THE STATE
versus
HENCE CHIBARO

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 7 June 2019

Application - Bail Pending determination of application for condonation of late filing of appeal

Applicant in person
K.H Kunaka, for the respondent

CHITAPI J: The applicant filed application No. B331/19 on 26 February, 2019 seeking to be admitted to bail pending the determination of his application for leave to appeal. In the State's response, Ms *Kunaka* resisted the application on the basis that the applicant had filed a previous application claiming the same relief and that the same had been dismissed. Counsel stated that there had been no change of circumstances since FOROMA J dismissed the previous application on 7 March, 2019.

It certainly would be unlikely that any change of circumstances warranting a review of FOROMA J's order of disposal would have occurred between 7 March, 2019 and 4 May, 2019. The applicant in his current application did not allude to any change of circumstances of note because he simply revisited the trial court's record and judgment pointing to alleged misdirections in the proceedings. He also dealt with the question of why bail should be granted. Reliance was placed on the same record of proceedings which was placed before FOROMA J and informed his determination that the applicant's proposed or intended application for leave to appeal out of time did not enjoy prospects of success.

It occurred to me that the applicant was simply judge shopping in that he filed this application in the hope that he could hood wink another judge to rule in his favour. Such an

approach is wrong. An approach to court to try ones luck is frowned upon by the court. Where an application for bail pending appeal, review or pending the determination of an application for leave to appeal or extension of such time as envisaged in s 123 (1) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] has been made and dismissed by the court, a subsequent application based on changed circumstances as envisaged in proviso (ii) to s 123 (1) (b) cannot be an easy one for the applicant. It cannot be a stroll in the park.

The proviso aforesaid reads as follows:

> "Provided that –
> (i) …
> (ii) Where an application in terms of this subsection is determined by a judge or magistrate, a further application in terms of its subsection may only be made, whether to the judge or magistrate who has determined the previous application or any other judge or magistrate, if such application is based on facts which were not placed before the judge or magistrate who determined the previous application and <u>which have arisen or been discovered after that determination</u> (own underlining).

Applications made in terms of s 123 are consequential upon the proceedings in the trial court having been concluded. When the judge considers an application for bail made in terms of the provisions of s 123 aforesaid, the record of proceedings is placed before the judge. The judge considers the evidence and judgment before determining whether or not to admit the applicant to bail. To this end I must accept or note that FOROMA J considered the record of evidence and judgment when he determined that the application for bail had no merit and consequently dismissing it. It is not open to the applicant to seek to get a second bite of the cherry by crafting arguments arising from the same record which the previous judge relied upon to determine the earlier application. It is not a change of circumstance for the applicant to raise new arguments on the same record or to place the same arguments made before the previous presiding to the next judge. The underlined portion of the proviso must always guide the applicants who make subsequent bail applications pursuant to the proviso. Changed circumstances envisaged therein must have arisen or been discovered after the previous determination. They must also not have been placed before the previous judge. By simple logic, the changed circumstances must not have been present at the initial determination. A circumstance cannot be said to arise if it was there. It can also only be subsequently discovered if it was not there. In some way, a changed circumstance

envisaged in the proviso is one that does not revise the correctness of the previous decisions. It is one that provides a justification to depart from the otherwise correct previous decision.

In *Evaristo Kamone* v *State* HH 567/18 the court indicated as follows on p 6 of the cyclostyled judgment in commenting on the proviso aforesaid:

> "The law does not support the applicant because upon an ordinary grammatical construction of the proviso, revisiting the same facts previously considered as they appear on the record does not amount to a changed circumstance but a revision or correction because nothing has changed on the record content"

These remarks aptly apply in this application.

It is also important to consider the rationale behind the proviso to s 123 under discussion. It is that there must be finality to litigation. A party should not be allowed to gallivant in the same court on the same matter. Once the judge has made a determination on the record in such application that determination is the decision of the High Court on the application. The Court becomes *functus officio* save to the limited extent provided by the proviso window through which the judge and therefore the court can revisit its decision. The window is that of changed circumstances. An approach informed by the expectation that a different judge should determine the application based on the same record and reach a different conclusion from the previous judge simply results in the court passing conflicting judgments on the same issue. Applicants must therefore appreciate that the second judge is bound by and will simply endorse the decision arrived at by the first judge where an attempt is made by the applicant to bring the same application before the same or second judge. If therefore the applicant is dissatisfied with the judges' decision such applicant has the avenue of appealing to the Supreme with leave of the judge if the decision made is consequent on an appeal to the judge from the decision of the magistrates court or directly as of right if the decision is made consequent on a decision of the judge where the application has originated in the High Court. See *AG* v *Mpofu and Anor* SC 50/02, *Dzawo* v *S* 1998 (1) ZLR 536 (s).

A worrying trend has taken route where applicants try their luck before different judges by filing one application after another under the guise of what they call changed circumstances. Sometimes the applicant actually succeeds in having the application heard and a contrary decision to the previous one is given. This happens where the state does not pick up that the applicant previously made an unsuccessful applicant and the applicant does not disclose the fact.. In other

cases unscrupulous applicants do not disclose that their applications are based on changed circumstances. They file them as fresh applications. There is a potential to defeat the course of justice if the trend is not checked. It is suggested that a provision similar to s 117 (5) but dealing with bail applications made under s 123, that is after completion of proceedings should be legislated. Section 117 (5) provides-

> "5. In bail proceedings the accused is compelled to inform the court whether-
> (a) the accused has previously been convicted of any offence; and
> (b) there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges.

Section 117 (8) provides as follows:

> "8. Any accused who willfully-
> (a) fails or refuses to comply with subsection (5); or
> (b) furnishes the court with false information required in terms of subsection (5);
> Shall be guilty of an offence and liable to fine not exceeding level seven or to imprisonment not exceeding two years or both."

A similar provision couched *mutatis mutandis* along the lines of ss 117 (5) and (8) can be introduced to curb the incidences of non-disclosure by an applicant who files an application following the dismissal of a previous one and willfully does not disclose the fact of the previous application having been made, determined and dismissed. The passage of such a provision will also act as a controlmeasure to check the filing of unmerited and therefore vexatious applications by applicants who avoid escalating their dismissed applications to the Supreme court whose decision is final.

In my determination, the proviso (ii) to s 123 recognises that a court becomes *functus officio* upon determining a matter placed before it. It ordinarily exhausts its jurisdiction and does not reconsider its decision or correct it save as may be provided for by law. The doctrine of *functus officio* is central to the principle that there has to be finality to litigation. Once the court determines a matter, the litigation before that court is finalized. The determination made finalizes the matter in that court. Any further determination on the matter must be made by the next superior court on appeal or review as the case may be. The provisions of proviso (ii) aforesaid being an exception to the general rule of *functus officio* and finality of litigation provides a narrow passage to having the court reconsider its decision. It is not a provision which should be abused. The applicant who applies for bail on the basis of the proviso must appreciate that reliance on changed circumstances assumes that the previous decision was correct. The applicant cannot in a subsequent application

attack the previous judgment. In manner of speaking, the applicant bringing a subsequent application for bail in terms of the proviso, will basically be saying to the judge, "I embraced your earlier ruling. I apply that you reconsider your decision because there are new facts which have arisen or been discovered after your determination as impact on your previous determination sufficiently to justify that you change or alter your decision."

Having interrogated the import and purport of the *proviso* (ii); the question which comes to mind is "what constitutes changed circumstances or new facts. I would postulate that apart from the statutory requirement that the "new" facts must have "arisen or been discovered after the determination," the facts should not be fanciful. They must be certain and proven. The new facts cannot arise from facts on record as previously considered and a determination made. In this sense, facts in the previously considered record may well be coined old facts as opposed to "new" facts. If such a distinct ion is drawn, it becomes easy to appreciate that "new" facts envisaged in the *proviso* (ii) relate to facts which were not in existence when the previous application was determined. Many a time applicants refer to new facts arising from the record but were not argued by the applicant. Such approach is wrong. In fact, when the applicant seeks to adduce new facts as envisaged by the *proviso*, the previously considered record may well be put aside except in so far as the new facts may impact on previously considered facts.

It will be noted that although reference in applications brought in terms of *proviso* (ii) is made to changed circumstances, the reference may well mislead. Whether a fact and a circumstance mean one and the same thing needs interrogation. In the College Dictionary, Revised Edition, "circumstance" is defined as, "a condition, or attribute that accompanies, determines, or modifies a fact or event, a modifying or influencing factor." "Fact" is defined as, "actuality, truth, something known to exist or to have happened." In relating new fact to changed circumstances therefore, I would posit that the applicant is required by the *proviso* to place or plead new fact(s) within the meaning of what amounts to a fact. Where the new fact or facts are established, the court then considers whether or not the proven new facts would amount to such a change of circumstances from those which were considered by the court as would impact on its earlier decision. Thus, a reference to an application based upon a change of circumstances is an expression which must be used with caution bearing in mind that the applicant must plead and prove new facts which have arisen or been discovered after the determination of the earlier application. The court

then asks itself whether the new proven facts alter or change the circumstances which prevailed. In other words, do the fact(s) modify or influence the facts which were considered to such an extent as would justify the change of the standing determination.

Having cautioned on the need to differentiate between fact and circumstance and to relate the two I will hasten to state that what amounts to new facts or changed circumstances as commonly called depends on the facts and circumstances of each case. It would thus amount to an exercise in futility to attempt to draw up a list of facts which may be open to an applicant to plead and prove for purposes of succeeding in having the applicant's previously determined bail application pending appeal to be reconsidered.

Reverting to the application before me, the applicant did not plead any new fact as required by *proviso* (ii) aforesaid. The applicant simply mounted an attack on the lower court's judgment. The proceedings and judgment are the same ones which FOROMA J considered in dismissing the earlier application. It is not necessary for me to go through the applicant's averments. They are based on the record unaltered. There are no new facts which the applicant purports to have discovered nor facts which have occurred since the last application. In passing, I would comment that new facts arising or being discovered after the last application, with regards bail applications pending appeal are hard to come by unlike in bail pending trial. In the latter case, investigations may unearth new facts. In the case of the former the court or judge is unlikely to find any change of circumstances other than outside of the court record. In this regard since in the present application, the applicant does raise any new facts outside of the record, there is in fact no proper application before me. The following order is accordingly made.

"The application be and is hereby dismissed."

National Prosecuting Authority, respondent's legal practitioners