

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

Appeal case no: - BA2025-45
Court *a quo* case no: - DCB2025-640

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

DATE 2026/02/18 SIGNATURE..... [REDACTED]

In the matter between:

LEHLOGONOLO KATLEGO CHAUKE

Appellant

and

THE STATE

Respondent

JUDGEMENT

BURNETT, AJ**Introduction**

- [1] The is an appeal against an order that was handed down by the learned Magistrate Netshiozwi in the Polokwane Magistrate's Court, dismissing the appellant's bail application. The appellant's bail application was heard over four days and dismissed on 17 December 2025. During the bail application the appellant led his evidence by way of affidavit whilst the respondent led oral evidence. The appellant's trial will resume in the Polokwane Magistrate's Court on 18 February 2026.
- [2] The appellant has been charged with the following crimes: -
- [2.1] Count 1: Attempted murder.
 - [2.2] Count 2: Malicious damage to property.
 - [2.3] Count 3: Possession of an unlicensed firearm.
 - [2.4] Count 4: Attempted murder.
 - [2.5] Count 5: Possession of an unlicensed firearm.
 - [2.6] Count 6: Assault with the intent to do grievous bodily harm.
 - [2.7] Count 7: Assault with the intent to do grievous bodily harm.
 - [2.8] Count 8: Robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977.
 - [2.9] Discharge of a firearm in a built-up area of any public place.

[3] The appellant grounds for appeal are somewhat lengthy and repetitive, however in short, they are as follows: -

[3.1] The learned magistrate rejected the evidence contained in appellant's affidavit outright.

[3.2] The learned magistrate did not apply the evidence correctly and took irrelevant evidence into account. This led to the magistrate incorrectly finding that that appellant had not discharged his burden of proof.

[3.3] The learned magistrate dismissed the bail application despite the appellant having established exceptional circumstances.

[3.4] The learned magistrate applied section 60 (4) of the Criminal Procedure Act 51 of 1977 incorrectly.

[3.5] The learned magistrate erred in that he applied bail in a punitive fashion.

[3.6] The learned magistrate erred in that he presided over the appellant's bail application in circumstances where he had authorized the warrant of arrest that led to the appellant's arrest.

[4] Counsel for both the appellant and the respondent filed heads of argument and appeared before this court on the date of hearing. The court, in reaching this decision, had due regard to the court records, the heads of argument and oral submissions made by the parties.

- [5] This case has attracted some public interest and because of this, I have attempted to draft this judgment in a way that non-legal professionals can understand.

Draft order

- [6] On the morning of hearing, immediately after introductions were made in chambers, the appellant's counsel, in absence of the respondent's counsel, attempted to engage me in discussions about a draft order that was purportedly agreed to between both parties. I informed counsel for the appellant that I would not entertain such discussions in chambers and that he should address me in court on the issue.
- [7] In court, counsel for the appellant requested that this matter be heard before the other bail applications because it would not take long, a draft order having been purportedly agreed to between the parties. **Section 65 (4)** of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the "CPA") states that:- *"The court or judge hearing the appeal shall not set aside the decision against which appeal is brought **unless such court or judge is satisfied that the decision was wrong** in which event the court or judge shall give the decision which in its or his opinion the lower court should have given."* This provision was re-affirmed In **Botha v S¹** wherein held that: - *It regulates that a court or Judge hearing an appeal shall not set aside the decision against which the appeal is brought, unless such Court is satisfied that the decision is wrong. This denotes that there must be a demonstrable material misdirection on the part of the Court of first instance in its refusal to grant the Appellant bail."*

¹ (Bail Appeal (BA03/2003) [2025] ZALMPPHC 49 (19 March 2025).

- [8] The court informed appellant that it was not going to simply rubber stamp a draft order that was agreed to between the parties, and that the appellant still had to satisfy the court that the magistrate's decision was wrong.
- [9] The State may decide not to oppose an appeal. In this case, had the respondent (State) elected not to oppose bail, it ought to have filed a Notice to Abide. However, the respondent filed heads of argument and appeared in court for the hearing of the matter on the date of appeal. It was odd that the respondent, having opposed bail so vigorously in the Polokwane Magistrate's Court, and having succeeded in obtaining a refusal of bail, would decide to agree to a draft order in circumstances where the accused is charged with serious offences. Upon being questioned on this, the respondent informed the court that it was going to proceed with its opposition of the bail.

The role of the appeal court

- [10] It is not the role of this court to re-adjudicate the bail application. It was held in **S v Barber²** that: - *"It is a well-known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application. This Court has to be persuaded that the magistrate exercised the discretion wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would that be an unfair interference with the magistrate's exercise of jurisdiction. I think it should be stressed that, no matter what this Court's own views are, the real question is*

² 1979 (4) SA 218 (D) page 220 ad paragraph E – G.

whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.”

[11] It was further held in **S v Porthen and Others**³ that:- *“When a discretion is exercised by the court a quo, an appellate court will give due deference and appropriate weight to the fact that the court or tribunal of first instance is vested with a discretion and must not askew my inclination to substantiate its own decision.”*

[12] The court a quo was afforded a discretion to grant bail, having regard to several provisions of the CPA. This court's role is to ascertain whether the court a quo exercised that discretion incorrectly. This court must show restraint and must not be tempted to adjudicate the bail application from scratch and replace the magistrate's views with my own.

General principle of bail appeals

[13] **Section 35 (e) of the Constitution of the Republic of South Africa** guarantees every person who is arrested (who has been charged with committing an offence) to be released from detention, if the interests of justice permit. This means that every arrested person has the right to apply for bail but does not have the automatic right to be released on bail. A person may apply for bail; however, they will only be released on bail if it is in the interests of justice to do so. The presumption of innocence has no bearing on a bail application; as in other criminal proceedings.⁴

³ 2004 (2) SACR 242 (C).

⁴ *Barese and Another v S* (A01/2023) [2023] ZAWCHC 125.

- [14] The CPA regulates the criminal justice system, including bail applications. Insofar as bail applications are concerned, the CPA distinguishes between different groupings of offences, which are divided into schedules. Schedule 6 is the group containing the most serious kinds of offences for purposes of bail.
- [15] The appellant has been charged with nine charges, for criminal offences allegedly committed in various districts. These charges are not all linked to the same incident. The Director of Public Prosecutions made the decision to centralise all these charges to be heard simultaneously at the Polokwane Magistrate's Court. It can safely be assumed that centralisation occurred for practical reasons. This is permissible in terms of **Section 90 (8) of the Magistrate Court Act 32 of 1944** which reads as follows:- *"Where an accused is alleged to have committed various offences within different districts within the area of jurisdiction of any attorney-general, the attorney-general concerned may in writing direct that criminal proceedings in respect of such various offences be commenced in the court of any particular district within his area of jurisdiction, whereupon such court shall have jurisdiction to act with regard to any such offence as if such offence had been committed within the area of jurisdiction of that court, and the court of the regional division within whose area of jurisdiction the court of such district is situated, shall likewise have jurisdiction in respect of any such offence if such offence is an offence which may be tried by the court of a regional division."*
- [16] The nine criminal charges against the appellant fall within different schedules, however because of the centralisation of charges, the requirements for bail are

determined by the worst charge within that group of charges, which in this case happens to be a schedule 6 crime.

[17] **Section 60 (1) (a)** of the CPA reaffirms the right in section 35 (e) of the Constitution.

Section 60 (1) (a) of the CPA states that:- *“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.**”* It will not be in the interests of justice to release an accused person from detention if one of the following scenarios are present: -

[17.1] Where there is the likelihood that the accused, if she or she, were released on bail, will endanger the safety of the public or any particular person or will commit a schedule 1 offence.

[17.2] Where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial.

[17.3] Where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence.

[17.4] 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.

[17.5] Where in exceptional circumstances there is the likelihood that the releases of the accused will disturb the public order or undermine the public peace and security.

There are several factors that a court may consider in determining whether any of the five scenarios are present.⁵

[18] It does not matter what kind of crime an accused has been charged with; if any (or some) of the five scenarios are present, it is not in the interests of justice that the accused person be released on bail, and bail **must** be refused. However, in cases where an accused person is charged with a schedule 6 offence, there are additional requirements.

Exceptional circumstances

[19] Section 60 (11) (b) of CPA states that: *"In schedule 6, the court **shall order that the accused be detained in custody** until he or she is dealt with in accordance with the law, **unless the accused**, having been given reasonable opportunity to do so, **adduces evidence** which satisfies the court that exceptional circumstances exist which is in the interests of justice to permit his release."*

[20] This means that where an accused falls into the category of a schedule 6 offence, he/she must prove **(with evidence)** that there are exceptional circumstances present to justify his/her release on bail, and that it is in the interests of justice to do so. Normally the State would have the burden of proof in criminal cases; but in bail

⁵ Section 60 (5), 60 (6), 60 (7) and 60 (9) of the CPA.

applications under schedule 6, the accused person bears this burden.⁶ The state, in proving the criminal charge against the accused as trial, must do so guilt beyond reasonable doubt. The accused person in schedule 6 bail applications must prove the existence of exceptional circumstances on a balance of probabilities.⁷ While there is a reverse onus in bail applications, the onus is at a lower degree for the accused person.

[21] The CPA does not define the meaning of exceptional circumstances; hence one must consider the caselaw for guidance. An interpretation of the term has been articulated by many authorities; some examples of which are: -

[21.1] In ***Liesching and Others v The State***⁸ is stated that: - *“The dictionary definition of “exceptional” must be the starting point of the enquiry. The Oxford English Dictionary defines exceptional as “of the nature of or forming an exception, out of the ordinary course, unusual, special. The meaning of the phrase “exceptional circumstances” has been considered by the courts on numerous occasions. The courts have been reluctant to lay down a general definition as each case is to be considered on its own facts. It has been held that it is neither desirable nor possible to lay down a precise rule or definition as to what constitutes exceptional circumstances. The meaning and interpretation given by the courts to the phrase has been wide ranging. Circumstances which may be regarded as “ordinary” in one matter may be considered “exceptional” in another. Ultimately, it is the function of*

⁶ *S v Botha* 2002 (1) SACR 222 (SCA) at 230H; *S v Viljoen* 2002 (2) SACR 550 (SCA) at 556C.

⁷ *S v Mathebula* [2010] 1 All SA 121 (SCA) (11 September 2009).

⁸ [2018] ZACC 25.

the presiding officers to determine whether, on a case-by-case basis, the circumstances can be found to be exceptional.”

[21.2] In ***S v Petersen***⁹ it described the concept within the context of bail applications as: - *“in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking, ‘exceptional’ is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration. In the context of section 60(11)(a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for certain flexibility in the judicial approach to the question. In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all applicable criteria.”*

[21.3] In ***Avnit v First Rand Trading***¹⁰ the court found that:- *“What is ordinarily contemplated by the words ‘exceptional circumstances’ is something out of the ordinary and of an unusual nature; something*

⁹ 2008 (2) SACR 355 (C) at paragraphs 55 – 56.

¹⁰ 2014 JDR 2014 (SCA) at paragraph 2.1.

which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; 'besonder', 'seldsaam', 'uitsonderlik', or 'in hoe mate ongewoon'. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case. Whether or not exceptional circumstances exist is not a decision which depends on the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly. Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or especially different. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional"

- [22] The inquiry into whether there are exceptional circumstances is a factual one.¹¹ This means that exceptional circumstances must be determined within the context of the case, based on the facts presented in evidence. For a set of facts to be exceptional, they must not be typical or average, instead they must be unusual, uncommon or remarkable. The facts presented by the accused must be viewed holistically and no single fact must be considered in isolation. The accused's prospect of success is an important factor to consider within the context of exceptional circumstances, but

¹¹ *Liesching and Others v the State* [2018] ZACC 25 paragraph 42.

the only factor. In *S v Mathebula*¹² the Supreme Court of Appeal said that: - “to successfully challenge the merits of the State’s case in bail proceedings, the applicant must prove on a balance of probabilities that he will be acquitted of the charge.” The fact that a state’s case is weak, whilst important, is alone not enough to overcome compliance with the exceptional circumstances rule.¹³

Evidence by way of affidavit versus oral evidence

[23] The Appellant adduced evidence in his bail application by submitting an affidavit to court. In bail proceedings, accused persons are fully entitled to lead their evidence by way of affidavit, they have the right not to subject themselves to oral evidence. This is tantamount to exercising your right to remain silent in terms of **section 35 (1) (a) of the Constitution**. However, before an accused person chooses to exercise these rights, he/she must consider the risks of doing so. The risk, and it is a big one, is that your evidence will have less probative value than the oral evidence that is led by the State (it will be worth less).¹⁴ Evidence by way of affidavit is less persuasive than oral evidence, and the reason for this is that evidence by way of affidavit cannot be tested through cross examination.¹⁵ This can be especially damning where the person that is giving evidence by way of affidavit is the party that bears the burden of proof.¹⁶

[24] Even if the appellant gave his evidence by way of affidavit, he could still have taken the stand for cross-examination thereafter, but he chose not to. It was said in

¹² 2010 (1) SACR 55 (SCA) paragraph 12.

¹³ *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas* 2002 (6) SA 150 (C) at 156E-F.

¹⁴ *S v Pienaar* 1992 (2) SACR 178 (W) at 180H.

¹⁵ *S v Mathebula* [2010] 1 All SA 121 (SCA) (11 September 2009).

¹⁶ *Killian v S* [2021] ZAWCHC 100 (24 May 2021); *Nando v S* (A39/2020) [2020] ZAGPJHC 108 (8 May 2020).

Pretorius v S¹⁷ that: - *“the use of affidavits in bail proceedings, although permissible, does not exonerate the applicant from subjecting himself to cross-examination in the witness box. All that an accused or applicant who has chosen to adduce his evidence by way of affidavit has to do is get into the witness box, take an oath or affirmation and state that his evidence is all contained in an affidavit and that he adopts the contents of the affidavit as his evidence. The applicant in such a case does not have to give evidence of what is contained in the affidavit. Cross-examination will then follow.”*

[25] It was held in **S v Smith and Another**¹⁸ that: - *“the appellant failed to testify on his own behalf, and no attempt was made by his counsel to have him testify at the bail application. There was thus no means by which the Court a quo could assess the bona fides or reliability of the appellant save for the say-so of his counsel.”* This principle was re-iterated in **S v Bruintjies**.¹⁹

[26] The appellant was legally represented during the bail application and made his election to adduce evidence by affidavit on the advice of his attorney. To the extent this is the way he chose to lead his evidence, he alone must bear the consequences thereof.

Discussion

[27] The requirements in schedule 6 offences are premised on the fact that it is generally in the best interests of justice that these accused persons remain in custody pending acquittal. A natural consequence of arrest and detention is personal hardship.

¹⁷ (CC91/2003) (2011) ZAGPPHC 65 [29 April 2011] at paragraph 23.

¹⁸ 1969 (4) SA 175 (N) page 177 paragraph E – F.

¹⁹ 20023 (2) SACR 575 (SCA) paragraph 7.

Nobody that is arrested or detained goes unscathed. The appellant, having been accused of these crimes, cannot expect that he will not suffer or be inconvenienced in some way. The learned magistrate did not apply bail in a punitive fashion; he complied with the instructions given to him in the Constitution of the Republic of South Africa and the CPA. The accused may feel as though he is being punished, however those feelings are a normal consequence of being charged with serious offences.

[28] It is common cause between the parties that the learned magistrate was also the magistrate that authorized the warrant of arrest to bring the accused person before the Polokwane Magistrates Court. It is also common cause that both parties (and their legal representatives) knew this before the bail application commenced and neither of them objected to the learned magistrate presiding over the matter. The appellant only raises this now in the hope that it will lead to a successful appeal. Counsel for the appellant could not give the court an explanation as to why the appellant did not object to the learned magistrate presiding over the matter. If the appellant felt aggrieved by this, he had a duty to raise his objection thereto at the start of the respondent's case, and brought a recusal application to the extent necessary.

[29] There is no evidence from the record that the learned magistrate had knowledge of any facts that were not addressed during the bail application; nor that he took anything into account that was not on the record. Neither counsel could provide clear authority that dictates that a presiding officer who signed the appellants warrant of arrest, cannot preside over the bail application.

[30] The appellant's affidavit does not bear zero weight, but it bears much less weight than the respondent's evidence. Even if the learned magistrate gave the appellant's affidavit more weight, the submissions contained therein would not have met the high threshold required in a schedule 6 bail application. There is nothing remarkable about the appellant's personal circumstances. There are certain aspects of the appellant's evidence that had the **potential** to be considered exceptional circumstances, however fell short in some way or another.

[31] As an example, the appellant states that he has a medical condition and he requires medical attention. The appellant does not however, take this court into his confidence and elaborate what kind of medical condition he has, what his symptoms are, what his prognosis is, what medication he is on, how it affects his daily life, ect. He does not even attach a report from his doctor. This is an aspect that could have been an exceptional circumstance however the appellant does not give the court enough information to consider it properly. It does however seem unlikely that the appellant is so concerned about this alleged health condition in circumstances where there is untested evidence lead by the state that the accused drinks alcohol and is addicted to crystal meth. If the appellant had been open and honest with the court about his personal health and subjected himself to cross-examination on this aspect, it could have yielded a different result.

[32] The fact that the appellant is a musician followed by many, is not in itself an exceptional circumstance. Counsel for the appellant submitted that his incarceration is determinantal to the economy. With respect, that is a stretch of the imagination. A job title does not create exceptional circumstances, however the circumstances of

that individual within his working environment may be, if evidence is presented to the court. The appellant states that he has pre-booked concerts to attend and stands to lose a large income, however that is, in this court's view, no different to an average worker who cannot attend work because he has been arrested. Financial hardship is a normal consequence of arrest and detention. It may be so that the appellant appoints people to assist him in the course of his work, however all the appellant says in his affidavit is that: -

"18. I run my own business in the music industry and have five (5) employees, namely: -

18.1 two dancers;

18.2 one driver;

18.3 a road manager;

18.4 a bookings manager."

[33] The appellant does not state whether these employees are employed by him on a full-time or a part-time basis. He does not say that he is their only source of income. If you want to use the fact that you have employees as an exceptional circumstance, you must at the very least show to the court that these employees are entirely dependent on the income that they derive from you, which the appellant does not do. To the extent that your work has an impact on people, be it employees, contractors, supporters, ect, you are required to give the court detailed information about this and not just general statements.

[34] The appellant says that he is involved in community work, which if true, is commendable. However, the affidavit of the appellant lacks sufficient detail to enable the court to ascertain whether this could be considered exceptional circumstances. The statements made by the appellant are not supported by any substantiating evidence; they are just statements. If the appellant was indeed truthful about his community work, and mentored many young musicians as he alleges, it would not have been difficult to call one of them as a witness or had him/her depose to a supporting affidavit.

[35] The attack on the respondent's case was very sparse and in respect of some counts, non-existent. The appellant could have taken the court in its confidence and given detail on his defenses and called witnesses where necessary. The appellant simply dealt with the charges against him in a very broad manner. The respondent called the investigating officer to give evidence on the charges, which evidence was largely untested. The investigating officer withstood cross-examination, and the learned magistrate was correct in accepting his evidence.

Interests of Justice

[36] The appellant did not successfully challenge the respondent's case, especially on the evidence pertaining to the appellant's previous cases that were withdrawn, due to the interference with witnesses. **This was fatal for the appellant** because it means that it must be accepted that there is a danger that he will interfere with the witnesses in this case. Even if the appellant were to discharge the burden in proving exceptional circumstances, he would not be granted bail by virtue of **section**

60 (4) (c) of the CPA. Only one of the grounds in section 60 (4) needs to be present for bail to be refused.

- [37] In **Yanta and Another v S**²⁰ it was held that: - *“What I find extremely disturbing and inexplicable is that the appellants are applying to be released on bail despite the fact that they were previously granted the same indulgence and messed it up. The appellants expect to be afforded yet another opportunity to be out on bail when they were released on bail in other matters. The current offences that the appellants are facing were allegedly committed while they were on bail. In my view, the finding by the court a quo that there is a likelihood that the release of the appellants on bail would disturb public order or undermine the public peace or security is beyond reproach. They are all facing serious charges, some of which were committed whilst they were on bail. If they were released on bail, they are likely to commit schedule 1 offences. In my view, it cannot be said that the magistrate was wrong in refusing to admit them to bail. There is no basis in law for this court to interfere with discretion by the Magistrate. In my view, the appeal must therefore fail.”* The accused is already on bail for another offence alleged to be committed. As per the above judgment, the appellant already had a chance and has messed it up. He has not provided this court with any evidence that he should be given a second chance at bail. The appellant simply did not say anything in his affidavit that would have convinced a court that he is not going to commit in more offences whilst out on bail.

²⁰ (A71/21, A43/21, A43/21) [2021] ZAWCHC 98 (14 May 2021).

Conclusion

[38] Schedule 6 bail applications are difficult; the burden of proof required by accused persons must be taken seriously and must be respected. The appellant has simply not met the challenge of proving exceptional circumstances.

[39] I accordingly find that the learned magistrate did exercise his discretion correctly.

Order

[40] I therefore make the following order: -

[40.1] The appeal is dismissed.

[Redacted Signature]

BURNETT, E J
ACTING JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION

APPEARANCES

FOR THE APPELLANT: - ADV. N C MATHABATHA & ADV. M S MONENE

INSTRUCTED BY: - RAMUSI ATTORNEYS

FOR THE RESPONDENT:- ADV. KW LEKOLOANE

INSTRUCTED BY:- NATIONAL PROSECUTING AUTHORITY

DATE OF HEARING: - 31 DECEMBER 2025

DATE OF JUDGMENT: - 18 FEBRUARY 2026