

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

3 September 2025

DATE

SIGNATURE

CASE NUMBER: A44/2025

In the matter between:

SAM MHLUPHEKI MTSHILIBE

1ST APPELLANT

DOCTOR DLAMINI

2ND APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

DOSIO J:

Introduction

- [1] This is an appeal against the refusal of bail in the Johannesburg Regional Court on 18 December 2024.
- [2] The bail application was brought in terms of s60(11)(a) of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977') and was dealt with by the court a quo as a schedule 6 bail application.
- [3] The appellant was represented in the court a quo. Even though the public prosecutor stated that it was a schedule 6 bail application, no objection was raised by the appellant.
- [4] The appellant has raised the following issues as grounds of appeal, namely that:
- (a) The court a quo erred in making a finding that the matter resorted under schedule (6), in that no assault was perpetrated on the victims, and neither was a firearm used.
 - (b) The court a quo erred in finding that the personal circumstances of the appellants did not constitute exceptional circumstances.
 - (c) The court a quo erred in making a finding that the state case is strong.
 - (d) The court a quo incorrectly emphasised how the appellants were arrested and totally ignored the reasons for the arrest.
 - (e) The court a quo incorrectly concluded that the appellants may evade their trial and erred in applying the provisions of s60(4)(a) to (e) of Act 51 of 1977.

Whether the matter resorts under a schedule 6 offence

- [5] At the inception of the bail application, the prosecutor stated that "*The matter is on the roll today for their schedule 6 bail application*".¹ At no stage did the legal representative of either the first or second appellant raise any objection in this regard, neither was it disputed at the inception of the bail application that it should or shouldn't be dealt with in terms of a schedule 6 offence. On the next appearance, namely on 21 November 2024, the prosecutor once again stated this was a schedule 6 offence.²
- [6] The charge sheet in respect to count one refers to robbery with aggravating circumstances. No mention is made that a firearm was pointed at the victims or that there was a threat of the infliction of grievous bodily harm. As a result, the jurisdictional fact required for the

¹ Caselines 003-4 lines 14-15.

² Caselines 003-89 lines 9-10.

matter to fall under a schedule 6 offence, was absent at the commencement of the bail application.

- [7] It was at this point that the legal representatives of the appellants should have sought clarity from the public prosecutor. This neglect on the part of the legal representatives to obtain clarity as to whether the bail application resorted under a schedule 5 or 6 offence, cannot now be raised as a ground of appeal.
- [8] The presiding officer in the court a quo was not privy to the statements in the docket and no blame can be placed on the court a quo for accepting the prosecutor's contention that it was a schedule 6 offence.
- [9] There is also no misdirection on the part of the court a quo from continuing to understand that this bail application was a schedule 6 offence once the investigating officer testified. During the cross-examination of the investigating officer by the second appellant's legal representative, he was asked why he believed that firearms were used in the commission of the offence. In this regard the investigating officer replied:
 "MR NENE: when I recall in one of the witness victim statements, I cannot recall who I was doing the statement, they said that they were pointed with the firearm to look down".³
- [10] During argument before this court, an objection was raised by the appellant's counsel that new evidence was being introduced, in that the respondent's counsel had uploaded the statements in the docket.
- [11] In the matter of *Liesching and others v The State and Another*,⁴ the Constitutional Court referred to the provisions of s19 of the Superior Courts Act 10 of 2013 which states that:
"The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law-
 (a) dispose of an appeal without the hearing of oral argument;
 (b) receive further evidence;
 (c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or

³ Caselines 003-175 lines 14-17.

⁴ *Liesching and others v The State and Another* [2016] ZACC 41.

(d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.” [my emphasis]

[12] In the statement of Busi Zondo, who is a 17-year-old female and a complainant in the matter, she states at paragraph 7 of her statement that:

“one male pointed Tshepiso with a firearm and told him to keep quiet”.⁵

[13] This statement supports the evidence of the investigating officer that during the robbery, a firearm was used.

[14] This court finds there is sufficient reason why this evidence should be allowed as it is in the interests of justice for this court to determine whether the court a quo was correct in deciding this bail application in terms of a schedule 6 offence or not.

[15] In order for the offence of Robbery to qualify as Robbery with Aggravating Circumstances, it must be read in conjunction with s1 of Act 51 of 1977 which states that:

“(1) In this Act, unless the context otherwise indicates-

“aggravating circumstances”, in relation to-

(a) ...

(b) robbery or attempted robbery, means

(i) the wielding of a fire-arm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm; or

(iii) a threat to inflict grievous bodily harm;

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence.”

[16] Schedule 6 confirms the above by specifying the following:

“Robbery, involving-

(a) the use by the accused or any co-perpetrators or participants of a firearm;

(b) the infliction of grievous bodily harm by the accused or any of the co-perpetrators or participants; or

(c) the taking of a motor vehicle.”

⁵ Caselines 10-9 para 7.

- [17] Accordingly, the evidence given by the investigating officer, becomes the foundation for the bail application to have been dealt with in terms of s6 and the court a quo correctly dealt with it as a schedule 6 offence.

Legal principles

- [18] Section 60(11)(a) of Act 51 of 1977 states:

“Notwithstanding any provision of the 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 on bail.”

- [19] In the context of s60(11)(a) of Act 51 of 1977, the concept ‘exceptional circumstances’ has meant different things to different people. In *S v Mahommed*,⁶ it was held that the dictionary definition of the word ‘exceptional’ has two shades of meaning: The primary meaning is simply: ‘unusual or different’. The secondary meaning is ‘markedly unusual or specially different’. In the matter of *Mahommed*,⁷ it was held that the phrase ‘exceptional circumstances’ does not stand alone. The accused has to adduce evidence which satisfies the court that such circumstances exist ‘which in the interests of justice, permit his or her release’. The proven circumstances have to be weighed in the interests of justice. The true enquiry is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the appellant’s release on bail.

- [20] In so far as the weakness of the State’s case in a bail application is concerned, the Supreme Court of Appeal in the matter of *S v Mathebula*⁸ held that:
- “... 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.”⁹

- [21] In the matter of *S v Smith and Another*,¹⁰ the Court held that:

⁶ *S v Mohammed* 1999 (2) SACR 507 (C).

⁷ Ibid.

⁸ *S v Mathebula* 2010 (1) SACR 55 (SCA).

⁹ Ibid para 12.

¹⁰ *S v Smith and Another* 1969 (4) SA 175 (N) page 177 e-f.

“The Court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby.”

[22] In *S v Bruintjies*,¹¹ the Supreme Court of Appeal stated that:

“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.”¹²

[23] In *Mathebula*,¹³ the Supreme Court of Appeal stated 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.”¹⁴

Evaluation

[24] The appellant’s counsel contended that the presumption of innocence is a *prima facie* concern for the court when considering to release an appellant on bail.

[25] Presumption of innocence is an important consideration, but a court needs to look holistically at all the circumstances presented in a bail application.

[26] In terms of s65(4) of Act 51 of 1977, the court hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong.¹⁵

[27] The appellants bear the onus to satisfy the court, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit their release.¹⁶ A mere denial of the considerations and/or probabilities of events, as contained in section 60(4) – (9) of Act 51 of 1977, would not suffice in order to succeed in convincing the court of the existence of exceptional circumstances, in order for bail to be granted.

¹¹ *S v Bruintjies* 2003 (2) SACR 575 (SCA).

¹² *Ibid* para 7.

¹³ *Mathebula* (note 8 above).

¹⁴ *Ibid* para 59 B-C.

¹⁵ *S v Rawat* 1999 (2) SACR 398 (W).

¹⁶ *S v Mabena and Another* 2007 (1) SACR 482 (SCA) and *S v Van Wyk* 2005 (1) SACR 41 (SCA).

- [28] The appellants did not present *viva voce* evidence in order to discharge the onus. They sought to rely on an affidavit accepted as an exhibit in the bail proceedings. As stated in the case of *Bruintjies*¹⁷ and *Mathebula*,¹⁸ evidence on affidavit is less persuasive than oral evidence. The denial of the appellants rested solely on their say-so with no witnesses or objective probabilities to strengthen them. As a result, the State could not cross-examine the appellants to test the veracity of the averments in their affidavits. This affects the weight to be attached to the affidavits handed in.
- [29] The respondent led the evidence of the investigating officer, warrant officer Nene who stated that shortly after this robbery, the victims reported the matter to the Duduza Police Station and the daughter, namely, Busi Zondo ('Ms Zondo') remembered the registration number of the black Toyota Double Cab which the robbers were in. The investigating officer stated that Ms Zondo told sergeant Mohlapeng that the registration number was JG89ZC-GP. It is sergeant Mohlapeng who remembered seeing such a car on the streets and that he knew the address where the car was, namely, 384 Molefe Street. This is the address of the first appellant. Sergeant Mohlapeng went to this house with backup and the said car was found there. The car was positively identified by Ms Zondo, as the car that they had been kidnapped in. Sergeant Masondo and sergeant Mohlapeng went into this house and that is where the police cap was found under a bed. In the black Toyota Double Cab, a crowbar and various registration number plates were found.
- [30] The first appellant in his statement merely stated in his affidavit he knows nothing about the police cap and that he was not present when it was discovered by the police. Nothing is mentioned in his affidavit about the crowbar and various registration number plates found in this car. The first appellant also stated in his affidavit that different drivers drive the same Toyota Double Cab, yet no names were given. The first appellant could have reopened his case after the respondent led the evidence of the investigating officer, to explain why shortly after the incident the black Toyota Double Cab was in his yard. He could have explained who had been driving it that day, but he did not reopen his case. As a result, the evidence of the investigating officer who testified under oath remains unchallenged.
- [31] The investigating officer also stated that at the police station, Ms Zondo pointed out the first appellant.

¹⁷ *Bruintjies* (note 11 above).

¹⁸ *Mathebula* (note 8 above).

- [32] The investigating officer also stated that on 18 October, a few days after this incident, Ms Zondo also saw the second appellant, who came to her school to search for drugs. Ms Zondo then told her teacher Ms Hlatswayo, that amongst the men that came to her class to search them, one of them were amongst the robbers who robbed her and her family. Ms Zondo was then taken to where the wardens were on parade and the complainant was asked to walk past the people on parade. Ms Zondo identified the second appellant and constable Base arrested him.
- [33] The investigating officer also stated that on 21 November 2024 he wanted both appellants to attend an identification parade in respect to two other matters, however, both refused to attend the identification parade. It appears in the other two matters a black Toyota Double Cab was also involved in certain robberies.

Strength of the State's case

- [34] In respect to the first appellant, no search warrant was obtained before his premises were searched.
- [35] In the matter of *S v Udeobi*¹⁹ the appellant's counsel argued that the State's case was 'exceptionally weak', because all the incriminating real evidence had been obtained without the required search warrants and would therefore be inadmissible at the appellant's trial. Plasket J, as he then was, rejected this argument. The court held that the admissibility of evidence is in the trial court's discretion, which would be exercised on all the available facts as established after a trial-within-a-trial. The court held that it is the trial court and not the bail court, that is best suited to deal with the issue of admissibility. Support for the view of Plasket J can be found in the matter of *S v Mququ*.²⁰
- [36] As regards the first appellant
- (a) The child victim, Ms Zondo, was able to describe the make and model of the vehicle that was used by the offenders during the commission of the offence, as being a Toyota Double Cab. Ms Zondo was further able to supply the officers with a registration number, being JG89ZC-GP. As a result, sergeant Mohlapeng who had noticed the same vehicle during his patrols, was able to take his fellow officers to the address where he saw the vehicle driving into. The robbery and kidnapping occurred on 8 October 2024 and on 9

¹⁹ Unreported, ECG case no 158/2018, 13 July 2018.

²⁰ 2019 (2) SACR 207 (ECG) at [19].

October 2024 the vehicle was found at the address. This address is the confirmed as being the address of accused one. The vehicle was positively identified by Ms Zondo as the vehicle used to kidnap her, her mother and her brother.

(b) The house of appellant one was searched and a police cap was found. This is noteworthy, since Ms Zondo and the other two victims stated that the perpetrators were dressed as police officers.

(c) Registration number plates were also found inside the black Double Cab.

(d) Ms Zondo was further able to positively identify appellant one as one of the perpetrators.

(d) Appellant one stated that someone else was driving his vehicle, however, he was unable to supply the officers with an address or a contact number. It is highly unlikely that a person would allow someone to drive their vehicle without even knowing their last names or where they stay.

[37] There appears to be a strong prima facie case against the first appellant. As stated in the matter of *S v Mathebula*,²¹ the first appellant has not successfully proven during the bail application that he will be acquitted of the charge.

[38] In the matter of *S v Panayiotou*,²² the court stated that:

“The only basis upon which it was argued that there is some doubt about the strength of the State case was in relation to the reliability of . . . [S] . . . as a witness. That issue, of course, is a matter that no doubt will be canvassed fully at the criminal trial. It is after all, at that point that critical questions of the admissibility and reliability of evidence will be tested. What the court is called upon to consider, in a bail application, is the nature of the evidence that is available to the prosecution and, absent a challenge in the bail proceedings to the admissibility or reliability of that evidence, the court will accept the evidence. It is upon this acceptance that the court decides whether the case is strong or weak.”²³

[39] It is for the trial court to find whether the evidence of Ms Zondo, together with the evidence of other state witnesses, will be sufficient to find the first appellant guilty beyond reasonable doubt.

[40] The court a quo in respect to the first appellant correctly considered the provisions of s60(4), (5), (6), (7) and (8) of Act 51 of 1977. As regards whether there is a likelihood that

²¹ *S v Mathebula* (note 8 above).

²² *S v Panayiotou* unreported, ECG case no CA&R 06/2025, 28 July.

²³ Ibid para 53.

if the first appellant, if released on bail will endanger the safety of the victim, the court a quo correctly found that the crime for which the first appellant is charged with, involved a degree of violence towards the victims. Due to the fact that there are other matters where a black Toyota Double Cab was used during the commission of offences and due to the fact that the first appellant refused to attend an identification parade, there is a possibility that the first appellant may be involved in other schedule 1 offences and that he may continue to commit schedule 1 offences if released.

- [41] Considering the provisions of s60(6) of Act 51 of 1977, the first appellant has adduced no evidence to show that he owns immovable property, or how much his assets are valued at. There appears to be a strong prima facie case against the first appellant and there may be an incentive to evade his trial if granted bail.

Exceptional circumstances

- [42] In the matter of *S v Dlamini; S v Dladla & others; S v Joubert; S v Schietekat*,²⁴ the Constitutional Court held that although the inclusion of the requirement 'exceptional circumstances' in s60(11)(a) limits the right enshrined in section 35(1)(f) of the Constitution, it is a limitation which is reasonable and justifiable in terms of section 36 of the Constitution in our current circumstances.
- [43] The first appellant has adduced no evidence that there exist exceptional circumstances which warrant his release on bail.
- [44] After a perusal of the judgment of the court a quo, I find no misdirection on the part of the court a quo. There is also no persuasive argument before this court to release the first appellant on bail. Accordingly, there are no grounds to satisfy this court, that the decision of the court a quo was wrong.
- [45] As regards the second appellant, the situation is somewhat different.
- [46] The second appellant is a traffic warden. On 18 October 2024 he was on duty doing crime prevention at a certain High School in Tsakane where it is alleged that Ms Zondo, who is

²⁴ *S v Dlamini; S v Dladla & others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).

a pupil at that school, informed a teacher that amongst the traffic wardens, she saw one that looks like the robbers who were amongst the robbers that robbed her family.

- [47] On 23 October 2024 at about 08h00 while the second appellant had just finished his parade, he was called by constable Base who informed the second appellant that he was arresting him for a robbery that occurred on 8 October 2024.
- [48] It is important to note that during the cross-examination of constable Base, he stated that Ms Zondo informed him that '*a group of men came wearing some African hoodie cap*'.²⁵ Furthermore during cross-examination, constable Base was asked:
"MR MABOGOANE: No distinguishing features were mentioned, any scars, the colour of their eyes. No description was given whatsoever".²⁶
- [49] To this constable Base replied:
"MR BASE: No. She explained to me at that time that the person she pointed out is the person and described the person at that time how they looked".
- [50] From the answer of constable Base it appears Ms Zondo only explained what the man looked like when she pointed him out and not before the line-up of wardens where she pointed out the second appellant.
- [51] Ms Zondo, together with the other victims were told to look down during the robbery. The second appellant was arrested on 23 October 2024, which is fifteen days after the offence had occurred, without Ms Zondo giving a facial description of the second appellant, prior to pointing him out. As a result, there exists the possibility that Ms Zondo may be mistaken regarding the identity of the second appellant. At most, her evidence must be approached with the relevant caution pertaining to identification.
- [52] The personal circumstances of the second appellant are also different to those of the first appellant. The second appellant is gainfully employed as a traffic warden. He owns a house valued at R430 000.00 and he has household utensils and furniture valued at approximately R15 000.00.

²⁵ Caselines 003-227 line 25 to 003-228 line 1.

²⁶ Caselines 003-230 line 23-25.

- [53] There are exceptional circumstances in respect to the second appellant in that no formal identification parade was held. In addition, no object used in this robbery was found in his possession, as opposed to a police cap found under the first appellant's bed. The second appellant is also not the owner of the black Toyota Double Cab which has allegedly been used in the commission of other offences.
- [54] After a perusal of the court record and the judgment of the court a quo, in respect to the second appellant, I am persuaded that the court misdirected itself and that the court a quo erred in denying the second appellant bail.

Order

- [55] In the result, the following order is made:
1. The appeal in respect to the first appellant is dismissed.
 2. The appeal in respect to the second appellant is upheld.
 3. Bail in the amount of R10 000.00 is set in respect to the second appellant.
 4. The following bail conditions will apply in respect to the second appellant:
 - a. The second appellant must report to the Duduza Police Station on a Monday and Friday, anytime between 06h00 and 21h00.
 - b. The second appellant may have no interaction with the complainants in this matter.
 - c. The second appellant may not leave the province of Gauteng without obtaining the permission of the investigating officer.



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JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 3 September 2025.

APPEARANCES

ON BEHALF OF THE 1ST AND 2ND APPELLANT:

Adv N M Mtsweni
Instructed by MD Mabogoane
Attorneys Inc

ON BEHALF OF THE RESPONDENT:

Adv C Ryan
Instructed by the Office of the National
Director of Public Prosecutions,
Johannesburg

DATE OF HEARING:

8 August 2025

DATE OF JUDGMENT:

3 September 2025