

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



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

Case number: A10/2023

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
.....
SIGNATURE	DATE

In the matter between:

E S C

Applicant

v

THE STATE

Respondent

JUDGMENT

MOSOPA, J

1. Section 12 of the Constitution of the Republic of South Africa enshrines the right to freedom and security of the person, and provides:

“(1) Everyone has the right to freedom and security of the person, which includes the right –

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial...”

Simply put, a person may not be deprived of his/her freedom for unacceptable reasons (see **S v Coetzee 1997 (3) SA 527 (CC)**).

2. The principal questions that must be answered in this matter are:

- 2.1. Whether an illegal foreign national accused of committing an offence is entitled to be admitted to bail;
- 2.2. Where the address of the bail applicant is not satisfactorily verified by the Investigating Officer, and;
- 2.3. Where the State relies on the strength of the State’s case against the bail applicant to deny him bail.

BACKGROUND

3. The appellant, a Nigerian citizen, and Mr. Peter Molobo, a South African citizen, were arrested separately on 10 March 2022, and were charged with the following charges:

- 3.1. Contravention of section 3(a)(i)(aa) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004;
- 3.2. Extortion;
- 3.3. Contravention of section 49(1)(a) of the Immigration Act 13 of 2002 (only in respect of the appellant);
- 3.4. Fraud;
- 3.5. Forgery (only in respect of the appellant);
- 3.6. Uttering (only in respect of the appellant), and;
- 3.7. Impersonating a police officer (only in respect of Mr. Molobo).

4. The State alleges that the appellant and Mr. Molobo, in furtherance of a common purpose, wrongfully and with corrupt intent, elicited a gratification amount of R300 000.00 from Mr. Okeke (the complainant), in exchange for the withdrawal of the complainant's drug-related charges. The complainant did not have the full amount requested, and only gave the appellant and Mr. Molobo R40 000.00.
5. At the time of the appellant's arrest, he was found in possession of a fraudulent asylum seeker visa (formerly known as an asylum seeker temporary permit). On that basis, it was established that the appellant had remained in the Republic of South Africa without being in possession of a valid asylum seeker visa, after his application for the extension of his visa was rejected by the Department of Home Affairs ("DHA").
6. The appellant and Mr. Molobo were arrested as a result of a trap, which was put in place in terms of the authority provided for in section 252A of the Criminal Procedure Act 51 of 1977 ("CPA"). The amount of R40 000.00 paid by the complainant was found in the appellant's possession and he later led the police to Mr. Molobo, who was then also arrested. No details were provided as to when the section 252A authority was applied for. The appellant did not place the constitutionality or the legality of the section 252A authority before the court during either of his two bail applications, and it is accepted that same will not be an issue in the course of his trial matter.
7. The appellant brought an application to be admitted to bail in the Pretoria Specialised Commercial Crimes Court, Regional Division of Gauteng, before Magistrate Setshoge, which application was dismissed on 16 May 2022. The applicant then brought another application to be admitted to bail on new facts, before the same presiding Magistrate, which application was also refused on 12 December 2022.
8. Aggrieved by these decisions not to admit him to bail, the appellant appealed to this court against such refusal, in terms of the provisions of section 65(1)

(a). I then heard the matter on 24 April 2023 and reserved judgment to be delivered at a later stage.

LEGAL PRINCIPLES

9. The State and the defense are in agreement that the offences the appellant is alleged to have committed resorts under Schedule 5 of the CPA.

10. Section 60(11)(b) of the CPA deserves mention and provides:

“(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

(b) in Schedule 5, but not 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 reasonable opportunity to do so adduces evidence which satisfies the court that the interests of justice permit his or her release.”

11. In terms of the above subsection, the appellant can only be admitted to bail if he adduces evidence which satisfies the court that the interests of justice permit his release. The demand that evidence be adduced should not be interpreted as a demand for the presentation of oral evidence. Evidence can be presented in terms of the normal “relaxed” rules of evidence (see **S v Hartlief 2002 (1) SACR 7 (T)**), where affidavits should be received (see **S v Pienaar 1992 (1) SACR 178 (W)**).

12. The concept of the “interests of justice” is not defined in the sub-section. In the matter of **S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat 1999 (2) SACR 51 (CC)**, the concept of “interests of justice” was defined as follows:

“The interest of society’ is the sense in which ‘the interests of society’ concept is used in sub-s(4). That subsection actually forms part of a functional unit with sub-ss (9) and (10). Between them they provide the heart of the evaluation process in a bail application, sub-s (9) being predominant. It is read first and ‘the interest of justice’ bears the same narrow meaning akin to the ‘interest of society’ (or the interest of justice minus the interest of the accused) the interpretation of the whole section falls neatly into place.”

13. Section 60(11)(b) of the CPA places the onus (burden of proof) on the bail applicant to adduce evidence which satisfies the court that it is in the interest of justice that they be admitted to bail. There is no onus on the State to disprove the existence of the “interest of justice”. The civil standard is used for the bail applicant to discharge the onus placed on them, namely that they must do so on a balance of probabilities.

14. The provisions of section 60(4)(a)-(e) are also important and provide that:

- “(4) the interest of justice do not permit the release from detention of an accused where one or more of the following are established;*
- (a) where there is the likelihood that the accused if he or she were released on bail, will endanger the safety of the public or any particular person will commit a schedule 1 offence, or*
 - (b) where there is a likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial or*
 - (c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence,*
 - (d) where there is a likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the*

objectives or the proper functioning of the criminal justice system, including the bail system,

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.”

15. If one or more of the jurisdictional factors mentioned in the above subsection are established, the bail applicant is not entitled to be admitted to bail.

FIRST BAIL APPLICATION

16. In his first bail application, the appellant deposed to an affidavit from which the following can be gleaned:

- 16.1. that he is a Nigerian national and arrived in South Africa as an asylum seeker;
- 16.2. after his village was attacked by the Niger Delta terrorist group, he fled his native country;
- 16.3. he arrived in South Africa in 2011 and his asylum seeker visa was repeatedly extended, up until 1 September 2020;
- 16.4. the asylum seeker visa which was found in his possession at the time of his arrest was renewed at DHA's Marabastad office and he was assisted by a gentleman known as Mr. Khopotso, an employee of the Department, who told him to pay an amount of R500.00;
- 16.5. at the time of his arrest, he resided at 2 Eglin Road, Sunninghill in Sandton, in terms of a 12-month lease agreement concluded on 17 December 2021, to commence in January 2022;
- 16.6. he resided at the address with his girlfriend, Ms. Phelokazi Ntsoongo;
- 16.7. he is a father of two minor children aged 7 and 9 years respectively, who currently reside with their mother at a different address than that of the appellant;

- 16.8. the children attend school and he is responsible for the payment of their school fees;
 - 16.9. he is self-employed as a movie director, producer and singer, He is also employed as a manager in his girlfriend's company called Epex Cleaning Chemicals (Pty) Ltd, and his salary ranges from R8500.00 to R10 000.00. The estimated value of his businesses, assets and investments amounts to a total of R30 000.00, and he has no assets or economic ties outside of South Africa;
 - 16.10. he does not have previous convictions nor any pending criminal charges;
 - 16.11. the State's case against him is weak and if released on bail, he will not interfere with witnesses, exhibits or evidence.
17. Ms. Phelokazi Ntsolongo also testified in support of the appellant's bail application and her evidence is summarised briefly as follows:
- 17.1. she is the appellant's girlfriend and they have lived together at the appellant's address since January 2022;
 - 17.2. she has been in a relationship with the appellant since 2020;
 - 17.3. she owns the company which employed the appellant as a manager;
 - 17.4. to her knowledge, the appellant does not have any movable or immovable assets;
 - 17.5. she confirmed that the appellant has two minor children, and;
 - 17.6. at the time of her testimony, she was responsible for paying the rent on the appellant's home.
18. The State also adduced the evidence of the Investigating Officer, Sergeant Mauwane, who is based at the DPCI (the Hawks). He confirmed that the

appellant was arrested after the section 252A authority was put in place, after he demanded the amount of R300 000.00 from the complainant. When he verified the asylum seeker visa found in the appellant's possession upon his arrest, DHA advised that the visa was fraudulent. He visited the address which Ms. Ntsolongo provided, despite not having been provided with the unit number, where he was informed by the caretaker that Ms. Ntsolongo had her own unit in the same complex, and the appellant was a party to another lease agreement wherein he was described as a second occupant. Efforts to reach the first occupant on the lease agreement did not yield fruit, because despite promising to go to the appellant's residential address, the first occupant failed to do so.

19. Mr. Ndou, from DHA, testified that the appellant's application for refugee status was rejected as being manifestly unfounded on 5 April 2011. However, his asylum seeker visa was extended several times thereafter, for the final determination of his application for refugee status, until he was finally rejected in September 2020, at which time his visa was not extended again. The appellant failed to appear before the Refugee Reception Officer and his visa was deemed to have lapsed, and as such, the appellant was an illegal foreigner in South Africa. In cross-examination, it was put to Mr. Ndou that the decision to finally reject the application was not communicated to the appellant, as is required.

20. In refusing bail, the court *a quo* stated that:

"...firstly to the address given by the applicant. I believe the court would be failing in his duties to be saying that the evidence as presented before this court in terms of the stability of the applicant within the Republic of South Africa has been shown on a balance of probabilities by the applicant who stayed for a period of five months as an occupant only, who is not liable to pay rental or in essence to comply with the essential conditions of like a lease of the place in terms of the payment

of rental, other things that are related to conditions that can lead to cancellation, because in the circumstances where he is being incarcerated the other person is not listed as an occupant of the place as well, the court cannot arrive at the conclusion that automatically just because the other girlfriend stays in that unit it means that he has taken over the lease when there are no documents to that effect, so if that was the case the court would say that there is stability of some sort because now I can see the name of that current being there.

As for the status of the applicant it is of right to can approach the high court in terms of review or appeal as he has indicated, but evidence that has been presented before this court as well in terms of the asylum document that has been presented to this court which the respondent labels as fraudulent and having been rejected, also there is no sufficient evidence satisfying the onus that rests on the applicant to show this court that the interest of justice permits his release and it is on that basis that I make the following order; the application for the release of the applicant on bail is dismissed.”(sic)

SECOND BAIL APPLICATION

21. In the second bail application, the appellant also deposed to an affidavit wherein he mostly repeated the averments made in the first bail application, save to add that the business which he was managing before his arrest was struggling financially, and that his children’s school fees have not been paid since his arrest. Further, that he has moveable assets to the estimated value of R30 000.00.

22. Ms. Ntsolongo also deposed to another affidavit in support of the appellant’s bail application, stating that she had moved to a new address, namely 41 Keiskama Avenue, Gallo Manor, Sandton and that she was willing to

accommodate the appellant if he is released on bail. Further, that her new address was within walking distance of the police station and she committed herself to ensuring that the appellant attends his court appearances.

23. Ms. Cynthia Tshuma, the mother of the appellant's minor children, also deposed to an affidavit in support of the appellant's bail application. She indicated that she and her children are financially dependent on the appellant and she further consented to the appellant residing with Ms. Ntsolongo.

24. The investigating officer could not confirm the address which Ms. Ntsolongo provided. The presiding Magistrate was not satisfied with the developments and made an order in terms of section 60(3) for certain evidence to be placed before her and made the following order:

24.1. that the investigating officer is to obtain an affidavit from Mr. Kansasa (lessor of the premises leased by Ms. Ntsolongo), in respect of the verification of the address. The investigating officer must also physically go and verify the address;

24.2. that he must approach the school of the appellant's children in respect of the address of Ms. Cynthia Tshuma and also find out who pays the school fees for the children and the outstanding balance; and,

24.3. to obtain the outcome of the section 205 request on the Capitec account of Ms. Ntsolongo.

25. The investigating officer could not verify the address as directed by the court *a quo*, as the appellant's legal representative informed him that the lessor was not willing to have people of Nigerian origin nor people with pending criminal charges in his premises.

26. Ms. Tshuma and Ms. Ntsolongo deposed to a further confirmatory affidavit and a supplementary affidavit, respectively. In those affidavits, they both

agreed that if the appellant is released on bail, he may reside with Ms. Tshuma and her children. Ms. Tshuma's address could not be verified by the investigating officer, as he did not find anyone at the premises when he visited the address, and further, that he could not communicate with Ms. Tshuma as he was not provided with her contact details. Moreover, according to the records kept by the children's school, Ms. Tshuma's address is different than the address provided to him by Ms. Tshuma and Ms. Ntsolongo, although both addresses are in Sunnyside. He also established that the school principal deposed to an affidavit stating that the children will not be academically excluded as a result of non-payment of their school fees.

27. In deciding the second bail application on new facts, the presiding Magistrate stated as follows:

"The applicant has been assisting the children in whatever way cannot be regarded as a new fact, as it has been dealt with in the previous application by this court and it has been adjudicated upon.

Moving to the second crucial aspect being the address of the applicant. I will re-emphasise to say that any determination that this court has to make in respect of the decision of or the principles as laid out in the Peterson matter, cannot be determined without reference being made to the previous reasoning of the court. And this came very clearly, it will be shown very clearly through the reasoning of the court in this instance. The address or addresses of the accused, the addresses that were brought in this very application as for the court to determine them as new facts or not. The previous address of the applicant 2 Eglin Road Sunninghill, Sandton placed before this court at the time the court, as opposed to what has been placed on record even today to say that the address was confirmed. It is correct that confirmation of an address is one leg to see – to verify if that address indeed exists, that is number one... the investigating officer testified that he could not fully

confirm the address as there were no contact details given or furnished to him in the documentation that was presented before court.” (sic)

CAN THE FACT THAT A BAIL APPLICANT IS AN ILLEGAL FOREIGNER BE USED TO DENY HIM BAIL

28. The appellant in this matter is also charged with the offence of being in the country without proper documentation, as his application was rejected by DHA.
29. It appears, on his own version, that he was given fraudulent documentation by Mr. Khopotso, who is allegedly in the employ of DHA. Mr. Ndou testified that the extension of an asylum seeker visa is done for free and the fact that the appellant was made to pay the amount of R500.00 by Mr. Khopotso is an indication that the appellant did not visit the relevant office of DHA to extend his asylum seeker visa. After his application was rejected, the appellant never physically appeared before the Refugee Reception Officer again.
30. Subsequent to his arrest, the appellant’s legal representatives were instructed to bring an application for judicial review against the Minister’s decision to reject his application for refugee status, in terms of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”). The appellant only annexed a letter from his attorneys indicating that a copy of the notice of motion was served on the Chairperson of the Standing Committee for Refugee Affairs, who is the second respondent in the review application. The letter is dated 5 April 2022, and while there is a case number provided as 19955/22, there is no copy of the notice of motion attached to the letter. However, it appears that both parties accepted that there a PAJA review has been brought by the appellant against the rejection and refusal to extend his asylum seeker visa.
31. The appellant’s status in the country was used as one of the reasons to deny him bail in the first bail application. It is trite that the bail applicant’s status in

the country cannot be used as a bar to his release on bail (see ***Ulde v Minister of Home Affairs and Another (Lawyers for Human Rights Amicus Curiae) (2009) 3 All SA 323 (SCA)***). The main purpose of granting bail is to secure the attendance of the bail applicant at court pending finalisation of their trial matter.

32. The appellant has been in the country since 2011 on an asylum seeker visa, for purposes of studying or working. He has children in the Republic and he was also employed. It is not quite clear as to whether the appellant has assets in the country. In his own version, he alleges that he has moveable assets to the value of R30 000.00, whereas his girlfriend, Ms. Ntsolongo avers that he has no moveable assets and they live together as girlfriend and boyfriend.

33. The PAJA review is not before me and I cannot delve into the merits thereof, but the fact that the appellant brought the application so late is concerning. On the State's version, the appellant was finally rejected in 2017, but on the appellant's version, he was only finally rejected in 2020. It is not clear whether condonation for the late filing of the application was sought, given that the PAJA review must be brought within 180 days of the impugned decision. The PAJA review is intended to alter the outcome reached administratively in terms of the Refugees Act.

34. In the matter of ***Saidi and Others v Minister of Home Affairs and Others [2018] ZACC 9***, the Constitutional Court held that a Refugee Reception Officer does have power to extend the permit provided for in section 22(1) of the Refugees Act 130 of 1998 (permit) pending finalisation of proceedings for the judicial review, in terms of PAJA, of the decision to refuse an application in terms of section 21(1) of the Refugees Act. The Court reasoned as follows:

"To illustrate a little more on the absurdity, an asylum seeker would be immune from prosecution while pursuing an internal appeal or review. This immunity would end soon as this internal process is finalised. She

or he would not have immunity pending a PAJA review. However, upon completion of the PAJA review, with the court deciding that the applicant ought to have been granted asylum, the immunity would kick in again...”

35. The Court further ordered:

“The permit must be issued or extended in accordance with the provisions of the Refugees Act and Regulations made in terms of section 38 of that Act.”

36. It is trite that for the visa to be extended after the rejection of the application, the asylum seeker must appear physically before the Refugee Reception Officer. **Saidi** (*supra*) does not deal with compliance in terms of the Refugees Act, but only extends the powers of the Refugee Reception Officers to extend the visa, pending the finalisation of the PAJA review.

37. Despite the pronouncement in **Saidi**, the appellant remains illegally in the country until he appears before the Refugee Reception Officer for the extension of his visa. The appellant is legally represented and it is unclear whether he gave his attorney a power of attorney to appear on his behalf before the Refugee Reception Officer, given that he is currently in custody, as this was not indicated in the papers before me.

VERIFICATION OF THE BAIL APPLICANT'S ADDRESS

38. Section 60(6)(i) of the CPA provides:

“(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 –

- (i) *the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached...*”

39. The appellant provided many addresses which were found to exist, but some were not verified. At the time of the hearing of this appeal matter, the appellant’s address of 2 Eglin Road, Sunninghill 219, Sandton was no longer in consideration as the 12-month lease agreement had lapsed and the lease was not renewed. Ms. Ntsolongo’s address of 41 Keiskama Avenue, Gallo Manor, Sandton, where she indicated that she would reside with the appellant if he is released on bail, was abandoned in the course of a bail application for the reasons already stated elsewhere in this judgment.

40. What is left is the address of Ms. Tshuma in Sunnyside. The school’s records show that the appellant’s children’s address is different from the address provided by Ms. Tshuma. It only emerged in the second bail application that the lease agreement of that address is in the name of Ms. Ntsolongo. The address was not mentioned in the first bail application, despite Ms. Ntsolongo being aware of its existence and testifying in the appellant’s first bail application. The address was mentioned as a new fact, as initially, the court *a quo* refused to admit the appellant to bail because no address provided could be verified. The lease agreement in respect of the address was concluded by Ms. Ntsolongo long before the arrest of the appellant.

41. When deciding what would constitute a new fact, the court in the matter of **S v Peterson 2008 (2) SACR 355** stated that:

“[58] Where evidence was available to the applicant at the time of the previous application but, for whatever reason, was not revealed, it cannot be relied on in the later application as new evidence. If the evidence is adjudged to be new and relevant, then it must be

considered in conjunction with all the facts placed before the court in previous applications, and not separately.”

42. The investigating officer visited the address of Ms. Tshuma, but he did not find anyone there. He was not provided with Ms. Tshuma’s contact details, thus he could not contact her telephonically to confirm whether she really resides at that address. As a result, while the investigating officer located Ms. Tshuma’s address, it could not be verified as being the address where she and her children reside.

43. In my considered view, without the verification of the address for the purposes of release on bail, it will be difficult for the investigating officer to enforce the bail conditions in the event of breach thereof.

STRENGTH OF THE STATE’S CASE

44. The appellant did not mention in either of his bail applications whether he intends to challenge the constitutionality or legality of the section 252A authority which led to his arrest. The appellant only avers that the State’s case against him is weak, without providing any further details.

45. At the time of his arrest, the appellant was found in possession of the money he demanded from the complainant to “withdraw” the charges against him. He led the police to his co-accused, who was then also arrested on some of the charges levelled against the appellant.

46. It is trite that there are prescribed minimum sentences for certain offences the appellant is charged with. The nature and gravity of the punishment which will likely be imposed in the event of a conviction may serve as incentive for the appellant not to stand trial.

47. I am alive to the fact that this court is not seized with determining the guilt of the appellant. The investigations in the matter are almost concluded and the only remaining aspect at the hearing of this matter was the cellphone records of the appellant. The court in the *Dlamini (supra)* matter, reasoned as follows when determining the strength of the State's case:

"[11] ...An important point to note here about bail proceedings is so self evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails in the main protecting the investigation and prosecution of the case against hindrance."

48. The appellant's co-accused was released on bail pending trial for reasons which are not before me. The circumstances relating to the appellant's co-accused cannot be equated to those of the appellant, despite facing the same charges. The co-accused is a South African citizen, whereas the appellant is not.

GENERAL

49. When determining the application for bail on new facts (the second bail application), the presiding Magistrate found that the appellant did not deal with new facts and, in my view, correctly dismissed the bail application.

50. The fact that the appellant was financially responsible for the minor children served in both bail applications and it is thus not a new fact. The appellant stated that he does not reside with his minor children and that they reside with their mother, and in my view, the Magistrate was correct in finding that the

appellant was not a primary caregiver to his minor children (see **S v M (Centre for Child Law as Amicus Curiae) 2007 (2) SACR 539 (CC)**). The address where the appellant is to reside should he be released on bail remains doubtful and the Magistrate did not misdirect herself in making such a finding.

51. I find that there was no misdirection on the part of the court *a quo* which calls for this court to interfere with her decision. The appellant remains an illegal foreigner in the country, despite his pending PAJA review, he does not have a fixed address and the State's case against him is watertight.

ORDER

52. In the result, the following order is made:

1. The appeal against the decisions of Magistrate Setshogo to refuse to admit the appellant to bail is hereby refused.

**MJ MOSOPA
JUDGE OF THE HIGH
COURT, PRETORIA**

Appearances:

For the applicant: Adv. KP Letswalo
Instructed by: Mwim & Associates Inc.

For the respondent: Adv. MM Thulare
Instructed by: SCCU, DPP Pretoria

Date of hearing: 24 April 2023
Date of judgment: Electronically delivered on 15 June 2023