Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: **CA&R 16/2025**

In the appeal of:

ELIZABETH DOMINIKE 1st Appellant

CHRISTOPHER EVURULUBI 2nd Appellant

and

THE STATE Respondent

Heard on : **21 August 2025**

Delivered on : **02 September 2025**

Coram : **Olivier AJ**

Summary : *Criminal Procedure – Appeal against refusal by Magistrate's Court to grant bail – Schedule 5 of Criminal Procedure Act, 1977 – Onus on appellants to show that release on bail in in interests of justice – Onus not discharged – Not in the interests of justice to release appellants on bail.*

ORDER

In the result, the following order is made:

1. The appeal is dismissed.

JUDGMENT

OLIVIER AJ

1. This is an appeal against the decision made by the learned Acting Senior Magistrate MS KVD Mokoto ("*the Magistrate*") on 18 June 2025 to, subsequent to being confronted with an application to that effect, deny bail to the appellants pending trial.

   This decision by the Magistrate forms the subject of this appeal.

2. The appellants were arrested on 28 May 2025 and are to stand trial in the District Court of Upington on a charge of contravening the provisions of the **DRUGS AND DRUG TRAFFICKING ACT**[1] ("*the* ***DDTA***") as well as on a charge of money laundering.

   It is, *inter alia*, alleged by the State that the appellant was found in possession of undesirable dependence producing substances as listed in Part 3 of Schedule 2 of the DDTA with a value of R2 million.

[1] Act 140 of 1992

3. It is trite that the abovementioned substances were found in a vehicle that belongs to the 2nd appellant and that, at the time that the substances, which were hidden in various compartments in the vehicle of the 2nd appellant, were found, the vehicle was being driven by the 2nd appellant.

4. In coming to her eventual conclusion that the appellants should be denied bail, the Magistrate reasoned as follows:

"*In considering whether to grant or refuse bail the court should not speculate of what the court thinks might happen. The court must be satisfied that there is a probability and not a possibility of one or more of the factors mentioned in section 60(4) happening…*

The presumption of innocence is merely one factor that must be considered, and must be considered in the context that it does not relieve the applicants of the burden to prove that the interests of justice permit their release on bail. The right must also be considered in conjunction with the strength of the State's evidence. If the right to be presumed innocent was overarching it would mean that every bail applicant had to be released on the basis that he or she was presumed innocent. That could not have been the intention of the legislature…

The strength of the state case, ideally goes hand in hand with consideration of failure to attend court. The stronger the case and punishment on conviction, the more incentive and chances of decamping…

The evidence of the investigating officer demonstrates that indeed the state does have a strong case as illustrated that the police received a tip off and the alleged drugs were found in the 2nd applicant's vehicle. The said drugs have been take (sic) for analysis and the estimated street value is over 2 million Rands. The immigration officer has also uncontested evidence that the 2 applicants are illegal immigrants who not only reside illegally in the country but also conduct their businesses illegally as they do not have *permits as they are not citizens nor do they have permits to conduct businesses in the Republic of South Africa.*

The applicants have evaded the rule of law pertaining to being legal immigrants, it is a mystery as to how they have managed to secure businesses and for several years lived in the Republic without renewing their VISA. I am further pursuaded that there exists a likelihood they will evade trial as it appears they have resources to be undetected by law enforcement agencies and can be untraceable and that if released on bail they will not attend trial.

The personal circumstances of the applicants are completely outweighed by these factors and taking into account all the relevant considerations no bail condition in the circumstances of this case will address the legitimate concerns of the state particularly the probability of the applicants committing a schedule 1 offence. Presently 2 of the 2nd applicants' vehicles are in police custody having been found to be used as instruments used for commission of a crime, suspected of transporting illegal drugs." (My omissions)

5. Mr Nel, who appeared for both the appellants, indicated in his heads of argument that the primary issues for determination by this Court of Appeal were the following:

   5.1 Whether the trial Court misdirected itself by under-emphasising the evidence by the appellants that none of the factors set out in Section 60(4)(a) to (e) of the **CRIMINAL PROCEDURE ACT**[2] (herein after referred to as "***the CPA***") are likely to occur if the appellants are released on bail;

[2] Act 51 of 1977

5.2 Whether the trial Court misdirected itself by finding that the State does have a strong case as illustrated by the fact that the police found the alleged illegal substances in the vehicle of the 2nd appellant;

5.3 Whether the trial Court misdirected itself by not complying with the provisions of Section 60(9) of the CPA;

5.4 Whether the trial Court misdirected itself by finding that there is a likelihood that the appellants will attempt to evade their trial whilst no basis for such finding exists; and

5.5 Whether the trial Court made a wrong order in denying the application for the release on bail of both appellants pending trial.

6. It is apposite to start off by confirming that this appeal should be considered against the backdrop of the provisions of Section 65(4) of the CPA which provides as follows:

"*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. I am therefore, in view of the above-quoted statutory provision, only allowed to interfere with the decision by the Magistrate to deny bail to the appellants, if I am satisfied that the decision made by the Magistrate was wrong.

This was confirmed in ***S v Barber***[3] where the Court held as follows:

[3] 1979 (4) SA 218 (D)

"*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. I think 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*."[4] (My underlining)

8. The Court in this Division has held similar views in the past[5] and has also stressed the fact that mere doubt as to the correctness of the decision by the Court *a quo* would not suffice.[6]

I have no reason to deviate from the above principle and arguments to the contrary were also not presented to me.

9. It was not in dispute that the offences with which the appellants are being charged, resort under Schedule 5 of the CPA and that it was therefore incumbent on the appellants to place evidence before the Court *a quo* to the effect that, on a balance of probabilities, the interests of justice permits their release on bail.[7]

10. As I understand the process, once any applicant for bail has manged to show that it is in the interests of justice that he/she be so released, the State has the opportunity to gainsay the applicant's contentions by showing that one or more of the grounds listed in Section 60(4) of the CPA are established and that, as a result, it is not in the interests of justice to release the applicant on bail.

---

[4] ***Barber***, *supra* at 220. See also ***S v Ali*** 2011 (1) SACR 34 (ECP), par 14
[5] See for example ***Mashalane and Another v S*** [2015] ZANCHC 19 (5 June 2015), par 15
[6] ***Dhor v Direkteur van Openbare Vervolging*** [2016] ZANCHC 79 (20 December 2016)
[7] See ***Section 60(11)(b)*** of the CPA

I will return to Section 69(4) herein later again.

11. It has however been held that even if the State manages to show, based on one or more of the grounds listed in Section 60(4) of the CPA, that the interests of justice do not permit the release of an accused person on bail, the Court still needs to consider the provisions of Section 60(9) of the CPA and the question whether it can finally be found to be in the interests of justice to deny bail if the interests of justice are weighed against the accused's right to liberty.[8]

12. It is, in my view, beyond doubt that the liberty of any person is paramount and the basic principle that should be adhered to is that any accused person is entitled to be released on bail at any time prior to his/her conviction if it is in the interests of justice that he/she be so released.[9]

13. The above was echoed in ***President of the Republic of South Africa v Zuma and Others***[10] where the Court, with reference to the constitutionally guaranteed right to personal freedom, stated as follows:

"*That value, which is foundational to our constitutional order, may never be treated lightly. Our history instructs us that it is a matter of pride that South Africans value and assert our freedom above all other considerations in the face of whatever adversity we chance upon to meet. Our law must guard that right and its exercise unreservedly.*"[11]

14. Section 60(1)(a) of the CPA gives further recognition of the above basic principle where it states as follows:

---

[8] ***Prokureur-Generaal, Vrystaat v Ramokhosi*** 1997 (1) SACR 127 (O) at 155
[9] See Section 35 of the Constitution of the Republic of South Africa, 1996, and also ***S v Mokgoje*** 1999 (1) SACR 233 (NC) at 237; ***S v Branco*** 2002 (1) SACR 531 (W) at 532
[10] [2023] JOL 57081 (GJ)
[11] ***Zuma***, *supra*, par 17

"*An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interest of justice so permits*."

15. The central questions therefore to be answered are:

    15.1 Whether the appellants have managed to show, on a balance of probabilities, that they should be released on bail because it would be in the interests of justice to do so;

    15.2 Whether the State has managed to show that one or more of the factors/grounds, as listed in Section 60(4) of the CPA, have been established and that, as a consequence, the appellants should not be released on bail; and

    15.3 Whether finally and with consideration to the provisions of Section 60(9) of the CPA, it could be found that it is in fact in the interests of justice to release the appellants on bail if the interests of justice are weighed up against the right to liberty of the appellants and whether the Magistrate was wrong in holding differently.

16. If regards are to be had to the above quoted reasons by the Magistrate for her eventual decision to deny the appellants' application for bail, I hold the view that it is clear that the Magistrate based her decision on the following:

    16.1 That the State has a strong case against the appellants;

    16.2 That, based on the fact that the appellants are in South Africa illegally, a likelihood exists that they will evade their trial; and

16.3 That, based on the fact that two of the 2nd appellant's vehicles are in the possession of the South African Police Services ("SAPS") for allegedly transporting drugs, there is a probability of the appellants committing a Schdule 1 offence.

17. The lastmentioned finding by the Magistrate, namely that there is a probability that the appellants will commit a Schedule 1 offence is, in my view and on the face of it, incorrect since offences relating to the illicit possession, conveyance or supply of dependence-producing drugs are listed as Schedule 2 offences and the Magistrate provides no other explanation for why, according to her, a likelihood exists that a Schedule 1 offence might be committed by the appellants if they were to be released on bail.

There is, in other words, no evidence or indications that would support this finding by the Magistrate.

18. It should be mentioned that Mr Steyn, who appeared for the State/respondent, did not pursue the argument that the appellants, if released on bail, will commit a Schedule 1 offence, and both his arguments as well as the arguments of Mr Nel, essentially revolved around the strength (or not) of the State's case and around the question whether a likelihood exists that the appellants may evade their trial.

19. The relevant portion of Section 60(4) of the CPA reads as follows:

"*The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:*

(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial"

20. I do not deem it necessary to refer to, or quote the remainder of the provisions of Section 60(4) of the CPA, and I also do not deem it necessary to deal with the remainder of the grounds set out in said Section 60(4) by virtue thereof that the State did not attempt to prove or focus on the remainder of said grounds.

The State hung their hat firmly on Section 60(4)(b) of the CPA and on the argument that it would not be in the interest of justice if the appellants were to be afforded bail, because a likelihood exists that they will evade their trial if they were to be released on bail.

21. Section 60(6) of the CPA deals with the factors which the Court may take into consideration to determine whether it has been established that an accused person may evade his/her trial and lists these factors as follows:

"*(a) The emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;*

(b) The assets held by the accused and where such assets are situated;

(c) The means, and travel documents held by the accused, which may enable him or her to leave the country;

(d) The extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;

(e) The question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;

(f) The nature and the gravity of the charge on which the accused is to be tried;

(g) *The strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;*

(h) *The nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;*

(i) *The binding effect and enforceablity of bail conditions which may be imposed and the ease with which such conditions could be breached; or*

(j) *Any other factor which in the opinion of the counrt should be taken into account.*"

22. Both the appellants deposed to sworn affidavits which were read into the record during the bail application proceedings in the trial Court, and these affidavits were accepted by the Court as **Annexure "A"** and **Annexure "B"** respectively.

The appellants did not testify on their own behalf in the proceedings in the Court *a quo* whilst the Prosecutor, during said proceedings and in support of his argument that bail should be refused, made use of the testimony of the investigating officer, as well as an official/immigration officer of the Department of Home Affairs.

23. During the bail application proceedings in the Court *a quo*, certain facts came to light which Mr Nel, to his credit, conceded might be of concern inasfar as the appellants are concerned.

These facts, which were not disputed, alternatively not seriously disputed, are as follows:

23.1 Both the appellants are Nigerian citizens who have been residing and working in South Africa for quite some time, and who are deemed to be in the country illegally since they are not in possession of valid visas, residential permits, and/or work permits;

23.2 The 1st appellant made one unsuccesful application for the renewal of, or for the issuing of a new visa/residential permit, which application was made approximately 11 years ago, and she has not made a similar application since;

23.3 The 2nd appellant applied for a renewal of, or for the issuing of a new visa/residential permit on three occasions;

23.4 The above applications of the 2nd appellant were rejected on two occasions for the fact that he used fraudulent documents in the application process;

23.5 The 2nd appellant entered the Republic of South Africa on fraudulent papers, alternatively on a passport belonging to someone else;

23.6 Both the appellants initially presented the members of SAPS, alternatively the Court *a quo*, with incorrect addresses (the 1st appellant on one occasion, and the 2nd appellant on two occasions) where they purportedly permanently reside;

23.7 The 2nd appellant was involved in an incident during 2022 involving illegal substances and the possession thereof, which matter has been withdrawn, apparently for further investigation; and

23.8 At the time of the bail application proceedings in the Court *a quo*, a second vehicle belonging to the 2nd appellant was found to be conveying illegal substances.

24. It was common cause that the appellants were first offenders, and that neither had any pending criminal matters against him/her.

25. From her affidavit that was read into the record during the proceedings in the Court *a quo*, the 1st appellant stated that she was 39-years old, single and self-employed as a hair dresser, that she earned an income of approximately R11 000.00 per month, and that she had a permanent residential address in Gauteng.

The 1st appellant confirmed that she was in possession of travel documents, but she also confirmed that these travel documents were in the possession of SAPS.

The 1st appellant further stated that she was unaware of the illegal substances that were being conveyed in the vehicle since she was only a passenger in the vehicle, and neither the vehicle nor the illegal substances that were found inside the vehicle, belonged to her.

26. The 2nd appellant stated that he was 43-years old, married to a South African citizen, that he also resides in Gauteng, and that he has four dependent children.

The 2nd appellant further stated that he was self-employed as musician and taxi driver and that he earned an income of approximately R12 000.00 per month.

The 2nd appellant also confirmed that his travel documents were in the possession of SAPS at the time.

27. Both appellants, predictably so, stated under oath that their release on bail would be in the interests of justice and they both solemnly undertook not to make themselves guilty of any of the acts listed in Section 60(4) of the CPA.

What is of interest, however, is the fact that, although both appellants stated that they were not flight risks, neither stated under oath that they will not evade their trial.

28. I hold the view that a Court should be careful to attach too much weight to statements made by applicants for bail in terms of Section 60 of the CPA, especially in instances such as the present matter where the affidavit deposed to is in fact a draft pre-prepared document with blank spaces that are completed with the deponent’s particulars and certain other presonal information, and which are then commissioned and read into the record.

I make the above remark whilst being well aware thereof that even such an affidavit is deemed to be evidence under oath, but I am of the view that such a draft pre-prepared affidavit should be approached with caution simply because the question might very well be posed whether the affidavit contains the actual evidence of the deponent, or whether it is merely a draft pre-prepared document where the deponent deposes to evidence thought out by someone else in order to create sympathy with the Court hearing the application.

I am well aware of the pressures and time constraints often faced by practitioners, but I hold the view that in instances where the liberty of persons is at stake, more thought and effort should be put into the evidence placed before Court and into the manner in which this evidence is placed before Court.

29. It was argued on behalf of the 1st appellant that the State does not have a strong case against her, since the 1st appellant was merely a passenger in the vehicle in which the illegal substances were found, that the 1st appellant was not the owner of the vehicle, that she was not the driver of the vehicle, and that there is currently no evidence to suggest that the 1st appellant was aware of the drugs in the vehicle.

Mr Nel submitted that, by virtue of the above, there is no reason for the 1st appellant to evade her trial, and that she would, in fact, welcome the opportunity to convince a Court of her innocence.

I agree that it appears as if the case of the State against the 1st appellant might be precarious, but I hold the view that in light of what is set out herein under, this is of little consequence.

30. Reliance was further placed on the fact that the 1st appellant does not have any previous convictions and that she has a confirmed and fixed residential address, albeit an address in Gauteng, and it was argued that although the 1st appellant is currently in South Africa illegally, it is is a situation that can easily be remedied by simply applying for the necessary visa/permit.

31. In respect of the 2nd appellant, it was conceded that the State might be better positioned inasfar as the strength of their case is concerned, but it was argued that it must still be proven that the drugs in the vehicle was the 2nd appellant's and, so it was submitted, it must be shown that a likelihood exists that the 2nd appellant will evade his trial if he is released on bail.

32. Mr Steyn submitted that the fact that, on face value, the State currently does not have a strong case against the 1st appellant should not be the defining factor in this instance, and that it should be regarded as only one factor to consider.

I agree with this contention, as was already alluded to above.

It was argued that more reliance should be placed on the dishonesty of both appellants, and on the fact that neither has any ties to the jurisdictional area of the Court *a quo*, either personally or financially, and on the fact that both are in South Africa illegally.

33. It is commmon cause that neither appellant has any emotional, family, community or occupational ties to the region where they are to be tried, and it is also common cause that neither holds assets within the jurisdiction of the Court *a quo.*

Argument and/or evidence on how their continued incarceration would impact on the appellants' family and professional lives was not presented to Court.

34. Counsel for both parties were further *ad idem* about the fact that the offences on which the appellants are to be tried are of a serious nature, and that these offences, if the appellants are to be found guilty, might attract serious sentences.

35. It also appears, *prima facie* from the papers at my disposal, as well as from the arguments presented, that the State appears to have a reasonably strong case against at least the 2^{nd} appellant and it should be considered that both appellants initially provided the Court *a quo* / members of SAPS with incorrect addresses under circumstances that can, at best, be described as dubious.

36. I am, however, of the view that the decisive factor in this instance is the fact that both appellants are in the country illegally and that neither has any documentation in their possession which would validate their presence in the country.

The 1^{st} appellant does not provide any explanation why, for the past 10 years, no attempt was made to apply for documentation that would render her stay in the country legal, and I agree with the argument that this raises the valid question whether she would have made any effort to do so, if she had not been arrested.

In the case of the 2^{nd} appellant, the position is even worse in the sense that he attempted to obtain documentation that would legalise his stay by using fraudulent means.

37. I am aware that the general principle is that a person should not be disqualified from being released on bail simply because such a person is an illegal immigrant, and that each case should be determined on its own merits,[12] but in this instance I hold the view that the release of the appellants on bail, whilst they are in the country illegally, would be to perpetuate an illegality, and that this Court should not allow this to be the case.

38. I consequently hold the view that, if all of the above is taken into consideration, in other words, the seriousness of the allegations against the appellants, the seriousness of the punishment that they might face, the fact that both presented incorrect / false information to the Court / members of SAPS, the fact that neither has any ties to the area of jurisdiction of the Court where they are to stand trial, and the fact that both are in the country illegally, I am of the considered view that a likelihood does exist that the appellants will evade their trial and that, as a consequence, it is not in the interest of justice to release either appellant on bail.

In the case of the 1st appellant, I also considered the fact that she is single and has no dependants, and in the case of the 2nd appellant I also took into consideration the fact that this was not his first involvement in a matter involving illegal substances and, if regards are to be had to the fact that a second vehicle of his was found to convey illegal substances during the time that the bail application proceedings were ongoing, it would appear as if the 2nd appellant is regularly involved in matters involving illegal substances.

39. I am therefore in agreement with the decision of the Magistrate, and I will consequently not interfere with the decision of the Magistrate to deny bail to the appellants.

---

[12] ***S v Branco*** 2002 (1) SACR 531 (W) at 536; ***Imran v S*** [2023] ZAWCHC 320 (7November 20230, par 50. Also see ***Afali v S*** [2024] ZAECMKHC 121 (1 November 2024)

ORDER:

40. After having considered all of the above, I make the following order:

THE APPEAL IS DISMISSED.

[redacted]

ACTING JUDGE AD OLIVIER
HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION
KIMBERLEY

Counsel for the Appellants: *Instructed by*:	**ADV I NEL** VAN ZYL INC. **Upington** c/o ELLIOT MARIS INC. **Kimberley**
Counsel for the Respondent: *Instructed by*:	**ADV R STEYN** Office of the Director of Public Prosecutions **Kimberley**