

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A338/21

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

4 February 2022
DATE

SIGNATURE

In the matter between:

ARTWWELL NUKU-CHA

1st Appellant

MAPITZI TSIBURA

2nd Appellant

NATHAN SWORERA

3rd Appellant

and

THE STATE

Respondent

JUDGMENT: BAIL APPEAL

A. J. BAM J

- [1] On 28 May 2020 the three appellants, and 5 others, appeared in the Magistrates Court, Pretoria before Magistrate (Ms) Botha, and applied for bail pending trial. The State only opposed the applications of three appellants, (they are Zimbabwean citizens), and bail was refused, hence this appeal (The rest of the accused are Republic of South Africa citizens).
- [2] The three appellants, citizens of Zimbabwe, and their 5 co-accused were arrested, and are facing several charges, including possession of stolen property, theft and corruption. In view of the value of the alleged stolen goods, apparently R1M, the crimes are so called Schedule 5 offences.
- [3] From the evidence adduced by the State and the appellants it seems that the three appellants were employed in the long distance transport business of transporting goods from Zimbabwe to the Republic of South Africa.
- [4] It seemed that the alleged stolen items concerned property of the South African Railways in the form of parts of trains covered by the Act on Critical Infrastructure, Act 18 of 2015.
- [5] The State adduced the evidence of the investigating officer, Warrant Officer S F Erasmus, who stated that, inter alia, the first appellant attempted to escape when he was arrested.
- [6] All three appellants stated that they have been in the RSA for several years, that they have strong family ties in the country, and that they are gainfully employed. Of occupation it seems that they are truck drivers. It also seems that the appellants were not abandoned by their employer, who, as pointed out above also arrested on the said charges. All three have valid passports. None of the appellant have previous convictions.

- [7] According to the investigating officer the first appellant is illegally in the RSA since 1 January 2019, and that he is due for deportation. In this regard the first appellant testified that he is a Zimbabwean citizen with a valid passport and that he is the holder of a valid working permit expiring on 31 January 2023. It does not appear from the record that the first appellant submitted any documentary proof, to the magistrate in this regard.
- [8] In respect of the second appellant, the investigating officer stated that he is illegally in the RSA, because his temporary visiting permit, issued on 19 October 2020, expired on 26 October 2020. In this regard the second appellant conceded that his temporary permit expired in 2019, but that he was in the “process” of applying for a new permit. He confirmed that he had a valid passport.
- [9] In respect of the third appellant the investigating officer stated that although the third appellant is in possession of a valid passport, his Republic of South Africa residential permit expired on 5 June 2020. The third appellant confirmed that he had a valid pass port and stated that his RSA working permit would only expire on 31 December 2021.
- [10] It seems that the State conceded during argument that the problem with the renewal of the work permits was due to the COVID 19 pandemic. It however seems that a Regulation had been promulgated that all expired residential permits had to be renewed by 31 July 2021.
- [11] In a very brief judgment, in refusing to grant bail to the appellants the magistrate stated that she was not going to make any ruling whether the appellants were legally or illegally in the Republic of South Africa, but emphasized that the appellants are Zimbabweans, and although they have valid passports, nothing prohibited them to leave the RSA.
- [12] Although it is appreciated that magistrate's courts are under a lot of work pressure, rulings and judgments, with the most limited furnishing of reasons, are absolutely unhelpful on appeal. What is more is that despite a

comprehensive notice of appeal, the magistrate did not furnish any further reasons for her decision. (The record shows that the magistrate was Ms Botha, but on page 92 mention is made that the magistrate's surname is Theledi. At the time of the lodging of the Notice of Appeal, the magistrate Ms Botha, apparently, was on leave.

- [13] The Notice of Appeal addresses numerous aspects not mentioned, and not dealt with by the magistrate in her judgment.
- [14] It follows that this Court found itself in the invidious situation to consider the appeal, especially in view thereof that Section 60(4) of the Criminal Procedure Act provides that the Magistrate's ruling can only be set aside if it is found that the magistrate was wrong. The argument of Mr Mashugu, appearing for the State, that this Court should evaluate the evidence itself, loses the point being that this Court is sitting as a Court of Appeal.
- [15] At the time the notice of appeal was filed, as pointed out above, the magistrate was apparently on leave, and it does not seem that the Notice of Appeal was at any stage brought to her attention. Accordingly, in the circumstances, I deemed it fair and appropriate, to grant the magistrate the opportunity to elaborate on her reasons to refuse bail, if she so wish. It is of importance that this Court should consider the magistrate's line of thought and what made her refuse bail.
- [16] It followed that on 25 January 2021 this Court made an order that the matter should be referred to the magistrate, Ms Botha, in order to afford her the opportunity to comment on the Notice of Appeal. The appeal was postponed to 27 January due to the fact that issues of bail are in nature urgent.
- [17] On 26 January the magistrate furnished her written response, and reasons for the refusal of bail. It now forms part of the record. In this regard it has to be recorded that the magistrate's prompt reaction to this Court's enquiry is commendable.

- [18] The Magistrate recorded that she had considered all the evidence, and then specifically concentrated on the Notice of Appeal, addressing the relevant issues.
- [19] The magistrate's main considerations for refusing bail is the fact that the appellants are from Zimbabwe. What, however is also of importance is that all three the appellants have valid passports. The issue addressed by the State, namely the work permits of the appellants, and that it has expired, was brushed aside by the Magistrate, who was not prepared to make any finding against the appellants.
- [20] Another aspect that seemed to have played a major part in the Magistrate's approach, is the seriousness of the charges against the appellants. There is no doubt that the charges, especially count 1, is of a serious nature, to the extent that it is a so called Schedule 5 offence. That makes the burden of proof in terms of Section 60(11)(b) of the Criminal Procedure Act, burdening the appellants, applicable.
- [21] From the evidence on record as remarked above it seems that the three appellants were truck drivers and that they were apparently working on the day of arrest. There is no indication that any one of them played a major role in the commission of count 1.
- [22] What, however, in my view is also of importance is that the appellants' co-accused, facing the same serious charges, are not in custody anymore. Accused 4 is on warning and the State did not oppose bail in respect of the rest of the accused.
- [23] After having considered all relevant facts, taking into account that the appellants are Zimbabweans, I am of the view that the Magistrate overemphasised the nature of the offences in respect of the appellants, or as far as they are concerned, in balancing all relevant aspects. In this regard, I find that the magistrate was wrong, and accordingly, that she wrongly refused bail in respect of the appellants.

[24] I am satisfied that the interest of justice permits the release of the appellants on bail.

[25] The appeal therefore succeeds.

[26] The following is ordered, in the form of a Draft Order made an order of court on 1 February 2022:

1. Bail is granted to the three appellants (Accused 1, 2 and 3) in the amount of R 10 000.00 each.
2. The following conditions are added:
 - (a) The three appellants should not leave the Republic of South Africa pending the trial;
 - (b) The three appellants should immediately surrender their passports and international drivers licences to the investigating officer Warrant Officer S. F. Erasmus &.
 - (c) The three appellants should report to the Silverton Police Station on Fridays before 10 am.



A. J. BAM

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES

For the Appellants:

Mr NETSHAWA & Mr LEBELOANE

For the State:

Mr MASHUGA

Heard on:

28 January 2022

Order delivered on:

01 February 2022

Reasons delivered on:

04 February 2022