IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)

CASE NO: CA&R03/2025

In the matter between

SIPHAMANDLA MATSHA **Appellant**

and

THE STATE **Respondent**

JUDGMENT

KRüGER AJ:

The ground of appeal

[1] The appellant, Mr Siphamandla Matsha, approached this court in an appeal against the refusal of the Motherwell District Magistrate's Court to admit him to bail on 19 December 2024.

[2] The appellant maintained that he established exceptional circumstances which, in the interests of justice, warranted his admission to bail. I was requested to uphold the appeal and grant bail. The crux of his case was that the court *a quo* erred in finding that the state had a strong *prima facie* case against him, as it was based on inadmissible evidence.

[3] The state opposed the appeal and contended that the magistrate exercised its discretion correctly and that it did not misdirect itself in the refusal of bail; accordingly, I was asked to dismiss the appeal.

The legal approach to bail appeals

[4] Section 65(4) of the Criminal Procedure Act makes it clear that a court hearing an appeal on the refusal of bail may only set that decision aside if it is satisfied that the decision of the court *a quo* was wrong.

[5] Hefer J in *S v Barber,*[1] explained the approach to be followed in a bail appeal as follows:

'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. 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 because that would be an unfair interference with the magistrate's exercise of 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 but exercised that discretion wrongly. . . . Without saying that the magistrate's view was actually the correct one, I have not been persuaded to decide that it is the wrong one.'

[6] It must thus be determined whether the magistrate materially misdirected himself in relation to law or fact. Only when such misdirection has been established, may the court on appeal determine whether bail ought to have been granted or not. In the absence of a misdirection, the appeal must fail.[2]

[7] Determining whether there was a material misdirection, in view of the challenge relating to the admissibility of the evidence presented in the bail proceedings, requires a brief consideration of the nature of bail proceedings and the information and evidence on which bail is adjudicated.

The nature of bail proceedings

[8] In *S v Botha,*[3] the Supreme Court of Appeal characterised bail proceedings as criminal rather than civil in nature. It did so in the context of determining the correct procedure to follow in respect of a refusal of bail by a high court as the court of first

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[1] 1979 (4) SA 218 (D) 220E–H.
[2] *S v Panayiotou* 2015 JDR 1532 (ECG) para 27. See also *S v Kara* 2023 (2) SACR 171 (WCC) paras 11-14.
[3] Para 5 confirmed in *S v Banger* 2016 (1) SACR 115 (SCA) para 6.

instance. In the course of its judgment, the SCA explicitly rejected earlier characterisations of bail proceedings as civil in nature.[4]

[9] Kriegler J in *S v Dlamini, S v Dladla, S v Joubert, S v Schietekat*[5] explained that 'a bail hearing is a unique judicial function'. Its interlocutory and urgent nature is reflected in its procedures, which are less formal than a trial. In particular, the learned judge noted that 'the evidentiary material proffered need not comply with the strict rules of oral or written evidence'. This is because a bail hearing is not concerned with the guilt of the accused. It is for the trial court to determine whether an accused is guilty. In bail proceedings, the court has to consider the possible guilt of the accused only insofar as that may influence where the interests of justice lie. The task of the court in a bail hearing is to decide whether it is in the interests of justice to release the accused pending the trial so as to protect the investigation and prosecution of the case against interference.

The burden of proof, evidence and information in bail proceedings

[10] In bail proceedings, information and evidence are placed before the court by means of *ex parte* submissions, oral evidence, and/or by way of affidavit.[6] Section 60(11) of the Criminal Procedure Act determines that an applicant for bail facing a Schedule 6 charge must adduce evidence to demonstrate that exceptional circumstances exist which, in the interests of justice, permit his release on bail. While a bail application will be unsuccessful where the applicant does not adduce any evidence (i.e. does not present oral evidence or evidence in the form of an affidavit),[7] there is no similar obligation on the state to adduce evidence in opposing the application.[8] However, where the state fails to counter the evidence of the applicant through submissions or evidence, that omission favours the applicant's case for bail.[9]

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[4] The court specifically stated that the characterisation in *S v Pienaar* 1992 (1) SACR 178 (W), *S v Maki* 1994 (2) SACR 630 (E) and *S v Ndjadayi* 1995 (2) SASV 583 (E) could not stand in the light of its own finding.
[5] *S v Dlamini, S v Dladla, S v Joubert, S v Schietekat* 1999 (4) SA 623 (CC) para 11.
[6] *S v De Kock* 1995 (1) 299 (T) 306h-307b; *S v Hartslief* 2002 (1) SACR 7 (T) 11d-e. Section 60(3) refers to 'sufficient information and evidence' being available to the court.
[7] *S v Dlamini, S v Dladla, S v Joubert, S v Schietekat* para 61: 'such detainees … must adduce evidence'.
[8] *S v Schietekat* 1998 (2) SACR 707 (C) 713h.
[9] *S v Hartslief* 12f-i.

[11] Where evidence is submitted in the form of a statement made by a person who is not called as a witness as proof of the content of the statement, that evidence is hearsay evidence. While hearsay evidence is generally not permitted in criminal proceedings, it is established practice for hearsay evidence to be permitted in bail hearings.[10] In the presentation of the state's case, it is usual for the investigating officer to testify at the hearing regarding the statements of the witnesses implicating the applicant in the commission of the offence.[11] The investigating officer's evidence can also be introduced in the form of an affidavit, read into the record. The weight to be attached to evidence presented in the form of an affidavit may be less than that attached to oral evidence.[12] At the same time, it must be borne in mind that a bail hearing is not a full-scale dress rehearsal for the trial.[13]

[12] The applicant has a formal onus that must be discharged on a balance of probabilities to demonstrate that exceptional circumstances exist which, in the interest of justice, permit his release on bail.[14] In *Dlamini's* case, Kriegler J explained that the onus is 'geared [not] to arriving at factual conclusions but designed to make informed prognoses'.[15]

'Exceptional circumstances'

[13] Van Zyl J in *S v Petersen*[16] explained that the phrase 'exceptional circumstances' is usually interpreted to mean something out of the ordinary and that there are degrees of exceptionality. What is 'exceptional' must be considered in

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[10] *S v Mak*i 1994 (2) SACR 630 (E) 638c. Froneman J held that bail proceedings were civil in nature for purposes of section 3 of the Law of Evidence Amendment Act 45 of 1988 and further added that, even if he were wrong, its use in bail proceedings was well established. Insofar as *S v Botha* overturned *Maki* regarding the nature of bail proceedings, reliance is placed on the established practice as noted. Van den Berg *Bail: A Practitioner's Guide* (1986) 114-115 explains that there seems to be no authoritative reason for the admission of hearsay evidence in bail proceedings. The author 'tentatively suggests that the practice may have evolved on policy grounds owing to the *sui generis* nature of the proceedings'.

[11] MT Mokoena *A Guide to Bail Applications* 2nd ed (2018) 40 placing reliance on *S v Yanta* 2000 (1) SACR 237 (Tk).

[12] *S v Tshabalala* 1998 (2) SACR 259 (C) 265g, as clarified in *S v Kula* 2023 2 SACR 52 (NWM) paras 63-64.

[13] *S v Viljoen* 2002 (2) SACR 550 (SCA) para 25.

[14] *S v Dlamini, S v Dladla, S v Joubert, S v Schietekat* paras 61; 78-79. *S v Rudolph* 2010 (1) SACR 262 (SCA) para 9.

[15] *S v Dlamini, S v Dladla, S v Joubert, S v Schietekat* para 78.

[16] 2008 (2) SACR 355 (C) paras 55-56.

context and in relation to the circumstances of the particular case. The learned judge continued:

'In the context of s 60(11)*(a)* the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. 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. See *S v Mohammed* 1999 (2) SACR 507 (C) ([1999] 4 All SA 533) at 513*f* 515*f*. 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 legal criteria. See in this regard the judgments in *S v H* 1999 (1) SACR 72 (W) at 77*b i*; *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC) (1999 (4) SA 623; 1999 (7) BCLR 771) paras 75 79 at 89*a* 90*h* (SACR); *S v Herbay* [1999] 2 All SA 216 (W) at 222*d j*; *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) (2002 (2) SA 680; [2002] 2 All SA 577) para 19 at 229*i* 230*d*; *S v Yanta* 2000 (1) SACR 237 (Tk) at 241*f* 242*d*; *S v Bruintjies* 2003 (2) SACR 575 (SCA) para 6 at 577*c.'*

[14] Personal circumstances and a weak state case, considered cumulatively, may, as was submitted for the appellant, constitute exceptional circumstances.

[15] Personal circumstances put forth as such, must not, as held by Hancke AJA in *S v Scott-Crossly*[17] be 'commonplace'.

[16] Where a bail applicant relies on a weak state case as exceptional circumstances, the bar is set high. Heher JA in *S v Mathebula*[18] explained:

'But a State case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge: *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) (2002 (2) SA 680; [2002] 2 All SA 577) at 230*h*, 232*c*; *S v Viljoen* 2002 (2) SACR 550 (SCA) ([2002] 4 All SA 10) at 556*c*. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the State is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see *Shabalala and Others v Attorney-General, Transvaal, and Another* 1995 (2) SACR 761 (CC) (1996 (1) SA 725; 1995 (12) BCLR 1593). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the State to rebut his evidence to that effect: *S v Viljoen* at 561*f g*.'

[17] An applicant for bail may succeed in proving exceptional circumstances of this nature on a balance of probabilities where he proves, for example, a cast-iron alibi,[19] or provide other independent evidence pointing to his innocence.[20]

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[17] 2007 (2) SACR 470 (SCA) para 12. See also *S v Jonas* 1998 (2) SACR 677 (SE) 678e-f.
[18] 2010 (1) SACR 55 (SCA) para 12.
[19] *S v Jonas* 678g.
[20] *S v Mohammed* 1999 (2) SACR 507 (C) 517I-J; *S v Viljoen* para 14.

[18] It is against the background of the purpose and nature of bail proceedings, and the articulated standard that I must consider whether the court *a quo* misdirected itself.

The judgment of the magistrate's court and the submissions considered

[19] The court outlined that the appellant (accused 2), together with three others, faced 15 charges, ranging from murder charges, attempted murder charges, charges of conspiracy to commit murder, and charges relating to unlawful possession of firearms and ammunition.

[20] In brief, the state's case, as set out in the affidavit of the investigating officer, is that accused 4 approached accused 1, her boyfriend, to engage the services of accused 2 and 3 to kill her brother for payment. Accused 4 changed the instruction and indicated her mother as the target. Accused 4 stood to benefit from her mother's policies, from whose death she would benefit, as her mother held policies in which she was named as beneficiary. The group of accused met to discuss the terms of their agreement and to make arrangements. After a failed attempt by accused 2 and 3 in April 2024 to kill accused 4's mother (leaving her seriously injured and blind), the group met again and conspired to kill several family members of accused 4. On 9 October 2024, accused 2 and 3 entered the home of accused 4's mother and fired multiple shots, killing two family members and seriously wounding two others. This second attack, in the view of the state, demonstrated that the appellant posed a danger to the witnesses who survived the attack.

[21] Accused 4 was arrested on 10 October 2024 and immediately confessed to her involvement. She led the police to accused 1, 2 and 3, who were then arrested. Accused 1 similarly confessed to his involvement on his arrest.

[22] The judgment recorded that the police were in possession of the confessions of accused 1 and 4, section 204 statements, and a letter written by one of the accused, implicating the appellant in the commission of the offences. It further recorded that the state intended to obtain financial records and cell phone records to bolster its case.

[23] The core contention in the current appeal is that the magistrate misdirected himself by placing reliance on the confessions made by the co-accused of the

appellant in making the finding that there was a strong *prima facie* case against him. The state's case, it was submitted, was based on inadmissible confessions of two co-accused persons. Since a confession is only admissible as evidence against the person who made that confession, no reliance could be placed on the confessions to implicate the appellant. Furthermore, it was submitted that the court erroneously held that there were section 204 witnesses in the matter, whilst they were in fact co-accused. Additionally, it was also submitted that the magistrate failed to attach due weight to the appellant's alibi.

[24] It is established practice for hearsay evidence to be adduced in bail hearings as canvassed above, given the *sui generis* nature of the proceedings.[21] Such hearsay includes evidence regarding the section 204 statements. In *Rajjab v S,*[22] the High Court, in a bail appeal, considered the hearsay evidence of the section 204 witnesses against the appellant in assessing whether exceptional circumstances had been established.

[25] In *S v Magawu*,[23] the High Court, in a bail appeal, was urged to find that the magistrate failed to take into consideration that the successful prosecution of the appellant would largely depend on the evidence of a section 204 witness in the trial, whose evidence might not satisfy the requirements of section 204. In rejecting the argument, the court relied on *Panayiotou* as authority for the proposition that the admissibility of such evidence must be determined by the trial court.

[26] The *Panayiotou*,[24] Goosen J (as he then was) held:

'The only basis upon which it was argued that there is some doubt about the strength of the state case was in relation to the reliability of the Siyoli [who made a section 204 statement] as a witness. That issue, of course, is a matter that no doubt will be canvassed fully at the criminal trial. It is after all, at that point that critical questions of the admissibility and reliability of evidence will be tested. What the court is called upon to consider, in a bail application, is the nature of the evidence that is available to the prosecution and, absent a challenge in the bail proceedings to the admissibility or reliability of that evidence, the court will accept the evidence. It is upon this acceptance that the court decides whether the case is strong or weak.

[21] Para 11 above.
[22] (CA&R 11/2016) [2016] ZAECPEHC 64 (22 September 2016) para 23.
[23] (CA&R139/2016) [2017] ZANCHC 12 (9 January 2017) paras 30-34
[24] Paras 53-54.

In this instance there was no admissibility challenge founded upon convincing evidence calling into question the admission of Siyoli's evidence or the evidence of the meeting that occurred between him and the appellant.'

[27] The appellant specifically raised the issue of the inadmissibility of the evidence of his co-accused against him in the bail hearing. While the dictum from *Panayiotou* quoted above indicates that a challenge to the admissibility of evidence may result in its rejection by the bail court, it should be read to mean that every admissibility challenge should necessarily result in a rejection of that evidence at the stage of the bail hearing. A bail hearing, after all, is not a dress rehearsal for the trial.

[28] In *S v Mpulampula,*[25] Jones J, in considering an argument that the accused's own confession should be inadmissible evidence in his bail application, commented as follows:

'The magistrate decided not to go into the admissibility of the evidence for the purpose of the application for bail, but expressed the view that the evidence on the point did not prove exceptional circumstances justifying his release on bail. Mr Daubermann's argument is that the magistrate misdirected himself in this regard. He should have regarded the appellant's uncontested evidence on affidavit as sufficient proof to cast serious doubt on the admissibility of the State evidence. I do not agree. While I accept that a court considering the question of bail may in appropriate circumstances give weight to convincing evidence to show that the State case against the accused is weak, that is not the position here. The appellant's evidence of assault, which could not be tested in cross-examination, does not amount to convincing evidence that the confessions will be held to be inadmissible at the trial. That can only be determined on trial. I do not accept the argument that the evidence of assault carries greater probative weight because it was not directly challenged by the State, which chose not to embark on a *quasi* trial-within-a-trial during the course of the bail application. There is no *onus* on the State to disprove the existence of exceptional circumstances.

[29] While the current matter is clearly distinguishable on the facts, the precedent establishes that the state bears no onus to disprove exceptional circumstances and that, as a rule, the trial court is the appropriate forum to determine the admissibility or non-admissibility of evidence and the weight to be attached to evidence.

[30] In order to rely on a weak state case as exceptional circumstances, the appellant bore the onus to prove, on a balance of probabilities, that he would be acquitted of the charges.[26]

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[25] *S v Mpulampula* 2007 (2) SACR 133 (E) 135i-136a. See also Udeobi v S (158/2018) [2018] ZAECGHC 55 (13 July 2018).
[26] Paras 16-17 above.

[31] The magistrate did not place reliance on the evidence of a section 204 *witness* but was careful to note that the state had section 204 *statements* which could result in the testimony by section 204 witnesses against the appellant. Additional evidence, in the form of cell phone and banking records, would further bolster the state's case. The magistrate also pertinently addressed the alibi evidence of the appellant, noting, correctly in my view, that the affidavits submitted in support of his alibi did not provide a strong or convincing alibi.[27] The court noted that the affidavit of the appellant's girlfriend accounted for his whereabouts after the time of the murders, while the second affidavit lacked specific details. I agree. The affidavit stated that the appellant assisted the deponent the whole day, working on his car, yet this was not the appellant's own version.[28] It is thus clear that little, if any, weight can be attached to the alibi evidence. It does not amount to a cast-iron alibi.

[32] I am satisfied that there was no misdirection on the part of the magistrate in finding that the state established a strong *prima facie* case against the appellant. I am also satisfied that the court correctly assessed that the appellant did not discharge the onus to prove, on a balance of probabilities, that he would be acquitted of the charges.[29] Accordingly, he failed to establish a weak state case as exceptional circumstances.

[33] The appellant further submitted that the court failed to take due account of his personal circumstances. However, the court pertinently took account of his personal circumstances and noted that his position as a first-time offender and having a fixed address do not amount to exceptional circumstances in view of the seriousness of the offence.[30] Commonplace personal circumstances do not meet the required threshold.

[34] In addition, the appellant submitted that the bail court erred in finding that he was a flight risk, that he would undermine the public safety, or that his release on bail would undermine confidence in the justice system. The appellant, it was contended, adduced oral evidence, while the prosecution submitted an affidavit to which less

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[27] Record page 209.
[28] Record page 67 and page 78.
[29] Record page 210.
[30] Record page 207.

weight should be attached. In all, the court, in the appellant's view, erred in finding that the totality of evidence did not establish exceptional circumstances and erred in refusing to admit him to bail.

[35] It is the appellant who must adduce evidence to prove exceptional circumstances that warrant his release in the interests of justice. No similar burden rests on the state, but it must at least counter the evidence of the applicant for bail. It did so in this instance.

[36] In my view, the court *a quo* took a holistic view of the evidence before it and did not misdirect itself in coming to its conclusion to deny the application for bail. There is thus no basis for interference with the exercise of the discretion by the magistrate, and the appeal must fail.

Order

[37] The appeal is dismissed.

R KRüGER AJ
ACTING JUDGE OF THE HIGH COURT

Date of hearing: 1 August 2025

Date of judgment: 21 August 2025

APPEARANCES:

For the appellant:	Mr *Z Ngqeza* Zolile Ngqeza Attorneys, Gqeberha
For the respondent:	Adv. *Andrews* Office of the Director of Public Prosecutions, Gqeberha