IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

REF: 16/750/2021
CASE NO: A54/2022

In the matter between:

TORITSEJU GABRIEAL OTUBU Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS,
WESTERN CAPE Respondent

HEARING DATE: 4 MAY 2022
JUDGMENT DATE: 16 MAY 2022

JUDGMENT

CARTER, AJ

INTRODUCTION

[1] The appellant (and seven other co-accused) appeared in the Cape Town Magistrates Court on 20 October 2021, where the prosecutor opposed the release of the appellant and his co-accused. The ensuing bail application proceeded and on 29 December 2021, the *court a quo* denied bail for the appellant as well as for his co-accused. The appellant then filed a notice of appeal on 1 February 2022; and the appeal was heard by this court on Wednesday 4 May 2022.

[2] The respondent argued that the bail proceedings in the *court a quo* should have proceeded in terms of section 60(11)(b) of the Criminal Procedure Act ("the Act")[1]. The *court a quo* ordered that the bail application should be determined and heard in terms of the provisions of section 60(4) of the Act. It must be noted that this is an appeal of the *court a quo's* decision to refuse the appellant bail pending an extradition request (not enquiry as yet) in terms of Section 9 read with section 10 of the Extradition Act.

[3] I have not been called upon to deliberate on which section referred to in paragraph 2 above applies, save for me to mention that having read the record of the proceedings in the *court a quo,* I am satisfied that the magistrate ruled correctly that the bail proceedings must be heard in terms of section 60(4) of the Act.

[4] section 60(4) of the Act states the following:

> "*The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:*
>
> *(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence[2]: or*
>
> *(b) where there is likelihood the accused, if he or she were released on bail, will attempt to evade his or her trial, or*
>
> *(c) where there is the likelihood that the accused if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence: or*
>
> *(d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the*

[1] No 51 of 1977 as amended
[2] Counsel for the respondent agreed that the appellant was not a violent person and had committed no acts of violence

proper functioning of the criminal justice system, including the bail system;

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security."

It is for me to decide whether the court a quo in applying the provisions above, was in anyway misguided in its decision making and thereby wrong in refusing bail for the appellant.

[5] Counsel for the respondent relied ostensibly on arguing under the sub-sections (b)[3] and (c) whereas counsel for the appellant argued along the lines that none of sub-sections (a) to (e) were relevant to the appellant, as the *court a quo's* refusal for bail was based upon a collectively reasoning for all eight accused's and thus the findings were unsupported by specific evidence for refusing bail for the appellant.

[6] The basic principle in our law is that bail ought to be granted, unless it is not in the interests of justice. Between both counsels, they made reference to 25 different cases in support of their respective arguments all of which assisted them. Section 60(4), in my view should be interpreted in the context of Flemming DJP in *S v Hudson*[4], as it has relevance to the matter before me. The learned Judge had the following to say:

"C*onsidering bail involves a balance between unequal considerations. Risk of harm to the administration of justice involves unquantifiable and unprovable future possibilities. The interests of the accused generally turn upon the extant facts and intentions. But it remains the chances that the administration of justice may be harmed which may justify the impact of detention despite a pending appeal.*"

Further, the general notion that the refusal of bail is in the interests of justice simply because there is a possibility that one or more of the consequences mentioned in section 60(4) will occur does not go far enough. There needs to be justifiable facts

[3] As dealt with in S v Mwaka 2015 (2) SACR 306 (WCC).
[4] 1980 (4) SA 145 (D)

and real evidence in support of the appellant breaching or failing to comply with subsection (4). It is to this extent that I wish to turn my focus on.

THE FACTS AND LAW

[7] The facts of the matter before me, is that the respondent had received a request from the United States of America for the provisional arrest of the appellant[5] in terms of article 13 of the treaty between the Republic of South Africa and the United States of America. To date there has been no formal request for the extradition of the appellant to the United States of America. There is simply at best a criminal complaint levelled against the appellant.[6] The bail proceedings were heard and conducted collectively for all 8 co-accused in the *court a quo*. Of the 8 accused, 6 of them have received formal requests for their extradition to the United States and 2 have not. No individual bail applications were heard for each co-accused and accordingly, the evidence that was led by the respondent in the bail application was relied upon and applied to all 8 co-accused. It is alleged that the appellant is a member of the Neo Movement of Africa also known as the "*Black Axe*", which organization allegedly conducted criminal activity by scamming romance victims in the United States via the internet and the use of mobile phones.

[8] Being faced with the above, it is necessary for me to decide whether the facts presented protect the liberty of an individual as opposed to ensuring the proper administration of justice, based also on the presumption of innocence which operates in the favour of the appellant. In weighing up this conundrum, I need to decide whether the *court a quo* was wrong in refusing to grant bail to the appellant.

[9] There is no doubt in my mind that the appellant was considered "on block" with his fellow co-accused's in the bail hearing. I can find no specific reference to an enquiry into the appellant's personal circumstances in the entire 1 991 pages of the record of the proceedings in the *court a quo,* save for as referenced in the affidavit of Arina Smit[7], that which the appellant himself disclosed and the three lines in the

[5] Record page 483
[6] Record page 488
[7] Record page 1921

magistrate's judgement[8]. It is a well-known fact and due process that the personal circumstances of an individual must be ascertained and canvassed fully in order to apply the principles of fair justice to the individual measured against the interests of society.

[10] The notion that the appellant could in all probability commit acts of violence or tamper with evidence or because he was Nigerian by birth, all because he was a member of the Black Axe, is by its very nature drawing the inference and in this case, the conclusion that the appellant was guilty by association and therefore, the interests of justice must be protected and hence the denial of bail. I am of the view that this approach by the *court a quo* was misguided and wrong. This is more succinctly elaborated by Miller J in *S v Essack*[9] where the following was stated:
"*The fact that an applicant for bail is a member of a certain group of persons does entitle the court to have regard to general observations applicable to that group, but such observations can never be conclusive in themselves. Each case must be considered on its own merits. If the offense is of the top which experience shows usually leads to the accused effecting his escape through familiar and well-known routes and if it appears, moreover, that his association with others who have affected their escape when similarly charged is sufficiently intimate to show a probability that he would follow suit, that might be sufficient ground full refusing bail. In general, however, before it can be said that there is any likelihood of justice being defeated through an accused person resorting to the known devices to evade standing his trial, there should be some evidence or some indication which touches him personally in regard to such likelihood*."
On the facts before me I am not convinced that there is overwhelming evidence that directly imports or implicates the appellant specifically and individually to him falling foul of the provisions of section 60(4) of the Act.

[11] On several occasions, the *court a quo* makes undeniable references to the appellant being part of the collective group of co-accused and conspirators[10] and therefore the only inference that can be drawn is their *nexus* being based on the

[8] Record page 299
[9] 1965 (2) SA 161 (O)
[10] Record pages 532 – 544, but no mention of the appellant is found

notion of “one of one for all and all for one”. The evidence however in my view, portrays or paints a very different picture as it relates to the appellant, in that:

11.1 the respondent conceded that there is no evidence that the appellant is or was a member of the Black Axe;

11.2 the respondent conceded that the appellant has not committed any acts of violence as purportedly regularly undertaken by the Black Axe organization;

11.3 the respondent conceded that the appellant might not have any cemented (real) ties within Nigeria anymore, but was still a flight risk because of his purported association with Black Axe in South Africa;

11.4 the respondent was more concerned with the fact that if assuming or on the probability, the appellant did flee South Africa, there is no extradition treaty between Nigeria and the United States of America, with little or scant consideration being offered by way of possible restrictive bail conditions being imposed;

11.5 the respondent argues that the appellant was and should be declared a Prohibited Person in terms of section 29(1)(f) of the Immigration Act[11], as his visa/s were purportedly either fraudulent or expired. The evidence as argued by counsel for the appellant records the opposite;

11.6 the respondent laid much emphasis that the appellant left the borders of South Africa on two occasions to go to Nigeria to attend the burial services for his mother and father respectively. The evidence shows that on both occasions, the appellant returned lawfully and has remained in South Africa. The alleged porous nature of South African borders are therefore in my view, irrelevant as the appellant has shown good faith in travels beyond South Africa;

11.7 the evidence shows that the appellant had a successful agricultural business in Nigeria, but subsequent to him fleeing Nigeria in 2012, he has not returned for reasons therefore, thereby negating the concern for him wanting to leave South Africa for other reasons;

11.8 there is no relevant or materially adverse previous conduct at face value that can be measured to project the future conduct of the appellant[12], thereby creating a reasonable basis upon which the appellant might be considered a flight risk or may tamper with any evidence or interfere with any witnesses. It simply does not exist on the evidence produced by the respondent.

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[11] No 13 of 2002

[12] S v Thornhill 1998 (1) SACR 177 (C)

11.9 the record shows the appropriate certificate[13] recording that the evidence (via attachments) has been received by Jeffrey M Olson Associate Director, Office of International Affairs, United States Department of Justice which is offered in support for trial[14]. True copies of these documents are maintained in the official files of the United States Department of Justice in Washington D.C. It therefore, diminishes exponentially the prospects and allegation that the appellant would in some way attempt to influence or intimidate witnesses or to conceal or destroy evidence.[15]

11.10 in the affidavit of Colonel Mildred Valencia De Wee[16], he deals extensively with the possibilities of the 8 co-accuseds being a flight risk, the propensity to commit further crimes and in specific Perry Osagiede being accused number 1 on the blank charge sheet.[17] Nowhere in his affidavit does he make any specific reference to the appellant, save for drawing the inference that the appellant allegedly is a co-perpetrator of criminal activities led by Perry Osagiede of the Black Axe movement. Collectively therefore, the Colonel reaches the conclusion that it is in the interests of justice that all 8 co-accused are kept in custody pending the finalization of the extradition proceedings.[18]

11.11 Captain Willem Jacobus Van Der Heever in his affidavit in opposition of bail[19] confirms that the appellant has no previous case against him. He goes further to deal with issues relating to sections 60(4)(a) (b) (c) read with sections 60(5) (6) and (7) stating that the appellant has no fixed address, no fixed employment, has family in Nigeria, is residing illegally in South Africa, that the applicants are members of the Black Axe group which conducts itself in criminal activity of a violent nature and thus the evidence is overwhelming against the applicants collectively. All of the aforementioned in my view, is factually incorrect, of which the *court a quo* to an extent relied upon notwithstanding, the magistrate's summary referred in in paragraph 13 below.

11.12 coupled with the above the fact that the underlying concern or rationale that appellant is a foreign national does not ostensibly preclude him from being considered for the granting of bail. This is clarified by Cachalia AJ as follows:

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[13] Record page 10
[14] Record page 11
[15] Section 60 (4)(c) of the Criminal Procedure Act
[16] Record page 1084 - 1099
[17] Record page A1
[18] Record page 1098 para 58
[19] Record 520 – 529

"*This factor must be weighed with other factors in deciding whether or not to grant bail. Even serious charges would not in itself preclude a foreign national from being granted bail.*"

[12] In his affidavit for the opposing of bail, Captain Willem van der Heever states that no bail condition is able to prevent the Applicants from accessing the online platforms, either to tamper with evidence or influence witnesses[20]. It is noteworthy to record that the evidence of Captain van der Heever ostensibly is a summation of probabilities pronounced on a collective group of 8 accused and not specific to each accuse individually.

[13] The magistrate in the *court a quo* thus comes to the conclusion that:

"*the evidence strongly suggests that even the most stringent bail conditions will not afford any safeguards such is a fine that the applicants will evade their extradition they will not tamper, destroy, conceal evidentiary material and/or evidence and that the probability exists that they will continue committing offenses*."[21]

[14] I find it inconceivable on the facts if individually determined that the appellant is rather the model or ideal candidate for the granting of bail as the *court a quo* stated the following;
"*I agree with the defense that the applicants have favorable personal circumstances. They have fixed addresses, families, assets within the Western Cape, they have no previous convictions and/or pending cases and that the extradition can take an indeterminate amount of time, but these factors have to be considered in light of all the evidence presented to the court*."[22]

[15] I am therefore of the view that in both Captain van der Heever and the magistrate, found their views and stratum on the applicants collectively, as a whole and not individually. This in my view, is a misdirection and is wrong.

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[20] Record page 526 at para 38
[21] Record pages 313 - 314
[22] Record page 313

[16] The appellant's supposed personal circumstances and/or situation as articulated by the magistrate could not be more succinctly summarized above. It begs the question as I posed to the respondent's counsel, what more could or must the appellant do to foster persuasive reasons as to why any continued incarceration would manifestly not be prejudicial to the applicant. It was conceded that the facts of the appellant's personal circumstances are not disputed, but the scales are weighed against him when faced with the possibilities of the appellant breaching the provisions of section 60(4) of the Act and therefore bail should be denied.

[17] A further factor that should be taken into consideration in deciding whether to grant bail or not, is the length of time it might take for the matter to be "trial ready". To an extent, this is a by-product of the outcome of any extradition hearing which embodies this matter. The magistrate was of the view that the "*extradition process is impossible for the court to decide"*, yet thereafter determines that the extradition hearing "*will be soon*"[23]. Counsel for the appellant argues that the due process of extradition could take years and substantiated this via numerous examples cited in the papers. The respondent did not disagree herewith nor furnish any information to the contrary. The magistrate in my view misdirected herself as the facts related to the appellant and relied upon the general notion that "*fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment to the detriment of others",* thereby relying on the case of *S v Shaik.*[24]

[18] Much was made in argument by both counsels on the issue of cell phones, thereby inferring that the possibility of the applicant being able to either have the means to tamper with the evidence or intimidate witnesses or undermine or jeopardize the objectives or the proper functioning of the criminal justice system. The evidence for the respondent was that a total of 11 cell phones were seized from the holding cells, of which 5 cell phones were seized from the holding cell wherein the appellant remained.

[19] It was further argued that the only inference that can be drawn is that the appellant had collective use of the cell phones, albeit no evidence was submitted in

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[23] Record pages 312 - 313
[24] 2008 (1) SA SACR (1) CC

this regard; and further that the appellant did not report to the prison authorities that such cell phones existed. The conclusion of the *court a quo* was that:

"*the applicants had access to cellphones while being detained in prison. In addition, the applicants did not only have access to the devices but had used the devices to communicate with others and persons in Nigeria. This indicates that the applicants have not severed ties with the birth country and that it warranted communication to be sent to Nigeria.*"[25]

[20] There is no evidence that the appellant made use of the cell phones, let alone to make contact with anyone in Nigeria, as all that interested him lived in Cape Town. To underscore this and as a natural consequence thereof, counsel for the respondent argue that there is an indication that the appellant will not adhere to any bail conditions as may be provided by the *court a quo*. On questioning counsel for the respondent, I did ask whether an inmate or the appellant could nevertheless continue as much with unlawful activity whilst in the confines of a prison cell, as opposed to being in the freedom of society, which was answered that this could merely be more controlled and monitored whilst being in custody, but nothing to stop altogether.

[21] I further raised the issue that the applicant had not reported the use or existence of the cell phones to the authorities because he might have feared for his life or some form of reprisal against him, which was conceded to as a possibility.

[22] A further aspect which much reliance was sought by the respondent and hence the decision of the magistrate was the guidance considerations in the provisions of section 60(6)(g) read with section 60(4)(b) of the Criminal Procedure Act. I have dealt with above some aspects in this regard and take note that what is stated and relied upon in the *S v Thornhill* and *S v Acheson*[26] matters. I do not need to apply further thought on the first set of guidelines, as this has to some degree been dealt with above, save for the fact of the proposition of stringent bail conditions and those guidelines mentioned in the third consideration.[27]

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[25] Record 302 read with pages 1239 – 1240
[26] 1991 (2) SA 805 (NM)
[27] Supra footnote 10

[23] Not losing cognizance of the fact that the appellant is not viewed as an awaiting trial prisoner, but rather only a suspect under arrest with no extradition request in place, would it be prejudicial for the appellant in all the circumstances to be kept in custody thereby being denied bail. Section 35(1)(f) of the Constitution entitles any arrested or detained person "*to be released from detention if the interests of justice permit – subject to reasonable conditions"*.

[24] In analyzing the judgment of the *court a quo,* the words "*applicants* and/or *collectively* and/or *co-conspirators/co-perpetrators*" are mentioned 115 times. Reference to "*Otubu* and/or *7th applicant*" is mentioned 14 times, only 5 of which related to his personal circumstances. On more careful analysis, the *court a quo* dedicated 95.66% of the judgment finding justifiable reasons why the "*applicants*" should not be released from custody. I am of the view that this is a very skewed approach in weighing up objectively and fairly whether the interests of justice do not permit the release from detention, measured against the liberties and rights of an individual. Accordingly, I am further of the view the magistrate was misguided and wrong in deciding to refuse bail to the appellant.

RELEASE OR CONTINUED DETENTION

[25] It is common cause that the appellant was arrested and incarcerated on 19 October 2021 some 6 months ago. There is no certainty as to how long it will take for the extradition enquiry and transfer of the appellant to the United States of America. Any cause for the delay thereof (other than administrative) is well within the rights of the appellant and the respondent. The appellant's health is good, he will naturally require time to prepare for any extradition process and endeavor to continue working in order to meet his financial needs. However, in contrast to this, the *court a quo* in my view could have imposed stringent bail conditions in order to assist the respondent to implement such "regulated" policing thereof. It is in this regard that I am of the view that the *court a quo* vexed itself into somewhat unchartered territory and the magistrate's decision was misguided and therefore wrong.

[26] It is the duty of the court to do as best as possible to minimize the impact on an accused's freedom and not for the *court a quo* to decide on the profound principle of innocent until proven guilty. The appellant is alleged to have unlawfully engaged in illicit activities, which include fraud, money laundering and racketeering, all of which is alleged to have been transacted through the "internet of things" or the worldwide web. In other words, the nature of the appellant's alleged unlawful conduct was cyber-crime instigated and related. Accordingly, there is a further duty upon a court to take all the circumstances into consideration and apply same to the facts in determining whether the interests of justice should prevail over the prejudice that the appellant would incur by being denied bail.

[27] I am of the view that the *court a quo* applied a "bail box" approach in denying the appellant bail, in that she should have considered proactive, practical and inventive bail conditions which would serve to balance the interest of society and those of the appellant. The guidelines of *Thornhill* and *Acheson* are, in my view, restrictive and outdated as they have limited application to the cyber universe that the world has rapidly progressed into.

[28] The methods allegedly used by the appellant was, *inter alia* via iCloud, cryptocurrency, bitcoin payment, storage wallets google drive, block chain devices and mobile storage wallets. Much of the aforementioned are still being understood by the major financial institutions and in the majority of countries not accepted as means for financial payment or transacting. Notwithstanding this, there is no excuse in my view to safeguard the unknown at the detriment of the appellant. In other words, if in doubt, say no. I therefore find little recognition to the conclusions of Captain van der Heever in paragraph 12 supra and paragraph 13 supra of the magistrate. The nine-dot principle pertaining to the solving and finding alternative practical and effective solutions to a changing environment should be applied even as it relates to effective bail conditions.

[29] I am of the view that the *court a quo* applied the old adage of what is contained in precedent in terms of what is factual as opposed to that which is real. Here I refer to the alleged criminal conduct of the appellant versus the cybersecurity and the internet of things. We live in a new digital world where the accepted norm of

communication is via social media platforms of Twitter and Facebook. Herein lies the foundation of the freedom of expression (albeit coming under some scrutiny) whereas the Criminal Procedure Act and many leading case law are some 35 years old[28], in an era where we lived under the notion of the suppression of communism and the fear of the total onslaught. As the medium of communication has vastly changed, so has the medium for conducting commercial transactions significantly moved onto a different playing field. To a large degree, the issues pertaining to granting bail and any conditions thereto are systemic in nature and careful consideration should have been given hereto.

[30] I mention the above as although the description of the alleged crimes that the appellant has been arrested for and awaiting an extradition enquiry are recognized, they are however significantly different in pedigree, nature and extent. If there is no remedial action that can be taken or enforced (in the present case without an enquiry or explanation therefore) then this impasse in approach will continually trump the basic principle of the freedom of individual liberty and consequently, any application for bail in terms of section 60(4) would automatically fail.

[31] For the reasons above, I am of the view that the respondent's case is somewhat contrived in the hope that the *court a quo* would and evidently did, simply apply all the facts collectively and not distinct and specific to the appellant, thereby securing the refusal for bail. This approach is one which departs from the standard provided for in section 35(1)(f) of the constitution which states"
"*everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions*".

[32] I am further of the view that the *court a quo* was confronted with a simulated bucket of possibilities canvassing and thus encompassing the appellant's preponderance of breaching the provisions section 60(4). This is coupled with a collage conspiracy that the appellant and his co-accused were in a collective predetermined *modus operandi* and thus labelled and considered as one and a

[28] S v Mohamed 1977 (2) SA 531 (A); S v Budlender 1973 (1) SA 264 (C)

group of wrongdoers. This, in my view, is not a basis upon which the respondent nor the *court a quo* has in terms of section 60(4) determined that the interests of justice would not permit the release of the appellant on bail and accordingly, the *court a quo's* decision was wrong in refusing same.

[33] I wish to turn my attention to the facts as it relates to the financial means and status of the appellant as this will have a direct bearing on the order made below.

33.1 The appellant in his founding affidavit states that he generates approximately R30 000.00 to R45 000.00 rands per month from his housing rental business.

33..2 He mentioned to Arina Smit that he also earned some money (no amount was disclosed) from the selling of Nigerian food items to his community and imports the food from Nigeria to sell in Cape Town.

33.3 An approximate amount of R69 500.00 cash was found in his safe at his place of residence.

33.4 The amount of R150 453.15 was discovered in the Nebank with number account [....] in the name of Otubu Properties (Pty) Limited of which the appellant is the sole director.

33.5 The appellant and his wife to whom he is married in community of property purchased a piece of land; namely Erf [....] Parklands, Cape Town and held under title deed number T[....] for the amount of R1 500 000.00 on 23 September 2020.

33.6 Also found in his safe were certain movable property to which the court had no valuation thereon, but for purposes of this matter has given a deemed valued of approximately R500 0000.00 as stated in court.

33.7 A Mercedes Benz was also removed from the appellant's house again with no value attached thereto.

33.8 It is common knowledge also that the appellant and his wife are building a house situated at [....] Abington Avenue, Parklands, Cape Town for an unspecified amount.

In total therefore, the appellant's estate has a net worth of approximately R2 300 000.00, him only having a half share in the immovable property mentioned above.

[34] Taking into consideration the appellant's net worth, it indicates to me that the appellant does have access to financial means and the initial amount of R10 000.00

that was suggested by the appellant's counsel is somewhat inappropriate and not commensurate with the earning capabilities of the appellant and makes a mockery of the purpose, function and aims of setting bail at an affordable yet not excessive amount. One of the main considerations of deriving the *quantum* for bail is whether the appellant would prefer to retain it and stand his trial rather than forfeit it in addition to accepting all the risks of absconding. The appellant must continually be reminded that stepping out of line in breach of his bail conditions is unacceptable and that such unlawful action will be met with the immediate and appropriate sanction. With this in mind, I have deemed it appropriate to set bail in the amount recorded below.

[35] It leaves me to deal with the issue of bail *per se*. During the hearing, counsel for the appellant provided a copy of a proposed draft order which incorporated extensive bail conditions, to which I understand the respondent was familiar with, as this had also previously been raised at the bail application in the *court a quo*.

[36] Subsequently, I have been informed that there has been interaction between the respective counsels as it relates to an agreed draft order in the event that I am inclined to uphold the appeal. One specific issue was the request by the court that it be considered that Mrs Otubu being the appellant's wife, relinquish her passport to the South African Police, seeing as she has a half share in the immovable property situated at Erf [....] Parklands, Cape Town. I was fully aware that this might very well infringe upon her personal rights. The respondent was of same mind and therefore do not seek such an order against Mrs Otubu. It has now been brought to my attention by the appellant's attorney of record that Mrs Otubu has unequivocally and voluntarily consented to handing over her passport to the South African Police.

[37] It has further been confirmed to me by the attorney of record of the appellant that they are also in possession of the childrens' passports and undertake to hold these passports and not return them to Mrs Otubu until the extradition proceedings are completed.

CONCLUSION

[38] For the reasons sated above, I am of the view that the magistrate misdirected herself and was wrong in determining that the interests of justice did not permit the release from detention of the appellant.

[39] It is hereby ordered that:

1. The appeal against the decision of the Additional Magistrate, Cape Town, R Oliver, delivered on 29 December 2021 at Cape Town Magistrates Court under case number 16/750/2021 refusing the appellant's release on bail, is hereby upheld.
2. The aforementioned decision is replaced with the following order:
    2.1 The appellant is released on bail upon payment in the amount of R210 000.00 rand (two hundred and ten thousand rand).
    2.2 In addition to paragraph 2.1 above, the immovable property being Erf [....] Parklands, situated in City of Cape Town, as owned between the appellant and his wife, is hereby caveated as security for bail and a copy of this order is to be served on the registrar of deeds. Such security shall only be released by an order of court.
    2.3 The appellant may not have contact of any nature, means or description with the co-respondents in the extradition proceedings and/or the Neo Black Axe Movement of Africa and its members of the Black Axe, whether domestically or internationally, except via his attorneys.
    2.4 The appellant's passport must be retained by the South African Police Services pending any extradition request and the outcome of any subsequent enquiry and extradition proceedings.
    2.5 The appellant may not apply for any travelling document other than to regularize his presence in the Republic of South Africa whilst on bail. In the event that the appellant finds it necessary to approach the Department of Home Affairs, he must inform his attorney who in turn must inform Captain Willem van der Heever. In the event that the appellant does not have an attorney of record, he must comply with the aforementioned *mutatis mutandis.*
    2.6 The appellant must report to the Parklands Police Station daily between the hours of 07h00 and 19h00. No excuse will be relied upon

even in the event of any state of emergency being imposed by the national or provincial government (Western Cape).

2.7 The appellant is confined to his place of residence, being [….] Hendon Street, Parklands, between the hours of 20h00 and 07h00.

2.8 In the event that the appellant is to change his place of residence, the appellant's attorney and the investigating officer, being Captain Officer Van der Heever, whose cell phone number is [....], must timeously be informed of same and be provided with a reasonable opportunity to confirm the address, prior to such change of address occurring.

2.9 The appellant may not contact any known witnesses directly or indirectly in the pending case against him in the United States of America.

2.10 That the appellant may not access or attempt to access the following email accounts:

Clickherenow01@gmail.com

Cickherenow01@gmail.com (Apple iCloud)

Otubuproperties01@hotmail.com

2.11 The appellant may not register a new email or use any third-party email which purports to enable the appellant to endeavor to, or actually engage in any manner or description, communications of a similar nature for which he has been arrested for.

2.12 The appellant is prohibited from engaging in any financial transaction/s of any description using, *inter alia,* any of the following methods:

2.12.1 via iCloud

2.12.2 cryptocurrency

2.12.3 bitcoin payments

2.12.4 storage wallets via any computer programme or mobile phone

2.12.5 block chain devices or mechanisms

2.12.6 digital asset transactions

2.12.7 payments in any virtual currency

No third party may assist or act on behalf of the appellant in engaging in any of the above financial transactions or mediums.

2.13 The appellant may not himself or via a third party register any new company with the Companies and Intellectual Property Commission of South Africa, to conduct any business dealings pending any extradition request and the outcome of any subsequent enquiry and extradition proceedings. Any business transaction/s must be conducted through an attorney's trust account in terms of section 86(4) of the Legal Practice Council No 28 of 2014.

2.14 The appellant may not engage in any criminal offence which can be shown to amount to whether directly or indirectly, romance scamming, electronic scamming or any criminal offence related to the internet including cybercrime, via any electronic or internet-based medium or commit any schedule 1 offence, whether in the Republic of South Africa or any other jurisdiction. No third party may assist or act on behalf of the appellant to engage in any of the above.

2.15 The appellant nor his company Otubu Properties (Pty) Limited are prohibited from holding an international bank account via which any financial transaction/s may be conducted. In so ordering, the appellant may not engage with, *inter alia,* any of the following commercial banks and/or cryptocurrency exchanges:

2.15.1 GT Bank – Nigeria

2.15.2 Fidelity Bank – Nigeria

2.15.3 Zenith Bank – Nigeria

2.15.4 Commonwealth Bank – Australia

2.15.5 Perfect Money Bank – Hong Kong

2.15.6 Investec Private Bank – United Kingdom

2.15.7 Local Bitcoins Cryptocurrency Exchange – Finland

2.15.8 Coinbox Cryptocurrency Exchange – Seychelles

2.15.9 Binary Uno Cryptocurrency Exchange – Seychelles

2.15.10 Kreken Cryptocurrency Exchange – United States

2.15.11 Coinbase Cryptocurrency Exchange – United States

2.15.12 Gemini Cryptocurrency Exchange – United States

2.15.13 Huobi Cryptocurrency Exchange - China

2.16 The appellant must attend court at all times up until the finalization of the extradition proceedings, including all appearances in respect of the Extradition Act 67 of 1962, any appeal to this court in terms of Section 13 of the Extradition Act 67 of 1962 and any decision by the Minister in terms of Section 11 of the Extradition Act.

2.17 If the appellant is released on bail, the appellant must appear in the Cape Town Magistrates Court, for purposes of continuation of the extradition proceedings, on 23 May 2022 and any further date thereafter.

2.18 Wherefore the appellant's wife, Mrs Anesu Georgia Otubu (formerly Usayi) with passport number [....] has consented to her passport being retained by the South African Police Services as a further condition of the appellant's release on bail, her passport must be retained by the South African Police Services pending the outcome of the enquiry and extradition proceedings.

G L CARTER
ACTING JUDGE OF THE HIGH COURT

For applicant:	Adv. A Katz SC
	Adv. B Prinsloo
Instructed by:	Mathewson Gess Inc Attorneys
For Respondents:	Adv. R Lewis
Instructed by:	Department of Public Prosecution