

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO.: BA17/2025

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED: <u> </u>
DATE <u>29/9/2025</u> SIGNATURE <u>[Redacted]</u>	

In the matter between:

**THE DIRECTOR OF PUBLIC PROSECUTIONS,
POLOKWANE**

APPELLANT

-and-

TAKALANI ERIC MATHELEMUSA

RESPONDENT

Delivered : 29 September 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **29 September 2025 at 14H00 pm**.

Date heard : 23 September 2025

Coram : Pillay AJ

JUDGMENT

PILLAY AJ

Introduction

- [1] This is an appeal sought by the State following the order by the Musina Magistrate's Court on 20 June 2025 releasing the respondent on bail of Ten Thousand Rand (R 10000,00) consequent on the respondent's application for bail on new facts.
- [2] The respondent was indicted on the following charges.
- [2.1] Robbery with aggravated circumstances as defined in Section 1 of Act 51 of 1977 read with the provisions of Section 51(2) of Act 105 of 1997 as amended.
- [2.2] Robbery with aggravated circumstances as defined in Section 1 of Act 51 of 1977 read with the provisions of Section 51(2) of Act 105 of 1997 as amended.
- [2.3] Attempted Murder
- [2.4] Unlawful possession of a prohibited firearm- a fully automatic firearm- in contravention of Section 4(1)(a) read with Sections 1, 103, 117, 120(1)(a) and

121 read with Schedule 4 and Section 151 of act 60 of 2000 and further read with Section 250 of Act 51 of 1977 and Section 51(2) of Act 105 of 1997- possession of a prohibited firearm: a fully automatic firearm.

- [2.5] Unlawful possession of a prohibited firearm- serial/identifying mark altered without permission of the registrar- in contravention of Section 4(1)(f)(iv) read with Sections 1, 17, 19, 20, 103, 117, 120(1)(a) and 121 read with Schedule 4 and Section 151 of Act 60 of 2000 and further read with Section 250 of Act 51 of 1977- possession of a prohibited firearm: serial numbers/identifying marks altered without permission of the registrar.
- [2.6] Unlawful possession of a firearm in contravention of Section 3 read with Sections 1, 103, 117, 120(1)(a) and 121 read with Schedule 4 and Section 151 of Act 60 of 2000 and further read with Section 250 of Act 51 of 1977 and Section 51(2) of Act 105 of 1997- unlawful possession of a firearm(s).
- [2.7] unlawful possession of ammunition in contravention of Section 90 read with Sections 1, 103, 117, 120(1)(a) and 121 read with Schedule 4 and Section 151 of Act 60 of 2000 and further read with Section 250 of Act 51 of 1977- unlawful possession of ammunition.
- [2.8] Unlawful possession of stolen property in contravention of the provisions of Section 36 of the General Law Amendment Act 62 of 1955.
- [2.9] Unlawful possession of stolen property in contravention of the provisions of Section 36 of the General Law Amendment Act 62 of 1955.

- [3] As the charges against the respondent was of offences listed in Schedule 6 to the Criminal Procedure Act 51 of 1977, the respondent undertook the task of adducing evidence which would satisfy the Court that exceptional circumstances existed which in the interests of justice permitted the Court to release the respondent on bail in terms of Section 60(11)(a) of Act 51 of 1977 as amended.
- [4] The State opposed the respondent's release on bail due to the State's case concerning a cash in transit heist, alleged to have been committed by the respondent and others. The respondent had a previous conviction of Robbery with aggravating circumstances wherein he was sentenced to 23 years imprisonment. It was alleged that this offence was committed whilst the respondent was on parole. The respondent was arrested in Musina in breach of his parole conditions of not leaving Thohoyandou. The State opposed both bail applications as the circumstances relied upon by the respondent, were not exceptional to warrant his release from custody.
- [5] The Presiding Magistrate found the following to be the new facts on which the respondent was released on bail namely;¹

"In view of the provisions of Section 60(g) and 60(10) of the Criminal Procedure Act 51 of 1977 which give me power to use my discretion, I have come to the following conclusion. In my view the issue of the delay to resume

¹ See Vol 6 page 570 to 571.

trial by handing him an indictment nine months after the dismissal of the first bail application constitute new facts.

The issue of his health which is deteriorating, where it is confirmed that applicant has a chronic disease in the form of hypertension and not rebutted and confirmed by the Correctional Services, also in my view constitute bail on new facts.

The issue of the applicant losing his cattle and goats and crumbling business, which was not happening before the initial bail application, which also the statement from the bank were attached, in my view also constitute new facts, as decided in the case of S v Mathebula 2010(1) SACR 55(SCA).

During the bail on the new facts as the facts were presented to me the state did not lead any evidence to establish the ground in section 60(4) of the Criminal Procedure Act 51 of 1977. The new facts proven together with the facts proven in the previous bail application cumulatively constitute exceptional circumstances.

And whereas having given a detailed account of the events none of the evidence presented by the State for refusing bail had been established in terms of section 60(4) of the Criminal Procedure Act 51 of 1977.

As a result, the Court finds that the interest of justice permits the release of the applicant on bail. Consequently, an order is hereby made as to the applicant is admitted to bail".

The State aggrieved by these findings, sought to appeal the decision of the Presiding Magistrate based on the misdirection that exceptional circumstances were proven to exist, to warrant the release of the respondent on bail.

[6] The grounds of appeal relied upon by the State were the following;

- [6.1] The learned magistrate erred in finding the respondent bail application on new facts were dealt with in terms of Section 60(10) of Act 51 of 1977.
- [6.2] The learned magistrate erred in allowing respondent to testify viva voce after respondent had closed his case wherein, he testified through affidavit.
- [6.3] The learned magistrate erred in not affording the appellant the opportunity to respond to new issues raised by the respondent in his viva voce evidence.
- [6.4] The learned magistrate erred in referring to bank statements and school report documents which were not disclosed to the appellant.
- [6.5] The learned magistrate erred in finding that respondent compliance with Section 144 of Act 51 of 1977 constituted a new fact. The error is supported by the Court conceding that the indictment was handed to the respondent on the day he was transferred to the High Court for trial.
- [6.6] The learned magistrate erred in finding that the respondent's health (hypertension) was deteriorating in the absence of evidence from a medical practitioner confirming same.
- [6.7] The learned magistrate erred in finding that the alleged loss of cattle and goats constituted a new fact. This despite respondent in the initial bail application confirming that the said cattle and goats were in a farm with farm workers and his wife could take care of the stock in his absence.

[6.8] The learned magistrate erred in finding that the respondent's crumbling business constituted a new fact. The respondent is allegedly involved in tender business and non-continuation in that business cannot constitute crumbling but cessation of business interest.

[6.9] The learned magistrate erred in finding that the appellant should have led evidence to establish the grounds in Section 60(4) of act 51 of 1977 despite such evidence being led in the initial bail application.

[6.10] The learning magistrate erred in finding that the respondent could be subjected to bail conditions, despite his violation of a parole condition not to commit any offence whilst on parole.

[7] Section 60(11)(a) of the CPA provides 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 interest of justice permit his or her release.

[8] It is clear from the aforesaid provisions that where an accused is charged with the commission of a Schedule 6 offence, a court will be entitled to grant bail only in those instances, where the accused advanced exceptional circumstances why he should be released. The effect of this provision shifted the onus to the accused to convince the Court on a balance of probabilities that such exceptional circumstances exist. As stated before, the bail application under consideration resorted under s 60(11)(a) of

the Criminal Procedure Act. The second bail application was brought on the basis that new facts had come to the fore which required a re-consideration of bail. It was those circumstances that resulted in the State appealing to this Court.

- [9] Regard was had to the provisions of Section 65(A)(1)(a) of the Criminal Procedure Act which indicated that the State may appeal to this Court against the decision of the Lower Court to release an accused on bail. Section 65(A)(1)(b) cross-references to Section 310A, which provides for the procedures to follow, and to Section 65, which provides for the test to apply when considering a bail appeal.

- [10] Section 65(4) provides that 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, in which event the Court shall give the decision which in its opinion the Lower Court should have given. The approach of a Court hearing a bail appeal is trite. In *S v Barber* 1979 (4) SA 218 (D) at 220 E-H it was said:

"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 it would be an unfair interference with the magistrate's exercise of his discretion. I think 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 ... "

- [11] Thus, even if this Court finds that the Magistrate was wrong, this Court must consider the facts before it afresh and determine whether the appellant has discharged the applicable onus. In this Court, both parties filed detailed heads of argument concerning whether the Court *a quo* erred in respect of its finding to admit the respondent to bail, and cognizance is taken of their contents. The Magistrate granted the respondent bail following his finding as highlighted above, which according to the Magistrate, the respondent established exceptional circumstances whereby the respondent was able to discharge the onus placed on him.
- [12] It took some time before these proceedings could be finalized, due to the concerns raised by the respondent, in respect of being released on parole. The appeal was postponed to address this issue, which was scheduled for determination by the Parole Board on the 19 September 2025. In as much as this was a factor affecting the respondent and his continued detention, amidst being released on bail in this matter, the consideration by the Parole Board, was ancillary to the appeal proceedings.
- [13] The state took exception to various findings made by the Court *a quo*, however from the reading of the record of proceedings, it was clear that three crisp issues featured in respect of the reconsideration by the Court *a quo*, in its decision to release the respondent on bail.
- [14] The first consideration pertained to the duration of the time, spent by the respondent awaiting trial in the High Court. The respondent highlighted in his application on new

facts that he had spent a period of more than 27 months in detention since his arrest which was 15 September 2022, and that to date he was not served with any indictment, whereas it was alleged by the state that there was a watertight case against him and his constitutional right to speedy trial was violated which impacted his family negatively.²

[15] The Court *a quo* noted the following in consideration of this aspect;

“In my view the issue of the delay to resume trial by handing him an indictment nine months after the dismissal of the first bail application constitute new facts.”

[16] From the accepted evidence the dismissal of the respondent's first bail application was on the 4 January 2023. The respondent did not appeal this decision. The indictment was handed to the respondent on 21 September 2023, when the matter was transferred from the District Court to the High Court. It was on this date that the respondent was informed of the charges, that he faced and that his trial would proceed on 27 May 2024 to 16 June 2024 in the High Court Polokwane. The application for bail on new facts was granted on the 20 June 2025.

[17] The State was at pains to highlight that the Court erred in finding that *“the delay to resume trial by handing him an indictment nine months after the dismissal of the first bail application”* was a new fact for bail to be considered. The appellant indicated the fact that in terms of Section 144 of the Criminal Procedure Act, an indictment was to

² See affidavit of respondent page 49 paragraph 9 and 10.

be served on an accused at least 10 days before the date appointed for trial. The indictment was served long in advance, and the respondent had misled the Court *a quo*, that he had not received the indictment. That reliance on this aspect as a new fact was a misdirection by the Court *a quo*.

[18] The respondent indicated that the delay to proceed with trial in the High Court constituted a new fact. Moreover, amidst the bail appeal the matter had still not proceeded to trial in the High Court and a period of more than two years had elapsed since the respondent's arrest. It was indicated that the Magistrate exercised his discretion judicially and took this aspect into account as a new fact.

[19] From the record it appeared that there was no evidence placed before the Court *a quo*, in respect of the delay and the reasons why the trial in the High Court had not proceeded. This was a bold allegation by the respondent and without further investigation and information before the Court *a quo*, it was not equipped to make the finding which it did, concerning this aspect being a new fact, to warrant the respondent's release.

[20] The Respondent's right enshrined in terms of Section 35(3)(d) of the Constitution³ providing that every accused person's trial begins and is concluded without

³ See the Constitution of SA 108 of 1996

unreasonable delay, and the mechanism provided for in terms of Section 342A of the Criminal Procedure Act⁴, was designed to deter unreasonable delays on the commencement, continuation and finalisation of criminal proceedings. In the application on new facts no evidence was presented concerning there being any enquiries held in terms of S342A, and the Orders made by the High Court or the Court a *quo* in respect of any delays, for same to have been considered as a factor, for the finding made in respect of this being a new fact. This was a misdirection by the Presiding Magistrate to endorse this as a new fact without properly ventilating on what basis it qualified to be such.

- [21] The second aspect was the finding by the Court a *quo* to the effect that the respondent's medical condition was a new fact as indicated;

"The issue of his health which is deteriorating, where it is confirmed that applicant has a chronic disease in the form of hypertension and not rebutted and confirmed by the Correctional Services, also in my view constitute bail on new facts."

- [22] The appellant highlighted that the learned Magistrate erred in finding that the respondent's health(hypertension) was deteriorating in the absence of evidence from a medical practitioner confirming same. There was no evidence led that the respondent was ever admitted in hospital because of hypertension.

⁴ See Act 51 of 1977

[23] Moreover the respondent in his affidavit for bail on new facts misled the court by alleging that he was not getting medication for hypertension⁵. The letter from the Department of Correctional Services dated 25 March 2025 confirmed that the respondent was collecting medication monthly for hypertension.

[24] In response the respondent indicated that as it was not disputed that the respondent was suffering from chronic hypertension, same was confirmed by the appellant and the Court considered the illness as one of the grounds submitted to constitute exceptional circumstances, considered cumulatively with the other new facts, as highlighted by the Court a *quo*.

[25] The respondent's affidavit was misleading concerning not receiving medical attention whilst in custody. The fact that the appellant provided written confirmation of the respondent's illness as well as the treatment been provided to the respondent, rebutted the version of not receiving medical attention, whilst incarcerated. The Court a *quo* misdirected itself instead, by concentrating on the medical condition, as deteriorating without any medical basis for that conclusion. The Court a *quo* should have acknowledging that the illness was being addressed, whilst the respondent was in custody.

⁵ See affidavit paragraph 9.8 on page 49

[26] The issue of the respondent's cattle and goats getting lost and his business crumbling was relied upon as a further new fact, considered by the Court *a quo* as follows;

"The issue of the applicant losing his cattle and goats and crumbling business, which was not happening before the initial bail application, which also statement from the bank were attached, in my view also constitute new facts, as decided in the case of S v Mathebula 2010(1) SACR 55(SCA)".

[27] The appellant highlighted that at the first bail application the respondent indicated to the Court *a quo*, that the cattle and goats would be housed on a farm and that his wife would be responsible for supervising same. The respondent in his affidavit placed great emphasis on receiving information, that his livestock was lost. It was apparent from the affidavit of the respondent's wife, who clarified the issue of the lost cattle and goats, in that on her visit to the farm, on that specific date, she was unable to find the aforesaid livestock. No evidence was placed before the Court *a quo*, that harm had befallen the said animals, which would have at least been verified by the employees working on the farm, responsible for the livestock. The respondent failed to explain in his affidavit in what context, was the said livestock lost and if this was a permanent or a temporary situation. Without more evidence and investigation, this allegation could not be considered in the context of a new fact justifying exceptional circumstances. The Presiding Magistrate erred by placing weight on such unsubstantiated information.

[28] The bank card and school reports which were relied upon by the respondent were disputed by the appellant as same were not discovered to the State, prior to the bail application proceeding. Moreover, the appellant indicated that there was no evidence in the first bail application, which could be compared with the current documentation, for justification that the circumstances of the family of the respondent as well as his business were being unduly prejudiced due to his incarceration.

[29] The respondent indicated that individually these circumstances may not have warranted intervention from the Court *a quo*, but cumulatively they would constitute new facts. This was considered by the Court *a quo* to warrant the release of the respondent on bail. It was further indicated that bail conditions concerning reporting to the police on a weekly basis was also included as part of the conditions to be complied with by the respondent when released on bail. This was a further issue of dispute between the parties.

[30] Regard was had to the case of *S v Yanta*⁶ where the Court noted as follows

"The approach adopted by Kriegler J in the Dlamini case suggests that the exceptional circumstances as envisaged by subsection (11)(a) are not to be construed as requiring an accused to place before a court factors or circumstances in addition to those provided for in subsections (4), (9) and (10) of the act. The enquiry remains the same, namely, a weighing of the considerations referred to in subsections (4), (9) and (10) of Section 60 and

⁶ See 2000 (1) SA CR 237 (Tk) at 243H -- 244 a

then to exercise a value judgment according to all the relevant criteria on the facts placed before a court. At the end of the day the court has to decide if those factors which have been found to exist and which favour the release of an accused from detention are such, weighed against the interests of justice, so as to constitute exceptional circumstances for the purposes of subsection (11)(a). There can be as many circumstances which are exceptional as the term in essence implies. So, for example factors such as an urgent serious medical operation, terminal illness or the lack of evidence implicating the accused in the charge may constitute exceptional circumstances when weighed against the factors set out in subsection (4)." Having regard to same on this point there was misdirection on the part of the Court a quo, as correctly highlighted by the Appellant.

- [31] The Court a quo noted the following concerning Section 60(4) and the failure by the State to lead evidence as follows;

"During the bail on the new facts as the facts were presented to me the state did not lead any evidence to establish the ground in section 60(4) of the Criminal Procedure Act 51 of 1977. The new facts proven together with the facts proven in the previous bail application cumulatively constitute exceptional circumstances.

And whereas having given a detailed account of the events none of the evidence presented by the State for refusing bail had been established in terms of section 60(4) of the Criminal Procedure Act 51 of 1977.

[32] In *S v Vermaas*⁷ it was held that in a bail application brought based on the alleged existence of new facts, the court entertaining that application should consider all facts before it, new and old and on the totality of the evidence determine whether the bail should be granted or refused. The same view was echoed by the court in the case of *S v Mohamed*⁸. These two cases were cited with approval by the full court in the case of *S v Petersen*⁹. The Court *a quo* did not consider all the evidence specifically those relied upon by the State in the first bail application wherein bail was refused. This was a further misdirection as the application for bail on new facts were clearly considered in isolation, having regard to the new facts without weighing it up against the evidence previously placed before the Court.

[33] The respondent in his affidavit drew the attention of the Court *a quo* to the fact that the State's case was based on circumstantial evidence and the strength thereof was doubtful regard was had to *S v Mathebula*¹⁰ where it was held as follows:

"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: S v Botha 2002 (1) SACR 222 (SCA) at 230h, 232c; S v Viljoen 2002 (2) SACR 550 (SCA) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which

⁷ 1996(1) SACR 528(T)

⁸ 1999(2) SACR 507 (C).

⁹ 2008(2) SACR 355 (C).

¹⁰ See 2010 (1) SACR 55 (SCA) at paragraph 12

he was involved only on the periphery or perhaps not at all. But 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; as to which see Shabalala & Others v Attorney-General of Transvaal and Another [1995] ZACC 12; 1996 (1) SA 725 (CC). 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. 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 561f-g."

[34] The Court *a quo* misdirected itself by placing weight on the abovementioned circumstances, without highlighting how these new facts impacted the totality of the bail proceedings, since no mention was made, concerning the factors relied upon, in his first decision, refusing to admit the respondent to bail. It is based on these material misdirection's that this Court can revisit the new facts raised by the respondent in considering whether the respondent established exceptional circumstances to warrant his release from custody.

[35] The respondent is presumed innocent till proven guilty in respect of these offences. From the accepted facts the respondent was on parole when the offences were committed, and he was arrested at Musina in breach of his parole condition. The respondent faces various serious charges as contained in the indictment. The appellant raised the apprehension of the commission of further offences and of evading of his trial. The appellant was concerned that the bail conditions would not

suffice to enforce compliance, since the respondent failed to comply with his parole condition. The appellant highlighted that the respondent was only in custody on account of the breach of his parole, as bail was set on 20 June 2025. The new facts as highlighted by the respondent were reconsidered in context of the provisions of Section 60 of the Criminal Procedure Act.

[36] The respondent's medical condition was being appropriately addressed by the Department of Correctional Services. The respondent received medication monthly and was being monitored. If there was a potential of deterioration in his medical condition same would be addressed by them, and feedback by them and or respondent to Court would ensue, if for any reason the Department of Correctional Services, were not equipped to help the respondent medically.

[37] The allegation of his animals being lost, his business interests and children's education as highlighted above were bold allegations without substance on which same could be relied as justification for his release, outside of the fact that his wife had the responsibility of the welfare of the livestock, his business interests and family, when offset against these serious allegations these factors, individually as well as cumulatively, did not strengthen the respondent's case to be released on bail. Some were also previously highlighted in his first bail application and ventilated at that application.

[37] Having taken all that has been placed before this Court I am satisfied that the Magistrate failed to exercise his discretion judicially in granting the admission of the

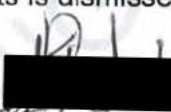
respondent to bail. The new facts as highlighted by the respondent were without merit individually and cumulatively. The respondent failed to place facts before this Court to find that exceptional circumstances existed in the interest of justice to permit his release on bail. The evidence presented by the respondent when measured against the provisions of Section 60(11)(a) read with Section 60(4)(a)-(e) and Section 60(9)(a)-(g) of the Criminal Procedure Act 51 of 1977. The new facts did not qualify as grounds for the admittance of the respondent to bail.

[38] In the result the following order is made:

[38.1] The appeal is upheld

[38.2] The decision of the court *a quo* is set – aside and replaced with the following.

[38.3] The application for bail on new facts is dismissed.



K L PILLAY AJ

ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

FOR THE APPELLANT : Adv M P Mudau

INSTRUCTED BY : Director of Public Prosecutions Limpopo

FOR THE RESPONDENT : Adv P Sengani

INSTRUCTED BY : Simphiwe Manenzhe Attorneys

POLOKWANE HIGH COURT