IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No: 8223/09

In the matter between

SAKHILE MICHAEL MAGCABA **Appellant**

versus

THE STATE **Respondent**

JUDGMENT

Delivered on: 2 November 2009

STEYN J

[1] This is an appeal against the refusal of the Ntuzuma district court, to grant the appellant who is the fourth accused in the court *a quo* bail.[1] The appellant and his co-accused are charged with robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act, 51 of 1977.[2] The offence is a schedule 6 offence in terms of the Act.

[2] The appellant was arrested on 23 January 2009 and he brought a bail application on 2 February 2009, which was

1 See case number 633/09.
2 Hereinafter referred to as 'the Act'.

refused by the district Magistrate of Ntuzuma. Appellant now appeals against this decision.

[3] On behalf of the appellant, Mr Mkhize, submitted that the learned Magistrate erred in fact and law. It was submitted by him that the decision was wrong;

> *"1. In respect of the aspects pertaining to the application for release on bail which was before the court a quo, as highlighted in the grounds of appeal;*
> *2. In making a finding that the appellant had not succeeded on proving exceptional circumstances; and*
> *3. In finding that the appellant was not entitled to be released on bail."*

In addition it is submitted that the following factors warrant in favour of the appellant's release on bail:

> *"1. The appellant has no previous convictions and no pending charges against him;*
> *2. He was a scholar, that he has a bursary with a very well-known company, Alexander Forbes ("the company"), that he had already registered with the college and that he needed to return to study, as he did not want to let the company down;*
> *3. He is able to afford bail;*
> *4. He has very strong ties with the district of Inanda; and*
> *5. He is not a flight risk."*

[4] Mr du Preez, acting on behalf of the Respondent, opposed the

application on the basis that the appellant failed to convince the court *a quo* of any exceptional circumstances as required in terms of subsection 60(11)(a) of the Act. On behalf of the respondent it was further submitted that recently in *Mathebula v S*[3] the SCA dealt with the fact that an application brought on an affidavit evidence is not open to be tested and challenged by cross-examination, and hence it is less persuasive.[4]

[5] It is evident that what the Act in terms of section 65(4) requires of this Court before setting any decision on bail aside, is that this Court should be satisfied that the lower court was wrong in its decision.[5]

[6] The record reveals that the learned Magistrate applied her mind to the burden cast upon the applicant in stating:

> *"As I have indicated, the only issue the Court needs to consider is, if there is (sic) exceptional circumstances, which, in the interests of justified permit the applicant's release."*

[7] The success of this appeal is dependent on whether the

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3 SCA unreported decision case number 431/2009 delivered on 11 September 2009.

4 See *Mathebula* at para [11].

5 See subsection 65(4) of the Act that reads:

> *"The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given." Also see S v Barber 1979 (4) SA 218 (D) 220E-H.*

applicant in the court *a quo* discharged the *onus* in terms of subsection 60(11) of the Act.

[8] Bail is presently defined in s 58 of the Act and regulated by sections 58 to 71 of the same Act. It is also regulated by s 35(1)(e)-(f) of the Constitution, 1996, read with s 12 of the Constitution.

[9] Previously an application for bail was regarded as *sui generis* and the accused bore the *onus* on a balance of probabilities to show why he should be released.[6] After the commencement of the interim Constitution[7] a host of decisions followed, all considering *onus* on the parties in a bail application.[8]

[10] The Constitutional Court, however, in the matter of *S v Dlamini*; *S v Dladla and Others*; *S v Schielekat*[9] did not resolve the issue of *onus*. Kriegler J dealt with it as follows:

> *"For the present it is unnecessary to resolve the question*

6 See *S v Hlongwa* 1979 (4) SA 112 9(D).
7 The interim Constitution of the Republic of South Africa, Act 200 of 1993.
8 See *Ellish v Prokureur-Generaal*, Witwatersrand Plaaslike Afdeling 1994 (2) SACR 579 (W); *Magano and Another v District Magistrate Johannesburg and Others* (1) 1994 (2) SACR 304 (W) *S v Mbele and Another* 1996 (1) SACR 212 (W); *S v Vermaas* 1996 (1) SACR 528 (T).
9 1999 (2) SACR 51 CC.

whether there is an onus in bail proceedings and, if so, its incidence. The current cases are governed by subsection 11 where there is undoubtedly a burden cast upon an applicant for bail."[10]

[11] In the context of s 60(11)(a) it is however necessary for an applicant to persuade the Court that 'exceptional circumstances' are present that in the interests' of justice permit his release. The concept, 'exceptional circumstances' not being defined, has meant different things to different people.[11] In my view, what is expected of a court is to exercise a value judgment in accordance with all the evidence and applying the relevant legal criteria.[12]

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10 *Op cit* at para [45], footnote 74 of the judgment.

11 See *S v C* 1998 (2) SACR 720 (C); *S v H* 1999 (1) SACR 72 (W) at 77b-i; *S v Schietekat* 1999 (1) SACR 100 (C); *S v Mokgoje* 1999 (1) SACR 233 (NC); *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) at 2291 – 2300; *S v Bruintjies* 2003 (2) SACR 575 (SCA) at 577 c-i.

12 See section 60(4) of the Act that provides for the grounds to be considered:

> *"a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or [Para (a) substituted by s. 4(c) of Act 85 of 1997.]*
>
> *(a) Where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or*
>
> *b) Where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or*
>
> *(c) Where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system;*
>
> *(d) Where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public or undermine the public peace or security; or [sic]".*

[12] In the present matter, albeit not framed in so many words, the respondent opposed bail on grounds of s60(4)(a) and to a lesser degree relied on s 60(4)(e). In support of its opposition the state tendered viva voce evidence of inspector Ngcube, the investigating officer in the case. In my view the court a quo considered all the relevant considerations, the strength of the state's case, the circumstances presented on behalf of the applicant and ultimately found that the circumstances do not qualify as 'exceptional'.

[13] It must necessary follow, that on an analysis of the evidence as a whole, the probative value of the statement produced by the appellant and the burden of 'exceptional circumstances' that rested on the appellant in the court a quo, that the appellant had not succeeded in demonstrating that the court below was wrong and that the decision should be set aside.[13]

[14] In the event the appeal is dismissed.

13 See *S v Porthen and Others* 2004 (2) SACR 242 (C), at para [17].

Steyn, J

Date of Hearing:	29 October 2009
Date of Judgment:	2 November 2009
Counsel for the applicant:	Adv M. I. Mkhize
Instructed by:	N T Mshengu & Associates
Counsel for the first respondent:	Adv R Du Preez
Instructed by:	Director of Public Prosecutions, Pietermaritzburg