

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: A75/2025

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: NO</u>
(3)	<u>REVISED: NO</u>
DATE	
SIGNATURE	 01/2/2026

In the matter between:

Mangombe, Lawrence Thakgalane

Appellant

AND

The State

Respondent

JUDGMENT

MIA J:

[1] This is an appeal against the refusal of bail by the Magistrate, Tembisa. The appellant is charged with rape and kidnapping.

[2] In view of the seriousness of the charges, the applicant was required to meet the onus in terms of section 60(11)(b)¹ of the Criminal Procedure Act (CPA) to satisfy the court that factors exist which indicate that it is in the interests of justice that he should be released on bail. The standard of proof is on a balance of probabilities.²

[3] The appellant was legally represented. He elected to bring his bail application by way of an affidavit. The application was opposed by the State who also opposed the application for bail by filing an answering affidavit. The appellant elected not to cross-examine the deponents of the affidavits submitted by the State. The Magistrate considered the affidavits. In terms of section 60(2A), the Magistrate was required to:

“(2A) The court must, before reaching a decision on the bail application, take into consideration(a) any pretrial 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.”

[5] Section 60(4) lists circumstances which inform the determination whether the interests of justice permit release of an accused on bail. This is further defined by sections 60(5)-(10).

[6] Having considered the appellant's and the respondent's evidence per affidavit, the Magistrate determined that the appellant had not discharged the onus satisfying the court that the interests of justice, justified his release on bail.

[7] This court may not set aside that decision unless it is convinced that it is wrong.³ In considering whether the Magistrate's decision was wrong, I have considered the guidance in *Killian v S*⁴ Binns-Ward J (as he was then) said:

¹(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

² *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* [1999] ZACC 8 (3 June 1999); 1999 (2) SACR 51(CC).

³ *S v Zondi* 2020 JDR 0818 (GJ) at para 13 -14.

⁴*Killian v S* [2021] ZAWCHC 100 (24 May 2021) at para [8].

"As I pointed out in *S v Porthen and Others* 2004 (2) SACR 242 (C), however, certainly in respect of bail applications governed by s 60(11), in which the bail applicant bears a formal onus of proof, the nature of the discretion exercised by the court of first instance is of the wide character that more readily permits of interference on appeal than when a true or narrow discretion is involved. I concluded (at para 15) '*Accordingly, in a case like the present where the magistrate refused bail because he found that the appellants had not discharged the onus on them in terms of s 60(11)(a) of the CPA, if this court, on its assessment of the evidence, comes to the conclusion that the applicants for bail did discharge the burden of proof, it must follow (i) that the lower court decision was 'wrong' within the meaning of s 65(4) and (ii) that this court can substitute its own decision in the matter*'. That analysis was most recently endorsed in a decision of the full court of the Gauteng (Johannesburg) Division of the High Court in *S v Zondi* 2020 (2) SACR 436 (GJ) at para 11-13." (footnotes omitted).

[8] The ground on which bail was refused during the first bail application was the Magistrate's belief that protection order was in place which supported the States position that the complainant required protection. The applicant relies on the absence of a protection order in the bail appeal and further advances his responsibility to care for his children who were residing with the complainant, their mother. Since his arrest, the children reside with the appellant's mother. According to the appellant his mother has limited financial resources and is financially unable to care for the children. He contended that it was in the interests of justice that he be released to care for his minor children in circumstances where he was the breadwinner. According to the applicant, the complainant receives a social grant for the care of the minor children which the complainant keeps. The appellant was of the view that this amount of R1500 was insufficient for the maintenance of the children and was not paid to his mother to care for the children. The concession was made on behalf of the appellant that the appellant's mother could request the money received from the complainant.

[9] The appellant has fixed addresses, and it was argued that he was not a flight risk and would not interfere with witnesses. The Magistrates decision was based on the possibility that the appellant's conduct would compromise the prosecution of the matter, either by influencing witnesses or accessing the complainant who indicated she was afraid of the appellant.

[10] In the first application, the Magistrate refused bail based on the existence of the protection order which ordered the appellant not to abuse the complainant. The interim protection order was in force from the time the order was communicated to the appellant.⁵ The appellant had knowledge of the protection order as he informed the complainant at the tavern that there was a protection order in place, and he could not engage with her.

[11] The Magistrate's decision cannot be faulted where the intention was to protect the complainant a key witness, who reported that she was afraid of the appellant.

[12] The appellant brought a second application for bail on new facts. The facts relied upon were that there was no protection order in operation and that it had been set aside. At that point the appellant relied on the court record that the matter was removed from the roll due to the absence of the parties, namely the complainant and the appellant.

[13] The record of the matter before the Family Court dealing with the protection order, reflects that the parties were absent, and the matter was removed from the roll. There was no indication that the interim protection order was extended, it follows thus that the order lapsed. During the application for bail on new facts, the court noted that the new facts placed before it were available at the time the application for bail was considered and there were thus no new facts.

[14] Whilst the court record was not placed before the Magistrate during the first bail application, the appellant was informed by the complainant that she had requested that the protection order be set aside. The non-existence of the protection order is heart of the matter. The Magistrate refused the application for bail based on new facts as the alleged new facts were available when the first application for release on bail was considered. The appellant indicated in his first application that the sexual intercourse was consensual. This was based on his belief that the complainant informed him that she had withdrawn the protection order. He thus

⁵ S 5(5) of the Domestic Violence Act 116 of 1998.

knew that the protection order was not in place. It is evident that the order lapsed when the appellant and complainant did not appear on the return date.

[17] Considering the reasons indicated for the decision to refuse bail, the Magistrate considered the safety of the complainant and interference with witnesses. The finding that the appellant would interfere with witnesses and specifically that the complainant is afraid of the appellant, cannot be faulted where the appellant communicated with the complainant whilst there was a protection order in place. The non-existence of a protection was known to the appellant during the first bail application.

[18] In terms of section 65(4) of the CPA, the court hearing the appeal will not set aside the application against which the appeal is lodged unless the court is satisfied that the decision is wrong.⁶ I am unable to find that the Magistrate either in the first or second bail application.

[19] The appellant's reliance on his needing to financially provide for the children does not take into account the social welfare grant paid for the children. These facts were also present during the first bail application. Considering the facts placed before the Magistrate, the allegation of abuse was not withdrawn even if the protection order was set aside. This remains applicable. The non-existence of the protection order is not a new fact. I cannot reach a different conclusion and am unable to find the Magistrate's decision was wrong.

[20] Accordingly, the appellant's appeal against the Magistrate's order of refusing bail application is dismissed.



S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

⁶ *S v Porthen and Others* 2004 (2) SACR 242 (C) para 11.

Appearances:

On behalf of the applicant	: Mr Sehunane
Instructed by	: Sehunane Inc Attorneys Johannesburg
On behalf of the respondent	: Adv C Ehlers
Instructed by	: Director of Public Prosecutions Johannesburg
Date of hearing	: 3 December 2025
Date of judgment	: 06 February 2026