



**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

CASE NO: A09 / 2022

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

03 FEBRUARY 2022
DATE

SIGNATURE

In the matter between:

MULUMBA TRESOR YUMA

APPELLANT

and

THE STATE

RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 03 FEBRUARY 2022.

J U D G M E N T

RATSHIBVUMO J:

[1] Introduction:

This is an appeal against the refusal of bail by the Eerstehoek Magistrate Court. The Appellant was arrested on 14 November 2021 while attempting to cross the South African border to Swaziland at Oshoek Port of Entry. The provisional charges preferred against him were fraud for having presented a passport to Home Affairs officials with a forged visa, and contravening section 49(1)(a) of the Immigration Act, no. 13 of 2002, for being illegal in the Republic of South Africa. These offences are listed in Schedule 1 of Act no. 51 of 1977 (the Criminal Procedure Act) and have not been repeated in Schedule 5 or 6. He would as such be entitled to be released on bail at any stage preceding his or her conviction in respect of such offences, if the court is satisfied that the interests of justice so permit.

[2] The evidence presented during bail application can be summarised as follows. When the appellant arrived at the border post as described above, the Home Affairs official had him arrested on suspicion that the visa (critical skills visa) in the passport presented by him was forged. The said visa was alleged to have been issued by the South African consulate in Lubumbashi in the Democratic Republic of Congo (the DRC). Following his arrest, an email correspondence from the Consulate-General was secured confirming that the said visa was not issued by the consulate. This email and was also handed in as exhibit. The State submitted that in

essence, that rendered the appellant illegal in the Republic of South Africa (South Africa).

[3] In his evidence given under oath, the Appellant confirmed the events leading to his arrest as testified by the Investigating Officer. The visa was issued to him by the South African consulate in the DRC on 11 February 2019. He did not personally visit the consulate as he acquired it through an agent. He found it difficult to accept that the visa was forged because from the date it was issued, he had entered the country without anyone from the Department of Home Affairs questioning it.

[4] He also testified that he has been in South Africa for the past 16 years and that he used a passport and always renewed his permit. It is not clear what permit he was referring to. His current passport was the fourth one. He resided with his wife named Monga Winny Nku who is also a citizen of the DRC. The two have been married since 2018 and have two small kids. He does not own any immovable property. He however has a motor vehicle the details of which he did not furnish. It was not mentioned what the make and value of the car was or if it bought through a loan or cash.

[5] On 22 December 2021, which was the last day of the bail hearing, counsel for the appellant handed in a bundle of documents from the Gauteng Division of High Court, Pretoria. Amongst these was a court order dated 21 December 2021 directing that the criminal proceedings at Eerstehoek Magistrate Court (under case no. A848/2021) against the appellant be stayed pending the finalisation of a Review Application under case no. 59473/2021 in the same court. In that application, the Appellant seeks an order declaring that the decision by the Minister and the Director General in the Department of Home Affairs declaring him an illegal immigrant, be reviewed and set aside. Further relief sought mirrors the relief sought and

granted by the Constitutional Court in *Abore v Minister of Home Affairs & Another*.¹ The difference is that in *Abore*, the applicant/appellant was challenging his detention and the looming deportation for being illegal in South Africa whereas the Appellant *in casu* is facing criminal charges that have nothing to do with his nationality. The less said about this review application, the better since it is pending.

[6] A number of exhibits were also handed in as part of the urgent application before the High Court in Pretoria forming the bundle that was handed in during the bail application on 22 December 2021. Although the purpose of handing in this bundle was to persuade the court to release the appellant on account of the proceedings being stayed, one could glean into some of the supporting documents handed in by the appellant before the High Court in Pretoria. Amongst these was a one-year lease agreement that shows that he was renting (or was due to rent) some premises for R6 500.00 per month, and that the lease was to start on 01 May 2019.²

¹ (CCT115/21) [2021] ZACC 50 (30 December 2021). In this matter, the Constitutional Court granted an order in the following terms:

1. Leave for direct appeal is granted.
2. The appeal is upheld.
3. The order of the High Court is set aside and is substituted with the following:
 - “a) It is declared that Mr Abore is, in terms of section 2 of the Refugees Act 130 of 1998 read with the Refugees Amendment Act 11 of 2017, entitled to remain lawfully in the Republic of South Africa and the respondents are ordered to refrain from deporting him until his status has been determined and finalised.
 - b) The respondents are directed to take all reasonable steps, within 14 days from the date of this order, to give effect to Mr Abore’s intention to apply for asylum in terms of section 21(1B) of the Refugees Amendment Act.
 - c) It is declared that the continued detention of Mr Abore during the period from 26 August 2020 to 7 February 2021, and during the period from 30 May 2021 to 25 June 2021, was unlawful.”
4. The respondents must pay the applicant’s costs in both the High Court and in this Court, including the costs of two counsel.

² See p. 26 of the appeal record.

- [7] Another document attached was an “offer of employment” by a company named Vetasi. This document was dated 29 August 2018 and in it, the appellant is offered an employment as a technician from 01 September 2018. He had to sign the document and return the original thereof to the company. What is conspicuous in the document is that it makes no mention of the salary and that the letter contains only a postal but no physical address.
- [8] In her judgment refusing bail, the Magistrate also referred to the entries and/or stamps on the passport which reflected that the passport ceased to be valid on 23 February 2019. This was according to an entry dated 20 February 2019 which extended its validity by just three days. Her other concern was the fraudulent visa presented by the appellant at the border post. It was on that note that she reasoned that once the appellant was released on bail; he would be breaking the immigration laws as he would be illegal in South Africa.
- [9] On appeal, the Appellant submitted that the Magistrate erred by failing to consider the nature and the gravity of the charge on which he is to be tried. In this regard it was submitted that the Magistrate should have found that the nature and the gravity of the charges against him were not indicative of any likelihood that he would attempt to evade the trial. It was argued in this regard that the Magistrate failed to consider the gravity of the punishment which is likely to be imposed should he be convicted of the charges against him in view of the absence of any evidence of any previous convictions.
- [10] The Respondent countered this by submitting the penal provisions of sections 49(1)(a) and 49(14) of Act 13 of 2002 which state,

“1 (a) Anyone who enters or remains in, or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years.

...

14 “Any person who for the purpose of entering or remaining in, or of facilitating or assisting the entrance into, residence in or departure from, the Republic, whether in contravention of this Act or not, commits any fraudulent act or makes any false representation by conduct, statement or otherwise, shall be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding eight years”

[11] The Respondent argued therefore that the charges faced by the appellant are serious and carry serious sentences upon conviction. It submitted therefore that the question on whether the appellant was likely to evade trial given the kind of sentence to be imposed upon conviction was rightly decided by the court.

[12] Section 65(4) of the Criminal Procedure Act provides,

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] The provisions above were considered and interpreted by Hefer J in *S v Barber*³ where he held,

“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 for bail. 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 the magistrate because that would be an unfair interference with the magistrate's exercise of his

³ 1979 (4) SA 218 (D) at 220E - H

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 exercised that discretion wrongly.”

[14] In *S v Porthen and Others*,⁴ Bins-Ward AJ (as he then was) focuses on the appeal court’s right to interfere with the discretion of the court of first instance in refusing bail when he held,

“When a discretion... is exercised by the court *a quo*, an appellate Court will give due deference and appropriate weight to the fact that the court or tribunal of first instance is vested with a discretion and will eschew any inclination to substitute its own decision unless it is persuaded that the determination of the court or tribunal of first instance was wrong.”

[15] The submissions by the Respondent above should be seen in light of the provisions of section 60 (4) of the Criminal Procedure Act, which states,

“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 or any particular person or will commit a Schedule 1 offence.

(b) Where there is the likelihood that the accused, if he or she is released on bail, will attempt to evade his or her trial.

(c) Where there is the likelihood that the accused, if he or she is released on bail, will attempt to influence witnesses or to conceal evidence.

(d) Where there is the likelihood that the accused, if he or she is released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including bail system. [My emphasis].

[16] In *S v Hudson*⁵, Thirion J was confronted with the meaning of the likelihood to evade trial when he dealt with the bail appeal where the

⁴ 2004 (2) SACR 242 (C) para 4.

⁵ 1980 (4) SA 145 (D)146H-147B

appellant's personal circumstances largely mirrored those of the appellant *in casu*; and he held,

"It is true that the appellant has built up a business in this country, that he is married to a South African woman and that he has fixed property in this country and that he has lived in this country for some 11 years. But the fact remains that he has no deep roots in this country. Furthermore he has connections overseas. He referred in evidence to the fact that he received from his mother in Canada certain trunks, in one of which a missing passport was found. It would therefore appear that his mother is living in Canada. He also admitted that whilst in Canada he had been arrested by the police for possession of marijuana, which I assume is another name for dagga. It also appeared from his passport that he has travelled widely abroad. This is therefore a case in which the appellant, if he wants to leave the county, would not find it difficult to do so."

[17] In considering bail, the courts are not expected to foresee how an applicant would behave in the future. They are however expected to tell from the facts of the case and personal circumstances presented to them, if there is a likelihood of the applicant evading the trial. The likelihood to evade trial is not gathered from the applicant's undertakings, but an evaluation of the circumstances of the case as a whole. Like Thirion J indicated in *Hudson* above, the court should not only look at whether the applicant is attached to South Africa, but also consider the kind of sentence likely to be imposed in case of conviction. The applicant's court attendance should not just be left at his mercy. Unless this is done with care, the resources may soon be channelled or focused on extraditing back to South Africa, people who were released because courts had faith in them and placed themselves at their mercy.

[18] The court *a quo* held a view that if the appellant was unable to produce a document that makes him legal in the country, he would be committing a

crime the moment he stepped out of a courtroom if so released. I do not find any misdirection in this view. I therefore agree with the finding that it would not be in the interests of justice for the appellant to be released on bail as there is a likelihood that he could evade trial.

[19] Before I conclude, I wish to express my distaste on certain utterances by the counsel for the appellant during the bail application proceedings which I found to be unfortunate and not upholding the court's decorum. The manner in which Advocate Loubser from the Pretoria bar was so vigorous in opposing the State's request for a postponement before the application could commence, the Public Prosecutor who was involved ended up asking to be "recused" from the bail application by the court. Although the presiding Magistrate did not excuse him, the Public Prosecutor gave the case to his colleague to handle for the purposes of bail application. On the date of the application, it was not long before the Public Prosecutor on record felt the heat. He informed the court that he could no longer handle the attacks from his opponent and all he needed was for the proceedings to be adjourned, as he was too emotional and feared saying what he was not supposed to.

[20] When bail application finally got underway, record is replete with objections from the defence right from the beginning to the end. The actual evidence is very brief, but the transcribed record is huge because of these objections, arguments, counter-objections and the rulings. There was even an objection to the first statement by the Public Prosecutor made to the Investigating Officer as a witness when he told him, 'it was common cause that he was a police officer stationed at Hartebees Police Station.' Few paragraphs thereunder, it became clear that the defence actually did not mean what he said in the objection as he knew not only the

investigating officer, but also knew when the docket was handed to him for investigations. Most of the rulings by the court were ignored as Asdv Loubser argued against them after they were made as the court's authority was put to test. Not even the Court Interpreter was spared the wrath of the counsel to the extent that all she wanted was to be excused from working in that court. I quote some of the exchanges as they appear from the record *in verbatim*:

PART A

After a lengthy argument for and against a postponement, the Magistrate gave reasons for her ruling which made about four pages and concluded as follows:⁶

COURT:

However, the Court will now make a ruling that this matter will be remanded.

Defence, give me the date when you will be able to come here for these purposes of this case to proceed? Whether it is tomorrow, whether it is this – whenever, because looking into time now it is 14:55. Even if you can say we proceed now, chances are that we may not be able to finalise the day, today.

MR LOUBSER: *May it please Your Worship. Your Worship my – we prepared a bail affidavit. If I can simply read that into*

⁶ See p. 110 of the appeal bundle:

the record, I believe it can be done in half an hour's time Your Worship.

COURT: *You may proceed then.*

MR LOUBSER: *As it pleases. I accept then that the application for postponement is refused Your Worship?*

COURT: *It is not refused...*

PART B:

After another argument emanating from an objection on whether the Investigating Officer could testify on the statement made by the complainant, the court again made a ruling as follows:⁷

RULING

COURT: *The hearsay in bail application it is allowed in court. The only time when a hearsay evidence is not allowed in court is during the trial. It is allowed on condition if the state will call that particular witness for supplementary of such hearsay evidence that has been led but under general law the hearsay it is allowed in court if such witness will be called to supplement such.*

⁷ See p.134 of the appeal bundle.

And in bail application hearsay evidence it is allowed.

Thank you, you may proceed state.

ADV LOUBSER: Your Worship may I advance the argument if the court is so inclined. Your Worship hearsay evidence is only admissible in a bail application if it complies with Section 3 of the Law of Evidence Amendment Act. My colleague has not made out any case as to why this evidence would comply with Section 3 of Law of Evidence Amendment Act of 1988. And as a result the evidence is then not admissible...

Argument on this aspect proceeded further as recorded on two pages of the transcription until the Public Prosecutor undertook to get all the authorities from his office to prove his argument, provided he was granted a postponement; to which the following interaction is recorded:⁸

COURT: No way. I have already made a ruling that you are allowed to proceed with the leading of the question of your witness.

PROSECUTOR: As it pleases the court Your Worship.

⁸ See p. 137 of the appeal bundle

COURT: But now Mr Loubser came back and to say you did not lay basis for such. And you have responded to say if that what he want then the matter can be remanded for you to also can get the case to prove that such evidence it is allowed in bail applications

PROSECUTOR: I can Your Worship.

COURT: So now the only where we stand now is the question of that do we proceed with the matter as per my ruling or we postpone the matter to allow the state to come and respond to the objection?

ADV LOUBSER: Your Worship but I fail to understand why the state is given another opportunity. Why can I be prepared. This was the exact same issue on Monday. I came prepared, the state was not prepared. Again today a very basic principle that the state has neglected to prepare upon. We are sitting with Section 3 this is the law and now the court wants to postpone the bail application once again to give them another opportunity despite the fact that the are dragging feet.

COURT: But it is an objection that you are laying so he want to prove to you why he lead hearsay evidence to this witness...

An argument proceeded until Adv Loubser took instructions (it is not clear whether these were taken from his instructing attorney of the Appellant) and he came back on record to inform the court that he will now accept the court's ruling. In my view, it was unnecessary for a member of the court to be given instruction to accept the court ruling as he was in any event obliged to do so. I guess he had to be instructed because the person giving instructions understood the court's procedures better.

PART C:

While the Public Prosecutor was leading the witness (the Investing Officer), the following appears on record:⁹

PROSECUTOR: I want to show you this document with regards to the facts of this matter. And you can confirm if you know this document or not. With leave of the court Your Worship.

OBJECTION BY ADV LOUBSER: Your Worship I have not seen this document.

COURT: Can your colleague have this particular document perhaps.

PROSECUTOR: I can make a copy for him Your Worship.

COURT: Oh okay.

⁹ See p. 146 of the appeal bundle.

ADV LOUBSER: But Your Worship do you see this is now again the problem. Now there has to be a copy made. This is... you cannot question a witness on a document if the opponent does not know what the document is. The validity of that document. Your Worship a hundred percent in contradiction of the law of evidence.

PROSECUTOR: I am not sure why my colleague is standing up while I am busy addressing the court or is it because he undermines me or what but when I still addressing the court I have to be respected as such up until when I sit down if he wants to raise an objection he will raise an objection Your Worship.

COURT: Mr Loubser... (intervenes)

PROSECUTOR: This is not how the law... (intervenes)

COURT: I will also appreciate that if you can raise up on a question of objection and then your colleague will sit down and then you will address your objection. Do not just attack the document which we do not have any knowledge of and without following proper procedure. Because now you are arguing about the document that you did not receive but you

do not object so that your colleague can have opportunity to sit down.

ADV LOUBSER: I will object slower next time that he has the opportunity to sit down Your Worship.

COURT: Okay. So you did not receive this particular document that the state lead evidence based on?

ADV LOUBSER: I have no idea what document this is. This is a hundred percent has to be disclosed to your opponent. This is trial by ambush. It is against our laws Your Worship and it is extremely disconcerting that I have to object to it.

COURT: Thank you.

*PROSECUTOR: My colleague must go and read **State v Dlamini** and Others what does **State v Dlamini** and Others... If you want any document which have to be used whether at the bail application or at... you must make a request. There was no request made to the State. How will the state know that my colleague will want... He must just read **State v Dlamini** it is a principled case of any bail application in this country. He cannot just interject without reading the law. Read between the lines, then when you object*

object within the lines. He must note a proper request if that is what he want. But state was willing to make a copy for him, but based on the fact that he is having an objection he must make a proper request as per then law.

COURT: Okay.

PROSECUTOR: As the court pleases.

COURT: Any submission Mr. Loubser?

*ADV LOUBSER: Your Worship if I recall, **State v Dlamini** correctly that refers to the trial after discovery has happened. The simple fact of the matter is that on Monday we indicated that we are still applying for bail. The matter was postponed to Monday for bail application. The matter was postponed to today for bail application. No indication of any documentation was made and the mere well logic simply does not follow that we would request it. It is also not the obligation of the state of the defence to request it, it is the obligation of the person using the document. The party using the document to support in evidence needs to disclose that to the opposing party.*

*Absolute at worst before he hands it up to the witness so that I am aware of what exactly is being handed up to the witness Your Worship. There is no way that we could have requested it and that if I recall **Dlamini** correctly which I have not recently read it, it refers to discovery before trial not before bail application.*

*PROSECUTOR: If I may raise the point he have not read it, I can confirm he have not read it. **State v Dlamini** speaks about the bail application and contents of the docket in a bail application. He must read the case and come back and make the submission. I know it by heart.*

ADV LOUBSER: Your Worship perhaps my colleague can indicate the ...it seems he is getting very emotional. Perhaps he can indicate the full citation that I can go and read again. As it pleases.

PROSECUTOR: I can have it in my office Your Worship I can quickly even have it on my phone. ‘

COURT: Do you want to go through?

PROSECUTOR: But now must I make research for him? He said when I come here I must be prepared and now he is

*the one who is not prepared because he does not know the law in terms of **State v Dlamini** that if you want to have problems with documents you can request them. I am not the one who must provide him with the documents. Unless a proper request is made. And this is a bail application in any event.*

COURT: Yo.

PART D:

The arguments between what was supposed to be the two learned friends went on until the stage where the Public Prosecutor indicated that his emotions would not let him proceed with the matter that day. He asked the court to adjourn the proceedings to the next day saying he feared he would say what he was not supposed to say. Unfortunately, even that request was debated for a long time culminating in another ruling by the court. Before a ruling could be made, the following appears on record while the Public Prosecutor was addressing the court:¹⁰

PROSECUTOR: ... *I have been always asking if my colleague he cannot just interject me. How will I proceed and assist him if he just interject me. That is not how the law works your worship that you interject and you*

¹⁰ See p. 167 of the appeal bundle.

say the matter will be struck from the roll. That is not so your worship.

ADV LOUBSER: Does the court want me to elaborate?

COURT: No, your colleague learned colleague is busy addressing me and you are busy talking to your instructing attorney next you and you are not paying attention and now I am wondering as to... (intervenes)

ADV LOUBSER: Your Worship that is my prerogative.

COURT: Did you hear his objection?

ADV LOUBSER: It is my prerogative. Your worship he is just repeating himself. I do not need to give attention to pay attention...

PART E:

During cross examination of the Investigating Officer as a witness by Adv Laubser, the following appears:¹¹

ADV LOUBSER: Yes Sir we are all very well aware of what the court looks for can just simply answer my question.

*INTERPRETER: Can I also be given a chance to finish?
Are you swearing at me?*

¹¹ See p. 209 of appeal bundle.

ADV LOUBSER: *(inaudible)*

INTERPRETER: *He just said fuck so I do not ...*

COURT: *Really?*

INTERPRETER: *Yes*

COURT: *Mr Loubser?*

ADV LOUBSER: *Yes Your Worship I was not swearing at her I am frustrated with the process because everybody seems to have some sort of entitlement that infringes on either my colleague's examination or mine. The arrogance displayed by the interpreter when she requested that I give her an opportunity to finish indicates that I am being malicious towards her. I am not being malicious I am simply trying to do my job and the remark was unnecessary.*

COURT: *So must you then swear*

INTERPRETER: *So was I supposed to keep quiet*

ADV LOUBSER: *Your Worship why is the court allowing that the court interpreter is speaking directly to counsel in open court why is that being allowed*

COURT: *And now are you raising your voice to me?*

ADV LOUBSER: One hundred percent I am. Why is the court allowing a court interpreter to address counsel directly?

Unsurprisingly, the interpreter was no longer willing to continue interpreting in this bail hearing. She asked and insisted that she should be excused and was eventually released by the court. Another interpreter came and took over.

[21] It will be difficult to expect members of the public to respect and uphold the decorum of the court if this is not adhered to by members of the court. Of late, it has become fashionable to just address the presiding officers in a contemptuous manner¹², as if parties are immune from the conviction of contempt of court. The fact that no such inquiry was held should not mean that there are no consequences for contemptuous behaviour as it can be best dealt with through a referral to the bodies or institutions governing the parties' conduct. This is one of such cases warranting an investigation so that corrective measures may be taken if deserved.

[22] In the result the following order is made:

[22.1] Appeal against the refusal of bail is dismissed.

[22.2] The Registrar should bring this judgment and the appeal record to the attention of the Legal Practice Council.

¹² See *S v Lavhengwa* 1996 (2) SACR 453 (W) where the High Court confirmed a conviction and a sentence on a legal practitioner for ignoring and arguing after the rulings were made by the Magistrate.


T. R. KATSHIBVUMO
JUDGE OF THE HIGH COURT

FOR THE APPELLANT : **ADV JW KOK**

INSTRUCTED BY : **BANDA AND ASSOCIATES**
SANDTON

C/O NTULI ATTORNEYS
NELSPRUIT

FOR THE RESPONDENT : **ADV CV MKHULISE**

INTRUSCTED BY : **DIRECTOR OF PUBLIC**
PROSECUTIONS MPUMALANGA
MBOMBELA

DATE HEARD : **27 JANUARY 2022**

JUDGMENT DATE : **03 FEBRUARY 2022**