

REPUBLIC OF SOUTH AFRICA



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

CASE NO. A249/2025

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
DATE	SIGNATURE
17/10/2025	[Redacted Signature]

In the matter between:

Gift Msimango

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 17 October 2025.

Judgment – Bail Appeal

Thupaatlase, AJ

Introduction

[1] This is a bail appeal following a refusal by the regional magistrate sitting in Brakpan regional court to grant the appellant bail who has been arrested and who is in custody. The parties agreed that the offences fall under schedule 5 and that the provisions of section 60 (11) (b)¹ of the Criminal Procedure Act² (the Act) are applicable. The bail application was heard on 03/01/2025 and judgment wherein bail was refused was delivered on 26/01/2025.

[2] The appellant appeared charged with contravention of section 17(1) (a) of the Domestic Violence Act³ (DVA). The allegation against the appellant was that he violated the conditions of the protection order which was obtained by his wife on 24/06/2024. It is alleged that such contravention took place on 16/12/2024.

[3] The introduction of s 59(1)(a)(ii)⁴ and (iii) (aa)⁵ of the Act has brought about a new bail dispensation to deal with the scourge of violence against women and children which has sadly engulfed our nascent democracy. The effect of these amendments have the effect of categorising domestic violence offences as Schedule 5 offences and therefore requiring formal bail application. The so-called 'police bail' is no more available for people accused of these offences.

[4] Section 59(1)(a)(ii) and (iii) must now be read conjunctively with the newly introduced s 60(11)(c) which provides that:

'60(11) Notwithstanding any provision of this Act, where an accused is charged with an offence –

(c) contemplated in section 59(1)(a)(ii) or (iii), 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'.

¹ (b) 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.

² Act 51 of 1977 as amended.

³ Act 116 of 1998.

⁴ (ii) against a person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998).

⁵ (iii)(aa) section 17 (1) (a) of the Domestic Violence Act, 1998

Evidence

[5] The appellant is employed by Ekurhuleni Metropolitan Police Department (EMPD) as a superintendent. He is married and has two children. He lists five other children that he is supporting. He has a fixed property in the jurisdiction of the court. He stated that he has no record of previous convictions. He stated that the complainant in this matter obtained a protection order in order to settle their family dispute. On the other hand, he stated that the complaint was willing to pay bail for him. He undertook that he'll abide by the bail conditions and that he'll not evade trial nor interfere with investigations. There is also an undertaking by the appellant not to intimidate witnesses.

[6] The affidavit of the investigating officer confirms the charge that the accused is facing. The investigating officer also states that the appellant was informed on the 16/12/2024 that a case was opened against him and that he was required to contact the investigating officer. He didn't respond to the request, and he was again contacted on 18/12/2024. On that day he avoided communicating with the police officer who was calling him by dropping calls.

[7] The investigating officer stated further that as a result of the appellant being uncooperative, a warrant of arrest (J50) was applied for and same was issued on the 19/12/2024. Thereafter the supervisor of the appellant was informed, and he brought the appellant to the police station and he was charged and detained. The investigating officer confirmed that the appellant owns fixed property and also his marital and employment status. He also confirmed that appellant has no record of previous conviction.

[8] The investigating officer stated that the appellant was abusing alcohol and is an aggressive person. She stated that should the appellant be granted bail, he'll intimidate the complainant. She stated that the appellant had threatened the children.

Grounds of Appeal

[9] The appellant lodged the appeal and has assailed the refusal to grant him bail on various grounds and principally that the court a quo misapplied the applicable legal provisions as set out in section 60(4) (a) (e) of the Act. It was further argued that the magistrate failed to take into account the personal circumstances of the appellant including that he was married with children. It was also alleged that he failed to take into account the appellant owned fixed property in the jurisdiction of the court.

[10] The appellant further took issue with the fact that the magistrate failed to take into account the fact that he was gainfully employed and has no record of previous convictions

Law Applicable

[11] The application is in terms of Section 65 (1) of the Act which provides that:

'An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.'

[12] The section directs how the appellate court should deal with such an appeal by providing in section 65 (4) of the Act 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'.

[13] The approach stated in *S v Barber*⁶ at page 220 E-H has been widely accepted as the correct approach to the test contemplated in section 65(4) of the Act that: "

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... Without saying that the magistrate's view was actually the correct one, I have not been persuaded to decide that it is the wrong one.'

[14] This approach was endorsed with added qualification in the case of *S v Porthen & Others*⁷ at para [16] that:

'Insofar as the quoted dictum in *S v Barber* might be amenable to be construed to suggest that the appellate court's power to intervene in terms of Section 65 (4) of the

⁶ 1979 (4) SA 218 (D&CLD)

⁷ 2004(2) SACR 242 (CPD)

CPA is strictly confined, in the sense of permitting interference only if the magistrate has misdirected him or herself in the exercise of his or her discretion in the narrow sense, I consider that it would be incorrect to put such a construction on the subsection; certainly in respect of appeals arising from bail applications made in terms of s60 (11) (a) of CPA. I am fortified in this conclusion by the manner in which the Supreme Court of Appeal dealt with the bail appeal in *Botha's* case supra. See paras [21]- [27] of the judgment. It is clear that the Appeal Court undertook its own analysis of the evidence and came to its own conclusion that the appellants had not discharged the onus on them in terms s 60 (11) (a) of the CPA.'

[15] It is axiomatic that Section 65(4) of the Act is couched in peremptory terms. This is made clear by the use by the Legislature of the word 'shall'. The decision of the magistrate cannot be set aside unless it is found to be wrong, and if this Court is satisfied that the decision was wrong, this Court shall give the decision which in its opinion the magistrate should have given. The *Barber* decision is a pre-constitution decision and the modification of it in *Pothen* is to be welcomed as it infuses constitutional flavor to it.

[16] In terms of s 65 (4) of the Act interference with the decision of the court a quo can only be done if the appellate court is satisfied that the decision to refuse bail was wrong. In order to succeed the appellant will have to show that the court a quo overemphasized aspects which militate against the granting of bail, whilst aspects in favour of the appellant to be granted bail were not given sufficient weight.

[17] In *S v Zondi*⁸ at para [12] the court stated that:

'It speaks for itself that if this court cannot conclude that the court a quo wrongly weighed up the points for and against the granting of bail, this court would not be at liberty to consider the issue afresh. The court's decision will have to stand.'

[18] The purpose of the bail proceedings had been crystallized in a number of decisions and in the case of *S v Motsisi* 2023⁹ at para [28] stated that:

'the essentials of a bail application include addressing relevant offence if the applicant so elect and such particulars as may be reasonably sufficient to satisfy the court, in this instance that the interest of justice permit the release of the applicant.'

[19] The unfortunate part is that the magistrate in one and a half page ex temporae judgment didn't deal and analyse the evidence that was led by the state and defence. The magistrate merely regurgitated the applicable legal principle. This was also done

⁸ 2020(2) SACR 436 (GJ)

⁹ 2023 (1) SACR 218 (WCC)

bail without interrogating the evidence. The failure by the magistrate to deal with evidence presented and to give reasons is a classic case of misdirection by a judicial officer. In the premises this court is at liberty to interfere and consider if on the evidence bail could be granted or not.

[20] There was no attempt to give effect to the applicable law in coming to the conclusion whether bail should be granted or not. There was mention that the complainant had submitted a withdrawal statement. The affidavit of the appellant states that the complainant was the person who had undertaken to pay bail if the court was inclined to grant bail.

[21] The court didn't probe this allegation further so as to inform itself of all factors. Section 60 (2A) of the Act provides that:

'The court must, before reaching a decision on the bail application, take into consideration— (a) any pre-trial services report regarding the desirability of releasing an accused on bail, if such a report is available; and (b) the view of any person against whom the offence in question was allegedly committed, regarding his or her safety'.

[22] The court must keep in mind that prima facie case, in itself is not a basis for refusing to admit an applicant to bail. This was made clear in the *S v Dlamini; S v Dladla and others; S v Joubert; Schietekat*¹⁰ where the following is stated at para [11]:

'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 it is considerably less formal than a trial. Thus, the evidentiary 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 enquiry 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'.

¹⁰ [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR (03 June 1999) 1999 (2) SACR 51 (CC)

[23] The bail proceedings are inquisitorial and therefore allowing the court to ask for further information if needs be. This is clearly illustrated by section 60 (3) of the Act which provides:

'If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court'.

[24] In *S v Acheson*¹¹ 177E-F the court emphasised that:

'accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court. The court will therefore ordinarily grant bail to accused unless this is likely to prejudice the ends of justice.'

[25] 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. This can only happen if the court deals with all the evidence in order to justify its conclusion. The point was emphasised in *S v Diale and Another*¹² at para [14] where it is stated that:

'A court cannot find that refusal of bail is in the interest of justice merely because there is a risk or possibility that one or more of the consequences mentioned s60(4) will result. The court must not grope in the dark and speculate; a finding on the probabilities must be made. Unless it can be found that one or more of the consequences will probably occur, detention of the accused is not in the interest of justice and accused should be released'.

[26] I am satisfied that in this matter the magistrate misdirected himself by refusing bail without providing reasons for such a decision. The failure to provide reasons has been dealt with in a number of judgments by our superior courts. In the case of *Vodacom (Pty) Ltd v Makate and Another*¹³ at para 46 the court stated that:

'The court speaks through its judgment. It is thus in the judgment that one expects to find evidence that the court discharged the duty of proper consideration the way it should. An indicative factor -albeit not exclusive- of the performance of the duty of proper consideration is providing adequate reasons for a judgment (the duty to provide reasons).Woefully lacking reasons are symptomatic of a flawed assessment of facts and issues. For present purposes, flawed in the sense that amounts to failure of justice. We must not lose sight of the fact the adequacy of reasons relate to a

¹¹ 1991 (2) SA 805 (NM)

¹² 2013 (2) SACR 85 (GNP)

¹³ [2025] ZACC 13

proper consideration of the evidence and issues and – based on that- taking a reasoned decision. That in no way, means that the reasons must be correct. I accept that unsatisfactory reasoning does not necessarily equal to discharge the duty of proper consideration'.

[27] *Vodacom* at para 54 court went further to underscore the importance of providing reasons despite the simplicity of the facts to be decided. The court continued to state:

'Reasons given for a court's decision help demonstrate that there was or wasn't proper performance of the duty of proper consideration. If the facts are simple and straightforward, not much may be required by way of reasons to support the conclusion reached. But the reasons must still be enough to demonstrate sufficiently that there compliance the duty'.

[28] The above quoted captures what happened in this case. I find that there was a failure of justice and the taking the conspectus of evidence, the appellant is entitled to be admitted to bail.

Order

[29] In the circumstances it is ordered as follows:

1. Appeal against refusal of bail is upheld.
2. The appellant is granted bail in the sum of R 2 000.00
3. Upon payment of the said sum of money, the appellant shall be released from custody on condition that:
 - 3.1. That the appellant attend court on the next date and any further date to which this matter is postponed and remain in attendance until excused by the court or dealt with in accordance with justice.
 - 3.2. He informs the investigating officer of his whereabouts at any stage that he has to leave Johannesburg metropolitan municipal area and also when he for reason whatsoever changes his residential address.
 - 3.3. 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.

- 3.4. 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 acknowledgment 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 Clerk of Court, Nigel.



THUPAATLASE AJ
ACTING JUDGE OF THE HIGH
COURT PRETORIA

Date of Hearing: 10 October 2025

Date of Judgment: 17 October 2025

Appearances:

For the Appellant: Adv. NT Motsisi

For the Respondent: Adv. Pruis

Instructed: DPP (Pretoria)