

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

CASE NO: 7881/24

In the matter between:

TSEGAYE ESYAS

Applicant

And

MAGISTRATE MCKENZIE,

PAARL MAGISTRATES COURT

First Respondent

ANNELISE VAN DYK

Second Respondent

DIRECTOR OF PUBLIC PROSECUTIONS

Third Respondent

PAARL EAST POLICE STATION

Fourth

Respondent

THE MINISTER OF HOME AFFAIRS

Fifth Respondent

THE MINISTER OF POLICE

Sixth Respondent

Heard: 19 April 2024

Delivered: 22 April 2024

JUDGMENT

LEKHULENI J

Introduction

[1] This is an application brought on an urgent basis for the review and setting aside of an admission of guilt fine paid by the applicant on 10 April 2024 at Paarl Magistrates Court under case number B246/24. The applicant also seeks an order that the admission of guilty fine of R1000,00 be refunded and that the applicant be brought before another Magistrate as soon as reasonably possible for the applicant to have a fair and just hearing for bail. In addition, the applicant sought an order that an interpreter be present when he appears at the hearing in due course before another magistrate.

[2] The first to the sixth respondents (the respondents) were duly served with the application, and they did not oppose the applicant's application. Instead, the respondents filed a notice to abide by the decision of this court, provided no cost order is sought against them.

The factual background

[3] The applicant is an Ethiopian Citizen and does not speak English at all. Approximately two months ago, the applicant arrived in South Africa, having fled from Ethiopia due to severe political unrest. According to the applicant, it was extremely unsafe in Ethiopia, and he was concerned for his life and safety should he remain there. He fled to South Africa to be with his family and seek asylum. His two

brothers are among the family members he has in South Africa. His brothers are all duly documented, as they respect the law of this Country.

[4] The applicant further stated that upon his arrival in South Africa, he attended at the immigration offices in Epping to begin the process of his own documentation. He was sent away after being told that the system was offline. A few days later, he revisited the immigration offices and was told that they only serve the first 24 people per day regarding those seeking asylum. Unfortunately, he was not among the 24 people and was again turned away. The applicant then travelled back to Paarl, collected some belongings, and returned to the immigration offices in Epping to sleep outside on the pavement to be part of the first 24 people for the next day. At this stage, he was very desperate. The following morning, he was indeed part of the first 24 people. However, they were all turned away due to loadshedding.

[5] The applicant asserted that in the interim, he obtained employment through his family member in Paarl as a shopkeeper, where he simply operated the till as he could not converse in English with customers. Before he could make it back to the immigration offices for the fourth time to apply for asylum, he was arrested together with his employer. He was arrested for being an illegal immigrant, and in his opinion, the shop owner was arrested for employing him. He was arrested on 03 April 2024 and was subsequently taken into police custody and detained. He appeared in court for the first time on 4 April 2024, and the matter was postponed to 10 April 2024 for an interpreter to come on record as he does not speak or understand English.

[6] He was not legally represented in court. After the postponement, he was taken back to the police cells and held at Paarl East Police Station. On 10 April 2024, he was brought back to appear in court. According to the applicant, he was quite confused about not seeing his family members in the courtroom, mainly because he does not speak English. He did not understand anything that was happening around him, nor could he converse with anyone. This caused him anxiety and panic. He wanted to speak to his family but could not see them around. He does not know what happened during the court proceedings as he did not understand the English language.

[7] The applicant further asserted that there was no interpreter in court. Nonetheless, the matter seemed to be proceeding with or without him being able to understand anything at all. The applicant stated that one, Ms Van Dyk, the second respondent (the head of Immigration) and another female police officer then went outside the courtroom. They approached the applicant's family to confirm that they were indeed the applicant's family members. Ms Van Dyk then asked the applicant's family members if they had money, which they confirmed. Ms Van Dyk then informed the applicant's brother that R1000,00 was needed to be paid to the cashiers for the applicant to be released on bail. She subsequently returned to the courtroom.

[8] According to the applicant, there was absolutely no mention to the applicant's brother about an admission of guilt fine. His brother filed a confirmatory affidavit to confirm these assertions. The applicant's brother was not allowed in the courtroom, and he was told to wait outside. Thereafter, the applicant's brother accompanied the female police officer to the Cash Hall and paid the R1000,00 as he was requested to

do. He was subsequently issued a receipt for such payment. Later, the applicant's brother returned to the courtroom with the receipt, labouring under the impression that the applicant was about to be released on bail. He was then told that Ms Van Dyk had already ensured that the applicant was taken away and is in custody.

[9] Perplexed by what was happening, the applicant's family members asked the police officer why the applicant was kept in custody when he had just paid bail. In response, the female officer explained to the applicant's brother that they were mistaken as they did not pay for the applicant's bail; instead, they paid the applicant's admission of guilt fine. The police officer further explained to them that since the applicant has now paid the admission of guilty fine, Ms Van Dyk is authorized to keep the applicant in custody until he is deported. According to the applicant, it became apparent to his family members at this point that Ms Van Dyk had orchestrated everything to ensure that they were misled. She preyed on isolating the applicant from his family and his lack of understanding of English to ensure that the applicant was deported and did not apply for bail.

[10] On 11 April 2024, Ms Van Dyk returned to the Police Station to collect the applicant personally and took him to the immigration offices to sign some documents. According to the applicant, Ms Van Dyk was extremely hostile and racist towards him, treating the applicant with severe inhumanity, like the applicant was simply an animal. The applicant averred that Ms Van Dyk shouted at him and forced him to remove the top half of his clothing; however, the latter did not understand what she was saying, but he was severely distressed by her conduct. Ms Van Dyk

forced the applicant to sign certain documents, and the applicant refused, and this angered her more.

[11] Upon returning to the police cells, the applicant averred that he felt he had no options. Ms Van Dyk tortured him to the point where he thought that his life was now in detention until deportation back to the political unrest in Ethiopia, and that made his life not worth living. There was nobody to hear his plight, and he could not undergo any more torture at the hands of Ms Van Dyk. At this stage, he believed that it was best to take his own life, and he attempted to hang himself. The police officials, however, had caught him trying to take his own life, and he was then moved to an isolated cell and placed on a suicide watch.

[12] The applicant further asserts that Ms Van Dyk still continued to insist that he signs documents, notwithstanding that she is aware that he will not sign them as he does not understand anything. In addition to the aforesaid, the applicant's attorney of record has also spoken to the police officials at Paarl Police Station, who confirmed that the conduct of Ms Van Dyk was a normal occurrence. He was informed that she treats people in this manner to threaten and demean them. More so, they confirmed that she does so to force immigrants such as the applicant to sign documents under duress. The applicant implored the court to ensure that Ms Van Dyk's conduct was investigated.

[13] It was the applicant's contention that the presiding magistrate erred in not ensuring that the appropriate interpreter was on record to allow him to have a fair hearing. The applicant further stated that he does not speak English, and nothing was ever explained to him nor to his family that he was not paying bail and that Ms

Van Dyk blatantly misled his family. The applicant stated that he could not comment whether Ms Van Dyk misled the learned magistrate. However, the applicant invited Ms Van Dyk and the magistrate to comment on why the proceedings proceeded as they did. To this end, the applicant sought an order that the admission of guilt fine be set aside and that he be refunded his money accordingly.

Legal Principles and Analysis

[14] As discussed above, the respondents did not oppose the application. The applicant challenged the magistrate who presided over his matter and Ms Van Dyk to comment on the legality of the proceedings of 10 April 2024, and both did not respond. They chose not to challenge the applicant's averments. Ms Van Dyk did not oppose the application despite the damning allegations made against her by the applicant. As things stand, the applicant's version remains uncontroverted.

[15] The right to be tried in a language that the accused understands is essential for the accused to exercise his right to a fair trial. It must be stressed that an accused person's right to be communicatively present in criminal proceedings is a prerequisite for participation in those proceedings. See *S v Abraham* 1997 (2) SACR 47 (C)). More so, the right to understand the proceedings has long been recognised in South African law. (see Steytler '*Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996*' (1998) at 361. Importantly, section 6(2) of the Magistrates Court Act 32 of 1944 places a duty on the court in criminal cases to call an interpreter at state expense if it appears to the court that an accused

is not conversant in the court language. The failure to do so is a gross irregularity vitiating the proceedings. See *S v Mafu* 1978 (1) SA 454 (C).

[16] The right to be tried and given information in a language that the accused understands or to an interpreter is entrenched in our Constitution. Section 35(3)(k) of the Constitution enshrines the right to be tried in a language that the accused person understands, or if that is not practicable, to have the proceedings interpreted to that language. The structure of the section envisages two distinct rights. *First* is the right to be tried in a language that the accused fully understands. *Secondly*, when that is not practicable, the right to have proceedings interpreted in a language the accused understands. Section 35(3)(k) does not confer a right to be tried in a language of choice but merely in a language the accused understands.

[17] This right is not only exclusive to South Africa. Section 14 of the Canadian Charter of Rights provides that a party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter. This right has also been entrenched in various International Conventions. Article 14(3)(f) of the International Covenant on Civil and Political Rights (adopted on 16 December 1966) provides that in the determination of any criminal charge against a person, everyone shall be entitled to free assistance of an interpreter if he cannot understand or speak the language used in court. Furthermore, Article 6(3)(e) of the European Convention on Human Rights also provides that everyone charged with a criminal offence has the right to free assistance of an interpreter if he cannot understand or speak the

language used in court. Similar provisions are found in Article 40(2)(b)(vi) of the Convention on the Rights of the Child.

[18] These conventions are a testament to the importance of this right. In my view, the purpose of this right is to ensure the meaningful participation of the accused in the proceedings. An accused person cannot be expected to participate meaningfully in criminal court proceedings, particularly to challenge and adduce evidence, if he does not understand the language used in court. The right to have an interpreter or to be tried in the language the accused understands strikes at the heart of a fair trial.

[19] In the present matter, it is common cause that the accused did not understand the proceedings. It is also common cause that no interpreter was present to interpret the proceedings to the applicant. According to the applicant, he did not understand what was happening in court and he became anxious and panicked. It is difficult to fathom on what basis the court below was satisfied that the accused was admitting guilt when the accused could not understand the proceedings and could not communicate with the court. The record of proceedings reveals that on 04 April 2024, the court postponed the matter for bail information. According to the applicant, it was also postponed for an interpreter.

[20] However, on 10 April 2024, the court endorsed the front page of the charge sheet on the sentence section and recorded that the matter had been transferred to the admission of guilty fine register. Concerningly, nothing on the record suggests that the applicant was unequivocally acknowledging guilt. The applicant asserted in his affidavit that he did not understand the proceedings as he did not understand the

language of record the court used. In my view, it was highly irregular for the magistrate to finalise the matter in the manner that he did without ensuring that the accused understood the proceedings. Regarding the necessity of a competent interpreter in criminal proceedings, Traverso J, as she then was, in *S v Abraham* 1997 (2) SACR 47 (C) at 49h, stated as follows:

“Dit blyk duidelik uit voorgaande bepaling dat die hof verplig is om 'n bevoegde tolk aan te stel om die beskuldigde by te staan. Indien 'n landdros dit nie sou doen nie, sou dit 'n ernstige onreëlmatigheid daarstel.”

[21] From the above, it is abundantly clear that the magistrate erred in proceeding to finalise the matter without determining whether the applicant indeed admitted guilt or not. The applicant was in court when the admission of guilt fine was paid. It was also irregular for the court *a quo* to proceed and finalise the matter in the absence of an interpreter for the accused. In addition, the court below failed to determine whether the admission of guilt fine was in accordance with the prescripts of the Criminal Procedure Act 51 of 1977.

[22] It is apposite to remind ourselves that a person must be fully aware of the consequences of an admission of guilt to appreciate the nature and the import thereof. The fact that on payment of the admission of guilt fine, the accused was waiving his right to adduce and challenge evidence was not explained to him. It was also not explained to him that by paying the admission of guilt fine, he was waiving his right to be sentenced only upon proof beyond reasonable doubt that he was guilty of the stipulated offence. It is incontestable that the applicant did not

understand as the proceedings were not explained in the language he understands. In my view, this irregularity is so gross that it vitiated the entire proceedings.

[23] The uncontroverted version of the applicant is that he did not speak nor understand English. He asserted that nothing was ever explained to him nor to his family about the payment of the admission of guilt fine. Instead, his brother who also filed a confirmatory affidavit to the applicant's application, confirmed that they were misled by Ms Van Dyk who intimated to them that they were paying bail. These allegations against Ms Van Dyk are so egregious. Surprisingly, they were not challenged at all by the second respondent.

[24] Lastly, I must mention that Ms Van Dyk's conduct, as explained by the applicant, is deplorable and must be condemned. It has been alleged that she treated the applicant with disdain and inhumanely, so much so that it led the applicant to attempt suicide. In addition, it has been alleged that she does this to force immigrants, such as the applicant, to sign documents under duress. Significantly, Ms Van Dyk did not dispute these allegations despite being personally served with this application.

[25] In my view, this kind of behaviour from a high-ranking government official is repugnant and objectionable to the expected tenets and attributes of a person in her position and to the *Batho Pele* principles. I must emphasise that section 195 of the Constitution provides that the public administration must be governed by democratic values and principles enshrined in the Constitution, which include, amongst others, that a high standard of professional ethics must be promoted and maintained.

Furthermore, section 10 of the Constitution guarantees everyone inherent dignity and the right to have that dignity respected and protected. These rights apply with equal force to the applicant. In my opinion, a note of caution must be sounded to Ms Van Dyk to desist from such unacceptable behaviour.

Order

[26] In the result, I would propose that the following order be granted:

26.1 The admission of guilty fine is set aside.

26.2 That the applicant be refunded the R1000 paid.

26.3 The matter is referred to Paarl Magistrate Court to be heard *de novo* before another Magistrate for the applicant to have a fair hearing as soon as reasonably possible.

26.4 That an appropriate competent interpreter be made available for the applicant at the hearing of those proceedings.

26.5 That the second respondent be removed entirely from handling the applicant's matter and from being present in the criminal proceedings involving the applicant.

LEKHULENI JD

JUDGE OF THE HIGH COURT

I agree and it is so ordered:

GOLIATH AJP

ACTING JUDGE PRESIDENT

APPEARANCES

For the applicant: Adv Essa

Instructed by: Boucher Attorneys Inc
Lehan Building Parow

For the Respondents: The State Attorney
Cape Town