



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: CA&R13/2024

In the matter between:

MUZI CELE

APPELLANT

and

STATE

RESPONDENT

JUDGMENT

ZONO AJ:

Introduction

- [1] This is a bail appeal emanating from Ntabankulu Magistrate's Court under case number B66/2023. This bail appeal concerns the decision of the Ntabankulu Magistrate's Court refusing to admit the appellant to bail.
- [2] The parties are "*ad idem*" that the notice of appeal was filed out of time. The appellant, in response to the late filing of the notice of appeal, lodged an application for condonation of the late filing of the notice of appeal. The application for condonation is not opposed. During the hearing parties agreed that the application for condonation be granted by consent.

- [3] The appellant was with his three co-accused when applying for bail in the court *a quo*. The four bail applicants in the court *a quo* were legally represented by the same legal representative. The bail application was refused in respect of all the bail applicants in the court *a quo*. However, only the appellant in these proceedings who seeks to impugn the decision of the court *a quo* refusing to admit him to bail.

Factual Background

- [4] The appellant, along with other accused persons are charged with two counts of murder, unlawful possession of firearms, namely, a rifle, a 9 mm Pistol and unlawful possession of ammunition, which offences were allegedly committed on 27th March 2023 in the district of Ntabankulu Eastern Cape. It did not appear to be in dispute that the offences fall within the ambit of Schedule 6. The appellant, like all other bail applicants gave *viva voce* evidence in support of his bail application in the court *a quo*.
- [5] The appellant testified that he is residing at Izingolweni in a place called Nkulu in the South Coast of KwaZulu Natal. That is his home owned by his father. That address was given to the police. At times he stays at his uncle's place at iNanda, and this address too, was given to the police.
- [6] The appellant testified that he was employed as a taxi driver, driving his father's taxi; earning a total salary of R4000.00 a month. He is an unmarried major male with two children: One staying at his homestead, while the other staying with the mother's family. The one staying with the appellant is doing Grade 5. She attends school using private scholar transport. For that scholar transport the appellant is paying R600.00. He is paying R200.00 school fees per annum. He stated that he is responsible for the support or maintenance of the minor child. The child's mother is busy with her education in Johannesburg. There is a child support grant received by the mother in respect of this child.

- [7] The other child, as already stated, is staying with her mother at Mbeni under Izingolweni; KwaZulu Natal. She is doing Grade 6. The appellant testified that he is responsible for her school fees which is the sum of R300.00 per annum. The appellant is paying R300.00 per month in respect of school transport.
- [8] With regard to his work, the appellant testified that the taxi he is driving is stationery at home and his employment is at risk. Appellant's father depended on him for taxi association's meeting as his younger sister sometimes goes to Durban for job seeking. The appellant is selling his cattle to the bereaved families for funerals. At the time of bail application in the court *a quo* he had 14 herd of cattle. His cattle are at his home, but he does not know what is happening with them now that he is in custody. With the money he is receiving from the sale of cattle he is constructing his own homestead, or his house. He was advised that when in custody there was a break-in or burglary and his lights were stolen.
- [9] The appellant has South African identity document. He does not have any travel document. He does not know state witnesses and is not going to interfere with the state witnesses. He has no pending case nor previous convictions. He is not going to evade trial. When out on bail, he testified that, he is not going to commit other offences. He is not a danger to society. He is not going to conceal nor destroy evidence. He testified that the state does not have a strong case against him. He testified that he is not guilty.
- [10] The appellant alluded to the fact that he was assaulted for him to make a statement admitting that he committed murder of some people. In cross examination he elected not to answer when a version by Mr Lembede, who was the first bail applicant in the court *a quo*, was put to him to say that they concocted a statement or a story to give to the police about assault. In cross examination a version was put to the appellant that he was assaulted by members of the community and his first answer was that he does not know that but he later denied it when it was put to him that his life is in danger.

- [11] About the strength or weakness of either side's case, under cross examination, the state put a version that firearms that were used at scene were recovered at room number 15 of the B&B where they were booked in, the B&B to which the Peugeot drove with the persons who were allegedly committing the offences at the scene, the appellant answered as follows "*I do not know that.*"

Court a quo

- [12] The court *a quo* found that there is no evidence pointing out to the innocence of the applicants, appellant included. There is no explanation as to why they were in Ntabankulu on the day in question. It concluded that the allegations against the applicants are serious and found that no exceptional circumstances exist that warrant the applicants to be released on bail. The nature and gravity of the case they are facing together with the possible punishment in the event of conviction were taken into account.
- [13] The court *a quo* further found that there are no emotional, family, community, or occupational ties between the accused and the place at which they will be tried. The finding included the appellant. It is so because they reside outside Ntabankulu. They have no fixed properties and their family do not even know Ntabankulu. They stay in their family/ father's properties outside Ntabankulu. In the final analysis the court *a quo* found that applicants' life would not be safe if released on bail. The court *a quo* refused bail.

Summary of appellant's grounds of appeal

- [14] The court *a quo* is criticised for alleged failure to properly evaluate the evidence; alleged failure to attach due weight to the evidence adduced by the appellant. The court *a quo* allegedly failed to attach due weight to the fact that appellant's evidence relating to his fixed address where he resides and that he will attend trial and abide by bail conditions that may be granted. The court *a quo* allegedly failed to exercise circumspection to establish if there are exceptional circumstances which in the interests of justice permit the release

of the appellant on bail. The appellant complains about court *a quo*'s alleged failure to attach due weight to the insufficiency of investigating officer's version, which insufficiency allegedly did not allow appellant to comment.

[15] Grounds of appeal are pivotal. They must be clearly and succinctly set out in clear and unambiguous terms, to enable the court and the respondent to be fully informed of the case the appellant seeks to make out and which the respondent is to meet in opposing the appeal. It does not help to marshal the grounds of appeal over the bar, which have not been set out clearly and succinctly in the notice of appeal¹.

[16] It is axiomatic that the founding document in an appeal against the refusal of bail application by the lower court is a notice of appeal². For a proper appeal to be prosecuted a proper notice of appeal must be duly filed³. A notice of appeal under section 65 of the Criminal Procedure Act must be a proper document from which the court can determine the grounds and merits of the appeal. A shoddy practice will not be tolerated⁴. To underscore a point that a notice of appeal is a necessary requirement of the process of appeal to superior court with regard to bail, Hiemstrar⁵ states as follows:

“Procedure –The accused serves the notice of appeal on the Magistrate or Regional Magistrate involved and on the DPP....”

Reference in section 65(3) of CPA to notice of appeal is reference to notice with clear, succinct and unambiguous grounds in the notice of appeal.

[17] A meaningful notice of appeal envisaged in section 65(3) of CPA serves a very important purpose in the process of the appeal. It serves to fulfil aspirations of section 34 of the Constitution which provides as follows:

¹ **AVBOB Funeral Services v Buzani** (2810/2020) [2024] ZAECQBHC 28(17 April 2024) and the cases referred to therein.

² Section 65(3) of Criminal Procedure Act.

³ **S v Maliwa** 1986 (3) SA 721 (W).

⁴ **S v HO** 1979 (3) SA 734 (W).

⁵ Hiemstrar's Criminal Procedure page 9-22.

“Access to courts- *everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent impartial tribunal or forum.”*

[18] Section 34 fair hearing right affirms the rule of law, which is a founding value of our constitution. The right to a fair hearing before court lies at the heart of the rule of law. Courts in our country are obliged to ensure that the proceedings before them are always fair⁶. It is a requirement of the rule of law that when a person may be adversely affected by an exercise of public power, which is what the exercise of judicial power entails, such a person is entitled to be heard⁷. It is the hearing that must be fair. Any hearing that has semblance of, or tainted with unfairness is inevitably arbitrary. Notice of appeal without meaningful grounds or grounds that are not clearly, succinctly and unambiguously set out in the notice is antithetical to the rule of law and would accordingly lead to unfair appeal proceedings.

[19] In sum, notice of appeal to superior court with regard to bail should comply with all the peremptory requirements of notice of appeal and serve the important purpose of all the notices of appeal of informing the other party and the court of grounds in clear, succinct and unambiguous terms of the case the appellant seeks to make out. The words “*clear, succinct and unambiguous*” used in many cases under this subject, must be understood to mean that grounds of appeal must be comprehensible and sufficiently particularised. To suggest otherwise would defeat the very purpose of informing the respondent of the case the appellant seeks to make out and which the respondent is to meet in opposing the appeal.

[20] In *Casu* the notice of appeal is replete with unsubstantiated conclusions which do not bear reference to any pieces of evidence. It is simply not clear how the

⁶ ***De Beers No v North- Central Local Council and South Central Council and others (Umhlatusana Civil Association intervening)*** 2002(1) SA 429 (CC) Para 11; ***Twee Jonga Gazellen (Pty) Ltd and another v Land & Agricultural Development Bank of South Africa t/the land Bank and Another*** 2011 (3) SA (1) (CC) Para 56

⁷ ***Samuels v South African Legal Practice Council (Formally Law Society of the Northern Provinces)*** (1112/2021) [2022] ZASCA 175 (7 December 2022) Para 66.

court *a quo* has failed to properly evaluate the evidence and how it has “*failed to attach due weight to the evidence*”. No specificity about the court *a quo*’s failure to attach due weight on investigating officer’s insufficient version to allow the appellant to comment on the relevant aspects thereof. No reference is made to the aspects of investigating officer’s evidence which was perceived to be insufficient to enable the appellant to comment thereon. That practice is regrettably unacceptable and do not accord with the imperative requirement of a notice appeal.

[21] The appellant in his notice of appeal dismally fails to show in any detail how the court *a quo* failed to exercise “*exceptional circumspection*” to establish if there are exceptional circumstances which in the interests of justice permit the release of the appellant on bail. Similarly, courts *a quo*’s alleged failure to attach due weight on the fact that the appellant has a fixed address is not at all explained. It is not clear if the complaint or ground is about the fact that the fact that appellant has a fixed address was not taken into account; or it means that it should have been accepted and taken into account as a sole point to release the appellant on bail. The vagueness and ambiguity of the ground is inimical to the established principles enunciated above.

[22] In conclusion on this aspect and topic, it is inevitable and inescapable that appellant’s notice of appeal is invariably defective. It is unfortunately irreparable. The invariable consequence of this current notice of appeal is that any argument that may be advanced may not flow from the notice of appeal which should serve as a guiding document in the process of the appeal. Argument itself should not encroach beyond the limits of the notice of appeal. Accordingly, there cannot be any successful appeal based on a defective notice of appeal. In the premises this appeal must face only one fate, a fate of dismissal on this ground.

[23] Even if I am wrong on the finding I made above, this appeal is destined to fail on other grounds. For the sake of completion and in the alternative, I deal hereafter with other grounds for dismissal of the appeal and relevant legal principles.

The legal framework and relevant facts

[24] Section 65(4) of the Criminal Procedure Act 51 of 1977, as amended provides:

“(4) The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.”

[25] In determining whether or not the onus of proof on the applicant for bail under section 60(11)(a) has been discharged, the court exercises a discretionary power. The appeal court does not have a free hand to do nor will it readily interfere with the discretion of the court of first instance⁸. The functions and powers of a court of appeal hearing bail appeal is similar to those in an appeal against conviction and sentence. This court has to be persuaded that the court *a quo* exercised the discretion which he has wrongly. Although this court may have a different view, it should not substitute its own view for that of the court *a quo* because that would be an unfair interference with the Magistrate’s exercise of his discretion.

[26] Incidences of onus are uppermost to guide the court hearing the appeal. This takes me to the provisions of section 60(11) (a) of CPA. Section 60(11)(a) of CPA provides follows:

“11. 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

⁸ **S V Porthen and others** 2004 (2) SACR 242 (C) SACR 242 Paras 11, 14 and 19.

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;”

It is common cause that offences with which the appellant is charged along with other accused persons fall within the ambit of schedule 6.

[27] Both the provisions of section 60(11)(a) and section 65 of the CPA require harmonious construction for purposes of bail appeal. They must be given a meaning that accords with the acceptable principles of interpretation. **Wallis JA**⁹ said the following about the interpretation:

“18*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective.....”*

[29] In *Cools Ideas*¹⁰ the Constitutional Court held that:

“28. *A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning,*

⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 Para 18

¹⁰ *Cools Ideas 1186 CC v Hubbard and another* 2014 (4) SA 474 (CC) Para 28

unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;*
- (b) the relevant statutory provision must be properly contextualised; and*
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)”.*

[30] The default position is that an accused person charged with a schedule 6 offence must be detained in custody. The accused person can only be released if, after having been given an opportunity, adduces evidence which satisfies the court that exceptional circumstances exist, which in the interests of justice permit his or her release. It flows from this statutory prescript that the bail applicant bears the onus of proof. The onus of proof must be discharged on a balance of probabilities¹¹.

[31] The onus of proof to be discharged by the bail applicant entails dual responsibility under section 60(11)(a) of CPA¹². Firstly, he is legislatively enjoined to satisfy the court that exceptional circumstances do exist; secondly; it must be shown by the bail applicant that exceptional circumstances demonstrate that the interests of justice permit his release on bail. The two requisites of bail application under section 60(11)(a) of CPA must contemporaneously or conjunctively be present or exist, *to wit*, exceptional circumstances and interests in justice for a successful bail application.

¹¹ **S v Yanta** 2006 (1) SACR 737 (TK).

¹² **Lategan v S** (CA&E 193/2023) [2023] ZAEC(M)KHC 125 (19 November 2024) Para 43.

Absence of one requirement may result in the bail applicant being not admitted to bail.

[32] By way of an example, bail applicant may succeed in demonstrating that interests of justice permit his release, but fail to establish that exceptional circumstances do exist for his release on bail under section 60(11) (a) of CPA. The outcome of the lack of that crucial requirement may not avail the applicant to bail. Exceptional circumstances must coexist with the interests of justice which permit the release of bail applicant on bail.

[33] It is the contemporaneous existence of the two requisites that distinguishes bail proceedings arising from the offences listed in schedule 5 governed by section 60(11)(b) of CPA and bail proceedings arising from the offences listed in schedule 6 governed by section 60(11)(a) of CPA. Were it not for the co-existence of two requirements in schedule 6 bail proceedings under section 60(11)(a) of CPA, there would not be any difference between section 60(11)(a) and section 60(11)(b) of CPA. Bail applications for applicants charged with schedule 5 offences would not be different from bail applications for applicants charged with schedule 6 offences. In schedule 6 bail applications, exceptional circumstances must be shown to exist in addition to the requirement of the interests of justice. In schedule 5 bail application only interests of justice need to be proved by the applicant for successful bail application.

[34] For the sake of completion, section 60 (11)(b) of CPA provides as follows:

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

(a)

(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”.

[35] In conclusion in this regard the contextual and purposive reading of the two provisions demonstrate that they are textually, contextually and purposively different. The opening words of section 60(11) (b) of CPA “*in schedule 5 but not in schedule 6*” are not tautologous¹³. Those words underscore the difference between the two provisions¹⁴. They must be given a meaning. They cannot be treated as if they do not exist. No word in a provision should be ignored¹⁵. This now takes me to the argument that was canvassed on behalf of the appellant.

[36] During hearing of this matter, the issues narrow themselves down to the fact that the appellant is the father of two minor children. However, the appellant’s argument sharply focused on one child who is allegedly staying with the appellant at his homestead. It was argued that the appellant is responsible for the maintenance of the minor child. School necessities and clothing were part of his argument. I was asked to understand those facts as constituting exceptional circumstances under section 60(11)(a) of CPA.

[37] There are multiple difficulties not only with these facts, but also with the fact that they constitute exceptional circumstances. Firstly, there is no ground of appeal dealing with the facts relating to appellant’s minor children foreshadowed in the notice of appeal¹⁶. It is impermissible to marshal grounds of appeal over the bar which have not been set out clearly and succinctly in the notice of appeal, no matter how meritorious those might be¹⁷. This point must fail on this point alone.

¹³ ***Ndaba v Ndaba*** 2017 (1) SA 342 (SCA) Para 54.

¹⁴ Section 60(11)(a) and Section 60(11)(b) of Criminal Procedure Act.

¹⁵ ***African Product (Pty) Ltd v AIG South Africa Ltd*** 2009 (3) SA 473 (SCA) Para 13; ***National Credit Regulator v Opperman and others*** 2013 (2) SA (1) SA (CC) Para 99.

¹⁶ ***McLoggan v State*** 2013 (!) SACR 267 (ECG) Para 5-10.

¹⁷ ***Municipality of Thabazimbi v Badenhorst*** (66933/2011) [2024] ZAGPPHC 195 (26 February 2024) Para 12-15.

- [38] Even if it were to be accepted that the appellant may raise a ground from the bar and argue same by ambush to the other party, I would still find that it does not constitute exceptional circumstances.
- [39] Whilst the court *a quo* correctly found that the appellant has no property of his own, he stays at his father's house, the appellant adduced evidence that the child is also staying at his home. Appellant's father is also staying in the same house or property. It has not been suggested that appellant's father is unable to take care of the minor child. Appellant's father is the grandfather of the same minor child who has been providing shelter and accommodation to both the appellant and the minor child. Nothing at all is suggestive of the fact that the appellant is responsible for the clothing and groceries for this minor child. On a balance of probabilities appellant's father who is the child's grandfather is responsible for those necessities. The substantial part of child's life is taken care of by the grandfather and there is no reason why he cannot undertake the remaining responsibilities. It worths mentioning that only R600.00 per month is paid for school transport for the minor child and a paltry sum of R200.00 per annum in respect of school fees. No suggestion that the grandfather cannot afford these two amounts, nor that he is unwilling to pay them.
- [40] No strong argument was made in respect of the other child. She is staying with her maternal family. She is the recipient of the child support grant. The appellant alleges to be paying R300.00 per annum for school fees and R300.00 per month for scholar transport. Nothing more is said about the child. No suggestion that these two paltry amounts cannot be paid by the maternal family which is responsible for the greater part of the child's life, including child's health, school uniform, clothing, groceries, shelter and/or accommodation.
- [41] On the basis of the evidence and lack thereof, I find on a balance of probabilities that the two minor children can be well and properly looked after without the appellant. The appellant did not adduce evidence that his cattle cannot be sold while he is in custody for children's school fees and transport.

[42] I find no fault in court *a quo*'s finding that the appellant had no family, community or occupational ties to the place to which he is to be tried, which is Ntabankulu.¹⁸ No fixed property is alleged to be in the name of the appellant as he has expressly testified that he is staying at his father's house¹⁹.

[43] Save to state that the state has no strong case against him, the appellant placed no version or basis of his defence in his evidence in chief. Even during the cross examination, the appellant contented himself with bare denials. In many instances when a version is put, the appellant would proffer answers in the following forms:

"I do not know or I do not remember". No meaningful answers were given to establish if state's case is weak against him. In this regard the nature and gravity of the charge²⁰, the strength of the state's case against the appellant²¹, and the nature and gravity of the punishment which is likely to be imposed against the appellant becomes very important²². I find no fault in court *a quo*'s finding that all of these may cumulatively serve as an incentive and a motivation for the appellant to attempt to evade trial.

[44] Mere denial of factual allegations by the bail applicant is not sufficient. More is required. He is required to adduce evidence to support any contention by him. However, I make no finding on the guilt or otherwise of the appellant. I address myself only on the aspect of rivalling evidence that was canvassed for consideration by both parties about the strength and weakness of the state's case against the appellant. The ultimate point I am making in that regard is simple that, appellant has not discharged the onus rested on his shoulders to show that exceptional circumstances exist which in the interests of justice permit the release of the appellant on bail. Proof by the appellant

¹⁸ Section 60(6)(a) of Criminal Procedure Act.

¹⁹ Section 60(6)(b) of Criminal Procedure Act.

²⁰ Section 60(6)(f) of Criminal Procedure Act.

²¹ Section 60(6)(g) of Criminal Procedure Act.

²² Section 60(6)(h) of Criminal Procedure Act.

that he would probably be acquitted can serve as an exceptional circumstance. The strength of the state's case is accordingly relevant to the existence of exceptional circumstances²³.

[45] I, therefore, conclude that I am not satisfied that exceptional circumstances exist which in the interests of justice permit appellants release on bail. Section 60(11)(a) and(b) read with schedule 5 and 6 respectively, represent the gravamen of the legislatures intensified battle against serious crimes. Bail applicants who are charged with offences mentioned in these schedules have an uphill battle particularly those to whom schedule 6 applies²⁴.

[46] In Peterson²⁵an attempt to define the word exceptional circumstances was made in the following words:

*“55....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. This depends on their context and on the particular circumstances of the case under consideration.”*²⁶

[47] Whilst exceptionality of the circumstances are a very important consideration in schedule 6 bail application, context and particular circumstances of the case under consideration are too important considerations. Exceptional circumstances, context and particular circumstances of the case feed of each other. Context in law is everything.²⁷ I have briefly outlined above the facts of this case, and came to a conclusion that they do not constitute exceptional circumstances contemplated by section 60(11)(a) of CPA.

²³ **W v Minister of Police** 2015 (1) ALL SA 68 (SCA); 2015(1) SACR 409 (SCA) Para 3; S v Jonas 1998 (2) SACR 677 (SE) at 678.

²⁴ Hiemstra's Criminal Procedure Page 9-12

²⁵ **S v Peterson** 2008 (2) SACR 355 (C) Para 55

²⁶ **Mtengwana v S** (CA&R 91/2023) [2023] ZAECHMHC 68 (12December 2023)

²⁷ **Minister of Home Affairs and others v Scalabrini Centre Cape Town and others** 2013 (6) SA 421 (SCA) Para 89.

[48] Exceptional circumstances must be circumstances which are not found in the ordinary bail application but pertain peculiarly to an accused person's specific application. What a court is called upon to do is to examine all the relevant considerations as a whole in deciding whether an accused has established something out of the ordinary or unusual which entitles him to a relief under section 60(11)(a) of CPA.²⁸

[49] In a different context, the concept of exceptional circumstances was subject of discussion. Zondi JA²⁹ had this to say:

"14. The concept of exceptional circumstances is not defined in the Act. In my view the concept is sufficiently flexible to be considered on a case by case basis, since circumstances that may be regarded as 'ordinary' in one case, may be treated as 'exceptional' in another. This may explain the reason for the reluctance by the courts to lay down a general rule". In Liesching and Others v The State [2018] ZACC 25; 2019(4) SA 219 (CC) the Constitutional Court in considering the concept of 'exceptional circumstances' within the context of S17(2) (f) of the Act referred to MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas and Others 2002 (6) SA 150 (C) Thing J distilled the principles that emerged from the survey of case law relating to the meaning of the concept of 'exceptional circumstances' at 156E-157C:

1. *What is ordinarily contemplated by the words 'exceptional circumstances' is something out of ordinary and of an unusual nature; something which is exceptional in the sense that the general rule does not apply to it; something uncommon, rare or different: besonder, seldsaam," uisonderlik' (sic) or in hoe mate ingewoon."*
2. *To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*

²⁸ **S v H** 1999 (2) SA (SACR) 72 (W) at 77 E-F.

²⁹ **Premier for the Province of Gauteng v Democratic Alliance** 2021 ALL SA 60 (SCA) Para 14.

3. *Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.*
4. *Depending on the context in which it is used, the word exceptional has two shades of meaning: the primary meaning is unusual or different, the secondary meaning is markedly unusual or specially different.*
5. *Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the legislature by applying a strict rather than a literal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.”³⁰*

[50] In *Knoop NO*³¹ the Supreme Court of appeal held that in the context of S18(3)³² exceptional circumstances:

- “(a) *must be something that is sufficiently out of the ordinary and of an unusual nature to warrant a departure from the ordinary rule that the effect of an application for leave to appeal or an appeal is to suspend the operation of the judgment appealed from,*
- (b) *must be a deviation from the norm.*
- (c) *must arise from the facts and circumstances of the particular case.”*

³⁰ *Johannesburg Society of Advocates v Nthai* 2021 (2) SA 343 (SCA) Para 102.

³¹ *Knoop NO v Gupta (Execution)* 2021 (3) SA 135 (SCA) Para 46.

³² Superior Court Act 10 of 2013.

[51] it is decipherable from these authorities that the weight of judicial opinion favours the view that the normal principle applicable to normal bail application³³ dealing only with the interests of justice are insufficient in a schedule 6 bail application contemplated in section 60(11) (a) of CPA.

[52] The words used in section 60(11) (a) of CPA that “*the accused adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release*” denote that subjective jurisdictional fact must be established before the accused’s release on bail. This category of jurisdictional facts is rooted on the fact that the empowering statute has entrusted the repository of the power with the function to determine whether in its subjective view the prerequisite fact or state of affairs existed or not. Expressions often used by legislature to express this intent are e.g., “*in his or her opinion or if he or she is satisfied the particular fact or state of affairs exist.*”³⁴In the absence of such preconditions or jurisdictional facts, the authority effectively has no power to act at all³⁵. On the facts of the case the court would permit the release of the appellant only if it is of the subjective view that exceptional circumstances which in the interests of justice permit the release of the appellant on bail do exist. I have found that the appellant has failed to satisfy this jurisdictional fact, and accordingly a power to release him cannot be exercised. Accordingly, the appeal cannot succeed.

Order

[53] In the result I make the following order:

53.1 The appellant’s late filing of the notice of appeal is hereby condoned.

53.2 The bail appeal is dismissed.

³³ Section 60(4) and 60(11)(b) of CPA.

³⁴ **Kimberly Junior Senior Secondary School and another v Head of Northern Cape Education Department and others 2010** (1) SA 217 (SCA) Para 13.

³⁵ **Paola v Jeeva NO** 2004 (1) SA 396 (SCA) Para 11, 14 and 16.

A.S ZONO
ACTING JUDGE OF THE HIGH COURT

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Matter heard on : 22 November 2024
Delivered on : 21 January 2025