

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A74/2025

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES
<u>19-05-2025</u>	<u>PD. PHAHLANE</u>
	
DATE	SIGNATURE

In the matter between:

FANNY KASONGO ILUNGA

APPELLANT

and

THE STATE

RESPONDENT

Judgment – Bail Appeal

PHAHLANE, J

- [1] This is an appeal against the judgment of the Learned Magistrate MS Mfulwane, sitting at Pretoria Magistrate court, in which the court dismissed the appellant's application to be released on bail. The appellant was legally represented at the bail hearing before the magistrate.
- [2] The Appellant is a Congolese National who was charged for assaulting her seven-year-old son, and for contravening the provisions of section 49(1)(a) of the Immigration Act 13 of 2002. According to the charge sheet, the assault charge is specifically identified as "child abuse; neglect; and assault", while contravention of the Immigration Act relates to "entering the Republic at any place other than at a port of entry".
- [3] It is common cause that on the day of her arrest, the appellant's application for asylum was rejected by the department of Home Affairs.
- [4] The grounds of appeal as noted in the Notice of Appeal are as follows:
- (1) *The Learned Magistrate erred and misdirected herself in finding that the appellant did not discharge the onus to establish any exceptional circumstances. Further that the Learned Magistrate erred in failing to consider all the exceptional circumstances raised.*
 - (2) *The Learned Magistrate erred in failing to consider that the bail application was not opposed by the State.*
 - (3) *The Learned Magistrate failed to consider the impact of credible evidence that the appellant will not evade trial in that:*
 - *She has established her family ties in RSA and her children are schooling in the republic.*
 - *irrespective of the appellant being a DRC national when she entered into the republic of South Africa, she applied for asylum seeking permit and after expiry of her asylum document, she had applied for a renewal of asylum-seeking document and after her arrest, she discovered that her asylum-seeking application was rejected, and she further reviewed the same rejection.*

- (4) *The Learned Magistrate erred in dwelling in the possible outcome of the review application for the rejected application for asylum seeking permit which is to be decided by the Home Affairs.*
- (5) *The Learned Magistrate failed to consider that the appellant is not a flight risk, the appellant count leave to DRC (sic) where there is political instability and civil unrest and leave her family in the Republic of South Africa.*
- (6) *The Learned Magistrate failed to consider that the interest of justice permit the release of the appellant on bail.*

- [5] It is clear from the first ground of appeal raised that the appellant had the duty or the onus to prove on a balance of probabilities and adduce evidence to satisfy the magistrate that exceptional circumstances existed, which in the interests of justice, entitled her to be released on bail, failing which she would be detained in custody. What is of importance is that the grant or refusal of bail is a discretionary decision under judicial control and as such, judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted.
- [6] The jurisdictional requirement for the appeal court to interfere with the decision of the learned magistrate is set out in Section 65(4) of the Criminal Procedure Act 51 of 1977 ("the CPA") which provides that: "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".
- [7] It should be noted that in a bail application, the enquiry is whether the interest of justice permits the release of the accused on bail. The "interests of justice" criterion requires a weighing up of the interest of the accused's liberty, against those factors which suggest that bail be refused, unless 'exceptional circumstances' are shown by the accused to exist. This exercise is one which departs from the constitutional standard set by section 35(1)(f). Its effect is to add weight to the scales against the liberty interest of the

accused and to render bail more difficult to obtain than it would have been if the ordinary constitutional test of the 'interests of justice' were to be applied¹.

[8] Accordingly, this court as a court of appeal must determine whether the appellant has discharged the burden placed on her and most importantly, whether the learned magistrate exercised her discretion wrongly. This principle was expressed by the court in **S v Barber**² as follows: *"It is well known that the powers of this court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this court may have a different view, it should not substitute its own view for that of the magistrate, because that would be an unfair interference with the magistrate's exercise of his discretion. 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"*.

[9] It is clear from the reading of the record of the bail proceedings that when the application was made on behalf of the appellant, the defence never addressed the court on any of the aspects referred to in section 60 of the CPA which deals with bail applications. Neither was the aspect relating to the interest of justice addressed on behalf of the appellant, nor the factors referred to in section 60(4) canvassed by either the State or the defence.

[10] It can be gleaned from the reading of the record that the only focus in the bail application was that the appellant had already lodged her review application in respect of her asylum permit, and that the court should as such admit her to bail. Be that as it may, it does not appear anywhere on the transcribed record – that this aspect formed the basis on which bail was sought as an exceptional circumstance, or whether it was only stated in passing.

¹ S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat [1999] ZACC 8; 1999 (2) SACR 51 (CC). at para 64.

² 1979 (4) SA 218 (D) at 220E-F

[11] It is indisputable that the court *a quo* declined to entertain the issues which were the subject of the review before the high court and stated the following:

“That can be dealt with in the high court, not in this court, but for now, unfortunately, she – (referring to the appellant) – wants to be released on bail. The application is still pending in the high court, and we do not know what the high court will do..... The Home Affairs rejected it Me sitting here, I am here if she is a flight risk or not (sic).

[12] It is trite that in any bail application, evidence can be presented through oral testimony or in an affidavit which will address the applicant's circumstances such as, amongst other things, the details of the applicant's address, employment, family and community ties, including giving reasons why the applicant should be released on bail and whether the applicant is not a flight risk.

[13] As indicated above, none of the factors relating to bail as outlined in section 60 of the CPA were addressed or placed before court. Mr Netshilaphala appearing for the appellant conceded that these factors were not placed on record before the learned magistrate, and neither were they addressed during argument because “it was not necessary to do so” as they were noted in the appellant’s bail statement (“affidavit”) admitted by the court as **exhibit A**.

[14] It is common cause that the alleged affidavit of the appellant is not attached to the record of the bail proceedings before this court, and neither is it referred to in the “Index” which forms part of the appellant’s documents attached to her application – to show that such an affidavit existed.

14.1 Ironically, a perusal of the record shows that the only affidavit admitted by the court *a quo* as **exhibit A** is the affidavit of the investigating officer, constable Lufuno Winnie Mutavhasindi dated 18 February 2025 titled “bail statement”.

14.2 Just as with the record of the bail proceedings, none of the crucial factors to be considered by the court in a bail application in terms of section 60 of the CPA were addressed in this affidavit.

14.3 In light of the above, the only inference to be drawn is that the appellant did not depose to an affidavit in support of her bail application before the magistrate, but most importantly, she did not place any evidence or exceptional circumstances before the magistrate to satisfy the court that it would be in the interest of justice that she be released on bail.

14.4 In my view, if it were indeed true that the appellant had deposed to an affidavit wherein she addressed all the pertinent issues to be addressed during the bail application, same would have been highlighted in her heads of argument. I say this being mindful of the phrase repeatedly used in the appellant's heads of argument, which is: "*the appellant explained through her attorneys....*", rather than using the words: "the appellant stated in her affidavit".

[15] It is common cause that only one **exhibit A** was admitted by the *court a quo*, and that is the affidavit referred to above. Before this court, when the court enquired from the appellant's counsel about the alleged affidavit of the appellant, counsel indicated that he was informed by the clerk of the court at the magistrate court that all the relevant documents were attached to the record of the proceedings and sent to the high court for purposes of bail appeal, and that there was no affidavit of the appellant on the court record.

[16] Mr Netshilaphala asked the court to give him a chance to approach the clerk of the appeal section at the magistrate court to check once more, if the appellant's bail affidavit is in their possession, and he was granted that opportunity. When the court resumed after two days, counsel informed the court that the clerk of the appeal section at the magistrate court searched and could still not find the appellant's affidavit. This is confirmed by an affidavit dated 13 May 2023 deposed to by ANTHOLINE FERREIRA NIEMANDT wherein the following is stated:

"I am an admin clerk at the Appeal Section, stationed at Pretoria Magistrate Court. A bail appeal was sent to the high court on 04/04/2025 – S v Fanny K Ilunga.

This office was approached and informed that the bail affidavit is outstanding. There is no bail affidavit attached to the documents in our possession. The original charge sheet was also checked, there is also no bail affidavit attached to it".

[17] In light of the above, it is undeniable that the appellant did not depose to an affidavit during the bail hearing because the only "bail statement marked as exhibit A" is that of the investigating officer and not the appellant. (emphasis added)

[18] With that being said, what is rather strange is that after this court raised serious concerns about the total failure to address the *court a quo* with regards to the requirements of bail as set out in section 60 of the CPA, and failure to present evidence and exceptional circumstances, this court is handed an affidavit which is alleged to be a copy of the affidavit that was given to the magistrate in support of the bail application, and it contains the very aspects which this court canvassed with counsel that they were not addressed in the *court a quo*.

18.1 The red flag and worrying issue about this affidavit is that some of the words and sentences have been deleted, and those changes were not initialled as it should be. One example is at paragraph 4 where typed words were deleted by striking them out with a pen and were replaced by inserting handwritten information, and no initials were made to these changes. Furthermore, the appellant did not initial every page of this affidavit, because the only initial ("JM") that appears at the bottom of each page seems to be that of the commissioner of oath, as it appears next to his full names where he administered the oath.

18.2 In my view, this affidavit was only presented to close the gap and correct the errors which this court has highlighted when it engaged counsel about failure to address the requirements of section 60, and other issues of concern.

18.3 Accordingly, this affidavit will not be taken into account, particularly because it is clear from the record that only one affidavit was admitted into the record.

[19] The CPA provides in section 60(4)(a) to (e) a checklist of the main criteria to be considered against the granting of bail, which any accused or his/her representative should address, and this was not done. On the other hand, sub-section 6(a-j) which is more relevant to the case of the appellant was never addressed by her counsel.

[20] It appears from the reading of the record that after it was disclosed to the court that the appellant is illegal in the country, the State could not make a decision as to whether or not to oppose bail because upon enquiry by the court, the prosecutor was unable to give a clear answer and informed the court that she wanted to “*address the court off record*”. The prosecutor further indicated that she “does not have to oppose the bail application” but acknowledged and conceded that the court had the discretion to decide whether to grant bail or not. The defence also confirmed that the court is vested with that discretion.

20.1 It should be noted that when the learned magistrate asked the State if the appellant was a flight risk, the State was still not able to respond to the court’s question but instead opted to inform the court that the appellant’s review application regarding her asylum permit has been launched with the high court, and that – it is yet to be decided by the high court.

20.2 The following is the interaction between the court and the State:

Court: *“It is a flight risk.*

Prosecutor: *I do not have to sound like I am defending the accused person before court, Your Worship.*

Court: *But*

Prosecutor: *Because going ahead, I will sound like I am defending her.*

Court: *Let me see what is happening on the charge sheet. What did I say? I am not sure if the State is opposing or not. Can I hear you?*

Prosecutor: *Your Worship, is not it (sic) that even if I say I oppose or I do not oppose, court can overrule me.*

Court: *No, I want to be sure. Are you opposing?*

Prosecutor: *Your Worship, my view is that I do not have to oppose this application. The reasons are those that I advanced”.*

- [21] Having regard to the second ground of appeal raised, the appellant’s contention that the State did not oppose bail is misplaced because it is evidence from the record of the proceedings that the court repeatedly enquired whether bail was opposed, and the State was undecided.
- [22] Similarly, the appellant’s contention that the learned magistrate failed to consider that she is not a flight risk as alleged on the fifth ground is without merit and has no basis. I have already indicated that there was no evidence placed before the court to make a finding that the appellant is not a flight risk.
- [23] With regards to the third and fourth grounds of appeal, these grounds are misleading and misplaced because it can be gleaned from the record of the proceedings that the defence was very insistent that the learned magistrate should consider granting bail because the review application for asylum permit has been filed with the high court, and stated the following: “... *I believe that the high court will rule in her favour*”.
- [24] The learned magistrate made it abundantly clear and repeatedly stated that the issue of an alleged pending review application will not be dealt with during the bail hearing, but that it is an issue that will be dealt with by the high court. It is on this basis that the magistrate declined to entertain this aspect because no application was made before the *court a quo* for consideration in that regard.
- [25] Mr Netshilaphala submitted at paragraph 4 of his heads of argument that the learned magistrate erred by disregarding the interpretation of section 21(4) of the Refugee Act³,

³ 130 of 1998

and holding that the appellant is an illegal immigrant. The section counsel referred to provides as follows:

(4) Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if—

(a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4

(b) such person has been granted asylum.

[26] Unfortunately, Mr Netshilaphala put reliance on the old Refugee Act which has now been repealed because section 21(4)(a) was substituted by section 15(d) of Refugees Amendment Act 11 of 2017 which came into effect from 1 January 2020 [and updated on 4 January 2023]. The amended paragraph (a) now reads as follows:

(a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such application has been reviewed in terms of section 24A or where the applicant exercised his or her right to appeal in terms of section 24B.

[27] The amended portion of the above provision of the Refugee Act changes the trajectory of the interpretation which the appellant wanted to use and rely on. Be that as it may, it is important to note that any argument or submission made by counsel from the bar is not evidence. What this court cannot comprehend is why counsel would attack the magistrate's decision not to entertain a non-existent application by submitting that the magistrate disregarded the interpretation of section 21(4)(a) – while the very same provision which counsel relies on has been invalidated and replaced since 2020.

- [28] As already indicated, there was no evidence placed before the magistrate and there was certainly no proper application made that would have enabled the magistrate to consider the provisions of the Refugee Act. Consequently, I do not agree with the submission made on behalf of the appellant – that the learned magistrate misdirected herself in disregarding the interpretation of the Refugee Act.
- [29] In refusing to grant bail to the appellant, the learned magistrate stated that the court must be cautious of granting bail where the risk of absconding remains high because the appellant lacked documentation to remain in the country. In this regard, the learned magistrate held that the appellant poses a flight risk, and that the interest of justice does not favour the appellant's release on bail.
- [30] It was submitted on behalf of the appellant that the magistrate misdirected herself in coming to that decision because there was no evidence brought before court to prove that the appellant is a flight risk.
- [31] On the other hand, the respondent submitted, and correctly so, that the magistrate properly exercised her discretion and was correct in coming to a finding that it would not be in the interest of justice to grant bail to the appellant, especially where the appellant had a duty to prove that she is entitled to be released on bail.
- [32] Reading through the judgment of the learned magistrate, there is nothing which suggest that the magistrate misdirected herself. The fact that the appellant is an illegal immigrant is a factor which the magistrate had to consider, especially where there is a risk that the appellant may abscond.
- [33] It may very well be that the appellant's children attend school here in South Africa, thus making it improbable for her to go back to her country of origin, the Democratic Republic of Congo as submitted in the appellant's heads of argument, but what cannot be avoided is the fact that the appellant failed to discharge the onus of proof to establish exceptional circumstances that favours her release on bail – in the interest of justice.

[34] I therefore do not agree with the submission made on behalf of the appellant because there was no reverse onus. The appellant had the duty to prove on a balance of probabilities and adduce evidence that can stand up to scrutiny and satisfy the magistrate that exceptional circumstances existed, which in the interests of justice entitled her to be released on bail, and she failed.

[35] Having perused the record of the court *a quo*, I cannot find any demonstrable misdirection in the magistrate's decision to refuse to grant bail to the appellant. I am satisfied that the magistrate properly exercised her discretion, and there are no grounds to satisfy this court that her decision was wrong.

[36] Consequently, it is my considered view that releasing the appellant on bail under the above-mentioned circumstances would, to my mind, not be in the interests of justice as it is likely to undermine the criminal justice system including the bail system itself.

[37] In this appeal, there are no grounds to satisfy this court that the decision of the learned magistrate was wrong. Put differently, the grounds set out above do not justify a conclusion that the appellant has made out a case for her release, or that the learned magistrate misdirected herself.

[38] I therefore cannot find any basis to interfere with the decision of the learned magistrate, and I cannot find any fault with the conclusion that the appellant is a flight risk. Similarly, I concur with the magistrate's finding that the appellant failed to satisfy the court that the interests of justice permit her release.

[39] In the premises, the following order is made:

1. The appeal is dismissed.



PD. PHAHLANE
JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the Appellant	: Mr Netshilaphala
Instructed by	: Netshilaphala RE Attorneys Email: enquiry@nreattorneys.co.za
Counsel for the Respondent	: Adv. C Pruis
Instructed by	: National Director of Public Prosecutions, Pretoria
Heard on	: 09 May 2025
Date of Judgment	: 19 May 2025