

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A 200/2019

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3)

27/1/2020
DATE

[Signature]
SIGNATURE

In the matter between:

OLANTUNJI, SAMSON ABDUL

Appellant

and

THE STATE

Respondent

JUDGMENT

MIA, AJ

- [1] The appellant appeals against the refusal of bail by the Regional Magistrate sitting in the Special Commercial Crimes Court, at Palmridge on 30 October 2019, charged with theft of R7 856, 000.00 and contraventions of sections 4 and 6 of the Prevention of Organised Crimes Act 121 of 1998.

BACKGROUND

- [2] The appellant and his co-accused submitted affidavits which informed the court a quo that the appellant and the co-accused were as unknown to each other. The co-accused was unemployed. The co-

accused was enlisted to open a bank account with documents which proved to be different to the address at which he was residing. He had recently moved from Pongola to Johannesburg. The amount of R7 856, 000.00 was deposited into this account. The appellant used the co-accused card to make various purchases despite not knowing him.

[3] The appellant was arrested and requested the police accompany him home without embarrassing him in public. Both the appellant his co-accused tendered evidence by way of affidavit to satisfy the court *a quo* that it was in the interests of justice that they be released. The appellant produced a valid passport and two expired passports. The evidence indicated that he recently commenced renting accommodation in Midrand. He paid the deposit and paid six months rental for the accommodation in advance. Prior to this he does not appear to have had a fixed address. He has a pub registered on his name trading as Hydro Lounge and appears to have interests in other business activities where he is not registered as a partner according to CIPC records. He is not married, however he lives with a partner and their children.

[4] The State's evidence entailed the oral evidence of the investigating officer and an affidavit of the previous investigator. The evidence also referred to video footage showing the appellant purchasing items using the card issued to his co-accused who was unknown to him. He purchased large quantities of alcohol and various luxury items from various stores, including laptops and watches using the card and punching in the pin number. A large sum of cash in the amount of R710 000.00 was found at his home. The investigating officer testified that he submitted a copy of a Ghanaian passport at Solly Kramers in Parkhurst which bore his photograph and the details of another person. Further a copy of an Angolan passport bearing the details of a third person was found on his cell phone. The picture of such person bore no resemblance to the appellant. Based on the evidence before it the court *a quo* refused bail.

[5] Mr Dingiswayo appearing for the appellant argued that the court a quo misdirected itself on a number of issues as follows:

1. It had admitted evidence when objections were raised and relied on such evidence to refuse bail and accepted such evidence as indicative of the appellant's propensity to commit crime. He argued that this should not have been permitted.
2. The strength of the State's case lay against six suspects whilst only two persons appeared on the day. The co-accused was the lawful account holder. The State had conceded that the appellant and the co-accused were unknown to each other. The appellant did not send the email to the bank requesting the change of banking details and consequently there was no case against the appellant. He submitted that the only offence the appellant could be charged with was the use of the proceeds of the card.
3. The appellant has a fixed address. He has ties to the Republic. The issue of his passport is a non-issue as two are expired and one is valid. Mr Dingiswayo argued that the appellant denied having a Ghanaian passport and informed the court that his instruction was that someone else had submitted the copy of the Ghanaian passport to Solly Kramer, not the appellant.
4. The suggestion of imminent charges was premature as the investigation had not been complete and the appellant was facing only one matter.
5. The appellant was not a flight risk as he has businesses in Sandton. He is well known at all the stores he conducts business with and if indeed there were charges against the appellant, then the investigating officer could have finalised that investigations and charged the appellant.
6. The prosecutor withdrew the statement of the investigating officer who had previously investigated the matters. There was thus no evidence of a *modus operandi* which the State sought to

prove linked the appellant to other crimes and indicated a propensity to commit crimes.

[6] In view of the above Mr Dingiswayo argued that arresting the appellant and setting the matter down for bail was premature. The appellant has a fixed address and a valid passport. He is not a flight risk and bail ought to be set in an amount determined by this Court.

[7] Mr Makgogoba appearing for the State argued that in a bail application ordinarily inadmissible evidence such as hearsay may be received. Thus Mr Dingiswayo's argument that it is inadmissible is unfounded. He argued further that the submissions regarding the J50 should be viewed from the view that the J50 carried more weight than that argued by Mr Dingiswayo. A J50 is only issued when an offence is committed. The matter cannot be placed on the roll until the person is arrested and hence the reason for the J50. Thus the J50 implies there is a pending matter. The J50 indicated the Cas number where the investigation was being completed. That there was another matter involving the same person indicated a propensity to commit crimes. This issue was relevant to the determination of bail. He argued further that the investigating officer testified that he could take the appellant into custody on that matter that day or the following day inferring that a further arrest was imminent. Mr Makgogoba informed this court that the J50 had in fact been executed over the weekend and on the appellant was charged with further offences which had been remanded for further investigation. He had informed Mr Dingiswayo about the matter before the current proceedings commenced.

[8] He argued further that the strength of the State's case was evident from the charge that the State alleged that it was a syndicate at work. There was a meeting of minds of more than one person. The evidence to support this was tendered when the investigating officer referred to the video footage of the appellant making purchases and using the

card of the co-accused and punching in the pin numbers. It was apparent that he received funds and goods. The evidence was uncontested that the appellant is well known as Hydro and has been shopping in this fashion for at least two years. Mr Makgogoba argued that the appellant's use of the proceeds also supported the State's case. The purchase at Solly Kramers was delivered to his own establishment.

[9] Mr Makgogoba also argued that the appellant was a flight risk as he had access to different passports. He had a valid passport and still presented a copy of a Ghanaian passport bearing his photo with a different name. Whilst Mr Dingiswayo argued that it was handed in by another person the record indicated on p75 that the appellant handed in the copy of the passport. He also had a copy of a third passport of another person on his phone. This suggested there was a further charge of the presentation of a false or fraudulent passport. He argued that the State's case against the appellant was overwhelming against the appellant contrary to Mr Dingswayo's submissions in this regard.

[10] He argued that it was not true that the appellant had strong ties to the Republic. The appellant had registered the pub in his name but apart from this business he had no assets moveable or immoveable in the country. He was only residing at the current premises for four months despite being in the Republic since 2009. None of the vehicles he drove were registered in his name. Having regard to the discrepancy regarding his identity and the passports he presented; that he had no assets in the country; there was a J50 which was pending and had since been executed and finally the strength of the State's case was strong it the conclusion was inevitable that the appellant was a flight risk and had a propensity to commit crime.

[11] In determining an appeal against the refusal of bail this Court has regard to section 65(4) of the Criminal Procedure Act 51 of 1977("the

Solly Kramers and as captured in the video footage. The explanation tendered by Mr Dingiswayo that someone other than the appellant handed in the copy of the Ghanaian passport bearing the appellant's photo was new evidence tendered from the bar. It was never put to the investigating officer. As Mr Makgogoba argued the record indicated that the appellant handed in the passport. Mr Dingiswayo argued that the photo was not clear enough to identify the appellant. The exhibit forming part of the court record was clear and Mr Dingiswayo was unable to explain why it was never put to the investigating officer that the appellant could not be identified from the exhibit handed in. The picture is clear and not of a poor quality to prevent identification as suggested by Mr Dingiswayo.

[16] The suggestion that there is no pending cases or that this was misdirection by taking same into account does not take into account that the previous investigating officer's affidavit was withdrawn. The J50 remained a part of the evidence. The investigating officer's testimony that he could arrest the appellant then was not challenged up to the date of the bail appeal. The result is that the J50 has been executed and the appellant has been arrested on another matter. For the purposes of this matter I cannot take into account the arrest, however the *court a quo* was correct in attaching weight to the J50 and noting that there was a pending matter.

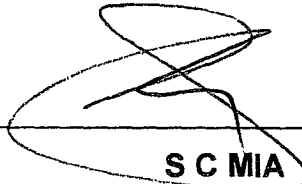
[17] In deciding the issue of bail on appeal this Court must be persuaded the *court a quo* exercised its discretion wrongly. In the event this Court holds a different view it may not substitute its discretion for that of the *court a quo*. Having considered the evidence placed before the *court a quo* as well as the further submission made by counsel for the appellant and the State, I am not persuaded that the *court a quo* erred or misdirected itself in exercising its discretion. Mr Makgogoba has been persuasive in his submissions as reflected above. In contrast Mr Dingiswayo pointed out misdirection's which he did not clarify during the bail proceedings and when he did attempt to do so on appeal it

became apparent that the issues were non issues and the record showed a different version to one he sought to put forward from the bar. The appellant is a flight risk and there appear to be a propensity to commit similar crimes. It is not in the interests of justice that he be released.

ORDER

[18] In the circumstances the following order is made:

1. The appellant's application for bail on appeal is dismissed.
2. The appellant shall pay the costs of this application.

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by 'C MIA', is written over a horizontal line.

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appearances:

On behalf of the applicant	:	Adv. ES Dingiswayo
Instructed by	:	Menye Attorneys
On behalf of the respondent	:	Adv. RM Mogagabe
Instructed by	:	The State Attorney
Date of hearing	:	21 January 2020
Date of judgment	:	27 January 2020