Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

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

[redacted]

SIGNATURE DATE: 9 January 2025

Case No. A147/2024

D[redacted] E[redacted] M[redacted] Appellant

and

THE STATE Respondent

JUDGMENT

WILSON J:

1 The appellant, Mr. M[redacted] was arrested and brought before the Randburg Magistrates' Court on a charge of fraud. Mr. M[redacted] applied for bail. The amount involved in the fraud alleged is in excess of R500 000. That meant that Mr. M[redacted]'s bail application fell to be determined under section 60 (11) (b) of the Criminal Procedure Act 51 of 1977. Section 60 (11) (b) obliges an applicant for bail to adduce "evidence which satisfies the court that the interests of justice permit his or her release".

2 Mr. M[redacted] put up an affidavit dealing with the circumstances giving rise to the charge and his personal circumstances. The State answered with its own affidavit, deposed to by the investigating officer.

3 On the strength of these two affidavits, the Magistrate below refused bail, apparently on the bases that there is a strong *prima facie* case against Mr. M[redacted] that Mr. M[redacted] is a flight risk, and that Mr. M[redacted] should continue to be detained for his own safety.

4 Mr. M[redacted] then appealed. His appeal was enrolled before me on 7 January 2025. I upheld the appeal, set aside the Magistrate's decision, and substituted it for an order releasing Mr. M[redacted] on bail, subject to conditions which were, for the most part, agreed between the parties. I intimated at the time I made my order that my reasons would follow in due course. These are my reasons.

The State's case

5 There is nothing on the record that so much as outlines what the State's case is – let alone material that would have permitted the Magistrate to form a view of its strength. The charge sheet gives no particulars of the offence, save to assert that it involves a sum exceeding R500 000. The absence of particularity was neither addressed nor remedied in the investigating officer's affidavit opposing bail.

6 By contrast, Mr. M[redacted] gives a detailed, if at times obscure, account of the facts that he believes gave rise to the charge. He says that the charge arose from the execution of his duties as a financial administrator for his church. The church wanted to purchase land in De Duer, and there appears to have been

a disagreement about the handling of the money procured for that purpose. The leader of a church faction hostile to Mr. M laid a charge of fraud against him. Mr. M says that the charge was malicious and without substance.

7 Whether or not that turns out to be true, it was the only admissible factual version relating to the nature of the case against Mr. M placed before the Magistrate. Not a word of the investigating officer's affidavit opposing bail addresses it, and no attempt was made to supplement the State's case in light of it. The Magistrate might have been swayed by the public prosecutor's assurances from the bar that the State's case is very strong. If she was, that was a mistake. The unsupported assertions of an advocate pleading his case should not be mistaken for evidence. Here, it is the evidence that counted, and the State's case was extraordinarily light on it.

8 Accordingly, the Magistrate's conclusion in her judgment refusing bail that "the state has a strong *prima facie* case against the applicant" lacks any discernible factual substrate on the record. As things stand, the situation is quite the reverse. There is nothing on the record that indicates what the State's case really is, but there is a fundamentally coherent allegation from Mr. M that the complaint against him is malicious.

Whether Mr. M will stand his trial

9 Mr. M is a Zimbabwean national. He lives in South Africa with his wife and two children. His wife is employed at a major South African insurance company. Mr. M is not presently employed, largely, it seems, because he does not have the right to work in South Africa. Mr. M instead has a three-

year multiple-entry temporary residence permit. That permit expired in October 2024, but not before Mr. M applied to renew it in September 2024. The permit was issued under section 11 (6) of the Immigration Act 13 of 2002, which provides for the issuance of temporary residence permits to spouses of South African citizens and permanent residents. From that, it may safely be inferred that Mrs. M is a South African citizen or permanent resident. It is also likely that Mr. and Mrs. M 's children were born in South Africa and are South African citizens.

10 In light of all these facts, it might have been concluded that Mr. M presents no serious flight risk. He is married to a South African, has two South African children, and, purely on the strength of his temporary residence permit, it can be inferred that he has lived here for at least three years. His affidavit also discloses that he has substantial moveable but illiquid assets in South Africa, which he would probably have to leave behind if he fled the jurisdiction.

11 There are also the uncontested facts that Mr. M knew about the complaint laid against him and the existence of the investigation into it for at least six months before he was arrested; that he co-operated fully with that investigation, including by giving a statement under warning in April 2024; and that Mr. M arrived at the police station under his own steam immediately before his arrest. None of this is consistent with the proposition that Mr. M presents an appreciable flight risk.

12 Against all this, however, the Magistrate concluded that "if Mr. M is convicted, punishment can be an incentive to abscond, so there is a possibility of a flight risk, he can go back to Zimbabwe". This conclusion was plainly

unsustainable, because it ignored the substantial evidence of Mr. M[redacted]'s ties to his home and family in South Africa, the negligible prospects of conviction on the evidence before the Magistrate at the stage of the bail application, and Mr. M[redacted]'s co-operation with the police for months before his arrest.

Mr. M[redacted]'s safety

13 In what appears to be a rhetorical flourish at the end of her judgment *ex tempore*, the Magistrate observes that "the gallery is full of community members and it is the court's opinion that it might be a safety risk for the applicant".

14 It is hard to know what to make of this. I am in the first place constrained to point out that cases are decided on the evidence, not on the presiding officer's subjective observations of the public gallery. In any event, a high level of public interest in a case does not in itself demonstrate a risk to the accused. The Magistrate does not record – and probably did not know – who was in the public gallery and why they were there. They might have been there in support Mr M[redacted] They might have harboured animosity toward him. They were likely just curious.

15 A court should not detain an accused person against their will merely because it is alleged that they would be in danger if released. Detention for an accused person's safety will seldom be appropriate. If it ever is, such detention may only be authorised after anxious consideration, where there is clear evidence of an imminent and acute risk of death or serious injury, only for so long as that risk endures, and only where the risk cannot be ameliorated by the

imposition of appropriate bail conditions. The facts of this case fall far short of that standard.

Release on bail

16 It was for these reasons that the appeal had to succeed. On the facts as I have set them out, Mr. M[redacted] met his burden under section 60 (11) (b). On the evidence before the Magistrate, he should have been released on conditions designed to address the seriousness of the charge and to ensure that he stands his trial. These conditions were for the most part agreed between the parties once it became clear that the Magistrate's decision would not stand.

17 There was, however, a disagreement about the amount of bail to be set. Mr. M[redacted]'s counsel asked for bail to be set at R1000. The State asked that bail be set in the amount of R5000. Given the seriousness of the charge, and that, on a conspectus of the evidence, R5000 is clearly within Mr. M[redacted]s grasp, I agreed with the State that bail should be set in that amount.

18 It was for these reasons that I upheld the appeal, set the Magistrate's decision aside, and ordered Mr. M[redacted]'s release on the conditions set out in my order of 7 January 2025.

[redacted]

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 9 January 2025.

HEARD ON:	7 January 2025
DECIDED ON:	9 January 2025
For the Appellant:	T Paile Instructed by ET Paile Attorneys Inc
For the Respondent	MB Mchunu Instructed by the National Prosecuting Authority