



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Bail Appeal No: CAB03/2026

Case No (a quo): L103/2025

In the matter between:

THEMBELA NGALEKA

First Appellant

LUYANDA NDZEKENI

Second Appellant

and

THE STATE

Respondent

Coram: Petersen ADJP

Date enrolled: 20 February 2026

Date heard: 20 February 2026; 03 March 2026

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 10h00 on 04 March 2026.

Summary: Bail appeal – Schedule 6 offence of murder; and attempted murder – procedural irregularities on appeal – notice of appeal not served on the clerk of the court, resulting in non-compliance with s 65(3) of the Criminal Procedure Act 51 of 1977 (CPA) – failure by appellants’ attorneys to follow procedure strongly deprecated – appellants relied on oral evidence and witness testimony to challenge the strength of the State’s case and to establish exceptional circumstances under Section 60(11)(a) of the CPA – employer’s refusal to co-operate with the police investigation substantiates the risk of interference and evidence tampering – appellants failed to prove on a balance of probabilities that they will be acquitted or that exceptional circumstances exist – principles in *S v Mathebula* 2010 (1) SACR 55 (SCA) applied – court a quo correctly refused bail – appeal dismissed.

JUDGMENT

Petersen ADJP

Introduction

[1] The first and second appellants, Mr Thembela Ngaleka and Mr Luyanda Ndzekezi, appeal against the judgment of the Magistrate’s Court, Makwassie, delivered on 04 December 2025. The court a quo refused to admit the appellants to bail pending their trial on charges of murder being Schedule 6 offences as contemplated in the Criminal Procedure Act 51 of 1977 (‘the CPA’); and attempted murder.

[2] The respondent, the State, has filed a notice indicating that it will abide by the decision of this Court and will not oppose the appeal. This notice is conditional, however, upon no costs being sought against the respondent. It is trite that in bail appeals, and indeed in criminal appeals generally, the court does not ordinarily make orders for costs. The respondent's reservation in this regard, while noted, does not alter the established legal position that costs orders are not granted against the State in such proceedings.

The procedural history of the appeal

[3] Before addressing the merits of the appeal, it is necessary to remark upon certain procedural irregularities that attended the prosecution of this appeal. The appellants' attorneys initially failed to serve the notice of appeal on the Clerk of the Magistrate's Court, as is required. This omission was only rectified on 23 February 2026, following a postponement of the appeal to 03 March 2026.

[4] The consequence of this failure was significant. Section 65(3) of the CPA imposes a peremptory duty upon the magistrate, upon notice of an appeal, to forthwith furnish reasons for the decision refusing bail. Because the notice was not served timeously on the Clerk of the Court, it was not brought to the magistrate's attention. The magistrate was consequently precluded from fulfilling the statutory obligation to provide written reasons for the refusal of bail.

[5] Furthermore, the record of the proceedings before the magistrate was not prepared and certified by the Clerk of the Court in the ordinary course. Instead, the appellants' attorneys irregularly had the transcribed records compiled and filed directly with the Registrar of this Court. This practice is to be strongly deprecated. It undermines the proper administrative function of the magistrates'

courts and the registrar's office, and it creates the risk of an incomplete or inaccurate record being placed before the appeal court.

[6] Notwithstanding these procedural failings, and to avoid any undue prejudice to the appellants, this Court has elected to entertain the appeal on the transcribed record as filed. The appellants ought not to suffer for the ineptitude of their legal representatives. This indulgence should not, however, be construed as condonation of such practices in the future.

Factual background

[7] The appellants are employed by Senqobile Equestrian Security Services (Pty) Ltd as members of a task team deployed to address cable theft along railway lines. In the early hours of 09 September 2025, they were on duty in the Leeudoringstad area.

[8] The charges against them arise from an incident wherein a kombi, transporting seven occupants, four females and three males, was subjected to gunfire. One occupant was killed, and others were injured. The State alleges that the appellants, acting in common purpose with one another and with other persons, were responsible for the shooting.

[9] The appellants' version, presented through the viva voce evidence of the first appellant, Mr Ngaleka, is that they were patrolling the railway line when they discovered that a cable had been cut. They encountered other security personnel who requested backup. They observed a vehicle they described as resembling an H1 and persons running towards it. They gave chase, attempting to stop the vehicle. During the chase, the vehicle made a U-turn, and the appellants followed.

Their vehicle ultimately lost control and collided with a gate. They deny that they fired any shots.

The bail proceedings in the court a quo

[10] The bail application was heard on several dates, including 23 September 2025, 14 October 2025, and 21 October 2025. The first appellant testified at length, and his evidence was subjected to extensive cross-examination by the prosecutor, Mr. Chose. The second appellant also testified but, on advice, elected not to traverse the merits of the case.

[11] The State opposed bail, relying on the investigating officer's evidence. An issue central to the State's opposition was the conduct of the appellants' employer. The investigating officer testified that the police had formally requested from Senqobile Equestrian Security Services a duty list of employees deployed in the area and a list of vehicles used on the day of the incident. Despite promises of co-operation, this information was never provided.

[12] The State argued that this deliberate obfuscation by the employer substantiated a reasonable apprehension that evidence was being suppressed and that there existed a real risk of interference with the investigation and with witnesses.

The findings of the court a quo

[13] On 04 December 2025, the magistrate delivered judgment refusing bail. The magistrate found that the appellants, bearing the onus under s 60(11)(a) of the CPA, had failed to establish the existence of exceptional circumstances which, in the interests of justice, permitted their release.

[14] The magistrate had regard to the serious nature of the charges, the strength of the State's case, and, significantly, the lack of cooperation from the appellants' employer. The magistrate concluded that this conduct demonstrated a clear likelihood of interference with the investigation and with evidence, and that the interests of justice required the appellants' continued detention.

The respondent's notice to abide

[15] As indicated at the outset, the respondent has filed a notice to abide by this Court's decision. The notice, dated 02 March 2026, and signed by Adv EC Manicus, counsel for the respondent, records that the respondent does not intend to oppose the appeal and will abide by the decision of this Court.

[16] This notice does not relieve this Court of its duty to evaluate the appeal on its merits. The respondent's decision not to oppose the appeal does not entitle the appellants to succeed; they must still persuade this Court that the court a quo's decision was wrong.

The grounds of appeal

[17] The appellants' amended notice of appeal, dated 16 February 2026, sets out twelve grounds of appeal. These may be summarised as follows:

(a) The magistrate erred in finding that the appellants had failed to prove exceptional circumstances on a balance of probabilities.

(b) The magistrate failed to attach sufficient weight to the appellants' personal circumstances, including their employment, their dependants, and their lack of previous convictions.

(c) The magistrate erred in finding that there was a likelihood that the appellants would interfere with witnesses or tamper with evidence, in the absence of proven facts.

(d) The magistrate misdirected herself in finding that the State's case was strong, and failed to appreciate that the State's case was based on circumstantial evidence and hearsay.

(e) The magistrate failed to consider granting bail with appropriate conditions to address any concerns.

The legal principles governing bail appeals

[18] The powers of this Court on appeal are circumscribed by s 65(4) of the CPA, which provides that the court hearing the appeal shall not set aside the decision of the lower court unless it is satisfied that the decision was wrong. Our courts have interpreted this provision as meaning that an appeal court will not interfere with the exercise of a lower court's discretion lightly.

[19] In the seminal case of *S v Barber*¹ it was held that:

‘The Court of Appeal does not have a mere discretion of its own to exercise in substitution of the discretion exercised by the Court below. The Court of Appeal can only interfere with the lower court's decision if it finds that the lower court exercised its discretion

¹ *S v Barber* 1979 (4) SA 218 (D) at 220E-H.

improperly... The Court of Appeal will not interfere unless it is satisfied that the lower court was wrong.’

[20] Because the offences with which the appellants are charged fall within Schedule 6 of the CPA, s 60(11)(a) applies. This section provides that an applicant for bail in such circumstances must adduce evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release.

[21] The meaning of ‘exceptional circumstances’ was elucidated by the Supreme Court of Appeal in *S v Mathebula*². At paragraph [12], the court held:

‘Where an applicant for bail in a Schedule 6 offence seeks to challenge the merits of the State's case, he or she must go further than a mere denial. The applicant must prove on a balance of probabilities that he or she will be acquitted of the charge. This is a formidable burden. It is not enough to show that the State's case is weak; the applicant must show that it is so weak that he or she is bound to be acquitted.’

[22] The SCA in *Mathebula* further held that personal circumstances, which are commonplace, such as having employment, a fixed address, and dependants, cannot alone constitute exceptional circumstances. Something more is required. Parroting the provisions of s 60(4) of the CPA does not suffice.

Evaluation

[23] Applying these principles to the present matter, I am not persuaded that the magistrate’s decision was wrong. The appellants bore the onus of establishing

² *S v Mathebula* 2010 (1) SACR 55 (SCA).

exceptional circumstances. They sought to do so, in part, by challenging the strength of the State's case.

[24] The first appellant gave a detailed account of the events of 09 September 2025, denying any involvement in the shooting. He was, however, subjected to rigorous cross-examination by the prosecutor. During that cross-examination, several significant contradictions and improbabilities emerged. The first appellant was unable to provide consistent, satisfactory answers regarding the identities of his managers and supervisors. His explanation that Mr Sebisi was a clan name, and that Mr Maslasi and Mr Sebisi were the same person, was unconvincing. The inconsistencies in his evidence about the presence of other vehicles during the chase, and his initial denial that any vehicle stopped behind them after the accident, undermined his credibility.

[25] More significantly, the evidence regarding the employer's failure to co-operate with the police investigation stands unchallenged. This is not a matter of mere speculation or suspicion. The investigating officer testified that specific information was requested from Senqobile Equestrian Security Services, and that despite promises, this information was never provided. The employer, which had offered, in its letter of 11 September 2025, to take full responsibility for the appellants and to ensure their court attendance, was conspicuously uncooperative when it came to providing the police with the very information necessary to investigate a serious crime.

[26] The appellants, through their counsel, sought to argue that they should not be punished for their employer's conduct. This submission misses the point. The issue is not one of punishment, but of risk assessment. The conduct of the employer, which has offered to stand as surety for the appellants and to supervise them, is directly relevant to the question of whether there is a likelihood of

interference with the investigation. If the employer is unwilling to cooperate with the police by providing routine operational information, what assurance can this Court have that it would cooperate in ensuring the appellants' attendance at trial, or in preventing them from tampering with evidence? The magistrate was entirely correct to view this conduct with grave concern.

[27] The appellants' personal circumstances, while undoubtedly important to them and their families, are commonplace. They are employed. They have dependants. They have no previous convictions. These factors, in isolation or in combination, do not constitute exceptional circumstances as contemplated in s 60(11)(a) of the CPA.

[28] The appellants have not discharged the onerous burden of proving on a balance of probabilities that they will be acquitted. They have not demonstrated that the State's case is so weak that they are bound to be acquitted. On the contrary, the evidence placed before the magistrate, including the employer's obstructive conduct, suggests a case of considerable strength.

[29] I have had regard to the grounds of appeal advanced by the appellants. The magistrate did not fail to consider the totality of the facts. The magistrate evaluated the evidence, weighed the competing considerations, and arrived at a decision based on the facts and the law. There is no misdirection on the part of the magistrate nor any error in law. The conclusion that the appellants had failed to establish exceptional circumstances, and that the interests of justice required their continued detention, was correct.

Conclusion

[30] For the reasons aforesaid, the appeal cannot succeed. The magistrate's decision was not wrong, and this Court has no basis to interfere.

Order

[31] In the result, the following order is made:

The appeal is dismissed.



A H PETERSEN

**ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG**

Appearances:

For the Appellants: Mr. O K K A Lehabe
Instructed by: De Beer & Claassen
 c/o Lehabe Attorneys Inc
 Mafikeng

For Respondent: Adv E C Manicus
Instructed by: The Director of Public Prosecutions
 Mafikeng