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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable

Case no: A 204/2025

Lower Court Case no: B 155/2025

In the matter between:

M[...] N[...]

APPELLANT

And

THE STATE

RESPONDENT

Coram: BARENDSE AJ

Heard: 22 October 2025

Electronically Delivered: 28 October 2025

ORDER

1 The appeal is dismissed.

JUDGMENT

BARENDSE AJ

INTRODUCTION

[1] The Appellant lodged an appeal to this court against the refusal by the Bishop Lavis Magistrate to grant an order for his release on bail. The Appellant was arrested on the evening of 31 January 2025 and charged with the murder of his wife, Ms Z[...] N[...], by shooting her with a firearm. A bail application was made on 5 February 2025 ("the first application"), which was refused. A further application was subsequently brought based on new facts on 2 April 2025 ("the second application"). Given that when the second application was made, the court had to consider all the facts before it, new and old, it is apposite to refer to both applications insofar as it is necessary.¹

The first application

[2] At the first application, the State contended that the Appellant was charged with a Schedule 6 offence on the basis that the alleged offence was premeditated. It appears that at the first application, the defence did not challenge this, but the court nevertheless considered this issue.² The State

¹ *S v Vermaas* 1996 (1) SACR 528 (T) p 529A.

² Record p 95.

called the investigation officer as a witness. The Appellant deposed to an affidavit in support of his application. It was accepted that an onus rested upon him to demonstrate on a balance of probabilities that exceptional circumstances existed which rendered it in the interest of justice to release him on bail. In his affidavit, the Appellant submitted that none of the factors set out in Section 60(4) (a-e) of the Criminal Procedure Act, 51 of 1977, (“the CPA”) would ensue if he were to be released on bail.

[3] The affidavit deposed to by the Appellant included averments that he did not know the complainant and the state witnesses. The evidence of the investigating officer was that the two state witnesses were close relatives of the Appellant and of his late wife. The witnesses were the late wife's sister and her husband. The Magistrate pointed at this apparent untruth in the affidavit, and the Appellant's legal representative at the time argued that when the first application was made, the defence did not have access to the docket as yet and was not sure who the state witnesses were.

[4] The affidavit contained the Appellant's personal circumstances including that he had no criminal record, was employed as a bus driver and owned a one-vehicle shuttle service. He was the father of three children aged 18, 14 and 12 and was the main breadwinner in the family. Details were provided of immovable property and vehicles owned by the Appellant and of his financial obligations. It was stressed that he desperately had to go back to work to ensure that his children would not lose the roof over their heads.

[5] In brief, the allegations by the State were that on the evening in question the Appellant called his wife and asked her where she was. Her vehicle was fitted with a tracking device, and her telephonic answer was inconsistent with the data of the tracking device. He then allegedly contacted his wife's sister, informing her that he needed her and her husband to urgently come to his home for a meeting. The Appellant fetched his sister-in-law and brother-in-law from Gugulethu and brought them to his home in Montevideo. En route to his home, the Appellant allegedly told the relatives that he caught his wife cheating again, showed them the data of the tracking device, and told them that his wife had lied to him about her location.

[5] Upon arrival at the Appellant's home, his wife was there. He allegedly instructed his then 18-year-old son to take his sisters with him, proceed to a filling station to refuel the vehicle, and thereafter go to a restaurant where they were to wait until joined by the elders. He asked his sister-in-law to call his wife, who was in the bedroom, to the living room. An argument between the Appellant and his wife ensued. During this argument, he allegedly uttered words to the effect that *'I will rather go to jail'*. He allegedly left the living room and returned with a firearm.

[6] At this stage, the two relatives were allegedly in the living room with the Appellant and his wife. The Appellant allegedly cocked his gun, and the sister-in-law left the living room out of fear and went to the kitchen. While the brother-in-law, the deceased, and the Appellant were in the living room, the Appellant fired a shot at the deceased. The brother-in-law then allegedly

ran to his wife, who was in the kitchen at the time, and he and his wife went from the kitchen into the garage. The kitchen door leads to the garage.

[7] While the two relatives were in the garage, a second shot was fired, and afterwards a third shot was fired. After the third shot was fired, the Appellant allegedly went to the garage where the two relatives were, put his gun to his head, and threatened to shoot himself. The Appellant allegedly decided against this and started making phone calls, informing people that he shot and killed his wife. The Appellant remained at home and cooperated with the police.

[8] The Magistrate found that the Appellant failed to satisfy the court that exceptional circumstances existed, cited extensive authorities for his conclusions and refused the application.

The second application

[9] The Appellant engaged the services of another legal representative and an application for bail on new facts was made on 2 April 2025, before the same Magistrate. The latest facts were listed as follows:

- a) the bail affidavit previously submitted was poorly drafted and contained inaccuracies.
- b) the state witnesses were known to the Appellant, the affidavit was prepared by his previous attorney, and he signed it in good faith, unaware of the inaccuracies;
- c) not all his assets, sources of income, and obligations were disclosed in the affidavit and that since his incarceration his

financial position deteriorated drastically, his inability to manage his affairs led to severe financial hardship impacting his ability to meet obligations and provide for his family;

- d) the court failed to fully consider the fact that he was the primary caregiver of his children and the devastating, emotional, mental and financial toll that his continued incarceration has on them;
- e) the children found themselves in a desperate situation, struggling without his support and that their well-being was at risk.

[10] The affidavit drew attention to the fact that the Appellant owns another business, a funeral parlour, that was not disclosed in the previous affidavit.³

[11] It must be added further that the Appellant's affidavit dealt extensively with relevant case law around the interests of children in these situations and emphasised that, since the loss of their mother, he has become the primary caregiver to them.⁴ In the second application, there was also an affidavit by his brother, Mr B[...] N[...], who submitted that the Appellant's continued incarceration is creating severe financial hardship for the children and is putting the Appellant's businesses at serious risk. He mentioned that the eldest child, an 18-year-old son, was left to care for his younger siblings. This is a responsibility that he is not emotionally or financially equipped for.⁵ He pointed at the rapidly deteriorating financial position of the family and the risk of losing their home. He further mentioned that the children

³ Record p 120.

⁴ Record p 122-127.

⁵ Record p133-136.

were struggling emotionally, mentally, and financially as they had to deal with the loss of their mother and the ongoing incarceration of their father.

[12] The Magistrate, with reference to *S v Petersen*⁶ considered whether the new facts on which the second application was based were, in fact, new or whether they were not a mere reshuffling or embroidery of old evidence. Further, and with reference to paragraph 58 of *Petersen*, the magistrate pointed out that where evidence that was available at the time of the previous application was, for whatever reason, not revealed, it cannot be relied upon in a later application as new evidence.⁷ The Magistrate concluded that the new facts relied upon in the second application did not constitute new facts demonstrative of exceptional circumstances. This finding applied to the position around the children as well. However, when refusing the second application, the Magistrate made an order directing the Clerk of the Goodwood Court to, with the assistance of the Clerk of the Goodwood Children's Court, notify the head of the social workers for the Montevideo area to investigate the well-being/welfare of the two minor children and take all necessary steps to ensure their well-being.

Reasoning on Appeal

[13] The appeal record contained reports by a Psychologist, Dr Nyewe, in respect of each of the three children.⁸ These reports were dated 16 June 2025 and were therefore procured after the second application to which this appeal relates. I shall return to this later.

⁶ 2008 (20 SACR 355 at 371.

⁷ Record p 197.

⁸ Record 219-223 ; 229-233 and 234-238.

[14] While the brother of the Appellant made general statements about financial hardship and the real threat to the financial well-being of the children, there is no information about how the Appellant conducted these businesses in the past. Given his employment as a bus driver, it is expected that he had assistance with operating the shuttle service and conducting the funeral business. The court *a quo* was not, at either of the two applications, provided with this information, and to what extent, if any, the two businesses were continuing. That said, there were only general statements by the Appellant's brother that the businesses were suffering.

[15] In terms of Section 60(11)(a) of the CPA, an accused charged with a Schedule 6 offence shall be detained in custody unless the accused satisfies a court that exceptional circumstances exist which, in the interest of justice, permit his or her release on bail. Exceptional circumstances denote something '*...unusual, extraordinary, remarkable, peculiar or simply different*'.⁹

[16] Section 65(4) of the CPA stipulates that a court or judge hearing an appeal against a decision of a lower court on bail may only set aside the decision of a lower court if it is satisfied that the decision was wrong.

[17] Section 60(4) of the CPA lists the following grounds which, if any is shown to exist, would have the effect that the interests of justice would not permit the release of an accused. These are:

⁹ *S v Petersen* 2008 (2) SACR 355 paragraphs [54]-[56].

- 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;
- 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 to be 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; or
- 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.

[18] This court must agree that the facts placed before the magistrate at the second application were not new facts but rather an elaboration on the facts that were available at the time of the first application and presented thereat. There are also no other grounds upon which this court can find that the Magistrate misdirected himself.

[19] Turning to the reports by Dr Nyewe referred to in paragraph [13] above, it is not open to this court to accept new evidence on appeal. The enquiry is confined to whether the Magistrate correctly refused the bail

application brought on new facts. It cannot receive new evidence on appeal.¹⁰ New evidence must first be placed before the court *a quo*.

[20] It is so that the best interests of a child are paramount in any case that affects a child.¹¹ Given that the best interests of the children are paramount but not absolute, these must be balanced with the other prescripts of, in this instance, whether the granting of bail will be in the interest of justice.

[21] It appears that the report/s by the social workers pursuant to the investigation directed by the Magistrate were not yet available. The matter cannot, therefore, be remitted to the court *a quo*. It is not clear where the minor children are currently living, whether a family member other than the eldest sibling is living with them and taking care of them, and, importantly, whether it is in the opinion of the social worker/s in the children's best interests for the Appellant to be released on bail. It is not known whether any of the children maintained a relationship with the Appellant since his incarceration, whether they visit him, and whether, given the allegations against him, they see their way clear to living with him in the family home. The reports by the social workers will undoubtedly cast light on these and other relevant factors.

[22] It remains open to the Appellant to obtain the reports by the social workers and if so indicated, bring another bail application based on new facts.

¹⁰ *S v Yanta* 2000 (1) SACR 237 (Tk) p 239.

¹¹ Section 28(2) of the Constitution. See also *S v M* 2008 (3) SA 232 (CC).

[23] In the circumstances, the appeal is dismissed.

R.D. BARENDSE
ACTING JUDGE OF THE HIGH COURT

Appearances:

For applicant: Adv A Paries
Instructed by: R Davies Attorneys

For respondent: Adv M Koti
Instructed by: State Attorney