**REPUBLIC OF SOUTH AFRICA**

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

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

28 September 2023
DATE

[redacted]
SIGNATURE

**CASE NUMBER:** A91/2023

In the matter between:

**SUJAN TAMANG** FIRST APPELLANT

**SANJOG LIMBU** SECOND APPELLANT

And

**THE STATE** RESPONDENT

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## JUDGMENT

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**DOSIO J:**

***Introduction***

[1] This is an appeal against the refusal of bail by the Boksburg Regional Court on 15 March 2023.

[2] The appellants, together with six others are charged with robbery with aggravating circumstances as intended in section 1 of The Criminal Procedure Act 51 of 1977 ('Act 51 of 1977') and possession of suspected stolen property.

[3] It is common cause that the bail application falls within the ambit of a schedule 6 offence and that the appellants are burdened with establishing the existence of exceptional circumstances which in the interests of justice would permit their release on bail.

[4] The appellants were legally represented during the bail application proceedings.

[5] The appellants adduced evidence by way of written affidavits which affidavits were read into record.

[6] The appellants have raised the following issues as grounds of appeal, namely that:

(a) The Court *a quo* erred by manifestly and materially misdirecting itself on the facts and applicable legal principals by underemphasizing the undisputed evidence that the release of the appellants on bail was not opposed by the investigating officer.

(b) The investigating officer stated that the appellants were not linked to the related criminal case, had verified residences, were not deemed flight risks and that bail conditions would be enforceable and binding upon them. Furthermore, that they did not display any criminal propensity and did not have criminal records.

(c) That Court *a quo* overemphasised the purported gravity of the charges and the foreign nationality of the appellants.

[7] The respondent's counsel contended that the Court *a quo* dealt fully with these aspects and supports the refusal to admit the appellants to bail. The respondent contends that the appellants failed to discharge the onus resting upon them that there were exceptional circumstances that in the interests of justice warranted their release on bail. Counsel argued that the only exceptional circumstance referred to by the appellants is that the State's case against the appellants is weak. It was further contended by the respondent that the appellants failed to show that the judgment of the Court *a quo* was wrong as required by section 65(4) of Act 51 of 1977 and that there are no irregularities committed by the Court *a quo*.

[8] The bail appeal commenced on 17 August 2023 and was remanded to 21 August 2023 as this Court required further supplementary heads from both the appellants and the respondent's counsel.

[9] The appellant's counsel argued that foreign nationality and being found in the Republic illegally does not constitute a fixed bar against bail. In addition, at the time of the bail appeal, the State had not as yet charged the appellants in terms of the Immigration Act 13 of 2002 ('Immigration Act'). It was stated that the appellants admit to their illegality, but explain the reasons therefore. It was once again stressed that there is absolutely no case against the appellants and that they do not have a criminal propensity.

***Legal principles***

[10] Section 60(11) (a) of Act 51 of 1977 states:

> 'Notwithstanding any provision of the Act, where an accused is charged with an offence referred to-:
> (a) 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 exceptional circumstances exist which in the interests of justice permit his or her release on bail.'

[11] In the context of s60(11)(a) of Act 51 of 1977, the concept 'exceptional circumstances', has meant different things to different people. In *S v Mohammed* [1], it was held that the dictionary definition of the word 'exceptional' has two shades of meaning: The primary meaning is simply: 'unusual or different'. The secondary meaning is 'markedly unusual or specially different'. In the matter of *Mohammed* [2], it was held that the phrase 'exceptional circumstances' does not stand alone. The accused has to adduce evidence which satisfies the court that such circumstances exist 'which in the interests of justice permit his or her release'. The proven circumstances have to be weighed in the interests of justice. The true enquiry is whether the proven circumstances are sufficiently unusual or different in any particular case as to warrant the appellant's release on bail.

[12] In so far as the weakness of the State's case in a bail application is concerned, the Supreme Court of Appeal in the matter of *S v Mathebula* [3] held that:

'…In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge…' [4]

[13] In the matter of *S v Smith and Another* [5], the Court held that:

'The Court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby'. Ibid 177 e-f

[14] In *S v Bruintjies* [6], the Supreme Court of Appeal stated that:

'(f) The appellant failed to testify on his own behalf and no attempt was made by his counsel to have him testify at the bail application. There was thus no means by which the Court *a quo* could assess the *bona fides* or reliability of the appellant save by the say-so of his counsel.' [7]

[15] In *Mathebula* [8], the Supreme Court of Appeal stated that:

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[1] *S v Mohammed* 1999 (2) SACR 507 (C)
[2] Ibid
[3] *S v Mathebula* 2010 (1) SACR 55 (SCA)
[4] Ibid para 12
[5] *S v Smith and Another* 1969 (4) SA 175 (N)
[6] *S v Bruintjies* 2003 (2) SACR 575 (SCA)
[7] Ibid para 7
[8] *Mathebula* (note 3 above)

'In the present instance the appellant's tilt at the State case was blunted in several respects: first, he founded the attempt upon affidavit evidence not open to test by cross-examination and, therefore, less persuasive'. [9]

***Evaluation***

[16] The appellant's counsel contended that the presumption of innocence is a prime concern for the court when considering to release an appellant on bail.

[17] Presumption of innocence is an important consideration, but a Court needs to look holistically at all the circumstances presented in a bail application.

[18] In terms of s65(4) of Act 51 of 1977, the court hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court is satisfied that the decision was wrong.[10]

[19] The appellants bear the onus to satisfy the Court, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit their release. [11] A mere denial of the considerations and/or probabilities of events, as contained in Section 60 (4) — (9) of Act 51 of 1977, would not suffice in order to succeed in convincing the Court of the existence of exceptional circumstances, in order for bail to be granted.

[20] The appellants did not present *viva voce* evidence in order to discharge the onus. They sought to rely on an affidavit accepted as an exhibit in the bail proceedings. As stated in the case of *Bruintjies* [12] and *Mathebula* [13], evidence on affidavit is less persuasive than oral evidence. The denial of the appellants rested solely on their say-so with no witnesses or objective probabilities to strengthen them. As a result, the State could not cross-examine the appellants to test the veracity of the averments in their affidavits. It is respectfully submitted that this affects the weight to be attached to

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[9] Ibid page 59 B-C
[10] *S v Rawat* 1999 (2) SACR 398 (W)
[11] *S v Mabena and Another* 2007 (1) SACR 482 (SCA) and *S v Van Wyk* 2005 (1) SACR 41 (SCA)
[12] *Bruintjies* (note 6 above)
[13] *Mathebula* (note 3 above)

the averments made in the affidavits as the probative value of the affidavits could not be tested.

*Illegal immigrants*

[21] It is somewhat puzzling that the investigating officer did not oppose bail as it is common cause that both appellants are illegally in the Republic and in contravention of the Immigration Act. Irrespective of this, s60(10) of Act 51 of 1977 stipulates that, 'Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice.'

[22] The Court *a quo* was not bound by the attitude of the investigating officer towards bail. The duty of the court is to ensure that the law is upheld.

[23] The appellants are from Nepal. They arrived in South Africa using Belize passports. No visitor's visa/ permits were issued to them by the Department of Home Affairs for reasons that they detailed in their affidavits. It is true that at the time the bail application was held, the appellants had not been charged yet with a contravention of s34 of the Immigration Act. Section 81(1) of Act 51 of 1977 provides that any number of charges may be joined in the same proceedings against an accused at any time before any evidence has been led in respect of any particular charge. Therefore, the fact that a charge for contravening the Immigration Act has not yet been added, does not assist the appellants in anyway. Counsel for the respondent conceded that it was an oversight on the part of the public prosecutor not to charge the appellants with a contravention of the Immigration Act. When the appellants are charged with a contravention of the Immigration Act, they will get an imprisonment sentence [14] and will be deported [15].

[24] It is true that the strength of the State's case is one of the considerations that the Court *a quo* had to bear in mind, but so too did the Court *a quo* have to bear in mind the status of the appellants in the Republic.

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[14] A fine or imprisonment not exceeding three months in terms of s49(1)(a) of the Immigration Act
[15] This is in accordance with s32(1) and (2) of the Immigration Act.

[25] There are numerous decisions from this Court as well as the Constitutional Court that deal with the release of an illegal foreigner who has contravened the laws of this Republic. See in this regard the decisions of Shanko v Minister of Home Affairs, Shambu v Minister of Home Affairs Bogala v Minister of Home Affairs [16] 2021 ZAGPJHC 857; 2023 ZAGPJHC 253 and Abore v Minister of Home Affairs [17] 2022 (2) SA 321 (CC). In the above mentioned cases the principle is the same in that Courts are in unison that the borders of the Republic of South Africa must be respected and those who wish to remain in the Republic must be authorized by the law to be here. This is to ensure that the borders are controlled in order to avoid a flood of immigrants entering the Republic illegally. Furthermore, an illegal foreigner will not be entitled to be released from lawful custody merely because they now wish to make their stay in the Republic lawful. The prescripts of sections 34 and 49 of the Immigration Act must be given full consideration taking into account Act 51 of 1977 as well as the Refugees Act 130 of 1998 ('Refugees Act'), which was the core issue in these above mentioned cases.

[26] In the matter of *Ashebo v Minister of Home Affairs and Others* [18], the Constitutional held that:

> '…once an illegal foreigner has indicated their intention to apply for asylum, they must be afforded an opportunity to do so. A delay in expressing that intention is no bar to applying for refugee status… Until an applicant's refugee status has been finally determined, the principle of non refoulement protects the applicant from deportation.' [19] [my emphasis]

[27] The matters of *Ashebo* [20], *Shanko* [21] and *Abore* [22] are distinguishable from the facts in the matter *in casu* as the appellants in the matter *in casu* have not sought asylum and have not made an application in terms of the Refugees Act. The lawfulness of detention under s34 of the Immigration Act is extinguished when the applicability of the Refugees Act is triggered. However, this is not the case in the matter *in casu*.

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[16] *Shanko v Minister of Home Affairs, Shambu v Minister of Home Affairs Bogala v Minister of Home Affairs* 2021 ZAGPJHC 857; 2023 ZAGPJHC 253
[17] *Abore v Minister of Home Affairs* 2022 (2) SA 321 (CC)
[18] *Ashebo v Minister of Home Affairs and Others* [2023] ZACC 16
[19] Ibid para 29
[20] Ibid
[21] *Shanko* (note 16 above)
[22] *Abore* (note 17 above)

[28] As stated in the Court *a quo* in the matter of *Shanko* [23],

> '[35] The ordinary procedure that would have followed had the applicants reported at a port of entry and intimated an intention to apply for asylum would have been the issuing of an asylum transit visa that would have allowed them to enter the country and thereafter present themselves to a Refugee Reception office. None of the applicants followed this route and the consequence of that is that they do not have a valid immigration visa (transit asylum or otherwise). They were accordingly at risk of being arrested and this is what occurred.' [24] [my emphasis]

The same has happened in the matter *in casu*.

[29] Sections 60(4)(b) and (d) of Act 51 of 1977 are of importance in the matter *in casu*. The sections state the following:

> '60(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: …
>
> (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…
>
> (d) where there is the likelihood that the accused, if he or she were released in bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; …'

[30] In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the factors referred to in s60(6) of Act 51 of 1977, 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;
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> (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;

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[23] *Shanko* (note 16 above)
[24] Ibid para 29

(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 the 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;'

[31] The Counsel for the appellants argued that the investigating officer stated that the appellants had no previous convictions and that their residences had been verified. It was further argued that because the investigating officer had the passports of the appellants that it was practically impossible for them to depart the country.

[32] This Court finds that the likelihood of the appellants not standing their trial is high due to the following factors:

(a) Should the appellants be convicted, they would most likely be sentenced to a term of imprisonment and be deported.

(b) The appellants do not own any substantial assets in the Republic.

(c) The appellants have no ties to the Republic and can easily move to any other place with the hope of not being detected by law enforcement. All their family reside in Nepal. Even if this Court orders that the passports remain in the custody of the investigating officer, the actions of the appellants has shown that they entered the border of the Republic without documentation.

(d) The appellants may use the same method they used to enter the Republic to exit the Republic and this would undermine the laws of this country.

(e) The *prima facie* strength of the State's case in respect to a contravention of the Immigration Act is strong. The appellants on entering and remaining in the Republic illegally, knew that they ran the risk of being detained and deported in terms of the Immigration Act.

[33] Even though the 212 affidavits from the Department of Home Affairs were not brought to the Court ***a quo's*** attention, they were in the docket according to the respondent's counsel and they confirm what the appellants have admitted, namely that they were illegally in the Republic.

[34] On the scant information that the Court *a quo* had regarding the appellant's status in the Republic, this Court is not persuaded that the Court ***a quo's*** decision to refuse the appellant's bail was incorrect.

*Weak case against the appellants*

[35] During the bail application, officer Ngumane stated that he could not link the appellants to the crime of robbery as that they were apprehended inside the shop, whilst the items that were robbed were still in the truck. This information is contrary to the additional affidavits that were referred to by the respondent's counsel whilst the matter was argued before this Court. These further affidavits were not before the Court *a quo*. The additional affidavits which are relevant are those of Kgomotso Salaman Malete ('A1') and Tlou Johannes Matlou ('A3'), in that both these witnesses state that they arrested the suspects who were offloading the trucks. By implication this means the appellants were amongst those who were offloading the trucks.

[36] The counsel for the appellants objected to this Court having sight of the additional affidavits and argued that since the documents were not presented during the bail that this court is precluded from having sight of the affidavits. Reference was made to s65(2) of Act 51 of 1977.

[37] Section 65(2) of Act 51 of 1977 states that:

'An appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts are first placed before the magistrate or regional magistrate against whose decision the appeal is brought and such magistrate or regional magistrate gives a decision against the accused on such new facts.'

[38] It is true that the affidavits A1 and A3 place the appellants at the truck offloading the goods instead of inside the shop when the arrest occurred, however, the fact that

they were in the vicinity of the truck when the goods were found are not new facts. The only difference is whether they were inside or outside the shop.

[39] Even if this Court is wrong and it may be found that the information contained in A1 and A3 are new facts, this court is vested with inherent power in terms of s173 of The Constitution in that:

'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[40] In addition, in the matter of *Liesching and others v The State and Another* [25], the Constitutional Court referred to the provisions of s19 of the Superior Courts Act 10 of 2013 which states that:

> 'The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may be specifically be provided for in any law-
>
> The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law—
>
> (a) dispose of an appeal without the hearing of oral argument;
>
> (b) receive further evidence;
>
> (c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or
>
> (d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.' [my emphasis]

[41] Accordingly this Court finds there is sufficient reasons why this Court of Appeal should consider the evidence contained in the affidavits A1 and A3, as it is in the interests of justice to make a proper determination in respect of the bail appeal. Accordingly, this Court finds that there is a *prima facie* case against the appellants on the merits.

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[25] *Liesching and others v The State and Another* [2016] ZACC 41

[42] In the matter of *S v Masoanganye and another* [26], the Supreme Court of Appeal held that:

> 'It is important to bear in mind that the decision whether or not to grant bail is one entrusted to the trial judge because that is the person best equipped to deal with the issue having been steeped in the atmosphere of the case.'[27]

[43] The trial was to commence on 4 September 2023. The investigation is completed and apart from obtaining a photo album from forensics this trial should be able to continue without delay.

[44] After a perusal of the record of the court *a quo*, this Court finds that there is no persuasive argument to release the appellants on bail. The appellants have not successfully discharged the onus as contemplated in s60(11)(a) of Act 51 of 1977 that there are exceptional circumstances which permit their release on bail. Accordingly, there are no grounds to satisfy this Court that the decision of the court *a quo* was wrong.

***Order***

[45] In the result, the appeal of the appellants is dismissed.

**D DOSIO**
**JUDGE OF THE HIGH COURT**
**JOHANNESBURG**

*This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 28 September 2023 .*

[26] *S v Masoanganye and another* 2012 (1) SACR 292 (SCA).
[27] *Masoanganye* (note 7 above) para 15.

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| Date of hearing: | 17 August and 21 August 2023 |
| Date of Judgment: | 28 September 2023 |

**Appearances:**

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|---|---|
| On behalf of the appellant | Adv. A. Granova |
| Instructed by: | Wentzel and Partners Attorneys |
| On behalf of the respondent | Adv R. L. Kgaditsi |
| Instructed by: | Office of The NPA |