

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

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

14/05/2021

SIGNATURE

DATE

CASE NO: A15/2020

In the matter between:

BINA MFANDAFUNA MASUKU

First Appellant

and

THE STATE

Respondent

JUDGMENT

MASHILE J:

INTRODUCTION

- [1] This is a bail appeal following the Court *a quo* per Magistrate Ngcanga's refusal to admit the First Appellant to bail. The apprehension and subsequent detention of the First Appellant emanated from the following charges as amplified by the explanatory notes to each count:

1.1 Count 1: Fraud –

The accused is guilty of the crime of fraud in that during or about February to August 1994 and at or near Johannesburg she pretended to the Department of Home Affairs that she was born in Durban, South Africa and her mother is Jane Matseleng Masuku, whereas she knew and was well aware that she was not born in Durban, South Africa and her mother is not Jane Matseleng Masuku, to the actual or potential prejudice of the Department;

1.2 Count 2: Fraud –

The accused is guilty of the crime of fraud in that during 1 August 2006 to September 2019 and at or near Pretoria and thereafter at or near Mbombela she pretended that she obtained her South African Citizenship lawfully and her application for employment with the Department of Justice was *bona fide*, whereas she knew and was well aware that she obtained her South African Citizenship through false misrepresentation and her application for employment with the Department of Justice was not *bona fide* to the prejudice or potential prejudice of the Department;

1.3 Count 3: Contravention of Section 49 (14), read with Sections 1, 49 (1) (a) and (b) and 48, of the Immigration Act, 2002 –

In that on or about February 1994 at or near Johannesburg the accused did unlawfully and intentionally make false statement to the Department of Home Affairs for purposes of obtaining residence in the Republic of South Africa; and

1.4 Count 4: Fraud (seven individual counts) against all 3 accused –

The accused are guilty of the crime of fraud in that during or about October 2014 to November 2017 and at or near Mbombela the accused did unlawfully and intentionally and in furtherance of common purpose did give forth and, among others, pretend to the complainants in seven late estates mentioned in Schedule 1 to the charge sheet that accused 2 will carry out the responsibilities of an executor, furnish accused 1 and / or the office of the Master of the High Court in a manner stipulated by law and all assets of the estate will be accounted for; and the accused by means of the said misrepresentation induced the complainants, to their actual or potential prejudice, to consider to request the appointment of accused 2 as executor in the estates and accused 2 will, among others, not carry out the responsibilities of the executor, will not furnish accused 1 and / or the office of the Master of the High Court and will not account for the assets of the estates.

FACTUAL MATRIX

- [2] The background facts were tersely traversed by the Court *a quo*. To avoid reinventing the wheel, I will borrow extensively from the summary made in its Judgment. The Appellant and another were arrested for fraud committed at Master of the High Court, Mbombela. The Appellant is an employee at the Masters Office. It is alleged that the Appellant referred estates to her co-accused, currently on bail, and/or his company to administer estates. Beneficiaries did not obtain their inheritances. The loss occasioned by the fraud perpetrated on the beneficiaries amounted in all to approximately **R1 900 000.00**.

- [3] In support of its case that bail to the Appellant ought to be refused, the State called two witnesses, the first of which was a Home Affairs employee. He testified that the Appellant was a subject of investigation in their department relating to her fraudulent attainment of South African Citizenship. The Court heard further from the same witness that her Citizenship status has been revoked and was due to be expatriated to Malawi, her alleged country of origin. The Appellant could not be deported solely because the South African Police Services ("SAPS") was still awaiting the National Prosecuting Authority to complete the fraud case committed at the Masters Office in Mbombela.
- [4] The witness testified that investigations conducted by the Department of Home Affairs established that the person alleged to be the Appellant's mother in her birth registration form did not have a child bearing the Appellant's details. Moreover, she did not know the First Appellant. The alleged mother of the First Appellant denied ever giving birth in Durban as claimed on the birth registration form.
- [5] Upon officials of the Department of Home Affairs seeking clarity from her on the discrepancy, she somersaulted and said that she was born in Tembisa, Tembisa Hospital, Gauteng Province to a different mother from the one she had mentioned on the birth registration form. Tembisa Hospital denied the allegations and furnished a register of all women who gave birth on the alleged date of birth. The woman supposed to bear the particulars of the Appellant's mother was not on the register. The conclusion that the first Appellant was not born in Tembisa was inescapable.
- [6] The second State witness was a police officer investigating fraud in the office of the Master in Mbombela. He told the Court that the Appellant and her co-accused live in the same residence belonging to her as intimate partners. The Appellant referred estates to her co-accused for him to administer them. Heirs did not receive all proceeds of their estates. Her co-accused utilized some of the proceeds for his own benefit, transferred estate funds to his personal bank account and registered

transfer of ownership of deceased estate properties to his own name.

- [7] The Appellant and her co-perpetrator levied their testimony before Court by way of affidavits. The former admitted that she lived with her co-perpetrator as her boyfriend. They were married at some stage and had known each other from the Office of the Master of the High Court in Johannesburg where she started working. Her boyfriend was an administration clerk for a firm of attorneys.
- [8] The Appellant denied defrauding the Master's Office in Mbombela and making false representations to the Department of Home Affairs. Instead, she laid the blame on the Department of Home Affairs officials who completed birth registration forms and related documents. She further denied ever referring estates to her boyfriend.

ISSUES

- [9] The issue is simply whether or not the Appellant has made a case for her to be admitted to bail. In considering that questions, the Court should determine whether it is in the interest of justice that the Appellant be admitted to bail as contemplated in Section 60(11) (b) of the Criminal Procedure, Act 51 of 1977.

ARGUMENT

- [10] The entire argument of the Appellant is premised on the characterisation of the charges being classified as Schedule 5 whereas they are not and should not have been so categorised. From that premise, the Appellant leaps to the conclusion that had the Court *a quo* appropriately classified the charges, it would have realised that she was, as a matter of right, supposed to have been admitted to bail. Insofar as her possible abscondence was concerned, she asserted that the Appellant has shown that she is South African notwithstanding that she did not have sufficient evidence to demonstrate this.

- [11] The essence of the State's contention was that although the notice of motion identifies eight grounds on which the appeal is founded, these are in fact only three. These are that the Court *a quo* erred in finding that the State has strong case against the Appellant, there is a risk of Appellant absconding by returning to Malawi and, the finding that there were no new facts in the second bail application.
- [12] A bail application is not a trial and should not be used as dress rehearsal for trial. To argue about admissibility of evidence and possible contradictions of witnesses is not the duty of a bail Court to make a final finding. The State submitted that the Judgment of the Court *a quo* in the first bail application could not be faulted and is based on the evidence that was placed before that Court. In general, an appeal Court will decide whether the judgment appealed from is right or wrong, according to the facts in existence at the time it was given.
- [13] The Appellant has failed to demonstrate how the Court *a quo* erred in law and on the facts placed before it at the time when it made the decision. On the evidence before the Court *a quo* the Citizen status of the Appellant in South Africa had been revoked by the Department of Home Affairs. The State then submitted finally that the Judgments of the Court should not be set aside and that the appeal be dismissed.

LEGAL FRAMEWORK

- [14] To the extent that admission to bail is regulated by Section 60 of the CPA, it will be instructive to make reference to the Sections mentioned by the Appellant as being pertinent. To start with Section 65(a):

"An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by imposition by such court of condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail,

may appeal 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."

[15] Section 65 (4) provides that:

"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."

[16] Section 60 (11) (b) provides that:

"Notwithstanding any provision of this Act, where and accused is charged with an offence referred to in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release."

[17] Section 60(4)(B) lists likelihood that the accused will attempt to evade his or her trial as a ground for refusing bail. In this regard, the Appellant has referred to John van der Berg: *Bail - A Practitioner's Guide* 3 edition (2012) where the learned author writes:

"the risk of abandonment is likely to be assessed at a relatively high level if the accused is a foreign national, a risk factor that is likely to be compounded by high mobility potential and access to foreign travel. This does not mean, of course, that such accused may never be granted bail, for there is always the option of imposing conditions to suit a particular case."

[18] The Appellant has also referred this Court to the matter of *Ulde v Minister of Home Affairs* (320/2008) [2009] ZASCA 34; 2009 (4) SA 522 (SCA); 2009 (8) BCLR 840 (SCA); [2009] 3 All SA 332 (SCA) (31 March 2009) where the court held that the arrest of an illegal foreigner under section 34 (1) of the Immigration Act, 2002 (Act

No. 13 of 2002) is subject to the exercise of a discretion by an immigration officer. The discretion is to be construed in *favorem libertatis*. Where a Magistrate had granted bail to a suspected illegal foreigner, an immigration officer could not ignore this fact in the exercise of his discretion.

EVALUATION

- [19] One of the grounds pointed out by the Court *a quo* for refusing bail is fear of abscondence. This is apart from the Court's discretion to lay down conditions to reduce the risk of evasion of trial. Conditions usually considered in these type of matters would be surrender of travel papers and reporting to the local police station once every day or every alternate day. The list is not exhaustive. The Court *a quo* was evidently alive to that possibility but it discounted it as follows:

"The easy possibility of leaving the country to escape facing charges against her. In effective policing of our borders, despite surrendering her passport can tempt her to leave the country."

- [20] The learned author, John van der Berg: *Bail - A Practitioner's Guide* 3rd edition (2012) acknowledges that where it has been demonstrated that an accused person is a foreign national, is mobile and has travel documents, the assessment whether to grant bail would be more rigorous but that does not necessarily mean that the accused person should be refused bail. However, due to the porous nature of our borders and lack of stringent measures to control movements from neighbouring Countries, the assessment whether or not to grant bail must be more than just strict. That should include, in appropriate circumstances, deprivation of liberty of an accused person.

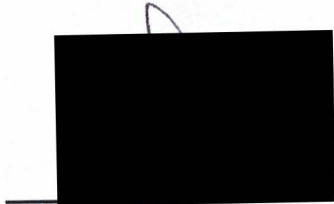
- [21] This leads me to the case of *Ulde supra* to which the Appellant has referred this Court. The Appellant would have this Court believe that it finds application in this case. That approach does not and cannot find favour with this Court. The Appellant

conveniently overlooks the fact that the Court in Ulde was concerned with 'a suspected foreign national'. Here we are dealing with a person who has been apprehended for being in this country under false pretenses, and therefore illegally, and whose Citizenship has been declared unlawful. The Appellant is not yet to be found to be an illegal immigrant but she is, and would have been extradited to Malawi had it not been for the charges that she is required to face.

[22] The Court *a quo* and correctly so in my opinion, accepted that the classification of the charges as Schedule 5 is incorrect in view of the new evidence that was levied before Court. The concession does not and will not assist the Appellant with admission to bail. The reason for that is that she remains a flight risk. The disquiet was pointed out by the Court *a quo* as early as its first judgment.

[23] In terms of Section 65(4) of the CPA, I am not satisfied that the Court *a quo* misdirected itself in any manner whatsoever. As such, there is no room for this Court to set aside the judgments refusing bail to the Appellant. In the premises, I make the following order:

The bail appeal application is dismissed.



B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 14 May 2021 at 10:00.

APPEARANCES:

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Mr Mashego

Instructed by:

DIMA MASHEGO ATTORNEYS

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Adv Nxumalo

Instructed by:

NDPP

Date of Hearing:

30 April 2021

Date of Judgment:

14 May 2021