

SOUTH AFRICA / JUDGMENT

S.A.P v S (Bail Appeal) (CAB 05/2025)

[2025] ZANWHC 92 (2 June 2025)

[2025] ZANWHC 92**COURT**

North West High Court, Mafikeng

BEFORE

A. Reddy

CASE / FILE NUMBER

CAB 05/2025

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH****WEST DIVISION, MAHIKENG****BAIL****APPEAL NO: CAB 05/2025****MAGISTRATE'S****CASE NO: S43/2024****Reportable:**

YES / NO

Circulate

to Judges: YES / NO

Circulate

to Magistrates: YES / NO

Circulate

to Regional Magistrates: YES / NO

In

the matter between:

S[...]
A[...]
P[...]
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 2 JUNE 2025 at 16h00.
ORDER
The
appeal against the refusal of bail is dismissed.

JUDGMENT

REDDY ADJP

Introduction

- [1] What serves before this Court is an appeal against the refusal of bail by the Magistrate at Stilfontein (the court a quo). For the purposes of context, the appellant made two applications for bail before the court a quo, hereinafter referred to as 'the application for bail' and 'the application for bail on new facts. The appellant is aggrieved by the refusal of bail in the court a quo in the application for bail and assails the refusal of bail on new facts.

Background

facts

- [2] In respect of the background facts, I propose to incorporate the factual matrix placing much store on facts presented in the application for bail and the application for bail on new facts.
- [3] The appellant and the complainant, N[...] M[...] were in domestic relationship which had traversed for more than a decade. At some stage they had cohabited. Prior to being stabbed by the appellant, the complainant terminated the relationship as the appellant had become physically abusive and sought to control her. Notwithstanding the conduct of the appellant, the complainant had not applied for any legal protection against him. She decided to return to her parental home located at 2 [...] P[...] Street, Khuma. From this relationship ANM, a minor child was born. The appellant contends that he had every intention of marrying the complainant. To this end, arrangements were put place for this objective to reach fruition. Towards the end of November 2023 an amount of R100.000.00 was 'given' to the complainant for safekeeping.

- [4] On returning to Carletonville, the appellant received reports accompanied by photographic evidence regarding the undesirable conduct of the complainant. Attempts by the appellant to contact the complainant went amiss. On the appellant's return for the December 2023 vacation, he decided to investigate the veracity of the reports and evidence that he was made privy to. Resultantly, the appellant proceeded to the parental home of the complainant. The complainant was not present. The appellant then proceeded to the leased room that they had occupied. He was confronted by a similar outcome. It was then that the appellant resolved to proceed to a nearby tavern.
- [5] After some time, the appellant returned to the room that they had leased. The result was no different, the complainant was still absent. The appellant then returned to the parental home of the complainant. Noticing that the gate to the entry of the premises of the parental home of the complainant was closed, the appellant scaled the perimeter fence. The complainant contends that the appellant laid in wait for her at her parental home.
- [6] On the arrival of the complainant at about 23h30 the appellant placed a cloth doused with paraffin into her mouth thereafter stabbing her twelve (12) times with an unknown object. There are eyewitnesses to this attack on the complainant. The appellant thereafter, as earlier, scaled the perimeter fence and fled. He contends that a group of onlookers began to charge at him.
- [7] The complainant was taken to the hospital where she was admitted, treated and discharged a day later. The medico legal report confirmed the twelve (12) stab wounds and the location on the body of the complainant.
- [8] On 19 December 2023, the appellant was arrested on a charge of attempted murder. On 24 December 2023 the matter was not enrolled seemingly due to a failure on the part of the police to comply with the peremptory provisions of section 50 of the Criminal Procedure Act 51 of 1977 (the CPA), in that the appellant was not brought before the court a quo within the mandatory forty-eight (48) hour period.
- [9] On 12 January 2024, two applications for protection orders, within the purview of the provisions of Domestic Violence Act 116 of 1998 were served on the applicant. In the first application, a protection order was sought by the minor child AMN. This application was postponed for the purposes of trial. In the second application, the complainant was granted a protection order against the appellant on 5 February 2024. Both orders were served on the appellant on 5 February 2024.
- [10] On 5 February 2024, the appellant, duly represented applied for bail by way of affidavit within the purview of section 60(11)(c) of the CPA. The facts that formed the fulcrum of his application for bail may be succinctly set out as follows. The appellant is twenty-eight (28) years old, having been born on 19 September 1995. He has resided at 3 [...] [...]th Street, Extension 1, Khuma since birth. This is in the same area as the parental home of the complainant. He is unmarried, with a ten

[10] year old child. He is unemployed. He had not previously been convicted of any offences; and had a pending case in the

Carletonville Magistrates' Court which had been postponed for further investigation.

[11] Notably, the appellant disclosed that a protection order had been granted against him on 5 February 2024 in terms of the Domestic Violence Act 116, of 1998. Within the body of the affidavit the appellant parroted the principles that constitute the interests of justice. It follows axiomatically that the primary factors that underpin the principle 'the interests of justice' was simply glossed over.

The opposition to bail

[12] Sergeant Susan Motlalepule Musi (Musi) the second investigating officer in the matter testified in opposition to bail at the initial application for bail. In essence, bail was opposed primarily on the basis that there was a likelihood that the appellant may interfere with the complainant.

Finding by the court a quo in the application for bail

[13] On 6 February 2024, the court a quo, found that the interests of justice will not be served by the release of the appellant on bail. Therefore, the appellant's application for bail was dismissed.

The application for bail on new facts

[14] Following the dismissal of the appellant's application for bail on 6 February 2024, the appellant on 17 October 2024 by way of a supplementary affidavit approached the court a quo for a consideration of his application for bail on new facts.

[15] The appellant's supplementary affidavit was more detailed when juxtaposed with the affidavit presented at the application for bail. The appellant raised three purported new facts. First, the appellant contends that he intends to tender a plea of guilty on a competent verdict of assault with intent to do grievous bodily harm. Second, he expounded on his personal circumstances which encompassed his qualifications and work experience. The role of the appellant as provider within his family structure was specifically emphasized. Third, in respect of the pending matter, the appellant contended that same was finalized in March or April 2024.

[16] The State as respondent in the application for bail on new facts presented no evidence.

The finding by the court a quo in the application for bail on new

facts

[17] On 17 October 2024, the court a quo found:

‘...so if the court has to summarise the judgment, the court cannot today say that the fact that new facts were presented to the court, that those new facts evaluate against the old facts, but now indicate to the court that the accused is a suitable candidate to be released on bail.

I am satisfied that although new facts were presented to the court, when I look at all the facts in this particular matter, the seriousness of the offence, the fact that the accused actually now wants to plead guilty. These facts, all being evaluated does not show to the court that the accused should in the interests of justice be released on bail.

Therefore your application has been denied.’

The grounds of appeal relevant to the application for bail

[18] The appellant raised a plethora of grounds in assailing the finding of the court a quo that it was not in the interests of justice to admit him on bail.

[19] Broadly, these include that:

1. The Magistrate contradicted herself and thus erred in that; on the one hand she acknowledged that the affidavit of the appellant during this application on new facts had “had put meat into the bones” in that it was comprehensive to elucidate the circumstances of the appellant’s case which was not advanced on 5 and 6 February 2024, but stated the only new fact was that the appellant was employed at the time he appeared before her.
2. The Magistrate erred in wrongly applying the test in her evaluation of the factors to be considered in weighting the interests of justice against the right of the appellant to his personal liberty. To this end, the Magistrate had not apprised herself of precedent in our law. See: *S v Dlamini*, *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* (CCT21/98, CCT22/98, CCT2/99 , CCT4/99) [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771 (3 June 1999).
3. The Magistrate erred in not considering that section 35(1)(f) of the Constitution entrenches the right of an accused to be released from detention if the interests of justice permit, subject to reasonable conditions. To this end, guidance as enunciated in *Kula v S* 2003 All SA 218 NWH wherein it was proposed that the possibilities of using bail conditions to minimise possible risks.
4. The Magistrate erred in fact and law by failing to consider pertinent factors as expounded in s60(4) (a)-(e) read with s60(9)(a)-(g) of the CPA.
5. The Magistrate erred in failing to attach proper weight to the tardy pace in which the matter was being investigated notwithstanding the period that had lapsed since the incident occurring and the hearing of the appellant’s application for bail.
6. The Magistrate erred on the facts in failing to consider that the incident occurred a month and a week before the second arrest on the same facts involving the parties, and the appellant had in no way attempted to intimidate witnesses and there was no evidence to suggest same.

The discretion of an appellate court

[20] Section 65(4) of the CPA sets out the legal framework for the consideration of an appeal against the refusal of bail as follows:

“[t]he 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.”

[21] In *S v Barber* 1979

(4) SA 218 (D) at 220E–H, the court remarked as follows in respect of the context of deciding an appeal in terms of section

65(4) of the CPA:

“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 views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.”

[22] Thus, even if this Court finds that the Magistrate was wrong, this Court must consider the facts before it afresh and determine whether the appellant has discharged the applicable onus.

Analysis

of the dismissal of the application for bail on new facts

[23] Our jurisprudence has evolved. Applications for bail within the contours of a domestic relationship must be considered by the court. To this end s 59(1)(a) the CPA provides that:

‘(1)(a) An accused who is in custody in respect of any offence, other than an offence-

(i) referred to in Part II or Part III of Schedule 2;

(ii) against a person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998); or

(iii) referred to in-

(aa) section 17 (1) (a) of the Domestic Violence Act, 1998;

(bb) section 18 (1) (a) of the Protection from Harassment Act, 2011 (Act 17 of 2011); or

(cc),

may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.’

[24] Section 60(11)(c) of the CPA reads as follows:

‘(11) Notwithstanding any provision of this Act, where an accused is charged with an offence -

(a) ...

(b) ...

(c) contemplated in section 59 (1) (a) (ii) or (iii), the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.’ (emphasis added)

[25] A statutory synergy exists between s60(11)(c) and s60(11B)(a)(iii) of the CPA. Section 60(11B) (a)(iii) of the CPA provides that:

‘(11B)(a) In bail proceedings, the accused, or his or her legal adviser, is compelled to inform the court whether - ...

(i) ...

(ii) ...

(iii) an order contemplated in section 5 or 6 of the Domestic Violence Act, 1998, section 3 or 9 of the Protection from Harassment Act, 2011, or any similar order in terms of any other law, was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, and whether such an order is still of force; and

(iv) ...’

[26] It has been conceded in this Court, that the court a quo correctly characterized the appellant’s application for bail. It is undeniable that the appellant had to apply for bail within the legal framework of section 60(11)(c) of the CPA.

[27] Before this Court two issues require consideration. First, did the appellant introduce relevant new facts and second, should the relevant new facts combined with the old facts result in a finding that the interests of justice permitted the appellant’s release on bail. Simply put, was the decision of the court a quo wrong.

[28] In *S v Mpofana* 1998

- (1) SACR 40 at 44G–I, the court postulated the following approach when faced with a bail application on new facts :

“In considering an application for bail allegedly brought on the strength of new facts, the court’s approach is to consider whether there are, in the first instance, new facts and, if there are, reconsider the bail application on such new facts, against the background of the old facts.”

See also: S v Petersen 2008 (2) SACR 355 (C) at para 57; S v Yanta (CC44/2021) [2023] ZAWCHC 23 (1 March 2023); 2023

- (2) SACR 387 (WCC) para 15.

[29] New facts are facts that came to light after refusal of bail, and obviously also include circumstances which have changed since the unsuccessful bail application was lodged. S v Moussa 2015

- (3) NR 800 (HC) at [7], S v Hitschmann 2007

- (2) SACR 110 (ZH) at 113b) . New facts must be ‘sufficiently different in character’ from the facts presented at the earlier unsuccessful bail

application. See S v Mohamed 1999

- (2) SACR 507 (C) at 512b) and ‘must not constitute simply a reshuffling of old evidence’ but must be ‘relevant for purposes of the new bail application’. See S v Petersen (supra) at [57]. This means that there must at least be some advance indication that the new facts, if received, would on their own –

or in conjunction with all the facts placed before the court in the earlier unsuccessful bail application – assist the court in considering release on bail afresh. S v Mohammed supra at 511h-512a.

[30] Two fundamental principles postulated in Mpofana and echoed in Petersen and Yanta delineates what constitutes new facts. First, the court must be satisfied that the facts are indeed new. Second, they are relevant for the purposes of the new bail application. The caveat is that the new facts should not constitute “simply a reshuffling of old evidence or an embroidering upon it”.

[31] The application for bail on new facts had to be considered within the ambit of section 60(11) (c) of the CPA. This resulted in the appellant having to convince the court a quo that the interests of justice justified his release on bail. Tangentially this would have resulted in the combined old and new facts being brought into sharp focus for a determination to be made if the appellant’s application passed muster of the relevant bail provisions.

[32] The court a quo found that the appellant had added primary facts to the application for bail on new facts. Moreover, a trilogy of factors was found to be new. It followed that the court a quo had to then embark on an enquiry which considered the competing interests against the statutory concept of the interests of justice.

The interests of justice are edified in section 60(4) of the CPA. It must be read conjunctively with section 60(9) of the CPA.

[33] The principle of the “interests of justice” is to be applied in accordance with the grounds as found in s60 (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;...”

[34] Much ado has been made about the appellant’s intention to tender a plea of guilty to the competent verdict of assault with intent to grievous bodily harm; and the decision of the National Prosecuting Authority (the NPA) rebuffing a potential ‘Plea and Sentence Agreement’ as evinced in s105A of the CPA. The separation of powers does not enjoin this Court to dictate to the NPA on the acceptance of representations, the acceptance of pleas of guilty to lesser offences or engaging in plea and sentence agreements. This Court would be overreaching if it were to dictate to the NPA how to perform its functions and duties. A court should be loath to prescribe and trespass on the functions and duties of the NPA.

[35] The sentiments expressed in *Koji v Director of Public Prosecutions* (628/2018) [2024] ZANWHC 297; [2025] 1 All SA 680 (NWM) (5 December 2024) at paras 17 and 18, are apposite:

‘The National Director of Public Prosecutions derives its mandate from section 179 of the Constitution. Section 179(2) expressly empowers the prosecuting authority to institute criminal proceedings on behalf of the State. This constitutional imperative must be exercised without fear, favour, or prejudice. This constitutional edict should not be construed to mean that a prosecution can be initiated without a proper consideration and application of the relevant law to justify unfounded prosecutions.

What is demanded in a constitutional eon is that when a decision is made to prosecute, prosecutorial oversight accompanies such decision to continuously assess the process to determine whether the prosecution is justified or not.”

[36] The appellants new facts whilst relevant did not swing the pendulum of ‘the interests of justice’ in his favour. In my view, the court a quo correctly found that the appellant had not passed the threshold of satisfying the interests of justice permitting his release on bail. As a result, the appeal must fail.

Order

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

A. REDDY

ACTING DEPUTY JUDGE PRESIDENT

OF THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION,

MAHIKENG

APPEARANCES:

For the Appellant : Mr GS Dlanjwa

Instructed by:

Dlanjwa Attorneys

31 Boom Street, Vannel Building

Klerksdorp

For the Respondent: Advocate WS Ndlovu

Instructed by:

The Director of Public Prosecutions

1st floor, East Gallery, Mega city,

Mmabatho

Date of Hearing 23 May 2025

Date of Judgment 02 June 2025

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