



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR 305/2023

In the matter between:

NAEEM ESSOP

Applicant

and

THE STATE

Respondent

ORDER

The following order is granted:

The applicant's application to be admitted to bail pending the outcome of his reconsideration application to the President of the Supreme Court of Appeal is dismissed.

JUDGMENT

Henriques J

Introduction

[1] This is an application in which the applicant seeks to be admitted to bail pending the outcome of his reconsideration application to the President of the Supreme Court of Appeal (SCA) in terms of s 17(2)(f) of the Superior Courts Act 10

of 2013 (Superior Courts Act). An application for bail pending his reconsideration application previously served before Marion AJ and, on 17 October 2025, such application was dismissed.

The basis for the application

[2] This application is premised on the basis that it amounted to a new fact that the chief registrar of the SCA on 20 October 2025 directed that the SCA's stamp on the respondent's answering affidavit in the reconsideration application be cancelled and returned the answering affidavit. This was due to non-compliance with SCA Practice Directive 01/2018 (the practice directive), which requires the answering affidavit in the reconsideration application to be no longer than ten pages.

[3] The applicant submitted that in considering the new fact application, this court is enjoined to not only consider the new facts but to also consider all facts before it, new and old and, on the totality of the facts, come to a conclusion.¹

[4] He submitted further that this application ought to be disposed of in the shortest possible time, given that it impacts on his liberty and that the fundamental object of bail is to maximise personal liberty. By his past conduct, he has shown that he would go to prison if need be, after he has exhausted all his remedies. He is not a flight risk, as he has adhered to his bail conditions throughout the criminal and appeal proceedings.

[5] It is common cause that the incident which gave rise to the criminal proceedings occurred in 2013. He initially stood trial in October 2014 and when the trial commenced, he was charged with murder, assault with intent to cause grievous bodily harm and pointing a firearm. He was released on bail of R5 000. Subsequently, he was convicted of murder and pointing a firearm on 25 January 2016. On 4 April 2016, he was sentenced to 15 years' imprisonment on the murder count and two years for pointing a firearm. The applicant spent three months in custody before he was released on bail in the sum of R40 000, pending an appeal.

¹ *S v Vermaas* 1996 (1) SACR 528 (T) (*Vermaas*) at 531f-g.

[6] His appeal succeeded on 2 March 2018 and his conviction was set aside on the basis of non-compliance with s 93*ter* of the Magistrates' Courts Act 32 of 1944. Representations were then made to the prosecuting authority to stay the prosecution, which was refused. The charges were reinstated and the applicant was summonsed to court in 2019 and released on a warning. In 2020, his application for a permanent stay of prosecution was dismissed. He stood trial and, on 5 December 2022, was convicted of murder and released on bail of R5 000, pending sentencing and ordered to surrender his passport. On 8 May 2023, he was sentenced to 12 years' imprisonment. Leave to appeal against his conviction and sentence was granted on the same day and he was released on bail pending appeal in the sum of R10 000.

[7] His appeal to the full bench against his conviction and sentence was heard on 13 September 2024 and judgment dismissing the appeal was handed down on 13 June 2025. The applicant surrendered himself on 23 June 2025 and filed a petition to the SCA, served on the respondent on 30 June 2025, and sought bail pending the outcome of the petition. Bail pending the petition outcome was granted in the sum of R10 000 by Seegobin J on 14 August 2025 by consent. His petition to the SCA was dismissed and he once again surrendered himself on 8 September 2025 and has been in custody serving his sentence since then.

[8] The reconsideration application was instituted on 10 September 2025 and the application to be released on bail pending the reconsideration application was instituted on 16 September 2025. It was heard on 16 October 2025 and dismissed on 17 October 2025. The applicant submitted that the possibility of the pending reconsideration application being finalised within a period of one to two months was a factor that weighed heavily with Marion AJ when she dismissed his bail application. The question as to when the result could be expected in the reconsideration application 'featured strongly' before her, which, in the applicant's view, led in part to its dismissal, as Marion AJ was of the view the application was premature.

[9] The applicant relied on the transcribed record of the proceedings before Marion AJ, in which the respondent's stance was that the registrar of the SCA would not accept a pleading if it did not conform to the rules and that all that was

outstanding was for a replying affidavit to be filed by the applicant in order for his reconsideration application to be heard by the SCA, as the papers were properly before the SCA and the court stamp from the registrar evidenced this.

[10] However, subsequently, on 20 October 2025, an email was received from the chief registrar of the SCA, indicating that the respondent's answering affidavit did, in fact, not comply with the practice directive, as the affidavit exceeded the prescribed ten-page rule. The email indicated that the registrar was duty-bound to cancel the stamp and to return the respondent's answering affidavit.

[11] In addition, he submitted that it is unfair for him to be in custody as a consequence of the delay caused solely by the respondent's non-compliance and as at 11 November 2025, when he deposed to the founding affidavit in this bail application, there has been no indication from the respondent that it has taken any steps to rectify the situation. The prospects of his reconsideration application being considered prior to 30 November 2025 are slim. He would have to wait until the SCA term re-opens on 15 February 2026 and the outcome of the reconsideration application may only become known in March 2026.

[12] He maintained that he is not a flight risk, as demonstrated by his conduct throughout the criminal and appeal proceedings nor has it been demonstrated that he would abscond whilst on bail. Further, reliance is placed on his personal circumstances, namely, his ties to his family, specifically his ill mother and child, that he has a significant number of movable and immovable assets, that he is a man of means and has a successful business, JNH Steel CC, which employs 38 staff.

[13] The applicant, in addition, submitted that he has good prospects of success in the reconsideration application. The applicant submitted that the question to be answered is whether the interests of justice would be negatively impacted if he were to go to prison in March 2026, instead of forthwith and that if the reconsideration application receives a positive result, he would have been deprived of his liberty for months without good reason and consequently it cannot be said to be in the interests of justice for him to remain in custody. Circumstances allow for his release on bail subject to stringent conditions pending the reconsideration application.

[14] The application is opposed by the respondent, in essence, on the following grounds, namely:

- (a) a point in limine that there is no new fact, as the non-compliance with the practice directive was known to the parties as well as the court prior to the application for bail pending the reconsideration application being argued, at the time the matter was argued on 16 October 2025 and when judgment was delivered. The applicant was aware of the respondent's non-compliance on 9 October 2025 when he filed his replying affidavit. A positive finding in this regard would be dispositive of this bail application.
- (b) The applicant has not demonstrated that the interests of justice permit his release on bail as:
 - (i) he has not demonstrated that he is not a flight risk, as he has been untruthful in disclosing assets in his name and there are limited appeal remedies now available to him; and
 - (ii) he has no prospects of success of being granted leave to appeal in the reconsideration application.

Issues

[15] Having regard to the application papers, the issues for determination in this application are the following:

- (a) Is there a new fact warranting this court considering a further application for bail pending the applicant's reconsideration application?
- (b) Is the applicant a flight risk?
- (c) Does he have prospects of success in the reconsideration application, having regard to the facts of this particular matter, in other words, are there exceptional circumstances in the reconsideration application?
- (d) Having regard to the factors mentioned in the various SCA authorities is it in the interests of justice for him to be released on bail?

[16] I propose to deal firstly with the point in limine as to whether there is a new fact warranting this court considering this renewed bail application. I agree with the respondent's submission that this will be dispositive of the application.

Is this a new fact?

[17] The CPA does not define what constitutes a new fact and there is no prescribed procedure for renewed bail applications. Certain general principles have been identified over the years as relevant when a court is faced with an application for an accused's release on bail based on new facts. These have been summarised as follows:²

'[15.1] Whether the facts came to light after the bail was refused. Such facts can include circumstances which have changed since the first bail application was brought, such as the period that an accused had been incarcerated;

[15.2] whether the facts are "sufficiently different in character" from the facts presented at the earlier unsuccessful bail application, in the sense that it should not simply be a "reshuffling of old evidence";

[15.3] whether the alleged new fact(s) are relevant in the sense that, if received by the court, it would per se, or together with other facts already before the court from the initial bail application, assist the court to consider the release of an accused afresh;

[15.4] a court hearing an application based on alleged new facts must determine, with reference to the evidence previously presented in the unsuccessful bail application, whether such facts are indeed new. In *Mpofana* above [12] at 44g – 45a Mbenenge AJ (as he then was) explained that —

"whilst the new application is not merely an extension of the initial one, the court which entertains the new application should come to a conclusion after considering whether, in the light of the facts that were placed before court in the initial application, there are new facts warranting the granting of the bail application"; and,

[15.5] where evidence was known and available to a bail applicant, but not presented by him at the time of his earlier application, such evidence can generally not be relied upon, for purposes of a renewed bail application, as "new facts". In this regard it was explained in *S v Le Roux en Andere* 1995 (2) SACR 613 (W) at 622 that, in the absence of such a rule, there could be an abuse of process leading to unnecessary and repeated bail applications, and that an accused should not be permitted to seek bail on several successive occasions by relying on the piecemeal presentation of evidence. I agree with the opinion of Van der Meer that this rule should not be an absolute or inflexible one and that a court should be willing to consider why relevant and available information was not placed before the court in the initial application.' (Footnotes omitted.)

² *S v Yanta* 2023 (2) SACR 387 (WCC) para 15.

[18] In *Davis and Another v S*³ it was held that:

‘If the evidence is adjudged to be new and relevant, then it must be considered in conjunction with all the facts placed before the court in previous applications, and not separately.’

[19] In *S v Mpošana*,⁴ the court explains further that:

‘... whilst the new application is not merely an extension of the initial one, the court which entertains the new application should come to a conclusion after considering whether, viewed in the light of the facts that were placed before court in the initial application, there are new facts warranting the granting of the bail application.’

[20] The court further indicated that the approach, when faced with a bail application on new facts, ought to be the following:⁵

‘In considering an application for bail allegedly brought on the strength of new facts, the court’s approach is to consider whether there are, in the first instance, new facts and, if there are, reconsider the bail application on such new facts, against the background of the old facts.’

[21] Our courts have also held that one must have regard to the evidence presented at the earlier unsuccessful bail application to determine which facts are new.⁶

[22] I align myself with the sentiments expressed in these decisions. In my view, the new facts must be sufficiently different in character from the facts presented at the earlier unsuccessful bail application. New facts are generally facts that come to light after the refusal of bail, which include circumstances that have changed since the unsuccessful bail application was lodged. In *S v Mohammed*,⁷ the court held that new facts are those which are ‘sufficiently different in character’ from the facts presented in the earlier unsuccessful application. The facts, further, ‘must not

³ *Davis and Another v S* [2015] ZAKZDHC 41 para 58.

⁴ *S v Mpošana* 1998 (1) SACR 40 (Tk) at 44j-45a.

⁵ *Ibid* at 44g-i.

⁶ *Vermaas* at 531e-g.

⁷ *S v Mohammed* 1999 (2) SACR 507 (C) (*Mohammed*) at 512b.

constitute simply a reshuffling of old evidence'.⁸ New facts must be 'new' and must be relevant for purposes of the new bail application.

[23] The purpose of a bail application on new facts is not to address problems or aspects not canvassed in the previous application or 'to fill gaps in the previously presented evidence'.⁹ There must also 'be some advance indication that the new facts, if received, would on their own—or in conjunction with all the facts placed before the court in the earlier unsuccessful bail application—assist the court in considering release on bail afresh'.¹⁰ Facts already known and available to an applicant for bail but not presented at the time of the earlier application cannot, for purposes of a renewed bail application, be relied on as constituting 'new facts'.

[24] Mr *Barnard* submitted that having regard to the transcripts and record of proceedings before Marion AJ, a new fact exists, in that it was not known at the time of the October 2025 bail application, that the registrar of the SCA would cancel the stamp and return the respondent's answering affidavit, given its non-compliance with the practice directive. He submitted, having reference to the transcript at various pages, that the stance of the respondent throughout has been to submit that there was no irregularity complained of and that the answering affidavit had been validly filed with the registrar of the SCA, who would not have accepted it had it not complied with the practice directive.

[25] No one was aware that the registrar of the SCA would cancel the stamp and return the respondent's answering affidavit. This, thus, entitled the applicant to bring a new application for bail on new facts, warranting this court considering the application for bail again, having regard to the current set of application papers as well as the previous set of application papers filed before Marion AJ.

[26] He elected not to deal with the respondent's submissions in its heads of argument as to whether this constituted a primary or secondary fact. In addition,

⁸ *S v Petersen* 2008 (2) SACR 355 (C) (*Petersen*) para 57.

⁹ *Ibid.*

¹⁰ S van der Merwe "New facts" for purposes of a renewed bail application: Principles, issues and procedures' (2017) 2 *Criminal Justice Review* 9 at 9 (contained in S Terblanche *Du Toit: Commentary on the Criminal Procedure Act* (RS74, 2025)).

having regard to the authorities, he submitted that this was not a reshuffling of old facts¹¹ nor was the applicant trying to bolster the original bail application by merely restating facts in a different way nor was the applicant dealing with facts already known to him.

[27] Mr *Singh* submitted that the fact of the respondent's non-compliance with the practice directive was known to the applicant at the time he filed his replying affidavit on 9 October 2025 and was a fact known to all the parties at the time the bail application was argued before Marion AJ and when she delivered her judgment.

[28] In its submissions, the respondent indicated that, in deciding whether the withdrawal by the SCA's chief registrar of the stamp and the return of the affidavit constitutes a new fact, one must distinguish between primary and secondary facts. It submitted that the primary fact relied on by the applicant is that the respondent's answering affidavit exceeded the ten-page limit prescribed by the SCA. This was pertinently raised before Marion AJ when she heard the initial application for bail pending the reconsideration application.

[29] The secondary fact constitutes the withdrawal of the acceptance stamp by the SCA and the return of the answering affidavit on 20 October 2025. The conduct of the chief registrar in withdrawing the acceptance stamp does not change the fact that the applicant knew the answering affidavit of the respondent was irregular and that it would be returned, alternatively the answering affidavit would not be accepted, prior to the judgment of Marion AJ being handed down.

[30] I find myself in agreement with these submissions of the respondent. I have considered the excerpts of the transcript referred to by Mr *Barnard*. I, however, disagree with the applicant's submission that the withdrawal by the registrar of the SCA of the stamp and the return of the answering affidavit constitutes a new fact. My conclusion in this regard is based on the following.

¹¹ *Petersen* para 57.

[31] In *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*,¹² the court, when dealing with the distinction between primary and secondary facts, held the following:

‘A distinction is drawn between primary facts and secondary facts.

“Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts.”

[32] If one considers the replying affidavit of the applicant in the bail application which served before Marion AJ, and which affidavit was deposed to 8 October 2025, he recorded the following:¹³

‘9.

What however concerns me in this regard is the fact that I have now been advised that the Respondent has taken an irregular step in the main application in that on 6 October 2025 they caused an answering affidavit to be served on my attorneys of record, which affidavit stretched over 25 typed pages.’

and

‘10.

‘The Rule dictates that such an affidavit may not exceed 10 pages hence I have no doubt that the Registrar of the SCA will not accept the said document which in turn will result in the outcome of my reconsideration application being delayed.’

[33] In his founding affidavit in the current application,¹⁴ the applicant submitted that the respondent was warned as early as 9 October 2025 that its papers did not comply with the rules and that its non-compliance would in all likelihood result in the reconsideration application being delayed, which in turn would result in him remaining in custody as a consequence of a delay caused by the respondent due to its non-compliance.

[34] Having regard to the judgment delivered by Marion AJ, she heard argument and considered submissions of both parties in respect of the issue as to whether or

¹² *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 324D-F.

¹³ Index Volume 3 of 3, Bail Application before Marion AJ, at pages 246–247, paras 9 and 10.

¹⁴ Founding affidavit at page 6, para 3.4.

not the respondent's answering affidavit was compliant with the practice directive. This much is evident from her judgment where she says the following:¹⁵

'I have heard arguments in respect of the issue of whether the respondent was compliant in having filed answering papers over and above the norm, which is 10 pages. The respondent's papers having being filed, which was about 26 pages. The applicant counsel submitted that this would entail a delay in the process of finalising the reconsideration application at the SCA.'

[35] The fact of the respondent's answering affidavit constituting an irregular step was raised during the course of argument before Marion AJ. This was evident having regard to the transcript of the proceedings.¹⁶ What is also evident from the transcript is that the learned acting judge and the applicant's counsel engaged in a debate in relation to how long it would take for the reconsideration application to be considered in light of 'the defectiveness of the answering affidavit'.

[36] A debate also ensued as to what options could be exercised in light of the respondent's non-compliance:¹⁷

'MARION AJ: Condonation.

MR BARNARD: Ja-no, no, well, or they can redo it. One or the two. The respondent can either redo its answer or they are going to have to do a condonation for being in excess of the papers.'

[37] In fact, in answer to a question from the court as to whether the SCA would consider the respondent's answering affidavit, the applicant's counsel indicated that in his experience, the SCA would not consider it and it would be sent back. This is evident from the transcript as follows:¹⁸

'MARION AJ: So they will not look at it?

MR BARNARD: They will not look at it, M'Lady. They do not even look at it. What happens-it has happened to me as well where I was not aware that it was only 10 pages for the first one I did. It came back, did not accept it....'

¹⁵ Annexure 'A', current bail application, at page 19, lines 7-14.

¹⁶ Annexure 'B', current bail application, at page 43 line 22 to page 44 line 24, and page 45 line 20.

¹⁷ Ibid at page 46 lines 8 to 12.

¹⁸ Ibid at page 46 lines 13 to 17.

[38] During the course of the hearing of the bail application before Marion AJ, the respondent deals pertinently with the answering affidavit having been filed. In addition, it was submitted that the registrar would never accept a pleading if it did not conform to the rules and that the registrar of the SCA would not have accepted the answering affidavit if the papers were not in order.¹⁹

[39] However, if one considers the principles enunciated in *Petersen, Mohammed and Vermaas*, this 'new fact' was previously before the court, served before the court, and cannot amount to a new fact for purposes of bail. I agree with the respondent's position that the primary fact was known to the applicant on 9 October 2025 and again at the time the matter was argued on 16 October 2025, when it was placed before the court.

[40] All that transpired was the withdrawal of the acceptance stamp by the chief registrar of the SCA on 20 October 2025, which is a secondary fact. The applicant, as well as his legal representative, knew that the affidavit exceeded the ten-page rule and would ultimately be rejected and returned. This fact existed prior to and at the time the judgment was delivered on 17 October 2025.

[41] It cannot amount to a new fact for purposes of this bail application if one has regard to the specific distinction between primary and secondary facts. The applicant's legal representative had a personal experience of the SCA returning the document and not considering a reconsideration application where it did not comply with the practice directive. This the applicant, I have no doubt, would have been apprised of by his legal representatives. This was dealt with pertinently during the course of submissions and in the replying affidavit. I agree that this is not a new fact for purposes of the bail application but is a 'reshuffling of old evidence'.

The bail application

[42] At the hearing of the matter, Mr *Singh* submitted that the court's finding of this not being a new fact bail application would be dispositive of the matter and the court need not apply its mind to any other issues. However, while this submission is

¹⁹ Application papers at pages 62 and 63.

correct, in the event of being wrong in the assessment of it being a new fact, I propose to deal with other aspects raised by the applicant in his application for bail.

[43] I may at the outset mention that I have considered the requirements for the release on bail as outlined in the CPA and have elected to focus on those which I am of the view justify the order which will be granted. This must not be interpreted to mean that I have not considered them. In doing so, I have had regard to the following principles.

[44] In *S v Masoanganye*²⁰ the court summarised the position as follows:

‘Since an appeal requires leave to appeal which, in turn, implies that the fact that there are reasonable chances of success on appeal, is on its own not sufficient to entitle a convicted person to bail pending an appeal: *R v Mthembu* 1961 (3) SA 468 (D) at 471A – C. What is of more importance is the seriousness of the crime, the risk of flight, real prospects of success on conviction, and real prospects that a non-custodial sentence might be imposed.’

Prospects of success

[45] In dealing with the applicant’s prospects of success, it is appropriate at this juncture to have regard to the applicant’s application for reconsideration and the test to be applied by the President of the SCA.

The test for reconsideration and the legal framework and jurisdictional standard under s 17(2)(f) of the Superior Courts Act

[46] Prior to the amendment on 3 April 2024 by the Judicial Matters Amendment Act 15 of 2023, s 17(2)(f) of the Superior Courts Act required the President of the SCA to be satisfied of the existence of exceptional circumstances before referring a decision for reconsideration. The subsequent amendment allows a referral if there is a risk of grave injustice or the administration of justice being brought into disrepute. This, however, does not change the essence of the President’s discretion, as was held by Smith JA in *Tarentaal Centre Investments (Pty) Ltd v Beneficio Developments*.²¹

²⁰ *S v Masoanganye and Another* [2011] ZASCA 119; 2012 (1) SACR 292 (SCA) (*Masoanganye*) para 14.

²¹ *Tarentaal Centre Investments (Pty) Ltd v Beneficio Developments* [2025] ZASCA 38 para 4.

‘When the President referred the matter for reconsideration, the jurisdictional requirement for the exercise of her discretion in terms of s 17(2)(f) was the existence of “exceptional circumstances.” That section was subsequently amended by s 28 of the Judicial Matters Amendment Act 15 of 2023, which came into operation on 3 April 2024. In terms of the amended section the jurisdictional facts for the exercise for the President’s discretion are, “circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute.” The amendment did not alter the nature of the President’s discretion in any way since the Constitutional Court in *S v Liesching and Others* (*Liesching*) – which was decided before the amendment - held that the phrase ‘exceptional circumstances’ encompasses the aforementioned jurisdictional factors.’ (Footnote omitted.)

[47] In *Avnit v First Rand Bank Ltd*,²² Mpati P clarified that s 17(2)(f) was not a mechanism for disappointed litigants to secure another opportunity for an appeal, but was rather a safeguard to avoid any grave injustice:

‘In the context of s 17(2)(f) the President will need to be satisfied that the circumstances are truly exceptional before referring the considered view of two judges of this court to the court for reconsideration. I emphasise that the section is not intended to afford disappointed litigants a further attempt to procure relief that has already been refused. It is intended to enable the President of this Court to deal with a situation where otherwise injustice might result. An application that merely rehearses the arguments that have already been made, considered and rejected will not succeed, unless it is strongly arguable that justice will be denied unless the possibility of an appeal can be pursued.’

[48] This was echoed in *Motsoeneng v South African Broadcasting Corporation SOC Ltd and Others*.²³ Similarly, in *Bidvest Protea Coin Security (Pty) Ltd v Mabena*,²⁴ the SCA confirmed that it must first consider whether exceptional circumstances exist. Reconsideration is not a routine remedy but an extraordinary one, requiring marked and unusual circumstances resulting in a grave failure of justice.²⁵

²² *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (*Avnit*) para 6.

²³ *Motsoeneng v South African Broadcasting Corporation SOC Ltd and Others* [2024] ZASCA 80; 2025 (4) SA 122 (SCA).

²⁴ *Bidvest Protea Coin Security (Pty) Ltd v Mabena* [2025] ZASCA 23; 2025 (3) SA 362 (SCA) para 23.

²⁵ *Minister of Police and Another v Ramabanta* [2025] ZASCA 95.

[49] In relying on these SCA authorities, it would appear that a reconsideration application envisaged in s 17(2)(f) is an extraordinary remedy and not a routine second chance. It is not an appeal on the merits but a safeguard against manifest injustice requiring exceptional circumstances, which must be markedly unusual and not readily arguable.

[50] In relation to the prospects of success, the applicant and Mr *Barnard* submitted that there is a crisp constitutional point which the applicant relies on for the submission that there are exceptional circumstances warranting the President of the SCA granting the reconsideration application. The applicant's case is that the failure by the full bench to consider and have regard to the video footage and its specific finding in paragraph 11 of the judgment constitutes exceptional circumstances. Paragraph 11 of the judgment provides as follows:

'...It is common cause that the video depicting Mrs Narain having weapons in her possession related to the first incident only. The shortfall in the appellant's contention is that the authenticity of that video was not dealt with and it was not handed in court and, therefore, it is not part of the appeal record.'

[51] He submitted that the issue is whether, when the appeal court decided the applicant's appeal, they did so on all the evidence placed before them, as envisaged by s 34 of the Constitution²⁶ and he relied on the following decisions as authority.

[52] The first of these decisions is that of *Vodacom (Pty) Ltd v Makate and Another*,²⁷ wherein the Constitutional Court on 31 July 2025 ruled that it was every appellant's constitutional right that when a court hears his or her appeal, such a court takes into account all the evidence placed before it when deciding the appeal. The court held the following:²⁸

'The founding constitutional value of the rule of law and s 34 of the Bill of Rights require, in my view, that a court should have regard to all material evidence and all material submissions bearing on the issues it must decide.'

²⁶ Section 34 of the Constitution grants the right to access to courts.

²⁷ *Vodacom (Pty) Ltd v Makate and Another* [2025] ZACC 13; 2025 (6) SA 352 (CC) (*Makate*).

²⁸ *Ibid* para 45.

[53] The second decision he relied on was that of *Godloza v S*.²⁹ *Makate* acknowledges the principle that when an appeal is heard, a court must consider all the material evidence placed before it. *Godloza* contains an oblique reference to this but, in my view, is distinguishable on the facts and is of no assistance to the applicant.

[54] Mr *Barnard* submitted that crucial to the conviction of the applicant was the reliance by the trial court and the full bench on the evidence of Mrs Ramkhelewan. She, it is common cause, was a single witness to the shooting incident and it was submitted that the trial court and the appeal court placed much emphasis on the fact that she despite being a poor witness was credible.

[55] As part of the matrix of evidence in the trial court, the respondent presented Mrs Ramkhelewan's evidence and the trial court also had regard to video footage taken of an incident which occurred prior to the shooting of the deceased. The trial court pronounced on the credibility or otherwise of Mrs Ramkhelewan, considering the impact of the video footage taken of the first incident and the effect it had on her credibility. In concluding that Mrs Ramkhelewan, although a single witness, was a reliable witness in all material respects, the appeal court concluded that the video footage was not properly introduced into evidence and was not part of the appeal record.

[56] It is the applicant's contention that the video footage destroyed Mrs Ramkhelewan's credibility completely and the authenticity of the video footage and the still photographs derived therefrom was never in dispute in the trial court and formed part of the appeal record. The applicant relied on a portion of the reconstruction process undertaken by the trial court in which the still photographs and CD containing the video footage were admitted into evidence and formed part of the record as exhibits 'R' and 'S'.³⁰

²⁹ *Godloza v S* [2025] ZACC 24 (*Godloza*) para 45.

³⁰ During the hearing of the bail application, Mr *Singh* pointed out that the references to the exhibits were incorrectly reflected but this does not affect the outcome of the bail application.

[57] The applicant submitted that the appeal court ought to have considered the video footage in the context of the cross-examination and further evidence which flowed therefrom. The fact that it made a finding when not all the evidence had been placed before it on appeal infringes upon the applicant's constitutional rights to a fair hearing, as guaranteed in terms of s 34 of the Constitution and as confirmed in *Makate*. Much store is placed on the fact that the appeal against the conviction was dismissed in large part on the acceptance of Mrs Ramkhelewan's evidence.

[58] Mr *Singh*, who appeared for the respondent, submitted that the applicant has no prospects of success on appeal. He submitted that the video footage was only one piece of evidence which was considered by the trial court as well as the full bench. He submitted that the applicant has a heavy burden to surpass at reconsideration stage, being that of exceptional circumstances. The applicant must prove at the reconsideration stage that his case truly raises a substantial point in law, will be of great public importance or demonstrate that without leave, a grave injustice may result.

[59] He submitted that the applicant has failed to discharge this onerous burden. He indicated that the applicant takes issue in relation to the video footage, but the video footage only involves the first incident and the second incident did not involve the video footage.

[60] The still images of the video evidence were before the trial court as well as the full bench. Even though this aspect was raised, it was the obligation of the applicant to ensure that such evidence was placed before the appeal court when prosecuting his appeal. When this was raised during the course of argument, the applicant, who was represented by senior counsel both in the trial court and during the full bench appeal, ought to have pertinently raised this with the full bench to indicate that it did form part of the record.

[61] In addition, he submitted that although Mrs Ramkhelewan was a single witness, her evidence was corroborated by the independent medical evidence, which supported the eyewitness's account of the events. Both the trial court and the full

bench took the evidence holistically into account together with the improbabilities of the applicant's version.

[62] I have had regard to the application papers which served before Marion AJ and the submissions made regarding the prospects of success.

[63] The applicant dealt in detail with all the evidence presented in both the trial court and before the appeal court. This was done by placing the affidavit filed in the reconsideration application, which sets out in great detail the misdirections in the findings of both the trial court and more specifically the appeal court.³¹

[64] The same aspects canvassed before me in this application, specifically the alleged breach of the applicant's rights to a fair hearing by the appeal court, were canvassed before Marion AJ, and in the petition considered by the SCA judges.

[65] Marion AJ heard argument on the prospects of success. This is evident from the transcript of the record of the proceedings before her.³²

[66] Having regard to her judgment,³³ Marion AJ gave consideration to the applicant's submissions relating to the evidence considered by both the trial court and the appeal court and the applicant's submissions relating to the breach of his fair hearing rights by the appeal court in not considering all the evidence presented in the trial court, specifically the video footage.

[67] She concluded 'having gone back to the drawing board with regards to the record' that the applicant would not succeed in his further appeal to the SCA.³⁴

[68] I likewise agree that the applicant's prospects of success in the reconsideration application are remote. Firstly, the 'constitutional point' was raised before two judges of the SCA in his petition. They considered it and refused the petition.

³¹ Annexures 'R3' and 'R4', bail application before Marion AJ, volume 1 at pages 23–109.

³² Annexure 'B', at pages 48–60 and 72–88.

³³ Annexure 'A', at pages 25–31.

³⁴ Annexure 'A', at page 31 lines 7–8.

[69] Secondly, what the applicant's submission on this aspect loses sight of, is that even if the full bench did not have regard to the actual video footage, i.e. the CD, the still photographs of such footage were available to them and formed part of the appeal record. This was also fully considered by the two judges of the SCA when the applicant's petition was considered. In addition, Mr *Barnard* has confirmed from the bar that this very issue has also been canvassed in the reconsideration application. It is trite that the SCA judges, when dealing with his prospects of success and in finding 'no special circumstances meriting a further appeal', would have considered the trial court's judgment on conviction and sentence, the leave to appeal and the judgment of the full bench.

[70] Lastly, I am fortified in the view that there are no prospects of success, especially having regard to the principles which are considered in a reconsideration application, and specifically what was stated by Mpati P in *Avnit*.³⁵

'Prospects of success alone do not constitute exceptional circumstances. The case must truly raise a substantial point of law, or be of great public importance or demonstrate that without leave a grave injustice may result. Such cases will be likely to be few and far between because the judges who deal with the original application will readily identify cases of that ilk. But the power under s 17(2)(f) is one that can be exercised even when special leave has been refused, so 'exceptional circumstances' must involve more than satisfying the requirements for special leave to appeal. The power is likely to be exercised only when the President believes that some matter of importance has possibly been overlooked or grave injustice will otherwise result.'

[71] If one has regard to both the application for special leave (the petition) and the application which served before me, the prospects of success canvassed by the applicant relate, *inter alia*, to the video footage. Despite this, two SCA judges on petition refused the applicant's application for leave to appeal. The same issue is now raised in the reconsideration application before the President of the SCA. During the reconstruction process undertaken in respect of the appeal record, there is reference to both the still photos as well as the CD containing the video footage as forming part of the record.

³⁵ *Avnit* para 7.

[72] This much is evident where the magistrate in the trial court deals with this issue as follows:³⁶

‘COURT: Yes. So let us just staple them together. OK. So for the record, then the still photographs that I mentioned at page 142 of the record and the CD that was played inside court and both those documents were admitted provisionally and it appears it skipped everybody’s mind for it to be finally admitted but no objection by the State it is accepted and marked Exhibit “R”, the still photographs, and the CD is marked Exhibit “S”. Thank you very much.’

[73] It is therefore evident that the still photographs and footage formed part of the evidence in the trial court and part of the reconstruction of the appeal record. In addition, having regard to the replying affidavit, the applicant referred to volume 6 of the record, which reflects these two exhibits. What is of concern is the fact that I am being asked to consider the prospects of success in light of these submissions. I am neither a court of appeal nor a review court sitting to determine whether the findings of the trial court and full bench were correct. I have been asked to consider whether this ground of appeal constitutes an exceptional circumstance for purposes of a reconsideration application, and, consequently, whether the applicant has demonstrated that the interests of justice demand his release on bail.

[74] Having considered this, I am of the considered view that he does not have prospects of success in his reconsideration application. I agree with the respondent’s submissions that the full bench was cognisant of the video and photographic evidence and how it impacted on Mrs Narain’s credibility in relation to the first incident. The still photographic images were part of the appeal record and there is no indication that this was not considered by the full bench. The submission of the applicant is thus erroneous when he submitted that the full bench did not have sight of all the evidence. It is common cause that the still photos were extracted from the video footage.

Propensity to mislead the court, flight risk and the interests of justice

³⁶ Volume 3, at page 197 line 17.

[75] The respondent submitted that when it came to declaring assets registered in his name, the applicant deliberately misled the court in relation to the exaggerated explanation of the number of cars he owns and the second immovable property in Phoenix, which he indicated belonged to him. Having regard to the respondent's answering affidavit and annexures 'KP4', 'KP5' and 'KP6', the respondent has proved that the applicant misled the court under oath. Mr *Singh* submitted that in doing so, the applicant sought to unlawfully gain an advantage which increases the risk of him being a flight risk.

[76] In addition, the submission of false evidence also has consequences, as confirmed by s 60(4)(d), read with s 60(8)(a) of the CPA, which provide that 'the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings', establishes the likelihood that if he were to be released on bail would undermine or jeopardise the objectives or proper functioning of the criminal judicial system. The respondent submitted that the applicant's propensity to mislead the court on material issues raises significant doubt about his intentions in obtaining bail, and may be indicative of him wanting to abscond.

[77] In both the application before Marion AJ and in the application before me, the respondent has pertinently pointed to the false explanations provided by the applicant in relation to his ownership of a number of cars and the second immovable property. One would have expected him on oath to correct this, considering that this is the second time it is being raised by the respondent. The applicant does not do so. I raised this pertinently with Mr *Barnard* at the hearing and he made submissions from the bar in relation to this and explained that the applicant indicated that he had purchased the property for his mother and it was still registered in her name. However, the CPA dictates what the consequence of the submission of false information is. The applicant must face the consequences of his failure to pertinently deal with this in his replying affidavit.

[78] The applicant relied on the fact that he has always adhered to his bail conditions and that he has during the course of these proceedings, which span in excess of 12 years, handed himself over when required to do so. That much cannot

be disputed. In fact, the applicant is presently in custody, having handed himself over when the full bench dismissed his appeal against his conviction and sentence.

[79] I agree that he has exhausted most of his appeal remedies and as such, the risk of abscondment increases. His remedy is now the reconsideration application before the President of the SCA. Once those avenues are exhausted, should he be unsuccessful, he will have to commence serving his sentence. His last resort, which he has indicated in his replying affidavit he intends exhausting, is the Constitutional Court.

[80] The respondent, in dealing with the applicant's assets, conceded that he has stood trial throughout, has complied with his bail conditions, and has handed himself over when called upon to do so. However, it has challenged the truthfulness of his submissions in relation to the number of properties he owns and the number of vehicles. Our courts have indicated that when considering whether an applicant is a flight risk, the determining factor is personal circumstances, as opposed to the property and assets that an applicant owns.³⁷ This Mr *Barnard* conceded. He submitted that the applicant is a man of means, as pointed out by Mr *Singh*. Although the applicant has surrendered his passport, I am of the view that nothing stops him from applying for a new passport.

[81] One must also bear in mind that the presumption of innocence is no longer applicable to the applicant nor is there an opportunity for him to interfere with evidence. However, 'the possibility that a convicted person may abscond when on bail pending the appeal, is increased'.³⁸ In addition, one must also remember that in dealing with prospects of success, an applicant must demonstrate not only that he has reasonable prospects of success but also that the sentence imposed is likely to be reduced and that he will not serve the sentence imposed by the trial court.³⁹

[82] Whilst I acknowledge that the applicant certainly is a man of means, his business connections to the international arena as well as the fact that he is a man of means cut both ways. Whilst it may mean that he has ties to South Africa, this

³⁷ *Masoanganye* para 19.

³⁸ *S v Mabapa* 2003 (2) SACR 579 (T) para 8.

³⁹ *S v Scott-Crossley* [2007] ZASCA 127; 2007 (2) SACR 470 (SCA) para 11.

also places him in a unique position, not enjoyed by many, of having financial means to abscond, should he desire to do so. Although he has adhered to his bail conditions and handed himself over when called upon to do so, I have to bear in mind that his options are getting slimmer and slimmer. He has exhausted both appeal remedies in the high court, has exhausted an appeal remedy by way of a petition to the SCA and his last hope now is a reconsideration before the President of the SCA.

[83] It is correct that in the past there have been instances where an appellant has succeeded in their reconsideration application, but I cannot from the submissions made in the papers filed before me and before Marion AJ come to the conclusion that the applicant has overwhelming prospects of success and would satisfy the court that exceptional circumstances exist. I acknowledge that the test for leave to appeal as set out in *Smith v S*⁴⁰ and the other authorities I have been referred to, indicates that all an applicant must do is satisfy the court that his case is arguable and that his prospects are reasonable. However, I am of the considered view that the risk of abscondment at this stage is even higher.

[84] As acknowledged by Mr *Barnard*, the applicant has served intermittent periods of incarceration and this can be taken into account, should he be unsuccessful in his respective appeals.

[85] A further aspect which warrants consideration is the applicant's contention that there will be a delay in the consideration of his reconsideration application as a consequence the interest of justice warrant his release on bail. This bail application was instituted on 12 November 2025, with the applicant deposing to the affidavit on 11 November 2025. It is apparent that the respondent, on receipt of the communication from the chief registrar of the SCA, cured the defect in the respondent's answering affidavit and served and filed a new affidavit in compliance with the practice directive as well as an application for condonation. Such papers were served and filed on 13 November 2025. The applicant, for some inexplicable

⁴⁰ *Smith v S* [2013] ZASCA 38.

reason, has elected to oppose the condonation application and indicated this by way of a letter to the respondent on 7 November 2025.

[86] This, in my view, delays the matter further, given his cause of complaint about the delays in the SCA considering his reconsideration application and laying the blame at the door of the respondent. He could have elected to file his replying affidavit and leave the aspect of condonation to the President of the SCA. Although in his replying affidavit in the bail application he indicated that he has filed his replying affidavit, I was not advised whether his opposition to the condonation application has been withdrawn. In the absence of him dealing with this, what remains is for the papers in the condonation application to be completed.

[87] In my view, the date of March 2026 suggested by the applicant as the date by which the reconsideration application can be considered, amounts to mere speculation. In addition, the applicant's stance of opposing the condonation application would contribute to an unnecessary delay. I am not certain why the applicant has adopted such a stance of opposing the condonation application. At the hearing, Mr *Barnard* indicated that he did not hold instructions in this regard, as his mandate was confined to the bail application and someone else had been briefed for the reconsideration application.

Conclusion

[88] I have carefully considered the application papers which served before Marion AJ and those before me and have had careful regard to the written heads of argument of both parties as well as the oral submissions. I am not satisfied that the applicant has established a new fact warranting this court from considering this bail application. In addition, even if I am incorrect in that conclusion, he has not discharged the onus and demonstrated that it is in the interests of justice that he be admitted to bail. I say so, having regard to the CPA and the applicable authorities in respect of bail pending appeal as the approach in respect of certain serious offences is less lenient and less liberty orientated.⁴¹

[89] In the result the following order is issued:

⁴¹ *Scott-Crossley* supra at para 6

The applicant's application to be admitted to bail pending the outcome of his reconsideration application to the President of the Supreme Court of Appeal is dismissed.

HENRIQUES J

Case Information

Date of Argument : 02 December 2025

Date of Judgment : 12 December 2025

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This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 9h30 on 12 December 2025.