NOORDKAAP HOË HOF, KIMBERLEY

REPUBLIEK VAN SUID-AFRIKA

20 DESEMBER 2016 **SAAK NR: CA & R136/2016**

In die saak van:

MK DHOR **APPELLANT**

teen

DIREKTEUR VAN OPENBARE VERVOLGING **RESPONDENT**

J U D G M E N T

The appellant Mr MK Dhor was arrested on 13 October 2016 on a charge of having contravened section 49(1)(b) of the Immigration Act, 13 of 2002, which provides that:

> "Any illegal foreigner who fails to depart when so ordered by the Director-General shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding four years."

The charge against the appellant reads:

> "That on 13 October 2016 while he was an illegal foreigner in South Africa he unlawfully and intentionally failed to depart from South Africa and that he overstayed here since 9 August 2015."

I pause to point out that the charge contains no allegation that the appellant had in fact been ordered by the Director-General to depart from South Africa.

On 24 October 2016 the appellant’s application to be released on bail was dismissed by the Magistrate Upington. He now appeals against that decision. The appeal is opposed by the Director of Public Prosecutions, represented by Adv Van der Bijl.

The appellant is represented by Adv. IJ Nel. Because of the maximum period of four years imprisonment provided for by the Immigration Act, a contravention of section 49(1)(b) would be an offence as envisaged in Schedule 1 of the Criminal Procedure Act, 51 1977. Section 60(4)(a) of the Criminal Procedure Act provides that the interests of justice do not permit the release of an accused if there is a likelihood that the accused will commit a Schedule 1 offence while out on bail. Section 60(5)(e) of the Criminal Procedure Act provides that, in considering the existence of such a likelihood the court may take into account,

> "Any disposition of the accused to commit offences referred to in Schedule 1 as is evident from his or her past conduct.”

The court may in terms of section 60(5)(h) also take into account,

> "Any other factor.”

Another factor which would be relevant is the likelihood that the release of an accused on bail will undermine the criminal justice system, as envisaged in section 60(4)(d) of the Criminal Procedure Act.

The application for bail was refused on the basis, primarily, that if the appellant was released on bail his continued presence in the country would amount to the perpetuation of the offence with which he had been charged, because he would still not be departing from the country, as envisaged in section 49(1)(b) of the Immigration Act. It would therefore appear that bail was refused on the basis of the likelihood that the factors in sub-sections (a) and (d) of section 60(4) of the Criminal Procedure Act were applicable in this case.

Section 65(4) of the Criminal Procedure Act provides that the court hearing an appeal against a decision in an application for bail may only interfere with that decision if the court is satisfied that it was wrong. Mere doubt about the correctness of the decision would therefore not suffice.

Is the appellant an illegal foreigner for purposes of section 49(1)(b) of the Immigration Act? His remaining in the country while on bail could only result in a continued contravention of section 49(1)(b) if he is an illegal foreigner. He is obviously a foreigner as envisaged in section 1(1) of the Act. In terms of section 1(1) an illegal foreigner is a foreigner “who is in the Republic in contravention of this Act.”

The Magistrate seems to have reasoned that the appellant had failed to depart in contravention of section 49(1)(b), that he was therefore on that basis in the country in contravention of the Immigration Act and that he was accordingly an illegal foreigner for the purposes of section 49(1)(b).

This reasoning would have been materially flawed. The contravention envisaged in the definition of an illegal foreigner in section 1(1) must of necessity be one which already exists when the failure envisaged in section 49(1)(b) occurs. To put it another way, the offence envisaged in section 49(1)(b) can only be committed by a person who is already in the country in contravention of the Immigration Act. It is a jurisdictional requirement of section 49(1)(b) that the person must already be an illegal foreigner at the time that the failure to depart occurs. The person cannot somehow become an illegal immigrant simply by being accused of being in the country in contravention of the Immigration Act.

Even if the appellant could have been regarded as an illegal foreigner on this basis, the Magistrate would still have been wrong to hold that the appellant would be continuing what he was charged with, merely by being out on bail and remaining in the country. What he was charged with was the contravention of section 49(1)(b) of the Immigration Act, the other elements of which offence would, even if the appellant is to be assumed to have been an illegal foreigner for purposes of the particular offence, be that he failed to depart after having been ordered to do so by the Director-General. The charge, as already mentioned, contained no allegation that the appellant had been so ordered and there also was no evidence to this effect in the bail application.

That is not, however, the end of the matter. The appellant would in my view on the evidence in any event in terms of other provisions of the Immigration Act have been in contravention of the Act prior to his arrest on the present count. Section 43 enjoins a foreigner to depart from the country upon the expiry of his or her "status”.

The word “status” is defined as meaning "the status of the person as determined by the relevant visa or permanent residence permit granted to a person in terms of this Act.”

The appellant’s visitor’s visa or permit expired in August 2015, and he did not depart then and still has not done so. That immediately turned him into an illegal foreigner and there is no evidence on record that he had approached the Director-General in terms of section 32(1) of the Act for authorisation to "remain in the Republic pending his or her application for a status.”

His remaining in the country under these circumstances would constitute an offence in terms of section 49(1)(a) of the Immigration Act, which provides that:

> "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."

It follows that the appellant had indeed at the time of his arrest been an illegal foreigner. It must be kept in mind, though, that the appellant is not charged with the contravention of section 49(1)(a) of the Immigration Act, but rather with the contravention of the more serious sub-section (b). The Magistrate held that:

> "When the accused is released ... obviously he faces the risk of being arrested again because his stay has not been corrected or legalise(d)."

that

> "should this court make a decision to release the accused today ... the court will be facilitating an otherwise already illegal matter" and that this problem "cannot be rectified by the courts."

The Magistrate clearly was of the view that if released on bail, the appellant's continued presence in the country would constitute a continued contravention of sub-section (1)(b) of section 49 of the Immigration Act. In this the magistrate was wrong, because there was no allegation or evidence that the appellant had been ordered to leave the country. The existence of such an order is a jurisdictional requirement of that particular offence, as already mentioned.

Ms Van der Bijl's argument that the expiry of the appellant's visa should somehow be deemed to have created or amounted to such an order, is untenable. The Immigration Act specifically provides for the making of such orders by the Director-General. It contains no provision that such an order can come into existence in any other way.

Even if the Magistrate was, however, correct in his view that there would be a continued contravention of section 49(1)(b), his apparent approach that bail could in no circumstances be granted in such a case, would have been wrong. Whether or not the appellant would be arrested again if released on bail, would in the first place be in discretion of the immigration officer concerned, and one of the factors that would have to be considered by the immigration officer in the exercise of that discretion would be the very fact of the appellant having been released on the same charge. The Magistrate's order cannot simply be ignored. (See section 34(1) of the Immigration Act and Ulde vs Minister of Home Affairs & Another 2009 (4) SA 522 (SCA).)

Secondly there is the provision in section 32 of the Immigration Act that an illegal foreigner may be,

> "authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status."

If the Director-General grants authorisation the appellant would for the period of that authorisation not be liable to be arrested. The finding that the appellant would, if released on bail and if he then remained in the country, have been contravening section 49(1)(b) of the Immigration Act, was therefore wrong, as was the approach that granting bail to an illegal foreigner would be futile and would of necessity not be in the interests of justice.

I am mindful of the fact, however, that without an authorisation by the Director-General the appellant's continued presence would constitute a contravention of sub-section (a) of section 49(1) of the Immigration Act, which would also have been an offence as envisaged in Schedule 1 of the Criminal Procedure Act, and accordingly then also one as envisaged in section 60(4)(a) of the Criminal Procedure Act.

Even if the appellant's continued presence in the country would technically constitute the less serious offence of a contravention of sub-section (a) of section 49(1) of the Immigration Act, the question would remain whether the Magistrate's finding that his release on bail would not be in the interests of justice, was correct on the evidence. The first important consideration, and one which the Magistrate had obviously not recognised, is that on the evidence before the Magistrate, and having regard to the charge and the absence of an allegation that the Director-General had ordered the appellant to leave the country, there simply was no prospect that the prosecution of the appellant on that charge would succeed. Compare S v Botha & 'n Ander 2002 (1) SACR 222 (SCA) paragraph 21.

As regards the evidence in general the following is common cause, or not seriously in dispute. The appellant is a Bangladesh citizen. His visa or permit, and therefore status, expired in August 2015. It was in his passport, which at that stage was in the possession of the police pending his prosecution on a charge of theft. After having been sentenced in September 2015 (for that charge) to a fine of R5 000 or two years imprisonment, wholly suspended, he attempted to retrieve his passport, but only succeeded in December 2015.

In January 2016 he was arrested because his papers were not in order, presumably because he no longer had a permit or visa to stay in South Africa. On 15 January 2016 he was released on warning to afford him the opportunity of addressing the problem and getting his papers in order.

He then on 18 February 2016 applied for a police clearance certificate, as envisaged in the Immigration Regulations published in Government Notice R413 on 22 May

2014. An application for the visa required by the appellant is not possible without such a certificate.

In March 2016 that case was struck off the roll when the Immigration Official did not attend court to testify against the appellant.

On 13 October 2016 the appellant was then arrested on the present charge after his tenant, having himself been confronted because his papers were not in order, drew the attention of the immigration officials to the appellant.

An affidavit by the appellant was submitted in support of his application. From it the following appeared:

1. He has been staying in South Africa and in the same area for 12 years.
2. He is the owner of a house, purchased in 2012, where he co-habits with Ms De Wee and their two minor children, aged 10 years and 5 years old.
3. The appellant is 36 years old and has only the one previous conviction already alluded to.
4. He is the owner of a shop which he rents out at R8 000 per month, but the tenant fell in arrears with the rent. It was when he took steps to have the tenant evicted that the latter told the immigration officials about him.
5. The appellant is his family's sole breadwinner.
6. His passport is with the police at the moment.

The prosecutor presented the evidence of Mr Andreas, an immigration official. He testified that the appellant had in the form of a permit endorsed in his passport been "admitted" for a period of 30 days from 10 July 2015 until 9 August 2015, when that permit expired. It is not clear if Mr Andreas by the word "admitted" in fact meant that the appellant had before the granting of that visa been outside the country.

Mr Andreas testified that the records of the Department of Home Affairs reflected that the appellant has not yet again applied for a permit or visa, but he also testified that he noticed, presumably while testifying and in the process of discussing the Department's records, that "there is police clearance that was sent through." He unfortunately did not say and was not asked when the police clearance was sent through and to whom.

Mr Andreas furthermore referred to previous unsuccessful applications by the appellant for a visitor's visa and for permanent residence, the former having failed because of the absence of a police clearance certificate and the latter *inter alia* because it had been found that the appellant was in possession of a temporary residence permit that had been issued fraudulently.

Three other considerations weighed by the Magistrate when considering the application for bail.

The Magistrate found that the appellant had not, since the previous case had been struck off the roll, taken steps to regularise his stay in the country. This would be correct to the extent that a police clearance certificate had been requested before that case was struck off the roll and there was no evidence of any steps that had been taken by the appellant in the more than seven months after that. It appears, however, that the appellant believed that there was nothing more that he could do, because of the fact that an application for a visa was not possible without the police clearance which he had applied for.

The second other consideration mentioned by the Magistrate was that previous applications by the appellant for similar permits had been unsuccessful. Mr Andreas mentioned only one that was refused in November 2014, in other words before the appellant was obviously successful in his application for a permit that expired in August 2015.

The Magistrate also referred to the fact that the appellant had been found in possession of a fraudulent permit, but that was already in 2013, and therefore once again before his successful application in 2015.

In any event, these factors fell to be considered by the Department when considering an application for a visa. As already mentioned, the Department granted the appellant the 2015 visitor's visa despite his earlier unsuccessful applications and the history referred to, so the Magistrate would have been wrong if he on the basis of these factors considered that an application by the appellant for at least a temporary visitor's visa would not succeed. Such a visa can in terms of section 11 of the Immigration Act be granted or renewed for up to three months at a time, and in some cases for even up to three years.

It was on the strength of these considerations, together with the consideration that the release of the appellant would amount to facilitating a crime, that bail was refused.

In my view the only one of these considerations which may have had substance is the absence of evidence about further steps by the appellant after having applied for a police clearance certificate. There is no evidence that he attempted to obtain the Director-General's authorisation to remain in the country pending an application for a permit. There is also no evidence that he attempted to apply pressure on the police to make a decision on his request for a police clearance certificate, if necessary even by means of an application for a *mandamus*.

On the other hand the appellant is clearly a layman, and his attorney has now advised him to get the assistance of someone who specialises in these matters.

All these steps can be taken if the appellant is released on bail. The possibility that he may not, and that he may sit back and do nothing to end his illegal presence in the country, is a factor that would in terms of section 60(9) of the Criminal Procedure Act be relevant when weighing up the interests of justice against the right of the appellant to his freedom and the prejudice he would suffer if detained.

It is in any event something that could, at least to an extent, be addressed by appropriate conditions. One such condition could be that the appellant within a specified period applies for the Director-General's authorisation as envisaged in section 32(1) of the Immigration Act, which would regularise, subject to the conditions of that authorisation, his presence in the country pending his application for a visa. Another could be that he submits an application for a visa or a residence permit within a specified period, if it can be accepted that the police clearance certificate is now available.

The prejudice that the appellant will suffer if he is to remain in custody is obvious. He is his family's sole source of income, as already mentioned. It would appear as though his tenant remained in occupation of his shop after the appellant was arrested, which could for obvious reasons also lead to irreparable damages. The tenant was also in arrears at the time of the appellant's arrest, so there is no merit on the evidence in Ms Van der Bijl's argument that the appellant and his dependants would not be deprived from an income in the form of rental while he is detained.

It must also be kept in mind that the appellant's permit expired while his passport was in possession of the police. The prosecutor presented no evidence to refute the appellant's statement on oath that he had experienced difficulty to retrieve the passport.

At the hearing of the bail application the appellant's attorney conceded that the offence that he was charged with fell under Schedule 5 of the Criminal Procedure Act, because of the appellant's previous conviction of theft, and that this meant that in terms of section 60(11)(b) of the Criminal Procedure Act the appellant bore the onus of satisfying the court that the interests of justice permitted his release.

In terms of Schedule 5 an offence in terms of Schedule 1 would also be an offence for purposes of Schedule 5 if the accused has a previous conviction for a Schedule 1 offence. The offence with which the appellant is charged is a Schedule 1 offence because the prescribed maximum sentence of "a fine or ... imprisonment not exceeding four years" exceeds the threshold in Schedule 1 of six months imprisonment without the option of a fine. The appellant's previous conviction of theft is also a Schedule 1 offence. The concession was therefore correct.

In my view the appellant had, however, in the circumstances and on the evidence, shown that the interests of justice permitted his release on bail.

The Magistrate committed the misdirections already referred to in deciding that the appellant would remain in contravention of section 49(1)(b) of the Immigration Act if released on bail and in assuming that the appellant would necessarily be liable to be arrested again if released. This led to the Magistrate not doing the weighing up required by the provisions of section 60(9) of the Criminal Procedure Act.

I have already dealt with the issue of the prospects of a successful prosecution on the present charge.

Ms Van der Bijl argued that the appellant had more than 10 years to apply for permanent residency and that he must be assumed to have no intention of doing so. This argument loses sight, firstly, of the fact that on the prosecution's own evidence the appellant has at least once applied for exactly that. Secondly Ms Van der Bijl did not refer me to any provision of the Immigration Act or the said Regulations that would require an applicant for a temporary visa to have already applied for permanent residency. It is only in the case of a visitor's visa being issued in terms of sub-section (6) of section 11 of the Immigration Act that there is a requirement that an applicant must apply for permanent residency, but even then only "within three months from the date upon which he or she qualifies to be issued with that visa."

Lastly it was common cause that none of the factors listed in sub-sections (b), (c) or (e) of section 60(4) of the

Criminal Procedure Act, that could otherwise have militated against a finding that the interests of justice permitted the appellant's release on bail, existed.

I am therefore of the view that the **APPELLANT SHOULD BE GRANTED BAIL** and I will grant counsel a short adjournment to discuss the amount of bail and possible specific conditions, other than of course the condition that the appellant attend court on the date to which the matter was adjourned on the last occasion.

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