Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

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

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

20/3/2023_____ ___
DATE SIGNATURE

CASE NUMBER: A08/2023

In the matter between:

B G APPELLANT

And

THE STATE RESPONDENT

JUDGMENT

DOSIO J:

INTRODUCTION

[1] This is an appeal against the refusal by the Regional Magistrate at Kempton Park to grant bail to the appellant pending his trial.

[2] The appellant is charged with the following offences:

(a) Count 1 is a charge of fraud in that it is alleged that the appellant fraudulently misrepresented to the Department of Home Affairs ('Home Affairs') that he was the lawful holder of (i) a temporary asylum seeker permit, (ii) permanent South African residence status, (iii) a relatives permit and (iv) that he was entitled to be issued with a non-South African identity document, whereas in truth he had been refused entry to the Republic of South Africa on 5 January 2016 for being in possession of fraudulent documents and was declared a prohibited person in terms of s29(2) of the Immigration Act 13 of 2002 ('Act 13 of 2002').

(b) Count 2 is a charge of theft where it is alleged the appellant stole an amount of R871 965-00 in cash from his previous employer, namely David Bass and or Load Master Company ('Load Master').

(c) Count 3 is a charge of contravening s49(14) read with s1 of Act 13 of 2002.

[3] When the first bail application was held, there was only one charge, namely, the theft charge (count 2). Bail in the amount of R5000-00 was granted in respect to this matter on 29 March 2021. The employer had a suspicion that the documents declaring the appellant to be lawful in the country were fraudulent and on that basis the documents were taken to the Home Affairs for inspection. Home Affairs declared that the asylum seeker temporary permit was invalid and the permanent resident status and the identity document of the appellant were fraudulent. These additional contraventions resulted in counts 1 and 3 being added, which led to bail being refused by the Court *a quo* on 17 November 2021.

[4] The appellant was legally represented during the bail application proceedings.

[5] The oral evidence presented by the appellant in the Court *a quo* was that he arrived in South Africa in 2008 when he was 23 years old and that he was 36 years old at the time the bail application was heard. He started working for Load Master in 2009 up to March 2021. He was later dismissed from his employment as his employer opened up a theft case against him. This is the pending matter on count 2. He testified that he is married according to customary law and

has two children who reside with his wife in KwaZulu-Natal. The appellant is the owner of a South African company called Invito Freight Solutions and his wife is a director in this company. His gross income per month was R400 000-00. He had mobile assets totalling R900 000-00, which included two trucks, trailers and a Land Rover Discovery. He testified that he lived at flat 501, 11 Central Avenue in Kempton Park at the time of his arrest.

[6] The appellant raised the following issues as grounds of appeal, namely that:

(a) The magistrate misdirected herself by finding that there is a likelihood that the appellant if released on bail will evade his trial because he is an illegal foreigner and gave an incorrect address committing a schedule 1 offence whilst out of bail.

(b) The magistrate disregarded the principle that an accused is presumed innocent until proven guilty.

(c) The magistrate failed to consider his personal circumstances, his permanent address, the fact that he had no previous convictions and that Home Affairs approved his permits and issued an identity document, furthermore, that he has a wife, children, friends, and business ties in this country.

(d) The magistrate could have imposed bail conditions to obviate the risk of the appellant absconding.

(e) The magistrate erred in finding that it was not in the interests of justice to release the appellant on bail.

[7] The respondent's counsel contended that the Court *a quo* dealt fully with these aspects and as a result, the respondent supports the refusal to admit the appellant to bail. The respondent contends that the appellant failed to discharge the onus resting upon him that it was in the interests of justice to release him on bail and that the appellant failed to show that the judgment of the Court *a quo* was wrong as required by section 65(4) of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977').

[8] The bail appeal commenced on 10 March 2023 but was remanded to 15 March 2023 as this Court required further supplementary heads from both the appellant and the respondent's counsel.

LEGAL PRINCIPLES

[9] Count one falls within the category of offences listed in schedule 1 of Act 51 of 1977 and count 2 falls within the category of schedule 5 offences. The fact that it is alleged that count

one, occurred prior to the theft count and continued after he was granted bail, results in this matter being dealt with under the ambit of a schedule 5 offence.

[10] Section 60(11) (b) of Act 51 of 1977 states:

'Notwithstanding any provision of this Act, where an accused is charged with an offence— …'

(b) 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;'

[11] In the matter of *S v Mathebula* [1] the Supreme Court of Appeal held that:

'…In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge…'[2]

[12] In the matter of *S v Smith and Another* [3] the Court held that:

'The Court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby'.[4]

EVALUATION

[13] The appellant's counsel contends that the presumption of innocence is a prime concern for the court when considering to release an appellant on bail. Presumption of innocence is an important consideration, but a Court needs to look holistically at all the circumstances presented in a bail application.

[14] In terms of s65(4) of Act 51 of 1977, the court hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong.

[15] Sections 60(4)(b) and (d), 60(5)(g) and (h), 60(b), (c), (g), (h), (i) and 60(8)(a) of Act 51 of 1977 are of importance in the matter *in casu*. The sections state the following:

'60(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:…

(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or…

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[1] *S v Mathebula* 2010 (1) SACR 55 (SCA) para 12.
[2] *Mathebula* (note 6 above) para 12.
[3] *S v Smith and Another* 1969 (4) SA 175 (N).
[4] Ibid at 177 e-f.

(d) where there is the likelihood that the accused, if he or she were released in bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;…

60(5) In considering whether the grounds in subsection (4)(a) have been established, the court may, where applicable, take into account the following factors, namely—…

(g) any evidence that the accused previously committed an offence—

(i) referred to in Schedule 1;..

(h) any other factor which in the opinion of the court should be taken into account…

60(6) In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors, namely—

(b) the assets held by the accused and where such assets are situated;…

(c) the means, and travel documents held by the accused, which may enable him or her to leave the country;…

(g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;…

(h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;…

(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or…

60(8) In considering whether the ground in subsection (4)(d) has been established, the court may, where applicable, take into account the following factors, namely—

(a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;…'

[16] The onus rests on the appellant to show it is in the interests of justice to release him on bail. The respondent presented the following evidence in the form of affidavits from:

(a) the investigating officer ('Sergeant Mahlaba'),

(b) an affidavit from Ms Sindiswa Mtshawu (Ms Mtshawu'), who is employed by Home Affairs,

(c) an affidavit from Nicolaas Kruger ('Mr Kruger'), who is employed by Home Affairs, and

(d) Mr Meruta Felix Monyai ('Mr Monyai'), who is employed at the Department of Home Affairs at O.R. Tambo International Airport.

[17] The affidavit of Ms Mtshawu stated that according to the records at Home Affairs and the National Information Immigration System (NIIS), there is no record that the appellant applied for asylum or that he was granted refugee status, accordingly, he is an illegal immigrant in the country. The affidavit states further that the appellant had committed misrepresentations which is an offence in terms of s49(14) read with s49(1)(a) of the Immigration Act 13 of 2002 as amended. It was further stated that he should be deported after finalisation of the criminal case

or after serving his sentence. She states further that it is not in the interests of justice to release him on bail as there are no traces of him entering or remaining in the country.

[18] The affidavit of Mr Kruger states that although the appellant is in possession of a permanent resident permit with reference number PTA4928/14, Home Affairs has no record of this permit being issued.

[19] The affidavit of Mr Monyai states that he received various documents pertaining to the appellant which he was asked to verify. These documents were an asylum seeker temporary permit, a permanent residence status sticker, a green identity document book, a Zimbabwean passport, a work visa and a relative visa. The relative visa was issued in Harare and it is the only document which was verified as being genuine. The asylum seeker temporary permit with file number DBNZWE16517008 does not have records on the National Immigration Information System (NIIS). As regards the permanent residence status with reference number PTA4928/14 and permit number 1009991256, there are no records for such permanent residence permit.

[20] Mr Munyai also searched on the immigration services data base at O.R. Tambo International airport and he established that the appellant was refused entry in the country on 5 January 2016 for being found in possession of a fraudulent permanent resident permit and a green identity book. This resulted in the appellant being declared a prohibited person in terms of s29(1)(f) of Act 13 of 2002, as amended. According to the records of Home Affairs, the appellant has to date not approached the Director General of Home Affairs for his status as a prohibited person to be overturned. In addition, the Movement Control System proves that the appellant has been travelling in and out of the country whilst he was a prohibited person. Mr Munyai stated that because the appellant is an illegal immigrant he will not attend his trial if released on bail, as he can easily leave the country. Mr Munyai accordingly concluded that the appellant needs to be deported and that bail should be revoked.

[21] As regards s60(4)(b) it is clear that the appellant has an uncle that lives in Botswana and that he has visited him in 2017 and 2018. Due to the many alleged fraudulent documents that the appellant has utilized, there is a possibility that he may once again leave the country undetected. This will jeopardise the proper functioning of the criminal justice system, including the bail system. The fact that the appellant has a wife with whom he married customarily is a neutral factor as his wife and two children aged eight years old and 18 months live with the appellant’s wife in KwaZulu-Natal at an address that is unknown to the appellant’s counsel. The respondent’s counsel stated that the investigating officer was told the address of the appellant’s

family is somewhere in Eshowe, KwaZulu-Natal, but it will not be easy to find him should he go and live there.

[22] As regards s60(4)(d) it is clear that there are numerous addresses which the appellant has given. The address on the ABSA and Nedbank load applications reflect the appellant's address as being Flat 24 Westbrook, North Street, Glenmarais. In the first bail application the address given was 604 Central Flats, Central avenue, Kempton Park. Whilst out on bail, he changed his address to 501, Central Flats, Central avenue. During the bail application he agreed that he did not inform the investigating officer of the change in address.[5] The investigating officer upon visiting the address 604 Central Flats on 27 October 2021 established that the appellant was no longer living at this address. The investigating officer accordingly opposed bail stating that the appellant is a flight risk. The appellant's counsel conceded that the appellant accordingly breached one of his bail conditions.

[23] The appellants counsel argued that the appellant does have a fixed address which is Flat 501, Central flats, Central avenue, Kempton Park and that this lease is in the name of the appellant, however, no lease was uploaded to CaseLines to confirm same.

[24] As regards s60(5)(g) it is clear from paragraph [21] that the appellant has committed a schedule 1 offence of fraud.

[25] As regards s60(6)(b) it is clear that two trucks that belonged to the appellant and which were of a high value have been attached by the South Gauteng High Court in an application which was brought by the complainants in the theft matter, namely Angela Bass and David Bass. Although the appellant's counsel argued that the Rule Nisi has been discharged, there was no court order handed up to confirm this and the appellant's counsel conceded that the trucks are still at the applicant's premises. As a result, the Rule Nisi which was granted against the appellant has stripped the appellant of two expensive assets which he no longer has in his possession.

[26] As regards s60(6)(c) it is clear that the identity document with number 8411196136189 was seized and blocked as being fraudulent in 2016. Even though he was sent back to Zimbabwe in January 2016 after being found in possession of fraudulent documents, he returned to South Africa using a relative visa and applied for a second identity document well

[5] Transcript on CaseLines 003-100.

knowing that he was a prohibited person. During the cross-examination of the appellant he was asked by the State Prosecutor:

'Prosecutor: Yes. So the fact that you are not legal in the country was communicated to you on 5 January 2016 per document.

Appellant: Yes'[6]

[27] The fact of applying for a second identity document only surfaced during the cross-examination of the appellant by the State Prosecutor in the Court *a quo* and it is clear that the appellant withheld this crucial information during his evidence in chief. It is clear the appellant obtained the second identity document without following the proper prescripts of the Immigration laws or challenging the decision that he was illegally in the country.

[28] As regards s60(6)(g) and (h), it appears that there is a strong *prima facie* case against the appellant. On count one, the sentence which can be imposed should the appellant be found guilty of fraud is one envisaged in terms of s51(2) of Act 105 of 1997, where the minimum prescribed sentence for a first offender is fifteen years imprisonment. Should the appellant be found guilty on count two, the Regional Court can sentence him up to fifteen years imprisonment. A sentence of up to eight years imprisonment may be imposed should he be found guilty on count three of a contravention of s49(14) of Act 13 of 2002. The nature and gravity of punishment which is likely to be imposed is a ground which a Court should consider in determining whether there is a likelihood of an appellant evading trial.

[29] As regards s60(6)(i) it is clear that he breached his previous bail conditions by not informing the investigating officer that his address had changed.

[30] From the affidavit of Mr Munyai, it is clear that the appellant has been entering the country and departing whilst being a prohibited person. There is nothing stopping him from leaving again. It is clear that in terms of s60(8) he supplied false information at the time of his arrest, pertaining to his legal status in the country. The Court *a quo* had no choice but to refuse bail. To have granted him bail would have gone against the administration of justice.

[31] In the matter of *S v Masoanganye and another* [7], the Supreme Court of Appeal held that:

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[6] Transcript CaseLines 003-89 lines 3-6.

[7] *S v Masoanganye and another* 2012 (1) SACR 292 (SCA).

'It is important to bear in mind that the decision whether or not to grant bail is one entrusted to the trial judge because that is the person best equipped to deal with the issue having been steeped in the atmosphere of the case.'[8]

[32] The trial is to commence on 1st and 2nd June 2023. As a result, it does not appear that any unnecessary delays are envisaged in finalising this matter.

[33] After a perusal of the record of the court *a quo*, this Court finds that there is no persuasive argument to release the appellant on bail. The appellant has not discharged the burden to prove that it will be in the interests of justice to release him on bail and this Court cannot find that the Court *a quo* misdirected itself.

ORDER

[34] In the result, the appellant's appeal is dismissed.

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D DOSIO
JUDGE OF THE HIGH COURT

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 20 March 2023.

Date of hearing:	10 March and 15 March 2023
Date of Judgment:	20 March 2023

Appearances:

On behalf of the appellant	Adv. F. Kunatsagumbo
Instructed by:	PK Nhlapo attorneys
On behalf of the respondent	Adv S. Mthiyane

[8] *Masoanganye* (note 7 above) para 15.