

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape High Court, Kimberley)

Saakno: / Case number: **1306/2011**
Datum verhoor: / Date heard: **25 / 08 / 2011**
Datum gelewer: / Date delivered: **07 / 10 / 2011**

In the matter between:

GASTON SAVOI

Applicant

and

THE STATE

Respondent

In re:

GASTON SAVOI
RODERIGO SAVOI
ALICIA MARCUS
TRACY LEE DUTTON
SANJAY MITHA
LEONARD DE LANGE
SHYRES HEALTH (PTY) LTD

Accused 1
Accused 2
Accused 3
Accused 4
Accused 5
Accused 6
Accused 7

Coram: Hughes-Madondo AJ

JUDGMENT

HUGHES-MADONDO AJ

[1] In these proceedings the applicant approaches this court in terms of section 63 of the Criminal Procedure Act 51 of 1977 (the "Act") for an amendment of his

bail conditions.

- [2] On 25 August 2010 the applicant, CEO of the Intaka Group of companies, was arrested in Cape Town. His arrest related to charges of fraud and corruption allegedly committed in KwaZulu Natal. He was released on bail on the same day.
- [3] Following investigations he was again arrested in respect of alleged offences in KwaZulu Natal. This time he was released on warning. The two cases in KwaZulu Natal were consolidated and this case is now pending in the regional court Pietermaritzburg.
- [4] In Kimberley magistrate court under case number B4265/10, the applicant appeared on 5 November 2010, having been arrested the previous day. He was again charged with fraud and corruption and released on R100, 000.00 bail together with bail conditions similar to the present case. This case is still pending in the Kimberley magistrate's court.
- [5] On 18 March 2011 the applicant was arrested yet again and appeared in the Kimberley magistrate's court. This criminal case B798/11 was transferred to this court. The applicant appeared for the first time in this court on 15 August 2011 when the case was adjourned to 3 February 2012. This case is presently

pending.

[6] Bail was granted in the Kimberley magistrate's court by consent in the present case as follows:

(a) The accused be granted bail in the sum of R50,000.00 cash AND

(b) Upon payment of the said sum of money, with the Registrar of Kimberley District Court or with the Clerk of the Criminal Court at the magistrates office serving as the venue for this Court, or with a member of the Prison Service at Kimberley Prison, the accused shall be released from custody on condition that

i) That the accused be released on the same conditions as before and the said conditions be made the Order of this Court."

[7] I do not propose to set out the bail conditions in its entirety and only set out those pertinent to these proceedings :-

"2. The accused shall surrender to the investigating officer or branch commander his passport;

4.2 Accused shall not apply for any travel documents throughout the duration of this matter, unless it is with the approval of the court upon application;

4.3 The accused is not permitted to leave the Republic of South Africa without the prior written consent of the Director of Public Prosecutions, Northern Cape and/or investigating officer and/or his branch commander investigating officer and/or his branch commander who would issue such written consent in consultation with the Director of Public Prosecutions;

4.4 The accused is not permitted to enter the premises or any point of entry or departure without the written consent of the Director of Public Prosecutions, Northern Cape and/or investigating officer and/or his branch commander who would issue such written consent in consultation with the Director of Public Prosecutions, Northern Cape."

[8] In terms of this order the applicant was not permitted to travel outside South Africa without the permission of the Director of Public Prosecutions (DPP) Northern Cape and/or the Investigating Officer and/or the

Branch Commander. He would also have to surrender his passport to the Investigating Officer or his Branch Commander.

[9] Currently there are three criminal matters against the applicant. The initial one is in KwaZulu Natal, Pietermaritzburg regional court. The second is case number B4265/10 pending Kimberley magistrate's court and lastly this matter, case number B798/11 now pending before this court.

[10] In all three matters the bail conditions are identical but for the amount allocated for bail. The conditions pertaining to the applicant's permission to travel outside South Africa are identical.

[11] In this application, the applicant seeks an amendment of the previous order to the extent that he can travel outside South Africa, on business, without permission of the DPP and/or Investigating Officer and/or Branch Commander.

[12] For ease of reference section 63(1) of the Act states:

“(1) 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 to reduce the amount of bail

determined under section 59 or 60 or amend or supplement any condition imposed 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."

[13] Section 63 provides the necessary procedure for instances where changed circumstances require appropriate amendments to the conditions of bail fixed at an earlier stage. See **Du Toit et al: Commentary on Criminal Procedure Act.**

[14] The applicant's case is that there exist changed circumstances that warrant him bringing this application for the amendment of his bail conditions.

[15] I now turn to deal with these changed circumstances. During March 2011 it became essential for the applicant to travel to Angola on business relating to the Intaka Group. This business trip was scheduled for the period of 4 July 2011 to 7 July 2011.

[16] As required in terms of his bail conditions, the applicant sought permission to travel from the relevant authorities. In regard to the two criminal

cases pending in the Northern Cape, during March 2011, the applicant wrote to Detective Lieutenant Colonel Dylan Perumal ("Perumal"), the Investigating Officer in the Northern Cape.

[17] Perumal requested that the applicant obtain confirmation from Angola that this visit was required. The applicant did so and transmitted it to Perumal. However no reply was forthcoming from Perumal.

[18] On the advice of his legal representative, the applicant proceeded with substantive applications in all the courts where criminal matters were pending against him. The purpose of which was to elicit a response from the relevant authorities.

[19] The first application was set down for hearing on 22 June 2011 in the Pietermaritzburg regional court, KwaZulu Natal. A consent order was granted, in terms of which it was ordered that the applicant was permitted to travel to Angola departing South Africa on 4 July 2011 and returning on 8 July 2011. The Prosecutor, Advocate Knorx Molelle of the Asset and Forfeiture Unit, the Investigating officer and the representative of the curator Mr Eugene Nel consented to this order being granted.

[20] Perumal was advised of the KwaZulu Natal consent

order. He however refused to grant the applicant permission to travel. As a result, in case B4265/10 a substantive application was initiated in the Kimberley magistrate's court on 27 June 2011. That application was brought in terms of section 63 of the Act and was opposed by the Deputy Director of Public Prosecution of the Northern Cape, Advocate Tshweu and Perumal.

[21] The grounds relied upon and set out by the applicant in its papers in both KwaZulu Natal and Kimberley magistrate's court were identical. The opposition by Perumal in Kimberley magistrate's court was that the consent order of KwaZulu Natal was not binding on the charges preferred against the applicant in the Northern Cape and that he was not convinced that it was necessary for the applicant to travel to Angola.

[22] An order granting the applicant permission to travel was granted by the Kimberley magistrate's court. This order was similar to the consent order of KwaZulu Natal. However Perumal still persisted with his refusal to allow the applicant to travel.

[23] The applicant submitted in his affidavit and in argument that he had abided with his bail conditions and sought permission to travel as required, however the relevant authorities in the Northern Cape were not acting reasonably and justly in the circumstances in

considering and granting him permission to travel.

[24] It was further submitted in argument on behalf of the applicant that the conduct of the relevant authorities in their persistent refusal to allow him to travel even in the face of two court orders created the existence of changed circumstances which now required appropriate amendments to be made to his bail conditions. These are specifically related to his ability to travel abroad for Intaka Group business in the future.

[25] It has always been the position of the respondents that the applicant was not a flight risk and this position still persists. Further, the respondent conceded that when the consent order was sought in Pietermaritzburg the relevant authorities were well aware that there were other bail orders made in the other courts.

[26] This concession was made by the respondent during the proceedings in the Kimberley magistrate's court. The presiding officer in the Kimberley magistrate's court went so far as to say that the bail conditions in all three matters were "dead similar".

[27] Even after Kimberley magistrate's court granted the applicant permission to travel, Perumal still persisted

in his opposition. His persistence was that there were no compelling reasons or explanations put forward to indicate to him that it was imperative for the applicant to travel to Angola.

[28] As there had been no successful appeal against these relaxation orders both were still valid court orders when Perumal yet again refused the applicant permission to travel.

[29] Evidently by the respondent's refusal to grant the applicant permission to travel as set out in these orders amounted to the respondent defying at least one lawful court order that directly instructed him to grant the applicant permission to travel. I am referring to the Kimberley magistrate's court order.

[30] In my view the respondents were not acting as contemplated by the bail conditions set out above and I must concur with the applicant that indeed there now existed changed circumstances to warrant that the applicant seek recourse in terms of section 63 of the Act. See **Shefer v Director of Public Prosecutions Transvaal** 2004 (2) SACR 92.

[31] I now turn to deal with the proposed amendment sought by the applicant.

[32] The applicant requests that this Court amend the bail conditions as follows:

- "1. The applicant's attorneys, Edward Nathan Sonnenbergs, Cape Town, shall retain the applicant's passport which will only be returned to the applicant for business-related travel;*
- 2. the applicant shall notify the investigating officer in writing of proposed travel outside the Republic of South Africa at least 10 days before his proposed date of departure;*
- 3. the applicant shall furnish the investigating officer with a full itinerary of his intended travel at least 7 days before departure; and*
- 4. the applicant may only travel outside the Republic of South Africa for business purposes and each such trip shall not exceed 14 days, inclusive of the date of departure and return."*

[33] It is a well known fact that bail conditions must be subject to the control and scrutiny of the authorities, must also be such that they are in the interest of justice and practically feasible. See **Rex v Fourie** 1947 (2) SA 547 (O) at page 577, Fischer, JP said that

the proposal put forward on behalf of the accused in respect of bail did not "*seem practical... it is difficult to see how the police can exercise sufficiently close supervision over the accused to ensure the fulfilment of these conditions. The suggestion does not offer a solution of the difficulties attendant on the accused being admitted to bail.*"

[34] The critical concern of the applicant is the manner in which the DPP and/or the Investigating Officer are exercising their powers in granting and refusing him permission to travel outside of South Africa. In his view the permission is being unreasonably withheld.

[35] On an examination of the amended conditions proposed by the applicant to my mind this merely results in a shift of power and/or control over the applicant's movements from the respondent on the one hand to the applicant's representative on the other.

[36] The amendment proposed results in there being two different sets of bail conditions that would govern the applicant's conditions to travel. Those conditions in Pietermaritzburg and Kimberley magistrate's courts will be the same whilst the proposed conditions sought to be imposed by this court would differ.

[37] There are no statutory rules regulating the effect of previous decisions of other or the same courts however by virtue of the maxim of *stare decisis (stand by the decision)*, the Kimberley magistrate's court will be bound to abide by decisions made by this court. What happens to the order in KwaZulu Natal which is different from the proposed order and KwaZulu Natal is another jurisdiction altogether. The courts in KwaZulu Natal Provincial Division are not bound to follow orders made in the Northern Cape Provincial Division. See **Metropole Building (PTY) Limited v Lovell** 1939 WLD 172 at 177.

[38] The fact that there would be two different orders governing the travel of the applicant clearly does not conform to the notion that bail conditions should be practically feasible. The practical problems that this would give rise to are:-

- a) who would now be the holder of the applicant's passport, the applicant's representative, as proposed in this division or the authorities as already set out in KwaZulu Natal division. This will surely create confusion as regards the holder of the applicant's passport.
- b) how would the applicant's movements

be monitored, as these will no longer be subject to the control and scrutiny of authorities concerned. This will be defeating the purpose of bail.

[39] Currently all three bail orders are similar and enforceable. If this court acceded to the applicant's request the proposed amendment would create a situation where the orders would be in conflict with each other. One set of rules will govern KwaZulu Natal and Kimberley magistrate's court while another will govern this matter. None of the orders would then be enforceable, as already stated they would be in conflict with each other.

[40] On the facts of the present case it is evident to me that compliance by the DPP and/or the Investigating Officer to control and scrutinise the movements of the applicant to ensure that he stands trial would be impossible with the proposed order. The lack of control and scrutiny would leave the respondent's with no powers to ensure that the applicant actually stands trial. It would also create impossibility as regards the applicant in that he would not be able to ignore the KwaZulu Natal order which has a different set of rules set out in order to obtain permission to travel.

[41] *"It is trite that a court will not engage in a futile*

*exercise of making an order which cannot be carried out". See **Administrator Cape and Another v Ntshwaqela and Others** 1990 (1) SA 705 at 720C-D.*

[42] It has been said that if an order is unenforceable then that court had no jurisdiction in granting such an order. A court will not make an order that it cannot enforce. The principle of effectiveness relates to the courts power to give an effective judgment and not merely exertion of its powers in a particular case. See **Metlika Trading Ltd v Commissioner SARS** 2005 (3) SA 1 (SCA) at 15 paragraph 36G-H.

[43] In the result even though the applicant has made out a case that changed circumstance exist that permit him to seek an amendment to his bail conditions as regards his travel, the proposed amendment taking into account these circumstances, to my mind, will not be able to be enforced nor carried out and as such it would be futile to make such an order that no effect can be given to.

[44] Even though the unreasonable conduct of the respondent led to the applicant seeking recourse from the courts. The nature of such proceedings is such that no order as to costs is applicable.

For the reasons set out above the application is dismissed. No order as to costs.

W HUGHES-MADONDO
ACTING JUDGE
NORTHERN CAPE HIGH COURT, KIMBERLEY

On behalf of Applicant:	Adv. F. van Zyl SC o.i.o Haarhoffs Inc.
On behalf of Respondent:	Adv. Tshweu o.i.o The Director of Public
Prosecutions	