**IN THE HIGH COURT OF SOUTH AFRICA**
**KWAZULU-NATAL LOCAL DIVISION, DURBAN**

**CASE NO. D11062/2021**

In the matter between:

**FUMING YAN** **APPELLANT**

**and**

**THE STATE** **RESPONDENT**

---

**ORDER**

---

**The following order shall issue:**

The appeal is dismissed.

---

**JUDGMENT**

---

**Steyn J:**

[1] The appellant appeals against the refusal of the magistrate, Durban to release him on bail on 12 November 2021. The appellant is charged with two counts, fraud, and in the alternative 2 statutory counts, i.e. irregular dealing in goods to wit 900 master cases of cigarettes alternatively making false statements to the customs controller in relation to container SEGU 6985032, which false information resulted in the importer evading custom duties and VAT, in the sum of R10 589 737.50. Count 2

is a contravention of s 49(1)*(a)* of the Immigration Act 13 of 2002 in that he remained illegally in the Republic of South Africa without the permission of the authorities.

[2] The appellant advanced several grounds of appeal. It was submitted that the learned magistrate had erred in not granting the appellant bail, inter alia by failing to consider that the appellant is not a flight risk, that there is no likelihood that he will interfere with the State witnesses, and that he failed to consider 'the totality of the evidence that the appellant proved'. Further, that the learned magistrate misdirected himself in not considering that bail conditions would address any possible flight risk.

[3] The State opposed the appeal and submitted that the learned magistrate was not misdirected on onus nor on the findings that the interests of justice did not permit the appellant's release.

[4] At the onset of the application for bail before the court a quo, it was established that the charges fall within the provisions of s 60(11)*(b)* of the Criminal Procedure Act 51 of 1977 (the Act) and as such, the appellant had to establish on a balance of probabilities that the interests of justice permit his release.

[5] Bail applications are unique in nature as has been acknowledged by the Constitutional Court in *S v Dlamini*; *S v Dladla & others; S v Joubert; S v Schietekat*[1] when it held:

'Furthermore, a bail hearing is a unique judicial function. It is obvious that the peculiar requirements of bail as an interlocutory and inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal court procedure, it is considerably less formal than a trial. Thus the evidentiary material proffered need not comply with the strict rules of oral or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. 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

[1] *S v Dlamini*; *S v Dladla & others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).

investigation and prosecution of the case against hindrance.'[2] (Footnote omitted, my emphasis.)

[6] Our bail system is undoubtedly designed to strike a balance between the interests of the offender and those of the victim, and society as a whole. The present legislation[3] governing bail was challenged and found to be constitutional. Accordingly, I shall consider the procedural issues as they present themselves in this matter. After 1994, the role of presiding officers changed and each and every bail application should now be decided within the prism of the Constitution,[4] coupled with the provisions of the Act. The Constitution does not grant an offender an absolute right to personal freedom.[5] Liberty is qualified and circumscribed. In my view, the duty of those presiding over bail applications have become far more onerous since 1994 as judicial officers are now expressly enjoined by the provisions of s 60 of the Act not to be passive. It cannot be said, given the facts of this appeal, that the learned magistrate was not mindful of the said duties or the obligations imposed. The questions asked by the learned magistrate were very relevant and show that the magistrate appreciated his inquisitorial duty when the application was heard.

[7] In *S v Barber*[6] Hefer J remarked as follows in deciding a bail appeal in terms of s 65(4) of the Act:

'It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly.'[7] (My emphasis)

---

[2] Para 11.
[3] See the Criminal Procedure Second Amendment Act 85 of 1997 and the provisions introduced by it.
[4] The Constitution of the Republic of South Africa, 1996.
[5] See section 35(1)*(f)* of the Constitution, which reads:
'Everyone who is arrested for allegedly committing an offence has the right-
…
*(f)* to be released from detention if the interests of justice permit, subject to reasonable conditions.'
[6] *S v Barber* 1979 (4) SA 218 (D).
[7] Ibid at 220E-G.

[8] What is required of this court in terms of s 65(4) of the Act before setting aside any decision on bail, is to be satisfied that the lower court was wrong in its decision.[8]

[9] I shall now consider all of the proceedings including the procedural issues in dealing upon the success of this appeal.

[10] In support of his bail application the appellant, a Chinese citizen, elected to file an affidavit (Exh B) in support of his application and to tender evidence viva voce.

[11] The appellant stated in his affidavit that he lives with his elderly parents and his wife in Durban North. During his viva voce evidence, however, he stated that his wife stays in China and that they are separated. During the application, the appellant contradicted his own affidavit as well as his own evidence before the court a quo. The list of contradictions is many and remains a matter of record. The appellant also failed to show that he is legally in the country, earning a monthly salary. No documentation of any income of any kind was produced to the court a quo.

[11.1] In his affidavit he avers that the cigarettes were not shown to him. In cross-examination he once more affirms the fact that the cigarettes were not shown. Once the State reminded him of the photos taken that will be used at the trial he recanted and conceded that the cigarettes were shown to him.

[11.2] When asked by the court to confirm that he stays with his wife and parents, he contradicts his affidavit.

[11.3] He had great difficulty explaining how he paid cash for a BMW M3 which was purchased recently. He at first stated that he paid between R80 000 to R100 000 for the vehicle. On further probing he admitted that he had paid R450 000 for the vehicle.

[11.4] He stated that he clearly informed the investigating officer that his passport was in the vehicle that was stolen. The passport then miraculously was found by his family at home.

[11.5] The appellant's movements entering and exiting South Africa show that he moves between South Africa, Uganda, Kenya and China. When cross-

[8] *S v Green & another* 2006 (1) SACR 603 (SCA).

examined the appellant was at sea to explain how the movements are not reflected on the movement central system if he entered and exited the country legally.

[11.6] In para 3 of his affidavit he stated that he came to South Africa on a visitors' visa and sought the assistance of an immigration agent to apply for an extension of his stay. During his evidence under oath it transpired that he arrived in July 2019 and that his visa expired on 16 July 2019 (See Exh D). Despite being deported previously, as per Exh D, he contends that he is legally in the country. The State in its opposition of the bail filed an affidavit deposed to by an immigrant officer, which in terms of s 212 of the Act, is prima facie proof of the facts contained in the statement. The document unequivocally supports the notion that the appellant is an illegal immigrant.

[12] It is evident that the learned magistrate cannot be faulted for finding that the appellant was unimpressive as a witness. In fact, the appellant, in my view, was an appalling witness, evasive and contradicting his own evidence. Simply put, he was economical with the truth. The appellant failed to discharge the onus and the court a quo correctly refused bail.

**Order**

[13] The appeal is dismissed.

_____

**Steyn J**