Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No:	CA&R 55/23
Date Heard:	23 November 2023
Date Delivered:	8 December 2023

In the matter between:

LUKHANYO MTHOMBENI **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Olivier AJ

JUDGMENT

OLIVIER AJ

INTRODUCTION:

1. This is an appeal against the refusal by the Hopetown District Court Magistrate, Mr. Coetzee, to afford bail pending the trial of the Appellant in Hopetown Case number RC19/23.

2. It is alleged on behalf of the Appellant that the Court *a quo* had erred in:

2.1 Ruling only during judgment on the applicable schedule that regulates the test to be applied in the application for bail, without affording the parties the opportunity to lead further evidence after the final ruling;

2.2 Not taking into account and/or under-emphasizing the factors set out in ***Sections 60(4)(a)*** to ***60(4)(e)*** of the Criminal Procedure Act[1] (herein after referred to as "*the CPA*");

2.3 Not taking into account that the Respondent failed to show that any of the factors set out in the above sections of the CPA are likely to occur if the Appellant is indeed released on bail;

2.4 Not weighing up the interests of justice against the Appellant's right to personal freedom and in particular the prejudice that the Appellant is likely to suffer should he be detained in custody as required by ***Section 60(9)*** of the CPA;

2.5 Over-emphasizing the seriousness of the offence and moving from the incorrect starting point namely that the Appellant had indeed committed the alleged offence and that he is a danger to society;

2.6 Finding that the Appellant will "*for sure*" commit the same offence, should he be released on bail;

2.7 Finding that the Appellant failed to prove that exceptional circumstances exist which in the interests of justice permit his release on bail;

[1]Act 51 of 1977.

2.8 Failing to find that the factors that were placed before the Court are in fact exceptional which, in the interests of justice, permit the Appellant's release on bail; and

2.9 Failing to afford bail to the Appellant pending the finalization of his trial.

3. The National Director of Public Prosecutions opposes this appeal.

4. Mr. Nel, who appeared for the Appellant, contended in his Heads of Argument that the primary issues that this Court needs to consider and determine are:

4.1 Whether the Court *a quo* misdirected itself in making a final ruling on the applicable schedule only during the judgment stage without affording the parties the opportunity to present further evidence on the issue; and

4.2 Whether the Court a quo materially misdirected itself and came to the incorrect conclusions and as a result, made an incorrect order in denying bail to the Appellant.

5. It should be stated that during argument, Mr. Nel conceded that the manner in which the Magistrate reached the decision as set out in paragraph 4.1 herein above, namely that the Appellant's bail application should be decided against the backdrop of him committing a Schedule 6 offence, did not materially affect the position of the Appellant in as far as the question whether or not bail should be afforded and that same should in effect be seen only as a possible procedural error committed by the learned Magistrate.

I tend to agree with Mr. Nel in this respect seeing that robbery with aggravating circumstances as alleged by the State, is *per se* a Schedule 6

offence in terms of the CPA and I can therefore not fault the Magistrate's decision in this regard.

I will consequently not deal with this issue any further and will proceed in dealing with the question whether the Magistrate was correct in denying bail to the Appellant, in terms of the relevant principles applicable to Schedule 6 offences.

BACKGROUND:

6. The Appellant (together with 2 (two) others)[2] was charged with the crime of robbery with aggravating circumstances and it is alleged by the State that on or about 15 January 2023, the accused persons unlawfully and intentionally assaulted another person and dispossessed said person of his property or belongings.

The further allegations are that, in the above process, the accused persons made use of a firearm and also that the assault had caused the victim grievous bodily harm.

7. It is common cause that at the commencement of the matter on 24 January 2023 before the learned Magistrate Coetzee, the Prosecutor submitted to the Court that the crime of which the Appellant was accused, was in fact a Schedule 6 offence. It is also common cause that on the said date, an application for bail was lodged on behalf of *inter alia* the Appellant and that the application was eventually denied.

8. It is this last-mentioned decision of the Court *a quo* with which the Appellant takes umbrage on the grounds set out herein above.

9. During the bail hearing in the Court *a quo*, a sworn affidavit by the Appellant was read into the record by his legal representative, in which the Appellant's

[2]It appears from the record of the proceedings in the Court *a quo* that the Appellant was referred to as Accused 1.

personal circumstances (to which I will return again herein later) were set out and in which the Appellant stated under oath:

9.1 That he will not endanger the public safety or the safety of any particular person whilst on bail;

9.2 That he will not commit an offence whilst on bail;

9.3 That he will not evade his trial;

9.4 That he will not interfere with any witness or attempt to conceal evidence;

9.5 That he will not attempt to jeopardise the objectives or proper functioning of the criminal justice system which would include the bail system; and

9.6 That he will adhere to any conditions of bail set by the Court.

10. The Appellant furthermore indicated that he will be able to afford bail in the amount of R500.00 (Five Hundred Rand) and the Appellant also admitted to one previous conviction of a similar nature.

11. The Prosecutor, in opposition to the application for bail, made use of one witness, namely the Investigating Officer in the matter who, in summary and in as far as the Appellant was concerned, testified as follows:

11.1 That, on the day prior to the alleged armed robbery, the Appellant was seen at a filling station whilst driving the Toyota Hilux motor vehicle that was witnessed at the scene of the armed robbery in question;

11.2 That on the day subsequent to the alleged robbery and when he was pulled over by officials, the Appellant was driving a Mercedes Benz motor vehicle;

11.3 That some of the goods that were allegedly stolen during the armed robbery, were found in the said Mercedes Benz vehicle and that, apart from the Appellant, the Mercedes Benz vehicle was also occupied by two of the other alleged perpetrators;

11.4. That the firearms that were allegedly used during the armed robbery, were not found in the Mercedes Benz vehicle with the Appellant, but in the Toyota Hilux vehicle that was driven by the Appellant the day before;

11.5 That the Appellant had a previous charge of robbery which was withdrawn;

11.6 That the Appellant had two further pending matters against him, to wit, an allegation of possession of a firearm and ammunition as well as an allegation of involvement in a cash in transit robbery; and

11.7 That he was worried that the Appellant might commit a further crime whilst out of bail.

12. During cross-examination, the above Investigating Officer conceded that one of the alleged pending matters against the Appellant, was in fact removed from the Court roll and is therefore no longer pending against the Appellant.[3]

The investigating officer furthermore conceded that the cash in transit allegation against the Appellant might also not be pending and it appears from the record that the position in respect of this alleged charge against the Appellant seemed to be uncertain.

13. In as far as the Appellant is concerned, the following remarks made by the learned Magistrate Coetzee in his judgment, are apposite:

"*Accused 1 and 2 as far as the offence is concerned, the Court finds that the offence is a Schedule 6 offence. The reason therefore is that it was an armed robbery … where firearms were used; an armed robbery. As far as*

[3]Reference was made to the alleged crime of possession of a firearm and ammunition.

accused 1 is concerned, he is not a first offender. He has a robbery case where he served three years' imprisonment since 2019 … The Court also find that both accused are prima facie *linked to this case. The car with which the armed robbery took place was stopped in Bloemhof after it was tracked by cameras along the N12. The two accused … were found in the car with the same goods that were stolen here in Hopetown. The Court also find* (sic) *it common cause that no exceptional circumstances was proved* (sic) *by any of the accused. As far as Section 60(4)(a) to (e) is concerned, the Court finds in the manner how this robbery was planned and executed, clearly people that travel from Tembisa and accused 2 travelling from Mozambique, and the way that they robbed a small place like Hopetown, the Court find* (sic) *both of these accused a danger to society. As far as accused 1 is concerned he also for sure will commit this crime again if the Court released him on bail, especially in the light of his previous conviction … The Court is then satisfied that both accused does* (sic) *not qualify for bail.*"

The inference that might be drawn from the fact that the Magistrate only referred to the Appellant's one previous conviction during his judgment on bail, so it was submitted by Mr. Nel, is because of the confusion that appeared to reign about any other previous convictions and/or further pending matters.

Whether I agree with Mr. Nel or not is in fact irrelevant because it appears that the learned Magistrate, in reaching his eventual decision to refuse bail to the Appellant, only took cognizance of the one previous conviction that was admitted to by the Appellant.

LEGAL PRINCIPLES AND MERITS:

14. It is common cause that persons not only have the right to freedom and the right not to be deprived of that freedom arbitrarily and without just cause[4], but it is also common cause that a person who has been arrested for allegedly committing a crime, has the right to be released *"… if the interests of justice permit, subject to reasonable conditions."*[5] (My omissions and underlining)

15. It is furthermore common cause that an accused person who applied for and who was refused bail by a lower Court, may appeal such refusal to a

[4]See **Section 12(1)(a)** of the Constitution of the Republic of South Africa, 1996 ("*the Constitution*").
[5]See **Section 35(1)(f)** of the Constitution.

Superior Court that has jurisdiction and it is also common cause that such appeal may be heard by a single Judge.[6]

It is also common cause that the local division of the Supreme Court in the area of jurisdiction of the lower Court in question, shall have the necessary jurisdiction in such bail appeal.[7]

The jurisdiction of this Court to hear this bail appeal is therefore not in question and it was also not argued to the contrary by any of the parties' legal representatives.

16. ***Section 60(1)(a)*** of the CPA states as follows:

"*An accused who is in custody in respect of an offence shall … be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.*" (My omissions)

17. In terms of ***Section 60(4)*** of the CPA however, it is stated that the interests of justice will not permit the release of an accused on bail if a likelihood exists that such an accused, if released on bail:

17.1 Will endanger the safety of the public at large or the safety of any person against whom the alleged offence was committed or any other particular person or if the accused will commit a Schedule 1 offence;

17.2 Will attempt to evade his/her trial;

17.3 Will attempt to influence or intimidate witnesses or to destroy or conceal evidence;

17.4 Will undermine or jeopardize the objectives or the proper functioning of the criminal justice and bail systems; or

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[6]See **Section 65(1)(a)** and **(b)** of the CPA.
[7]**Rule 65(1)(c)** of the CPA.

17.5 Will disturb the public order or undermine the public peace or security.[8]

18. ***Sections 60(5)***, ***(6)***, ***(7)***, ***(8)*** and ***(8A)*** of the CPA set out the factors which a Court may, where applicable, take into consideration when considering whether the respective grounds in ***Section 60(4)*** have been established.

19. If regard is had to the reasoning of the learned Magistrate Coetzee when bail was refused to the Appellant, it appears that the Magistrate based his eventual decision on the following:

19.1 That the offence for which the Appellant was being charged, is a serious offence since firearms were allegedly used in the commission thereof;

19.2 That the Appellant was not a first-time offender;

19.3 That the Appellant did not manage to show that exceptional circumstances existed to warrant his release on bail; and

19.4 That the Appellant posed a threat to society and that the Appellant, if released on bail, will definitely commit a similar offence again.

20. Given the above and in as far as the grounds set out in ***Sections 60(4)(a)*** to ***(e)*** of the CPA are concerned, in other words the grounds that would, in the interests of justice, not permit the release of the Appellant on bail, it appears that only the provisions of ***Section 60(4)(a)*** might have been in the back of the Magistrate's mind when the ruling not to afford bail to the Appellant was made, since the record of the proceedings in the Court *a quo* does not reflect any evidence or indication that the Appellant, if released on bail, would:

20.1 Attempt to evade his/her trial;

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[8] See **Section 60(4)(a)** to **(e)** of the CPA.

20.2 Attempt to influence or intimidate witnesses or to destroy or conceal evidence;

20.3 Undermine or jeopardize the objectives or the proper functioning of the criminal justice and bail systems; or

20.4 Disturb the public order or undermine the public peace or security.

The learned Magistrate however did not specifically state in his judgment that he made the decision to refuse bail to the Appellant based on ***Section 60(4)(a)*** of the CPA and it appears from the record that the State also did not present any evidence that the grounds referred to in ***Section 60(4)(a)*** of the CPA are applicable in this instance apart from the testimony by the Investigating Officer that he is concerned that the Appellant might commit a similar offence whilst on bail.

I am afraid however that the Investigating Officer's unsubstantiated concern in this instance, does not pass muster and I can also not fathom how this unsubstantiated concern, moved the Court *a quo* to make a finding that the Appellant would "*for sure*" commit a similar offence if he was to be released on bail.

21. It should furthermore be mentioned that the sworn affidavit referred to by me in paragraph 10 *supra* as well as the contents thereof, is not even mentioned in the judgment by the Court *a quo* and it appears that said contents as well as the Appellant's personal circumstances were not considered by the Court *a quo* before coming to the conclusion that bail should be refused.

From the record of the proceedings in the Court *a quo*, it furthermore appears to be common cause that none of the factors referred to in ***Sections 60(5)***, ***(6)***, ***(7)***, ***(8)*** and ***(8A)*** of the CPA were discussed and/or considered by the learned Magistrate.

22. In summary therefore, I am left with the following conundrum in considering the question as to whether the Court *a quo* was wrong in refusing bail to the

Appellant and in considering whether bail should in fact be extended to the Appellant:

22.1 The State, in the proceedings in the Court *a quo* and indeed also in the proceedings during the appeal, did not manage to prove/establish any of the grounds as set out in ***Section 60(4)*** of the CPA that would preclude the Appellant from being granted bail;

22.2 The Court *a quo* based its eventual decision to refuse bail to the Appellant on the belief of the Investigating Officer that the Appellant, if released on bail, will commit a similar offence which the Court *a quo* then found to be a fact[9];

22.3 The Court *a quo* found that the Appellant did not manage to show that exceptional circumstances exist that would entitle him to be released on bail without even referring to what exceptional circumstances in this instance would entail and without explaining how this finding was reached;

22.4 The case for the Appellant in the proceedings in the Court *a quo* was based solely on his affidavit that was read into the record and no further evidence by either the Appellant or by someone on his behalf was placed before the Court; and

22.5 That apart from one previous conviction of a similar nature that was admitted to by the Appellant, a huge amount of confusion reigned during the proceedings in the Court *a quo* as to possible further previous convictions and/or pending criminal matters against the Appellant, hence (possibly) the reason why the learned Magistrate, in his judgment, only referred to the one previous conviction that was admitted to by the Appellant.

[9] I refer to the comment made by the learned Magistrate to the effect that the Appellant, if released on bail will "*for sure*" commit the same offence again.

23. It should be mentioned at this point that the Appellant's personal circumstances, at the time of the proceedings in the Court *a quo* and as set out in his above-mentioned sworn affidavit, were as follows:

23.1 The Appellant is 44 (forty-four) years of age;

23.2 The Appellant is married and he has four children all of whom are minors and residing with the Appellant and his wife;

23.3 The Appellant has a fixed residential address where he has been residing for nineteen years prior to the date of the bail hearing;

23.4 The Appellant completed Grade 12 at school and is self-employed and the sole breadwinner; and

23.5 The Appellant's wife and children are dependent on him financially.[10]

24. In this instance and specifically in view of the fact that the Appellant is charged with a ***Schedule 6*** offence, the Appellant would, in terms of the provisions of the CPA, not to be entitled to be released on bail up to and until the finalization of his case unless the Appellant can convince the Court thereof *"… that exceptional circumstances exist which in the interests of justice permit his release*"[11]

In my view, the current legal position is clear, namely that once it is established that an accused is being charged with a ***Schedule 6*** offence (as is the case with the Appellant in this instance), such an accused is not automatically entitled to bail (notwithstanding the provisions of *inter alia* ***Section 60(1)(a)*** of the CPA) and such an accused's right to liberty is therefore restricted up to and until he/she can convince the Court that exceptional circumstances exist that would, in the interests of justice, permit his/her release on bail.

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[10]The Appellant confirmed under oath that his wife was unemployed at the time.
[11]**Section 60(11)(a)** of the CPA.

25. Although the above provisions of ***Section 60(11)(a)*** appear to fly in the face of the abovementioned rights to liberty in terms of the Constitution, this specific provision of ***Section 60(11)*** of the CPA has been found to indeed be constitutional.[12]

26. The provisions of ***Section 60(11)(a)*** of the CPA and specifically the question as to what would constitute "*exceptional circumstances*" as required in terms of this statutory provision, has been debated, scrutinized and decided upon in numerous previous cases and I do not intend to discuss or even refer to all of same herein.

I will consequently restrain myself and attempt to refer to only those previously decided cases which I deem relevant for purposes hereof.

27. In the Appellant's case and seeing that he is being charged with a ***Schedule 6*** offence, the starting point in the proceedings in the Court *a quo* and indeed also during the proceedings in this Court, should have and should be that his continued detention is the norm.[13]

28. The *onus* is therefore on the Appellant to show, on a balance of probabilities that exceptional circumstances exist that would, in the interests of justice, permit his release on bail.[14]

This *onus* that rests on an accused and in this case the Appellant to show that these exceptional circumstances that would permit his release on bail exist, means that an accused is required to show that there are circumstances that are "*… sufficiently unusual or different in any particular case as to warrant the applicant's release.*"[15]

29. The Constitutional Court has held that:

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[12] I refer to Constitutional Court's decision in the matter of **S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat** 1999 (2) SACR 51 (CC).
[13] See **Schietekat**, *supra* at page 84.
[14] **Diseko & Others v S** [2016] ZANCHC 66 (SAFLII Reference) at paragraph [14]. Also see **Schietekat**, *supra*.
[15] See **S v Mohammed** 1999 (2) SACR 507 (CPD) at page 515.

Section 60(11)(a) does not contain an outright ban on bail in relation to certain offences, but leaves the particular circumstances of each case to be considered by the presiding officer. The ability to consider the circumstances of each case affords flexibility that diminishes the overall impact of the provision. What is of importance is that the grant or refusal of bail is under judicial control and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted."[16]

The same Court has also held that: "*… the evaluation is to be done judicially, which means that one looks at substance, not form.*"[17]

30. In the matter of ***S v Mabena***[18] the learned Nugent JA held as follows:[19]

"*The 'potential factors for and against the grant of bail' listed in the Act are no less relevant to the assessment of bail in relation to Schedule 6 offences than they are in relation to lesser offences. Before a court may grant bail to a person charged with such an offence it must be satisfied, upon an evaluation of all the factors that are ordinarily relevant to the grant or refusal of bail, that circumstances exist that warrant an exception being made to the general rule that the accused must remain in custody.*" My underlining)

and further:[20]

"*… what the law requires before bail is granted in relation to Schedule 6 offences is a proper judicial enquiry to determine whether the provisions of the Act have been met.*" (My omissions)

31. It was held in the matter of ***Schietekat***[21]:

"*… that where an accused is charged with a Sch 6 offence, the exercise to be undertaken by the judicial officer in determining whether bail should be granted is not the ordinary exercise established by ss 60(4)-(9) … in which the interests of the accused in liberty are weighed against the factors that would suggest that bail be refused in the interests of society. Section 60(11)(a) contemplates an exercise in which the balance between the liberty interests of the accused and the interest 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 … Its effect is to add weight to the scales against the liberty interests of the accused and to render bail more difficult to obtain than it would have been if the ordinary constitutional test of the 'interest of justice' were to be applied.*" (My underlining)

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[16] **Schietekat**, *supra* at page 88.
[17] **Schietekat**, *supra* at page 90.
[18] 2007 (1) SACR 482 (SCA).
[19] **Mabena**, *supra* at paragraph [6].
[20] **Mabena**, *supra* at paragraph [26].
[21] *Supra* at page 85.

32. The above was in effect echoed in the matter of ***Rudolph v S***[22] and it was then added by the learned Snyders JA as follows:[23]

> "*Exceptional circumstances do not mean that 'they must be circumstances above and beyond, and generally different from those enumerated' in subsection 60(4)-(9). In fact, ordinary circumstances present to an exceptional degree, may lead to a finding that release of bail is justified.*" (My underlining)

33. In this instance and after hearing argument on behalf of the Appellant and the State, I requested Mr. Nel to summarize what he deemed to be the exceptional circumstances in the Appellant's case that would warrant the release of the Appellant on bail.

34. Mr. Nel indicated that exceptional circumstances could be found in the personal circumstances as set out in the abovementioned affidavit that was read into the record in the proceedings in the Court *a quo* as well as in the fact that the State did not manage to show that any of the grounds as set out in ***Section 60(4)*** of the CPA were met which would entail that the Appellant should not be released on bail.

35. I refer once again to the provisions of the provisions of the CPA itself where ***Section 60(11)*** states:

> "*(11) Notwithstanding any provision of this Act, where an accused is charged with an offence –*
>
> (a) *referred to in Schedule 6, the court shall order that the accused be detained in custody … unless the accused … adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;*" (My underlining and omissions).

36. It is clear from the above, in my view, that it is incumbent on an accused to first discharge the *onus* to convince the Court that the necessary exceptional circumstances exist that would warrant his/her release on bail, before the

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[22] [2010] 2 All SA 178 (SCA).
[23] **Rudolph**, *supra* at paragraph [9].

State attracts any sort of *onus* to show cause as to why bail should not be granted.

37. The primary question therefore now is, whether the Appellant did in fact discharge the above *onus* and I find for the reasons set out below that the Appellant unfortunately did not.

38. If I am to understand the above authorities as well as the authorities referred to herein below correctly, what is expected from an accused in showing that exceptional circumstances do exist that would warrant his/her release on bail, is something more than a simple regurgitation of the accused's personal circumstances and a simple statement that said accused will not act in a manner as described by ***Section 60(4)(a)*** to ***(e)*** of the CPA.

39. I am fortified in my view by the decision of the Supreme Court of Appeal in ***Botha en 'n Ander v S***[24] where the Court *inter alia* considered what the "*exceptional circumstances*" required by ***Section 60(11)(a)*** would entail and where the Court, through Vivier ADCJ who penned the judgment, held that exceptional circumstances would entail that the normal considerations for the granting of bail set out in ***Section 60(4)*** to ***(9)*** of the CPA, in terms whereof the accused's right to liberty are weighed against those factors that would, in the interest of justice, prohibit his release on bail, no longer suffice and that a mere denial thereof that the existence of the circumstances set out in ***Section 60(4)*** to ***(9)*** is a probability, will also not suffice or to quote the learned Vivier ADCJ *verbatim*:

> *"'n Blote ontkenning van die waarskynlikheid van die gebeure in artikel 60 (4)(a)-(e) sou dus nie voldoende wees nie."*[25]

40. Mr. Nel's argument therefore that the undertakings given by the Appellant in his affidavit that was read into the record during the bail proceedings in the Court *a quo* create exceptional circumstances that would warrant the release of the Appellant on bail, can therefore not be accepted.

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[24] [2002] 2 All SA 577 (A).
[25] See **Botha**, *supra* at paragraph [18].

41. I am further fortified in my above view that the Appellant did not manage to show the required exceptional circumstances to exist by simply setting out his personal circumstances by way of affidavit, by the remark of Snyders AJ referred to in paragraph 32 *supra* and I hold the view that the Appellant should at least have presented his ordinary personal circumstances and raised it to a higher level in this instance.

42. In the matter of ***S v DV***[26] it was held by the learned Legodi J that:

"*Personal circumstances to an exceptional degree may lead to a finding that release on bail is justified.*"

The same Court held further:

"*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 interest of justice to order the release of the person of the accused.*"[27]

43. The above was put in even stronger terms by Comrie J in the matter of ***Mohammed*** where the learned Judge, with reference to the matter of ***Schietekat*** states as follows:[28]

"*… a Schedule 6 applicant for bail has a clear and definite obligation to persuade. He or she has a duty to adduce evidence of exceptional circumstances and he or she has an* onus *to satisfy the court, by the end of the bail enquiry, that exceptional circumstances exist which in the interests of justice permit the applicant's release.*" (My omissions)

The same Court held further as follows:

"*So the true enquiry, it seems to me, is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the applicant's release.*"

44. Finally the Constitutional Court also "*raised the bar*" as to what would constitute exceptional circumstances where it was held by Kriegler J as follows:

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[26] 2012 (2) SACR 492 (GNP) at paragraph [7].
[27] **S v DV**, *supra* at paragraph [8].
[28] See **Mohammed**, *supra* at page 513.

"*… an accused charged with a Sch 6 offence could establish the requirement by proving that there are exceptional circumstances relating to his or her emotional condition that render it in the interests of justice that release on bail be ordered notwithstanding the gravity of the case.*" (My omissions)

45. The above, in my view, would be in keeping with the comment of Kriegler J in ***Schietekat*** to which I have already referred to herein above, namely that the result of the provisions of ***Section 60(11)(a)*** of the CPA would be to make it a little bit more difficult for an accused charged with a more serious offence to be released on bail, than what the case would be for an accused charged with a less serious offence, in that more weight is added to the scales against the freedom of an accused in the first instance.

This, in my view, should certainly be the case especially in a country that is plagued with crime in general and specifically with violent crime.

46. I therefore can unfortunately find nothing exceptional in the Appellant's personal circumstances set out in paragraph 23 *supra* that would warrant his release on bail.

Evidence was for example not tendered on behalf of the Appellant that his taxi business cannot, for some or other reason, be run on his behalf by his wife or that he simply, also for some or other reason, had to be present in said business.

47. Although criticism can certainly be levelled at the manner in which the bail proceedings in the Court *a quo* were conducted as well as against the apparent unsubstantiated finding that was eventually reached by the learned Magistrate and although such criticism may certainly be warranted, I can find no reason, neither in the proceedings in the Court *a quo*, neither in what was submitted in the proceedings before me, that convinces me to differ with the eventual finding by the Magistrate based thereon that, in my view, the Appellant did not manage to discharge the above *onus* to persuade the

Court that sufficient exceptional circumstances exist that would, in the interests of justice, entitle him to be released on bail.

ORDER:

48. In view of all of the above, the following order is made:

The appeal is dismissed.

DATED AT KIMBERLEY ON THIS THE 8TH DAY OF DECEMBER 2023.

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OLIVIER AJ
ACTING JUDGE IN THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY

For APPELLANT:	Adv. I.J. Nel o.i.o Mtubu Attorneys **KIMBERLEY**
For RESPONDENT :	Adv. L. Pillay National Director of Public Prosecutions **KIMBERLEY**