

SOUTH AFRICA / JUDGMENT

## Ferris v Khumalo and Another (Bail Appeal) (CA&R 6/2025) [2025] ZANCHC 14 (7 February 2025) [2025] ZANCHC 14

COURT

Northern Cape High Court, Kimberley

BEFORE

MC Mamosebo

CASE / FILE NUMBER

CA&R 6/2025

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: CA & R: 6/2025

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the appeal of:

CLIVE NATHAN FERRIS

Appellant

and

MAGISTRATE KHUMALO

First Respondent

THE STATE

Second Respondent

Heard on: 04 /02/2025

Delivered on: 07/02/2025

Summary: Magistrate refused bail. Appeal against refusal. Schedule 6- Exceptional circumstances. Sec 60(11)(a) -Appellant bears onus- balance of probabilities. No call on State to rebut appellant's evidence. Appellant relied on affidavit. Investigating officer testified. Appellant succeeded in discharging the onus.

## ORDER

In the result the following order is made:

1. The appeal is upheld.

## JUDGMENT: BAIL APPEAL

### MAMOSEBO ADJP

- [1] Magistrate Khumalo, of the Kimberley Magistrates Court, dismissed the appellant's bail application after being unable to find the existence of exceptional circumstances justifying his release. He now approaches this Court on appeal against such refusal.
- [2] The appellant, Mr Clive Nathan Ferris, was arrested on 21 December 2024. His co-accused, his daughter, was arrested on 08 January 2025, on the following charges: (1) murder, (2) attempted murder, (3) assault with intent to do grievous bodily harm, (4) possession of a firearm without a licence, permit or authorisation issued in terms of the Act, and (5) unlawfully discharging a firearm in a built-up area or public place.
- [3] The appellant's first appearance was supposed to be on 24 December 2024, however, the State relying on s 50(1)(d)(ii) of the Criminal Procedure Act, 51 of 1977 (CPA)[1] handed in the appellant's medical certificate confirming that he was hospitalised in substantiation for a remand in absentia to 03 January 2025. The appellant was unrepresented at that stage. A J7 detention warrant was completed.
- [4] On 3 January 2025 the court explained the appellant's rights to legal representation and that the State is opposing his admission to bail and further that it is a Schedule 6 bail application.
- [5] At the hearing of the bail application the appellant, now duly legally represented, sought to discharge the onus by producing an affidavit in support of his application. The affidavit attached to the Notice of Appeal is neither signed by him or his legal representative nor commissioned by a commissioner of oaths. I was, however, persuaded by the record that the original affidavit attached to the charge sheet as Annexure A was duly signed and commissioned.[2]
- [6] The following appears in the appellant's affidavit for consideration as relevant in the discharge of his onus.

He is a divorced 67-year-old frail South African citizen. He resides in Kimberley with his daughter and a 9-year-old grandson. He has attained two diplomas in Education. He is a pensioner but earns additional income through leasing his second immovable property. His monthly income is R22 000. He sustained a dislocated shoulder and a skull fracture during the fracas on 21 December 2024 and would undergo surgery upon his release from detention. He possesses two immovable properties, two vehicles and household furniture. He has no relatives outside South Africa and his passport has expired. He has no previous convictions and no pending cases against him. He would be able to post bail in an amount of R500.

[7] The appellant proffered the following explanation in as far as the merits are concerned.

‘(a) On the 21st day of December 2024 at around 06:00 am or so, I was awakened by my daughter’s strangely early phone call and she (accused

2) was hysterical in the phone call, requesting that I come to her home immediately and help her. At the time, I was at my home at 3[...] C[...] Road in Kimberley.

(b) At Mieniva Gardens, tensions ran high leading up to the ultimate loss of life and sustained physical injuries. I sustained injuries as demonstrated herein and was under police guard until my first court appearance on 02 January 2025. I attach photos as CF1 – CF3.’

The appellant maintains that the State will not be able to prove the element of intent in all the offences.

[8] The appellant contends that the cumulative effect of all the circumstances rendered them ‘exceptional’ for purposes of his release on bail. He added further that although he knows some of the state witnesses, he does not know any other. He undertakes not to interfere with them. He is not a flight risk because his family members are within the country. He will further not disturb the public order or endanger the lives of others. His release would not jeopardize the functioning of the criminal justice system. The appellant closed his case without calling any witnesses.

[9] Sgt Modise Clive Moshotlha, the investigating officer, testified that he has been a member of the South African Police Service (SAPS) for 20 years, of which 11 was with the Kimberley Detective Unit: Serious and Violent Crimes. The State alleges that the appellant assaulted accused 2’s boyfriend, Lucan, who is the complainant in the

attempted murder charge and shot and killed Lucan’s mother. According to the investigating officer there are six eye-witness

statements in the docket and CCTV footage from a security camera in the vicinity where the incident occurred. The investigations are ongoing as they are awaiting forensic reports.

[10] The I/O explained that it has been established that the appellant is the owner of the firearm that was discharged at the scene. Although an owner has to renew the firearm licence every five years, the appellant’s firearm licence was last renewed on 05 August 2011. It was thus due for renewal in 2016. This makes possession of his firearm unlawful. He is opposed to the

appellant being admitted to bail because not only will it cause an uproar within the community, but he will also intimidate witnesses. His release will jeopardize public confidence in the criminal justice system. According to the investigating officer the appellant knows all the witnesses. The J88 confirms a dislocated shoulder, multiple bruises and laceration on the skull which, according to the doctor, are not life threatening. The State case was closed.

- [11] Notwithstanding the vehement protestation by Mr Mongala, for the appellant, it cannot be gainsaid that the facts and circumstances presented and outlined in the State case, if proven in a trial in due course, constitute a Schedule 6 offence, if not offences, regard being had to the murder and attempted murder charges. The claim by Mr Mongala that the State had an ulterior motive to formulate the charges until accused 2 was added, in order to introduce the element of common purpose lacks substance. It only has to be mentioned to be dismissed.
- [12] The attack on the previous judicial officers was fallacious. The fact that Magistrate du Toit recused herself and later postponed the bail application to another date and intimated that the application may be heard by a Magistrate stationed outside the Kimberley Magistrates Court does not show any prejudice. The determination not to admit the appellant to bail was made by Magistrate Khumalo.
- [13] Ms Engelbrecht, for the respondent, contended that the submission by the appellant that he is a frail 67-year-old man viewed against his conduct as testified to by the investigating officer is untenable. The appellant assaulted the complainant with fists, chased people and witnesses around wielding his firearm, unlicensed for that matter, fired several shots, one of which killed the deceased. This cannot be the behaviour of a frail person. The Concise Oxford English dictionary describes the word 'frail' as 1. 'weak and delicate' 2. 'easily damaged or broken.' I will return to this submission.
- [14] The appellant's application is to be determined in terms of Section 60(11)(a) of the CPA which stipulates that:

'Notwithstanding any provision of this Act, where an accused is charged with an offence 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...'

Based on this provision, the appellant must satisfy the Court that he should be admitted to bail. This presupposes that he must discharge this onus on a balance of probabilities. Given regard to the factors distilled at paras 18(a) – (h) hereunder I am persuaded that the appellant has discharged such an onus.

[15] The SCA in *S v Viljoen*[3] emphasised two reservations in bail applications. The first is that where an accused, having regard to what is already on record, cannot even make out a *prima facie* case, there is no duty on the State to adduce rebuttal evidence. The second, and more important, caveat is that care must be taken to avoid turning every bail application into a protracted trial before the criminal trial. Simply put, bail proceedings should not be treated as a rehearsal for the trial.

[16] More significantly, the SCA in *S v Mathebula*[4], observed that in bail applications which fell within the ambit of Schedule 6 of the CPA, pronounced the following:

‘[12] 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 230h, 232c; *S v Viljoen* 2002 (2) SACR 550 (SCA) ([2002] 4 All SA 10) at 556c. 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] ZACC 12; 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 561f - g.’

[17] The appellant’s evidence is founded on an affidavit and was, obviously, not tested by cross-examination. In *S v Pienaar*

[5] the following remarks were made by the court:

‘In my view therefore there is nothing in the Criminal Procedure Act that renders the use of affidavits in bail applications impermissible. Obviously an affidavit will have less probative value than oral

evidence which is subject to the test of cross-examination. At the same time an affidavit will carry more weight than a mere statement

from the Bar.’

[18] In my view the following factors redound in favour of the appellant, which the Magistrate did not attach sufficient weight to:

- (a) The appellant did not initiate the trouble. He was summoned to the scene by his daughter, accused 2, who was seemingly in distress and created the impression that she was in mortal danger.
  - (b) The firearm which was ostensibly used in perpetrating the alleged offences and intimidation of some observers was indisputably acquired lawfully and licensed until 2016, when the licence was not renewed.
  - (c) This firearm has now been confiscated and may not be returned to him (it would serve as an exhibit) until the case is disposed of, if at all. In any event, if convicted, he will be declared to be unfit to possess a firearm in terms of s 103(1) of the Firearms Control Act 60 of 2000. The danger posed by this firearm has abated. There was no suggestion that he has other firearms.
  - (d) It is common cause that the appellant does not have any previous convictions and no other cases pending against him. There is, therefore, no history that he is possessed of a violent disposition.
  - (e) It was common cause at the hearing that the appellant was not a flight risk. This presupposes that he would stand his trial, which is what bail aims to achieve.
  - (f) At age 67 the appellant is not a 'spring chicken' but an aging man who is somewhat discomforted by the shoulder and head injury sustained during the fracas. That he, perhaps, called it upon himself is neither here nor there. "Frail" is not his apt characterisation.
  - (g) The appellant undertook not to interfere with state witnesses. He has been furnished with a list of them. If he does, he knows the consequences, which could be attached to his bail conditions.
  - (h) The case is unlikely to be disposed of soon. Mention was made of further investigation. This will be followed by a pre-trial conference. Detention will also hamper his unimpeded proposed medical treatment.
  - (i) Suitable bail conditions are an additional safeguard.
- [19] It is worth mentioning that accused number 2, for different considerations, has been admitted to bail in the amount of R5 000 on the following conditions: that she may not have any contact, directly or indirectly, with the state witnesses; that she may not, directly or indirectly, intimidate the state witnesses; that she may not, directly or indirectly, interfere with the investigations in this case; that she is to report to the Kimberley Police Station once a month between 08:00 in the morning and 18:00 in the afternoon until the case is finalised; that she attend court on the days directed by the court and must remain in attendance until excused by the court. Should she fail to adhere to these conditions, her bail will be cancelled and she will be remanded in custody.

[20] For the foregoing reasons I am satisfied that the Magistrate misdirected himself and that it is in the interests of justice that the appellant be admitted to bail. His decision accordingly stands to be set aside.

[21] The evidence shows that the accused has an income of R22 000 per month derived from rental collected. I am of the view that he could afford an amount of R10 000 for bail.

[22] In the result the following order is made:

1. The appeal is upheld.
2. The appellant is admitted to bail in the amount of R10 000.
3. The appellant may not have any contact, directly or indirectly, with the state witnesses.
4. The appellant may not, directly or indirectly, intimidate the state witnesses.
5. The appellant may not, directly or indirectly, interfere with the investigations in this case.
6. The appellant is to report to the Kimberley Police Station once a month between 08:00 in the morning and 18:00 in the afternoon until the case is finalised.
7. The appellant is to attend court on the days directed by the court and must remain in attendance until excused by the court. The next court date is 18 February 2025.
8. Should the appellant fail to adhere to the conditions, his bail will be cancelled and he will be remanded in custody.

MC MAMOSEBO

ACTING DEPUTY JUDGE PRESIDENT

NORTHERN CAPE DIVISION

For the appellant Adv. JK Mongala Instructed by: Moribe Attorneys For the defendants: Adv. MZC Englbrecht Instructed by: Office of the Director Public Prosecutions

- [1] Section 50(1)(d)(ii) provides Procedure after arrest (1)(a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.
- (d) If the period of 48 hours expires- (ii) or will expire at, or if the time at which such period is deemed to expire under subparagraph (i) or (iii) is or will be, a time when the arrested person cannot, because of his or her physical illness or other physical condition, be brought before a lower court, the court before which he or she would, but for the illness or other condition, have been brought, may on the application of the prosecutor, which, if not made before the expiration of the period of 48 hours, may be made at any time before, or on, the next succeeding court day, and in which the circumstances relating to the illness or other condition are set out, supported by a certificate of a medical practitioner, authorise that the

arrested person be detained at a place specified by the court and for such period as the court may deem necessary so that he or she may recuperate and be brought before the court: Provided that the court may, on an application as aforesaid, authorise that the arrested person be further detained at a place specified by the court and for such period as the court may deem necessary;

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[2] Record p 55 line 14 - 24

[3] S v Viljoen 2002 (2) SACR 550 (SCA) para 25

[4] Ibid para 12

[5] S v Pienaar 1992 (1) SACR 178 (W) at 180h - i

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