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**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

CASE NO: BA14/2025

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED YES/NO

SIGNATURE: MALANGENI AJ

DATE: 12 SEPTEMBER 2025

In the application between:

CHRIS CAVEN KHOZA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT ON BAIL APPEAL

Malangeni AJ

Introduction

[1] On 24 January 2025, the Bushbuckridge Magistrates' Court refused to admit the appellant to bail. This decision did not sit well with the appellant, which is why he has approached this Court to set aside the decision of the court *a quo*. He notes an appeal in terms of section 65(1)(a) of the Criminal Procedure Act 51 of 1977 ("the CPA").

Background

[2] It is common cause that the appellant is facing the following counts:

- 2.1 Murder.
- 2.2 Attempted murder.
- 2.3 Robbery with aggravating circumstances.

[3] It is further common cause that the bail falls within the ambit of Schedule 6. During the bail application, the appellant filed an affidavit which was marked Exhibit "A", whereas the respondent, in opposing the bail, led the evidence of the Investigating Officer, namely Sergeant Thabo Lucas Mokoena.

[4] From Exhibit "A", the appellant raised the following factors as exceptional circumstances:

- 4.1 That the deceased was one of his closest friends, as he usually referred most of his customers to him in Bushbuckridge for the repair of motor vehicles which were involved in a motor vehicle accident.
- 4.2 That on 2 November 2024, approximately at midnight, he was with the deceased and Jabulani Mashego at the Coastal tavern next to the R40 road in Bushbuckridge, consuming alcohol.
- 4.3 That at about 02:00, Jabulani Mashego requested to use his motor vehicle with registration number J[...] to collect his girlfriend at Nkanini Trust in Bushbuckridge, and he remained at the tavern. He was informed that when

the deceased was driving home to Marite, he spotted his motor vehicle stopped next to the truck on the R40 road towards Gadi store, where the deceased stopped with the intention to ask Jabulani what was happening. The deceased was subsequently shot.

4.4 While detained, he was informed that the incident occurred approximately at 02:30 in the morning at the spot where there was no source of light.

4.5 The state relied on the identification parade that was held on 9 December 2024 at Hazyview, wherein he was pointed out as a suspect. Moreover, the incident occurred on a night when there was no source of light, and therefore it is quite strange how the witness was able to identify him as a suspect during the night.

4.6 That should he be detained, he will suffer financial prejudice as he is the one who is looking after his children.

4.7 That the state's case is weak against him.

[5] In opposing the bail, Sergeant Mokoena stated the following:

5.1 That he considered the appellant a flight risk because he was arrested at Witbank.

5.2 He may commit a Schedule 6 offence as the firearm that was used in shooting the deceased has not been recovered.

5.3 He will disturb the investigation as December (one who was given a firearm) is refusing to give a statement as he fears the appellant. He says the appellant is trigger-happy and he likes to use a firearm a lot.

5.4 He has sent a certain Mr Mbosane to him, telling him not to oppose bail.

5.5 The deceased's family is against him being released on bail.

5.6 He knows the identity of the witnesses; he was able to ask one of them as to why he attended an identification parade.

5.7 The state has a strong case. The witness who knows him very well saw him at the scene. He or she managed to point him at the identification parade. And he has made a confession, admitting to being at the scene.

[6] The Magistrate dismissed the appellant's bail application on the grounds that he was not suitable to be released on bail and that he failed to show any exceptional circumstances.

The Applicable Law

[7] Section 35(1)(f) of the Constitution states that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. Bail appeal is governed by section 65(1)(a) of the CPA and it provides that:

“An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.”

[8] As I indicated, the bail application fell within the confines of Schedule 6 of the CPA. This Schedule is governed by section 60(11)(a) of the CPA and it states that:

“... 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.”

[9] As to what is meant by exceptional circumstances, there is no clear definition. There is no designed formula to be used for its interpretation, meaning that each bail application has to be dealt with on its own merits. In *S v Petersen*,¹ the Full Bench stated that

¹ *S v Petersen* 2008 (2) SACR 355 (C) para 55 and 56.

“General speaking ‘exceptional’ is indicative of something unusual, extraordinary, remarkable, peculiar or simply different ... 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 ... 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.”

[10] The list of factors to constitute exceptional circumstances is unlimited or endless. In *S v Jonas and Others*² the court said that:

“The term ‘exceptional circumstances’ is not defined. There can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused’s absence is one that springs to mind. A terminal illness may be another. It would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence he did not commit could also be viewed as an exceptional circumstance. Where a man is charged with a commission of a Schedule 6 offence when everything points to the fact that he could not have committed the offence, e.g. he has a cast-iron alibi, this would likewise constitute an exceptional circumstance.”

[11] The factors listed in section 60(4) of the CPA play a crucial role for a Presiding Officer hearing a bail application. This section stipulates that:

“(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;

² *S v Jonas and Others* 1998 (2) SACR 677 (SE).

- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
- (c) where 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; or
- (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;
- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.”

[12] In determining how the bail appeal should be approached, section 65(4) of the CPA clearly clarifies the powers of courts hearing the appeal. This section states 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”.

[13] Judge Ishmail in the unreported judgment of *Chewe v The State*³ dealt with the approach on bail appeals in the following:

“This appeal is advanced against the refusal of bail by the court having heard the initial and subsequent application. The task of this court is merely to ascertain whether the court of first instance exercised its mind judicially and correctly. In this regard I am enjoined to follow the approach laid down by the court in *S v Barber* 1979(4) SA 218(D) – ‘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,

³ *Chewe v The State* (unreported case no. A702/2015 GDP-26/10/2015) para 21.

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. I think it should be stressed that no matter what the court's 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'."

[14] To interfere with the other court's discretion is not an easy subject, as there is no formula on how discretion should be exercised, save to say that it should be exercised judicially. To determine whether the discretion has been exercised wrongly or otherwise will vary from one person to the other.

Evaluation

[15] Both parties filed written heads of arguments and further made oral submissions. They referred this court to different authorities in favour of granting and refusing bail. In the main, the appellant submitted that he subsequently discharged the onus on the balance of probabilities and that the administration of justice will not be jeopardised, defeated or frustrated if he is admitted to bail on the strength of the evidence presented by him and such evidence was not disputed by the Investigating Officer. The respondent submitted that the court *a quo* dealt with the factors in terms of section 60(4)(a) to (e) in its judgment. Section 60(4) of the CPA provides that it is not in the interest of justice to release an accused if one or more of the provisions listed in paragraphs (a) to (e) therein are established.

[16] The appellant claims that the state's case against him is weak, raising identity as a defence. In support of this defence, he submits that at the scene it was dark; therefore, how was he identified as the perpetrator in the darkness? It is his duty to show the weakness of the state's case against him. In *S v Mathebula*,⁴ it was held that

⁴ *S v Mathebula* 2010 (1) SACR 55 (SCA) para 12.

“But 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 ... 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: *S v Viljoen* at 561 b-g.”

[17] I do not believe that the state’s case is weak, considering the following *prima facie* pieces of evidence by the Investigating Officer:

17.1 That one of the state witnesses is currently under the witness protection program.

17.2 The appellant was positively identified at an identification parade by one of the witnesses.

17.3 The appellant apologised to the deceased, saying he had shot the wrong person.

17.4 That the appellant made a confession.

17.5 That the appellant admits having been with the deceased on the date of the alleged incident.

[18] As to the quality or weight of that evidence, that will be determined by the proper forum (trial court), as that court will be empowered to evaluate the whole evidence before it.

[19] It is the Investigating Officer’s evidence that the deceased’s firearm, which was taken from him, has not yet been recovered. The deceased told the appellant to hand over that firearm to December. The latter is not cooperating with the police and is refusing even to make a statement, saying he fears the appellant, as he is a person who is trigger-happy.

[20] This suggests that investigations are still incomplete. No one knows whether the appellant handed over the firearm in question to December. The whereabouts of such firearm are best known by the appellant. If released on bail, there is a likelihood

that he will interfere with the investigation by, for example, concealing or destroying evidence.

[21] The Investigating Officer also testified that the appellant incited a certain Mr Mbosane to persuade him not to oppose bail. The appellant further questioned one of the witnesses as to why he or she attended an identification parade. From this piece of evidence, the appellant has already started influencing state witnesses. The Investigating Officer is a state witness. Therefore, the likelihood is that he will influence witnesses and intimidate them, as December had already advised the Investigating Officer that he is afraid of the appellant, as he is trigger-happy. The above are factors listed under section 60(4)(c) of the CPA.

[22] As it is on record that the appellant apologised to the deceased, telling him that he had shot the wrong person, the right person that the appellant intended to shoot is still alive. The appellant knows the whereabouts of the deceased's firearm. In line with section 60(4)(a) of the CPA, the likelihood is that the appellant, if released on bail, will endanger the safety of that targeted person. Releasing the appellant on bail, the court would be risking the innocent person's life.

[23] I am alive to the fact that the main objective of bail is to secure the attendance of the accused in court. The evidence presented by the Investigating Officer that the appellant is a flight risk is without merit. The fact that he was arrested in Witbank does not prove that he was running away from the police. There is no evidence to the effect that the police visited the appellant's home and could not find him. What the Investigating Officer said is that they were tracking him. The appellant did not know that he was wanted, and further that he was being tracked by the police. No evidence was adduced to the effect that he resisted the arrest. It is on record that he has a fixed address. There is no evidence to the effect that he has a passport or any travel document that may take him out of the country.

[24] On the issue of the appellant being a flight risk, I disagree with the court *a quo's* reasoning that when he was arrested in Witbank, he was on the run.

[25] In denying bail, the bail court indicated that the appellant did not show any exceptional circumstances. The appellant raised his personal circumstances as grounds for him to be admitted to bail.

[26] In Exhibit "A", the appellant mentioned that:

26.1 He is self-employed as a motor mechanic, making a profit of approximately R5000.00.

26.2 He is not married but a father of three minor children.

26.3 If detained, he will suffer financial prejudice as he is looking after his children. He presents himself as a sole provider to his children.

[27] To me, Exhibit "A" is not detailed. There are spaces left open, and such spaces will remain open as the deponent to exhibit "A" cannot be cross-examined. An affidavit that contains insufficient information leaves the deponent in a disadvantaged position.

[28] If the applicant for bail decides to use an affidavit in his or her application, such affidavit must detail all the averments upon which he or she relies in his or her application for bail. Let me make a simple example regarding the appeal under consideration. The appellant stated that he is the father of three children. However, he does not say anything about the mother or mothers of his children. I do not know whether she is or they are still alive, working or not. He further mentioned that he runs a mechanic business. However, he does not say whether there could be no one to run the business in his absence or whether the business depends solely on him. Now that he is in custody, the court does not know if the business is running or not.

[29] Therefore, his affidavit or exhibit "A" lacks the necessary averments, and such averments were supposed to come from the appellant himself. The court is not empowered to fill in any gaps in the affidavit by any of the parties, but to evaluate what has been presented before it.

[30] The bail court dealt with relevant factors covered under section 60(4). This section does not say the court must deal with all these factors; it refers to one or

more. The court *a quo* exercised its discretion judiciously. I agree with the court *a quo*'s decision that the appellant did not show any exceptional circumstances. What the appellant brought is just ordinary circumstances that do not meet the requirements of section 60(11)(a) of the CPA. Therefore, the appeal must fail.

Order

[31] The appeal is dismissed.

M MALANGENI

ACTING JUDGE OF HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Appearances

Counsel for the Appellant: Mr B Silubane

Instructed by: AB Mdluli Attorneys

Counsel for the Respondent: Adv F Tsotetsi

Instructed by: Office of the Director of Public Prosecutions,
Mpumalanga

Judgment reserved on: 05 September 2025

Date of delivery: 12 SEPTEMBER 2025