

REPUBLIC OF SOUTH AFRICA



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

CASE NO: A191/2024

DPP REF NUMBER: 10/2/5/2-BA7/25

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES
	
<u>04-08-2025</u> DATE	<u>PD. PHAHLANE</u> SIGNATURE

In the matter between:

TSHEPO GORDON MHLANGA

APPELLANT

and

THE STATE

RESPONDENT

Judgment – Bail Appeal

PHAHLANE, J

[1] This is an appeal lodged in terms of section 65 of the Criminal Procedure Act¹ (“the CPA”) against the judgment of the Learned Magistrate, Mrs Laws, sitting at Nigel Magistrate court on 07 October 2024, in which the court dismissed the appellant’s application to be released on bail.

[2] The above section makes provision for an appeal to a superior court against the refusal of bail in a lower court. The jurisdictional requirement for the appeal court to interfere with the decision against which the appeal is sought is set out in section 65(4) of the CPA 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 wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given”.

[3] The appellant is facing two charges, namely, robbery with aggravating circumstances involving the use of a firearm during the hijacking of a motor vehicle as well as kidnapping. The count of robbery with aggravating circumstances is one of the offences listed under Schedule 6² of the CPA and accordingly, the bail application falls to be dealt with in terms of section 60(11)(a)³. This section places the **onus** on the accused to prove on a balance of probabilities, and to adduce evidence which satisfies the court that exceptional circumstances exist, which in the interests of justice entitles him to be released on bail, failing which he must be detained in custody.

[4] In *S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat*⁴ the following instructive passage in the judgment of Krigler J, is noted:

¹ Act 51 of 1977

² The offences listed under Schedule 6 include: Robbery, involving –
(a) the use by the accused or any co-perpetrators or participants of a firearm.
(b)
(c) the taking of a motor vehicle

³ Section 60(11)(a) provides: “Notwithstanding any provision of this Act, where an accused is charged with an offence referred to 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”.

⁴ 1999 (4) SA 623 (CC); 1999 (2) SACR 51 (CC)

“[61] Under subsection (11)(a), the lawgiver makes it quite plain that a formal onus rests on a detainee to adduce evidence and satisfy the court that exceptional circumstances exist justifying his release on bail.

[64] Section 60(11)(a) does more than restate the ordinary principles of bail. It states that where an accused is charged with a schedule 6 offence, the exercise to be undertaken by the judicial officer in determining whether bail should be granted is not the ordinary exercise established by subsection 60(4) - (9) (and required by section 35(1)(f)) in which the interests of the accused in liberty are weighed against the factors that would suggest that bail be refused in the interests of society. Section 60(11)(a) contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail, will be resolved in favour of the denial of bail, unless “exceptional circumstances” are shown by the accused to exist. This exercise is one which departs from the constitutional standard set by s 35(1)(f). Its effect is to add weight to the scales against the liberty interest of the accused and to render bail more difficult to obtain than it would have been if the ordinary constitutional test of the “interests of justice” were to be applied”.

[5] The SCA in ***S v Botha and Another***⁵ stated the following: “In terms of both s 60(11)(a), there is a formal burden of proof on an accused applying for bail "to adduce evidence to the satisfaction of the court, on a balance of probabilities that "extraordinary circumstances" exist which warrant his or her release, and that such extraordinary circumstances warrant release in the interests of justice”.

[6] In the current matter, the appellant was expected by the court *a quo* to prove on a balance of probabilities that there are exceptional circumstances which in the interest of justice permits his release on bail. Exceptional circumstances as a concept have not been defined by the legislator, but over the years, our courts have acknowledged and accepted that

⁵ 2002 (2) SA 680 (SCA); 2002 (1) SACR 222 (SCA) at para 20 (30 November 2001)

the word “exceptional”, is indicative of something unusual. The meaning and interpretation was given by the court in **S v Petersen**⁶ as follows:

“Generally speaking, “exceptional” is indicative of something unusual, extraordinary, remarkable, peculiar or simply different... In the context of section 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 Mohamed 1999(2) SACR 507 (C) 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”.

[7] Accordingly, what will constitute exceptional circumstances will depend on the facts of each particular matter in order to determine whether they have been shown to exist. The court is required to consider and weigh up all relevant material which has been put forward by an accused as a whole.⁷ So, the true enquiry is whether the appellant’s circumstances are sufficiently unusual or different as to warrant his release on bail. In this regard, the SCA in **S v Bruintjies**⁸ held that:

“What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstance which remove the applicant from the ordinary run and

⁶ 2008 (2) SACR 355 (C) at [55-56]; See also: S v Josephs 2001 (1) SACR 659 (c) at 6681; S v Viljoen 2002 (2) SACR 550 SCA); and S v Mohammed 1999 (2) SACR 507 (C)

⁷ S v Mohammed 1999 (2) SACR 507 (C).

⁸ 2003 (2) SACR 575 (SCA) at 577 (25 February 2003).

which serve at least to mitigate the serious limitation of freedom which the legislature has attached the commission of schedule 6 offence”.

At 577 the court stated that: –

“If, upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interest of justice, warrant his release, the appellant must be granted bail.”

[8] It is common cause that the appellant was legally represented at the bail hearing before the magistrate. He presented his evidence in an affidavit and placed the following personal circumstances before the court:

- (a) He is 47 years old, and is not married
- (b) He has three dependants, one of which is a minor.
- (c) He has no previous convictions and no pending cases.
- (d) He is unemployed and survives on his late mother’s Provident Fund.
- (e) He does not have any immovable property
- (f) He will comply with the bail conditions if he is released on bail.
- (g) He does not have any family ties or relatives outside the Republic.

[9] The appellant denied knowledge of the hijacking incident or having committed the offence and raised an alibi stating that he was at home with his girlfriend on the day of the incident. He contended that the circumstances of this case are such that the State does not have a strong case against him and he should as such be released on bail.

[10] Mr Kgagara appearing for the appellant argued that the identity of the appellant is in dispute because the appellant denied having committed the offence and thus making the State’s case weak. In this regard, he argued that the State failed to prove that it has a strong case against the appellant and submitted that: – ‘the fact that the appellant has never been convicted of any offence, that aspect should be taken as an exceptional circumstance that entitles him to be released on bail’.

[11] I do not agree with the arguments and submissions made on behalf of the appellant for the following reasons:

- (a) The issue of identity goes to credibility, and it is an aspect which must be determined by the trial court.
- (b) The appellant's bare denial of the offence is not an exceptional circumstance, but it is his version that will be tested by the trial court.
- (c) His reliance on the "weakness of the State's case" requires him to prove more than just that. In order to successfully challenge the merits of such a case in bail proceedings an applicant must prove on a balance of probability that he will be acquitted. It follows that there is no onus on the State at this stage because section 60(11)(a) specifically places that burden on the bail applicant.

[12] The SCA in *Mathebula v S*⁹ held that "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, nor is an attack on the prosecution case at all necessary. 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".

[13] Having regard to the above, Mr Kgagara seem to ignore the fact that a court seized with a bail application fulfils a different function from a trial court. Its role is **not** to determine the guilt or innocence of an accused person. The court's concern and focus at the bail stage is to decide whether the interest of justice permits the release of the accused pending trial. A presumption in favour of the bail applicant's innocence plays no part in that exercise.

[14] The question of the burden of proof to establish the strength of the State's case has been dealt with by the court in *Mathebula v S supra*, where the court held that:

"[11] 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-

⁹ 2010 (1) SACR 55 (SCA)

examination and, therefore, less persuasive: cf S v Pienaar 1992 (1) SACR 178 (W) at 180h; 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. The vulnerability of unsupported alibi defences is notorious, depending as it does, so much upon the court's assessment of the truth of the accused's testimony.

[12] 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". (underlining added for emphasis)

[15] As indicated above, the appellant did not testify under oath but presented his evidence in an affidavit which could not be subjected to test by cross-examination. In *Killian v S*¹⁰ the court dealt with the dangers inherent in the use of an affidavit in bail proceedings where section 60(11) of the CPA applies and stated the following: *"In cases where section 60(11) applies, there is consequently a true onus on the applicant to prove facts establishing exceptional circumstances, and the applicant should 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 section 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."* (underlining added for emphasis)

[16] In opposing bail at the court *a quo*, the respondent relied on the affidavit and *viva voce* evidence of the Investigating officer, Sergeant Knox Ndabeni. He stated in his affidavit that the incident occurred on 10 September 2023 around 21:30 in Daduza at Ramaphosa street wherein the complainant and his friends were accosted by three suspects who pointed them with firearms. The complainant was dragged to the backseat of his vehicle and the suspects drove off with him. He was later dropped off in the same area of Dabuza and proceeded to the police station where he opened a case. On the 13th of September, the complainant was driving on the same street where he was hijacked, and saw one of the people who hijacked

¹⁰ [2021] ZAWCHC 100 at para 13 (24 May 2021).

him driving a black BMW with registration number [.....] This person was the appellant.

[17] The complainant took the registration number of the BMW and contacted the police who then managed to get the house address **in which** the BMW was registered. The police visited this house several times looking for the appellant without success. Sergeant Ndabeni further noted in his affidavit that the police only managed to arrest the appellant a year later on 15 September 2024. An identity parade (“ID parade”) was arranged and the appellant was positively identified by the complainant. It is noted that the complainant identified the appellant because he managed to see his face clearly on the day of the incident – with the assistance of the illuminating light inside the vehicle because the vehicle door was not properly closed during the hijack when they were driving away. He further noted that the degree of violence implicit in the charge sheet as it relates to how the complainant was threatened and pointed with a firearm when he was hijacked and kidnapped, is one of the issues that should be taken into consideration and persuade the court not to grant the appellant bail. Sergeant Ndabeni submitted that it will not be in the interest of justice to admit the appellant to bail and noted the following:

“There is high prevalence of the offence of car hijacking in Daduza in this district as evident from the statistics. Four cars were hijacked in the month of September only”.

[18] Sergeant Ndabeni also gave *viva voce* evidence and testified that he went several times to the house address in Ramaphosa street that was identified as the place where the appellant allegedly resided but could not find him. He explained that on the 15th of September 2024 his commander, captain Magiba and other commanders were conducting an operation in search of the appellant, and he was found at the same address in Ramaphosa street. The appellant was found wearing the necklace or traditional beads described by the complainant when he reported the matter to the police on the day of the incident. The witness testified that he went to the appellant to inform him of the planned ID parade that would be conducted and the reasons thereof. According to him, the ID parade was conducted by warrant officer Nene, and he (Sergeant Ndabeni) was informed thereafter that the appellant had been positively identified at the parade. He said he approached the appellant at the police cells where he was

detained, and the appellant confirmed that he had been pointed out at the ID parade, and he thereafter proceeded to charge him.

[19] Responding to the question whether the appellant was a flight risk, he responded in the affirmative and explained that – not only did he visit the appellant’s house address several times, but he also left a message for the appellant by writing his details on a “call note” which he attached to the padlock at the gate.

[20] It is worth mentioning that the appellant noted in his bail affidavit that he should be committed to bail because he will not interfere with witnesses; endanger the safety of any person or the public; evade trial; and that he is not a flight risk.

[21] Upon evaluating the evidence, the court *a quo* could not find any exceptional circumstances or any fact that could be deemed to be extraordinary. It dismissed the bail application and held that the appellant was a flight risk. The court’s decision was based on the fact that the police only managed to trace and arrest the appellant after a year – having gone to his place on several occasions and could not find him. It held that this was an attempt by the appellant not to be arrested, and that he was trying to evade or avoid arrest in order to delay the process. The court *a quo* further took into account that a message was left for the appellant to contact the police, and he failed to do so.

[22] Mr Kgagara submitted that the court *a quo* misdirected itself in refusing to grant bail and finding that the appellant is a flight risk. The basis of this submission is that there was no evidence led by the State to show that the appellant is a flight risk. Counsel further submitted that the court *a quo* misdirected itself in not considering that the personal circumstances of the appellant constitute exceptional circumstances which in the interest of justice entitles him to be admitted to bail.

[23] The respondent on the other hand submitted, and correctly so, that the court *a quo* did not misdirect itself because the appellant’s affidavit before the court *a quo* did not point a single factor as an exceptional circumstance to be considered by the court, but instead, the affidavit only dealt with the factors referred to in section 60(4) and did not meet all the

requirements of section 60(11)(a). Mr Molokomme further submitted that the appeal is *void* of merit and that the court *a quo* was correct in finding that the appellant is a flight risk. He also submitted that the court *a quo* exercised its discretion correctly because it evaluated all the evidence before it when it came to a finding that it would not be in the interests of justice to admit the appellant to bail.

[24] I have taken due regard to the submissions made on behalf of the appellant. If one looks at the personal circumstances of the appellant and what has been submitted by his counsel as exceptional circumstances, those circumstances¹¹ are in my view, normal and ordinary circumstances which do not warrant any justification to be classified as exceptional, and do not pass the test laid down in the authorities cited above. Having said that, the SCA in **S v Scott Crossley**¹² held that the “personal circumstances which are really ‘commonplace’ can obviously not constitute exceptional circumstances for purposes of section 60(11)(a)”.¹³

[25] I have already indicated that the appellant had a duty as required by section 60(11)(a) to adduce evidence and prove on a balance of probabilities that he is not a flight risk, and that exceptional circumstances exist which warrant his release on bail. Furthermore, he had to satisfy the court that the interest of justice permits his release on bail.

[26] In terms of section 60(4) of the CPA, the interests of justice do not permit the release from detention of an accused where one or more of the grounds sets out in paragraphs (a) to (e) have been established. On the other hand, section 60(5)-(9) elaborates on factors a court should heed when considering the grounds in section 60(4).

[27] This court is mindful of the undisputed evidence which formed the basis of the court *a quo*'s decision to refuse bail when it held that the appellant is a flight risk. In this regard, section 60(4)(b) empowered the court *a quo* not to admit the appellant to bail where there was a likelihood that the appellant, if released on bail, would attempt to evade his trial. With

¹¹ See para 8.

¹² 2007 (2) SACR 470 (SCA)

¹³ See also: S v Mazibuko and another 2010 (1) SACR 433 at para 19 (KZP)

that being said, it is indisputable that the appellant failed to adduce any evidence to prove that he is not a flight risk, or that the interest of justice permits his release from custody.

[28] An analysis of all the evidence before the court *a quo* supports the finding that the appellant had failed to establish exceptional circumstances. When all the evidence is considered and weighed against the appellant's personal circumstances, I am satisfied that the appellant failed to prove that the interests of justice permit his release on bail.

[29] Consequently, I cannot find any fault in the court *a quo*'s decision that the appellant is a flight risk. Reading through the judgment of the court *a quo*, there is nothing which suggest that the court *a quo* misdirected itself in that regard.

[30] It is on record that the court *a quo* already took into consideration the personal circumstances of the appellant and still arrived at the conclusion that the interest of justice do not permit the granting of bail in favour of the first appellant. Some of the aspects to be considered by the court in the process of determining whether the grounds in subsection (4) have been established where the interests of justice do not permit the granting of bail, are evident in subsection (5)(a)(f) of the Act.

[31] The factors specified in subsection (5)(a)(f) were highlighted by Sergeant Ndabeni who testified that the court should consider the degree of violence implicit in the charge sheet, and the fact that the appellant was positively identified in the ID parade. He specifically stated that one of the important considerations of concern is the 'high prevalence of the offence of car hijacking in the area of Daduza' where the offence occurred.

[32] Having regard to what is noted in the preceding paragraph, I am of the view that the court *a quo* correctly applied its mind to the evidence placed before it while taking into consideration, *inter alia*, the factors specified in subsection (5)(a)(f).

[33] As indicated above, court hearing an appeal in terms of section 65(4) shall not set aside the decision of the court *a quo*, unless that decision was wrong. Be that as it may, sight must

not be lost of the fact that the decision whether or not to grant bail is one entrusted to the court *a quo*.

[34] Accordingly, this court as a court of appeal will only set aside the decision of the court *a quo* if it is clear that the court *a quo* exercised its discretion wrongly when refusing to grant bail to the appellant. This principle was expressed by the court in ***S v Barber***¹⁴ as follows:

“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. 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”.

[35] I have thoroughly considered all the circumstances of this case and the submissions made by both parties. Upon a through reading the judgment of the court *a quo*, there is nothing to suggest that the court *a quo* misdirected itself. Consequently, I find that the appellant failed to discharge the onus as required in terms of section 60(11)(a), to prove that exceptional circumstances exist. Furthermore, he failed to prove that the interest of justice permits his release on bail. Accordingly, his appeal stands to be dismissed.

[36] In my view, to release the appellant on bail under the above circumstances would, to my mind, not be in the interests of justice as it is likely to seriously undermine the criminal justice system including the bail system itself.

¹⁴ 1979 (4) SA 218 (D) at 220E-F

[37] In the premises, the following order is made:

1. The bail appeal is dismissed.



PD. PHAHLANE
JUDGE OF THE HIGH COURT

APPEARANCES

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Heard on	: 9 July 2025
Date of Judgment	: 4 August 2025