

SOUTH AFRICA / JUDGMENT

Mpofu v S (Bail Appeal) (CAB2/2025)

[2025] ZANWHC 143 (10 March 2025)

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COURT

North West High Court, Mafikeng

BEFORE

J T Maodi

CASE / FILE NUMBER

CAB2/2025

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

CASE NO: CAB 2 – 2025

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

KUDAKWASHE MPOFU

APPLICANT

and

STATE

RESPONDENT

BAIL APPEAL

CORAM : MAODI AJ

DATE HEARD:

21 FEBRUARY 2025

DATE OF ORDER:

28 FEBRUARY 2025

DATE FOR REASONS: 10 MARCH 2025

ORDER

The appeal against the refusal of bail is dismissed.

REASONS

MAODI AJ

Introduction

[1] This appeal is brought pursuant to the magistrate at the Mmabatho Magistrates Court refusing the appellant to be admitted to bail. It is common cause that the appellant is charged with two counts of fraud, both relating to being in possession of a fraudulent permanent residence permit and relating to two different incidents. It is further common cause that the charges fall within and are governed by Schedule 5 of the Criminal Procedure Act, 51 of 1977 as amended. The matter appeared before the magistrate over a few days for bail application. The appellant led evidence through his affidavit (exhibit “A”) supported by a police docket under Pretoria Central Cas 346/03/2024 as (exhibits “B”) respectively. The state presented evidence viva voce and by affidavit. Colonel Kgekoane testified for the state, while an affidavit of Emmanuel Meela was handed into record as exhibit “C”.

Appellant’s grounds of Appeal

[21] The grounds of appeal are contained at paragraphs 1 to 3 of the notice of appeal as follows:

2.1 The learned magistrate erred in coming to the conclusion that there is a likelihood that the appellant if he were released on bail, will attempt to evade his trial, in one more or all of the following

respects:

2.1.1 The learned magistrate concluded when denying the appellant bail that there is evidence that the appellant is a flight risk because he is illegal in the country.

2.1.2 The learned magistrate further concluded when denying the appellant bail that the appellant’s permanent residence permit is fraudulent, that he might even cross the borders without authorities noticing same.

2.1.3 The learned magistrate erred and misdirected herself in ignoring and failing to consider the following undisputed evidence adduced by the appellant.

2.1.3.1 The fact that the appellant was previously charged with the same allegations of fraud by the same SAPS at the Pretoria Central Police Station under cas number: 346/03/2024.

2.1.3.2 The fact that with respect to the Pretoria Magistrate's Court charges, on Tuesday, 19 March 2024 the investigating officer visited the appellant at his home in Mafikeng, North West Province and informed the appellant that a criminal case of fraud had been opened against the appellant by the Department of Home Affairs and that the appellant was expected to make his first appearance at the Pretoria Central Magistrate's Court on Wednesday, the 20 March 2024.

2.1.3.3 The fact that the appellant's attorneys and the appellant made the necessary arrangements with the investigating officer for his official handing over to SAPS at Pretoria Central Police Station on the 20 March 2024.

2.1.3.4 The fact that the appellant voluntarily travelled approximately 320km from his home in Mahikeng, North West to the Pretoria Central SAPS to hand himself over to the police for his arrest on the allegations of fraud as arranged and was subsequently detained and charged accordingly.

2.1.3.5 The fact that the appellant attended his trial until its finality on the 2 August 2024 when the state decided to withdraw the charges against the appellant at the Pretoria Central Magistrate's Court.

2.1.3.6 The fact that with respect to the current matter before the Mmabatho Magistrate's Court, the appellant was once again arrested at his home on the 28 June 2024 where he was previously arrested in March 2024 and detained at the Mmabatho SAPS and brought before Mmabatho Magistrate's Court.

2.1.3.7 The fact that the appellant co-operated with the Pretoria Central SAPS on the 19 and 20 March 2024 and the appellant's conduct in handing himself into custody is evidence enough that he is not a flight risk.

2.1.3.8 The appellant's evidence that he has absolutely no reason to flee and not attend his trial, because to do so, would render him a fugitive and when caught, he will be detained and not released due to the contravention of his bail conditions.

2.1.3.9 The fact that on the 20 March 2024, the appellant was arrested and made to appear before the Pretoria Central Magistrate's Court, where the appellant's bail application was postponed to the 26 March 2024 for formal bail application. Disgruntled by the postponement by the Magistrate's Court, he approached the North Gauteng High Court, Pretoria, for an urgent bail application, which application was heard by the Honourable Madam Justice Cowen, whom granted an order in the appellant's favour releasing the appellant on bail.

2.1.3.10 The fact that the appellant never contravened his bail conditions from when he was granted bail on the 21 March 2024 until his charges were withdrawn on the 2 August 2024, notwithstanding the fact that the state was alleging that he was an illegal immigrant at that stage.

2.1.4 The learned magistrate erred and misdirected herself in finding that the appellant is a flight risk because he is illegal in the country and ignoring and failing to consider the following:

2.1.4.1 The right not to be deprived of freedom arbitrarily or without just cause applies to all persons in South Africa whether they are there illegally or not (*Lawyers for Human Rights and Another v Minister of Home Affairs and another* [2004] ZACC 12; 2004 (4) SA 125 (CC) [also reported at [2004] JOL 12542 (CC) – Ed].

2.1.4.2 The state did not have the facts on which to base a reasonable belief that the appellant is a flight risk. The appellant's history does not show that he is a fugitive from justice in both South Africa and Zimbabwe.

2.1.5 The learned magistrate erred and misdirected herself in finding that the appellant is a flight risk because there is evidence that the permanent residence permit is fraudulent and ignoring and failing to consider the following:

2.1.5.1 The duty of the court in a bail application is to assess the prima facie strength of the state case against the bail applicant as opposed to making a provisional finding on the guilt or otherwise of such an applicant. Bail proceedings are not to be viewed as a full dress rehearsal for trial. The making of credibility findings of witnesses on the merits of the case against the accused is left to the trial court which is better placed to assess such witnesses.

2.1.5.2 The learned magistrate erred and misdirected herself in ignoring the fact that state in the Pretoria Magistrate's Court matter, when accepting the appellant's representations and withdrawing the charges levelled against the appellant on the 2 August 2024, accepted the appellant's version of events when submitting that the alleged fraud was committed by MRM and officials of Home Affairs and not by the appellant and consequently the state withdrawing the charges against the appellant.

2.1.5.3 The fact that the complainant in the Pretoria fraud allegations was a Home Affairs official, Mr Emmanuel Meela, where the charges relating to fraud were withdrawn on the 2 August 2025 and the same Home Affairs official, Mr Emmanuel Meela is again the complainant in the Mmabatho matter, alternatively has tendered evidence in opposition of the appellant's bail application.

2.1.5.4 The fact that there only exists one alleged permanent residence permit in both the Pretoria matter and the Mmabatho matter.

2.1.6 The learned magistrate erred and misdirected herself in finding that the appellant is a flight risk because according to the learned magistrate, the state witness testified that even though he is aware that it is said that the applicant has a house in A[...] V[...], same is still under investigation to confirm ownership and that the tracing of the appellant will be very difficult should he be admitted to bail, in light of one or more of the following respects:

2.1.6.1 The state is already in possession of an affidavit from Bushi Makgetla, a tribal headman of the Makgetla tribe, who deposed to an affidavit confirming that the appellant is the lawful owner of stand number: 2[...], Makgetla View (“A[...] V[...]”).

2.1.6.2 The learned magistrate ignored, alternatively failed to take into consideration the said affidavit of the tribal headman, Mr Bushi Makgetla, whose affidavit formed part of exhibit “B” accepted by the learned magistrate into evidence during the bail proceedings. A copy of the receipt/proof of payment by the appellant for the said stand is also attached to exhibit be, which the learned magistrate ignored.

2.1.6.3 Even if the appellant was not the owner of any immovable property and in the worst-case scenario, did not possess a title deed as required by the learned magistrate, ownership or property or the possession of a title deed is not a ground upon which a bail court can deny an accused bail for.

2.2 The learned magistrate erred in not finding that the particular circumstances in the case of the appellant are not circumstances contemplated in Section 60(4) of the Act, which can be considered as an indication that the interests of justice does not permit the appellant’s release on bail.

2.3 The learned magistrate erred in not properly weighing up the interests of justice against the right of the appellant to his personal freedom and the prejudice he is likely to suffer if he was to be kept in custody when considering the existence of special circumstances and coming to the conclusion that the appellant did not

adduce evidence which satisfied the court that the interests of justice permit his release on bail”.

The State’s response can be summarised as follows:

[3] The appellant is illegal in the country because he was found in possession of fraudulent permanent residence permit and he used it for various reasons including applying for employment within the country. The said permit was not processed and issued by the Department of Home Affairs. It is not in dispute that the appellant is illegal in the country. There is evidence that the appellant is a flight risk because he is illegal in the country and his permanent residence permit is fraudulent. That he might even cross the country without the authorities noticing him.

Evidence presented at Court

[4] An affidavit by the appellant states that he is an adult male who resides at 0[...] A[...] V[...], Mahikeng, North West Province. He is unmarried with one dependent minor child, a girl who is two (2) years old. He is currently unemployed having, resigned from his employment at the North West Development Corporation (NWDC) as the Chief Financial

Officer (CFO) on the 17th March 2024. He was born on the 21st September 1991 in Zimbabwe and obtained a study permit in 2011 to study in the Republic of South Africa (RSA) and during January 2011, he entered the RSA for purposes of pursuing his studies. He studied Bachelor of Commerce in Accounting at the University of Johannesburg where he obtained his undergraduate degree in 2013 and his honours degree in 2014. Post tertiary studies, he underwent training of articles in the profession of chartered accountancy in the North West Province during the period 2015 to

2018. At the time he completed his articles in January 2018, he had already passed his board exams in 2015/2016. He practiced as a Chartered Accountant until he was appointed at the NWDC as an Asset Manager in 2021. In June 2023 he was appointed CFO at NWDC. A job he held until he resigned on the 17th March 2024.

[5] The interests of justice permit his release on bail. Further that the dictates of fairness and justice, in view of the peculiar facts herein, warrant that he should not be deprived of his liberty and that he should be released on bail. He has been residing in South Africa since 2011 and was granted permanent residence by the Department of Home Affairs on the 15th October 2018 and he has no intention to relocate to any other country. He owns property in South Africa which consists of a house

at 0[...] A[...] V[...], Mahikeng. He owns movable assets comprising of household furniture and effects, which are valued in the amount of approximately R 150 000, 00. He owns vehicles, to wit: a Ford Ranger Wild Track 2019 model; a BMW 320i 2017 model; and a Range Rover Sport 2020 model with a collective value of R 1, 2 million. His friends and family reside in RSA as well as in Zimbabwe. He does not have any other pending cases except the matter which he is appearing for in this court. He does not have any previous convictions.

[6] He deals with issues relating to him and the Minister of Home Affairs, Dr Aaron Motsoaledi. He states that the High Court in Gauteng, Pretoria have an order against the Minister of Home Affairs to show on affidavit why it is said he is not in possession of a valid and authentic permanent residence permit. He denies that he committed any fraud in the issuing of his permanent residence permit. When he appointed the services of an agent to lodge the permanent residence permit application with home affairs, he was informed that his application was successful and duly issued. Therefore, if there is any fraud that might have been committed, it was committed by officials of the Department of Home Affairs. He was charged with the same offence at the Pretoria Central Magistrates Court on the 20th March 2024. He was made to appear at the Pretoria Magistrates Court where he applied for bail, but his application was postponed to 26th March 2024. Disgruntled by the postponement, he approached the North Gauteng High Court, Pretoria for an urgent bail application which was heard by Honourable Madam Justice Cowen, who granted an order to release him on bail. on the 2nd August 2024 the state withdrew the charges against him after his representations were successful.

- [7] He further stated that, because he was charged in Pretoria and the said charges were withdrawn, this is double jeopardy and constitutes a review by the North West DPP of decisions of the Gauteng DPP, which is not allowed. He is not a flight risk as he attended his trial in Pretoria until it was withdrawn. He was arrested at his home in Mahikeng. This coupled with the fact that under the Pretoria case, he travelled 320kms to hand himself over to the police. He has co-operated with police on all matters. He does not know the identity of witnesses upon whom the state will rely. He has no intention to interfere with witnesses. He has good relations with people. He is not disposed to violence. He should be released on warning instead of fixed amount.
- [8] Lieutenant Colonel Molo Gerson Kgekoane testified for the state. He is employed by the Directorate for Priority Crimes Investigations (DPCI) commonly known as the Hawks. He had just been promoted to the rank he holds. He opposed bail as the appellant is a flight risk. Appellant is illegal in the country and there is likelihood that he might evade trial. Appellant is a Zimbabwean. Looking at the borders of our country, the appellant can easily go back to his country without the authorities noticing him. The appellant is facing serious charges of fraud, defrauding the government over an amount of R 3 million. He does not know how long the appellant has been in the country. According to home affairs the permit is fraudulent. The fraud happened at North West Development Corporation. He is aware that the appellant stood trial in Pretoria but thinks it was for immigration laws.
- [9] The appellant currently stays in Mmabatho and that is where they arrested him. He does not remember the house number but the place is called A[...] V[...], Mmabatho. He does not know who the appellants stays with, but thinks the appellant stays alone. He does not know if the appellant owns property. The appellant does not have previous convictions, and is unemployed. It will be very difficult to trace and locate the appellant as he is illegal in the country. He is a foreign national. Appellant does have a passport but he is not sure if the passport was valid or not. His understanding is that the document was fraudulently obtained and therefore he regards the appellant as an illegal immigrant, but when it comes to whether the appellant is a prohibited person, only the Department of Home Affairs officials should confirm that. Under cross examination he confirmed that his major concern about the appellant is that he is a flight risk because the appellant is an illegal foreigner.
- [10] The second witness for the state was Emmanuel Meelo, whose affidavit was read into record. He is an adult male immigration officer and investigator employed by the National Department of Home Affairs. Part of his duties is to deal with

aspects of the clearance of persons applying for admission to the Republic of South Africa of which the first step is always the

determination of the validity of their travel documents and other supporting documents, and the identification of the person presenting

the passport and/or travel document. An immigration officer has three aids to make such identification, i.e- the comparison of the photograph, the comparison of a signature and the classification of a fingerprint, and broad comparison to determine whether there is reason to believe that the fingerprint is different or similar. The same applies to the signature and photograph.

[11] He gave findings by the Department of Home Affairs as to why the appellant is illegal in the country and why the permanent residence permit is fraudulent. Further that the appellant is a prohibited person in terms of the laws of the Republic of South Africa. Their investigation revealed that the appellant never applied for a permanent residence permit. Pursuant to the application brought by the appellant in February 2023 against the Minister of Home Affairs, the department decided not to oppose the application, but to investigate the matter and inform the appellant in line with prayer 1 of his notice of motion. The said investigation was done and a decision on the validity and authenticity was made, that the permanent residence permit provided by the appellant was obtained fraudulently. This was communicated to the appellant.

[12] With regard to the bail issue, he referred to contraventions of the Immigration Act as constituting criminal

offences, specifically an illegal foreigner buying or renting property and harbouring or accommodating an illegal foreigner. Based

on this, it is his conclusion that the appellant is a flight risk as he is a prohibited person and is not in possession of any valid documents to be in the Republic.

Judgment by the Court a quo

[13] The court a quo found that the appellant is facing charges of fraud which are governed by Schedule 5 which directs that the test is whether the interests of justice permit the release of the accused on bail or not. That the appellant has no history of defaulting in the matter (the Pretoria case) and the appellant has no previous convictions or pending cases. The appellant resigned and as such does not have occupational ties at this stage. There is evidence that the appellant is a flight risk because he is illegally in the country. His permanent residence permit is fraudulent, that he might even cross the borders without authorities noticing same. The court a quo is not satisfied that the appellant has discharged the onus to prove that the interests of justice permit his release. Therefore, the application for his release was denied.

Analysis of bail refusal

[14] Section 65(4) of the Criminal Procedure Act is the relevant section in consideration of bail appeals, and it provides as follows: “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.”

[15] In *S v Barber* 1979 (4) SA 218 (D) at 220 E – H the court held as follows: “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 magistrates who had the discretion to grant bail exercised that discretion wrongly.”

[16] In *Panayiotou c S* (CA & R 06/2015) [2015] ZAECHGC 73 paragraph 27, it was stated that: “...In order to interfere on appeal it is accordingly necessary to find that the magistrate misdirected himself or herself in some material way in relation to either fact or law (see *S v Ali* 2011 (1) SACR 34 (E) at paragraph 14, cf. also *S v M* 2007 (2) SACR 133(E)). If such misdirection is established, the appeal court is at large to consider whether bail ought, in the particular circumstances, to have been granted or refused. In the absence of a finding that the magistrate misdirected him or herself, the appeal must fail.”

[17] Section 60(11)(b) provides as follows:

S 60

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

(a) ...

(b) 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.”

[18] In casu, information in favour of the appellant, as placed before the court a quo, is that he has a minor dependent child, he attended the Pretoria court without absconding, he has no previous convictions or pending cases and has an address in Mahikeng. His defence is also that he sourced the services of an agency to apply for his permanent residence permit. He has movable and immovable property in Mahikeng.

[19] The court a quo found him as a flight risk. Hence the refusal of bail. I cannot interfere with the said finding, unless I am of the view, and given the information before me as the court of appeal, that the court a quo was wrong. The appellant has to show that the court a quo did not consider that it was in the interests of justice that he be released on bail. On the other hand, the state had to establish one or more of the grounds set out in Section 60(4).

[20] I have considered the provisions of Section 60(4) and the judgment of the court a quo. I agree with the court a quo that the provisions of Section 60(4)(a) are not relevant for this matter. I will deal with the provisions of Section 60(4)(b) later. The elements of Sections 60(4)(c); (d) and (e) are also not applicable to this matter as no evidence in respect of same was adduced at the court a quo.

[21] Section 60(4)(b) is the clause which was applied by the court a quo. I am prompted to deal first with the provisions of Section 60(6) which provides as follows:

“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 occupational 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, if any, 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 borders of the Republic in an attempt to evade his or her trial;
- (f) The nature and 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 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
- (j) Any other factor which in the opinion of the court should be taken into account.”

- [22] It is trite that detention should not be used as punishment. In bail applications the detainer bears the duty to justify the detention, however, the accused bears the onus to prove exceptional circumstances and/or that it is in the interests of justice that he be released on bail. Amongst other issues like interference with state witnesses in a criminal trial, securing the attendance of an accused person to court or trial is one of the primary factors in consideration of bail.
- [23] Although the appellant has informed the court a quo that he has a minor dependent child, he does not tell the court where the child stays and with whom the child lives. Whether the said child is in the Republic of South Africa or in Zimbabwe remains a mystery. The names of the child are not even mentioned. It

was not placed before the court a quo whether the child lives or stays with her mother, maternal or paternal family or whether the child stays with the appellant himself. Since it has been alleged that the minor child is dependent, as to who supports the minor child was not placed before the court, since the appellant is unemployed. With regard to family in South Africa and some in Zimbabwe, not much information was placed before the court a quo. I do not know who is the family referred to who are in South African and who are in Zimbabwe. Is it the appellant's father, mother, siblings or relatives? Such information was not provided. Therefore the appellant has not established any family, emotional or community ties in the Republic of South Africa.

- [24] With regard to his employment, the appellant resigned from his job at NWDC on the 17th March 2024, but has not placed any information before the court a quo as to the reasons for his resignation. The appellant has also confirmed that he remains unemployed to the date of bail application and appeal. The appellant has not stated whether he has any intention of securing another employment in RSA and the basis on which he will be allowed to hold a job in RSA, given the allegations of the status of his documents and his own status as a person in the RSA. The statement by the appellant that he was issued a permanent residence permit by the Department of Home Affairs is false and wrong, because the appellant has himself admitted that the permit at issue is a fraudulent one and is not valid. His defence is that he was not involved in the commission of the said fraud as he instructed an agency which sourced same for him. The issue of passport was not properly canvassed at the court a quo. As it is I do not know if the appellant has a valid passport or not. However, Emmanuel Meelo, (Immigration Officer employed by the Department of Home Affairs), whose affidavit was handed into record as exhibit "C" informed the court a quo that the appellant is not in possession of any valid documents and is a prohibited person. This information was not challenged by the appellant. How then was the court a quo expected to admit the appellant into bail and stipulate bail conditions with information such as this in front of it? Therefore, I find that the appellant has not established any occupational ties to the RSA, and his travel documents are not restrictive of him to evade trial.

[25] The evidence adduced by the appellant to the court a quo on the value of his assets, both movable and immovable, is not satisfactory. The said assets are of insignificant value for him not to worry about losing. Since the appellant is unemployed and he has sought to be released on warning, no amount of bail to be

fixed can assist his course as no information to that effect has been placed before the court a quo and even to this court. Therefore, the appellant has not provided a satisfactory case on his assets and bail to be fixed as a consideration for his admittance to bail and the implications of his loss of same should he evade trial and flee the country or from the authorities.

[26] The appellant is facing serious charges which fall under Schedule 5. If convicted he is facing a lengthy committal sentence. With the appellant having admitted that the permanent residence permit which was found in his possession is fraudulent, the state's case, although still having to be proved against him personally, is strong. This, coupled with all factors I have highlighted above, especially that the appellant has not proven bonds or ties with the RSA, might weigh heavily on him to influence him to flee the country, thereby evading his trial. The appellant has not established any evidence that shows that it is in the interests of justice for him to be released on bail.

Conclusion

[27] I am therefore satisfied that the court a quo was not wrong and the magistrate did not misdirect herself on the provisions of Section 60(4)(b).

Order

[28] I therefore make an order as follows:

1. The appeal is dismissed.

J. T. MAODI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

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