

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

CASE NO. A238/2025

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE 15/10/2025

SIGNATURE

In the matter between:

Sihloniphisa Sipho Msane

Appellant

and

The State

Respondent

This judgment was handed down electronically by circulation to the parties' and or the parties' legal representatives by email and by being uploaded to CaseLines. The date for the hand down is deemed to be 15 October 2025.

Judgment – Bail Appeal

Thupaatlase, AJ

Introduction

[1] This is an appeal against the refusal by magistrate in Nigel , to admit the appellant to bail. The bail proceedings and the judgment thereof, that is the subject of this appeal, were heard on 18 February 2025 and the Magistrate delivered judgment, *ex temporae* on the 05 March 2025. The magistrate refused the application to grant appellant bail and.

[2] The parties agreed that the notice of appeal was filed out of time. The appellant has as a result of such lateness lodged an application for condonation of late filing of notice of appeal. The application for condonation is not opposed. During the hearing the parties agreed that condonation be granted by consent.

[3] In dealing with bail appeal this court is guided by Section 65(4) of the Criminal Procedure Act¹, (the CPA). The section 65(4)² provides that a Court hearing an appeal against the bail refusal will not set aside the decision of the magistrate unless such court is satisfied that the decision was wrong either in facts and or the law.

[4] In *S v Barber*³, the Court states as follows: -

“It is well known that the powers of this court are legally limited where the matter comes before it on appeal and not as 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 own view for that of the Magistrate because that would be unfair interference with the Magistrates exercise of its discretion. I think it should be stressed out that, no matter what this Court’s own views are, the real question is whether it can be said that the Magistrate who had discretion to grant bail but exercised that discretion wrongly”.

[5] In *S v Porthen and Others*⁴, the Court held that: -

“if such misdirection is established, the appeal court is at large to consider whether bail ought, in the particular circumstances to have been granted or refused. In the

¹ See Act 51 of 1977

² (4) 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.

³ See 1979 (4) SA 218 (D) at 220 E-H. see also *S v Branco* 2002 (1) SACR 531(WLD) at 5331

⁴ See 2004 (2) SACR 242 (C) at para 11

absence of a finding that the Magistrate misdirected himself or herself the appeal must fail’.

[6] The other important factor is that in a bail application the court is required to make a ruling relating as to under which Schedule the bail application is to be adjudicated. This is important to avoid a situation where it is later discovered that the bail proceedings were procedurally flawed. It is also important to note that the focus at the stage of bail application is not to decide the guilt of the applicant. In the case of *S v Dlamini*; *S v Dladla*; *S v Schietekat*⁵ the focus was described as protecting the investigation and prosecution of the case against hindrance.

[7] The task is to decide whether the interest of justice permits the release of the applicant if the offence falls under Schedule 5 or whether there are exceptional circumstances which in the interest of justice permit the release of the applicant on bail. This is clearly set out in section 60(11)⁶. It is the duty of the applicant to adduce such evidence, either that exceptional circumstances exist which in the interest of justice permitted his release on bail or that on a balance of probabilities, the interest of justice permitted his release on bail.

The facts

[8] The applicant is charged with 2 counts of rape in contravention of section 3 of Sexual Offences Act⁷ (SORMA) read with section 51(1) of Criminal Amendment Act⁸ and 1 count of sexual assault in contravention of section 5 of SORMA. The state alleges that the offences were committed by the appellant between 2023 and 2025.

⁵ [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR (3 June 1999); 1999 (2) SACR 51 (CC)

⁶ “(11) Notwithstanding any provision of this Act, where an accused is charged with an offence –
(a) referred to in Schedule 6, 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 exceptional circumstances exist which in the interests of justice permit his or her release;

(b) referred to in Schedule 5, but not in Schedule 6, 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; or

⁷ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

⁸ Act 105 of 1997.

[9] The appellant submitted an affidavit in support of his application. In the terms of the affidavit the appellant denied the allegations and instead admitted a romantic relationship with the complainant in count 1 and count 2. He denied any relationship with the complainant in count 3.

[10] The affidavit also gives details regarding the personal circumstances of the applicant. The appellant was at the time of the application a 48-year-old male and residing in Springs with his family. He is a lawful owner of the residential property. He undertook that if granted bail he'll not interfere with investigation and will not evade trial.

[11] The State opposed bail application and submitted the affidavit of the investigating officer. In addition, the investigating officer also gave viva voce evidence to substantiate why he was opposing that the applicant be granted bail. Among the reasons to oppose bail were the threats that were directed towards the appellant by members of the community. These were circulated via social media platforms.

[12] The investigating officer also alluded to the fact that people will lose faith in the justice system and that the State has a strong case against the appellant. The affidavit also confirms that parties are not residing in the same town, and as a result a condition prohibiting communication between them will be effective.

[13] The investigating officer also confirmed that the personal circumstances of the appellant and that the appellant has no record of previous convictions. In his evidence the investigating officer also gave account of how the accused was apprehended by members of the community.

Analysis

[14] The magistrate gave ex temporae judgment and refused the appellant bail. The magistrate gave a short judgment and didn't deal at length with evidence that was presented in court. There were a number of remarks that appear to be unwarranted and irrelevant. The magistrate refused to admit the affidavits of the witnesses as was proposed by the prosecution. The reason by the magistrate was that the court was

not dealing with a trial. This decision denied the magistrate the opportunity to be in a position to form a prima facie view of the state case against the appellant.

[15] In the case of *Kula v The State*⁹ at para 56 the court stated the importance of such evidence by stating that:

‘In a bail application resorting to the ambit of s 60(11)(a), the strength of the State’s case is a very relevant factor when assessing the question of exceptional circumstances. The cogency of the state case will have an impact on other factors that are interrelated and influential in considering whether the appellant is a suitable candidate to be released on bail’.

[16] In the course of the judgment, the magistrate appears unsure whether the bail resorted under Schedule 5 or Schedule 6. The court correctly remarked that it was not called upon to deal with the guilt of the accused. The court remarked about the public pressure but quickly hasten to add that it was not influence by such pressure. The importance of making a ruling on the Schedule was underscored in *S v Nel and Others*¹⁰ where it was stated that:

‘in the ordinary course of an application for bail a timeous ruling should be made on the applicable Schedule or section.’

[17] The remarks by the court around the scourge of domestic violence are also legitimate, however it is difficult to understand how those remarks were relevant in the decision reached by the magistrate. It is on the other hand unfortunate that the magistrate opted to bring his/her personal opinion instead of bringing impartiality and objectivity to bear in the evaluation of the evidence tendered.

[18] I am satisfied that the magistrate misdirected himself and erred. He failed to evaluate the evidence presented. The magistrate didn’t deal with any of the factors enumerated in terms of section 60(4) (a) (e) CPA. My conclusion that the magistrate erred is fortified by the conclusion that the magistrate made that ‘ there may have been exceptional circumstances in his favour but still the court deemed it necessary that the bail

⁹ [2023] ZANWHC ; 2023 (2) SACR 52 (NWM); [2023] 3 All SA 218 (NWM)

¹⁰ 2018 (1) SACR 576 (G) at para [7]

application of the applicant be refused'¹¹. It is not clear what makes it necessary to deny appellant bail when there is finding that there are exceptional circumstances.

[19] Given my conclusion that there was misdirection on the part of the magistrate, I am at liberty to interfere with the finding. There is no evidence establishing the appellant will endanger the safety of the public or any particular person or will commit a schedule 1 offence. The investigating officer told the court that the appellant is not staying in the same town as the witnesses and he has no previous convictions.

[20] A conspectus of the evidence presented indicates that the appellant passed the threshold of establishing that exceptional circumstances exist which in the interest of justice permit the release of the appellant. This much was found to be the case by the magistrate. It is not clear why despite the finding, the magistrate still thought it correct to deny the appellant bail.

Order

[21] In the result the following order is made:

1. The appellant's late filing of notice of appeal is hereby condoned.
2. The appeal against the refusal of bail is upheld.
3. Bail is granted subject to the following conditions:
 - 3.1. The appellant is granted bail in the sum of R 2 000.00 cash;
 - 3.2 Upon payment of the said sum of money, the appellant shall be released from custody on condition that:-
 - 3.3. He appears personally at the Nigel Magistrates' Court at 08h30am on the 20 October 2025 and remain in attendance up until he is excused by the court and thereafter on such dates and times and to such places to which these proceedings are adjourned until a verdict is given in respect of the charge to which the offence in this case relates;
 - 3.4. The appellant is prohibited from contacting or communicating directly or indirectly with any of the witnesses or possible witnesses in this case until

¹¹ See page 19 para 10 of the transcribed record

finalization of this matter. A list of the witnesses will be provided to him by the prosecutor/investigating officer before his release.

3.5. That the accused reports in person to the person in charge of the Charge Office (Community Service Centre) at Duduza Police Station every Friday between the hours 07h00AM and 18h00PM with his identity document. The appellant shall first report in accordance with this order on first day following his release on bail.

3.6. The appellant is restricted to the Magisterial district of Ekurhuleni and may not leave the magisterial district without prior written approval of the investigating officer. If granted permission to leave the magisterial district, which permission may only be withheld on reasonable grounds, the appellant is to provide a valid itinerary of his movements and keep the investigating officer updated at all times as to his whereabouts

3.7. The appellant's residential address is recorded as 3 3[...] A[...] W[...] S[...]. If he should change such address he will notify the Clerk of the Court, Orkney and the investigating officer of such change within 24 hours.

4. The appellant is informed that in terms of section 67(1) Act 51 of 1977, if, after his release on bail, he fails to appear at the place and on the date and at the time appointed for his trial or to which the proceedings are adjourned, or fails to remain in attendance at such trial or at such proceedings, or fails to comply with the above conditions, the relevant Court shall declare the bail provisionally cancelled, and the money provisionally forfeited to the State, and issue a warrant for his arrest. The appellant is further informed that it is also a punishable offence for failing to appear or for non-compliance with a stipulated condition.

9. A copy of this order with the bail conditions must be served on the appellant personally by the Investigating Officer before his release on bail. A copy of such service duly signed as acknowledgement by the appellant certifying that he is fully conversant with the conditions of his release in bail must be filed as part of the record in the District Court with the Clerk of the Court.

THUPAATLASE AJ
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Date of Hearing: 09 October 2025

Date of Judgment: 15 October 2025

Appearances:

For the Appellant: Mr. Ndaba

Instructed by: BP Ndaba Inc.

For the Defendant/Applicant: Adv. Pruis

Instructed: DPP (Pretoria)