113] The applicant argues that the prospects of success caused by the reneging of the informal plea agreement by the state is good. However as the review papers currently stand his averments on the issue of this agreement are hearsay. He did not attend the discussions that culminated in any informal plea agreement, he was only advised of the apparent agreement. He chose not to give *viva-voce* evidence on this aspect.

[114] He has no first-hand knowledge of the deal, his attorney and senior counsel informed him of the deal. Neither of them have been joined to this application or deposed to any affidavit in the review proceedings confirming this. The prosecutrix denies being party to any agreement and is still to file papers in the review application.

[115] The prosecutrix of the proceedings in the regional court has deposed to an affidavit in the bail application in which she effectively denies any plea agreement with the magistrate to impose a non-custodial sentence. At the time of the application for bail pending review commencing the prosecutrix in the regional court, Ms Letsholo has not filed an affidavit in opposition to the review application but in her bail affidavit and her affidavit filed in the objection to leave to appeal being granted it is clear that she denied being party to a tripartite informal plea and sentence agreement.

[116] Her behaviour throughout the proceedings are consistent with her seeking imprisonment due to the high amounts involved. She led evidence in aggravation of sentence that suggests from the onset of the sentencing proceedings she regarded the matter as warranting a term of imprisonment, she further addressed the court at length at trial stage on why a term of imprisonment was the only appropriate sentence. The only evidence on oath of any person supposedly involved in this agreement at this time is a denial by the prosecutrix that it existed.

[117] Whereas submissions are made by the applicant that supplementary affidavits may be filed, however at this time the applicant's affidavit contains no evidence on the agreement that is first hand. I must decide the prospects of success on the papers before me, I cannot speculate on what might transpire later on during the exchange of papers pending the review, who might or might not depose to affidavits is unwarranted conjecture at this time.

[118] A reading of the papers reveal that if there had been a plea agreement between the state, the magistrate and the prosecution as early as 2 November 2018 the state advised that they were leading three witnesses from the complainant banks; ABSA, First National Bank [FNB] and Mercantile Bank in aggravation of sentence. On 12 February 2019 the state led the evidence of only two witnesses employed by FNB and Mercantile Bank in aggravation of sentence and the state argued for a lengthy term of imprisonment. All deals were clearly off at this point in November 2018.

[119] In such a serious matter, with amounts involved in excess of 109 million rand and the banks actual loss suffered as a result being well over 30 million rand this was a matter completely unsuited to an informal agreement. Three of the largest banks in the country were complainants' proper consultation with them in respect of any plea agreement would have been obvious to any prosecutor or for that matter investigating officer let alone a senior state advocate assigned to the specialised commercial crime unit. If a plea agreement was to be made it should, obviously, have been done in compliance with section 105A of the CPA.

Delay in reacting to the State reneging or withdrawal from the Agreement

[120] The submission is that the applicant trusted his legal representatives, was ignorant of the court processes as a layman and wanted to wait and see what the sentence was.

[121] I find this improbable and unlikely. It was such a startling development that not only would it surely trigger discussions between the applicant and his legal team but pointed discussions between the prosecution and the applicant's legal team but also the bench.

[122] In these circumstances the continuation of the trial would have been almost impossible, the courts position alone, with respect, would have been untenable.

[123] The submission by the applicant is that Howse SC's apparent anger, when he heard that the state was going to lead bank employees in aggravation of sentence, supports the applicant's contention that there was an agreement is not sustainable from the record. There could just as easily be another explanation. The source of his frustration is not uncommon, the other side had failed to inform him or discovered their evidence to him that would have allowed to prepare for the hearing. in my view it is a neutral factor
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[124] The applicant is a highly successful wealthy businessman who committed a crime that was described as well planned and sophisticated. He is not an indigent litigant with limited education, most likely the opposite. Throughout he has been quick to consult with different lawyers, he was not a supine bystander.

[125] He states that he did not know that the state could endeavour to appeal his sentence nor was he advised of this. I find it difficult to believe that a well educated intelligent person would not know that in law there is an appeal process and that this option is open to the state. He regularly was a person who sought second opinions, he is not naïve.

[126] A rudimentary reading of media reports would reveal this, regularly media reports are published of state appeals and sentences are increased. The Pistorius matter is a high profile example of this as are the appeals and reviews by the state in sexual offences matters, particularly involving children.

[127] The review application is filed with the Constitutional court ruling imminent. Ms Athmaran has argued that the applicant was considering the possibility of instituting the review during the time of the application for leave to appeal to the SCA. There are various e-mails to that effect, including seeking advice from attorneys and senior counsel from Gauteng. Her submission was that the applicant was told that the review was not possible.

[128] During this exchange counsel 'corrected' my contention that the papers and e-mails indicated opinions from counsel that there were no reasonable prospects on review. Mr. Kisten for the state pointed out that the e- mail trail contained the following from the applicant on 22 January 2023; 'I have been receiving contradictory information on the chances of success with the review…. I have decided not to proceed with the review.'[62]

[129] At [95] of the applicant's founding affidavit in the review application he says; 'on 9 January 2023 the review was discussed and Mr Pillay who said that the review was unlikely to be successful. Senior Counsels Roux and Howse both advised against pursuing the review route.

[130] It is clear that the applicant had been advised that the probabilities of success on the review application were not good. If this option was being explored, especially noting the use of the term 'chances of success' in the email, that it is inconceivable that the various lawyers did not discuss the prospects of success with the applicant. It is with respect the first question to be answered, "are review proceedings a worthwhile option, do we have a realistic chance of succeeding on review?"

[131] It is an undisputable fact that the review application was filed when the decision of the constitutional court was imminent. The filing of the review application that was being discussed in November 2022 was delayed until November 2023. The delay in filing the review application some five years after the impugned conduct allegedly occurred does not redound to the benefit of the applicant.

[62] Page 101 and 102 of the application on 2 February 2024

[134] It lends itself to the suggestion that the applicant has now reverted back to the option of review, not because he believes on sound legal advice that it will be successful, but in order to further delay the proceedings. The merits of which have already been exhausted on appeal.

[135] The evidentiary material filed on record does not support a finding on the papers filed in this matter and the review proceedings at this point in time that the prospects of success are good.

[136] As was said in *Bailey*[63] If it is so that the appellant has no prospect of avoiding imprisonment, the only value of bail is to the appellant. He would gain postponement and not avoidance. (A chance to take to flight is not a legitimate advantage.) A court will not allow bail procedures to frustrate punishment procedures which have been duly formalised'[64].

Abuse of Process

[137] The state has argued that the filing of this application is an abuse of process, that the application is filed with the sole purpose of the applicant avoiding having to serve the sentence imposed upon him by the high court now that the appeals process is exhaustive.

[138] The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well[65].

[139] In an article, part authored by former constitutional court judge Cameron, published in the de Rebus in December 2020[66] the authors wrote,

"When an accused engineers the delay as primary agent, the right to a fair trial is exploited as a form of 'lawfare', which fundamentally erodes the criminal justice system. For the criminal justice system to perform its educative, palliative and conflict resolution functions, the public must be able to rely on it to act swiftly. That is the message that must be ingrained in all who serve it. From every perspective, justice delayed is justice denied. When the defence invokes important rights with the intention – oblique or directly of thwarting the criminal justice system, abuse of the judicial process supervenes. Tactics include meritless applications, failing to appear and applying for unnecessary postponements. Dysfunction in

[63] *Bailey and others (supra) at [*
[64] *S v Hlongwane 1989 (4) SA 79 (T) at 102E-G.*
[65] *Zanner v DPP [2006] ZASCA 56; 2006 (2) SACR 45 (SCA); [2006] 2 All SA 588 (SCA); 2006 (11) BCLR 1327 (SCA)*
[66] Justice postponed: What causes unreasonable delays in criminal trials? Co-authored by JJ du Toit and Alexia Katsiginis and retired Justice Cameron

the criminal justice process thus damages, and undermines the rule of law, by appearing to cast ridicule on the entire legal system."

[140] Our courts have not attempted to have an all-encompassing definition of what is meant by an abuse of process. Over the years there have been a number of instances in which the courts have deemed it appropriate to intervene and arrest an abuse of process which include those instances where proceedings have been instituted for an ulterior and/or improper purpose and for an improper and/or ulterior motive[67].

[141] There is a strong likelihood that the review proceedings and this application is brought solely for the purpose of the applicant avoiding the term of imprisonment imposed upon him. The timing of the application supports this contention.

Findings:- Competence of Counsel

[142] The applicant contends that incompetence of counsel, Mr Howse SC and his attorney Mr Naidoo in pleading guilty against his wishes and not advising him of the possibility of a state appeal. He now argues that this vitiated his right to a fair trial. However 'the truth' as he refers to it in his affidavits, both on review and in the bail application are identical to the facts upon which he pleaded guilty.

[143] The reasons why he felt the need to mislead/lie to the banks to induce them to extend funding was fully ventilated, his belief that Biotrace would service the loans and that the innuendo that the banks were responsible for their losses as a result were considered fully by both the court a quo and the appeal court.

[144] None of the reasons put up by the applicant seem to disclose a defence to the crime of fraud, his desire to help his sister whereas deserving of some sympathy and/or empathy does not disclose a defence and his belief that Biotrace could service the loan is actually irrelevant. Olsen J decisively dealt with these aspects.

[145] Considering the quantum of the fraud, the principles' involved in the sentencing of white collar crime, the applicant's legal representatives by convincing the trial court to ignore the amount of the fraud and excluding a full consideration of the actual loss or indeed any loss to the complainant banks, instead convincing the court to focus almost solely on the applicant as acting for a 'cognisable good cause' was an 'achievement' albeit a misdirection by the trial court[68]. The high court concluded the applicant was not remorseful for his actions.

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[67] See Maughan v Zuma and others [2023] ZAKZPHC 59.

[68] Olsen J remarking at [21] referring to counsel for the applicant's submission on the record *'And then the other three points – unfortunately my learned friend has fallen into the trap now of arguing against the plea which she accepted.'*
It strikes me that there is more truth in these words than was perhaps intended. Traps are not accidental phenomena. Traps are set, usually for the unwary. Putting that aside for the moment, counsel's argument is that the State accepted the condition of remorse by agreeing to paragraph 18 of the statement in terms of s 112(2). *There the statement was made that the "accused is*

[146] The sentence was corrected on appeal by the high court, noting the appeal processes are now complete, this has to now be accepted as correct. It is not, as suggested, a mere opinion of the court, judgments of the superior courts are binding in terms of precedent and the rule of law.

[147] The applicant confirmed both in his statement and to the regional court that the pleas were voluntarily made, he used the same statement in subsequent proceedings as a voluntary statement. There is, with respect no suggestion of incompetence of legal representation, the prospects of success are in my view remote on this issue.

Findings: The Agreement between the applicant's representatives, the state and the magistrate

[148] In respect of the verbal plea and sentence agreement agreed upon between the court, the applicant and the prosecution I am satisfied that the probabilities are overwhelmingly against this succeeding as a ground of review. The averments contained in the affidavits filed in the review application on this aspect are all hearsay. Whereas counsel for the applicant correctly points out these papers can be supplemented where they are deficient, I however must assess this bail application and the prospects of success issue that arises on the facts and probabilities disclosed on the affidavits before me as they stand today.

[149] It was suggested on behalf of the applicant that magistrate Ms Mazibuko's affidavit when filed could well be dispositive of all the issues. However this has not been filed, it may well be important bit at this time her possible response is conjecture and not a fact before the court at the time of assessing the merits of the bail application. There is no reliable and direct evidence on oath to suggest that the allegation by the applicant satisfies a balance of probabilities test that there was an agreement that was reneged upon.

[150] The probabilities overwhelmingly favour the conclusion that there was no agreement.

[151] Counsel for the applicant correctly referred this court to the supreme court of appeals acknowledgment that not only does informal plea bargaining exist in our criminal courts but that it plays an important part in ensuring that matters be expedited[69].

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remorseful". In other contexts it may legitimately be argued on behalf of the defence that the remorse proclaimed must be taken to be that which is a valid consideration in determining sentence. But where, as is the case here, the remainder of the statement is inconsistent with valid or true remorse, that argument cannot be sustained. "

[69] *Van Heerden v Regional Court Magistrate, Paarl* (883/2015) [2016] ZASCA 137 (29 September 2016)

[152] In *Van Heerden* the SCA stated at [17]:
"Plea bargaining is well recognised in South African criminal procedure and its efficacy in appropriate cases has long been accepted. It is a complementary procedure that is not meant to supplant the standard procedure for pleas of guilty under s 112 of the Act, and the established practice of accepting pleas of guilty on the basis of bona fide consensus reached, remains applicable. The procedure is a fundamental departure from our adversarial system and it helps ease the considerable pressure on the courts by making it possible for cases to be negotiated and settled by the parties 'outside the court[70]'

[153] The SCA continues, "Nonetheless, there are two independent systems of negotiation within the South African criminal justice system), namely: (a) under statute and (b) informally. Great importance is placed on the independence of prosecutors in either system (see M E Bennun 'The Mushwana Report and prosecuting policy' 3 *SACJ* (2005) 279, and the authorities and sources referred to therein). Statutorily negotiated agreements are regulated under s 105A of the Act. Their advantage is that once a plea has been accepted on a certain factual basis, the prosecutor is bound by the facts upon which the agreement has been reached and so is the court also bound to convict and sentence the accused on that factual basis. Megan B Rogers 'The development and operation of negotiated justice in the South African criminal justice system' (2010) 2*SACJ* at 239).) Conversely, the disadvantage of entering into an informal plea agreement is that the prosecutor and accused cannot reach a binding agreement with regard to the facts and sentence to be imposed without the co-operation of the presiding officer. **At most, the parties can reach an informal agreement in terms of which the prosecutor undertakes to *recommend* that a reduced sentence be imposed or undertakes not to motivate for a harsher sentence**." [My emphasis and footnotes omitted]

[154] It is the applicant's contention that the magistrate was party to the agreement.

This not unheard of in our criminal justice. Indeed Daffue J in *S v Roberto*[71] considered this exact issue and with reference to the *Van Heerden* matter sagely said and I can do no better to repeat his words:
"The concept of an informal plea agreement is not a new phenomenon. In *Van Heerden v Regional Court Magistrate, Paarl* the court mentioned that informal plea bargaining is an everyday experience in our courts. No doubt, informal plea bargaining is a useful tool to alleviate heavy court rolls in especially our lower courts. Usually, the process provides an opportunity to a prosecutor to obtain a guilty plea on a lesser charge in exchange for the possible imposition of a specific and usually a reduced sentence. Many examples may be provided, but to name one, a person charged with driving under the influence of alcohol may agree to plead guilty on a charge of negligent driving and the imposition of a much more lenient sentence than in the case of drunken driving. Often prosecutors are prepared to accept guilty pleas on culpable homicide where murder charges were levelled at accused persons and agree not to ask for long term imprisonment, but for correctional supervision, a fine or even a suspended sentence. Problems arise when one of the parties afterwards alleges a misunderstanding or breach of the agreement. Matters get worse when the presiding officer is either part of the negotiations, or incorrect information was provided to him/her in chambers pertaining to what was agreed upon[72]".

[70] See; A Kruger, *Hiemstra's Criminal Procedure* (Service 6, (2013) at 15-6).
[71] *S v Roberto In re S v Cumbe* (RC07/2021-RC08/2021) [2022] ZAFSHC 133; 2022 (2) SACR 442 (FB)
[72] Roberto (supra) at [7]

At [8] he says “it is trite that the parties (the prosecutor in particular) are bound by an informal plea agreement, but they cannot foresee how the presiding officer may exercise his/her discretion relating to sentence, **unless he/she has become a party to the agreement which is in my view would be unacceptable and should be avoided**. [My emphasis]

[155] At [9] he sagely advises why in most matters and in particular with regard to serious matters that require consultation and input from complainants that; “Section 105A was introduced by the Legislature to provide for a formal plea and sentence agreement procedure and to minimise problems with informal plea agreements, although it is a cumbersome procedure. I do not intend to summarise s 105A, but briefly refer to the following insofar as it would have been relevant *in casu*. The prosecutor must consult *inter alia* with the Investigating Officer and the complainant (or his representatives such as the family in the event of death) and he/she must also consider the previous convictions, if any, and the interest of the community. The negotiations do not include the presiding officer and once an agreement is reached, it must be reduced to writing and contain all relevant information as required by the section, including previous convictions. If the presiding officer is of the opinion that the sentence agreed upon is unjust, the parties are informed accordingly and also which sentence is considered just. The parties may either abide by the agreement, subject to the right to lead evidence and present argument pertaining to sentence, or withdraw from it. If they withdraw from the agreement, the trial shall start *de novo* before another presiding officer, provided that the accused may waive his right to be tried by another presiding officer. Obviously, if the legal representatives followed s 105A procedure *in casu*, the presiding officer would not have been involved in any prior negotiations and the previous convictions would have been on record at the stage when the agreements were to be considered in open court.”

[156] At [10] Daffue J says, “The Supreme Court of Appeal has stated on several occasions that the plea bargaining mechanism provided for in s 105A should be encouraged. Plea bargaining still takes place, but once the agreement is formalised and all stakeholders’ rights have been taken into consideration, it is duly considered by the presiding officer who should only finalise the process if there was due compliance with the strict requirements of the section and if he/she is satisfied with the sentence agreed upon.”

[157] At [11] the judge says, “Informal plea bargaining has its place in respect of trivial crimes, but again, the presiding officer shall not become embroiled in the negotiations. Digested court rolls may be alleviated by “settling” criminal disputes in this manner. The factual dispute that has arisen in *Van Heerden supra* shall never be forgotten. *In casu,* I foresee that the relevant role players will not be speaking from the same mouth. They will have to be subjected to cross-examination to establish the truth. I can imagine that the prosecutor would not want to be heard that he had misled the presiding officer.

[158] The state in their papers have alluded to the fact that in a matter such as this they would only have considered dealing with a plea and sentence agreement in terms of section 105A due to the seriousness of the matter. I am satisfied that on the papers as they stand at this time the prospects of success on the existence of an informal agreement that the applicant not be sentences to imprisonment if her pleads guilty is remote.

Findings: Abuse of Process

[159] The state's contention is that the review application and this bail application is filed deliberately at the eleventh hour to frustrate the administration of justice by preventing the applicant from serving his sentence and is thus filed for an ulterior purpose.

[160] The delay is inordinate, obviously so. It took nearly four years seven months to finalise a guilty plea in the regional court. Norms and standards as published by the Chief Justice in the government gazette in 2014 require regional court matters to be finalised within nine months of first appearance in the regional court. This now forms part of the regional court practice directives.

[161] Initial delay from time of first appearance to a guilty plea being accepted constituted in excess of 29 postponements, almost inevitably occasioned by the applicant's legal stratagems. It is clear that the legal stratagem used at the inception of the case was to obstruct, hinder the prosecution in their conduct of the trial and in particular from commencing the trial.

[162] The prosecution's argument is in line with what was said in *Hudson;*
"When…the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse."

[163] Worryingly this review application is filed almost nine years after the applicant first appeared in court notwithstanding the impugned conduct of the prosecution commencing on 28 November 2018[73] whereas precedent suggests that the impugned conduct of the prosecution, if it occurred might be a ground for a successful review the applicant does nothing to institute his review application until just short of a year after Olsen J's sentencing the applicant to imprisonment on 25 November 2022.

[164] On his own version the applicant knew that the state were acting mala-fide early on, he chose to wait to see how the cards fell. Since November 2018 he had the opportunity to address the actions of the state, he chose not to do so until the constitutional court was about to rule on his final avenue of appeal. The belated review application is in the circumstances opportunistic.

[165] More disturbingly, he had been advised by two senior counsel and an attorney no later than January 2023 that the prospects of success on review were not good or worth pursuing. He figuratively parks this review when he receives this advice, only

[73] Page 32 of the paginated charge-sheet, transcript of proceedings where Howse SC expresses his displeasure at the state not informing him that they were calling witnesses and failing to discover the evidence that the witnesses intended to traverse.

to jump start the application to review shortly before judgment was due from the constitutional court.

[166] His explanation that he did not think it was 'possible' as proffered in argument cannot be sustained. His own e-mail and affidavits reveal otherwise. The likelihood is that it was not pursued earlier due to the probabilities of success being unfavourable.

[167] On the papers filed in the review application and the affidavits filed in the application for bail pending review I am satisfied that the applicant was fully aware that the advice of the lawyers he had consulted suggested a review application did not have good prospects of success.

[168] I agree with the submissions of state counsel, Mr. Kisten the application is brought in order to thwart the proper administration of justice, it is brought to prevent the applicant having to undergo his sentence. The applications for judicial review and this application for bail are brought for the purpose of delaying the serving of sentence.

[169] The applicant's lack of bona-fides and the doubts expressed by Olsen J in his judgment have surfaced again in this matter. The evidentiary material attached to the affidavit of one of the major creditors to the entities that the applicant is linked to are deeply concerning. At worst the applicant deliberately set to mislead this court under oath, deliberately traded in an unauthorised manner to the detriment of creditors, unlike the submission of a growing and thriving business but one where liquidation is imminent and apparently inevitable. Mr Kisten for the state has correctly pointed out that the applicant's willingness to be less than frank with the court adversely affects his credibility and more importantly the trust and reliance on his assertions.

Conclusion

[170] In conclusion I am of the view that the prospects of success are remote, there is no suggestion that the standard of legal representation suggests that the legal team of the applicant were incompetent. There is nothing to suggest on a perusal of the evidentiary material on record that counsel for the applicant in the regional court conducted themselves other than in accordance with the applicants instructions. The version placed before the court accords with the version of the applicant even on review.

[171] The second ground is the informal plea agreement between the state, the applicant and the presiding officer. Similarly the prospects of success are remote, the delay is inordinate the papers as filed do not indicate a likelihood on proper grounds that they will succeed on review. I am not satisfied that the applicant has shown a sound, rational basis for the conclusion that there are prospects of success on review.

[172] Should I be wrong in these findings, I am still of the view that the applicant has not discharged the onus to show that the interests of justice permit his release pending the hearing of the review application. He has been less than forthcoming in his affidavits before the court. Even at this late stage he does not take the court into his confidence concerning his current projects, his bona fides are questionable. Incarceration is imminent the temptation to abscond grows, insolvent companies in which he holds which appear to be shortly the subject of liquidation proceedings are hardly compelling reasons to remain.

[173] The delay is so inordinate in this matter, the timing if these applications and the purpose of them is such that the applicant has failed to show that the administration of justice would be served by the granting of bail. The opposite is demanded by the circumstances of this matter.

[174] Wallis JA said the following about tactical lawfare conducted by litigants in *Moyo v Minister of Constitutional Justice and Development and others:*
'The term "Stalingrad defence" has become a terms of art in the armoury of criminal defence lawyers. By allowing criminal trials to be postponed pending approaches to the civil courts, justice is delayed and the speedy trials for which the constitution provides do not take place. I need hardly to add that this is of particular benefit to those who are well-resourced and able to secure the services of the best lawyers.[74]'

[175] A perception, or is it a reality, has developed that those who have the ability to manipulate and delay proceedings to avoid the consequences of their actions are never held to properly account for their actions. In this matter the applicant has had the benefit of a full ventilation of his 'truth,' as he put it in his affidavit, to further allow him to avoid the consequences of that same admitted conduct, more than nine years after he first appeared in court is on these facts, with respect, untenable.

[176] The harm to the criminal justice system when this occurs is immeasurable, it casts ridicule on the entire legal system, it has to stop at some point. This application, in my view, is more about delaying the imposition of sentence than the merit of any review

Order

[177] Bail pending the review of the proceedings in the regional court under case number 41/1660/2014 is refused.

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G P W Davis-Regional Magistrate

[74] 2018 ZASCA 100 AT [169]; 2018 (8) BLCR 972 (SCA); [2018] 3 ALL SA 342 (SCA); 2018 (2) SACR 313 (SCA)

Dates of Hearing	13, 14, 21, 22 and 29 February 2024.
Date of judgment	29 February 2024
For the Applicant	Mr. C Van Schalkwyk SC
Instructed by	Chetty And Kisten Attorneys 32 Adelaide Drive Glenashley Durban, 4051 Tel: 032 533 6933 Email : suren@chettyandkisten.co.za
For the State/Respondent:	Mr. J Kisten Specialised Commercial Crime Unit -Durban Office of the Director of Public Prosecutions 5th Floor, John Ross House Corner Victoria Embankment and Jonsson Lane Durban Email: jkisten@npa.gov.za