

(CD10)

ON 20 OCTOBER 2011

PROSECUTOR As the Court pleases Your Worship, today is the judgment for the application that was heard by this honourable Court
5 yesterday. The State is represented by myself, N Dunywa. The presiding officer is Mr Van Vuuren. The defence ...(intervention)

MS CLARENCE Ja, Your Worship, I confirm my appearance on behalf of the applicant – Clarence S A.

COURT Thank you.

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JUDGMENT (20 OCTOBER 2011)

COURT This is an application brought by the applicant in this matter for the relaxation of bail conditions imposed upon him, restricting his ability to travel abroad.

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The applicant wishes to attend a pharmaceutical fair in Germany and then proceed to pursue further business interests in Argentina and Brazil, the relevant period being 22 October 2011 up to and including 13 November 2011. He therefore seeks the return of this passport and the permission of this Court to obtain all relevant travel documentation rendering it possible for
20 him to embark on the proposed trip.

He was afforded the opportunity to attend a similar pharmaceutical fair in Paris in 2010. Early this year, that is 2011, he was granted permission to visit Angola. The prosecuting authority has now opposed this application on the basis that he has now become a flight risk due to changed
25 circumstances. These circumstances are that the charges brought against

him have now been formalised and that he is now faced with the realisation that the trial will indeed proceed.

It is accepted that he faces very serious charges and possible periods of lengthy imprisonment should he be convicted.

5 The mere fact that the applicant wishes to pursue his business interests in other countries is not a cause for concern for the respondent. The concern is that he has the means to generate income in order to survive comfortably without having to return to the Republic of South Africa.

 The applicant, through his counsel, maintains, however, that he has
10 shown his true colours insofar as being a non-flight risk is concerned. The past history, he says, is proof of this. He has, from the outset, been aware that he faces allegations of misdemeanour involving R180 million. The possibility of a long term of imprisonment has been apparent to him throughout but he has returned from travel overseas and has shown no hint
15 of a desire to abscond.

 In October 2010, the respondent did not object to the applicant travelling to Paris. The applicant did so and indeed did return. In June this year the respondent, as mentioned previously, in Pietermaritzburg, consented to the applicant travelling to Angola. Advocate Dunywa of the
20 local Director of Public Prosecutions' Office was advised by Lieutenant Colonel Du Plooy that there was no objection on his part to the applicant indeed travelling to Angola. Regardless of any possible agreements reached between the applicant and the Asset Forfeiture Unit it was clearly open to the investigating officer to raise a concern should the
25 applicant have indeed been deemed to be a flight risk. Indeed, his

colleague Colonel Jones certainly did not deem his hands to be tied in this regard.

The actions of Colonel Jones in threatening the applicant with arrest should he leave for Angola must be referred to. In the absence of any reply
5 to the numerous requests for his actions to be explained and further, the deafening silence in the respondent's opposing papers in this regard give rise to the regrettable but unavoidable conclusion that the respondent was defying two direct court orders and being obstructive. A vague reference has been made to "new evidence". No arrest, four months later, has been
10 made in this regard and indeed such arrest, if necessary, could have been affected on the applicant's return from Angola, specifically bearing in mind the importance of the trip as set out in the order made by the High Court in Pietermaritzburg.

To my mind, this displays a glaringly obvious obstructive attitude on
15 behalf of the investigating officers. On 7 October 2011, the North West High Court voiced similar concerns.

What concerns the Court is the possible extent to which this deplorable attitude of the investigating officer has permeated through to all officials involved in opposing this application. In other words, is the
20 application being opposed for obstructive reasons or as a genuine concern that the applicant has now become a flight risk? The unexplained actions of Colonel Jones have caused a cloud to hang over the respondent's opposition to the application, creating doubt as to their true motive. This is most regrettable, as is the pointing of fingers between various factions in the
25 NPA involved in the investigation as to apparent agreements made or not

made with the applicant. It is difficult for a Court to determine certain important issues when the investigation unit as a whole is divided. It renders it most difficult to unravel the truth.

Be that as it may Advocate Mokhatla, on behalf of the respondent,
5 has most valiantly sought to remove that cloud by arguing that regardless of any actions taken by Colonel Jones or his colleagues the gist of the matter remains that the circumstances surrounding the charges brought against the applicant have changed. In her view, they have changed to the extent that he can now justifiably be found to be a flight risk. This is a focussed approach by
10 Advocate Mokhatla and carries merit. It is an independent view adopted by herself in presenting argument on behalf of the respondent.

In essence, this stance adopted by the respondent requires of this Court to determine whether the crossing of the fine line between the applicant being aware that he is facing a serious charge as opposed to reality setting in
15 when being served with the indictment, is sufficient cause for him to become a flight risk.

A number of peripheral issues have been raised by both parties but I believe this aspect referred to above is indeed the determining factor in this application.

20 It must, however, be noted that as recently as 7 October 2011 the North West High Court found the applicant to not be a flight risk. Both parties in those proceedings would have been aware that the indictment had been served on the applicant at that stage. Indeed, the application brought in that court involved the same bail conditions which pertain to the application in this
25 matter, albeit it that the application in that court was brought for a different

purpose.

Advocate Howse has argued that the applicant has a strong legal team, which includes more than one senior counsel. He has therefore, from the outset, constantly been advised and updated as to what to expect
5 insofar as the charges are concerned. He was further made aware via the respondent of the extreme seriousness of the charges and possible sentences to be imposed when applying successfully for bail in the Kimberley regional court – that was, of course, prior to the indictment being handed to him.

10 The Court has not lost sight of the fact the applicant is now based firmly in the Republic of South Africa and has much to lose, not only materially, should he flee the country.

All papers filed in this matter have been carefully scrutinised. The arguments presented have received proper and due consideration in order to
15 determine, as argued by Advocate Mokhatla, whether it would be in the interests of justice and indeed, in her view, the interests of society to allow the applicant to travel overseas whilst facing such serious charges. This careful scrutiny and consideration has revealed insufficient reason to find that the interest of justice and society would not be served by relaxing the bail
20 conditions 2 and 4, pertaining to the applicant.

In other words, the fine line that has been crossed by the serving of the indictment has been insufficient reason to cause this Court to determine the applicant to now be a flight risk.

Accordingly, the application must succeed.

25 The following order is made –

1. THE APPLICANT IS GRANTED PERMISSION TO TRAVEL
TO THREE COUNTRIES, NAMELY GERMANY,
ARGENTINA AND BRAZIL AS FROM 22 OCTOBER 2011
AND RETURNING TO THE REPUBLIC OF SOUTH
5 AFRICA NO LATER THAN 13 NOVEMBER 2011.
2. THE RESPONDENT MUST MAKE AVAILABLE TO
THE APPLICANT, OR HIS LEGAL REPRESENTATIVES,
HIS PASSPORT BY NO LATER THAN 11H00 ON
21 OCTOBER 2011.
- 10 3. THE APPLICANT IS PERMITTED TO OBTAIN ALL
NECESSARY TRAVEL DOCUMENTATION TO ALLOW
HIM TO TRAVEL TO THE NAMED COUNTRIES.

COURT I must add that the Court did consider adding a further order
15 insofar as the possible frustration of the orders of this Court to be put into
effect but has decided that it is not in a position to do so.

PROSECUTOR As the Court pleases.

COURT Thank you.

MS CLARENCE As the Court pleases.

20 COURT ADJOURNED

TRANSCRIBER'S CERTIFICATE

I, the undersigned, hereby certify that so far as it is audible, the foregoing is a true and correct transcript of the proceedings recorded by means of a mechanical/digital recorder in the matter of:

STATE

V

SIPHO DERRICK SHABALALA – ACCUSED 1

GASTON SAVOI – ACCUSED 2

INTAKA HOLDINGS (PTY) LIMITED – ACCUSED 3

BUSISIWE NYEMBEZI – ACCUSED 4

BEATRICE NTOMBIHLE SHABALALA – ACCUSED 5

SANDILE KUBONI – ACCUSED 6

LINDELIHLE MKHWANAZI – ACCUSED 7

YOLISWA LULAMA MBELE – ACCUSED 8

BLUE SERENITY INVESTMENTS (PTY) LIMITED – ACCUSED 9

ROWMOOR INVESTMENTS 738 (PTY) LIMITED – ACCUSED 10

ACCUSED 11

JABULANI THUSI – ACCUSED 12

ACCUSED 13

KUBONI SHEZI ATTORNEYS – ACCUSED 14

ACCUSED 15

ACCUSED 16

ACCUSED 17

VICTOR NTSHANGASE – ACCUSED 18

ALSON SIPHO BUTHELEZI – ACCUSED 19

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CASE NO: RC1119/2010
DATE: 20 OCTOBER 2011

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF
PIETERMARITZBURG HELD AT PIETERMARITZBURG

BEFORE : MR C VAN VUUREN

**JUDGMENT IN RESPECT OF THE
RELAXATION OF BAIL PROCEEDINGS IN RESPECT OF ACCUSED 2**

THE STATE VERSUS SIPHO DERRICK SHABALALA – ACCUSED 1
GASTON SAVOI – ACCUSED 2
INTAKA HOLDINGS (PTY) LIMITED – ACCUSED 3
BUSISIWE NYEMBEZI – ACCUSED 4
BEATRICE NTOMBIHLE SHABALALA – ACCUSED 5
SANDILE KUBONI – ACCUSED 6
LINDELIHLE MKHWANAZI – ACCUSED 7
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– ACCUSED 11
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ACCUSED 13
KUBONI SHEZI ATTORNEYS – ACCUSED 14
ACCUSED 15
ACCUSED 16
ACCUSED 17
VICTOR NTSHANGASE – ACCUSED 18
ALSON SIPHO BUTHELEZI – ACCUSED 19

ON BEHALF OF THE STATE : ADVOCATE N DUNYWA

ON BEHALF OF –

ACCUSED 2 : MS S A CLARENCE

REPORT ON RECORDING

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