

SOUTH AFRICA / JUDGMENT

Ihedioha v S (A230/2024) [2024] ZAGPPHC 1274 (29 November 2024)

[2024] ZAGPPHC 1274

COURT

North Gauteng High Court, Pretoria

BEFORE

Mosopa

CASE / FILE NUMBER

A230/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, PRETORIA

Case Number: A230/2024

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE

29 NOVEMBER 2024

SIGNATURE

In

the matter between: KEVIN
 EZE IHEDIOHA
 APPELLANT
 And
 THE
 STATE
 RESPONDENT

JUDGMENT

MOSOPA J

1. The appellant applied in the Pretoria Magistrate's Court to be released on bail following his arrest on the 31 December 2021. On the 9 June 2023, District Court Magistrate J.C. Kruger refused the appellant's bail, aggrieved by such decision, he then appealed against such refusal to grant him bail, in terms of section 65(1)(a) of Act 51 of 1977.
2. The appeal matter was heard on the 25 October 2024 and judgment was reserved. At the time of the hearing of the bail application at the court a quo, an objection was raised by the defence when the state wanted to have the matter to resort under Schedule 6. The state at that stage did not furnish the certificate confirming that the charge levelled against the appellant resorts under Schedule 6. The court a quo eventually made a ruling that the matter resorts under Schedule 1 and the matter proceeded on that basis.
3. The court, in *S v Nel and Other* 2018 (1) SACR 576 (GJ) at par 7, had on occasion of dealing with the matter where the defence objected to the use of a particular Schedule by the state, and stated that;

"[7] In the ordinary cause of an application for bail, a timeous ruling should be made on the applicable schedule or section, whether placed in dispute or not. This determines how the bail application will be conducted and more importantly determines the issue of onus."

4. The court a quo made a timeous ruling to the objection raised and this matter will proceed and be determined under Schedule 1. At the time of the bail application, charges levelled against the appellant were the following;
 - 4.1. Trafficking person in contravention of section 4(1) and related section of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 read with the provisions of section 51(1) of Act 105 of 1997, and
 - 4.2. Corruption charges that relate to the alleged bribing of the Investigating Officer.
5. The appellant is arraigned with 7 other accused and at the hearing of the appeal, I was informed that the matter has now been transferred to the High Court for the purpose of plea and trial. When the matter was in the High Court, there was an instance where I postponed the matter, as the Judge who was allocated the matter was not present on that day. Before

the hearing of the current appeal, I enquired from the parties if I can still preside over the appeal matter as I had postponed the matter on a previous occasion. I must pause to say at that stage, my role was only to postpone the matter to another date. I did not know what charges all the accused were arraigned with and I did not know the merits of the matter.

6. The appellant was arrested because of the surveillance that was done by Warrant Officer Barath, the Investigating Officer in the matter together with his investigating team and the police applied for a section 252A of Act 51 of 1977 ("Act") trap. The corruption charges were levelled against him after he was arrested on a trafficking in person charge. It is alleged that the appellant's brother, his wife and a third person, offered Warrant Officer Barath at the time when he went to verify the address of the appellant in Centurion an amount of R20 000,00 for the release of the appellant. The three people mentioned were arrested after a section 252A trap was put in place and the R20 000, 00 was seized from them at the time of their arrest.
7. The appellant was not arrested for being in the country illegally but for committing an offence, his status in the country played a crucial role in him being denied bail as it will appear clearer later in this judgment. His status in the country was brought in as one of the reasons for the state to oppose bail. The arrest of the appellant and his detention was not as intended in terms of sections 3(1)(g), 34 or 49 of the Immigration Act 13 of 2002 ("Act").
8. After the arrest of the appellant, a review application in terms of Rule 53 of the Uniform Rules was brought against Refugee Status Determination Officer of the Home Affairs against its decision to declare the appellant as being illegal in the country, after such decision was made on the 5 March 2020. It was alleged that the appellant submitted a fraudulent visa when he applied for a temporary resident status, after entering the Republic in 2009. Despite the review application documentation admitted into evidence during the bail hearing as an exhibit, it did not form part of the transcribed record when the matter was heard.
9. I then requested Mr Forbay appearing on behalf of the appellant to furnish the court with the copy of the review application of the appellant, when the matter was adjourned and judgment was reserved, Mr Forbay is not involved in the review application but another legal practitioner was involved and Mr Forbay faced challenges in being invited into Caselines by that practitioner as he informed Mr Forbay that he cannot invite him to Caselines as the appellant owes him money for his services. This information was forwarded to the state and the court by Mr Forbay through an email.
10. I then instructed my clerk to approach the general office and if possible, she be invited to Caselines as Mr Forbay had been provided with the case number. The review application under the name and case number Kevin Eze Ihedioha (Ref PTANGA008989152) v The Director Department of Home Affairs and 2 Others, Case number 28443/2022 could not be found on Caselines. I again on the 15 November 2024 instructed my clerk to inform the parties of such developments. On the 25 November 2024 the state informed my clerk that the names of the appellant cannot be found on Caselines under such case number in the

Pretoria High Court as the matter on Caselines is the matter of Shoba v Road Accident Fund, Case number 28443/2022, which is a civil trial matter.

11. The explanation given to the state by Ms Marema a registrar from the General Office of the Pretoria High Court, was that if a case number is issued to a particular matter and the parties do not upload such to Caselines, that case number can be allocated to any matter thereafter. The physical file that was opened when the case number was issued is still lying in the general office and there are no other documents except for the notice of motion, founding affidavit, annexures and proof of service. There is no indication that the respondents indicated an intention to oppose the review application. No further steps were taken by the appellant to prosecute the review application, despite such application being issued in 2022.
12. The state in the bail hearing submitted the section 212 statements from Vella Mack Tshiboze from the Home Affairs, Control Immigration Officer Inspectorate who stated that the appellant entered the Republic on the 7 March 2009 and his application for temporary resident status was rejected on the 5 March
2020. The other section 212 statement was from Alfred Leshoka Moleka an Immigration Officer from the Home Affairs, who stated that the appellant is not authorised to remain in the Republic and such rejection was on the 5 March 2022. The state also presented the affidavit of Delpha Melicia Motau the girlfriend of the appellant who confirmed her relationship with the appellant, although they are not staying together, but on occasion the appellant would visit her place.
13. They also submitted the affidavit of Warrant Officer Don Barath, the Investigating Officer in the matter who submitted his affidavit and spelling out an attempt to bribe him when he went to verify the address of the respondent at Centurion, which led to the arrest of three people after a trap was put in place. He also stated his reasons in that affidavit why the appellant must not be permitted to bail.
14. The appellant testified in the bail hearing and confirmed the following;
 - 14.1. That he was born on the 2 October 1982, and that he is 40 years old,
 - 14.2. He is a Nigerian citizen and entered the Republic in 2009, and that throughout his entire stay in the Republic until his arrest, he stayed in Pretoria and never travelled back to his country of origin;
 - 14.3. His father passed away in 1988, and he does currently not have parents, his family is his fiancé and his 5-year-old child, who was born from his relationship with Khanyisa Vika and they have since terminated their relationship;
 - 14.4. He is responsible for the maintenance of his child;

14.5. He is now in a three-year-old his relationship with his current fiancé who is a South African citizen;

14.6. At the time of his arrest he was residing at 6[...] S[...] street, Elma Court Flat, Arcadia which was a rented place. Since his arrest he has not paid any rental fees, and the rental agreement is no longer in place;

14.7. He was paying an amount of R2 600.00 for such rental, and the flat consisted of 4 bedrooms and he was occupying one of them and two other people were occupying other rooms;

14.8. His brother stays in Centurion;

14.9. He is in the business of buying and selling vehicles that were involved in motor vehicle collision and sold such after repairing them. He also assists people to bid in auctions for purchase of motor vehicles and he gets an amount of R 30 000.00 on a successful bid;

14.10. As a result of his incarceration, he cannot do the work anymore, and he cannot employ other people to do the work for him as experienced people are needed for such employment;

14.11. He earned an amount of approximately R15 000.00;

14.12. He has immovable assets to the value of R70 000.00 to R80 000.00 which includes a motor vehicle;

14.13. He does not have previous convictions, no other pending matter and there are no warrants issued against him, and

14.14. He launched a review application challenging a decision by Home Affairs declaring his stay in the Republic as illegal.

15. After evidence was presented, the presiding Magistrate was not satisfied with evidence not led on the merits of the matter and also evidence that links the appellant to the alleged commission of the offences. The Magistrate then invoked the provisions of section 60

(3) of Act 51 of 1977 which provides;

“60(3) If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.”

16. Following the order made by the presiding Magistrate, the state led the oral evidence of Warrant Officer Barath, the Investigating

Officer. He testified that following the section 252A application, they went to the appellant's place of residence, and they found drugs as well as the two victims who were later rescued and later taken to a place of safety. The place where drugs were found is the place which is rented by appellant as informed by the caretaker and appellant had the keys to such a place.

17. He also went to the Pretoria High Court to verify the status of the review application and received the same documents that he was initially furnished with as no further documents could be found.
18. In cross-examination he confirmed that the victims who were rescued were not physically found at the room that the appellant was occupying but in one of the rooms in the flat. The drugs were found in the garage in which only the appellant has access to and they were found by a dog unit member. The drugs found were tested at the forensic laboratory and came back positive. At the time of the bail hearing appellant was not arraigned on a charge of possession of drugs as they were still waiting for the test results. The appellant did not present further evidence or affidavits.
19. In not permitting the appellant to bail, the presiding Magistrate made certain factual findings and on the issue of the address of the appellant, concluded that;
“He was arrested at his residence and provided an address in Centurion. It appears that is a family member of the accused (appellant’s) address, and he is known in that address. The address in Sunnyside is from his fiancé, where he states that they are in a relationship for there years but that the accused, they are not staying together and that the agreement is that he will only visit her at the premises...there is no lease agreement and there is indeed nothing preventing the accused to literally move over night from this address to any other address including the address in Sunnyside.” (sic)
20. Further,
“He does not have a business bank account and is not registered at the Revenue services.”

With regard to his status in the country, the Magistrates stated that;

- “Dealing with the status of the accused; he entered the country with a visitors visa and therefore most probably legally...there is a High Court application pending to set aside the decision by the refugee status determination officer in rejecting his application for asylum...it appears that since then there is no progress or no movement what so all to enrol this matter. It is difficult not to find that this is clearly a smoke screen in an attempt to justify his stay in the country. As the accused stand were he is indeed illegal in the country.”*
21. The onus is on the state to prove that the appellant is not entitled to be admitted to bail, and the state must prove its case on a balance of probabilities, except for bail applications that resorts under section 60(11)(a) and 60(11)(b) of Act 51 of 1997 (S v Sithole and Others 2012 (1) SACR 586 (KZD)). The right to be released on bail at any stage preceding conviction is subject to the provisions of section 50(6) as provided in section 60(1)(a) of Act 51 of 1977. An accused, who is aggrieved by the refusal of a lower court to grant him or her bail, may appeal such refusal in terms if the provision of section 65(1)(a) of Act 51 of 1977.
 22. Section 60(4)(a)-(e) is instructive and makes the following provision;

“[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:

- (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 or will commit a Schedule 1 offence; or
 - (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
 - (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; or
 - (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise 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.”
23. From the above, it is clear that bail ought to be granted, unless it is not in the interest of justice (*S v Mwaka* 2015
- (2) SACR 306 (WCC)). The Constitutional court in *S v Dlamini*, *S v Dladla and Others*, *S v Joubert*, *S v Schietekat* [1999] ZACC 8; 1999
- (2) SACR 51 (CC), held that the provision did not amount to a deeming provision and did not usurp the judiciary’s constitutionally entrenched power to decide the question of release on bail. The provision ought to be read in conjunction with other provision of section 60 of Act 51 of 1977.
24. The concept “interests of justice” is not statutorily defined, but it meant nothing more than unusual factors that must be taken into consideration in bail applications (*S v De Kock* 1991
- (1) SACR 299 (T)).
25. It was required for the state to establish the existence of jurisdictional factors stated in terms of section 60(4)(a)-(e) for
- the appellant to be refused to be permitted to bail. However, it must be noted that the grounds listed, do not mean that it is an exhaustive list.
26. The appellant provided the address that he used to reside at the time of his arrest. The lease agreement he concluded with the owner of that flat is no longer in place as the appellant defaulted on his obligations to pay rental money because of his incarceration. The appellant also provided the address of his brother in Centurion, which was confirmed by the Investigating Officer after he visited that address. He could not access the room in that address wherein it was stated that appellant would stay in as apparently his girlfriend took

the key to that room.

27. Further address visited by the Investigating Officer was the address of Melissa Motau, appellants current girlfriend who confirmed that the appellant was not residing at that address, but he would come and visit there. It was argued by Mr Forbay that the Investigating

Officer was given wrong instructions when he visited that address, because it is the appellant's contention that the address will be his address if he is released on bail. This was the position before the presiding Magistrate invoked the provisions of section 60(3) for further leading of evidence or information.

28. Based on that, I fail to understand why the appellant did not obtain a further affidavit from Ms Motau confirming the version of the appellant, bearing in mind that the matter was adjourned to a later date by the presiding Magistrate for that purpose. In contention Mr Forbay could not also give the reason as to why a further affidavit was not obtained from Ms Motau to confirm the appellant's version. At the time of hearing of the appeal matter, we only had the affidavit of Ms Motau confirming that the appellant is not staying at her address, but he would come and visit.

29. It is also not clear as to where the appellant is to reside if released on bail. I also fail to understand why the appellant's

brother's address was provided if indeed the appellant was to reside with his girlfriend if he was released on bail.

30. The appellant's status according to the Department of Home Affairs is that of a person who is illegal in the country. There is currently nothing in the appellant's version to gainsay that. The review application against such decision, despite being issued in 2022, nothing has been done to prosecute it. According to Home Affairs records, the appellant's application for a temporary residence status was rejected on the 5 March 2020, meaning that at the time of his arrest in 2022, the appellant knew that he was in the country illegally. The review application was only attended to after his arrest.

31. Revised Consolidated Practice Directive 1 of 2024, court operations in the Gauteng Division (with effect from 26 February 2024 amended on 12 June 2024) makes it peremptory for all notice of motion (review application) issued to Caselines and issued on Court Online portal. The directive also makes it peremptory for litigants to upload original notices to either Caselines or Court Online (whichever platform is applicable to the relevant case in terms of the directive).

32. Directive 6.9 makes the following provision;

“[6.9] In the event of non-compliance or partial compliance with any provision in a statute or by a Rule of court to serve and file court process and/or deliver any document ancillary thereto and which is attributable to strictness imposed by this directive, its implications for the litigant or litigant’s legal representatives, condonation where required, shall be granted by a court in respect of any shortcomings in compliance.”

33. No explanation has been proffered by the appellants failure to upload documents to Caselines or Court online as prescribed by the court’s directives and no further steps were taken to remedy such non-compliance, as such the case number has now been allocated to different parties.

34. In *S v Acheson* 1991 (2) SA 805 at 822A-B, the court stated that;

“An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court. The court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice.”

35. At the time of the arrest of the appellant drugs were found in a garage which is under his name and control. Such drugs were tested and had a positive result from the forensic laboratory. The appellant was at the time of the bail hearing not yet arraigned on a charge of possession of drugs. If careful consideration can be made on how the charge of Trafficking Persons against the appellant is crafted, it is clear that it is alleged that, appellant is arraigned for the abuse of vulnerability and making his victim(s) to be “drug depended.” It shows that the possession of drugs complete the required elements of that particular charge.
36. The rescued victims were not found at the appellant’s flat when they were rescued but elsewhere in that building. DNA results are still outstanding and from what is presented on behalf of the state, it is not clear as to how the appellant is linked to the two victims who were rescued.
37. It might be so that when an attempt was made to bribe the Investigating Officer, the appellant was in custody and did not directly participate in the commission of that offence. But the question that needs to be answered is, what were the three arrested individuals going to benefit by bribing the Investigating Officer? It is clear also from the Investigating Officer that the benefit was for

him to release the appellant and no other person arrested in the matter.

38. One of the people who was arrested is the brother of the appellant. The bribery allegations arose when the Investigating Officer went to verify the address of the appellant in Centurion which is the property owned by the appellant’s brother who was eventually

arrested together with his wife. It is also the Investigating officer's evidence that when he was obtaining the warning statement from the appellant, he requested the Investigating Officer to assist him and he construed that to mean that he wanted him to do something wrong, "helping him to get out of it or to pay him."

39. It is therefore my considered view that the presiding Magistrate did not misdirect himself when making a finding that the appellant was in the country illegally. Further that he does not have a confirmed address, and it is not known where he will be staying if released on bail. Finally, that the state has a strong case against the appellant and there is no need for this court to interfere with such finding. This appeal ought to fail.

ORDER

In the result, the following order is made;

1. Appeal against the refusal of the Magistrate to release the appellant on bail is hereby refused.

M.J. MOSOPA

JUDGE OF THE HIGH

COURT, PRETORIA

APPEARANCES:

FOR THE APPELLANT : MR FORBAY INSTRUCTED BY : FORBAY ATTORNEYS INC FOR THE
RESPONDENT : ADVOCATE ROOS INSTRUCTED BY : THE DIRECTOR OF PUBLIC PROSECUTIONS
Date of Hearing : 25 October 2024 Date of Judgment : 29 November 2024

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