IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH CASE NO. CA&R 11/2016

In the matter between:

AKTARHUSEN AKBHABHAI RAJJAB **Appellant**

and

THE STATE **Respondent**

JUDGMENT ON BAIL APPEAL

Bloem J.

[1] The appellant was refused bail on two occasions in the magistrate's court in Port Elizabeth. He now appeals against the refusal of bail.

[2] On 27 August 2015 the appellant appeared in the magistrate's court in King William's Town on one count of fraud and one count of corruption in contravention of section 3 (a) of the Prevention and Combating of Corrupt Activities Act[1]. Those counts arise from the appellant and his co-accused allegedly compiling fraudulent documentation relating to the conclusion of marriages and the registration of such marriages by the Department of Home Affairs. On that same day the magistrate granted bail to him and his two co-accused in the sum of R1 000.00 on condition *inter alia* that he must hand his passport to the investigating officer, captain Mawethu Kobese, that he must report to the King William's Town police station every day from 28 August 2015 and that he must telephone the investigating officer if and when he leaves King William's Town. On 4 September 2015 and upon the application of the appellant the

[1] Prevention and Combating of Corrupt Activities Act, 2004 (Act No.12 of 2004).

magistrate amended the last condition so that, from that date, the appellant was required to report to the police station in King William's Town every Monday.

[3] On Tuesday, 15 December 2015 and at Walmer Park, Port Elizabeth the appellant was arrested by members of the South African Police Service. On 30 December 2015 he applied for bail in the magistrate's court in Port Elizabeth (the first application) which was refused because the magistrate held that the interests of justice did not favour the appellant's release on bail.

[4] On 4 May 2016 the appellant applied for bail on the basis of alleged new facts (the second application). On 9 May 2016 the magistrate again refused the application on the basis that the appellant did not place new facts before her. The appellant now appeals against the refusal of the two bail applications.

[5] I will now deal with the allegations that the parties made in their respective affidavits in the first application. The appellant alleged that he was a 35 year old male residing at 4 Louisa Street, King William's Town where he had been residing for the last 5 years. Regarding his family he alleged that he is married and has 3 children aged 1, 3 and 5 respectively and that he was residing with his brother and some extended family at the above address, the property of his "*wife's cousin*". He owns two businesses in King William's Town which employ six members of staff and carry stock to the value of about R500 000.00. He alleged that he did not know the identity of the state witnesses, was unaware of any incriminating evidence against him and has a valid defence.

[6] The appellant alleged that on 15 December 2015 he noted a man taking a photo of him. He packed up his computer and ran to his vehicle where he was arrested by many members of the South African Police Service attached to the Hawks Unit.

They searched his vehicle and "*retrieved the evidence all relating to the King William's Town matter*". He was detained and interviewed by members of the Hawks and officials from the Department of Home Affairs.

[7] On 16 December 2015 he was visited by his girlfriend, Laika Geswindt, of Schauderville, Port Elizabeth who undertook to arrange legal representation for him but, she said, "*for now [he] must listen to warrant officer Pienaar, the member of the Hawks in charge of [his] case*". Thereafter warrant officer Pienaar took him from the cells and drove him to the Hawks office where he was interviewed. He refused to sign any document without first consulting a lawyer. Warrant officer Pienaar told the appellant that his wife was a lawyer and that he needed R200 000.00 to get a good lawyer and bail. The appellant said that he needed to contact his brother in King William's Town. He used warrant officer Pienaar's cellphone to contact his brother. Warrant officer Pienaar then called his wife whereafter he told the appellant to inform his brother to take the money to the Hawks offices in Newton Park, Port Elizabeth. The appellant spoke to his brother. After some time warrant officer Pienaar also spoke to the appellant's brother. Before his brother's arrival the appellant was handcuffed and caused to sit on the backseat of a vehicle behind the offices of the Hawks. Ms Geswindt joined him at the back of the vehicle. He was later informed that his brother and his passengers were also arrested, but later released. His brother later informed him that when they arrived at the offices of the Hawks, Ms Geswindt took the money. His brother did not know what was happening. He later learnt that Ms Geswindt gave the money to warrant officer Pienaar. A further charge of corruption was subsequently opened against him. He alleged that while he was in custody his business did not generate an income.

[8] Captain Kobese and warrant officer Pienaar deposed to affidavits on behalf of the state. The latter performs duties as an investigator at the Organised Crime Unit in Port Elizabeth. He and his colleagues received information that the appellant was allegedly falsifying documents for foreigners in exchange for money. He was allegedly collaborating with officials employed by the Department of Home Affairs who the appellant paid so that they could unlawfully issue permits and passports to foreigners. On 15 December 2015 and at Walmer when the appellant became aware that he was under surveillance he attempted to run away. He was caught. A vehicle registered in his wife's name, Shaheen Rajjab, was searched and large quantities of passports, documentation belonging to the Department of Home Affairs and files of foreigners, were found in it.

[9] The state opposed bail on a number of grounds.

9.1. In the King William's Town matter the appellant, his wife and an official from the Department of Home Affairs were arrested after an operation was conducted by members of the South African Police Service which allegedly revealed that they illegally sold marriage certificates. He was arrested for the same type of offence in Walmer on 15 December 2015, namely "*corruption and fraud and has therefore demonstrated a tendency to do so*".

9.2. The appellant failed to comply with a bail condition, namely not to leave King William's Town without contacting the investigating officer "*and simply continued with his alleged illegal activities in the Port Elizabeth area*".

9.3. The appellant attempted to evade arrest by running away from the police and attempted to dispose of evidence implicating him by throwing his laptop and other documents to another foreigner and told him to run away with those items.

9.4. Although the appellant told the police that he resided with his wife in King William's Town, a "*section 204 witness*" stated under oath that she lived with the appellant in Port Elizabeth, that the appellant paid the monthly rental and that he goes to King William's Town only over weekends.

9.5. After his arrest on 15 December 2015 the appellant raised R80 000.00 in cash within a few hours. Warrant officer Pienaar believed that had he had his cellphone after his arrest the appellant would have transferred R200 000.00 into his (the investigating officer's) account. Warrant officer Pienaar furthermore believed that the appellant had access to funds and would have no difficulty to secure funds to flee in order to avoid a trial.

9.6. The section 204 witness informed warrant officer Pienaar that the appellant has family in India and that he will use his connection with corrupt officials within the Department of Home Affairs to obtain a passport to flee the country.

9.7. Members of society feel strongly about corruption and fraud. Through his conduct the appellant unlawfully assists illegal foreigners to remain in the country "*which indirectly places a burden on this country to care for its needs*".

9.8. The appellant is likely to interfere with or intimidate state witnesses as he and his wife have in the past threatened to kill the section 204 witness.

[10] Lastly, warrant officer Pienaar alleged that when the appellant was arrested, the state seized 79 passports, 57 birth certificates, 119 marriage certificates as well as 3 South African identity books from the appellant. In his view, if convicted, the appellant faces a long term of imprisonment.

[11] On 16 December 2015 the appellant was charged with bribing warrant officer Pienaar with an amount of R80 000.00 in exchange for his release on bail and for the return of the exhibits seized during his arrest on the previous day.

[12] The magistrate was of the opinion that the state had a *prima facie* case against the appellant, that he was on bail in a case where he was facing corruption and fraud charges and accordingly a candidate for a term of imprisonment and that, because he was found in possession of passports and South African identity documents and continuing with unlawful activities in that regard, he had the potential to travel, even beyond the borders of the country, which made him a flight risk. The magistrate also took into account that the appellant breached his bail conditions in two respects. Firstly, he left King William's Town without contacting the investigating officer and secondly, the last time that he reported at the King William's Town police station was on Sunday, 29 November 2015 and not on Mondays, as ordered on 4 September 2015. In the light of the above findings the magistrate held that, if released on bail, there was a likelihood that the appellant would attempt to evade his trial, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system. She refused bail because, in her view, the interests of justice did not favour the appellant's release on bail.

[13] The second application was set down for hearing on 12 April 2016. Although this aspect is not dealt with in detail in the affidavits, it appears that the magistrate refused to hear the second bail application and postponed it to 11 May 2016. The appellant approached this court and on 6 May 2016 Pickering J set aside the magistrate's decision to postpone the second application to 11 May 2016 and ordered the magistrate to hear it by no later than 9 May 2016 and give judgment as

soon as possible thereafter but not later than 12h00 on 10 May 2016.

[14] The appellant deposed to the main founding affidavit in the second application. Confirmatory affidavits by his wife and friend were delivered. His wife confirmed that they married on 23 July 2009 which marriage still subsists, that she and the appellant are the parents of three minor children who reside with her at 4 Louisa Street, King William's Town, that prior to his arrest, she and the children were maintained by the appellant and that his continued incarceration causes prejudice and harm to her and the children because no one pays their creditors and the school fees in respect of the eldest child. She denied that the appellant was a flight risk. One of the appellant's friends also deposed to a confirmatory affidavit about the alleged cellphone calls to and from warrant officer Pienaar and the alleged bribery on 16 December 2015. The state opposed the second application. In his affidavit warrant officer Pienaar alleged that his investigation revealed *inter alia* that the appellant and his wife are registered as directors/partners of a company registered as Aktarhushen Immigration Practitioners and that the appellant was an accused in a criminal case in King William's Town wherein he allegedly contravened his bail conditions. The state also delivered the affidavit of Corne Botes, the manager of PostNet in Walmer. According to him he was present when the appellant was arrested on 15 December 2015. He saw the appellant on almost a daily basis in PostNet where he used the internet facilities and used to serve his clients between 08h15 and 14h30, depending on the number of clients. Mr Botes and the personnel at PostNet would, on the appellant's request, make photocopies, print or scan documents for him.

[15] On 10 May 2016 the magistrate refused the second application. She found that the appellant did not place new facts before the court but "*merely an elaboration of facts*

presented in the first bail application". The magistrate furthermore found that it was the state that placed new facts before the court, namely that the appellant faced "*additional charges of fraud relating to the illegal issuing of passports, birth certificates and marriage certificates*". The magistrate found that the appellant is a person who cannot be trusted and who was contemptuous of the administration of justice because in paragraph 62 of his affidavit he stated that he has no previous convictions and has "*not been released on bail pending any charges*". That is obviously incorrect because on 27 August 2015 he was released on bail pending the corruption and fraud charges in King William's Town. The magistrate furthermore found that the impact that the appellant's incarceration has on his family was an aspect raised in the first application. She also held that, although she did not mention it in her judgment in the first application, such impact is "*far outweighed by the interests of justice*".

[16] I agree with the magistrate that, despite his affidavit consisting of 78 paragraphs, the appellant did not place a single new fact before court in the second application. He simply elaborated on aspects raised in the first application. However, the second application attracted certain responses from the warrant officer Pienaar. In his answering affidavit he pointed out that a criminal case had been registered in King William's Town against the appellant for contravening his bail conditions. A charge sheet was also placed before the magistrate during the hearing of the second application from which it is apparent that, arising from the events of 15 December 2015, on 6 January 2016 the appellant was charged with one count of fraud in the magistrate's court in Port Elizabeth. These facts were not before the court when the first application was considered.

[17] Mr Price SC, counsel for the appellant, submitted that, because the magistrate found that the appellant did not place new facts before the court and dismissed the second application on that basis, the magistrate should not have had regard to the facts that warrant officer Pienaar placed before her in the second application. He submitted that I should also not have regard to those facts. The submission was, because the application was dismissed, regard should not be had to any of the facts contained in the affidavits filed on behalf of the state. No authority was referred to and I am unaware of any authority in support of that submission. As I understand it, a determination of whether or not an accused should be released on bail, can only be made after a consideration of all the facts placed before the presiding officer.[2]

[18] In view of the fact that the magistrate correctly found that the appellant adduced no new facts in the second application, I shall now assess the grounds upon which she dismissed the first application in the light of all the evidence – old and new. The magistrate refused bail primarily because she found that if the appellant were released on bail there is the likelihood that he would evade his trial and he will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system.

[19] Section 60 (3) (b) and (d) of the Criminal Procedure Act[3] provide that the interests of justice do not permit the release from detention of an accused while there is the likelihood that the accused, if released on bail, will attempt to evade his or her trial or will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system.

[20] Regarding the likelihood of an evasion of his trial, the magistrate took into account

[2] *Jacobs and others v S* [2004] 4 All SA 538 (T) at 542c-d.
[3] Criminal Procedure Act, 1977 (Act No. 51 of 1977).

that the appellant faces a criminal prosecution in King William's Town relevant to the alleged compilation of fraudulent documentation relating to the conclusion of marriages. He was released on bail on the above conditions. On 15 December 2015 he was arrested and documentation was found in his possession or under his control which created the impression that the appellant could arrange fraudulent travel documentation for himself and his family to leave the country and so evade his trial. It should also be borne in mind that in the first application the appellant referred to 4 Louisa Street, King William's Town as a property belonging to his "*wife's cousin*". However, in the second application he attached a lease agreement that he concluded as early as 2 January 2014 with the lessor in terms whereof he leased a flat at 4 Louisa Street, King William's Town from that date for a period of 3 years. Interestingly his wife concluded another lease agreement for the same flat, rental and period with the same lessor. The appellant did not explain in his affidavit in support of the second application why he lied under oath when he said that the property belonged to his wife's cousin when, according to the lease agreement, Lainprops 2 CC was the lessor. He also did not explain why he and his wife concluded different lease agreements in respect of the same flat for the same period and rental. The fact remains that he and his family are tenants at the above address. He is neither the owner thereof nor did he state that he was the owner thereof. He also did not state that the immovable property from which the two businesses are conducted belong to him. To the contrary, those businesses are lessees of Red Square Properties.

[21] When he was released on bail on 27 August 2015, the appellant was required to hand his passport to captain Kobese, which I understand he did. The fact that the appellant had 79 passports in his possession or under his control gives credence to warrant officer Pienaar's belief that the appellant would fraudulently obtain passports

for himself and his family to enable them to leave the country and so evade his trial.

[22] Save for the documents allegedly found in the appellant's possession or under his control on 15 December 2015, other factors to be taken into account are the nature and the gravity of the charges on which the appellant is to be tried, the strength of the case against him and the nature and gravity of the punishment which is likely to be imposed should he be convicted on the charges against him.[4] The events of 15 December 2015 gave rise to a charge of fraud against the appellant, it being alleged that on that day he unlawfully, falsely and with the intent to defraud and to the prejudice or potential prejudice of the Department of Home Affairs gave out and pretended to various foreign nationals that he was authorised to issue passports, birth certificates and marriage certificates and permits when in truth and in fact he knew at all material times that he was not an employee of the Department of Home Affairs and was not authorised as such to issue or extent those passports, certificates and permits. The events of 16 December 2015 gave rise to a charge of corruption against the appellant, it being alleged that he bribed warrant officer Pienaar to release him on bail and to return the documents seized from him on the previous day.

[23] The evidence adduced by the state leads me to the conclusion that the *prima facie* strength of the state's case is reasonable, regard being had to the evidence of warrant officer Pienaar and Mr Botes as well as the fact that the Director of Public Prosecutions approved the sting operation on 16 December 2015. I have also considered the hearsay evidence of the section 204 witnesses.

[24] Corruption and fraud are serious offences.[5] Those two offences are so serious that the legislature has prescribed minimum sentences. In this regard reference is made

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[4] Section 60 (6) (f), (g) and (h) of the Criminal Procedure Act.
[5] *S v Shaik and Others* 2007 (1) SACR 247 (SCA) in respect of corruption.

to section 51 (2) as read with Part II of Schedule 2 of the Criminal Law Amendment Act[6] for which an accused convicted of corruption or fraud might be sentenced to imprisonment for a period ranging between 15 and 25 years, depending on whether he or she is a first, second or third or subsequent offender.

[25] In the light of all the factors the magistrate cannot be faulted for having found that, because the appellant is likely to evade his trial, the interests of justice do not permit his release from detention.

[26] I now consider the magistrate's finding that, if released on bail, the appellant will undermine or jeopardise the objectives or the proper functioning of the criminal justice system.[7] In considering this ground the magistrate took into account that the appellant failed to comply with two bail conditions, namely that he did not report to captain Kobese before he left King William's Town and he did not report at the King William's Town police station at least on Monday, 14 December 2015. In addition, from his affidavit in the second application, it is apparent that the appellant, knowing it to be false, supplied false information about the ownership of his place of residence during the first application.[8]

[27] I also take into account that the charges that arise from his conduct on 15 and 16 December 2015 are similar to the charges that he faces in King William's Town. He is accordingly likely to continue committing similar offences if he were released on bail and thereby undermine the objectives of the criminal justice system, including the bail system. In that regard (the propensity to commit a similar offence or offences),

[6] Criminal Law Amendment Act, 1997 (Act No. 105 of 1997).
[7] Section 60 (4) (d) of the Criminal Procedure Act.
[8] In terms of section 60 (8) (a) of the Criminal Procedure Act in considering whether the ground in subsection (4) (d) has been established, the magistrate was entitled to take into account the fact that the accused, knowing it to be false, supplied false information during the bail proceedings.

Mr Price referred to the unreported judgment of *Wendy Galada v the State*[9] where a magistrate refused bail to an accused who had been convicted of fraud and sentenced to six years' imprisonment of which two years' imprisonment were suspended. She was subsequently charged with various counts of fraud and corruption. The relevant parole board indicated that she could be released on parole if granted bail. She applied for bail. The magistrate refused to release her on bail on the grounds that there was the likelihood that she would abscond and not stand trial and commit further offences. The magistrate subsequently found that it would not be in the interests of justice for her to be released on bail. On appeal it was submitted on behalf of the state *inter alia* that she had the propensity to commit fraud and that her past conduct justified the conclusion that there was a strong likelihood that she would commit further crimes if she were released on bail. Smith J found that the magistrate did not consider that, if released on parole, there would be stringent parole conditions and she would have a two year suspended sentence hanging over her head. The learned Judge found that, with the appropriate conditions, the interests of justice permitted her release on bail. The magistrate's refusal to release her on bail was set aside. Ms Galada was accordingly released on bail on conditions similar to the ones with which the appellant herein allegedly failed to comply.

[28] *Galada* is distinguishable from the present case. All the offences of corruption and fraud with which Ms Galada was charged were allegedly committed before she was sentenced to prison. In other words she was not charged with an offence which she allegedly committed after she was convicted or sentenced. She was previously granted bail for a period of one year before she was sentenced to prison. There is nothing in the judgment to suggest that she broke any of her bail conditions. In this

[9] *Galada v The State*, delivered on 7 April 2015 in the Eastern Cape Division under case number 6/15.

case the appellant allegedly failed to comply with two of his bail conditions and he allegedly committed similar offences as the ones in respect of which he was granted bail. In my view, *Galada* does not assist the appellant.

[29] In the light of all the evidence, I am not persuaded that the magistrate should have released the appellant on bail. He was previously released on bail with conditions. He failed to comply with those conditions. After he was released on bail he allegedly committed similar offences to the ones in respect whereof he was released on bail. In the circumstances, the interests of justice do not permit the appellant's release from detention.

[30] In the result, the appeal is dismissed.

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G H BLOEM
Judge of the High Court

For the appellant:	Adv T C Price SC, instructed by Changfoot van Breda Attorneys, East London and Roelofse and Roelofse, Port Elizabeth.
For the state:	Adv I C Loots of the office of the DPP, Port Elizabeth.
Date of hearing:	16 September 2016
Date of delivery of the judgment:	22 September 2016