

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

12 September 2024

DATE

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SIGNATURE

CASE NUMBER: 006387/2024

In the matter between:

TIGABU ADANE

Applicant

and

MAGISTRATE MR JASKOLKA

First Respondent

DEPARTMENT OF JUSTICE & CORRECTIONAL SERVICES

Second Respondent

DIRECTOR GENERAL DEPARTMENT OF HOME AFFAIRS

Third Respondent

**REFUGEE STATUS DETERMINATION OFFICER
DEPARTMENT OF HOME AFFAIRS**

Fourth Respondent

MINISTER OF POLICE

Fifth Respondent

NATIONAL DIRECTOR FOR PUBLIC PROSECUTIONS

Sixth Respondent

Coram: MDALANA-MAYISELA J and DOSIO J

Heard: 9 September 2024

Delivered:

12 September 2024

ORDER

(a) The conviction and sentence is reviewed and set aside.

(b) In terms of section 304(2)(c)(v) of the Criminal Procedure Act 51 of 1977 the proceedings are to commence de novo before another Magistrate.

JUDGMENT

DOSIO J:

Introduction

- [1] The applicant launched an application for review in terms of rule 53 of the uniform rules of the Superior Court Act.
- [2] The applicant seeks the following relief:
- (a) That the conviction and sentence by the Court a quo on 5 January 2024, under case number 32/01/2024, be reviewed and set aside.
 - (b) That the applicant be released from custody.
 - (c) Cost of this application to be paid by respondents jointly and severally, the one paying the other to be absolved if they decide to oppose this application.
 - (d) That the applicant be given further and or alternative relief.
- [3] The first to fifth respondents have not opposed the matter. The sixth respondent has opposed the matter.
- [4] The applicant was legally represented in the Court a quo.

Background

- [5] On 3 January 2024, the applicant was arrested and detained at the Orlando East Police Station, under case number 68/01/2024 and charged with an offence of being an illegal

immigrant in the Republic of South Africa. On 4 January 2024, the applicant appeared before the Court a quo at Orlando East Magistrate Court. It is alleged by the applicant that there was a language barrier at the Court, in that the applicant requested an interpreter who knew his language, namely Amharic. The matter was adjourned to the following day for a legal representative and an interpreter.

- [6] On 5 January 2024, the applicant appeared before the same presiding officer. The applicant was told that he will be represented by somebody from Legal Aid. The applicant was informed that the appointed interpreter did not understand the language Amharic. The Court proceeded with the hearing and the applicant was found guilty and sentenced to 30 days in prison, with an additional order that he be deported to his native land, namely, Ethiopia. The applicant launched an urgent application to stop his deportation, which comprised part A of the application. The order was granted and the application in casu, which is part B, is to review and set aside the conviction and sentence. The applicant contends that his constitutional right to have an Amharic interpreter was infringed, thereby resulting in his release from custody.

The contentions of the applicant

- [7] The applicant based his review application on the fact that the presiding officer solely took into consideration the statement or report submitted by the Immigration Officer and that the Court a quo did not confirm whether the applicant understood the charge to which he was pleading guilty to.
- [8] Furthermore, the applicant was never informed of his rights when he was prosecuted and there was no interpreter who could converse with the applicant in Amharic. It was contended that the interpreter deployed in the matter in casu did not know the applicant's language, which resulted in many 'inaudible' and 'indistinct' parts of the transcript in the Court a quo. As a result, the applicant ended up partaking in proceedings which he did not understand.

The contentions of the sixth respondent

- [9] The sixth respondent contended that the applicant was legally represented and understood the proceedings. As a result, the conviction and sentence was fair, just and reasonable.

Evaluation

- [10] Section 35(3) of the Constitution provides that every arrested person has a right to a fair trial, which includes:
- “(f) to choose, and be represented by a legal practitioner, and to be informed of his right promptly; and
- (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceeding interpreted in that language.”
- [11] In the matter of *S v Ndlovu*,¹ the Supreme Court of Appeal held that:
- ‘The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial. And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention be pertinently brought to the attention of the accused at the outset of the trial, if not in the charge sheet then in some other form, so that the accused is placed in a position to properly appreciate in good time the charge that he faces as well as its possible consequences. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly.’² [my emphasis]
- [12] In the matter of *S v Mashinini and Another*³ the Supreme Court of Appeal held that:
- ‘To my mind, the solution to this legal question lies in s 35(3) of the Constitution. Section 35(3)(a) of the Constitution provides that every accused person has a right to a fair trial which, inter alia, includes the right to be informed of the charge with sufficient detail to answer it. This section appears to me to be central to the notion of a fair trial. It requires in clear terms that, before a trial can start, every accused person must be fully and clearly informed of the specific charge(s) which he or she faces. Evidently, this would also include all competent verdicts. The clear objective is

¹ *S v Ndlovu* 2003 (1) SACR 331 (SCA) at page 12-13

² Ibid pages 12-13

³ *S v Mashinini and Another* 2012 (1) SACR 604 (SCA) at page 7

to ensure that the charge(s) is sufficiently detailed and clear to an extent where an accused person is able to respond and importantly to defend himself or herself. In my view, this is intended to avoid trials by ambush.⁴[my emphasis]

- [13] An accused has a fundamental right to a fair trial and to be tried in a language that he or she understands. In *S v Ngubane*⁵ (*Ngubane*) the court held that the accused had been deprived of his fundamental right to a fair trial in terms of s 25(3)(i) of the interim Constitution Act 200 of 1993, by not having had the proceedings simultaneously interpreted to him in a language which he fully understood. The court in *Ngubane*⁶ also stressed that the interpretation must be given in a language that the accused fully understood and not in a language that he or she partially understood.

The court record

- [14] The proceedings commenced on 5 January 2024. After the public prosecutor put the charge to the applicant, the transcript reflects the following:

COURT: Do you understand the charge, Sir?

ACCUSED: [Indistinct]

COURT: It is Amharic and English, Ms Hendricks.

INTERPRETER: I can use English, your Worship.

COURT: How is your Amharic?

- 10 INTERPRETER: The Amharic interpreter was [indistinct].

COURT: Hey?

INTERPRETER: Are you English speaking or Amharic?

ACCUSED: [No audible answer]

INTERPRETER: Amharic?

ACCUSED: Yes

INTERPRETER: It was not arranged, Your Worship.

COURT: Hm?

INTERPRETER: No Amharic interpreter was arranged, Your Worship.

- 20 COURT: Do you understand English?

ACCUSED: Yes

COURT: Do you understand the charge against you?

ACCUSED: [No audible answer]

COURT: How do you plead?

⁴ Ibid page 7

⁵ *S v Ngubane* 1995 (1) SACR 384 (T)

⁶ Ibid

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ACCUSED: [No audible answer]' ⁷

Further

'INTERPRETER: Do you understand?

ACCUSED: Ja.

INTERPRETER: How do you plead? Are you guilty or ... (intervened)

COURT: Guilty or not guilty?

ACCUSED: [No audible answer]

INTERPRETER: Sir? Do you plead guilty or not guilty?

ACCUSED: Guilty

INTERPRETER: Guilty?

10 ACCUSED: Ja.

INTERPRETER: Guilty, Your Worship.

COURT: Yes, Me Mnisi?

MR MNISI ADDRESSED THE COURT: Thank you, Your Worship. I confirm my appearance and I further confirm that indeed, the plea of guilty is in accordance with my instructions, as such we have prepared a 112 Statement.

Can I read it into the record?

COURT: You may.

MR MNISI: Thank you.

20 "In the Magistrates Court for the District of
Soweto, held at Orlando.
Case 68/21/2024. In the matter between
The State and Adane Tegabu.
I, the undersigned, Athane Tegabu, do
hereby make the following statement:' ⁸

Further

' I confirm that I am the accused in this
matter and I understand the charges
against me, as explained to me by my
representative. I confirm further that I
make this statement freely and voluntarily
without being influenced thereto.

⁷ Page 2 of the transcript lines 1-25

⁸ Page 3 of the transcript lines 1- 25

I confirm further that I understand the Implications of this statement, and that I May be convicted by this Honourable Court without any witness being called by the state, but on the strength of this statement alone.

I plead guilty to the charges against me, and therefore the facts that I plead guilty are as follows:

I admit that on or about the 3rd of January 2024, and at or near Orlando, in the District of Soweto, I did unlawfully and Intentionally contravene the Immigration Act 13 of 2022. I admit that I entered and remained in the Republic of South Africa without the valid travelling documents, as prescribed in section 9.4A or any other valid travelling document.

I admit that my conduct of entering and'

Further

'remaining in the Republic of South Africa was wrongful and unlawful. I confirm that I had the intention of remaining in the Republic of South Africa without the documents that permit me to do so. At all material times I was aware that by entering and remaining in the Republic of South Africa without valid documents was an offence. I admit that I was at my sober senses at all times of the commission of this offence. I admit that at all material times I had the necessary intention to commit the said offence.

I further admit that I have no valid defence In law, and that my actions were wrongful

and unlawful and are punishable by law.

I humbly place myself at the mercy of this Honourable Court and hereby request the Court to have mercy on me, as I am deeply remorseful of my actions.

20

The statement I duly signed by the accused person and the legal representative.

COURT: You signed?

ACCUSED: [No audible answer]

PROSECUTOR: The plea is in accordance with the state's' ¹⁰

Further

'case, Your worship. Therefore the state accepts the plea.

COURT: The statement in terms of section 112.2 is accepted as EXHIBIT A.

PROSECUTOR: As the Court pleases, Your worship.

MR MNISI: As it pleases the Court, Your Worship.

COURT: Yes, Sir.' ¹¹

[15] It is clear to this Court that the only aspects that indicates some level of understanding on the part of the applicant, as to the contents of the proceedings, is reflected on pages two and three of the Court transcript where the applicant was asked the following:

'COURT: Do you understand English?

ACCUSED: Yes' ¹²

And

'INTERPRETER: Sir? Do you plead guilty or not guilty?

ACCUSED: Yes' ¹³

All other questions posed by the court are either not audible or indistinct.

[16] Of crucial importance is what is reflected at page two of the transcript, where the Court asked the accused whether he understood the charge. His answer is 'indistinct'. In

¹⁰ Page 5 of the transcripts line 1-25

¹¹ Page 6 of the transcripts line 1-25

¹² Line 20-21 transcript p.2

¹³ Line 7-8 transcript p.3

addition, at page five of the transcript, after the plea in terms of s112 of the Criminal Procedure Act 51 of 1977('Act 51 of 1977') was read out, there is no clear indication if the applicant understood what was read out on his behalf. All that the Court a quo asked was whether he signed, to which the answer is 'inaudible'.

- [17] Section 112 of Act 51 of 1977 states that:
 '...(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)(b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.' [my emphasis]
- [18] It is clear from the court transcript that once the s112 plea was read out by the applicants legal representative, the Court a quo did not ask the applicant whether he understood the s112 plea which was read out on his behalf or whether he was pleading guilty freely and voluntarily.
- [19] The respondent's counsel argued that once an accused is legally represented it is not a requirement for a Court to ask an accused whether he understands the s112 plea and whether he is making it freely and voluntarily. This Court disagrees. It is clear that the matter was postponed from the day before to obtain a proper interpreter for the applicant. The record does not reflect at all that the applicant understood this charge and accordingly, it was imperative for the Court a quo to have confirmed that the applicant understood the charge to which he was pleading guilty to.
- [20] This Court has considered how did the applicant's counsel obtain all the information contained in the plea of guilty if the applicant did not understand English. The applicant's counsel stated this information was most probably obtained from the s212(1) statement, compiled in terms of Act 51 of 1977 by Mr Diapeng Molefe, an immigration officer, who was employed by the Department of Home Affairs, marked as exhibit 'BB2'. In the absence of the Court a quo confirming that the applicant understood what was incorporated in the s112 plea, such possibility as mentioned by the applicant's counsel exists.

- [21] The respondent's counsel argued that notwithstanding that there are aspects in the transcript that are 'inaudible' and 'indistinct', there is in any event a confirmatory affidavit filed by the prosecutor. The confirmatory affidavit does not indicate what was actually stated in the transcripts which is labelled as 'inaudible' and 'indistinct'. The respondent's counsel also did not listen to the recording and was unable to address this Court as to whether there are in fact distinct answers given by the applicant during the plea stage or not.
- [22] Section 6(2) of the Magistrates Court Act 32 of 1944 ('Act 32 of 1944') provides as follows:
 'If in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the representative of the accused is conversant with the language used in evidence or not.'
- [23] This was not done. The interpreter utilised was not conversant in the language Amharic.
- [24] Section 112(1)(b) of Act 51 of 1977 states the following:
'(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount * determined by the Minister from time to time by notice in the Gazette, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.' [my emphasis]
- [25] In the matter in casu a sentence of imprisonment was imposed, together with an order for deportation, without the option of a fine. As a result, due to no available Amharic interpreter and irrespective of the applicant having a legal representative, in terms of s112(1)(b) of Act 51 of 1977, the Court a quo should still have questioned the applicant to confirm he understood the charge and was pleading guilty freely and voluntarily.

- [26] Reference was made by the respondent's counsel to the matter of *Mthethwa v De Bruin NO and Another BCLR* ¹⁴, where the court held that an accused does not have the right to choose the language in which the proceedings are conducted and that s35(3)K of the Constitution only grants the right to be tried in the language which the applicant understands.
- [27] Section 6 of Act 32 of 1944 is very clear in that it states the following:
 '6. Medium to be employed in proceedings
 (1) Either of the official languages may be used at any stage of the proceedings in any court and the evidence shall be recorded in the language so used.
 [S 6(1) amended by s 7 of Act 40 of 1952 with effect from 27 June 1952.]
 (2) If, in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the language in which the evidence is given, is one of the official languages or of whether the representative of the accused is conversant with the language used in the evidence or not.' [my emphasis]
- [28] The court in the matter of *S v Pienaar* ¹⁵ referred to s6(1) of Act 32 of 1944 and s(35)(3)(k) of the Constitution, as a basis for the right of an accused to be tried in his or her own language. This would mean that every endeavour should be made to conduct a particular trial in the accused's mother tongue. The court then extended this to cover the situation of the provision of a legal representative who can communicate directly with accused persons in their respective mother tongues.
- [29] It is clear to this Court that the legal representative appointed by Legal Aid to assist the applicant was not conversant in Amharic. Legal Aid cannot always find a legal representative who is proficient in an accused's preferred language, however, there are interpreters who are proficient in Amharic and who could have assisted in this matter.
- [30] In addition to the review procedure provided for in s304(4) of Act 51 of 1977, an aggrieved accused may in terms of s53 of Uniform Rule 53 apply for the review of proceedings in the Magistrate Court.

¹⁴ *Mthethwa v De Bruin NO and Another BCLR* 1998 (3) 336 N

¹⁵ *S v Pienaar* 2000 (7) BCLR 800 NC

- [31] This Court finds that under the current circumstances, the applicant was not accorded an opportunity to understand the charges preferred against him which warrants that the proceedings be reviewed and set aside. As a result, this Court finds that there was an irregularity in the proceedings. It is a fundamental principle that ordinary people should not only be given access to the law, but should also be able to understand it. Court proceedings must be conducted in a language that an accused understands in order to allow such accused the opportunity to comprehend all the proceedings. This will ensure a fair trial.
- [32] Magistrates are requested to ensure that in instances where an accused is unable to understand English fully, that all attempts must be made to provide such an accused with an interpreter proficient in the desired language.
- [33] Legal practitioners who represent foreign nationals should also place on record that the plea entered into on behalf of an accused, was discussed fully with the foreign national and also translated in his or her desired language.
- [34] The applicant's counsel conceded that the arrest was not unlawful. As a result, in terms of s304(2)(c)(v) of Act 51 of 1977, the matter is remitted back to the Magistrate Court in order that the proceedings commence de novo before another Magistrate.

Costs

- [35] The applicant's counsel requested that costs be awarded against the respondent.
- [36] Costs are within the discretion of this Court.
- [37] There are no suggestions that the respondent was acting mala fides to oppose this matter. As a result, this Court does not find that a cost order is appropriate.

Order

- [38] In the result, the following order is made:
- (a) The conviction and sentence is reviewed and set aside.
 - (b) In terms of section 304(2)(c)(v) of the Criminal Procedure Act 51 of 1977 the proceedings are to commence de novo before another magistrate.



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JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree, and it is so ordered



MMP MDALANA-MAYISELA
JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 12 September 2024.

APPEARANCES

ON BEHALF OF THE APPLICANT :

Mr T.S Mahafha

Instructed by Mulisa Mahafha Attorneys

ON BEHALF OF THE SIXTH RESPONDENT: Adv. F Mohamed

Instructed by Office of the National

Director of Public Prosecutions.