**REPUBLIC OF SOUTH AFRICA**

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

Case Number: A16-2026

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

[redacted]
SIGNATURE

03/03/2026
DATE:

In the matter between:

**AHMED MOHAMED ABDI** **Appellant**

and

**THE STATE** **Respondent**

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**JUDGMENT**

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**Mfenyana J:**

[1] This is an appeal against the refusal of bail on new facts, pursuant to the provisions of section 65 of the Criminal Procedure Act (the CPA).[1]

[2] The appellant is one of 10 accused facing charges of theft, kidnapping, robbery and money laundering.

[3] On 29 August 2025, the appellant unsuccessfully applied for release on bail. His appeal against the refusal of bail was also unsuccessful. In November 2025, he brought a further application for release on bail based on new facts, which was likewise dismissed on 15 December 2025. This application is a sequel to the refusal by the court *a quo* to admit the appellant to bail on new facts.

[4] The State has not opposed the appeal.

[5] In the notice of appeal, the appellant contends that the court *a quo* erred in finding that no exceptional circumstances existed, justifying his release on bail; that the evidence presented by the appellant did not constitute new facts; in allowing the enquiry about the Schedule of the charge to degenerate into evidence against the bail application; in putting undue emphasis on the appellant's status in the Republic of South Africa, rejecting the evidence by the State that he is a naturalised citizen of Somalian origin who holds only a South African identity document; and in finding that the application amounted to a request for the court to review its judgment.

[6] In its judgment, the court *a quo* held that the issues raised by the appellant did not constitute new facts as they were in existence at the time of the initial bail application and within the control of the appellant. The court

[1] Act 51 of 1977.

referred to *S v Mpofana*[2] that in determining whether new facts exist, the court should have regard to whether, when 'viewed in light of the facts that were placed before the court in the initial application, the facts presented are new facts', and whether the information relied on was available to the appellant at the time of the initial bail application.

[7] In its reasons for judgment, the court a quo noted that the appellant failed to provide documentary proof that he was a director of any companies, a South African identity document or identity number, or proof that he had 'FICA'-verified his bank accounts using the addresses he gave.

[8] The court further held that the appellant was a flight risk because he owned no immovable property and reiterated that the existence of a J50 warrant in another matter suggested that he might evade trial.

[9] At the bail hearing on new facts, the State relied on the evidence of the investigating officer, who confirmed that he had verified the appellant's identity document, that the appellant held no other identity document besides his South African one, and that he had no foreign citizenship. This information was later made available to the defence and the court. The record further shows that, on this occasion, the appellant provided a lease agreement and proof of his directorship in three companies. Copies of these documents, however, are not included in the record before this court.

[10] Following a lengthy exchange with counsel for the appellant concerning the appellant's status in this country, the court concluded that the appellant was a permanent resident and not a naturalised South African citizen, as he had previously stated in his affidavit in the initial bail application, to which counsel conceded. In this regard, the court *a quo* noted that the

[2] 1998 (1) SACR 40.

appellant had misled the court, which was denied by the appellant's counsel.

[11] The record shows that when the matter was heard on 15 December 2025, at the instance of the court invoking its powers in terms of section 60(3), the investigating officer testified about the well-being of the appellant's children. She told the court that they were in good condition, and their mother had stated that she did not need the involvement of social workers.

[12] The court, thus, found that there were no exceptional circumstances that permitted the appellant's release on bail, as there was a likelihood that he would evade trial, noting further that there was no evidence showing that the appellant had a strong case in relation to the State's case, and that the undisputed evidence was that the appellant's minor children were taken care of in his absence and were not adversely affected by his absence.

[13] In these proceedings, it was argued on behalf of the appellant that the court *a quo* misdirected itself in putting undue emphasis on the appellant's citizenship. Counsel further argued that the court *a quo* also misdirected itself in finding that the facts relied on by the appellant were not new. He further submitted that these facts, which relate to the appellant's proof of residence and his directorship of companies, were not in dispute between the State and the defence. However, the presiding magistrate *mero motu* challenged these facts. Consequently, the supporting documents were not to hand at the hearing of the initial bail application, which influenced the court's decision to refuse bail, as the court concluded that the appellant would likely evade trial as he, *inter alia*, had no fixed property registered in his name.

[14] Counsel conceded that the documents sought to be introduced are not new; however, because they were not initially presented or considered by the court *a quo* in making its decision, they should be treated as new facts.

He added that they are relevant to the determination whether or not the appellant should be admitted to bail.

[15] Regarding the issue of the J50, counsel submitted that the J50 warrant was cancelled. In addition, according to the investigating officer, the matter was *nolle prosequi*. As such, there is no pending case against the appellant. He added that in the bail application appealed against, the appellant also provided proof of his directorship of the companies and a lease agreement. Presumably, this suggests that the appellant is not likely to evade trial if released on bail.

[16] On whether the charges against the accused fall within Schedule 5 or 6, an argument ensued between the court and the defence counsel. It appears that when the initial bail application was heard, it was heard as a Schedule 5. This meant that the appellant was required to adduce evidence to show that his release would be in the interests of justice. Schedule 6, on the other hand, requires a bail applicant to show that there are exceptional circumstances which warrant their release on bail.

[17] In this regard, the appellant contends that the appellant was denied the opportunity to adduce evidence as required, and that this amounts to a misdirection. Before the court *a quo*, it was argued on behalf of the appellant that the determination of the matter as a Schedule 5 in the first place was a result of the existence of the J50.

[18] On these bases, the appellant avers that this court should interfere with the decision of the court *a quo* or remit the matter to the court *a quo*.

[19] A court dealing with a bail appeal based on "new facts", typically in terms of s 65(2) or s 60(11) of the Criminal Procedure Act 51 of 1977 must primarily determine whether the circumstances have genuinely changed

since the initial bail refusal and whether those changes warrant a different decision

[20] New facts in these circumstances are not meant to cure defects in a previous application, but to place before the court facts that arose only afterwards. Here, the cancellation of the J50 and the finalisation of the related matter constitute new facts. The other facts the appellant relies on do not: they existed before the initial bail application and were available to the appellant. Besides arguing that these facts were not in dispute by the State, and that, for this reason, he did not have the documents the court required to prove his residence, identity document, and his directorship in his companies, it was also contended on behalf of the appellant that although he had control of the documents before the first bail application, the court was obliged to consider them.

[21] In addition, section 60(11) of the CPA states:

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 circumstances exist which in the interests of justice permit his or her release;
>
> (b) in Schedule 5, but not 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 the interests of justice permit his or her release.

[22] There can thus be no merit to the appellant’s contention that he was not given an opportunity to adduce evidence, as the matter was treated as a

Schedule 6 matter. The appellant elected to adduce evidence in the form of an affidavit. It is a trite principle that affidavits serve a dual purpose: as pleadings and also evidence. In addition, both schedules 5 and 6 require the leading of evidence.

[23] In terms of section 65(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”.

[24] The difficulty with the appellant’s contention that the documents ought to be regarded as new facts because they were not presented to the court, is that the appellant still bears the responsibility to argue his case and substantiate his averments. He must present his case in full at the bail application. What the bail application on new facts, far from introducing new facts, merely repeated and expanded on the facts already relied on in the first bail application, now with proof of the appellant’s averments. This is contrary to the purpose of the provision. The second application, however styled, was, in my view, an attempt to have another bite at the cherry, which the appellant is not entitled to.

[25] While I sympathise with the appellant, understanding that he would not be entitled to approach this court on new facts unless those new facts had been placed before the court *a quo* first, this did not stop him from instituting the first appeal proceedings. In my view, this was a strategy, (however devised), gone wrong.

[26] Accepting that there is no limit to the number of times an accused person can apply for bail, an application for bail on new facts must present genuinely new facts which arose after the refusal of the first bail application or changed circumstances. In this regard, I differ with the court *a quo* on

whether the cancellation of the J50 constitutes a new fact. Having occurred after the first bail application was refused, it represents a change in circumstances and is therefore a new fact. However, on its own, it does not alter the situation. A court should consider the evidence holistically. The cancellation of the J50 is merely a factor among many that the court should consider and cannot, on its own, guarantee the granting of bail.

[27] Having said that, the appellant cannot cherry-pick which of the requirements apply to him. In the heads of argument, while citing all the requirements for bail on new facts, counsel merely clings to one requirement, *i.e* that the facts are relevant to the determination of the new bail application.

[28] I do not think the appellant's reliance on *S v Le Roux*[3] as cited in the heads of argument assists him. It is indeed the correct legal position. Again, the reliance on the word "unavailable" borders on semantics. In any event, except for not being presented in court, there is no indication that the appellant's lease agreement, proof of directorship, and identity document were unavailable to him.

[29] Applied to the facts of this matter, the facts relied on by the appellant do not constitute new facts. Not only were they available prior to the hearing of the initial bail application, but the appellant had access to them at that point.

[30] Likewise, the appellant's status in the Republic was a relevant consideration in determining whether or not he would stand trial. I therefore do not agree that the attention paid to it by the court *a quo* was unwarranted. The appellant did not play open cards in this regard. As the court *a quo* observed, as a permanent resident, there is no requirement

[3] S v Le Roux en Andere 1995 (2) SACR 613 (W).

for him to renounce the citizenship of his country of birth. There are at least three versions proffered for the appellant in this regard.

[31] The first, which is stated in his affidavit in the first bail application, is that he is a naturalised citizen of this country. The second is that he stated in his bail affidavit that he is a permanent resident. The third version is that he is a naturalised citizen, although he has not collected the documents to confirm this from Home Affairs. All these were relevant factors to be taken into account by the court *a quo*, as it did in determining whether there was a risk that the appellant would not stand trial.

[32] Quite apart from the issue of the J50, coupled with the evidence for the State that the appellant eluded the police for close on three years and that when they finally caught up with him, he resisted arrest, such that the investigating officer had to call for backup. The applicant did not give *viva voce* evidence and solely relied on affidavit.

[33] I do not consider it necessary to deal with the strength of the state's case against the appellant, as it has no bearing on the bail application on new facts. Besides, this was fully canvassed in the first bail appeal before Makamu J.

[34] As in any appeal, the role of the appeal court is not to substitute the decision of the bail court for its own. In *Pataka v The State*[4], a decision of this Division, the court noted that:

> In considering this appeal, even if this Court has a different view, it should not substitute its own view for that of the court a quo, because that would be an unfair interference with the court a quo's exercise of discretion. It is after all the court a quo who would have been best equipped to deal with the question of bail, steeped in the atmosphere of the case.

[4] Unreported, Case number: (A337/2017) [2018] ZAGPJHC.

[35] It is trite that “the grant or refusal of bail is unmistakably a judicial function”. … (e)ven where the prosecution concedes bail, the court must still make up its own mind”.[5]

[36] On the strength of these authorities, including those relied on by the appellant, I do not believe that the criticism against the court *a quo* is justified. I will readily agree that the conduct of the proceedings was not what it could have been; perhaps there could have been fewer interruptions. However, this cannot elevate the conduct of the proceedings and the decision of the court *a quo* to the level of a misdirection. In my view, the court *a quo* duly discharged the judicial function it is enjoined to perform in bail proceedings. In any case, ‘in hindsight, everyone is wise.’

[37] I cannot find any misdirection in the decision of the court *a quo* which warrants interference by this court. There are no exceptional circumstances which justify the appellant’s release on bail.

*Order*

[38] In the result, the appeal is dismissed.

[redacted]
S Mfenyana
Judge of the High Court

[5] *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* (CCT21/98, CCT22/98, CCT2/99, CCT4/99) [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC); 1999 (2) SACR 51 (CC) (3 June 1999), para 10.

Date heard: 23 February 2026

Date of judgment: 3 March 2026

This judgment was handed down electronically by circulation to the parties' representatives by email and by uploading the judgment onto Caselines. The date of delivery of the judgment is deemed to be **3 March 2026**.

*Appearances:*

For the appellant:
Counsel: W B Ndlovu
Instructed by Muedi Inc. Attorneys

For the respondent:
No appearance