IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

BAIL APPEAL NO: CAB 06/2025
MAGISTRATE'S CASE NO: A330/2022
Reportable: YES/**NO**
Circulate to Judges: YES/**NO**
Circulate to Magistrates: YES/**NO**
Circulate to Regional Magistrates: YES/**NO**

In the matter between:-

DANIEL MERE **APPELLANT**

and

THE STATE **RESPONDENT**

*Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is **15 MAY 2025** at **10h00**.*

ORDER

The appeal against the refusal of bail is dismissed.

JUDGMENT

REDDY ADJP

Introduction

[1] What serves before this Court is an appeal against the refusal of bail by the Magistrate at Itsoseng (the court *a quo*). For the purposes of context, the appellant made two applications for bail before the court *a quo*, hereinafter referred to as 'the application for bail' and 'the application for bail on new facts.'

[2] On 15 November 2022, the application for bail was dismissed within the purview of section 60(11)(b) read with Schedule 5 of the Criminal Procedure Act 51 of 1977 (the CPA). On 8 November 2023, the application for bail on new facts, considered within the ambit of section 60(11)(a) read with Schedule 6 of the CPA suffered a similar fate. On both occasions the appellant was enjoined with legal representation.

[3] The appellant assails both decisions of the court *a quo.* The respondent conceded that the appeal against the refusal of bail on new facts should be upheld.

The application for bail in the court *a quo*

[4] The appellant was charged with two counts, murder and assault with intent to do grievous bodily harm. There was no *lis* between the appellant and the

respondent that this application for bail fell within the category of section 60(11)(b) read with Schedule 5 of the CPA.

[5] The appellant testified in support of his application for bail, to convince the court *a quo* that the interests of justice permitted his release on bail. Additionally, his sister Miriam Ditsaba Bereng testified in support of his application for bail. The Investigating Officer, Constable Taunyane (Taunyane) testified in opposition to the release of the appellant on bail.

[6] The following are the salient features of the appellant's case. The appellant has been residing at 3[...] Itsoseng for approximately ten (10) years. He is thirty-eight (38) years old, a South African citizen and the bearer of a South African passport. The appellant conceded that he had no misgivings in handing over his passport. He is self-employed as a subsistence farmer dabbling in livestock. From this he generates an amount of R5000.00 per month. Although he is unmarried, the appellant is the father of four minor children. The appellant maintains his children from the income accrued from the sale of livestock. The appellant disclosed a string of previous convictions. He has no pending cases.

[7] The appellant contended that he was able to deposit an amount between R500.00 and R1000.00 for the purposes of bail. It bears mentioning that the fulcrum that formed the appellants request to be released on bail comprised (i) his livestock being unguarded and unattended, with information at his disposal suggesting that he had suffered losses as some of his stock had been stolen; (ii) his movable assets inclusive of a car and furniture were unsecured with an amplifier of having been stolen at an independent shack; (iii) his seventy-year (70) year old ailing mother with whom he resides is mentally unwell; and (iv) his continued detention would prejudice his children.

[8] Taunyane testified that on 29 October 2022, at about 09h00 the complainant (on the assault with intent to do grievous bodily count) was at a salon when the appellant requested an amount of R20.00. The complainant retorted that he did not have money. The appellant held the complainant by his belt averring that a R20.00 was visible, moreover that same was to be used for the cutting of the

complainant's hair. The complainant was searched, refuting to hand over the R20.00. The complainant was then stabbed with a knife under the left breast, his right shoulder and head.

[9] Later that evening between 20h00 and 21h00, in another confrontation the appellant stabbed the deceased twice on the right upper arm and fled. The deceased ran to his home to seek assistance.

[10] The investigations were said to be complete in both counts but for the filing of a photo album regarding the murder. The instrument/s used in the commission of these offences were not recovered. Direct evidence links the appellant to both offences. To this end, the statements of the relevant witnesses had been secured.

[11] Taunyane's opposition to the release of the appellant on bail was primarily founded on the assertion that the appellant would: (i) evade his trial, and (ii) interfere with witnesses.

Findings of the court *a quo* in the application for bail

[12] In broad strokes the court *a quo* found that: ,(i) there is a likelihood that the appellant if released on bail would endanger the safety of the public or any particular person or commit a Schedule 1 offence; (ii) there is a likelihood that the appellant if released on bail would attempt to evade his trial; and (iii) there is a likelihood that the appellant if released on bail would attempt to influence or intimidate the witnesses or conceal or destroy evidence. Anchored on these findings the court *a quo* found that the interests of justice did not permit the release of the appellant on bail.

The grounds of appeal relevant to the application for bail

[13] The appellant assails the aforesaid findings on the following basis:

"1. That the honourable Magistrate Mrs Taliwe erred and/or misdirected herself in not finding that it is in the best interest of justice that the Appellant be granted bail.

2. That the state has no prima facie evidence against Appellant, in that the state has strong case against the Appellant, same shall be argued in the Appellant's head of arguments to be attached herein.

3. That the Appellant is a South African citizen and does possess a passport , however, he never travelled outside the republic of South Africa neither does he have friends or relatives outside the Republic of South Africa.

4. That the Appellant co-operated with the police at material times during the arrest.

5. That the Appellant has a permanent residential address at house no: 3[...], Zone 3, Itsoseng, the above is the address the police visited when they were looking for the Appellant, it is the parental home of the Appellant.

6. That the Appellant is unmarried with 5 minor children….

7. That the Appellant is unemployed, however he (Appellant) is a farmer dealing mainly with livestock, that he (Appellant) generates income in the amount of R5000.00 per month from his livestock farming business and he supports the minor children from the said income.

8. The learned magistrate erred in failing to attach sufficient weight to the fact that the Appellant was the only person taking care of his livestock.

9. That at the time of the bail hearing Appellant did not have any pending cases.

10. The learned magistrate erred and/or misdirected herself in finding that the Appellant may endanger the safety of the witnesses and/or commit schedule 1 offences if released on bail

11. The Appellant shall respectfully submit that the above finding by the learned magistrate was based on assumptions and speculations, therefore, constitute a material misdirection.

12. The learned magistrate erred in failing to attach weight to the fact that during the Appellant's application to be released on bail, the appellant did not have any pending cases and/or warrant of arrest against him.

13. The learned magistrate erred in finding that there was a likelihood that the Appellant may evade trial if he is released on bail.

14. The learned magistrate erred in failing to attach sufficient weight to the fact that the Appellant was arrested at Itsoseng within the jurisdiction of Ditsobotla, where the alleged offences were committed."

The bail application on new facts in the court *a quo*

[14] On 7 November 2023, *Ms Thambe* (the prosecutor) appearing for the State made the following submission:

> "Your worship as the Court may note that this matter bears a Regional Court case number. Indeed, this is a Regional Court matter, which is to appear in the Regional Court on 15 to 16 February 2023. It is now appearing before the District court on the basis that the applicant wishes to make an application to be released on bail on the basis of new facts.
>
> Accused person previously brought an application within the ambit of schedule 5, and his bail was denied on 15 November 2022. The bail application on new facts, is still opposed by the State. Your Worship, may I just borrow the charge sheet once again?
>
> Accused person in this matter, made his first appearance at the Regional Court on 10 May 2023. He appeared on a charge of premeditated murder. So therefore, currently the accused is facing a charge of premeditated murder, and therefore Your Worship, as we may all take notice that this offence now falls within the ambit of schedule 6. Therefore, in his bail application, it is upon the accused as an applicant to disclose or to satisfy the court that exceptional circumstances exist which in the interests of justice permit his release on bail.
>
> **Therefore, Your Worship, I am placing the schedule as being that of schedule 6 in order to avoid confusion of the record, because previously the accused brought an application that falls within the ambit of schedule 5'.'** (emphasis added)

[15] Mr Motlhabane (then appearing for the appellant) was invited by the court *a quo* to retort to the contention of *Ms Thambe* and posited the following:

"As it pleases the Court Your Worship. Your Worship. **I do confirm my appearance on behalf of the accused in this matter [indistinct] in relation to the schedule as it was moved from schedule 5 to schedule 6 [indistinct] Your Worship.''** (emphasis added)

[16] Clearly, the appellant duly enjoined with legal representation, took no issue with the change in the bail Schedule from Schedule 5 to Schedule 6. Further, confirmation of the categorization of the bail application on new facts as resorting within the ambit of Schedule 6, for the purposes of the bail application on new facts is broached in the body of the affidavit in support of bail on new facts as follows:

"My legal representative has explained the provisions of section 60(11) of the Act to me. I respectfully make the following submissions in respect thereto:

I have been informed that I am accused of having committed the offence of murder which has been explained to me by my attorney, **and the offence is under schedule 6 of the Criminal Procedure Act.**

I am advised that I do not have to deal with the merits of the case for the purpose of a bail application. I will stand my trial, should it proceed against me, and there is no possibility that I will even think of not standing my trial.

I trust the South African Legal system and that it in fact will show that I did not commit the offence I am charged with.

In order to persuade the above Honourable Court that I should be released on bail, I provide this Honourable Court with information in terms of Section 60 of the act."

[17] Given the absence of a *lis* on the applicable bail Schedule for purposes of the application for bail on new facts, the application for bail on new facts was correctly decided within the four corners of section 60(11)(a) read with Schedule 6 of the CPA. Section 60(11)(a) of the CPA places an onus on an applicant which is to be discharged on a balance of probabilities. The threshold to be met, is that an applicant must show that exceptional circumstances exist which in the interests of justice permits his release on bail.

[18] In his affidavit in support of bail on new facts, the appellant opined the following as new facts. First, the charge of assault with intent to do grievous bodily harm had been withdrawn. Second, as an incarcerated subsistence farmer he had suffered a drastic reduction in his livestock because of theft. Third, an informal dwelling which he owns in Verdwaal had been demolished and the material used to construct same was stolen. His movable property housed in the dwelling, including his motor vehicle was also stolen. Fourth, his sister Miriam Ditsaba was unable to care for his ailing mother as she is required to be at her house in Bodibe.

[19] The State as respondent in the application for bail on new facts presented no evidence.

Findings by the court *a quo* in the application for bail on new facts

[20] The court *a quo* having considered all facts old and new, found that the appellant did not demonstrate any exceptional circumstances which in the interests of justice permitted his release on bail. Accordingly, the appellant's application for bail on new facts was dismissed.

The grounds of appeal relevant to the application for bail on new facts

[21] The appellant assails the aforesaid finding on the following basis:

"1. That the learned Magistrate Mrs Taliwe erred and/or misdirected herself in not finding that new facts exist in the bail application of the Appellant and she erred in failing to find that the interest of justice permit the release of the appellant on bail.

2. The learned magistrate erred in failing to attach sufficient weight to the fact that the charge of assault GBH was withdrawn against the appellant, as such, the new facts in the Appellant's bail application on new facts.
3. The learned magistrate erred and/or misdirected herself in finding that the bail on new facts of the Applicant falls within the ambit of schedule 6, the

contention of Applicant in this regard is premised on the fact that the initial bail application of the Appellant was conducted under schedule 5.

4. It is therefore submitted that this honourable court will probably come to a different conclusion with regard to the appellant's release on bail."

The approach of an appeal court to the refusal of bail by a Magistrates' Court

[22] Section 65(4) of the CPA sets out the legal framework for the consideration of an appeal against the refusal of bail as follows:

> "[t]he 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."

[23] In *S v Barber* 1979 (4) SA 218 (D) at 220E–H, the court remarked as follows in respect of the context of deciding an appeal in terms of section 65(4) of the CPA:

> "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. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly."

[24] Thus, even if this Court finds that the Magistrate was wrong, this Court must consider the facts before it afresh and determine whether the appellant has discharged the applicable onus.

Analysis of the dismissal of the application for bail

[25] In the application for bail, it was obligatory for the appellant to convince the court *a quo* on a balance of probabilities that the interests of justice permitted his release on bail. The terse evidence presented by the appellant when measured against the statutory framework as evinced by section 60(11)(b) read with section 60(4) (a)-(e) and section 60(9) (a)–(g) of the CPA could not have resulted in the appellant convincing the court *a quo* that the interests of justice permitted his release on bail. Resultantly, the decision of the court *a quo* is unassailable. It stands to reason that the appeal against the refusal of the application for bail must fail.

Analysis of the dismissal of the application for bail on new facts

[26] In *S v Mpofana* 1998 (1) SACR 40 **( )** at 44G–I, the court postulated the following approach when faced with a bail application on new facts :

> "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."

See also: *S v Petersen* 2008 (2) SACR 355 (C) at para 57; *S v Yanta* (CC44/2021) [2023] ZAWCHC 23 (1 March 2023); 2023 (2) SACR 387 (WCC) para 15.

[27] Two fundamental principles postulated in *Mpofana* and echoed in *Petersen* and *Yanta* delineates what constitutes new facts. First, the court must be satisfied that the facts are indeed new. Second, they are relevant for the purposes of the new bail application. The caveat is that the new facts should not constitute "*simply a reshuffling of old evidence or an embroidering upon it"*.

[28] The application for new facts had to be considered within the purview of section 60(11)(a) read with schedule 6 of the CPA. This resulted in the appellant having to convince the court *a quo* that there existed exceptional circumstances which in the interests of justice justified his on bail.

Tangentially this would have resulted in the combined old and new facts being brought into sharp focus for a determination to be made if the appellant's application passed muster of the relevant bail provisions. There is no underscoring that the appellant's new fact was primarily the withdrawal of the count of assault with intent to do grievous bodily harm. The theft of his property and destruction of his dwelling did nothing to tilt the scales in favour of his release on bail to constitute exceptional circumstances. The issue of care of his mother was canvassed in the application for bail and was therefore not a new fact.

[29] In the context of section 60(11)(a) of the CPA, the legal phraseology exceptional circumstances are undefined. In *S v Jonas* 1998 (2) SACR 677 (SE), it was held that:

"[t]he term "exceptional circumstance" is not defined. There can be many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation necessitating the accused's absence is one that springs to mind. A terminal illness may be another. It would be futile to attempt to provide a list of possibilities which will constitute such exceptional circumstances. To my mind, to incarcerate an innocent person for an offence he did not commit could also be viewed as an exceptional circumstance. Where a man is charged with the commission of schedule 6 when everything points to the fact that he could not have committed the offence, e.g that he has a cast-iron alibi, this would likewise constitute an exceptional circumstance."

[30] In *S v Bruintjies* 2003 (2) SACR 575 (SCA) at 577, para 6, the following was said regarding exceptional circumstances:

"…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 circumstance 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 the commission of schedule 6 offence. The prospect of success may be such a circumstance, particularly if the conviction is demonstrably suspect. It may, however, be insufficient to surmount the threshold if, for example, there are other facts which persuade the court that society will probably be endangered by the appellant's release or there is clear evidence of an intention to avoid the grasp of the law. The court will also take into account the increased risk of abscondment which may attach to a convicted person who faces the known prospect of a long sentence. Such matters together with all other negative factors will be cast into the scale with factors favourable to the accused such as stable home and work circumstances, strict adherence to bail conditions over a long period, a previously clear record and so on. If, upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail."

[31] Whilst the appellant takes issue on appeal with the bail application on new facts being characterised as schedule 6, it is unassailable that he was acutely aware of the change of the Schedule from 5 to 6, being legally represented and that the onus was different from the initial application for bail. To suggest otherwise is simply not borne out by the record.

[32] Notwithstanding the respondent's stance of electing not to present any evidence to gainsay that of the appellant, the appellant was not absolved from the duty to adduce exceptional circumstances which in the interests of justice permitted his release. This much is clear from the ratio in the *locus classicus*, *S v Mathebula* (431/2009) [2009] ZASCA 91; 2010 (1) SACR 55 (SCA) ; [2010] 1 All SA 121 (SCA) at paras 9, 12 and 13, where the State also did not lead evidence in the application for bail on new facts.

[33] A bail court is clothed with a discretion to grant of refuse bail. In the application of this judicial discretion the court must consider the conspectus of

the evidence dovetailed by submissions. See *Dlamini*; *S v Dladla and others*; *S v Joubert*; *S v Schieteket* [1999] ZACC 8*;* 1999 (2) SACR 51 *(CC)* at 88 H–I , 89E and 90B–D.

[34] Personal circumstances which are really 'commonplace' can obviously not constitute exceptional circumstances for purposes of section 60(11)(a). See: *S v Scott Crossley* 2007 (2) SACR 470 (SCA) at para 12. Additionally, the appellant has merely parroted the provisions of section 60(4)(a)–(e) with scant reference to section 60(9)(a)–(g) of the CPA.

[35] On an overall consideration of the application for bail on new facts, no exceptional circumstances were ventilated in the court *a quo*. The decision of the Magistrate in dismissing the application for bail on new facts similarly cannot be faulted.

Order

[36] In the premises, I make the following order:

The appeal against the refusal of bail is dismissed.

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A. REDDY
ACTING DEPUTY JUDGE PRESIDENT
OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION,
MAHIKENG

APPEARANCES:

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Date of Hearing	9 May 2025	
Date of judgment	15 May 2025	