REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A12/2023

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

14/06/2023

THE STATE — Appellant

and

JAMES JUNIOR ALIYU — Respondent

JUDGMENT: BAIL APPEAL

Johnson AJ

[1] The respondent, who is charged with an offence mentioned in Schedule 5 of the Criminal Procedure Act 51/1977 (CPA), has applied for bail in the district court in terms of section 60 pending his extradition enquiry to the United States of America.

[2] He was granted bail. The State is subsequently bringing an application to appeal the granting in terms of section 65A.

[3] The respondent has raised a point *in limine* that the appellant has not applied for leave to appeal the granting of bail to the respondent. He relies on the provisions of section 65A of the Criminal Procedure Act 51/1977 (CPA). It determines as follows:

> 1. (a) The attorney-general may appeal to the superior court having jurisdiction, against the decision of' a lower court to release an accused on bail or against the imposition of a condition of bail as contemplated in section 65(1)(a).
>
> (b) The provisions of section 310A in respect of an application or appeal referred to in that section by an attorney-general, and the provisions of section 65 (1) (*b*) and (*c*) and (2), (3) and (4) in respect of an appeal referred to in that section by an accused, shall apply *mutatis mutandis* with reference to a case in which the attorney-general appeals in terms of paragraph (*a*) of this subsection.

[4] Section 310A (1) (a) of the CPA provides that: "The attorney-general may appeal against a sentence imposed upon an accused in a criminal case in a lower court, to the provincial or local division having jurisdiction, provided that an application for leave to appeal has been granted by a judge in chambers. Subsection (b) determines that: "The notice shall state briefly the grounds of the application."

[5] The matter came before me in court, not in chambers, during the hearing,

[6] The State has applied for leave to appeal the judgement of the court *a quo,* delivered on 18 January 2023*,* in an application on pp 004-7 – 004-22 of the papers, dated 10 February 2023 which was filed on 13 February 2023. It is accompanied by an application for condonation for the late filing of the application for leave to appeal on pp 004-26 - 004-33, which is unnecessary as the application was brought within the time limit provided for in terms of section 310A(2)(a) of the CPA. I am satisfied that this matter is correctly before me. To refer it back to the Registrar to place it before a judge in chambers to grant permission for leave to appeal, and then refer it back to me to hear the State's application, will be absurd, time consuming and costly. I am of the view that I am able to consider the application for leave to appeal as the matter had been placed before me twice, and I am aware of the grounds of the application. As the State alleges that the magistrate committed an irregularity in the granting of bail, a court cannot shut its eyes to the allegations merely because the application was not placed before a Judge in chambers to grant leave to appeal.

[7] The fact that further steps were taken when the accused was served with a notice of the appeal, indicates that he and his attorney was satisfied with the way in which the Director of Public Prosecutions handled the matter. They accepted service of the papers. He is acutely aware of the contents of the State's application, he has appointed council to represent him in the matter, and he has filed Heads of Argument in opposition to the State's application in terms of section 65A (1) (a). There will no prejudice to the applicant if I grant the State leave to appeal at this stage.

[8] I therefore granted the application for leave to appeal.

[9] The Respondent who goes by the names of James Junior Aliyu, Old Soldier and Ghost, appeared in the magistrate's court subsequent to his arrest on a warrant of

arrest, issued on 2022/06/28 in terms of Article 13 of the Extradition Treaty between the Government of the Republic of South Africa and the Government of the United States of America (USA) for his extradition to the United States of America following information under oath, to stand trial on counts of:

9.1. Conspiracy to commit wire fraud in violation of Title 18, United States Code, section 1349;

9.2. Wire fraud and aiding and abetting wire fraud, in violation of 18 U.S.C section 1343 and 2;

9.3. Conspiracy of money laundering, in violation of 18 U.S.C. section 1956(h); and

9.4. Money laundering and aiding and abetting money laundering, in violation of 18 U.S.C section 1956(a)(1)(A)(i), 1956(a)(1)(B)(i) and 2.

[10] There is a formal request for his extradition in terms of the Extradition Act 67/1962 (The Act) to the United States of America, requesting a finding:

10.1 in terms of section 10 of the Act, that the Respondent is liable to be surrendered to the USA; and

10.2. that the respondent be committed to a prison in terms of section 19 (1) Act to await the decision regarding the surrender of Minister of Justice and Correctional Services.

[11] The parties have agreed that the bail application in the district court resorts under schedule 5 CPA.

[12] The respondent placed his matter before court by way of an extensive affidavit and his partner testified under oath. He is a Nigerian citizen. The State has charged him for various contravention of the Immigration Act 13/2002 and various counts of fraud in relation to the opening of bank accounts. He has a valid defence and will plead not guilty.

[13] He was involved in business dealing with a Mr Mushonga, who gave him two vehicles as surety for money he owed him. Instead of setting out what his defence is, he attacks the character of Mr Mushonga in a large part of his affidavit, and accuses him for the predicament that he is in. His life and that of his partner is in danger. The police abducted him and said they would release him if he stopped his feud with Mr Mushonga. He was released on bail 2 days later, but the police did not pursue the matter of the fake identity card for which he was apparently arrested. His partner was also harassed by suspected policemen. It demonstrates that he was framed and set up. Mr Mushonga has sufficient money and wields power to have police officers commit criminal offences on his behalf. This demonstrates the circumstances under which he is prosecuted and is a clear indication of his valid defence.

[14] His release will not prejudice justice and he has no way of travelling as his passport is in the hands of the police. He poses no threat to the public, or any person and he has no previous convictions.

[15] When evaluating this version, it is clear that the respondent places all the blame on others, and tries to exonerate himself. The learned magistrate ignored these facts and merely concluded that that the respondent denies the offences and has a valid defence. He completely ignored the fact that the respondent is playing the blame game and gave no explanation why he believed he had a valid defence. The respondent made

all these unsubstantiated allegations without affording the State an opportunity to cross-examine him on his allegations.

[16] Mr Stephen Dougherty from the USA Secret Service and Capt. Van den Heever of the South African Police Services gave statements disputing his allegations. The learned magistrate ignored the evidence of Mr Dougherty and Capt. Van den Heever, and decided to accept the version of the respondent, without good cause or giving any reasons. A presiding officer cannot selectively decide what evidence he prefers to take cognisance of in a bail application. All the evidence needs to be considered.

[17] The respondent further pronounced that he has no pending criminal cases against him. This is false. According to the statement of Capt. Van den Heever there are various matters pending against him in the Randburg Magistrates' Court. He also has various identities and it appears that he has access to the Department of Home Affairs to obtain false documents. The court *a quo* ignored this.

[18] He has made many unsubstantiated allegations regarding newspaper reports to give credence to his statement. Although hearsay evidence is permissible in a bail application, one must never lose sight of the fact that its probative weight is not similar to direct evidence.

[19] He further alleged that he has no real ties in Nigeria, but this is farfetched. He does not explain his frequent travels, except when his father passed away. The reasons for his extensive travels remain a mystery. Due to the fact that he travelled extensively to Nigeria from 2016, despite the fact that he allegedly permanently resides in South Africa and considered it his home, one would have expected him, where he carries the burden of proof, to enlighten the court in this regard.

[20] The partner of the respondent changed the address that he gave as his when he was arrested, to a different one, despite warnings from her attorneys not to do so. She concealed her second address from the police and they could not confirm it, contrary to what the respondent said in his statement. She stayed there for 3 months before she revealed that it was the respondent's address. The fact that she freely changed it, points to the fact that it was her address, not that of the respondent.

[21] When the respondent's partner was recalled, her evidence sounded like an extract from a James Bond movie. There were hidden video cameras, video footage and masked faces. One cannot help but see a picture emerge where everyone, even the police, was out to get the respondent and frame him. When she was confronted with video evidence which was meant to support her evidence, she was unsure of the date of the footage, and the identities of the persons who appeared in the video.

[22] The respondent declared that she had a South African passport, but he concealed the fact that she also has a British passport.

[23] Capt. Van den Heever deposed of an affidavit which in great detail described the involvement of the respondent in the charges that he is sought for in the USA. His involvement has caused a loss of approximately $12 million, which was sent to his and other bank accounts.

[24] He registered 13 bank accounts using a false name. He is a flight risk and has three passports of which one is valid. His previous Nigerian passports expired on 27 July 2015 and 14 July 2020. He has no doubt that the respondent will flee to a country that does not have an extradition treaty with the United States of America. He has no fixed address in the RSA, and no fixed employment. He is in good health which enables him to travel easily. He has obtained a South African ID document under a false name

containing his photo. The Department of Home Affairs has no physical or electronic record of him and his birth certificate cannot be traced.

[25] He has a pending criminal matter in the Randburg magistrates' court and is charged with 15 counts of fraud, uttering and contraventions of section 49 of the Immigration Act 13 of 2002.

[26] Steven Dougherty is an agent in the services of the United States Secret Services. He does global investigations. He investigated the respond after he received information about him.

[27] He has established that the respondent and his co-conspirators created fraudulent email addresses which mimicked actual email addresses of individuals. He gave an elaborate description of how the crimes were committed for which his extradition is sought. The extradition application contains various affidavits which I find unnecessary to deal with at this stage.

[28] Bail appeal is governed by section 65(4) of the CPA which states that:

"*The court or judge hearing the appeal shall not set aside the decision against*

which the appeal is brought, unless such court or judge is satisfied that the decision

was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given."

[29] The meaning attached to this was stated as follows in *S v Barber 1979 (4) 218 (D)* at 220E-H:

"*It is well known that the powers of this court are limited where the matter comes before it on appeal and not as a substantive application for bail. This court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although*

this court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that no matter what this court's own views are the real question is whether it can be said that the magistrate who had the discretion to grant the bail exercised that discretion wrongly".

[30] Where the applicant in a bail application decides to bring his application for bail by way of an affidavit and there is a dispute between his papers and that of the prosecution's, the allegation of the State, unless farfetched, would prevail, because the applicant bears the onus to prove his case on a balance of probabilities.

[31] The learned magistrate unfortunately, acted as a witness in the case, by searching, by his own admission during his judgement, on Google for evidence of an extradition treaty between the USA and Nigeria. The State and the respondent's lawyer had opposing views on the existence of such a treaty. It is irregular for a court to search for evidence on Google, which had not been proved to be a reliable source of information, to contradict the arguments of one party or the other. Neither the State nor the respondent was thereafter given an opportunity to respond to the presiding officer's finding. It is not permissible for an independent judicial officer to give evidence from the bench. It is permissible in certain defined circumstance to take judicial cognisance of certain facts and in this case, law of a foreign State. It is a condition however, that such law must be ascertained readily and with sufficient certainty. (See section 1 (1) of the Law of Evidence Amendment Act 45/1988). An extradition treaty between two foreign countries cannot be ascertained readily and with certainty. It was irregularly for the learned magistrate to take cognisance of what he had uncovered on Google, and does not bode well for the independence, and impartiality I might add, for the Judiciary.

[32] In *S v Le Grange* [2008] ZASCA 102 at [21] the court confirmed it as follows:

> "*It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy, it is important that the public should have confidence in the courts. Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer."*

[32] The trial court did not investigate why the respondent, who is a Nigerian citizen, goes by different aliases. He gave no consideration to the strength of the State's case as put forward by the witnesses, and merely echoed the respondent's allegation that "he will plead guilty and has a strong defence". It was never considered in judgement what that defence of the respondent is and on what credible evidence it is based. Of greater importance, is that the evidence of the State regarding the commission of the offences, were ignored.

[33] The evidence of the investigating officer Capt. Van den Heever, that the respondent is a member of a movement "Black X", that they are involved in internet scams and wire fraud internationally and has members across the world, was also ignored without giving any valid reasons for not considering it. The court thus misdirected itself by finding that there is no evidence to support the fact that he is a member of "Black X".

[34] Evidence that the respondent obtained a South African ID fraudulently under the name William Khosi Mtsweli, which ID was found in his possession and was indicative of a warning sign that he is a flight risk, was also ignored by the court *a quo.*

[35] He also echoed the allegation by the respondent that he is not flight risk and will stand trial, completely ignoring the opposing evidence and opinions of the witnesses for the State, who disputed this.

[36] The magistrate has failed to consider that there is a pending warrant for his arrest in the USA and that an application for his extradition is pending. He is charged there for serious crimes. This is a great incentive to abscond.

[37] It is trite that once a misdirection is apparent from the record either on the findings of fact or law, this Court is at large to interfere with the decision of the magistrate.[S v M 2007 (2) SACR 133 (E)]

[38] Where a court *a quo* misdirected itself materially on the facts or legal principles, the court of appeal may consider the issue of bail afresh. See *S v Mpulampula* 2007 (2) SACR 133 (E) at 136*e* and *S v Jacobs* 2011 (1) SACR 490 (ECP) at [18]. If misdirection is established, the appeal court is at large to consider whether bail ought, in the circumstances, to have been granted or refused.

[39] It is not lost out of sight that the focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial, and that entails in the main, protecting the investigation and prosecution of the case against hindrance.

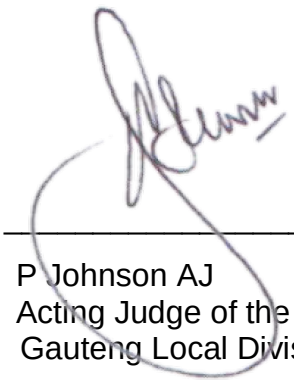
[40] The trial magistrate merely ignored the appellant's evidence regarding the commission of the offences, and did nor evaluate it. As far as the allegation by the respondent is concerned, he only gave a terse remark that: "*He will plead not guilty and has a valid defence."* Bearing in mind that he has the onus to prove, such an empty remark does not carry any weight.

[41] What the court is called upon to consider in a bail application, is the nature of the evidence that is available to the prosecution and, absent a challenge in the bail proceedings to the admissibility or reliability of that evidence, the court will accept the evidence. It is upon this acceptance that the court decides whether the case is strong or weak.

[42] In the result I am satisfied that the learned magistrate misdirected himself and that his decision to grant the respondent bail, was wrong. The correct decision in view of the above was to refuse the respondent's application for bail.

[43] In the result I made the following orders yesterday on 13 June 2023:

1. THAT the order of the District Magistrate, Randburg to grant bail to the Respondent, dated 18 January 2023 in case number 3/3517/2022, is set aside;
2. THAT the bail of the Respondent is revoked and he is remitted to cusody;
3. THAT the order that bail be granted to the Resondent is replaced with the following order: "The application for bail is refused";
4. THAT a warrant for the immediate arrect of the Respondent is authorized in terms of section 65A (3) of the Criminal Procedure Act 51/1977.



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P Johnson AJ
Acting Judge of the High Court
Gauteng Local Division

FOR APPELLANT: S.W. van der MERWE,
MONTANO ATTORNEYS
THE ITALIAN CLUB
7 MARAIS ROAD
BEDFORD VIEW

FOR RESPONDENT: ADV. C. MACK,
OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS
DATE OF HEARING: 13 JUNE 2023

DATE OF JUDGMENT: 14 JUNE 2023

This judgment was handed down electronically by circulating it to the parties and/or parties' representatives by email and by being uploaded to CaseLines.