- REPORTABLE -

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No. **A60/2008**

In the matter between:

PAUL FEYEN Appellant

and

THE STATE Respondent

JUDGMENT

WEBSTER AJ

INTRODUCTION

1] The Appellant in this matter, a Belgian citizen, was arrested on 7 November 2007. He faces 53 charges of fraud and a further 16 charges relating to contraventions of the Value-Added Tax Act 89 of 1991 and the Income Tax Act 58 of 1962. These offences were allegedly committed over the period 2002 to 2005 and entail actual prejudice of R2.9 million and further potential

prejudice of R3.2 million.

2] On 19 November 2007 the Appellant applied for bail before the Magistrate at Bellville, which application was opposed by the State. The grounds of opposition included, *inter alia*, concern that the Appellant was a flight risk and the allegation that he has a propensity to commit this type of offence.

3] After evidence had been led judgment was given on 20 December 2007 in terms of which bail was refused.

4] The Appellant now approaches this Court on appeal.

ISSUE

5] The issue for determination before the Magistrate was whether or not the interests of justice permitted the Appellant's release on bail.

ONUS

6] The matter was disposed of as a schedule 5 offence. Mr Roussouw, who appeared for the Appellant at the hearing and who appears today in the appeal, conceded that the matter was appropriately dealt with in these terms. Mr Els, who appears for the Respondent, shares this view.

7] Section 60(11)(b) of the Criminal Procedure Act 51 of 1977 provides that:

"Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

(b) in schedule 5, but not 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 the interests of justice permit his or her release."

8] Accordingly, the onus had been upon the Appellant to establish, on a balance of probabilities, that the interests of justice permitted his release on bail.

AFFIDAVIT EVIDENCE

9] The Appellant sought to discharge this onus by introducing in evidence an affidavit deposed to by him.

10] It is quite permissible for an applicant in a bail application to place evidence before the court by means of an affidavit. A court may not disallow such affidavit evidence.

See **S v Piennaar** 1992 (1) SACR 178 (W);

S v Hartslief 2002 (1) SACR 7 (T); and

Jacobs & Others v S [2004] 4 ALL SA 538 (T).

11] The probative value of the affidavit evidence will depend on the totality of the facts and the extent to which the content is disputed.

12] The content of an affidavit is not subject to being tested under cross-examination. *Viva voce* evidence, on the other hand, is subject to such testing. By virtue of this distinction, when the two conflict, the *viva voce* evidence is likely to carry more weight and is likely to be preferred over the content of the affidavit, subject to the former having positively endured the rigours of cross-examination.

FLIGHT RISK

13] A ground of opposition advanced by the State at the bail hearing was that the Appellant was a flight risk and would, in the event of being released on bail, not stand his trial.

14] It emerged in a communication from the Belgian Department of Justice that, aside from other previous convictions, the Appellant had been convicted and sentenced in Belgium on 15 January 2002 to 4 years imprisonment and a fine of €12 394.68 on charges of forgery, fraud, fraudulent bankruptcy, common bankruptcy and the use of a false name.

15] It was undisputed on the evidence that on 28 May 2002 a directive had been issued by the Belgian Court of Appeal that Appellant should be committed to prison to commence serving that sentence. On 4 July 2002, when the local police in Belgium visited his home to present him with documentation requiring him to commence his sentence, he had already left the country and was residing in South Africa. He arrived here on 3 June 2002, just days after the directive as to his committal had been issued.

16] It is common cause that he is presently sought by Interpol in regard to the unserved sentence. It is further common cause that the Belgian authorities have initiated formal extradition procedures to ensure his return to Belgium.

17] When the Appellant left Belgium for South Africa he left behind his wife and daughter.

18] In his affidavit the Appellant has not been forthcoming with certain significant and persuasive facts. He failed to disclose that he had not served the sentence of 4 years imprisonment. He also failed to disclose that he was sought by Interpol in this regard. He had simply stated that there were no outstanding warrants for him 'in South Africa'. He also omitted to disclose that fraud charges were part of his most recent convictions. This selective disclosure on his part of crucial factual material does not assist his case.

19] Mr Rossouw has argued that the high point of the Appellant's case is that once it become known to him that the South African Revenue Service were investigating charges against him he had been in and out of the country on a number of occasions. He argues that had the Appellant wished to flee he had had the opportunity to have done so. This, contends Mr Rossouw, is indicative of his intention to stand his trial. He argues that the further incentives for the Appellant to stand his trial are the fact that he has a live-in relationship with a South African and the fact that he owns a immovable property in South Africa.

20] Appellant's track record in respect of his conduct in Belgium poses obstacles

for him. It is so that he had attended his last trial in Belgium. However he did not remain within that jurisdiction to serve his sentence. After his appeal had been dismissed he fled before he could be committed to serve the sentence. This must weigh heavily against him when assessing whether he is a flight risk in the present context.

21] The fact that he had had a wife and daughter in Belgium had been insufficient incentive to keep him in that country. Against this background, on the probabilities, his live-in relationship with a South African will not be incentive enough to keep him here.

22] As to the two fixed properties Appellant owns in South Africa, a house in Somerset West and a farm in Botrivier, it is apparent that steps had already been taken, prior to his arrest, for Appellant to dispose of the farm. The sale of these properties can, in any event, readily be achieved in his absence.

23] The question remains as to what incentive there would be for Appellant to remain in South Africa were he to be released on bail.

24] The Appellant faces proceedings to extradite him to Belgium. In addition, according to the Home Affairs officials called to testify, the Appellant is no longer legally in South Africa and were he to be released on bail he would face arrest on charges relating to his illegal presence here.

25] The Appellant's incentives to remain in South Africa are not compelling. I am unable to fault the Magistrate in finding that there is a real concern that the

Appellant will not stand his trial should he be released on bail. On the evidence which is common cause there exists a strong incentive to flee.

26] I am not satisfied that the imposition of appropriate conditions relating, for example, to reporting, can provide effective safeguards in this instance. In many instances such conditions can effectively serve to allay concerns as to flight and should not be underestimated.

S v Bennett 1976 (3) SA 652 (C);

S v Branco 2002 (1) SACR (W)

27] I am in agreement with the Magistrate's finding that the evidence of the investigating officer is to be preferred over the affidavit evidence of the Appellant where the two are in conflict. Especially given Appellant's lack of candour in his affidavit.

PROPENSITY

28] In his affidavit the Appellant records his previous convictions to be the following:

28.1 On 4 December 1990 he was convicted of forgery and uttering and sentenced to 2 months imprisonment, suspended for 3 years, together with a fine of 100 Belgian francs, alternatively 1 month imprisonment.

28.2 On 23 March 2001 he was convicted, as an accomplice, in the removal of waste materials and the transportation thereof. He was fined 1 000 Belgian francs or 90 days imprisonment.

28.3 On 15 January 2002 he was, according to him, convicted of forgery and contraventions of the Belgian Bank Act and sentenced to 4 years imprisonment together with a fine of 5 000,00 Belgian francs or three months imprisonment.

28.4 On 13 November 2002 the Court of Appeal in Antwerp confirmed a sentence of receiving stolen property and the forgery of stamps and sentenced him to 7 months imprisonment, as well as a fine of 200 Belgian francs or 1 month imprisonment. (If this disclosure is correct it would amount to a further sentence the Appellant has failed to serve in Belgium.)

29] Once access had been gained to the records of the Belgian authorities it became apparent, as set out above, that on 15 January 2002 he was in fact sentenced to 4 years imprisonment and a fine of €12 394,68 on charges of forgery, fraud, fraudulent bankruptcy, common bankruptcy and the use of a false name. It was this sentence which he had failed to serve when he left the country.

30] The Appellant now faces 53 fraud charges and 16 charges relating to tax contraventions. The combined actual and potential prejudice amount to some R6.1 million.

31] When last sentenced in Belgium the Court of Appeal had remarked that "....*the offences were linked with falseness, fraudulent behaviour and the use of a false name, elements that seriously jeopardise the public trust. Reference can be made to the huge extent of damage that was inflicted on the various suppliers who were not paid.*"

32] In regard to the Appellant himself the Court of Appeal had stated that "....*the defendant Feyen has shown a reprehensible fraudulent behaviour that does not belong in the legal business, and that makes him unfit to carry out economic activity for lack of elementary honesty...*"

33] His track record discloses that the Appellant has a clear propensity to commit crimes of dishonesty.

34] The Magistrate can, therefore, not be faulted for finding that the evidence establishes that the Appellant has a propensity to commit this type of offence.

APPROACH ON APPEAL

35] In terms of Section 65(4) of the Criminal Procedure Act 51 of 1977 this Court shall only set aside the decision against which the appeal is brought if it is satisfied that the decision is wrong.

CONCLUSION

36] Having regard to the totality of the evidence I am of the view that the conclusion reached by the Magistrate, that the Appellant had failed to discharge the onus upon him of showing, on a balance of probabilities, that the interests of justice permitted his release on bail, was correct. As such no basis exists for this Court to interfere.

37] The appeal is accordingly dismissed and the order of the Magistrate refusing bail is confirmed.

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WEBSTER AJ

March 2008