



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 242/2014

In the matter between:

**MARWICK THANDUKUKHANYA KHUMALO**

**Applicant**

**And**

**THE KING**

**Respondent**

**Neutral citation:** *Marwick T. Khumalo and Another v The King (242/2014) [2014] SZHC 202 (18<sup>th</sup> August 2014)*

**Coram:** **M. Dlamini J.**

**Heard:** **15<sup>th</sup> August 2014**

**Delivered:** **18<sup>th</sup> August 2014**

*Bail variation application – onus on the respondent to show on a balance of probabilities that the applicant will jeopardize the administration of justice – applicant however, to discharge evidential duty – focus should be on the interference with administration of justice and where none, applicant has right to attend lawful duties*

Summary: Applicant who is under strict bail conditions, seeks to travel overseas to do a handover following that his term of office as a member of Commonwealth Parliamentary Association (CPA) is about to come to an end. Respondent strenuously opposes the application on the basis that there is a likelihood that he might interfere with potential and key witnesses.

### Genesis

[1] The applicant stands indicted together with others for crimes against the Corruption Act and Income Tax Order and for fraud. The total value reflected in the indictment is E444,500.00. At his arrest, June 2013, he was slapped with a holding charge of E5,776,896.93. His bail application based on the holding charge was granted by consent of respondent. On the 16<sup>th</sup> July 2013, he applied for a variation of one of his bail conditions, viz. release of his travelling document in order to travel firstly to Namibia and thereafter the United Kingdom to attend to CPA business as chair of the CPA Trustees. This application was declined by this Court on the basis that the respondent deposed that the witness would rub shoulders with a number of their witnesses who were in the Republic of Namibia and the United Kingdom and that he might jeopardise investigation of the charge involving E5 million. On the 21<sup>st</sup> February 2014 the applicant lodged a similar application for purposes of travelling to South Africa in order to access *inter alia*, a specialist in relation to his health condition. Again this application was opposed by respondent through Senior Counsel. The court granted the application to travel to South Africa by reason that a similar application was made by his co-accused in the same holding charge of E5 million and was not opposed by respondent and further that it was in the interest of justice to have applicant attended to by a physician of his choice

so as to be fit to stand his trial. He now seeks for an order to have his passport released to him in order to attend his CPA business overseas.

[2] The applicant asserts in support of his application:

“13. The present applicant has been prompted by the fact that, I was appointed Treasurer of the Commonwealth Parliamentary Association (CPA) in London in September 2011 (prior to charges I am currently facing) for a period of three (3) years. September 2014 marks the end of my term.

14. I am a member of the Trustees, the Audit Sub-Committee and Executive Committee within CPA in my capacity as Treasurer of CPA. I am therefore required to attend the Trustees meeting, Audit Sub-Committee meeting and Executive Committee meeting. I chair the Audit Sub-Committee. As a member I am supposed to attend at least twice a year. I missed the first meeting early this year partly because the respondent delayed to respond to my request to attend.

15. I say that this is my last term of office and I am expected to attend so that I can hand over a report of my office for the past three (3) years and also participate in the final Audit Trustees meeting where we will be appointing a CPA Independent Chairperson. It is an important meeting not only for me but also for CPA and the Parliament of the Kingdom of Swaziland as a member of the forum.”

He avers further:

“18. I have since been indicted in respect of the fraud charge of E444,500.00 and have also been given a list of a summary of evidence and a list of witnesses. In point in casu and to assist the Honourable Court in that the summary of evidence and list of witnesses to testify in any case consist of local Swazis. This means that there are no witnesses on the list that reside outside of Swaziland especially in London or in the CPA London that I may influence or interfere with.”

[3] Au contraire respondent states:

- “5. *May I humbly state that as much as the court order states that the Applicant can apply for the release of his passport and travel document upon furnishing specific and full information of the private or official duties and the place of travel, it does not allow the Applicant to visit CPA-Swaziland, Regional and or CPA International as per his present application. May I state that it is my believe that the court considered that the Applicant will interfere with Crown witnesses if he is allowed to go and the court will have no jurisdiction to take or punish the Applicant if he does interfere with the Crown witnesses. The State has a duty and responsibility to manage bail conditions and to ensure that the administration of justice is not placed in jeopardy. This may undermine the operation of the criminal justice system.*
7. *However, may I state that the Applicant is not entitled to attend these meetings because he (Applicant) will interfere with Crown witnesses or documentary evidence.*
8. *May I state that the CPA International mid-year Executive Committee meeting was not hosted by Happy Valley Resort and Casino but was hosted by Royal Swazi. However, the Applicant and his accomplices together with Happy Valley Resort and Casino made the Swaziland Government to pay the Happy Valley Resort as if it was the one that hosted the meeting. May I state further that the CPA International paid for the meeting. May I state that the CPA International through the Secretary General Dr. WF Shija made a donation of \$15,000 to the Swaziland Government which was diverted to the CPA local branch accounts by the Applicant and his accomplices. In this regard Dr. WF Shija is a key witness in this. May I bring it to the court’s attention that the present invitation letters are signed by the same Dr. WF Shija whom the Crown regards as a key witness. It is therefore surprising that the Applicant alleges that there are no witnesses that will come from the CPA International. This is moreso because the Crown is in the process of seeking Mutual Legal Assistance from the United Kingdom and other international jurisdictions and as such it (Crown) is not in a position to disclose those witnesses that will come from the United Kingdom and other jurisdictions to testify. The process of seeking Mutual Legal Assistance has proved to be a long exercise as there are many mandatory processes that are involved but for purposes of the present charges this process is at advanced stage. The Applicant will interfere with the evidence the Crown is seeking through the Mutual Legal Assistance process as alluded by the Honourable Court in its judgment delivered on the 17<sup>th</sup> July 2013.*

9. *May I humbly state that there are no new facts in this matter that requires the Honourable Court to attend to this matter as a matter of urgency because the urgency is self created by the Applicant. May I state that this matter was dealt with by this Honourable Court in its judgment delivered on the 17<sup>th</sup> July 2013 at pages 17 – 58. Therefore, the only purpose of this application is to abuse the court processes and stands to be dismissed as there are no merits. The Honourable Court is humbly referred to the judgment attached herein marked SMM1*

9.1 *May I state that the Applicant is not to attend any CPA activities as per the judgment issued by this Honourable Court on the 17<sup>th</sup> July 2013.*

9.2 *May I further stat that the only option available to Applicant is to note an appeal against the above judgment instead of trying to manipulate the court order issued on the 21<sup>st</sup> February, 2014 by this Honourable Court.”*

#### Issue

[4] From the given circumstances of the matter by both parties, the question for determination is whether there is a likelihood that the applicant might interfere with the Crown’s witnesses.

#### Adjudication

[5] **Reynolds J in Attorney General, Zimbabwe v Phiri 1988 (2) S.A. 696** at 701 had the following to say on application pertaining to bail:

*“The test in my view, should be one of deciding whether or not there is a reasonable possibility that the due administration of justice will be prejudiced if the accused is admitted to bail.”*

[6] As *in casu* I am faced with the question of interference with the Crown witnesses as per respondent’s submission. The test by Honourable **Reynolds J (supra)** still maintains; *“is there a real danger or a reasonable*

*possibility that the due administration of justice will be prejudiced if the accused is” permitted to travel to the United Kingdom?*

[7] I must state from the onset that the onus of establishing the likelihood or “*real danger*” as per **Reynolds J.** (op. cit) rests with the respondent on a balance of probability by reason that one cannot prove a negative. Otherwise the applicant must in the circumstances discharge the evidential duty.

[8] The applicant deposed that: “*in casu and to assist the Honourable Court in that the summary of evidence and list of witnesses to testify in any case consist of local Swazis. This means that there are no witnesses on the list that reside outside of Swaziland especially in London in the CPA London that I may influence or interfere.*” The respondent then answered: “*May I state that the CPA International through the Secretary General Dr. WF Shija made a donation of \$15,000 to the Swaziland Government which was diverted to the CPA local branch accounts by the Applicant and his accomplices. In this regard Dr. WF Shija is a key witness in this. May I bring it to the court’s attention that the present invitation letters are signed by the same Dr. WF Shija whom the Crown regards as a key witness. It is therefore surprising that the Applicant alleges that there are no witnesses that will come from the CPA International. This is moreso because the Crown is in the process of seeking Mutual Legal Assistance from the United Kingdom and other international jurisdiction...*”

[9] Of glaring, as can be deduced from the indictment and the respondent’s answer, the witnesses indicated in the summary of evidence do not include any witnesses from outside this jurisdiction. As correctly observed by the applicant, all the witnesses are from within the Kingdom of Swaziland.

However, it is averred on behalf of respondent that Dr. Shija and other international CPA members are witnesses in this matter. Of note, is that this assertion on behalf of the respondent has been so stated as early as July 2013 when the first application to travel to the Republic of Namibia and overseas by the applicant was lodged. However, when the indictment was subsequently drawn, the summary of evidence attached thereto did not bear testimony of any overseas or cross border witnesses. Learned Counsel on behalf of respondent submitted that a summary of evidence could be amended at any time to reflect additional witnesses. That is very much appreciated. However, there are a number of reasons on the ground which do not support the respondent's contention. The summary of evidence does not reflect that there are additional witnesses whose list and evidence shall be given in due course pending the Mutual Legal Assistance (MLA) application. On the contrary, from reading the entire summary of evidence, one concludes that the Crown's case is sealed by the witnesses therein. It appears that the Registrar of this court took the same view as he then set a pre-trial date for the applicant and his co-accused as appears from the criminal record submitted during the hearing of this matter. The pre-trial conference was scheduled for the 4<sup>th</sup> October, 2013. On that date, the defence team applied for a postponement. The respondent did not object to it and it was so granted. On 25<sup>th</sup> October, 2013, the next pre-trial conference date, the defence applied for a postponement. The respondent successfully opposed that application. One wonders as to why the opposition in the light of the assertion that there were outstanding witnesses in the United Kingdom and other international jurisdiction but for the MLA application. If such averments by the respondent were anything to go by, one would have expected the respondent to be the first to apply for a postponement of the pre-trial conference on the basis that more evidence was pending. Their opposition to a postponement meant that they were

ready to prosecute the applicant and his accomplices. This conduct by the respondent defeats their assertion that there are witnesses in the United Kingdom and other international jurisdiction.

[10] What exacerbates the position that there are no further witnesses by the Crown is the deposition by the respondent that: “*the Crown is in the process of seeking Mutual Legal Assistance...*” In all fairness, this flies in the face of the respondent for the reason that the words, “*is in the process of seeking*” in simple day to day interpretation means that the respondent is either anticipating instituting an MLA application or has recently commenced the said application. This is surprising when one notes that the applicant was charged over a year ago; over a year ago, the respondent deposed that its witnesses were in the United Kingdom; almost a year ago the respondent held a pre-trial conference indicating that the Crown was ready to prosecute despite resistance to the same. The respondent does not even attempt to tell the court as to how advance the LMA application is. All it says that the LMA is at advanced stage. It is silent as to exactly what stage is the LMA. This is not surprising because as one conjectures, the reason is that respondent is still considering the MLA.

[11] Approached from another angle, from the summary of evidence, it is clear that some of the witnesses are based in Parliament where the applicant is a member. He is obviously in contact with them. It has not been asserted that he has interfered with these witnesses. For that reason alone, one must find in his favour. In other words, it cannot be said that there is a real danger or possibility that the administration of justice might be prejudiced if applicant could be permitted to travel overseas. This is more so because the respondent deposes that he might interfere with Dr. Shija, the chair of CPA International. I think it goes without saying that Dr Shija, by virtue of



his position alone, is a man of virtue. It is therefore obvious that it is highly unlikely that he might stoop so low as to interfere with the administration of justice by assisting the applicant in shielding away any evidence in this matter as feared and so attested by respondent.

[12] There is another point which needs attention in this matter. The applicant deposed that this is his last term in office and therefore must travel to the United Kingdom to do a hand over. The respondent submitted that the appellant does not have to travel to the United Kingdom in person. He can delegate his deputy or assistant. **S v Russel 1978 (1) SA 223** at 226 his Lordship **Watermeyer J.** faced with a similar submission where the *court a quo* refused the appellant to discharge his duties stated:

*“I come now to Mr. Aaron’s third submission, with which I agree, and that is that on the evidence led the magistrate erred in imposing the condition under consideration. By prohibiting the appellant from going to the squatters’ camps, or those of them that are still standing, the magistrate was placing upon him restrictions which would prevent him **from carrying out his duties.**”* (my emphasis)

The learned judge proceeded:

*“The magistrate’s reason for denying the appellant that opportunity, namely that his presence in not needed there **because the Church is strong enough to send others, does not seem to me to be a valid reason for denying appellant that right.**”*(my emphasis)

[13] In the absence of any demonstrated interference with the Crown’s witnesses as indicated above, I see no reason why I should differ from the view taken by his Lordship **Watermeyer J supra viz.**, that the focus should be on

interference with the administration of criminal justice and not on preventing the applicant from carrying on with his lawful duties.

[14] Before I conclude this matter, it is apposite that I clarify the perception by respondent that judgment of July, 2013 was to the effect that applicant could not travel to the United Kingdom for CPA businesses. Generally, that position is correct. The basis for that judgment was that the respondent's evidence was that its witnesses were members of the CPA International and that they were to summon them. However, from the summary of evidence, it is clear that the position as attested by respondent then is not so on the ground as demonstrated by the summary of evidence and respondent's conduct of insisting that a pre-trial conference be held. For that reason, the judgment of 2013 is not applicable *in casu*. The real risk of interference with the Crown's witnesses is rendered too remote, if any at all, by such circumstances.

[15] In the totality of the above, I hereby make the following orders:

- (1) The applicant's application is granted.
- (2) No order as to cost.

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**M. DLAMINI**  
**JUDGE**

**For Applicant: L. Howe of Howe, Masuku & Nsibandze Attorneys**

**For Respondent: M. Nxumalo of The Director of Public Prosecutions**