Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: A188/2021

Before: The Hon. Mr Justice Binns-Ward
Hearing: 1 December 2021
Judgment: 3 December 2021

In the matter between:

MARTIN LENNARD KORVER Appellant

and

THE STATE Respondent

JUDGMENT
(Delivered by email to the parties' legal representatives and by release to SAFLII.
The judgment shall be deemed to have been handed down at 10h00 on 3 December 2021.)

BINNS-WARD J:

[1] The appellant has come on appeal from a decision by the regional magistrate in the Specialised Commercial Crimes Court at Bellville refusing his application for an amendment to his conditions of bail to permit him to travel to the Netherlands to visit his elderly parents and one of his daughters who is currently living there. The application was made in terms of s 63 of the Criminal Procedure Act 51 of 1977. An accused person who is aggrieved by the decision of his application to a lower court in terms of s 63 enjoys a right of appeal to the High Court under s 65; see *Shefer v Director of Public Prosecutions* 2004 (2) SACR 92 (T). Such an appeal may be heard by a single judge by virtue of s 65(1)(b) of the Act.

[2] At the time of his application to the court a quo the appellant was, and currently remains, on bail pending his trial on a number of charges including fraud, theft and money laundering. The amount involved, part of which is denominated in Euros, runs into many millions of Rand in local currency value. If convicted, he faces a minimum sentence of 15 years' imprisonment, as prescribed under the Criminal Law Amendment Act 105 of 1997, unless the trial court finds that there are substantial and compelling circumstances to permit the imposition of a lesser sentence. The commission of the alleged offences involved, amongst other matters, the forging of his business partners' signatures on documents for the purposes of mortgaging the business's immovable property in favour of a foreign registered bank and appropriating the proceeds of the loan consequently advanced by the bank and the diversion of deposit payments made by foreign customers of the business into his own overseas banking accounts. As far as can be gleaned from the papers, the state appears to have a strong prima facie case against the appellant, although he denies criminal liability and contends, without volunteering corroborative detail, that the matter is properly characterised as a civil dispute with his business partners.

[3] The bail conditions imposed after the appellant's arrest on 27 March 2018 prohibit him from travelling outside the Western and Eastern Cape Provinces without notice to the investigating officer and required him to surrender his travel documents, thereby prohibiting travel outside the country. He is a citizen of the Netherlands and holds permanent resident status in South Africa. He has lived in this country for more than 27 years, and has, since 2008, been married to a South African citizen by birth who also holds Dutch citizenship. His two children by his current marriage, aged 12 and 11 respectively, also hold Netherlands citizenship. One of the primary motivations given in support of the application was the alleged desirability that the appellant should be able to be with one of his daughters by a previous marriage when she celebrated her 21st birthday, which he regarded to represent her coming of age.[1] That milestone had already been passed however by the time the application was decided. The other was that he should be able to visit his elderly parents.

[1] Article 233 of the Burgerlijk Wetboek prescribes the age of majority in the Netherlands to be 18.

[4] The appellant lives in Plettenberg Bay in a house owned by his wife, who reportedly runs a coffee shop business in the town. The appellant places a value of approximately R6 million on the property, although evidence concerning the prices at which properties in the area change hands (approx. R3 million) suggests it is probably worth considerably less than that. He testified, without specificity, that all his moveable property is kept at the property owned by his wife. It is evident that when a judgment creditor sought to execute a judgment against the appellant on 28 July 2016, he declared to the sheriff that he possessed no exigible movable property. At that stage he declared to the sheriff that he owned a half share in immovable property at 12 Klaasenbosch Drive in Constantia, Cape Town.[2] The indications are that he must have disposed of that property because there was no reference to it by him in his application for a variation of his bail conditions.

[5] The appellant testified that he has established a new business of his own locally, although the evidence concerning it is sparse. It was uncontested that he is the sole shareholder and director of Korevest Leisure Group BV, a company registered in the Netherlands and that he conducts at least five banking accounts in either his own name or that of the company. Four of these accounts are with ABN Amro Bank in the Netherlands and the fifth with F von Lanschot Bankiers (Schweiz AG) in Switzerland.

[6] The appellant was released on bail on the day of his arrest. His application for bail was not opposed. Bail was fixed at R100 000. The following conditions were attached in terms of the order granting the appellant bail:

1. The accused reports to his nearest police station, which is Plettenberg Bay, between the hours of 07h30 and 17h00 on a Monday and Friday.

2. The accused notifies the investigating officer, Lieutenant-Colonel E.L. De Villiers, of any change of his residential and work address at xxx@saps.gov.za or 071 xxx xxxx.

[2] Annexure GS 3 to the affidavit by one of the complainants, Mr Gustav Shaefer jurat 12 July 2021. The annexure was detached from the affidavit in the compilation of the appeal record and appears at p. 81 of the record.

3. That he does not enter any port of entry.

4. The accused does not, until the finalisation of the criminal case, apply for any travel documentation permitting him to leave the borders of the Republic of South Africa, without prior notification to the investigating officer, Lieutenant-Colonel E.L. de Villiers.

5. The accused notifies the investigating officer of any travel documentation which is still being processed that he applied for prior to his court dates.

6. The accused hand over his travel documentation – passport(s) -to the investigating officer, Lieutenant-Colonel EL de Villiers.

7. The accused notifies the investigating officer, Lieutenant-Colonel EL de Villiers, in the event that he needs to travel outside the jurisdiction of the Western Cape / Eastern Cape with sufficient detail of the said travel and itinerary.

8. In the event that the accused needs to travel outside the borders of the Western Cape / Eastern Cape, he needs to give the investigating officer one (1) week's notice.

9. The investigating officer has to respond within 24 hours after the notice has been given.

10. The accused not to interfere with or make contact with any of the state witnesses, which are [four persons named].

(A 'port of entry' is an expression defined in s 1 of the Immigration Act 13 of 2002 with reference to s 9A of the Act to mean any place in the Republic designated by the Minister of Home Affairs, which complies with the prescribed requirements, where all persons have to report before they may enter, sojourn or remain within, or depart from, the Republic. That was also its evidently intended import in para 3 of the bail conditions.)

[7] Counsel for the state when the appeal was argued before me has, so I was informed from the bar, been involved in the matter against the appellant from inception, including the proceedings when bail was set. He advised, without objection from the appellant's counsel, that the bail conditions were determined by negotiation between the state and the appellant, and the order was made by agreement.

[8] The magistrate refused the application for the amendment of the appellant's bail conditions because she was not persuaded that there had been a relevant alteration in circumstances from the time when bail was set.

[9] The state has submitted, and the appellant's counsel has accepted, that s 65(4) of the Criminal Procedure Act applies in respect of the determination of the appeal. That provision states that in any appeal against a decision of a lower court in respect of an application for bail, the court of appeal shall not set aside the decision of the lower court unless it is satisfied that the decision was 'wrong'. The approach in cases like this, where the nature of the discretion exercised by the court a quo was a wide (or 'loose') one, was summarised in *Knox D'Arcy Ltd and Others v Jamieson and Others* [1996] ZASCA 58; 1996 (4) SA 348 (A) at 360D-362E; see also *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22 (26 June 2015); 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 87. Its application in the context of appeals in terms of s 65 of the Criminal Procedure Act was described in *S v Porthen and Others* [2003] ZAWCHC 36 (21 August 2003); 2004 (2) SACR 242 (C) and *S v Petersen* [2008] ZAWCHC 11 (27 February 2008); [2008] 3 All SA 301 (C) ; 2008 (2) SACR 355 (C). The scope for interference by an appellant court is greater than in matters such as sentencing, where the court of first instance exercises a true (or 'narrow') discretion.

[10] However, even when a wide discretion is involved, an appeal court will, as a matter of judicial policy, exercise restraint against too readily interfering in the decision of the court of first instance; cf. e.g. *South African Broadcasting Corporation Limited v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at para 39, *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) at

para 113 and *Crompton Street Motors CC v Bright Idea Projects 66 (Pty) Ltd* [2021] ZACC 24 (3 September 2021); 2021 (11) BCLR 1203 (CC) at para 46-47.

[11] The magistrate was correct in considering that a material change in circumstances is generally the basis for a reconsideration of originally imposed bail conditions; cf. S v *Savoi* 2012 (1) SACR 438 (SCA) at para 9 and *Shefer* supra at para 22. Were the position otherwise, s 63 would lend itself to abuse as an improper substitute for appeals properly brought under s 65 of the Criminal Procedure Act.

[12] The only change in circumstances identified by the appellant was that his parents are older now than they were when the bail conditions were originally set and that more than three years have passed without his trial commencing. Both of his parents were already in their early 80's when the appellant was arrested. There is no evidence that either of them is in extremis or that it would not be possible (constantly changing Covid-19 related travel restrictions aside) for them to visit the appellant in South Africa. The fact that his parents would get older while the pending criminal proceedings took their course was foreseeable and must have been appreciated when the appellant's bail conditions were set. A desire for physical contact with his parents is understandable, but his need for that has to be assessed proportionately with the considerations considered reasonably necessary in the interests of justice to ensure that he stands trial. The assessment was undertaken, or must be understood to have been undertaken, when he was admitted to bail.

[13] Nothing in the evidence supports the notion that circumstances have materially changed so as to require their reassessment. I do not regard evidence that the appellant has faithfully complied with the currently applicable bail conditions, of itself, affords sufficient reason to relax them. He must be taken to have appreciated that a failure to comply with them would have resulted in a possible withdrawal of bail and resultant incarceration. His adherence to the bail conditions shows nothing more than that his release on those conditions pending his trial has been justified and that the conditions have thus far worked effectively to ensure that he remains available to stand trial. It does not bear with any weight on the question whether the conditions should be amended, even just temporarily, to permit the appellant to leave the country.

[14] I consider that the magistrate was justified in inferring from the conditions imposed when bail was originally granted to the appellant that he was considered a flight risk. That seems to be the only logical reason for the imposition of the requirement that he surrender his travel documents and prohibiting him from applying for replacements without first notifying the investigating officer. The conditions imposed in this case were materially distinguishable in this respect from those imposed in the *Savoi* matter cited above, which were referred to in the appellant's counsel's written argument.

[15] In *Savoi* the accused was required to surrender his travel documents, but the investigating officer was expressly permitted to release them if the accused needed to use them for bona fide business travel. Mr Savoi was not considered a flight risk. The appellant is. What other reason could there be for making one of the appellant's bail conditions a prohibition from access to any port of entry? And there were, furthermore, objectively identifiable reasons for reasonably considering him to be a flight risk. He might have lived in South Africa for an extended period, but he has maintained citizenship and proprietary connections with his homeland throughout that period and it cannot be overlooked the alleged offences include the diversion of funds that should have come to South Africa in the ordinary course of business into foreign bank accounts. I do not think that there is anything to be made in the circumstances of the investigating officer's omission in her affidavit opposing the appellant's application for a variation to expressly reiterate that he is considered to be a flight risk. As it was, the state also filed affidavits by the complainants in support of its opposition to the variation application. The content of those affidavits was plainly directed in part to highlight the danger that the appellant could flee the country to avoid trial. They pointed out that in addition to the criminal charges, the appellant is beset with a raft of civil proceedings against him in the High Court involving claims totalling in the tens of millions.

[16] It was plainly contemplated when bail was granted to Mr Savoi that he would require to travel for business purposes. By contrast, the bail conditions set in the current case make no provision for the investigating officer to return the appellant's travel documents to enable him to travel internationally. The appellant is forbidden from even entering a port of entry. He cannot even go to an international airport to

meet someone visiting from abroad. His movements even within most of the Republic of South Africa are restricted by being subject to report and monitoring. Endeavours by the appellant's counsel to construe the currently applicable bail conditions as something other than an absolute ban on the appellant travelling abroad were unpersuasive. They relied on reading individual conditions and parts of individual conditions in isolation and out of context when the order in terms of which bail was granted is considered as a whole. That plainly reflected a misdirected approach to the proper interpretation of the order.[3]

[17] Emphasis was placed in argument on the fact that the appellant had returned voluntarily to South Africa even after he was made aware that a case against him was being investigated. Parallels were sought be drawn between his conduct in that regard and that of the accused in *S v Savoi*. I do not consider that there is any profit in the comparison. The appellant's conduct in returning to South Africa was an established fact that must have been taken into account when his bail conditions were set, just as they were when materially different conditions were attached when Mr Savoi applied for bail. As already remarked, the logical basis for the distinction between the conditions set in the respective cases is that Savoi was not regarded as a material flight risk and the appellant was.

[18] The appellant's counsel also sought to rely on a passage in the judgment of the Namibian High Court (per Frank AJ, Silungwe AJ concurring) in *S v Pentz* [2008] NAHC 104 (2 June 2008) at para 17. That matter is distinguishable for similar reasons to those upon which I have distinguished *Savoi*.

[19] In *Pentz*, just as in *Savoi*, the originally set bail conditions required the accused, who faced a charge of murder, to surrender his travel documents to the investigating officer who was vested by the court's order with the discretionary power to temporarily return them to him for travel to South Africa 'for business reasons or

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[3] Judgments and court orders are subject to the same rules of interpretation applicable to other jural documents; see *Firestone SA (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304E-G and *Eke v Parsons* 2016 (3) SA 37 (CC) at para 29. They fall to be construed and understood consistently with their apparent purpose, determined contextually; cf. *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

for whatever other purpose'.[4] The investigating officer had under that condition permitted the accused to travel to South Africa on several occasions. The historically permitted visits had all gone off without incident. However, on the eighth occasion that the accused applied for his passport to be released to him so that he could spend the end of year festive season holidays visiting family in South Africa, his application was refused without reason. He thereupon applied for the amendment of his bail conditions, alternatively for an order that his passport be released to him for the purposes of his visit to South Africa and also to apply for the renewal of his residence permit in Namibia, which was about to expire. At the hearing in the magistrate's court, the prosecutor agreed to the release of the passport for the purpose of the residence permit renewal. For reasons which were not apparent, the magistrate nevertheless refused the accused's application in its entirety.

[20] On the facts of the case, namely the unproblematic nature of the accused's seven previous visits to South Africa under the prevailing bail conditions and the state's failure to provide any reason for the refusal to accede to the accused's request to use his passport for an eighth trip, the Namibian High Court concluded that the decision to withhold the passport had been capricious. It was in that quite distinguishable context that Frank AJ made the following remarks relied upon by counsel in support of his argument in the current case: '*I however do wish to point out that the prosecuting authority must take cognisance of the remarks aforesaid and that the return of the passport to the appellant on request is not to be refused on capricious reasons but is to be considered on a case by case basis*'.

[21] The judgment in *Pentz* accordingly bears no relevance in the determination of the current case. As it was, the court, whilst holding that the accused's passport should have been temporarily released to him to use for his intended visit to his family, nevertheless upheld the magistrate's refusal to accede to his application deleting the condition that he be required to surrender the passport to the investigating officer.

[22] The appellant's counsel sought in argument to identify other aspects of the matter that he contended evidenced altered circumstances. In this regard, apart from the appellant's adherence to the existing conditions – a matter that I have already addressed, he pointed to (i) the time the matter has taken to come to trial, (ii) the

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[4] *S v Pentz* supra, para 1.

increased age and fragility of the appellant's parents (iii) the Covid-19 epidemic and (iv) the amendment of paragraph 1 of the above quoted bail conditions to permit the appellant to report by email to the investigating officer twice a week rather than by physically presenting himself at the Plettenberg Bay police station every Monday and Friday.

[23] The matter has indeed been much delayed in its progress towards trial, but save for on one occasion, in April 2021, when the state requested, and was, without objection from the appellant's senior counsel, granted, a postponement, the delays have been attributable to the appellant. The appellant has changed legal representatives on three occasions and a delay of nearly two years was caused by the time taken to compile a forensic auditor's report that he commissioned for the trial. I was, moreover, informed that in the period intervening between the dismissal of his application for a variation of the bail conditions and the hearing of the appeal, the appellant had applied for an order reviewing and setting aside the decision to prosecute him and for a permanent stay of the proceedings. I do not consider that in the circumstances that I have just summarised the appellant can place much stock on the delay. It seems that were it not for his own actions his trial would have already been underway.

[24] As already remarked, the increasing age of his parents was an identifiable factor when the bail conditions were originally set. The appellant has described that his father has undergone cardiac surgery and that his mother has had a mastectomy, but he has given no detail as to when these procedures were carried out or as to how, once his parents had recovered from surgery, their condition prevented them from travelling to visit him. I am not persuaded in the circumstances that the magistrate's approach to this aspect of the matter was wrong.

[25] The Covid-19 pandemic does not bear on the central issue which is whether circumstances have changed such as to indicate that the appellant should no longer reasonably be considered to be a flight risk. If anything, the Covid-19 related travel restrictions summarily imposed and lifted by governments around the world during the ever-changing course of the pandemic show that if the appellant leaves the

country his ability to return on the date he is required for the purpose of court appearances could easily be compromised even if he wished to come back.

[26] It seems that the amendment of paragraph 1 of the originally imposed conditions concerning twice weekly reporting by the appellant may have been inspired by the constraints occasioned locally by Covid-related emergency measures. Whatever, the reason, however, the amendment did not in any material manner detract from or dilute the conditions left unaltered that were unmistakably directed at forbidding the appellant from holding travel documents or accessing a port of entry. I do not consider that the amendment was a relevant consideration for the magistrate to have weighed and there is no indication that it was a factor especially urged before her.

[27] For all these reasons, the appeal is dismissed.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Appellant's counsel:	**R. Liddell**
Appellant's attorneys:	**Mathewson Gess Inc.** **Cape Town**
Respondent's counsel:	**D. Combrink** **Directorate of Public Prosecutions** **Western Cape** **Cape Town**