Of interest

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO. CA&R 226/2024

In the matter between:

VILI KRASIMIROV GEORGIEV **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Rugunanan J

[1] This is an appeal against a refusal of bail by a magistrate post an appeal lodged against a committal order under section 10(1) of the Extradition Act[1] (the Act).

[1] Act 67 of 1962 as amended.

[2] In an order dated 23 December 2024 marked as 'Annexure A' hereto this Court upheld the appellant's appeal against the decision of the magistrate in Gqeberha refusing to admit him to bail, and in substitution thereof, granted him bail for the specified amount on conditions.

History

[3] The appellant is an extraditee. On 19 December 2014 the Supreme Cassation Court of the Republic of Bulgaria (the apex court) confirmed his conviction for murder (a statutory offence in Bulgaria[2]) and his sentence of 18 years' imprisonment for an offence committed by him on 5 December 2008 in that country. The appellant was initially acquitted of the charge by the trial court, the Sophia City Court on 19 July 2013. The prosecution appealed to the Sophia Court of Appeal. On 17 April 2017 that court overturned the acquittal, substituting it with the aforementioned conviction and sentence. The appellant's final bid in an appeal to the apex court failed. The appellant was out on warning pending the outcome of the appeal in that court. He travelled to South Africa on 10 December 2014 on a Bulgarian passport and was issued with a holiday/visitor's visa that was stamped in his passport and valid until 4 January 2015. He never departed upon expiry of its validity period. On request by the Bulgarian authorities to have him extradited, the appellant was arrested in South Africa (Gqeberha) on 17 August 2018.

[4] His arrest was effected in terms of a warrant issued by a magistrate in Pretoria. At the time of his arrest the appellant's visa had long expired. He was – and remains – illegally in South Africa.

[2] In terms of articles 115 and 116 of the Bulgarian Criminal Code.

[5] On 13 September 2018 during the course of the extradition enquiry before the magistrate the appellant was granted bail of R100 000 on conditions *inter alia* that he keeps his cellphone number open and that he be subject to 24 hours house arrest. The State did not oppose the appellant's release on bail. As the extradition enquiry progressed, notwithstanding delays, the appellant's conditions of release were incrementally relaxed until he enjoyed full freedom of movement.

The procedural context occasioning the appeal against the refusal of bail and the applicable legal framework

[6] On 22 November 2024 and in accordance with the provisions of section 10(1) of the Act the magistrate made a finding that the appellant is liable to be surrendered to Bulgaria and that he be committed to prison to await the decision by the Minister of Justice and Constitutional Development (the Minister) with regard to his surrender to that State. In accordance with section 13(1) of the Act the appellant lodged a notice to appeal the magistrate's finding.[3]

[7] Simultaneously and in accordance with section 13(3) of the Act, he applied for his release on bail. His application was refused on

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[3] *Wares v Additional Magistrate, Simonstown, Cape Town and Others* [2024] ZAWCHC 200 para 14. The relevant section reads: '13 Appeal - (1) Any person against whom an order has been issued under section *ten* or *twelve* may within *fifteen* days after the issue thereof, appeal against such order to the provincial or local division of the Supreme Court having jurisdiction.
(2) On appeal such division may make such order in the matter as it may deem fit.
(3) Any person who has lodged an appeal in terms of subsection (1) may at any time before such appeal has been disposed of, apply to the magistrate who issued the order in terms of section 10 or 12 to be released on bail on condition that such person deposits with the clerk of the court, or with a member of the Department of Correctional Services, or with any police official at the place where such person is in custody, the sum of money determined by the magistrate.
(4) If the magistrate orders that the applicant be released on bail in terms of subsection (3), the provisions of section 66, 67, 68 and 307 (3), (4) and (5) of the Criminal Procedure Act, 1977 (Act 51 of 1977), shall *mutatis mutandis* apply to bail so granted, and any reference in those sections to –*(a)* the prosecutor who may act under those sections, shall be deemed to be a reference to such person who may appear at an enquiry to be held under this Act; *(b)* the accused, shall be deemed to be a reference to the person released on bail under subsection (3); *(c)* the court, shall be deemed to be a reference to the magistrate who released such person on bail; and *(d)* the trial or sentence, shall be deemed to be a reference to the magistrate's order under section 10 or 12.'

25 November 2024. The magistrate held the view that the appellant is a flight risk because he is a foreign national with a history of having fled his home country and is presently illegally in this country. She was also of the opinion that she was 'not convinced' that his appeal against her finding under the Act engendered 'prospects of success'.

[8] The appellant now resorts to this Court in an appeal against the refusal of bail. It is common cause between the parties that the nature of the present appeal is in relation to bail pending his appeal under the Act.

[9] It was contended in this appeal that the magistrate misdirected herself: *(a)* when she concluded that there are no prospects of success in the appeal against her finding that the appellant is liable to be surrendered; and *(b)* in concluding that the appellant is a flight risk. These aspects of the appellant's argument are dealt with later in this judgment.

[10] The high court has the inherent jurisdiction to grant bail to a person liable to be extradited while awaiting the relevant ministerial decision and/or the outcome of their appeal under section 13(1) of the Act.[4] Section 13(3) of the Act permits a person such as the appellant, who has been found liable to be extradited, the right to appeal that finding directly to a provincial or local division of a superior court.

[11] The inherent jurisdiction of the high court to grant bail in circumstances such as the present is grafted in the common law. The power is undisturbed due regard being had for the provisions of section 173 of the Constitution. The section confirms the inherent power of the superior courts and reads as follows:

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[4] *Wares supra* paras 87-90.

'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[12] Extradition proceedings in terms of the Act are *sui generis*[5]. They are intended to deliver or surrender to a foreign State an extraditee who has been accused or convicted of a criminal offence in that State.[6] While certain provisions of the Criminal Procedure Act[7] may be applicable to such proceedings[8] they are not criminal trial proceedings nor are they to be treated as such. The proceedings are concerned with the extraditability of the subject i.e. whether the person should be surrendered – their culpability or punishment does not feature.[9]

[13] The legal framework that applies when seeking bail after lodging an appeal under section 13(3) of the Act does not embrace the requirements of the legislative scheme set out in sections 60(11)*(a)* and *(b)* of the Criminal Procedure Act. The sections differ from the more flexible criteria set out in section 13(3). The section does not contain any reference to the restrictive requirements in section 60(11) of the Criminal Procedure Act.[10] Recourse to the requirements laid down in the Criminal Procedure Act may result in an unjustified limitation of the right against arbitrary deprivation of freedom constituting an unjustified limitation on the constitutional rights to freedom and security[11] (see *Wares v Additional Magistrate, Simonstown, Cape Town and Others*[12]). Whether it is

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[5] *Kouwenhoven v Director of Public Prosecutions* [2021] ZASCA 120; 2021 4 All SA 619 (SCA) 2022 (1) SACR 115 (SCA) para 29.
[6] Section 3.
[7] Act 51 of 1977 as amended.
[8] As indicated in section 13(4) of the Extradition Act.
[9] *The Director of Public Prosecutions, Western Cape v The Magistrate, Cape Town and Nigel Tucker* [2022] ZAWCHC 184; [2022] 4 All SA 322 (WCC); 2023 (1) SACR 245 (WCC) para 75 and see the footnotes thereto.
[10] *Wares supra* paras 152-154.
[11] Section 12(1)*(a)* of the Constitution.
[12] [2024] ZAWCHC 200 specifically paras 152-154.

necessary to pronounce that the provisions of the Criminal Procedure Act relating to bail be made applicable to persons who are liable to be extradited is a matter for legislative deliberation.[13]

The test for Interference on appeal and the benchmark for bail in extradition matters

[14] The ultimate epitome of the rule of law is the Constitution and all law must be viewed under its lens. Section 35(1)*(f)* entitles an arrested or detained person 'to be released from detention if the interests of justice permit, subject to reasonable conditions'. A person committed to prison in terms of section 10(1) of the Act to await the Minister's decision is not excluded from the reach of the Constitution.

[15] Generally, the grant or refusal of bail is a discretionary decision under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted.[14] This does not mean that their discretion is absolute and unfettered. The discretion is one that must be exercised judicially in the sense that a judicial officer is expected to exercise their discretion in accordance with legal principles identified within the correct legal framework.

[16] The power of an appeal court to interfere in a decision by a lower court to refuse bail is generally limited to the question whether the discretion by the presiding officer in the court *a quo* was exercised wrongly[15]. If satisfied that the decision to refuse bail was wrong, or that some important aspects were overlooked[16], a court of appeal is at liberty

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[13] *Wares supra* para 155.
[14] *S v Dlamini; S v Dladla and others: S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC) at 88*h-i.*
[15] *S v Barber* 1979 (4) SA 218 (D) at 220E.
[16] *Alehi v The State* [2021] ZAGPPHC 492 para 21.

to undertake its own analysis of the evidence in which event it may disregard the factual findings of the court *a quo* and come to its own conclusion on the facts as they appear in the record[17].

[17] In considering bail in extradition proceedings, the high court retains the inherent power[18] to do so and it remains the benchmark in our law that bail ought to be granted unless it is not in the interests of justice[19]. Therein lies the crux of the matter.

The evidence in the bail application *a quo*

[18] The appellant testified in English. He has a Grade 12 level of education. He came to South Africa on 10 December 2014 on a valid visitor's visa while the outcome of his appeal to the apex court in the Republic of Bulgaria was pending. Alleging that the legal system in his country of origin is corrupt, he came to South Africa because the functionaries within the Sofia Court of Appeal wanted a bribe of €340,000 from his father in order to acquit him. He testified that they informed his father that he will be sentenced if the bribe is not paid. The appellant alleges that he also received threats from the family of the deceased that he will be killed once he goes to prison in Bulgaria. He intends making these disclosures in his representations to the Minister.

[19] At the time of his arrest in South Africa his visa had already expired and the arresting officer took possession of his passport containing the expired visa. He presently has a relationship with a South African woman with whom he lives together as man and wife and has a 5 year old child from the same woman. He has attempted to marry her on several

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[17] *S v Porthen* 2004 (2) SACR242 (C) para 16.
[18] *Wares supra* paras 87-90.
[19] *Toritseju Gabrieal Otubu v Director of Public Prosecutions, Western Cape* (A54/2022; 16/750/2021) [2022] ZAWCHC 79 para 6.

occasions but the Department of Home Affairs refuses to allow him to do so because of his illegal status in this country.

[20] He has also applied for asylum in 2022 and has recently (i.e. on 21 November 2024) renewed his endeavour to do so. The application is still pending.

[21] The appellant owns a quarter share of fixed property located in Gqeberha to the value of approximately R1 400 000. He receives an income (no detail specified) by virtue of a shareholding and directorship in a company called Reality Trade SA (Pty) Ltd. His ‘wife’ is an employee of the company.

[22] He testified that he will abide by any bail conditions that may be fixed and will hand himself over if his appeal is unsuccessful. He was aware throughout the extradition enquiry before the magistrate that she could find against him and order his detention, but nevertheless attended court on each occasion that he was required to do so.

[23] He indicated that he did not receive a fair trial in Bulgaria and intends to make representations to the Minister not to order his extradition, notwithstanding that since 10 December 2014 he made no efforts to legitimise his stay in South Africa.

[24] The record offers no indication whether the appellant has previously been charged or convicted or sentenced of an offence in this country, or whether there are any impending criminal proceedings against him.

[25] It is common cause:

(a) The appellant knew that if his appeal to the apex court was unsuccessful he would be required to hand himself over to serve his sentence in Bulgaria.

(b) He came to South Africa to avoid imprisonment in Bulgaria.

(c) On 13 September 2018 the appellant was granted bail without opposition from the State on conditions mentioned earlier and that these were relaxed until removed entirely by agreement.

(d) To the knowledge of the prosecutor (but apparently not disclosed to the court on that occasion) the appellant was already illegally in the country and was at all times required to remain in the country in order to attend the extradition proceedings.

(e) Since his release on bail on 13 September 2018 until 22 November 2024 when the magistrate found that he is liable to be extradited, the appellant complied with all his bail conditions and attended the magistrate's court on each occasion for the duration of the extradition hearing.

[26] The State adduced no evidence in opposition to the application for bail before the magistrate.

[27] It is significant that the appellant's testimony stands undisputed and uncontradicted.

The magistrate's refusal

[28] The appellant was denied bail for the reason that: *(a)* he did not 'convince' the magistrate that his appeal against the finding that he is liable

to be surrendered has prospects of success, and *(b)* she considered that he is a flight risk.

[29] In drawing these conclusions the magistrate relied on *Coetzee v S*[20]. In that matter the court, in dealing with the question of bail pending appeal, devised a formula that encompasses two 'relevant' and 'interconnected' factors: *(a)* prospects of success on appeal, and *(b)* the likelihood of absconding. Because these factors tend to shift in emphasis, it was observed in *Obiwuru v S*[21] (to which the magistrate referred) that it is within the discretion of the bail court to assess which of them is appropriate. On that premise, the likelihood of the appellant absconding induced the magistrate to adopt an approach that elevated her enquiry into prospects of success to the heightened standard that the appellant had to 'convince' her that in seeking bail such prospects were extant.

[30] The formulation in *Coetzee* was devised in the context of a refusal of bail pending an appeal against conviction and sentence. It was not in the context of a refusal of bail upon an appeal being noted against a committal order under the Act. It is apparent that the magistrate overlooked this cardinal distinction. She treated the application for bail as if it was one for bail pending appeal in a criminal case after sentence.

[31] In the light of the above, the determinative question in this appeal is whether the magistrate correctly acted well within her discretion in denying the appellant bail. Intertwined with this question is the vexing issue whether she was correct in applying the *Coetzee* formulation in refusing bail.

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[20] 2017 JDR 0451 (GP), [2017] ZAGPPHC 65 para 12.
[21] [2024] ZAWCHC 181 paras 68 and 70.

[32] To begin with, in heads of argument it was correctly contended for the appellant that the question concerning prospects of success in the appeal against the finding that he is liable to be surrendered was never raised during the application for bail, and that the magistrate unfairly dismissed the application by holding the view that she was not convinced that the appellant enjoyed such prospects.

[33] Prospects of success are relevant when a party ordinarily seeks leave to appeal. Section 13(1) of the Act does not identify leave to appeal as a prerequisite for appealing to a superior court. A consideration and plain reading of section 13(3) of the Act indicates that an application for bail pending an appeal duly noted in terms of the Act, is only concerned with the release of a person on condition that such person deposits with the clerk of the court, or with a member of the Department of Correctional Services, or with any police official at the place where such person is in custody, the sum of money determined by the magistrate.

[34] It appears to be the position that in matters pertaining to the Act, the issue of bail must be dealt with within its terms of reference. Prospects of success in an appeal against a refusal of bail do not do not factor for the reason that leave to appeal is not a requirement. The overarching criterion for bail is the interests of justice. Recognition of this standard is not discordant with the *sui generis* nature of proceedings under the Act. Respectfully, the magistrate erred in her approach once she considered prospects of success and in doing so her discretion in denying bail was exercised wrongly.

[35] In his heads of argument the appellant contended that in holding that there are no prospects of success the magistrate relied on

inadmissible evidence during the conduct of the extradition enquiry. The evidence was in the form of unsworn English translations of documents written in Bulgarian. He argued that the documents were placed before the magistrate without recourse to the prescripts of section 9(3) of the Act and in addition, she failed to establish the competency of the interpreter who translated the documents from Bulgarian into the English language.

[36] Since prospects of success features in a formula that does not fit within the framework of the Act, it is not within the remit of this Court to comment on these issues. To do so may verge upon expressing an opinion on prospects in the appeal or to second guess its outcome.

[37] During argument insofar as the appellant made submissions to demonstrate his prospects of success in the appeal against the finding that he is liable to be extradited, it was contended for the State that this issue is an irrelevant consideration. For reasons already dealt with it is unnecessary to delve into this aspect. By the same token it is unnecessary to delve into the State's submissions in support of upholding the magistrate's order in the extradition enquiry.

[38] I turn to the finding that the appellant is a flight risk. The magistrate's judgment indicates that she relied on the fact that the appellant is illegally in the country. Beyond that there is no evidence to support the conclusion that he will abscond if granted bail.

[39] On this issue the thrust of the State's opposition to bail is evident from the record of proceedings before the magistrate as follows:

'PROSECUTOR: I want to start off by saying I am opposing the application based on the fact that yes the accused person before court, an order has now been made for him to be surrendered to a foreign state. We know he has previously from Bulgaria

abscond[ed] when he faced the sentence that he had to serve of 18 years. So he is in exactly the same position now. I further ascertained that at present the accused before court is an illegal immigrant in South Africa. That is in essence what the opposition is based on.'

[40] Relying on *S v Botha*[22] the State pressed with the argument that the appellant be denied bail because his previous conduct in absconding from Bulgaria renders him a flight risk. In *Botha* the court made the following observation regarding previous conduct:

'Die beoordelaar van feite in 'n borgaansoek moet ideaal gesproke beklee wees met profetiese gawes. Dit moet bepaal word wat in die toekoms gaan gebeur. Gaan die beskuldigde sy verhoor staan en/of gaan hy met die ondersoek inmeng. Die feit dat hierdie gawe die gewone sterfling ontbreek veroorsaak dat van hulpmiddele gebruik gemaak moet word. Die voor-die-hand-liggende hulpmiddel is die optrede van 'n beskuldigde in die verlede. Dit mag onder bepaalde omstandighede nadelige gevolge vir 'n beskuldigde inhou. In so 'n geval sal hy besef dat hy tot 'n groot mate die outeur van sy eie omstandighede is.'

[41] The State did not challenge the appellant with the direct imputation that his past conduct prompts the risk that he will abscond if granted bail. The Court was urged to draw an inference. This is incorrect. In *S v Boesak*[23] the Supreme Court of Appeal underpinned the comments by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[24] in pronouncing that it is obligatory of a cross-examiner to put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to a witness. The attention of the witness must be directed to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an

[22] 2000 (2) SACR 201 (T) at 208G-H.
[23] [2000] ZASCA paras 50-53.
[24] 2000 (1) SA 1 (CC) at 36J-37E.

opportunity, while still in the witness stand, of giving any explanation open to the witness and of defending his or her character. This is in particular the case where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, or to qualify the evidence given by him, or to explain contradictions on which reliance is to be placed.[25]

[42] The record indicates that the magistrate was addressed on the above legal principles and authorities which are binding on her. Her misdirection is that she ignored them without attaching any weight to the apparent failure by the State to suggest to the appellant that he will abscond.

[43] To all intents and purposes the clear authority directed at the obligation imposed on a cross-examiner and the rationale therefor, binds this Court. It cannot, with respect, be urged to employ prophetic foresight on the basis of the *dictum* in *Botha.* To infer what the appellant might do in future is a speculative exercise. Engaging therein will go against the grain of the Constitution and amount to an arbitrary deprivation of the appellant's freedom without just cause.

[44] That said, this Court granted the appellant bail with conditions duly considered to be in the interests of justice.

[45] The order remains effective.

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[25] *S v Boesak* [2000] ZASCA paras 50-53 quoting from *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at 36J-37E.

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M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Appellant: *P Daubermann*, Griebenow Attorneys, Gqeberha (Ref: A Griebenow) Tel: 082 570 6084, Email griebenow@yebo.co.za
lawyer.za@gmail.com

For the Respondent: *M Stander*, Office of the Deputy Director of Public Prosecutions, Gqeberha, Tel: 012 842 1455 or 084 703 9502
Email mstander@npa.gov.za

Date heard: 19 December 2024.

Date delivered: 30 December 2024 (electronically).

'ANNEXURE A'

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA

C A & R 226/024

BEFORE THE HONOURABLE JUSTICE RUGUNANAN

On the day 23rd of December 2024

In the matter between:

VILI KRASIMIROV GEORGIEV **APPELLANT**

AND

THE STATE **RESPONDENT**

Having heard Mr. Daubermann for the Appellant, and Adv. M Stander for the Respondent and having read the material filed of record

THIS COURT RESERVED JUDGEMENT ON 19 DECEMBER 2024;

THEREAFTER ON THIS DAY;

IT IS ORDERED THAT:

1. The appeal is upheld.

2. The order issued by the Magistrate in the Gqeberha Magistrates' Court (Case No. 27/2758/18) on 25 November 2024 refusing the Appellant's application for bail is set aside.

3. The appellant is granted bail in the amount of R100 000 (One Hundred Thousand Rand) on the following conditions:

   3.1 The he reports in person to the officer in charge of the Community Service Centre (otherwise known as the charge office) at the police station nearest to his place of residence twice aa week every Wednesday and Sunday between the hours 06h00 and 18h00.

   3.2 That he must reside at his current place of residence namely 9 Marock Crescent in Bluewater Bay, Gqeberha, and shall not leave or travel out the district of the Nelson Mandela Bay Metropolitan Municipality except for medical or health related reasons.

   3.3 In the event that travel is required for the purpose contemplated in paragraph 3.2 the appellant and/or his legal representatives shall, as soon as circumstances reasonably permit, notify the Deputy Director of Public Prosecutions (Adv. M Stander, Tel: 012 842 1455 or 084 703 9502) and shall volunteer further information as to the appellant's contact details, his whereabouts and expected duration of his absence.

   3.4 That he will be excused from reporting to the police station if absent from the district of the Nelson Mandela Bay Metropolitan Municipality on the days mentioned in paragraph 3.1 and for reasons contemplated in paragraph 3.2 (in all other circumstances the provisions of paragraph 3.1 shall strictly apply)

   3.5 That except for the purposes of pursuing with his application for asylum, he is prohibited from applying or obtaining any travelling documents for the purpose of undertaking travel beyond the borders of the Republic of South Africa.

   3.6 That the title deed number T17823/2021 to the property described as Erf 329 Amsterdamhoek, Nelson Mandela Bay, Division of Uitenhage be surrendered to the Deputy Director of Public prosecutions (Adv. M Stander) for safekeeping, and further that he (including the other co-owners mentioned in the title deed), be prohibited from applying for a new title deed and disposing of the property.

4. In the event that the appellant fails to adhere to any of the conditions mentioned in this order, a warrant of arrest shall be authorised for immediate issue and execution and will result in forfeiture of bail money; alternatively the Deputy Director of Public Prosecutions acting for the State may bring an application in terms of section 68 of the Criminal Procedure Act 51 of 1977 for cancellation of the appellant's bail and for his committal to prison.

Reasons for this order will be delivered electronically no later than 09h30 on 30 December 2024 or anytime sooner as circumstances may permit.

TO: Griebenow Attorneys, Appellant's Attorneys (Ref: A Griebenow) 082 570 6084 griebenow@yebo.co.za

cc P Daubermann lawyer.za@gmail.com

AND TO: The Office of the Deputy Director of Public Prosecutions (Ref: M Stander) 012 842 1455 or 084 703 9502 mstander@npa.gov.za

BY ORDER OF COURT

S. M. SOMYALI

REGISTRAR (APPEALS)

REGISTRAR
IN THE HIGH COURT OF SOUTH AFRICA
23 DEC 2024
ECD - MAKHANDA - 006
EASTERN CAPE DIVISION
MAKHANDA