IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A127/2021

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

SIGNATURE 07/06/2024 DATE

In the matter between

HANZAR ABBAS **Appellant**

And

THE STATE

JUDGMENT

MOSOPA J

Introduction

1. On 3 December 2020, the appellant brought a bail application in the Pretoria Commercial Crimes Court (Regional Court) before Magistrate Mr Van Wyk. This bail application brought by the appellant, after hearing evidence, was

refused. Aggrieved by such decision, the appellant brought an appeal against such refusal by the below court in terms of section 65(1)(a) of the Criminal Procedure Act 51 of 1977 ("CPA").

Background

2. The appellant was arrested along with three other people on 10 September 2020 and charged with one count of possession of suspected stolen property and two counts of fraud involving the purchase of motor vehicles to the value of R451 157,50 and R383 016,78 respectively. His co-accused (accused 3 and 4) were released on warning and eventually pleaded guilty. The appellant pleaded not guilty and as a result thereof, the trials were separated. I was informed during the hearing of the current matter that their cases were finalized on 18 May 2021.

3. At the time of his arrest, the appellant was a resident at the place which was rented by his co-accused (accused 1). Several items, including, two pages of an ABSA account, two vehicle registration documents and a birth certificate, were found inside the room the appellant resided in. Accused 1 has since been refused bail and is in custody pending the finalization of his trial matter.

4. The appellant arrived in South Africa on a visitor's visa on 16 October 2019. At the time of his arrest on 10 September 2020, his visitor's visa had expired, as the appellant failed to renew it after the expiry date. The appellant is therefore in the country illegally and his status was confirmed as such by the Department of Home Affairs. I must also at this stage state that, despite the Immigration Officer stating in his affidavit that the appellant is an illegal foreigner in the country in contravention of section 49 (1) (a) of the Immigration Act 13 of 2002, the appellant was not criminally charged for such a contravention. The issue pertaining to the appellant's status in the country is not disputed, as the appellant conceded that he is in the country illegally following his expiry of the visitor's visa and has since instructed his attorneys to apply for its renewal.

Legal Principles

5. It is agreed by the parties that the offence which the appellant is charged with, falls under the provisions of section 60(11)(b) of the CPA (Schedule 5 offence). The appellant, in terms of the above subsection, can only be released from detention if he adduces evidence which satisfies the court that the interest of justice permits his release.

6. The concept "interest of justice'" is not defined in the sub-section. In the matter of ***S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (2) SACR 51 (CC)***, the concept of "interest of society" was defined as follows;

   "'The interest of society' is the sense in which 'the interests of society" concept is used in sub-s(4)…It is read first and 'the interest of justice' bears the same narrow meaning akin to the 'interest of society' (or the interest of justice minus the interest of the accused) the interpretation of the whole section falls neatly into place."

7. Section 60(4)(a)-(e) of the CPA provides;

   "(4) the interest of justice do not permit the release from detention of an accused where one or more of the following 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 will commit a schedule 1 offence, or

   (b) where there is a 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,

   (d) where there is a likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system,

(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."*

8. Finally, the functions and powers of the court hearing appeal under section 65 are similar to those in an appeal against conviction and sentence. In the matter of ***S v Baber 1979 (4) SA 218 (D)*** at 220 E-F, Heher J, when dealing with functions and powers of court under section 65, remarked as follows;

   "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..."

Discussion

9. The court below, when denying the appellant bail, reasoned as follows;
   1) That bail is denied on the basis of threats the appellant made to witnesses in a different matter where his co-accused was standing trial;
   2) That several items linking the appellant to the commission of the offence were found in his possession at the time of his arrest and;
   3) That the appellant is willfully in the country illegally and the appellant will not stand trial if granted bail.

10. Both the parties in favour and against granting bail, presented their cases on applications and no oral evidence was led. Presentation of affidavits in bail proceedings is permissible and it is admitted evidence. (***S v Hartslief 2002 (1) SACR 7 (T)***). The phrase that the party must "adduce evidence" does not mean that the party must lead oral evidence.

11. It is common cause that the appellant's status in the country is classified as being that of an illegal foreigner by the Department of Home Affairs, as the appellant failed to renew his visitor's visa when it expired in 2019. At the time of his arrest, his visitor's visa had been expired for almost a year. No reasons were proffered by the appellant as to why such was not renewed whilst the

appellant was not arrested. What is before me is that the appellant has instructed his current legal representatives to apply for the renewal of such visitor's visa, which means that his status in the country remains illegal at this stage.

12. It is true that the bail applicant's status in the country, mainly as to whether he is a foreigner, is not the only consideration in refusing or granting bail. The main purpose for granting bail is to secure the attendance of the bail applicant at court pending finalization of his trial matter. If a court is of the view that a bail applicant is a flight risk, then the court is entitled to deny the bail applicant bail.

13. It is must be noted in casu, that the status of the appellant as an illegal immigrant is not a subject of any criminal proceedings, as the appellant is not charged with contravention of section 49(1)(a) of the Immigration Act 13 of 2002. The issue pertaining to his status in the country was only raised for the below court to deny him bail. The arrest of the appellant was a sequel to allegations of fraud committed and he was found in possession of suspected stolen property and the arrest was effected by the members of the South African Police, as opposed to by immigration officers from the Department of Home Affairs.

14. In contention Mr Rudman, on behalf of the appellant, contended that a bail applicant is entitled to be released on bail irrespective of whether or not he is classified as an illegal foreigner. Mr Rudman relied on the matter of ***Ulde v Minister of Home Affairs and Another (Lawyers for Human Rights Amicus curae) (2009) 3 ALL SA 323 (SCA)***; which dealt with the discretion the immigration officer had in detaining an illegal foreigner. The facts of the Ulde matter can be summarized as follows; Ulde, an Indian national, was arrested for contravention of the Immigration Act and arraigned in the Kempton Park Magistrate court for trial. Allegations against him were that his passport and identity documents issued to him by the Department of Home Affairs were fraudulent. He then was released on bail by the Magistrate Court despite being in the country illegally and then he was re-arrested while on bail on the same allegations despite being released on the bail for this.

15. It was correctly conceded by Mr Rudman in argument that I am not bound by the decision of the Magistrate Court to release Mr Ulde on bail. Moreover, the circumstances that led to the release of Mr Ulde on bail were not mentioned in that decision, but the main factor for determination was the exercise of a discretion by the immigration officer.

16. The matter in my view is distinguishable from the current matter for the following reasons;

    16.1 the appellant's detention in casu, was for the commission of a fraudulent activity and not for him being in the country illegally;

    16.2 the appellant entered the country legally on a visitor's visa until it expired, whereas Ulde entry into the country was deemed illegal;

    16.3 the appellant status is not a subject of a criminal proceedings, and evidence is that he is in the country illegally, and

    16.4 the ***Ulde*** matter dealt with the discretion to be exercised by the immigration officer when detaining an illegal foreigner, whereas such issue does not arise in the current matter.

17. It is true that the right not to be deprived of freedom arbitrarily or without just cause applies to all persons in South Africa whether they are here illegal or not. (See ***Lawyers for Human Rights and Another v Minister of Home Affairs and Another 2004 (4) SA 125 (CC)***).

18. In the ***Ulde*** (supra) matter, the following was stated at para 7;

    "bearing in mind that we are dealing here with the deprivation of a person's liberty (albeit of an illegal foreigner's), the immigration officer must still construe the exercise of his discretion in favorem libertatis when deciding whether or not to arrest or detain a person under s 34 (1)- and be guided by certain minimum standards in making the decision."

19. I was further referred to the matter of ***Phale v Minister of Home Affairs and others (2011) JOL 27250 (GNP)*** wherein an illegal foreigner was released on bail on the charges of fraud and contravention of Immigration Act 13 of 2002 by the Rustenburg Magistrate Court. Bail was not opposed by the Investigating

Officer but by another party to the proceedings, the Director General: Department of Home Affairs. The same principle adopted in the ***Ulde*** (supra) matter was followed in the ***Phale*** matter relating to a discretion to be exercised by the immigration officer. Reasons for the Investigating Officer not opposing bail, were not provided in the ***Phale***, but what is evident in the ***Phale*** matter is that the applicant lived in Botswana and South Africa and then returned to Botswana in 1996. His father was a South African and his mother is a Botswana citizen.

20. In casu, the appellant has no relatives in South Africa and when he came to South Africa he stayed with friends in the Kwa-Zulu Natal Province and later on Gauteng where he stayed with his co-accused, accused 1 in the below court. Accused 1 has since lost his property and they intended to stay with a friend if released on bail. However, the problem with that place, is that it is a rented place and the person who stays there himself has criminal proceedings pending against him and he is currently out on bail. That person is only known by accused 1 and accused 1 was denied bail, by the below court, even though that person confirmed that he is willing to accommodate the appellant in the event he is released on bail, no further affidavits were received from him to further confirm whether the same position stands even if accused 1 is denied bail.

21. Bail was not only denied because of the appellant's being an illegal foreigner in the country, but for the fact that he threatened witnesses together with accused 1, in the matter where accused 1 is released on bail and that is undisputed evidence before his court.

22. The court below also denied bail because of the strength of the state's case as some evidential material was found in possession of the appellant at the time of his arrest.

23. It is therefore my considered view that when the appellant was denied bail, the provisions of section 60(4)(a)-(e) were properly considered and there is no need for this court to interfere with the decision of the below court. The below court correctly found that the one or more of the jurisdictional aspects provided in the sub-section exist in this instance and thus, exercised the discretion it had

correctly. In my view, given that the appellant is an illegal foreigner, if he is granted bail, it will be difficult to monitor him and ensure that he attends court until the matter is finalized, as he has no place to stay in the Republic. The person who promised to share accommodation with the appellant, is renting the accommodation and is himself also subject to criminal proceedings. Further, the appellant has no relatives in the country. The witnesses in this matter are known to the appellant and it will be easy for him to interfere with them, as he had done so previously in an unrelated matter.

24. Having regard to the above, the following order is made;

1. The appeal against the refusal to grant appellant bail is refused.

MJ MOSOPA
JUDGE OF THE HIGH COURT, PRETORIA

Appearances:

For the Appellant:	Mr A Rudman
Instructed by:	Anton Rudman Attorneys
For Respondent:	Mr WJ van Zyl
Instructed by:	The DPP
Date of hearing:	20 May 2021
Date of Judgement:	Electronically transmitted