



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Appeal no: A134/2025

In the bail appeal between:

THABANG THESELE

Appellant

(Accused One in the court *a quo*)

and

THE STATE

Respondent

and

Appeal no: A128/2025

In the bail appeal between:

APRIL MONATISA

First Appellant

(Accused Four in the court *a quo*)

SETLHABI ISAAC MATSIME

Second Appellant

(Accused Three in the court *a quo*)

and

THE STATE

Respondent

Neutral citation: *Thesele v The State* (A134/2025); *Monatisa and Another v The State* (A128/2025) [2025] ZAFSHC 255 (22 August 2025)

Coram: Daffue J

Heard: 15 August 2025

Delivered: This application was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 09h00 on 22 August 2025.

Summary: Bail appeal – section 60(11)(b) of Act 51 of 1977 applicable – investigating officer testified in bail application about intimidation of complainant prior to accused persons' first appearance – no charge of intimidation added to charge sheet – unfairness – no balancing approach adopted – held on appeal that appellants had proven that the interests of justice permit their release on bail – strict bail conditions set.

ORDER

1 The bail appeals of all three appellants are upheld.

2 The magistrate's court order refusing bail to the appellants is set aside and substituted with the order in the following paragraph.

3 Bail is granted in the amount of R10 000.00 (Ten Thousand Rand), in respect of each appellant, subject to the following conditions:

3.1 the appellants are ordered to attend their trial, where and when so directed by the trial court, until finalisation of the criminal trial, and to remain in attendance, whenever the matter is before court, until and/or unless they are excused from attendance by the trial court;

3.2 the appellants shall not interfere with the investigation in any manner and shall not interfere, contact, communicate or intimidate any State witness, whether known or unknown to them, either directly or indirectly;

3.3 the appellants, Thesele and Monatisa, shall report in person at the Welkom Police station between 08h30 and 16h30 every Monday of each week, unless they are attending the criminal trial in which event they shall produce proof of court attendance;

3.4 the appellant, Matsime, shall report in person at the Hennenman Police station between 08h30 and 16h30 every Monday of each week, unless he is attending his criminal trial in which event he shall produce proof of court attendance;

3.5 the appellants shall not leave their residences for more than five (5) consecutive days without informing the investigating officer under case number: A379/2025 beforehand;

3.6 the appellants shall not travel beyond the borders of the Free State Province without the prior written consent of the investigating officer;

3.7 the appellants shall immediately surrender all passports and/or travelling documents in their possession to the investigating officer; and

3.8 the appellants are not allowed to change their residential addresses without first reporting to and informing the investigating officer accordingly.

JUDGMENT

Daffue J

[1] On Friday, 15 August 2025, I heard two separate bail appeals simultaneously. The appellant in bail appeal A134/2025 which was set down for hearing first, is Thabang Thesele (Thesele), cited as accused 1 in the court *a quo*. The first appellant in bail appeal A128/2025, is April Monatisa (Monatisa), he being cited as accused 4 in the court *a quo* and the second appellant is Setlhabi Isaac Matsime (Matsime), cited as accused 3 in the court *a quo*. Herein later I shall refer to them as the appellants, save insofar as I need to deal with each of them individually. Advocate J Nkhahle appeared for Thesele. Messrs Sephachana and Khesa appeared for Monatisa and Matsime respectively. Advocate Teki appeared for the Director of Public Prosecutions (the DPP).

[2] The appellants were arrested on 9 April 2025. They and three other accused appeared in the Hennenman Magistrate's Court for the first time on 9 April 2025. All six accused were charged with five counts, to wit corruption, extortion, kidnapping, defeating the administration of justice and assault. The crimes were allegedly committed on 23 October 2024, and the complainant is a certain Ugochukwe Evaristus Orji, a Nigerian citizen. All six accused persons are members of the South African Police Service (SAPS) and attached to the Anti-Gang Unit in the Goldfields. Thesele is a sergeant and the other five are constables. I shall soon deal with their personal circumstances.

[3] The bail proceedings pertaining to the accused persons started on 24 April 2025 when their affidavits were tendered as evidence of their personal circumstances and reasons why the interests of justice required that they be released on bail. No *viva voce* evidence was led by them. Thereafter, the investigating officer, Mr Ngomane's *viva voce* evidence was led. He was cross-examined on behalf of accused 1. The bail application was postponed to 16 May 2025 when accused 1's cross-examination continued where after the investigating officer was cross-examined by all the other accused persons' legal representatives. On 25 June 2025, the learned magistrate delivered his judgment, dismissing all bail applications.

[4] Accused 2, 5 and 6 appealed. On 23 July 2025, their bail appeal was successful, apparently without same having been argued and by agreement between the legal representatives of the parties. The successful appellants were granted bail in the amount of R10 000 each, subject to certain conditions.

[5] During oral argument, I pointed out to the parties that the learned magistrate's reasons as provided for in s 65(3) of the Criminal Procedure Act 51 of 1977 (the CPA) did not form part of the appeal records. The filing of such additional reasons appears to be peremptory. However, I have on occasion adjudicated bail appeals without reasons having been obtained from presiding officers while in other cases, I insisted on obtaining reasons. On 6 August 2025 the learned magistrate was requested in writing by JMS Attorneys on behalf of Monatisa and Matsime to grant reasons by 12h00 on 8 August 2025, failing which it would be deemed that he did not have any additional reasons to provide. The learned magistrate took exception to this. In his handwriting and under his signature, he made the following note on the letter of demand:

'If you don't know the CPA 51/77 then look it up. No deadline is required.'

[6] Section 65(3) stipulates that the magistrate 'shall forthwith furnish the reasons for his decision to the court or judge, as the case may be.' The word 'forthwith' means immediately, promptly, without delay, or within a reasonable time under the circumstances. I accept that it was arrogant to insist that reasons be provided within two days, especially insofar as the bail applications were dismissed more than a month earlier. Fact of the matter is that I was not furnished with additional reasons. However, I am satisfied that the learned magistrate delivered a detailed judgment and that the appeals should be adjudicated based on the appeal records provided to the court.

[7] The charge sheet does not indicate whether reliance is placed on any of the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997, but it was accepted in the court *a quo* that Schedule 5 of the CPA applied. Section 60(11)(b), dealing with Schedule 5 offences, stipulates that 'the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.' (Empasis added.)

[8] Section 65(4) of the CPA stipulates that the court hearing a bail appeal shall not set aside the court *a quo*'s decision unless such court is satisfied that the decision was wrong. Therefore, in case of doubt, the court of appeal should not interfere. Even if it may have a different view, it should not substitute its own view for that of the court *a quo* as this would be an unfair interference with the court *a quo*'s exercise of its discretion.

[9] The learned magistrate accepted the version of the investigating officer that the State had a strong case against the accused persons. This includes evidence of a tracking device proving the movement of the police vehicle, statements of the various State witnesses, a photo album and identity parade which was held, bank statements, the informer's evidence as to how the events on the fateful day occurred and cell phone evidence. Although the investigating officer dealt with allegations pertaining to intimidation of witnesses by Thesele and Monatisa in February 2025, thus about two months before the accused persons' first appearance in court, no charge of intimidation has been added to the charge sheet.

[10] The function of the court hearing a bail application is to assess the *prima facie* strength or weakness of the State's case and not to make a finding of guilt or innocence, even provisional.¹ In *casu*, the magistrate has, in essence, accepted the guilt of the accused persons. This is apparent from his reliance of SAPS' code of conduct and the following observation: 'Having the right to proffer an affidavit and not a single applicant had elected to testify, this in itself speaks volumes.'

[11] The learned magistrate failed to accept that every person awaiting trial is potentially innocent and that the unnecessary restriction of a citizen's liberty goes against the grain of all civilised perceptions of justice.² I accept that the legislature introduced major amendments in 1995 and 1997, in terms whereof bail legislation focused not so much on the accused, but the community, as a result of which it intended to curtail bail for suspects charged with very serious offences. However, the court should always grant bail where possible and should lean in favour of the liberty of the subject, provided that the interests of justice will not be prejudiced. I accept that the charges in *casu* are indeed serious, but the learned magistrate did not consider the non-penal character of bail and

¹ *S v Van Wyk* 2005 (1) SACR 41 (SCA) para 6.

² *Twayie en 'n Ander v Minister van Justisie en 'n Ander* 1986 (2) SA 101 (O) at 104E-F.

the fact that a proper refusal of bail should not be viewed as a form of anticipatory punishment. It is indeed irregular to refuse bail as a form of punishment. The facts in this case are distinguishable from those in *S v Rudolph* where the court held that the accused's prior unlawful conduct could not be ignored.³

[12] The personal circumstances of the appellants, as contained in their affidavits referred to above are briefly the following:

a. Thesele is a 48-year old sergeant who lives in Welkom in an immovable property registered in his own name. It is mortgaged. He stays with his wife, and they have three children who are 18, 12 and 8 years old, respectively. He is the main breadwinner of his household and has no previous convictions. He dealt with Schedule 5 as well as the various aspects mentioned in s 60(4)(a) to (d) of the CPA and confirmed that he would not act as stated therein.

b. Matsime, accused 3 in the court *a quo*, is 43 years old and employed as a member of the SAPS, a member of the Anti-Gang Unit. He is staying in the small town, Hennenman. He has a permanent home address and has been residing there for the past four years. As is the case with Thesele, he also dealt with the factors set out in s 60(4) and confirmed that he would not act as stated therein. He has no previous convictions.

c. Monatisa is a 32-year old constable in the employ of SAPS. He has been staying at the same residence in Welkom for the past year and, although he is unmarried, he has two children who are 11 and 8 years old respectively. He also confirmed that he would not be acting as set out in s 60(4) of the CPA. He has no previous convictions.

[13] The learned magistrate relied on *S v Najoe*⁴ (*Najoe*) in criticising the appellants and their co-accused for not testifying under oath in order to be cross-examined, bearing in mind the strong case against them. He then mentioned the fact that all the accused persons were members of the Anti-Gang Unit, a special police unit, who were supposed to serve the public. He emphasised that, as police officers, they were duty bound by an oath and code of conduct, but that they had failed in acting as could have been expected of them. He concluded that the allegations are extremely serious and their actions unbecoming of any police officer.

³ *S v Rudolph* [2009] ZASCA 133; 2010 (1) SACR 262 (SCA) paras 14 and 15.

⁴ *S v Najoe* [2012] ZAECPHC 34; 2012 (2) SACR 395 (ECP).

[14] The learned magistrate's reliance on *Najoe* is unfortunate. In that case, the applicant and three other accused persons were charged with robbery with aggravating circumstances and two counts of murder. Section 60(11)(a) of the CPA was applicable. The applicant had to satisfy the court that exceptional circumstances existed which in the interests of justice permitted his release on bail. Furthermore, the applicant made a pointing out relating to the offence. The court held that on the applicant's own account, the State had a strong *prima facie* case against him on the charges of robbery with aggravating circumstances. A trial date was already set for three months in the future.⁵ The case is therefore distinguishable on the facts and the law from the matter at hand.

[15] The learned magistrate's reliance on *S v Ntsele*⁶ is also unfortunate. The Supreme Court of Appeal dealt with the trial court's evaluation of the evidence and the adequacy of proof in a criminal trial, not a bail application.

[16] Insofar as the learned magistrate was of the view that the appellants should have testified *viva voce* to be subjected to cross-examination, he disregarded the trite principle that it was never the intention of the legislature to insist that bail applications should be a full dress-rehearsal of the criminal trial to follow. The hearing of bail applications must be kept within reasonable limits,⁷ subject to the provisions of the legislation and the rights of the accused.

[17] I have touched on the investigating officer's allegations of intimidation. Notwithstanding the expiry of a period of two months, no charge in this regard was added to the charge sheet pertaining to Thesele and Monatisa. It is apparent from the record that the issue of intimidation was raised for the first time during the evidence of the investigating officer. Therefore, when the bail proceedings started, the appellants would not know that the State would rely on acts of intimidation that had already taken place. Surely, this aspect would have been canvassed in the affidavits if these allegations were known at the time, or the appellants might have decided to testify *viva voce* in order to deal with the issue of intimidation. This caused the bail hearing to be unfair, an aspect never appreciated by the learned magistrate. This is sufficient ground to set aside the

⁵ *Ibid* paras 12, 13 and 14.

⁶ *S v Ntsele* 1998 (2) SACR 178 (SCA).

⁷ *S v Viljoen* 2002 (2) SACR 550 (SCA) para 25.

learned magistrate's order refusing bail.

[18] It is apparent that the investigating officer's evidence pertaining to the alleged intimidation played a role in the exercise of the learned magistrate's decision to dismiss bail. Murders and all other offences such as intimidation can be arranged from inside correctional centres and committed by making use of third parties. The instigator may be inside or outside a correctional service centre at the time. In my view, strict bail conditions may go a long way to prevent accused persons from intimidating witnesses, but of course, there is no guarantee at all. If accused persons are considering intimidating witnesses, it will not make any real difference whether they are kept in custody awaiting trial or not.

[19] The learned magistrate also dealt with the provisions of s 60(4)(a) to (d), read with s 60(7), stating that the accused persons overlooked the provisions of s 60(7)(a) to (h). He concluded that 'the defence was hamstrung in Section 60(4)(c) and went to great lengths in defending this Section, yet overlooked Section 7(a) to (h), Section 60(4)(a).' He is wrong. It is clear that the investigation against the accused persons had already been completed by the time that the bail applications were heard. Furthermore, the learned magistrate failed to consider whether appropriate, effective and enforceable bail conditions could prevent the accused persons from intimidating witnesses and/or concealing or destroying evidence. In any event, the learned magistrate's reliance on s 60(5) and s 60(6) is incorrect. There is no admissible evidence indicating a likelihood that the accused persons would endanger the safety of the public or the complainant, bearing in mind what I have mentioned above. Furthermore, there is no likelihood that the accused persons would attempt to evade their trial. It is important to remember that 'likelihood' mentioned in the aforesaid sub-sections of s 60(4) must have some factual support and may not amount to speculation.⁸ Although I accept that it was not necessary for the State to prove actual interference with witnesses and that well-grounded fears would suffice, I am not prepared to accept that the State has shown that there was a real risk that the accused persons would interfere with State witnesses when bail is granted.

[20] The learned magistrate failed to fully consider the purpose of bail and in this regard misdirected himself. Hoexter AJ made it clear in *Minister van Wet en Orde en Andere v*

⁸ *S v Kock* [2003] ZASCA 1; [2003] 1 All SA 551 (SCA); 2003 (2) SACR 5 (SCA) para 20.

*Dipper*⁹ that the purpose of bail is to minimise the accused's right to freedom before his conviction and sentence. Therefore, a balance should be struck between the interest of society, *ie* that the accused would stand their trial and would not interfere with the administration of justice on the one hand and the liberty of the accused to be presumed innocent pending the outcome of their trial. The learned magistrate did not adopt such a balanced approach.

[21] It appears from the annexures to the charge sheet that the criminal case was remanded on 5 August 2025 to 26 August 2025 for the DPP's decision. At that stage accused 2, 5 and 6 were already out on bail. One does not know when this matter will eventually be heard, but bearing in mind the delays in the Regional Court with which we have become used to in the past, this case may not be finalised during the next year. In *Najoe*, relied upon by the learned Magistrate, a definite trial date has been set, contrary to the situation here.

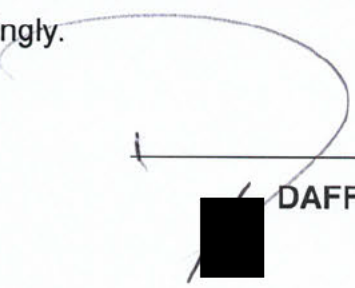
[22] I conclude that the appellants have proven on a balance of probabilities that the interests of justice require that they be released on bail. Strict conditions shall apply to prevent any contact with State witnesses and/or any possible intimidation.

[23] The following orders are issued:

- 1 The bail appeals of all three appellants are upheld.
- 2 The magistrate's court order refusing bail to the appellants is set aside and substituted with the order in the following paragraph.
- 3 Bail is granted in the amount of R10 000.00 (Ten Thousand Rand), in respect of each appellant, subject to the following conditions:
 - 3.1 the appellants are ordered to attend their trial, where and when so directed by the trial court, until finalisation of the criminal trial, and to remain in attendance, whenever the matter is before court, until and/or unless they are excused from attendance by the trial court;
 - 3.2 the appellants shall not interfere with the investigation in any manner and shall not interfere, contact, communicate or intimidate any State witness, whether known or unknown to them, either directly or indirectly;

⁹ *Minister van Wet en Orde en Andere v Dipper* 1993 (2) SACR 221 (A) at 224g.

- 3.3 the appellants, Thesele and Monalisa, shall report in person at the Welkom Police station between 08h30 and 16h30 every Monday of each week, unless they are attending the criminal trial in which event they shall produce proof of court attendance;
- 3.4 the appellant, Matsime, shall report in person at the Hennenman Police station between 08h30 and 16h30 every Monday of each week, unless he is attending his criminal trial in which event he shall produce proof of court attendance;
- 3.5 the appellants shall not leave their residences for more than five (5) consecutive days without informing the investigating officer under case number: A379/2025 beforehand;
- 3.6 the appellants shall not travel beyond the borders of the Free State Province without the prior written consent of the investigating officer;
- 3.7 the appellants shall immediately surrender all passports and/or travelling documents in their possession to the investigating officer; and
- 3.8 the appellants are not allowed to change their residential addresses without first reporting to and informing the investigating officer accordingly.



DAFFUE J

AppearancesA134/2025

For the Appellant:

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M Teki

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A128/2025

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