

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 40516/2021

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

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DATE
SIGNATURE

In the matter between:

AZIWOH EMMANUEL ASANGBENG

APPLICANT

And

THE MINISTER OF HOME AFFAIRS

1ST RESPONDENT

**THE DIRECTOR GENERAL, DEPT OF HOME
AFFAIRS**

2ND RESPONDENT

THE HEAD IMMIGRATION, ORTIA OFFICE

3RD RESPONDENT

**THE DEPT OF JUSTICE & CORRECTIONAL
SERVICES**

4TH RESPONDENT

**THE CHIEF MAGISTRATE OF THE DISTRICT COURT
KEMPTON PARK**

5TH RESPONDENT

**THE HEAD OF THE NATIONAL PROSECUTIN
AUTHORITY**

6TH RESPONDENT

**THE SENIOR PUBLIC PROSECUTOR, KEMPTON
PARK MAGISTRATE COURT**

7TH RESPONDENT

**THE HEAD OF PRISON, MODDERBEE PRISON,
BENONI**

8TH RESPONDENT

JUDGMENT

MAKUME J:

- [1] This is an application for leave to appeal the judgment I handed down on the 21st September 2021 when I dismissed the Applicant's application to be released from Modderbee Prison.
- [2] The Applicant is a 27-year-old Cameroon Citizen who entered the Republic of South Africa on the 29th December 2020 using a falsified visa.
- [3] On the 5th July 2021 whilst clearing documents to enable him to leave the country at OR Tambo International Airport he was arrested and appeared at the Kempton Park Magistrate Court on a charge of not only fraud but being in the Republic of South Africa illegally in contravention of Section 49(1)(a) of the Immigration Act 13 of 2002.
- [4] After several appearances in that Court he indicated through his Counsel that he intends to plead guilty and pay a fine. This is recorded

in the charge sheet under case number D1182/2021 Kempton Park Magistrate Court.

- [5] It was whilst being detained at Modderbee Prison pending the outcome of the criminal charges referred to above that he brought an urgent application before this court seeking an order to declare his continued detention at Modderbee Prison unlawful and that he be released to enable him to approach the relevant authorities where he intends to apply for asylum in terms of the Refugee Act 10 of 1998.
- [6] The grounds of application for leave to appeal are set out in the notice filed on the 17th September 2021 it is being opposed.
- [7] When the parties appeared before me on the 17th March 2022 to make submissions on the application it was brought to this court's attention for the first time that the Applicant had been released from detention and was still in the country. I was told that the charges against the Applicant were withdrawn by the state on the 29th September 2021.
- [8] I then after hearing the application for leave asked counsel to address me on the issue of mootness now that the Applicant has been released. I granted counsel for the Applicant an opportunity to file supplementary heads dealing with the issues of mootness.

[9] Section 16(2) (a) (i)(ii) of the Superior Court Act 10 of 2013 provides as follows:

“When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or results, the appeal may be dismissed on this ground alone.

Save under exceptional circumstances the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.”

[10] Section 16(2) has to be read in conjunction with Section 17(1) of the Superior Court Act which deals with reasonable prospects of success and compelling reasons why the appeal should be heard by the Court of Appeal.

[11] It is trite law that the test to be applied in deciding whether or not leave should be granted is governed by Section 17(1). I have a discretion which I have to exercise judicially after taking into consideration the evidence before me.

[12] In paragraph 17 of my judgment I made a finding based on facts that the Applicant was being held at Modderbee Prison not for purposes of deportation but because he is to stand trial amongst others on a charge of fraud. His stay at that prison was governed by the Criminal Procedure Act. To get his release he had all the opportunities in terms

of the Criminal Procedure Act not the Refugees Act to make application to be released on bail. He did not avail himself of that opportunity because he knew that, that application will be opposed on the basis that he was a flight risk as he had no fixed address or employment. The matter in Kempton Park was still pending when he and his new attorney decided to rather abuse this Court with an urgent application seeking this Court to declare the detention unlawful.

- [13] The Applicant failed to prove that his arrest was unlawful he also failed to prove that his continued detention was unlawful. What the Applicant sought to achieve in this application was for this Court to interfere without just reason in the process that was still in progress at the Magistrate Court.

MOOTNESS

- [14] Mootness relates to whether a decision presents an existing or live controversy. Ackerman J in the matter of **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)** held that this is a necessary ingredient if the court wishes to avoid giving advisory opinion or abstract proposition of law. If there is no live controversy the matter is moot in the sense that the decision of the Court will make no difference.

- [15] I am mindful of the fact that the Constitutional Court in **Van Wyk v Unitas Hospital 2008 (2) SA 472** made it clear that mootness is not an absolute bar to justifiability and that the Court has a discretion to hear the matter if it will be in the interest of justice to do so. In that regard one relevant factor is whether the court order will have some practical effect on the parties or on others. Another is whether it will be in the public interest to hear the case either because it will benefit the large public or achieve legal certainty.
- [16] The Applicant has submitted that this application has reasonable prospects of success. I disagree he has approached this court in order to avoid consequences on the running of the criminal case against him. In my view as it was said in Van Wyk (supra) prospects of success pale into insignificance where the issue of mootness has become a fact.
- [17] The Applicant maintains that the issue in this matter is his right to civil liberty namely his unlawful detention. Once more he is misdirected he was lawfully arrested for presenting fraudulent documents to an immigration officer and was lawfully arrested and charged. The issue around Constitutionality was dealt with by the Constitutional Court in the matter of **Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC) at paragraph 9**. This was a case concerning the Constitutionality of certain voting arrangements. The elections were over and the district was satisfied with the arrangements that had ultimately made for it by the Electoral Commission. The

Constitutional Court concluded that there was no suggestion that its order would have any impact on the parties or any other practical value.

[18] In the result and in my view I am not persuaded that there are any prospects of success of the appeal. Secondly that in any case the Applicant has been released from detention and is free to approach the Refugee Offices and apply for asylum. The matter is moot.

ORDER:

1. The Application for leave to appeal is dismissed with costs.

DATED at JOHANNESBURG this the day of APRIL 2022.

**M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

DATE OF HEARING : 17 MARCH 2022
DATE OF JUDGMENT : APRIL 2022
FOR APPLICANT : ADV MATLHAPENG
FOR RESPONDENT : ADV MAGANO