

SOUTH AFRICA / JUDGMENT

K.Y.M v S (Appeal) (CAB20/2024)

[2025] ZANWHC 140 (30 July 2025)

[2025] ZANWHC 140**COURT**

North West High Court, Mafikeng

BEFORE

A Reddy

CASE / FILE NUMBER

CAB 20/2024

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Policy**IN**

**THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG**

APPEAL CASE NO:

CAB 20/2024
MAGISTRATE'S
CASE NO: B59/2024

Reportable:

NO
Circulate
to Judges: NO
Circulate
to Magistrates: NO
Circulate
to Regional Magistrates: NO

In the matter between:

K[...] Y[...] M[...]

APPELLANT

and

THE STATE

RESPONDENT

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 30 JULY 2025 AT 10H00.

ORDER

1. The appeal against the refusal of bail is upheld.
2. Bail is granted subject to

the following conditions:

(i) The appellant is granted bail in the sum of R 2000-00 (two thousand rand).

(ii) Upon payment of the said sum of money, the appellant shall be released from custody on condition that: -

The appellant is to relocate to the alternative address which is within the knowledge of investigating officer Ghampe.

If she should

change such address, she will notify the Clerk of the Court and investigating officer Ghampe of such change within 24 hours.

The appellant is ordered to attend trial court until the finalization of the criminal matter, and remain in such attendance, whenever the matter is before court, unless excused from such attendance by the court.

The appellant is to surrender all passports in her possession to investigating officer Ghampe, prior to her release on bail and is prohibited from approaching any office of the Department of Home Affairs to apply for a passport.

3. The appellant is informed that in terms of section 67(1) Act 51 of 1977, if, after her release on bail, she fails to appear at the place and on the date and at the time appointed for her trial or to which the proceedings are adjourned, or fails to remain in attendance at such trial or at such proceedings, or fails to comply with the above conditions, the relevant court shall declare the bail provisionally cancelled, and the money provisionally forfeited to the State, and issue a warrant for her arrest. The appellant is further informed that it is also a punishable offence for failing to appear or for non-compliance with

a
stipulated condition.
4.
A copy of this order with the bail conditions must
be served on the appellant personally by investigating officer
Ghampe before her release on bail. A
copy of such service duly signed as acknowledgment by the appellant
certifying that she is fully conversant
with the conditions of her
release on bail must be filed as part of the record in the Regional
Court with the Clerk of the Court.

JUDGMENT

REDDY J

Introduction

[1] This is an appeal against the refusal of bail by the Magistrate Lehurutshe, (the court a quo). It is common cause that the appellant was arrested on 19 May 2024, for the alleged murder of her husband, Mr R[...] M[...]. This offence fell within the category of Schedule 5 of the Criminal Procedure Act 51 of 1977 (the CPA). The appellant made two unsuccessful applications for bail, the first on 3 June 2024 and the second on new facts on 17 July 2024. The appellant only assails her refusal of bail on 3 June 2024. It follows that the application for bail on new facts, need not detain this, Court.

The appellant's case

[2] The appellant's application for bail is founded entirely on her founding affidavit. It reads:

"I undersigned K[...] Y[...] M[...] hereby declare under oath as follows. I am an adult female person and the Accused in this

matter, charged with the offence of murder. I know and understand the charges against me. For record purposes I wish to inform the Court that I wish to exercise my right to remain silent.

Regarding the merits of this case, I admit this is a schedule 5 bail application. I hereby wish to be released on bail and base my request on the following facts and circumstances that justify my release. I am married female person of 34 years old. I have two minor children.

A 16 year old daughter as well as a 14 year old daughter. I am a caregiver of both my children and they reside with me. I have no previous convictions no pending cases against me. I also have no outstanding warrants of arrest against me.

I am not a flight risk I do not possess any passport or travel documents.

I am also unemployed, and I am a housewife Your Worship. I undertake that if I am released on bail I will respect and honor any terms and conditions set by the Honourable Court. I further confirm that my release on bail will not jeopardise the safety of the public or community. I also confirm that I will not interfere with the administration or proper functioning of the system of the Criminal Justice System.

I also undertake that I will not intimidate threaten or unduly influence the complainant or any State witnesses. I can afford an amount of R 2000,00 bail. I respectfully submit that it is in the interests of justice that I should be released on bail and confirm that I obey, respect and comply with any bail terms and conditions that the Court might impose.”

The respondent's case

[3] Similarly, the opposition of the respondent's bail was predicated on an affidavit of the investigating officer, Herman Kgoitsione Ghampe, (Ghampe). Ghampe's affidavit reads thus:

“I Herman Kgoitsione Ghampe state under oath that I am an Investigating Officer of CAS 72/5/2024 whereby it is alleged that Ms K[...] M[...] stabbed her husband Mr M[...] G[...] M[...] with a knife.

Which resulted in his death, the investigations were conducted in this matter. And Accused person was profiled, it was found that she is a first offender with no pending cases nor previous convictions.

And no outstanding warrants of arrest Your Worship. The Accused person has a fixed at Ikageleng Section Tinokhana where this matter occurred. The Accused person is a mother of two children namely, R[...] M[...] who is 16 years old and P[...] M[...] who is 14 years old. The Accused person alleged that she has an alternative address which is provided for in this affidavit.

Your Worship for record purposes may I not disclose same alternative address on the record Your Worship.

She alleged that the person who resides at the abovementioned address is her biological sister I[...] S[...] P[...].

The Accused person was asked if he had, if she has a passport and she said that she does have one, however she does not mind handing it over to the police until the duration of this case.

It further states that murder weapon was found and taken as Exhibit by the police. Witness statements in this matter were taken, therefore Accused person will not be able to influence them, nor to influence the investigation.

She alleged that she will attend Court everyday on every given date. And that she will obey all her bail conditions if she is granted bail. She is not a flight risk. It further proceeds to say I have information that communities of Tinokhana is against the release of the Accused person. And that if the Accused person is released they will take the law into their own hands.

And this therefore puts the Accused person and her family at risk. However I am of the opinion that if the Court Orders that she relocates at the provided alternative address that risk would be minimised Your Worship. Further goes on to say the State does not have enough grounds to oppose the release of the Accused person on bail.”

The judgment of the court a quo

[4] Against the backdrop of these affidavits, the court a quo made the following primary findings in dismissing the appellant’s application for bail:

“...The check list is not exhaustive and the Court has to consider any other relevant factor. And having established all the relevant factors the Court must weigh up the pros and cons of bail judicially. Keeping in mind the possibility of using appropriate conditions to minimise the possible risk. And where public peace is a factor, or where Subsection 60[4] E and Section 60 [8] are invoked, the Court shall proceed with great caution.

And establish that the requisite exceptional circumstances are indeed present. It is submitted in the affidavit by Investigation Officer the last paragraph of the affidavit I will quote

“ I have information that the community of Tinokhana is against the release of the Accused and that if she will be released they will

take law by their own hands and put the Accused person and her family at risk.”

This statement is also supported by a large community always here before Court. At some point a special force has to be, has been tasked to control the situation and to ensure order and safety at court. And the Accused stated that she is the mother and caregiver of the two minor children.

.....

I am therefore of the view that the release, her release is likely to result in one of the factors listed in Section 60 Subsection 4A which is specifically Section 64 E which reads as follows.

“Wherein exceptional circumstances there is the likelihood that the release of the Accused will disturb the public order or undermine the public peace or safety or security.”

It is clear from the community conduct that the nature of the offence is charged with circumstances under which the offence was committed, is likely to endue a sense of shock or outrage in the community where the offence was committed. It is also clear that the shock or outrage of the community might lead to public disorder if the Accused is released. Her safety might be jeopardised by her release.

The Accused release will undermine or jeopardise the public confidence in the criminal justice system. The safety of her family might also be jeopardised by her release. The Court is accordingly not satisfied that the Applicant has discharged the onus resting upon her. To show on the balance of probabilities that the interest of justice permit her release on bail.

Therefore the following order is made. Bail is denied.” (my emphasis)

Grounds of appeal

[5] The appellant's challenge against the refusal of bail is best encapsulated by extrapolating the Notice of Appeal, which reads:

1. The Magistrate learned in finding that the Appellant did not discharge the onus of showing that:
 - (i) Exceptional circumstances existed instead of factors which are in the interest of justice to permit the appellant to be a suitable candidate to be released on bail, due to the fact that the alleged offence the appellant has been charged with within the ambit of Schedule 5 and not Schedule 6 of the Act.
 - (ii) That the factors which the Appellant displayed during her bail application did not meet the criteria of the interests of justice to permit the appellant to be released on bail.
2. The learned Magistrate misdirected herself by placing undue emphasis that the Appellant presented no new facts which in the interest of justice permit her release on bail.

The discretion of an appellate court

[6] An appellate court shall not set aside the decision against which the appeal is brought, unless it is satisfied that the decision was wrong, in which event the appellate court shall give the decision which in its opinion the lower court should have given. See: *Bechan and Another v SARS Customs Investigations Unit and others* 2024

(5) SA 1 (SCA).

[7] In this regard the following was postulated in *S v Barber* 1979 (4) SA 218(D), 220 para e-f:

"It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as 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 magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to granted bail exercised that discretion wrongly."

[8] In *Alehi v S* 2022

(1) SACR 271 (GP) para 21 the following was posited:

'[21] Where the court a quo has indeed misdirected itself materially on the facts and the legal principles, the court of appeal may consider the issue of bail afresh. Interference is also justified where the lower court "overlooked some important aspects" in coming to the decision to refuse bail; see *S v Ramaisa* (unreported, FB case no A24/2012, 3 May 2012).'

[9] The law of general application which sanctions this interference is section 65(4) of CPA, which reads:

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

- [10] 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

- [11] As a point of departure, I digress to make certain observations regarding the use of affidavits as an evidentiary tool within the context of bail proceedings. The appellant and respondent elected to proceed with adducing evidence by way of an affidavit. In our legal culture, this practice is not untoward. 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, s 60(11)(b) of the CPA does not make it peremptory that viva voce evidence be the only evidential medium for the application of bail. To my mind, an affidavit can be used with equal force where an accused applies for bail for offences listed in Schedule 6 of the CPA. There is no bar to an affidavit being used to apply for bail. See: *S v Hartslief* 2002 (1) SACR 7 (T).

- [12] In *S v Pienaar* 1992

- (1) SACR 178 (W) at 180 H – I, the court held that :

‘In my view therefore there is nothing in the Criminal Procedure Act that renders the use of affidavits in bail applications impermissible. Obviously an affidavit will have less probative value than oral evidence which is subject to the test of cross-examination. At the same time an affidavit will carry more weight than a mere statement from the Bar.’

- [13] It bears repeating, that affidavit evidence within the context of bail proceedings have less probative value than viva voce evidence. The absolute difference is the absence of the tool of cross-examination. That being so, it is a salutary practice that this difference be borne in mind in the assessment of affidavit evidence.
- [14] Given the significance of an affidavit it must contain primary facts. For completeness, hearsay evidence may be relied on within the body of the bail affidavits.
- [15] In my view, the court a quo committed a series of errors which cumulatively resulted in the wrong finding being made. First, Ghampe in his affidavit does not set out in broad strokes what the case for the respondent was against the appellant at the time the appellant made her application for bail. Ghampe’s affidavit whilst structured in not opposing bail, fails to set out a prima facie case against the appellant. At best, it speaks to the recovery of a knife.

Second, the court a quo failed to interrogate this fissure in Ghampe's affidavit. Third, the court a quo failed to request that viva voce evidence be called to address this lacuna or request that a supplementary affidavit be presented to address same. Given the inquisitorial nature of this sui generis proceedings the court a quo was enjoined with a discretion to correct same within the ambit of s 60(3) of the CPA.

- [16] Fourth, the court a quo placed its entire finding to refuse the release of the appellant on bail in four lines from the investigating officer's affidavit, which was hearsay and untested, and was not quoted in its entirety. Fifthly, the court a quo transported its subjective observations into the judgment to justify the conclusions that s60(4)(e) of the CPA would find application. Sixthly, it was devoid of legal sense that members of the community would threaten the life and limb of the appellant and her next of kin given the absence of the bare minimum prima facie evidence against the appellant.

Seventhly, according to the observations of the court a quo members of the community had gathered in show of force against the granting of the appellant's bail. In my view not much store can be placed on this, given that in public hearing no incriminating

evidence was read from Ghampe's affidavit to demonstrate the strength of the respondent's case, which on Ghampe's

affidavit was non-existent. Eighthly, the court a quo had not forewarned the appellant nor the respondent that it was to rely on

the doctrine of judicial notice to introduce subjective observations under the ruse of judicial notice. By this the court quo rendered the audi alteram partem principle sterile.

- [17] In view of the court a quo's stance of the doctrine of judicial notice, a few comments in this regard are apposite. The question whether a court should take judicial notice of a fact, is one of law and is decided by the court. The South African law of evidence makes provision for this doctrine and allows a judicial officer to accept the truth of certain facts which are known to him or her, even though no evidence was led to prove these facts. This may happen in two situations: where facts are

so well-known so as not to be the subject of reasonable dispute, (that is, general knowledge which requires no external evidence) or where facts can be readily ascertainable by accurate sources so that evidence to prove them would be completely unnecessary (or even absurd). The reasons for the existence of the doctrine of judicial notice are twofold. First, it expedites cases in the sense that much time would be wasted if every fact which was not admitted had to be the subject of evidence. Second, the doctrine tends to produce uniformity of decision on matters of fact (where a diversity of findings may sometimes be embarrassing).

- [18] In some instances, a court may take judicial notice of some facts without any enquiry, that is, without consulting any specific source, whereas in other instances judicial notice may only take place with reference to a source of indisputable authority. The distinction between the two is that in the former instance, evidence may generally not be led to refute facts

which have been properly noticed, while in the second instance, evidence may generally be led concerning the disputability or indisputability of the source. Schwikkard and Van der Merwe Principles of Evidence (2009) 481-82, (Zeffert, Paizes and Skeen The South African Law of Evidence (formerly Hoffmann and Zeffert) (2003) 170; Schwikkard and Van der Merwe 478-79)

- [19] The interests of justice are edified in s 60(4) of the CPA. It must be read conjunctively with s 60(9) of the CPA. The principle of the “interests of justice” is to be applied in accordance with the grounds as found in s 60(4) of the CPA which provides that:

“(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;
- (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 he 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;...”

- [20] The court a quo singled out section s60(4)(e) of the CPA for special attention. Seemingly, the court a quo lost focus that this section is prefixed with the legal phrase ‘where in exceptional circumstances...’ In *S v Mohammed* 1999

- (2) SACR 507 (C) it was held that the dictionary meaning of exceptional circumstances word ‘exceptional’ has two shades of meaning: The primary meaning is simply: ‘unusual or different’. The secondary meaning is ‘markedly unusual or specially different’.

- [21] No petitions, affidavits or viva voce evidence of any member of public, organisation or community leader were presented to pass muster of what constituted the exceptional circumstances. Moreover, s60(4)(e) is delineated into subclasses which provide:

‘(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.”

[22] What the court a quo seemed to have been oblivious to is the contention of Ghampe in his affidavit where the following was posited:

“However I am of the opinion that if the Court Orders that she relocates at the provided alternative address that risk would be minimised Your Worship. Further goes on to say the State does not have enough grounds to oppose the release of the Accused person on bail.” The court a quo paid no attention to this in evaluating the conspectus of the evidence before it. Moreover, the doctrine of judicial notice was incorrectly applied. On the totality of the evidence the appellant should have been granted bail. The decision to have refused the appellant’s bail was clearly wrong.

Order

[23] In the premises, I make the following order:

1. The appeal against the refusal of bail is upheld.
2. Bail is granted subject to the following conditions:

(ii) Upon payment of the said sum of money, the appellant shall be released from custody on condition that: -

The appellant is to relocate to the alternative address which is within the knowledge of investigating officer Ghampe.

3. The appellant is informed that in terms of section 67(1) Act 51 of 1977, if, after her release on bail, she fails to appear at the place and on the date and at the time appointed for her trial or to which the proceedings are adjourned, or fails to remain in attendance at such trial or at such proceedings,

or fails to comply with the above conditions, the relevant court shall declare the bail provisionally cancelled, and the money

provisionally forfeited to the State, and issue a warrant for her arrest. The appellant is further informed that it is also a punishable offence for failing to appear or for non-compliance with a stipulated condition.

4. A copy of this order with the bail conditions must be served on the appellant personally by investigating officer Ghampe before her release on bail. A copy of such service duly signed as acknowledgment by the appellant certifying that she is fully conversant with the conditions of her release on bail must be filed as part of the record in the Regional Court with the Clerk of the Court.

A REDDY

JUDGE OF THE HIGH COURT

OF SOUTH AFRICA, NORTH WEST DIVISION,

MAHIKENG

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Date of Hearing :

18 July 2025

Date of Judgment :

30 July 2025

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