

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Reportable/Not Reportable

Case no: CA & R 9/2025

In the matter between:

TSHEPO MALAMBI

Appellant

and

THE STATE

Respondent

Neutral citation: *Malambi v The State* (Case no CA & R 9/2025) (21 November 2025).

Coram: TYUTHUZA AJ.

Heard: 31 October 2025.

Delivered: 21 November 2025.

Summary: Criminal law – *Appeal to superior court with regard to bail – Section 65 of the Criminal Procedure Act 51 of 1977 (CPA) – Schedule 6 Offences – Section 60(11) of the CPA – Appellant to prove exceptional circumstances permitting release on bail in the interests of justice – Appeal court may set aside refusal to grant bail where decision is wrong – Appeal court to give its own decision – Magistrate’s failure to analyze evidence and provide adequate reasons amounts to misdirection and failure of justice – Appeal upheld.*

ORDER

1. The appeal against the refusal of bail is upheld.
2. The Magistrate's Court order refusing bail to the appellant is set aside and substituted with the order in the following paragraphs.
3. The appellant is granted bail in the sum of R5000.00 (Five Thousand Rands).
4. Upon the payment of the said sum of money, the appellant shall be released from custody on condition that:
 - 4.1. The appellant shall report to the Roodepan Police Station between 08:00 and 16h30 every Monday of each week, unless he is attending the criminal trial in which event he shall produce proof of court attendance.
 - 4.2. The appellant shall attend court at all times, up until the finalisation of the trial.
 - 4.3. Should the appellant fail to attend any court session on a date and time appointed, or should he fail to remain in attendance at trial or such other proceedings as he may be required, the appellant may be dealt with in terms of section 67(1) of the CPA.
 - 4.4. The appellant shall not leave Kimberley or the borders of the Northern Cape Province without the prior written permission of the Investigating Officer.
 - 4.5. The appellant shall not interfere with the investigation in any manner and shall not interfere, contact, communicate or intimidate any State witness, either directly or indirectly until the finalization of the case.
 - 4.6. The appellant's residence is officially recorded as 1[...] S[...] Street, Roodepan, Kimberley, Northern Cape. Should he change his residential address, he shall inform the Investigating Officer in writing within 24 hours.

JUDGMENT- BAIL ON APPEAL

Tyuthuza AJ

Introduction:

- [1] On 30 October 2023, the Kimberley Regional Court refused bail in respect of the appellant's bail application which was opposed by the State. This is an appeal against the Court *a quo*'s decision lodged in terms of section 65 of the Criminal Procedure Act 51 of 1977 ("the CPA").
- [2] The appellant, accused 18 in the pending matter of *George Peters and 20 Others v The State* under case number RCZ 50/2023, was legally represented throughout the bail proceedings before the Court *a quo*. The appellant was arrested on 21 January 2022 and has been in custody since. He is charged with various charges, including racketeering, gang-related offences, attempted murder and murder.
- [3] During the proceedings in the Court *a quo*, the parties were *ad idem* that the abovementioned offences fall under schedule 6 of the CPA, and that section 60(11) applies to the bail proceedings. Thus, the appellant would be entitled to be released on bail only if the court was satisfied that there were exceptional circumstances permitting his release on bail, in the interests of justice.
- [4] Section 60(11)(a) of the CPA provides as follows:
- '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.’

- [5] The onus was and is consequently on the appellant to show that exceptional circumstances exist which in the interests of justice permit his release on bail. The onus of proof must be discharged on a balance of probabilities. This was confirmed by the Supreme Court of Appeal in *Rudolph v S*¹ wherein it held that:

‘The section places an onus on the appellant to produce proof, on a balance of probability, that “exceptional circumstances exist which in the interests of justice permit his” release. It “contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail, will be resolved in favour of the denial of bail, unless exceptional circumstances are shown by the accused to exist”. Exceptional circumstances do not mean that “they must be circumstances above and beyond, and generally different from those enumerated” in ss 60(4) to (9). In fact, ordinary circumstances present to an exceptional degree, may lead to a finding that release on bail is justified.’ (Own emphasis.)

- [6] Section 65(4) of the CPA directs how the application in terms of section 65(1) ought to be dealt with, it provides 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.’

- [7] Thus, even if this Court finds that the Magistrate was wrong, this Court must still consider the facts before it afresh and determine whether the appellant has discharged the applicable onus.²

¹ 2010 (1) SACR (SCA); [2010] 2 All SA 178 (SCA) para 9.

² *S v Jiyane* 2018 JDR 1300 (GP) para 13; *S v Barendse and Another* 2023 JDR 1714 (WCC) para 19.

[8] In terms of section 60(4) of the CPA, an accused cannot be released from detention if the interests of justice require their continued detention. The interest of justice would not permit the release of the accused person on bail if any one of the following grounds are established, *to wit*:

- (a) Where there is likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence;
- (b) Where there is likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
- (c) Where there is likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- (d) Where there is likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;
- (e) Where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

[9] In dealing with the above factors in *S v Branco*³, Cachalia AJ said the following:

‘The factors which the court may take into account in determining whether any of the grounds described in section 60(4) have been established, are set out in section 60(5), section 60(6), section 60(7) and section 60(8) of the Act. These factors are merely guidelines in assisting the court in arriving at a just decision, they are not “*numerus clausus*” of the factors that a court may consider. (See *S v Stanfield* 1997 (1) SACR 221 (C) at 226c-d.) Nor are any of the factors individually decisive. Some of them may be weightier than others, depending on the circumstances of the particular case. The court must judicially exercise a proper discretion, taking into account the totality of the circumstances.’

³ 2002 (1) SACR 531 (WLD) at 533F– H.

[10] After considering these factors, the court must do a final weighing up of factors for and against the granting of bail as contemplated in subsections 60(9) and (10) of the CPA.

Proceedings in the Court a quo:

[11] The appellant did not testify but relied on an affidavit which was placed before the Court and admitted into evidence as Exhibit "G". The appellant under oath stated that:

- 11.1. He is accused number 18 in the matter and is 27 years old. He is unmarried and has one child who is two years old. His child stays with her mother in Lerato Park, Kimberley.
- 11.2. Before his arrest, he was residing with his mother at 108 Sane Street Pescodia, where he grew up and both his parents still live.
- 11.3. His mother is unemployed, whilst his father is a pipe fitter at the water plant in Kimberley and has been employed there for the past 32 years. He has one brother and one sister who both reside in Kimberley.
- 11.4. He passed grade 12 in 2016 thereafter he completed a course at TVET College in Kimberley where he passed his N3 in fitting and machinery. He was employed at the Department of Social Development from 2018 until he resigned in 2020, thereafter, he did piece jobs until he was arrested.
- 11.5. He was arrested on 21 January 2022 on counts of murder and attempted murder. During February or March 2022, he applied to be released on bail, but his application was dismissed.
- 11.6. He was initially charged with some of his co-accused; he intends to plead not guilty to all counts brought against him.
- 11.7. He denies being part of a gang, nor a group of people, organization or association with the aim to commit criminal offences.
- 11.8. He has no previous convictions or pending matters. He does not have a passport and has never been outside the borders of South Africa. He does not have any family members who reside out of South Africa and all his emotional ties are in Kimberley.

- 11.9. He was advised that some of the offences he is charged with fall under schedule 6 of the schedules regulating bail applications and that he must show that there are exceptional circumstances present warranting his release on bail in the interests of justice.
- 11.10. He has been in detention since 2022 without his trial starting, he was informed that the matter would be transferred to the High Court. He is charged with 20 co-accused and there are 56 charges all together. He is advised that a trial of this nature will take years to be finalised.
- 11.11. The matter is complicated, many witnesses are going to be called to testify, and consultations while detained are going to be very difficult. The Correctional Centre is currently overcrowded and the conditions where he is detained in are not good.
- 11.12. He is advised that the above factors accumulatively with the fact that there is no likelihood that any of the factors set out in subsection 60(a) to (e) of the CPA will occur, constitutes exceptional circumstances warranting in the interest of justice that bail be granted to him pending the finalisation of his trial.
- 11.13. He is of the opinion that, should he be granted bail, the crimes for which he is charged with are not likely to induce a sense of shock or outrage in the community where the offences were committed. Further that his release on bail will not lead to public disorder and will not jeopardize the public confidence in the criminal justice system or his safety.
- 11.14. He will not undermine the peace and security among members of the public.
- 11.15. If he is granted bail, he will be able to pay an amount of R5000, if the amount is higher his family will help to raise the money. If bail is granted to him, he is willing to accept any bail conditions that the Court may decide on, and he undertakes to attend all court appearances until the matter is finalised.
- 11.16. He has never put the safety of the public or any person in danger. He did not commit any offence.

11.17. He will not intimidate or influence any witnesses in this case, and he will not contact or communicate with any witnesses if the Court orders him not to.

11.18. If granted bail, he will report once a week at the nearest police station on the days and the times the Court orders him to.

11.19. He will not change his address without notifying the investigating officer in writing of his intentions to do so.

11.20. He is advised that exceptional circumstances exist which in the interest of justice permit that bail be granted to him.

[12] The State presented the affidavit of Captain Riaan Baartman who deposed to a detailed affidavit on 29 August 2023, which set out the reasons for the opposition to bail. His affidavit was admitted in those proceedings as Exhibit “V”. Captain Baartman was the lead investigator of the multi-disciplinary team under the command of Brigadier SJ Mojela investigating this matter. According to his affidavit, the appellant’s last available address was 1[...] S[...] Street, Roodepan, his current address is unknown as he has been in custody since 17 February 2022. The appellant has no previous convictions. The appellant has no pending cases, he is implicated in 8 counts which range from conspiracy to commit murder, murder and possession of unlicensed firearms. Bail was refused against the appellant relating to the 6th gang occasion. Captain Baartman further stated that there is evidence against the appellant in the form of witness statements and WhatsApp conversations that will show that the appellant and his co-accused, during the period of 17 January 2022 to 22 January 2022, conspired to kill Clayton Virgil Jackson. He further stated that eyewitness’ evidence will show that the appellant killed Dukianye Jacobs on 22 January 2022 at Roodepan by shooting him.

[13] Upon hearing the evidence in respect of the bail application, the Court *a quo* found as follows:

‘Wat beskuldige 18, betref, is dit ook so dat hierdie misdryf val onder bylaag 6 van die strafproseswet, sy beedigde verklaring sit sy persoonlike oomstandighede uiteen in BEWYSSTUK G.

Hy is sedert 17 Februarie 2022(sic) reeds in hegtenis op die aanvanklike 18 (sic) aanklagtes en dit is so dat daar ook al 'n borgaansoek in die verlede afgewys was, hy het dan geen vorige veroordelings nie.

Ek is van mening dat, wanneer daar gekyk word na- in ag geneem word die sterkte van die staat se saak en ook die ander omstandighede, die verbondenheid van die partye aanmekaar, dat dit eweneens een van daardie aangeleenthede is waar dit riskant sou wees, om beskuldige dan op borg vry te laat en ek is van mening dat daar nie buitengewone omstandighede bewys is wat sy vrylating sou regverdig het nie, en beskuldige 18 se borgaansoek word dan afgewys.⁴

Grounds of appeal:

[14] The appellant raised the following grounds of appeal in relation to the Court *a quo*'s order:

- (i) That the appellant was charged with offences that are included in schedule 6 offences regulating bail applications, whilst it was agreed between the parties before the bail application commenced that the schedule for the application is schedule 5.
- (ii) That it was not taken into account that the appellant has an address where his parents reside, which address was confirmed by Captain Baartman. The address being 1[...] S[...] Street, Roodepan.
- (iii) That the Court *a quo* erred by refusing bail and finding that there will be certain risks in granting bail to the appellant, and therefore finding that it is not in the interests of justice to grant bail.
- (iv) That the Court *a quo* erred by not taking into account that the appellant had no previous convictions.
- (v) That the Court *a quo* erred by not finding that to release the appellant on bail would be in the interests of justice.
- (vi) That the Court *a quo* erred by not granting bail to the appellant pending the finalisation of his trial.

⁴ Record Vol 5 at 374, line 10 – 25.

Analysis:

- [15] The Court *a quo* was correct in finding that the applicable schedule was schedule 6. Accordingly, this appeal will be dealt with in accordance with the test applicable to schedule 6 applications. At the hearing the appellant also conceded that the schedule that is applicable is schedule 6 and not schedule 5 as per the notice of appeal.
- [16] From the record it appears that the State's reasons for opposing the appellant's bail application were based on (a) the fact that the current address of the appellant was unknown to the investigating officer and (b) the fact that the appellant is implicated in 8 counts which range from conspiracy to commit murder, murder and possession of unlicensed firearms. The appellant presented evidence that he was living with his mother in 1[...] S[...] Street, Roodepan before his arrest. He confirmed that he was staying at this address and that is the address where he grew up. This evidence was not disputed by the Captain Baartman. Captain Baartman did not dispute the personal circumstances of the appellant including the fact that he has a two-year-old child living in Kimberley, and that his family ties are in Kimberley. It was never seriously contended that the appellant is a flight risk and that he will not stand trial. The appellant confirmed that he does not possess a passport. The Court *a quo* merely regurgitated the applicable principles in terms of section 60 of the CPA but failed to deal with each consideration in respect of the evidence led by the appellant in those proceedings. Further, the Court *a quo* merely considered the strength of the State's case, and the appellant's connection to the other accused persons and on this basis found that it would be too risky to release the appellant on bail. The Court *a quo* failed to lay a factual basis for its assertion that the release of the appellant would be too risky.
- [17] The strength of the State's case and the probability of conviction is an important consideration, but it does not displace the main issue which the court is required to decide, that is whether or not the interests of justice permit

the release on bail of the appellant.⁵ The Court in *Landela and Another v The State*⁶ said:

‘The strength of the state case, ideally goes hand in hand with consideration of failure to attend court. The stronger the case and punishment upon conviction, the more incentive and chances of decamping. But this alone would not necessarily disentitle an accused person from being granted bail. Strict bail conditions can be imposed. For example, strict reporting conditions, fixing high amount of bail and confiscation of any travelling documents.’

[18] Further, in *Botha v S* (Bail Appeal)⁷ the Court held:

‘A Court when hearing bail application must avoid speculating about things which may or may not happen. When deciding on bail the Court must be satisfied that there is a probability, not just a possibility, of one or more of the factors listed in section 60(4) of the CPA. Where the Court does not arrive at the conclusion that the probability exists of those circumstances happening, the Court cannot then rely in its refusal to grant bail on the mere existence of a risk or possibility that one or more of the things mentioned in that legislative text may result. To do so the Court would not be exercising its decision making or discretion appropriately.’

[19] In *Rosen v S*⁸, this Court was faced with an application for bail appeal of a co-accused in respect of the same proceedings in the Court *a quo*, it found as follows:

‘It is also so that in our law a Court cannot find that the refusal of bail is in the interest of justice merely because there are certain unidentified risks or possibility that one or more of the consequences mentioned in Section 60(4) will result. A finding on the probabilities must be made. The Court cannot grope in the dark and speculate because justice cannot be conceived in the dark – it is not a cloak and dagger issue. Unless and until 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 the accused should be released- *S v Diale and Another* 2013 (2) SACR 85 (GNP).’

⁵ *Bouwer v S* (Bail Appeal) [2025] ZALMPPHC 94 para 19.

⁶ [2017] ZAGPPHC 930 para 25.

⁷ [2025] ZALMPPHC 49 para 18.

⁸ [2024] ZANCHC 101 para 45.

[20] Thus, whilst the fact that the State's case is strong is an important issue for the Court *a quo* to consider, it is however one of the many other factors which the court ought to consider in getting to the conclusion that the release of the appellant on bail would pose as a risk. Nxumalo J aptly puts it as follows:

'Prima facie evidence is subject to being tested during trial. The impact of such *prima facie* evidence, in a bail application should be seen to be minimised by lack of evidence of the likelihood that, if released on bail, the accused will attempt to influence or intimidate witnesses or attempt to or destroy evidence. The likelihood of the appellant evading trial, other than to suggest a strong case against him, was not established.'⁹

[21] The Court *a quo* had no regard to the fact that the appellant has no previous convictions, the fact that he has been in custody since 2022 and the fact that his emotional ties are in Kimberley. No cogent findings were made by the Court on whether if the appellant is released there would be a likelihood that he would endanger the safety of the public or any particular person. Neither were there findings made to the effect that the appellant will attempt to influence or intimidate witnesses or attempt to destroy evidence. This is notwithstanding the fact that in his affidavit, the appellant gave an undertaking that he will not act in a way that any of these factors will occur. The Court *a quo* ignored the undertakings made by the appellant in his affidavit.

[22] Furthermore, the Court *a quo* failed to consider the possibility of suitable bail conditions, despite the appellant having stated in his affidavit that he would abide by any bail condition which the court would impose, and none of this information was challenged. In *S v Branco*¹⁰ it was stated:

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

⁹ *Ibid* para 48.

¹⁰ *Supra* fn 3 at 536J – 537A.

[23] The record shows that the Court *a quo* failed to adequately consider the relevant factors together with the information which was disclosed to the Court during those proceedings.

[24] Consequently, I find that the Court *a quo* wrongly exercised its discretion in refusing the appellant bail on the basis that there were risks in granting him bail and finding that the appellant advanced no exceptional circumstances for him to be released on bail in the interests of justice.

[25] In the premise I make the following order:

1. The appeal against the refusal of bail is upheld.
2. The Magistrate's Court order refusing bail to the appellant is set aside and substituted with the order in the following paragraphs.
3. The appellant is granted bail in the sum of R5000.00 (Five Thousand Rands).
4. Upon the payment of the said sum of money, the appellant shall be released from custody on condition that:
 - 4.1. The appellant shall report to the Roodepan Police Station between 08:00 and 16h30 every Monday of each week, unless he is attending the criminal trial in which event he shall produce proof of court attendance.
 - 4.2. The appellant shall attend court at all times, up until the finalisation of the trial.
 - 4.3. Should the appellant fail to attend any court session on a date and time appointed, or should he fail to remain in attendance at trial or such other proceedings as he may be required, the appellant may be dealt with in terms of section 67(1) of the CPA.

- 4.4. The appellant shall not leave Kimberley or the borders of the Northern Cape Province without the prior written permission of the Investigating Officer.
- 4.5. The appellant shall not interfere with the investigation in any manner and shall not interfere, contact, communicate or intimidate any State witness, either directly or indirectly until the finalisation of the case.
- 4.6. The appellant's residence is officially recorded as 1[...] S[...] Street, Roodepan, Kimberley, Northern Cape. Should he change his residential address, he shall inform the Investigating Officer in writing within 24 hours.

T TYUTHUZA
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Appearances

For the Appellant: Adv K Nxumalo
Instructed by: Legal Aid South Africa

For the Respondent: Adv JJ Cloete
Instructed by: Office of the Director of Public Prosecutions