

SOUTH AFRICA / JUDGMENT

Lifman v Director of Public Prosecution Western Cape - Bail Appeal (CC35/2021) [2023] ZAWCHC 302; 2024 (1) SACR 188 (WCC) (27 November 2023)

[2023] ZAWCHC 302

COURT

Western Cape High Court, Cape Town

BEFORE

Lekhuleni

CASE / FILE NUMBER

CC35/2021

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In the High Court of
South Africa

(Western

Cape Division, Cape Town)

Case

No: CC35/2021

In

the matter between:

MARK
ROY LIFMAN
APPLICANT
And
THE DIRECTOR OF
PUBLIC PROSECUTION
WESTERN CAPE
RESPONDENT

Heard:

06 November 2023

Delivered:

27 November 2023

JUDGMENT

LEKHULENI J

Introduction

[1] This is an application in terms of section 63(1) and (2) of the Criminal Procedure Act 51 of 1977 ("the CPA") for the amendment of bail conditions set against the applicant by the Cape Town Magistrates Court. Essentially, the applicant seeks an order that his bail conditions imposed against him on 22 December 2020, be amended to the effect that he deposits an additional amount of 150,000 in cash and that his passport with serial number M00[...] be returned to him by Captain Kotze within 48 hours of the date of this order. In the alternative, the applicant seeks an order that his passport be returned to him by Captain Kotze one week before he travels outside the borders of the Republic of South Africa on condition that he furnishes Captain Kotze with proof of his itinerary and destination address and that upon his return, he would return his passport to Captain Kotze within 48 hours of returning to the Republic of South Africa. The applicant also seeks an order that he be permitted to apply for a new passport. The State opposed his application.

The Applicant's Case

[3] The applicant and his co-accused are facing a slew of serious charges, including Murder and various counts of conspiracy to murder, as well as contraventions of the Prevention of Organised Crime Act 121 of 1998. The State has preferred nine counts against the applicant. The applicant was arrested on 22 December 2020 after he handed himself over to the South African Police Services in Cape Town Police Station. The applicant's arrest followed a warrant of arrest that was issued against him on 15 December 2020. Pursuant thereto, his attorney was requested to arrange that the applicant report at

the Cape Town Police Station so that the applicant could appear in Court. The applicant was arrested and subsequently released on bail under certain conditions. Among others, a bail amount of R100 000 was fixed, and the applicant was ordered to surrender all passports or similar travel documents to Captain Kotze through his legal representative before he could pay his bail. In his founding affidavit in support of this application, the applicant avers that at the initial bail application, Captain Herbst, who is part of the investigating team in this matter, deposed to an opposing affidavit in which he asserted that if the applicant was released on bail, he would evade his trial.

[4] According to the applicant, his attorney advised him that if he could accept the bail condition of handing in his passport, he would be released on bail. If he declines to do so, it will constitute a risk that he could remain incarcerated. The applicant further contends that he accepted the bail conditions of handing in his passport as there were still largescale travel bans and restrictions imposed on international travel from South Africa due to COVID-19. Furthermore, he was confident that in due course he would be able to disprove

his alleged involvement in the charges levelled against him. He was not prepared to run the risk of not being released by holding onto his passport.

- [5] In November 2021, the applicant made an application to this court to amend his bail conditions under Section 63 of the CPA. He requested the return of his passport to enable him to travel to Turkey and other countries for work purposes. In that application, the applicant mentioned that he had been offered a consulting position in Turkey and would need to travel extensively, although he would be based in Turkey.
- [6] Basically, the applicant sought an order that this court amend his bail conditions to allow him to work and stay in Turkey. In a well-crafted judgment, Montzinger AJ declined the applicant's application. The applicant's application for leave to appeal also suffered the same fate. Later, the applicant failed to persuade the Supreme Court of Appeal to grant him leave to appeal the judgment.
- [7] The applicant is now applying again to amend the bail conditions allegedly on new facts. The applicant raised two grounds in support of the present application: First, that there will be an inordinate delay before the trial against him commences. The applicant further avers that the trial of this matter was initially scheduled for hearing from 28 February 2022 to 24 March 2022. The date was not adhered to, and the matter was further enrolled for hearing from 24 July 2023 to 30 September 2023. His legal representative has since informed him that this trial date will not materialise. At a pre-trial conference of this matter, he was informed that a new date for hearing for 24 July 2023 has been arranged.
- [8] Secondly, the applicant averred that he instructed a private expert in the digital forensic field to examine and analyse all phone data that the State relies on against him to establish his physical whereabouts during the relevant dates mentioned in the indictment. In

addition, the applicant stated that his lawyer compared original recordings of intercepted phone calls with transcriptions and

identified discrepancies in the State's case. After completing trial preparation, he was informed that his case was strong and weaknesses in the State's case had become apparent. The applicant asserts that he has a complete defence against all the charges preferred against him. He believes that he will be able to challenge the State's evidential material and show that he is not guilty of the offence preferred against him. He is eager to stand trial and for a verdict to end the matter.

The State's Case

- [9] The State opposed the applicant's application. The investigating officer, Captain Kotze, filed an affidavit in which he asserted that the applicant is charged with a range of serious offences, including murder and conspiracy to commit murder, as well as contraventions of the Prevention of Organised Crime Act 121 of 1998. Captain Kotze averred that the applicant's involvement in these offences is explained in the summary of substantial facts in the indictment, which allegations are supported by the evidence of witnesses taken under

oath who are available to testify when the matter goes for trial. Captain Kotze further averred that a conviction on the charge of murder alone could lead to a sentence of life imprisonment.

- [10] The investigating officer further alluded to the fact that the critical concern which the State had about the applicant at the time of his arrest was that he had the ability and substantial means to flee through the borders of South Africa to a jurisdiction where there would be great difficulty in securing his return to South Africa. To this end, Captain Kotze asserted that this concern was largely overcome when the applicant agreed to surrender his passport and subjected himself to other bail conditions. As a result, his request for bail at the Magistrates Court was not challenged or opposed.
- [11] Regarding the inordinate delay, Captain Kotze admitted that there was a delay but denied that the delay was excessive or inordinate. Captain Kotze pointed out that the effect of COVID-19 had adversely affected the functioning of the High Court and caused a huge backlog in this court, which has not yet been cleared which ultimately led to the remand of the matter for trial on 24 July 2023 to the 22 July
2024. In his deposition, he stated that it took some of the applicant's co-accused time to obtain legal representation.
- [12] Captain Kotze further averred that legal representation for all the accused was only finalized on 10 February
2023. He disputed the applicant's claim that the State's case was weak, maintaining that it was strong against the applicant. He disputed the allegations that there are new facts supporting the amendment of the applicant's bail conditions. He maintained that the conditions proposed by the applicant will not eliminate the risk that once the applicant leaves our borders, he may not return to face his trial.

Issues

to be decided

- [13] This court is enjoined to decide whether the applicant's bail conditions imposed by the Cape Town Magistrates Court should be amended specifically for the return of his passport as stated in paragraph 1 of this judgment, to enable him to travel abroad for business purposes.

Submissions

by the parties

- [14] At the hearing of this application, Ms Killian, for the applicant, argued that in his previous attempt, the applicant wanted to have his passport so that he could go and work in Turkey. At that time, he was offered a position as a consultant for a business in Turkey called Cisily Textiles. Counsel argued that the applicant is now bringing this second application on new

facts. Ms. Killian submitted that there had been an undue delay in enrolling the matter for trial. Furthermore, it was argued that the applicant had discovered, after receiving further particulars, that the State's case against him was weak. Counsel implored the court to consider this and to accede to the applicant's application.

- [15] Ms Killian further submitted that the applicant is not a flight risk. He travels overseas often for business purposes. He imports textile fabric to South Africa. The applicant personally wants to see whether the fabric is worth importing. Relying on *S v Vermaas* 1996 (1) SACR 528 (T), Ms Killian argued that the applicant presented two new facts and that the court should consider all old and new facts to come to a just conclusion. Furthermore, it was contended that this court should not regard the fact that in the previous matter, another

court refused bail to the applicant as an impediment to hearing this matter on the merits.

Counsel urged the court to consider the applicant's behaviour in its entirety, considering that he surrendered himself to the police, complied with bail conditions, and is committed to attending trial. Ms. Killian appealed to the court, at its discretion, to increase the bail amount as a guarantee for the return of the applicant's passport.

- [16] Mr Menigo, who appeared for the State, submitted that this Court must balance the interest of justice and the accused's right to freedom of movement. Mr Menigo submitted that when the applicant appeared in the lower court he was arrested on his return from Turkey. It was submitted that the State did not oppose bail in the lower court because the applicant was prepared to hand in his passport. If the applicant refused to hand in his passport, the State would have opposed his bail application, and the applicant would have had the onus to satisfy the court that exceptional circumstances warranted his released-on bail. Counsel argued that the applicant didn't provide his financials to the court, which showed a lack of openness and candour. According to Mr Menigo, the applicant can still send a proxy to source the alleged textiles he wants to import into the country.

- [17] If the applicant is allowed to travel internationally and should abscond, Mr Menigo submitted that this would result in substantial prejudice to the State and its witnesses, some of whom are being kept under witness protective arrangements at significant costs to the State. Furthermore, Counsel argued that the poor level of cooperation between Turkey and Dubai, two of the destinations listed by the applicant in his application are such that it could be a lengthy procedure to ensure his extradition, with no guarantee of success, as is evidenced by the fact that the Turkish authorities offered no genuine assistance in returning the wanted suspect in this matter one Mr Kishor Naidoo. This Court was also referred to the failed attempt to extradite the Gupta brothers from Dubai.

- [18] Importantly, the State contended that if the applicant absconds, the delay will substantially prejudice his co-accused's rights to a speedy trial. Furthermore, the contention proceeded, it would also prejudice the interest of the deceased family who are eagerly waiting for justice for their loved one. Mr Menigo urged the Court to reject the applicant's application.

Applicable Legal principles and Discussion

[19] Before discussing and distilling the legal principles and applicable law for this case, I must mention that from the correspondences filed on record, I have noted that a judge has already been appointed to hear this matter. Additionally, I have observed that a trial date has been set for 24 April 2024, and that all the Counsels representing the fifteen accused have confirmed their availability for the trial.

[20] The applicant brought his application in terms of section 63(1) and

(2) of the CPA. The relevant parts of section 63 of the CPA provides as follows:

‘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, increase or reduce the amount of bail determined under section 59 or 60 or amend or supplement any condition imposed under section 60 or 62, whether imposed by that court or any other court, and may, where the application is made by the prosecutor and the accused is not present when the application is made, issue a warrant for the arrest of the accused and, when the accused is present in court, determine the application.’

[21] Section 63(1) applies to conditions in respect of bail granted by a court in terms of section 60 of the CPA. The provisions of this section also apply to any additional conditions that a court imposed in terms of section 62 of the CPA. The purpose of section 63 of the CPA is to provide the necessary procedure for those instances where changed circumstances require appropriate amendments to the conditions or amount of bail fixed at an earlier stage (see *Shefer v Director of Public Prosecutions, Transvaal 2004 (2) SACR 92 (T) 99g*).

[22] In the present matter, the applicant seeks to amend his bail conditions, particularly for the return of his passport, as he desires to explore business opportunities in Turkey, Dubai, China, and Hong Kong. According to the applicant, for sixteen years, since 2004 until 2020, he has travelled to arrange for the import of clothing that he can only purchase if he has examined the ranges personally. He seeks this Court to direct the return of his passport so that he can travel to these countries for this purpose.

[23] Inevitably, this case implicates the applicant's constitutional right to freedom of movement envisaged in section 21(1) of the Constitution and the right to leave the Republic envisaged in section 21(2) of the Constitution vis-à-vis the interest of justice envisaged in section 60(4) (b) and 60(6) of the CPA. Therefore, this court is enjoined to balance the demands of the interest of justice against the applicant's rights to freedom of movement.

[24] It must be stressed that the applicant's constitutional rights to freedom of movement and the right to leave the Republic are not absolute. The law of general application (in this case the CPA) may limit these rights if the limitation meets the requirements of the limitation clause set out in section 36 of the Constitution. For instance, a lawful arrest, detention, and imprisonment may limit the right to freedom of movement. The right to leave the Republic may be limited by bail conditions set by courts in terms of 60 and 62 of CPA if it is in the best

interest of justice to ensure that the accused stands trial and that there is no interference with the administration of justice, as delineated in sections 60(4)(b) and 60(6) of the CPA.

- [25] In this case, the applicant bears the onus of proving on a balance of probabilities that if the conditions are relaxed to allow him to travel abroad, he would not flee from the jurisdiction of the Republic and would stand trial. To this end, the applicant asserted that from 22 December 2020 to the date of signing his affidavit, he has attended all dates to which the matter has been postponed either in the Magistrates Court or the High Court. He further submitted that he does not intend to evade his trial; on the contrary, he wishes the trial to commence and proceed.
- [26] As previously stated, this court must strike a balance between the interests of justice to ensure that the accused stands trial against the accused's right to freedom of movement. Montzinger AJ, in *S v Lifman* 2022 (1) SACR 241 (WCC) at para 18, correctly pointed out that ultimately to determine what would be in the interest of justice requires this court to exercise a judicial discretion in the form of a value judgment, balancing the right of the accused, in this case, the right to freedom of movement against that of the public. In undertaking this discretionary exercise, the court is allowed to be guided by the checklist of relevant factors provided in section 60(4) of the CPA.
- [27] In casu, the applicant seeks the return of his passport as he intends to travel abroad to buy textile fabric. He alludes to the fact that the State's case is weak against him and that there were inordinate delays in setting the matter for trial. In my view, there can be no doubt that this matter will take some time to be finalised. There are fifteen accused charged together with the applicant. The fifteen accused are facing various counts totalling 38. This matter has been fast-tracked. A judge has been allocated for this matter, and the trial date has been set. All counsels have confirmed their availability to commence with the trial in the second term of 2024.
- [28] Importantly, from the email exchange filed in this application and from the pre-trial minutes, it cannot be denied that there was a slight delay that cannot be attributed to the State. The delay is a natural consequence of multiple accused charged together under the provisions of the Organised Crime Act 121 of 1998. It is common cause that the delay among others, was due to the unavailability of legal representatives and lack of legal representation for some of the accused. That has since been addressed. In my view, the trial proceedings must be allowed to unfold unhindered so that the matter may be heard and finalised.
- [29] Crucially, the applicant contends that his passport be returned to him and that he will stand trial and won't abscond. It bears emphasis that the applicant's ipsi dixit that he will stand trial is not enough. His say-so is certainly not a cognisable indication that he will not abscond and will return to the country and stand trial if his conditions were to be amended.

[30] In *Shefer v Director of Public Prosecutions, Transvaal, and Another* 2004 (2) SACR 92 (T), the Court observed that the future conduct of an applicant must be considered based on information about his past conduct. Meanwhile, in *S v Savoi* 2012 (1) SACR 438 (SCA), at para 22, the Supreme Court of Appeal observed that the danger of a bailed accused avoiding attendance at his trial could

never be entirely ruled out. The Court stated further that courts must determine cases according to the facts, and whether an accused

person will or will not attend in due course is entirely a question of fact and inference from facts. The facts must be relevant to the conclusion. Significantly in my view, the Court found that an increase in the number and seriousness of the charges that an accused faces may of itself be a relevant factor as exercising a new influence on a previously compliant accused.

[31] In the present matter, this Court has been informed that there is another accused that the State is struggling to extradite to this country to face charges with the applicant. That person is based in Turkey, where the applicant intends to travel. In my view, there are reasons to believe that the applicant may want to take advantage of this fact. It is also worth noting that in 2021, the applicant sought the amendment of his bail conditions as he stated then that he was offered a position as a consultant for a business in Turkey. Two years later, the applicant no longer wants to take this position but wants to travel to the countries mentioned above to source for textile. The applicant gave a vague and unsubstantiated account of his need to travel internationally.

[32] As correctly pointed out by Mr Menigo, the applicant alleges that he wishes to explore business opportunities in the countries mentioned above without providing any detail on the nature of the prejudice he would suffer should he be denied these opportunities. There is no clear indication why the applicant needs to explore these opportunities in person. It is not clearly explained why an agent or proxy cannot explore these opportunities on behalf of the applicant. Based on my assessment; I seriously doubt the applicant's genuineness and authenticity.

[33] It bears emphasis that the applicant knew that this matter would take a long time to conclude. The applicant asserted in his affidavit that he has travelled internationally for sixteen years, from 2004 until 2020, to arrange for importing clothing that he can only purchase if he has personally examined the ranges. Since

December 2020, he has been limited and prejudiced in expanding his business interests, particularly the textile industry. Surprisingly,

he did not disclose that when he applied for his bail application. At paragraph 11 of his bail application affidavit, the applicant stated as follows:

“To have to be restricted to my house for the duration of this matter, I believe it will be harsh and unreasonable bail condition. The case will probably take a long time before it is completed which will mean that I may be under house arrest for months if not years. This will impact on my life and my business

interest will be negatively affected. I am also prepared to surrender my passport which will effectively restrict my movement within South Africa.” (My underlining)

- [34] Furthermore, it is clear from his founding affidavit that he knew since the day he agreed to the bail conditions that he had to travel to these countries to buy textiles of various ranges, which he personally had to examine. Notwithstanding, he was prepared to hand in his passport to support his bail application. In other words, he voluntarily surrendered his passport to secure bail. Suddenly, after being granted bail, he wanted his passport to be returned to him so he could travel the world to do business. It seems to me that the applicant planned to get bail on an unopposed basis and to later approach the court to amend his bail conditions. In my view, to allow the applicant to circumvent the provisions of section 60 (bail application in court) through an application in terms of section 63(1) is virtually an abuse of court processes, which the courts should not countenance.
- [35] The applicant and his co-accused are facing very serious charges, including a charge of murder. A conviction on this charge (murder) alone could lead to a sentence of life imprisonment. Although the accused has previously adhered to his bail conditions by attending court without fail, I believe that the severity of the charges levelled against him and the potential sentence he may face if convicted could tempt him to abscond. In *S v Savoi* (supra), the Supreme Court of Appeal cautioned that an increase in the number and seriousness of the charges that an accused faces may of itself be a relevant factor as exercising a new influence on a previously compliant accused. The court noted that the proximity of an upcoming trial, where an accused may face imprisonment, is also a significant factor.
- [36] As explained above, this case will be going on trial in April 2024. There is no reason why the applicant cannot wait for the matter to be finalised before pursuing his business interests. I am of the view that allowing the applicant to travel internationally and potentially absconding would obstruct the interests of justice. If the applicant is absent on the trial date, his co-accused would be substantially prejudiced. The co-accused would suffer substantial injustice because the delay would infringe on their right to a speedy trial. The interest of justice will also be frustrated if the applicant does not show up on the trial date.
- [37] Importantly, the observation of Mr Menigo that there are limited resources in the High Court in the form of judges and courtrooms is spot on and cannot be faulted. If this matter does not proceed on the 22 April 2024 due to the applicant's absence, this would likely prejudice the administration of justice with respect to matters which could have been allocated for hearing during that time.

- [38] Lastly, the applicant has argued that the case against him is very weak, and he is confident that he will demonstrate at the trial that he is not guilty of any offence. The courts have cautioned several times that bail proceedings should never become a dress rehearsal of the trial. During bail proceedings, a court does not have to make a finding, even on a provisional basis, as to the guilt of an applicant for bail or even for the amendment of bail conditions. All that a court must do is weigh the prima facie strength or weakness of the State's case, and such a decision ought not to be made regarding credibility findings so that bail proceedings do not become a dress rehearsal for the trial itself. *S v Viljeon* 2002 (2) SACR 550 (SCA) at 25.
- [39] As correctly pointed out by the State, it would be impossible for this court, even on a balance of probabilities, to assess the strength of the applicant's allegations without venturing into the trial court's jurisdiction. Furthermore, the applicant has not filed a confirmatory affidavit from his expert to substantiate his allegations that, from the expert report, the evidence against him is wanting. I am mindful that hearsay is permissible in bail applications; however, I am of the view that in a case like this, a confirmatory affidavit was critical to the applicant's application. Captain Kotze stated that the State has a strong case against the applicant. Those submissions have not been controverted.
- [40] Given all these considerations, I am of the view that the applicant has failed to satisfy this Court that on a balance of probabilities, it is in the interest of justice to grant the application for the amendment of his bail conditions.

Order

- [41] In the result, the following order is granted:

41.1 The applicant's application for the amendment of the bail conditions is hereby dismissed.

LEKHULENI JD

JUDGE OF THE HIGH COURT

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Prepared on 11 October 2026 · Esheria