



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

Reportable/Not Reportable

Case no: A2026-016507

In the matter between:

ISHMAEL KLEINKIE

Appellant

and

THE STATE

Respondent

Neutral citation: *Kleinkie v The State* (Case no A2026-016507) (27 February 2026).

Coram: Tyuthuza AJ.

Heard: 18 February 2026.

Delivered: 27 February 2026.

Summary: Criminal law – *Appeal to superior court regarding bail – Section 65 of the Criminal Procedure Act 51 of 1977 (CPA) – Schedule 5 Offence – Murder- Domestic violence- Section 60(11) of the CPA – Appellant to prove interests of justice permitting release on bail – Appeal court may set aside refusal to grant bail where decision is wrong – Appeal court to give its own decision – Magistrate’s failure to deal with factors listed in section 60(4)(a)–(e) amounts to misdirection and failure of justice – Appeal upheld.*

ORDER

1. The appeal against the refusal of bail is upheld.
2. The order of the Court *a quo* is set aside and substituted with the order set out as follows:
 - 2.1. The appellant is granted bail in the sum of R2,000.00 (Two Thousand Rands).
 - 2.2. Upon the payment of the said sum of money, the appellant shall be released from custody on condition that:
 - 2.2.1. The appellant shall report to the Roodepan Police Station between 08h00 and 16h30 every Monday of each week, unless he is attending the criminal trial in which event he shall produce proof of court attendance.
 - 2.2.2. The appellant shall attend court at all times, up until the finalisation of the trial.
 - 2.2.3. 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.
 - 2.2.4. The appellant shall not leave Kimberley or the borders of the Northern Cape Province without the prior written permission of the Investigating Officer.
 - 2.2.5. 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.

JUDGMENT – BAIL APPEAL

Tyuthuza AJ

Introduction:

- [1] The appellant, Mr Ishmael Kleinkie, faces a charge of murder read with the provisions of section 51(1) of the Criminal Law Amendment Act¹ (“the CLAA”) in which he is alleged to have killed his wife on 26 December 2025. The appellant was arrested on 26 December 2025 and has been in custody since.
- [2] On 13 January 2026, the Frances Baard Regional Court refused bail in respect of the appellant’s bail application which was not 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 Act² (“the CPA”).
- [3] It is common cause that the offence falls under Schedule 5 of the CPA, and that section 60(11) of the CPA applies to the bail proceedings. Thus, the appellant would be entitled to be released on bail only if the Court was satisfied that the interests of justice permit his release.
- [4] Bail applications in respect of persons involved in domestic violence-related offences are only to be dealt with by the courts, since the so-called “police bails” prior to the first appearance are no longer permitted.³
- [5] In *S v Kula*⁴, the Court stated as follows:

¹ 105 of 1997.

² 51 of 1977.

³ Section 59(1)(a) of the CPA.

⁴ [2023] 3 All SA 218 (NWM); 2023 (2) SACR 52 (NWM) para 12.

“The introduction of s 59(1)(a)(ii) and (iii) has brought about a new bail dispensation to deal with the scourge of gender-based violence which has sadly engulfed our nascent democracy. There are in fact now four categories of bail applications which a Court may be called to adjudicate. These include a bail application in respect of offences identified in ss 60(11)(a), (b) and (c) and any other bail application not falling within the ambit of the aforesaid sections. 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.’”

Grounds of appeal:

[6] The grounds of appeal, in sum, are that the Court *a quo* erred in:

- (i) Finding that the appellant is charged of a very serious offence to the effect that the interests of justice do not permit his release on bail.
- (ii) Not weighing the factors in section 60(4)(a)–(e) against the provisions in section 60(9) of the CPA.
- (iii) Finding that the appellant did not prove that the interests of justice permits his release on bail.

Proceedings in the Court a quo:

[7] The appellant elected not to adduce oral evidence but filed an affidavit in support of his bail application. In his affidavit, the appellant provided the following information:

7.1. He is 36 years old.

7.2. He is unmarried.

- 7.3. He has three children aged 8, 12 and 15 who reside with him.
- 7.4. He is currently residing at 2[...] C[...] Court, Roodepan, and has been living there for the past 12 years.
- 7.5. He is in good health.
- 7.6. He has a grade 12 education.
- 7.7. He is self-employed and earns R12 000.00 monthly.
- 7.8. He owns furniture.
- 7.9. He has no previous convictions.
- 7.10. He was arrested on 26 December 2025 and has been informed that he is accused of having committed the offence of murder.
- 7.11. He is the breadwinner and looked after his wife and denies murdering her.
- 7.12. He can afford bail in the amount of R1500.00.

[8] In his affidavit, he simply regurgitates the provisions of section 60(4)(a)–(e) of the CPA, without elaborating thereon.

[9] The State did not oppose the release of the appellant on bail pending the trial. However, on 12 January 2026, the investigating officer, Detective Modise, deposed to, and filed an affidavit wherein he stated the following:

- 9.1. The appellant resides at 2[...] C[...] Court, Roodepan, and has been living at the address for the past 10 years.
- 9.2. The appellant is self-employed.
- 9.3. The appellant does not possess a passport.
- 9.4. The appellant has no pending matter or previous convictions.
- 9.5. The appellant should be granted bail as there is no likelihood that he will:
 - 9.5.1. Interfere with state witnesses;
 - 9.5.2. Endanger the safety of the public;
 - 9.5.3. Endanger the safety of state witnesses;
 - 9.5.4. Commit other offences; or
 - 9.5.5. Evade his trial.

- [10] He further stated that bail should be granted on the following conditions: that the appellant does not interfere with witnesses and attends Court at all times.
- [11] He elaborated on the allegations against the accused as follows:

“On Friday 2025/12/2025 at about 02:00 a witness heard a knock in the door and looked and heard the deceased call her and asked her to open the door and she open and discovered that the deceased is bleeding on her left shoulder. She told witness that his boyfriend accused stabbed her and choked her and accused her of sleeping around with men and later deceased was screamed and complaining about pain but the shoulder would stopped bleeding and accused came again and stepped deceased again on her face and witness asked accused why is he doing that can’t he see deceased is in a lot of pain. Accused was arrested when he was pointed positively by witness.” (*Sic.*)

Analysis of the appeal:

- [12] Section 65(4) of the CPA directs how the application in terms of section 65(1) ought to be dealt with, it directs 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] Section 65(4) of the CPA is drafted in peremptory terms. The decision of the Court *a quo* cannot be set aside on appeal unless the appeal court is satisfied that it was wrong. Thus, if this Court is satisfied that the impugned decision was wrong, this Court shall set aside that decision and substitute it with the decision which, in its opinion, the court *a quo* ought to have given.

- [14] It has been held that in order to succeed, the appellant will have to show that the Court *a quo* overemphasised aspects which militate against the granting of bail, whilst aspects in favour of the appellant to be granted bail were not given sufficient weight.⁵

⁵ *Msimango v S* (Bail Appeal) [2025] ZAGPPHC 1119 para 16.

- [15] As alluded to above, the appellant faces a charge that falls within the ambit of Schedule 5 offences. Section 60(11)(b) places an *onus* on the appellant to prove, on a balance of probabilities, that the interests of justice permit his release on bail. Section 60(11)(b) of the CPA provides as follows:

“Notwithstanding any provision of this Act, where an accused is charged with an offence-

. . .

(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;”

- [16] The Constitutional Court in *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat*⁶ stated:

“ . . . That subsection [60(11)(b)] stipulates that an accused must satisfy a magistrate that the ‘interests of justice’ permit his or her release. It clearly places an *onus* upon the accused to adduce evidence. However, apart from that, the exercise to determine whether bail should be granted is no different to that provided for in ss 60(4) - (9) or required by s 35(1)(f). It is clear that an accused on a Schedule 5 offence will be granted bail if he or she can show merely that the interests of justice permit such grant.”

- [17] In the matter of *S v Smith and Another*⁷, the Court held that:

“The Court will always grant bail where possible, and will lean in favour of, and not against, the liberty of the subject, provided that it is clear that the interests of justice will not be prejudiced thereby.”

- [18] The court must be satisfied, on the evidence, that there is a real likelihood, and not a speculative or remote possibility, that one or more of the grounds

⁶ 1999 (4) SA 623 (CC) para 65.

⁷ 1969 (4) SA 175 (N) at 177E– F.

enumerated in section 60(4) of the CPA will occur if the accused is released on bail.⁸ This can only be achieved if the court properly considers and evaluates all the relevant evidence before reaching its conclusion.

[19] In *S v Diale and Another*⁹, the Court stated that:

“A court cannot find that the 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 in s 60(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 the accused should be released.”

[20] Where the Court *a quo* has indeed misdirected itself materially on the facts and the legal principles, the court of appeal may consider the issue of bail afresh. Interference is also justified where the lower court “overlooked some important aspects” in coming to the decision to refuse bail.¹⁰

[21] It is apparent from the record that the Court *a quo* failed to consider the grounds set out in section 60(4)(a)–(e) of the CPA.

[22] The Court *a quo* treated the bail proceedings like a trial and concerned itself with the question of guilt. The Court *a quo* placed emphasis on the seriousness of the crime and the strength of the State’s case. Whilst it is so that the strength of the State’s case is an important consideration, it is not the only factor which a court should consider in determining whether to grant or refuse bail. It is trite that further considerations as stipulated in section 60 of the CPA must be considered cumulatively.¹¹

⁸ See *Botha v S* (Bail Appeal) [2025] ZALMPPHC 49 para 18.

⁹ 2013 (2) SACR 85 (GNP) para 14.

¹⁰ *S v Alehi* 2022 (1) SACR 271 (GP) para 21.

¹¹ *Tshitete v S* [2024] ZAGPJHC 400 para 15.

- [23] The Court *a quo* failed to engage with the statutory grounds set out in section 60(4)(a)–(e) of the CPA, and to weigh those considerations against the evidence tendered by the appellant.
- [24] The court hearing the bail application must express a balanced value-judgment, taking into account the grounds in section 60(4) of the CPA. In general, the reasons for refusal of bail can usually be found in one of two considerations, or both, namely: (1) whether the accused will abscond; and (2) whether the granting of bail will lead to interference with the investigation and/or prosecution.¹² These considerations entail a projection of future conduct taking into account past conduct.¹³
- [25] The Court *a quo* failed to consider whether effective and enforceable bail conditions could be put in place to ensure that the appellant: does not endanger the safety of the public or anyone else; does not evade trial; and does not intimidate witnesses and/or conceal or destroy evidence. All these factors were overlooked even though the State presented no evidence that the appellant would likely intimidate witnesses and conceal or destroy evidence.
- [26] In the premises, this Court is at liberty to interfere and consider if, on the evidence, bail should be granted or not.
- [27] The appellant is a first-time offender with no previous conviction(s) or pending matters. He is a breadwinner and resides with his three minor children. He has a fixed address in Kimberley and has been residing at the address for a period of more than 10 years. He does not have any travel documentation.
- [28] There is no evidence establishing that there is a likelihood that the appellant will endanger the safety of the public or any particular person, or will commit a schedule 1 offence, or is likely to evade his trial, or that he will influence or intimidate witnesses. Similarly, there is no evidence that he will conceal or destroy evidence, or that his release will undermine or jeopardise the

¹² *Hiemstra's Criminal Procedure*, Issue 2 at 9 – 12.

¹³ See *S v Thornhill* 1998 (1) SACR 177 (C) at 182E– G.

objectives or the proper functioning of the criminal justice system, including the bail system. Further, no evidence was presented that the release of the appellant will disturb the public order or undermine the public peace and security.

[29] I accordingly find that the interests of justice, as envisaged in section 60(11)(c) of the CPA, merit the release of the appellant on bail, subject to strict conditions.

[30] In the premise, I make the following order:

1. The appeal against the refusal of bail is upheld.
2. The order of the Court *a quo* is set aside and substituted with the order set out as follows:
 - 2.1. The appellant is granted bail in the sum of R2,000.00 (Two Thousand Rands).
 - 2.2. Upon the payment of the said sum of money, the appellant shall be released from custody on condition that:
 - 2.2.1 The appellant shall report to the Roodepan Police Station between 08h00 and 16h30 every Monday of each week, unless he is attending the criminal trial in which event he shall produce proof of court attendance.
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- 2.2.4 The appellant shall not leave Kimberley or the borders of the Northern Cape Province without the prior written permission of the Investigating Officer.
- 2.2.5 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.

T TYUTHUZA
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Appearances

For the Appellant:	Mr Juries
Instructed by:	Kenneth Juries & Associates
For the Respondent:	Adv QH Hollander
Instructed by:	Office of the Director of Public Prosecutions