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

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION - MAHIKENG

CASE NO: CAB 3/2025

MAGISTRATES CASE NUMBER: 182/2024

In the matter between:

PETRUS KHOLISILE MVALA **APPELLANT**

and

THE STATE **RESPONDENT**

BAIL APPEAL

CORAM : REDDY J

DATE HEARD **28 MARCH 2025**

DATE OF JUDGMENT **9 APRIL 2025**

Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is **9 APRIL 2024** at **16h00**.

ORDER

1. The bail proceedings before Magistrate Van Loggerenberg are set aside.

2. The matter is remitted to the court *a quo* for a bail application *de novo*, before a Magistrate other than Magistrate Van Loggerenberg.

3. The appellant shall remain in custody and must be requisitioned to the court *a quo* as a matter of urgency, on a date arranged with his legal representative, to give effect to paragraph 2 of this order.

JUDGMENT

REDDY J

Introduction

[1] This an appeal against the judgment by the Magistrate Van Loggerenberg, at Coligny, (court a *quo*) handed down on 15 January 2025, in terms of which the appellant's application for bail was dismissed. The appeal is opposed.

[2] The circumstances which gave rise to the decision of the court a *quo* is briefly as follows. After having been transferred from the Magistrates' Court Lichtenburg, the appellant appeared before the Magistrate Coligny on a charge of murder. What stands out from the provisional charge sheet is that this averment is said to be read with the provisions of section 51 (1) or (2) of the Criminal Law Amendment Act 105 of 1997 (the CLAA). For present purposes, the absence of clarity in this regard is of no moment.

The appellant's case in the court a *quo*

[3] On 15 January 2025, the appellant applied for bail before the court a *quo*. A *lis* ensured between the appellant and the respondent as to the classified Schedule of the Criminal Procedure Act 51 of 1977 (the CPA) under which the appellant was to apply for bail. The court a *quo* correctly found that the appellant was to apply for bail within the structure of Schedule 5 of the CPA. Resultantly, it was incumbent on the appellant to convince the court on a balance of probabilities that the interests of justice as delineated by the provisions of section s60(11)(b) of the CPA permitted his release on bail.

[4] To this end, the appellant duly represented by Mr Masibi (referred to in the transcript as Mr Msibi) used the medium of a bail affidavit to meet the watermark of section 60(11)(b) of the CPA.

[5] The appellant's case was this. He is a South African who owned and resided at [redacted] Extension [redacted] T[redacted], Coligny and was employed at the D[redacted] M[redacted]. He was resident and

employed for a period exceeding thirteen years within the jurisdiction of the court a *quo*. If bail was granted, he proffered an alternative address outside the geographical area of the court a *quo*. This would allay any potential concerns that he may interfere with state witnesses. When he became aware that he was a person of interest to the South African Police Service (SAPS), he voluntarily handed himself over. To this end, this cooperation with the SAPS it was said is a clear fact that he has every intention of standing his trial.

[6] He is the father of two (2) children, aged twelve (12) and twenty-four (24) years old. His 24-year-old child is unemployed. The submission went that prolonged pretrial incarceration would inevitably impede on his ability to support his children and axiomatically result in a loss of support for them. He does not have any previous convictions and/or pending cases. In concluding the appellant contended that (i) his release on bail will not jeopardize his safety and/or sense of safety and security amongst members of the public, and the criminal justice system will not be undermined.

The respondent's case in the court a *quo*

[7] On 24 December 2024, at about 21:00 the police received information that the deceased had been stabbed and was ferried to the local clinic. On arrival at the local clinic, Captain Kitty (Kitty) found the family of the deceased present. Notwithstanding the attempted intervention of medical personnel, the deceased passed

on. He observed that the body of the deceased including her face was covered extensively with blood. She was identified as Beanie Machachini.

[8] Kitty swiftly returned to the police station to pursue further investigation. Whilst at the police station, the appellant arrived and indicated that he wished to hand himself over. In attempting to clarify what motivated this proposition, the appellant disclosed that he had stabbed Beanie. On further probing the appellant as to who Beanie was, he disclosed that she was at the clinic. At this point some further investigation was conducted. This process culminated in the arrest of the appellant. Photos from cell phones later re-affirmed that the deceased and the appellant had been involved in a domestic relationship.

[9] The collated evidence of the state was as follows. There are two witnesses who will provide direct evidence linking the appellant, as the deceased and the appellant were seen together in the motor vehicle of the deceased. This motor vehicle forms part of the investigation. The deceased and the appellant's blood-stained clothing had been seized and forwarded for the purposes of DNA analysis, which was still outstanding. Kitty optimistically opined that the results of same would be available within two (2) months. The accompanying chain of custody statements would require a day to secure. The post-mortem examination had been conducted and the report of same had been filed.

[10] Kitty opposed bail on the following grounds:

(i) The serious and callous nature of the crime allegedly committed within the context of a domestic relationship. Moreover, thirty-two (32) stab wounds had been inflicted on the deceased.

(ii) Femicide was prevalent in the North West Province. Notwithstanding, the confirmation of the appellant's alternative address and the proposition that he would request a transfer to the Lichtenburg, the personal safety of the appellant was a realistic concern given the anger of the community. This was demonstrated by the petitions that were presented to him.

[11] The court a *quo* dismissed the appellant's application for bail predicated exclusively on the fact that the appellant's affidavit did not pass muster of the peremptory requirements as evinced in the Justices of the Peace and Commissioner of Oaths Act 16 of 1963, more appositely, section 4 of the Regulations Governing the Administering of the Oath or Affirmation. This will be elucidated further.

[12] Aggrieved by the dismissal of his application for bail, the appellant assails the finding of the court a *quo* on the following grounds:

1.1 That the Learned Magistrate erred when he decided that there was no bail application before him despite admitting the Appellant's bail affidavit as exhibit "A" in the proceedings.

1.2 In doing so, the Learned Magistrate ignored and disregarded evidence tendered and admitted into the record and refused bail without entertaining whether the interests of justice permitted the Appellant's release on bail or not.

1.3 The Learned Magistrate erred and misdirected himself by entertaining the appellant's application, state leading evidence, exhibit handed over to court, in its ruling this court analysed the evidence tendered, including that of the Appellant and in conclusion held that there was no application before it and consequently denied bail.

1.4 In rejecting the appellants bail affidavit, the learned Magistrate erred by disregarding the fact that bail proceedings are Sui Generis in nature and the rules of evidence are more relaxed than in a trial.

2.1. That the learned Magistrate erred by refusing, on record to rule on whether the interests of justice permits the applicant's release on bail or not and gave undue weight to whether the Appellant's affidavit in support of bail was properly commissioned or not after it being admitted as an exhibit in the proceedings.

2.2. In doing so, the Learned Magistrate committed a material injustice by refusing to consider whether the factors listed in Section 60(4) a-e were established by the State and/or whether the Appellant had satisfied the onus which rested on him to prove on balance of probabilities that the interests of justice permits his release on bail.

3. That the Learned Magistrate erred and misdirected himself when he held and/or decided that the Appellant did not , on a balance of probabilities, adduce evidence proving that the interests of justice his release on bail.

4. That the learned magistrate erred and misdirected himself when he held and/or decided that the Appellant did not, on a balance of probabilities, adduce evidence providing that the interests of justice permits his release on bail.

4.1 That the Learned Magistrate erred when he decided that for a Court to decide on whether to grant bail, it must be determined whether the Applicant was the perpetrator of the offence or not and not whether it was in the interests of justice for the Appellant to be released on bail.

4.2. In doing so, the Learned Magistrate did not appreciate that the main purpose of bail is to secure the Appellants attendance at the trial and that bail cannot be used as a form of anticipatory punishment for the mere fact that an applicant is linked to the offence preferred by the state.

5.1 That the Learned Magistrate erred and misdirected himself when he held that the release of the Appellant will lead to shock and outrage in the community in terms of section 60(4) (e) read together with subsection 8(A) (a) to (e) of the Criminal Procedure Act 51 of 1977 as amended.

5.2 In doing so, the Learned Magistrate erred in disregarding the fact that the petitions were only handed over at closing argument by the state and only after defence objected to such evidence.

5.3 Furthermore, the Learned Magistrate continually erred by admitting the petitions *mero motu* and after the close of the State's case without affording the Appellant's legal representative an opportunity to raise any objections to such petitions.

5.4. Furthermore, the Learned Magistrate erred and allowed himself to be dictated to by the views of the community to the detriment of the Appellant's personal circumstances and the interests of justice.

6.1. That the Learned Magistrate erred and misdirected himself by not properly considering the personal circumstances of the Appellant and the evidence of the State which had been fully placed before Court and out rightly refused bail based on technicalities and not on facts placed before the Court.

6.2. In so doing, the Learned Magistrate erred by not properly exercising his duties and discretion which lies with him and thereby committed a material injustice.

7.1 That the learned Magistrate erred and misdirected himself on the merits of the case and made adverse inferences that the appellant has murdered the deceased yet there is no confession or written statement made by the appellant.

7.2 Furthermore, the Learned Magistrate erred when he decided that the Appellant had made admissions to the investigating officer that he had assaulted the deceased without being placed in possession of full facts relating to such alleged admissions.

7.3 In so doing, the Learned Magistrate decided, at the bail stage, the guilt of the Appellant and usurped the powers which lies with the trial and thereby committed a material injustice.

8.1 That the Learned Magistrate erred and misdirected himself by not considering the fact that there was no evidence before court that the appellant was a flight risk and further that he has ever interfered with state witnesses whilst out on bail and lastly that he has never committed any offence whilst out on bail. That the appellant is a first time offender with no previous conviction and no pending matter.

8.2. In doing so, the Learned Magistrate erred by not considering the fact that none of the factors listed in Section 60(4) (a) –(e) were in existence, which was an indication that the interests of justice permitted the Appellant's release on bail.

8.3 In doing so, the Learned Magistrate erred by not properly striking a Balance between such section 60(4) (a) –(e) against the evidence tendered of record.

The discretion of a judge on appeal

[13] Turning to the function of this Court, the test on appeal against the decision of the court *a quo* is set forth in s65 (4) of the CPA. It reads:

"The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given."

[14] In *S v Barber* 1979 (4) SA 218 (D), Hefer J stated the test on appeal as follows:

'It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own view are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.'.

[15] A judge is not enjoined with a discretion to simply with the swoop of a pen set aside the decision against which the appeal is brought, unless the judge is satisfied that the decision was wrong. Should this occur, it is a salutary practice in our jurisprudence that reasons underscoring this should be provided. Moreover, the judge shall give the decision which in his opinion the court a *quo* should have given. The crisp issue is therefore whether the court a *quo* exercised its discretion, in refusing bail, wrongly.

Discussion

[16] The Constitutional Court in *S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC) at para [11], pp 63 to 64, describes the nature of a bail enquiry as follows:

> "Furthermore, a bail hearing is a unique judicial function. It is obvious that the peculiar requirements of bail as an interlocutory and inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal court procedure, it is considerably less formal than a trial. Thus the evidentiary material proffered need not comply with the strict rules of oral or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. An important point to note about the bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails, in the main, protecting the investigation and prosecution of the case against hindrance." (references omitted)

[17] The sentiments expressed at para [7] of *S v Mabena* 2007 (1) SACR 482 (SCA) also apposite to the facts of the present appeal, where the SCA stated as follows:

"The legislative scheme for the grant of bail, whether generally or in relation to Schedule 6 offences, necessarily requires a court to enquire what the circumstances are in a particular case and then to evaluate them against the standard provided for in the Act. The form that such an enquiry and evaluation should take is not prescribed in the Act, but a court ought not to require instruction on the essential form of a judicially conducted enquiry. It requires at least that the interested parties – the prosecution and the accused – are given an adequate opportunity to be heard on the issue. For although a bail inquiry is less formal than a trial, it remains a formal court procedure that is essentially adversarial in nature. A court is afforded greater inquisitorial powers in such an inquiry, but those powers are afforded so as to ensure that all material factors are brought into account, even when they are not presented by the parties, and not to enable a court to disregard them. And while a judicial officer is entitled to invite an application for bail, and in some cases is even obliged to do so, that does not make him or her a protagonist. A bail inquiry, in other words, is an ordinary judicial process, adapted as far as need be to take account of its peculiarities, that is to be conducted impartially and judicially and in accordance with the relevant statutory prescripts."

[18] To underscore the concerns of the court a *quo,* it is peremptory to quote the following exchange as appears from the record:

'APPLICANT: Statement confirmed, Your Worship.
COURT: Do you confirm your signature and the contents thus?
APPLICANT: Yes, I do confirm, Your Worship.
MR MASIBI: As the Court, Your Worship. May I also submit.
COURT: Just a minute, just a minute.
MR MASIBI: As the Court pleases.
COURT: The, by whom was the oath commissioned?
MR MASIBI: It is constable. Yes.

COURT: Is this, Mr Prosecutor, did you have a look at the…

PROSECUTOR: No, I did not see it.

COURT: At this?

PROSECUTOR: No, Your Worship.

COURT: Please address me whether the commissioning is in order, whether it is in terms of the Act, ruling the commissioning of oaths.

MR MASIBI: Your Worship, we, the Court asked me about the officer, the police officer who is the commissioner of oaths.

COURT: No, no, no I ask you now, address me on whether this is in compliance with the Act.

MR MASIBI: May I, Your Worship?

COURT: Mr Prosecutor, you may peruse this?

PROSECUTOR: Thank you, Your Worship.

MR MASIBI: I believe the Court, when Your Worship asked me about the commissioned affidavit, it was to, there was a good reason for that, and I ask the police about the stamp. And if the police is saying there are no stamps they do not.

COURT: Alright.

MR MASIBI: Stamp.

COURT: So, you say it is not, there is no stamp. Alright I can see there is no stamp, yes.

MR MASIBI: Court pleases.

COURT: What else is. Is it, furthermore, is it in accordance with the law? The 1977 law?

MR MASIBI: Your Worship, I am indebted to this Court.

COURT: Actually, 1972.

MR MASIBI: **Wisdom. It is an application, if there is some defect on it, the Court can just highlight and permit us to effect the changes, because that on its own, it is an application.**

COURT: Case stands down. Have a look whether it is in accordance with the law relating to commissioning of oaths.

MR MASIBI: Yes.

COURT: **And either rectify it or tell me that it is in order and then I will accept , then I will make an order as to that.**

MR MASIBI: Can the Court highlight where.

COURT: The Court…

MR MASIBI : **The defect in the application?**

COURT: **No, no, I sir I am not going to teach you what is necessary to be part of an affidavit.**

MR MASIBI: As the Court pleases.

COURT: I am not a training officer.

MR MASIBI: As the Court pleases.

COURT: I am not a training officer. I am not going to train advocates.

MR MASIBI: My apology.

COURT: You see, the, just a minute, listen what I am telling you. Listen what I am telling you. Make sure that it is in accordance with the law. The court adjourns.

[19] When the court resumed the following transpired:

'COURT: Are you satisfied that this is now complying with the law Advocate Msibi?

MR MSIBI: Confirm so, Your Worship

COURT: Do you have any address on that Mr Prosecutor?

PROSECUTOR: Your Worship, I have made sure that the commissioner of oath gave his full details at the bottom he also added a portion where there are certain questions which the deponent had to answer Your Worship.

COURT: There is no date stamp, and you said that for it to be correct there must be a date stamp Advocate Msibi, now what now?

MR MSIBI: The Commissioner of Oaths does not have a date stamp Your Worship, it is members of the South African police who are in this Court. I believe they can assist the Court in that respect.

COURT: No, it is for you as legal representative to supply this Court with the correct- with correct documentation. It is not for the Commissioner of Oath the Court is going to ask you as legal representative. Now I am asking you- you also stated that there was no stamp, so you satisfied now that this is a proper affidavit?

MR MSIBI: Confirm so, Your Worship.

COURT: All right it is marked as EXHIBIT A, you may rise Mr Mvala. Do you confirm that it is your signature here?

ACCUSED: Yes, I do confirm Your Worship.

COURT: Were you asked by the Commissioner of Oaths to. I am not going to take it any further I will have to deal with it at a later stage. Is that your application Advocate Msibi?

MR MSIBI: Your worship we will provide the Court with the address.

COURT: All right in the meantime sir, it is so that it is a punishable offence if you lie about or fail to disclose whether you have previous convictions or pending matters. Do you know this?

ACCUSED: Yes, I do Your Worship.

COURT: Do you confirm that you know that it is a punishable offence if you fail to tell the Court that there whether there is any domestic violence or even in the protection from Harassment Act interdicts or against you, Where the victim was involved?

ACCUSED: Yes, I do confirm, Your Worship.

COURT: is the information that was given to the Court regarding protection orders as well as previous convictions or pending matters do you confirm that that is correct?

ACCUSED: Yes, I do confirm Your Worship.

COURT: You say you want to provide the Court with the address?

MR MSIBI: Yes, Your Worship. May the same be provided to the Court.

COURT: That will be marked EXHIBIT B.

MR MSIBI: As the Court pleases. Your Worship that that will be the application for the applicant Your Worship.'

[20] With reference to the appellant's affidavit, the following exchange occurred during the address on the merits between the court a *quo* and *Adv Masibi:*

'COURT: Regarding the affidavit if I am not mistaken then what is written here, do you have a copy with you?

MR MSIBI: I do not have a copy with me Your Worship.

COURT: After we stand dated at Coligny, after that there is I know and understand etcetera and there a signature of your client. Am I correct to recall that was not written originally that that was done during the break? Or am I mistaken.

MR MSIBI: That is correct, Your Worship.

COURT: Was it done during the break?

MR MSIBI: The adjournment.

MR MSIBI: Yes that is what the Court indicated.

COURT: Then also the name and address and his rank that was written afterwards that was not there do you agree?

MR MSIBI: Yes, that is the Court's suggestion.

COURT: Mr Prosecutor do you also agree that that was done that these aspects that are noted here namely I know and understand I have no obligation I consider to be binding on my conscious and the signature. That was done during the adjournment.

PROSECUTOR: That is correct we advised…

COURT: All right no that is all I wanted.

MR MSIBI: As Court, pleases, Your Worship.

….

MR MASIBI: As the Court pleases.

COURT: Advocate, do you confirm that, in chambers, when we talked about the affidavit , I told you and explained to you what the affidavit is about, and I then also say that you should consider rectifying it, and it was then rectified as we already talked about it. And can you also confirm or deny that I asked the interpreter, Mr Motshwaiwa, to come with his stamp, and that was also not utilised. Is that correct? Is that so?

MR MASIBI: Your Worship, the Court is now putting me in a spot, a record position to confirm things that has transpired in the chambers, and just say yes or no. Your Worship, it is a document that the Court said it needed to be.

COURT: No, no, no, no, I just want you to confirm, did that happen? Did I tell you there, "sir, you are needed to be. Do you want me to explain everything that happened there?

MR MASIBI: That I was not prepared? Are you saying

COURT: I said that. I said that in chambers.

MR MASIBI: Okay

COURT : Regarding the.

MR MASIBI: The affidavit.

COURT: The affidavit not being properly signed and properly. I said that. And then I explained to you how it is working, and then I, the rest also happened. Do you confirm it or do you deny it? That is all I want to know.

MR MASIBI: The Court has said so many things, I do not know what to confirm, nor deny.

COURT: Alright, thank you. Mr Prosecutor, can you confirm that that happened in chambers?

PROSECUTOR: That is correct. Your Worship.

COURT: Alright. Your case is closed and your address is finished, can I carry on with the judgment.

MR MASIBI: Confirm so, Your Worship.

COURT: Mr Prosecutor, do you have anything else you want to say?

PROSECUTOR: Nothing further. Thank you, Your Worship.

COURT: Alright, and we pressed for time, as well, You may rise sir.'

[21] Unsurprisingly, the court a *quo* dismissed the appellant's application. The bulwark of which was that there was no affidavit before it. The appellant, elected to proceed with adducing evidence by way of an affidavit. The requirement that evidence be adduced in compliance with s 60(11)(b) of the CPA does not exclude the use of an affidavit as an instrument to apply for bail. Put differently, s60(11)(b) of the CPA does not make it peremptory that *viva voce* evidence be the only evidential medium for the application of bail. See: *S v Hartslief* 2002 (1) SACR 7 (T).

[22] For an affidavit to pass muster as an evidentiary tool for the purposes of bail proceedings, it must cohere to the peremptory requirements

as evinced in the Justices of the Peace and Commissioner of Oaths Act 16 of 1963, more appositely, section 4 of the Regulations Governing the Administering of the Oath or Affirmation.

[23] An affidavit of an accused in bail proceedings forms the cornerstone of his case. The bail affidavit must satisfy the general requirements for affidavits as contained in the Regulations (Promulgated in *Government Gazzette* 3619, Government Notice R1258 of 21 July 1972 as amended by Government Notice R1648 of 19 August 1977, Government Notice R1428 of 11 July 1980 and Government Notice R774 of 23 April 1983) ("the Regulations") promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963 ("Justices of the Peace and Commissioners of Oaths Act").

[24] In terms of the Regulations the oath or affirmation is administered by a commissioner of oaths in accordance with Regulations 1(1) and 1(2). In terms of Regulation 2(1) before a commissioner of oaths administers the prescribed oath or affirmation, the commissioner of oaths is required to ask the deponent:

(a) Whether he knows and understands the contents of the declaration;
(b) Whether he has any objection to taking the prescribed oath; and
(c) Whether he considers the prescribed oath to be binding on his conscience.

[25] If the deponent answers these questions in the affirmative, the commissioner of oaths must administer the oath. If the deponent merely confirms the contents of his or her declaration, but objects to

taking the oath or does not consider the oath to be binding on his or her conscience, the commissioner of oaths administers the affirmation. In terms of Regulation 3(1), the deponent is then required to sign the statement in the presence of the commissioner of oaths, and, if unable to write, he or she must affix his mark in the presence of the commissioner of oaths at the foot of the statement.

[26] In terms of Regulation 4(1) the commissioner of oaths must:

"Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he is required to state the manner, place and date of taking the declaration."

[27] The commissioner of oaths is, thereafter, required to sign the declaration, print his full name and business address below his signature, and state his designation and the area for which he holds his appointment or his office if he has been appointed *ex officio.* See*: Absa Bank Ltd v Botha NO and Others* (39228/12) [2013] ZAGPPHC 163; 2013 (5) SA 563 (GNP) (7 June 2013).

[28] Notwithstanding the classification of bail proceedings as *sui generis,* general compliance with the Regulations is necessary. To this end, substance over form would be the overriding criteria. In *casu* the appellant's bail affidavit did not adhere substantially with the Regulations, as is evident from the interaction between the court *a quo*, counsel representing the appellant and the prosecutor.

[29] The court a *quo* made a farce of the bail proceedings. Upon realization that there was a fissure in the appellant's affidavit, the proceedings should have stood down or been postponed for proper compliance. Absent proper compliance with the Regulations, there simply was no evidence from the appellant.

[30] It was prejudicial to the appellant for the court *a quo* to continue with the entire bail proceedings well knowing that the admission of the appellant on bail would be refused, based on a technicality. The procedure adopted by the court a *quo* rendered the appellant's right to apply for bail nugatory.

[31] The refusal of bail by the court *a quo* on a procedural shortcoming rather than substance constitutes a gross irregularity in the proceedings. The court *a quo* failed in its duty to heed the salutary warning expressed in *R v Hepworth* 1928 AD 265 at 277, that:

> "A criminal trial is ***not a game*** where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a ***judge's position in a criminal trial is not merely that of an umpire*** to see that the rules of the game are observed by both sides. A ***judge is an administrator of justice***, he is ***not merely a figure-head***, he has ***not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done***." (my emphasis)

Conclusion

[32] The bail proceedings in the court *a quo,* vitiated by a gross irregularity stands to be set aside and remitted to the court *a quo* for

hearing of the bail proceedings afresh before a Magistrate other than Magistrate Van Loggerenberg.

Order

[33] In the result, the following order is made:

1. The bail proceedings before Magistrate Van Loggerenberg are set aside.

2. The matter is remitted to the court *a quo* for a bail application de *novo*, before a Magistrate other than Magistrate Van Loggerenberg.

3. The appellant shall remain in custody and must be requisitioned to the court *a quo* as a matter of urgency, on a date arranged with his legal representative, to give effect to paragraph 2 of this order.

[redacted]

A REDDY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION MAHIKENG

APPEARANCES

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For the Respondent:	Adv K E MAMPO
Attorneys for Respondent:	N DPP Megacity Complex East Gallery 3139 Sekame Road Mmabatho
Date of hearing:	28 March 2025
Date of judgment:	09 April 2025