IN THE HIGH COURT OF SWAZILAND

Crim. Appeal Case No. 491/17

In the matter between

DILAWAR HUSSAIN **APPLICANT**

AND

REX **RESPONDENT**

Neutral citation: *Dilawar Hussain v Rex (491/17) [2018] SZHC 04 (04 January 2018)*

CORAM: **MASEKO J**

FOR APPLICANT: **ATTORNEY NTOBEKO PETROS PILISO**

FOR RESPONDENT: **PRINCIPAL CROWN COUNSEL BRYAN MAGAGULA**

Heard: **18-27 December 2017**

Delivered: **04 January 2018**

Preamble: *Criminal Law and Procedure – Bail – Section 95 and 96 of the Criminal Procedure and Evidence Act No. 67 of 1948 as amended discussed – Interests of justice in grant or refusal of bail – Whether absence of Extradition Treaty between a peregrinus applicant's country and Swaziland a factor to be considered in bail applications.*

Held : *that the interests of justice does not justify that the Applicant be*

admitted to bail and consequently the Application is dismissed.

JUDGMENT

[1] On the 7th December 2017 the Applicant who is of Asian origin launched an urgent bail application before this court, seeking an order in the following terms as contained in the Notice of Motion:

1. Dispensing with the normal forms and service relating to institution of proceedings and that this matter be heard as one of urgency.
2. That the Applicant's non-compliance with the above said forms and service be condoned.
3. Admitting Applicant to bail.
4. Further and/or alternative relief.

The Applicant did file a Founding Affidavit in support of this Application and annexed thereto a copy of the charge sheet containing the charges faced by the Applicant.

[2] On the 8th December 2017 the Crown herein represented by the Directorate of Public Prosecutions filed a Notice of Intention to Oppose the Application.

[3] The matter appeared before my brother His Lordship T Dlamini J on the 8th December 2017 wherein he postponed it to the Contested bail Roll of the 15th December 2017 after having issued orders on when each party was to file their pleadings.

[4] Indeed on the 14th December 2017 a Book of Pleadings was filed by Mr. Piliso on behalf of the Applicant.

[5] On the 15th December 2017 this court was seized with this matter as it was on the Contested Bail Roll.

[6] Owing to the urgency of the matter and the nature of bail applications it became necessary on the 15th December 2017 that I grant leave to the Crown to file a Supplementary Answering Affidavit and the Applicant was granted leave to file company documents from the bar, in fact Applicant was further granted leave to file a Supplementary Replying Affidavit on or before the 18th December 2017. The parties duly complied and the arguments eventually started on the 18th December 2017.

[7] During the submissions by Counsel it became clear that there was a serious dispute of fact which necessitated the leading of oral evidence.

[8] The dispute of fact centres around the whereabouts of an International Passport issued by the Immigration Department of the Ministry of Home Affairs to the Applicant Dilawar Hussain during the year 2015.

[9] In his Founding Affidavit the Applicant states that he is an adult male of Pakistan origin and a Swazi Citizen of Tubungu Township. It

appears from the Applicant's Replying Affidavit on paragraph 7 (7.1) at page 29 of the Book of Pleadings that the Applicant was arrested on the 6th December 2017.

[10] The Applicant states at paragraph 4 (4.1) of the Founding Affidavit that he was in custody at Mbabane Police Station having been charged with Fraud, Forgery, Uttering a Forged Document, Contravention of the Immigration Act and the Citizenship Act.

[11] The Applicant states that the charges emanate from the fact that he applied for and was granted Swazi Citizenship by the Swaziland Citizenship Board after presenting all documentation that was required in terms of the Citizenship Act.

[12] Applicant states that he arrived in the country during February 2003 after acquisition of the necessary entry permits. He says he immediately fell in love with the country and had the desire to be a permanent citizen whereupon he started making enquiries about obtaining the Swazi citizenship.

[13] At paragraph 4 (4.4) page 6 of the Book he states as follows:

> ***'Indeed I khontaed through the late TV Mthethwa and thereby became a subject of Zombodze Umphakatsi. All documentation regarding my khonta and/or being a subject of Zombodze Umphakatsi were produced and/or obtained through the late TV Mthethwa. On the basis of this document I applied for***

citizenship to the Citizenship Board. The Board after careful consideration of my application granted me citizenship after I had renounced my original Pakistan Citizenship as required.'

At paragraph 4 (4.5) he states as follows:

'To my knowledge all documentation I submitted to the Citizenship Board were authentic and I never forged any of the documents nor did I have any intention to defraud the Board. In fact I wish to add that during the course of my application the Citizenship Board required a confirmation letter from Zombodze Umphakatsi regarding my status which was duly issued.'

At paragraph 4 (4.6) he continues to state that:

'I submit before the above Honourable Court that I have been falsely implicated in this offence in that at all material times during the acquisition of my Swazi Nationality I was made to believe that the ordinary requirements needed to attain Swazi Nationality were in order.'

At paragraph 4 (4.7) he continues to state as follows:

'***I am advised and humbly submit that by virtue of having been granted citizenship I remain a lawful resident of the Kingdom of Swaziland. I am a businessman running an over a million Emalangeni Company in the Kingdom trading as Mali Investments which deals in wholesale furniture. I have children within the Kingdom of Swaziland who are also attending school in the country.'***

At paragraph 6 (6.1) he continues to state as follows:

'I submit before the above Honourable Court that if granted bail I will reside at Tubungu Township which is my current

residence. I also undertake not to interfere with Crown witnesses nor abscond trial---'

At paragraph 6 (6.2) he continues to state as follows:

'I must mention further that amongst some of the requirements I satisfied before being granted citizenship was renounciation of my original Pakistan citizenship hence the only citizenship I have now is Swazi. I submit therefore that I have fixed roots in the country and have children schooling within the country and an over a million business trading as Mali Investments which I cannot leave overnight.'

At paragraph 7 – AD URGENCY (7.1) he continues to state as follows:

'I submit before the above Honourable Court that I am a sickly person suffering from Sugar Diabetes and thus require constant medical check-ups and occasionally specialist treatments. It is my fear that my continued incarceration is likely to worsen my condition as I cannot receive specialist treatment whilst in custody.'

[14] It is very important that I state that the only supporting document attached to his Founding Affidavit is the charge sheet which contains the following counts:

COUNT ONE

The Accused is charged with the crime of Fraud:

In that upon or about the 15th November 2016, and at or near Mbabane, in the Hhohho Region, the said accused person did unlawfully and with intent thereby to defraud, misrepresent to the Swaziland Citizenship Board (Paul Mpostoli Shabangu) that two documents – 'An Authority to issue Certificates of

"kukhonta" dated 06/07/2006 and Certificate of "kukhonta" No 1037' were authentic documents and did by means of the said misrepresentation induce the said Swaziland Citizenship Board to its prejudice and obtained a certificate of registration as a citizen of Swaziland.

Whereas when the accused person made the aforesaid misrepresentation well-knew that the said certificates were not authentic and thus did commit the crime of Fraud.

COUNT TWO

The Accused is charged with the crime of UTTERING A FORGED DOCUMENT:

In that upon or about the 15th November 2016, and at or near Mbabane, in the Hhohho Region, the said accused person did unlawfully and with intent thereby to defraud, and to the prejudice of Swaziland Citizenship Board offer, utter and put off forged documents, to wit, authority to issue Certificate of Kukhonta and Certificate of Kukhonta, and did thereby commit the said crime

COUNT THREE

The Accused is charged with the crime of CONTRAVENING SECTION 14 (2) (c) of THE IMMIGRATION ACT 17 of 1982:

In that upon or about the 6th December 2017 and at or near Matsapha area in the Manzini Region, the said accused person

not being a Swazi Citizen did unlawfully enter and remain in the Kingdom of Swaziland without a valid entry permit or pass and did thereby contravene the said Act.

COUNT FOUR

The accused is charged with the crime of CONTRAVENING SECTION 23 OF THE SWAZIALND CITIZENSHIP ACT OF 1992:

In that upon or about 15th November 2016 and at or near Mbabane in the Hhohho Region the said Accused person did unlawfully make a false statement to the Swaziland Citizenship Board (Paul Shabangu) for the purpose of procuring Certificate of Registration as a Citizen of Swaziland and did thereby contravene the said Act.

[15] In its Opposing Affidavit the Crown through 5307 D/Sergeant Akhona Sambulo Dludlu stated that he is a Police Officer and the Principal Investigator of this case under the Counter Terrorism and Organized Crime Unit based at the Police Headquarters in Mbabane.

[16] At paragraph 3 (3.2) he states that the Applicant is facing serious charges relating to the forgery of important documents being the Authority to issue the Certificate of “kukhonta” which is signed by the Head of State and Certificate of “kukhonta” which is signed by His Royal Highness Prince Phuhlaphi.

[17] Detective Dludlu continues to state that investigations are not complete and that as at that stage of the investigations they had uncovered five (5) fraudulent lists of the Authority to issue Certificate of "Kukhonta" including that of the Applicant.

[18] Detective Dludlu states further that from the five (5) fraudulent lists twenty-two (22) names including that of the Applicant have been fraudulently inserted.

[19] Detective Dludlu explains in his affidavit that the fraudulent insertion of names is done by taking genuine lists which were altered by the removal of names which were genuinely on the lists and replaced with names which were not supposed to be on the lists.

[20] Detective Dludlu further states that they have also uncovered fraudulent certificates of "kukhonta" one of which bears the name of the Applicant. He states that the Certificates of "kukhonta" bears a forged signature of His Royal Highness Prince Phuhlaphi.

[21] Detective Dludlu states further that the Applicant submitted these forged documents and also appeared personally before the Swaziland Citizenship Board and subsequently acquired Swazi Citizenship fraudulently on the basis of these forged documents. At paragraph 3.3 Detective Dludlu continues to state that Applicant is also facing charges of Contravening the Immigration Act and the Citizenship Act

respectively which renders his Swazi citizenship to be questionable and consequently his stay in the country illegal as he does not have authority to stay in the country.

[22] The Officer continues to state that if the Applicant is granted bail then that would be tantamount to perpetrating an illegality or at its best granting him authority to stay in the country illegally. He states that it is only the Honourable Minister for Home Affairs who has the authority or power to grant the Applicant authority to stay in the country legally.

[23] The Officer proceeds to state that considering the nature of the evidence collected thus far he has a reasonable apprehension that if released on bail the Applicant is likely to abscond and thus evade his trial. He states further that two (2) people who were earmarked for arrest together with the Applicant have already disappeared and ARE believed to have skipped the country to evade arrest. His belief is that these people may assist the Applicant to abscond his trial.

[24] Detective Dludlu states further that Swaziland does not have an extradition treaty with Pakistan and therefore it would be impossible to extradite the Applicant if he were to abscond trial and travel to Pakistan.

[25] The Officer states further that if the Applicant were released on bail, he would interfere with investigations by communicating with witnesses before they give statements thereby prejudicing the interests of justice. He verily believes that Applicant may also conceal or destroy evidence before it could be recovered.

[26] The Officer believes that the Applicant knows the witnesses in this matter i.e. those involved in obtaining the lists, those involved in the fraudulent alteration of the documents, those who forged the documents and those he submitted the fraudulent documents to.

[27] The Officer states further that statements of crucial witnesses have not been recorded and that there is no effective way to prevent communication between Applicant and witnesses and also that these are people well known to the Applicant as he had all along been dealing with them and he alone knows where to find them or how to communicate with them.

[28] In his Replying Affidavit the Applicant reiterate that he has a good and bona fide defence in showing that he never committed any of the offences with which he is charged and that the Crown should charge the people who issued the forged certificates.

[29] It should be noted that I mentioned earlier in this judgment that both parties were granted leave to file Supplementary Affidavits. I therefore continue to deal with those.

[30] In its Supplementary Affidavit filed on the 15th December 2017 Detective Dludlu states that through further investigations he has found that the Applicant was the holder of several passports, namely –

1. A PALAU PASSPORT NO. KF 558237
2. A SOUTH AFRICAN PASSPORT NO. A 01537356
3. A PAKISTANI PASSPORT NO. KH 282661
4. A PAKISTANI EMERGENCY PASSPORT NO. 4560
5. A PAKISTANI PASSPORT NO. KH 600190
6. A SWAZI TRAVEL DOCUMENT NO. 40589072
7. A SWAZI INTERNATIONAL PASSPORT NO. 10030685

The Officer states that upon arrest on the 6th December 2017 the Applicant surrendered only his Swazi Travel Document and that the whereabouts of the other passports remain unknown.

[31] In response to these allegations the Applicant in his Supplementary Replying Affidavit filed on the 18th December 2017 denied being the holder of a Palau Passport, a South African Passport, a Pakistani Emergency Passport and the other Pakistani Passport.

[32] Applicant states further that he had only one Pakistani Passport which he surrendered to the Pakistani Embassy in Pretoria when he

acquired Provisional Swazi Citizenship, this was after he had been issued with the Swaziland International Passport in 2015.

[33] Applicant states further that as for the Swazi International Passport same was held or taken by the Immigration Department when he tried to renew it after he was told that the rules have changed as he had to produce his Citizenship Certificate in order to have his International Passport renewed.

[34] It was during the oral submissions by Counsel that it became clear that there was a serious dispute of fact as regards the issue of the passports being denied by the Applicant and in relation to the new allegations as revealed in the Supplementary Affidavit for the first time that the Swaziland International Passport No. 10030685 was actually being kept by a certain officer at the Immigration Department in the International Passport Section who was very well known by the Applicant but whose name he didn't know. The court then ordered that oral evidence be led to clarify the issue of Swaziland International Passport.

[35] It was submitted by Mr. Piliso that Applicant could easily identify the individual officer who had taken his Swazi International Passport.

[36] This court was left with no choice but to issue an order directing the Royal Swaziland Police, His Majesty's Correctional Services and both

Counsel to escort and accompany the Applicant to the International Passport Section to identify the officer who was alleged to be in possession of Applicant's passport.

[37] Indeed in the afternoon of the 18/12/2017 the Applicant was escorted there where he easily identified the Officer-In-Charge, one Ms. Eunice Mhlongo.

[38] It also transpired that the Applicant needed the services of an Interpreter as he was said to have a limited understanding of the English language. This being a primary requirement the court adjourned the matter for a few days to enable the Registrar of the High Court to arrange for an interpreter.

[39] On the 22nd December 2017 the Applicant testified under oath assisted by Mr. SOHAIL KHAN the Interpreter who had been secured by the Registrar.

[40] The Applicant stated that he was a resident of Tubungu Matsapha and also the holder of a Swazi International Passport which was issued by the Immigration Department in 2015. He testified that the last time he used the said passport was on the 24th October 2016 when he was from Pakistan enroute to Swaziland.

[41] He testified that upon his return he had to renew the said passport since it was overused and had only two pages left whereupon he handed over the same to Eunice Mhlongo at the Immigration Department. This was around the 1st and 2nd November 2017. This is the officer whom the Applicant identified on the 18th December 2017 at the Immigration Department.

[42] He testified that Mhlongo had advised him to leave his passport with her and she would also fill the form for him and once done with that she would then call him. He claims to have also left two passport size photos and a copy of his Swazi National Identity Document. He testified that days went by without her calling him. He became aware that the police were conducting investigations and when he called her, she informed him that he must not come to her but that she would call him. At some point he physically went to her office but she promised to call him but never did until he was arrested whereupon he handed over to the police his Swazi Travel Document, Khonta Certificate and the Swazi Identity Document.

[43] He testified that since 2015 he and Mhlongo were friends and he would occasionally give her lunch money, buy her gifts and even bought her a cellular phone. He further stated that they exchanged cellphone numbers and that Mhlongo resides in Ngwane Park, Manzini.

[44] Under cross-examination from Mr. Magagula, he stated that he arrived in Swaziland on the 22nd February 2003 and that he had been using his Pakistani Passport until he acquired the Swazi International Passport in 2015. He testified further that he handed over the Pakistani Passport to the Pakistani Embassy in Pretoria during the same week he had obtained the Swazi International Passport. He stated that under Pakistani' system you cannot be the holder of two passports.

[45] Under cross-examination he also testified that he was running a business behind Matsapha Police Station dealing in cellphone accessories and furniture which he was importing from China. He further explained that he obtained the Swazi International Passport first and thereafter a week later he was issued with the Swazi Travel Document by the Manzini Immigration Office.

[46] Eunice Mhlongo testified under oath that she was the Officer-In-Charge of the International Passport Department in the Immigration Department of the Ministry of Home Affairs in Mbabane.

[47] She confirmed that on the 18th December 2017 she was identified by the Applicant in her office whilst in the company of two female colleagues. She admitted that she knew the Applicant who was issued with an International Passport but denied that they were friends.

[48] She denied that she was in possession of Applicant's passport as alleged by him, but pointed out that when the Applicant came to her office he did not want to renew his International Passport but wanted International Passport **application forms** for his brother, and this was declined and that was the last time she saw him.

[49] She testified that indeed the Applicant had bought her a cellular phone and that she had promised to pay him for it when she had funds. She denied that the Applicant bought her any other gifts and/or gave her money as he alleged in his testimony.

[50] She explained in detail the requirements to be met in order for one to be granted an International Passport and the criteria used in granting the passport being whether for holiday, visit and training. She handed into court EXHIBIT"A" being the documents for the grant of the Applicant's International Passport.

[51] She was subjected to a lengthy and searching cross-examination by Mr. Piliso for the Applicant but she maintained her testimony that:

1. Applicant never came to the office to renew his passport but to request for an application form for his brother.
2. She refused to give him the form because she wanted the brother himself to come so that she could interview him and explain the requirements to him.

3. She never at any stage took Applicant's International Passport.
4. She was aware of an Investigation by Parliament Select Committee.

[52] In closing submissions Mr. Piliso urged this court to admit the Applicant to bail on the basis that he would not abscond trial as he had his roots in the country. He submitted further that he was at this stage innocent until proven otherwise during his trial and therefore that he was entitled to bail and further that it was not permissible for the Crown to arrest first and then investigate later.

[53] Mr. Piliso referred this court to a number of authorities in support of his submissions. He referred to the case of ***Mfanawenkosi Mbhunu Mtshali & Another v Director of Public Prosecutions, Criminal Case No. 180/2013*** where Ota J (as she then was) granted bail to the Applicants who had been charged with contravention of the Seditious and Subversive Activities Act of 1938 stated at paragraph 10 as follows:

> ***'I am fortified in the conclusion reached ante, by the fact that there is no evidence urged by the Respondents to show a likelihood, (not mere possibility) that the Applicants:-***
>
> ***(a) might not stand trial***
>
> ***(b) might commit other offences whilst on bail***
>
> ***(c) might interfere with Crown witnesses thus tampering with the course of justice.***
>
> ***There are factors that will militate against the grant of bail---'***

At paragraph 13 Her Ladyship stated:

> ***'In the absence of evidence in proof of these factors the interest of justice favours the grant of this application'***

The Applicants Mtshali and Nkambule were thus granted bail.

[54] I must point out that the case referred to above is distinguishable from this case in the following scenarios:

(a) Applicant is a *Peregrinus* thus likely to abscond his trial if admitted to bail. There is no documentary evidence submitted before court to support the allegation of renounciation of his Pakistani citizenship.

(b) Applicant is facing very serious charges of Fraud, Forgery and Uttering a Forged Document, Contravention of the Immigration Act and the Citizenship Act.

I must point out that offences relating to Fraud, Forgery and Uttering are very prevalent in the country and always attract custodial sentences and this factor alone is enough to induce the Applicant to abscond his trial.

(c) The offences themselves were executed through organized crime syndicates who are involved in the systematic alterations of the documents and the insertion of names of individuals undeserving the grant of citizenship of this

country by the Citizenship Board and also undeserving the grant of the kukhonta Certificate.

(d) Investigations are still ongoing in this case where the police have discovered that the Applicant is the holder of five (5) other passports other than the Swazi Travel Document and the Swazi International Passport.

As regards the five (5) passports the Crown did not pursue arguments on them simply because investigations are ongoing to determine whether they belong to the Applicant or not. In order to clear the mist it becomes necessary that the Crown be afforded the opportunity to conduct this investigation which by its nature is very complex and requires co-operation of foreign jurisdictions. This investigation, when concluded, may exculpate the Applicant or incriminate him, so it is very essential that it be conducted.

(e) At the time the Applicant was arrested, two more suspects had been identified through investigations that they had executed similar *modus operandi* in the commission of similar offences and they simply vanished thereby evading arrest.

Therefore the fear by the Crown that if released the Applicant may abscond trial is real, reasonable and not imaginary. It suffices to say that the investigation is at its infancy stage and according to Detective Dludlu twenty-two (22) different lists containing fraudulent material have so far been uncovered.

(f) The Officer-In-Charge at the International Passport Section of the Immigration Department denies ever receiving the Applicant's Swazi International Passport as alleged by the Applicant.

This is a set back to the Applicant's claim that the said passport is in the possession of the Swaziland Government. The denial of the passport by the Officer-In-Charge caused great discomfort to the Applicant and more particularly because the Officer was very clear that they never keep expired and or overused passports but that these are returned to their owners.

She made an example that where the passport has a visa the holder is allowed at the border posts to use the new passport and the old one simultaneously to exhibit the visa.

The Officer was candid with the court when dealing with the issue of the cellular phone in that she volunteered the sensitive information in her evidence in chief on how she came to receive the gadget from the Applicant.

Concerning the alleged possession of the Applicant's International Passport, she explained with conviction and certainty that the Applicant had come to request for an International Passport Application Form for his brother and she refused because she wanted the brother to come for a personal interview and to explain the requirements for that attainment of the International Passport and also to fill the first part of the form to avoid it being given to another person; this being a measure that had recently been adopted to prevent the fraudulent allocation of these forms to undeserving persons.

It must be noted that the Applicant never disclosed any information regarding the Swazi International Passport in his Founding Affidavit and Replying Affidavit.

Applicant only deals with this issue on the 18th December 2017 at paragraph 7 of his Supplementary Replying Affidavit where he states as follows:

'I admit having held the Swazi International Passport which I currently do not have, what transpired is that the pages of the passport were full and I went to the Ministry to apply for a new one and I was told that the rules have changed it is no longer allowed that I be issued with the international passport until I produce my citizenship certificate. My passport was then held by the Immigration department. I could have surrendered it together with the Swazi Travel Document if I had this passport.'

It therefore becomes very clear that the story that the passport was taken by the Officer-In-Charge at Immigration is an afterthought to justify why the passport was never surrendered and or disclosed to the Police during the arrest of the Applicant.

(g) The Applicant claims to have settled in the country and also operating a flourishing business.

He has filed before court the following documents:

(i) Trading Licence for the year 2017 issued to a company namely PAK BROTHERS INVESTMENTS (PTY) LTD trading as MAHLI FURNITURE SHOP

(ii) Trading Licence for the year 2017 issued to a company namely SABBAR BROTHERS INVESTMENTS (PTY) LTD, trading as SB PAK. Both licences herein referred to above operate on PLOT No. 710 MATSAPHA and share the same postal address being Box C1170.

(iii) Form J for SABBAR BROTHER INVESTMENTS (PTY) LTD filed with the Registrar of Companies on the 3rd January 2015 listing the directors as:

DILAWAR HUSSAIN

AHMED ALI

MUNIR FAISAL

No current Form J (if any) was ever produced in court.

(iv) Form C of SABBAR BROTHERS INVESTMENTS (PTY) LTD dated 12th August 2015 wherein Applicant is listed as having 70% shares, Ahmed 20% and Munir 10%.

No current Form C (if any) was ever produced in court.

(v) Memorandum and Articles of Association of SABBAR BROTHERS INVESTMENTS (PTY) LTD bearing the Registration Date as being 23rd December 2010.

[55] Since the Applicant has not produced a current FORM J and FORM C before court it becomes difficult to ascertain as to whether currently he still is the director and shareholder of SABBAR BROTHERS INVESTMENTS (PTY) LTD and thereby having legitimate business interests in Swaziland. The Form J and Form C are all dated 2015 and thus of no force and effect because the Annual Company Licence is renewed during the month of June of every year.

[56] There is no doubt that the Applicant heavily relies on existence or presence of this investment project in the country in order to be admitted to bail, but when he produces long expired important company documents it becomes difficult to ascertain whether the business interests and roots he claims to have in the country still exist. There is no evidence produced before court to demonstrate that as at 2017 the Applicant is a director and shareholder of SABBAR BROTHERS INVESTMENTS (PTY) LTD.

[57] I also point out that in the Affidavits filed by Applicant before court he claims to operate the business trading as MALI INVESTMENTS which deals in wholesale furniture, see paragraph 4.7 page 7 of the Book of Pleadings.

[58] In the Trading Licence I referred to earlier, the company trading as MAHLI (not MALI) FURNITURE SHOP is a trading name for PAK

BROTHERS INVESMENTS (PTY) LTD and not SABBAR BROTHERS INVESTMENTS (PTY) LTD. There are no documents produced in court to show or prove that the Applicant is a director and shareholder of PAK BROTHERS INVESTMENTS which owns the trading name MAHLI (not MALI) FURNITURE SHOP.

[59] It is trite law that directorship and shareholding in a company is proven by a current FORM J and FORM C duly filed and stamped with the Registrar of Companies stamp and also duly certified by the said Registrar where necessary. None of this has been filed and produced before this court by the Applicant, therefore I am compelled to conclude that the Applicant has not proved the 'over a Million Investment' he claims to have in the country.

[60] On these premises therefore, the only reasonable inference is that there are no business interests proven before court that would compel the Applicant to stand his trial. He is therefore declared a flight risk.

[61] ***In Rodney Masoka Nxumalo and Others Criminal Appeal No. 01/2014 MCB Maphalala JA (as he then was) sitting with Ebrahim JA and Odoki JA (both concurring) stated the following:***

> ***'Bail is a discretionary remedy. Fran J in S v Pinero 1992 (1) SACR 577 (NW) at p 580 said the following:***
>
> ***In the exercise of its discretion to grant or to refuse bail, the court does in principle address only one all-embracing issue:***

Will the interest of justice be prejudiced if the accused is granted bail? And in this context it must be borne in mind that if an accused is refused bail in circumstances where he will stand his trial, the interests of justice are also prejudiced. Four subsidiary questions arise. If released on bail will the accused stand trial? Will he interfere with state witnesses or the police investigations? Will he commit further crimes? Will his release be prejudicial to the maintenance of law and the security of the state? At the same time the court should determine whether any objection to release on bail cannot suitably be met by appropriate conditions pertaining to the release on bail'.

[62] In the bail application of ***Sabelo Dalton Ndlangamandla v Rex Case No. 15/2003*** His Lordship Masuku J (as he then was) stated the following:

> ***'In Ndlovu v Rex 1982-86 SLR51 at 52 E-F, Nathan CJ stated the applicable principles as follows:***
>
> > ***The two main criteria in deciding bail applications are indeed the likelihood of the Applicant standing trial and the likelihood of his interfering with Crown witnesses and the proper presentation of the case. The two criteria tend to coalesce because if the Applicant is a person who would attempt to influence Crown witnesses it may readily be inferred that he might be tempted to abscond and not stand his trial. There is a subsidiary factor also to be considered, namely the prospects of success in the trial.'***

Masuku J continues:

> ***'In the case of Sean Blignaut v Rex Case No. 1549/2001, I cited with approval the judgment of Mohammed J (as he then was) in S v Acheson 1991 (2) SA 805 (Nm Sc) 822-823 C where the factors applicable were lucidly enumerated. These factors are the following:-***

1. Is it more likely that the accused will stand his trial or is it more likely that he will abscond and forfeit his bail? The determination of that issue involves a consideration of other sub-issues such as:

(a) How deep are his emotional, occupational and family roots with the country where he is to stand trial;

(b) what are his assets in that country;

(c) what are the means that he has to flee from that country;

(d) how much can he afford the forfeiture of the bail money;

(e) what travel documents he has to enable him to leave the country;

(f) what arrangements exist or may later exist to extradite him if he flees to another country;

(g) how inherently serious is the offence in respect of which he is charged;

(h) how strong is the case against him and how much inducement there would therefore be for him to avoid standing trial;

(i) how severe is the punishment likely to be if he is found guilty;

(j) how stringent are the conditions of his bail and how difficult would it be for him to evade effective policing movements.

2. The second question which needs to be considered is whether there is a reasonable likelihood that, if the accused is released on bail, he will tamper with the relevant evidence or cause such evidence to be suppressed or distorted. This issue again involves an examination of other factors such as:

(a) whether or not he is aware of the identity of such witnesses or the nature of their evidence;

(b) whether or not the witnesses concerned have already made their statements and committed themselves to give evidence or whether it is still the subject of continuing investigations;

(c) what the accused's relationship is with such witnesses and whether or not it is likely that they may be influenced or intimated by him;

(d) whether or not any condition preventing communication between such witnesses and the accused can effectively be policed.

3. A third consideration to be taken into account is how prejudicial it might be for the accused in all the circumstances to be kept in custody by being denied bail. This would involve again an examination of other issues such as for example:

(a) the duration of the period for which he is or has already been incarcerated, if any;

(b) the duration of the period during which he will have to be in custody before his trial is completed;

(c) the cause of the delay in the completion of his trial and whether or not the accused is partially or wholly to be blamed for such delay;

(d) the extent to which he might be prejudiced in engaging legal assistance for his defence and in effectively preparing his defence if he remains in custody;

(e) the health of the accused.'

Masuku J continues to state that:

'In support of this latter proposition, I quote with approval from the remarks of Millin J. in Leibman v Attorney-General 1950 (1) SA 607 (W) where the following appears at page 609:

> ***'The court is always desirous that an accused person should be allowed bail if it is clear that the interests of justice will not be prejudiced thereby, more particularly if it thinks upon the facts before it that he will appear to stand his trial in due course. In cases of murder, however, great caution is always exercised in deciding upon an application for bail. The meaning of this last sentence from subsequent cases, is that the very fact that a person is charged with a crime which may entail the death penalty is in itself a motive to abscond. But that fact is not enough. If it were otherwise – if that fact were regarded as enough – no person charged with a capital offence could ever hope for bail, and yet bail has in many cases been granted to persons charged with capital offences. The Court looks at the circumstances of the case to see whether the person concerned expects, or ought to expect conviction. If it is found on the circumstances disclosed to the Court that the likelihood of conviction is substantial that the person ought reasonably to expect conviction, then the likelihood of his absconding is greatly increased. Thus the Court goes into the circumstances of the case i.e. the evidence at the disposal of the Crown.'***

[63] In the case of ***Qin Ming He & Dao Thanta Hue v Rex Criminal Appeal Case No. 171/2017*** Mamba J stated the following at page 6-7 paragraphs 13-14:

> ***'Ultimately, all the charges faced by the applicants are very serious. The evidence by the Crown against them is also not weak. They are foreigners. They are likely to leave Swaziland at any time if released on bail. Swaziland has no extradition treaty with either China or Vietnam. Apart from this, to cause them to return to***

Swaziland once they have left the country would be difficult, laborious and cumbersome. In a word, it would not be in the interests of justice to grant them bail as provided in Section 96 (4) (b) of the Criminal Procedures & Evidence Act 67 of 1938; or the common law in general. This, of course does not negate the right of the applicants to be presumed innocent until proven otherwise. These are two separate and distinct concepts or precepts of the law that are considered individually yet forming the component parts or elements of one and the same equation.'

'It has to be restated that the major or overall consideration in a bail application, as perhaps in all applications before the court, is to do justice to the litigants. The interests of justice are paramount. If for instance, the accused is likely to abscond or not stand trial, the interests of justice would be adversely affected. Again, if there is the likelihood that the accused may tamper with the evidence or Crown witnesses or in any way interfere with the administration of justice, then the interests of justice would be adversely affected and bail should be refused. In order to succeed in its opposition, the Crown does not have to adduce evidence to establish that justice would actually be adversely affected if the applicant is released on bail. All that is necessary or sufficient is to satisfy the court, on a balance of probabilities, that there is a likelihood that the interests of justice would be imperilled if the applicant is granted bail. That, in this case, the Crown successfully did.'

[64] In the case of ***Mthulisi Alaster Khumalo v Rex Case No 439/2014*** Mamba J stated the following;

'This is an application for bail. The application is opposed by the Crown on the grounds inter alia that –

(a) the applicant has failed to show or establish that there are exceptional circumstances warranting that he be released on bail;

(b) the applicant is likely to abscond trial as he often spends his time in the Republic of South Africa and

(c) the applicant is facing four counts of Robbery, which on its own is a very serious offence and the evidence against him is overwhelming and this would induce him to abscond trial should he be released on bail. All four counts were allegedly committed on 31 October 2014 at Nkoyoyo near Mbabane'.

At pages 5-6 His Lordship Mamba continues to state that:

'From the above evidence, it is clear to me that the applicant has a relative in the form of his mother's brother, in the Republic of South Africa. The applicant has lived with this man in Johannesburg whilst studying there. The charges faced by the applicant are serious and carry a straight and severe custodial sentence. The allegations are, or the evidence against him is prima facie serious, strong and cogent. All these factors tend to show in my judgment that the applicant, if released on bail, would be likely to abscond his trial. Put differently, he has failed to discharge the onus resting on him to establish that the interests of justice demand that he be released on bail or that the interests of justice would not be prejudiced by such release.'

'Whilst it is true that there is nothing to gainsay the applicant's averment that he is suffering from acute asthma, I do not think that this factor takes his case any further. I say so because I think that such malady or sickness is, at least under the circumstances of this case, not an exceptional circumstance. Asthma is a sickness or ailment but it is neither terminal, rare nor exceptional as

defined in the relevant law. It is not 'one of a kind'. (per Magid AJA in Senzo M. Motsa v R, Appeal 15/2009, unreported).'

[65] The law regulating bail proceedings is found in sections 95 and 96 of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended. Section 95 (1) provides as follows;

> ***'(1) Notwithstanding any other law the High Court shall be the only Court of first instance to consider applications for bail where the accused is charged with any of the offences specified in the Fourth, the Fifth Schedules or under section 95(6).'***

Section 95 (8) provides as follows:

> ***'The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the grounds under the provisions of section 96(4) are established.'***

[66] It therefore becomes essential that section 96 (4) be referred to as it contains the grounds upon which bail may be denied and forms the basis upon which the present application is opposed by the Respondent; it reads as follows:

> (4) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established:
>
> (a) Where there is a likelihood that the accused, if released on bail, may endanger the safety of the public or any particular person or may commit an offence listed in Part II of the First Schedule; or

(b) Where there is a likelihood that the accused, if released on bail, may attempt to evade the trial;

(c) Where there is a likelihood that the accused, if released on bail, may attempt to influence or intimidate witnesses or to conceal or destroy evidence;

(d) Where there is a likelihood that the accused, if released on bail, may undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or

(e) Where in exceptional circumstances there is a likelihood that the release of the accused may disturb the public order or undermine the public peace or security.

[67] **EVADE TRIAL: Section 96 (4) (b)**

The Respondent opposed the bail application on the ground that the Applicant is highly likely to evade his trial because he is a *peregrinus* and also had a number of passports. The Applicant admitted to only having been a holder of three passports, one being a Pakistani passport which he claims to have surrendered to the Pakistan Embassy in Pretoria after he had been issued with the Swazi International passport in 2015; the second passport being the Swazi travel document which he claims to have surrendered to the Royal Swaziland Police upon his arrest on the 6th December 2017. The third

one being the Swazi international passport which he claimed to be in the possession of Eunice Mhlongo, the officer-in-charge at the International Passport section.

[68] This allegation led to the leading of oral evidence which has been dealt with in this judgment; I further stated that I accept the explanation offered by Mhlongo as more credible and reject that given by the Applicant.

(i) **Emotional, family, community or occupational ties of the accused to the place at which the accused shall be tried:**

The Applicant testified that he is a married man operating a business in Matsapha behind the Matsapha Police Station and that he resides in Tubungu and further that he has children attending school in the country.

The court cannot be expected to give credence to these allegations in the absence of any documentary evidence to substantiate them.

The Applicant has not attached any lease agreement or title deeds pertaining to his place of residence nor has he

submitted documentation sufficient to prove his claim pertaining to the business.

I have already stated above that the company documents submitted to court (form J and Form C) were all dated 2015. No current Form J or Form C were submitted to substantiate the claim of business ties of the Applicant.

No birth certificates of the children nor their documentary proof of their Swazi schools was attached to the Applicant's pleadings.

There is no letter or documentation from the community leadership of the Zombodze Umphakatsi/ Chiefdom confirming that the Applicant is indeed a member of the Zombodze community through the "kukhonta" custom.

(ii) **The assets held by the accused and where such assets are held:**

The Applicant testified that he has an over a million Emalangeni investment in Matsapha and that he is resident in Tubungu, Matsapha. As observed above in paragraph (i) the Applicant has not filed any supporting documentation in this regard such as the title deed or lease agreement of his place of residence or the business.

(iii) **The means and travel documents held by the accused which may enable him to leave the country:**

The Applicant's testimony in relation to passports held by him has been addressed earlier in this judgment, the most important contention being in respect of the Swazi International Passport which the Applicant alleged to have given to Eunice Mhlongo, which allegation was denied by Mhlongo. The court is inclined to accept the testimony and version given by Mhlongo and reject that of the Applicant.

The fact the Eunice Mhlongo denied ever taking the Applicant's passport as he had alleged is an important factor in determining whether the Applicant is likely to abscond his trial and I find that he is highly likely to abscond using that passport.

(iv) **The question whether the accused can be readily extradited if he escapes from Swaziland:**

The investigating officer stated in his opposing affidavit that in the event the Applicant is granted bail and he evades trial and flees to Pakistan, it would be impossible

to extradite him to Swaziland as there is no extradition treaty between Swaziland and Pakistan.

(v) **The nature and gravity of the charge on which the accused shall be tried and the nature and the nature and gravity of the punishment likely to be imposed on conviction:**

I have indicated above that the accused faces serious charges and if convicted, faces a custodial sentence which is a deterrent to other would be offenders and therefore the possibility of a sentence of imprisonment is a factor likely to induce the Applicant to abscond and evade his trial.

(vi) **The strength of the case against the accused:**

The opposing affidavit by Detective Dludlu illustrates the nature of the evidence against the Applicant, and therefore the Respondent has demonstrated that it has a strong case against the Applicant.

The fact that the investigation of this matter is conducted by the Counter Terrorism and Organised Crime Unit of the Royal Swaziland Police is a clear indication of the seriousness of the charges. Additionally, that the commission of the offences involve organised crime

syndicates necessitating the involvement of the specialised investigative unit is an incentive that the accused may in consequence attempt to evade trial as it has become clear that the syndicate has been exposed.

(vii) **The binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached.** Detective Dludlu stated in his opposing affidavit that the Applicant may evade trial and that there are no effective ways and means by which communication between the Applicant and witnesses can be prevented as the witnesses are people with whom the Applicant is familiar and easily accessible to him.

[69] **INTIMIDATE, INFLUENCE AND INTERFERE WITH WINESSES OR TO CONCEAL OR DESTROY EVIDENCE: SECTION 96 (4) (C).** In his opposing affidavit, Detective Dludlu stated that the Applicant was familiar with the identity of the witnesses and the evidence which they may bring against him. The recording of statements and further investigations were still being conducted and thus incomplete. The witnesses are known to the Applicant and if released on bail he is highly likely to communicate with them and there are no means of preventing such communication. There is a likelihood that he may conceal or destroy evidence before they could recover it as the people

involved in the crime syndicate that made the fraudulent lists are known by the Applicant.

[70] I have also considered that the Applicant has been in custody since the 6th December 2017 and the Respondent should obtain a trial date at the earliest opportunity to prevent a lengthy detention without a trial which is undesirable and unconstitutional.

[71] The Applicant has indicated in is founding affidavit that he was suffering from sugar diabetes and sinus; unfortunately, no medical records were submitted to confirm these bare allegations. The absence of any supporting documentation makes it extremely difficult for a court hearing a matter where such allegations should be proven by supporting documentation.

[72] The failure to file crucial supporting documents to the pleadings is a fatal blow to the case of that litigant who is trying to convince the court to decide in his/her favour.

[73] I have also found it difficult to address the business interests as the Applicant has failed to file current Forms J and C before court. It therefore becomes difficult to determine whether the Applicant is still a director and or shareholder in the company.

[74] I have explained above that the trading licences filed do not advance the case for the Applicant any further because:

(i) The Trading Licence for Mahli Furniture Shop (not Mali as stated in the Applicant's founding affidavit) is issued to a company called PAK BROTHERS INVESTMENTS (PTY) LTD. There has been no documentation submitted to show this court that Applicant is either a director or shareholder of the said PAK BROTHERS INVESTMENTS (PTY) LTD. There is no current Form J and Form C proving that the Applicant is indeed a director and shareholder of PAK BROTHERS INVESTMENT.

(ii) The Memorandum and Articles of Association of SABBAR BROTHERS INVESTMENTS (PTY) LTD filed in court only shows that the Applicant was a director when the company was formed on the 23rd December 2010. Form J and Form C filed before court and dated 3rd January 2015 and 30th June 2015 respectively does not provide proof that the Applicant is still a director and shareholder to date.

[75] At this stage it is prudent to mention that section 96 (14) (a) (i) provides as follows:

'Notwithstanding any law to the contrary—

(a) in bail proceedings the accused, or the legal representative, is compelled to inform the court whether—

(i) the accused has previously been convicted of any offence'

I refer to this Section because upon the perusal of **EXHIBIT 'A'**, being the **application form and supporting documentation for the application of the Swaziland International Passport No 100 306 85, it** has revealed the Applicant's Police Certificate of a Previous Conviction wherein the Applicant was convicted of Assault with Intent to do Grievous Bodily Harm (Assault GBH) by the Mbabane Magistrate Court under Reference CRO No 740/ 2014 and was sentenced to E2 000.00 (Two Thousand Emalangeni) fine or one year imprisonment plus E2 000.00 medical expenses to be paid by Applicant to the Complainant.

[76] This disclosure, as sanctioned by section 96 (14) (a) (i) is mandatory and was not complied with in this case. Full disclosure of previous conviction must therefore be made before court in bail applications; counsel and accused persons alike are hereby advised to comply with this section.

[77] I therefore find that the Respondent has submitted sufficient evidence in support of its opposition to the bail application, and on the other hand the Applicant, has failed to satisfy this court that the interests of

justice permit his release and consequently I find that he must be detained in custody until his trial is concluded.

[78] For the above reasons I hereby make the following order:

1. The Application for bail is hereby refused.
2. The Applicant is to remain in custody pending his trial.
3. The Applicant has a right to appeal this judgment.
4. The full judgment shall be made available to the parties on the 11th January 2018 at 11:00hrs.
5. Exhibit A is hereby released to the Immigration Department and the Crown to file a fully certified copy thereof in this file.

It is so ordered.

NKOSINATHI MASEKO
JUDGE OF THE HIGH COURT