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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: A525/2024

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

DATE 27/03/2026

SIGNATURE

In the matter between:

NGCOBO MANDILAKHE

Appellant

and

THE STATE

Respondent

JUDGMENT

Jordaan, AJ

Introduction

[1] This is an appeal in terms of s65 (1) of the Criminal Procedure Act 51 of 1977(the Act) against the refusal, by the Magistrate at Fochville Magistrates Court, to admit the appellant to bail on 17 October 2025.

[2] On 20 September 2024, the appellant, a 52-year-old male, was arrested on the charge of rape of a 10-year-old girl, on diverse occasions during the period 2023 to 2024.

[3] As a result of this incarceration, the appellant filed an application for bail on 16 October 2024. This bail application was denied.

[4] Following the refusal to admit the appellant to bail, the appellant brought two consecutive applications for bail on new facts by affidavit, both of which were dismissed.

[5] On 13f October 2025, after receipt of disclosure from the respondent, the appellant brought his third application for bail on new facts by affidavit, which was refused on the 17 October 2025. It is this dismissal which forms the basis of this appeal.

Background

[6] On 16 October 2024, the appellant, legally represented by Mr. Nkomo, launched his application to be remitted on bail. The charge against the appellant was an offence in the ambit of Schedule 6 to the Act. The appellant undertook the task of adducing evidence which would satisfy the court that exceptional circumstances existed which, in the interest of justice, permit his release as provided in section 60(11)(a) of the Act.

[7] The appellant sought to discharge this onus by producing an affidavit deposed to by him. The appellant's affidavit contained the following averments, asserted to be of relevance in the discharge of the onus:

- (a) He concedes the offence, he is charged with, has an element of violence, is serious and prevalent in the Honorable Court's jurisdiction.
- (b) He has never threatened anyone nor has grudges against anyone and disputes that he has benefited or has the proceeds of this offence.
- (c) He was born on 2 February 1972 at Nongoma in KwaZulu-Natal and has been married to Nonsikelelo Nxumalo since 2015.

- (d) He is a citizen of the Republic of South Africa.
- (e) His current residential address is 5[...]/3[...] W[...], I[...] Street, Extension 4.
- (f) He has been residing at this address for seven months since March 2024.
- (g) His past residential address is 3[...] B[...] Street, Shoppers, Wedela.
- (h) He considers himself to be geographically bound to the court's jurisdiction.
- (i) He is employed by Kusasalethu mine as a labourer since 2012, earning R8000 per month, and has no other source of income.
- (j) He has immovable property at KwaDabhasi, Nongoma, which is valued at a sum of R700,000.
- (k) He has the following movable assets consisting of a bedroom suite; 8 cattle which are at Kwa Dabhasi Nongoma; a Toyota Corolla Run-X motor vehicle which is at 5[...]/3[...] W[...] and is valued at R150 000.
- (l) His dependents are his wife, his five-year-old daughter, his seven- and twelve-year-old sons and his twenty-one-year-old daughter, in her first year of studies at the University of KwaZulu-Natal.
- (m) He has no contacts with neighbouring countries and has no travelling documents, nor does he intend to apply for the same, if released on bail.
- (n) He is unaware of any extradition treaties between the Republic of South Africa and any other neighbouring countries.
- (o) He is prepared to pay bail at an amount of R2000, which amount belongs to his brother.
- (p) He places value upon it; hence, he could not afford to contravene the bail conditions, thus causing the money to be forfeited to the state.
- (q) He will plead not guilty to the charge(s) against him and will elaborate on his defence during trial.
- (r) He is confident that the trial will return a verdict of not guilty in his favour as he has a legal and sound defence to the charges preferred against him. He states that he has a strong case and that he is not going to labour the bail court with the merits of the case, as he is of the view that the bail court is the competent court to ventilate this matter.

- (s) He will be unable to adequately prepare himself for this matter if he were continuously incarcerated.
- (t) He is aware of the probable sentence to be imposed upon conviction, however, that will not influence him to abscond from this matter.
- (u) He was arrested on the 20th of September 2024 and estimates that he will be in custody for the next three months before this matter is finalised.
- (v) He will suffer financially if his incarceration is not terminated due to the following reasons: he will lose his job, and as a breadwinner, he will not be able to provide for his family.
- (w) He is suffering from the following illnesses: high blood pressure and is taking high blood pressure medication.
- (x) He is aware of the identity of the witnesses and even though he became aware of their identity, he will not interfere with them.
- (y) He is not related to the witnesses.
- (z) He hopes and trusts that the investigations are complete, or that they are about to be completed.
- (aa) As a condition to his bail, he will not interfere with the smooth running of this matter and if the Honourable Court deems it necessary to attach further conditions to his bail he will still abide.
- (bb) He never provided false personal information upon his arrest and he trusts that it has been verified.
- (cc) He did not attempt to evade the police upon arrest and he was arrested by the police at his place of residence.
- (dd) He has no previous convictions and pending cases.
- (ee) He will not contravene any bail conditions set by the Court.
- (ff) There will be no community outcry if he is released on bail; his life will not be in danger; he will not endanger the safety of the public or any other person, or commit a schedule one offence.
- (gg) He will not attempt to evade his trial, he will not attempt to interfere with witnesses or evidence.
- (hh) He will not undermine the objectives or proper functioning of the criminal justice system including the bail system.

- (ii) It was his humble submission that there are “exceptional circumstances” which in the interest of justice permits his release on bail.
- (jj) He is prepared to furnish further information if the Court so desires.

[8] The respondent led the evidence of the investigating officer, Constable Jeremiah Chiawelo, in opposition to bail. He, in essence, testified that the minor female child(the child) is known to the appellant, they reside in the same area of Wedela, that the child initially refused the appellant’s instruction for her to undress, upon which the appellant placed his hand on his waist, where the victim saw a black firearm on his waist. Out of fear that the appellant might shoot her, she then undressed.

[9] It was the evidence of the investigating officer that the appellant penetrated the child on her thighs, whereafter he warned her not to report the incident to anyone or else. The child thought the appellant might do something bad to her, so she did not report it. The appellant penetrated the child in this manner on numerous occasions during 2023 until he vaginally penetrated the victim on 15 September 2024.

[10] Constable Chiawelo testified that on 19 September 2024, the child refused to comply with the appellant’s instruction to undress and went home. It was his testimony further that on her arrival at home, she was questioned by her mother on where she was coming from, and the child reported that the appellant had raped her. The child and her mother went to the appellant’s home, where the mother confronted the appellant, upon which the appellant gave them R1000 to take the child to the doctor. The following day, the mother took this R1000 to the police station and opened a case of rape against the appellant.

[11] Constable Chiawelo testified that the appellant does not have a fixed address in that he is renting, the community is outraged and submitted a petition against the appellants release on bail, the lives of the child and her mother would be at risk should the appellant be released on bail, the appellant’s presence in Wedela will intimidate the victim child if she come across him, the appellant will interfere with the state’s case should he be released and the appellant might evade trial.

[12] During cross-examination, Constable Chiawelo was confronted with the fact that the child's mother opened this case because the love relationship between the appellant and the child's mother came to an end. He replied that the child reported the incident to three different persons, and the J88 confirmed penetration.

[13] He testified that the addresses of the appellant are positive, but that the alternative address provided at 1[...] D[...] is negative in that Ms Zeto has moved from the address. Zeto telephonically denied that she is related to the appellant and refused to accommodate the appellant.

[14] In its judgment, the bail court had regard to relevant case law, the Constitution and the Act in the context of the evidence tendered in the bail application. The Magistrate considered amongst other factors the appellant's ties to the area, the alternative address that was refuted, the likelihood of the appellant evading his trial, the seriousness of the offence, that the appellant knows the witnesses, the marked public outrage, the appellant's circumstances and concluded that the appellant failed to discharge the onus on him to adduce evidence which satisfied the court that exceptional circumstances exist which in the interest of justice permits his release.

[15] On 17 December 2024, the appellant brought an application, on affidavit, for bail on new facts on the basis that he was served with a letter from his employer warning of termination of his employment, should he not present himself for work on or before 18 December 2024, that his family is suffering financially as he is the sole breadwinner and that his children will not receive their school examination results as their school fees have not been paid.

[16] The state opposed the application and led the evidence of Constable Chiawelo who in essence testified that there are no new facts.

[17] On 18 December 2024, the bail court dismissed the application. . It was found that the loss of employment was a consequence of the appellant's continued incarceration, thus not a new fact. The court further held that the interests of the appellant's children cannot override all other legitimate interests, having regard to the offence and the incidence of gender-based violence.

[18] On 17 March 2025, the appellant lodged a second application, on affidavit, for bail on new facts. The appellant in essence advanced as new facts that he has high blood pressure which is a chronic ailment, that he has not received treatment while incarcerated, that he suffers spiritual attacks, that he recently discovered that he has diabetes, that his health is deteriorating, that the investigations are incomplete, that his children are affected by his loss of income due to his incarceration and that he needs to consult a traditional healer.

[19] The state opposed this application by leading the evidence of Constable Chiawelo, who in essence testified that the issue of the appellant's children had been dealt with in the last bail application, that the appellant was taken to Fochville Clinic to be medically attended to, where he was issued with his chronic medication; and that he could not comment further on the issue of traditional healers. He further testified that only the DNA report was outstanding.

[20] The court found that the only issues that are submitted as new facts to be dealt with are the appellant's need to consult a traditional healer and that the appellant contracted diabetes or high blood pressure while in custody.

[21] On 1 April 2025, the bail court dismissed the application. The bail court, in dismissing the application, found that the appellant's own evidence showed that he was taken to Fochville clinic to be medically attended to; that there was no evidence that the appellant's health would further deteriorate while he was kept in custody; that he was issued with chronic medication, and thus the medical condition already existed; that there was no evidence that he contracted any illness while in custody; that his need to consult a traditional healer was merely a discussion between the appellant and his attorney in the absence of any diagnosis; that the further new alternative address provided would not stop the appellant from interfering with the minor child, that delays in the finalisation of trials is unacceptable, but are a commonly found situation; and it concluded that the appellant failed to discharge the onus on him to adduce evidence which satisfied the court that exceptional circumstances exist which in the interest of justice permit his release.

[22] On 13 October 2025, the appellant launched his third application for bail on new facts. He submitted, inter alia, that the state's case is manifestly weak, given

that there is no DNA result, the significant delay in the criminal justice process, that the section 170A assessment indicates the minor is a competent witness thus her testimony will not be affected by his release and he raises considerations why his release on bail is warranted as per his affidavit read into record.

[23] The state opposed this application and led the evidence of Constable Chiawelo who testified that he was not given an address in Bushbuckridge to verify as an alibi for where the accused was living in 2023, that a DNA report can take anything from 12 months to more than 18 months in his experience, that he listened to the WhatsApp messages which consists only of the appellant's voice recording messages on a date unknown and that the section 170A deals only with the witness being able to distinguish between a truth and a lie and whether she can testify independently or assisted by an intermediary.

[24] He further testified that the delay in this case was caused by the defence who did not want to commence the trial on the set down date without a DNA report. It was his testimony that the DNA report would only be additional to a strong case, that the R1000 was booked into the SAP13 as the mother presented it as a bribe, that the accused's health was addressed on the previous bail application and that the J88 report record clefts at 12, 3 and 6 o'clock.

[25] When confronted with the fact that the mother's statement reflects that the money was given to take the child to a doctor, Constable Chiawelo testified that the mother, during consultation, told him that the appellant gave her the R1000 to take the child to the doctor when she told him she is going to the police, to prevent the step of going to the police.

[26] When confronted that the child's statement indicates that there was no rape on 19 September 2024, yet he testified the child was raped three times, Constable Chiawelo replied that he replied to the state's question on how many incidents there were, and his reply to that question of the state was during 2023, on 15 September 2024 and on 19 September 2024.

[27] On 17 October 2025, the court dismissed the application.

[28] Aggrieved by the dismissal of this application for bail on new facts, the appellant lodged this appeal and assails the finding of the bail court on various grounds, as set out in his notice of appeal:

“1. The learned magistrate erred in refusing to release the appellant on bail by finding that he has failed to establish the existence of exceptional circumstances which would permit his release on bail in the interest of justice, in view of the following:

1.1 The learned magistrate erred by finding that the appellant had not established the existence of new facts;

1.2 The learned magistrate erred by ignoring serious shortcomings in the state’s case such as the contradiction relating to whether the complainant had been raped on 19 September or not;

1.3 The learned magistrate erred by simply disregarding this aspect and treating it as of no consequence, whereas it goes to the core of the allegations against the appellant;

1.4 The learned magistrate erred in interpreting the evidence relating to the appellant’s current address incorrectly. Fact is, it has always been the appellant’s version that he stayed at a different address and did not know the complainant and her mother regarding the 2023 allegation had come to the fore;

1.5 It has not been disputed by the state that the address furnished by the appellant as his current address, was indeed the correct address the investigating officer could not dispute the correctness of the address;

1.6 The learned magistrate's erred by overemphasizing the importance and suspicions surrounding the voice note sent to the complainant’s mother by the appellant if anything this message was an indication that the complainant was displaying behavioral problems;

1.7 The learned magistrate attempted to draw inferences from the voice note which was not supported by the contents of the voice message;

1.8 The learned magistrate clearly heard in her interpretation of the evidence relating to the alleged bribe of R1000,00 during cross examination of the investigator it was pointed out to him that the true

position was relating to the payment of R1000,00, something he could not deny;

1.9 It is not clear on what basis the magistrate found that the payment of R1000,00 was improper, especially when a perfect logic full explanation has been furnished by the appellant and the complainant's mother;

1.10 The learned magistrate erred by finding that the matter was trial ready, even though the DNA results are still outstanding. The DNA results could have a material bearing on the progress of the matter;

1.11 A reading of the learned magistrate's judgment creates the clear impression that she failed to apply her mind to all the facts of the matter when considering the application.

2. The learned magistrate in her judgment found that the appellants affidavit had not been properly commissioned and that accordingly there was no evidence before her. In this regard, the learned magistrate committed several misdirections:

2.1 The learned magistrate found that the appellants affidavit had not been commissioned properly and that accordingly there was no evidence before court;

2.2 The learned magistrate failed to take into consideration the fact that the affidavit was read into record and that it was placed on record by the appellants attorney that the affidavit had been duly commissioned and attested on the morning of the bail application;

2.3 The learned magistrate failed to order that the affidavit be interpreted to the appellant and further failed to ask the appellant whether he confirmed the contents of the affidavit;

2.4 But it goes further the learned magistrate failed to mark the affidavit as an exhibit;

2.5 Despite forming the view that the affidavit was not properly commissioned and did not constitute evidence, the learned magistrate allowed the proceedings to be conducted as if the affidavit was properly before her;

2.6 The learned magistrate was enjoined to immediately point out to the appellants legal representative that the affidavit did not comply with the legal requirements. Instead, she raised it for the first time

during her judgment, affording the appellant no opportunity to rectify the position;

2.7 The learned magistrate was clearly intent on favouring form over content and in the process rendering the application nugatory. This constitutes a serious misdirection.

3. On a perusal of the evidence and the learned Magistrate's judgment, it is clear that she failed to approach the application by the appellant with an open and objective mind and that accordingly the appellant did not receive a fair hearing.

4. On a conspectus of all the evidence, it is clear that the learned magistrate had failed to apply her mind and exercise her discretion judicially.

5. In the premises, the learned magistrate was clearly wrong in finding that the applicant has not proven new facts and failed to establish the existence of exceptional circumstances to permit his release on bail in the interest of justice.”

Appellant's submissions

[29] The appellant advanced his grounds of appeal in the notice of appeal and further submitted that the appellant has an *alibi* in that he in 2023 lived at 3[...] B[...] Street, Wadela, which is far away from the witnesses' house and that he did not know the complainant in 2023. That the respondent failed to investigate this *alibi* as it proves the weakness of the state's case and the bail court never considered this, while over-emphasising the seriousness of the offence.

[30] Counsel for the appellant was directed to the appellant's affidavit and was constrained to concede that the appellant in his affidavit never stated that he did not know the complainant in 2023.

[31] The appellant further submitted that the bail court was speculating without probability in stating that the appellant does not have a fixed address, that the appellant will interfere with witnesses and that there was no threat with a firearm, but that the appellant had a firearm on his side, and that is why she was scared.

[32] It is the appellant's further submission that the state has a weak case, as there was no rape alleged on 19 September 2024, as the investigating officer testified, and the complainant's mother never stated that the money was a bribe.

[33] The appellant contended that the bail court, on a technicality, did not accept that the affidavit was evidence.

Respondent's submissions

[34] The respondent, in essence, submitted that the appellant cannot merely allege that the state has a weak case now that they have the docket; he needs to show the likelihood of acquittal, further that the R1000 was correctly accepted as an attempt to influence the state witnesses and that the appellant submitted at least four addresses.

[35] The respondent further submitted that the state has a case against the accused, the charge sheet can be amended on consultation, however the affidavits show there was sexual violations over a period of time as well as sexual penetration, the complainant implicate the appellant and the complainant in her affidavit states that when the complainant refused to undress as per the appellant's instruction, the appellant showed or motioned to his firearm on his waist, which instilled fear as a result of which she undressed- thus a threat to the complainant.

[36] The respondent submitted that the appellant provided at least four addresses; thus, the court was correct in stating where the appellant will be traced to. The respondent further submitted that the current and past address of the appellant was confirmed as positive by the investigating officer, his alternative address was false, and a further alternative address was provided.

[37] The respondent further submitted that the Magistrate merely stated that the affidavit was non-compliant but proceeded with the bail on new facts and delivered judgment.

Legal principles

[38] Section 65(4) of the Criminal Procedure Act 51 of 1977 (the CPA) deals with bail appeals from the lower courts to the High Court and determines as follows:

“4. The court or judge hearing the appeal shall not set aside the decision against which the 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.”

[39] In *State v Barber*,¹ Hefer J considered the test to be applied as contemplated in section 65(4) and remarked as follows:

“It is 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 which he has 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 be an unfair interference with the magistrate’s exercise of his discretion. I think it should be stressed that, no matter what this court’s own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail but exercised that discretion wrongly ... Without saying that the magistrate’s view was actually the correct one, I have not been persuaded to decide that it is the wrong one.”

[40] Section 60(11)(a) of the CPA is applicable in this matter as the appellant was arraigned for a Schedule 6 offence. This section remains applicable when bail pending the outcome of an appeal is considered.

[41] Section 60(11)(a) reads as follows:

“Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

(a) 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 a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional

¹ 1979 (4) SA 218 (D) at 220 E-H

circumstances exist which in the interest of justice permit his or her release”.

[42] The appellant must adduce evidence which satisfies the court, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his release.

Evaluation

[43] The appellant submits that the Magistrate misdirected herself in finding that the affidavit had not been commissioned properly and, accordingly, there was no evidence before the court. The respondent contends the magistrate nonetheless proceeded with the application.

[44] The Regulations Governing the Administration of an Oath or Affirmation promulgated in terms of section 10 of the Justices of Peace and Commissioner of Oaths Act 16 of 1963, in Regulation 4 provide:

“(1) Below the deponent’s signature or mark, the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration, and he shall state the manner, place and date of taking the declaration.”

[45] The date and the place of the taking of the oath is not reflected and left blank. The transcribed record reflects:

“So it is on that basis that I am saying it is non-compliant and the Act says shall.”²

“So, in short, I am simply saying there is no evidence before the Court because of this non-compliance. Be that as it may, as it may, I am going to proceed to respond to all the bail on new facts that were brought by the applicant...”³

² Transcribed record Volume 5 page 461 lines 20 to 21.

³ Transcribed record Volume 5 page 461line 25 to page 462 lines 1to 4.

[46] The bail court then exercised its discretion not to reject the admitted affidavit notwithstanding the discovery of its non-compliance and proceeded with the application. The bail court considered the affidavit in evaluating the evidence and giving its judgment.

[47] The appellant's alibi defence pertains to the year 2023's charge, but it must be borne in mind that the charge against the appellant also includes a charge of rape on 15 September 2024.

[48] The investigating officer testified, confirming the current and past addresses of the appellant as positive, but the alternative address as negative. A further alternative address was provided with a confirmatory affidavit.

[49] The appellant attacked the strength of the state's case further on the ground of contradictions pertaining to 19 September 2024, which the bail court stated are best determined in the trial court.

[50] The bail court had regard to the recordings of the appellant and the evidence of the respondent that the recordings have no date and consist of soliloquies recorded by the appellant; the bail court cannot be faulted for viewing it as strange.

[51] To successfully challenge the merits of a case advanced to be weak, in bail proceedings, an applicant needs to prove on a balance of probability that he will be acquitted of the charge.⁴

[52] In dealing with the evidence as was produced by the appellant on affidavit, the Supreme Court of Appeal stated in *Mathebula v S*⁵ that:

“Thus, it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the state to rebut his evidence to that effect: *S v Viljoen* at 561f-g”.

[53] The respondent, as the prosecutor of this case on the merits, enrolled the case for trial and the investigating officer testified that the case could proceed

⁴ *S v Botha en á Ander* 2002 (1) SACR 222 (SCA).

⁵ 2010 (1) SACR 55.

without a DNA. It was the appellant who delayed the case on trial date for want of a DNA report. Thus, the bail court did not err in stating that the case is trial ready.

[54] The remainder of the factors advanced was found by the bail court to be neither unusual nor such that they singly or cumulatively satisfied the court that exceptional circumstances existed which, in the interest of justice permitted the release of the appellant.

[55] This Court finds that the bail court took a holistic view of the evidence before it. The Court is satisfied that the bail court's decision was not wrong in concluding that the appellant's application to be admitted to bail should be denied.

Order

[56] Considering the above, I make the following order:

1. The appeal is dismissed.

M.T.JORDAAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

For the Applicant:

Mr. J. Eksteen
BDK ATTORNEYS

For the Respondent:

Ms E. Mafunisa
DIRECTOR OF PUBLIC PROSECUTIONS

