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IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

BAIL APPEAL NUMBER: BA19/2026
LOWER COURT CASE NO: 272/2026

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|-----|--|
| (1) | <u>REPORTABLE: YES/NO</u> |
| (2) | <u>OF INTEREST TO THE JUDGES: YES/NO</u> |
| (3) | <u>REVISED: YES/NO</u> |

SIGNATURE

27/08/2026
DATE

In the matter between:

K[...] J[...] K[...]

APPELLANT

AND

THE STATE

RESPONDENT

Delivered:

27 August 2026

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be 27 August 2026 at 16:00.

Date heard:

20 August 2026

Coram:

Ngobeni J

JUDGMENT

NGOBENI J

[1] " ... *our law relating to bail continued (continue-my own emphasis) to evolve, both in terms of jurisprudence mostly seeking to develop and expand the common law, and continuing statutory attempts to improve the bail-related statutes, inter alia by ameliorating the plight of those awaiting-trial prisoners who are simply unable to afford even nominal*

bail. Alas, the bail law remains far from satisfactory, and instead of being simplified, seems to be becoming ever more complicated¹".

- [2] The view of Advocate van der Berg expressed above about navigating in interpreting and applying law reforms in our courts, particularly on bail legislation, as expressed in what I have quoted above, was fortified by the Constitutional Court when it dealt with the cases of *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat*² (*Dlamini & Others*) by saying the following on paragraph 2 of the judgment:

"... But the transition did have an effect on the country's criminal justice system. People who had acquired specialised knowledge of the system, and had become skilled and sure-footed in its practice, were confronted with a new environment and lost their confidence. Particularly in the lower courts, where the bulk of the country's criminal cases is decided, judicial officers, prosecutors, practitioners and investigating officers were uncertain about the effect of superimposing the norms of a right culture on a system that had evolved under a wholly different regime; and about the effect of that superimposition in a given case. Bail was no exception. On the contrary, much of the public debate, and much of the concern in

¹ This is an extract from the preface of the third edition of the book *'Bail: A Practitioner's Guide'* 2012, by John van der Berg.

² [1999] ZACC 8 (3 June 1999).

official circles about law enforcement has been directed at the granting or refusal of bail.” (footnotes omitted).

[3] The appellant in this case is K[...] J[...] K[...], who appeared before honourable Magistrate H. Henning, in the Magistrates’ Court for the district of Moutse, sitting in Moutse (court *a quo*), for a bail application having been charged with three counts of rape. The application was dismissed by the court *a quo* on 03 July 2026. This appeal is against that decision for the denial of his release pending further investigations or trial. The state in this court still opposes the application, as was the position in the court *a quo*.

[4] The brief facts that were placed before the court *a quo* is that the appellant was charged with three counts of rape which allegedly took place over a period of time. The victim is the step-daughter of the appellant who was sharing the same residence with the appellant, his wife (mother of the victim) and their other children. The incident that brought about the arrest of the appellant was when the mother of the victim found what she suspected to be semen on the cycling short or trouser that the victim was wearing, and when she confronted her daughter about that, she reported that the appellant sexually penetrated her in the car the previous day.

[5] The appellant was subsequently arrested and charged with three counts of rape of the same victim. The state in the bail application by the appellant classified the charges as falling under schedule 6 of the CPA, which means that the onus rested on the appellant to satisfy the court that on a balance of probabilities, exceptional circumstances exist which in the interest of justice permit his release³. Section 60(11)(a) was found to be constitutional by the Constitutional Court (CC) in *Dlamini & Others* case, *supra*.

[6] The point of departure is of course the provisions of section 35(1)(f) of the Constitution of the Republic of South Africa, 1996 (Constitution) which states that:

35 Arrested, detained and accused persons

"(1) Everyone who is arrested for allegedly committing an offence has the right-

(a) to (e) ...,

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions".

[7] The state, as required by section 60(11)(a) of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the CPA) classified the charges

³ *Dlamini & Others, supra*, S v Mohammed 1999(2) SACR 507 (C).

under schedule 6. It must be understood that the CPA classifies offences under different schedules according to different sections of the CPA, and they go up to schedule 8. Specific offences are specified for a specific schedule. For the sake of easy reference and completeness, Section 60(11)(a) of the CPA reads as follows:

"(11) Notwithstanding any provision of this Act, where an accused is charged with an offence-

(a)referred to 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"

- [8] The first striking question upon reading the quoted section above is as to what exceptional circumstances are. This is not a *novel* question. It has been dealt with in many cases since the introduction of section 60 of the CPA in 1995 to emphasise the importance of judicial oversight in bail hearings. The regulation and tightening of the conditions for release on bail for serious offences was of concern. It is also because of the outcry of communities out there who fail to understand the purpose of release on

bail and the understanding that release on bail is not necessarily an acquittal.

[9] The concerns of the community members may have merit where a serial offender keeps on reoffending when out on bail, hence the need for the tightening of the bail laws so that the course of justice is not undermined as stated in provisions of section 60(4)(d) and 60(8A) which was inserted because of continued community concerns and it came into effect on 01 August 1998⁴.

[10] There is a plethora of cases that dealt with what exceptional circumstances are. It is trite that there is no definite definition of what exceptional circumstances are, but that determination is made by the judicial officer presiding over the bail application based on the facts and circumstances of the case. Exceptional circumstances in one case may not be exceptional circumstances in another case. That is the reason why judicial oversight is important.

[11] It was well explained in *S v Petersen*⁵ on the meaning and interpretation of exceptional circumstances as follows:

⁴ See footnote 2, Dlamini & Others, paragraphs 13-14 emphasise the fact that judicial oversight is important in bail hearings as required by section 60 of the CPA and that the community is also considered when a bail is considered for an accused person.

⁵ 2008 (2) SACR 355 (C).

"Generally speaking "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different ... This may of course, mean different things to different people so that allowance should be made for a certain measure of flexibility in the judicial approach to the question ... In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all the applicable criteria"

[12] In the case at hand the court *a quo* in its judgment placed emphasis on the seriousness of the offences that the appellant is charged with. One of the factors that is required from the presiding officer when dealing with an application of this nature is of course to test or make a value judgment on the strength of the state's case. That aspect, if not well managed or considered has the tendency of being elevated to the task of a trial court of determining guilt or innocence, because at the end it will be dependent on the presiding officer on how much he/she believes the strength of the version of the state vis-à-vis that of the accused.

[13] The court *a quo* in its judgment dealt with different aspects of the state's case in as far as its strength is concerned, and why it found that the case of the state is strong, as compared to the version of the appellant. There was an issue with regard to an alleged semen found on the pants that the victim was wearing, which is still the subject of investigation. Be that as it

may the court *a quo* dealt with the improbability that the mother of the victim could have taken the condom that they used with the appellant and planted that semen on the pants that was worn by the victim or in her genitals.

[14] There are no issues that the appellant could flee nor evade trial. The court *a quo* of course dealt with the possible sentence or sentences faced by the appellant if convicted. The court *a quo* considered the relationship and the proximity of the appellant to the victim and the mother even though they moved out of the common home. The court *a quo* was not persuaded about the fact that the appellant was employed and maintaining his children. Counsel for the appellant submitted in argument that this court must take into consideration the harsh economic realities of this country of unemployment. Counsel also persuaded this court to fix bail for the appellant and consider imposing conditions on the appellant.

[15] In order to interfere on appeal, it is accordingly necessary to find that the Magistrate misdirected himself or herself in a material way in relation to either the facts or the law. In the absence of a finding that the Magistrate misdirected himself or herself, the appeal must fail⁶. If the appeal court finds that the court *a quo* has misdirected itself in terms of the law and

⁶ Fourie v S (A107/2020) [2020] ZAGPPHC (8 June 2020), S v Barber 1979 (4) SA 218 (D).

facts, then it must follow what the court in *S v Porthern and Others*⁷ concluded, referring to *S v Botha*⁸ that the appeal court's power to intervene in terms of section 65(4) of the CPA is not strictly confined as suggested in *Barber*, above, and that the appeal court can undertake its own analysis of the evidence and come to its conclusion whether the appellant had discharged the onus in terms of section 60(11)⁹.

[16] The provisions of section 65(4) of the CPA are peremptory as it contains the word 'shall' on what the court or judge in an appeal is supposed and expected to do. Section 65(4) of the CPA reads as follows:

65 Appeal to superior court with regard to bail

"(1) to (3) ...

(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 is in its or his opinion the lower court should have given"

[17] The CC in the *Dlamini and Others* judgment, *supra*, reconciled the rights of an arrested and detained person in terms of section 35(1)(f) of the

⁷ 2004 (2) SACR 242 (C).

⁸ 2002 (1) SACR 222 (SCA).

⁹ See footnote 6, par. 16, *Fourie v S.*

Constitution to the provisions of section 60(11)(a), in terms of the duty to adduce evidence on exceptional circumstances by stating the following on paragraph 64:

"... However, s 60(11)(a) does more than restate the ordinary principles of bail. It states that where an accused is charged with a sch. 6 offence, the exercise to be undertaken by the judicial officer in determining whether bail should be granted is not the ordinary exercise established by sub-ss 60(4)-(9) (and required by s 35(1)(f)) in which the interests of the accused in liberty are weighed against the factors that would suggest that bail be refused in the interests of society. Section 60(11)(a) contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail, will be resolved in favour of the denial of bail, unless "exceptional circumstances" are shown by the accused to exist. This exercise is one which departs from the constitutional standard set by s 35(1)(f). Its effect is to add weight to the scales against the liberty interest of the accused and to render bail more difficult to obtain than it would have been if the ordinary constitutional test of the "interests of justice" were to be applied".

[18] The appellant in trying to show the court *a quo* exceptional circumstances came strongly on the issue that he is employed and responsible for the maintenance of his thirteen children, and the fact that his livestock was

stolen in his absence. The misdirection by the court *a quo* on the aspect of employment in my view was to say that the R12 000-00 that he earned was not enough to maintain his thirteen children. I believe that, that aspect is dependant on their standard of living.

[19] The court *a quo* dealt with the strength of the state's case by referring to the alleged incidents which the victim reported to her mother, who apparently did nothing with the reports, hence when she confronted the victim regarding the last alleged incident she apparently asked her if the appellant was still sexually abusing her. I find that as the prosecutor submitted, the mother of the victim might be easily influenced with regard to the charges the appellant is facing, because she allegedly knew as to what was happening between the appellant and the victim but did not report that.

[20] The reasoning by the state of interference with witnesses is therefore not farfetched if one goes with what allegedly transpired before the appellant was arrested. The only aspect that stands out in favour of the appellant is the fact that he is employed. It is generally known in this economic climate that it is difficult to find employment. The fact that he is employed was not found to be exceptional by the court *a quo* as compared to the seriousness of the allegations the appellant is facing. I did not find fault with the application of the law to the facts by the court *a quo* as required by section 65(4) of the CPA.

Conduct of the proceedings in the court *a quo*

[21] Having dealt with the bail application, I now turn to a different issue. It is important that the decorum of the court must be upheld at all times. That is in terms of the language used in court, how witnesses are spoken to and also how they are treated. The respect must even be extended to those that are not even before court but mentioned in the proceedings for whatever reason. That duty rests on all officers of the court, and that duty lies more heavily on the presiding officer who is in control of the proceedings in court. It should be concerning when a presiding officer uses a language that is unbecoming to address a potential witness who is not even before the court.

[22] On pages 12 to 13 of the record of the proceedings of the case at hand, on 02 July 2026, one Warrant Officer Phala testified for the state in this bail application. The witness was testifying about the fact that Sergeant Tlaka took down the statement of the mother of the victim. It appears that the learned Magistrate Henning was not satisfied with the quality of the statement that was obtained from the mother of the victim by a Sergeant. When he was told that it is a Sergeant who took down that statement this is how he reacted:

"COURT: Not a **stupid** constable, a sergeant. Did he ask her what she had done about the report in August?

MS PHALA: ...

COURT: ...

MS PHALA: ...

COURT: ...

MS PHALA: What she relayed or told me, although it differs from what she had written on the statement, she told me that she only saw the child behaving differently all along until she only discovered when she saw the semen on the child's clothes.

COURT: Warrant, you are an experienced 17 year investigator on these [indistinct 12:22], you get an A1 statement taken by a **flat foot** in a charge office. It screams questions. Surely the very first thing you do is retake a proper detailed statement from the complainant".

[23] I do understand the frustrations of the learned Magistrate because of the standard of the statement, but he must have ventilated his frustrations better, than using the demeaning or inappropriate words in describing the potential witnesses in the case. It is clear from the court record that the words that I highlighted above were not directed to the appellant, but to the witness that was testifying. The fair trial right can therefore not be invoked by the appellant on that basis. On page 30 of the judgment the Magistrate refers to the children of the appellant as a "small army of

dependants". That is derogatory in my view. It is a conduct which this court condemns in the strongest terms. This judgment must be brought to the attention of the Chief Magistrate, Limpopo Province with regard to the concerns of this court on the use of language by the presiding officer of record in court.

[24] In the result, the following order is made:

- (i) the appeal is dismissed,
- (ii) the copies of the whole record of this case and this judgment must be send to the office of the Chief Magistrate, Limpopo Province, with regard to what I raised from paragraph 21 of this judgment.

J.T. NGOBENI

JUDGE OF THE HIGH COURT

APPEARANCES

For the appellant:	Adv. Mathabatha with Adv. Moetji
Instructed by:	Mtsweni Attorneys Inc.
For the respondent:	Adv. Magoda.
Instructed by:	Director of Public Prosecutions, Polokwane.
Heard on:	20 August 2026
Judgment delivered on:	27 August 2026

POLOKWANE HIGH COURT