

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: A60/2025

Delete whichever is not applicable

(1) Reportable: No.

(2) Of interest to other judges: No

(3) Revised.

22 May 2025

Date

Signature

In the matter between:

THULANI SANDILE MONAMUDI

APPELLANT

v

STATE

JUDGMENT

MUNZHELELE J

[1] The appellant, Thulani Sandile Monamudi is an awaiting trial prisoner charged with robbery with aggravating circumstances as intended in terms of section 1 of The Criminal Procedure Act 51 of 1977. The appellant is currently appearing at Nigel Magistrate Court while the matter remains under investigation. The appellant applied for bail, which was refused on 12 December 2024 by Magistrate Laws. It is against this refusal that the appellant brings his appeal before this court.

[2] During the bail application, the appellant was expected to demonstrate to the court a quo that exceptional circumstances exist as prescribed in terms of schedule 6 that in the interest of justice, the appellant should be released on bail. The provisions of section 60(11) (a) of the Criminal Procedure Act 51 of 1977 are applicable.

[3] Section 60(11) (a) reads as follows:

"(11) Notwithstanding any provisions of this Act, where an accused is charged with an offense intended -

(a) in Schedule 6, the court must order that the accused be detained in custody until he or she has been dealt with in accordance with the law, unless the accused, after being given a reasonable opportunity to do so, presents evidence that convinces the court that there are exceptional circumstances that permit his or her release in the interests of justice.

[4] An appeal against the refusal of bail is governed by section 65(4) of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as "the Criminal Procedure Act"), which 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 incorrect. In such event, the Court or Judge shall render the decision that, in its or his opinion, the lower court should have rendered."

[5] The approach of a court hearing a bail appeal is well-established. In *S v Barber* 1979 (4) SA 218 (D) at 220 E-H, it was stated:

"It is well known that the powers of this Court are largely limited when the matter is presented on appeal rather than as a substantive application for bail. This Court must be persuaded that the magistrate exercised his discretion improperly. Accordingly, while this Court may hold a different view, it should not substitute its own opinion for that of the magistrate, as doing so would constitute an unfair interference with the magistrate's exercise of discretion. It should be emphasized that, regardless of this Court's own views, the pertinent question is whether it can be concluded that the magistrate, who possessed the discretion to grant bail, exercised that discretion improperly..."

[6] It must be stated that the onus to establish the need for release on bail rests with the appellant. It was also common cause between the parties that the standard of proof is on a balance of probabilities. The appellant is required to demonstrate, on a balance of probability, that exceptional circumstances exist to justify his release on bail at the court a quo. This standard obligates the appellant to show, on a balance of probabilities, that his release on bail is warranted due to the presence of exceptional circumstances, which, in the interest of justice, require his release.

[7] The appellant, during the arguments and in his heads of argument, submits that the state's case against him is weak. He contends that there is insufficient evidence to

establish the identification of the appellant as the perpetrator. The evidence presented by the state is circumstantial. The appellant's counsel argued that the complainant described the perpetrator, Thulani, as being of dark complexion, whereas the appellant who was arrested is of light complexion. In light of this, the appellant submits that the refusal of bail by the court a quo constitutes a misdirection. The court a quo refused bail on the grounds that there were outstanding accused persons yet to be arrested.

[8] The respondent contends that the appellant's counsel was incorrect in stating that the complainant described the appellant as dark in complexion. The respondent further argues that the refusal of bail was not solely based on the issue of unarrested co-accused persons, but also due to the appellant's application for tertiary education, which was considered by the court. Further that, he cannot raise the issue of a weak case during arguments. The respondent denies any error on the part of the court a quo in its decision to refuse bail.

[9] The court a quo refused bail on the grounds that the appellant failed to demonstrate, in his affidavit, the weakness of the state's case, which he had an obligation to do. Furthermore, the court found that the appellant's intention to apply for tertiary education could not be regarded as an exceptional circumstance, as the appellant should have submitted such an application prior to his arrest, and, by the time of his arrest, he should have already received the outcome of his application to tertiary institutions. Lastly, the appellant did not demonstrate in his affidavit that he was likely to be acquitted, a point which the court found to be a failure on his part. Consequently, the court found that no exceptional circumstances existed to justify the release of the appellant on bail in the interests of justice.

[10] In *S v Petersen* 2008 (2) SACR 355 (C) Van Zyl J, writing for a full bench, observed (at [55]) that:

'On the meaning and interpretation of "exceptional circumstances" in this context, there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking, the word "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. In the context of s 60(11) (a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for a certain measure of flexibility in the judicial approach to the question. See *S v Mohammed* 1999 (2) SACR 507 (C) ([1999] 4 All SA 533) at 513f–515f. In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all the applicable legal criteria.'

[11] The sole issue upon which this appeal is based concerns the alleged weakness of the state's case against the appellant. I am in agreement with the court a quo that the appellant should have articulated his prima facie case regarding the weakness of the state's case in his affidavit in support of the bail application. This would have enabled the respondent to be properly informed of the appellant's assertions and to adequately address them.

It is well-established that the foundation of application proceedings lies in the affidavit, which serves as the primary document wherein the parties present their case and set forth the specific issues for determination by the court. This process ensures transparency and allows the opposing party the opportunity to respond to those issues. Legal arguments advanced during the hearing should be confined to the facts and issues that have been clearly established in the affidavit. The introduction of new matters at the hearing, particularly those not previously raised in the affidavit, risks causing prejudice to

prejudice to the opposing party, who may not have had an opportunity to respond in an informed manner.

The only exception to this principle is where new facts are directly linked to those presented in the affidavit and do not result in prejudice to the opposing party. In this case, the argument that the circumstantial evidence was weak, was expected to constitute the exceptional circumstance justifying the grant of bail. However, it is clear that the appellant failed to present any supporting evidence for this assertion in his affidavit. Consequently, the court a quo was correct in rejecting this argument as an exceptional circumstance, and rightly pointed out that the appellant should have raised the issue of the weakness of the state's case within the affidavit prior to relying on it during the arguments.

[12] Whenever s 60(11) is applicable, and the issue of bail has to be decided on the question whether the appellant has discharged the burden of proof placed upon him by s 60(11) (a) and 'where an appellant, taking into account what is already on record, does not even make out a *prima facie* case, there is no duty on the respondent to present evidence in rebuttal. (see generally *S v Mbele & another* 1996 (1) SACR212 (W) 237f–g). The appellant is expected to adduce acceptable evidence that shows that the State's case against him is non-existent or weak. The appellant failed to discharge the onus in this case. The court a quo was right in dismissing his application as lacking exceptional circumstances.

[13] In *S v Mathebula & another* 2010 (1) SACR 55 (SCA) at para [12] it was again quoted with approval the decision that was held in *S v Viljoen* 2002 (2) SACR 550 (SCA) at 561f–g that until a bail applicant has set up a *prima facie* case for his release, there is no call on the prosecution to rebut his evidence to that effect.

[14] In conclusion, the purported weaknesses in the respondent's case are unfounded. I find that the court a quo's assessment of the entirety of the evidence presented in the bail application was properly conducted, and I find no error in its decision that the appellant failed to demonstrate exceptional circumstances warranting his release on bail. The appellant did not establish a prima facie case in support of his bail application.

[15] As a result the following order is made:

1. Bail appeal is dismissed.
2. The magistrate's order is confirmed.



M. Munzhelele

Judge of the High Court, Pretoria

Heard: 22 May 2025

Delivered: 22 May 2025

Counsel for the State: Adv. Rancho

Counsel for the Accused: Adv. Kgagara