



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Of Interest

CASE NO. CA&R11/2026

In the matter between:

XOLANI SOMTSEWU

First applicant

MANDLENKOSI NJEKANYE

Second applicant

and

THE STATE

Respondent

JUDGMENT

LAING J

[1] This was an urgent application for the applicants to be granted bail, pending the determination of their appeal against conviction and sentence. Alternatively, the applicants sought an order that the trial court hear their application in that regard. These are the reasons for the *ex tempore* order that was handed down at the hearing.

[2] On 24 March 2025, the regional Specialised Commercial Crimes Court ('the trial court') convicted the applicants of fraud and obstruction of the administration of

justice. The trial court sentenced the applicants on 30 September 2025 to 15 years on the first count and 6 years on the second count, to run concurrently. Their application for leave to appeal was unsuccessful. The applicants consequently petitioned the High Court, which granted leave to appeal on 10 February 2026. Their attorney requested a date for a bail application in the trial court. The magistrate refused to entertain the matter, referring the applicants to the so-called district ‘bail court’. The attorney issued a requisition for the applicants to attend the hearing, scheduled for 19 February 2026. For various reasons, the requisition was rejected. Notwithstanding, the attorney requested a further date from the magistrate, who responded that the ‘bail court’ lacked jurisdiction since the High Court was now seized with the matter.

[3] At the outset, it is important to emphasize the applicants’ basic right to the freedom and security of their persons, as stipulated in terms of section 12 (1) of the Constitution. This is the primary filter through which the present matter must be viewed. The Supreme Court of Appeal remarked, in *Magistrate Stutterheim v Mashiya*,¹ that the finalization of an application for bail was always a matter of urgency. Although the court was dealing with an accused, rather than (as here) a convicted person who was subsequently granted leave to appeal, the principle remains that he or she is entitled to a prompt decision one way or the other.²

[4] In *S v Hlongwane*,³ the court dealt with the powers of the High Court to grant bail, both in terms of statute and the common law. After sentence in a lower court, the High Court has a common law power to release on bail, pending further proceedings before it. The statutory powers of the lower court must, however, not be overlooked. In that regard, there is an overlap between the common law and sections 304 (2) and 309 (3) of the Criminal Procedure Act 51 of 1977 (‘CPA’), such that the relevant statutory powers replace the common law power.⁴

[5] The provisions of section 304 (2) set out the procedure to be followed within the context of a review. A judge has particularly wide powers when it appears to him

¹ 2003 (2) SACR 106 (SCA).

² Para 16.

³ 1989 (4) SA 79 (TPA).

⁴ See headnote, at 81F–G.

or her that proceedings in a lower court were not in accordance with justice, including the power to:

‘(vi) make any order in regard to the suspension of the execution of any sentence against the person convicted *or the admission of such person to bail*, or, generally, in regard to any matter or thing connected with such person or the proceedings in regard to such person as to the court seems likely to promote the ends of justice.’ (Emphasis added.)

[6] Of more immediate relevance, a convicted person’s appeal from a lower court forms the subject of section 309. The provisions permit an appeal to the High Court if leave has been granted under section 309B (by the lower court) or section 309C (by the High Court, on petition). Once the appeal has been noted and prosecuted, section 309 (3) indicates that ‘[the] provincial or local division concerned shall *thereupon* have the powers referred to in section 304 (2) . . .’⁵ From this, it must be understood that the statutory requirements to trigger the wide powers available under section 304 (2) are that the appeal be ‘noted and prosecuted within the period and in the manner prescribed by the rules of court’, in accordance with section 309 (2). The purpose of this would presumably be to avoid a situation where the High Court admits a convicted person to bail but he or she stalls the day of reckoning indefinitely by failing or refusing to pursue an appeal. Until he or she satisfies the requirements of section 309 (2), by noting and prosecuting the appeal as prescribed, the High Court has no statutory jurisdiction to exercise the powers contemplated under section 304 (2) — and cannot be said to be seized with the matter.

[7] Upon what authority can the lower court grant bail? The case law refers, in this regard, to section 60 (1) of the CPA, which provides as follows:

‘(1) (a) An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.

(b) Subject to the provisions of section 50 (6) (c), the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions

⁵ Emphasis added.

and duties in respect of bail in terms of this Act *until the accused appears in such other court for the first time*.⁶

(c) . . .’

[8] In *S v Makola*,⁷ the erstwhile Appellate Division found that section 60 (1) afforded both the lower court and the High Court jurisdiction to release an accused on bail. But the latter has jurisdiction to entertain an original application for bail only if proceedings were pending in that court.⁸ It would, at that stage, be the appropriate court to do so because counsel prosecuting on behalf of the state would be in a better position than a prosecutor in a lower court to deal with the latest facts relevant to the application.⁹ The requirement remains, however, that the case be pending before the High Court; that was not the position in the present matter.

[9] More recently, in *S v Sello*,¹⁰ the court was confronted with a situation where the applicant had been convicted and sentenced in the regional court. He applied for leave to appeal, which the trial court refused. Consequently, he applied for leave on petition to the High Court, which was successful. This, in turn, led to an urgent bail application, which presented the court with the dilemma of whether it had the necessary jurisdiction to grant bail as a court of first instance. The court found as follows:

‘I am satisfied that, at the moment when the application for leave to appeal against conviction and sentence was considered and granted by my colleagues, this court became vested with jurisdiction in respect of the bail application proceedings. I am comfortable that, although I was confronted with an unusual application, the *dictum* in *Hlongwane* . . . in respect of ss 309 (3), read with ss 304 (2) (c) (vi), is a correct exposition of the law and should be followed. If I were to refuse to hear the application and/or dismiss it for lack of jurisdiction, the applicant would have to return to the regional court, uncertain when such application would be heard. In the event of an unsuccessful application, he would have to return to this court on appeal. Such a cumbersome and time-wasting procedure can never

⁶ Emphasis added.

⁷ 1994 (2) SACR 32 (A).

⁸ At 34D–E.

⁹ At 35D–E,

¹⁰ 2023 (2) SACR 399 (FB).

be in the interest of justice. Consequently, I was prepared to hear and adjudicate the bail application, which I did.¹¹

[10] The court found that it was vested with jurisdiction to deal with the bail application once the applicant's petition had been decided in his favour. It is not apparent, however, to what degree the statutory requirements contained in section 309 (2) were considered.

[11] Subsequently, in *Labuschagne v Director of Public Prosecutions*,¹² neither the regional court (which had convicted the applicant) nor the High Court was prepared to hear a bail application, pending the outcome of a petition for leave to appeal against conviction and sentence. The court evaluated the statutory provisions and legal principles pertaining to bail. It referred to section 60 (1), finding that the apparent purpose of the legislature, in relation to subsection (b), was to ensure that the lower court retained jurisdiction until the accused appeared in such other court, eg the High Court, for the first time.¹³ It pointed out that, in contrast to the facts in *Makola*, there were no proceedings pending against the accused in the High Court. On that basis, the court held that the statutory powers of the lower court had to be given effect; the High Court had no common law power to adjudicate the application.¹⁴ The decision was, however, distinguishable from the facts in the present case since the applicant's petition in that matter had not yet been decided.

[12] It is unclear, with respect, how reliance can be placed on section 60 (1) (b) when the provisions refer expressly to an accused, not a convicted person. If anything, then there seems to be a lacuna in the CPA for addressing the situation that confronted the court in the present matter.

[13] Notably, the court in *Labuschagne* held that the trial court was best suited to adjudicate a bail application. This had been the view of the Supreme Court of Appeal

¹¹ Para 22.

¹² 2024 (2) SACR 463 (FB).

¹³ Para 16.

¹⁴ Para 25.

in *S v Masoanganye and Another*,¹⁵ where the appellants had been convicted and sentenced in the High Court, obtained leave to appeal, but failed to secure bail. The court stated as follows:

'It is important to bear in mind that the decision whether or not to grant bail is one entrusted to the trial judge because that is the person best equipped to deal with the issue, having been steeped in the atmosphere of the case. Through legislative oversight, something this court has complained about for more than two decades, and ignored by the Executive, a convicted person has an automatic right of appeal to this court against a refusal of bail. But there is a limit to what this court may do. It has to defer to the exercise of the trial court's decision unless that court failed to bring an unbiased judgment to bear on the issue, did not act for substantial reasons, or exercised its discretion capriciously or upon a wrong principle.'¹⁶

[14] The above decisions underscore the centrality of the trial court. The presiding officer would have the necessary appreciation of the proceedings and circumstances, in general, to determine a bail application.

[15] In *S v Majali*,¹⁷ the applicant brought an urgent bail application in the High Court after proceedings had been postponed in the lower court. Dealing with the question of when the High Court may exercise its common law jurisdiction, the judge held that it had to be exercised in a way that was consistent with section 39 (2) of the Constitution; a court, when interpreting any legislation, was required to promote the spirit, purport and objects of the Bill of Rights. That meant the advancement of the fundamental rights mentioned in section 12 (1) and section 35 (1).¹⁸ The decision was referred to in *De Bruin v Director of Public Prosecutions, Free State and Another*,¹⁹ where, in similar circumstances, the lower court had postponed bail proceedings, prompting an urgent application in the High Court. Recognizing its inherent jurisdiction, the court nevertheless held that the exercise of its power to

¹⁵ 2012 (1) SACR 292 (SCA).

¹⁶ Para 15.

¹⁷ 2011 JDR 0950 (GSJ).

¹⁸ Paras 15 and 26. As previously mentioned, section 12 (1) of the Constitution guarantees everyone the right to freedom and security of his or her person; 35 (1) (f) stipulates that an arrested person has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.

¹⁹ 2025 (1) SACR 231 (FB).

intervene should be exercised only in exceptional circumstances.²⁰ It went on to issue the following warning:

‘Bail applicants do not have carte blanche to approach the High Court as a court of first instance in each and every case where they are dissatisfied with bail processes in the lower courts. The floodgates are not open. Every application will still have to be considered on its merits, bearing in mind that exceptional circumstances should be present.’²¹

[16] It was not disputed that the applicants in the present matter obtained, on petition, leave to appeal to the High Court. They had, moreover, noted an appeal, which the registrar has yet to set down for hearing; there was no suggestion that the applicants did not intend to proceed. The court was satisfied that there has been substantial compliance with the requirements of section 309 (2), vesting it with the wide powers described in section 304 (2). Nevertheless, even if it could have been said that there was insufficient compliance, then the court was persuaded that there were grounds upon which to exercise its common law powers. It was evident from the applicants’ affidavits, which were uncontested, that they had obtained bail at the commencement of criminal proceedings and secured extensions thereof until the lower court’s refusal of their applications for leave to appeal. They had remained in attendance throughout trial and sentencing. The first applicant resided in the Butterworth district and earned a living, prior to his arrest, as an e-hailing driver; his mother and three children were dependents. The second applicant resided in the Qumrha district. He had previously been a warrant officer in the South African Police Services but had resigned when it became apparent that he would serve a custodial sentence; his wife, three children, a niece, and two grandchildren were dependents. Neither of the applicants had a passport or any other form of travel document. At the request of the court, counsel for the applicants produced the record, inclusive of the applications for leave to appeal and the lower court’s judgment. The charges pertained to the first applicant’s alleged submission of a fraudulent claim against the Road Accident Fund and the second applicant’s alleged collusion in that regard. There was no indication from the record that any of the so-called ‘likelihoods’ listed in section 60 (4) of the CPA had been present.²² In a situation where both the trial court

²⁰ Para 9.

²¹ Para 14.

²² The grounds upon which it would not be in the interests of justice to release a detainee are set out in greater detail under subsections (5) to (8A).

and the 'bail court' had refused to entertain the matter, to refer the applicants back to a lower court would, quite simply, not have been in the interests of justice.

[17] There was, furthermore, no opposition to the application. The respondent delivered no affidavits and made no submissions to that effect. Whereas its filing of a chamber book consent to bail, in the amount of R 30 000 each, was tantamount to opposition, the conditions stipulated therein served as a useful framework for the order that followed.

[18] Overall, the court was persuaded that the applicants' substantial compliance with the requirements in section 309 (2) triggered the wide powers available under section 304 (2). If, however, the applicants had failed to note an appeal or to demonstrate their intention to take further steps, then it could not have been said that the High Court was seized with the matter. The trial court would have been, in no small way, better placed to have dealt with the application. Considering the applicants' basic constitutional right to the freedom and security of their persons, as emphasized in *Magistrate Stutterheim*, as well as the exceptional circumstances that accompanied the matter, the court was satisfied that the common law powers regarding the granting of bail had also been available at the time.

[19] Consequently, the following order was made:

- '1. The applicants' non-compliance with the usual forms and service be condoned and that the application be heard on an urgent basis in terms of rule 6(12) of the Uniform Rules of Court.
2. Bail be and is hereby granted to the first applicant in the amount of R 1, 000, and to the second applicant in the amount of R2, 000, subject to the following conditions:
 - (a) the first applicant continues to reside at Zangwa Location, Ndabakazi A/A Butterworth;
 - (b) the second applicant continues to reside at [...] L[...] Road, Qumrha;

- (c) the applicants do not leave the municipal boundaries of the Amathole District Municipality unless prior arrangement is made with the investigating officer, Detective Sergeant Coetzee;
- (d) the first applicant is to report to the Butterworth police station every Friday between the hours of 06h00 and 18h00;
- (e) the second applicant is to report to the Qumrha police station every Friday between the hours of 06h00 and 18h00;
- (f) the applicants hand any travel documents in their possession to the investigating officer by 2 March 2026 and do not apply for either a passport or a temporary passport until the appeal process has been concluded;
- (g) the applicants ensure that the appeal record is lodged with the Registrar of the Eastern Cape Division of the High Court, Makhanda, within 30 calendar days of the transcribed record of the trial having been made available; and
- (h) the applicants report to the Clerk of the Court, East London, within 48 hours of their appeal to the Eastern Cape Division of the High Court, Makhanda, having been dismissed or struck off the roll.

3. A copy of this order must be served:

- (a) by the Sheriff of the High Court on the Head: Mdantsane Correctional Services Centre or such other senior official having the necessary authority; and
- (b) on the respondent's Makhanda and East London addresses, respectively.'

JGA LAING

JUDGE OF THE HIGH COURT

Appearances

For the applicant:	Adv Coto
Instructed by:	Z Xakwe Attorneys Inc. 49 Beach Road Nahoon EAST LONDON Tel: 043 721 0446 Email: reception@zxakweattorneys.co.za C/O Yokwana Attorneys 10 New Street MAKHANDA Tel: 046 622 9928
For the respondent:	No appearance.
Date heard:	27 February 2026.
Date delivered:	10 March 2026.