REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION: PRETORIA)

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

10/06/2014 .....
DATE SIGNATURE

CASE NO: A124/14

KHOZA **APPELLANT**

and

STATE **RESPONDENT**

JUDGMENT

KHUMALO J

[1] The Appellant was refused bail in the Magistrate Court, for the district White River held at Sekukuza. Before this court is an appeal against the refusal.

[2] He was arrested on 17 November 2013 on charges of contravention of certain provisions of the National Environmental Management: Protected Areas Act, Act 57 of 2003, Regulation Gazette No 3838 as published in the Government Gazette no 28181 of 28 October 2005 and the Criminal Procedure Act 51 of 1977 ("the Act") for unlawfully and intentionally hunting, catching, capturing or killing any specimen of a listed threatened or protected species, and of the Firearms Control Act for unlawfully being in possession of ammunition, to wit 5 x 375 calibre round without being a holder of a permit to possess such ammunition. He had also entered the Kruger National Park without permission.

[3] It was submitted by Mr Nel, on behalf of the Appellant, that Appellant is facing schedule 1 offence/s wherefore the onus rests upon the state to prove that it is not in the interest of justice to release him on bail. He argued that the learned magistrate in the court a quo erred in refusing Appellant bail on the basis that he did not have a permanent place of abode, disregarding the undertaking by the brother that he will

be staying with him in Mozambique and will make sure that he attends court, while the state could not prove otherwise. Appellant had also cooperated and indicated his intention to plead guilty to trespassing in the Park. He has a very strong defence, also against the allegations on the fictitious stamps and the dates recording his movements into and out of the Republic. Mr Nel further argued that the magistrate also erred when he found that Appellant may abscond and fail to attend trial due to his ability to leave and enter the Republic without using the border gate. According to him the state failed to discharge the onus as there was no evidence that the accused may abscond or fail to stand trial.

[4] A Mozambican national, Appellant was arrested inside the National Park nature reserve or world heritage near the Crocodile Bridge in White River. His arrest followed a shooting that ensued in the Park between the men he was with at the time and the rangers, which resulted in a fatal shooting of one of the men.

[5] In support of his application in the court a quo, Appellant had alleged in the testimony he tendered by way of an affidavit, to have come across the three men who were carrying rifles inside the Park. He, at the time was walking back to the border gate of South Africa and Mozambique. The men were allegedly unknown to him. According to him he had entered the Republic legally, on 15 November 2013, intending to go to Nelspruit and when he was in Malelane he realised that he left his wallet and decided to walk back, taking a shortcut through the Park. The three men spoke Portuguese which he did not understand. He however heard that they were there to hunt. Suddenly there were gun shots, the men were exchanging fire with the rangers and one of the men was fatally wounded the other two ran away. He surrendered to the rangers who arrested and badly assaulted him, suspecting that he was in the Park hunting without a permit.

[6] The Respondent, in opposing the application, relied initially on an affidavit by one Mr Siko Moses Majola, a senior immigration officer at Home Affairs, White River, whose normal course of duty according to the affidavit is to check documents of foreign nationals verifying if they are valid or not, interviewing those suspected to be illegal foreigners and determine their citizenships and investigate their residence permits or fraudulent South African citizenship and also responsible, on completion of the investigation, for their charging, apprehension and removal back to their country of origin. The reason for opposing bail was that on 29 November 2013, their office was visited by one Detective Mogale from the organised Crime Unit asking them to assist in verifying a passport of a suspect arrested in the Park. The passport with I D number DJ 007 685 whose holder was the Appellant was verified from a system of the Department called movement control system that records movements of people entering or leaving the country.

[7] It was verified that the Appellant's passport had only one valid date stamp although there are four entry stamps and one departure stamp which made the movements not to correspond. The entry stamp dated 12 November 2013 was valid and was to expire on 12 December 2013 and its number 187 was the only valid stamp. The verification indicated that the number of entry stamps do not correspond with the departure stamps which, according to him, means Appellant has other means to leave the Republic without stamping his passport with Home Affairs officials at the port of entry. The entry stamps dated 14, 15 and 2 November 2013 that had an invisible last number was found to have been faked. They all did not

have stamp numbers and are not in the control movement system and two of the stamps have no corresponding departure stamps. Majola therefore submitted that the Appellant has got other means of entering and departing the country without stamping his passport and has access to a fake stamp as according to the movement control system there is no record that the Appellant entered the Republic on 14 or 15 November or 20 something. The date on date stamp is invisible and the only departure stamp that is visible is the stamp dated 14 November 2013 which is also invalid.

[8] He (Majola) accordingly submitted that the Appellant has contravened the following sections of the Immigration Act 13 of 2000 as amended:

[8.1] s49 (1) (a) that reads: "Anyone who enters or remains in, or depart from the Republic in contravention of this act, shall be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding three months."

[8.2] s9 (1) that reads: "No person shall enter or depart from the RSA at a place other than a port of entry."

[8.3] s9 (3) (d) that reads: "No person shall enter or depart RSA unless the entry or departure is recorded by an immigration officer."

[8.4] s9 (3) (e) that reads: "No person shall enter or depart RSA unless examined by an immigration officer as prescribed."

[9] Appellant, in his evidence that he also tendered by way of an affidavit, disputed that the stamps in his passport are fictitious and contended that he did not use any other way to enter South Africa or to go back to Mozambique other than the official border gate. He however did not offer any more explanation for the incomprehensible stamps, the unaccountable extra dates of entry or why there are no corresponding departures for the extra entries.

[10] He proceeded to indicate that he intends to plead guilty to trespassing and not guilty to any other charges the state intends bringing against him. Also, he mentioned that he has no impending cases or previous convictions, undertook to attend court until the matter is finalised and not to commit any offence, vowing to abide by the bail conditions imposed and pointed out that he is married with two minor children and is the sole breadwinner. He pleaded for the court to release him on a bail of R5 000.00, an amount that his brother, one Sergio Beyjani Khoza ("Sergio") had brought to court and was ready to pay.

[11] Sergio confirmed under oath to be the brother mentioned and that he was there to pay the bail, coming all the way from Makhudu, in Mozambique where he stays and also that on being released, Appellant will stay with him there in Mozambique and undertaking to make sure that he attends court until the matter is finalised.

[12] The court a quo then invoked the proceedings of s 60 (2) (c) of the Act requiring of the prosecutor that more evidence by Majola be adduced, which evidence was along the lines of the evidence in his affidavit. He however further explained that on entering the Republic, the passport gets scanned and the system then records the information on the passport and automatically give the passport

holder the number of days he can be in the country and also allocate a number to the entry, which numbers and information were missing from the Appellant's passport. No further evidence was led.

[13] Now s 60 of the Act, which is the relevant section applicable in these proceedings in ss (4) (1) (a), reads that:

> "An accused who is in custody in respect of an offence shall, subject to the provisions of s 50 (6) be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit."

[14] In *S v Stanford* 1997 (1) SACR 221 (c) it was held that the court a quo had lost sight of the fact that denial of bail would be in the interest of justice only if one of the grounds set out in s 60 (4) was probable. The onus is upon the Respondent/ prosecution to establish the existence of such grounds for the continued incarceration of the Appellant in the interest of justice. The question therefore to be answered on this appeal is whether the Respondent discharged the onus. Tshiki BJ in *Botha v Minister of Safety and Security & Others; January v Minister of Safety and Security & Others* 102 (10 SACR 305 (ECP) (at [33] explains how the prosecution can go about establishing the required grounds to discharge the onus and states that:

> "Prosecutors also have a duty to establish facts that justify the further incarceration of a detained person before he or she can apply to the court for the detainee's further incarceration. One of the methods expected to be used by the prosecutor is to establish, from the police official investigating the case, all the facts which would justify the further detention of the arrested person. He or she had to protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of a suspect."

[15] So, in addition s 60 (4) (b) provides that the interest of justice do not permit the release from detention of an accused where there is a likelihood that the accused, if she or he was released on bail, will attempt to evade his or her trial. The provisions of s 60 (4) (b) are to be read with the provisions of s 60 (6) that set forth the factors that are to be considered to establish if the accused might evade the trial, which reads as follows that:-

> 'in considering whether the ground in subsection (4) (b) has been established, the court may where applicable, take into account the following factors, namely-
>
> (a) the emotional, family, community or occupational ties of the accused to the place at which he is to be tried;
> (b) the assets held by the accused and the place where such assets are situated;
> (c) the means, and travel documents held by the accused, which may enable him or her to leave the country;
> (d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;

(e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;
(f) the nature and the gravity of the charge on which the accused is to be tried;
(g) the strength of the case against the accused and the incentive that he or she in consequence have to attempt to evade his or her trial;
(h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached;
(j) any other factor which in the opinion of the court should be taken into account.'

[16] The court a quo, in refusing bail to the Appellant, correctly took into consideration the evidence led on behalf of the parties, specifically that the Appellant had no residence in the Republic and that when released on bail he was going back to Mozambique. Also the submission by the Respondent that there are no other means the Respondent can make sure that he comes back to attend trial as there is no extradition treaty with his country of origin. The court also viewed his ability to enter and depart from the country through other means besides the official port of entry or departure as exacerbating the situation and the fact that he is charged with serious offences involving possession of a firearm and trespassing in the Park to find that it is not in the interest of justice that he be released on bail. The Respondent's Counsel argued that the Appellant might be facing a long term imprisonment.

[17] The other adverse factors to be considered in balancing the interest of justice and the right of the Appellant to liberty that validates the decision of the court a quo is the absence of emotional and family ties in the Republic because even the existence of an extradition treaty may not be a guarantee that the Appellant will not evade the trial, if he is without family ties in the country, same as the undertaking by his brother. As noted in the *Commentary on the Criminal Procedure Act* by Du Toit & Others on p9-39 with reference to *S v Petersen* 2008 (2) SACR 355 (C) where a full bench noted at [78] that the existence of a treaty between South Africa and Namibia provided no guarantee that extradition would indeed take place if the Appellant were to relocate for purpose of evading her trial. This reality rendered meaningless the undertaking of the Appellant's Namibian family that they would not have permitted her to become a fugitive from justice.

[18] As a result this court has no authority to interfere with the discretion of the court a quo unless if the court has erred or misdirected itself. The Act in s 65 (4) clearly stipulates that:

> "The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given."

[19] I am satisfied that there was no misdirection by the court a quo, the decision was correct. Under the circumstances I make the following order:

[19.1] The appeal is dismissed.

N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

On behalf of Appellant: **Adv Nel**
Instructed by: **Legal Aid; Nelspruit**

On behalf of Respondent: **Adv Nethononda**
Instructed by: **National Director of Public Prosecutions**