

IN THE REGIONAL COURT  
FOR THE DISTRICT OF GAUTENG  
HELD AT PRETORIA

CASE NO: 111/10/2017

DATE: 18-01-2018 – 02-08-2018

In the matter between  
THE STATE  
*versus*  
MORRIS L S TSHABALALA

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**RECORD OF PROCEEDINGS**

BEFORE : MS N SETSHOGOE  
ON BEHALF OF THE STATE : ADV SMITH  
ON BEHALF OF THE DEFENCE : MR. MAKHANYA  
INTERPRETER : MR HENDRICKS

VOLUME 4 (PAGES 260 - 293)



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**PROCEEDINGS HELD ON 2 AUGUST 2018**

[11:25]

PROSECUTOR: Case number 111-10 of 2018 the state vs. Morris Lesiba Selaki Thabalala court 18 on 2 August 2018. Presiding officer magistrate N. Setshogoe, public prosecutor advocate CB. Smith, and then defence advocate van de Heever. Your worship the case was put on the role today and this is a bail application for new facts, the reason for the case to be on a roll today is that the court made and order that Mr. Nikabende must come and testify.

10 I was in contact with Mr. Nikabende via whats app and Mr. Nikabende has informed me that the is not coming to court. He was apparently refrained to come to court your worship. Since Mr. Nikabende was the court witness I informed Mr. Nikabende not to give his reasons to me but to the court so what I suggest your worship can we 1<sup>st</sup> deal with the aspect whether the court has received correspondence from Mr. Nikebende whether he will come to court to testify or not.

COURT: Before we start with the real issues in this matter, I am going to order that everyone is in court must switch 20 off his or her cell phone. Switch it completely off, not put it on silent or anything. The stenograph reports that there is a problem in the recording. So if the cell phones are on we won't have a transcript of record because [indistinct] audible then that is a problem, can we please switch off the cell phones. Advocate Smith for the state may I get it clear on record whether you are

saying there is communication between yourself and Mr. Nikbende?

PROSECUTOR: Correct your worship.

COURT: Via whats app which is the cell phone communication?

PROSECUTOR: Yes your worship.

COURT: Were upon he indicated he will not be able to attend court as there is an order from the court that in both the provisions of section 60 subsection 3 of the criminal procedure

10 act?

PROSECUTOR: Yes.

COURT: Do you want me to...

PROSECUTOR: Yes your worship can I also put on record until Tuesday this week Mr. Nikebende was willing to come to court, and since Tuesday he informed me via Whats app that he is not coming to court he is afraid to come to court. There was also another development your worship and in on Tuesday he was supposed to appear at the police station in Durban on departmental charges, and one of the departmental charges 20 levelled against Mr. Nikebende is that he communicated with the defence attorney Mr. Thabalala and told Mr. Thabalala that according to him Mr. Thabalala said get bail and he will come and testify in court to that effect.

So up to when the charges were given to Mr. Nikebende up to Tuesday he was willing to come to court but since Tuesday

via whats app he communicated to me that he was not willing to come to court anymore because apparently he is afraid to come to court, as the court pleases.

COURT: You mentioned something that you told him that he mustn't give business to you he must advance business to court?

PROSECUTOR: That is correct your worship I told him told him that he was a court witness, the court ordered him in terms of section 63 to come to court and t come and testify. So I told him 10 since he is a court witness he should inform the court of his reasons why he's not coming to court.

COURT: Thank you advocate Smith.

PROSECUTOR: As the court pleases.

COURT: This morning when I was approached in chambers by advocate Smith for the state and advocate Van De Heever representing the applicant I indicated that I received an email communication from a firm of attorneys I just want to verify if anyone representing that firm is available in court, it's Vista and company in association with Sanwith incorporated. Is there 20 anyone in court perhaps from that firm of attorneys? So I take it nobody's here. But I'm going to place on record this letter dated the 31<sup>st</sup> of July 2018 and that was received on the very same date.

Yes the letter is dated and I'm just going to read it into the record but I'm called that I read an order that Mr. Nikabende

be in court in terms of the provisions of the criminal procedure act as afore mentioned. Eastern company attorneys, convincers, administrators, estates. Our reference Gerdi Bell / Ace / [indistinct] / 184237. Email address [kacey@listerco.co.za](mailto:kacey@listerco.co.za). 31<sup>st</sup> July 2018 advocate Smith per email Smith@npa [indistinct]. CC Magistrate per email Nsigoia Justice: Dear Sir/Madam [indistinct] state vs. Morris Thabalala aka KGB.

The above matter refers, we act on behalf of Sedric Nikabende. We confirm that our client has been requested as the 10 lead investigator in the matter to provide evidence at a hearing of the above mentioned proceedings. You may be aware that our client recently provided an affidavit to the minister effectively with some blowing several irregular activities with and IP ID. This affidavit was provided and disclosed under the protector disclosure Act, and accordingly the various protections apply.

Our client in no way wishes to frustrate your proceedings however you are requesting him to arrive to give evidence, arraignments were made by IP ID for his transport and accommodations etc. Please note as there are various 20 irregularities that have been conducted within that enterprise and our client does not feel safe in their hands. Furthermore please be advised that our client has been unlawfully suspended please see to the affidavit filed to the minister and various allegations has been made against him.

We therefore wish to apologize on the defence behalf

and request an indulgence that he be given another opportunity to attend at court with proper arraignments been made for his transport and accommodation via either Justice or NPA rather than IP ID. We once again wish to apologise for the inconvenience however our client is currently in a turbulence situation. We trust you find the above to be in order and await your response. Yours faithfully, Garry Bell and Eastern company.

Let's just state that my response was back to the email sent to just say noted and I sent the email back like that.

10 Advocate Smith did you receive this correspondence.

PROSECUTOR: I did not receive such correspondence your worship.

COURT: Must thank you as you asked me if I if I was informed otherwise...

PROSECUTOR: As the court pleases your worship. Your worship may I then deal with the necessity that Mr. Nikemebde must come and testify. What I have done is I have requested the section sepina to be issued for the cell phone records of Mr. Nikebende and Mr. Mkanya. Both cell phone records then corresponds so I'm only going to deal with the cell phone records of Mr. Mkanya, your worship I then beg leave to hand up the cell phone records so that the court can follow.

Your worship if your worship look at the 1<sup>st</sup> page I handed 2 pages to you, on the 1<sup>st</sup> page on the 1<sup>st</sup> line there's under the coulomb MSISDN your worship will see that there's a

number 27827418040 that is Mr. Mkanya the attorney's cell phone number, if your worship then run to the call date it's 20 June 2018 8:33. If your worship looks at call type MTC. MTC means incoming call, so if your worship then looks at call duration it was 79 seconds. If your worship looks at other party it's 27724310553 that is the cell phone number of Mr. Nikapende.

So according to this line at on 20 June 2018 at 8:33 Mr. Nikapende phoned Mr. Mkanya. If your worship then runs down to the 2<sup>nd</sup> page the 2<sup>nd</sup> line the MSISDN number is 27827418040 10 that's Mr. Mkanya' number. The call date is 20 June 2018 10:34:06 the call type is MOC. MOC means that's an outgoing call. The call duration is 46 seconds, and the other party is 27724310553 that is Mr. Nikabende' cell phone number so on 20 June 2018 at 10:34:06 Mr. Mkanya phoned Mr. Nikabende and that call duration was 46 seconds.

If your worship goes to the 3<sup>rd</sup> page that I handed up your worship will see on the second line from the top the number is 27827418040 that's Mr. Mkanya' number the call date was 20 June 2018 and the time was 17:29:25 the call type is a MTC that 20 means it's an incoming call to Mr. Mkanya the phone number is 27724310553 that's Mr. Nikebende' cell phone so on 17:29:28 Mr. Nikebende phoned Mr. Mkanya.

Now I thought it wise to het their cell phone records to positively be able to indicate to the court the calls on 20 June between Mr. Mkanya and Mr. Nikebende. Now if your worship

goes to EXHIBIT N in the docket that is Mr. Nikebende' opposing affidavit. Now in EXHIBIT N Mr. Nikebende only mentions the 1<sup>st</sup> and the 2<sup>nd</sup> call he does not mention the 3<sup>rd</sup> call at 17:29:25.

COURT: Yes.

PROSECUTOR: So if your worship quickly scans that affidavit your worship will see that Mr. Nikebende only mentions the 1<sup>st</sup> 2 calls so he. So he says he phoned Mr. Mkanya and then later Mr, Mkanya phoned him. Now strangely enough he doesn't mention the 3<sup>rd</sup> call at 17:29:25. He doesn't mention that at all  
10 in his affidavit he just denies that with what Mr. Mkanya said he told Mr. Mkanya he denies that he said that. But your worship the state finds it very strange that conveniently Mr. Nikebende neglects to mention anything about the 3<sup>rd</sup> call at 17:29.

Now your worship will remember when Mr. Mkanya testified under oath, he specifically testified to the fact that there was that call at 17:29:25 the afternoon by Mr. Nikebende to Mr. Mkanya and during that call Mr. Nikebende told Mr. Mkanya that according to him Mr. Thabalala should get bail and that he will come and testify to that effect. So your worship it's evident  
20 according to the cell phone record that Mr. Nikembende is not playing open card with the court.

That will also explain why Mr. Nikebende is afraid to come to court today and because only on the cell phone records he would be seriously destroyed by the state and the defence under cross-examination because the defence mentioned the 3<sup>rd</sup>

call. So according to this evidence your worship and because of the fact that the doesn't mention the 3<sup>rd</sup> call the state on record will now concede that Mr. Nikebende told Mr. Mkanya that according to him Mr. Thabalala should get bail, that there is a political reason for this prosecution and that Mr. Nikebende will or was willing to come to court to testify to that effect.

I'm conceding that fact your worship. Furthermore now let's look at Mr. Nikebende in the main bail application he made an affidavit and he mentioned certain facts. In the bail application 10 on new facts he made another affidavit, and in that affidavit he is giving certain facts but he is not playing open cards with the court. That means that everything that Mr. Nikebende has now said in the mail bail application and on the bail application on new facts, a big question mark should be put behind that.

Is Mr. Nikebende now plying open cards with the court and is he a credible witness. The state on record is willing to go so far that the state Mr. Nikebende is not a trustworthy witness and that place the whole bail application in jeopardy, because the state will oppose bail on the instruction of the investigating 20 officer. Normally the investigating officer will tell the state that he opposes bail. He has now told Mr. Mkanya that according to him Mr. Thabalala should get bail.

The discretion on whether Mr. Thabalala should get bail or not that is the courts discretion. So I just wanted to discuss one other aspect and that is there is a possibility that Mr.

Thabalala the applicant was under the oppression that his appeal succeeded. And that is why he did not report a serving sentence that is part of his past. But the main question the court should look at what is the chances of him not standing his trial eventually and evading his trial.

If he now is afforded parole again by the prison, he needs to report to his parole officer on a frequent basis. Up to now and that is point that is not stressed by his defence team is that he frequently reported to his parole officer when he was on 10 parole. There's no indication that after he was afforded parole that he was going to evade that part of his sentence. So according to the state the court can take that into consideration and look at it in that light that there isn't an indication that Mr. Thabalala will not stand his trial eventually.

So that is how I think the court should deal with Mr. Thabalala' past and his previous sentence that he only started serving in 2013. The state also has the opportunity or the right to inform the court that he is not opposing bail. The state is not going to get involved in the nitty gritty of letters that Mr. 20 Nikebende wrote, any battles between him and IPID. I don't think that is relevant for this bail application. The state is informing the court that the state is not opposing bail any more although it's a schedule 5 bail application.

The state is of opinion that it is safe for the court to grant Mr. Nikebende bail. We have talked by offers leave it there

and I think it's right that the defence can address the court your worship and then I'll address on bail conditions, as the court pleases.

COURT: Just take e through what you say based on the original affidavit of Mr. Nikabende...

PROSECUTOR: Yes your worship.

COURT: As opposed to can I just finish? As opposed to the current one in this application of new facts that he has not played with open cards. Cause you just said [indistinct]?

10 PROSECUTOR: Yes your worship he is neglecting to give the court details about the 3<sup>rd</sup> call, he doesn't mention the 3<sup>rd</sup> call. So he is not playing open cards with the court. So the question now is did he play open cards with the court in the main bail application because he is definitely not playing open cards with the court on bail application on new facts. I think that places a question mark on his overall credibility.

COURT: And you also mentioned about that is one of the reasons because he made an application on new facts we have to weigh this as what the reasons were originally as to why  
20 bail was granted?

PROSECUTOR: That's correct your worship.

COURT: And as to why you say now Mr. Thabalala the applicant might not have been aware of the dismissal of his application?

PROSECUTOR: Your worship I'm just telling the court that

there is a possibility that he could not have been aware that his appeal did not succeed. I'm just dealing with that because that because that is one of the fact that the court will have to consider is that previously he was sentenced in 1996 and he didn't stop serving that sentence before 2013.

As I understand from the defence they saying Mr. Thabalala thought his appeal succeeded. And that it's the courts discretion the court must deal with that because the court must revisit everything that happened in this bail application and make 10 a decision. So I'm just advising the court on how I feel and from the states side give the applicant the benefit of the doubt that there is a possibility that his appeal did not succeed. That's my point judge.

COURT: Thank you advocate van de Heever...

DEFENCE: May I please the court...

COURT: You'll address the court sitting.

DEFENCE: I'm in destined to the court. Your worship I want to start off by stating the following it is seldom that one comes across a prosecutor who's got the conviction like advocate 20 Smith has and concede that there is serious credibility issues pertaining to the main investigator in his case. And I commend him for that and so it was my attorney and my client. I think the approach flowed by advocate Smith is the correct approach.

There is serious issues pertaining to the credibility of Mr. Nikabende not just pertaining to this particular case and some

of the facts that he stated in EXHIBIT B, his original bail affidavit. But also as the court knows without a shadow of doubt he blatantly mislead the court by omitting a crucial fact in the subsequent affidavit that he made. That places a serious question mark over not only the role he played as the chief investigator in this case but it places a question mark on everything that he stated under oath originally in EXHIBIT B.

And anything that came forth via EXHIBIT C that is the affidavit of Mathew Sesoko as he was the chief investigator at the 10 time. Now your worship will recall in our application on new facts we literally challenged almost all the averments in EXHIBIT B and EXHIBIT C and we placed on record under oath and my attorney gave the same evidence when he gave evidence [indistinct] and that wasn't challenged by my learned friend for the state.

That 99% of the averments contained in the affidavits in which the state handed up EXHIBIT B and EXHIBIT C to oppose bail is not supported by one iota of evidence contained in the docket. You cannot and I at the time basically very briefly addressed the court on that issue, you cannot speculate when 20 you try and put fact forward to the court that's exactly what we say.

You rely on facts, he is a seasoned investigator and we submit that my learned friend quite correctly now saw that there is no basis for any of the facts that was deposed to under oath. The next issue is that I would have expected him not to rely on, with

the greatest of respect, the kind of excise that he preferred to he's court in the letter i.e. that he is afraid of IPID. Why if you are a whistle blower and you've always been honest and you stand by your convictions, do you now alleged that you are afraid for the very people you work for.

And that you don't want to come to court because they made the arraignments for you to come to court. I submit that even that fact the court should seriously question this. What he basically saying to the court is I'm afraid because my own people 10 made arraignments that something is going to happen to me. It just doesn't hold any water.

I respectfully submit to the court thus that in the premises where the state now had the opportunity to evaluate the investigation and the facts contained in the affidavit put forth by their own chief investigator and where they stand up and concede that there is serious problems relating with what was supposed to what the court should accept it. More so the court would recall that part of our fact on the new application was the fact that we said that after thorough investigation and my attorney also gave 20 evidence to that effect.

There was not a single of a warrant arrest issued we've sited the issue of the application for firearm licence and we sited the application made by the Mr. Thabalala for to become a police officer and we said if there is a warrant of arrest issued form him cause that is the normal process. If your bail or your appeal is

declined there will be a warrant of arrest issued for you if you don't normally report as expected. And no such warrant of arrest has ever been issued nowhere and that the profile of the applicant does not reflect same.

There's that it was evidence again given under oath by Mr. Mkanya and it was unchallenged. More so the court will recall that we did hand up the document reflecting the revocation of parole and at the time I said that I will address the court fully on that issue. That document makes it quite clear that up to the date 10 when his parole was revoked purely for the fact that his bail was refused there was no reason for the parole board to intervene and revoke his bail before that.

I.e. that as per his conditions of parole he regularly reported for parole in other words throughout he did as was required in terms of his parole commissioning. But more so the most important fact is the fact that I would submit that it's common cause that Mr. Thabalala knew about the fact that there was this investigation ongoing and despite that he attended to his duties and he never evaded arrest.

20 Si I would submit to the court that there is coupled with the states concession at this point, the concession that there is a serious question mark hanging over whatever was stated and opposed and done by the chief investigator coupled by the concessions made by the state on the issues we rose on the application on new facts. And the states concession that they no

longer oppose bail.

I submit that the court should then at this point grant the applicant bail. My learned friend and myself has in the meantime discussed the issue of the amount, I don't know if the court wants me to address the court on that particular issue at this point. But I submit in the light of everything that is before court at this point the applicant should be granted bail because lastly normally when you deal with a schedule 5 bail application the state is guided by the chief investigating officer or the investigating officer, and 10 normally the court is guided by what is done by the prosecutor.

I can almost say all of that has been revoked in the sense my learned friend placed on record that he wish not to follow for reasons all ready on record the advice given to him by his chief investigating officer and he is giving the court guidance as to what is his own stance is taking into account his intimate knowledge of the content of the docket and the credibility issues pertaining to his investigator. May it please the court.

COURT: Okay advocate Smith let me just ask about the record of cell phone communication again. This other number 20 as per EXHIBIT N is that affidavit of Mr. Nikabende that informs us that he received a call from a number that appeared to be from a prison personnel?

PROSECUTOR: Yes.

CU Is it also forming a part of the record here?

PROSECUTOR: No your worship for completeness sake

your worship once that then I beg leave to hand up Mr. Nikebende' cell phone record, let me just mark it.

COURT: It says 0824644930.

PROSECUTOR: What's the number your worship?

COURT: 082...

PROSECUTOR: Ja.

COURT: 4644930.

PROSECUTOR: Yes your worship let me just hand up the document. That will be the cell phone record of Mr. Nikebende  
10 your worship that call is indicated on the 1<sup>st</sup> line. It says it came from 27774331503 that's Mr. Nikabende' number 20 June 2018 7:45:20. MTC was an incoming call and the other party is 2784644930. So that call is indicated...

COURT: What is the number that you read from...

PROSECUTOR: 44930, it's the 1<sup>st</sup> line top, top.

COURT: Yes but I don't section the number 0824644930.

PROSECUTOR: Look at the 1<sup>st</sup> line other party your worship, coulomb other party. Can I just see whether I handed the  
20 court the correct document. Yes.

COURT: Just underline that.

PROSECUTOR: I made an asterisk for the court were the number is indicated. Your worship will see directly under that Mr. Nikebende receives a call from Mr. Thabalala, it's a second line it's that 8040 number. And then if your worship looks at 195 there

is a 27722479066 number that was the other call from the prison that Mr. Nikebende is talking about. And then down that other party coulomb your worship will see 8040 comes up again that is another call from Mr. Thabalala. And then your worship will see the last line on that page is where Mr. Nikebende phones Mr. Mkanya at 17:29:25.

If your worship gives me back the document I can find it I can just indicate it afterwards then the court can be certain. Your worship let me hand you my document. My document is 10 highlighted in orange then the court can find the lines much easier.

DEFENCE: Your worship I noticed that my learned friend refers to a Mr. Thabalala that's phoning I assume it's Mr. Mkanya?

PROSECUTOR: Mr. Mkanya yes sorry.

DEFENCE: So that the record reflects it correctly.

PROSECUTOR: There's your copy.

COURT: Yes thank you advocate Smith.

PROSECUTOR: As the court pleases. So I just want to 20 make a note your worship if your worship looks at Mr. Nikebende' cell phone record everything is there according to EXHIBIT N his affidavit, except his last call to Mr. Mkanya.

COURT: All right is there any submission on just what I wanted to know about...

DEFENCE: I've just been given this your worship. I

have not nor have my attorney verified that these numbers are prison officials numbers but I submit currently that doesn't matter at this point, because of the submissions made by my learned friend.

COURT: Can I just have the matter stand down but we [indistinct] later, thank you.

**COURT ADJOURNS**

**COURT RESUMES**

COURT: Thank you. This court this judge is dealing with an application of Mr. Thabalala being a second application 10 on new facts but I have got to decide today as to whether the court concedes with what is being placed on record especially on the side of the prosecution advocate Smith is duly indicated on record. The court faced with this kind of application which I would say is a normal application being dealt with after the initial application that has been brought has been dismissed in against the applicant Mr. Thabalala.

The same principles that are applicable in respect of the original application in the first application are also applicable in the second application on alleged new facts. And hence Mr. 20 Thabalala was at the inception of the proceedings on this second application duly apprised of the provisions of section 60 11(b) as well as section 60 11(B) subsections A to D as to the same expectations that are expected in the kind of application that he has brought before this court. In today's judgment I would not be lengthy as all has been placed on record due to the affidavits that

I been admitted into the record.

Disposed to that applicant Mr. Thabalala in this current application the opposing affidavits has been places on record by the respondent being the state in this matter through the officers that deposed to the affidavits. I would just have to place in a nutshell the principals that I have to deal with in the current application as it is the second application before this court.

I would firstly start to say that the state has indicated in its submissions to say that despite the fact that the state has 10 placed on record that it consists that Mr. Thabalala should be afforded bail for the reasons that were duly advanced on records that the discretion still lies with the court as to whether it consists to the submissions made from both the applicant and the respondent in this regard in order to decide on that aspect. This is based on section 60 subsection 10 of the criminal procedure act 51 of 1977 which provides that notwithstanding the fact that the prosecution does not oppose the granting of bail.

The court has the duty contemplated in subsection 9 to weigh up the personal interest of the accused against the interest 20 of justice. So that is the discretion and the duty that is still lying with the court to do that. The test in respect of the current application has been placed duly in the decision of Peter vs. the state that is an appeal matter of 2008 volume 2 SACR page 355 (c) for the Cape division.

At paragraph 57 of the decision it was stated and I

quote: When as in the present case the accused relies on new facts which have come to the four since the first of previous bail applications the court must be satisfied firstly that they are relevant for purposes of the new bail application. They must not constitute simply a reshuffling of old evidence or in embryo that upon it and the court in that decision relied or referred to that decision of De Villiers which is a 1996 volume 2 SACR (t) for Transvaal at page 126 paragraph E to F.

In further stating that the purpose of adjusting new facts  
10 is not to address the problems in counted in the previous applications or to fill in gaps in the previous leave presented evidence. And wherever evidence were available to the applicant in the previous application and was not tended. It cannot be relied upon in the lent application. And if the evidence is adjust to be new and relevant then it must be conceded in conjunction with all factors or facts placed before court in previous applications and not separately and hens the decision of Remarks in 1996 volume 1 SACR page 528 Transvaal has been sighted in that regard.

This is just to state that from what I have read into  
20 record the court should look into what has been placed before court as new facts by the applicant and go further than that to see if this factors that I have placed before court has allegedly new facts where available to the applicant in the previous application and whether they are relevant as well to what the issues are in the current application for bail. And also decide upon that in

conjunction with what the court has dealt with in the previous application.

Going to the previous application of the court the reasons why Mr. Thabalala was denied bail clearly stated in the judgment of the court which already has been transcribed for purposes of this new application been brought before this court and I will at the relevant time as well just give a summary of what the court came to as a conclusion against the decision or against the application of Mr. Thabalala not to be granted today.

10           In the variety of the reasons that I am not going to stipulate all the reasons as they are on record as placed by Mr. Thabalala. It is the second application been duly represented by counsel before court. But in a nutshell there was a concern that has been raised due to those factors as placed before this court for consideration and amongst others that were placed by him before this court was the fact that there was not been a full discloser that the applicant is seeking as well in order to bring a full reasoning in this application which are document that are set to be in the states docket and which the state at the end also  
20 indicated to the court that it was not willing to disclose that the relevant time on that application was brought.

And also the challenge that has been brought as itemised in the application in the affidavit of the applicant in this matter about the amendments that were brought in the previous application in the affidavit of then investigating officer Mr.

Nikabende who the court is duly informed that through the evidence placed n record that he is in suspension since this current application before court and other officers who testified and presented their evidence through affidavits before this court.

And there was also a version that was given as well that needs to be conceded by the court that relates to what the court also decided in the previous application that relates to the previous conviction of Mr. Thabalala that is also duly placed on record of which there was an appeal lodge against it. And which 10 was a strong hold from the side of the respondent even the initial application to say that he didn't availed himself to serve the sentence relating to the matter as before mentioned and which was challenged from his side as to say he was not aware that there was a dismissal with his application on appeal and as he could not availed himself at the relevant time until he was detected and now since 2013 then he started to oblige to the decision the court in that appeal.

This as I said I am not going to unleash all the aspects that were brought before this court in respect of the current 20 application but I will just need to go back to what I decided and which lead me to deny the applicant in the initial application the bail as he pleaded for. In summary I indicated that the conduct of Mr. Thabalala as had been placed on record trough the respondent then in respect of the matter that I referred to the appealed that he had lodged which was dismissed and his

conduct having not abided to the court order of availing himself to serve the sentence then. The fact that he was also employed within the South African Police services in the intelligent section at the time when he had a record that showed that he had a previous record and the fact that he did not disclose such and he was still within the employer of the South African police services.

And that also led to the court being persuaded at the time to say that he could not be a candidate to be released on bail because there would be a doubt as to whether he would 10 comply with any bail conditions as when he was on bail he also allegedly also committed the offences that are levelled against him being in the matter before court. And as he was still on parole as well and the conduct relating to the bail conditions and the parole conditions as well and taking into account politically with the other 2 reasons that I have mentioned led this court then to say that he would not be a candidate to believed that he would attend court.

And that if he is released he could also, there would be a likelihood that he could commit schedule 1 offences . In a 20 nutshell those were the reasons of the court having denied bail to the applicant. In the second application as I have indicated the factors were categorized and placed on record in the affidavit of Mr. Thabalala and the sort of concern and complained levelled against the manner of the investigations done by Mr. Nikabende as he is no longer the investigating officer in this matter I will

address him as such and that even the response of the state the respondent in this current application did not address the issues that were raised by the applicant in this application before court.

The merits of the case in respect of the current offences before court I will not dell much into as this is not a trial court though I also need a finding in the previous judgment in the application that was originally brought before me that the state case. The state has a strong case in as far as it has been placed before this court and I cannot deviate from the finding that I made 10 in respect of the allegations against Mr. Thabalala but what I am trying to indicate is that, that will be for the trial court now to decide as to the current affidavits that were disposed to by [indistinct] about the expenditure and approval of expenditure relating to the matters that are levelled against Mr. Thabalala.

The state today has addressed the court and that brings now the factors that I would just have to decide whether they can regard them as new factors to add on what the applicant has already placed on record and this is based on the evidence that was tended by the applicant initially in his affidavit which makes 20 reference to what he has been informed through his instructing attorney Mr. Mkanya and that relates to the telephonic or cell phonic communication between Mr. Mkanya and Mr. Nikabende who then earlier was the investigating officer in this matter.

I reiterate to say that this brings a turn about of events in the circumstances that was correctly stated by advocate Van

De Heerver representing the applicant to say that it creates doubts now in the mind of the court that as to whether whatever has been deposed to by Mr. Nikabende who was the investigating officer in this matter should be regarded as the truth of the amendment that he made against the applicant.

The state also [indistinct] supported that view as advocate Smith for the state is the first party to address the court and to bring an about the issues before court after the court had made an order on the previous date that the evidence of Mr. 10 Nikabende should be placed on record and I evoke the provisions of section 60 subsection 3 of the criminal procedure act to that effect.

And today he did not appear before court for the reasons that were also addressed before this court before we get into the merits of the application percept and the court also placed on record letter of [indistinct]. It might be because of the fact that the there is now evidence relating to the communication between himself and Mr. Mkanya which he was asked and his evidence is before court through the exhibit that was presented 20 before this court through the responders for him to deny that whoever indicated to Mr. Mkanya that in his view the applicant should be released on bail because all this matters surrounding him is politically motivated or inclined.

On the previous occasion when the Mr. Mkanya testified the record will state that advocate Smith challenged him on that issue

as to say whether the court should be persuaded by a view given by Mr. Thabalala who was the investigating officer then, which view was given after he was suspended from his normal duties as a police officer.

Giving a view from the side of the advocate Smith that why should he then say all these things about what Mr. Mkanya said about him only when he was in suspension and not before. The crucial question was at the time should the court be persuaded, in other words overlook everything that it has decided 10 up to this point, and be persuaded by a view of Mr. Nikabende to say that Mr. Thabalala deserves to be released on bail.

At the time looking at the provisions that I have just read into record section 6 subsection 10 it is my duty to weigh all this evidence that is before me. Take into account the reasoning as to why I denied bail in the 1<sup>st</sup> instance, look into again what has been brought before me as new factors to take into consideration. All the tests that I've put on record to say that the factors should be weighed as to whether they are relevant to whatever issues are here before this court.

20 And they are not just an attempt to try and fill up gaps that could have been dealt with in the initial application. My thinking now at the time when advocate Smith argued likewise was to say indeed at that time I have reasons on record as to why I denied bail to Mr. Thabalala as previously stated and which I also repeated and placed onto record today in a nutshell.

But today when one reads the cell phone communication indicated to me being the communication between Mr. Nikabende and Mr. Mkanya on the 20<sup>th</sup> of June 2018. Which fact was deposed to, or factors were deposed to by Mr. Thabalala in the latest that he [indistinct] before court. Wherein he indicated all the instances where he communicated starting with the prison people on the day inquiring from him as to indeed Mr. Thabalala should be brought or called on the particular day.

And that they needed assistance in that regard. The cell 10 phones that I mention on record this morning to be verified as to whether indeed they appear anywhere in this list that was initially given by advocate Smith from prison officials as indicated in the affidavit by Mr. Nikabende. The state provided same and indicated to the court and indeed I can see cell phone numbers that were given by Mr. Nikabende. In his affidavit to say prison people communicated with him.

And also that of Mr. Mkanya at the relevant time which was given to by Mr. Mkanya when he testified as his instructing attorney. Outlining to the court the events of 20 June 2018 on the 20 morning. That also overlapped to the afternoon times when he was communicated to by Mr. Nikabende. The later communication that is incriminatory in the circumstances and in the view of the court has been left out in what has been deposed to.

[Indistinct] such communication that he was told about [indistinct]. Mr. Mkenya in this circumstances had to testify and

give evidence in doing that he knew the repercussions he was aware of the repercussions that we befall him in this circumstances but he did not make complete sense to the court if there were just bare allegations from Mr. Thabalala without him supplementing same. And for that reason he had done well in testifying before court and putting himself in a risk for whatever risk I do not know.

But what I'm saying is that the incriminating communication, cell phonic communication between Mr. 10 Nikabende and Mr. Mkanya in which he communicated to Mr. Mkanya to say that the applicant deserves to be released. Because of the reasons as outlined. That call he didn't mention at all in his affidavit to this court to say that there was still a later communication with Mr. Mkanya from himself and detail as to what the content was.

Without having the actual recording as to what the communication was the court is sitting with the version that is placed before this court by Mr. Mkanya as he is the person who directly with Mr. Nikabende to that effect. And the affidavit which 20 is evidence that is made under oath by Mr. Nikabende. And indeed in respect of all other communications that happened from the morning that is the 2 cell phonic communications that appear as well as those from the officials from prison.

Safe for the one that I say it's incriminating in the sense that it now says that the investigating officer said something that

is against something that he actually said in his original affidavit which was very mentally opposing bail against the applicant. It is not what Mr. Nikabende said to Mr. Mkanya to say that the applicant is deserving a release from incarceration. But is his conduct per say in not disclosing that to the court.

That leaves the court to say that his conduct in that regard will indeed leave doubt as to whether whatever he now challenged even previously or even at this current junction which he barely denied against the amendment mentioned by the 10 applicant one can rely on in this [indistinct]. On the second level based on the reasoning that I gave previously to cuss the doubt as to whether the applicant Mr. Thabalala can be a candidate to be released based on the fact that I also pronounced to say that there would be a likelihood that if he is released he may not attend court in the future and he also might commit further offences under schedule 1.

I also indicated in my reasoning that even if the court has to consider as to whether there can be measures that could be placed if conditions, if he is released on bail as conditions of 20 bail like reporting at the police station based on what the court relied on at that time. Based on his employment within the South African police service intelligence and the alleged amendments that were made that he has been protected within those years of government. That needs to be reconsidered again now that we have evidence of nature before this court.

The what I will agree of from advocate Smith's submissions made this morning and what to an extend the defence said previously relating to police services SAPS the IP ID all what has been submitted before this court as a newspaper reports and allegations this court cannot involve itself with the South African police service IPID intelligence services to sort out their issues and clean then up and whatever reasons were placed before this court that they are political issues involved in this court cannot involve itself because if one aligns himself with 10 political issues then one cannot be guided by politics but I am a creature of stature that looks into the criminal procedure act 51 of 1977 of constitution act 108 of 1996 and which is a corner stone of all legislation and to which provides for fairness and justice to be applied in respect of even applicants in bail proceedings and in my initial previous judgment.

I mentioned the relevance sections of our constitution section 12 1 or constitution act as before mentioned that relates to the freedom of a liberty of a person subject to the provisions of section 36 of our constitution and the relevance section relating 20 to bail section 60 which also governs the liberty of the accused read with the provisions of our constitution.

In the circumstances after the state also considered and placed on record that the applicant still being on parole he has been abiding to the conditions of parole and despite the facts that this also was part of the reasons that I gave be given information

at that time and the reasoning that I have just outlined as to how I came to a conclusion to dismiss his bail in the previous application.

I would say that what the state has placed on record today that the applicant is not to be regarded as a flight risk that, that is bringing me to that conclusion based on what the state said that he is abided to his parole bail conditions the fact that now we have evidence that is contradicting clearly contradicting from what has been placed from the applicant's side and Mr.

10 Nikabende evidence which is misleading the court in as far as he out rightly and deliberately left out his communication that is leveled against him in what he has indicated to Mr. Mkanya instructing attorney in this matter.

It is also a conduct an ill conduct on his part and in a bail application the conduct of the applicant as well have my judgment also was based on the conduct of Mr. Thabalala was leveled to scrutiny by this court and it is mainly the main reason of the court to have dismissed his application at that time. So if it is on the respondent's side and there is ill conduct that is clearly

20 shown in the evidence of Mr. Nikabende and the court cannot leave it and put in [indistinct] not deal with it won't be fair because the applicants and the respondents in this matter should be treated equally in the circumstances.

It is on that bases that I say the circumstances that I outlined now that were brought to the attention of the court today

I regard as new facts that was just brought due to the fact that I call upon the evidence of Mr. Nikabende did not tell up before this court to come and testify and they are relevant to all the entire issues that were brought in this bail application and they guide the court to say it will be in the interest of justice to release him and that is the finding of the court.

DEFENCE: May I please the court your worship.

PROSECUTOR: As the court pleases your worship.

DEFENCE: Your worship my learned friend and myself  
10 as provisionally agreed on the amount. The amount we agreed on is R5000 no further conditions the applicant is in position of a passport that is no longer in use. In 96 it all ready expired and my learned friend accepts that. So in the premises off course the normal conditions apply no contact with witnesses ext.

PROSECUTOR: Yes I confirm your worship I will accept that his passport no longer applies so that not be a condition defense did give me an undertaking that he will not apply for new travel papers. Your worship reporting to the police station according to me has no real leaning or value so it is a normal bail  
20 conditions. The contents of the docket was disclosed so the applicant knows exactly who the future state witnesses will be so the condition then is no direct or indirect contact with any state witness.

COURT: You said what about the aspect?

PROSECUTOR: I accept that his passport had expired your

worship but the defence did give me an undertaking that he will not apply for a new passport.

COURT: Did you arrange a date?

PROSECUTOR: Yes your worship. 1<sup>st</sup> October the case is on the rolling court 19 1<sup>st</sup> of October. The new reason for postponement is for representation so 1<sup>st</sup> October is the indistinct

DEFENCE: Your worship I confirm the date of the 1<sup>st</sup> October for representations for the state to be made to the state for withdrawal of the matter against the accused.

10 COURT: Who is the new investigating officer?

DEFENCE: Manta your worship. They don't have ranks inspector [indistinct] IPID is the new investigating officer. Not inspector your worship investigator they have a rank investigator in term of [indistinct].

COURT: Mr. Thabalala stand up please. I postpone your matter to the 1<sup>st</sup> day of October 2018 1 October for further hearing in court 19. Bail is fixed at R5000 that is payable in the clerk of the court Magistrate Pretoria prior to new release. Appear in court 19 then if you have paid bail on the 1<sup>st</sup> of October half 20 past 8 in the morning and other dates that are scheduled for you to appear. You must not directly and indirectly interfere with state witnesses or police investigations. You must not commit any other offices when you are released on bail.

Inform inspector Mandla from the IPID should you relocate from the address that you gave on record. The contact

details you should then obtain from the prosecution for inspector Mandla. You must not apply for any passport from now on until the matter is finalized. Should there be any reason for you to do that the court directs that you give a proper application [indistinct] mentioned before court. If any of these conditions of bail are bridge please know that you will be arrested brought to court and the court doesn't find any justification of valid reasons in the bridge then there is a likelihood that the court will cancel your bail. You understand that?

10 MR THABALALA: I understand.

COURT: Thank you.

DEFENCE: May I please the court.

PROSECUTOR: As the court pleases.

**COURT ADJOURNS**

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