

SOUTH AFRICA / JUDGMENT

Alehi v S (A173/2021) [2021] ZAGPPHC 492; 2022 (1) SACR 271 (GP) (10 August 2021) [2021] ZAGPPHC 492

COURT

North Gauteng High Court, Pretoria

BEFORE

Khumalo

CASE / FILE NUMBER

A173/2021

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IN THE REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE: YES

(2)

OF INTEREST TO OTHER JUDGES: NO/YES

(3)

REVISED.

(4)

Signature:

Date: Electronically
delivered 10/08/201
CASE
NO: A173/2021
CHIDOZIE
IGNATIUS ALEHI
APPELLANT
and
THE
STATE
RESPONDENT
This
matter was enrolled for hearing on 30 JULY 2021, and dealt
with or determined on the basis of the papers or record and written
argument filed on behalf of the parties, without
appearance and oral
argument.

JUDGMENT

KHUMALO J

INTRODUCTION

- [1] Everyone is equal before the law. Equality before the law means that we are all entitled to equal protection and benefit of the law, by having access to courts and to the application of the law in a just manner. Every judge is therefore obliged to take full account of the Constitution in the light of the requirements of s 39 (2) of the Constitution of the Republic of South Africa, 1996, which is, that the court must promote the spirit, purport and object of the Constitution. However, each case before court is to be decided in accordance to its own facts.
- [2] The right to be released from detention if the interests of justice permit, subject to reasonable conditions, is a basic fundamental human right that is available to everyone who is arrested for allegedly committing an offence; see s 35 (1) (f). Furthermore, anyone has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights; as provided in s 38 of the Constitution.
- [3] Mr Chidozie Ignatius Alehi (“Alehi”), the Appellant, a Nigerian foreign national who is without a valid permit or passport is appealing against the refusal by the magistrate’s court Springs, to admit him to bail, following his arrest and arraignment on a charge of dealing in drugs in contravention of section 5 of the Drugs and Drug Trafficking Act, Act 140 of 1992 (DDTA), alternatively with possession of drugs in contravention of section 4 of the DDTA.

- [4] In accordance with the charge sheet the drugs were in about 49 Ziplog bags. The Appellant was legally represented by Mr Okorie during the bail hearing on 12 April 2021.
- [5] The offence of which the Appellant is charged is a Schedule 1 offence wherefore the state bore the onus to prove in the court a quo that it is in the interest of justice for the accused to remain in custody.

GROUND OF APPEAL

- [6] The Appellant's alleges that when the court a quo refused him bail, it misdirected itself in one or more of the following ways:
1. by not considering the totality of all evidence before the court.
 2. Not giving weight or not sufficient weight to factors such as whether:
 - a. the Appellant had a propensity to commit further crimes if released on bail, the fact that the Appellant was a first time offender with no previous convictions or pending cases.
 - b. The Appellant has a confirmed fixed address, and his fixed employment was never challenged.
 - c. The appellant has established ties to our country, he has a very small child of 11 months and was living with the mother of this child.
 - d. He is the breadwinner.
 3. In actual fact the state failed to put any circumstance which would serve as incentive for the Appellant to flee. On the contrary all the information placed before the court is sufficient to indicate that the Appellant has no incentive to flee.
 4. Relying only, on the reason that the Appellant was a foreigner who has no valid or legal presence in the Republic, on only the status of the Appellant despite the fact that the appellant has made various attempts to legalise himself and even as a last resort expressing intention to apply for asylum which can only be applied for in person in terms of the Refugees Act.
 5. By ignoring a wealth of evidence which show that the Appellant had been making efforts to legalise his presence by extending his expired documentation.
- [7] In terms of s 65 (4) (b), for the Appellant to succeed on his appeal, he has to persuade the appeal court that the decision of the magistrate to refuse him bail on the grounds as alleged was wrong.
- [8] The section reads:

"The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given."

- [9] Furthermore, it is imperative for the court hearing an appeal to take cognizance that the powers and functions of a court hearing an appeal under s 65 are similar to those in an appeal against conviction and sentence, as Hefer J has enunciated in *S v Barber* 1979 (4) SA 218 (D) at 220E-H that:

“It is well known that the powers of this court are largely limited where the matter comes before it on appeal not as a substantive

application. 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 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 ...Without saying that the magistrate’s view was actually the correct one, I have not been persuaded to decide that it is a wrong one.” (my emphasis)

- [10] It is on that basis that I consider the Appellant’s allegation that the evidence that proves that actually the interest of justice favoured the release of the Appellant on bail was before the court a quo, but was ignored or overlooked by the court who concentrated on the status of the Appellant as a foreigner, illegal in the country, resulting in the court’s misdirection. The Appellant has to persuade the appeal court that it is so.

COURT A QUO PROCEEDINGS

- [11] It is common cause that during the hearing of the bail Application in the court a quo, no previous convictions, pending matters or warrants of arrests against the Appellant were found. The state, in opposition to bail, led the evidence of Ms Sandra Lambrecht (“Lambrecht”), the Investigating Officer. The Appellant did not testify but led the evidence of one Nobuhle Mbonambi (“Mbonambi”) and Mr Okorie, his attorney, made certain allegations and reference to documents by putting them to Lambrecht, the state witness during cross examination.
- [12] Lambrecht’s testimony was, that the Appellant was arrested when he was found with drugs in his possession. She visited the Appellant’s confirmed address and found it in disarray. The address is a very tiny place which she could not make out if there were other occupants besides the Appellant. They searched the room and there were no baby or female clothes. The Appellant on his arrest, gave the information recorded in the docket, that he is not married and with no dependents. According to a s 212 statement filed by a Home Affairs official, the Appellant was illegal in the country. His passport expired in April 2017. He entered the Republic in 25 June 2012 and was granted a temporary residence permit visa that expired on 25 July 2012. She confirmed an Application that was shown to her under cross-examination to be dated 2012 and bearing 2013 and 2014 receipt stamps. She denied what was put to her that the dates prove that the Appellant has been to Home Affairs a number of times to check on his

Application and that as the decision is still pending, there is still an opportunity for the Appellant to go and get the final outcome. She vehemently denied that, pointing out that there was no proof of another attempt since 14 July 2014 and according to the receipt from Home Affairs, enquiries are to be made within 30 days from date of the receipt which date is 14 July 2014 on the last receipt. She also contested Mr Okorie's allegation that since the establishment of a VFS Office in 2015, Appellant has been tracking the Application but on line and not required to go physically to Home Affairs, hence the stamps were only until 2014. She pointed out that the tracking by home Affairs can only be done on a person that has a valid passport. She also contested that the Appellant has a life partner and an 11 months old child, on the basis that it is the Appellant himself on his arrest who provided the answers in relation thereto, stating that he is not married and has no dependents. She opposed bail because the Appellant was illegally in the country and did not possess valid documents.

[13] Mbonambi's testimony was that she is the life partner of the Appellant. They started dating in 2015 and have been living together since 2016. She however is not staying with the Appellant permanently with whom she has an 11 months old daughter. She visits and then go back home which is their arrangement. The Appellant fixes fridges whilst she is unemployed. When the Appellant was arrested on 3 March 2021, she was at home in Etwatwa. Life has been difficult since then, so she decided to move back home with her grandmother in Etwatwa who is looking after her and the baby. In 2018 the Appellant went to Pretoria to try and fix his documentation but when he got there he was arrested. After that, it was difficult for him to go to Pretoria because he was afraid of being arrested. He also could not go back home because of family politics. So he decided to fix his papers being in South Africa by applying for asylum. Before 2018 he constantly went to Pretoria to fix his papers, and he would be turned back, cut off from the queue. She then again said after the arrest in 2018, the Appellant still kept on going to Pretoria even with all the fear, and he will get a stamp. She further pointed out that they have tried getting married, a gentleman from Home Affairs offered to assist them. She however realized that it was going to create problems for her and advised the Appellant to sort out his documentation first. At the time she was at Home Affairs to add the Appellant's name on the child's birth certificate.

[14] The court a quo on consideration of the evidence led, found with regard to the Appellant's status that, there were enquiries on his permit renewal Application that he made in 2012 to 2014 and since then he has done nothing. There is no proof of his application for asylum but a wish that he verbalized in 2018 and did nothing, therefore illegal in the Republic. The Appellant was illegal in the country and therefore it can never be in the interest of justice to release anybody who is illegal in the country.

[15] The court a quo's statement that "the Appellant was illegal in the country, and therefore it can never be in the interest of justice to release anybody who is illegal in the country", prompted the Appellant to also allege that the learned magistrate failed at that pretrial stage to consider and apply the pertinent principle of presumption of innocence in terms of s35 (2) (h) of the Constitution. Of course the statement's oversimplification imprint viewed in

isolation, seem to suggest that the pertinent rights under section 35 of the Constitution are not available to persons found to be illegal in the country when arrested of any offence, or that the Appellant was not afforded such right, which is unfortunate as going through the record and the evidence it is clear that such allegation or suggestion has no merit. The principle of presumption of innocence as per our Constitution is a universal right conferred to everyone by the Bill of rights, the pretrial hearing of bail is grounded on that principle.

- [16] The statement has got to be read together with the reasoning of the court as a whole and in consideration with all the other evidence that was led to determine the soundness of the court a quo's overall conclusion and decision. Section 35
- (1) (f) postulates a judicial evaluation of different factors that make up the criterion of the interest of justice, and that the basic objective traditionally ascribed to the institution of bail is to maximise personal liberty.

Facts

that pertains to a person's illegal status will, inter alia, be a factor to be considered but will not be singled out as the sole determinant of whether or not it is in the interest of justice for a suspect to remain in custody. Reference by Appellants to *Bula and Others v Minister of Home Affairs and Others* (589/11) [2011] ZASCA 209; [2012] 2 All SA 1 (SCA); 2012 (4) SA 560 (SCA) (29 November 2011) has no merit. The Appellants in the matter were not suspects or charged of a criminal offence.

- [17] The factors that the court a quo had to consider in determining the question of interest of justice are outlined in s 60 (4) of the Act. According to the section, the interests of justice would not permit the release of the accused if one or more of the following grounds are, inter alia, shown to exist:
- (a) Where there is a likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence,
 - (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
 - (c) Where there is a 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; or
 - (d) Where there is a likelihood that the accused, if he or she is released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system. S60 (8);
 - (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.'

[18] In considering whether the ground in subsection (4) (b) has been established, the court may, where applicable, take into account the following factors, namely-

- (a) the emotional, family, community or occupations ties of the accused to the place at which he or she is to be tried;
- (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;
- (d) the extent to which the accused can afford to forfeit the amount of bail which may be set.
- (e) the question whether the extradition of the accused could readily be effected should he or she flee across the border of the Republic in an attempt to evade his or her trial;
- (f) the nature or gravity of the charge on which the accused is to be tried;
- (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 punishment which is likely to be imposed and the ease with which such conditions could be breached; or likelihood;
- (i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
- (j) any other factor which in the opinion of the court should be taken into account

[19] Section 60 (8) provides that 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;
- (b) whether the accused is in custody on another charge or whether the accused is on parole;

© any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or

- (d) any other factors which in the opinion of the court should be taken into account.

[20] The criteria involve the weighing up of the interest of the accused, in liberty against those factors which suggest that bail be refused in the interest of society, taking both trial related and extraneous factors into consideration; see *S v Dlamini*; *S v Dladla & Others*; *S v Joubert* and *Sv Schietekat* [1999] ZACC 8; 1999 (2) SACR 51 (CC). The focus at the bail stage is to decide if the interest of justice permits the release of the Applicant pending trial which entails in the main protecting the investigation and prosecution of the case against hindrance.

[21] Where the court a quo has indeed misdirected itself materially on the facts and the legal principles, the court of appeal may consider the issue of bail afresh. Interference is also justified where the lower court “overlooked some important aspects” in coming to the decision to refuse bail; see *S v Ramaisa* (unreported, FB case no A24/2012, 3 May 2012).

[22] The Appellant argues that the court in misdirecting itself has failed to take into consideration the whole evidence including that: -

[22.1] The State could not prove that the Appellant had a propensity to commit further crimes if released on bail, for the fact that the Appellant was a first time offender with no previous convictions or pending cases:

[22.1.1] This was common cause as confirmed by the State and was noted by the court

[22.2] the Appellant has a confirmed fixed address, and his fixed employment was never challenged:

[22.2.1] Although the address was confirmed, there is no evidence that it is a fixed address. No evidence was led on the nature of Appellant’s occupancy and not much could be made out from the address. It was put to Lambrecht that the Appellant stays there with a wife and child and Lambrecht pointed out that on investigation the address was found to be a very small room, therefore could not have been occupied by more than one person. It was in a state of chaos with no clothing of a child or female person found, during a search. Furthermore, on his arrest the Appellant said he was unmarried and with no dependent. This description does not indicate a fixed address, though confirmed.

[22.2.2] On Appellant’s employment his witness Nobambo said Appellant

fixes fridges not that he had a fixed employment as alleged in the heads of argument. Fixed employment connotes the existence of an employment contract or relationship that constitute of an employer and employee that may be for a fixed term or permanent in nature. There was no evidence of a fixed employment before the court a quo.

[22.3] The appellant has established therefore ties to our country, he has a very small child of 11 months and was living with the mother of this child:

[22.3.1] This allegation was dealt with by Lambrecht who indicated that the Appellant during his arrest gave information to the police that was recorded in the docket that he was not married and with no dependents. Notwithstanding Appellant’s presence in court and being represented, he did not lead evidence denying making the declaration, nor was it put to Lambrecht that Appellant denies making it. Instead it was put to Lambrecht that he was married, and on that being refuted that Appellant lives with a life partner. It is interesting that ultimately in the heads of argument reference is only made to the mother of his child. His residence also did not have signs of him staying with anybody else.

[22.3.2] Furthermore, Mbonambi's testimony was that she stayed in Etwatwa, and occasionally visited the Appellant as per arrangement they had. This is contrary to the allegation made on behalf of the Appellant that Appellant lives with Mbonambi and the child. It is therefore not true that they lived together. They had also considered an assistance by a Home Affairs person to get married even though Appellants had no valid documents. So had Mbonambi not refused, the Appellant would have married her without being in possession of valid documents entitling him to be in the country. There was therefore no evidence before the court a quo that proved that Appellant had established any ties to the country. The state had actually proved the contrary.

[22.4] The Appellant was a breadwinner:

[22.4.1] The allegation is weighed against the fact that he could not refute what he told the police that he was not married and that he did not have a dependent, which was justifiably not considered. Mbonambi has indicated that they were staying full time with her grandmother who is looking after them.

[22.5] Relying only, on the reason that the Appellant was a foreigner who has no valid or legal presence in the Republic, on only the status of the Appellant despite the fact that the appellant has made various attempts to legalise himself and even as a last resort expressing intention to apply for asylum which can only be applied for in person in terms of the Refugees Act:

[22.5.1] The Appellant's documentation reflects that the last time he

got a stamp from Home Affairs enquiring on his Application for renewal of his permit was in 2014. Mr Okorie, Appellant's

attorney then put to Lambrecht that since then the Appellant has been constantly following up with Home Affairs on his Application for renewal of his permit. When it was indicated that the documentary evidence does not support the allegation but indicates that Appellant was last at Home Affairs in Pretoria in 2014, then Mr Okarie put it to Lambrecht that the Appellant has not been visiting Home Affairs since 2015 but tracking the response on line through the VHS office which was established since 2015. No proof was submitted to support the allegation. However, Mbonambi, the supposedly wife or life partner of the Appellant since 2015 or 2016 testified that Appellant constantly visited Home Affairs in Pretoria until 2018 when he was arrested, where after he was not so keen to do it anymore. Mbonambi later said Appellant still continued post 2018 to go to Home Affairs Pretoria although he was afraid of being arrested again.

[22.5.2] The attorney, who is an officer of the court failed to explain to the court why he presented such glaringly conflicting evidence or to lead the evidence of the Appellant to clarify the obvious untruth that was before the court. There was consequently no basis for the court a quo to find that there was evidence of the Appellant following up on his Application post the 2014 enquiry. It is obvious that what was put to the court was made up as the hearing was proceeding. The court a quo was therefore merited to have found that there is no evidence that the Appellant had followed up on his alleged Application for a permit nor was there any indication of having followed up on his alleged express wish in 2018 to apply for asylum as he has alleged.

[23] In terms of s 60 (8) when considering whether there is a likelihood that the accused, if he or she is released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; 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 is decisive of that fact.

[24] The Appellant has failed to prove that the decision of the court a quo to refuse the Appellant bail on the reasons given was wrong. Contrariwise the State had proved that it would be in the interest of justice for the Appellant to remain in custody.

[25] I am therefore satisfied of the magistrate's conclusion that it will not be in the interest of justice to admit the Appellant to bail.

It is therefore ordered that:

1. The Appeal against the refusal by the Regional Court, Springs to admit the Appellant to bail is dismissed.

N V KHUMALO

JUDGE OF THE HIGH COURT GAUTENG, PRETORIA

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