IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO.: **CAB09/2025**

Reportable: YES / **NO**

Circulate to Judges: YES / **NO**

Circulate to Magistrates: YES / **NO**

Circulate to Regional Magistrates: YES / **NO**

In the matter between:

NKULULEKO MOSES KRAAI **APPLICANT**

And

THE STATE **RESPONDENT**

CORAM: MASIKE AJ

ORDER

(i) The application for bail pending appeal is dismissed.

JUDGMENT

MASIKE AJ

INTRODUCTION

[1] Bail proceedings are always to be heard and finalised as a matter of urgency. Though the applicant may not always be entitled to be released since section 35(1)(f) of the Constitution permits the release of an accused person on bail if the interests of justice permit. The applicant in bail proceedings is entitled at first instance to a prompt decision one way or another. (See: *Magistrate, Stutterheim v Mashiya* 2004 (5) SA 209 (SCA) at page 216E – F).

[2] This matter served before this Court on 12 September 2025, from the reading of the notice of motion, Mr Nkululeko Moses Kraai (the applicant), sought relief in the following terms:

"1. That the Applicant be granted bail in the amount of Five Thousand Rands Only (R5000.00).

2. Upon payment of the amount mentioned above, the Applicant be released from custody pending Appeal (judgment) in case number CAF 04/2024.

3. That further and/or alternative relief be granted to the Applicant."

[3] What served before this Court was an application for bail pending appeal.

BACKGROUND FACTS

[4] The applicant was arraigned and convicted in the High Court of South Africa, North West Division (the High Court) on the charges of murder (count 1), robbery with aggravating circumstances (count 2) and kidnapping (count 3).

[5] The trial was heard by the Honourable Mister Justice Lephadi AJ (the trial court Judge) and at the conclusion of the trial, the trial court Judge found the appellant guilty of the proffered charges and sentenced the appellant to 15 years in respect of count 1, 20 years in respect of count 2 and 5 years in respect of count 3. The trial court Judge further ordered that the sentences in respect of count 1 and 2 to run concurrently. The sentence in respect of count 3 was to run independently. The applicant was sentenced to an effective 25 years imprisonment. The applicant was sentenced on 7 July 2020. The applicant was further declared unfit to possess a firearm in terms of Section 103 of Act 60 of 2000.

[6] The applicant on 7 July 2020 brought an application for leave to appeal on both the conviction and sentence. The trial court Judge refused leave to appeal on both conviction and sentence.

[7] On 21 April 2021, the Supreme Court of Appeal (SCA) granted the applicant leave to appeal to the Full Court of the High Court on both the conviction and sentence.

[8] The Full Court, per: Morgan AJ, Khan AJ and Maodi AJ heard the appeal on 16 May 2025, and judgment was reserved. I was informed at the hearing of the bail application that the Full Court disposed of the appeal in terms of Section 19(a) of the Superior Courts Act 10 of 2013.

[9] The State did not oppose the appeal and before this Court, Mr Tlatsana who appeared for the State, informed the Court that the State does not oppose the application of the applicant to be admitted to bail pending appeal.

[10] In support of the application to have the applicant admitted to bail, the applicant filed an affidavit. The reading of the affidavit reveals in addition to the facts I have summarised in paragraphs 4 to 9 herein above the following:

10.1 The applicant is incarcerated at Rooigrond Correctional Centre in Mahikeng.

10.2 The bail application of the applicant falls within the ambit of schedule 6.

10.3 The applicant is 46 years of age. The applicant is permanently residing at house 1[...] M[...] B, Atamelang (the Atamelang residence) and he has been staying there since 2011. Before moving to the Atamelang residence, the applicant was residing at his parental home at 1[...] M[...] Street, Phiri Section in Soweto.

10.4 The applicant has one child who is a major aged 21 years.

10.5 The applicant has the following previous convictions:

10.5.1 On 4 September 2004, the applicant was convicted of:

Count 1: Robbery with Aggravating Circumstances and he was sentenced to 15 years imprisonment.

Count 2: Robbery with Aggravating Circumstance and he was sentenced to 15 years imprisonment.

Count 3: Assault with intent to cause grievous Bodily Harm and he was sentenced to 6 months imprisonment.

Count 4: Attempted robbery to which he was sentenced to 3 years imprisonment.

10.5.2 On 20 January 2014, the applicant was convicted of house breaking with intent to steal and theft and paid an admission of guilt fine of R 400.00.

10.6 The appellant does not have any pending matters against him and no outstanding warrants of arrest.

10.7 The applicant proclaims that he is not a flight risk and that in all of his cases he stood trial until finality. He does not possess a passport or any travel document.

10.8 The applicant was unemployed at the time of his arrest. He, however, had a registered company by the name of Doughlas D Kraai (Pty) Ltd and a clothing label company as well as catering services where on a good month he could generate an income of about R 17 000.00 for that month,

10.9 The applicant has undertaken should he be admitted to bail, to respect and honour any conditions that the court sets including signing at the nearest police station which is the Atamelang police station.

10.10 The applicant has undertaken to hand himself over to the nearest police station or correctional service centre should his appeal not succeed. He has stated that he would not abscond or evade incarceration should his appeal fail.

10.11 The applicant is of the view that his release on bail will not endanger the safety of the public, or community, including himself.

10.12 The applicant contends that his release on bail will not jeopardise the objectives of the bail system and he has undertaken not to commit other offences whilst on bail.

10.13 The applicant contends that there is a likelihood that his appeal will succeed and this constitutes an exceptional circumstance. It is further contended that it is not in the interests of justice to keep the applicant in custody whereas he has shown that his appeal has real prospects and the SCA has granted him leave to appeal.

[11] Counsel for the applicant in his heads of argument has submitted that the conviction of the applicant was premised on the evidence of Mr Tshepang Johannes Leteane (Mr Leteane), a witness that was called in terms of Section 204 of the CPA. The trial court Judge found Mr Leteane not to be honest, reliable and credible. The trial court Judge could not rely on his testimony. The evidence of Mr Leteane was further contradicted by another witness, Lesedi Mavhunga who corroborated the version of the applicant that the applicant was not present when the deceased was robbed and killed. The trial court Judge did not grant Mr Leteane indemnity from prosecution as he was found not to be frank and honest.

[12] It is the argument by counsel for the applicant that despite the findings of the trial court Judge, the court went ahead and made a finding that the applicant acted in pursuance of a common purpose with Mr Leteane to commit the crimes.

[13] Counsel for the applicant submits further that the undue delay of the appeal for a period of approximately 4 years is a further factor which this Court should consider on deciding whether the applicant should be released on bail. It is contended on behalf of the applicant that considering this factor, together with

the more than reasonable prospects of success outlined in the affidavit of the applicant, this court is implored to find the applicant on a balance of probabilities established exceptional circumstances do exist which in the interests of justice permit his release on bail and that the applicant should be released on bail and execution of his sentence be suspended.

THE LAW

[14] Section 321(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA) reads as follows:

> "(1) The execution of the sentence of a superior court shall not be suspended by reason of any appeal against a conviction or by reason of any question of law having been reserved for consideration by the court of appeal, unless -
>
> (b) the superior court from which the appeal is made or by which the question is reserved thinks fit to order that the accused be released on bail or that he be treated as an unconvicted prisoner until the appeal or the question reserved has been heard and decided:
>
> Provided that when the accused is ultimately sentenced to imprisonment the time during which he was so released on bail shall be excluded in computing the term for which he is so sentenced: Provided further that when the accused has been detained as an unconvicted prisoner, the time during which he has been so detained shall be included or excluded in computing the term for which he is ultimately sentenced, as the court of appeal may determine."

[15] From the reading of the offences listed under schedule 6, murder which is committed whilst committing robbery with aggravating circumstances will for the purposes of bail proceedings fall under the ambit of schedule 6 of the CPA.

[16] Section 322(1)(a) (b) and (c) of the CPA reads as follows:

> "(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may –
>
> (a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or (my own emphasis)
>
> (b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or
>
> (c) make such other order as justice may require:
>
> Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect."

ANALYSIS

[17] Considering the charges proffered against the applicant, the bail application of the applicant falls to be determined under the ambit of schedule 6 of the CPA.

This is common cause between the applicant and the State. The applicant is accordingly required to adduce evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his release on bail. (See: Section 60(11)(a) of the CPA).

[18] The applicant relies on the fact that the State did not oppose his appeal before the Full Court as one of the grounds which tend to show there are exceptional circumstances which exist and that it would be in the interests of justice for him to be admitted to bail.

[19] The applicant further relies on the SCA granting him leave to appeal to the Full Court that his appeal has real prospects of succeeding before the Full Court.

[20] Section 322 (1)(a) of the CPA prescribes the powers of the appeal court to allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice.

[21] In *Matatiele Municipality and Others v President of the RSA and Others* 2006 (5) SA 47 CC para 67 the Constitutional Court held:

"It is trite that this Court is not bound by a legal concession if it considers the concession to be wrong in law. Indeed, in Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others, this Court firmly rejected the proposition that it is bound by an incorrect legal concession, holding that "if that concession was wrong in law [it] would have no hesitation whatsoever in rejecting it." Were it to be otherwise, this could lead to an intolerable situation where this Court would be bound by a mistake of law on the part of a litigant."

[22] In my view, the Full Court is not bound by the stance adopted by the State not to oppose the appeal of the applicant. It is for the Full Court to allow the appeal if it is of the view that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice.

[23] In *R v Mthembu* (*Mthembu*) 1961 (3) SA 468 (D) at page 471A – C, quoted with approval by the SCA in *Masoanganye v The State* (252/11) [2011] ZASCA 119 (7 July 2011) Henochsberg J held as follows:

> "The mere fact that leave to appeal has been granted does not, per se, entitle a convicted person to be allowed out on bail. As I see it, the effect of sec. 368 is such that the grant of bail is in the discretion of the Court, even where the crime is a serious one. I think that the law is that, if justice is not endangered, the Court favours liberty, more particularly where there is a reasonable prospect of success. That, I think, is to be gathered from the decision in the case of Rex v Milne & Erleigh (4), 1950 (4) SA 601 (W), and the cases there cited. In the light of what was said in R v Desai, 1953 (2) P.H. H.192, it seems to me that the onus of establishing that justice will not be endangered, and that there is a reasonable prospect of success, is upon the applicant."

[24] The paragraph I have quoted from *Mthembu* should be read with Schedule 6 of the CPA. Accordingly, in addition to the applicant satisfying the court that justice will not be endangered and there are reasonable prospects of the appeal succeeding, the applicant must satisfy the court that exceptional circumstances exist which in the interest of justice permit his release on bail.

[25] In *Masoanganye v The State* (252/11) [2011] ZASCA 119 (7 July 2011) para 14, the SCA held as follows:

"Since an appeal requires leave to appeal which, in turn, implies that the fact that there are reasonable chances of success on appeal, is on its own not sufficient to entitle a convicted person to bail pending an appeal: *R v Mthembu* **1961 (3) SA 468** (D) at 471A-C. What is of more importance is the seriousness of the crime, the risk of flight, real prospects of success on conviction, and real prospects that a non-custodial sentence might be imposed."

[26] In *Rohde v The State (Rhode)* 2020 (1) SACR 329 (SCA) para 8 Nicholls JA writing for the minority stated as follows:

"Being granted leave to appeal a conviction is an important consideration but it is not, in and of itself, a sufficient ground to grant an accused bail. In terms s 17(1) of the Superior Courts Act 10 of 2013, leave to appeal may only be granted where the judges concerned are of the opinion that 'the appeal would have a reasonable prospect of success, or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. Because no reasons are ever provided therefor, we are unable to state categorically what were the grounds for granting leave to appeal. Even if one were to accept for present purposes that the appellant has reasonable prospects of success, this is but one of the factors to be considered."

[27] When the SCA granted the applicant leave to appeal to the Full Court, it did not provide reasons for granting leave to appeal. As observed by Nicholls JA in *Rohde*, the court is unable to state categorically what were the grounds for granting leave to appeal. I cannot agree with the contention by the applicant that because the SCA granted him leave to appeal to the Full Court that this factor is indicative that his appeal has real prospects of succeeding before the Full Court.

[28] The other factor to be considered is the status of the applicant has changed. The presumption of innocence does not operate in his favor. In *Williams v The State* 1981 (1) SA 1170 (ZA) at page 1171H – 1172B the court held as follows:

"Different considerations do, of course, arise in granting bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find it seems that it is putting it too highly to say that before bail can be granted to an applicant on appeal against conviction there must always be a reasonable prospect of success on appeal. On the other hand even where there is a reasonable prospect of success on appeal bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding. Such cases as *R v Milne and Erleigh (4)* 1950 (4) SA 601 (W) and *R v Mthembu* 1961 (3) SA 468 (D) stress the discretion that lies with the Judge and indicate that the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. In my view, to apply this test properly it is necessary to put in the balance both the likelihood of the applicant absconding and the prospects of success. Clearly, the two factors are inter-connected because the less likely the prospects of success are the more inducement there is on an applicant to abscond. In every case where bail after conviction is sought the *onus* is on the applicant to show why justice requires that he should be granted bail."

[29] The applicant has been convicted of very serious offences, and the trial court Judge imposed a custodial sentence of 25 years. The applicant has served 5 years of the sentence. As indicated herein above, counsel for the applicant implored me to consider the undue delay of the appeal for a period of approximately 4 years as a further factor when deciding whether the applicant should be released on bail. I have a difficulty with this submission. The SCA granted the applicant leave to appeal to the Full Court on 21 April 2021. In the bail affidavit of the applicant, no explanation is tendered for the delay in prosecuting his appeal before the Full Court. Counsel for the applicant also did not make submissions before the Court explaining the delay in prosecuting the appeal before the Full Court. I cannot make a finding one way or another if the

delay was due to circumstances beyond the control of the applicant or if it was due to conduct of the applicant.

[30] An increased risk of the applicant absconding is inevitable when one considers that the applicant has served some 5 years of a 25 year sentence. The applicant has not taken the Court into his confidence as it relates to the status of the company Doughlas D Kraai (Pty) Ltd. Is the company operating or has it been deregistered. Equally with the Atamelang house. What is the status of that house, who is residing there. The 21 year old major child. Is this a major child in need of care and if he or she is in need of care, who has been assisting the major child whilst the applicant has been in prison. If the major child is one in need of care, why is the person who has been assisting the major child no longer in a position to continue assisting. The absence of these details leaves the Court with the uneasy inference that the applicant has no reason not to abscond should the appeal before the Full Court fail.

[31] What are exceptional circumstances? In *Petersen v The State* 2008 (2) SACR 355 (C) para 55 Van Zyl J held as follows:

"On the meaning and interpretation of "exceptional circumstances" in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration."

[32] In *S v H* 1999 (1) SACR 72 (W) Labe J dealing with the meaning of "exceptional circumstances" stated the following ta page 77B - C:

"…the Legislature does not give examples of what could contribute towards being exceptional circumstances as envisaged in s 60(11)(a). It would seem to me that one must look to the ordinary meaning of the words 'exceptional circumstances'. The *Concise Oxford Dictionary*, 1990, defines 'exceptional' as *inter alia* unusual or not typical. The same dictionary defines 'special' *inter alia* as exceptional or out of the ordinary. It also defines 'a special case' as an exceptional or unusual case."

[33] The personal circumstances highlighted by the applicant in his bail affidavit do not disclose any factors which one can describe as unusual, extraordinary, remarkable, peculiar or different. In considering the bail application, this Court has further considered the stance taken by the State not to oppose the bail application of the applicant pending appeal.

[34] The stance adopted by the State does carry some weight in favor of the application of the applicant, but this Court is not bound by the stance adopted by the State. This Court has a duty to weigh up the personal interest of the applicant against the interests of justice and determine if the applicant has made out a case that exceptional circumstances exist which in the interests of justice permit his release. This Court has a duty to ensure that the law is upheld. In my view, the applicant has failed to make out a case that exceptional circumstances exist which in the interests of justice permit his release on bail. In the circumstances his application must fail.

[35] Resultantly, the following order is made: -

ORDER:

(i) The application for bail pending appeal is dismissed.

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T MASIKE

ACTING JUDGE OF THE HIGH COURT SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING	**:**	**12 SEPTEMBER 2025**
DATE OF JUDGMENT	**:**	**18 SEPTEMBER 2025**

FOR APPLICANT	**:**	**MR M.E SETUMU**
INSTRUCTED BY	**:**	**LEGAL AID SOUTH AFRICA** ATTORNEYS FOR THE APPLICANT DR. JAMES MOROKA DRIVE BOREKELONG HOUSE MMABATHO CELL: 060 531 3171 **Email: EsromS@legal-aid.co.za**

FOR RESPONDENT	**:**	**ADV F T TLATSANA**
INSTRUCTED BY	**:**	**DIRECTOR OF PUBLIC PROSECUTIONS NORTH WEST PROVINCE** EAST GALLERY 3139 SEKAME ROAD CELL: 073 608 2744 **Email: FTlatsana@npa.gov.za**