

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

CASE NUMBER: A29/2025 DPP REF.

NUMBER: 10/2/5/2-2025/009

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES/NO

22 MAY 2025

In the matter between:-

NEWTON WELMANS

APPELLANT

versus

THE STATE

RESPONDENT

JUDGMENT

BOKAKO AJ.

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 22 May 2025.

A INTRODUCTION

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

2. On the 3rd of March 2025, the Appellant appeared before Magistrate Mashabela in the District Court of Kempton Park Magistrate Court, where a bail application was adjudicated. On 18 March 2025, the application was considered, and 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, who is facing a charge of dealing in drugs, in contravention of Section 5(b) of the Drugs and Trafficking Act 140 of 1992 and an alternative count of Possession of Drugs, in contravention of Section 4(b) of the Drugs and Trafficking Act 140 of 1992.

B. BACKGROUND

5. The appellant was apprehended at OR Tambo International Airport concerning case number 119/02/2025. According to the investigating officer assigned to this case, the appellant was discovered to be in possession of narcotics concealed within his luggage upon his arrival in the country on flight number 1365 from Brazil.

6. The appellant is a 36-year-old male citizen of South Africa, born on 19 February 1989, in the Northern Cape. He grew up at his parents' home located at [...] S[...] Street, C[...], Northern Cape. Currently, he lives at 7[...] C[...]t Street, D[...], Pretoria, where he is a tenant and pays a monthly rent of R3000. He has resided at this address for four years.

7. He is in a stable relationship and is the parent of a thirteen-year-old child. His partner is presently unemployed. He is self-employed as a mechanic, earning a

monthly income ranging from R8,000.00 to R12,000.00. Additionally, he owns a vehicle and possesses furniture valued at R50,000.

C. BAIL APPEAL

8. 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.

9. Therefore, the fundamental issue is whether the presiding magistrate improperly exercised their discretion in denying bail. As Hefer J stated in *S v Barber* 1979(4) SA 218D 220E-H, "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".

10. 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.

11. 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."

12. 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.

13. 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”

14. 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.’

15. 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’

16. 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.

D. SUBMISSIONS

17. The Appellant is facing a charge of dealing in drugs, in contravention of Section 5(b) of the Drugs and Trafficking Act 140 of 1992 and an alternative count of Possession of Drugs, in contravention of Section 4(b) of the Drugs and Trafficking Act 140 of 1992.

18. The appellant contends that the bail court did not adequately comprehend the nature of the proceedings and the corresponding burden of proof. The appellant's representative also argued that the bail court failed to consider his version of events, instead solely accepting that of the investigator's report.

19. The respondent contended that the court assessed the submissions from both the applicant and the state's submission. The record indicates no evidence suggesting that the court overlooked the respondent's placing exclusive emphasis on the appellant.

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

21. Counsel for the appellant argued that 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. 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.

22. The appellant further submits that he is a 36-year-old South African male, the father of a 13-year-old, and has a partner who is financially dependent on him. He is currently self-employed as a mechanic. He resides exclusively within the Republic of South Africa and holds a travel document that is presently in the custody of the police. He does not possess any assets outside the Republic of South Africa.

23. Although he does not have the case docket, he knows the details in the charge sheet. He is fully informed about the accusations against him as described in his constitutional rights documentation. He is prepared to go to trial if the case progresses and has no plans to flee the country or evade justice, whether in South Africa or abroad. He is committed to engaging in the proceedings until they are completed. Additionally, he can pay the bail amount specified at R5,000.

24. The Appellant has no outstanding cases. He has one previous conviction of theft. There is not a single iota of evidence to suggest that the Appellant has a propensity to commit Schedule 1 offences.

25. The charges against the Appellant do not consist of any element of violence. There appears to be no evidence that the Appellant will endanger the public or any particular person.

26. However, it is highly improbable that the Appellant, released on bail, will present a threat to public safety or to any specific individual.

27. The residential address of the Appellant is undisputed. There is no evidence to suggest that he possesses the means or the intention to lead a life as a fugitive. He is a citizen of South Africa, and there is no evidence indicating that he will refrain from standing trial. Furthermore, his financial resources are limited, which significantly reduces the likelihood of his being considered a flight risk. His right to movement can be regulated and, indeed, restricted through the imposition of suitable conditions to such an extent that it becomes practically impossible for him to evade trial.

28. The respondent opposed the granting of bail, submits that the learned magistrate correctly deemed the Appellant to be a flight risk in that the Appellant is facing serious allegations, and the state has a strong case against him.

29. According to the affidavit of the investigating officer submitted by the state and recorded as Exhibit B by the court a quo, the Appellant is renting with his uncle at house number 7[...] C[...] Street in Pretoria, asserting that this is not a permanent residence, and the Appellant may decide to relocate to a different address if granted bail and become untraceable.

30. The investigating officer also noted in his affidavit at paragraph 4 that when the Appellant was arrested, he admitted that this was not his first attempt to smuggle drugs into the country and that he had previously been successful. He further argued that the Appellant is a self-admitted drug trafficker and may engage in this behavior again while on bail.

31. According to his bail affidavit (Exhibit A) at paragraph 8, the Appellant stated he has a prior theft conviction with a suspended sentence in 2020. The Respondent argues that the Appellant may commit a Schedule 1 offence if released on bail.

32. The Respondent contends that the state maintains a compelling case against the Appellant, given that the purported narcotics were located in his luggage. Should he be found guilty, he may face a substantial sentence.

E. EVALUATION

33. As elucidated in the subsequent sections, the Magistrate observed that the allegations levied against the Appellant bear significant gravity, necessitating that he substantiate that the interests of justice justify his release on bail. The criminal offences are enumerated in Schedule 5 of the Criminal Procedure Act (CPA), thereby imposing the responsibility upon the bail applicant to establish that granting him bail is congruent with the interests of justice.

34. The Appellant articulated several justifications for the appeal, primarily asserting that the Magistrate rejected his bail application based on flawed and speculative reasoning. This is due to the Appellant being regarded as a flight risk, as well as the offence affecting the economy of the Republic.

35. The Magistrate concluded that the Appellant had not satisfied the necessary burden to substantiate his application for bail release, as he failed to convincingly demonstrate that such a release would serve the interests of justice.

36. The Appellant contends that the Magistrate erred in determining that he failed to demonstrate the weakness of the State's case. This implies that, according to the Court *a quo*, the Appellant has not sufficiently established that the interests of justice justify his release on bail. Furthermore, the Appellant asserts that the Court *a quo* failed to consider his personal circumstances when rendering the decision to deny bail.

37. The Criminal Procedure Act clearly outlines the situations where someone charged with a Schedule 5 offence cannot be released from custody. In this context, Section 60(4) of the CPA explains that we must consider the interests of justice, which means that the release of an accused on bail is not possible if:

- A. The accused poses a risk to public safety, to any individual involved in the alleged offence, or to others, particularly if he is likely to commit an offence listed in Schedule 1.
- B. The individual may avoid trial if granted bail.
- C. The accused, if released on bail, may try to influence or intimidate witnesses, or could potentially destroy or conceal evidence.
- D. Would threaten or compromise the integrity and functionality of the criminal justice system;
- E. Unusual situations can hinder the granting of bail to an accused, as there is a risk that they may disrupt public peace or safety.

38. In this case, the Magistrate concluded that the Appellant posed a flight risk, among other observations. Additionally, he found that the Appellant's purported drug-dealing activities threaten the nation's economy.

39. An appellate court is governed by section 65(4) of the Criminal Procedure Act (CPA), which stipulates that a court or judge reviewing an appeal cannot overturn the original ruling unless there is a strong belief that the decision is incorrect.

40. This indicates that a clear material misdirection by the court of first instance in denying the Appellant bail must be demonstrated. Should such misdirection not be proven, the court will refrain from overturning the contested decision.

41. This was confirmed in *S v Barber* 1979(4) SA218(D)220E-H. where the following was stated:

"It is well known that the powers of this Court are largely limited to where the matter comes before it on appeal and not as a substantive application. 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 view for that of the Magistrate because that would be

an unfair interference with the Magistrate's exercise of his discretion. ...without saying that the Magistrate's view was actually the correct one, I have not been persuaded to decide that it was the wrong one."

42. In denying bail to the Appellant, the Court reasoned, among other factors, that: The case presented by the State against him is compelling, and the Appellant is confronted with a lengthy term of incarceration. The Court concluded that this constituted an incentive for him to evade his trial, and the Appellant is considered a flight risk, potentially fleeing the country to avoid trial due to the severity of the charges.

43. The Appellant relied on the decision in *S v Dlamini; S v Dladla and Others; S v Jubert; Schietekat* [1999] ZACC 8; 1999 (2) SACR 51(CC) PARA 11. to challenge the bail decision reasoning that it was speculative and not borne out of the facts which were before the Court a quo. In this case it was held amongst others that:

"Furthermore, a bail hearing is a unique judicial function. It is obvious that peculiar requirements of bail as an interlocutory inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal Court it is considerably less formal than a trial. Thus, the evidential material proffered need not comply with the strict rules of oral evidence 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. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the inquiry is not really concerned with the question of guilt. That is the task of the trial Court. The Court hearing 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."

44. 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.

45. 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.

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

47. 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 perpetual behaviour of trafficking drugs, as alluded to by the investigating officer.

48. 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.

49. 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.

50. 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.

51. 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.'

52. 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.

53. 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; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC) at 63e – 64a.

‘An important point to note here about bail proceedings is so self-evident that it is often overlooked. 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.

54. 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.’

55. This court holds the view that approving bail for the appellant, contingent upon stringent conditions, will effectively restrain him from committing further crimes.

56. 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 if released on bail is very low.

57. 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.

58. In light of the evidence presented in the Court *a quo* and the reasoning provided by the Magistrate, it is my determination that the Magistrate significantly misdirected himself in relation to both the facts and the law. Therefore, pursuant to section 65(4) of the CPA, this Court of Appeal is empowered to annul the previous decision and replace it with the decision that the Court *a quo* ought to have rendered.

59. I am satisfied that the Appellant has fulfilled his obligation to demonstrate that the *interests of justice* warrant his release on bail. Consequently, I shall issue an order pertaining to the bail conditions. The Appellant has suggested that bail be established at an amount of R5000.00. However, I find this amount insufficient, considering the seriousness of the criminal charges the Appellant is confronting.

Order

60. 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 applicant in the amount of R8000.00 (eight thousand rand) under the following conditions:
4. He shall report to the Pretoria Police Station twice a week, namely on Mondays and Fridays between 06:00 and 17:00, with the first report scheduled for Monday, 26 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 should not communicate with any state witnesses, obstruct them, or intimidate any individuals.
7. 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.

8. The appellant's residence is officially recorded as 770 Claremont Street, Despoort in Pretoria, Gauteng. Should he update this address, it is imperative that he inform the Investigating Officer within 24 hours; and

9. 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 Kempton Park 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. Tshabalala

Counsel for the Respondents ADV. Ramokoma

Date of Hearing: 19 MAY 2025

Date of Judgment: 22 MAY 2025