CECIL HONDO MADONDO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 18 February, 2021

Bail Appeal

R Mukavhi, for the applicant
R.H.Kunaka, for the respondent

MUNANGATI-MANONGWA J:The applicant a 60 year old Insolvency practitioner appeared before the Magistrate at Harare on initial remand on 5 February 2021, facing a charge of fraud as defined in section 136 of the Criminal Law (Codification and Reform) Act [*Chapter9:23*] (herein after referred to as "the Code.").Upon being placed on remand the appellant applied to be remanded out of custody. The respondent opposed the granting of bail on the grounds of risk of abscondment and interference with witnesses. The court *a quo* dismissed the abscondment contention and upheld the respondent's contention that appellant was likely to interfere with witnesses because of the relationship between him and the witnesses. The appellant has approached this court by way of appeal in terms of Section 121(1)(b) of the Criminal Procedure and Evidence Act, [*Chapter 9:09*] (hereinafter referred to as "the Act") challenging the decision of the court *a quo* in refusing to grant him bail.

The appellant raised the following grounds of appeal:

1. The court *a quo* erred and misdirected itself in concluding that the appellant will interfere with witnesses when there was no evidence placed before it to support such a conclusion. In reaching the conclusion the court *a quo* relied solely on the supposed strength of the State case against the appellant.
2. The court *a quo* erred and misdirected itself in by failing to take into account relevant matters placed before it in the determination of the question of bail and thus reached an unsubstantiated conclusion that it was in the interest of justice that bail be refused.

3. The court *a quo* erred and misdirected itself when it failed to strike a proper balance between protecting the individual liberty of the alleged offender on the one hand and the due administration of justice on the other, and denied the appellant bail in circumstances where the balance strongly favoured the granting of bail.

The appeal is opposed by the respondent. The respondent's written response is brief and is simply to the effect that there was no misdirection. The respondent contends that "the appellant holds an influential position in the company as he is the judicial manager of Redwing Mining Company. The witnesses to be recorded statements are his subordinates as such interference is high."

The facts on the remand form 242 and the annexures thereat indicate that the applicant is a court appointed Corporate rescuer practitioner for Redwing Mining Company (Pvt) Ltd, duly appointed by the High Court sitting at Mutare under case No HC99/19 in consequence of the placement of the Company under corporate rescue in terms of the Insolvency Act.

It is alleged that acting in that capacity, the applicant during the period 15 October and 2 December 2020, entered into joint venture and tribute agreements for the conduct of mining operations at claims belonging to Redwing Mining Company (Pvt) Ltd (hereinafter referred to as "Redwing company.") The companies dealt with were Porbadek Investments (Pvt) Ltd (hereinafter referred to as "Probadek Investment,") Prime Royal (Pvt) Ltd and Betterbrands Mining (Pvt) Ltd in that order. It is alleged that Redwing as represented by the appellant executed agreements first with Probadek followed by Prime Royal and lastly with Betterbrands. It is alleged that Probadek Investments the complaint herein acted upon the misrepresentation by the appellant that it had been given exclusive mining rights over the claims of Redwing Mining Company. It is alleged that the complainant company and the appellant then executed a tribute agreement which they registered with the Registrar of Deeds as a step to operationalize the mining operations. Probadek Investments paid corporate rescue fees in the sum of US$60 000 into appellant's company Tudor House Consultants and further made a capital expenditure of US$200 000.

The police listed the nature of the evidence against the appellant as follows:

- Statement by Patricia Mutombgwera
- Statement by Grant Chitate
- Copy of memorandum of tribute agreement between Redwing Mine represented by accused, and Probadek Investments (Pvt) Ltd

- Copy of Notarial Deed of Trust entered into between Redwing Mine represented by accused and Probadek Investments (Pvt) Ltd
- Copy of Joint Venture and Relationship Agreement entered into between Redwing Mine represented by accused and Probadek Investments (Pvt) Ltd
- Copies of proof of payments made by Probadek Investments (Pvt) Ltd into accused's personal company
- Copy of tribute agreement entered into between Redwing Mine represented by accused and Betterbrands Mining (Pvt) Ltd
- Copy of tribute agreement entered into between Redwing Mine represented by accused and Prime Royal (Pvt) Ltd

The above list of documents provide the paper trail to show that the appellant concluded agreements with the three companies relating to the same Redwing company mining claims. The allegations of fraud were therefore founded on the reasoning that Probadek Investments paid money to the appellant and incurred capital expenditure under a belief that the company had secured exclusive rights over the claims in issue yet the appellant went on to conclude similar agreements with the other companies. This summation broadly sets out the allegations to which the appellant will answer to at the trial if the respondent establishes a *prima facie* case against the appellant.

It is clear from the record that the magistrate's decision in refusing bail is premised on one ground, that the accused will interfere with witnesses. The appeal therefore must address the question, whether or not the magistrate misdirected himself in law, fact or both in denying the appellant bail on the ground that appellant was likely to interfere with witnesses.

It is competent for the court acting in terms of Section 117(2)(a)(iii) of the Criminal Procedure and Evidence Act aforementioned, to deny an accused bail on the ground of likelihood of interference with witnesses. The operative provisions read as follows:

"117(2) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established—
(*a*) where there is a likelihood that the accused, if he or she were released on bail, will—
(i) ……
or
(ii)……..
or
(iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
(iv) ……."

It is apparent from the wording of the operative provision as quoted above that the ground for refusal of bail must not just be alleged, it must be established. Thus some factual basis for the court to conclude that there is a likelihood that an accused will interfere with witnesses , intimidate witnesses or conceal or destroy evidence must be alleged and proved on a balance of probabilities.

As a guide, in the case of *Ashton Mlilo v State* HB49/18 MATHONSI J (as he then was) stated as follows at p2 of the cyclostyled judgment;

> "In terms of section 117(2) of the Act it is a compelling reason to deny bail where the accused person is a flight risk or is likely to interfere with witnesses or evidence. However before denying bail on those grounds the court must be satisfied that indeed such a risk exists. The State cannot succeed in contesting bail by merely raising those grounds without pointing to any evidence suggesting propensity to abscond or interfere with witnesses."

In essence there has to be some reasonable factual basis to hold that the accused is likely to interfere with witnesses.

The mere fact that the witnesses may be subordinates of the accused at the workplace does not on its own establish the likelihood that the accused *will* and not *may* interfere with witnesses. The distinction is important because the word "will" connotes a more definite event in that there is no doubt that it will happen. However the word "may" connotes a doubtful eventuality.

The learned magistrate stated in his judgment that "In this case the witnesses are persons who can be influenced by the accused. Whilst in this case conditions may be imposed, it is unlikely that such a condition may adequately insulate the investigation against interference. The state must be given a chance to do a thorough investigation so that the ends of justice are met. From the narration of the I.O. the state case is strong and apparent. That encourages interference from an accused. It is in the interest of justice that bail be refused."

It is apparent that the magistrate considered the work relationship between the appellant and his subordinates as sufficient to conclude that there was a likelihood that the appellant will interfere with witnesses. There was no allegation or evidence led before the magistrate to indicate that the appellant had done any act directly or indirectly to interfere with witnesses or investigations or to conceal or to destroy evidence. The magistrate also stated that it was unlikely that any conditions which may be imposed would "adequately insulate the investigation against interference." From the allegations on the Form 242 and the analysis of the evidence of the Investigating Officer, there are two witnesses which the police singled out as the ones who the appellant would interfere with. There are Benjamin Pousula and the Finance Manager Percy. The reason given by the investigation officer for

alleging interference was that the witnesses were subordinates of the appellant, and nothing further. The magistrate on his part simply stated that the witnesses were persons who can be influenced by the appellant. There was nothing further established to justify the conclusion that the appellant will interfere with witnesses or investigations. Given that no interference with investigations by the appellant was alleged by the Investigating Officer nor otherwise established there was therefore no need to find that investigations needed to be safeguarded.

It follows that the learned magistrate was misdirected at law to determine the adequacy of proof to establish the ground for refusal to grant bail which he relied upon. He mistakenly and wrongly considered that the mere fact that the appellant was the boss, and the witnesses subordinates, was sufficient to infer a likelihood that the appellant will interfere with subordinates. Taking note of the facts of the matter, it is apparent that the appellant as acting judicial manager entered into agreements with three companies at different companies. One of them the complainant, alleges that the appellant committed fraud by entering into subsequent agreements after it had concluded the first one with complainant. In other words, the alleged fraud arises from a breach. The appellant will at trial have the evidential onus to justify his actions. The agreements are already with the police. The case involves written instruments as listed in the form 242. It is thus difficult to appreciate what the nature of the interference could possibly be.

The magistrate did not also have regard to the provisions of s 117(3) of the Act which sets out factors to be considered when determining the adequacy or establishment of the ground that the accused in any case will interfere with witnesses or investigations. The magistrate's decision was therefore reached without adequate facts from which to hold that the appellant would interfere with witnesses or evidence or investigations. This was a misdirection.

The court finds that it is not necessary to interrogate the other grounds of appeal being grounds 2 and 3 as they are not only too generalized but they do not contain grounds or reflect the basis upon which bail was refused. The magistrate's judgment clearly and unequivocally shows that bail was denied on the ground of likelihood of interference with witnesses. It being held that there was a misdirection on that aspect, and further referring to the totality of the facts and the circumstances of the appellant, the court finds that the appellant is a proper candidate for bail. He is a professional accountant whose credentials

are such that the High Court appointed him a corporate rescuer practitioner. He is the owner of a business operating under the Company Stonehouse Consultants (formerly Tudor House Consultants).He is of fixed abode. He is a family man and has both economic and social interests to protect. He has no valid travel document. There is no risk of abscondment alleged or apparent from the alleged facts.

Having considered all the factual allegations and the magistrate's decision in which he was misdirected on reaching the conclusion that the appellant may interfere with witnesses and investigations, it is determined that there are no compelling reasons to deny the appellant bail.

Accordingly the following order is granted:

1. The appeal against refusal of bail by the Regional Magistrate Nduna on 8 February 2021 succeeds.
2. The order of the Magistrate of 8 February 2021 dismissing the application for bail be and is hereby set aside and in its place the following order is made:
3. The appellant is hereby granted bail on the following conditions:
   a) The appellant shall deposit the sum of RTGS $100 000.00 with the Clerk of Court Harare.
   b) The appellant shall continue to reside at No 1446 Beestone Road, Shawasha Hills, Harare, until the matter is finalized.
   c) The appellant to report once on Mondays, Wednesday and Fridays at the Zimbabwe Republic Police Highlands between the hours 8.00am and 4.00pm
   d) The appellant shall not interfere with witnesses.
   e) The appellant is barred from visiting Redwing Mine, Penhalonga, Mutare until this matter is finalized.

Rubaya – Chinuwo Law Chambers, for the appellant
National Prosecuting Authority, for the respondent