IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION MAKHANDA)

REPORTABLE
CASE NO: CA&R 180/2024

In the matter between:

MAKIDU AFALI **Appellant**

And

THE STATE **Respondent**

BAIL APPEAL JUDGMENT

MHAMBI AJ

PREAMBLE

WHEREAS the Republic of South Africa has acceded to the 1951 Convention relating to status of refugees, the 1967 protocal relating to the status of refugees and the 1969 Organization of African Unity Convention governing the specific aspects of refugee problems in Africa as well as other human rights instruments, and has so doing assumed certain obligations to receive and treat in it's territory refugees in accordance with the standards and principles established in Internal Law[1]:

INTRODUCTION

1. This is an appeal against the refusal by Magistrate in Makhanda, to admit the appellant to bail. The bail proceedings and the judgment thereof, that is the

[1] See Preamble to the Refugees Act, 130 of 1998.

subject of this appeal were heard on 24 September 2024 and the Magistrate delivered judgment, *ex temporae* on the same day.

2. The Appellant is a Malawian National, he was charged of contravening Section 49(1) (a) of the **Immigration Act 13 of 2002, (the Act)** in that he entered and remained within the Republic of South Africa, illegally. Section 49 (1) (a) of act states that:

49. Offences

(1)(a) anyone who enters or remains in, or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years.

3. In dealing with bail appeal this court has to conform with Section 65(4) of the Criminal Procedure Act[2], **the CPA**. The CPA in Section 65(4) provides that a Court hearing an appeal against the bail refusal will not set aside the decision of the Magistrate unless such court is satisfied that the decision was wrong either in both facts and the law .

THE APPEAL

4. Clearly, the test for interfering with the Magistrates Judgment, is whether the *court quo* misdirected it'self in a material way in relation to facts or the law[3].

5. In **S v Barber[4]**, the Court states as follows:-

"It is well known that the powers of this court are legally limited where the matter comes before it on appeal and not as substantive application. This court has to

[2] See 51 of 1977
[3] See Spaneyiotou V S, CA and R , 06 2015, 2015 ZAEC GHC 73 para [26] –[27] (unreported judgment).
[4] See 1979 (4) SA 218 (D) at 220 E-H. see also S v Branco 2002 (1) SACR 531(WLD) at 5331

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 unfair interference with the Magistrates exercise of its discretion. I think it should be stressed out that, no matter what this Court's own views are, the real question is whether it can be said that the Magistrate who had discretion to grant bail but exercised that discretion wrongly".

6. If such misdirection is established the appeal court is at large to consider whether bail ought to have been granted[5] or refused, and in the absence of a finding that the Magistrate misdirected himself/herself the appeal must fail.

7. In **S V Schieteket[6],** the Court held that:

"The grant or refusal of bail is a discretional decision under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted".

8. The power of the court of appeal in dealing with bail appeal has been dealt with in number of decisions, supporting the approach in **BARBER.** In **S v ALI,** the Court held that:-

"In order to interfere an appeal, it is accordingly necessary to find that the Magistrate misdirected himself or herself in some material way in relation to fact or law".

9. In **S v Porthern and Others**[7], the Court held that:-

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[5] See 1999 ZACC 8, 1999 (2) SACR 51 (CC) 88H-1, 89E and 90B-D
[6] See 2011 (1) SACR 34 (E) at para 14 see also S V M, 2007 (2) SACR 133 (E)
[7] See 2004 (2) SACR 242 (C) at para 11

"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 himself or herself the appeal must fail".

THE FACTS OF THIS CASE

10. The appellant is a Malawian National, he was arrested on 22 August 2024, he is charged with one count of contravening **Section 49(1) (a) of the Immigration Act 13 of 2002.** During the bail proceedings in the court a quo both the State and the defence agreed that the offence falls under schedule 1 of the CPA.

11. The State therefore had the onus to satisfy the court that the interests of justice did not permit the release of the appellant on bail.

12. The factors that the court *a quo* had to consider in determining the interests of justice are outlined in Section 60(4) of the CPA. According to this 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: -

d) where there is likelihood that the accused if he or she were released on bail, will undermine or jeorpadise the objections or the proper functioning of the Criminal Justice System, including the bail system.

13. In dealing with the above factors the court in **S v Branco**[8], **Cachalia AJ** said the following:-

"*The factors which the Court may take into account in determining whether any of the grounds described in Section 60(4) have been established, are set out in Section 60(8) of the Act. These factors are merely guidelines in*

[8] See 2002 (1) SACR 531 (WLD) at pages 533

*assisting the court in arriving at just decision they are not numerous clausus of the factors that a court may consider, (See **S v Stanfield 1997 (1) SACR 221 (C) at 226 (c- d)**. Nor are any of the factors individually decisive, some of them may be weightier than others, depending on the circumstances"*

14. Even though the concept " interest of justice" is not defined in section 60(14) the court in **Dlamini**, **S v Dladla and others, S v Joubert, S v Schietekot,**[9] per Krieger J, the concept "**interest 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 subsection S(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**" beares the same narrow meaning kin to the interest of the society" (or the interest of justice minus the interest of the accused) the interpretation of the whole section falls neatly into place".*

15. The State in it's oppositition of bail filed an affidavit deposed by **Khuselwa Maxhwele,** an immigration officer in the Department of Home Affairs. She described her normal duties as being responsible in respect of the apprehensive and removal of the illegal foreigners. According to her affidavit, she checked out the relevant Movement control systems (MCS) and found no records of the appellant's entry in the Republic.

16. She further states that at the time of appellant's arrest, the appellant was in possession of fraudulent and expired Malawian special permit, having expired on 30 December 2023.

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[9] See 1999 (4) SA 623, (CC) 1999 (7) BCLR 771 (3 June 1999)

17. The State conceded in the court a quo that it has no proof that the appellant's permit is fraudulent but the State insisted on the fact that the permit has expired since December 2023. The State accepted that the appellant has a valid passport which he used to enter the Republic but the appellant has not acted to renew the expired permit since December 2023. The State relied on that to say the interest of justice do not permit the release of the appellant on bail since, he is an illegal immigrant.

18. The apellant in his support to be released on bail filed an affidavit.

19. In his affidavit, amongst other things,he stated that he has a valid passport from Malawi which was issued on 06 September 2022 and will expire on 5 September 2032. According to his affidavit the original passport was confiscated by the immigration officers during his arrest but copy thereof was filed as an exhibit in court.

20. In that affidavit he disclosed his intention to apply for asylum. This was also confirmed by the legal practitioner who appeared on his behalf during the bail proceedings of the court *a quo*. According to the record the appellant sought be released out on bail to enable him to apply for asylum and that the State should release his passport as he cannot be assisted without it, for asylum application purposes.

21. It is worthy to note that the affidavit of the appellant do not disclose the reasons for late applying for asylum before expiring of his permit nor does it discloses good cause of the delay for his asylum application.

22. In it's refusal to release the appellant on bail, the court a quo considered that:

    (a) the appellant has disclosed intention to apply for asylum, that was noted in the appellant's affidavit.

(b) The appellant has valid passport, a valid special permit that expired on 30 December 2023.

(c) The appellant did not state any reason why from 2023, when his special permit expired, he did not apply for asylum.

23. According to the record, considering the evidence that has been tendered before the court a quo the court was of the view that it was not in the interest of justice that the appellant be released on bail. The court a quo considered the appellant as flight risk. Therefore the appellant's bail was refused.

24. The appellant, amongst other reasons for the appeal, has argued that:-

a) The Magistrate rejected the appellant's intention to apply for asylum.

b) The Magistrate did not consider the factors listed in ection 60 (4) (a) – (e) in order to determine, if it would be in the interest of justice for the appellant to be released out on bail.

c) The learned Magistrate did not consider Regulation 8 read with Section 21 of the Immigration Act, in that the Magistrate ignored the provisions that requires the appellant to present himself personally/physically at RRO Office to make an application for asylum.

25. I disagree with the appellant's argument that the decision of the Magistrate was wrong.

26. The main reason for the finding by the Magistrate was that he appellant was in the Country illegally, at the time of his arrest, as alleged special permit had expired. The appellant for a full period of about seven months did nothing to

have the special permit renewed or to apply for asylum as he sought to rely on that intention to apply for asylum as the sole basis for him to be released out on bail.

27. The Magistrate had emphasized in her Judgement that the appellant did not place any reason before the court why his asylum application had not been done for seven months, according to the record and from the Magistrate's judgment on bail application, the appellant was at the time of his arrest not in possession of a document validating his stay in this country.

28. In those circumstances to grant the appellant bail will allow him to continue his illegal sojourn in the Republic[10].

29. In **Oppressed ACSA Minority (1) (Pty) Ltd) and Another V Government of the Republic of South Africa and Two Others[11],** it was held that the court cannot perpetuate an illegality. The Magistrate was correct in her finding not to be in the interests of Justice to release out on bail appellant under circumstances where he had no legal documentation to be in the Republic.

30. The appelant's personal circumstances and his right to freedom and liberty was under the circumstances of this case outweighed by the interest of Justice, it would have been a miscourage of justice, or it would jeopidise the administration of justice had the Magistrate released out on bail someone with no legal documentation to be in the Republic.

31. The facts of this case are distinguishable with those in **Ulder v Minister of Home Affairs and Another (Lawyers for Human Rights admitted as AMicus Curiae)[12],** in this case, the court emphasized that, the applicant's status in the

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[10] Seej Oliver Freedom Eke V The State unreported judgment by Malusi J, Makhanda Case No: CA and R 94 2023, paras 11-15.
[11] See 2022 JDR [767] SCA at Para 17.
[12] See 2009 3 ALL SA 323 (SCA)

Country should not be used as a bar to his release on bail. The main purpose of granting bail is to secure the attendance of the bail applicant at Court pending finalization of the trial matter.

32. In this case, the appellant has no legal documentation to be in the Republic, it could not be said the Magistrate used the appellant's foreign status rather ealisng the appellant out on bail would defeat the same object of Section 49 of the Immigration Act, which the Magistrate correctly said it was not in the interest of justice to grant bail to the appellant.

33. Having said that,the argument by the appellant that the Magistrate erred in not considering his intention or expression to apply for asylum. The magistrate considered the appellants expression to apply for asylum, her decision to refuse bail was based on the fact that the interests of justice did not permit appellant to be released out on bail, the constitutional court has dealt with whether expression to apply for asylum makes detention of the accused unlawful or does that qualify his releasee out on bail, as I will demonstrate by authorities hereinafter. I have to consider the following question:

The Constitutional Court on the right to apply for asylum and whether that right grants the asylum seeker permission to be released from detention:

34. The circumstances of this case are distinguishable from the matters the Constitutional court has dealth with, in those matters, the Constitional court dealth with applications seeking for the release of the Applicant therein for several reasons, the matter before me is bail appeal, and it must be considered as such and not more than issues that were before the Magistrate when bail application was sought.

35. This matter is distinguishable with the matter of **Saidi and Others v Minister of Home Affairs and Others**[13], the Constitutional Court reasoned as follows:-

"An asylum seeker would be immune from prosecution while persuing an internal appeal or review. The immunity would end as soon as his appeal or review is finalized. However, upon completion of the PAJA review, with the court deciding that the applicant ought to have ben granted asylum, the immunity kick in again.

36. In this matter, the evidence before the Magistrate was that the appellant intends to apply for asylum not that he has applied for asylum and or intends to appeal or review a decision not granting him asylum. **SAIDI** does not apply to circumstances of this bail appeal.

37. The matter of **Ashebo v Minister of Home Affairs and Others,**[14] the central issue in this case was the applicant's right to apply for asylum in South Africa, after being in the country unlawfully for over a year.

38. The Constitutional Court, in **Ashabo**, had two critical issues to consider:-

a) The first, is the time afforded to an illegal foreigner to apply for asylum,

b) The second, is whether an illegal foreigner is entitled to be released from detention after expressing an intention to seek asylum while awaiting deportation until their application has been finalized.

39. The Constitutional Court has dealth with the first issue in two matters, the one is **Ruto v Minister of Home Affairs**[15] and the other is, **Abore v Minister of Home Affairs and Another**[16]**.**

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[13] See 2018 ZACC 9
[14] See 2023 (5) SA 382 CC, 2024 (2) BCLR 217 (CC judgment delivered on 12 June 2023
[15] See 2017 (3) BCLR 383 (CC), 2019 (2) SA 239 (CC).
[16] See 2022 (4) BCLR 387 (CC), 2022 (2) SA 321 (CC)

40. In both matters, the Constitutional Court has held that once an illegal foreigner has indicated their intention to apply for asylum, they must be afforded an opportunity to do so, and further that the delay in expressing that intention, does not bar the individual from applying for asylum. Thus, until an applicant's application for asylum, has been finally, adjudicated the principle of *non-refoulement* protects the applicant from deportation.

41. To answer whether the Applicant's expression of an intention to apply for asylum entitled him to be released from detention. The Constitutional Court answered in the negative. The Court held that there is no automatic right which entitles an illegal immigrant to be released from prison once they have declared their intention to apply for asylum. However, the court held that if the individual does express such an intention while in detention, the Department of Home Affairs must take all reasonable steps to facilitate the process of the application being made.

42. In sum, the reliance by the appellant's Counsel on the authorities I have analysed above, does not make the decision of the Magistrate to refuse bail of the appelant wrong. I agree with the respondent submission that pending the determination by the Immigration officer on whether the appellant has shown good cause for his entry and continued stay in the Republic, his detention is not unlawful, and the magistrates decision refusing appellant bail was correct.

CONCLUSION

43. The finding by the Magistrate refusing the appelant's bail application was correct.

44. The Respondent has a duty to take all reasonable steps, within reasonable time, and assist the appellant to appear before the Refugee Reception Officer of the Department of Home Affairs, nearest to where the appellant is detained, in order

to show good cause for his entry or illegal stay in the Republic as required by Regulation 8(3) of the Refugees Act, and affirmed by the constitutional court.

45. In consideration of the interests of justice as this court has such powers, afforded to it by Section 173 of the Constitution,[17] the following order issues:-

ORDER

1. The appellants bail appeal is dismissed.

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M. MHAMBI

ACTING JUDGE OF THE HIGH COURT

Date Heard:	**30 October 2024**
Date Delivered:	**01 November 2024**

APPEARANCES

Counsel for the appellant:	**Mr Solani**
Instructed by:	**Legal Aid**
Counsel for respondent:	**Mr Govender**
Instructed by:	**National Prosecuting Authority**

[17] See The Constitution of the Republic of South Africa, 1996.