



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: CC35/21

Coram: Montzinger AJ

Heard: 05 October 2021

Delivered: 19 November 2021

In the matter between:

MARK LIFMAN

Applicant

and

THE STATE

Respondent

JUDGEMENT

(DELIVERED BY E-MAIL ON FRIDAY 19 NOVEMBER 2021)

MONTZINGER AJ

[1] This is an application, on motion, where the applicant, Mr Lifman, seeks the amendment of his bail conditions imposed by the Cape Town Magistrate's Court on 22 December 2020. This Court is engaged with the application by virtue of the provisions

of s 63(1) of the CPA¹. This section grants an accused the right to approach a court on application, before which a charge is pending, to amend or supplement any of the bail conditions imposed under s 60 or s 62 of the CPA. The state opposes the application.

[2] The matter came before me as an urgent application on 05 October 2021. Argument was heard on the day. Further information was requested from both the State and Mr Lifman. The parties complied with the Court's requests.

[3] This Court is called upon to decide whether a case has been made out for the amendment of the bail conditions imposed by the Cape Magistrate's Court on 22 December 2020.

Contextualising Mr Lifman's position

[4] Mr Lifman was arrested on 22 December 2020 at SAPS Cape Town, surrendering himself freely and voluntarily to the State. He took this course of action after he was informed by his attorney that a warrant for his arrest, containing 3 charges, has been issued. According to the warrant he was charged with murder and conspiracy to commit murder² allegedly committed during the period May 2017 to August 2017 in the district of Cape Town.

[5] The alleged offences resorted under schedule 6 of the CPA. Therefore, to qualify for bail Mr Lifman had to comply with the provisions of s 60(11)(a) of the CPA. This required him to present evidence that exceptional circumstances justify his release

¹ The Criminal Procedure Act, 51 of 1977

² In terms of section 18(2)(9) of the Righteous Assemblies Act 17 of 1956

from prison, in the interest of justice. Mr Lifman discharged this onus and was granted bail.

[6] Bail was granted in the amount of R100,000.00 subject to the conditions that Mr Lifman: (1) attend court on 9 February 2021 and all further court proceedings; (2) surrendered his passport to Captain Coetzee of the Hawks; and (3) report to Sea Point SAPS on Mondays between 08:00 and 18:00.

[7] The criminal proceedings were transferred to the High Court for hearing and consistent with the practice in this division the matter was allocated to a pre-trial judge whose task is to case manage the matter until it is certified trial ready. The first pre-trial hearing took place on 6 August 2021. The criminal proceedings are still at pre-trial stage and no trial date has been set.

[8] During May 2021 the State added a further 6 charges to the indictment, so Mr Lifman faced a total of 9 charges. In addition to the murder and conspiracy to commit murder charges, the State also now allege that Mr Lifman contravened the Prevention of Organised Crime Act³.

[9] After the indictment was amended Mr Lifman on 16 July 2021 first pursued an application in terms of s 63(1) of the CPA in the Cape Town Magistrate Court seeking to amend his bail conditions. That application was supposed to be heard by the Magistrate's Court on 5 August 2021. However, by that time the criminal proceedings have been transferred to this Court and the Magistrate's Court therefore lost its

³ 121 of 1998 ("POCA")

jurisdiction, as s 63(1) is only available to an accused in a court before which a matter was pending. Mr Lifman abandoned that application and relaunched it in this Court.

[10] What motivated Mr Lifman's application in this Court came because of changed circumstances in the form of an offer of employment he received. The offer requires him to take up employment in Bursa, Turkey and to travel extensively. He would be required to visit countries in Europe, South America, and Africa. Mr Lifman's position is that while he has the freedom to travel anywhere within the boundaries of South Africa, with some limitations, he is not allowed to travel outside of the boundaries of South Africa to take up this new employment opportunity.

[11] It emerged from the notice of motion as well as the supplementary heads of argument that Mr Lifman seeks to amend his bail conditions of 22 December 2022 to be as follows:

- (a) That he pays an additional amount of R 100 000.00⁴.
- (b) That he attends on such dates and times and to such places to which the criminal proceedings are adjourned until a verdict is given in respect of the charges(s) to which the offence(s) in this case relates, or where sentence is not imposed forthwith after the verdict and the court extends bail, until sentence is imposed.
- (c) His passport be returned for the purposes of travelling to Turkey and other countries as required by his employment.
- (d) Provides the investigating officer with a valid international return air ticket.

⁴ During argument the point was made that the applicant no longer pursues this condition.

- (e) Provides the investigating officer with a fixed address in Bursa, Turkey as well as an international telephone number on which he can always be contacted.
- (f) Advises the investigating officer 48 hours in advance of his intention to travel outside the borders of Turkey for business reasons only.
- (g) He supplies within 48 hours of travel, a full itinerary of any of his travels from South Africa to Turkey and from Turkey to any other destination including the address where he will reside at the said destination.
- (h) He informs the investigating officer within 24 hours of a change of address or telephone number.

[12] After argument and the additional information was provided counsel on behalf of Mr Lifman proposed three further conditions to address the concerns I raised during argument. These were:

- (a) That while Mr Lifman is overseas in Turkey he reports to the investigating officer twice a week by WhatsApp or video call.
- (b) Mr Lifman reports to the South Africa Honorary Consul in Istanbul once a week.
- (c) The travels by Mr Lifman be limited to travels to Dubai and in the event of travelling to Dubai that he reports to the South African Embassy in Dubai on his arrival.

[13] In evaluating whether Mr Lifman is entitled to an amendment of his bail conditions certain principles of law in respect of the relief sought needs to be restated. These principles underlie this Court's conclusions and order.

The law: amendment of bail conditions

[14] Section 60 (12) of the CPA empowers a bail court to attach conditions, that in the court's opinion are in the interest of justice, to release an accused on bail.

[15] Tied to s 60 (12) is s 62 of the CPA that deals with bail conditions. These conditions serve to ensure that the fears the state might have, in the release of an accused person, are catered for⁵. The jurisprudence provides that at least four basic principles govern bail conditions. *First*, the bail condition may not be contra bonos mores⁶. *Secondly*, the condition should not be vague and ambiguous⁷. *Thirdly*, a condition cannot be so that it is not permitted by law⁸. *Fourthly*, must be practically feasible. On the practicality requirement the court in *Rex v Fourie*⁹ said that the condition must be such that police must be able to sufficiently close supervise the accused.

[16] Tied to both s 60 (12), s 62 is ss 63(1) of the CPA. As mentioned, the last-mentioned section allows an accused the opportunity to approach a court, before which

⁵ *S v DV & others* 2012 () SACR 492 (GNP) at [54]

⁶ *S v Louw* 2000 (2) SACR 714 (T)

⁷ *S v Russel* 1978 (1) SA 223 (C) 226 E

⁸ See *S v Russel supra*

⁹ 1947 (2) SA 547 (O) at page 577

a charge is pending, to ask for appropriate amendments to the conditions of bail set earlier by another court¹⁰.

[17] It seems to me that when a court is requested to amend an accused's bail conditions the inquiry resolved itself into the primary consideration whether it is in the interest of justice to do so. This is apparent from a mere reading of s 60 (12) that requires a court to attach bail conditions that are in the interest of justice. This approach was echoed in *S v Savoi*¹¹ where the Supreme Court of appeal said that the lower court primarily had to consider the *interest of justice* whether an amendment of the bail conditions was necessary.

[18] Ultimately to determine what would be in the interest of justice requires of this Court to exercise a judicial discretion in the form a value judgement balancing the right of the accused with that of the public¹². In undertaking this discretionary exercise, the Court is allowed to be guided by the checklist of relevant factors provided in ss 60 (4) as particularised in ss (5) to (9). In this instance the relevant factors will be the factors in ss 60 (4)(b) and (6)¹³.

[19] Much time during argument was dedicated to whether an onus is applicable in an application in terms of s 63(1). The law is incontrovertible that there is no general onus in a bail application¹⁴ concerned with the release of an accused. This Court is not sitting as a bail court and is thus not approaching the matter as a bail application in the

¹⁰ See *Shefer v Director of Public Prosecutions, Transvaal* 2004 (2) SACR 92 (T) 99g

¹¹ 2012 (1) SACR 438 (SCA) at paragraph 47

¹² *S v Schietekat* 1999 (2) SACR 51 (CC) par 46

¹³ *S v Schietekat supra* par 101 – [7 – 8]

¹⁴ See inter alia: *Ellish & Andere v Prokureur-generaal, Witwaterandse Plaaslike Afdeling* 1994 (2) SACR 579 (W) at p585f-h

strict sense. When it comes to an application to amend bail conditions it was found in *Shefer v Director of Public Prosecutions*¹⁵ that the party seeking the amendment bore the onus, on a balance of probabilities. I find the approach in *Shefer* persuasive that in an application in terms of s 63(1) the applicant¹⁶ must advance evidence that indicate on the probabilities that an amendment of the bail conditions will: (1) give credence to, and (2) be the best expression of the interest of justice.

[20] Another issue that requires exposition is that during argument strong reliance was placed on the judgment of *S v Savoi* by the Supreme Court of Appeal to convince me that the facts of the matter in that judgment correlates largely with the facts present in the application before me. The proposition being that if *S v Savoi* applies then I am bound, by virtue of stare decisis, to follow that judgment and should thus lean towards granting the amendment similar to what the Supreme Court of Appeal did for Mr Savoi.

[21] I disagree with the proposition. For two reasons. Firstly, the judgment is distinguishable on the facts and secondly the stare decisis principle only binds this Court to the ratio decidendi of a judgment by a court higher in the court hierarchy¹⁷. The ratio decidendi to which this Court is bound is as expressed in paragraph 47 of the *S v Savoi* judgment.

[22] That the matter of *S v Savoi* is distinguishable on the facts is apparent. Although there is a long list it suffices to point out that Mr Savoi knew about the investigation and possible charges against him for a period of 4 years before he was

¹⁵ *Shefer v Director of Public Prosecutions*, Transvaal 2004 (2) SACR 92 (TPD) at para 30

¹⁶ As this can also be the State

¹⁷ See *Turnbull-Jackson v Hibiscus Coast Municipality & Others* 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at para 54-57.

eventually charged. During that time, he frequently travelled internationally and returned home each time. Secondly, the possibility of travel was anticipated, and the bail conditions catered for possibility with approval by certain officials, and thirdly he had a wife and children that remained in South Africa every time he travelled.

The Merits of the application

[23] The most important feature of this application for the amendment of the bail conditions relates to the return of Mr Lifman's passport so that he may be permitted to travel to Turkey, take up employment with a company and reside there temporarily.

[24] The company is Cisiy Textiles located in Bursa, Turkey and Mr Lifman's involvement with it preceded the COVID-19 pandemic as he assisted them with sourcing fabrics, attending trade fairs and meeting with agents and manufacturers. All these functions apparently, involved extensive overseas traveling. These travels apparently included a variety of countries including Turkey, Israel, Russia, China, Hong Kong, the USA, the United Kingdom, Greece, Poland, Netherlands, Belgium, Dubai and Georgia.

[25] After Mr. Lifman's release on bail the opportunity with Cisiy Textiles presented itself. However, since his bail conditions required him to hand over his passport, he is unable to travel outside of the borders of South Africa.

[26] What strikes this Court as unusual is that despite Mr Lifman's extensive travels on behalf of the company, prior to his arrest, no mention of this was made during his

bail application. Although the record of the bail proceedings in the Magistrate's Court did not serve before me, the State's allegation that they regarded Mr Lifman as a flight risk and for this reason requested him to hand over his passport is not in dispute. The mysteriousness of the after-bail employment opportunity arises in the context that on Mr Lifman's version, by the time his bail application was considered he was already involved with Cisiy Textiles. However, no attempt was made to convince the bail court why the condition for his passports to be handed over would have impeded his ability to freely travel, particularly on behalf of Cisiy Textiles.

[27] Moreover, the new business opportunity came in the form of an offer by the company for Mr Lifman to take up the position of consultant due to his extensive experience in the clothing industry. This intention is expressed in the letter addressed to Mr Lifman dated 13 July 2021. Mr. Lifman further elaborate and says that the previous owner of the company has died and his son, Mr. Mohammad Yasin took over the management of the business. However, Mr. Yasin is not well versant in English and therefore requires assistance with the running of the business. So Mr Lifman's involvement is thus also required because of his ability to speak English.

[28] An important feature of the offer of employment or business opportunity is that a final and comprehensive job description will only be negotiated on confirmation that Mr. Lifman be allowed to travel to Bursa, Turkey to take up the employment. Whatever the final terms of his appointment Mr. Lifman will be required to travel extensively between Europe, Asia, and Southern America. However, this changed in the replying affidavit. Mr Lifman is now satisfied to only travel to Dubai. This is again peculiar as the primary

motivation for the application was initially to allow him to travel extensively and to develop business opportunities for Cisiy Textiles in various countries.

[29] Furthermore, according to Mr. Lifman having regard to the nature of the industry the company operates in, an integral part of sourcing suppliers involves inspection of factories to ensure compliance with global best practices. Also, the sourcing of fabrics and yarn requires quality control checks. That can only be done by physically feeling, stretching, and testing the material in your hands. As a result, the functions of the position cannot be performed via electronic platforms. However, in reply he was satisfied to travel only to Dubai. What the Court deducts from all of this is that Mr Lifman is rather intensely focused on being outside of the borders of South Africa and in particular Turkey and it is not pertinent for him to perform the functions he so strongly relied on to justify the freedom to travel while awaiting the finalisation of his trial.

[30] Another feature of concern of the request is the fact that since Mr Lifman will be required to travel extensively and since Bursa, Turkey will serve as his base it would be prudent for him to be allowed to temporarily reside in Bursa and only return to South Africa to prepare for his trial, attend court proceedings and visit family. He thus requests this Court to allow him to set up camp, settle in and entrench himself as a resident of a different Country while he is awaiting trial in South Africa. He does this on the strength of facts to which this Court cannot attached a high degree of persuasiveness. In fact, such a request conflicts with him being relying on family ties in South Africa. He is asking the court to allow him to go to another country and start, to a degree, a new life.

[31] The fact that since the time he was granted bail he has complied with all the bail conditions does count in his favour. However, this is but one of the factors that is placed on the scale to see what will be the best expression of the interest of justice.

[32] As mentioned, the State alleges that at the time Mr. Lifman was granted bail one of the primary concerns were whether he had the ability and means to flee through the borders of South Africa to a jurisdiction where there would be great difficulty in securing his return. The concern was alleviated when Mr. Lifman surrendered his passport and subjected himself to certain bail conditions restricting his movement.

[33] If travelling internationally was so paramount then the surrendering of his passport would have been a contentious issue that arose before the bail court. In fact, it can reasonably be inferred that if Mr Lifman had any intention to travel within a period after being granted bail then he would have made that clear and attempted to negotiate some conditions like those granted in *S v Savoi*. As mentioned, the bail application was not seriously contentious and the State made it a condition that the passport be surrendered, which Mr Lifman did without contestation.

[34] This Court is of the view that the sudden need to travel to take up an employment opportunity, of which the details are skeletal, is a concern. I am rather concern about the timing of the employment opportunity, and the need to travel to be resident in Bursa, Turkey. This is peculiar as the employment opportunity came after the State increased the number of charges from 3 to 9. The charges also increased in seriousness. No doubt that if Mr Lifman is found guilty he will spend a significant

amount of time in prison. This can possibly influence the fact that he was previously compliant with his bail conditions¹⁸.

[35] Then there is the possibility that Mr Lifman may take advantage of the fact that there is no effective co-operation from the Turkey authorities to extradite criminal suspects. The State mentions a certain Mr Naidoo who is apparently an associate of Mr Lifman and who is also implicated in the crimes that Mr Lifman is charged with. Mr Naidoo is currently in Turkey and the State is experiencing great difficulty in having him extradited. I attach no value to the allegation that Mr Lifman and Naidoo are allegedly associates. Mr Lifman denies it and the allegation is not supported by fact. However, what it does illustrate is that factually the State is currently having difficulty in obtaining co-operation from the Turkish authorities. This is the very country that Mr Lifman seeks permission to go live and work in. It is not inconceivable that Mr Lifman will take advantage of such a situation if the opportunity presents itself.


[36] To address the potential difficulties with his re-location Mr Lifman proposed a list of conditions that he believes should alleviate the Court's fears. However, on consideration all the conditions to a degree are not practically feasible. They also fail to satisfy the objective that for an accused out on bail the conditions must be such that the police must be able to sufficiently close supervise him. If he is granted the opportunity to live in another country and travel extensively the ability of the state to closely supervise Mr Lifman will be impeded by the freedom he will have to be able to travel and visit different countries.

¹⁸ *S v Savoi* par 22

Conclusion and order

[37] The compounding effect of some of the factors expanded on in the preceding paragraphs infused my discretion and decision that Mr Lifman has failed to convince this Court that the probabilities compels a conclusion that the amendment of the bail conditions will be in the interest of justice. In the result, I make an order in the following terms:

The application is dismissed.



MONTZINGER, AJ
Acting Judge of the High Court

Appearances:

Applicant's counsel:	Adv J Van Niekerk
Applicant's attorney:	Marcellos Stevens Attorneys
State Attorney Counsel:	Adv Menigo
The States Attorney:	The State Attorney