

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN GAURENG HIGH COURT, PRETORIA)

CASE NO: **A04/2011**

MAGISTRATE'S CASE NO: **B434/2011**

In the bail appeal between:

HARRIS MAHMOOD

1st Appellant

MUHAMMAD IFTIKAHR

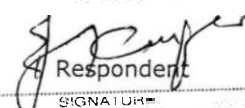
2nd Appellant

MUHAMMAD TANVEER BUTT

3rd Appellant

And

THE STATE

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: <input checked="" type="checkbox"/> NO.	
(2) OF INTEREST TO OTHER JUDGES: <input checked="" type="checkbox"/> NO.	
(3) REVISED: <input checked="" type="checkbox"/>	
29/2/2012	
DATE	SIGNATURE

JUDGMENT

[1] This is a bail appeal. The Appellants are appealing against the refusal of bail by the Magistrate in the Magistrate's Court at Meyerton, on 3 November 2011. The Appellants' grounds of appeal are set out in the notice of appeal which appears at p144 and further of the record and which is dated 10 November 2011.

[2] The offences regarding which the Appellants have been arrested and stand accused of, are schedule 7 offences. In essence, the alleged offences amount to fraud.

[3] The investigating officer, Captain Rossouw acted on certain information and visited a certain address in Meyerton where a business by the name of Jenet Sound & Cell is housed. It is evident from Captain Rossouw's evidence that four suspects were arrested at the given address of which the current Appellants are three. The alleged offences are related to what is generally referred to as Simcard fraud. Regarding the alleged status of the Appellants as illegal immigrants, Captain Rossouw did not want to express an opinion. Regarding the alleged offences of which the Appellants stand accused she was not prepared to connect any of the Appellants with any crimes but merely said that there was "something wrong".

It was put to her by counsel representing the Appellants that "so you will agree with me that the only reason why these people are currently kept in custody is because of your suspicion that they may not be legal in the country? – Yes, Immigration and the 212's that were accepted as the truth."

She furthermore conceded that according to the contents of "the 212's" it appeared as if the Appellants were in possession of asylum seeker permits.

When put to her that *"if the court set a bail condition that they are in house arrest at that specific place, would that assist you? – Yes that would assist me."*

Captain Rossouw was not prepared to commit herself to an unequivocal statement that house arrest (of the Appellants) will suffice but her response to a question put to her in this regard, is significant:

"Captain I want to put it to you that all three the applicants before court are not a flight risk and that the court may impose a condition of house arrest which would secure them at this specific address? – I will leave that to the Judge to decide."

- [4] Mr Breed, an immigration officer in the employ of the Department of Home Affairs, also testified. Despite the contents of the three relevant "212's", Breed seemed to have doubt regarding the legality of the Appellants respective permits. In the "212's" it is explicitly stated that the First Appellant was in possession of an asylum seeker temporary permit (p71), that the Second Appellant was likewise in possession of an asylum seeker temporary permit (p91), as was the Third Appellant (p109). Breed attempted to cast doubt

regarding various aspects pertaining to the process allegedly followed by the Appellants and the legality of the steps taken by them. He testified that no original applications could be traced (with the exception of the Third Appellant) that the applications may be fraudulent and that, as there were "*no applications*" no need to verify fingerprints arose (see for example p45 and 48 of the record). The evidence given by Breed is, of course, relevant to the extent that it may assist in determining whether the Appellants are a flight risk: It is not for this court to adjudicate on issues pertaining to the question whether the prescribed procedures had been followed by the Appellants in every respect.

- [5] Mr Potgieter on behalf of the Appellants referred to the matter of **Bula & Others v Minister of Home Affairs & Others** under case number 589/2011 (Supreme Court of Appeal) where the following was *inter alia* said:

"Regulation 2(2) of the Refugee Regulations ...makes it even more clear that, once there is an indication by an individual that he or she intends to apply for asylum, that individual is entitled to be issued with an appropriate permit valid for 14

days within which there must be an approach to a Refugee Reception Office to complete an application for asylum. Read with section 22 of the RA it is clear that once such an intention is asserted the individual is entitled to be freed subject to the further provisions of the RA.

The principle of legality, an incident of the rule of law, dictates that officialdom in all its guises must act in accordance with legal prescripts.” (par [78] and [79] of the judgment)

“It follows ineluctably that once an intention to apply for asylum is evinced the protective provisions of the Act and the associated regulations come into play and the asylum seeker is entitled as of right to be set free subject to the provisions of the Act.” (par [80] of the judgment)

- [6] All three Appellants handed in affidavits in which each, respectively, alleges that he is an asylum seeker in this country and is in possession of a temporary permit. The First Appellant’s temporary permit allegedly expired on 11 January 2012 as does the Second Appellant’s, whilst the Third Appellant’s temporary permit will only expire on 7 March 2012. All three Appellants expressed the willingness to submit to house arrest, should bail be granted to

them. All three work and reside at 13A Loch Street, Meyerton. With regard to First and Second Appellants, Mr Breed testified that no record of their respective asylum applications could be traced on the Department's files. With regard to the Third Appellant there was a difference in names and in birth dates as allegedly supplied by the Third Appellant. With regard to the First and Second Appellants, Mr Breed conceded that he verified the alleged absence from the records of the Departments with the Head of the latter, and only that. This court is accordingly not in a position to determine whether any of the documentation relied upon by the Appellants for purposes of seeking asylum in this country are fraudulent, or not.

- [7] In view of all of the foregoing facts I am of the view that the interests of justice would best be served should the Appellants be granted bail to which stringent conditions apply. Not only did Captain Rossouw not offer any convincing reasons why bail should not be granted but she conceded that the case against the Appellants regarding the schedule 7 offences which the Appellants allegedly committed, could only be proven pending some further evidence to be obtained by the State. I am, furthermore, not convinced by the evidence of Mr Breed to the extent that the section 212's filed in evidence are, *prima facie*, not reconcilable with

the alleged "*lack of proof*" regarding the Appellant's respective applications for asylum, as testified to by Mr Breed. In this regard a reasonable doubt exists as to the extent to which reliance can be placed on the oral evidence. In this respect the approach laid down by the Supreme Court of Appeal in **Bula** supra applies. But even if the judgment in **Bula** supra does not find application, there are in my view convincing reasons why the interests of justice would be best served should bail be granted to the Appellants.

[8] I make the following order:

1. The appeal succeeds and the Magistrate's finding / refusal of bail, is set aside.
2. The Appellants are granted bail of R10 000,00 each, subject to the following conditions:
 - 2.1 The Appellants, respectively, are placed under house arrest at the address known as 13A Loch Street, Meyerton and they may not leave the said address at any time or for whatsoever reason.
 - 2.2 The Appellants' said house arrest would be subject to and controlled by correctional supervision performed by

the Department of Correctional Services or another organ of state as may be authorized by the Department of Correctional Services to perform such functions on its behalf.

2.3 The said house arrest applies for 24 hours per day, and 7 days per week.

2.4 These conditions will apply until the finalization of the court action pursuant to the charges of which the Appellants stand accused. It follows that the Appellants may only leave the said address for purposes of consulting with their lawyers in connection with the said legal action against them and/or for attending court for the said purposes.

3. The contents of this order must be brought to the attention of the Department of Correctional Services by the Appellants' attorneys of record, in writing, within 5 calendar days from the date of this order.

TJ KRUGER AJ