

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: A21-2026
Case No a quo: 41/1085/2025

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

SIGNATURE



DATE:

In the matter between:

SIPHETHO SIBIYA

Appellant

and

THE STATE

Respondent

JUDGMENT

Mfenyana J:

- [1] The appellant appeals against the decision of the magistrates' court in Johannesburg (court *a quo*) on 12 December 2025, refusing to release the appellant on bail. The appeal is brought pursuant to the provisions of section 65 of the Criminal Procedure Act (the CPA).¹
- [2] The appellant is charged with one count of murder and two of attempted murder.
- [3] The State opposes the appeal.
- [4] In the notice of appeal, the appellant lists several grounds of appeal, which overlap to a considerable extent. This much was conceded by Mr Mthimkhulu, counsel for the appellant at the hearing of the matter. The key issues emanating from the grounds of appeal are that the court *a quo* misdirected itself:
- 4.1 by relying on the affidavit of the investigating officer in opposition to bail, having found that it was contradictory and therefore, unreliable.
 - 4.2 in refusing to release the appellant on bail after finding that exceptional circumstances existed.
 - 4.3 in finding that the release of the appellant would jeopardise the proper functioning of the criminal justice system.
 - 4.4 in making findings of guilt against the appellant in bail proceedings, and
 - 4.5 in violating the doctrine of *stare decisis*.
- [5] In its judgment, the court *a quo* noted that that the appellant bore the onus to demonstrate the existence of exceptional circumstances, as the matter falls under Schedule 6. The court accepted that the fact that the appellant

¹ Act 51 of 1977.

handed himself over to the police was an exceptional circumstance, as submitted by the defence; however, this *“does not mean that the court simply have to release the applicant on bail. The Court will have to be satisfied that the interest of justice permits his release on bail, and the guidelines have been set down by the legislature to assist the Court with regard to the termination whether the interest of justice will justify the release of an applicant on bail.”* (sic)

- [6] The court then proceeded to deal with the appellant's personal circumstances. It further noted that the determination of guilt was a matter for the trial court after evaluating the evidence before it.
- [7] In dealing with whether the release of the appellant would be in the interests of justice, the court referred to section 60(4)(d), which stipulates that the interests of justice do not permit the release of an accused person from detention “where there is a likelihood that the accused will undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system”.
- [8] The court referred to an affidavit by a witnesses who witnessed the incident, which was read into the record, and in which the witness referred to the appellant by name. According to the affidavit, the accused and his co-accused went to the premises of the deceased and removed items belonging to the deceased, making allegations of robbery against him. Thereafter, on a separate incident, the deceased was fatally shot.
- [9] The court concluded that the witness knew the accused and that all these facts indicate that the incident was premeditated and that in confronting the deceased, the accused took the law into his own hands. Relevant to section 60(4)(d), the court found that ‘these actions have jeopardised the proper functioning of the criminal justice system. Coupled with the fact that

if the accused were to be convicted on the charges against him, he would face a long term of imprisonment', the court added.

- [10] It is on these grounds that the court *a quo* concluded that it would not be in the interests of justice to release the appellant on bail.
- [11] In its reasons for judgment, the court *a quo* referenced section 60(11), reiterating its judgment that the onus rests on the appellant to adduce evidence that exceptional circumstances exist, which in the interests of justice justify his release on bail. The court further reiterated its acceptance that the appellant's voluntary surrender to the police may constitute exceptional circumstances.
- [12] The court relied on *S v Mathebula*² that in bail proceedings, an applicant who seeks to challenge the merits of the state's case must prove, on a balance of probabilities, that he will be acquitted of the charge. In this regard, it found that there was direct evidence linking the appellant to the commission of the offences.
- [13] On behalf of the appellant, it was argued that once the court *a quo* found that exceptional circumstances existed, it was no longer open to it to refuse bail. In doing so, it committed a misdirection.
- [14] Counsel further submitted that the court *a quo* misdirected itself further, by determining the appellant's guilt, which is a matter for the trial court, and in finding that the appellant had taken the law into his own hands, particularly as bail was refused on that ground alone, despite the appellant having met all the requirements in section 60(4)(a) to (e) of the CPA.

² [2009] ZASCA 91.

- [15] It was further the appellant's contention that the court *a quo* should have found that the interests of justice permit his release on bail and should not have placed reliance on the affidavit of the investigating officer, that the appellant would interfere with state witnesses, which was relied on by the state in opposing bail, as it was contradictory.
- [16] The appellant argues that the court *a quo* failed to follow *stare decisis*. Citing *Branco*³, the appellant contends that a court hearing a bail application must begin from the premise that freedom is a constitutional right and may be curtailed only lawfully where the interests of justice require. In refusing bail, the court *a quo* failed to consider that detention would cause the appellant irreparable harm, including financial loss. It also failed to apply *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat*⁴, which holds that bail proceedings are not concerned with an accused's guilt, but only possible guilt insofar as it is relevant to the interests of justice.
- [17] Counsel further submits that section 60(4)(d) should be read with section 60(8), and the court failed to do this and to take section 60(9) into account. There was no evidence that the appellant knowingly supplied false information during the bail proceedings; was in custody on another charge; would not comply with bail conditions if imposed; or would evade trial and interfere with witnesses as required in terms of section 60(8), the argument proceeded.
- [18] The appellant further argues that the court *a quo*'s finding that the interests of justice did not permit his release on bail, based on the prospect of a lengthy term of imprisonment if convicted, amounts to anticipatory punishment as discussed in *S v Acheson*⁵.

³ 2002(1) SACR 531(W).

⁴ 1999(2) SACR 51(CC).

⁵ 1991(2)SA 805 (NM).

- [19] The appellant accordingly avers that he satisfied, on a balance of probabilities, all the requirements for release on bail. He further contends that, if the court was concerned that he might interfere with witnesses, it could have imposed conditions restricting his contact with them, particularly as he had offered to relocate to an alternative residence. On this basis, the appellant submits that this court should interfere with the decision of the court *a quo* and admit him to bail.
- [20] On behalf of the state, Ms Mbodi argued that the court *a quo* did not misdirect itself, as section 60(4) applies if one or more of the grounds listed therein are found to exist. Thus, the court did not need to find that all the listed grounds exist. In this regard, the court *a quo* found that the appellant would jeopardise the functioning of the criminal justice system as he was staying at the same residence as the witness.
- [21] Counsel argued that the court *a quo* did not find that exceptional circumstances existed and did not interpret the law incorrectly in this regard, as stated by the appellant. She further argued that the appellant had previously attempted to evade the police, and handing himself in was merely an afterthought. This is based on a statement which the prosecution submitted forms part of the docket, but was to the state's surprise, not included in the investigating officer's affidavit. It does not appear from the judgment that the court *a quo* considered this information and to what extent.
- [22] Ms Mbodi further argued that the court *a quo* correctly considered that the appellant took the law into his own hands, which signifies his disregard for the law. Again, this reasoning does not appear *ex facie* the judgment of the court *a quo*. These omissions cannot be considered in favour of the state. If anything, they are indicative of a misdirection.

[23] On the issue of *stare decisis*, the state argued that the principle in *S v Dlamini et al* is that the interests of justice demand detention and thus there was no obligation on the court *a quo* to release the appellant on bail. This is incorrect. The principle in this decision is that bail proceedings, specifically under section 60 of the CPA, must strike a balance between the right to freedom, manifested in the presumption of innocence, and the interests of justice.

[24] In terms of section 60(11) of the CPA, where an accused is charged with an offence 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”.

[25] Section 60 (4) provides in relevant parts:

“(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

- (a) Where there is the 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 the 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 the 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 the 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; or

- (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.”

[26] The sole ground on which the judgment of the court *a quo* is based is 60(4)(d). In this regard, section 60(8) is instructive. It provides:

(8) In considering whether the ground in subsection (4)(d) has been established, the court may, where applicable, take into account the following factors, namely-

- (a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;
- (b) whether the accused is in custody on another charge or whether the accused is on parole;
- (c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or
- (d) any other factor which in the opinion of the court should be taken into account.

[27] None of these factors was considered by the court *a quo*. In this regard, Mr Mthimkhulu argued that no evidence was presented, and, in fact, none exists. Assuming that the court *a quo* placed reliance on subsection (8) (d), which confers a discretion to the court to consider any other relevant factor, the judgment is silent on how this discretion was exercised, if at all.

[28] Lastly, in terms of section 60(9), when considering the provisions of subsection (4) the court is enjoined to weigh the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, various factors, which, include the period already spent in detention, reasons for delay if any, the

probable period of detention until finalisation of the trial, financial implications on the accused person.

- [29] From the reading of the relevant provisions, the starting point is that a bail applicant must satisfy the court that exceptional circumstances exist which, in the interests of justice, permit his release on bail. The court *a quo* found that exceptional circumstances existed. The respondent's submission to the contrary is without merit. That being the case, the next step of the enquiry is the determination of the interests of justice.
- [30] As the provision states, the court must consider whether any of the factors listed in subsection (4) exist, which militate against the granting of bail. In the present case, there is no evidence that the appellant would pose any danger to the public or a person related to the offence; or that he would evade trial; or attempt to influence or intimidate the witnesses or conceal evidence; or undermine the proper functioning of the criminal justice system. To the contrary, the investigating officer, in her affidavit, which was read into the record, states that the appellant would not evade trial or jeopardise the functioning of the criminal justice system or bail system and would not interfere or undermine public peace. The investigating officer added that no suspects or investigations were outstanding.
- [31] The respondent's submissions (despite the absence of evidence or a legitimate basis) that the appellant poses a danger to the public or to individual safety, and may interfere with witnesses, as they appear from the record are both founded on the assertion that the appellant and the witness know each other. That assertion later developed into a suspicion, but it cannot morph into evidence. Moreover, the judgment of the court *a quo* is solely premised on this assertion.
- [32] The court noted in its judgment that the state provided contradictory accounts on whether or not investigations were finalised, and whether or

not there was a likelihood that the appellant would interfere with witnesses. Apart from acknowledging the existence of these contradictions, the court *a quo* paid no regard to these factors. It is therefore, curious, how the court could rely on the appellant's relationship with one of the witnesses.

[33] While the existence of exceptional circumstances cannot be viewed in isolation, the determination of the interests of justice must be viewed against the whole statutory framework in section 60, as clearly provided in the CPA. A determination of subsection(11) presupposes the consideration of subsection (4) which leads to subsection (8) and ultimately subsection (9). The court *a quo* failed to do this. This lends credence to the appellant's contention that the court incorrectly applied the law.

[34] In arriving at the conclusion that section 60 (40(d) finds application, the court *a quo* paid no regard to section 60(8). It also made no factual determination of the appellant's suspected interference, and relied on blanket statements, speculation and unsubstantiated suspicions.

[35] Having failed to consider section 60(8), the court *a quo*, naturally, did not engage in the next stage of the enquiry, which is to weigh its findings in relation to section 60(8) against the appellant's constitutional right to liberty (section 60(9), in determining whether on the whole, the interests of justice permit the appellant's release on bail. This is a misdirection, sufficient to vitiate the proceedings before the court *a quo*. Even if the determination of the court *a quo* passed muster, it proffers no reason why the appellant's alleged interference could not be addressed by imposing appropriate bail conditions.

[36] While I do not agree with Mr Mthimkhulu that the court's finding that the appellant would face a lengthy term of imprisonment if he were to be convicted on the charges against him, amounts to anticipatory

punishment, it is not clear from the judgment how this relates to section 60(4)(d).

[37] I do not consider it necessary to deal with the decisions cited by the appellant in much detail, save to state that the common thread running through all of them is that bail proceedings should not become a 'dress rehearsal' for the trial, and that courts must pay attention to the specific statutory requirements, and the interests of justice as detailed in section 60.

[38] In terms of section 65(4)," 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".

[39] I am satisfied that the decision of the court *a quo* is clearly wrong. The court *a quo* misdirected itself in various respects; in failing to consider the applicable statutory provisions; in its misinterpretation and misapplication of the bail law in general; and in its incorrect determination of the provisions of section 60(4), read with section 60(8) and section 60(9) of the CPA.

Order

[40] In the result, the following order issues:

- a. The appeal is upheld.
- b. The order of the court *a quo* is set aside and substituted with the following:

"i. The applicant is granted bail in the amount of R5 000.00.

- ii. The applicant is prohibited from interfering with, communicating with, harassing, or approaching any of the complainants and state witnesses in any manner whatsoever.
- iii. The applicant must provide the investigating officer with his alternative residential address where he shall reside until the finalisation of the trial.
- iv. The applicant is prohibited from leaving the Republic.
- v. The applicant must inform the investigation officer of his intention to travel outside of the province of Gauteng and the jurisdiction of this court.
- vi. The applicant must report at the nearest police station twice a week between 13h00 and 17h00.


S Mfenyana
Judge of the High Court

This judgment was handed down electronically by circulation to the parties' representatives by email and by uploading the judgment onto Caselines. The date of delivery of the judgment is deemed to be **28 April 2026**.

Appearances:

For the appellant:

Counsel: M Mthimkhulu

Instructed by Mnisi Bonginkosi Attorney

For the respondent:

Counsel : TJ Mbodi

Instructed by the Director of Public Prosecutions, Johannesburg