

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)**

**CASE NUMBER BA05/2024
MAGISTRATE COURT CASE NUMBER 347/23**

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

**MANTHATA AJ
30/08/2024**

In the matter between:

ABEDNIGO DESMOND MBUYANE

APPELANT

AND

THE STATE

RESPONDENT

BAIL APPEAL JUDGEMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail. The date and time of hand-down is deemed to be on 30 August 2024 at 14h00.

MANTHATA AJ

[1] This is an appeal against the refusal of bail, by the District Magistrate Mr Hall, sitting in Mbombela court, on the 23rd of April 2023. A further bail application on new facts, which the respondent opposed, was launched on the 2nd of October 2023, and was dismissed on the ground that even if the facts relied on were new, exceptional circumstances do not exist permitting the Appellant admitted to bail.

[2] The appellant is charged with an offence of murder. The charge sheet stipulates that the charge of murder is read with section 51 of the Criminal Law Amendment Act 105 of 1997, it is not clear as to which of the two subsections of section 51, namely subsection (1) or (2) is applicable.

[3] The State and the Defence, however, agreed from the beginning of the bail application that the charge falls in the category of offences listed in schedule 6 of the Criminal Procedure Act 51 of 1977 ("Act 51 of 1977").

[4] Section 60 (11) (a) of Act 51 of 1977 states the following:

"Notwithstanding any provision of this Act, where an accused is charged with an offence referred to - (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release."

[5] The legal representative of the appellant, however, argued after evidence was presented that the murder was not premeditated or planned and therefore the bail application falls within the ambit of Schedule 5 of Act 51 of 1977.

[6] Section 60 (11) (b) of Act 51 of 1977 states the following:

"Notwithstanding any provision of this Act, where an accused is charged with an offence referred to- (b) in Schedule 5, but not in schedule 6, the court shall order that the accused be detained in custody until he or she

is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.”

[7] The learned Magistrate decided in his judgement that the charge falls within the ambit of Schedule 6 of Act 51 of 1977 and that the appellant failed to adduce evidence on a balance of probabilities that exceptional circumstances permits his release on bail.

[8] The grounds upon which the appeal is based are the following:

8.1 The Magistrate erred that the application falls within the ambit of Schedule 6 of Act 51 of 1977;

8.2 The Magistrate erred in accepting the evidence of the investigating officer with regard to the grounds mentioned in Section 60(4) of Act 51 of 1977;

8.3 The Magistrate erred in finding that the release of the Appellant on bail will not be in the interests of justice.

[9] In adjudicating over the grounds as set out in section 60(4) the court would have to weigh, in terms of section 60(9) of the CPA, the interest of injustice as against the right of the accused to personal freedom and the extent to which detention will prejudice him. This exercise would have regard to the factors identified in section 60(9) (a – g). In summary, once exceptional circumstances have been established by the bail applicant, the enquiry must focus on the balance between the interest of the State as set out in section 60(4) – (8)A on the one hand and the applicant’s interest in his personal freedom as set out in the section 60(9) on the other.¹

[10] It is trite that the Appellant bears the onus to convince or persuade the court *a quo* that exceptional circumstances exist that permits his release on bail. In an attempt to do so he presented an affidavit in support of the bail application.

¹ See *Keevy v S* (A66/2013) [2013] ZAFSHC 53 (2 April 2013)

[11] The Appellant stated in the affidavit amongst others, the following:

- 11.1 He is a citizen of the Republic of South Africa and have family ties in the country. He does not have relatives or connections outside the Republic of South Africa which can make him to contemplate evading trial;
- 11.2 He is 37 years old, a father of four minor children aged 17, 12, and 3 years respectively, all the children are schooling, employed and a breadwinner;
- 11.3 He is also supporting two minor children of his wife who are 14 and 13 years old respectively;
- 11.4 He is a church member of Zalamani Nande Apostolic Church in Zion, a board member and secretary of Uthando House, an orphanage home, and a chairperson of the Swalala Ma-50 Branch;
- 11.5 He is residing at Stand No. 5[...], M[...], Hazeyview Trust, 1[...], (Masoyi). This is his marital home registered under his name and has been staying at the address for 10 years;
- 11.6 He is employed and was promoted to the law enforcement unit in 2016 in April 2016;
- 11.7 He has three (3) cars that he purchased through the banks, has credit loan with Capitec, credit cards with ABSA and Makro, and clothing accounts. If he is detained, he will not be able to meet his financial obligations as he will lose his employment;
- 11.8 On the merit of the case the Appellant stated the following: On the 15th April 2023, while on standby at work, he was around Mbombela and needed to see his wife urgently. He then figured that she was at kwaNyonyi Lodge. He went to see her as she was not responding to his

calls. When he got there, he saw her car in front of one of the rooms. He called her and she said she was coming out. He then pushed the door and upon entry he was confronted by the deceased in a fighting mood. They fought and as they scuffled, he saw him putting a hand under his shirt and immediately feared he was taking out a gun and he responded first and shot at the deceased using a work gun that he was carrying since he was on standby at work;

11.9 He acted out of fear and a strong suspicion that the deceased was attacking him, as he recognised him as a law enforcement officer from another government department that he had met around Mbombela. He knew also that as a law enforcement agent he was ordinarily allowed by his employment to carry a gun. When he saw him putting his hand under his shirt after the scuffle made him assume that he was taking out a gun to attack him;

11.10 The State will not be able to prove beyond reasonable doubt that he shot the deceased intentionally as the peculiar facts of this case point to the contrary;

[12] The State led oral evidence of the investigating officer of the case Warrant Officer Elbert Jacobus Pieter De Lange. He testified that the deceased was a Traffic Law Enforcement Agent and was off duty on the day in question. The deceased was in the company of the lady and they booked into the Lodge. The accused came to the lodge and accosted them. Accused kicked opened a locked door and entered. A scuffle ensued between the accused and deceased where after the deceased ran away and accused chased him. Accused produced a firearm and shot the unarmed deceased at twice, once on the shoulder and once on the back of the head.

[13] Warrant Officer De Lange was cross-examined and stood on his version on how the incident occurred without contradictions and inconsistencies.

[14] In **S v Bruintjies**², Shongwe AJA, stated:

² 2003 (2) SACR 575 (SCA) at 577 paragraph [7]

“The appellant failed to testify on his own behalf and no attempt was made by his counsel to have him testify at the bail application. There was thus no means by which the Court a quo could assess the bona fides or reliability of the appellant save by the say-so of his counsel.”

[15] In **S v Mathebula**³, Heher JA stated at para [11]:

“In the present instance the appellant's tilt at the State case was blunted in several respects: first, he founded the attempt upon affidavit evidence not open to test by cross-examination and, therefore, less persuasive”.

[16] In Killian v S at para [13]. the Court dealt with the dangers inherent in the use of affidavits in bail proceedings where section 60(11) of the CPA applies:

“Bail applications are sui generis. To an extent they are inquisitorial and, in general, there is no prescribed form for introducing evidence at them. But in cases where s 60(11) applies and there is consequently a true onus on the applicant to prove facts establishing exceptional circumstances, an applicant would be well advised to give oral evidence in support of his application for bail. This seems to me to follow, because - differing from the position in which the Plascon-Evans rule is applied – the discharge of the onus is a central consideration in s 60(11) applications. If the facts are to be determined on paper, the state's version must be accepted where there is a conflict, unless the version appears improbable.”

[17] In the present case the Appellant did not testify under oath but presented affidavit evidence which could not be subjected to test by cross-examination.

[18] The learned magistrate when considering the Appellant affidavit evidence pondered on many questions which remains unanswered and unclarified. This is not

³ 2010 (1) SACR 55 (SCA) at 59b-c

surprising as the affidavit evidence was not open to test by cross-examination.

[19] The State had adduced clear evidence in regard to the occurrence of the murder and the evidence was subjected to cross-examination.

[20] The argument by the Appellant which was also canvassed during oral argument is that the State will not be able to prove beyond reasonable doubt that the Appellant shot the deceased intentionally as the peculiar facts of this case point to the contrary.

[21] In **S v Mathebula**⁴ at para [12] the Supreme Court of Appeal set out the test in relation to an attack on the strength of the State's case:

“But a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge: S v Botha 2002 (1) SACR 222 (SCA) at 230h, 232c; S v Viljoen 2002 (2) SACR 550 (SCA) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the state is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see Shabalala & Others v Attorney-General of Transvaal and Another [1995] ZACC 12; 1996 (1) SA 725 (CC). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus, it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the state to rebut his evidence to that effect: S v Viljoen at 561f-g.”

[22] The Appellant must prove on a balance of probability that he will be acquitted

⁴ 2010 (1) SACR 55 (SCA)

of the charge and he had failed in that regard.

[23] It was further argued that the Appellant enjoys Constitutional rights to be presumed innocence until proven otherwise. I agree with this argument except that the right referred to is not absolute.

[24] In **S v Mbaleki and another**⁵ at para [14], the Court remarked as follows:

“I need however to also deal with the perception out there that the presumption of innocence had a role to play at the consideration of bail. In S v Dlamini, S v Dladla and Others, our Constitutional Court unanimously decided that the right to be presumed innocent is not a pre-trial right but a trial right. This has also been understood by the learned Magistrate.”

[25] In **Mafe v S**⁶ at para [95], Lekhuleni J said the following regarding the presumption of innocence:

“In summary, the presumption of innocence is one of the factors that must be considered together with the strength of the State’s case. However, this right does not automatically entitle an accused person to be released on bail. What is expected is that in Schedule 6 offences the accused must be given an opportunity, in terms of section 60(11)(a), to present evidence to prove that there are exceptional circumstances which, in the interests of justice, permit his release. The State, on the other hand, must show that, notwithstanding the accused’s presumption of innocence, it has a prima facie case against the accused. In reaching a value judgment in bail applications, the court must weigh up the liberty interest of an accused person, who is presumed innocent, against the legitimate interests of society. In doing so, the court must not over-emphasise this right at the expense of the interests of society.”

[26] A court seized of a bail application fulfils a very different function from a trial court. Its role is not to determine the guilt or innocence of the accused person. The

⁵ 2013 (1) SACR 165 (KZD)

⁶ [2022] ZAWCHC 108 (31 May 2022)

bail court's concern with the interests of justice, in the sense of weighing in the balance 'the liberty interest of the accused and the interests of society in denying the accused bail', will however in most cases entail that it will have to weigh, as best it can, the strengths or weaknesses of the state's case against the applicant for bail. A presumption in favour of the bail applicant's innocence plays no part in that exercise. The court will, of course, nevertheless bear in mind the incidence of the onus in making any such assessment⁷.

[27] The learned magistrate had considered and evaluated the Appellant affidavit evidence and the State's oral evidence. The conclusion that the learned magistrate reached is that the murder is premeditated or planned.

[28] In terms of section 65(4) Act 51 of 1977, the court hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.

[29] I find no fault on the learned magistrate decision that the murder falls within Schedule 6 of Act 51 of 1977.

[30] The Appellant has the onus to prove on balance of probabilities that exceptional circumstances exist which permits his release on bail.

[31] In **S v Petersen**⁸ at para [55] it was held as follows:

"Generally speaking 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference."

[32] In the matter of **S v H**⁹, it was held that:

⁷ S v Barendse and Another (A01/2023) [2023] ZAWCHC 63 (22 May 2023) Conradie v S [2020] ZAWCHC 177 (11 December 2020) at paras [19]-[20].

⁸ 2008 (2) SACR 355 (C)

⁹ 1999 (1) SACR 72 (W) at 77E-F

"... Exceptional circumstances must be circumstances which are not found in an ordinary bail application but pertain peculiarly ... to an accused person's specific application. What a Court is called upon to do so is to examine all the relevant considerations ... as a whole, in deciding whether an accused person has established something out of the ordinary or unusual which entitles him to relief under section 60(11)(a)."

[33] In **S v Josephs**¹⁰ at 668I it was held: "Showing 'exceptional circumstances' for the purposes of section 60(11) of the Criminal Procedure Act does not post a standard which would render it impossible for an unexceptional, but deserving Applicant to make out a case for bail."

[34] The Appellant contends in the Heads of Argument admitted into evidence as Exhibit "C" that the following constitute exceptional circumstances:

- 34.1 The charge against him involves an affair that his wife had with the deceased. He found her with him in a rented room. He had just been married to her for less than a year and when he discovered this he lost control;
- 34.2 this has badly affected his emotional health and he needs to get marriage counselling urgently as he is struggling to come to terms with the fact that the woman he so dearly loves could have an affair with another man. He needs to save his marriage and unfortunately the people who are assisting him in prison in this regard are just ordinary pastors not trained marriage counsellors;
- 34.3 He needs to get psychological counselling to deal with trauma of the shooting incident as well as the 'catching' of his wife with another man;
- 34.4 He fears that if he does not get professional psychological counselling

¹⁰ 2001 (1) SACR at 659 (C)

he stands to either lose his marriage and he needs professional help to come to terms with what happened within his marriage;

34.5 If not released on bail to be attended by psychologist he might also lose his mind from the memories of the events and from mental anguish;

34.6 He is kept in a separate cell in prison from the rest of the inmates and eats separately from the rest of the inmates due to the nature of the offence he is facing;

34.7 Keeping him separately from other inmates does not help him but depresses him further as he cannot talk to anyone about what happened and this is haphazard to his mental health;

34.8 Suffering from post-traumatic stress disorder cannot be excluded as a possibility in the absence of medical help of counselling;

34.9 It will be to the benefit not only of him but even the Prosecution to be admitted into bail so that he can get medical help he needs in order to face trial in his full mental capacities. Being kept in custody will only serve to defeat the very purpose of his detention which is to face trial;

[35] The exceptional circumstances that the Appellant argued exist, only emerged in the Heads of Argument filed in support of the bail application. They were not included in the affidavit evidence the Appellant presented in support of the bail application. Even if the said exceptional circumstances had been included in the affidavit evidence they would still not be tested under cross-examination, the concern raised by the learned magistrate.

[36] It is my view that the purpose of Heads of Argument and/or oral argument is not and must not be an opportunity to raise new facts. The argument must confine or limit itself to the facts, evidence or issues raised in the hearing or trial.

[37] For Counsel for the Appellant to introduce or raise new facts in the Heads of

Argument and allowed to argue on that was tantamount to adducing evidence from the bar which is unacceptable.

[38] The learned magistrate had considered the above grounds which are deemed to constitute exceptional circumstances. He dismissed the grounds as not constituting exceptional circumstances as the Appellant failed to produce medical proof to support his medical condition. I cannot find any fault on the decision raised by the learned magistrate.

[39] The personal circumstances of the Appellant are fully outlined in paragraph [11] [11.1.]- [11.7.] of this judgement.

[40] In **S v Mazibuko and another**¹¹, at para [19]:

“As far as the appellant’s personal circumstances are concerned, they are commonplace and not out of the ordinary — none of these factors constitutes exceptional circumstances.” it was held that: “... for the circumstance to qualify as sufficiently exceptional to justify the accused’s release on bail it must be one which weighs exceptionally heavily in favour of the accused, thereby rendering the case for release on bail exceptionally strong or compelling.”

[41] The learned magistrate had considered the personal circumstances of the Appellant and still arrived at the conclusion that they do not constitute exceptional circumstances. Again, I cannot find any fault on the conclusion reached by the learned magistrate.

[42] As stated above in paragraph [8][8.2] the Appellant contends that learned Magistrate erred in accepting the evidence of the investigating officer with regard to the grounds mentioned in Section 60(4) of Act 51 of 1977.

[43] In consideration to the grounds mentioned in Section 60(4) of Act 51 of 1977, the learned magistrate considered the nature and the gravity of the charge on which

¹¹ 2010 (1) SACR 433 (KZP); See also S v Scott-Crossley 2007 (2) SACR 470 (SCA) at para [12]

the accused is to be tried; the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her; and the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated and arrived at the conclusion that it will not be in the interests of justice to admit the Appellant into bail.

[44] The effect of s 60(11), as substituted by s 4(f) of the Criminal Procedure Second Amendment Act 85 of 1997 (with effect from 1 August 1998), is that sub-secs 60(4) to (9) have to be applied differently. The signal difference is the obligation placed on the applicant for bail to show exceptional circumstances justifying a departure from the legislative determination that continued detention should be the norm for persons charged with Schedule 6 offences. A court's evaluation of the facts with regard to the considerations in sub-secs 60(4) to (9) is required to be undertaken in accordance with the aforementioned statutory precept¹².

[45] There is no doubt that premeditated or planned murder is a serious charge and upon conviction a life imprisonment would be imposed unless substantial and compelling circumstances exist justifying deviation from imposition of life imprisonment.

[46] The key state's witness is the Appellant's wife. The deceased was with her at the time he was shot death. The Appellant used her affidavit in support of his release into bail. The circumstances under which the affidavit was obtained is mysterious.

[47] Counsel for the State argued that the fact that it is not known how the affidavit was obtained from the State's witness raises a concern that she might be influenced or intimidated as a witness.

[48] In **S v Dlamini, Dladla, Joubert, Schietekat**¹³ the Constitutional Court held that:

“...The focus at the bail stage is to decide whether the interests of justice

¹² See *Barense and Another v S* (A01/2023) [2023] ZAWCHC 125; [2023] 3 All SA 381 (WCC) (22 May 2023).

¹³ [1999] ZACC 8; 1999 (2) SACR 51 (CC) at para [11]

permit the release of the accused pending trial; and that entails, in the main, protecting the investigation and prosecution of the case against hindrance.”

[49] The test in terms of Section 60(4)(c) of Act 51 of 1977 is whether there is a likelihood that, if the Appellant was released, that he would attempt to influence or intimidate witnesses. The court had to look if there would be an attempt to that effect.

[50] The eye witness in this case is the Appellant's wife and her affidavit in support of the Appellant's release was obtained without the State not knowing. The wife had moved away from the marital home. She is the one who apparently had witnessed the incident and without her the State would not be able to prove the case against the Appellant.

[51] If the Appellants is to be released on bail, then the main aim of “protecting the investigation and prosecution of the case against hindrance” would be defeated.

[52] The learned magistrate conclusion on the likelihood of interference with the witness(s) cannot be faulted.

[53] The Appellant lodged bail application on new facts on the 2nd of October 2023. He presented affidavit evidence which outlined the following:

- 53.1 He is employed as a law enforcement officer in Mbombela and his salary has been stopped since 17 April 2023. He has been suspended from duty;
- 53.2 He bought a VW Polo TSI from Volkswagen Financial Services. He pays instalment of R7 966.42. on the 21st January 2023 it had had arrears of R16 057.95;
- 53.3 He also owns a Toyota Hilux which is financed by Motor Financial Institution a division of Nedbank Limited. He is in arrears and an agreement was made with MFC that payment be postponed to 22

August 2023 to effect the arrears. He would not be in a position to honour the agreement since he is still in custody;

- 53.4 His wife is unable to pay school fees for their children;
- 53.5 His wife received stipend of plus or minus R2 500 per month from the mother's business trading by selling meat and porridge. The R2 500 is insufficient to cover his family expenses including payment for their motor vehicles;
- 53.6 After he was denied bail his elder sister Thuli Regina Mahunye moved to his resident to look after his property hence his wife moved to her parental home as a result of this case. His sister Thuli Regina Mahunye has since left his house due to marital commitment;
- 53.7 His niece Banzi Lesley Mbuyane also assist him in looking after his property and aiding his extra marital children financially. He is now having financial constraints in assisting him;
- 53.8 His AVBOB policy has lapsed after his incarceration. He will be able to reinstate the policy if he is outside prison;
- 53.9 The Toyota Hilux 2.5 D4D has not been paid for since May 2023 until to date. The arrears are R51 670.48;
- 53.10 His Mercedes Benz C200 is in arrears of R76 287.10;
- 53.11 He has since lost a considerable amount of weight since his incarceration. He is undergoing medical treatment for stress related issue which affect his eyes, headache and back pains. He does not have the medical records which are in the hands of Correctional Services health officials;
- 53.12 He is a South African citizen and has spent his whole life since birth in

the Republic. All his ties are within the Republic;

53.13 The doctrine of innocent until proven guilty in terms of the Constitution still prevails upon him. He is not a flight risk. He is a South African citizen with a fixed address. He has no pending cases, no previous convictions. He has never lived outside the Republic of South Africa.

[54] In **S v Mpofana**¹⁴ the court explained the approach to be taken in applications for bail based on new facts as follows:

“In considering an application for bail allegedly brought on the strength of new facts, the court’s approach is to consider whether there are, in the first instance, new facts and, if there are, reconsider the bail application on such new facts, against the background of the old facts.”

[55] In **S v Mohammed**¹⁵, the court stated that:

“it seems logical that any renewed application based on new facts or changed circumstances should only be able to be properly judged with reference to those facts and circumstances which were placed before the court in the first instance. There can of course be no numerous clauses as to the nature of new facts or changed circumstances that may legitimately warrant the grant of bail previously refused. The newly discovered evidence of a witness who may prove the accused’s innocence, as was in this case, is an example.”

[56] In the matter of **Davis and Another v S**¹⁶, it was held that:

“If the evidence is adjudged to be new and relevant, then it must be considered in conjunction with all the facts placed before the court in previous applications, and not separately”.

¹⁴ 1998 (1) SACR 40 at 44(G – I)

¹⁵ 1999 (2) SACR 507 (C)

¹⁶ (2888/2015) [2015] ZAKZDHC 41 (8 May 2015)

[57] New facts must be 'sufficiently different in character' from the facts presented at the earlier unsuccessful bail application¹⁷ and must not constitute simply a reshuffling of old evidence¹⁸

[58] The learned magistrate found that the arrear amounts the Appellant accrued on his finances constituted new facts. He, however, refused bail on new facts he finds exists on the basis that when new facts are considered with the old facts in the initial bail application, do not constitute exceptional circumstances.

[59] I cannot find any fault on the decision of the learned magistrate in this regard but I have a different view as to whether the issue of the Appellant accruing arrear amounts to his accounts constitute new facts. My view is that they do not.

[60] During the initial bail application, the Appellant said that he has three (3) cars that he purchased through the banks, has credit loan with Capitec, credit cards with ABSA and Makro, and clothing accounts, he has minor children who are schooling and if he is detained he will not be able to meet his financial obligations as he will lose his employment.

[61] Logic dictates that the learned magistrate knew or ought to have known that if the cars are not paid, arrears would be accumulated on failure to pay the cars as the Appellant would be in detention and if the Appellant is in detention school fees would not be paid. What the Appellant brought as new facts is simply a reshuffling of old evidence.

[62] The Appellant raised an issue of medical condition in para. [53] of this judgement. The learned magistrate dismissed the health issue as not constituting exceptional circumstance.

[63]. The question of a detainee's ill-health due to conditions in our prisons was considered in the matter of **S v Mpošana**¹⁹ and it was stated in this regard, as follows:

¹⁷ S v Mohamed 1999 (2) SACR 507 (C) at 512b)

¹⁸ S v Petersen 2008 (2) SACR 355 (C) at [57].

¹⁹ 1998 (1) SACR 40 (TK)

“Upon a proper construction of s 35(2)(e) and (f) of the said Constitution, one whose detention has been pronounced lawful and in the interests of justice cannot simply resort to a further bail application merely because he has been detained under inhumane and degrading conditions or on the ground that his right to consult with a doctor of his own choice has been infringed. It is, however, available to such person firstly to apply to the prison authorities concerned and call upon them to remedy whatever complaints he/she has with regard to the conditions of his/her detention. Should the prison authorities fail to remedy such complaints, it is available to the detainee concerned either to challenge the detention before a court of law as being unconstitutional or obtain a court interdict to force the prison authorities to comply with the law. In any event, in hoc casu, the magistrate has, quite correctly in my view, ordered that the prisons officials should afford appellant the right to consult with a medical practitioner of his choice and appellant's concern in this regard should be laid to rest.”

[64] In **Solomons v S**²⁰ the held that:

“...bail in general is not a remedy to the failures of prison authorities to detain inmates in conditions consistent with human dignity.” this Court held that: “I do not believe much can be made of the conditions of detention in a case such as the present one. Whilst unsatisfactory, I believe that the State is correct in its argument that the conditions of detention is really a separate issue which needs addressed through the Office of the Inspecting Judge or some other process. Such conditions cannot in my view constitute exceptional circumstances justifying the release of the Applicant.”

[65] The Appellant says he is undergoing medical treatment for stress related issue which affect his eyes, headache and back pains.

²⁰ [2019] 2 All SA 833 (WCC) at para [30]. See also Lin and another v S 2021 (2) SACR 505 (WCC) at para [73]

[66] The appeal court is at liberty to consider its own analysis of the evidence in order to conclude whether an accused person has discharged the onus on him as set out in section 60(11)(a) of the CPA.²¹

[67] The Appellant is not saying that the prison cannot provide him with the necessary medical treatment but instead is saying that he is undergoing treatment. If the Appellant is raising this issue on the ground that he wants to consult with a doctor of his own choice, it cannot stand. I agree with what was said in **Solomons v S**²², and considering **S v Mpofana**²³ that this cannot be an exceptional circumstance.

[68] I therefore cannot find any fault on the decision of the court *a quo* in dismissing the issue of ill-health as not constituting exceptional circumstance.

[69] In conclusion the powers of this Court are largely limited in that it cannot interfere with the exercise of the magistrate discretion in refusing bail unless if the discretion was exercised wrongly.

[70] The above was clearly expounded in **S v Barber**²⁴ where Hefer J held:

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

[71] I find that the Appellant failed to successfully discharge the onus that

²¹ See *S v Porthen and Others* 2004 (2) SACR 242 (C) at paras [16]-[17], *S v Botha*, 2002 (1) SACR 222 (SCA)

²² [2019] 2 All SA 833 (WCC)

²³ 1998 (1) SACR 40 (TK)

²⁴ 1979 (4) SA 218 (D) at 220E - H

exceptional circumstances exist in terms of Section 60(11)(a) of Act 51 of 1977 that permits his admission into bail. I find that the court *a quo* correctly denied his application to be admitted into bail.

[72] Accordingly, the following order is made:

1. Appeal is dismissed.

MANTHATA AJ
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

APPEARANCES:

For the Applicant	:	Mr V Segodi
Instructed by	:	Vusi Segodi Attorneys
Counsel for the Respondent	:	Adv TD Mahasha
Instructed by:		Director of Public Prosecutions
		Mpumalanga, Mbombela