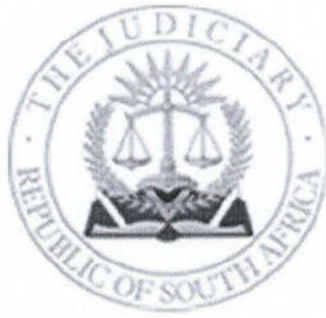




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 26 MARCH 2025

CASE NO: A01/2025

MAGISTRATE'S COURT CASE NO: 3/680/2025

In the matter between:-

SWART, FRANCOIS

Appellant

and

THE STATE

Respondent

Neutral Citation: *Swart, F v State* (A01/2025) [2025] ZAGPJHC.... (2025/03/25)

Coram: Allen AJ

Heard: 25 March 2025

Delivered: 26 March 2025 – this judgment was handed down electronically by circulation to the parties' representatives by email and by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is due to be 09:30 on 26 March 2025.

Summary: Bail Appeal in terms of section 65 of the Criminal Procedure Act 51 of 1977 (CPA) - The interests of justice do permit the appellant's release on bail – No evidence proffered fraud committed whilst out on bail in other cases - Section 60(11)(b) of the CPA not applicable - Appeal is upheld and bail granted

ORDER

1. The appeal is upheld and the order of the Learned Magistrate to refuse bail is set aside.
2. Bail is granted to the appellant in the amount of R 1 000.00.
3. The appellant is to appear personally in Court 4 at the Randburg Magistrate's Court, at 08:30 on 04 April 2025, and thereafter on such dates and times and to such places to which these proceedings are adjourned until a verdict is given in respect of the charge(s) to which the offence in this case relates, or where sentence is not imposed forthwith after verdict and the court extends bail, until sentence is imposed.

4. The appellant is to inform the investigating officer in this matter should he wish to leave the Province of Gauteng other than for the purposes of appearing before another court.
5. The appellant is not to directly or indirectly contact the witnesses for the state or interfere with the investigations in this matter.

JUDGMENT

ALLEN AJ

INTRODUCTION

[1] Before me is a bail appeal in terms of section 65 of the Criminal Procedure Act 51 of 1977 (the CPA) against the whole of the judgment and order of the Learned Magistrate Davis in the Magistrate's Court for the District of Johannesburg North held at Randburg for refusing to release the appellant on bail on 27 February 2025.

BACKGROUND

[2] Appellant brought a formal bail application in terms of section 60(1)(a) of the CPA read with section 35(1)(f) of the Constitution of the Republic of South Africa. Appellant's application was on affidavit, dated 10 February 2025. The prosecution did not oppose bail.

THE ISSUE

[3] The issue is whether the decision to refuse the application to grant bail was wrong.

THE FACTS

[4] The appellant has been charged with one count of fraud for allegedly defrauding one Andrew Christian van Heerden on or about 29 November 2022 to 13 August 2023 at or near Modimolle in the Regional Division of Limpopo. The purpose was, as per the charge sheet, for payment of the amount of R139 104.50 to assist the complainant to book and pay for a holiday in the Maldives. The appellant was further charged in the alternative with one count of theft. The appellant, in his affidavit, referred the court *a quo* to his arrests on essentially the same charges on three separate occasions¹. On each occasion he paid the bail and fully complied with the bail conditions.

[5] The appellant requested reasons from the Learned Magistrate. Separate reasons were not furnished and appellant was referred to the record of the bail proceedings.

[6] In the judgment the Learned Magistrate relied on argument from the state. The state alleged that it was a Schedule 5 offence whilst appellant argued that it was a Schedule 1 offence. The appellant was represented throughout the proceedings.

[7] The Learned Magistrate, in her judgment², did not refer to the date, alternatively period, when the alleged crimes were committed. The appellant's profile was also handed in. I have considered the wanted case history³ and noted that the date fraud was allegedly committed was 29 November 2022 for the Modimolle case number 127/8/2023. Having considered this charge sheet there is a time period specified⁴ and it cannot be excluded that the further arrests emanated from the same time period. The Randburg case (first case) charge sheet only refers to fraud and an amount without any dates. The charge sheet for the Commercial Crimes Court in Palm Ridge is incomplete and dates could not be established. For this case in Randburg (second case) the charge sheet is also incomplete to the extent that no dates were disclosed.

¹ Paragraph 9 of his affidavit, page 002-35 to 002-36 of Caselines

² Record of proceedings 003-103 line 20

³ Caselines page 002-19

⁴ 29 November 2022 to 13 August 2023

[8] The timeline for the first appearances and the timeline for the alleged transgressions are not necessarily the same, put differently, it does not appear from the record that the appellant committed the alleged crime of fraud after his first appearance in Modimolle. In addition, the complete charge sheets for the other three matters are not before me either.

[9] The grounds of appeal are that the court *a quo* erred:

1. In finding that the interest of justice does not permit the appellant's release on bail.
2. In finding that the offence for which the appellant stands charged was committed whilst the appellant was out on bail in respect of other cases and therefore that the said offence falls within the ambit of Schedule 5 of the CPA.
3. In determining the bail application of the appellant in accordance with the provisions of Section 60(11)(b) of the CPA, *alternatively* by finding that the said bail application should not be considered in terms of Section 60(1)(a) of the CPA.
4. In requiring the appellant to adduce evidence satisfying the Court, on a preponderance of probabilities, that the interests of justice permit the appellant's release on bail and finding that the appellant had failed to discharge such onus, *alternatively* that the state had proven on a preponderance of probabilities, that the interests of justice do not permit the appellant's release on bail.
5. In finding that the appellant:
 - 5.1. Has a propensity to commit offences listed in Schedule 1 of the CPA; and/or
 - 5.2. Is a flight risk; and/or
 - 5.3. Will attempt to influence or intimidate witnesses or to conceal or destroy evidence; and/or
 - 5.4. That the appellant has undermined or jeopardised the objectives or the proper funding of the criminal justice system, including the bail system.
6. In finding that:

- 6.1. Any possible conditions attached to the appellant's release on bail would not be capable of placating any concerns or objections to the appellant's release; and/or
 - 6.2. The State had established a *prima facie* case against the appellant.
7. In failing to:
- 7.1. Attach sufficient weight, *alternatively* any weight at all, to the adherence and compliance of the appellant whilst released on bail in other related matters; and/or
 - 7.2. Attach sufficient weight, *alternatively* any weight at all, to the rights of the appellant to his personal freedom and in particular the prejudice that the appellant will suffer if detained in custody; and/or
 - 7.3. Attach sufficient weight, *alternatively* any weight at all, to:
 - 7.3.1. The period for which the appellant has already been in custody since his arrest; and/or
 - 7.3.2. The probable period of detention until the disposal or conclusion of the trial if the appellant were not released; and/or
 - 7.3.3. The financial loss which the appellant will suffer owing to his further detention; and/or
 - 7.3.4. The impediment to the preparation of the appellant's defence or any delay in obtaining legal representation which may be brought about by the continued incarceration of the appellant; and/or
 - 7.3.5. The state of health of the appellant and in particular the state of the appellant's mental health; and/or

7.3.6. The abuse of process by the SAPS and the State in continuously arresting the appellant for related charges; and/or

7.3.7. The effect of the appellant's continued detention on the family and friends of the appellant.

7.3.8. The punitive effect of the appellant's continued incarceration.

8. By failing to consider, *alternatively* merely paying lip-service to, the appellant's right to a fair trial including the right to be presumed innocent until proven guilty; right to freedom and security of the person; right to dignity; right to freedom of movement and residence; and right to freedom of trade, occupation, and profession.

[10] The appellant proffered the following:⁵ "now it is my submission that this method does not fall within the remit of Schedule 5, because the offence is not alleged to have arisen whilst the accused was out on bail and therefore it is a Schedule 1 application." The prosecutor's response hereto was as follows: "Your worship, I am in the hands of the court." ⁶

[11] The Learned Magistrate hereafter alerted the prosecutor to the timelines of the pending matters whereafter the prosecutor responded that he had a look at it and conceded that it was a Schedule 1 offence⁷. The prosecutor further argued that his reliance on this is: "because this matter happened in 2022. ... and the others came after this". This reply is unsatisfactory to address the timelines.

[12] In the wanted case history for Modimolle the date is 29 November 2022 which is the first date for the period of alleged fraud in the same charge sheet in the court *a quo*. In the circumstances it cannot be said that the appellant committed alleged fraud after he was released on bail in the first case in Modimolle as the evidence proffered is not supportive. In my view it cannot be said that the appellant committed fraud after he was released on bail in any of the cases.

⁵ Record of proceedings 003-5 line 20 – 25

⁶ Record of proceedings 003-6 line 2 - 3

⁷ Record of proceedings 003-59 line 3

[13] The Learned Magistrate also relied on section 60(10) of the CPA which stipulates: "(10) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice: Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any person against whom the offence in question has allegedly been committed".

[14] Section 60(9) of the CPA reads as follows: "(9) In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely-

- (a) the period for which the accused has already been in custody since his or her arrest;
- (b) the probable period of detention until the disposal or conclusion of the trial if the Accused is not released on bail;
- (c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
- (d) any financial loss which the accused may suffer owing to his or her detention;
- (e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
- (f) the state of health of the accused; or
- (g) any other factor which in the opinion of the court should be taken into account".

[15] Section 65(4) of the CPA reads as follows:

"65. (4) 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."

[16] Section 35(1)(e) and (f) of the Constitution read as follows:

"Arrested, detained and accused persons

35. (1) Everyone who is arrested for allegedly committing an offence has the right –

- (e) at the first court appearance after being arrested, to be charged or to be informed

- of the reason for the detention to continue, or to be released; and
- (f) to be released from detention if the interests of justice permit, subject to reasonable conditions."

[17] The Constitution obliges that the Learned Magistrate be presented with the charge sheet or at least be informed of the summary of the substantial facts that underpin the arrest of the appellant and why the appellant is before the court. The charge sheets in the other cases, as well as the charge sheet in this case, is a necessity to, especially, consider bail to the appellant.

[18] The Constitution conceived the possibility, especially in serious offences, that the charges may include data or information which would still require further investigation. It would be further information which would form part of the evidence and was necessary to be acquired before the state was in a position to frame the true and correct charges and present a charge sheet. The position of the state to formulate charges upon which the appellant would be required to plead was already determined, albeit incomplete to the extent that dates were excluded.

[19] In my view, fairness and justice call for the state to put the substantial facts upon which its charge is founded, first, and that the appellant then has an opportunity to provide an answer and show exceptional circumstances where applicable, and if needs be the state gets an opportunity to rebut. The charge sheets in all the cases are of importance, especially where the reliance is on a continuance to commit fraud whilst out on bail. The state has failed to disclose dates with sufficient detail which was unfair to the appellant. Hence, in my view, the reason the court *a quo* overruled the prosecution's election not to oppose bail.

[20] In this case the court had to be well-informed to form an opinion whether it has reliable, sufficient or important information to reach a decision on the bail application, as envisaged in section 60(3) of the CPA, without infringing on the responsibilities and rights of the state and of the appellant.

[21] Section 60(5) of the CPA expounds the provisions of section 60(4)(a) and provides as follows:

"In considering whether the ground in subsection 4(a) has been established, the court may, where applicable, take into account the following factors, namely –

- (a) the degree of violence towards others implicit in the charge against the accused;
- (b) any threat of violence which the accused may have made to any person;
- (c) any resentment the accused is alleged to harbour against any person;
- (d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;
- (e) any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct;
- (f) the prevalence of a particular type of offence;
- (g) any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; or
- (h) any other factor which in the opinion of the court should be taken into account."

[22] In the court *a quo* no evidence was proffered to substantiate a refusal of bail on any of these grounds. The appellant is also a first offender.

[23] In the case of *Naude and Another v Fraser* **1998(4) SA 539 (SCA); [1998] 3 All SA 239 (A)** at 563E-G it was said in the context of a civil matter:

"It is one of the fundamentals of a fair trial, whether under the Constitution or at common law, standing co-equally with the right to be heard, that a party be apprised of the case which he faces. This is usually spoken of in the criminal context, but it is no less true in the civil. There is little point in granting a person a hearing if he does not know how he is concerned, what case he has to meet. One of the numerous manifestations of the fundamental principle is the subrule that he who relies on a particular section of a statute must either state the number of the section and the statute, or formulate his case sufficiently clearly so as to indicate what he is relying on: *Yannakou v Apollo Club* **1974 (1) SA 614 (A)** at 623G. As the proposition itself indicates there is no magic in naming numbers. The significance is that the other party should be told what he is facing."

[24] The general principles on bail were set out in *S v Smith and Another* **1969 (4) SA 175 (N)** at 177E-F as follows:

“The general principles governing the grant of bail are that, in exercising the statutory decision conferred upon it, the Court must be governed by the foundational principles which is to uphold the interests of justice; the Court will always grant bail where possible, and will lean in favour of, and not against, the liberty of the subject, provided that it is clear that the interests of justice will not be prejudiced thereby (*McCarthy v R* 1906 T.S. 657 at p. 659; *Hafferjee v R* **1932 NPD 518**).”

[25] It is trite that a court hearing an appeal in terms of section 65(4) of the CPA shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong, in which event the court shall give the decision which in its opinion the lower court should have given. Thus, this court can only interfere with the decision of the court *a quo* if the Learned Magistrate misdirected herself in some material way, in relation to either the facts or the law. In the absence of a finding to that effect the appeal must fail. See *Fourie v S* **(A107/2020) [2020] ZAGPPHC 260 (8 June 2020)** paras 16-17, and *S v Mpulampula* **2007 (2) SACR 133 (E)** at 136E.

[26] In *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)** it was said by the court in the summary:

“7. In determining where the interests of justice lie, the essential exercise is to ascertain the relevant circumstances by using as a guide the check-list of relevant factors against the grant of bail provided in sub-s (4), as particularised in sub-ss (5) to (8A), and of those for the grant of bail provided in sub-s (9).

8. With regard to the factors both for and against the grant of bail, the checklist is not exhaustive, and the court has to consider any other relevant factor.

9. In seeking to establish the presence of such factors the court is to act as pro-actively and inquisitorially as may be necessary.

10. Having established all relevant factors, the court must weigh up the pros and cons of bail judicially, keeping in mind the possibilities of using appropriate conditions to minimise possible risks.

15. Bail serves not only the liberty interest of the accused, but the public interest by reducing the high number of awaiting trial prisoners clogging our already overcrowded correctional system, and by reducing the number of families deprived of a breadwinner.”

[27] In the case of *Yanta and Another v S* (A71/21, A43/21) [2021] ZAWCHC 96 (14 May 2021) in para 26 it was said:

“What I also find extremely disturbing and inexplicable is that the appellants are applying to be released on bail despite the fact that they were previously granted the same indulgence but messed it up. The appellants expect to be afforded yet another opportunity to be out on bail when they were released on bail in other matters. The current offences that the appellants are facing were allegedly committed while they were on bail. In my view, the finding by the court *a quo* that there is a likelihood that the released of the appellants on bail would disturb public order or undermine the public peace or security is beyond reproach. From the evidence placed before this court it cannot be disputed that the appellants have the propensity of committing serious offences. They are all facing serious charges some of which were committed whilst they were on bail. If they are released on bail they are likely to commit schedule 1 offences. In my view, it cannot be said that the magistrate was wrong in refusing to admit them to bail. There is no basis in law for this court to interfere with the discretion exercised by the magistrate. In my view, the appeal must therefore fail.”

[28] I also refer to this case as appellant was previously granted bail, but it cannot be said that he messed it up. No proof was submitted that the current offence was committed whilst out on bail. There is no likelihood that the appellant, when released on bail, would disturb the public order or undermine the public peace or security. No evidence was proffered to substantiate this other than remarks from the bar. From the evidence placed before the court it cannot be said that the appellant has a propensity of committing fraud.

[29] No evidence was placed before the court *a quo* that the appellant would evade his trial if released on bail, as envisaged in section 60(4)(b) of the CPA.

[30] There is no evidence to suggest that, if released on bail, the appellant would attempt to influence or intimidate witnesses or attempt to conceal or destroy evidence. There is no evidence to indicate that the appellant would interfere with the police investigation. In my view, the court *a quo* did not attach appropriate weight to these factors, but rather concentrated on the seriousness of the offences allegedly committed whilst out on bail. I appreciate the fact that the charges the appellant face are serious but, in my view, this is not the only determining or the sole factor the court

must have regard to.

[31] There is no evidence indicating that if the appellant was to be released on bail, he would be untraceable or a danger to the public or that the administration of justice would be undermined, as envisaged in section 60(4) of the CPA.

[32] With regards to exceptional circumstances as envisaged in section 60(11) of the CPA see *S v Jonas* **[1998 (2) SACR 677 (SE)]**, *S v Bruintjies* **[2003 (2) SACR 575 (SCA) at 577]**, *S v DV* **[2012 (2) SACR 4492 (GMP) at para 8]** and *S v Mabena* **[(373/06)[2006] ZASCA 178; [2007] 2 All SA 137 (SCA); 2007 (i) SACR 482 (SCA) (17 October 2006)]** at para 6]. These decisions explain the nature and extent of this concept and how it should be applied in bail applications.

[33] Exceptional circumstances in this matter will only be applicable if it is determined to be a Schedule 6 offence as envisaged in section 60(11)(a). This section does not find application as no evidence was proffered. If it is found to be a Schedule 5 offence as per section 60(11)(b) then the shifting of the onus rests on appellant to adduce evidence to the satisfaction of the court that it is in the interests of justice to permit his release. It was conceded later as a Schedule 1 offence and therefore this section does not find application either.

[34] The Learned Magistrate referred to the test of in the interests of justice in a bail application on the premise of the continued detention of the appellant based on all the evidence presented. In this matter the Learned Magistrate came to the wrong conclusion. The only evidence presented was incomplete to the extent that it could not be proved that the appellant continued to commit the alleged crime of fraud after his first successful bail application in Modimolle, or thereafter. Put differently, it could not be proved that the appellant continued to commit fraud outside the time period disclosed in the Modimolle charge sheet and why further arrests followed in other courts thereafter on the same charge of fraud.

[35] Prior to the hearing, appellant filed heads of argument whilst the State

elected to not do so. During argument the State conceded that appellant be granted bail. Appellant proposed an amount of R 1 000.00 whilst the State proposed an amount of R 10 000.00 with bail conditions. It is common cause that appellant is now unemployed. The State relied on the other cases and the respective bail amounts of R 4000.00, R 5 000.00 and R 6 000.00. The State also argued that the seriousness of the offence be taken into account. The State was invited to proffer evidence to substantiate appellant's financial position and income sources during the previous bail applications in comparison to the current matter. The State was unable to do so.

[36] The appellant has on a balance of probabilities shown that the interests of justice permit his release on bail. The evidential considerations in determining whether the interests of justice will be served by releasing the appellant on bail was ill-conceived and therefore the factors relied upon could not have been probable.

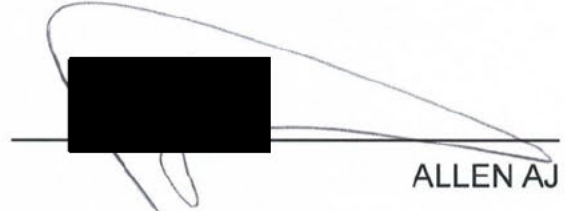
[37] I am of the view that it is in the interests of justice that bail be granted in the amount of R 1 000.00.

ORDER

[38] In the premise I make the following order:

1. The appeal is upheld and the order of the Learned Magistrate to refuse bail is set aside.
2. Bail is granted to the appellant in the amount of R 1 000.00.
3. The appellant is to appear personally in Court 4 at the Randburg Magistrate's Court, at 08:30 on 04 April 2025, and thereafter on such dates and times and to such places to which these proceedings are adjourned until a verdict is given in respect of the charge(s) to which the offence in this case relates, or where sentence is not imposed forthwith after verdict and the court extends bail, until sentence is imposed.

4. The appellant is to inform the investigating officer in this matter should he wish to leave the Province of Gauteng other than for the purposes of appearing before another court.
5. The appellant is not to directly or indirectly contact the witnesses for the state or interfere with the investigations in this matter.



ALLEN AJ
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION JOHANNESBURG

For the Appellant:

Advocate R.G. Schorn
Instructed by Witz Inc.

For the State:

Advocate Morule
Instructed by DPP