

**IN THE HIGH COURT OF SOUTH AFRICA,  
MPUMALANGA DIVISION, MIDDLEBURG (LOCAL SEAT)**

Lower Court Case Middleburg No: 761/22

Appeal Court Case No: BA11/2022

In the matter between:

**RAMSEY SIFISO NDLOVU**

First Appellant

**TSHEPO INNOCENT MASILELA**

Second Appellant

And

**THE STATE**

Respondent

This Judgment is granted by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. This Judgment is further uploaded to the electronic file Judgment is deemed to be 26 August 2022.

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**BAIL APPEAL JUDGMENT**

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Introduction

1. This is an appeal against refusal of the Middleburg Magistrates Court on 27 June 2022 to allow the appellants bail.
2. The appellants were legally represented throughout the bail proceeding in the Magistrate's Court and are also legally represented in the present proceedings.
3. The appellants are charged with two counts of murder which fall under schedule 6 of the Criminal Procedure Act of 1977 (the CPA).
4. Appellants therefore had to persuade the Magistrates Court on a balance of probabilities that exceptional circumstances exist to permit their release on bail.

5. The issue for determination is whether the Magistrate erred in finding that the appellants failed to discharge its onus of satisfying the Court on a balance of probabilities that exceptional circumstances exist which, in the interest of justice permit release of the appellants.
5. The issue is founded on grounds of appeal that the learned magistrate erred in the following respects:
  - 5.1. In not properly weighing the rights of the appellants to be released on bail as opposed to denying bail;
  - 5.2. By not considering the undisputed facts as contained in the appellants' affidavits in so far as it relates to their personal circumstances;
  - 5.3. By overemphasizing the strength of the state's case; and
  - 5.4. In finding that the appellants failed to adduce evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit the release by disregarding the evidence that applicants placed before the court.

### Facts

6. Appellants are charged with the murders of two adults namely Senzo Mtsweni and Thapelo Mashamba who died on 24 May 2022 allegedly from injuries suffered as a result of the assault that took place on 23 May 2022. Appellants were arrested on 14 June 2022 and kept in custody in accordance with the provisions of Section 60(11)(a) of CPA which stipulates, pertaining to Schedule 6 offences, that: "the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law ..."
7. Appellants brought formal bail application before the Magistrate's Court and chose to provide the evidence through affidavits. The state did not oppose the

bail application, however, it presented *viva voce* evidence of the investigating officer.

### Evidence

Appellants' affidavit state the following amongst others as evidence in support of the application:

*Information that is common to both appellants is that:*

8. They do not have any previous convictions. They have never missed any court date and their bail money was never finally or provisionally forfeited to the state;
9. They have never influenced, intimidated or interfered with state witnesses or police investigations in the past or during the course of the case;
10. They do not have pending cases. They were arrested on 14 June 2022 at Middelburg for the charges that they facing.
11. The state witness identity is not known to the appellants. Appellants undertook not to interfere with the state witness and investigations.
12. They do not have passports and do not intend leaving South Africa. They do not have relatives outside South Africa and they are healthy and not under any medication.
13. They are not a flight risk and do undertake to attend court in accordance with the court directives. They have neither threatened anyone involved in the case nor have he received any threats. Their safety will not be compromised if he were to be released.
14. Their release on bail will not affect public peace or order. Their release will not negatively influence the criminal justice.

*Personal Circumstances of the first appellant*

15. He is a 37-year-old South African who has been residing at his present address in Middleburg, for 22 years. He regards the address as his permanent residence.
16. He is self-employed as a tavern or pub owner who has operated the business for over a year. The business is operated from within the Jurisdiction of this court. He makes monthly profit of about R37,000.00 from the business. His assets are valued at about R100,000.00.
17. He has close family ties and resides with both his parents and his two siblings. He is responsible for a maintenance of his child.

*Personal Circumstances of the second appellant:*

18. He is a 27 years old South African whose permanent residence is in Middleburg at the address where he has been living for the past 20 years.
19. He is self-employed as a state agent under MDV Housing Development. He earns the basic salary of R8,500.00 plus commission. His average monthly income is the amount of R17,000.00. He has been in this self-employment for 2 years.
20. His assets are valued at about R50,000.00. He maintains himself, his child and his siblings, with whom he resides. He resides at the same address with his grandparents and cousins.

*The strength of the case:*

21. The case against them is weak and lacks substance. There is no evidence whatsoever linking them to the commission of the offence and they will be acquitted at trial

22. The state relies on circumstantial evidence which does not implicate them on the alleged crime. They intend to plead not guilty and will disclose their defence during trial.
23. They will afford pay R1,000.00 for bail and will comply with all the bail conditions.

The state led the evidence of one witness namely Sgt Abiya Bonoko Ranaka, the investigating officer in this case. He testified that:

24. He had no problem with the appellants' bail application. He was not opposing the application because he had not yet received the post-mortem report and the photo-album.
25. He had sent documents requesting for SAP69 documents whose purpose is to supply information on the appellants' criminal records and any pending case. At the time of the application the information had not been received. Thus the state has no independent information on the appellant's criminal records. He stated that if he had tangible information like the photo-album or SAP69's he would oppose the bail application.
26. He confirmed that the appellants are linked to the offences and outlined the basis on which he concluded that the appellants are linked to the crimes. The first appellant was implicated by independent witnesses while the second appellant was implicated by the first appellant and the second appellant himself through of his own admissions in the statement. He testified that both the deceased were beaten and injured at the first appellant's tavern.
27. The accused were only arrested on 14 June 2022 because developments in the investigations. The investigating officer stated that community members around the first appellant's area had informed him about the first appellant's involvement but he could not act until he got obtained written information. He states that the community was threatening to burn first appellant's tavern if he was not arrested but he, the investigating officer stopped them and told them that he would only act when he had evidence.

### Submissions

28. Appellants' counsel relied on the cases of S V Bruintjies, S v DV and Another, S v Rudolph and S v DV for the definition of the term "exceptional circumstances" since same is not defined in the CPA. Based on those authorities, he argued that even ordinary circumstances may nevertheless considered as exceptional circumstances when considered holistically and cumulatively. The counsel submitted that looking at the appellants' affidavits, that they were arrested at their homes, the weakness of the case and the fact that the state did not oppose the bail application the Court should conclude that the appellants have discharged their onus of proving the existence of exceptional circumstances.
29. The prosecutor maintained that it was not opposing the application due to lack of information regarding the appellant' criminal records. The state further submitted that the state has a strong case in that the appellants are linked to the case. Further the state submitted that the appellants are facing serious offences and investigations would take a long time to complete. Based on these submissions, the state suggested that the Court consider releasing the appellants on bail subject to stringent conditions. It is trite that offences falling under schedule 6 of the CPA are in their nature serious and some may require investigations for a stretched period of time. I do not understand the prosecutor to be suggesting that the likelihood of investigations taking long should be a factor constituting exceptional circumstances warranting review. I must say that if such attitude were to be adopted, the great majority of persons facing charges involving schedule 6 offences would have to be released on bail pending their trial without full appreciation of the meaning of special circumstances warranting release.

30. The above information is not exhaustive information on submissions made.
31. Having considered the submissions made and the applicable law, the Court refused the application on grounds that appellants had failed to prove the existence of exceptional circumstances.
32. In the present proceedings, it is contended on behalf of the appellants that their affidavits were never challenged by the state and they remain evidence. It is argued that the personal circumstances of the appellants as recorded in their affidavits, taken as a whole constitute exceptional circumstances.
33. My observation is that in its judgement, the Court did not quarrel with the veracity of the appellants' personal circumstances. In analysis of the evidence, the Court accepted that there are instances where ordinary circumstances can qualify to be exceptional circumstances warranting release. However, the Magistrates found that the nature of evidence adduced by the appellants is such that it does not qualify to be elevated to the status of exceptional circumstances. The court also stated that it could not find that the state case is weak thus and thus qualifies to the elements constituting exceptional circumstances.

#### Legal principles

34. Section 65(4) of CPA sets out the powers of courts hearing the appeal. It provides as follows: "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 opinion, the lower court should have given".
35. S v Barber 1979(4) SA 218 (D) highlights the limitations of a judge presiding over an appeal against the refusal to grant bail in comparison with the liberty of a judge presiding over substantive application for bail. At 220 E-G the court pronounces that "It is well known that the powers of this Court are largely

limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the Magistrate exercised the discretion which he has, wrongly.”

The question to consider is whether it is necessary for this Court to interfere with the Magistrates judgment or not. I can only do that if *I am satisfied that the decision is wrong* (my emphasis).

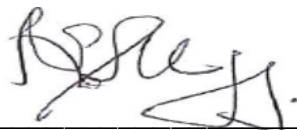
36. On what constitutes exceptional circumstances it was held in *S v Bruintjies 2003 (2) SACR 575 (SCA)* at Par 6 that:

*“What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant facts, save to say that the legislature clearly had in mind circumstances which remove the applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the legislature has attached to the commission of a schedule 6 offence”.*

37. I have considered the evidence presented in the Magistrates Court, the judgment of the court a quo and the written submissions placed before me. There is no basis to find that the Magistrate exercised its discretion wrongly. Accordingly, I shall not interfere with the judgment of the Magistrates Court.

38. In the result the following order is made:

a) The Appeal is dismissed.



RAMAGAGA AJ