IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)

Case No: CA&R17/2025

In the matter between:

MONGAMELI TOM Appellant

and

THE STATE Respondent

JUDGMENT

ZONO AJ:

Introduction

[1] This is an appeal against the refusal of bail by the Mdantsane Magistrate's Court under case number A149/25. The appellant was arrested by the members of South African Police Service on 19 March 2025, and he was kept in custody since his date of arrest. On 9 April 2025 an opportunity was made available to him to apply to be admitted to bail. The appellant was legally represented. Bail application was eventually refused by

the Mdantsane Magistrate's (District) Court. The appellant deposed to an affidavit setting out all the facts he perceived to be relevant to secure his release on bail. I will turn to this aspect later in the judgment.

[2] The appellant is charged with fifty-one (51) counts of fraud which were allegedly committed between Cape Town and East London[1], and fifty-two counts of theft which were also allegedly committed between Cape Town and East London. However, the preamble (and tables of committed offences) in the charge sheet reveals only fifty-one (51) offences, four (4) of which appear to have been committed in the Eastern Cape Province. Two (2) of the offences which were allegedly committed in the Eastern Cape appear to have been committed within the Magisterial district of Mdantsane.

[3] I set out to detail the particulars of the offences allegedly committed in the Magisterial district of Mdantsane. The offences appear to have been committed in different ATMs at different times and dates in Mdantsane. On 12 March 2025 an amount of R143 500.00 was taken from the Capitec ATM which bears the following identity particulars:SASB1659 under the site name NK Service Station at 2126 Qumza Highway, Mdantsane, Eastern Cape, 5219. Under the collum CIT Provider appears Fidelity. On 21 February, under ATM identity number SASB1336 an amount of R236 900.00 was allegedly taken from Capitec ATM with site name Shell VXL Motors at Mdantsane, Unit 1, Mdantsane, Eastern Cape 5219.

[4] From the onset it is apposite to state that Mdantsane Magistrate's (District) Court had jurisdiction to adjudicate on the two (2) matters that took place on 21 February 2025 and 12 March 2025 respectively. I will deal with the rest of others (which were allegedly committed outside the jurisdiction of that court) during the course of this judgment. I will do that because it is in respect of all the charges preferred against the appellant that the bail application was refused. It is not clear what would be *court a quo*'s position, stance

[1] As per the charge sheet.

or view about the charges that were allegedly committed within its jurisdiction had it considered only those offences. It is not apparent from the record that bail application would be refused if the magistrate was to limit itself only to the offences allegedly committed respectively on 21 February 2025 and 12 March 2025, upon which the *court a quo* had jurisdiction.

Law and discussion

[5] It is now apposite to advert to the law that governs appeals of this nature. Section 65 of the Criminal Procedure Act[2] provides for appeals to the Superior Court with regard to bail. The decision against which an appeal was brought can only be set aside if, in the opinion of a judge, was wrong. In what follows I quote provisions of subsection 1 and 4 of the Act.

[6] Section 65 (1) and (4) of the Criminal Procedure Act provides as follows: -

"1.(a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.

2…

3…

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."

[7] In terms of section 65 (4) of the Criminal Procedure Act, interference with the magistrate's decision to admit the accused to bail can only take place if the judge or court

[2] Criminal Procedure Act 51 of 1977 as amended.

is satisfied that the magistrate was wrong.[3] Section 65 (4) of the Criminal Procedure Act creates a jurisdictional fact for the exercise of the power to differ from what the magistrate has decided. The following word are pivotal: -

"*Unless such court or judge is satisfied that the decision was wrong*." The satisfaction of the appeal court or judge about the fact that the magistrate was wrong is a pre-condition or a condition precedent to the exercise of the power to set aside magistrate's decision refusing to admit an accused to bail. The necessary pre-conditions that must exist before power can be exercised, are referred to as jurisdictional facts.[4] These facts are jurisdictional because the exercise of the power depends on their existence or absence as the case may be.[5]

[8] Section 65(4) of the Criminal Procedure Act brings into sharp focus the distinction between the two categories of jurisdictional facts.[6] The first category is described as *'objective jurisdictional facts'* which include the type of fact or state of affairs that must exist in an objective sense before the power can validly be exercised. The second category is '*subjective jurisdictional facts'*. In this category the empowering statute has entrusted the repository of the power itself with the function to determine whether in its subjective view the prerequisite fact or state of affairs existed or not. Expressions often used by the legislature to express this intent are, e.g., *'in his or her opinion'* or '*if he or she is satisfied that'* the particular fact or state of affairs exists. Applicable in this case is the second category. In the absence of subjective jurisdictional facts, this court cannot have power to set aside the decision of the magistrate. This court can only interfere where it is shown that the repository of the power, the magistrate, in deciding the bail application was wrong.

[3] S v De Abreu 1980 (4) SA 94 (W) 96(W) – 97A.
[4] Kimberly Junior School and Another v Head of the Northen Cape Education Department and Others 2010 (1) SA 217 (SCA); 2009 (4) All SA 135 (SCA) para 11.
[5] Meyer v South African Medical and Dental Council 1982 (4) SA 450 (T) at 454E-H.
[6] President of the Republic of South Africa v South African Football Union 200 (1) SA 1 (CC) para168.

[9] In *S v Barber*[7] Hefer J remarked as follows in a matter involving interpretation of section 65(4) of the Criminal Procedure Act:

"It is well known that the powers of this court are largely limited where the matter comes before it on appeal and not as a substantive application. This court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this court may have a different view, it should not substitute its own view for that of a magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. 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 but exercised that discretion wrongly."

[10] Whether or not the magistrate was wrong in refusing to admit the appellant to bail will be adjudged by what served before him and how that information or evidence was dealt with. In the preceding paragraphs I have indicated that the appellant in making this bail application, deposed to an affidavit, contents of which were read into the record. The actual affidavit in support of bail application was admitted as exhibit A. I set out to deal hereinafter with the material or relevant facts in the appellant's affidavit.

[11] The appellant resides at No 68 Sayed Maturah, Mitchell's Plain. He was born on 18 April 1987 and a director in two companies, namely, *Abakwazidenge Trading* (Pty) Ltd registered as such on 20 August 2021; and *Khundulu Holdings* (Pty) Ltd registered as such on 28 November 2023. Both companies carry on business in the Western Cape. Both businesses came to a standstill after his arrest. The appellant averred that both companies were respectively making a net profit ranging between R30 000.00 to R50 000.00 monthly.

[12] With his fiancée or future wife he has one (1) child. In addition to this child, the appellant has further three (3) children from different women. Two birth certificates were

[7] S v Barber 1979 (4) SA 218 (D) 220 E-H.

annexed to the affidavit in support of the application. The appellant stated that his children are not recipients of child support grant (SASSA grant), and he is responsible for their maintenance. He is staying with one child and his fiancée. Other children are staying with their mothers. He pays R1500.00 for each child per month depending on his income.

[13] About his businesses, the appellant states that he has two employees who are weekly paid. He has been unable to pay their salaries or wages as his businesses are not operating since his arrest.

[14] The appellant attests to the fact that he has no family ties outside the Republic of South Africa as his friends and family members reside within the borders of South Africa. He concludes in this regard by saying he is not a flight risk, and he will stand his trial. He has no previous convictions nor pending cases. He has never offended any bail legislation provisions.[8] He further states that he is well known in his community and that he does not have a tendency of fleeing and undertakes to cooperate.

[15] The appellant states that he does not know the identity of the state witnesses, therefore he will not interfere with them. He will not disturb the public order and or undermine the proper functioning of the Criminal Justice System. He will not interfere with the investigations. He will not commit Schedule One (1) offence whilst out on bail. He will not conceal or destroy any evidence. In conclusion he states that he will comply with the conditions as may be imposed on him and it is in the interests of justice that he be released on bail. He requested an amount of R1000.00 to be fixed.

[16] The magistrate did not deal at all in its judgment with the aforesaid contents of appellant's affidavit in support of bail application. Judicial accountability impels the judiciary officers to account to the parties in a litigation and to the public at large through

[8] Section 60 (4) (a-e) of the Criminal Procedure Act 51 of 1977.

their judgments. The judgment must account for all the evidence presented before it. The court must not deal only with the evidence it thinks it is relevant or it supports his or her order, it is enjoined to deal also with the evidence it is rejecting. The court must account for its judgments otherwise its decision will be arbitrary.

[17] There is not a single reason in the magistrate's judgment why the appellant's case or version has not been accepted or rejected. We may only assume that it was rejected for the fact that it is not referred to in the judgment. In fact, the magistrate's failure to accept or reject appellant's case is rooted in his failure to consider same. One cannot accept or reject something he has not considered. No balancing act has been made by the magistrate.

[18] In *GMSA Financial Services*[9] Mbenenge JP referred with approval to the case of M v M[10] thus:

"5. *It has also been held that the core principle of the rule of the law include the right of a litigant to be given reasons by a court*. *"Absent such a right, transparency is cloaked in darkness, accountability is honoured in the breach*." Accountability and transparency are incidences of proper judgment writing.

[19] In *Dr AB Xuma Local Municipality*[11] the court cited with approval the case of *Mvumbi NO*[12] thus:

"4. It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and when a judgment is appealed, written reasons are

[9] GMSA Financial Services: A Division of West Bank: A Division of First Rand Bank Limited v PBF Investors (Pty) Ltd and Another (2358/2017) [2019] ZAECMHC 15 (12 March 2019) para 5.
[10] M v M (20350/2012) [2015] ZAWCHC 197 (24 November 2015).
[11] Dr AB Xuma Local Municipality and Another v Local Resident Under Consolidated Case Number 988/2023 [2025] ZAECMHC 19 (20 March 2025) para 4.
[12] Strategic Liquor Services v Mvumbi NO and Others 2010 (2) SA 92 (CC) para 15.

indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process,"

[20] *Baxter*: Administrative Law at 228 puts thus:

"A duty to give reasons entails a duty to rationalize the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached and requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair – it is also conducive to public confidence in the administrative decision-making process. Thirdly – and probably a major reason for the reluctance to give reasons – rational criticism of a decision may only be made when the reasons for it are known."

Although this *dictum* was made in the context of administrative decision making, it applies with equal or more force in the context of judicial decision, especial in the context of Criminal Justice System, where right to freedom and security[13] is in the balance.

[21] In the case of *Macingwane*[14] Gwala AJ aptly remarked thus:

"39. In my view it is irregular for a magistrate not to give reasons for his or her judgment. It is also unfair to the accused person. It creates doubt whether the trial was fair or not"

[22] The Constitutional Court in *Mphahlele*[15] observed as follows:

"[12] There is no express constitutional provision which requires judges to furnish reasons for their decisions. Nonetheless, in terms of section 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the judiciary is bound by it. The rule of law undoubtedly requires judges not to act arbitrarily and to be accountable. The

[13] Section 12(1) of the Constitution.
[14] Macingwane v S (CA&R20/18) [2019] ZAECMHC 76 (20 November 2019) para 39.
[15] Mphahlele v First National Bank of South Africa Ltd 1999 (2) SA 667; 1999 (3) BCLR 253 para 12.

manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer.

In these circumstances I am unable to assess the correctness of the magistrate's decision refusing to admit the appellant to bail.

[23] In *Macingwane*[16] Gwala AJ made the following compelling and instructive dictum: *"32. There is a plethora of authorities to the effect that in the process of reasoning and analysis of evidence presented before court, in reaching its conclusion (whether it be to convict or to acquit) the court must account for all the evidence. Some of the evidence might be found to be unreliable, and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.*

33. The magistrate did not account for the judgment he gave. He did not analyse the evidence before arriving at his conclusion. He did not explain why the evidence of the accused persons was not accepted and why that evidence did not meet the standard of being reasonably possibly true. He did not even explain on what basis he found that the state had discharged its onus of proof and why its evidence was accepted.

35. Whilst it is accepted that the magistrate's court is generally a busy court, justice still requires that he or she who sits to make judgment about the lives of the people must account for his or her judgment. A presiding officer, accounts for his or her judgment by

[16] Macingwane *supra*.

giving an analysis of the facts before him or her leading to a conclusion ultimately reached. This is fair to both the complainant and the accused. Certainly, the accused person is entitled to know on the basis of what evidence is he or she found guilty and by what evidence did the state managed to discharge the onus resting on it. Sadly, it does not appear from the judgment of the magistrate how the court was satisfied that the guilt of the appellant was proved beyond a reasonable doubt."
I align myself with these observations.

[24] A judgment without reasons is arbitrary. Equally a judgment that does not account for all the evidence is arbitrary. A judgment without balancing exercise between the two opposing versions or evidence lacks proper analysis and is consequently arbitrary.

[25] Section 12 of the Constitution provides for Freedom and Security of the person as its heading suggests. Subsection 1 provides as follows:
"12. (1) Everyone has the right to freedom and security of the person, which includes the right-
(a) not to be deprived of freedom arbitrarily or without just cause…"
Magistrate's refusal to admit the appellant to bail is arbitrary and consequently unconstitutional for it offends the provisions of section 12(1) (a) of the Constitution.

[26] Another important constitutional provision is section 165 of the Constitution which deals with judicial authority. Courts are enjoined by the Constitution to be impartial. Subsection 2 provides thus:
"2. The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."
Partiality is apparent in the judgment of the magistrate when it glaringly omits to consider appellants assertions or evidence. It would be different if appellant's evidence was referred to and rejected and reasons for such rejection are provided. It is unknown why appellant's evidence was at least not referred to in the magistrate's judgment.

[27] It is noteworthy from the record that appellants' evidence is not rebutted, save for the fact that it is stated that state's case is strong and appellant's case is weak. The evidence embodied in the appellant's affidavit relates to the factors a court must take into account when considering bail applications. The magistrate should have considered them in its decision whether or not to grant bail.[17]

[28] Mbenenge J (as he then was) now JP in *Sinqu*[18] had this to say:
"9. The magistrate's conclusion that no weight could be attached to the evidence tendered by way of evidence by the appellant is not substantiated. The evidence embodied in the affidavit related to the factors a court is normally called upon to consider in its decision whether or not to grant bail. That evidence was neither controverted nor contended by the prosecution. Those factors were elicited by the accused's attorney and not placed in dispute when Sgt Pieters testified. For this reason, the magistrate ought to have accorded the evidence due and proper consideration and weighed the evidence in determining whether the interests of justice warranted the appellant's admission to bail."
The appellant's affidavit contained evidence that is worthy of consideration. The fact that such evidence may be less persuasive does not mean that it had to be disregarded.[19]

[29] There is a concerning finding made by the magistrate in his judgment. He found as follows:
"In his affidavit the accused only states that he does not bear any knowledge of these offences and he is going to plead not guilty. As the onus is upon the accused to convince the court that it will be in the interest of justice for him to be released, the court must look at section 60(4) …"

[30] It is not true that the appellant only stated in his affidavit that he does not bear any knowledge of the offences. I have summarised above what constituted appellant's affidavit. It was disingenuous of the magistrate to falsely state that the accused, in the

[17] Section 60(4)(a – e) of Criminal Procedure Act 51 of 1977 as amended.
[18] Sinqu v S (CA&R31/2016) [2016] ZAECBHC 14 (21 December 2016) para 9.
[19] Mfeketho and 2 Others v The State (CA&R 193/2014 [2014] ZAECGHC 67 (21 July2014).

affidavit, only stated that he bears no knowledge of the offences he was accused of. The magistrate knew, as the affidavit was in front of him, that all the relevant factors envisaged in section 60(4) (a – e) of the Criminal Procedure Act were addressed in the affidavit. If one ties up or couples magistrate's failure to consider the contents of the appellant's affidavit and the incorrect statement that the appellant only stated in his affidavit that he bears no knowledge of the offences with which he was charged, one easily comes to a conclusion that the judgment of the magistrate is dishonest. That buttresses a point about magistrate's lack of impartiality alluded to above. Dishonest judgment cannot sit comfortably with a constitutional principle of impartiality and that invariably offends provisions of section 165(2) of the Constitution. This explains how wrong the magistrate's judgment is. A judgment that offends constitutional principles is utterly wrong. Mr *Soga* wisely conceded that the magistrate's judgment is indefensible, and he is commended for his helpful submissions.

[31] Having found that the decision of the magistrate is wrong, I also find that the appellant must be admitted to bail. Mr *Soga* for the state suggested that bail amount should be fixed at R3 500.00, whereas Mr *Maseti* for the appellant suggested an amount of R2 000.00. Both counsel submitted that normal bail conditions should be imposed.

[32] In the result I accordingly make the following order:

32.1 The appeal is upheld.

32.2 The decision of the magistrate, Mdantsane Magistrate's Court, refusing to admit the appellant to bail is set aside and substituted with the following order:

32.2.1 The appellant is admitted to bail and shall be released upon payment of R3 000.00 (Three Thousand Rand).

32.2.2 The appellant shall appear and present himself at court at 08:30 or at such time as the presiding officer may dictate, on every date to which the case may be or is postponed.

32.2.3 The appellant is ordered not to: -

(a) interfere with state witnesses; or to conceal or destroy evidence, and not to interfere with the investigations.
(b) not to disturb the public order or undermine the public peace or security.
(c) not to undermine or jeopardise the objectives or the proper functioning of the Criminal Justice System.
(d) not to endanger the safety of the public or any particular person or commit a Schedule 1 offence.

AS ZONO

JUDGE OF THE HIGH COURT (Acting)

Appearances

For the Appellant:	Mr Maseti
Instructed by:	P Melapi Attorneys
	c/o Ronny Lesele Attorneys
	46 Leopold Street
	KING WILLIAMS TOWN
Contact:	072 197 4535
For the Respondent:	Adv Soga
Instructed by:	Director of Public Prosecutions
	BHISHO
Date heard	29 May 2025
Date delivered	12 June 2025