

SOUTH AFRICA / JUDGMENT

Moolman v S (A02/2025) [2025] ZAGPJHC 218 (6 March 2025)

[2025] ZAGPJHC 218

COURT

South Gauteng High Court, Johannesburg

BEFORE

Dosio

CASE / FILE NUMBER

A02/2025

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

4

March 2025

CASE

NUMBER: A02/2025

In

the matter between: JOHANNES
 ALBERTUS MOOLMAN
 Appellant
 and
 THE
 STATE
 Respondent

Coram: DOSIO J

Heard: 5 and 6 February 2025

Delivered: 4 March 2025
 ORDER
 The
 appeal of the appellant is dismissed.

JUDGMENT

DOSIO J:

Introduction

- [1] This is an appeal against the refusal of bail in the Fochville Magistrate Court. The bail application commenced on 11 December 2024 and was completed on 19 December 2024.
- [2] The appellant was legally represented.

Background

- [3] The appellant is arraigned on five charges. Count one is a contravention of s3(1)(a) read with s1 and 3(1) and 3(2) of the Criminal Matters Amendment Act 18 of 2015 ('Act 18 of 2015'), read with part II of schedule 2 of the Criminal Law Amendment Act 105 of 1997, in that it is alleged the accused tampered with, damaged or destroyed, a transformer with serial number P[...] (50 KVA) near

plot [...] on 2[...] L[...] Farm in the district of Merafong. Count two is a contravention under the same s(3)(1) and 3(2) of Act 18 of 2015, where it is alleged the accused tampered with, damaged or destroyed a transformer, with serial number 0[...] (100 KVA), at the same address mentioned in count one. Count three is a contravention of s3(1) and s3(2) of Act 18 of 2015, where it is alleged the accused tampered with, damaged or destroyed a transformer, with serial number 0[...] (100 KVA), at the same

address mentioned on count one. Count one, two and three occurred during the period 13 January 2020 to 3 December 2024. Count four is a charge of theft committed on 3 December 2024 at the same address, where it is alleged that the accused stole 119 city power meter boxes each valued at R4000-00. Count five is a charge of theft in that it is alleged during the period 13 January 2020 to 3 December 2024 the accused stole electricity to the value of R662013-00 from Eskom or Douglas Henry Basuford.

- [4] The bail application was dealt with under the ambit of schedule 6 of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977') and was opposed by the respondent.
- [5] During the bail application, the appellant did not testify. Instead, an affidavit in support of his application was read out by his legal representative and handed in. The respondent led the evidence of the investigating officer.

Grounds of appeal

- [6] The following grounds of appeal were raised:
 - (a) That the court a quo erred and misdirected itself in refusing the appellant's application for bail.
 - (b) That the court a quo erred in finding that there is a likelihood that the appellant will interfere with investigations and/or witnesses, despite evidence to the contrary that the appellant does not know the State witnesses and that he never interfered with investigations and/or witnesses.
 - (c) That the court a quo erred and misdirected itself in failing to give proper regard to the fact that the State did not allege that the appellant is a flight risk, a danger to society, that there is a likelihood that the appellant would commit further offences, or that his release will bring the administration of justice into disrepute.
 - (d) That the court a quo misdirected itself by emphasizing the seriousness of the offence while failing to give adequate consideration to the personal circumstances of the appellant.
 - (e) That the court a quo erred and misdirected itself in finding that the appellants age of 80 years and his state of health do not constitute exceptional circumstances.
 - (f) That the court a quo erred and misdirected itself by totally disregarding the fact that the prison or detention facilities do not have the adequate infrastructure to cater to the appellant's health condition.
 - (g) That the court a quo erred and misdirected itself by failing to properly consider the availability of appropriate bail conditions that could mitigate any potential risk.

Personal circumstances of the appellant

- [7] The appellant's personal circumstances, placed on record before the court a quo, are as follows:

- (a) He is 80 years old and a trustee to the Moolman's family trust. The trust has in its possession a farm that is approximately 200 hectares and there are about 100 people residing on the property. The farm also has six hundred houses, twenty businesses and three taverns.
- (b) It was contended that he suffers from elevated blood pressure and a disease of the peripheral nerves and peripheral neuropathy, due to his nervous system being damaged, which affects his movement, organ function and gland function.
- (c) He also suffers from osteo-arthritis, which affects many of his joints, namely, the spine, his knees, his hips, the base of his thumb and the tips of his fingers. This is a chronic condition causing him much pain, stiffness, swelling and limited movement.
- (d) He also suffers from an enlarged prostate which can result in blocking the flow of urine to his bladder which is indicative of prostate cancer.
- (e) It was contended his doctors have advised him that any stressful situations can worsen his joint problems and a failure to take his medication will expose him to the risk of a heart attack, heart failure and even death.
- (f) Two letters from his doctors were attached.
- (g) The appellant was moved from the Fochville Police Station to the Potchefstroom prison which is closer to the clinic.
- (h) It is alleged the prison facilities are not sufficient to cater for the appellant's health requirements.
- (i) The appellant is a widower with two adult children. He earns an income of R6000-00 per month.
- (j) The appellant has resided in the district of Merafong for the past 50 years.
- (k) He does not have a passport and does not own any property outside the Republic of South Africa.
- (l) The witnesses in this matter are unknown to the appellant.
- (m) He undertakes to not have any contact with any witnesses in this matter.
- (n) He has a previous conviction of murder where he was sentenced to ten years imprisonment in 2022. He appealed the decision and was granted bail pending the appeal in the Supreme Court of Appeal.
- (o) He has no other pending matters against him.
- (p) He is able to provide an alternative address where he can stay should bail be granted.
- (q) He had R1000-00 for bail.

Evidence on behalf of the respondent

- [8] The respondent led the evidence of the investigating officer who has sixteen years of service in the South African Police Services and who is stationed at the National Head Office for Organised Crime. He stated the total of the value of the charges arraigned against the accused amount to R7.1 million.
- [9] The charges against the appellant arise due to the appellant connecting the electricity to his farm after Eskom disconnected it in
2018. When the Eskom personnel tried to access the farm, the appellant denied them access. Eskom has failed to disconnect the electricity. It appears the appellant also illegally connected electricity to more than 500 shack dwellers on his farm. He collected money from these dwellers but did not pay Eskom. In one of the properties of the appellant, 119 City Power metre boxes were found. There were also forty-seven semi-metre boxes found which are used to distribute electricity. The investigating officer confirmed that the value of the 119 metre boxes totalled R476 000-00 and that the amount owed to Eskom for electricity was around R6 million. He stated taking into consideration the damage to the three transformers, as well as the theft of the 119 metre-boxes, as well as the amount owed to Eskom, that the total value was around R7.1 million. The crimes were committed with the help of others and more charges may still be added.
- [10] According to the investigating officer, the accused was sentenced before for two murders, three attempted murders and one kidnapping charge. The appellant is currently on bail pending appeal of these convictions.
- [11] The tampering of the electricity facilities at the appellants farm were committed whilst the appellant was on bail pending appeal and also arise as far back as 2018.
- [12] The investigating officer stated that if the appellant is granted bail, his life will be in danger due to more than 500 aggrieved dwellers on his farm who may want to attack him. He also had an objection to the appellant moving to an alternative address if granted bail.
- [13] The appellant was moved from the Fochville Police Station to the Potchefstroom Prison.
- [14] The investigating officer was adamant that there is a strong case against the appellant.

Legal principles

- [15] Section 60(11)(a) of Act 51 of 1977 states:

‘Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-:

- (a) 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.’

[16] In the context of s60(11)(a) of Act 51 of 1977, the concept ‘exceptional circumstances’, has meant different things to different people. In *S v Mohammed*[1] (‘Mohammed’), it was held that the dictionary definition of the word ‘exceptional’ has two shades of meaning: The primary meaning is simply: ‘unusual or different’. The secondary meaning is ‘markedly unusual or specially different’. In the matter of Mohammed,[2] it was held that the phrase ‘exceptional circumstances’ does not stand alone. The accused has to adduce evidence which satisfies the court that such circumstances exist ‘which in the interests of justice permit his or her release’. The proven circumstances have to be weighed in the interests of justice. The true enquiry is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the appellant’s release on bail.

[17] In so far as the weakness of the State’s case in a bail application is concerned, the Supreme Court of Appeal in the matter of *S v Mathebula*[3] (‘Mathebula’) held that:

‘...In order successfully to challenge the merits of such a case in bail proceedings as applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge...[4]

[18] In the matter of *S v Smith and Another*,[5] the court held that:

‘The Court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that interests of justice will not be prejudiced thereby’.[6]

[19] In the matter of *S v Rudolph*,[7] the Supreme Court of Appeal stated that in respect to schedule 6 offences:

‘The section places an onus on the appellant to produce proof that exceptional circumstances exist which in the interests of justice

permit his release. It contemplates an exercise which the balance between the liberty interests of the accused and the interests of society in denying the accused bail, will be resolved in favour of the denial of bail, unless exceptional circumstances are shown by the accused to exist’.[8]

[20] In *S v Bruintjies*[9] (‘Bruintjies’), the Supreme Court of Appeal stated that:

‘(f) The appellant failed to testify on his own behalf and no attempt was made by his counsel to have him testify at the bail application.

There was thus no means by which the Court a quo could assess the bona fides or reliability of the appellant save by the say-so of his counsel’.[10]

[21] In *Mathebula*,[11] the Supreme Court of Appeal stated that:

‘In the present instance the appellant’s tilt at the State case was blunted in several respects: first, he founded the attempt upon affidavit evidence not open to test by cross-examination and, therefore, less persuasive’.[12]

Evaluation

- [22] Presumption of innocence is an important consideration, but a court needs to look holistically at all the circumstances presented in a bail application.
- [23] In terms of s65(4) of Act 51 of 1977, the court hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong.[13]
- [24] The appellant bears the onus to satisfy the court, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his release.[14] A mere denial of the considerations and/or probabilities of events, as contained in s60(4) – (9) of Act 51 of 1977, would not suffice in order to succeed in convincing the court of the existence of exceptional circumstances, in order for bail to be granted.
- [25] The appellant did not present viva voce evidence in order to discharge the onus. He sought to rely on an affidavit accepted as an exhibit in the bail proceedings.
- [26] As stated in the case of Bruintjies[15] and Mathebula,[16] evidence on affidavit is less persuasive than oral evidence. The denial of the appellant rested solely on his say-so with no witnesses or objective probabilities to strengthen his version. As a result, the State could not cross-examine the appellant to test the veracity of the averment in his affidavit. This affects the weight to be attached to the averments made in the affidavit as the probative value of the affidavit could not be tested.
- [27] This court has considered the state of the appellant's health and has considered whether the court a quo misdirected itself in not analysing the medical reports that were handed up, appropriately.
- [28] The court a quo stated that as regards the medical reports that were handed up.
- ‘... the reports do not say anything about the deteriorative stage, or health of the respondent, or sorry of the applicant’.
- [29] During the appeal before this court, I raised the question that the medical reports handed up to the court a quo were old medical reports with no updated medical reports. The matter was postponed to the following day for the appellant's counsel to obtain proper instructions in this regard. On the return date, the appellants counsel stated that no new and updated medical reports were ever handed in during the bail application in the court a quo.
- [30] The respondents counsel stated that the appellant had been seen by a clinical psychologist at the correctional facility in Potchefstroom on 5 and 17 December 2024 and seen by doctor Desai on 8 and 22 January 2025. According to the respondent's counsel, the appellants medication was being sourced by a pharmacy in Krugersdorp.

- [31] As a result, there was no medical evidence in the court a quo or before this court to suggest that the appellants medical condition has deteriorated further or that he will not be able to stand trial.
- [32] Had the appellant been suffering from a life-threatening illness, such evidence should have been placed before the court a quo. This was not done. The only medical evidence handed up in the court a quo, were letters from Doctor Fernandez Silva dated 5 December 2024 and 11 November 2024. This doctor was not called in the court a quo to substantiate why the appellant is suffering from a life-threatening illness.
- [33] In the matter of *S v Van Wyk*, [17] the Supreme Court of Appeal held that a medical condition should be taken into account together with other factors in order to determine whether there are exceptional circumstances to allow the applicant out on bail. The medical condition cannot be the only factor, as the appellant has other remedies to deal with the situation.
- [34] The first appellant is not left without a remedy. He can invoke his right to adequate medical care and access to a chosen medical practitioner in terms of s35(2)(e) and (f) of the Constitution of the Republic of South Africa Act 108 of 1996, whilst incarcerated, if he is not satisfied with the medical attention he is receiving.
- [35] Accordingly, this court does not find his medical condition to be of such a nature to amount to exceptional circumstances.
- [36] Even if this court is wrong in this regard, the provisions of s60(4)(a) to (e) of Act 51 of 1977, must be considered.
- [37] Section 60(4) of Act 51 of 1977 states:
- ‘(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:
- (a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;
- [Para (a) substituted by s 4(c) of Act 85 of 1997 (wef 1 August 1998) and by s 4(c) of Act 12 of 2021 (wef 5 August 2022).]
- (b) 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
- (c) where there is the likelihood that the accused, if her or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

- (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;
- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.' [my emphasis]

[38] Section 60(5) of Act 51 of 1977 states:

'(5) In considering whether the grounds in subsection (4)(a) have been established, the court may, where applicable, take into account the following factors, namely-

- (a) the degree of violence towards others implicit in the charge against the accused;
- (b) any threat of violence which the accused may have made to a person against whom the offence in question was allegedly committed or any other person;
- (c) any resentment the accused is alleged to harbour against a person against whom the offence in question was allegedly committed or any other person;
- (d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;
- (e) any disposition of the accused to commit-
 - (i) offences referred to in Schedule 1; ...
- (f) the prevalence of a particular type of offence;
- (g) any evidence that the accused previously committed an offence-
 - (i) referred to in Schedule 1; ...' [my emphasis]

[39] As regards section 60(5)(d) OF Act 51 of 1977, the appellant was convicted on 1 March 2022 of the following crimes, namely:

Count one: murder

Count two: murder

Count three: murder

Count four: attempted murder

Count six: attempted murder

Count seven: kidnapping

[40] The appellant was sentenced on 1 March 2022 as follows:

Count one: ten years imprisonment half of which was suspended for a period of five years on condition he was not again found guilty of murder committed during the period of suspension.

Count two: ten years imprisonment half of which five years were suspended on condition he was not found guilty of murder committed during the period of suspension. Neither the appellant or respondent's counsel could give this court the exact sentences imposed in respect to counts three, four, six and seven, however, it is clear such sentences were most probably sentences of direct imprisonment.

[41] The respondent's counsel stated that the current set of facts relate to the previous convictions in that the same residents on the appellant's farm previously complained and as a result, a confrontation previously arose. During this previous confrontation, the appellant shot randomly into the crowd and five people were injured, of which two died. One of the protestors were also kidnapped by the appellant.

[42] Even though these previous convictions and sentences are being appealed against, the fact remains that in terms of section 60(5)(b) and 60(5)(c) of Act 51 of 1977, it is clear that the appellant has previously uttered threats against these dwellers on his farm and harbours resentment towards them. In addition, in terms of section 60(5)(d), the appellant, as a result of his previous convictions, has a disposition to violence.

[43] In terms of section 60(6) of Act 51 of 1977

‘(6) In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors, namely—

- (a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
- (b) the assets held by the accused and where such assets are situated;
- (c) the means, and travel documents held by the accused, which may enable him or her to leave the country;
- (d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
- (e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;
- (f) the nature and the gravity of the charge on which the accused is to be tried;
- (g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;
- (h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
- (i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or

(j) any other factor which in the opinion of the court should be taken into account.’ [my emphasis]

[44] During the bail application in the court a quo it was stated that the appellant had another address where he could stay if bail was granted. However, it is common cause that during the bail application in the court a quo no alternative address was given for the investigating officer to investigate. In addition, it is common cause that the appellant is in charge of this farm, so the likelihood of finding alternative accommodation is unlikely and never placed before this court for consideration.

[45] The respondent’s counsel stated that the investigation is still not complete. Considering the appellants previous actions of damaging and destroying transformers, it is not in the interests of justice to release him. The charges are serious and should the appellant be found guilty, the gravity of the punishment to be imposed, will most likely be direct imprisonment.

[46] Section 60(8) of Act 51 of 1977 states as follows:

‘(8) In considering whether the ground in subsection (4)(d) has been established, the court may, where applicable, take into account the following factors, namely—

- (a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;
- (b) whether the accused is in custody on another charge or whether the accused is on parole;
- (c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or
- (d) any other factor which in the opinion of the court should be taken into account.’ [my emphasis]

[47] Not only has the appellant a disposition to violence, but he also mislead the court a quo into believing that he only had one previous conviction of murder for which he was sentenced to ten years imprisonment.

[48] Section 60(8A) of Act 51 of 1977 states as follows:

‘(8A) In considering whether the ground in subsection (4)(e) has been established, the court may, where applicable, take into account the following factors, namely—

- (a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;
- (b) whether the shock or outrage of the community might lead to public disorder if the accused is released;
- (c) whether the safety of the accused might be jeopardised by his or her release;

- (d) whether the sense of peace and security among members of the public will be undermined or jeopardised by the release of the accused;
- (e) whether the release of the accused will undermine or jeopardise the public confidence in the criminal justice system; or
- (f) any other factor which in the opinion of the court should be taken into account.’ [my emphasis]

[49] The respondent’s counsel stated that if bail is granted the dwellers on the appellant’s farm will most likely rise up against him once again and that the appellant’s own safety cannot be guaranteed. The respondent’s counsel repeated that the dwellers on the appellant’s farm are angry that the appellant took their money and never paid Eskom.

[50] This court finds no exceptional circumstances that warrant granting the appellant bail.

[51] In the matter of *S v Mosoanganye and another*, [18] the Supreme Court of Appeal held that:

‘It is important to bear in mind that the decision whether or not to grant bail is one entrusted to the trial judge because that is the person best equipped to deal with the issue having been steeped in the atmosphere of the case.’ [19]

[52] After perusal of the record of the court a quo, this court finds that there is no persuasive argument to release the appellant on bail. The court a quo was fully aware of the appellant’s personal circumstances and considered them. The appellant has not successfully discharged the onus as contemplated in s60(11)(a) of Act 51 of 1977 that there are exceptional circumstances which permit his release on bail. Accordingly, there are no grounds to satisfy this court that the decision of the court a quo was wrong.

Order

[53] In the result, the appeal of the appellant is dismissed.

D DOSIO

JUDGE OF THE HIGH COURT

JOHANNESBURG

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APPEARANCES

ON BEHALF OF THE APPELLANT: Mr Mbavhalelo Gerson Mmbadi

(Attorney with right of appearance)

Instructed by Joncto and Zondi

Inc Attorneys

ON BEHALF OF THE RESPONDENT: Adv. L. Mashabela

Instructed by the Office of the National

Director of Public Prosecutions

[1] S v Mohammed 1999 (2) SACR 507 (C)

[2] Ibid

[3] S v Mathebula 2010 (1) SACR 55 (SCA)

[4] Ibid para 12

[5] S v Smith and Another 1969 (4) SA 175 (N)

[6] Ibid 177 e-f

[7] S v Rudolph 2010 (1) SACR 262 (SCA)

[8] Ibid para 9

[9] S v Bruintjies 2003 (2) SACR 575 (SCA)

[10] Ibid para 7

[11] Mathebula (note 3 above)

[12] Ibid page 59 B-C

[13] S v Rawat 1999 (2) SACR 398 (W)

[14] S v Mabena and Another 2007 (1) SACR 482 (SCA) and S v Van Wyk 2005 (1) SACR 41 (SCA)

[15] Bruintjies (note 9 above)

[16] Mathebula (note 11 above)

[17] S v Van Wyk 2005 (1) SACR (SCA)

[18] S v Mosoanganye and another 2012 (1) SACR 292 (SCA)

[19] Mosoanganye (note 7 above) para 15

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