

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

**CASE NO: A23/2025**

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES

**DATE 07-10-2025**

**SIGNATURE PD. PHAHLANE**

**In the matter between:**

**S[...] L[...] C[...]**

**APPELLANT**

**and**

**THE STATE**

**RESPONDENT**

*Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 7 October 2025.*

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**Judgment – (Bail Pending Appeal)**

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**PHAHLANE, J**

- [1] The appellant was convicted on 11 June 2024 by the Pretoria Regional Court on two counts, namely: attempted murder and rape. The count of rape relates to having had sexual intercourse with the complainant while he was aware of his HIV status. He was sentenced on 25 September 2024 to 10 years imprisonment on the count of attempted murder and life imprisonment for rape.
- [2] The appellant noted an appeal directly to the High Court in terms of section 309(1)(ii) of the Criminal Procedure Act 51 of 1977 (“the CPA”) which makes

provision for a convicted person who was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("the CLAA") to note an appeal without having to apply for leave in terms of section 309B. On 24 March 2025, the appellant's application to be released on bail pending his appeal was refused by the trial court.

[3] It is common cause that the appellant did not testify under oath during the bail application and presented his evidence by means of an affidavit, supported by other documents as well as the affidavit deposed to by his wife confirming that the appellant has two minor children and that she works at Woolworths in Brooklyn. His personal circumstances were placed on record and will not be repeated herein save for those aspects which I consider to be relevant in this appeal. The following circumstances are noted:

- (a) The appellant is a South African citizen.
- (b) He was raised by his mother and stepfather, and his biological father resides in Namibia.
- (c) He has qualifications in the security industry and has a security company.
- (d) He was also in the special forces doing special operations within the South African National Defence Force ("SANDF"). He stated that he is not allowed to mention the special operations he was involved in for security reasons.
- (e) If he is granted bail, he will adhere to all bail conditions set out by the court and hand over his passport to the investigating officer or the clerk of the court.
- (f) He cannot flee from South Africa because he will not be safe in other countries as a result of his career in the SANDF.
- (g) If the appeal is not successful, he will hand himself over to the clerk of the court to serve his sentence.

[4] The bail application was premised on the fact that the appeal would have reasonable prospects of success. The appellant contends that his constitutional right to a fair trial was infringed because the trial proceedings were marred by

procedural irregularities in that the court failed to comply with the provisions of section 212B (5)<sup>1</sup> of the CPA.

- [5] It is specifically alleged that the trial court failed to enquire from the appellant whether he confirms the information given by the prosecutor in terms of subsection 1. This relates specifically to paragraphs 1 and 5 of the notice which reads as follows:

*“Paragraph 1: The accused was at all times relevant to charges employed as a Staff Sergeant by the South African National Defence Force (SANDF)*

*Paragraph 5: The accused was immediately after the outcome of the subsequent testing done since 8<sup>th</sup> of October 2007 up to and until 14<sup>th</sup> of March 2014 became available, informed by the SANDF medical staff of his positive HIV status”<sup>2</sup>.*

- [6] The appellant noted in his notice of appeal that his attorney did not put the above paragraphs 1 and 5 of the notice in dispute because upon being questioned by the Learned Magistrate if the two aspects were an issue, the attorney confirmed that these two aspects are in fact admitted<sup>3</sup>.
- [7] With regards to paragraph 5 complained of, it is alleged that the said paragraph did not refer to the word “HIV”, and that the Learned Magistrate inserted the word “HIV” to the positive status of the appellant. It is averred that the trial court further misdirected itself by accepting hearsay evidence during the trial.

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<sup>1</sup> The section provides: “If a notice was forwarded or handed over by a prosecutor as contemplated in subsection (1), the prosecutor shall notify the court at the commencement of the proceedings of such fact and of the reaction thereto, if any, and the court shall thereupon institute an investigation into such of the facts which are not disputed and enquire from the accused whether he or she confirms the information given by the prosecutor and whether he or she understands his or her rights and the implications of the procedure and where the legal adviser of the accused replies to any question by the court under this section, the accused shall be required by the court to declare whether he or she confirms such reply or not”.

<sup>2</sup> Paginated page 803 of the record.

<sup>3</sup> Paginated page 1086 of the record.

- [8] It is on the basis of the above averments that the appellant submitted that: ‘as a result of the Learned Magistrate’s irregularities which infringed on his right to a fair trial, there are reasonable prospects of success on appeal because his conviction was not in accordance with the law’.
- [9] Mr Moldenhauer appearing for the appellant submitted that the appellant has a better chance than just a reasonable prospect that his convictions will be set aside due to the irregularities committed by the Learned Magistrate. He insisted that the enquiry done by the Learned Magistrate in respect of the admissibility of paragraphs 1 and 5 of the notice, should have been directed at the appellant and not his attorney.
- [10] He referred to the decision in ***S v Beegte***<sup>4</sup>; ***Obiwuru v S***<sup>5</sup> and ***Menyuka v S***<sup>6</sup>, and stated that the circumstances of the latter case are applicable to the current matter – and submitted that the appellant should be committed to bail because it will be unfair to keep him in custody to serve a sentence which is likely to be set aside.
- [11] It is trite law that noting an appeal against conviction does not automatically suspend the execution of the sentence imposed following the conviction, and neither is it a ground to justify the release of a sentenced accused on bail pending appeal – unless the trial court ‘thinks it fit to order’ that the accused be released on bail. This requires of a sentenced accused to apply for bail to the trial court and to place the necessary facts before the court that would allow it to exercise a discretion in his favour to grant bail.
- [12] There are different considerations which arises in granting bail after conviction and sentence from those relevant to granting bail pending trial. At the heart of a decision on the issue of bail pending appeal lies two relevant factors that are interconnected, and they are: **(a)** the prospects of success on appeal; and **(b)**

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<sup>4</sup> (925/12) [2013] ZASCA 1 (11 February 2013)

<sup>5</sup> (A216/23) [2024] ZAWCHC 181 (16 July 2024)

<sup>6</sup> 2021 (2) SACR 316 (GJ) (24 February 2021)

the increased risk and likelihood of abscondment once a person has been sentenced to a lengthy term of imprisonment.

- [13] Apart from submitting that he has reasonable prospects of success on appeal, the appellant contends that he is not a flight risk because he attended all court appearances during trial, save for the time when he was absent due to ill-health, and that the whereabouts of his wife who works at Woolworths in Brooklyn are known.
- [14] Our courts have over the years recognised that the mere fact that the appellant has reasonable prospects of success on appeal, is not a sufficient ground to entitle a convicted person to be granted bail pending an appeal<sup>7</sup>. One of the factors to be considered during bail include the rights and safety of the victim who is also at the centre of the criminal justice system. I will deal with this aspect later in the judgment.
- [15] It is trite that the powers of an appeal court to interfere with the decision of the trial court to refuse bail are circumscribed by section 65(4) of the CPA. Accordingly, this court as a court of appeal will only set aside the decision of the trial court if it is satisfied that the trial court had exercised its discretion wrongly<sup>8</sup>. What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted<sup>9</sup>. In essence, the decision to grant bail is one entrusted to the trial court because that court is best equipped to deal with the question of bail having been steeped in the atmosphere of the case<sup>10</sup>.

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<sup>7</sup> S v Masoanganye & Another 2012 (1) SACR 292 (SCA); See also: S v William 1981 (1)SA 1170 (A) where the court held as follows: “even where there is a reasonable prospect of success on appeal bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding”.

<sup>8</sup> Section 65(4) of the CPA provides as follows: “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”.

<sup>9</sup> S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC); 1999 (2) SACR 51 (CC).

<sup>10</sup> S v Masoanganye at para 15; See also: S v Beegte at para 4

[16] The legal principle for interfering with the trial court's judgment was enunciated in **S v Barber**<sup>11</sup> 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".*

[17] It should be noted that the authorities referred to on behalf of the appellant are distinguishable from the current matter, not only in respect of the applicable principles, but also in respect of the circumstances and the sentences imposed in those cases. Notwithstanding, the common factor in **Obiwuru** and **Beegte**<sup>12</sup> is that the bail appeals were dismissed.

[18] To give a brief background, the court in **Obiwuru** dealt with bail appeal pending petition. The appellant was sentenced to twelve (12) years imprisonment, five of which was suspended – as opposed to the current matter where life imprisonment was imposed on the appellant.

[19] Although the appeal court dealt with the aspect relating to the 'prospects of success on appeal', it emphasized the importance of always being mindful of the fact that "launching a petition is not a guarantee that the petition would be granted".

[20] In expressing that the appeal before it rested entirely on the assertion that the trial court used the wrong test in coming to a conclusion that bail should be

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<sup>11</sup> 1979 (4) SA 218 (D) at 220E-F

<sup>12</sup> Ibid 10.

denied', it referred *inter alia*, to the decision in **S v Masoanganye** where the court held that the trial judge is the one vested with a discretion whether or not to grant bail, and held further that as far as the issue of prospects of success is concerned, it is important to remember that the stringent test in bail after conviction and sentence is potentially designed to protect the proper functioning of the bail administration and to maintain public confidence in the administration of justice.

[21] In the ultimate, the appeal court concurred with the trial court's decision by holding that the trial court did not misdirect itself in refusing to grant bail to the appellant pending his petition because leave to appeal had not been granted and it was not known whether the appellant's appeal would be adjudicated or not. It acknowledged that the trial court 'attributed weight to the fact that there was a likelihood that the appellant would abscond should he be released on bail, because a substantial custodial sentence provides an incentive to abscond and leave the country'. Further that the court hearing an application for bail pending appeal should only be concerned with an application for release of the applicant, because 'it is not the task of the bail court to try and second guess the outcome of the petition or the appeal'.

[22] On the other hand, the courts in **Menyuka** and **Beegte**, dealt specifically with the applications brought in terms of section 321 of the CPA<sup>13</sup> where the sentences were imposed by the high court and leave to appeal had already been granted to the appellants who were serving 27 years and 15 years imprisonment respectively. As indicated in **Menyuka**<sup>14</sup>, the issue for determination was whether a Superior Court hearing a bail application pursuant to the terms of section 321 is bound by the terms of section 60(11)? This is an aspect entirely different from the present case because the convictions and

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<sup>13</sup> Section 321(1) provides: "The execution of the sentence of a superior court shall not be suspended by reason of any appeal against a conviction or by reason of any question of law having been reserved for consideration by the court of appeal, unless –

(a) .....

(b) the superior court from which the appeal is made or by which the question is reserved thinks fit to order that the accused be released on bail or that he be treated as an unconvicted prisoner until the appeal or the question reserved has been heard and decided."

<sup>14</sup> At para 14.

sentences herein were imposed by the magistrate at the regional court, and accordingly, the provisions of section 321 do not apply to this case.

- [23] Having regard to the above, I am of the view that the appellant's reliance on the authorities cited above is misplaced. Consequently, I do not agree with the submission that the circumstances in **Menyuka** are applicable to the present case.
- [24] It is important to note that the focus in this bail appeal was predominantly on the criticisms levelled against the trial court for the alleged irregularities committed during the trial proceedings. It is also clear from the appellant's heads of argument that much emphasis was placed on those alleged irregularities and the argument that the appellant has reasonable prospects of success on appeal by reason of such irregularities. Similarly, this was the same argument presented during the appellant's bail application before the trial court. Mr Moldenhauer submitted that the appellant's heads of argument relied upon during his application before the magistrate, would also be relied upon in this appeal.
- [25] What is noted in the preceding paragraph begs the question of whether the trial court misdirected itself or had exercised its discretion wrongly when it refused to grant bail to the appellant, because that remains the issue for determination by this court.
- [26] If regard is had to the appellant's heads of argument and the submissions made before this court, it is indisputable that the trial court's decision to refuse to grant bail was never challenged. This is so because no misdirection specifically dealing with the trial court's refusal of bail has been identified, – which would entitle or empower this court to interfere with the decision of the trial magistrate as required by section 65(4) of the CPA. (underline added for emphasis)
- [27] As already indicated, there are different considerations which arises in granting bail after conviction and sentence, which include the prospects of success on appeal which forms the basis of the appellant's application, and the increased

risk and likelihood of abscondment, bearing in mind that the appellant has been sentenced to life imprisonment.

- [28] With regards to the issue of the prospects of success on appeal in respect of conviction, the appellant had in his Practice Note referred this court to the prosecutions' section 212B notice which forms part of the court's bundle presented in support of this bail appeal. It is important to note that the prosecution's section 212B notice specifically refers to the "positive HIV status" of the appellant<sup>15</sup>. It was therefore incorrect for the defence to state that the Learned Magistrate inserted the word "HIV" to the positive status of the appellant when the document states otherwise.
- [29] One wonders why the Practice Note prepared on behalf of the appellant would refer to a specific document which contradicts paragraph 5 complained of, – which forms the core basis of his appeal against conviction.
- [30] When Mr Moldenhauer's attention was drawn to this aspect and the court enquired from him why 'his submissions' and the notice of appeal which the court was referred to, reflects different information to what is actually contained in the prosecution's section 212B notice, he responded that there is another document that was placed before the trial court that supports his argument that the word "HIV" was not included, but that document is not before this court and is not contained in the court's bundle.
- [31] It is therefore my considered view that the submissions made in respect of paragraph 5 complained of has no merit.
- [32] With this in mind, it becomes difficult to find in favour of the appellant and conclude that he has reasonable prospects of success on appeal. I am mindful of the appellant's heads of argument which deals in detail with the criticisms levelled against the trial court and the submissions made that support those criticisms. Be that as it may, it is important to note that this court cannot at this

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<sup>15</sup> Ibid paragraph 5.

stage be concerned with the evaluation of the merits of the case because that is the responsibility of the appeal court which will have the benefit of the entire transcript before it. Consequently, this court is not required to second-guess the outcome of the appeal or scrutinise the evidence of the trial court in full detail as was presented in argument before this court on behalf of the appellant because that may amount to a dress rehearsal for the appeal to follow<sup>16</sup>.

[33] As far as the application before this court is concerned, the appellant had the onus to prove on a balance of probabilities and to place relevant factors before the court to enable it to determine whether individually or cumulatively, they warrant a finding that circumstances of an exceptional nature exist, which in the interest of justice warrant his release.<sup>17</sup> This is because he has been sentenced for an offence listed under Schedule 6 which attract the application of the provisions of section 60(11)(a) of the CPA. But most importantly his status has changed, and the increased risk of abscondment is inevitable because he has been sentenced to a long term of imprisonment.

[34] It is common cause that the respondent opposed the bail application and presented the affidavit of the investigating officer and the complainant. The investigating officer noted in his affidavit that bail should not be granted because the appellant poses a threat to the complainant because he has received specialised training in the SANDF which include evasive actions and escape techniques as a special force operative. He also noted that the appellant is a flight risk because the address provided by the appellant could not be verified due to lack of access to the premises, having regard to the fact that he has been sentenced to life imprisonment. This evidence is corroborated by the affidavit of the complainant who noted that she fears for her life and safety and explained that because of the training which the appellant had received in the Special Forces withing the SANDF, he has the ability and skill to evade the law enforcement and to kill.

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<sup>16</sup> S v Viljoen 2002 (2) SACR 550 (SCA)

<sup>17</sup> See also: S v Bruintjies, 2003 (2) SACR 575 (SCA) at paragraph 6

- [35] The respondent submitted, and correctly so, that the appellant has failed to discharge the onus that rests upon him to prove that exceptional circumstances exist which in the interest of justice permits his release, especially when regard is had to the fact that he has been convicted and sentenced for an extremely serious offence. The respondent further submitted that there is no apparent misdirection in the reasoning of the trial court and that the Learned Magistrate exercised his discretion properly when refusing to grant bail to the appellant.
- [36] I concur with the respondent's submission. While the appellant contends that he has reasonable prospects of success on appeal, one should not lose sight of the fact that the prospect of success is not considered in isolation. Even if the appellant were to succeed in establishing the prospects of success on appeal, that does not necessarily mean that he is entitled as of right to be granted bail because prospects of success on appeal (on its own) is not sufficient to entitle a convicted person to bail pending an appeal. In **S v William**<sup>18</sup> the court held as follows: "even where there is a reasonable prospect of success on appeal, bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding".
- [37] I have already indicated that one of the factors to be considered by the court include the rights and safety of the complainant. Having said that, there are certain objective facts which the court on appeal will no doubt find interesting, especially when dealing with the enquiry as to whether the appellant poses a flight risk. This relates to **(a)** failure of the appellant to rebut the respondent's case. In this regard, the affidavits of both the investigating officer and the complainant containing the averment that the appellant poses a threat to the complainant remain unchallenged; and **(b)** the undisputed evidence that the appellant has the ability to vanish without a trace because he received specialised training as a special force operative in the SANDF which include evasive actions and escape techniques.

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<sup>18</sup> 1981 (1) SA 1170 (A)

[38] Having regard to the above, I am of the view that the safety of the complainant ought to be guaranteed, and it would be in the interest of justice to do so.

[39] Reading through the judgment of the trial court, it is clear that when the court evaluated the evidence before it, it took into account the undisputed evidence presented on behalf of the State which cannot be ignored.

[40] In dismissing the appellant's application to be released on bail, the trial court held *inter alia* that the appellant is a flight risk. In this regard, the trial court held as follows:

*"The applicant would be facing a lengthy term of imprisonment if the convictions are confirmed, despite him undertaking to hand himself over to the clerk of the court and also to surrender his passport to authorities should his appeal fail the prospects of a lengthy term of imprisonment is in my opinion sufficient motivation for the applicant to flee or abscond instead of handing himself in to go back to prison."*

*This court also has to consider that the applicant has a family connection, that is his biological father who is in Namibia which is outside the borders of this country".*

[41] Having regard to the above, I cannot find any fault or misdirection in the decision of the trial court which exercised a discretion, having taken into account all the circumstances before the court.

[42] This court is mindful of the undisputed evidence which also formed the basis of the trial court's decision to refuse bail when it held that the appellant is a flight risk. With that being said, I find that the appellant has 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. The trial court having considered the specialized training of the appellant stated the following:

*“It was never challenged or disputed that the applicant has received specialised training while in the special forces unit within the SANDF involving evasive and escape techniques. That being the case with such training, even if the applicant were to surrender his passport, there is no guarantee or no amount of bail or strict bail conditions that would act as a safeguard against the risk of the applicant fleeing. He can easily evade the law enforcement with the skills that he possesses. The court considers the applicant under those circumstances to be a flight risk. To grant bail to the applicant under those circumstances would not be in the interest of justice”.*

- [43] An analysis of all the evidence before the trial court supports a finding that the appellant had failed to establish exceptional circumstances entitling him to be granted bail. Accordingly, I am of the view that the trial court did not misdirect itself in finding that **(a)** the appellant’s release would undermine the objectives of the criminal justice system; **(b)** it would not be in the interest of justice to grant bail to the appellant, but most importantly; **(c)** there are no prospects of success on appeal.
- [44] The appellant indicated in his heads of argument that he would be able to **loan** from his family an amount of R10 000,00 for bail, but there are no guarantees that even the stringent bail conditions would provide adequate safeguards against the risk of abscondment in the circumstances<sup>19</sup>.
- [45] In light of the above, I am not persuaded that the trial court erred in refusing to admit the appellant to bail. I am satisfied that the Learned Magistrate properly exercised his discretion. 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 this would also seriously undermine the criminal justice system including the bail system itself. I therefore cannot find any basis to interfere with the decision of the magistrate. Similarly, I concur with the magistrate’s finding that the appellant

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<sup>19</sup> S v Beegte (925/12) [2013] ZASCA 1 (11 February 2013)

failed to satisfy the court that the interests of justice permit his release. Accordingly, the appeal must fail.

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

1. The appeal against the refusal of bail is dismissed.

PD. PHAHLANE  
JUDGE OF THE HIGH COURT

APPEARANCES

|                            |                                                         |
|----------------------------|---------------------------------------------------------|
| Counsel for the Appellant  | : Mr HW Moldenhauer                                     |
| Instructed by              | : Moldenhauer Attorneys                                 |
| Counsel for the Respondent | : Adv. K Germishuis                                     |
| Instructed by              | : National Director of Public Prosecutions,<br>Pretoria |
| Date of Judgment           | : 07 October 2025                                       |