



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

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

CASE NO: 133375/2023

24 March 2025

M. P. MDALANA-MAYISELA J

In the matter between:

SOLOMON EYOP ANAYE

Applicant

And

MAGISTRATE MR JASKOLKA

1st Respondent

DEPARTMENT OF JUSTICE AND CORRECTIONAL SERVICES

2nd Respondent

DIRECTOR GENERAL: HOME AFFAIRS DEPARTMENT

3rd Respondent

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

4th Respondent

MINISTER OF POLICE

5th Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

6th Respondent

JUDGMENT

Mdalana-Mayisela J

Introduction

- [1] The applicant has brought an application in terms of section 304 of the Criminal Procedure Act 51 of 1977 ("the CPA") read with rule 53 of the Uniform Rules of Court for reviewing and setting aside the conviction and sentence handed down by the magistrate, Orlando East Magistrate Court on 8 November 2023 under case number 86/11/2023. The first to fifth respondents are not opposing the application. The sixth respondent is opposing the application.
- [2] In part A of his notice of motion, he sought an order interdicting the second and third respondents from deporting him to his country of origin pending the determination of part B. Part A was heard in the urgent court on 18 December 2023. The interim interdict was granted against the second and third respondents.
- [3] In part B, he seeks an order that the conviction and sentence be reviewed and set aside; that he be released from custody or released on bail; and further or alternative relief be granted. In his heads of argument and oral argument he seeks an order that the matter be remitted back to the lower court to start *de novo*. During oral argument, he advised that the prayer for release from custody or release on bail has been abandoned.

Factual background

- [4] The applicant who is an Ethiopian citizen was a holder of the Asylum seeker temporary permit ("permit") which expired on 6 March 2020. He applied for extension of his permit. He received correspondence from the fourth respondent dated 14 June 2023 advising him that a decision has been reached on his application for extension of the permit and requesting him to report to the Pretoria Refugee Reception Office on 14 July 2023 to receive a decision in person. He stated that he could not attend to the fourth respondent's office on 14 July 2023 because he was shot and robbed and was admitted at Chris Hani Baragwanath Hospital.
- [5] On 6 November 2023, the applicant was arrested by members of the South African Police Services and detained at Orlando West Police Station. He was charged with an offence of being an illegal immigrant in the Republic of South Africa. It is common cause that at the time of his arrest he was not in possession of a valid permit to reside in the Republic.

- [6] On 8 November 2023, he appeared in the lower court. He was legally represented. He was convicted in terms of section 49(1) of the Immigration Act 13 of 2002, as amended. He was sentenced to 30 days imprisonment, and a deportation order to his country of origin was issued.

Grounds of review

- [7] The grounds of review are as follows:

[7.1] There was gross irregularity in the proceedings in the lower court; and

[7.2] The lower court admitted inadmissible evidence and rejected admissible evidence.

Evaluation

- [8] The applicant has launched this application in terms of section 304(4) of the CPA read with rule 53. Section 304(4) provides as follows:

"If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section."

- [9] I now deal with the first ground of review. The applicant alleges that his language is Amharic. He is not fluent in English. He was legally represented by a legal practitioner, Mr Lesolang who could not speak Amharic. The interpreter, Mr Legodi also could not speak Amharic. He contends that he requested the services of the legal practitioner and interpreter who know Amharic. The proceedings were conducted in English. They were not interpreted in Amharic. He contends that he was advised to plead guilty when he did not understand the charge preferred against him. The lower court convicted and sentenced him on that guilty plea. He contends that his constitutional right to a fair trial was infringed.
- [10] The 6th respondent is opposing this application on the basis that the applicant did not inform the magistrate that he did not understand the charge preferred against him.

Further, the 6th respondent contends that the applicant should be fluent in English because he has been residing in the Republic for about eight years.

- [11] Section 6 of the Magistrate Court Act 32 of 1944 provides for the medium to be employed in proceedings in the lower court as follows:

"(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."

- [12] Section 35(3)(k) of the Constitution of the Republic of South Africa provides that every arrested person has a right to a fair trial, which includes *'to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language'*. In *S v Mashinini and Another*² the Supreme Court of Appeal held that:

"To my mind the solution to this legal question lies in section 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 to ensure that the charge 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."

- [13] In *Tigabu Adane v Magistrate MR Jaskolka and Others*³, where I was sitting with Dosio J, on similar facts, we stated as follows:

"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 Ngubane⁴ (Ngubane) the court held that the accused had been deprived of his

¹ *S v Mashinini and Another* 2012(1) SACR 604 (SCA).

³ *Tigabu Adane v Magistrate MR Jaskolka* case no. 006387/2024 GLD (9 September 2024).

fundamental right to a fair trial in terms of section 25(3)(i) of the interim Constitution Act 200 of 1993, by not having heard the proceedings simultaneously interpreted to him in a language which he fully understood. The court in Ngubane 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."

- [14] In the current matter it is clear from the record that the magistrate did not ask the applicant whether he understands English well. He was also not asked which language he fully understands. It was not placed on record whether Mr Legodi interpreted the proceedings, and if he interpreted them, it was in which language. After the charge was put in English, Mr Lesolang approached the applicant and thereafter, the magistrate asked the following questions only:

"COURT: Yes. How old is your client, Adv Lesolang?"

MR LESOLANG: 26, Your worship.

COURT: Do you understand the charge, sir?"

ACCUSED: Yes.

COURT: How do you plead?"

ACCUSED: Guilty"

- [15] The section 112(2) statement was read into the record in English. The magistrate did not ask the applicant if he understood and confirmed the contents of the section 112(2) statement. The magistrate asked the State if the plea was acceptable. The state answered in the affirmative. Thereafter, the magistrate delivered a judgment in one sentence, finding the applicant guilty as charged.
- [16] It is clear from the record that the applicant did not have a fair trial. The proceedings were not interpreted in the language he fully understands. He was not fully and clearly informed of the specific charge which he faced. There is not indication from the record that the Amharic interpreter was present and interpreted the conversation between the applicant and Mr Lesolang when the section 112(2) statement was prepared.
- [17] On the second ground of review, the applicant contends that the lower court admitted inadmissible evidence against him. It admitted the statement prepared by the

⁴ S v Ngubane 1995 (1) SACR 384 (T).

immigration officer of the department of Home Affairs, Masakhane Mbayi in terms of section 212(1) of the CPA. Mr Masakhane alleged in the statement that there were no personal details of the applicant in the department's database. He used the names Solomon lop to search for the details. The record of the proceedings in the lower court also refers to the applicant as Solomon lop. The appellant contends that he is not Solomon lop. His correct details are Solomon Eyop Anaye. He handed up the correspondence document from the department of Home Affairs to prove that he applied for extension of his permit and that his personal details are recorded in the database of the department.

- [18] I do not find it appropriate to comment on the status of Mr Masakhane's section 212(1) statement because this matter will be remitted back to the lower court and another magistrate will make a finding on this issue.

Conclusion

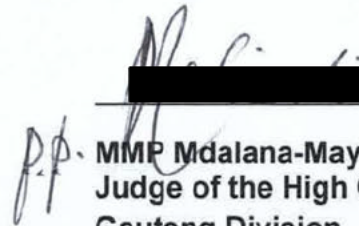
- [19] I conclude that the lower court has failed to comply with section 6(2) of the Magistrate Court Act and section 35(3) of the Constitution by not ascertaining whether the applicant is sufficiently conversant with English, and by not calling the competent interpreter to translate the proceedings in Amharic, the language that the applicant fully understands. The applicant's right to a fair trial was also infringed, in that he was advised to plead guilty to a charge he did not fully and clearly understand. I find that there was a gross irregularity in the proceedings which warrants that the conviction and sentence be reviewed and set aside.
- [20] The applicant seeks costs against the opposing respondent. There is no evidence before this court showing that the sixth respondent acted mala fide in opposing this application. I am not inclined to award costs against the sixth respondent.

ORDER

- [21] In the premises, the following order is made:

1. The conviction and sentence are reviewed and set aside.

2. 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.



MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division,
Johannesburg

I agree



T Bokako
Acting Judge of the High Court
Gauteng Division,
Johannesburg

Date of delivery: 24 March 2025

Appearances:

On behalf of the applicant: Mr MP Mahafha

Instructed by: Mulisa Mahafha Attorneys

On behalf of 6th respondent: Adv A Deoraj

