WICKNEL MUNODANI CHIVHAYO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 20 September 2018, 8 October 2018 and 11 October 2018

Application for Variation of Bail Conditions

W.T. Manase, for the applicant
T. Kasema, for the respondent

CHITAPI J: The applicant was admitted to bail pending trial by this court on the terms of an order granted by CHIKOWERO J on 10 August, 2018. The terms of the order were as follows:

"IT IS ORDERED THAT:

1. He deposits $2000-00 with the Clerk of Court Harare Magistrates Court.

2. He resides at 14 Stonechat Lane Borrowdale, Harare until this matter is finalised.

3. The applicant shall surrender to the Clerk of Court the replacement title deed number 1375/2012 in respect of property known as an undivided 15.08278% share number 4 of a certain piece of land situate in the District of Salisbury called Lot 3 of Lot 2 of Lot A of Colne Valley of Reitfontein measuring 7931 square metres held by Five Chisholme Road-Cluster Four (Private) Limited.

4. Applicant shall surrender his passport to the Clerk of Court Harare Magistrates Court.

5. He shall report twice a week on Mondays and Fridays at Criminal Investigation Department Commercial Crimes Division between 6 am and 6pm.

6. The applicant shall not interfere with state witnesses."

The fact of the case are dealt with by CHIKOWERO J in his judgment dated 27 August, 2018 under the same CRB herein B 1118/18. No useful purposes is to be served by repeating them, save to incorporate the learned judges judgment by reference.

The applicant now applies in terms of s 117 A as read with s 116 of the Criminal Procedure & Evidence Act, [*Chapter 9:07*] for alteration or variation of the conditions

aforesaid in part. In particular, the applicant applies for alteration of conditions 4 and 5 in that he seeks a temporary release of his passport and the concomitant temporary suspension of reporting conditions for the period of release of the passport. In terms of s 116 as aforesaid, the court enjoys the power to alter any bail conditions which it may have imposed on an accused person in any given case. This power as given in s 116 is therefore an exception to the *functus officio* doctrine in terms of which a court is divested of its jurisdiction in relation to a matter once it has pronounced its decision on it.

When the application was placed before me on 20 September, 2018, I read through the voluminous record to acquaint myself with the background to the case. The record comprised more than 500 pages and took the best part of my evening reading through it since bail applications are referred to a judge late on the day preceding the following day which latter day will be the hearing date. I need not state that bail court is every judge's nightmare or unpleasant experience because of the pressure involved. It is a daily court in which a judge is saddled with a long roll of cases which he or she must read and prepare for on the eve of the set down date. Records for the following day are forwarded to the judge to prepare at the end of the day for disposal on the following day.

On reading the application, I noted that the application for bail variation had been filed on 5 September, 2018. The State had responded thereto on 7 September, 2018 arguing that there were no changed circumstances to warrant a variation of the conditions imposed by the court. The record indicated that the application was set down on 7 September, 2018 and MUSHORE J presided in bail court. It was not apparent from the record as to what transpired on 7 September, 2018. The record however contained "an affidavit in opposition" deposed to by the applicant and filed of record on 17 September 2018. The affidavit was answering the affidavit attached to the States response filed on 7 September, 2018 to which was attached an affidavit deposed to by Zivanai Macharaga the prosecutor in the pending trial at the magistrates court.

When I enquired from both applicant and state counsels as to what had transpired in the light of the filing of further documents filed after 7 September, 2018, I was advised that the application had not been disposed of on 7 September, 2018 and that MUSHORE J had directed that further documents should be availed by the applicant.

As it was not clear to me from the record as to what the judge had directed on 7 September, 2018, I stood down the application and had the record referred to MUSHORE J for

directions as to what she had ordered. When the record was referred back to me, MUSHORE J on a compliment slip indicated that the matter was not partly heard and that she had in fact dismissed it. It meant therefore that I could only properly deal with the matter on the basis of information not placed before and considered by MUSHORE J

My attention was then drawn to an endorsement made by MUSHORE J on 7 September, 2018 on the result slip wherein she endorsed on reasons for dismissing the application; "I informed Mr *Manase* to ensure that he provides an affidavit from applicant's co-director in South Africa as the letter annexed to the affidavit does not constitute proper evidence." The paper trail then made sense in that the filing of the applicant's affidavit on 17 September, 2018 was made consequent upon the advice or directive of MUSHORE J. The state then subsequently responded to the affidavit of 17 September, 2018 through its response filed on 20 September, 2018. I then referred the record to registry after indicating on the result slip that consequent on MUSHORE J's indications, it was now up to the applicant to proceed with the matter as he may be advised to.

On 2 October, 2018, the applicants' legal practitioner wrote to the Registrar indicating that MUSHORE J had in fact referred the matter back to me for determination and that in that light, counsel were awaiting to be given directives on the way forward since I had stood down the matter for clarifications and directions from MUSHORE J. I consequently directed the Registrar to set down the matter before me and to advise the applicant's and State counsel of the set down date.

Counsel appeared before me on 8 October, 2018 and argued the matter. I reserved judgment and hence this judgment. Mr *Manase* submitted that the applicant had filed the affidavit which the court directed that he should file to authenticate the letter inviting the applicant to South Africa to finalize contract negotiations with a South Africa company on energy projects proposed to be undertaken within the subregion. It is significant to note that the state did not deny that the applicant and his company had a business relationship with the South African Company referred to. The Chief Executive Officer of the South African Company filed an affidavit in which he confirmed that the applicants' company Intratrek Holdings SA (Pty) Ltd was engaged in contract negotiations with the South African Company and that the negotiations were at a stage where the applicant in person as the director and principal of the company should attend in person. The State counsel's only assertion relative thereto was that the applicant's company had other directors who could represent the company.

Mr *Manase* submitted that it was clear from the undisputed papers that the South African Company required the attendance of the applicant as director and principal of his company. I have to accept that contract negotiations in the world of commerce are delicate and it is not uncommon that hard and concrete decisions are made from the top. To argue that any director can represent the applicant's company in circumstances where the other negotiating party has clearly indicated that it can only engage and finalize negotiations with the principal would in my view amount to taking too simplistic a view the matter and intricacies of contracts negotiations.

I need to observe in passing an issue raised in the State papers that the affidavit of the Chief Executive Officer of the South African Company should have been notarized and not merely signed before a Commissioner of Oaths in that country. There is substance in the point raised because in terms of the High Court (Authentication of Documents) Rules, RGN 995/1971, a document executed outside Zimbabwe is admissible on its production if it is executed before a notary public, mayor or a judicial officer in that country. It is also deemed sufficiently authenticated if the authentication is done by a designated officer at a Zimbabwe diplomatic mission in that country in terms of s 3 (b) of the rules. I however note that bail applications are *sui generis* in that the court is not bound to strict rules of evidence.

Section 117 A (4) provides that the court may consider any evidence including hearsay evidence and inter - alia "affidavits and written reports which may be tendered by the prosecutor, the accused or his or her legal practitioner". It is therefore permissible for the court to take cognizance of the documents presented by the accused and in any event I have already observed that the State did not dispute the content of the documents save to say that the applicant may send a proxy or co-director in his place to represent the company and to submit that the daffidavit from South Africa should have been notarized and that the affidavit should therefore be ruled inadmissible.

Mr *Kasema* in his response was content to abide by the papers filed of record and submitted that the application be dismissed for reasons given by Mr Macharaga the prosecutor handling the case in his affidavit. I have already commented on Mr Macharaga's point regarding notarization of documents. I also commented on his assertion that a co-director can represent the company. Mr Macharaga also attached to his affidavit a 42 paged exception taken by the applicant to the charges he is facing. He indicated that because of the filing of the exception the case was deferred to 22 October 2018. The taking of an exception, is a pre-trial

procedural step provided for in s 170 of the Criminal Procedure and Evidence [*Chapter 9:07*]. Where the accused raises an exception the court must determine it before plea. No adverse inference should be drawn on account of the filing of the exception because the applicant as accused is by law entitled to take the exception. All that I am able to deduce therefrom is that the applicant's trial has thus not commenced because he has not yet offered a plea to the charge, the procedure being that the exception must be disposed of first.

Mr Macharaga also raised the issue that the applicant was facing another case where he is jointly charged with one Genius Kadungure who was issued with a warrant of arrest for defaulting court. It was not alleged that the applicant has ever defaulted court. Mr *Kasema* fairly conceded that the applicant's application could not be determined on the basis of the wrongs of his co-accused. Mr *Kasema* further informed the court that the co-accused's warrant of arrest had been cancelled and that he was back in the country.

Mr Macharaga lastly submitted that on 13 August, 2018, following the admission of the applicant to bail in case No. R 734-5/18, the applicant defaulted reporting to the police. He attached an extract of the default enquiry carried out on 28 August 2018. From the record, it was Mr Macharaga himself who advised the court that the issue of the default had been discussed between counsel and that the default enquiry should be terminated which the court did. It does not appear to me to be proper for the state to approbate and reprobate at the same time. If the default was not adjudicated upon and was terminated, it is improper to rely on it to oppose an applicant's application because the termination meant that no judicial pronouncement was made upon it. It also meant that the default had been understood condoned by the State, hence its decision not to have the court enquire into it further.

From all the above, I come to the conclusion that the applicant has demonstrated on a balance of probabilities that his attendance is required in South Africa for purposes of furthering the business interests of his company. I reach this conclusion taking into account that the grant of bail is made in recognition of the principle that an accused person is presumed innocent until proven guilty. Such accused must be allowed to go about his life and business for as long as the exercise of the right does not threaten or defeat the due administration of justice.

The question that presents itself is whether the temporary release of the applicant's passport is likely to defeat the course of justice. I think not. Mr *Kasema* conceded that if the applicant was mindful to abscond from the court's jurisdiction, he could easily do so without

the passport although the use of his passport would legitimize his entry into a foreign country. There were no pointers adduced by the State to indicate that the applicant was not reminded to return to Zimbabwe were he to be allowed the temporary release of the passport and his exit from Zimbabwe. For a court to entertain an apprehension that there would be a likelihood of abscondment if the passport is temporarily released, there should be placed before the court, facts from which the court may draw a reasonable inference of apprehension or likelihood of abscondment.

In my judgment, the surrender of a passport by an accused to secure his or her due attendance at trial as a condition of bail is not intended to deprive such accused person or suspect of his or her livelihood. To hold so would fly against and constitute a violation of the presumption of innocence as provided for in s 70 (1) (a) of the constitution. The condition will also fail the reasonableness criteria as set out in s 50 (6) of the constitution which provides that conditions of release on bail should be reasonable. It must also be appreciated that whilst a condition imposed may have been reasonable at the time that it is imposed, a change of circumstances may render the condition unreasonable if was to continue to hold. Therefore, the correct approach in my view is that the accused on bail must continue to go about his life and the State should promote and be supportive of the applicant's endeavours to earn a livelihood through lawful means so long as allowing the applicant that latitude does not defealt the administration of justice.

I must next consider whether, if the passport is released, there remains sufficient security to ensure the applicant's due attendance for his trial. The applicant was ordered to surrender title deeds to a valuable property in Colne Valley. The property measures 7931 square metres which amounts to almost two acres of land in a prime area. The applicant stands to lose the property if he absconds. I have also remained mindful of the findings made by CHIKOWERO J in his reasons for granting the applicant bail when he stated as follows:

"Most important of all, there was clearly no evidence that applicant was a flight risk."

The learned judge gave his reasons for his findings. The findings made remain extant and as I have already observed, no further facts were placed before me to merit my making a contrary finding. The applicant was found by the court to have travelled "virtually to every corner of the world, and returned to Zimbabwe" at a time that the case was under investigation to the applicant's knowledge and involvement in the investigations. The learned judge also made findings that on the charges faced by the applicant, there did not appear to be very compelling

evidence to render the applicant's conviction a foregone conclusion. No facts were placed before me to show that the position has otherwise changed. The only new development is that the accused filed an exception which is pending determination. It is trite that in bail applications and in so far as the court is required to consider whether the accused is likely to stand trial, the court will *inter alia* consider the nature of the offence and the relative strength of the state case basing on information placed before it without turning bail proceedings into a trial. See *S* v *Chipetu* HMA 06/17; *S* v *Banda* HB 6/15; *S* v *Nyaruviro & Anor* HB 262/17; *Gumbo* v *S* 2017 ZAGPJHC 147; *Tungamirai Madzokere & 28 Ors* v *S* HH 182/12. The rationale for the court to consider the relative strength of the state case is a matter of common sense. An accused facing a case which is considered relatively weak is unlikely to abscond trial compared to one where the nature of the evidence grounds a sure conviction like a case where a thief is caught red handed so to speak.

In my judgment therefore and taking into account all the circumstances of the case and all other factors which are properly considered in applications for bail and alteration or variation of conditions which may have been imposed, I am not persuaded that the temporary release of the applicant's passport will result in applicant absconding trial nor that such release will defeat the due administration of justice. I also did consider ordering that additional sureties should be provided by the applicant. Upon careful consideration of the facts of the case and the findings made by CHIKOWERO J on the strength of the State case, and further taking into account the nature of the other sureties held, there is no justification to call for additional sureties to be deposited by the applicant. The State counsel did not in any event call for such additional sureties in the event that the application for variation was granted.

Accordingly I make the following order: taking into account that the accused's trial was postponed to 22 October, 2018.

1. The conditions of bail imposed by the court in its order of 10 August 2018 admitting the applicant to bail are varied by the suspension of conditions 4 and 5, to wit, as follows:
    (i) The applicant's passport shall be temporarily released to him by the Clerk of Court.
    (ii) The applicant shall return the passport into the custody of the Clerk of Court by no later than 4.00pm on or before 22 October 2018.

(iii) The reporting conditions imposed on the applicant are suspended until 22 October 2018 where after the applicant shall abide by them.

2. For the avoidance of doubt, conditions 1, 3 and 4 remain unaltered whilst condition 2 will apply for as long as the applicant is within Zimbabwe.

Manase & Manase, applicant legal practitioners
National Prosecuting Authority, respondent's legal practitioners