



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 488/2023

In the matter between:

UZZAL MOHAMMED

1ST APPLICANT

HUSSAIN SHAHDAI

2ND APPLICANT

And

THE CROWN

RESPONDENT

NEUTRAL CITATION:

***UZZAL MOHAMMED & ANOTHER v THE
CROWN (488/2023) [2024] SZHC – 111
(28/05/2024)***

CORAM:

BW MAGAGULA J

DATE HEARD:

26/03/2024

DATE DELIVERED:

28/05/2024

FLYNOTE:

*Criminal Law and Procedure – Variation of bail conditions –
The charge is in relation to the release of the Applicant's*

passports temporarily for purposes of renewal – Crown opposed to the variation on the basis that the release of the passports to the possession of the Applicants would be as good as assisting them to evade trial as there is no extradition agreement between the Kingdom of Eswatini and Bangladesh. Yet the Applicants are Bangladesh Nationals – A court can only vary the conditions of bail where there has been a genuine and legitimate change of circumstances warranting such variation – where there is no change of circumstances, then the application for variation of bail, conditions stands to fail and be dismissed.

HELD: *The expiry of passports is a genuine and legitimate change of circumstances, which did not exist when the bail conditions were imposed. The concerns raised by the crown of the existence of risk for the Applicants to abscond can be mitigated by the use of cover to convey the passports to Pretoria.*

JUDGMENT

BW MAGAGULA J

- [1] In the matter before this Honorable Court, the Applicant, a foreign citizen, stands charged with a criminal offense. Having been granted bail previously, one of the conditions imposed was the surrender of his passport, a requirement to ensure his availability for legal proceedings. The Applicant dutifully

complied with this condition, relinquishing his passport to the appropriate authorities. However, as his passport approaches its expiration date in two months' time, the Applicant now petitions this Court to review his bail conditions, seeking permission to reclaim his passport temporarily. His intent is to present it to his embassy for renewal, thus ensuring continued legal residency and facilitating any necessary international travel. The Court is thus tasked with assessing the merits of this application in light of the Applicant's circumstances and the interests of justice.

- [2] The two Bangladesh Nationals seek the following prayers in their notice of motion;

2.1 That the bail conditions set by the above Honourable Court in this matter on the 10th November 2023 be varied in the following manner;

- a) That the investigating officer at Mbabane Police Station is to restore to the Applicants their Bangladesh International Passports for purposes of sending them for renewal at the Pretoria High Commission.**
- b) That upon such renewal the Applicants are to return the passports to the investigating officer.**

- [3] Granting the Applicants such further and / or alternative relief.

[4] The Applicants were granted bail by the above Honourable Court on the 10th November 2023 and as part of the conditions of the bail was that Applicants were to surrender their passports to the investigating office at Mbabane Police Station and not to apply for a new one.

[5] The Applicants have complied with the bail conditions and indeed the passports are currently in the possession of the investigating officer.

Applicants' basis for seeking variation

[6] Both Applicants have deposed to founding affidavits in support of their applications.

[7] It is contended by the Applicants that they have noted that their passports are due to expire on different dates and months this year.

[8] First Applicant contends in founding affidavit that his passport is due to expire in the month of August 2024. This is disputed by the crown who contend that the first Applicant's passport expires 2 months later being October 2024.

[9] The second Applicant contends that his passport is due to expire on the 24th May 2024. This allegation by second Applicant is not disputed by the crown who confirm that the passport is due to expire in May 2024.

- [10] The Applicants contend that the process of renewal of their passports require that their applications for renewal be done at least within 3 months prior to the date of expiry of the passport and that the renewal process takes between 3 to 6 months to be completed. This allegation by the Applicants is not disputed by the crown.
- [11] The Applicants further detail that process requires that the passports be sent together with the applications and required details to the Bangladesh Embassy in Pretoria and that upon receipt of the applications the Bangladesh Embassy in Pretoria sends all the details to the Bangladesh passport department which then makes enquires in the country where the Applicant is resident and issues a new passport and sends it to the Bangladesh Embassy in Pretoria. The Embassy in Pretoria then calls Applicants to collect or make arrangements to be sent to the country where Applicants are resident.
- [12] Applicants contend that they have no intention to travel to Pretoria for purpose of sending the application but had intended to use courier services such as D.H.L and that upon renewal the passports (renewed) will again be handed over that should they intend to travel using the passports an appropriate application shall be made in court.

Respondents Grounds for opposing

- [13] The Applicants' bail condition variation application is vigorously opposed since Applicants are Bangladesh Nationals a country which the Kingdom of

Eswatini has got no Extradition agreement with. No extradition process could be readily effected should they flee across the borders of the Kingdom.

- [14] The release of passports to their possession would be as good as assisting them to abscond and evade trial, either using the formal or informal crossing points in the country. There is no guarantee that they will return the passports, and no policing measures can be put in place to ensure that they return them. The passports are valid and there is no urgency or need for such renewal.
- [15] The Applicants are facing a serious charges of Fraud allegedly committed in furtherance of a common purpose involving amounts E617, 067-46. The offences attract lengthy custodial sentences upon conviction, which may induce Applicants to flee this jurisdiction and not bargain with the risk of facing jail time.
- [16] Applicants have got no emotional and family ties to this country, their families are in their home country. They have no assets in their names in the country, save for running grocery supermarkets at KaShali and Ngwane Park, where they are renting premises, they can easily dispose of same through selling or abandon the stock which comprises of insignificant items.
- [17] 1st Applicant has already transferred the trading licence including the stock at Gege Supermarket situated at KaShali for E120 000-00. The Applicants can

easily forfeit the E10 000-00 cash amount they paid as part of their bail condition.

- [18] The property used as surety belongs to a third party, as such they would not suffer any prejudice, if property were to be forfeited to the state should they abscond.

The Applicants legal arguments in support of the application

- [19] *Exfaice* the Respondent's main ground for opposition of the Applicant's application is that the Applicants are a flight risk and would use the passports to flee this jurisdiction.
- [20] It is important to note that the Applicants are not applying for bail at this stage but were granted bail by the above Honourable Court on the 10th November 2023, with the parties agreeing on the bail conditions through a recognizance form. The issues of Applicants being a flight risk did not arise during that application, which would have been the appropriate stage to determine whether Applicants were entitled to bail or not.
- [21] The present application before court is for a variation of one of the conditions of bail, that requires the Applicants passports to be kept by the investigating officer and that they do not apply for a new one.

- [22] The Applicants have stated that they do not intend to travel using the passports and are amenable to whatsoever manner that could cause the renewal of their passports.
- [23] The Applicants tender to accept whatsoever measures that can be put in place to ensure that the passports are returned to the investigating officer, upon renewal. They have also made suggestions of such measures.
- [24] The Applicants' further argue that the basic principle in applications for variation of bail conditions is that there has to be a genuine and legitimate change of circumstances warranting such variation. The court has been referred to the case of **Lucky Nkululeka Ndlovu v Rex (139/2020) SZHC 166 Page 112 and 12 paragraphs 11 to 12** which quoted with approval, **Masuku J** in the Botswana case of **LESEDI APADILE V THE ESTATE MCHFT0000005-06**
- [25] It is further contended on behalf of the Applicants' that in the Applicants were granted bail on the 10th November 2023. Their passport renewal due dates were beyond the bracket of three months required for their renewal applications to be filed. In February 2024, when the present proceedings were filed, the second Applicants passport fell due for renewal within a period slightly over the three month period hence a change in the circumstances warranting the present application.

[26] The Applicants concede that the first Applicant's passport did not fall due within a period slightly over a month. However, it is contended contra that Applicants were granted bail together, in a joint application and placed the same surety. The first Applicants' passport expires within the same year and consequently it is convenient that the application for variation be done jointly as opposed to piecemeal fashion. It is also argued that it is also convenient that whatever measures are put in place to avert the crown's fears be in done once to minimize on expenses that may be associated with them.

[27] The Applicants' argue that changed circumstances constitute factors connected with the initial decision to grant bail and which since the grant of the bail application have changed and therefore render continued performance thereof by Applicant unjust, grossly unreasonable or impossible. The court was referred to the matter of **Lucky Nkululeko Ndlovu V Rex (139/2020) SZHC 166 at page 12 paragraph 12.**

The Respondents Legal Arguments

[28] The crown submits that should the court order renewal of the passports of Applicants even though the assistance of the police, this court will have no control of what will happen at the Bangladesh High Commission in Pretoria regarding the said passports. The court will also have no way of enforcing its order nor hold anyone accountable at the High Commission moreso because it is a country on its own based outside the jurisdiction of this court and controls its own processes in terms of International Law.

- [29] The doctrine of effectiveness cannot be fully applied in the circumstances. There is no legal justification for the renewal of Applicant's passports in *casu*. As already pointed out the Kingdom of Eswatini has got no Extradition agreement with the Republic of Bangladesh to facilitate extradition proceedings should Applicant's abscond and return to their home country.
- [30] Applicant's renewed the trading permits/licences was done way after lodging the present application and Respondents having filed the answering affidavit pointing out the glaring factors pointing to likelihood of flight by Applicants.
- [31] The Director of Public Prosecutions also submits that the factors applicable in considering whether Applicant is a flight risk before grant of bail are still considered even after grant of bail and for purposes of considering whether court should grant a variation of bail condition for release of passport. The crown persuades this court by relying on the judgment of Her Lordship Justice Dlamini in the case of **Marwick T Khumalo and Another v The King (242/2013) [2013]** where she dismissed an application for variation of the case as the Respondents had established on a balance of probability that Applicant was likely to intimidate and or interfere with crown witnesses, should court permit release of passport and permit Applicant permission to travel to attend CPA meeting.

THE LAW

[32] Section 96 (19) of the Criminal Procedure and Evidence Act 67/1938 (as amended) provides that;

(19) Subject to the provisions of this Act – 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 provisions of Sections 95 (3) and 95 (4). Increase or reduce the amount of bail so determined, or amend or supplement any condition imposed under subsection (15) or (18) whether imposed by that court or;

a) 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 the court to determine the application.;

b) If the court referred to in paragraph (a) is a superior court, an Application under that paragraph may be made to a judge of that court if the court is not sitting at the time of the application.

(20) The court dealing with bail proceedings as contemplated herein which imposes any further condition under subsection (18) or which under subsection (19), amends the amount of bail or amends or supplements any condition or refuses to do so, shall record the relevant proceedings in full ...shall on its mere production in any court in which the charge is pending, be *prima facie* proof of such condition or any amendment or supplementation thereof.

[33] In the matter of **Lucky Nkululeko Ndlovu vs Rex High Court case no.139/2020**, His Lordship N. M. Maseko J had the occasion to state the

following in a matter where the Applicant was seeking an order to vary his bail conditions. The learned judge in his judgment referred to a Botswana decision of **LESEDI APADILO vs THE STATE MCHFT – 000000-5 -06**, where the court considered whether a reason advanced by the Applicant amounted to a change in circumstances.

- [34] In the **Monnanyana v The State [2002] 1 B.L.R 72 (C.A)** the court remarked that the only conclusion one may arrive at is that the court has common law power to regulate its own orders and where appropriate and in the interest of justice, it will do justice by varying the bail conditions where there is a change in the Accused's circumstances.

ANALYSIS AND CONCLUSION

- [35] Having considered the arguments by the respective parties and considering the legal authorities cited, it appears that the crown is more concerned about the fact that the variation of the Applicant's bail condition will usher in a flight risk as the Applicants would use the passport to flee this jurisdiction. In assessing the application, the Court must balance the interests of justice with the need to mitigate potential risks.

- [36] The court is inclined to consider this argument holistically. The first premise being that the Applicant are already on bail. So the considered the issue of the flight risk when it granted the bail. Hence the court must weigh whether there

is a change in the circumstances that warrant the variation of the bail conditions. The issue of the flight risk has already been considered and the court granted them bail despite them being Bangladesh Nationals.

[37] It is also my view, that if the Applicants intended to abscond or are desirous of absconding, they can do so, with or without the passports. However, there are other conditions that may militate against that decision. The security which they put and the suretyship. Also, the other bail conditions including the periodic reporting at the police station. The crown or law enforcement agencies would know the very minute the Applicants are not complying with the reporting procedures.

[38] The judgment of **Marwick Khumalo and Another vs The King** (*supra*) which the crown relies on is distinguishable from the matter at hand. The crown has not established that the current Applicants will intimidate or interfere with crown witness. Infact that consideration is not an issue in this matter. What is in issue is flight risk.

[39] The risk to abscond solely on the basis of the passports being handed over to them is also mitigated by their tender that they will not use this passports to go outside the jurisdiction of this court, but they are amenable to use whatsoever manner that could cause the renewal of the passports including using currier as a means of conveyance of the passports to Pretoria.

[40] When applying the legal principle that was stated in the **Lucky Nkululeka Ndlovu vs Rex**¹ which is that there has to be a genuine and legitimate change of circumstances warranting such variation. The imminent expiration of the Applicant's passports constitutes such a change, as it directly affects their ability to travel and maintain legal residency.

[41] The court has to ask itself this question, have the Applicants presented to the court a genuine and legitimate change of circumstances warranting such a variation. This would then mean is the imminent expiry date of validity in a passport sufficient and the genuine legitimate change in the circumstances. When a passport expires it means it cannot be used. If there is an opportunity to renew it before the expiry date then will then validate the passport. If one looks at the issue of the purpose of the passport being that it is used by a person to travel outside the borders of that country. The state on its own has used this passports as a leverage to ensure that the Applicants remain in this jurisdiction.

[42] The Court acknowledges the Crown's concerns regarding flight risk, particularly in light of the absence of an extradition agreement between Eswatini and Bangladesh. However, it is also crucial to recognize that the Applicants have complied with bail conditions thus far and have expressed a willingness to cooperate with authorities.

¹ 139 of 2020

[43] In considering the Applicants' application the court must strike a balance between safeguarding the interests of justice and mitigating potential risks. While the risk of flight is a legitimate concern, it is not insurmountable, especially given the measures proposed by the Applicants to ensure the return of their passports.

[44] The court is of the view that, it will also be the interest of the state to hold invalid passports that are not usable as part of the bail conditions. What will the crown benefit from holding expired passports? Also, when considering the interest of the Applicants, the fact that the Applicants are Accused persons, and are facing criminal charges. Their fate is still yet to be decided by the courts in the future. They should not be prejudiced, as they are presumed to be innocent until they are found guilty by a court of law. Hence, their travel documents should be kept valid so that a court of law acquits them, in the event and they are able to utilize the said passports. When that event happens, it must find them with valid passports.

[45] It is the considered view, of the court that the application to vary the condition relating to the handing over of the passports is genuine, especially owing to the fact that it is temporal. The Applicants will return back the passports to the state once it has been renewed.

[46] In granting the Applicants' request, the Court emphasizes the importance of ensuring access to legal rights while also addressing legitimate concerns about

flight risk. The conditions imposed seek to strike a balance between these competing interests, thereby promoting fairness and equity in the administration of justice.

[47] Due to the foregoing reasons, the court is of the view that the Applicants have made a case for the orders sought. The court will grant the Applicants the order sought in the following manner;

- a) That the investigating officer at Mbabane Police Station is to restore to the Applicants their Bangladesh International Passports for purposes of sending them for renewal at the Pretoria Bangladesh High Commission.
- b) That upon such renewal, the Applicants are to return the passports to the Investigating Officer.



BW MAGAGULA J

THE HIGH COURT OF ESWATINI

For The Applicants:
For the Respondent:

Piliso Simelane (Piliso Simelane and Partners.)
N.Mhlanga (DPP Chambers)