

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A29/2022

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: <i>No</i>
(2)	OF INTEREST TO OTHER JUDGES: <i>No</i>
(3)	REVISED.
..... DATE	<i>[Signature]</i> SIGNATURE

In the matter between:

PURESS, PAPY BABU

Appellant

and

THE STATE

Respondent

Heard: 20 APRIL 2022

Delivered: 26 APRIL 2022

JUDGMENT

KARAM, AJ:

- [1] The appeal in this matter was argued on 20 April 2022. Mr Gissing appeared for the Appellant and Ms Spies represented the State. The court proceeds to hand down its judgment.

- [2] On 28 July 2020, a bail application was instituted on behalf of the Appellant in the Johannesburg Regional Court and same was refused. This is an appeal against such refusal.
- [3] The Appellant is charged with:
- Contravening Section 36 of the General Law Amendment Act 62 of 1955;
 - Theft read with the provision of Section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997;
 - Contravening Section 86(1) of the Electronic Communications and Transactions Act 25 of 2004;
 - Fraud read with the provisions of Section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997; and
 - Contravening Section 18(2)(a) of the Riotous Assemblies Act 17 of 1956.
- [4] At the bail hearing, the Appellant's evidence was in the form of an affidavit. The State opposed the application and its evidence was in a form of an affidavit by Colonel Mosito as well as the viva voce evidence of the latter colonel and Ms Van Der Merwe, a forensic investigator of the South African Post Office.
- [5] All of the aforesaid evidence is on record and this Court is not going to burden this judgment by reiterating same.
- [6] Concisely put, the South African Post Office controlled the issuing of grant cards on behalf of the South African Social Security Agency ("SASSA"). Both the Post Office's integrated grant payment system and the SASSA system were intercepted or hacked by a syndicate which fraudulently reissued SASSA beneficiary grant cards and fraudulently withdrew monies from such fraudulently re-issued grant cards.
- [7] The charges against the Appellant relate to same.

[8] It is trite that in bail applications falling under Schedule 5, the accused is burdened with an onus to satisfy the court, that the interests of justice permit their release on bail.

[9] Section 60(11)(b) of the Criminal Procedure Act 51 of 1977 ("CPA") provides that where an accused is charged with an offence referred to in Schedule 5, the court shall order that the accused be detained in custody until he is dealt with in accordance with 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 release.

[10] An appeal against the refusal of bail is governed by Section 65(4) of the CPA which provides that:

" A 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 shall have given. "

[11] The approach of a court hearing a bail appeal is trite. In *S v Barber 1979 (4) SA 218 (D) at 220 E – H* it is stated:

"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 it would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this own court's 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."

[12] Whilst it is not the function of the *court a quo* or this Court in a bail matter to make a determination on the guilt or otherwise of the Appellant, it is this Court's view that the State has an overwhelmingly strong case against the Appellant on some if not all of the charges, for inter alia, the following reasons:

[12.1] It is common cause that the Appellant was found in possession of 8 of the aforesaid fraudulently reissued SASSA cards.

[12.2] It is further common cause that the Appellant withdrew monies from such cards and was arrested whilst in the process of doing same.

[12.3] The Appellant, as he is legally entitled to do, did not disclose his defence. Same can, however, be gleaned from the evidence of Van Der Merwe and Mosito viz that he was given same as payment or compensation for having rendered travel services to a person. It is not clear whether this was payment was for a once off travel service or not. Irrespective thereof, it is not explained why the traveller did not withdraw the money allegedly owed himself, and/or why the Appellant possessed 8 such cards. This version appears highly improbable to say the least.

[12.4] It further does not explain the multiple withdrawals using such cards, over an extended period of time, which in certain instances were captured on CCTV footage.

[12.5] Further, it is apparent that the learned Magistrate delivered an *ex tempore* judgment in the bail application.

In such judgment he did not refer to several factors which in this Court view are relevant and further serve to justify his refusal to grant bail. These include the following:

[12.5.1] Colonel Mosito's allegations that the Appellant's fiancé advised him, in the presence of the Appellant, that the Appellant does not support her or the children financially (this directly contradicts the Appellant's allegations in paragraph 10 of his affidavit, exhibit "A").

[12.5.2] That the Toyota vehicle, purchased by the Appellant on her behalf, was paid for by her in cash in March 2020; that she did not know how much she paid for same; that the Mercedes vehicle was purchased for her by the Appellant for R40 000,00 cash, and her lack of response regarding the Chevrolet vehicle.

All of this, yet she is not employed, does laundry and was last employed in 2008 as a domestic worker and supports her children with SASSA grants.

[12.5.3] The explanation for the missing clothing of the Appellant that the latter used to wear when making withdrawals from the ATM as captured on the CCTV footage, namely that the Appellant requested his friend to take his clothing to a spiritual healer for cleansing. Apart from the improbability of this explanation, it further contradicts the fiancé's allegations that the Appellant has no friends.

[12.5.4] The Appellants alleged engagement in repairing television sets and electronics, as he advised Mosito, yet the lack of any evidence of same at the residence (this directly contradicts the Appellant's allegation in his affidavit that he is engaged in the antique and refurbishment business - see paragraph 10 of exhibit "A".)

[12.5.5] The Appellant's initial refusal and subsequent furnishing of false information pertaining to his cellular telephone unlocking pattern and pin code.

[12.5.6] The fact that the Appellant provided different birth dates when arrested, on the charges relating to his respective previous convictions.

[12.5.7] The fact that the Appellant made no reference in his affidavit to where these large sums of cash monies allegedly given to him by his fiancé to purchase the aforesaid vehicles, are derived from. At the bail hearing, the Appellant's legal representative made reference to an alleged inheritance received by the Appellant's fiancé. However, apart from no reference being made thereto in the Appellant's affidavit, there is further no confirmatory affidavit pertaining thereto by the Appellant's fiancé.

[13] The fact that the Appellant was still in control of the additional 26 unrecovered fraudulently re-issued SASSA cards wherewith he is accused of or linked to having made other withdrawals, further offences could possibly be committed.

[14] It is common cause that the Appellant, a Congolese national, was legally in South Africa at the time of the commission of these offences, by virtue of an asylum seeking temporary visa, which visa expired on 31 July 2020.

It is improbable that same will be permanently granted or temporarily extended by virtue of the Appellant's serious previous convictions involving violence, albeit that they are unrelated to the offences he is currently charged with, as well as the fact that he is facing the current charges. It is unclear why he was not deported after serving his custodial sentence for the previous conviction.

[15] Whilst the Appellant may not be subjected to the minimum sentence legislation if the State are unable to connect or link him to the R 1 million plus loss occasioned by the Post office and/or SASSA withdrawals in Gauteng, it is highly probable that he will nonetheless face a custodial sentence if convicted.

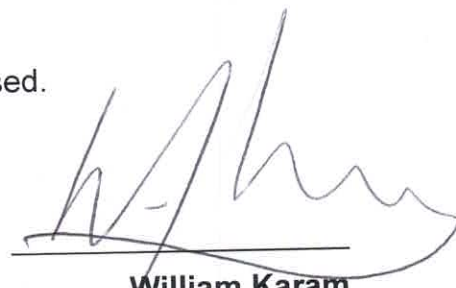
[16] The Court may just add that apart from the seriousness of these offences and irrespective of the actual loss that may ultimately be proved to be suffered by the Post Office and/or SASSA, these offences are morally repugnant in that SASSA grants are provided for the most vulnerable members of our society. It is indeed ironic that the Appellant's own child and stepchildren are maintained by SASSA grants.

[17] The aforesaid factors, together with the fact that he has no formal employment, no immovable assets, and practically no movable assets of any value, and no bank account, renders him a flight risk.

[18] The Court has considered the submissions of counsel for the Appellant and finds no merit in same. This Court cannot find fault with the findings of the learned Magistrate in his refusal of bail and finds that same was fully justified and correct. In the result, the appeal against the refusal of bail is dismissed.

Order:

1. The appeal against the refusal of bail is dismissed.



William Karam
Acting Judge of the High Court
Gauteng Local Division

Appearances:

For the State:

Adv. J H Spies (State Advocate)

For the Appellant:

Mr. Gissing from Strauss De Waal
Attorneys