



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Appeal case number: **A76/25**

Magistrates Court case number: **B103/25**

In the matter between:

SIPHOSIHLE BUNU

Applicant

and

THE STATE

Respondent

Coram: Acting Justice T Sarkas

Heard: 13 June 2025

Delivered electronically: 29 July 2025

JUDGMENT

SARKAS AJ:

[1] This matter concerns an appeal against the decision of a magistrate refusing the appellant's release on bail.

BACKGROUND

[2] The appellant was arrested on 10 February 2025 and faces charges of murder, and robbery with aggravating circumstances.

[3] The appellant appeared in the Atlantis Magistrates' Court on 24 and 28 February 2025, and was legally represented during the bail proceedings.

[4] The appellant's evidence in support of his bail application was on affidavit. The affidavit sets out that:

4.1. He is 24 years old, and has lived with his family at the given address for 12 years.

4.2. He has been employed for two years.

4.3. He has no dependants, and is not in possession of a passport.

4.4. He has no previous convictions, no pending cases, and no outstanding warrants of arrest against him.

4.5. He will plead not guilty to the murder charge.

4.6. It is in the interests of justice to permit his release on bail because he is not a flight risk, has a clean record, and has been employed for two years

[5] The appellant also annexed a timesheet to his affidavit which shows that he was working:

5.1. from 17:44 on 6 February 2025 to 06:07 on 7 February 2025;

5.2. from 17:46 on 7 February 2025 to 06:02 on 8 February 2025.

[6] In this regard, at the bail application hearing, the appellant's legal representative referred to the timesheet as showing that on the days indicated, the accused was at work. In response, the State argued that the appellant was not at work during the day when the deceased went missing.

[7] The investigating officer, who gave *viva voce* evidence on behalf of the State at the bail hearing in the court *a quo*, testified that:

- 7.1. On 9 February 2025 he was called out to the Old Darling Road (also called the Mamre Road), where the body of the deceased had been found.
- 7.2. The deceased's wife had informed the investigating officer that the deceased, an Uber driver, had gone to work on the morning of 6 February 2025, and did not return.
- 7.3. The tracker for the vehicle driven by the deceased showed that on 6 February 2025, the vehicle was stationary on Old Darling Road, where the body was found, at 17:00, for about 15 minutes.
- 7.4. According to the appellant's cousin, who has given a statement, on 7 February 2025 at about 14:00, the appellant arrived at his aunt's house driving the vehicle that was later identified as the vehicle that had been driven by the deceased the day before. The appellant was accompanied by two other male persons who were travelling in another vehicle. The appellant informed his cousin that the appellant had bought the vehicle and wanted to store it there, out of sight, in order to repair it. The appellant also asked his cousin not to tell anyone because it was a surprise.
- 7.5. The owner of the vehicle had informed the investigating officer that on 8 February 2025, he had received a notification from the tracking company that the tracker had been tampered with. The owner then tracked the stolen vehicle to the appellant's aunt's house, and called for police assistance.
- 7.6. When the police arrived there on 8 February 2025, the persons working on the stolen vehicle fled. When the stolen vehicle was found, the VIN numbers had been tampered with, and a false VIN number stamped on the vehicle.
- 7.7. At the stage of the bail application, forensics and the post-mortem were still outstanding, and the appellant is not directly linked to the murder.
- 7.8. However, the appellant had registration papers issued in his name on 13 January 2025 that contained the false VIN number that had been stamped on the stolen vehicle.
- 7.9. This indicated that the appellant had planned the offence, and it led to the death of somebody. The deceased was brutally murdered for the

stolen vehicle. The persons who murdered the deceased were dangerous, and it was not known if the appellant was connected to the people that committed the murder.

- 7.10. The appellant refused to disclose how he came to be in possession of the stolen vehicle.
- 7.11. The appellant and the witnesses were very well known to each and the investigating officer believed that there would be interference with State witnesses.
- 7.12. When the investigating officer interviewed the appellant's cousin, the witness indicated that the accused's mother had told the witness not to give a statement against her son, and that is evidence of indirect interference with the State witness.

- [8] On 28 February 2025, the magistrate delivered judgment, refusing the bail application. The court observed that that the appellant had placed no exceptional circumstances before the court, and that there is a likelihood that the appellant would interfere with and intimidate witnesses.

THE LAW

- [9] It is common cause that the bail application fell within the ambit of Schedule 6 to the Criminal Procedure Act 51 of 1977 ('CPA'). By virtue of s 60(11)(a) of the CPA, the court was obliged to order that the appellant be detained in custody until he was dealt with in accordance with the law, unless, having been given a reasonable opportunity to do so, he adduced evidence which satisfied the court that exceptional circumstances existed which in the interests of justice permitted his release.
- [10] Section 60(11)(a) *'imposes an onus on the applicant for bail to adduce evidence to prove to the satisfaction of the court the existence of exceptional circumstances justifying his release on bail. The court must also be satisfied*

that the release of the accused is in the interests of justice. The standard of proof is on a balance of probabilities.’¹

[11] In *Killian v S*, the court pointed out that 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, because the discharge of the onus is a central consideration in s 60(11) applications.²

[12] As to the meaning of exceptional circumstances in s 60(11)(a) of the CPA, the court in *S v Petersen* explained that:

‘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.’³

[13] In *S v Josephs* the court held that:

‘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.’⁴

[14] The approach to such an enquiry was addressed in *S v H* as follows:

‘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

¹ *Killian v S* [2021] ZAWCHC 100 (24 May 2021) (**Killian**) at para 3, with reference to with reference to *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC) (**Schietekat**).

² *Killian* at para 13.

³ *S v Petersen* 2008 (2) SACR 355 (C) at para 55.

⁴ *S v Josephs* 2001 (1) SACR 659 (C) at 668I.

*established something out of the ordinary or unusual which entitles him to relief under section 60(11)(a).'*⁵

[15] The court in *S v Branco* highlighted that:

*'It must however be borne in mind that any court seized with the problem of whether or not to release a detainee on bail must approach the matter from the perspective that freedom is a precious right protected by the Constitution. Such freedom should only be lawfully curtailed if "the interests of justice so require". (See s 35(1) of the Constitution, which entitles any arrested or detained person 'to be released from detention if the interests of justice permit; subject to reasonable conditions'.) The fundamental objective of the institution of bail in a democratic society based on freedom is to maximise personal liberty.'*⁶

[16] Finally, in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*, the Constitutional Court stated that *'[a]n applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant, or anything else that is particularly cogent.'*⁷

[17] Section 60(4) of the CPA provides that the interests of justice do not permit the release from detention of an accused where one or more of the specified grounds are established.

[18] The courts must look to the five broad considerations mentioned in subsections 60(4)(a)–(e), and then weigh up the factors for and against bail as required by sections (9) and (10).⁸

⁵ *S v H* 1999 (1) SACR 72 (W) at 77E–F.

⁶ *S v Branco* 2002 (1) SACR 531 (W) at 532i - 533a.

⁷ *Schietekat* at para 75.

⁸ *Krejcir v S* [2015] JOL 33670 (GSJ) at para 10, with reference to *S v Schietekat* 1999 (4) SA 623 (CC) (*Schietekat*).

[19] Section 60(7) of the CPA sets out the considerations which may be taken into account when considering whether there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence. These include:

- 19.1. the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him;
- 19.2. whether the witnesses have already made statements and agreed to testify;
- 19.3. whether the investigation against the accused has already been completed;
- 19.4. the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;
- 19.5. how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be.

[20] Section 60(9) of the CPA goes on to provide that in considering the question, the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the listed factors.

[21] Section 60(10) of the CPA sets out the court's duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice: Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any person against whom the offence in question has allegedly been committed.

[22] This appeal lies in terms of s 65 of the CPA. Section 65(4) of the CPA provides that: *'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'*.

[23] The appeal court's powers to consider an appeal against the refusal of bail in where s 60(11)(a) of the CPA is implicated is addressed in *Porthen and others v S* as follows:

23.1. *'In determining whether or not a bail applicant has established the existence of "extraordinary circumstances" within the meaning of section 60(11)(a) of the CPA, the court has to make a decision on the facts judged within the context of the particular case. Facts which might be sufficient in one case, might not be enough to warrant the grant of the bail application in the peculiar context of another matter.'* The exercise required of the court entails the making of a 'value judgment' as to whether the proven circumstances are of such a nature as to be 'exceptional'.⁹

23.2. *'...in a case like the present where the magistrate refused bail because he found that the appellants had not discharged the onus on them in terms of s 60(11)(a) of the CPA, if this court, on its assessment of the evidence, comes to the conclusion that the applicants for bail did discharge the burden of proof, it must follow (i) that the lower court decision was "wrong" within the meaning of s 65(4) and (ii) that this court can substitute its own decision in the matter.'*¹⁰

23.3. *'...it is still necessary to be mindful that a bail appeal, including one affected by the provisions of s 60(11)(a), goes to the question of deprivation of personal liberty. In my view, that consideration is a further factor confirming that s 65(4) of the CPA should be construed in a manner which does not unduly restrict the ambit of an appeal Court's competence to decide that the lower court's decision to refuse bail was "wrong".'*¹¹

[24] Accordingly, each case must be decided on its own peculiar facts, with reference to the principles set out above.

⁹ *Porthen and others v S* [2003] 3 All SA 725 (C) (**Porthen**) at paras 12-13.

¹⁰ *Porthen* at para 5.

¹¹ *Porthen* at paras 16-17.

THE GROUNDS OF APPEAL

[25] The grounds for appeal are that the magistrate erred:

- 25.1. In refusing bail notwithstanding that none of the factors set out in s 60(4) of the CPA were established by the State.
- 25.2. By placing emphasis on the seriousness of the offence when the appellant has a clean record and there is no likelihood that were he to be released on bail, he would commit offences.
- 25.3. In not considering that the docket is in the possession and care of the investigating officer and therefore the appellant will not have the means to access and destroy any evidence in the docket.
- 25.4. In not considering that there was no evidence to prove any likelihood that the appellant had attempted to indirectly influence the witnesses.
- 25.5. In not exercising her discretion to '*restrict the physical presence of the accused outside of Khayelitsha to an alternative address away from the State witnesses*'.

[26] Having considered the application, the record, and the magistrate's judgment, the following observations are made:

- 26.1. The magistrate determined the bail application with reference to various authorities dealing with the interests of justice, the weight to be attributed to evidence tendered by affidavit where *viva voce* evidence is adduced, and what constitutes exceptional circumstances
- 26.2. The magistrate had due regard to the appellant's affidavit, noting that nowhere in the affidavit is it indicated what the court should regard as exceptional circumstances, nor does the affidavit stipulate that the court should take into consideration the appellant's ordinary circumstances as grounds for exceptional circumstances.
- 26.3. With reference to the timesheet annexed to the appellant's affidavit, the magistrate explained that because of the timeframes in evidence, the worksheet did not substantiate an alibi.

26.4. The magistrate concluded that no exceptional circumstances were placed before the court, and that, based on the testimony of the investigation officer, the State had a strong case against the appellant.

26.5. The magistrate further concluded that the State had provided sufficient evidence that there could be further tampering with the witness should the appellant be released on bail. In this regard, the magistrate explained that the appellant's mere statements on affidavit that he would not do so could not be tested under cross-examination, and more weight was given to the investigating officer's testimony.

[27] I am respectfully in agreement with the magistrate's findings, which are consonant with the Supreme Court of Appeal's approach in *Mathebula v S*, where it was held that:

'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: ...; second, both the denial of complicity and the alibi defence rested solely on his say-so with neither witnesses nor objective probabilities to strengthen them. ...

... 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...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.

*... The remainder of the personal factors urged on us, are neither unusual or such as singly or together warrant release of the appellant in the interest of justice. Parroting the terms of subsec (4) of s 60, as he did, does not establish any of those grounds, without the addition of facts that add weight to his ipse dixit.'*¹²

¹² *Mathebula v S* 2010 (1) SACR 55 (SCA) at paras 11-15.

[28] I am therefore not persuaded that the magistrate was wrong in her refusal of the appellant's bail application. The appellant's bald enumeration of his personal circumstances, the strength of the *prima facie* State case against him, and the substantial risk of interference with State witnesses should bail be granted, constituted cogent reasons for the refusal of bail, particularly since the onus was on the appellant.

ORDER

[29] I accordingly make the following order:

1. The appeal against the refusal of the magistrate to grant bail to the appellant is dismissed.

ACTING JUDGE T SARKAS

For appellant: Adv S **Nosilela**
Instructed by: Ralawe Attorneys

For respondent: Adv C **Blankenberg**
Instructed by: Directorate of Public Prosecutions, Western Cape