

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED
2 MAY 2025

CASE NUMBER: A23/2025
DPP REF. NUMBER: 10/2/5/2-2025/009

In the matter between:-

J[...], R[...]

APPELLANT

versus

THE STATE

RESPONDENT

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 2 May 2025.

A INTRODUCTION

1. This is an appeal against the Magistrate at Randburg's refusal to grant bail to the appellant pending his trial.

2. On April 4, 2025, the Appellant appeared before Magistrate Mathopa in the District Court of Randburg, situated within the Johannesburg Central Division, where a bail application was adjudicated. On the same day the application was considered, the Appellant's request for bail was denied.

3. The Appellant approaches this court to appeal against the bail court's denial of bail.

4. The appellant is charged with violating a protection order.

PRELIMINARY ISSUE

5. The respondent presented an initial concern that warrants examination by this court. It asserted that the court's function is to determine whether the bail court was "wrong" in its discretionary decision to deny the Appellant bail.

6. In order to arrive at an informed conclusion regarding the potential error made by the bail court, it is essential for this court to possess complete access to the entire record of the bail proceedings. Both parties agreed that the pertinent section of the Magistrate's judgment is distinct. Indeed, the entirety of the Magistrate's judgment section was either omitted or inaccurately represented in the transcript.

7. The transcribed record indicates that the judgment of the bail court encompasses several ambiguous annotations, leading to a disjointed account of the judgment.

8. A court typically prefers a complete record when considering an appeal, including appeals relating to bail. An incomplete record may lead to complications, as the court must have all the relevant information to make an informed decision.

However, there are situations where a court may still proceed even if the record is not fully complete for this bail appeal.

9. This is referenced to: S v Chabedi⁷, at paragraph 5:

“On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of Appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal, not that it must be a perfect record of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible .”

10. I’ve looked for essential elements such as evidence and submissions made for the initial bail and the arguments provided by both parties.

11. This court notes that crucial parts of the record were captured that relate to the affidavits of both parties, namely the appellant’s and the complainant’s affidavits, which were relied upon during the bail hearing at the court.

12. In sequence, on 7 April 2025, the appellant submitted a letter requesting written reasons from the Magistrate; however, to date, none have been received. Both parties acknowledge that they have been informed of the Magistrate’s leave of absence, and it is unequivocally established that the Magistrate is aware of this request. Both parties have participated in the efforts to secure the written reasons.

13. I respectfully disagree with the respondent’s assertions that the appellant played no role in bringing this significant issue to the magistrate's attention. However, it is well-established that the appellant is required to submit the record of appeal to the appellate court. He is expected to take an active and proactive role in overseeing and managing the proceedings.

14. It is disconcerting that the Magistrate was apprised of this discrepancy yet chose not to take action. A letter was dispatched for his consideration; furthermore, the respondent's legal representative made attempts to reach out to the pertinent officials but was met with failure. Ultimately, we ascertain that the Magistrate is currently on leave.

15. A comprehensive bail record is indispensable for the appeal process. All parties involved, including the presiding judicial officer, are unequivocally obligated to uphold accurate trial records in reference to: *Mompoti v S* (A86/2018) [2018] ZAFSHC 129 (30 July 2018) at paras 9-11.

16. The court must ensure that all participants have access to a comprehensive record in order to uphold justice. The representative for the appellant argued that the absence of the complete record does not significantly impair the assessment of the case. They persuaded the court to proceed without all the information, asserting that the conclusions of the Magistrates are founded on evidence presented by both parties through affidavits included in the compilation.

17. The appellants also argued that requesting a delay or alternative solutions to obtain the reasons would be detrimental to them. Bail is inherently urgent and should be regarded as such. The accused is self-employed, and any postponement in these proceedings will have a significant financial effect on him. He needs to gather legal fees to secure a fair trial and effectively present his case.

18. Legal principles regarding bail indicate that it is important to assess the reasons for urgently handling bail applications.

19. In *Magistrate Stutterheim v Mashiya* 2003 (2) SACR 106 (SCA), p. 113 c-d, the Supreme Court of Appeal emphasised that 'the right to a prompt decision is thus a procedural right independent of whether the right to liberty actually entitles the accused to bail.'

20. In this case, the record's inadequacy, which does not include a transcription of the Magistrate's judgment segment, does not render it insufficient for a

comprehensive evaluation of the appeal. This court concludes that the record permits an adequate assessment of the appeal, taking into account the relative urgency associated with these types of proceedings.

C. BAIL APPEAL

21. It is trite that a court considering an appeal cannot overturn the previous decision unless it believes it was incorrect. If this is the case, the court must provide the ruling it thinks the lower court should have made.

22. Therefore, the fundamental issue is whether the presiding magistrate improperly exercised their discretion in denying bail. As Hefer J stated in *S v Barber*: “In consideration of the authorities, it is acknowledged that it is an established principle of law that appeal courts possess limited jurisdiction in matters concerning bail appeals. Irrespective of the court's perspective, the primary issue is whether the lower court *materially* misdirected itself in relation to the pertinent facts or legal principles”.

23. The Court of Appeal is permitted to reassess the matter of bail solely under particular conditions. Furthermore, intervention on appeal may be deemed appropriate if the lower court has neglected to consider substantial factors during its decision-making process. This stance has been corroborated by Van Zyl J in *S v Yanta* 2000 (1) SACR 237, which stated, “Like any other appeal, an appeal against the refusal of bail must be determined on the material on record.”

24. According to section 65(4) of Act 51 of 1977, the court reviewing the appeal will only overturn the decision if it determines that the original decision was incorrect.

24. In *S v Dlamini* 1999(2) SACR 51 (CC), Justice Kriegler, representing a unanimous panel of the Constitutional Court, articulated the following significant observations:

“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 here about bail proceedings is so self-evident that it is often overlooked”

25. Furthermore, it was determined that ‘The interests of justice in regard to the granting or refusal of bail therefore focus primarily on securing the attendance of the accused at the trial and on preventing the accused from interfering with the proper investigation and prosecution of the matter.’

26. In the case of *S v Smith and Another*, 1969 (4) SA 175 (N) the Court determined that: ‘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’

27. Consequently, this court needs to evaluate all pertinent factors to assess if they, either alone or together, support a conclusion that the interests of justice necessitate the appellant’s release.

28. This litigation arises from a case of domestic violence. It is undisputed that both parties have protection orders against each other.

29. It is therefore essential to pay attention to section 60(11B)(a)(iii) of the CPA, which states:

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

(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

30. 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
(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, presents compelling evidence illustrating that justice is upheld through the granting of his or her release.

31. As previously noted, the applicant in a bail application concerning a domestic violence offence must present evidence that persuades the court that the interests of justice permit their release on bail.

32. The inclusion of domestic violence offences in the same subsection as the most serious offences listed in Schedules 5 and 6 highlights how seriously the legislature views these crimes.

D. BACKGROUND FACTS

The following are common causes:

33. The complainant and the appellant are a married couple currently in the process of divorcing.

34. In the year 2020, the complainant obtained a protection order against the appellant.

35. Currently, there is maintenance litigation regarding their two children, who are in the complainant's custody while the parties are separated.

36. In terms of s60(6)(b) of Act 51 of 1977, the appellant has a fixed address as he lives with his partner.

37. The Appellant contends that the bail court did not adequately comprehend the nature of the proceedings and the corresponding burden of proof.

38. The Appellant additionally contends that the court made an error in not presuming that the complainant acted with ulterior motives, considering that the court had previously determined his guilt in relation to an offence during a bail proceeding.

39. The appellant's representative also argued that the bail court failed to consider his version of events, instead solely accepting that of the complainant.

40. The respondent contended that the court assessed the submissions from both the applicant and the complainant. The record indicates no evidence suggesting that the court overlooked the Appellant, placing exclusive emphasis on the complainant's statements. This Appellant did not submit or reference any component of the bail proceedings from which this assumption could be inferred, nor could the Respondent identify any such evidence within the record.

41. Additionally, it is emphasised that the bail court is not required to address every factor considered in its decision.

42. This court must evaluate all relevant factors and determine if, either individually or collectively, they support the conclusion that the interests of justice necessitate the appellant's release.

43. Further, in terms of section 65(4) of Act 51 of 1977, the court hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong.

44. The appellant, a 41-year-old South African male, resides at [...] H[...] L[...] in B[...], Gauteng. He has called this property his home since 2018, viewing it as his permanent residence.

45. He is the father of three children, aged one, five, and six, who are financially dependent on him. Currently self-employed, he manages various projects; however, he lacks a stable income.

46. He demonstrates financial responsibility by ensuring the payment of school fees, school uniforms, stationery, food, medical bills, clothing, and the day-to-day needs of all his children and extended family members. He resides solely within the Republic of South Africa, does not possess travel documents, such as a passport, and lacks any assets outside the Republic of South Africa.

47. He does not possess the case docket; however, he is acquainted with the details outlined in the charge sheet. He is fully aware of the allegations against him as stipulated in his constitutional rights documentation. He is ready to proceed to trial should the case advance; he has no intention of fleeing the country or avoiding justice either within South Africa or internationally. He is committed to participating in the proceedings until their conclusion. Furthermore, he can remit the bail amount indicated in R1000.

48. The respondent opposed the granting of bail by submitting the affidavit of the complainant. The complainant, a 37-year-old individual currently married to the appellant, formally requested that the court deny bail to the appellant.

49. The applicant has experienced numerous instances of physical abuse during their marriage. Allowing him bail poses a significant risk to her and the children's lives.

50. Their safety is at risk due to his unending threats. For the last four years, he has been absent from his children's lives and has not provided them with financial support.

51. On two separate occasions, the appellant attempted to kill her, and that was in April 2018. He strangled her and he locked her in the house where he left her with the children with no electricity.

52. On the 5th of October 2019, he again pushed her down to the ground and wrestled her, knocking her with his fist.

53. The appellant fails to adhere to the existing parenting plan.

54. On March 28, 2025, at approximately 12:00 PM at the Randburg Magistrate Court, the appellant demonstrated behavior that necessitated an immediate arrest. During the proceedings, it became evident that the accused posed a significant risk to her personal safety due to the erratic nature of his actions, which encompassed various threats and a documented history of violence.

55. The appellant attempted to forcefully take her witness file, coming dangerously close to her. She could feel his grip and fingers, leaving her unsure if he intended to harm her. In fear, she screamed for security to assist her as a woman alone without any support.

56. He subsequently proceeded on foot to his vehicle and departed. The situation was rather intimidating, as he was dissatisfied with the outcome of the rule nisi application. He wished to avoid waiting for assistance with the bundle. This behavior culminated in the detention of the appellant.

E. EVALUATION

57. It is well established that supplementary factors outlined in sections 60(2A), (2B), and (4)-(9) of Act 51 of 1977 must be collectively considered.

58. It is important to note that while the state case may be significant, it is not the sole factor a court should evaluate when deciding whether to approve or reject bail.

59. During the bail proceedings, neither the appellant nor the complainant testified. Affidavits were filed in support of the bail proceedings.

60. This Court is unable to draw a negative inference from the use of affidavits by either party. The fact remains that the appellant could not be subjected to cross-

examination regarding his aggressive efforts to obtain a witness's file from the complainant.

61. Interference is considered justified if the lower court's 'overlooked some important aspects' when deciding to refuse bail as referenced in *Alehi v S* [2021] ZAGPPHC 492; 2022 (1) SACR 271 (GP) para 21.

62. The complainant has expressed her view that she does not want the appellant to be released on bail as he poses a significant risk to her personal safety, given the volatile nature of his behaviour, including all threats and history of violence.

63. Section 60(5) of Act 51 of 1977 states that: '(5) In considering whether the grounds in subsection (4)(a) have been established, the court may, where applicable, consider 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 a person against whom the offence in question was allegedly committed or any other person;

- (c) any resentment the accused is alleged to harbour against a person against whom the offence in question was allegedly committed or any other 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—

- (i) offences referred to in Schedule 1;

- (ii) an offence against any person in a domestic relationship, as defined in **section 1** of the **Domestic Violence Act, 1998**;

- (cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, 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—

- (i) referred to in Schedule 1;
- (ii) against any person in a domestic relationship, as defined in **section 1** of the **Domestic Violence Act, 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; or
 - (cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, while released on bail or placed under correctional supervision, day parole, parole or medical parole as contemplated in sectionv73 of the **Correctional Services Act, 1998**; or
- (h) any other factor which in the opinion of the court should be taken into account.'

64. The appellant does not dispute that there is a protection order against him that was filed in 2020.

65. It is evident that from 2020 to the present, no complaints or charges have been filed against the appellant for violating the current protection order.

66. The complainant only mentions incidents from 2018 and 2019, which happened before the protection order was granted against the appellant.

67. The appellant has consistently adhered to the protection order issued by the court.

68. Furthermore, it is important to note that once the appellant was notified by an investigating officer regarding the expectation to report to the police station, he did not exhibit any reluctance. He handed himself to the police. That is how he was arrested and detained.

69. With regard to the incident at the Randburg Magistrate Court, it is evident, as stated by the complainant, that the appellant sought access to the maintenance file,

which served as the location of the altercation between the parties involved. The appellant and the complainant found themselves in the same location at the maintenance court. Their encounter was prompted by a court order requiring them to share the file's contents, leading to the altercation.

70. To date, there is no evidence that the appellant violated the protection order issued between 2020 and the present.

71. Following a meticulous review of the submitted documentation, it appears that the esteemed magistrate, at a certain juncture, mistakenly perceived himself to be presiding over a criminal trial rather than evaluating a bail application. Consequently, he did not adequately contemplate the fundamental objective of bail. I believe the lower court significantly misjudged both the facts and the applicable legal principles. It evidently neglected to address the primary issue, namely, 'safeguarding the investigation and prosecution from hindrances.

72. In the matter of *S v Dlamini* 1999(2) SACR 51 (CC), the Constitutional Court held that:

‘The interests of justice in regard to the granting or refusal of bail therefore focus primarily on securing the attendance of the accused at the trial and on preventing the accused from interfering with the proper investigation and prosecution of the matter.’

73. The magistrate neglected the fundamental purpose of bail and approached the appellant's situation as if it were being adjudicated in a trial court. It failed to account for the possibility that, even in the event of a guilty verdict, the trial court might ultimately decide to impose a fine rather than direct imprisonment, contingent upon the nature of the appellant's charges.

74. The court overlooked the fact that the complainant and appellant remain married and have children to support. Even though the complainant secured a protection order in 2020, it is clear that no complaint was ever lodged against the appellant.

75. The complainant indicated that the appellant was 'confronted with serious allegations of intimidation directed at her in an extremely aggressive manner. While this certainly seems like a grave accusation, there is no evidence of physical force being employed against the complainant or presented to the lower court. Ultimately, this decision will rest with the trial court.

76. Bail applications are distinct and unique, as they do not fall strictly under civil or criminal proceedings. As a result, the rules of evidence typically followed in trial actions are not rigidly enforced, and the presiding officer possesses greater inquisitorial powers. To quote Kriegler J: *S v Dlamini* 1999(2) SACR 51 (CC), *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 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".

This court notes that the Magistrate overlooked the 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 focus of the Magistrate was 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.

77. This court holds the view that approving bail for the appellant, contingent upon stringent conditions, will effectively restrain him from communicating with the complainant. He complied with a protection order issued in 2020 until the recent occurrence involving the complainant.

78. The record shows that the Magistrate did not adequately consider the relevant factors, taken together, these factors suggest that the likelihood of the appellant attempting to evade trial or threatening the complainant, if released on bail, is very low.

79. Upon reviewing the lower court's record and considering the parties' submissions, this court concludes that the lower court's decision to deny bail was wrong.

ORDER

80. The following orders are issued:

1. The appellant's appeal against the refusal of his bail application is upheld.
2. The order of the court *a quo* is set aside and substituted with the order set out as follows:
3. Bail is granted to the appellant in the amount of R2000.00 (two thousand rand) under the following conditions:
4. He shall report to the Randburg Police Station twice a week, namely on Mondays and Fridays between 06:00 and 17:00, with the first report scheduled for Monday, 5 May 2025;
5. He shall attend his trial and all related postponements, remaining in attendance until excused, and ultimately until a verdict is rendered regarding the charge this case pertains to.
6. He is required to refrain from any form of communication with the complainant, *either* in person or through WhatsApp or cellular phone, until the resolution of the criminal case against him;
7. He should not communicate with any state witnesses, obstruct them, or intimidate any individuals, including the complainant.
8. He is prohibited from visiting the Bromhof Randburg magisterial district, where the complainant lives, until the conclusion of the criminal case against him, except on days when he must appear in the Randburg Magistrate's Court.

9. He shall not exit the Gauteng province without obtaining written consent from the Investigating Officer. To receive this authorisation, he is required to submit a valid itinerary detailing his movements and continuously inform the Investigating Officer of his whereabouts.

10. The appellant's residence is officially recorded as [...] H[...] L[...], B[...], Gauteng. Should he update this address, it is imperative that he inform both the clerk of the court in Randburg and the Investigating Officer within 24 hours; and

11. The Investigating Officer is required to personally deliver a copy of this order, which includes the conditions of bail, to the appellant prior to his release on bail. Furthermore, a written acknowledgement from the appellant, affirming his comprehension of the conditions of the bail release, must be submitted to the clerk of the Randburg Magistrate's Court as an integral component of the official record.

T. BOKAKO

Acting Judge of the High Court
Gauteng Local Division, Johannesburg

APPEARANCES

Counsel for the Appellant ADV MOLAFI

Counsel for the Respondents ADV. EHLERS

Date of Hearing: 29 APRIL 2025

Date of Judgment: 2 MAY 2025