



IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF KWAZULU-NATAL
HELD AT DURBAN IN THE SCCC2 SITTING IN T COURT

CASE NO: 41 / 394/ 2019

IN THE MATTER BETWEEN:

THE STATE

And

SIPHO NZUZA

ACCUSED 17

APPLICATION FOR AMENDMENT OF BAIL CONDITIONS

[1] Mr. Madonsela SC appears for the Applicant assisted by his junior Mr. Mlaba. The Applicant is accused number 17 in Regional court case number 41/394/2016, which is pending before S Court which is the other Specialised Commercial Crimes Court at the Durban Magistrates Court¹. Mr. Nzuza, the Applicant has applied for the amendment of his bail conditions. By way of Notice of motion² to the State he noted this application seeking the following amendment to the conditions of bail:

1. That Condition 7 should read as follows:

1.1 The accused may not communicate in any way, whether directly or indirectly, with the following witnesses regarding any matter pertaining to the Audit trail of this DSW tender, (namely the DSW [Durban Solid Waste] tender forming the subject matter of the criminal charges against the accused.)

1.1.1 Krish Kumar

1.1.2 Sipho Cele

1.1.3 Andre Peterson

¹ During the preparation of this judgment indictments were served and the mater transferred to the High Court.

² [1] Exhibit AA 'Accused number 17's application for the amendment of bail conditions.

- 1.1.4 Mbuso Ngcobo; and
- 1.1.5 Raymond Rampersad.

2. That condition 9 should read as follows:

2.1 That the accused may not be directly involved in the disciplinary processes of the identified witnesses, by way of initiating any disciplinary processes of senior officials or any official identified as a witness in this case.

3. That condition 11 should be deleted in its entirety.

4. That Condition 11A should be deleted in its entirety.

[2] The State represented by Senior State advocate Ms. Siraram has opposed the application and during the course of the application verbally noted an application that the State also sought an amendment to the bail conditions to read that the Applicant “not be allowed to go back to the Municipality until finality of the case.”³

[3] Chapter 9 of Act 51 of 1977 applies, more particularly Section 63(1) of the CPA provides;

Amendment of conditions of bail

- (1) any court before which a charge is pending in respect of which bail has been granted may, upon the application of the prosecutor or the accused, increase or reduce the amount of bail determined under section 59 or 60 or amend or supplement any condition imposed under section 60 or 62, whether imposed by that court or any other court.

[4] Section 63 is meant to provide the necessary procedure for instances where changed circumstances require appropriate amendments to the conditions or amount of bail fixed at an earlier stage. The section spells out that upon an application by either the accused or the prosecution the court is vested with a discretion to either, vary or delete conditions of release on bail. Section 62 empowers the court on an application by the prosecutor to add any further condition of bail. Section 63(1) empowers a court to amend or supplement any conditions imposed under section 60 or 62.

[5] Rather starkly the application has caused the spotlight to fall upon the role played by the custodians or gatekeepers of public funds within this municipality and the fiscal consequences where those charged with the legal and constitutional responsibility of ensuring the

³ [90] States Heads of Argument.

proper use of public funds for service delivery in terms of the PFMA and related legislation fail to perform. Similarly and just as importantly where those charged with the oversight responsibility fail to perform or are corrupt themselves then the consequences are devastating.

[6] Section 152(1) of the Constitution describes the objects of local government to include:

“the provision of a democratic and accountable government for local communities; to ensure the sustainable provision of services to communities; the promotion of social and economic development, safe and healthy environment.”

There was a constitutional duty on the Applicant as City Manager to act to ensure this constitutional prerogative was complied with and a concomitant responsibility on the other role-players in the council, the Executive Committee of Council and other senior management positions. Unfortunately in this matter, as a collective too many people charged with an onerous responsibility to act in accordance with this constitutional duty simply failed to perform and this has impacted severely upon this application.

[7] For clarity I will begin by setting out the names and positions of the major role-players impacting upon this application:-

1. Zandile Gumede, Mayor of the eThekweni Municipality
2. Councillor Mlondi Mthembu, Chairman of Human Settlements. EXCO member.
3. Sandile Ngcobo, Chairman Bid Adjudication Committee [BAC]
4. Robert Abbu, Deputy Head: Strategic and new development at DSW.
5. Leo Saunders, investigator for Integrity Forensic Services.[IFS]
6. Mbuso Ngcobo, head of the City Integrity and Investigation Unit [CIU].

The Applicant was arrested on the 20th March 2020 and added to the charge-sheet as accused number 17 in this matter where at the time of the writing of this Ruling there are now 22 accused, including the Applicant’s wife, Bagcinile Nzuza who was added many months later.

[8] The matter was pending in S court Durban but has now been transferred for trial in the High Court. The balance of the accused are made up of Service provider entities⁴ cited in terms of section 332(1) of Act 51 of 1977 and the remaining accused are persons associated with

⁴ Ilanga La Mahlase-Accused three, Uzuzinekele Trading 31 cc- Accused Six, Omphile Thabang Projects-Accused eight, El Shaddai Holdings-Accused 11.

the service providers⁵, senior employees of the municipality at the time and elected public office bearers⁶ serving on the council.

[9] The matter is often referred to as the “Durban Solid Waste Tender Fraud” matter or perhaps most often as the ‘Mayor’s case’ and is widely reported in the press due to the charging of the then incumbent Mayor, Zandile Gumede as Accused 16 and indeed to a lesser degree for that matter, the Applicant who as City Manager was effectively the managing head of the city and the Accounting Officer. This position comes with onerous responsibilities in terms of the management of one of the biggest cities in terms of financial and service delivery responsibilities, including a vitally important oversight role to which I will return later in this Ruling. The arrest of both the Executive Mayor and the City Manager were obviously high-profile arrests and major public interest events.

[10]. Brief Overview of the Evidence of the State⁷

During March 2018 the head of the “City Integrity and Investigation Unit” [CIU] Mbuso Ngcobo⁸ authorized an investigation by “Integrity Forensic Services” [IFS] into alleged irregularities at the Durban Solid Waste [DSW] component of eThekweni. The IFS report completed in December 2018 found inter alia that councillors’ and employees of the municipality had acted in common purpose to defraud the municipality by circumventing the Supply Chain Management [SCM] and administrative processes of the municipality to secure the award of tenders or Orders in favour of four service providers. This being in contravention of the SCM policies and procedures of the municipalities, thereby contravening municipal and financial management legislation. The amount alleged to have been defrauded is now approximately R320 million⁹.

[11] The report, and indeed the later evidence of the Investigating Officer, immediately implicated two employees of the municipality who held senior management positions in the SCM department, namely Robert Abbu and Sandile Ngcobo. They were the first two arrested and appeared in court on the 30th of April 2019, and are listed as accused one and two on the charge-sheet. Also implicated, amongst others in the IFS report was the then executive mayor of the city Zandile Gumede and Councillor Mondli Mthembu.

⁵ Links to Service providers; Accused 4- Mzwandile Dladla, Accused 5- Hlenga Sibisi, Accused 7- Zithulele Mkhize; Accused 9-Bongani Dlomo, Accused 10-Khoboso Dlomo; Accused 12-Prabakaran Pariah; Roles of Sithamone Ponnani- Accused Thirteen; Accused 14- Craig Ponnani are unknown to the court but unnecessary for this purpose.

⁶ Accused 15-Mondli Mthembu- City Councillor and the Executive City Mayor- Zandile Gumede. Accused 19 is Umvuyo Holdings, Accused 20 is Mthotozisi Nojiyeza, accused 21 is Bhokokwakhe Phewa and Accused 22 is Sduduzo Khuzwayo.

⁷ Compiled prior to the serving of the Indictment.

⁸ Exhibit EEE

⁹ As per the indictment

[12] Robert Abbu was heavily implicated in criminal wrong-doing within the SCM of the Municipality even before the DSW tender fraud took place. The CIU had conducted an investigation into the “Orange Bag Corruption” matter which pre-dated the DSW matter, indeed the wrong-doing in the matter appears to have commenced prior even to the appointment of the Applicant as city Manager. Abbu’s immediate line senior, one Rampersad began drafting a notice of intention to suspend and informed the Applicant of same. Although the Applicant had agreed to this suspension, he later recanted and instructed Rampersad not to suspend Abbu but to transfer him¹⁰.

[13] He was seconded to work under the Applicant and reported directly to the City Manager, he no longer had to submit proposals or work to Rampersad for approval, instead they went directly to the Applicant. He was assigned to a brand-new post outside of any ordinary post within the municipality, he became the ‘Head of Special Projects.’¹¹ When questioned about this unusual turn of events, the Applicant informed the Deputy city Manager of Trading, one Philemon Mashoko that “he [the Applicant] was instructed to do this”, that the letter had been drafted by someone else¹² and that he had been “instructed politically” to let Abbu head up special projects.

[14] Investigations in the IFS report reveal that Abbu and Ngcobo are central to the manipulation of the DSW processes in favour of service providers aligned to the Applicant and senior public office bearers such as Mayor Gumede and Councillor Mthembu. As a result of Abbu’s new position and refined reporting structure he along with Sandile Ngcobo a fellow employee and accused two they were able to manipulate tender processes in favour of those service providers who were to benefit from the award.

[15] Abbu was in charge of the renewal of the DSW refuse collection tender process. He failed to put in place processes to ensure the timeous implementation of a complete and proper tender process to take place. As a result the tender process had to be expedited in terms of an ‘emergency’ section 36 tender process or emergency process where a full tender process was not followed and some safeguards, checks and balances are not followed. The original tender award is thus referred to as being for the interim provision of refuse collecting services etc.

[16] Service providers were appointed and the amount of the tender has escalated from approximately 60 million rand to in excess of 320 million rand. Further investigation has revealed corrupt payments made by the service providers to municipal officials and public office bearers and renovations done to properties of some of the accused by the service providers. These payments and services at times being paid to family of the employees and public office bearers and are in the nature of the payment of a corrupt benefit.

¹⁰ Exhibit GGG, Affidavit of Saunders and see LS 2 of exhibit GGG.

¹¹ Supra LS 3-Page 4 and page 6

¹² Supra page 6, 7, 11

[17] Furthermore, as Colonel Mphaki told the court, cell-phone tracking of calls between the service providers in and around the time of the awarding of the tender show a large mesh of calls taking place between Gumede, the then mayor, Nzuza the Applicant, councillor Mondli Mthembu, Abbu and Sandile Ngcobo the municipal managers and the four service providers. This was not denied by the Applicant's counsel during cross examination it being suggested that the large number of calls was due to the high-profile of the matter and the urgency required to resolve the problems of refuse collection due to service delivery processes¹³. This needs to be juxtaposed against the report compiled by Saunders in the IFS report when he deals with the cell-Phone records of those involved;

‘analysis of these records indicates that at all times Nzuza and Bagcinile [his wife-now accused 18] when material decisions were being made in respect of the preparation of tender documents and related processes, Nzuza and Bagcinile were in contact with Ngcobo, Abbu and the service providers that were ultimately awarded the DSW contract, prior to these service providers being invited to submit the tenders’

[18] Similarly as the City Manager is the Accounting Officer and as he acknowledged an expert on compliance legislation and in particular the PFMA this suggestion in cross examination needs to be examined in accordance with the relevant legislation. As manager of the financial administration of the municipality, the municipal manager is responsible for the revenue¹⁴ and expenditure management of the municipality. The municipal manager is compelled to report to the speaker of the council any interference by a councillor outside of his or her duties in the financial affairs of the municipality or in the responsibilities of the board of directors of the municipality¹⁵. Councillors break the law and can be charged criminally for interfering with the SCM Process.

[19] A huge responsibility assigned to the municipal manager is the implementation of the supply chain management policy of the municipality, which responsibility may not be impeded by any person¹⁶. The municipal manager must take all reasonable steps to ensure that proper mechanisms are in place to minimize the likelihood of fraud, corruption, favouritism and unfair and irregular practices¹⁷. As the guide to Municipal managers authorised by Treasury States;

“Councillors need to fully understand their oversight responsibilities to be effective in their role. Given the importance of this oversight role, both the Municipal Systems Act

¹³ Exhibit GGG [79] on page 22

¹⁴ S 64 MFMA

¹⁵ S 103 MFMA

¹⁶ Sections 115(1)(a) and (2) MFMA

¹⁷ S 32(1)(b) MFMA. 32(4) MFMA and S115 (1)(b) MFMA.

and the MFMA protect councillors' policy-making role by separating it from the implementation role of officials.¹⁸”

[20] The suggestion by Senior Counsel to the investigating officer of this kind of communication being normal due to the prevailing circumstances in Durban at the time also needs to be seen in this context where office bearers are expressly forbidden from interfering with SCM issues.

[21] The Applicant was also implicated initially as having contravened various provisions of the Municipal Financial Management Act [MFMA] in respect of the DSW tenders but had told the IFS investigators that he had performed these contraventions under duress from the Mayor Gumede and Councillor Mthembu.

[22] This caused the following unusual and undesirable result- Nzuza was the Accounting Officer and Mayor Gumede was the head of the Executive committee [EXCO] of which Mthembu was a member and they were all implicated yet they were the same persons or bodies they would ordinarily be required to study and implement the report.

[23] Mbuso Ngcobo as head of the CIIU was statutorily obliged to report the matter to the South African Police Services [SAPS] and he duly did without being influenced or asked to do so by any individual or organization¹⁹, as such he the registered complainant on the docket²⁰.

[24] Colonel Mphaki was assigned to investigate the matter and shortly thereafter it became known that the matter was being investigated, the head of the CIIU Ngcobo came under pressure from the Municipal Public Accounts Committee [MPAC] to present the IFS report to them. This would have meant that various councillors²¹ who were implicated in the report would have become aware of the matters against them. At this stage Mphaki did not want the report prematurely disclosed as it might compromise the investigation.

[25] The Applicant although not shown the full contents of the report was fully briefed by Ngcobo on the contents of the report and he was fully appraised of the contents of the report. Indeed, the Applicant when he testified confirmed that he knew in detail of the report and was assisting in the uncovering of the fraud and corruption and that he had worked with the CIIU and the Investigating Officer in the investigation.

¹⁸ CFO Handbook for Municipalities – Part I

¹⁹ Section 34 of the Prevention and Combatting of Corrupt Activities Act, 2012

²⁰ Exactly who the complainant is and whose interests are served in the deciding of this application is explored later in the judgment.

²¹ At these stage five councillors are now charges as accused 15,16 and 20-22.

[26] The State maintain that at all times from the release to them of the IFS report that the Applicant was an “accomplice” witness who they envisaged might give evidence at any subsequent trial in accordance with the provisions of section 204²² of the Criminal Procedure Act. Indeed, this becomes an important aspect in determining the credibility of the Applicant when he finally gave evidence in this matter.

[27] Finally, on the 30th day of April 2019 Accused one and two, the two managers Abbu and Ngcobo were arrested along with 11 other accused or entities who became accused one to thirteen and appeared in the specialised Commercial Crime Court. They were all

²² 204 “Incriminating evidence by witness for prosecution”204 (1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor—(a) The court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness—(i) that he is obliged to give evidence at the proceedings in question;(ii) That questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;(iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;(iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and (b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him—(a) such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and(b) The court shall cause such discharge to be entered on the record of the proceedings in question.(3) The discharge referred to in subsection (2) shall be of no legal force or effect if it is given at preparatory examination proceedings and the witness concerned does not at any trial arising out of such preparatory examination, answer, in the opinion of the court, frankly and honestly all questions put to him at such trial, whether by the prosecution, the accused or the court.(4) (a) Where a witness gives evidence under this section and is not discharged from prosecution in respect of the offence in question, such evidence shall not be admissible in evidence against him at any trial in respect of such offence or any offence in respect of which a verdict of guilty is competent upon a charge relating to such offence.(b) The provisions of this subsection shall not apply with reference to a witness who is prosecuted for perjury arising from the giving of the evidence in question, or for a contravention of section 319 (3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).

released on bail. Six weeks later Accused fourteen to sixteen were arrested, this included the Mayor and Councillor Mthembu.

[28] Ten months later the State believing the Applicant was no longer co-operating, in fact believed he was assisting the other accused, abandoned the idea of using him as an accomplice witness and arrested him on the 10th March 2020. He was released on bail with certain conditions that were agreed upon attached to his release. Seven months later his wife was arrested and then three persons and an entity were added on the 18th March 2021. The three accused arrested on the 18th March 2021 are accused 20-22, all three are elected ward councillors' of the eThekweni Municipality.²³

[29]

The Applicant's Original Bail Application:

The accused's bail application due to the amounts of money involved²⁴ fell within the ambit of Schedule 5 of the CPA and as a consequence fell to be decided in terms of section 60 (1) (b) of the Act.

Notwithstanding, any provision of this Act, where an accused is charged with an offence referred to-

“In Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfied the court that the interests of justice permit his or her release.”

[30] The Applicant was thus required to:

“... satisfy a magistrate that the 'interests of justice' permit his or her release. It clearly places an *onus* upon the accused to adduce evidence. However, apart from that, the exercise to determine whether bail should be granted is no different to that provided for in sections 60(4)-(9) or required by s 35(1)(f). **It is clear that an accused on a Schedule 5 offence will be granted bail if he or she can show, merely, that the interests of justice permit such grant.**²⁵ [my emphasis]

What had to be satisfied before the Applicant could be released was the following:

S60 (4) (a) - (e) reads: –

²³ Mthokosisi Nojiyeza- Accused 20, Bhelokwakhe Phewa-Accused 21 and Sduduzo Khuzwayo-Accused 22

²⁴ Section 51 (2) of Act 105 of 1997 [prescribed minimum sentence of 15 years imprisonment] and schedule 5 of act 51 of 1977.

²⁵ S v. Vermaas 1996(1) SACR 528 (T); S v. Tshabalala 1998(2) SACR 259 (C) and Siwela v S (2000)(1) ALL S. A. 389 (W). in Dlamini; Kriegler J:

- (a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or
- (b) Where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or
- (c) Where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
- (d) Where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;
- (e) Where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.²⁶

[31] In order to satisfy this court that the interests of justice permitted his release he deposed to an affidavit, his legal team and the Applicant agreed to certain conditions being attached to his release. In his affidavit the Applicant stated that he was the Municipal Manager for Durban when he became acquainted with copies of various forensic reports related to allegation of fraud, corruption and maladministration in connection with the awarding of two contracts of the eThekweni municipality, the manufacturing and distribution of Orange recycling bags and the construction of urine diversion toilets in eThekweni²⁷.

[32] As the Municipal Manager he was legally obliged to implement disciplinary proceedings against various officials and political office bearers as a result. As a consequence, he has been in constant communication with and provided full support and assistance to the Hawks National and Clean Audit System, [HAWKS]

[33] He is now 57, lives at Zimbali Resort with three adult children. At the time of the bail application and indeed till today is employed as the city Manager and earns R300 000-00 per month. He is extremely well educated holding amongst others an MBA from UKZN. He currently is on special leave but he is still in receipt of his salary of 3.6 Million rand per annum.

In [9] of his affidavit at first appearance he avers:

- 9.1 At the outset, I am the one who lodged complaints with the police.
- 9.2 I have always cooperated with the investigators²⁸
- 9.3 This cooperation and interaction with investigators has taken place over a period amounting to almost a year notwithstanding several implications by the investigators that

²⁶ Criminal Procedure Act, Act 51 of 1977

²⁷ The "Orange bag corruption and the toilets matter" do not form part of the DSW tender fraud, it pre-dates the Applicants appointment as City Manager, it was never explained in his initial application the significance of these matters other than it seems to be a reason advanced by the Applicant that he might have been charged.

²⁸ Shortened- see affidavit of Applicant in bail application dd 10 March 2020.

I was implicated. Not once did I react to such implications in a manner that would suggest any obstruction to the investigations.....

[34] The court then concluded that, in agreement with the Applicant and the State that the interests of justice permitted the Applicant's release and he having discharged the onus bail was granted, fixed and paid in the amount of R50 000 with certain conditions specifically designed to satisfy the States concerns in respect of the integrity of the investigation, the safety of their witnesses and to curb any further malfeasance within the municipality's SCM or differently put to prevent the further commission of crime or non-adherence to tender protocols.

[35] The conditions that later came to be contentious are contained in [7] of the bail conditions of the 10th March: -

7. The Accused may not communicate in any way; whether directly or indirectly with the witnesses relating to the audit trail of this DSW Tender-See Annexure A.

8. Refrain from accessing information (documents or reports from any official of the Municipality relating to this investigation.

9. Refrain from involvement with the disciplinary processes of officials charged in relation to this investigation.

10. Not to access information relating to this investigation.

11. Not to participate directly or influence in any tender process during the duration of this investigation. His powers as Accounting officer in relation to Tender processes must be delegated in terms of: Section 79 read with Section 77, section 10 (2) and section 106 of MFMA²⁹, 56 of 2003.

[36] It is common cause that the Applicant was initially suspended by the Municipality after his arrest, no disciplinary proceedings were completed or actually commenced against him despite the IFS report implicating him and his own reaction that he deliberately flouted SCM regulations and procedures but that at the time he was acting under duress from two members of EXCO – The Mayor and Mthembu, accused 15 and 16.

[37] This is an unfortunate recurring theme in this matter, no disciplinary proceedings in respect of any accused in this matter has been completed with the result that as Colonel Mphaki put it, those responsible for the fraud remain on the crime scene. I will return to this in the ruling, it is an obvious failure of oversight by those involved and those legally obliged to protect the municipality's fiscus.

²⁹ Municipal Finance Management Act, Act 56 of 2003.

[38] After the lapse of his period of suspension the Applicant then took special leave until the 25th of September 2020. The Applicant returned to work at the Municipality as City Manager on the 28th September 2020 until he was re-arrested on the 16th November 2020 after the State had successfully, ex-parte, applied for a warrant for the arrest of the Applicant for breach of his bail conditions. The printed and digital media reporting fully on the matter including whether or not the Applicant was in breach of the conditions of bail.

[39] The State in the ex-parte application relied on three affidavits and annexures of tender documents and council minutes submitted by the Deputy City Manager, Sipho Cele, Andre Peterson, the Head of Supply Chain Management and the Investigating Officer. During the appearance in court consequent to the issuing of the Warrant of Arrest the investigating Officer testified before this court and detailed the events that led to the State applying for the Warrant of Arrest against the Applicant.

[40] Prior to him doing so Mr. Madonsela SC in an effort to limit the lis between the State and the Applicant had set out that the Applicant had returned to work, that he had tried to take steps to ensure that he did not breach the conditions but that as the City Manager he was, in law required to perform certain tasks that he could not further delegate. As such the bail conditions were ultra-vires and unenforceable notwithstanding the agreement between the State and the Applicant at the time of his arrest.

[41] Immediately after the lunch adjournment with the Investigating Officer still testifying proceedings were halted, the State withdrew their application on the basis that the Applicant had agreed to a new set of conditions that the State were comfortable with. The matter was then postponed with the following conditions attached which effectively prevented the Applicant from performing the functions of the City Manager:

9. The accused shall refrain from involvement with disciplinary processes completely until this condition is reviewed by this court on 10 December 2020;

11.(A) The accused shall, notwithstanding the provisions of sections 78 (8) 79 (1) (c), 79 (3) (e) and 79 (4) of the MFMA, (Act 56 of 2003) and Municipal Supply Chain Regulations, (of 30 May 2005) in particular Regulation 5, not participate directly or indirectly in any or all Supply Chain Management processes, irrespective of the amount of the tender award value of the tender concerned.

[42] On the 10th December 2020 the Applicant gave notice that he would be bringing an application for the amendment of the bail conditions dated 16 November 2020. The matter was postponed till the 20th day of January 2021 where the Applicant sought an order as envisaged in the notice of motion.

[43]

The Hearing

The hearing was a lengthy affair, the Applicant testified and during the course of his evidence reference was made to many different statutes and regulations pertaining to his employment. Thereafter the investigating Officer Colonel Mphaki testified and the State also handed in the affidavits of three employees of the city Andre Peterson the head of SCM, Mbuso Ngcobo head of CIU and Leo Saunders, a director of IFS who were tasked with investigating and uncovered the DSW fraud. Many documents were handed in and I will not refer to all of them but where I do, I will reference them below.

[44] Prior to proceeding the Applicant was informed by the court that these proceedings may be admissible during his trial³⁰ and that he had the right not to answer any question that may incriminate him in the commission of an offence and that if he waived that right these proceedings may be produced and be admissible during his trial.

[45]

Applicant's and Colonel Mphaki's Evidence

The Applicant's evidence is simple, he is the City Manager, he wants to go back to work as he believes some of the apparent problems with the city finances could and would be positively addressed by him. Although he was suspended by effluxion of time he can no longer legally be suspended. If the city wishes to discipline him, they can do so but they cannot remove him from his employment as the City Manager while this process is undertaken. He wishes to exercise his right to work as it is integral to his dignity.

[46] He is the best person for the job and he should be allowed to return to work where he can turn around the financial difficulties the city is in. He believes that the conditions imposed are as suggested by counsel, despite the defence being involved in them being set at first appearance is as argued ultra vires as it inter alia flouts Regulation 5 (2) of the SCM Regulations, in that the regulations prohibit delegation of tenders with a value in excess of ten million rand.

[47] Similarly his involvement in disciplinary matters is limited by Regulation 5 of the Disciplinary Code for Senior Managers.³¹ The scope for him to effect any influence over disciplinaries is very limited and can be satisfied by a condition that he not involve himself in disciplinaries of the five named employees. The two witnesses testified on the following issues that became relevant in this application.

³⁰ **S v SEJAPHALE 2000(1) SACR 603(T)** S60(11B) (a-d)

³¹ Exhibit MMM

[48]

Accomplice or Investigator

In his oral evidence the Applicant does not dispute that the DSW Fraud occurred, he agrees it did, he was part of those who uncovered it, he was assisting in the uncovering and charging of the culprits, he is innocent of any corruption or fraud, he maintains that he was a part of the group that exposed the fraud and was assisting the investigation team at all times. He is innocent. He was at no time made aware he was an accomplice witness or a witness that would be giving evidence at the trial of those already arrested as a witness seeking indemnity in terms of section 204 of the CPA.

[49]

On this point the Applicant was manifestly dishonest in his assertions in this regard. When one considers the evidence led on this point the unerring conclusion is that when he finally gave evidence in this application, he chose to mislead the court. There are a number of irrefutable reasons for saying so: -

1. The initial IFS report implicated him and he was not arrested as the State considered whether or not to use him as an accomplice witness.
2. He admitted assisting in the scheme under duress and political pressure from the Mayor and Mthembu, Accused 15 and 16.
3. He was fully appraised of the report and its contents and the report including his apparent involvement and that's the reason he was initially approached to be an accomplice witness³².
4. In the statement he deposed to the police there is a four-page preamble³³ to the statement that he eventually made that is signed separate to the statement made, all pages are initialed and the end is signed by the Applicant. It is inconceivable that the highly intelligent, well-educated and articulate Applicant could have been unaware that he was signing a statement made other than in the expectation of being an accomplice witness.
5. In his discussions with Saunders there can be no misunderstanding, he had breached SCM laws, he acknowledged this and had made himself a party to the crime, even if under duress.
6. Colonel Mphaki testified that there was no illusion present, he explained rather bluntly to the Applicant that he was his section 204 witness but that he did not trust him, this evidence was not challenged under cross-examination by counsel.
7. The lie is completely exposed when these five observations when one reads his 'bail' affidavit at his first appearance, in 9.16.3 "this cooperation was provided notwithstanding several implications by the investigators that I was implicated. Not once did I react to such implications in a manner that would suggest any obstruction to the investigation.

[50]

On any analysis, even one where one tries to be favourable to the accused, there can be no other conclusion other than at the time, he gave evidence under oath the Applicant deliberately misled the court, he knew the State saw him as a person involved in the

³² Leo Saunders affidavit-exhibit GGG [14-20]

³³ Exhibit 'ccc'

crime and not merely a person who uncovered it and he chose to disavow this, his lie was exposed. This mendacity must be factored into any decision in respect of his undertaking not to interfere with the witnesses of the conduct of the State case.

[51] **The Failure to Discipline**

The Applicant gave viva-voce evidence in connection with the failure of the City to complete the disciplinary processes of accused one and accused two, being the Senior managers Robert Abbu and Sandile Gumede. It is apparent from the position that the Applicant held, that the duty to ensure that this process was conducted properly and completed in accordance with the legislative and procedural prescripts, fell upon the Applicant.

[52] The manner in which the City overseen by the Applicant as City Manager approached the workplace disciplinary processes of Abbu and Ngcobo is almost unfathomable, it is illogical and appears to be a dereliction of duty both by the office of the City manager and Council and/or the Executive Committee [EXCO] of the council. It suggests very strongly that Abbu and Ngcobo were protected.

[53] Unfortunately, the same statement can be repeated in its entirety in respect of the events that occurred following the arrest of the Applicant in this matter. Perhaps even worse in this instance because in full awareness of the Applicant's involvement as set out in the IFS report replete with cogent of examples of MFMA breaches and admissions by the Applicant the leadership of the city, those armed with the duty of oversight over the use of public funds actually made a positive decision not to institute workplace discipline against him.

[54] It is common cause that no disciplinary process has been successfully completed in respect of any person charged on the DSW fraud matter or related matters. This is so despite the fact that the Applicant was one of those responsible for ensuring that Accused one and two in the DSW matter, Abbu and Ngcobo were disciplined for their roles.

[55] In Ngcobo's instance despite apparently³⁴ compelling evidence that Gumede had been rewarded with a Jaguar motor-vehicle and a house paid for by service providers no disciplinary process was completed and he successfully approached the labour court for reinstatement of his position within SCM workplace. The same came to pass with the Applicant, no disciplinary processes were in fact completed despite the existence of the IFS report implicating the Applicant including his explanation of duress which in the circumstances of his position as City Manager is in itself a damning indictment of misconduct.

³⁴ Colonel Mphaki's viva-voce evidence

[56] In respect of employment law and financial misconduct issues within municipalities, a highly regulated compliance environment exists with demanding procedural and reporting requirements. In addition to the PFMA there are regulations governing financial misconduct procedures and criminal proceedings.³⁵ With regard to oversight of senior officials and public office bearers in connection with public funds legislation provides and, in fact, demands oversight to be exercised by the City Manager and/or the Executive Committee of council. In respect of the Senior managers the Applicant was required to comply with the regulations and time frames including the very limited periods that an employee may be suspended.³⁶

[57] The Applicant laid the blame on the SAPS for the failure to discipline, this was so because the head of the CIU had informed him that the police had removed the evidence from the municipal offices and he had no way of accessing this information. He conceded and indeed it is the legal position that he was the City Manager, by virtue of that position he bore an obligation to ensure that the discipline of senior management employees was conducted in terms of the prevailing prescripts. He failed to do so, the affidavit of Leo Saunders of IFS is damning in this regard, the report was discussed in detail and it is abundantly clear that even on his version that he had assisted in the investigation and would have known what the impugned conduct was.

[58] Furthermore if there was an impasse in the obtaining information then there would be a record of request, either by message or in writing by the Applicant either to the police or to IFS. The fact that there is no correspondence or indication thereof to anyone is a strong indicator that the Applicant made no effort whatsoever to discipline either Abbu or Ngcobo. This would be the second instance that the Applicant has protected Abbu, the first being when Abbu's line senior Rampersad had wanted to discipline accused one in connection with the "orange bag" corruption matter and again during the DSW tender fraud.

[59] Sandile Ngcobo is heavily implicated in the matter, there are allegations in the public domain and criminal charges have been laid in respect of corrupt benefits being paid to him in the form of allegations a service provider buying him a Jaguar motor-vehicle and paying amounts over to an attorney to secure the purchase of a house. Andre Petersen's affidavit³⁷ sets bare the failure of the City Manager and Council to ensure misconduct

³⁵ Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings -gazette 37682 dd 30 may 2014-Exhibit GG

³⁶ "Government: Disciplinary Regulations for Senior Managers, 2010"

³⁷ Exhibit DDD Pages 1-8

proceedings notwithstanding the fact that the municipality were in receipt of the full police docket.

[60] Despite the police giving over the docket to the Applicant and the municipality no disciplinary process has been concluded. Indeed as I understand it Ngcobo is now back working within the SCM at the municipality. There is a legal opinion filed in respect of one Bheki Khathi³⁸ expressing caution about instituting any disciplinary action against Ngcobo which has no reference whatsoever to what the law is, it is as a legal opinion, with respect almost worthless.

[61] There seems to be a predilection in council when confronted with misconduct in the workplace to refer the matter away from their own legal department in order to obtain opinions from counsel at great expense both in money and time³⁹.

[62] When one is confronted by exacting time frames to continually delay matters that actually in the main deal with whether or not SCM protocols have been observed seem to me to be both cost ineffective and miss the purpose of a disciplinary hearing in a workplace. It is not to prove the guilt of the accused in the sense that he committed a criminal offence, merely to prove misconduct in an employment sense.

[63] With respect to the Applicant his failure to discipline cannot be explained away with reference to seeking opinions, it obfuscates he was under a clear unambiguous duty to discipline them, he knew as he had investigated them, he knew they had assisted the mayor and the service providers as he was fully aware of the wrongdoing. With respect armed with such personal knowledge and then to abdicate his legal responsibility to ensure discipline was an abandonment of his responsibility as the city Manager.

[64] The two issues (disciplinary action and criminal case) are completely separate even though they may stem from the same misconduct. The disciplinary enquiry only has to prove that the employee is guilty on a balance of probabilities. This is a much easier test than in a criminal case. In a criminal court, the State prosecutes an individual for a criminal offence and has to prove beyond a reasonable doubt that the person is guilty – which is much harder to prove. Essentially, the outcome of the criminal procedure does not have an effect

³⁸ Exhibit GGG LS 7 Opinion by Bheki Khathi

³⁹ Applicant engaged services of senior counsel on prospects of success in an internal disciplinary hearing of managers-at great cost an internal disciplinary hearing is delayed. There seems to be a conflation within the municipality of criminal trials and disciplinary hearings-not only are the tests and onuses different but the actual nature of the misconduct need not be fraudulent for a finding of serious misconduct to be made. These basic legal concepts seem to be deliberately obfuscated in the misconduct space within the municipality leading to a paralysis of discipline at the higher levels.

on the result of the disciplinary enquiry and vice versa. They remain parallel processes independent of each other.

[65] As the Applicant told the court, he was assisting in the investigation, assisting the police and IFS and therefore he would have known exactly the role of Abbu and Ngcobo and his assertion that he was unable to discipline them due to no access to information is palpably false.

[66] The same scenario has occurred with the Applicant, no disciplinary process has been formally instituted against him by his employer, the council of the eThekweni Municipality. This is so despite the report of Saunders and the evidence uncovered in the IFS report, the Applicants confession that he broke SCM protocols and procedures as a result of pressure from the Mayor and Councillor Mthembu. The head of CIIU'S investigation report and the advice that the misconduct hearings could and should take place within the time-frames required in terms of the legislation was ignored.

[67] The EXCO and Council have refused to discipline the Applicant and it appears that by effluxion of time he can no longer be suspended. This might not mean that the employer is not allowed to have the employee out of the workplace. Cele J sitting in the Labour Court of South Africa in the matter between Sandile Ngcobo v eThekweni Municipality⁴⁰ where the learned judge answered the following question; “whether there is any provision in terms of which the granting of special leave can be lawfully justified⁴¹?”

Clause 5.3 of the South African Local Government Bargaining Council Collective Agreement reads:

‘In exceptional circumstances special leave on full salary may be granted by the Municipal Manager beyond the maximum of 10 days per annum’

The learned judge concluded at [9] “ Clause 5.3 is clearly a stand-alone provision....paragraph 5.3 creates an exceptional circumstance under which an employee may be placed on Special Leave as distinct from being placed on special leave in terms of clauses 5.1 and 5.2. [these clauses provide for special leave but for a period no longer than 10 days]

Then in [10] the question is whether exceptional circumstances existed to justify the municipal manager having recourse to clause 5.3. ‘they are founded in the Applicant being criminally charged on two separate occasions with serious criminal matters.....it cannot reasonably said

⁴⁰ Case number: D1439/2019 delivered on 20 February 2020

⁴¹ Supra [6]

that the action to place the Applicant on special leave was unlawful. Clause 5.3 is the provision in terms of which the granting of special leave can be lawfully justified.’

[68] Whereas this arrangement may not apply to the Applicant as he is appointed in terms of section 57 of the Municipal Systems Act⁴² it is a strong indicator that where persons are charged with serious criminal offences such as corruption involving public funds and they serve at the highest level this behaviour should be treated with the utmost seriousness and where necessary the charged individual removed from the “scene of the crime” while the investigation and disciplinary processes are finalised.

[69] The supine manner in which those charged with discipline, both within the municipality and EXCO’s oversight legal space, has negatively impacted upon the dynamics of this matter, it is a constant thread, for whatever reason oversight and discipline is not properly exercised placing at risk not only the proper investigation of the matter but SCM expenditure.

[70] **THE MORAR MATTER**

The Applicant confirmed that he has never been suspended in respect of the DSW matter, he was however suspended in respect of the Morar appointment. Mbuso Ngcobo the Head of CIIU was made aware that the initial forensic investigation indicated that the MORAR appointment was effected by the Applicant and Morar paid 58 Million rand without complying with the policies and procedures of SCM of the eThekweni municipality.

[71] The investigators since February 2020 when the Applicant was prior to his arrest still the City Manager have tried to get documents from the office of the City Manager in connection with this appointment⁴³ without success. Indeed, almost surreally there seems to be no supporting documentation emanating from the office of the city Manager in connection with this appointment.

[72] Basic documentation such as the copies of the proposal, appointment letter, invoices from the service provider justifying payment, SCM proposals and no e-mail

⁴² Act 32 of 2000.

⁴³ Exhibit FFF- See trailing mails and list of documents required.

communication are all missing. It is a bizarre situation and one that has been escalated to Provincial Treasury who are now investigating.

[73] Tellingly at the time of the requests made to the PA of the Applicant he was still employed. It is deeply disturbing that 58 million rand can be paid out without a paper trail in the municipality or e-mail record. It, with respect, does not add up. The Applicant's reliance on not being able to furnish the documents to the treasury KZN investigators as he was precluded from doing so due to the bail conditions cannot hide the fact that when the original investigation was ongoing the Applicant was at work, was the City Manager but did not supply these documents when he had ample opportunity to do so. 58 Million rand seems to have disappeared to Morar with little or no documentation to account for same.

[74] An examination of a timeline reveals the following:

1. The head of CIU, Mbuso Ngcobo⁴⁴ engaged Nexus Forensic Services PTY (Ltd) [NEXUS], a forensic auditing firm to conduct a forensic investigation into the appointment of a service provider, MORAR Incorporated pertaining to irregularities in their appointment.
2. At this time the Applicant was the city Manager.
3. At the time of the appointment of MORAR to investigate the Revenue Management system [RMS] he was the City manager.
4. Investigation⁴⁵ reveals that he appears to have been instrumental in the appointment of MORAR.
5. This MORAR investigation included the investigation of some of those that had evidence of his wrongdoing in the DSW Fraud.
6. This investigation contemplated possible disciplinary proceedings being instituted against some of the witnesses.
7. Initial investigations revealed that the appointment was made by the Applicant without following SCM policies and procedures.
8. Despite repeated requests by NEXUS between the office of the City manager and NEXUS between 26th February and 12th March 2020 no supporting documentation pertaining to the appointment was ever forwarded from the city manager's office.
9. The Applicant was only arrested on the 10th of March 2020.
10. There is no coherent explanation from the Applicant, if everything was above board why he did not merely supply the supporting documentation and/or any electronic trail of the information sought when this information was requested.
11. EXCO eThekweni escalated the matter by resolution to KZN Provincial Treasury and another forensic auditing firm, known as The FIRM was appointed.
12. The FIRM subsequently contacted the Applicant who informed them that as an accused person his bail conditions prevented him from being of assistance.
13. The Applicant under cross-examination denied that he made the appointment unilaterally by himself and was unaware, when it was put to him by Senior State

⁴⁴ Exhibit GGG

⁴⁵ Exhibit GGG [6] of the affidavit of Mbuso Ngcobo.

Advocate Ms. Siraram that some 40 million rand was paid over to MORAR before they had done any work in terms of the contract.

[75] When being questioned the Applicant agreed it was highly unusual that no documents underpinning the appointment of MORAR could be found, in the highly regulated SCM space within public entities that a 58 Million rand tender seems to have no documentation underpinning the appointment and payment of public funds is, with respect both bizarre and disturbing. The explanation by the Applicant that he could not help as he was precluded to do so is, with respect to him, also disingenuous.

[76] He was the city manager when the documentation was requested, prima facie it pertained to a massive breach of the SCM protocols and procedures that would have warranted his immediate intervention, indeed he could merely have instructed his PA to release the documents in accordance with the Head of CIIU directive that all parties are to cooperate with the NEXUS investigation⁴⁶. If the appointment was above Board he would have instantly been vindicated had he in February and March with the full infrastructure of the municipality at his fingertips just handed over the documents to NEXUS.

[77] At the time the Applicant knew he was being treated by SAPS as an accomplice in the DSW matter, in light of this the allegation that he had illegally or at best flouted SCM protocols was a serious one. That being so he had ample opportunity to forward the investigators the documentation required that would have vindicated the appointment and its compliance but he chose not to do so.

[78] Instead there appears to be no or very little supporting documentation whatsoever for the appointment of MORAR or for their payment within the municipality's records. As has been pointed out by the State he is not the custodian of these documents and the fact that he had the opportunity to supply the documents before his arrest and to advise the FIRM investigators thereafter where they could find them at the municipality. It was easy for him to comply.

[79] The fact that there is almost no supporting documentation in respect of a 58 Million rand appointment and spend from the fiscus of the municipality is inexplicable, surely a cause for concern and proper oversight and consequence management by those responsible.

⁴⁶ Exhibit FFF Letter written by head-CIIU dd 21 February 2020 as supplied to Applicant's PA.

[80]

HLENGA SIBISI

Hlenga Sibisi is accused five in this matter. Colonel Mphaki told the court that a company called Uhlanga, was controlled by Sibisi. Sibisi was arrested on the 30th of April 2019 some eleven months before the Applicant was arrested on the 20th March 2020. Coincidentally or perhaps not coincidentally six days before the Applicant's arrest Uhlanga was awarded a nineteen million tender.

[81]

The Applicant who had even on his own version a detailed knowledge of the DSW matter knew that Sibisi was charged in the DSW matter for his conduct on behalf of the entity Ilanga la Mahlase, [Accused Three] despite the fact that he was not the director of the entity. A superficial investigation by him revealed that Sibisi, Accused number five was a director of Uhlanga and therefore he and his company would automatically be blacklisted because of his being charged as accused number 5 in the DSW matter. He was aware that Sibisi and Dladla for that matter had been charged in the related "jaguar" matters involving Sandile Ngcobo.

[82]

This would mean that Sibisi and the three companies that he was a director of would be blacklisted and therefore ineligible to receive municipal contracts during this time. Sibisi resigned from all three of the companies and in the case of Uhlanga he was replaced as a director as per the CIPC documents by the sister of accused number three Mzwandile Dladla. As such if this transaction was legitimate Uhlanga had the right to be removed from the blacklist which duly took place.

[83]

It is not in dispute that the overall responsibility for oversight rests with the City Manager. He was acutely aware of the various links that Dladla and Sibisi to alleged corruption in the DSW matter and pay-offs to council employees. The bear minimum of investigation by the Investigating Officer revealed that the removal of Sibisi as the director was in all likelihood a transparent ruse to get around being blacklisted, in fact transparent fronting.

[84]

The current registered director is the sister of accused three, Dladla however all the particulars in the CIPC documents and addresses are that of Sibisi, all the contact details, telephone numbers and persons to contact in respect of the business is Sibisi. All council communication lines go directly to Sibisi in respect of the entity bidding for work or when invited to tender.

[85] This is overwhelmingly likely to be a scheme to secure removal from the blacklist. With the utmost respect to counsel it is not nonsensical in this kind of situation to draw as a likely inference that Sibisi remained in control of the company, it with respect screams that it is a front. Indeed, the Applicant conceded that a modicum of investigation would have revealed a situation that required a more in-depth investigation. No reasonable person exposed to the type of fraud and corruption and indeed involved in the investigation such as the Applicant testified he was could have trusted the bona-fides of Sibisi or Dlodla for that matter.

[86] Noting that both Dlodla and Sibisi have been charged with making large corrupt payments to Sandile Ngcobo in respect of the Jaguar motor-vehicle and property purchase. It, with respect makes no sense to do no checking, it goes beyond merely failing to do proper oversight it is with respect at least grossly negligent non-performance of one's duty.

[87] **THE WITNESSES**

Prior to the completion of this Ruling the indictment was served on all the accused in the DSW matter.⁴⁷ In this indictment seven witnesses are listed but the State has informed the court that there may be others whose names have not been disclosed. That corresponds with the evidence of the Investigating Officer Colonel Mphaki.

[88] The original condition imposed in respect of witnesses were:

“7. The Accused may not communicate in any way; whether directly or indirectly with the witnesses relating to the audit trail of this DSW Tender

The suggested amendment affecting the witnesses were⁴⁸ :

1. That Condition 7 should read as follows:

1.1 The accused may not communicate in any way, whether directly or indirectly, with the following witnesses regarding any matter pertaining to the Audit trail of this DSW tender, (namely the DSW tender forming the subject matter of the criminal charges against the accused.)

1.1.1 Krish Kumar

1.1.2 Sipho Cele

1.1.3 Andre Peterson

1.1.4 Mbuso Ngcobo; and

1.1.5 Raymond Rampersad.

2. That condition 9 should read as follows:

⁴⁷ 23 March 2021, indictment served in S court

⁴⁸ After indictment a full list of witnesses were provided and includes seven employees of the City.

2.1 That the accused may not be directly involved in the disciplinary processes of the identified witnesses, by way of initiating any disciplinary processes of senior officials or any official identified as a witness in this case.

[89] Advocate Madonsela SC has argued that the conditions are too wide and has with respect correctly referred to authority that suggests that the State should list the names of the witnesses that the accused may not communicate with in respect of the DSW matter. Whereas the city Manager is responsible and accountable to the council and to EXCO in respect of serious disciplinary matters involving senior managers the Applicant will not involve himself directly in their disciplinary matters but may have to table the status of investigations involving them at council level.

[90] One must be mindful in this matter that even on the Applicants version as the person who assisted in the investigation of the matter and was therefore fully aware of the IFS report, he was at all times privy to the evidence that implicated the persons involved in the DSW tender. He has never disputed it occurred, it did, but it was not him, he was merely assisting in uncovering the perpetrators of the fraud and corruption.

[91] It seems inconceivable that on his version he was not aware where the fraud was committed, what SCM procedures were flouted and the individuals involved in the investigation of this malfeasance both within council and the investigators of IFS. It is not a case where the Applicant can be said to be totally in the dark about who the witnesses are, or about what evidence they may give against him. This is especially so if one then factors Saunders' of IFS affidavit and the head of CIU, Ngcobo's statement about the Applicant's involvement and admissions of the role he played.

[92] Section 60 (4) (c) provides in respect of witnesses:

“Where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence;”

Senior State Counsel Ms. Siraram referred to the “unreported” decision in *S v Duruwe*⁴⁹ of Roberson J where she said:

⁴⁹ The matter is actually reported in SAFLII as, *Duruwe v S* [2018] ZAECHGHC 136 (19 December 2018) -neutral citation, and can be found under the judgments listed for the Eastern Cape High Court sitting at Grahamstown.[December 2018]

“ I cannot fault this reasoning. It is worth mentioning, as pointed out by Counsel for the State, that s 60 (7) (a) of the CPA provides that in considering whether the ground in s 60 (4) (c) has been established, the court may take into account the fact that an accused is familiar with the identity of the witnesses and the evidence they may bring against him. Section 60 (7) (e) provides that in considering whether the ground in s 60 (4) (c) has been established, the court may take into account how effective bail conditions prohibiting communication between an accused and witnesses are likely to be.

[93] The nub of the matter is actually, in my view, taking into account the position of the Applicant as the City Manager and the authority that he possesses due to his employment is how effective would it be to have conditions saying that he may not communicate with the witnesses about SCM matters pertaining to the DSW tender and/or not be involved directly in any disciplinaries but at the same time signs off on multi-million rand tenders to have the same witnesses investigated, as in the MORAR investigation into RMS.⁵⁰

[94] This is before one factors in the inexplicable lack of compliance of the MORAR contract where little proper documentation appears to be available throughout the municipality. There can be little doubt that despite the claim by the Applicant that he did not know the identity of the witnesses at the Municipality until affidavits were deposed by the Acting City Manager, the head of the CIIU, Mbuso Ngcobo and the Head of SCM Andre Petersen that he by virtue of the IFS Report, his involvement in the investigation and his inside knowledge as an apparent accomplice means that not only does he know the identity of some witnesses but knows exactly the evidence to be brought to trial by them.

[95] Although the letter written by Krish Kumar⁵¹, the Deputy City Manager for finance, often referred to as the City Treasurer has been criticised by counsel for the Applicant as being of limited value as it is not evidence under oath and moreover in the view of the Applicant not an indicator of tension between the Applicant and the City Treasurer but one of cordiality. In the context of the very limited time that the City Manager had been back in the position following his suspension and special leave at the time, I disagree.

[96] Prior to dealing with that issue it is worth remembering that bail proceedings are *sui generis*, the rules are more relaxed than in a trial. Hearsay evidence is admissible in bail proceedings and it may be admitted depending on its reliability. Similarly a letter apparently written by Mr. Kumar to the Mayor of Durban, an individual who forms part of a group required by law to provide oversight by virtue of their position in local government falls to be considered. Its probative value to be measured by taking into account the fact that it is not a statement under oath and the factors surrounding it when deciding its value to these proceedings. There appears

⁵⁰ REVENUE MANAGEMENT SYSTEM

⁵¹ Exhibit ‘UUU’

to be no dispute that it was written by Mr Kumar addressed to the Mayor and copied on to the Deputy-Mayor Belinda Scott⁵².

[97] I disagree on a careful reading of the letter that what is contained in the letter shows a healthy relationship free of stress. It is quite understandably written in a very polite manner as one would expect when the Mayor the political and oversight Head of the City is being addressed by a most senior Treasury official. In context the City manager had been back in the position as City Manager for just a few weeks. Kumar alludes to trying to give effect to the Mayor's instructions to all his DCM's that they work with the Applicant on his return but points out how difficult this in fact is as **the Applicant is conflicted in many of the issues raised.** [my emphasis]

[98] It is not necessary for the purpose of this Ruling but it is worth noting that in respect of the following points raised about certain appointment that the City Manager is obviously conflicted but nonetheless places undue pressure on Kumar.

1. The MORAR Investigation was instituted by him and Finance had major issues with the high amounts being claimed.⁵³
2. In Woodglaze despite Legal at the municipality deeming the expenditure wasteful and possibly fraudulent in the amount of 67 million rand and a CIU investigation underway he places pressure on Kumar to proceed.
3. He was asked under great time pressure to furnish reports that Kumar had no knowledge of.
4. In respect of the use of security vehicles the City Manager's attitude can best be described as threatening as he expresses his concerns about his personal safety despite Kumar merely following the orders of council.

[99] A careful reading of the letter, with respect, indicates that Mr Kumar is actually reaching out for help while the City Manager, the Applicant places intolerable pressure upon him replete with the innuendo of possible discipline being implemented against him. There is conclusive proof in this letter that the Applicant has involved himself in SCM issues which at the time he was specifically prevented from doing so.

[100] Counsel for the Applicant has been scathingly critical of the Investigating Officer in respect of his evidence of the negative psychological effect that the presence of the Applicant in the offices of the city Manager and the effect of him being able to pressurise the witnesses unfairly. Of course Mr. Madonsela SC is correct, Mphaki is not a trained psychologist, he does not conduct clinical examinations or consultations with the witnesses and as such cannot

⁵² Now resigned.

⁵³ It had already been flagged for investigation by CIU who had appointed NEXUS to investigate and report.

and is not trained to definitively make any findings as to the mental health and strain of the witnesses.

[101] He is, however an experienced investigating officer who is in contact with the witnesses and in the perfect position to observe them and their reactions to the environment that they are working in. When he tell the court that some of the witnesses are now reluctant to testify due to circumstances at the municipality and that the psyche of the witnesses is negative then this must be factored in.

[102] The issue also raised its head when the State believing that the Applicant had breached bail conditions by involving himself in the work of the City Manager that was in conflict with his bail conditions applied for a warrant for his arrest. At the time pursuant to advice from “Legal” the Applicant believed the bail conditions were ultra-vires and therefore not binding upon him and he therefore ignored them. When the Acting City Manager Sipho Cele deposed to an affidavit to that effect along with Petersen and Ngcobo this was met with much criticism in the media, some of this criticism being attributed to Councillors serving on EXCO.

[103] This being so despite the fact that these affidavits were deposed to at the behest of the Investigating Officer and their being no real dispute about their factual accuracy, the actual issue was whether or not the conditions were enforceable. The Acting City Manager was severely criticised with members of council being quoted questioning the integrity and bonafides of the Acting City Manager.⁵⁴

[104] This is so, notwithstanding the fact that these councillors should or ought to have been fully aware of the contents of the IFS Report. Alarminglly one of the sources is named as being from within the CIIU, by virtue of that fact that those serving on CIIU had to be aware of the investigations, their outcomes, the MORAR investigation and indeed the Applicant’s admission that he flouted SCM regulations under duress despite his executive position and responsibility. Appraised of this information it is difficult to understand the response at the time other than certain factions within council appear to be unwilling to perform proper oversight. There can be little doubt that those willing to testify in this matter are, quite simply by the nature of the DSW tender fraud’s profile under some pressure.

⁵⁴ The Daily News, 26 November 2020 written by Chris Ndaliso

[105]

THE COMPLAINANT

Whereas the Head of CIU may have lodged the first complaint with SAPS the complainant in essence is the Municipality who govern the city through council resolutions, through EXCO and the office of the Mayor. These bodies or persons are legally obliged to hold the City Management to account for their action and therefore provide an important oversight role to ensure clean governance and optimal use of the fiscus to provide services to the City with particular emphasis in providing basic services for the most vulnerable.

[106]

To this end section 52 of the MFMA provides that the mayor of a municipality must provide general political guidance over the fiscal and financial affairs of the Municipality. To this end and to properly exercise oversight using various committees to strengthen this oversight role.

[107]

Whereas the Municipal manager holds the primary legal accountability for financial management in terms of the MFMA and is further responsible for implementation of policy the non-executive councillors oversee the performance of the municipality. They are supposed to hold EXCO and city management accountable for performance and have the authority to discipline the city manager for misconduct.

[108]

However councillors and elected officials are to stay well away from the operation of SCM⁵⁵ and under threat of criminal conviction⁵⁶ must refrain from trying to exert undue influence over the Accounting Officer, the city Manager.

[109]

It appears to be the official position of council and EXCO, that unless something exceptional happens, the Applicant will not be disciplined by the city. This attitude flies in the face of the oversight function of council, faced with an immense corrupt misuse of public funds the council and EXCO choose the path of least resistance, they choose to be ineffectual and indeed positively supine. This is so despite their own CIU and forensic investigators being in receipt of evidence that the Applicant broke and disregarded the SCM laws and procedures that he had to uphold by virtue of his position as the accounting officer of the municipality. Armed with an admission to their own investigators that the Applicant as the gatekeeper of SCM had flouted SCM protocols under apparent duress from the Mayor council chose to do nothing. With respect, oversight failed.

⁵⁵ Section 118 -MFMA

⁵⁶ Section 173 (4) of the MFMA.

[110] In a reply to a question by this court, the Applicant readily conceded that if this had been a private company, this situation would never have been allowed to arise, an investigation would have taken place timeously and role-players removed until the completion of these hearings. Those in responsible positions in council appear to have chosen to ignore their legal obligation to provide meaningful oversight over the fiscus of the municipality.

[111] There can be little doubt that the failure of council to act upon the original IFS report that laid open the abuses that the Applicant himself confirms occurred is disturbing. Already in December 2018 the Applicant knew of the allegations, knew the involvement of senior public office bearers and his staff yet did nothing to intervene, as the Accounting officer he knew he was under obligation to act urgently.

[112] In a Guide for Accounting Officers when using the Public Finance Management Act published by National Treasury the following instructively appears on Page 12;

- Disciplinary processes: The accounting officer is expected to ensure that incompetent or dishonest departmental officials are subjected to the prescribed disciplinary steps. Should the accounting officer fail in his or her duties, the onus is on the executive authority to act against the accounting officer. In this case Council and EXCO.
-

[113] Faced with perhaps the biggest public sector corruption matter in the city the various oversight bodies chose to do nothing. The reliance on so many opinions about instituting discipline and the prospects of success in the process when you actually know of the wrongdoing, your senior officials and IFS report outlined what was done, with respect, shows that there was either no desire to conclude this process for reasons that must be alarming or indicative of complete ineptitude. Exco and/or Council with respect completely abdicated their oversight role. Indeed there seems to be a deliberate course of action undertaken by councillors that is diametrically opposite to their legal obligation of oversight.

[114] Senior State Counsel's frustration with the lack of support from the complainant was tangible, the failure by the Municipality to act against those implicated strongly indicates a council that is either ambivalent about how the matter resolves or despite the huge amount of money taken out of the fiscus council and the EXCO of the city either through ineptitude or political paralysis refuses to act, the result is the loss of massive amounts of funds that could have been used to supply services to those most in need. This clearly made her function more difficult, fortunately she acts for the greater interests of society without fear or favour and not the ambivalent complainant.

[115] This is especially so when one considers at the outset, CIU and IFS investigations revealed that massive fraud and illegal peddling of influence had occurred involving the Mayor and councillors of the city, that the City Manager had admitted to being influenced to being a part of was known months before the first arrest in this matter. Having full

knowledge of these investigations which were within the domain of their own CIU that council and EXCO did nothing.

[116]

Findings and Evaluation

At the original bail application by agreement between the Applicant and the State certain conditions were imposed specifically designed to satisfy the States concerns in respect of the integrity of the investigation, the safety of their witnesses and to curb any further malfeasance within the municipality's SCM or differently put to prevent the further commission of crime or non-adherence to tender protocols. There was no issue raised at this time in concern with whether or not the accused was a flight risk.

[117]

Indeed conditions were imposed to satisfy the State's concerns and importantly put differently with these conditions in place the State no longer opposed bail as they were satisfied that with these conditions in place the State felt there was no likelihood that the Applicant would commit further offences, intimidate witnesses or undermine the bail system, in other words those concerns as contained in section 60 (4) :

- (a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or
- (c) "Where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence;"
- (d) Where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;

[118]

I notewhats the goal behind these conditions being imposed. As the constitutional court said in Dlamini⁵⁷ at [11]:-

"An important point to note here about bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may

⁵⁷ S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771

bear on where the interests of justice lie in regard to bail. **The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails in the main protecting the investigation and prosecution of the case against hindrance.**” [my emphasis]

I am cognisant that release has been effected and we deal here not with the question of release but the issue of the conditions but with respect the dicta remains the guiding point.

[119] It is against this directive that the court must consider the amendment application, in other words if they can be amended in a manner that accords with the interest of justice that allows for the proper prosecution of the matter. It is in this context that this court considers the evidence led before it by both the Applicant and the State. This necessitates an evaluation of the accused’s conduct from the time that the State say that he was identified as a suspect in the matter and a consideration of whether he was actually an investigator in the matter.

[120] It also requires an analysis not only of the role he played with the witnesses and for that matter whether or not he deliberately assisted some of the co-accused to the detriment of the investigation. If the court finds after this analysis that it has been established there is no likelihood that the factors listed above will be compromised then the conditions need to be amended accordingly and what conditions may then need to be imposed to secure the integrity of the State case at trial.

[121] Predicting future conduct is never straight-forward; In *S v Tshabalala*⁵⁸ it was stated that the court must assess the appellant’s future conduct in the light of existing or historical facts and circumstances. It is the examination of the Applicant’s history in this matter and his evidence before this court that causes problems for the Applicant. The manner in which he gave his evidence is problematic, his mendacity works against him.

[122] I do not come to that conclusion without a detailed analysis of the role played by the Applicant in this matter and on a scrutiny of his conduct from the time that the investigation was launched into this matter and in particular his evidence in court. Once this is done one can only come to a conclusion that the Applicant from the outset sought to mislead this court. I have in detail above dealt with the various instances which suggest his dishonesty but the repeating of the following events show beyond doubt that the evidence of the Applicant is materially false.

⁵⁸ 1998 (2) SACR 259 (C) at 269d

[123] At his original bail application he stated in his affidavit:

9.1 At the outset, I am the one who lodged complaints with the police.

The original notification to the police emanated from the head of the CIIU, Mbuso Ngcobo. The truth was that he was an implicated person in the report. His referral constantly to the orange bag matter is factually incorrect, the DSW fraud has nothing to do with that matter other than accused one, Abbu was protected when exposed in the orange bag matter.

[124] Whereas this might be far too insufficient in itself to be an indicator that he was being dishonest the evidence that the Applicant gave that he was one of those uncovering the fraud, that he had assisted the police and was in fact merely one of those exposing the rot is false beyond doubt.

[125] There are a number of irrefutable reasons for saying so: -

- a. The initial IFS report implicated him and he was not arrested as the State considered whether or not he be called as an accomplice witness.
- b. He admitted⁵⁹ assisting in the scheme under duress and political pressure from the Mayor and Mthembu, Accused 15 and 16.
- c. He was fully appraised of the report and its contents and the report including his apparent involvement⁶⁰.
- d. In the statement he deposed to the police there is a four-page preamble⁶¹ to the statement that he eventually made that he signed, all pages are initialled and signed by the Applicant.
- e. It is inconceivable that the highly intelligent, well-educated and articulate Applicant could have been unaware that he was signing a statement made in the expectation of being an accomplice witness.
- f. In his discussions with Saunders there can be no misunderstanding, he had breached SCM laws, he acknowledged this and had made himself a party to the crime, even if under duress.
- g. Colonel Mphaki testified that there was no illusion present, he explained rather bluntly that the accused was his section 204 witness but that he did not trust him, this evidence was not challenged under cross-examination by counsel.
- h. The lie is completely exposed when these five observations when one reads his 'bail' affidavit at his first appearance, in 9.16.3 "this cooperation was provided notwithstanding several implications by the investigators that I was implicated. Not once did I react to such implications in a manner that would suggest any obstruction to the investigation.

⁵⁹ To IFS and to CIIU.

⁶⁰ Leo Saunders affidavit-exhibit GGG [14-20]

⁶¹ Exhibit 'ccc'

[126] On any analysis, even one where one tries to be favourable to the accused, there can be no other conclusion other than at the time, he gave evidence under oath the Applicant deliberately misled the court, he knew the State saw him as a person involved in the crime and not merely a person who uncovered it.

[127] The explanation for his failure , in particular to discipline accused one, Robert Abbu and accused two, Sandile Ngcobo is similarly false. Abbu was in the context of this matter protected from an overwhelming case of corruption justifying he being subject to serious discipline that the Applicant as the head of the city was responsible to ensuring happened. Similarly in the case of Ngcobo he told the court that Ngcobo who apparently received a luxury car as a kickback or incentive from a service provider could not be disciplined due to the “removal of all documentation by the police”.

[128] Simply, this is not true, the overwhelming evidence is Abbu was protected by the Applicant when disciplinary proceedings were imminent against him, when confronted by Mashoko⁶², he told the DCM that the instruction not to discipline had come from the Mayor. This is contained in the IFS Report that the Applicant was privy to. Similarly the averment that the police removed all the information and he could not discipline is palpably false, there was sufficient evidence to discipline Abbu before a position was created removing him from the oversight of Rampersad.

[129] Similarly with Ngcobo the Investigating Officer was not seriously challenged about his evidence that he in fact made available all the information necessary to discipline Ngcobo. On many instances eluded to in the subject headings above the Applicant has been shown to be extremely reluctant to take the court into his confidence, in particular with the MORAR and Hlenga Sibisi matters.

[130] In context these two matters are very important. In the Sibisi matter a tender is granted to the company on the basis of a lifting of the “blacklisting” of the company upon the resignation of Sibisi. It suffices to say that a modicum of investigation in accordance with the oversight responsibility of the Accounting Officer would have revealed this tender award for what it was:

A transparent piece of directorship engineering or fronting to ensure that a tender was granted to the probable benefit of accused 4 and 5. Significantly a few days before the arrest of the Applicant he signs off on a tender for nineteen million rand where the money is destined for the benefit of those already arrested in the DSW tender.

[131] Above in the MORAR matter there is clear evidence that the Applicant clearly hampers the conduct of the proceedings against the accused in the matter. The Applicant

⁶² Deputy City Manager Trading- Saunders IFS Report.

knew before his arrest that the documentation surrounding the MORAR appointment by him was missing and was required by the investigators of the time NEXUS, he failed to supply it to NEXUS. Today the investigation is being pursued through the appointment by Provincial Treasury of a forensic business known as 'The FIRM' who have not been able to locate the supporting documentation from within council. This same investigation has led to the possible discipline of potential witnesses for the State. The Kumar letter to the mayor is a clear indicator of the difficulties encountered by senior management of the municipality by the MORAR investigation.

[132] In essence the Applicant faces two major difficulties, the first it is difficult to accept his bona-fides in that he has misled the court when giving evidence and secondly and perhaps even more importantly despite professing to trying to be of assistance he has embarked on a course of conduct since he knew he was implicated and agreed to be an accomplice witness that was designed to undermine not only the investigation but also his obligations as the Accounting Officer of the City.

[133] I am of the view that the evidence and the conditions attached to the Applicant's arrest on bail no longer satisfy the purposes for which they were imposed. These purposes were to secure the well-being of the witnesses and to protect them from intimidation. This would include a threat to their mental well-being. In Section (60) (7) the CPA provides ;-

In considering whether the ground in subsection (4) (c) has been established, the court may, where applicable, take into account the following factors, namely- [irrelevant provisions omitted]

1. (a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;
2. (b) whether the witnesses have already made statements and agreed to testify;
3. (d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;

[134] In hindsight the behaviour of the Applicant since his role was first exposed by Saunders in the IFS report was directed at imposing obstacles and impediments to the prosecution of the matter. He has done so by favouring those charged with him with large tenders which with a minimum of investigation would have been exposed as potentially fraudulent and importantly has allowed witnesses to be exposed by apparently unlawfully appointing MORAR to conduct investigations into their conduct.

[135] In light of the seniority of the city manager, his powerful position, akin to the CEO of the city and his ability thereby to negatively impact on those employed as servants of the city has clearly as Mphaki testified led to these witnesses being intimidated and reluctant to testify. Kumar's letter is replete with examples of, with respect, clear examples of the City

Manager in his brief return as city manager of unfairly and without cause placing unwarranted pressure on Kumar.

[136] The biggest concern is that one of the purposes of the conditions originally was to ensure the integrity of the fiscus by preventing the Applicant from influencing the tender processes and/or by granting tenders to parties. I am aware that the Applicant has revealed all the processes that are involved in these processes but it is clear that he by the virtue of this position he is able to greatly influence these procedures. He is powerful within the municipality and council and in his capacity as the person responsible for oversight he has caused tenders to be granted that appear patently unlawful, MORAR with no supporting documentation and the Uhlanga tender which is bedevilled by blatant fronting.

[137] The cost of those two tenders is 77 Million rand and the latter one occurs at the time where the Applicant knows he is about to be arrested. It cannot just be a coincidence that the beneficiaries just happens to be two of the accused in the DSW matter.

[138] If one takes as guidance when trying to predict future conduct from an examination of past behaviour and especially the recent past conduct of the individual concerned then there is a clear and present danger that if the Applicant is restored to the post of City Manager that future criminal acts in respect of SCM Procedures and protocols will occur. The evidence goes well beyond a mere establishing of a likelihood that future offences might be committed, there is a grave risk.

[139] The conditions suggested by the Applicant to cater for this likelihood is that the conditions as set out in his notice of motion be imposed.

In respect of the witnesses the notice of motion prayed:

1. That Condition 7 should read as follows:

1.1 The accused may not communicate in any way, whether directly or indirectly, with the following witnesses regarding any matter pertaining to the Audit trail of this DSW tender, (namely the DSW [Durban Solid Waste] tender forming the subject matter of the criminal charges against the accused.)

1.1.1 Krish Kumar

1.1.2 Sipho Cele

1.1.3 Andre Peterson

1.1.4 Mbuso Ngcobo; and

1.1.5 Raymond Rampersad.

[140] In view of the fact that the indictment is to hand that could be amended to read the 55 witnesses listed in the indictment served upon the Applicant. Similarly the Applicant in his Notice of Motion prayed for the following amendment in respect of his involvement in the disciplinary processes of the witnesses:

2. That condition 9 should read as follows:

2.1 That the accused may not be directly involved in the disciplinary processes of the identified witnesses, by way of initiating any disciplinary processes of senior officials or any official identified as a witness in this case. [seven witnesses in total]

That condition 11 should be deleted in its entirety. This states;

11. Not to participate directly or influence in any tender process during the duration of this investigation. His powers as Accounting officer in relation to Tender processes must be delegated in terms of: Section 79 read with Section 77, section 10 (2) and section 106 of MFMA⁶³, 56 of 2003.

4. That Condition 11A should be deleted in its entirety. This states;

11.(A) The accused shall, notwithstanding the provisions of sections 78 (8) 79 (1) (c), 79 (3) (e) and 79 (4) of the MFMA, (Act 56 of 2003) and Municipal Supply Chain Regulations, (of 30 May 2005) in particular Regulation 5, not participate directly or indirectly in any or all Supply Chain Management processes, irrespective of the amount of the tender award value of the tender concerned.

[141] This is, with respect, where the application becomes very challenging. The Applicant's history shows he unlawfully, as the accounting officer, allowed himself to be influenced by politicians in conflict with the SCM to flout SCM regulations in order to grant unlawful tenders. He even agreed to give evidence as an accomplice witness in this regard.⁶⁴ His falsehoods and his painting of himself as one of those uncovering the malfeasance was tellingly exposed.

[142] After this while knowing he was being treated as an accomplice he granted tenders that are subject to investigation for being unlawful and tainted by illegality and fraud.⁶⁵ Precisely what the State seek to protect with these conditions, namely the abuse or fraud against the municipal fiscus by the Applicant would be removed. With the Applicant's dubious relationship with the truth and his past misconduct, I cannot see how the interests of justice in this application would allow for this removal or for that matter to be served by the removal of

⁶³ Municipal Finance Management Act, Act 56 of 2003.

⁶⁴ See IFS Saunders affidavit Exhibit

⁶⁵ See MORAR, Uhlanga-Sibisi, and other instances mentioned by Kumar.

this condition unless it was replaced by a condition able to serve the purpose for which the condition was imposed, namely to protect against further crime.

[143] Indeed the concerns of the State at this time of the arrest of the Applicant about the danger of further crimes being committed and interference with witnesses should the Applicant be reinstated sans the conditions remains as real today, if not more so than on the 10th March 2020. I am reminded of the words of Heher JA, in *S v Savoi*⁶⁶ where in a slightly different context said; an amending order should be made “ to better honour the spirit of the original grant of bail without prejudicing the State”.

[144] **The legality Issue**

There has been considerable argument advanced by learned counsel for the Applicant about the legality of the conditions as set out in point 11 and 11A. The State has replied, whereas for completeness I detail in brief the arguments made I believe that these arguments fall away on a proper consideration of where the interests of justice lie when one considers bail in terms of schedule 5 and therefore section 60 (11) (a) of act 51 of 1977. In the event I believe this argument must yield to the words of Heher JA in *Savoi*, conditions need to be applied that will give effect to that original agreement unless conditions have changed substantially, with respect they have not, the State’s concerns rightly remain at this time, perhaps more so.

[145] The argument on behalf of the Applicant is that the condition that prevents the Applicant from exercising his statutory powers as the City Manager is ultra-vires. In *S v Russel*⁶⁷ the Cape High Court struck out a condition preventing a priest from performing his duties. The learned authors in Du Toit’s commentary state on the effect of Russell, ‘the approach before our courts is that a condition which is ultra-vires should merely be regarded as pro non scripto...’

[146] The conditions as they stand prevent the Applicant from performing his duties that he as the City manager is statutorily obliged to do, these being certain disciplinary functions and tenders with a value attached in excess of 10 million rand. With regard to the tender aspect Regulation 5 (2) of the SCM Regulations prohibits the delegation of these amounts other than to the City Manager.

[147] Similarly the disciplinary role played by the Applicant is small and in a highly regulated environment and the submission that his involvement in such matters is minimal or negligible and as they stand are currently too broad.

[148] The riposte by the state is a simple one, section 170 of the MFMA allows the municipality to apply to National Treasury to approve a departure from any treasury

⁶⁶ *S v Savoi* 2012 (1) SACR 436 [SCA]

⁶⁷ 1978 (1) SA 223 [C]

regulation or from any condition imposed in terms of this Act. The Applicant or municipality can bring an application in terms of section 170.

[149] Although conscious of the irony that these conditions when imposed were agreed upon, I do not understand the contention in argument that they were agreed upon, a court was available to hear an opposed bail application. Having said that one can but only agree with the submission in the argument of the Applicant that even if agreed, if the agreement is unlawful it cannot stand as it conflicts with the legality principle of the Rule of law.

[150] Key for the court is the finding that the evidence has established the likelihood that if the Applicant is reinstated then there is a real risk or likelihood that further offences may be committed against the municipality and that the likelihood is that the Applicant as he has done will take steps to discipline witnesses or potential witnesses and that the witnesses are intimidated by the prospect of the Applicants return as City Manager. Indeed the key concerns that led to the agreement in respect of the Applicant's original release on bail are still valid.

[151] The potential further damage to municipal funds is of grave concern and with respect this cannot be catered for by the Applicant returning as the City Manager. Even if one accepts that various committees and bodies approve tenders before they are granted with the complete lack of oversight and malleable behaviour within the municipality there is nothing preventing these awards been made.- They have already been by the Applicant.

[152] Certainty of the conditions imposed is important, the Applicant needs to be properly informed of what conduct is allowed and that which is penalisable. An order preventing the city manager from being involved in disciplinary matters and from being involved in SCM matters and the signing off on tenders makes it extremely difficult, if not impossible for him to execute the executive position of City Manager.

[153] An order that he may not involve himself in any disciplinary proceedings at all, and that he may not be involved in the tender processes of council, approve and sign off on tenders at all has the effect, so I have been told, of the Applicant quite simply not being able to perform in terms of his contract of employment. He is an executive city manager, well remunerated⁶⁸ to perform an executive function as head of the municipality and if these core functions of the accounting officer removed he cannot perform the functions of the City Manager.

[154] In argument it was suggested that there should be efforts to reasonably balance between the rights of the State and the Applicant or perhaps a reasonable

⁶⁸ As per Nzuza's bail affidavit 3.6 million p.a.

accommodation of the Applicant's right to work. Any accommodation of the Applicant's rights in this regard must be in accordance with the interests of justice, perhaps the correct question is, do the interests of justice in respect of this matter allow for the deletion of these bail conditions and for the Applicant to resume with almost full power the duties of the City Manager. Past history over the past few years says an emphatic no.

[155] With the utmost respect to counsel if the position is that the condition imposed are ultra-vires and therefore unenforceable the proper approach is not to draw a line through them but, if the concerns addressed in the original conditions still exist and are valid considerations, then the interest of justice demand that the conditions that be imposed pass legal muster.

[156] To borrow from Senior State Counsel Ms Siraram argument⁶⁹ to merely draw a line through the conditions would allow the ineptitude or indeed complicity of a paralysed EXCO and Council to allow for wasteful expenditure and continuing plunder of the fiscus as has occurred in the DSW tender. Sadly even the Applicant has admitted that he should have been timeously subjected to disciplinary proceedings, armed with an IFS investigation and indeed their own CIU investigation those responsible for oversight did nothing effective. Even the Applicant admits millions of Rands were stolen from the municipal fiscus and to date no-one has had a disciplinary finalised from within the municipality.

[157] The reasons for the imposition of the condition ab initio remain as relevant today as when they were imposed on the 10th day of March 2020, perhaps more so. The application that the Applicant effectively resume the full functions of the City Manager must fail. Accordingly the application in the notice of motion is refused.

[158] I am of the view that the argument that the accused cannot be denied his right to work due to the conditions must fail. His right to work is limited by where the interests of justice lie in this matter. The interests of justice after factoring in the danger of , in particular the clear and present danger of the further depletion of public funds that his right to return to work replete with the almost full authority of City Manager must fail, one regularly in the Specialised Commercial Crimes Courts comes across private-sector matters where the complainant requires as a condition that the accused remain off the precincts of the business as it compromises both the business and the investigation. That, with respect, is similar to this matter and if the applicant as an employee has been prejudiced in the exercise of his employment law rights his recourse is against the supine employer. In the criminal case against the applicant the interests of justice overwhelmingly favour the retention of the limitations imposed at the first and subsequent applications.

[159] Section 63 spells out that upon an application by either the accused or the prosecution the court is vested with a discretion to either, vary or delete conditions of release on bail. Section 62 empowers the court on an application by the prosecutor to add any further condition of bail. Section 63(1) empowers a court to amend or supplement any conditions imposed under section 60 or 62. Due to the legality of the conditions imposes I intend to order

⁶⁹ Heads of Argument [87-89]

that with the conditions that led to the original conditions generally still existing that an order should be made ensuring certainty.

ORDER:

After hearing the evidence of the applicant and the Investigating Officer and considering the papers and affidavits filed on record and after a consideration of the submissions of counsel the application for the amendment of certain conditions and deletion of others to enable the applicant to return to work as a nearly fully functional City Manager as set out in his Notice of Motion is dismissed.

The court is satisfied that the interests of justice require that the conditions be amended and it is ordered that the conditions imposed at the bail application dated 10 March 2020 and modified at the hearing dated 16th November 2020 be further amended to read:

That Condition 7 is that:

- 1.1 The accused may not communicate in any way, whether directly or indirectly, with the witnesses as set out in the indictment to the charge.
- 1.2 The accused may not enter into the premises at which those witnesses employed by the municipality work.

That condition 9 is:

That the accused may not be directly or indirectly involved in the disciplinary processes of the Municipality in respect of any other person until his criminal trial is concluded.

That condition 11 is that the accused is:

11. Not to participate directly or indirectly in any tender process during the duration of this criminal trial.

That Condition 11A now states:

- 11.(A) The accused shall not participate directly or indirectly in any or all Supply Chain Management processes, irrespective of the amount of the tender award value of the tender concerned.

That Condition 11B be added:

- 11B – That the accused may not perform the functions of the Accounting Officer of the Municipality until the criminal trial is concluded.

G P W Davis-Regional Magistrate
Dated and signed at Durban this 30th day of March 2021.