



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 2026-133822

In the matter between:

FERREL GOVENDER

APPLICANT

and

**THE DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU-NATAL**

RESPONDENT

ORDER

The following order is granted:

1. It is declared that the high court has exclusive jurisdiction to hear the applicant's second bail application on new facts.
 2. The applicant's second bail application on new facts is dismissed.
 3. The relief sought in paragraph 2 of the notice of motion dated 9 June 2026 is refused.
 4. There will be no order as to costs.
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JUDGMENT

Henriques J

Introduction

[1] This is an opposed application which served before me, initially as an urgent application on 10 June 2026 in motion court. The original relief foreshadowed in the notice of motion was the following:

‘1. ...

2. That a *rule nisi* do hereby issue calling upon the Respondent to show cause, if any, to this Honourable Court on the 10th day of June at 09h30 (or so soon thereafter as the matter may be heard) why an order should not be made in the following terms:

2.1 That the Applicant who is appearing under Durban High Court Case Number: CCD 45/2025 is remitted to the Durban Magistrates' Court, Court 10 for purposes of a bail application on new facts;

2.2 That the Respondent or Respondent's representative is directed to appear at the Durban Magistrates' Court, Court 10, on the 10th of June 2026 to arrange a date for the hearing of the application for bail on new facts;

2.3 That the respondent be and is hereby directed to requisition the Applicant on the date arranged between the parties as per paragraph 2.2 mentioned above.

3. That there is no order as to the costs of this application. Alternatively, and in the event the Respondent opposes the application, then the Respondent be directed to pay the costs hereof.’

[2] The application for urgent interdictory relief is opposed by the respondent, the exact grounds will be dealt with later in this judgment. In the founding affidavit, the applicant, in summary, makes the following submissions in support of the application:

(a) in dealing with urgency, in terms of the KwaZulu-Natal Division Practice Directives, bail appeals, bail applications as well as bail applications on new facts are by their very nature urgent;

(b) he is scheduled to appear at the Durban Magistrates' Court on 10 June 2026, a holding date, awaiting clarity from the Judge President of the KwaZulu-Natal Division on the hearing of his bail application on new facts;

(c) he wants to finalise his bail application on new facts before the trial commences on 20 July 2026 so as not to prejudice any party;

(d) the respondent was being ‘high-handed in refusing to requisition him or to have the matter remitted to the magistrates’ court for hearing and as a consequence,

he has no alternative but to institute these proceedings;

(e) the respondent has wasted time and rendered the matter urgent, given its highhandedness and its refusal to requisition him to court;

(f) both he and his legal representatives have acted promptly throughout at all times and attempted to engage the respondent to obtain the remittal and requisition orders; and

(g) he relies on correspondence from the respondent of 8 June 2026, in which it was indicated that they would not requisition him, which he submits has necessitated the application. This was in response to his request of 5 June 2026 requesting that he be requisitioned to the high court on Wednesday, 10 June 2026 to obtain an order from any high court judge presiding in the criminal court, remitting the matter to the magistrates' court to deal with his bail application on new facts.

[3] In his founding affidavit, he sets out in detail what has prompted the urgent application, specifically that he intended to bring an application for bail on new facts together with a recusal application in respect of the magistrate who presided over his initial bail application and first bail application on new facts, Mr KR Bruorton (Mr Bruorton).

[4] His trial is enrolled and scheduled to start on 20 July 2026 in the High Court, Durban and should he be released on bail, he would be able to consult with his legal team 'freely and needs to do so given that he is facing a life sentence'. After notifying the office of the chief magistrate of his intent not only to seek the recusal of Mr Bruorton, but also to bring a second bail application on new facts, his legal representatives were informed by the chief magistrate that Mr Bruorton had retired and would not be returning to deal with the second bail application on new facts. The applicant had requested that the recusal application be raised in chambers with Mr Bruorton.

[5] The chief magistrate informed his legal team that a new magistrate, Mr Zuma (Mr Zuma), had been appointed by him to preside over the second bail application on new facts. On 1 June 2026, his legal representatives, together with the State advocate, Mr Shah, approached Mr Zuma to obtain directions in respect of the

hearing of the second bail application on new facts. It was on this date that all the relevant parties were furnished with the second application for bail on new facts, as well as the transcript of all the bail proceedings which were heard before Mr Bruorton.

[6] The legal representatives agreed with Mr Zuma to attend at his offices on 10 June 2026 to arrange a date for the hearing of the second application for bail on new facts and the applicant's legal representatives undertook to approach the office of the Judge President for a directive to remit the applicant to the district court for his second bail application on new facts to be heard.

[7] His correspondent legal representative, Ms Arvina Harricharan, then corresponded with the office of the Judge President, on an unknown date, in which they sought her assistance and guidance for his remittal.¹ The email reads as follows:

'Dear Madam,

I trust that you are well.

Kindly be advised that our office represents Mr. F Govender. He is currently appearing in the Durban High Court under case number CCD 45/2025.

The State Advocate in the matter is Advocate K. Shah, whom I have included in this mail.

The Accused trial has been scheduled to commence on 20 July 2026.

The Accused has requested we bring an Application for Bail on New Facts in the District Court.

We are humbly seeking the Judge President's assistance and guidance on the way forward to remit the Accused to the District Court for the purposes of the said Bail Application on New Facts.

A provisional date has been arranged which is 10 June 2026 before the Learned Magistrate.

Kindly advise which will be a suitable way forward and ...'

[8] The email response from the office of the Judge President's secretary was:

'Good morning

Judge President Poyo Dlwati has had sight of you email and requested me to advise you that shouldn't the matter go back to the Magistrates' court for bail. The prosecutor and

¹ The exact date on which the email was sent is not evident from the annexure nor is the full content of the email legible.

defence counsel can requisition the accused.

You can speak to your Seniors.....'

[9] The applicant's legal representative, Mr Mlotshwa, on receipt of the Judge President's secretary's email response, made a further written request to Mr Shah of the respondent to requisition the applicant to the high court for his remittal to the magistrates' court for a directive from Mr Zuma on the further conduct of the second bail application on new facts. He considered the response to be a directive from the Judge President.

[10] This request was emailed on 3 June 2026 at 15h14, suggesting that Mr Shah requisition the applicant for Monday, 8 June 2026, so that:

'any Criminal Court Judge can give us order that matter is being remitted to the Magistrates' Court only to hear application for bail on new facts and has to be referred back to High Court upon finalisation thereof so that on 10 June 2026 the matter can be placed before the Learned Magistrate Zuma to give us directive on the further conduct of the matter in light of the fact that bail appeals, bail applications and applications for bail on new facts are by their very nature urgent.'

[11] On the same day at 15h40, Mr Shah indicated that the respondent will not be able to accede to the request, as the respondent did not consider any directive to have been issued by the Judge President. The response read as follows:

'I regret that a proper consideration of the response by the JP does not constitute a "directive" but merely an advice. No where does she direct a requisition and the matter be placed before a judge.

This is an applicant driven process and it is the applicant who bears the onus - we are merely litigants herein and will endeavour to respond in the correct manner and correct forum when the matter is correctly enrolled.

Consequently we are unable to accede to your request to requisition the accused.'

[12] The applicant maintains that his rights have been violated as a result of 'the respondent's refusal to requisition him for a remittance order....', that he has exhausted all legal remedies and that he has a right to have the bail application on

new facts heard by the magistrates' court, relying on 's 65(6)(c)'² of the Criminal Procedure Act 51 of 1977 (the CPA).

[13] Annexed to his application papers were the recusal application in respect of Mr Bruorton and the various email exchanges between the respondent and his attorneys of record. The apparent basis for seeking the recusal and the second bail application on new facts is, inter alia, that after the initial bail application, Mr Bruorton had mentioned to his former legal representative, Mr Ravindra Maniklall (Mr Maniklall), that he had found a dossier concerning the applicant under his office door, which Mr Bruorton surmised was an attempt to influence the refusal of the applicant's bail application.

[14] Mr Bruorton had informed Mr Maniklall that he had discarded the dossier and attached no weight to it during the adjudication of the applicant's first bail application. The applicant indicates that he remained concerned about this, despite Mr Maniklall's assurance of Mr Bruorton's sincerity and Mr Maniklall's advice that they did not have proof that the dossier influenced Mr Bruorton in any way.

[15] According to the applicant, prior to the institution of the first bail application on new facts before Mr Bruorton, the applicant once again expressed his concern, presumably to his legal representatives, about the report concerning the dossier. Despite this, he did not seek Mr Bruorton's recusal then, as he was advised by his legal representatives to accept Mr Bruorton's assurance that the dossier had not influenced him in any way. He did, however, deal with the existence of the dossier in paragraph 30 of his application. Mr Bruorton, however, dealt with this in his judgment in the bail application on new facts at paragraph 93 and the applicant takes issue with this finding, as he maintains that he could not have raised the issue of the dossier at his first bail application. It is for these reasons that he indicates he harbours a reasonable apprehension that Mr Bruorton would not be fair should he preside over the second application for bail on new facts.

[16] The respondent opposes the application on a number of grounds, including four points *in limine*. These four points *in limine* are the following:

² This, presumably, is an incorrect reference to s 50(6)(c) of the CPA.

- (a) Firstly, the misjoinder and/or non-joinder of the National Director of Public Prosecutions, the applicant having cited the Director of Public Prosecutions in the application;
- (b) Secondly, a lack of urgency. The basis upon which the applicant seeks to institute a bail application on new facts, being the recusal of the magistrate, can be dealt with by way of review proceedings and secondly, he has a further alternative of a bail appeal against Mr Bruorton's refusal of his first bail application on new facts and lastly, his first bail application on new facts was refused seven months prior to the institution of these proceedings with no explanation for the delay, the submission being that urgency is self-created;
- (c) Thirdly, an irregular review. The applicant seeks the recusal of the magistrate on the strength of untested allegations, despite the magistrate being *functus officio* in circumstances where the route opted for by the applicant is bad in law and no authority exists for it; and
- (d) Fourthly, the absence of jurisdiction of the magistrates' court. The respondent contends that the applicant has been arraigned in the high court, with his trial scheduled to commence on 20 July 2026. The high court has exclusive jurisdiction to deal with any issues related to the determination of his bail. The magistrates' court, which is a creature of statute, has no inherent jurisdiction to hear his second bail application on new facts in terms of s 65(2) of the CPA and there are no provisions in the CPA or the Magistrates' Court Act 32 of 1944 (the MCA), which allow another presiding officer in the magistrates' court to deal with the second bail application on new facts. Should the matter be remitted to the lower court before Mr Zuma, an untenable situation would arise where a magistrate would be 'reviewing' another magistrate's ruling where he has no jurisdiction to do so.

[17] When the matter served before the motion court on 10 June 2026, I raised the following preliminary aspects with the applicant's counsel, Mr *Mlotshwa*. These related to the urgency of the matter, prematurity, whether or not this court had jurisdiction to issue the orders requested and/or whether or not the magistrates' court had jurisdiction to actually deal with the second bail application on new facts.

[18] As a consequence, rather than risk the application being struck off the roll for

want of urgency or be dismissed, Mr *Mlotshwa* agreed to a consent order with Ms *Naidu*, the respondent's representative at the hearing, as follows:

- '1. The matter is adjourned to the 3rd July 2026 for argument on the following points:
 - 1.1 Is there a new fact or facts raised by the Applicant which warrants the application for bail on new facts;
 - 1.2 Can the matter for a bail application on new facts be remitted to the Magistrates court before a different Magistrate in circumstances where the Magistrate who was seized with the bail application in the Magistrates Court, is no longer available;
 - 1.3 If the Court concludes that this court has jurisdiction to hear the matter, on the facts of this matter, the application for bail on new facts can be ventilated in this Court.
2. The applicants are required to file their Replying Affidavit, Heads of Argument in respect of 1.1 - 1.3 and Practice Note by the 19th of June 2026.
3. The Respondent is required to file their Supplementary Affidavit and Heads of Argument in respect of 1.1 – 1.3 by the 26th of June 2026.'

[19] In his replying affidavit, the applicant addresses the three matters referred for determination.

The respective cases for the parties

[20] In dealing with the aspect of jurisdiction, the applicant submits that various sections of the CPA are applicable. Firstly, s 50(6)(c) which reads as follows:

'The bail application of a person who is charged with an offence referred to in Schedule 6 must be considered by a magistrate's court: Provided that the Director of Public Prosecutions concerned, or a prosecutor authorised thereto in writing by him or her may, if he or she deems it expedient or necessary for the administration of justice in a particular case, direct in writing that the application must be considered by a regional court.'

Secondly, s 65(2), which provides:

'An appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts are first placed before the magistrate or regional magistrate against whose decision the appeal is brought and such magistrate or regional magistrate gives a decision against the accused on such new facts.'

And lastly, s 60(1)(b) which states:

'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 and duties in respect of bail in terms of this Act until the accused appears in such other court for the first

time.'

[21] He submits that the high court does not have jurisdiction to hear the application for bail on new facts, as the jurisdiction conferred on the court is subject to the provisions of s 50(6)(c). Given that he is charged with a schedule 6 offence, the magistrates' court has jurisdiction and must deal with the second bail application on new facts, as he would be able to appeal such decision in terms of s 65(2). If the high court hears his application for bail on new facts, it limits his right of appeal if it is refused.

[22] In addition, he relies on the Judge President's comments during the course of pre-trial proceedings in a matter of the *State v Siyanda Emmanuel Mbulwana and Others* (case number CCD33/2025), in which Mr Mlotshwa appeared, and the Judge President indicated that the application for bail must be referred to the magistrates' court. Although acknowledging that there is 'no explicit section' that deals with the position pertaining to the non-availability of a judicial officer seized with the bail application or a bail application on new facts, the applicant submits that inter alia ss 118,³ 276A(3)(c)(i),⁴ 309(2)⁵ and 309B(2)(a)⁶ of the CPA pertain to this matter and are authority for the submission that another magistrate can be assigned to deal with his second bail application on new facts.

³ Section 118 provides as follows:

'Non-availability of judicial officer after plea of not guilty.— If the judge, regional magistrate or magistrate before whom an accused at a summary trial has pleaded not guilty is for any reason not available to continue with the trial and no evidence has been adduced yet, the trial may be continued before any other judge, regional magistrate or magistrate of the same court.'

⁴ Section 276A(3)(c)(i) provides as follows:

'The clerk or registrar of the court, as the case may be, shall for purposes of the reconsideration of the sentence in accordance with this subsection—

(i) within a reasonable time before the date referred to in paragraph (b) submit the case record to the judicial officer who imposed the sentence or, if he is not available, another judicial officer of the same court: Provided that if the evidence in the case has been recorded by mechanical means, only such parts of the record as may be indicated as necessary by such a judicial officer, shall be transcribed for the purposes of this subsection....'

⁵ Section 309(2) provides as follows:

'An appeal under this section shall be noted and be prosecuted within the period and in the manner prescribed by the rules of court: Provided that the magistrate against whose decision or order the appeal is to be noted, or if he or she is unavailable any other magistrate of the court concerned, may on application and on good cause shown, extend such period.'

⁶ Section 309B(2)(a) provides as follows:

'Any application in terms of subsection (1) must be heard by the magistrate whose conviction, sentence or order is the subject of the prospective appeal (hereinafter referred to as the trial magistrate) or, if the trial magistrate is not available, by any other magistrate of the court concerned, to whom it is assigned for hearing.'

[23] He indicates that the chief magistrate has already appointed a new magistrate to deal with the matter, who has read the record and has prepared himself to consider the applicant's second application for bail on new facts.

[24] It is for these reasons that he submits the matter is capable of being remitted to the magistrates' court for a second bail application on new facts before a different presiding officer.

[25] In dealing with whether or not there are new facts raised, the applicant annexes a copy of his affidavit in support of his second application for bail on new facts and indicates that he would not be dealing with it in his affidavit, given that he is of the view that the high court does not have jurisdiction and whichever presiding officer is assigned must determine whether there are new facts.

[26] In this affidavit, in respect of his personal circumstances, he refers to what he said in both his prior bail applications which served before Mr Bruorton. The new facts he relies on are the following:

- (a) The recusal application of Mr Bruorton on the basis of the report that Mr Bruorton had made to Mr Maniklall about the dossier;
- (b) In the first bail application on new facts, Mr Bruorton indicated that the issue of the dossier had been raised by his legal representative at his first appearance, however, this was factually incorrect, as Mr Bruorton was aware that Mr Maniklall had only told him of this after the hearing of his initial bail application and after 3 February 2025, when he refused bail;
- (c) After the disclosure of the docket and the CCTV footage, there are discrepancies with the time stamps of the CCTV footage and the traffic camera footage;
- (d) The discrepancy in the eyewitness statements and his account of the events and the identification of the applicant;
- (e) Mr Bruorton's finding that he may interfere with State witnesses. The applicant indicates that there is no possibility of him doing so, as in his view, they are not good witnesses, and he does not know all their names. In respect of two of the State

witnesses, Ms Larissa Ras and Ms Salona Ramrutton, they would not be testifying for the State, and he will not interfere with Mr Byron Moodley. To ameliorate this fear, he will relocate to Johannesburg and will reside at a predetermined address in Sandton, and will wear a 24-hour tracking device. His vehicle is fitted with a tracking device, which police will have access to and he undertakes to report daily to a police station and restrict his movements and will provide the South African Police Service (SAPS) with access to the location services on his phone for them to monitor his movements.

[27] His personal circumstances, the new facts and his undertaking to comply with any conditions and tender of bail in the amount of R3 million, constitute exceptional circumstances which, in the interests of justice, permit his release on bail.

[28] In its supplementary answering affidavit, the respondent amplifies its position as follows. Firstly, in relation to jurisdiction, the lower court, which is a creature of statute, is bound by the four corners of the empowering statutes. There is no legislation which empowers the lower court to deal with the second bail application on new facts in these circumstances. Although a chief magistrate exercises administrative authority to allocate work to magistrates, such allocations will only be lawful if they comply with the MCA and the CPA. In the absence of any empowering legislation, the second bail application on new facts cannot serve before another magistrate.

[29] The respondent submits that on a proper interpretation of the CPA, as the applicant has been indicted in the high court and is due to stand trial, it is the high court that must exercise its jurisdiction and deal with the second bail application on new facts.

[30] In response to the second bail application on new facts and whether or not there are new facts advanced by the applicant, the respondent submits that there are no new facts and relies on the affidavit of the investigating officer, Mr Kumarasan Pillay (Mr Pillay), in opposition to the second application for bail on new facts. Mr Pillay in his affidavit indicates in summary why there are no new facts as alleged by

the applicant and also deals with the issue of the dossier and Mr Bruorton's recusal.

Issues

[31] Having regard to the court order taken by consent, the issues for determination are the following:

- (a) Is there a new fact(s) alleged by the applicant warranting a second application for bail on new facts?
- (b) Can a bail application on new facts be remitted to the magistrates' court to be dealt with by a different magistrate in circumstances where the magistrate who was seized with all the applicant's bail applications in the magistrates' court is no longer available?
- (c) Does the high court have jurisdiction to hear the second bail application on new facts in these circumstances? Allied to this is the question of which court has jurisdiction to deal with bail applications once an accused has been referred to the high court for trial.

[32] I propose dealing with the issues as set out in (c) and (b) first followed by (a).

Chronology

[33] It is perhaps apposite at this stage to set out the chronology of the matter to contextualise the various submissions of the respective parties and the background against which the issues fall to be determined.

[34] The applicant was arrested on 1 January 2025, when he formally handed himself over to members of the SAPS. A formal opposed bail application proceeded in the magistrates' court before Mr Bruorton in January/February 2025. Initially, the parties, whilst waiting for a directive from the Director of Public Prosecutions, proceeded with the bail application as a schedule 6 application. On 3 February 2025, Mr Bruorton handed down judgment in the bail application and refused to admit the applicant to bail but admitted his co-accused, his brother, Darren Govender, to bail.

[35] The applicant then lodged a bail appeal, which was heard by M E Nkosi J on 13 March 2025, who handed down judgment on 20 March 2025, in which he

dismissed the bail appeal and refused to admit the applicant to bail. A procedural irregularity occurred when, on 26 March 2025, M E Nkosi J heard an application for leave to appeal his order and granted leave to appeal. This was brought to the respective legal representative's attention and M E Nkosi J then directed the applicant to petition the Supreme Court of Appeal (SCA) on 28 March 2025. The applicant then proceeded with the petition to the SCA which was subsequently dismissed on 15 May 2025.

[36] On 15 August 2025, the indictment was served on the applicant, requiring his first appearance in the high court on 17 November 2025. The respondent made discovery on 3 September 2025, which was acknowledged by Mr Maniklall, his then legal representative.

[37] On 3 November 2025, Mr Bruorton presided over the first bail application on new facts, which proceeded over several days. On 13 November 2025, the applicant made his first appearance in the high court and the matter was adjourned to 12 February 2026 for a pre-trial conference. Judgment in the first bail application on new facts was delivered on 27 November 2025 and bail was refused by Mr Bruorton.

[38] On 12 February 2026, the pre-trial conference could not proceed and had to be adjourned, as the applicant appointed a new legal team and as a consequence, the applicant's counsel was not available to attend the pre-trial conference on 17 April 2026. The pre-trial conference was adjourned to 23 April 2026 for his counsel to be present. On 23 April 2026, at the pre-trial conference, the matter was adjourned for trial, commencing from 20 July 2026 up to and including 21 August 2026.

[39] The applicant instituted and served the second bail application on new facts on 28 May 2026 on the respondent. The complete record of all bail proceedings, dealt with by Mr Bruorton and ME Nkosi J were filed on 1 June 2026.

Jurisdiction

[40] The principal issue for determination in this matter is which court has jurisdiction to entertain a second bail application on new facts once a matter has

been transferred to another court and the magistrate who heard the initial application is no longer available. Allied to this is the question of which court has jurisdiction to deal with a bail application once a matter has been transferred to the high court. Is it the current court (the high court), or the transferring court (the magistrates' court) or do both retain concurrent jurisdiction?

Submissions by the parties

[41] Mr Cassim SC, who appeared at the hearing of the matter for the applicant, concedes that s 173 of the Constitution confers jurisdiction on the high court to deal with the second bail application on new facts. He, however, submits that the question to be answered is whether it is in the interests of justice for the high court to be seized with such application. Given the various sections referenced in the applicant's founding affidavit, he submits that on a correct interpretation of those sections, specifically s 50(6)(c), the legislature consciously left out the high court.

[42] Having regard to s 65(2), which deals with bail appeals, the section enhances the traditional reasoning that a high court is never a court of first instance, otherwise the floodgates will be opened and a high court would be inundated with bail applications in circumstances where the high court already has an overburdened workload. It would also undermine the right of appeal.

[43] He submits that having regard to the principles of interpretation, where one has regard to the wording, purpose and context of the relevant matter one is considering, the provisions of s 50(6)(c) are contained under chapter 5 of the CPA, which deals with the procedure to be followed after an accused person is arrested. Matters lie predominantly before the magistrates' court unless that section is invoked, where the matter then goes to the regional court. A proper interpretation of these sections and the interests of justice mean that bail applications properly belong in the magistrates' court. In determining what is in the interests of justice, there are two elements for consideration, namely, whether it is fair and whether it is expedient to the promotion of the good administration of justice. Nowhere in the CPA is the high court mentioned, save for purposes of a bail appeal.

[44] The magistrates' court is a creature of statute and it derives its power from the CPA, which only references the magistrates' court. Therefore, it must follow that it is the magistrates' court that must deal with the applicant's second bail application on new facts. There is nothing untoward about the chief magistrate reallocating the second bail application on new facts to another magistrate, as Mr Bruorton has become unavailable. He is required, in the interests of justice, to do so, given that it is expedient and prudent to ensure the matter is dealt with. There is nothing in the statute which expressly excludes him from doing so, as such authority to reallocate the matter to another magistrate is implied or tacit. It is no different from another judge being appointed to deal with a matter should the judge assigned to a matter become unavailable.

[45] In answer to a question from the court as to why, given the particular facts of this matter, this court ought not to exercise its discretion to deal with the matter, he submitted that one must exercise a discretion while weighing up the rights of an individual, specifically the right to liberty. It is more expedient and fair for this application to be heard by the magistrates' court, given that the applicant has been incarcerated since his arrest and the trial is looming. One of the concerns which the court *a quo* had was that the applicant was a threat to witnesses. The applicant has proposed numerous conditions, like, for example, wearing a tracker, tendering bail in the sum of R3 million and has undertaken to remain in the Sandton area and restrict his movements to consulting with his legal practitioners and medical appointments.

[46] Mr *Shah*, for the respondent, submits that the respondent was reticent for the matter to be heard in the magistrates' court, as what the applicant proposes was for the record and the application to serve before a magistrate of either equal or lesser experience than Mr Bruorton to conduct a secondary analysis of the matter. The respondent submits that this would amount to a review of Mr Bruorton's judgments or a secondary analysis akin to an appeal, which is impermissible.

[47] There are no provisions in the CPA or the MCA which cater for this particular scenario. The sections which the applicant relies on are materially different from the present scenario. The amendment to the CPA by the introduction of s 50(6)(c)

confers jurisdiction and takes precedence - the court in which the accused is appearing has jurisdiction.

[48] He submits that the cases which he has referenced in his heads of argument make provision for the high court and the magistrates' court to have concurrent jurisdiction, alternatively in circumstances where the high court has exclusive jurisdiction, it may refer the matter back to the magistrates' court only if it is in the interests of justice and practical to do so. In these instances, the magistrates who dealt with the matter were available. Both the Appellate Division decision of *S v Makola*,⁷ as well as the SCA decision in *S v Botha en 'n Ander*,⁸ provide that a high court can deal with bail as a court of first instance.

[49] Given the concession that the high court has inherent jurisdiction, the interests of justice dictate that the matter be dealt with by the high court and there is no cogent reason advanced by the applicant why, on the facts of this matter, the high court ought not to deal with the second bail application on new facts. This is all the more so, given that Mr Bruorton is no longer available and any magistrate appointed to deal with the matter will be conducting a secondary fact analysis of the matter.

[50] The answer to these questions involves an interpretation exercise.

Interpretation

[51] In *Nedbank Ltd and Others v National Credit Regulator and Another*,⁹ Malan JA, in relation to the interpretation of the provisions of the National Credit Act 34 of 2005, held the following:

'The rule of interpretation is that a statutory provision should not be interpreted so as to alter the common law more than is necessary unless the intention to do so is clearly reflected in the enactment, whether expressly or by necessary implication: "[I]t is a sound rule to construe a statute in conformity with the common-law, save where and insofar as the statute itself evidences a plain intention on the part of the Legislature to alter the common-law. In the latter case the presumption is that the Legislature did not intend to modify the common-

⁷ *S v Makola* 1994 (2) SACR 32 (A) (*Makola*).

⁸ *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) (*Botha*).

⁹ *Nedbank Ltd and Others v National Credit Regulator and Another* [2011] ZASCA 35; 2011 (3) SA 581 (SCA) para 38.

law to any extent greater than is provided in express terms or is a necessary inference from the provisions of the enactment.” (Footnote omitted.)

[52] In the well-known decision of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,¹⁰ he summarised the proper approach to statutory interpretation as follows:

‘The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’ (Footnotes omitted.)

[53] I am also mindful that I am enjoined by s 39(2) of the Constitution, when interpreting the specific provisions of the CPA, namely ss 50(6)(c) and 60(1), to do so in a manner which ‘promote the spirit, purport and objects of the Bill of Rights’.¹¹ In *S v Letaoana*,¹² Marcus AJ held:

¹⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18. This approach was confirmed in the subsequent decision of *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) paras 10–12 and applied in numerous cases.

¹¹ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC) para 22.

¹² *S v Letaoana* 1997 (11) BCLR 1581 (W) at 1591.

'Section 39(2) of the present Constitution reflects an important change in wording from its forerunner in section 35(3) of the interim Constitution. The latter required a court, when interpreting a statute to have "due regard" to the spirit, purport and objects of the chapter on fundamental rights. Section 39(2), by contrast, provides that a court "must promote" the spirit, purport and objects of the Bill of Rights. To "promote" in this context, means to further or advance. It means more than taking into proper account. Thus, when interpreting section 60 of the Criminal Procedure Act a court is obliged to "promote" the objects of the Bill of Rights.'

[54] If an omission exists in the CPA, then courts are required in terms of s 36(4) of the Constitution to develop the common law and also to promote the spirit, purport and objects of the Bill of Rights.¹³

Legislation

[55] Magistrates' courts, being creatures of statutes, do not have the same inherent jurisdiction or common law powers as the high court. The high court by contrast has the inherent power to regulate its own proceedings and processes, subject to the Constitution, the Superior Courts Act 10 of 2013, and, in this instance, the CPA.¹⁴

[56] Considering the applicable legislation, namely section 60(1)(b) of the CPA which deals with the bringing of a bail application once a matter has been transferred and Section 50(6)(c), which is referred to in s 60(1)(b), the question which arises is whether, through the inclusion of the reference to s 50(6)(c) in s 60(1)(b), the magistrates' court retains exclusive jurisdiction over bail applications by virtue of the following part from s 50(6)(c): 'The bail application of a person who is charged with an offence referred to in Schedule 6 must be considered by a magistrate's court...'

Discussion

[57] There has been much debate in our courts regarding this question and the manner in which it must be interpreted has resulted in a divergence of opinion.

¹³ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC) para 39.

¹⁴ Section 173 of the Constitution states as follows: 'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[58] This was considered in *Director of Public Prosecutions, Eastern Cape, and Another v Louw NO: In re S v Makinana*,¹⁵ where a problem had arisen in the Eastern Cape that a regional magistrate, upon the transfer of a matter from the magistrates' court to the regional court, refused to hear a bail application, contending that the magistrates' court in which the accused first appeared retained jurisdiction. The magistrate was of the view that the section ousted the jurisdiction of the regional court and, by implication, the high court.

[59] The full bench did not agree with this interpretation and held the following:¹⁶
'We do not agree with this interpretation. The words "subject to the provisions of s 50(6)(c)" in s 60(1)(b) must be interpreted in conformity with, and in such a way as to promote, the values of the Constitution and the spirit, purport and objects of the Bill of Rights. It must be interpreted, in other words, so that it promotes the value of, and the right to, freedom as well as the right to be "released from detention if the interests of justice permit, subject to reasonable conditions" and the right of access to court. More than that, it must be interpreted in such a way that it gives effect to the State's obligations, in terms of s 7(2) of the Constitution, not only to abstain from interfering with these rights – the negative obligation to respect them – but also to positively facilitate their exercise - the positive obligations to protect, promote and fulfil them.'

[60] The court proceeded to hold as follows:¹⁷
'In order to do so, s 50(6)(c) and the "subject to" clause of s 60(1)(b), must be interpreted restrictively (if that is reasonably possible). They must, in our view, be interpreted to mean no more than that bail applications in Schedule 6 cases must be heard initially in the magistrate's court, unless the Director of Public Prosecutions directs otherwise, but that, once such a matter is transferred to either a regional court or a High Court, that court, whichever it may be, acquires jurisdiction, as the court before which the matter is pending, to entertain any bail application that may be brought.' (Footnote omitted.)

[61] The court held that it could not have been the intention of the legislature to exclusively vest jurisdiction in the magistrates' court, even when a matter is

¹⁵ *Director of Public Prosecutions, Eastern Cape, and Another v Louw NO: In re S v Makinana* 2004 (2) SACR 46 (E) (*Makinana*).

¹⁶ *Ibid* para 27.

¹⁷ *Ibid* para 28.

transferred.¹⁸

'For essentially the same reasons as expressed by F H Grosskopf JA, we take the view that these sections are strong indications that the Legislature did not intend that s 50(6)(c) should be interpreted to mean that every court, except the magistrate's court, before which a Schedule 6 offence is pending is robbed of jurisdiction to decide whether an accused should be released on bail, while it may add to or tinker with the conditions set by the magistrate who heard a bail application in the magistrate's court.'

[62] It provided an example of the practical difficulties which would be experienced if the magistrates' court retained exclusive jurisdiction, even when a matter is transferred.¹⁹ It held that '[s]uch unworkable and potentially prejudicial outcomes ought to be avoided if the legislation can reasonably be interpreted in another way'.²⁰

[63] It then granted the following declaratory order:²¹

'It is declared that, in terms of s 50(6)(c) of the Criminal Procedure Act 51 of 1977, read with s 60(1) of the Act, a magistrate's court has exclusive jurisdiction to hear a bail application in respect of any case in which an accused person is charged with a Schedule 6 offence (provided that the Director of Public Prosecutions does not direct otherwise in terms of the proviso to s 50(6)(c)) from the first appearance of the accused until he or she appears in any other court to which his or her matter may be transferred, whereupon such other court shall enjoy jurisdiction to entertain a bail application (whether or not it is the accused's bail application).'

[64] Some disagreement has arisen on whether the declaratory order in *Makinana* is to be interpreted as meaning that the court to which a matter has been transferred had exclusive jurisdiction or whether concurrent jurisdiction with the transferring court is retained.

[65] In *S v Mzatho and Others*,²² a special review, the court held that the order in *Makinana* did not state that 'the "other court" shall enjoy exclusive jurisdiction'.

¹⁸ Ibid para 29.

¹⁹ Ibid para 31.

²⁰ Ibid para 32.

²¹ Ibid para 33.

²² *S v Mzatho and Others* 2007 (2) SACR 309 (T) (*Mzatho*) para 21.

[66] It proceeded to grant the following declaratory order:²³

‘It is declared that a regional court confronted with a bail application, which in the opinion of the presiding regional magistrate it cannot entertain, has the power to refer the bail application to a lower court if such referral would, in the opinion of the presiding regional magistrate, be in the interests of justice and serve to protect the fundamental rights of the applicant for bail as entrenched in the Constitution.’

The overriding criteria is the interests of justice.

[67] The implication of this is that the court in *Mzatho* was of the opinion that the court to which a matter has been transferred does not have exclusive jurisdiction to entertain a bail application, and that the magistrates’ court retains concurrent jurisdiction.

[68] In an unreported review decision of Van Zyl J in *S v Hlongwane and Others*,²⁴ the approach in *Mzatho* was followed:

‘40. In the result the court issued a declaratory order that the regional court, confronted with a bail application which in the opinion of the presiding regional magistrate it could not entertain, had the power to refer the bail application to a lower court if such referral would, in the opinion of the deciding regional magistrate, be in the interest of justice and serve to protect the fundamental rights of the applicant for bail as entrenched in the Constitution.

41. In my view similar considerations apply in the present matter for the protection of the rights of sentenced applicants for leave to appeal from the magistrates’ and the regional courts in terms of section 309B, as well as petitioners for leave to appeal in terms of section 309C.’

[69] In *S v Seroka*,²⁵ also a special review, the court held that a court to which a matter has been transferred has exclusive jurisdiction to hear a bail application, except where the court has referred the matter back to the transferring court for the bail application:

‘In the circumstances, considering the above case law, it is this court’s view that, once an accused person has appeared in another court, pursuant to a transfer of such person from the transferring court, for sentencing or trial purposes, such receiving court shall be vested, to the exclusion of the transferring court, with exclusive jurisdiction in respect of bail-

²³ Ibid para 35.

²⁴ *S v Hlongwane and Others* [2015] ZAKZPHC 1.

²⁵ *S v Seroka* 2021 (2) SACR 622 (LP) (*Seroka*) para 19.

application proceedings, *unless* the receiving court refers the matter back to the transferring court for a bail application. In such instance, where the matter has been referred back to the transferring court, such transferring court shall have the necessary jurisdiction to entertain the bail application.'

[70] The court in *Seroka* thus recognised that the court to which the matter had been transferred had exclusive jurisdiction. It is only when that court transfers the matter back for the bail application that the transferring court is again vested with jurisdiction. A factor which influenced the referral back to the lower court in *Seroka* was that there was only one regional court magistrate who would eventually deal with the trial and it was undesirable for the same magistrate to deal with the bail application and the trial.

[71] In *DPP Limpopo v Patel and Another*,²⁶ also a special review, the court distinguished from *Makinana* and held that the court to which a matter was transferred had exclusive jurisdiction:

'In the circumstances, considering the above case law, it is this court's view that once an accused person has appeared in another court, pursuant to a transfer of such person from the transferring court, for sentencing or trial purposes, such receiving court shall be vested to the exclusion of the transferring court, with exclusive jurisdiction in respect of bail application proceedings. In the result the application for review must succeed.'

[72] The court in *Patel* also held that after the accused had appeared in the high court and the high court had refused bail and remanded the accused in custody, it was impermissible for the magistrate to make an order admitting the accused to bail. The court said the following:²⁷

'The Magistrate in granting bail after the High Court has made an order that the First Respondent is to remain in custody, acted irregular. The Magistrate in making the order she did, in effect sat as a court of appeal, although it was on new facts, which she could not have done. Practically this will have the effect that an accused can do forum shopping when it comes to bail applications. It could never have been the legislature's intention that an accused person can jump backwards and forwards between the court of first instance and

²⁶ *DPP Limpopo v Patel and Another* [2021] ZALMPPHC 29 (*Patel*) para 25.

²⁷ *Ibid* para 23.

the trial court for bail applications. In this court's view, this will create uncertainty and chaos and hamper the case flow and justice system.'

[73] In *Koopman and Others v S*,²⁸ which concerned a bail appeal, the district court had entertained a second bail application on new facts after the appellant had already been transferred to the regional court and had made several appearances. It was emphasised that the referral of a bail application from the regional court to the magistrates' court is an exceptional measure.²⁹

'It is important to emphasise that the referral of a bail application from a Regional Court to a District Court is not a general rule or a matter of routine practice. It is an exceptional measure, available only in limited circumstances.'

And that it is narrow in its operation:³⁰

'The principle established is narrow in its operation in that the referral back to the District Court is justified only where there is a practical impediment to the Regional Court hearing the bail application, typically arising from the fact that the Regional Court has only a single magistrate who would be precluded from sitting at the trial if he or she heard the bail application. It is not a general licence for accused persons to bypass the Regional Court and bring bail applications directly before the District Court after the matter has been transferred.'

[74] The court in *Koopman* held that in the absence of a referral back to the magistrates' court, such a court did not have any jurisdiction:³¹

'The distinction between the two scenarios is not merely procedural. It goes to the very foundation of the court's jurisdiction. Where there is a referral back, the District Court's jurisdiction is derived from the referral itself. Where there is no referral, the District Court has no jurisdiction. The fact that an accused may prefer to bring the application before the District Court, or that the District Court may be more convenient or familiar with the facts of the matter, is irrelevant. Jurisdiction is determined by law, not by the convenience of the parties.'

[75] The court set out the proper procedure to be followed once a matter has been transferred to a higher court:³²

²⁸ *Koopman and Others v S* [2026] ZANWHC 68 (*Koopman*).

²⁹ *Ibid* para 12.

³⁰ *Ibid* para 14.

³¹ *Ibid* para 16.

³² *Ibid* para 22.

'The proper procedure for an accused who wishes to bring a bail application after the matter has been transferred to a higher court is as follows:

(a) The accused must approach the receiving court (the court where the trial is pending) with the bail application.

(b) If the receiving court is of the view that it cannot properly entertain the application (for example, because the court has only one magistrate who would be precluded from presiding at the trial if he or she heard the bail application), it may, in the exercise of its discretion, refer the matter back to the transferring court for the hearing of the bail application.

(c) Upon such referral, the transferring court acquires jurisdiction to entertain the application.'

[76] The rationale for this is the following:³³

'This procedure ensures that the receiving court retains control over all aspects of the proceedings, including bail, and that the referral back is made only where necessary in the interests of justice. It also avoids the fragmentation that would result if an accused could simply elect to approach either court for bail. It prevents forum shopping and ensures that bail applications are heard by the court best placed to assess all relevant factors, including the progress of the trial and any risks that may have arisen since the transfer.'

[77] *Makinana* did not explicitly state that the court to which a matter has been transferred has exclusive jurisdiction to hear a bail application. *Mzatho* held that as *Makinana* did not specifically hold that the court to which the matter has been transferred has exclusive jurisdiction, it meant that both the receiving and transferring courts retained concurrent jurisdiction to hear a bail application. The courts in *Seroka*, *Patel* and *Koopman* have held that a court to which a matter has been transferred has exclusive jurisdiction to hear a bail application. Only where a matter has been transferred back to the transferring court will that court have jurisdiction to hear the matter.

[78] However, what all these cases have held is that the reference to s 50(6)(c) in s 60(1)(b) does not mean that the magistrates' court retains exclusive jurisdiction over all bail applications. The differences lie in whether the court to which a matter has been transferred has exclusive jurisdiction or whether the magistrates' court retains concurrent jurisdiction.

³³ Ibid para 23.

[79] I have considered the various authorities referred to. There is authority for the proposition that high courts have previously entertained bail applications as court of first instance.³⁴ In this regard, I refer to *Botha*, in which an accused who appeared in the high court applied for bail, which was entertained, and thereafter appealed to the SCA against the refusal of bail in the high court sitting as court of first instance. *Makola* although useful, was decided prior to the current amendment of the CPA.

[80] I align myself with the sentiments expressed in *Koopman*, although it relates to the regional court: once a higher court is seized with a trial, it is best placed to assess factors relevant to bail³⁵ and further that 'jurisdictional questions are fundamental'.³⁶ A court cannot assume jurisdiction it does not have, even if the result is inconvenience or delay. The proper administration of justice requires that proceedings be conducted before the correct forum.

[81] *Koopman* does contain a very convincing reason why the receiving court should have exclusive jurisdiction and I align myself with such reasoning. I am of the view that the court to which the matter has been transferred has exclusive jurisdiction to deal with the second bail application on new facts and consequently the relief sought in the notice of motion cannot be granted.

[82] Having reached this conclusion, I must add the following rider. Although the high court is vested with exclusive jurisdiction once a matter has been transferred, it is not precluded from referring a matter back to the magistrates' court to deal with a bail application if it is not able to deal with it depending on the circumstances. The procedure suggested in *Koopman* should ideally be followed.

[83] In circumstances other than the present one, the proper procedure for an accused who wishes to bring a bail application after a matter has been transferred to a higher court is the following:

³⁴ See *Botha*.

³⁵ *Koopman* para 28.

³⁶ *Koopman* para 29.

- (a) An accused person must approach the receiving court (in which the trial is pending) with a bail application;
- (b) If the receiving court is of the view that it cannot entertain the application, it may, in the interests of justice, and in the exercise of its discretion, refer the matter back to the transferring court for the hearing of the bail application; and
- (c) The transferring court, as a result of such referral, obtains jurisdiction to entertain the applicant.

[84] I have had regard to the various sections which the applicant refers to, which he submits confer jurisdiction on the magistrates' court. I am in respectful disagreement with those sections, as they are not applicable to the current facts of this particular matter. Section 60(1)(b) provides that a 'court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of the [CPA] *until the accused appears in such other court for the first time*' (my emphasis).

[85] Consequently, for as long as the applicant was still appearing in the lower court, that court was empowered to consider any applications for bail and/or bail on new facts. The fact that Mr Bruorton has now retired and is unavailable was one portion of the applicant's application. By the time he instituted the second bail application on new facts, he had already been indicted in the high court and he had been transferred from the lower court to the high court and had made several appearances in the high court.

[86] For the sake of completeness, and in the event that it may be argued s 65(2) of the CPA requires a bail application on new facts to be brought in the court which originally heard the application, the following is relevant.

[87] It was held in *S v Vermaas*³⁷ that this section does not deal with a bail application; it merely precludes a right of appeal if new facts are not placed before the court *a quo*:

³⁷ *S v Vermaas* 1996 (1) SACR 528 (T) (*Vermaas*) at 531d-e.

‘Section 65(2) does not deal with fresh applications for bail like the present. It precludes the right of appeal on new facts not before the court a quo without referral of the matter to that court.’

[88] In *S v Yanta*,³⁸ the following was held:

‘In terms of s 65(2) an appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts were first placed before the court against whose decision the appeal is brought and such court has given a decision against the accused on such new facts.’

[89] Lastly in *S v Makola*,³⁹ it was held by the then Appellate Division that this section is applicable when new facts are discovered before the appeal is heard, it does not govern all further bail applications:

‘Section 65(2) makes provision for a particular case, viz where new facts are discovered before an appeal is heard. The Legislature could never have intended that s 65(2) should also govern all other renewal applications. In my judgment such new applications may indeed be brought under s 60(1) of the Act.’

Conclusion

[90] There is, on any interpretation, no basis for the lower court to have retained jurisdiction to deal with the applicant’s second bail application on new facts. Section 60(1)(b) section is clear in this regard. The high court has exclusive jurisdiction over him and the lower court is *functus officio* upon having transferred him to the high court. I agree that this court could in its discretion refer the matter back to the magistrate who previously refused bail if this was an application for bail on new facts. However, before such referral could be made, the court would have, of necessity, to order the matter being referred to the lower court, thereby conferring jurisdiction to the lower court to entertain the matter.

[91] The situation that one is dealing with here is different from those relied on by the applicant. In the first instance, the magistrates’ court is a creature of statute and is constrained to proceed within the boundaries of the authorised legislation. Having regard to s 65(2), the new facts must first be placed before the original magistrate

³⁸ *S v Yanta* 2000 (1) SACR 237 (Tk) at 249g-h.

³⁹ *Makola* at 35i-j.

against whose decision an applicant is appealing against. The section does not cater for another magistrate to deal with the matter in Mr Bruorton's absence and no longer being available.

[92] I agree with Mr *Shah* that ss 118 and 275 of the CPA cater for limited and unique circumstances but neither of these nor the MCA caters for another magistrate to preside over proceedings as in this instance. The plain reading of s 60(1)(b) confers jurisdiction on the high court in circumstances where the applicant is appearing with a trial pending.

[93] I also agree that the provisions of ss 50(6)(c) and 60(1)(b) must be interpreted restrictively to mean that in bail applications involving schedule 6 cases, they must be heard initially in the magistrates' court unless the Director of Public Prosecutions directs otherwise but that once the matter is transferred either to a regional court or a high court, that court obtains exclusive jurisdiction as the court before which the matter is pending to entertain any bail application that may be brought.

[94] In applying the principles, the undisputed chronology referred to is determinative of the issue. The matter was referred to the high court on 13 November 2025. By the time the second bail application on new facts was issued, the applicant had appeared in the high court.

[95] The high court (the receiving court) was therefore vested with jurisdiction over the trial and exclusive jurisdiction to deal with such application, unless it referred the matter back to the lower court for such purpose. I do not agree with the applicant's submission that, on the facts of this matter, it would not be in the interests of justice for the matter to be heard by the high court.

[96] Something needs also to be mentioned about the request to the Judge President. The applicant did not seek a specific directive from the high court to deal with the second bail application on new facts. If one has regard to the email correspondence exchanged, nowhere are the facts of the matter set out with sufficient detail for the Judge President to issue such a directive. In addition, given that the matter had been dealt with on the pre-trial roll on several occasions, no

attempt was made by the applicant for the matter to be placed back on the pre-trial roll for such a directive to be issued.

[97] The applicant, in my view, sought to bypass the high court and approached the senior magistrate. In my view, the senior magistrate had no power/authority to reallocate the matter to another magistrate in these circumstances, who in turn had no power to entertain the application.

[98] On the facts of this matter, the applicant ought to have approached the high court (either the trial judge or a senior presiding judge in the criminal court, or a judge in the pre-trial court) for a directive, after making full disclosure. Any approach to the office of the Judge President and/or Deputy Judge President ought to have correctly disclosed all the relevant facts upon which an informed decision could have been made. In this matter, the applicant's legal representatives elected not to make full and proper disclosure to the Judge President about the full set of facts for her to make a proper determination.

[99] Having concluded that this court has exclusive jurisdiction to deal with the second application for bail on new facts, I propose to deal next with the last issue as to whether there are new facts warranting this court considering the second bail application on new facts.

Is this a new fact?

[100] The CPA does not define what constitutes a new fact and there is no prescribed procedure for renewed bail applications. Certain general principles have been identified over the years as relevant when a court is faced with an application for an accused's release on bail based on new facts. These have been summarised as follows:⁴⁰

'[15.1] Whether the facts came to light after the bail was refused. Such facts can include circumstances which have changed since the first bail application was brought, such as the period that an accused had been incarcerated;

⁴⁰ *S v Yanta* 2023 (2) SACR 387 (WCC) para 15.

[15.2] whether the facts are “sufficiently different in character” from the facts presented at the earlier unsuccessful bail application, in the sense that it should not simply be a “reshuffling of old evidence”;

[15.3] whether the alleged new fact(s) are relevant in the sense that, if received by the court, it would per se, or together with other facts already before the court from the initial bail application, assist the court to consider the release of an accused afresh;

[15.4] a court hearing an application based on alleged new facts must determine, with reference to the evidence previously presented in the unsuccessful bail application, whether such facts are indeed new. In *Mpofana* above [12] at 44g – 45a Mbenenge AJ (as he then was) explained that —

“whilst the new application is not merely an extension of the initial one, the court which entertains the new application should come to a conclusion after considering whether, viewed in the light of the facts that were placed before court in the initial application, there are new facts warranting the granting of the bail application”;

and,

[15.5] where evidence was known and available to a bail applicant, but not presented by him at the time of his earlier application, such evidence can generally not be relied upon, for purposes of a renewed bail application, as “new facts”. In this regard it was explained in *S v Le Roux en Andere* 1995 (2) SACR 613 (W) at 622 that, in the absence of such a rule, there could be an abuse of process leading to unnecessary and repeated bail applications, and that an accused should not be permitted to seek bail on several successive occasions by relying on the piecemeal presentation of evidence. I agree with the opinion of Van der Meer that this rule should not be an absolute or inflexible one and that a court should be willing to consider why relevant and available information was not placed before the court in the initial application.’ (Footnotes omitted.)

[101] In *Davis and Another v S*⁴¹ it was held that:

‘If the evidence is adjudged to be new and relevant, then it must be considered in conjunction with all the facts placed before the court in previous applications, and not separately.’

[102] In *S v Mpofana*,⁴² the court explains further that:

‘... whilst the new application is not merely an extension of the initial one, the court which entertains the new application should come to a conclusion after considering whether,

⁴¹ *Davis and Another v S* [2015] ZAKZDHC 41 para 2, quoting from *S v Petersen* 2008 (2) SACR 355 (C) (*Petersen*) para 58.

⁴² *S v Mpofana* 1998 (1) SACR 40 (Tk) at 44j-45a.

viewed in the light of the facts that were placed before court in the initial application, there are new facts warranting the granting of the bail application.'

[103] The court further indicated that the approach, when faced with a bail application on new facts, ought to be the following:⁴³

'In considering an application for bail allegedly brought on the strength of new facts, the court's approach is to consider whether there are, in the first instance, new facts and, if there are, reconsider the bail application on such new facts, against the background of the old facts.'

[104] Our courts have also held that one must have regard to the evidence presented at the earlier unsuccessful bail applications to determine which facts are new.⁴⁴

[105] I align myself with the sentiments expressed in these decisions. In my view, the new facts must be sufficiently different in character from the facts presented at the earlier unsuccessful bail application. New facts are generally facts that come to light after the refusal of bail, which include circumstances that have changed since the unsuccessful bail application was lodged. In *S v Mohammed*,⁴⁵ the court held that new facts are those which are 'sufficiently different in character' from the facts presented in the earlier unsuccessful application. The facts, further, 'must not constitute simply a reshuffling of old evidence'.⁴⁶ New facts must be 'new' and must be relevant for purposes of the new bail application.

[106] The purpose of a bail application on new facts is not to address problems or aspects not canvassed in the previous application or 'to fill gaps in the previously presented evidence'.⁴⁷ There must also 'be some advance indication that the new facts, if received, would on their own—or in conjunction with all the facts placed before the court in the earlier unsuccessful bail application—assist the court in

⁴³ Ibid at 44g-h.

⁴⁴ *Vermaas* at 531e-g.

⁴⁵ *S v Mohammed* 1999 (2) SACR 507 (C) at 512b.

⁴⁶ *Petersen* para 57.

⁴⁷ Ibid.

considering release on bail afresh'.⁴⁸ Facts already known and available to an applicant for bail but not presented at the time of the earlier application cannot, for purposes of a renewed bail application, be relied on as constituting 'new facts'.

[107] The question is: has the applicant established new facts? In *Killian v S*⁴⁹ the court held inter alia the following:

'In an application like the present, there must not only be new facts or changed circumstances placed before the court. *It must be new facts or changed circumstances that legitimately warrant the granting of bail previously refused* [S v Mpofana 1998 (1) SACR 40 at 44g-i; S v Mohammed 1999 (2) SACR 507 (C); S v Yanta 2023 (2) SACR 387 (WCC) at para 12 to 15]. *Reshuffling of old evidence or seeking to address problems encountered in the previous application or filling gaps in the previously presented evidence is not enough* [S v Peterson 2008 (2) SACR 355 (C) para 57; S v Mbuyane 2024 JDR 3741 (MM)].' (My emphasis.)

[108] In *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*,⁵⁰ the court, when dealing with the distinction between primary and secondary facts, held the following:

'A distinction is drawn between primary facts and secondary facts.

"Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts."

[109] In determining whether there are new facts, it is perhaps useful to have regard to *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others*,⁵¹ which indicated there are two types of facts in motion proceedings, namely primary facts and secondary facts:

'Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts ... Secondary facts, in the absence of the primary facts on which they

⁴⁸ S van der Merwe "New facts" for purposes of a renewed bail application: Principles, issues and procedures' (2017) 2 *Criminal Justice Review* 9 at 9 (contained in S Terblanche *Du Toit: Commentary on the Criminal Procedure Act* (RS76, 2026)).

⁴⁹ *Killian v S* [2026] ZAWCHC 166 para 14.

⁵⁰ *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 324D-F.

⁵¹ *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* 2003 (4) SA 207 (C) para 28.

are based, are nothing more than a deponent's own conclusions ... and accordingly do not constitute evidential material capable of supporting a cause of action.'

[110] Mr Pillay's affidavit summarises what has been identified in the applicant's affidavit as constituting new facts as the following:

- (a) the discrepancy in the time stamps on the various CCTV footages;
- (b) the discrepancy between the statements and presumed evidence of the eyewitnesses;
- (c) the report provided by the deceased to his wife that, prior to him being shot, he was 'going to buy truck tyres';
- (d) the apprehension that the respondent has that the applicant may interfere with State witnesses; and
- (e) the favourable conditions which permit him to be released on bail.

[111] Mr *Cassim* SC, when dealing with the above, submits in the main that the new facts warranting the second application for bail on new facts are to be found in paragraphs (a) and (b). He relies on paragraphs 16.2.1 to 16.2.9⁵² of the replying affidavit relating to the CCTV footage of the movement of a black SUV and Ford Ranger bakkie (which the State alleges are vehicles driven by the applicant and his brother) shortly after the shooting occurred in support of the contents of paragraph (a). He submits that there is a discrepancy of 13 minutes in the CCTV footage, which he indicates emanated from objective scientific evidence which had recently surfaced because it was based on technical expert evidence.

[112] The second new fact is the discrepancies and inconsistencies on material issues in the eyewitness statements which identify the applicant and place him on the scene.⁵³

[113] The third new fact relating to the report by the deceased to his wife that he was going to buy new truck tyres was not pursued.

⁵² The applicant's replying affidavit at pages 114-116 of the index to proceedings, volume 2/2.

⁵³ The applicant's replying affidavit, paras 16.3, 16.3.1-16.3.16, at pages 116-120 of the index to proceedings, volume 2/2.

[114] Mr *Shah* submits in essence that there are no new facts and what the applicant relies on as forming the bases for this second bail application on new facts were facts already in his knowledge after discovery by the State on 3 September 2025 and at the time of the first bail application on new facts. He submits, therefore, that, relying on the record of proceedings in the various bail applications specifically the investigating officer's affidavits, there are no new facts. His heads of argument and SR3 Pillay's affidavit⁵⁴ deal in detail with whether these are new facts and I have had regard to them. I have not incorporated these into the judgment as it would make the judgment prolix.

[115] In essence what the applicant now raises is a 13-minute difference in the time stamps of the CCTV footage. This, he submits, allegedly excludes him from the crime scene and casts serious doubt on the strength of the State's case, as it goes to the cardinal question of the applicant and his co-accused's presence on the scene.

[116] If one has regard to the record of the proceedings, the aspects of the CCTV footage were canvassed in the initial bail application, as well as in the first bail application on new facts, both of which served before Mr Bruorton. I agree that the submissions that these are new facts are not tenable and I say so for the following reasons. The applicant had previously confirmed to Mr Pillay that both he and his brother were at the scene but for a short while⁵⁵ and this was not disputed in the reply to Mr Pillay's affidavit in the original bail application.⁵⁶ In addition, in his petition to the SCA, the applicant indicated that 'there is evidence that both he and his brother were in the vicinity of the shopping centre but no evidence or any witnesses who claim that he [the applicant] fired shots at the deceased'.⁵⁷

[117] These submissions were repeated by Mr Hellens SC before ME Nkosi J in the bail appeal⁵⁸ when he engaged with him and the application for leave to appeal.⁵⁹

⁵⁴ Index to Proceedings, Volume 2/2, pages 135 to 170

⁵⁵ Record, volume 1, at page 102 (exhibit 'F'), paras 37-38.

⁵⁶ Record, volume 1, at page 156 (exhibit 'G'), para 16.

⁵⁷ Record, volume 2, at page 354 (annexure 'KPO9'), para 15.

⁵⁸ Record, volume 7, heads of argument, at pages 1529–1530, para 28.

⁵⁹ Record, volume 7, at pages 1543, line 20-25, page 1544, line 1– 1546, line 8.

The applicant's call records and cellphone handset movements coincide with the CCTV footage and this aspect was not materially disputed by him.⁶⁰ The cellphone recording by the eyewitness of 29 December 2024 and screenshots were introduced in the first bail application on new facts.⁶¹

[118] If one has regard to the screenshots from the CCTV footage, both the BMW X5, followed by the Ford Ranger, are captured at 12h06 by the camera on the corner of Meridian Drive and Umhlanga Boulevard. In addition having regard to annexure 'KP2',⁶² some 200 metres away the vehicles movements have been captured moving in tandem away from the scene. The SNIPR cameras also illustrate the movement of both vehicles converging on the alleged scene and leaving the scene during the times alleged in the original bail application.⁶³ Not only was this discovered in September 2025, but it was also in the possession of the applicant prior to the first bail application on new facts.

[119] At the hearing of the application, Mr *Shah* acknowledged that there was a 13-minute discrepancy, but in court at the hearing did the exercise of subtracting the 13 minutes, from the times referenced in paragraph 16. 2 of the applicant's affidavit and it tracks with the CCTV footage, the handset movements and what is alleged in annexure 'SR3'. I agree also that this is a triable issue.

[120] It is also evident that, having regard to the first bail application on new facts, the alleged new facts which the applicant purports to raise in relation to his identification by eyewitnesses and the contradictions between the evidence of these witnesses were exhaustively dealt with therein⁶⁴ and canvassed by Mr Bruorton in his judgment.

[121] For the sake of completeness, although not pursued in argument, what the deceased is reported to have said to his wife, namely, that he was going out to buy

⁶⁰ Record, volume 1, at pages 95–99 (exhibit 'F'), paras 7–24; record, volume 1, at page 108 (exhibit 'F'), paras 58–59.

⁶¹ Record, volume 2, at pages 357–366, annexure 'KP11'.

⁶² Index of the proceedings, Volume 2/2 pages 156–166

⁶³ Index of the proceedings, Volume 2/2 annexure KP3, pages 157–170, the composite map of the routes taken by the vehicles and the time stamps.

⁶⁴ Record, volume 2, at pages 257–260, exhibit 'FG2', pages 261–270, exhibit 'FG3'.

trucks, was also dealt with in the original bail application in January 2025.

[122] It is undisputed that discovery was made by the State on 3 September 2025.⁶⁵ Further discovery took place on 18 September 2025.⁶⁶ Mr *Shah* indicates that the CCTV stills were supplied prior to the first bail application on new facts and this was not disputed by the applicant nor was it disputed by Mr *Cassim SC* when I raised this at the hearing.

[123] Mr Bruorton dealt with the CCTV footage and cellphone records in his first judgment in dealing with the strength of the State's case. He concluded that the State has a strong prima facie case that the applicant and his co-accused were at the scene at the relevant time and that the applicant was the one who fired the shots.⁶⁷

[124] The court dealt with the eyewitness statements as well as the identification parade. This was also canvassed at the first bail application on new facts.⁶⁸ The court also considered the identification of the applicant.⁶⁹

[125] The favourable circumstances of the applicant which he refers to in this second bail application on new facts are dealt with exhaustively by him in his first bail application⁷⁰ and in the first bail application on new facts before Mr Bruorton.⁷¹ In this matter what he undertakes to do is change his personal circumstances by relocating to Sandton, so that the magistrates' fears that he will interfere with witnesses are allayed.

[126] I therefore agree with the submission of the respondent that these are not new facts but are merely old facts being refashioned into new facts. What the applicant attempts to do in this second bail application on new facts, is to raise aspects which were in his knowledge at the time of the first bail application on new facts. It is a reshuffling of old facts. What is not explained is why this was not dealt

⁶⁵ Record, volume 1, at page 233 para 17.

⁶⁶ Record, volume 1, at page 233 para 18.

⁶⁷ Record, volume 7, at page 1481, para 100, judgment para 107, at page 1482.

⁶⁸ Record, volume 6, at pages 1430–1431, paras 82–84.

⁶⁹ Record, volume 6, at pages 1432–1434, paras 88–91.

⁷⁰ Record, volume 1, at page 94 (exhibit 'F') para 6.

⁷¹ Record, volume 2, at pages 261–270, exhibit 'MFA'–'FG3'.

with in his first bail application on new facts. It is disingenuous of the applicant to say that the CCTV footage time discrepancy are new facts which are as a result of new scientific expert evidence and are therefore new facts. It is not new scientific evidence this evidence formed part of the discovery made in September 2025. He was ably represented by an eminent silk and a seasoned experienced attorney who specialises in criminal matters who are able to easily determine a time discrepancy from the discovery.

[127] I therefore agree that these are not new facts warranting consideration in a second bail application on new facts. I also agree with the magistrate's findings that these are triable issues best suited for determination by the trial court.

[128] A further issue which warrants mentioning is the recusal application. Although the parties indicated it was rendered moot, I am compelled to canvass a few aspects as it was alleged to be a new fact and at the hearing Mr Shah made a few submissions about same and are apparent from the affidavits filed.

[129] It is apparent that the applicant was represented by Mr Maniklall, who had Mr Hellens on brief from inception and was present at the first bail application on new facts. The applicant further had Mr Hellens, Mr Manyathi and Mr Small-Smith on a watching brief. Prior to the conclusion of the first bail application on new facts, Mr Hellens no longer participated in the proceedings.

[130] On 12 February 2026, when the pre-trial conference served before Radebe J, Mr Maniklall indicated that he was withdrawing as attorney of record, as the applicant had adopted for a 'more affordable' defence team. Mr Small-Smith placed himself on record as attorney for the applicant, with the correspondent attorney being Ms Arvina Harricharan, and Mr Hodes SC would attend to the trial. It was for these reasons that the matter was adjourned to 17 April 2026.

[131] As the applicant's counsel was not available it was adjourned to 23 April 2026. On 23 April 2026, Mr Small-Smith was in attendance and the court was advised that the applicant would be represented by Mr Hellens, with Mr Wolmarans. Given the request for access to exhibits by the defence, when the pre-trial

proceeded before Bedderson J, an order was issued that any interlocutory applications were to be filed by no later than 22 May 2026.

[132] On 6 May 2026, Mr Shah asked the investigating officer to comment on a letter sent by Mr Small-Smith, alleging impropriety on behalf of Mr Bruorton. The issue of the dossier was never formerly raised until recently in the recusal application and the second application for bail on new facts. It appears to have related to publicly available information relating to the applicant which was circulated online and in the print and social media. It was not a 'dossier', which has a more sinister connotation, as opposed to publicly available information freely circulating.

[133] This was also referenced by Mr Maniklall after the applicant and his co-accused's first appearance at court, when he lamented their identities and personal information being circulated prior to them being charged or appearing in court.⁷² The issue was dealt with in the first bail application on new facts.⁷³

[134] The stance of the respondent was that, in bringing the recusal application, the applicant is impermissibly attempting to conduct a review of the bail application. This application was served on the respondent on 28 May 2026. It is correct that the recusal application is based solely on the applicant's assertion and is premised on untested inadmissible hearsay evidence, which is not supported by any affidavits by the officers of the court or, interestingly enough, the applicant's then representative, Mr Maniklall.

[135] It is also self-evident that the applicant has delayed in seeking Mr Bruorton's recusal, given that the issue of the 'dossier' was within his knowledge, on his version at the time of the first new fact bail application in which Mr Bruorton presided. If the applicant's version is accepted, it would mean that he and his legal representatives knowingly allowed Mr Bruorton to preside, knowing full well that he harboured these misapprehensions and views of Mr Bruorton's impartiality.

[136] Despite this, the applicant proceeded with a bail appeal and a subsequent

⁷² Record, volume 3, at page 549, lines 15 to 22

⁷³ Record, volume 1, at pages 40-41, exhibit 'B', paras (B)(d)-(e).

petition to the SCA and did not seek a review of the magistrate's decision given this disclosure. He was represented by eminent senior counsel as well as Mr Maniklall, a seasoned senior legal practitioner, who has a predominantly criminal practice and neither one of them elected to raise this with Mr Bruorton after he had dealt with the first bail application but merely instituted the first bail application on new facts before him. According to the respondent, the parties engaged with Mr Bruorton in chambers on 7 November 2025 but the issue of the 'dossier' was not traversed with him.

[137] I agree that having regard to the record filed, the issue of the 'dossier' was extensively dealt with in the first bail application on new facts by both the applicant and the State. The State dealt with the matter in a detailed replying affidavit and the applicant did not make any verbal or written submissions disputing the contents of the replying affidavit.

[138] To the extent that the applicant indicates this was a new fact, I do not agree.

[139] His personal circumstances and his undertakings as tendered in his affidavit coupled with the magistrates' concern he will interfere with witnesses have likewise also been dealt with in the previous bail applications. I am not satisfied that these coupled with his offer to relocate in this application, tip the scales in his favour as constituting exceptional circumstances which in the interests of justice warrant his release on bail.

[140] In summary, I am unpersuaded that there are new facts warranting a second new fact bail application or that the applicant has established exceptional circumstances, thereby discharging the onus. I do not reach this conclusion lightly. I have considered the record and the current application and I am mindful of the fact that courts always lean in favour of a person's liberty. This matter however, does not concern a first-time applicant for bail. This constitutes the applicant's fifth attempt at bail.

Points in limine

[141] I am aware that both the Constitutional Court and the SCA have expressed the view that a lower court must decide all issues raised in a matter before it,

specifically for purposes of an appeal.⁷⁴ Given that the parties had defined the issues for determination in the consent order, I do not deem it necessary to deal with them.

Costs

[142] In his notice of motion, the applicant sought costs of the application in the event of opposition. The replying affidavit seeks costs against the respondent on a punitive scale. The respondent, although initially seeking a costs order in the first set of affidavits filed, has sought no order for costs.

[143] Given the nature of the application and the fact that it has morphed into something different from the original application, it is appropriate for a no-costs order to be made. However, I must caution counsel of the obligations he has when signing a certificate of urgency and of the practice directives of this division, specifically practice directive 10.1.

Order

[144] The following order is issued:

1. It is declared that the high court has exclusive jurisdiction to hear the applicant's second bail application on new facts.
2. The applicant's second bail application on new facts is dismissed.
3. The relief sought in paragraph 2 of the notice of motion dated 9 June 2026 is refused.
4. There will be no order as to costs.

HENRIQUES J

⁷⁴ *Spilhaus Property Holdings (Pty) Ltd and Others v Mobile Telephone Networks (Pty) Ltd and Another* [2019] ZACC 16; 2019 (4) SA 406 (CC) para 44. See also *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* [2012] ZASCA 15; 2012 (3) SA 486 (SCA) para 49.

Case Information

Dates of hearing: 10 June 2026; 3 July 2026

Date of judgment: 31 August 2026

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This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 9h30 on 31 August 2026.