

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: A61/2025

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
12 November 2025	
DATE	SIGNATURE

In the matter between:

ROBIN TANYARADZWA NHEPERA

Applicant

and

STATE

Respondent

BAIL APPEAL JUDGMENT

PJ DU PLESSIS AJ

BACKGROUND

[1] This is a bail appeal against the refusal by the Daveyton Magistrates Court of the Appellant's application for bail in terms of Schedule 5¹ of the Criminal Procedure Act, 51 of 1977 (CPA).

¹ Section 60 (11) (b) Act 51 of 1977

- [2] The Appellant (Robin T. Nhepera), a Zimbabwean citizen, is charged with eight counts of theft totalling R2,064,720 from her former employer, Mtanga Bulk (owned by Jonathan Mtanga, a family member), where she worked as a legal Administrator for three years. She resigned in October 2024 and returned to her parental home in Harare, Zimbabwe (where her claimed residential address was not supplied).
- [3] She returned to South Africa on 18 April 2025 on a three-month visa. The Appellant was arrested on 23 April 2025 at OR Tambo International Airport while attempting to board a flight back to Zimbabwe. Her legal status in South Africa expired on 17 July 2025 while she was in custody.

APPROACH

- [4] As this is a bail appeal the approach is governed by section 65(4) of the Criminal Procedure Act 51 of 1977 (CPA) which provides that:

“The court or judge 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**, in which event the court or judge shall give the decision which in its opinion the lower court should have given.”

In **S v Barber 1979 (4) SA 218 (D)** the above was probably best articulated by Heher J (as he then was) when he held:

“... the powers of this Court are largely limited where the matter comes before it on appeal ... This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. ... 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.**”

ANALYSIS

- [5] The learned Magistrate refused the applicants bail on the singular **ground**. This finding is in terms of Section 60 (4) (b) CPA which states:

“where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial:

- [6] He came to this conclusion by stating the following cumulative flight risk factors which he regarded as “fatal for the applicant” – them being her lack of assets and unemployment in RSA, as well as her struggle and proven failure to obtain a verifiable address where she would stay trial awaiting. She also indicated her intention to study in RSA, but no proof of this was provided. The Magistrate therefore considered various of the ten **factors**² listed under Section 60 (6) CPA which speaks to his ultimate finding on the **ground** mentioned supra under Section 60 (4) (b) CPA.
- [7] One of the core issues argued in this appeal centres on the Magistrates finding regarding the strength of the State's case, a **factor** under Section 60(6)(g) CPA, which was used as a prominent determining factor.
- [8] This as the Magistrate held: "I appreciate that these are bail proceedings, and I am not the trial Court," and that his function was only to "*prima facie* assess and determine the relevant strength of the state's case". He however then made a definitive finding that the evidence (the "fake stamp") "fatally" compromised the Applicant's case. This language use was argued to have blurred the line between a *prima facie* assessment and a *de facto* conclusion on the merits of guilt, thereby usurping the function of the trial court.

² Section 60 (6) Act 51 of 1977 “factors” for consideration under Section 60 (4) (b) Act 51 of 1977 are:

- (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 enforceability 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 court should be taken into account.

- [9] I agree that the Magistrates overzealous wording may be an overstatement for enquiring on one **factor** under section 60 (6) (g), but strongly disagree that he made a *de facto* conclusion on the merits of guilt. This was a bail application and the factor consideration and ruling about the “fake stamp” holds no consequence to the theft charges the appellant faces. It can therefore not be held on this point that the Magistrates ultimate decision was wrong and replaceable.
- [10] Magistrates must ensure their bail judgments are concise and adhere strictly to the language of the legislation, clearly identifying which of the five **grounds** listed in Section 60(4)(a)-(e) CPA established that releasing the applicant would not be in the interest of justice; it is critical not to elevate a mere **factor** for consideration (such as the strength of the State's case, listed under S 60(6)(g)) to the status of a conclusive, independent ground, though it remains essential that the judgment indicates which specific factor(s) (listed under S 60(5)-(8A)) were considered to support the established ground.
- [11] We seem to have reached a stage where “the strength of a case” which is but a singular **factor**, to establish a **ground**, of what would **not** be in the interest of justice to grant bail, have been elevated to a **ground** (and not just a factor) for consideration of justice interest. This should be guarded against, by all decision makers and representatives seeking to question or challenge, the decision made.
- [12] It is recognised that the **factor** of a State case being strong or weak is an extremely important issue for the bail court to consider. However, in this case, it is one of ten possible **factors** to consider, in getting to a decision if the **ground** of there being a likelihood that the accused, if released on bail, will attempt to evade her trial.
- [13] The strength or weakness of a State case still under investigation, it being challenged by a bail applicant either viva voce or on affidavit, and the requirements that such a challenge must meet to be successful, have already been extensively pronounced upon in case law – See **Mathebula v S 2010 (1) SACR 55 (SCA)** paragraphs 11-12 and more recent **Matlala v S (A67/2025) [2025] ZAGPJHC 1099 (27 October 2025)** paragraphs 48-51.

- [14] The Appellants legal representative in the bail proceedings indicated that she intends to plead, not guilty, and took on the strength of the States case in that she was not the only administrator receiving cash at the business, and that she has a provable alibi for some of the dates where allegations of theft are made against her. There were also allegations made of a bias and a possible corrupt friendship, between the investigating officer and the complainant. The owner was also accused of looking for a scapegoat as he was having serious tax issues with SARS.
- [15] Before this court Adv. Mureriwa for the appellant, also referred to the documentary evidence placed before the court a quo and said it meant nothing as it was merely delivery notes, invoices and statement of cash, which only proves something was ordered and delivered an invoice was generated and a cash payment was made. There is no evidence of any of the people invoiced to say I paid x- amount in cash to the Appellant, but the statement shows y-amount indicating a theft may have been committed.
- [16] All of these aspects can be viewed in light of the findings made in the cases referred to in paragraph 13 supra, and it all comes down to this; A bail applicant must prove on a balance of probability that they will be acquitted of the charge, and until they set up a prima facie case of the prosecution failing, the state has no duty to rebut their evidence (*S v Botha* 2002 (1) SACR 222 (SCA); *S v Viljoen* 2002 (2) SACR 550 (SCA)). I find this was not achieved by the Applicant.
- [17] The main thrust of the Appellant's grounds of appeal is that the Magistrate committed legal misdirection's and factual overreaching conclusions, primarily by disregarding the presumption of innocence and the right to liberty. The Appellant contends that the Magistrate erred in law by disregarding the presumption of innocence and Appellant's rights to liberty and dignity.
- [18] This ground of appeal must be viewed in the light of the findings made by our Apex Court in the matter of **S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC)**
- [19] In paragraphs [45] to [50], the Constitutional Court held the term "interest of justice" means: "**a value judgment of what would be fair and just to all**

concerned" and importantly further that the phrase "the interests of justice" has **two distinct meanings** within the CPA bail legislation and must be interpreted consistently with the Constitution.

[20] In the overarching context of Section 60(1)(a), which determines whether bail should be granted at all, "the interests of justice" is given a **wider** meaning that requires weighing the State's (societal) interests against the accused's right to liberty.

[21] However, in Section 60(4), which lists the adverse grounds (like evading trial or witness intimidation) that permit the refusal of bail, the phrase takes on a **narrower** meaning, referring specifically to the **societal interests** themselves.

[22] This wider and narrowed meaning distinction ensures the court does not solely focus on the State's case. This as Section 60(9) CPA creates an **all-important mandated judicial exercise**, which is the weighing of the right of the accused to personal freedom, in particular the prejudice (listed in Section 60(9)(a) to (g)) likely to be suffer if detained in custody, **against** the unfavourable / harmful societal **ground(s)** established under Section 60(4), which was determined, after consideration of the relevant **factors** in Sections 60(5-8A) by the bail court.

[23] Only if the societal interest grounds (60 (4) (a-e)) clearly outweigh the accused's right to freedom and prejudice (60 (9)), after conducting this weighing (balancing) act, can the court legitimately refuse bail. This interpretation harmonises the CPA with the Constitutional right to be released from detention if the interests of justice permit, preventing an automatic refusal based merely on the existence of a risk.

[24] The Appellant argues the Magistrate failed to execute this statutory duty under Section 60(9) CPA. This as he failed to balance the established ground being, the likelihood the Appellant will evade her trial Section 60(4)(b), against the personal freedom and prejudice the Appellant may suffer by being detained until the matter is finalised.

[25] The Appellant submits that even where the Schedule 5 onus has not been fully discharged by the Applicant, the court must still consider and impose stringent bail conditions (such as house arrest or high bail which cannot be afforded to be

forfeited) to mitigate the established ground(s) risk, before resorting to an outright refusal of bail. The Appellant submits this failure to explore such stringent release conditions is a substantive legal misdirection contradicting binding High Court authority (*Sureia Faquir v S*)³.

- [26] I agree that the Magistrate failed to properly execute his statutory duty under section 60(9) CPA. He mentioned it, but didn't comply with it. The Magistrate's judgment, in the evaluation section thereof, focus heavily on the Section 60(6) **factors** that supported his finding of the **ground** under Section 60(4)(b). He did not balance the applicant's personal freedom and prejudice faced under the Section 60(9) factors, against the unfavourable / harmful societal ground found not to be in the interest of justice for release, established under Section 60(4)(b).
- [27] His ultimate findings were that the Appellants lack of assets,⁴ unemployed status⁵ lack of emotional, family and community ties⁶; the gravity of the charge and the penalties likely to be imposed⁷ and the strength of the State's case⁸ "militate against the acceptance of her submission that she is not a flight risk and will stand trial".
- [28] Due to the Magistrate's failure to execute this **mandatory** statutory duty under Section 60(9) he erred and was wrong. This finding does not mean that his final decision to refuse bail was wrong, but it does mean that this court hearing the appeal, is now empowered to give the decision that in its opinion should have been given.
- [29] The evidence establishes a likely and substantial risk against granting bail. The applicant is a foreign national with no legally verified South African address – although Adv. Mureriwa, her counsel in this court, offered she could come and stay at his house if bail is granted – an issue I will speak to later in this judgment.
- [30] Her address in Zimbabwe was never presented in the papers and her legality (Visa) in RSA lapsed on 17 July 2025 after her arrest in this matter. She is

³ (A73/2013) [2013] ZAGPPHC 523 (12 May 2013)

⁴ Section 60(6)(b)

⁵ Section 60(6)(j)

⁶ Section 60(6)(a)

⁷ Section 60(6)(f&h)

⁸ Section 60(6)(g)

unemployed, and lacks substantial assets or family (not complaining against her) ties within RSA.

- [31] She was unreachable to the investigating officer where she was in Zimbabwe, which led to the issuance of a J50 warrant of arrest, which was executed at the airport, due to a tip-off that she was in RSA and was leaving for Zimbabwe. The charges are serious Schedule 5 offences, eight counts of theft, with minimum sentences applicable, justiciable in the Regional Court, creating a significant incentive for her to abscond.
- [32] Considering the weighing factors under Section 60(9) the period already in custody awaiting trial carries a low weight, as the State confirmed investigations would be completed "without undue delay." Some of the delays thus far was found by the Magistrate to be due to the applicants request and is evident from the record. Financial loss similarly carries a low weight due to the applicant's unemployed status, and her state of health carries no weight as no critical medical issues were raised. Whilst the impediment to her defence carries moderate weight, it is not unique to RSA as this type of difficulty is faced by many trial awaiting accused.
- [33] The Applicant's side of the weighing factors supra as per Section 60(9)(a)-(g), which measures her freedom rights and prejudice of detention, is weak. Her constitutional right to freedom (Section 35(1)(f)) is legitimately curtailed when the interests of justice are shown to be in greater peril. **Personal freedom is permitted unless it conflicts with a fundamental interest of justice.**⁹ This entire phrase represents the constitutional balance point established by the CPA.
- [34] On the issue of bail conditions, I was referred to the decision of Cachalia AJ (as he then was) in **S v Branco 2002 (1) SACR 531** where I was specifically referred to the quotation on page 537 where he held:

*"Finally, a court **should always** consider suitable conditions as an alternative to the denial of bail. Conversely, where no consideration is given to the application of suitable conditions as*

⁹ Matlala v S (A67/2025) [2025] ZAGPJHC 1099 (27 October 2025) par. 53

an alternative to incarceration, this may lead to a failure to exercise a proper discretion.”

[35] With all due respect to now, Cachalia JA, this I find is not a conclusion that can be made, if the bail provisions in Chapter 9 - Sections 58-70 is carefully looked at and read with the Constitutional Courts decision of Dlamini.

[36] The heart of this judgment is that the **factors** contained in Sections 60 (5-8A), speak to their respective **grounds**, to be established of what will not be in the interest of justice to grant bail, per Sections 4 (a-e). Once such grounds are found, the mandated judicial weighing exercise with Section 60(9) must be conducted. If a court then concludes bail is to be refused, as it will be in the interest of justice to do so, there is nothing in the bail legislation or Dlamini that warrants the finding that “a court **should always** consider suitable conditions as an alternative to the denial of bail.”

[37] I say this, as a bail court who properly went through the whole bail consideration process (grounds, factors and weighing of accused’s interests), has now made a finding to grant or refuse bail using their inherent judicial discretion.¹⁰

[38] This is a decision that a bail court when refusing bail can make, as **S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC)** par 79 held:

“It should of course never be forgotten that the Constitution does not create an unqualified right to personal freedom and that it is inherent in the wording of s 35(1)(f) that the Bill of Rights contemplates - and sanctions - the temporary deprivation of liberty required to bring a person suspected of an offence before a court of law. The hypothesis, indeed the very reason for the existence of s 35(1)(f), is **that persons may legitimately and**

¹⁰ **S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC)** par 74 “... the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted.”

constitutionally be deprived of their liberty in given circumstances¹¹.”

- [39] If bail is refused in the interest of justice by a bail court who properly attended to all considerations, there is no other provision in Chapter 9 of the CPA or Dlamini or the Constitution, that held: “suitable conditions must be considered as an alternative to refusing bail.”
- [40] The pronouncement quoted of the learned judge, tends to read into the bail and constitutional considerations¹² dealt with extensively in this judgment, something non-existent.
- [41] This, as bail conditions and their appropriateness in Chapter 9 is never elevated to this level, that when a court has decided to **refuse bail**,¹³ now it must go further and consider “conditions as an alternative to incarceration”
- [42] While bail conditions are listed as **factors**¹⁴ a court may consider when determining if the statutory **grounds**,¹⁵ these bail conditions are not elevated to a requirement that the court must treat them as an alternative to incarceration. It then follows also that a court will not risk failing to exercise proper discretion simply by refusing to grant bail with conditions, when it outright decided to refuse bail.
- [43] I therefore respectfully disagree and hold that if a bail court properly went through the whole bail consideration process (grounds, factors and weighing of accused’s interests) and refused bail, there is no obligation on it in the CPA, to further consider *conditions* as an alternative to incarceration. It cannot be said also such a failure (to consider conditions) is indicative of an improper judicial discretion exercised. The only time such a finding of improper judicial discretion may be made is if the **factors** related in footnote 14, dealing with bail conditions, was not properly considered to establish one of the **grounds** as per footnote 15.

¹¹ Especially the Section 60(11) (a-c) circumstances (*My emphasis on the quotation*)

¹² Section 60(9) CPA

¹³ Contra when **GRANTING** bail but it cannot be paid – Section 60(2) (2B) (b)(i-ii) CPA

¹⁴ Section 60 (6)(i); Section 60 (7)(e); Section 60 (8)(c)

¹⁵ Section 60(4)(b); Section 60(4)(c); Section 60(4)(d);

[44] There are two further issues that needs to be ventilated in this judgment stemming from the submissions in the appeal. The first was the submission of Adv Mureriwa that there cannot be a rule that if you are a foreigner in South Africa, and you get arrested you, will not get bail.

[45] I agree with this submission as section 9(1) of the Constitution states:

“Everyone is equal before the law and has the **right to equal protection and benefit** of the law.”

[46] It must however be remembered what Heher JA held in **S v Savoi 2012 (1) SACR 438 (SCA)**, at par [22]:

“courts must determine cases according to the facts, and whether an accused person will or will not attend in due course is entirely a question of fact and inference from fact”.

[47] **Legal** visitors to RSA should not fear, that as a matter of course their bail will be refused. They are however here as visitors and are not expected to break the law. If, however they get arrested, especially for serious offences (like the Appellant), whilst having been in or busy visiting our shores, they will face the same challenges an arrested South African national will face, when applying for bail. Unfortunately, with the added hinderance, like in this matter, that their lives, their assets, family, employment and earning capacity lie outside the borders and jurisdiction of RSA.

[48] Thus, when a court apply these Constitutionally validated bail provisions¹⁶ in the CPA, the **ground** found in this matter, not to be in the interest of justice to grant bail Section 60(4)(b), will be a very difficult hurdle to clear for any foreigner, due to the **factors** listed for consideration under Section 60 (6).

[49] Whilst it is not impossible for a foreign national to be granted bail, all courts hearing bail applications must first comply with the mandated judicial weighing

¹⁶ S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC)

exercise (for nationals and foreigners alike) before exercising their judicial discretion to arrive at a final decision on bail.

[50] Illegal foreigners (undocumented or overstaying their legal entry) are another issue and will only be referred to briefly. Not disregarding an illegal foreigner's entitlement to apply for asylum, the mere expression to do so does not entitle release from detention, especially if the Immigration Act was contravened by entering and remaining in the country illegally.

[51] Where the detention of an illegal foreigner is solely for deportation then the detention is authorised by section 34 of the Immigration Act and requires judicial oversight and detention confirmation. However, where the detention is in regard to a criminal offence in terms of section 49(1), the further detention may also be authorised by the CPA.

[52] If you are an undocumented illegal foreigner the Immigration Act 13 of 2002 in Section 32 (1) says you shall "depart" whilst subsection (2) clearly state such people "shall" be deported. The proviso being that Section 32 (1) states

"unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status"

[53] Due to these provisions an illegal foreigner who has not been given indulgence to stay by the Director-General of Home Affairs pending status determination on a submitted application, must depart or be deported.

[54] In the absence of such authorised indulgence there is an even bigger problem when it comes to bail, as it was held in Mulumba Tresor Yuma v S A09/2022 Ratshibvumo J (as he then was) paragraph [18]

"The court a quo held a view that if the appellant was unable to produce a document that makes him legal in the country, he would be committing a crime the moment he stepped out of a courtroom if so released. I do not find any misdirection in this view. I therefore agree with the finding that it would not be in the

interests of justice for the appellant to be released on bail as there is a likelihood that he could evade trial.”

[55] The last issue requiring ventilation is Adv. Mureriwa’s offer to this court, and the court a quo, that if the Applicant is granted bail, his verified home address can be used for the Appellant’s stay or ordered house arrest. The Magistrate extensively dealt with the “affidavit” filed by Adv Murariwa and found it not to be one. On this address offer made he concluded in his judgment¹⁷ in regard to the address:

“Murariwa’s home means nothing to her. If she were to abscond, if she were to abandon that residence and flee, she loses nothing in regards to that home.”

[56] When this offer was repeated before this court, I immediately enquired if it does not cross professional ethical boundaries. Adv. Mureriwa immediately defended his position, stating it does not. I disagree.

[57] Counsel at the Bar in Johannesburg are not even permitted to pay the bail bond for their client(s), so as to preserve the strict line between professional and private conduct / assistance. This offer of housing the Appellant, in my view, crosses the ethical boundary line, and I would urge Adv. Mureriwa to in future seriously reconsider his position in such matters. This, as his passion and enthusiasm with which he prosecuted this appeal was exceptional, and it would be a shame if such an ill consideration in future robs him of representing other clients.

ORDER

[58] I accordingly make the following order:

The appeal against the denial of bail by the court a quo is dismissed

¹⁷ Pages 26-28 of the typed record dated 02 September 2025 (00.3-265 to 00.3-267)



PJ DU PLESSIS
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:

Adv. I Mureriwa instructed by
Machingura Inc. Attorneys

For the Respondent:

Adv. MJ Morule instructed by DPP
Gauteng Johannesburg

Hearing:

31 October 2025

Judgment:

12 November 2025