IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 242/2013

In the matter between:

MARWICK T. KHUMALO	**1st**	**Applicant**
BHUTANA DLAMINI	**2nd**	**Applicant**

And

THE KING	**Respondent**

Neutral citation: ***Marwick T. Khumalo and Another v The King (242/2013) [2013] SZHC 155 (17th July 2013)***

Coram: **M. Dlamini J.**

Heard: **16th July 2013**

Delivered: **17th July 2013**

Application for variation of bail conditions – onus on respondent to show on a balance of probability that there is a real risk that granting relaxation of the bail condition will and not may prejudice the administration of criminal justice system – court enjoined to

consider whether there is a new factor arising – hearsay evidence admissible in application of this nature.

Summary: Serving before me are two bail variation applications. Both applicants *viz*. Marwick T. Khumalo and Bhutana Dlamini, seek for the release of their passports. I have consolidated the two applications. Both applicants are committee members of the Commonwealth Parliamentary Association (CPA), Swaziland, with the 1st Applicant serving as Chair.

[1] Although the respondent initially opposed both applications, at the hearing, respondent submitted that it was no longer opposing the application by Bhutana Dlamini (2nd Applicant). I must point out from the onset that the respondent was well advised for the reason that the 2nd applicant based his application on a referral note by his doctor to the Republic of South Africa in order to undergo assessment of his head tumor. It is trite that for an accused person to stand trial, he must be fit and proper. One of the basic rules is that his health must be given the necessary attention. The respondent was well advised not to pursue its opposition as the interest of justice will better be served by 2nd applicant accessing unavailable health facilities and expertise outside the country.

[2] The court therefore orders the release of his passport or traveling document on conditions to be agreed between the parties and entered as an order of court.

[3] The above leaves this court with 1st applicant's application which is ferociously opposed by the respondent. With the 2nd applicant's application having fallen off, I will refer to the 1st applicant as applicant.

[4] The applicant premises his application on the following averments deduced from his founding affidavit:

> *"8. By virtue of my position as stated above, I have been invited to attend a seminar which will be held in Windhoek, Namibia from the 17th to the 27th July 2013. Annexed hereto is a copy of the letter of invitation marked* ***"A"*** *and* ***"B"*** *respectively.*
>
> *9. I therefore require my passport, for the entry into the Republic of Namibia and to be able to travel to Namibia, for the said CPA, Africa Regional Executive Committee and Annual general meetings.*
>
> *10. Also, I am invited to attend and to Chair the CPA Trustees meeting which will be held in London in the United Kingdom from the 13th August 2013. Annexed hereto is a copy of the letter marked* ***"C"****.*
>
> *11. I therefore need my passport to be able to process my visa for the entry to the United Kingdom for the said meeting of the Trustees of the CPA.*
>
> *12. The invitations referred to above have been extended to me by virtue of my position with the Commissioner Parliamentary Association and cannot be assigned to another member of the CPA hence, I am obliged to attend the said meetings."*

[5] In *au contraire* respondent avers:

> *"4. Our investigations have established that the other participants to the meeting where the Applicant is invited received their invitations in April, 2013 and it is also worth noting that strangely*

the Applicant's name was not amongst those who were invited. This to my mind suggests that his invitation was an afterthought which came up after his arrest that is calculated at undermining this investigation.

5. *If the original invites are anything to go by and if the Applicant contends that it was the original idea of the organizers of the meetings or conferences, he ought to have received his invite in or around April 2013, together with the others. If he contends that he received his invite in April, 2013, then that suggests that the urgent basis of this application falls away as they become self created and self serving. Therefore this application ought to have been brought through the normal procedure to the court.*

6. *If it is true that the invites were received by the Applicants and other participants around April 2013, the onus was on the Applicant to have disclosed that he had been invited when he applied to be released on bail in June 2013, and such omission is fatal. I submit that the assertion that this application is brought on urgent basis is disingenuous and not made in good faith. It is my contention that the basis in which this application is brought up should fall away.*

7. *This investigation extends beyond CPA-SD as it touches on CPA Africa Region and International. There is a great likelihood that if Applicant is allowed to attend these meetings, he is bound to intentionally or unwittingly to come into contact with potential witnesses which eventually has to be avoided at all costs as this would be detrimental to the on going investigations.*

8. *It is apposite at this stage to deal with the conduct and the role that was played by Dr. William Shija (Shija) who appears to be the main facilitator of these invitations. It is curious to note that when the DPP and Commissioner ACC attempted to have a meeting with him he declined to give them audience citing reasons that the CPA-SD was largely autonomous and therefore this investigation was an internal matter. See Annexure "**MTK1**"*

10. *Shija and other African Region Members are potential witnesses in the matter and therefore, the Applicant cannot be allowed to meet with them., as mentioned in paragraph 7 above.*

11. *In the short time span that the 1st Applicant had been admitted to bail he has shown flagrant disregard for the observation of his bail conditions in that in the very first Friday that he was supposed to report to the Mbabane Police Station, he did not do so as a result of which we have approached the Court for an application for his warrant of apprehension. I humbly refer the Honourable Court to Annexure "**MTK2**" and further to the Confirmatory Affidavit of 3935 D/Sgt. Kheshe Dlamini.*

It is my submission therefore that it is ill conceived for the Applicant to approach the Court for the variation of the very same conditions that he has shown no respect for. What he must concern himself about at this point in time is an application to be re-admitted to bail as his arrest is imminent."

[6] Expatiating on the above grounds, Mr. Z. Jele submitted that:

[7] Firstly, when the applicant was arrested, and having been under police custody for two days, his primary concern was to secure his liberty. It is for

this reason that he totally forgot about the invites to Windhoek and London. It is not until later that he suddenly recalled that he had been invited. It is at that stage that frantic efforts were made to search for the correspondence inviting him to the two meetings. It was, however, discovered that the letter of invitation was among the documents seized by the respondent during its search and seizure conducted on the day of arrest. He then resorted to contact CPA head office in London which dispatched the copy annexure **"B"** attached at page 1 of the book of pleadings.

[8] Secondly, the applicant shall be attending the Windhoek and London meeting not as a CPA local committee member but as the international Treasurer Committee member. In brief, the applicant shall not be discussing CPA Swaziland business as he is charged for unlawful activities relating to the national CPA. In this regard, the likelihood that he would interfere with the evidence or witnesses of the respondents is unlikely or too remote, so unveiled the submission.

[9] Thirdly, the applicant has the right to be presumed innocent until proven guilty. It follows therefore that his right to continue with his livelihood should not be interfered with. He has a right to continue discharging his duties unrestricted.

[10] Fourthly, the opposition by respondent is unmerited by reason that the applicant does communicate with the London office whenever the needs arise. There is no condition in the bail nor has respondent in the past suggested to him not to communicate.

[11] Fifthly, the respondent merely makes a bold assertion which is without any support by stating that the applicant will interfere with its potential

witnesses. Respondent ought to have divulged the list of the would-be witnesses.

[12] The applicant is ready and willing not to interfere with any witnesses for the respondent in the event respondent informs him of their identity.

[13] Applicant contends further that the submission by respondent that investigations are on-going smacks of the cardinal rule of procedure that one must investigate before arresting and not *vice versa*.

[14] Respondent *viva voce* countered applicant's submission as follows:

[15] The court should consider that by virtue of applicant's arrest, his right to liberty is restricted. It is the duty of this court to balance the right of the individual to his liberty and that of the State in the administration of criminal justice. In balancing the rights, the court should consider the following, so went the submission:

- The applicant was arrested on the 25th June 2013. He was on the same day admitted to a medical clinic for two days.

- On the day of his arrest, the applicant deposed to a very lengthy and detailed affidavit in support of his bail application. In this affidavit, it is clear from paragraphs 9 and 10 that the applicant appreciates the nature and extent of the charges he is facing as he seems to outline where the charges emanates from.

- This is fortified by the fact that by then he had in his possession a copy of the charges. Paragraphs 9 and 10 reads:

"9. The Auditor General conducted an audit of the affairs of the CPA Swaziland and in the course of the audit, denied us an opportunity to present certain documents and / or information that could rebut some of the preliminary findings made by the Auditor General. It seems to me that in essence the charges relate to an absence of supporting documentation relating to the activities of the CPA Swaziland and hence the warrant. It also seems to me that the Crown is of the view that certain documents and / or information submitted to the Auditor General has been considered by the latter to be fraudulent. I deny that the documents are fraudulent but more importantly point out that neither myself or the Treasurer or any member of the executive have been interviewed with respect to these documents.

10. I submit that all amounts that have been received by the CPA Swaziland have been applied towards genuine activities of the CPA and that we have full and proper records for every item of expenditure. I may mention that the CPA is a voluntary association, and it is telling that the charges to not emanate from the association or any of its members."

- Applicant volunteered or unilaterally decided on the bail conditions as appears at paragraph 17 which reads:

"*17. I state that if I am admitted to bail, I will adhere to all the bail conditions to be set by this Honourable Court.*

17.1 I will not interfere with the state witnesses more so because, I do not know the said witnesses and / or their pull particulars.

17.2 I will report to any police station that this Honourable Court will direct me to report to. I can and I will, on the directive, of his

Honourable Court, surrender my passport and other travel documents to any police station the court directs us.

17.3 I will also attend trial as and when the court directs.

17.4 I will also abide by all other conditions that this Honourable Court may set and on the above premises, I reiterate that I wish to be admitted to bail."

[16] For applicant to later turn around and demand for the variation of the very conditions which he unilaterally mapped and voluntarily tendered is nothing but abuse of the court's process, respondent submitted.

[17] The charge sheet reflects more specifically at paragraph (e) as follows:

"(e) The invoices were utilized to create false impression that the CPA Swaziland Branch had sponsored and / or catered for activities of the CPA, Regional and / or International and / or other CPA local branch (es), and or"

[18] The above clearly shows that the respondent's case does not pertain to applicant as a local committee member. It extends to the regional and international branch of the CPA. In the result should the applicant be granted the variation, there is a high likelihood that he will interfere with the Crown's witnesses.

[19] Respondent raised a second point which may be considered as a *point in limine*. It was contended that the applicant's application could stand or fall on this point. Respondent submits that as applicant's application was

brought in a certificate of urgency, the urgency is self created. Respondent continued to demonstrate its point in the following manner:

[20] The applicant was arrested on the 25th June 2013. At all material time he was already a member of the CPA regional and international. He was aware that he has to discharge his duties as a committee member of these two branches. Annexure **"B",** the correspondence of invitation was authored and received well before his arrest of 25th June 2013.

[21] If annexure **"B"** is anything to go by, it was dated 7th May 2013. The applicant was therefore aware well before his arrest that he ought to travel outside the country. From the above, firstly, it is not clear why applicant undertook to surrender his passport in the light of his scheduled travelling. Secondly, applicant waited from 25th June 2013 and only lodged the present application on the 11th July 2013. This protracted period vitiates urgency, respondent argued.

[22] The third point raised by respondent is that Article 22 (4) (a) of the Constitution of the CPA International branch regulates the procedure to be followed in the event there is a casual vacancy in any of the committees. The respondent argues that applicant having had his movements restricted ought to have informed the CPA headquarters in order to enable it to substitute him. In this regard the non-attendance by applicant of the CPA meetings would not prejudice the organization.

[23] On its fourth ground, respondent seriously challenged the authenticity of annexure **"B"**, letter of invitation. Respondent pointed out from the bar that such correspondence was not among the documents which were the subject of search and seizure on the 25th June, 2013.

[24] However, annexure 1 and 2 being invites directed to Senator Honourable Gelane Zwane MP and Honourable Prince Guduza, MP President and Speaker respectively was seized from applicant on the 25th June 2013. Respondent called upon the court not to admit the said annexure. Respondent then interrogated the contents of annexures 1 and 2 and unearthed as follows:

[25] Delegates of the very same meeting applicant intends to proceed to, were informed on the 19th April, 2013 of the meeting in Windhoek. They were to return acceptance forms on 30th April 2013. By 10th May 2013 all travel and accommodation forms had to be returned for the business of the meeting to commence on 17th July 2013.

[26] From this, the court was urged to infer that annexure "**B**" was created later as by 10th May 2013 the organizers of the meeting had a list of delegates and applicant was not among the delegates.

[27] His subsequent invitation after the closing date of filing of travel and accommodation forms was meant to frustrate the bail conditions imposed by this court.

[28] Alternatively, annexure "**B**" together with "**MTK1**" is nothing else but a vehicle or a mode to facilitate applicant to interfere with the Crown's witnesses or on-going investigations.

[29] The respondent submitted annexure 3 showing that the Right Honourable Prime Minister wrote to Dr. Shija who is identified by respondent as one of its witnesses. This correspondence was not copied to anyone. However, on

reply of the same, Dr. Shija copied it to a committee member in the local branch of CPA and also to the regional member.

[30] The above are the submissions I am called upon to adjudicate.

[31] Before I embark on adjudging the above, it is apposite at this stage to consider the principles governing bail matters.

[32] Section 96 (19) (a) of the Criminal Procedure and Evidence Act No.67 of 1938 reads:

> *"any court before which a charge is pending in respect of which bail has been granted may, upon the application of the prosecutor or the accused, subject to the provision of Section 95 (3) and 95(4), increase or reduce the amount of bail so determined or amend or supplement any condition imposed…"*

[33] In terms of this enactment, the court has the power to amend bail conditions.

[34] **His Lordship Innes C. J**. in **Krohn v Minister of Defence and Others 1915 A.D.** at 196 expressed:

> "*Every subject, high or low, is amenable to the law, but none can be punished save by a properly constituted legal tribunal. If any man's right or personal liberty or property are threatened, whether by the Government or by a private individual, the courts are open for his protection. And behind the courts is ranged the full power of the State to ensure the enforcement of their decrees*."

[35] Bringing the above *ratio* closer home, the learned **Ramsbottom J**. in **Lobel and Another v Claassen, N. O. 1956 (1) S. A. 531** at 532 expounded:

> "*The principles which are to be applied in cases of this kind (*bail matters) *are, I think, that the court must safeguard the liberty of the individual but it must also safeguard the administration of justice. Arrested persons and the police often have conflicting interest in the cases, and the court must, whilst desiring to allow people to be released on bail,*(or variation of conditions) *not do so if there is a danger that to order the release will interfere with the course of justice."*(words in brackets my own)

[36] Pointing to the guiding principle, **Miller J**. in **S. v Essack 1965 (2) S.A. 161** at 162 stated:

> "*In dealing with an application of this nature, it is necessary to strike a balance, as far as that can be done, between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice… The presumption of innocence operates in favour of applicant even where it is said that there is a strong prima facie case against him, but if there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if he is allowed out on bail (*or his bail conditions relaxed*) the court would be fully justified in refusing to allow him bail.*" (words in brackets my own)

[37] Section 16(1) of our 2005 of the Constitution reads:

> "*A person shall not be deprived of personal liberty save as may be authorized by law in any of the following:*
>
> *(e) upon reasonable suspicion of that person having committed, or being about to commit, a criminal offence under the laws of Swaziland."*

[38] Interpreting a similar provision, **Van Blerk J. A. in Magano and Another v District Magistrate Johannesburg, and Others 1994 (4) S.A. 169** at 171 stated:

> "*The language of the section does not merely give to an accused person the right to apply for bail which he has under the Criminal Procedure Act…but the right to be released from detention with or without bail. That right may only be denied an accused person where the interest of justice require otherwise. … For these reasons I am of the view that accused person does not bear the onus of proving that he should be released from detention, but that the State is required to show that he should be refused such bail because the interest of justice require it.*"

[39] *Fortiori*, it is my considered view that the *onus* does not shift where the accused calls for relaxation of his bail condition. The *onus* still rest with the Crown to show that the interest of justice do not "*require it*" as per **Van Blerk J.** *supra*.

[40] Expounding on the *raison d'etre* of bail conditions, **Watermeyer J**. in **S. v Russel 1978 (1) 223** at 225 stated:

> *"…if one looks at the conditions they all have this in common namely, that they are designed to ensure the proper administration of justice in the sense that the accused will stand his trial, that he will not temper with prosecution witnesses or otherwise interfere with the investigation of the case."*

[41] With the above outlined principle of law operating at the backdrop of my mind, I now set out to enquire whether the respondent has established that

should the applicant be allowed to travel to Windhoek or London, "*…there is a real risk that he will not merely may interfere*" (see **S. v Bennett 1976 (3) S.A. 652** at 655) *with the prosecution witnesses or otherwise interfere the investigation of the case"* as per Watermeyer J. *supra*.

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[42] Applicant has refuted respondent averment on tempering with its witnesses on the grounds that respondent has not divulged the names of its potential witnesses and that he knows the identity of the witnesses. Further the regional meeting in Windhoek, Namibia will consist of over two hundred delegates as each African country shall be represented by at least four members. Respondent calls for the applicant, it would seem, not to interact with members of the public so to speak. In the circumstances it is inconceivable that one would interfere with witnesses.

[43] Further applicant should not be restricted or denied his right to continue discharging his work.

[44] It is common cause that respondent has neither informed applicant nor the court of the names of its witnesses. In fact respondent refers to potential witnesses on on-going investigations. Respondent only identifies Dr. Shija.

[45] **S. v Bennett** *op.cit* is the general authority that "*the State cannot arrest in order to investigate*", (see page 652).

[46] On the right of applicant to continue with his livelihood i.e. attending to his duties at regional and international level of CPA, I am alive to the case of **S. V Russel** *op. cit* where his **Lordship Watermeyer** was faced with a similar application where bail condition imposed was to the effect that the accused should not carry out his duties as an Anglican priest. As propounded in

casu by respondent the respondent in that case also averred that there were others who could discharge his duties. The appeal court struck out such conditions on the basis that the:

> "*Magistrate has not said that he imposed the condition because he feared appellant might again hinder the officials should they carryout further demolition.*" (Page 226 D)

[47] The preceding prerequisite calls for me therefore to ascertain whether in *casu* the respondent has discharged the *onus.* Has the respondent presented evidence on a balance of probability that the applicant will interfere with its witnesses or the investigation of the case?

[48] Before interrogating the evidence before me, I must point out that the attachments herein were admitted on the basis that hearsay evidence is admissible in bail application proceedings as propounded in **S. v Maharaj and Another 1976 (3) S.A. 205** as follows:

> "*In an application for bail the court in a proper case, may place reliance upon hearsay evidence….*"

[49] The respondent has referred this court to annexure "3" a correspondence which reads:

> "*Head of Secretariat*
> *Commonwealth Parliamentary Association*
> *United Kingdom Secretariat*
> *Suite 700,*
> *Westminster House*
> *7 Milbnk*
> *London SW1P 3JA*

United Kingdom.

Dear Head of Secretariat

I am writing to ask if you would be kind enough to grant an audience to our Anti-Corruption Commission and Director of Public Prosecutions, both officers being part of an investigation into the affairs of the Commonwealth Parliamentary Association – Swaziland Branch.

I should be most grateful if they could see you on 31May and 3 June 2013.

I do regret the very short notice but can assure you that the issue is a serious one requiring thorough investigation without any delay.

In view of the time factor, I suggest you communicate your reply by faxing my office on 00268 2404 9589.

Thanking you in anticipation

Yours faithfully,

Dr. B. S. S. Dlamini
Prime Minister"

[50] A response reads under "MTK1" as follows:

"*Rt. Hon. Prime Minister,*

I hereby acknowledge receipt of your letter of 23 May 2013.

I wish to inform you that the mode of our administration, as per the Association's Constitution, is to work with our Branches and Regions, which are largely autonomous.

Therefore, it will not be possible for me to meet the officers you have assigned to follow up on the matter that relates to the CPA Swaziland Branch because it is an internal matter in your country.

Yours sincerely

cc: *The Branch Secretary*
CPA Swaziland Branch

Dr. Thomas D Kashillialah
Regional Secretary, CPA Africa Region
Dar es Salaam, Tanzania."

[51] What is glaring from the two correspondences *viz*. annexure 3 and "MTK1" is that annexure 3 was not copied to anyone. It was addressed only to the Head of Secretariat. However, the response was copied to the local branch Secretary in Swaziland and also to the Regional Secretary who is based in Tanzania."

[52] It is common cause that the applicant chairs the local branch and is a committee member of the umbrella body. It would appear to me that the only irresistible inference that can be drawn from this conduct is that should the Crown wish to gather information from the local and regional branch those approached should be aware that their Secretary General has already declined to provide the information to assist in the investigations.

[53] Needless to point out that the above also demonstrates that the investigation has already encountered resistance. The position that should applicant be permitted to attend the two meeting, "*there is a real risk that he will interfere with the Crown's witnesses or the investigation of the case*," as is

the *ratio decidendi* in **S v Bennett** *supra* is therefore justified by this circumstance.

[54] The submission that applicant does communicate with the CPA regional and international adds weight to the respondent's submission. Applicant avers at paragraph 6.2 of his reply:

> "*6.2 Prior to my arrest I learnt that the Director of Public Prosecutions as well as the Commissioner Anti Corruption Commission, visited the regional offices in Tanzania, wherein they interviewed officials and obtained information….*"

[55] One wonders how applicant became privy to this information more so in the light of his own showing that charges had not been laid against him. Again the inference to be drawn, unfortunately, can only be adverse to this application.

[56] I am aware that Mr. Jele submitted that respondent was declined an appointment because it failed to follow procedure for obtaining evidence in a foreign jurisdiction. However, one would expect that the reply would at least highlight that as the reason for the decline.

[57] Applicant's application is further confounded by the evidence that the letter of invitation was sent to him well prior to his arrest. He *mero motu* tendered as his bail conditions the surrender of his passport. It is trite that where a court of law has disposed of a matter, it will not vary its decision unless the applicant raises a new or fresh circumstance which did not exist when the application was first dealt with. The rational for this principle of our law is that it is undesirable that cases should be litigated piece meal.

This is more so when one is dealing with such cases as in *casu* where litigation costs are borne by the tax payer. I am aware of the submission on behalf of applicant that at the time when the bail application was moved, the applicant was preoccupied by the desire to attain his personal liberty. However, I also accept the evidence before me that the bail application was set down two days later after his arrest. I also accept the uncontested evidence that the passport was handed four days later. In the eyes of the administration of justice, this is sufficient time for the applicant to recollect. The cardinal rule that courts should not be burden with unnecessary cases is upheld by searching for a new factor in cases that have previously been dealt with in our courts.

[58] In the totality of the above, it is my considered view that the respondent has discharge its onus of proof on a balance of probability and the scales of the administration of criminal justice tilt in its favour.

[59] Before pronouncing on the final orders herein, I must commend firstly Mr. Jele for the application to have paragraph 9 of respondent struck off. Dr. Shija's integrity remains intact. As correctly observed by Mr. Jele and the court is of the same view, it would be gross injustice to judge otherwise a man of Dr. Shija's calibre based on annexure 3. I also commend the respondent for its swift unreservedly withdrawal of its paragraph 9. Counsel for respondent was well advised. I therefore order paragraph 9 of respondent's answering affidavit struck off and expunged from the record of proceedings.

[60] For the record, the application filed by respondent for the court to issue warrants of arrests against the 1st and 2nd applicants herein and one Sanele Nxumalo and Nomphumelelo Zulu on the reason that they failed to report

to their respective police station on the date they appeared for a remand or on the next day after they were granted bail is dismissed for want of evidence on the first date of reporting. This is because the recognizance forms reflect that they ought to have reported fortnightly. At any rate the Crown submitted that their alleged none reporting should be condoned. By no means however, does this suggest that the bail condition of reporting fortnightly is varied.

[61] In the foregoing, I enter the following orders.

1. 1st applicant's application is dismissed.
2. 2nd applicant's application is granted.
3. Respondent's counter-application on warrant of arrest is dismissed.

M. DLAMINI
JUDGE

For Applicant: **Ms R. Mahabeer instructed by the Director of Public Prosecutions.**

For Respondent: **Mr. Z. Jele**