EVAN MAWARIRE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 25 January 2019 and 29 January 2019

**Bail Application Pending Trial**

*T. Bhatasara,* for the applicant
*M. Shumba with L Masuku,* for the respondent

CHITAPI J: The applicant applies for bail pending trial on a charge of "subverting a constitutional government as defined in s 22 (2) (a) (iii) of the Criminal Law Codification and Reform Act, [*Chapter 9:23*]. The operative section provides as follows:

> "22. (2) Any person who, whether inside or outside Zimbabwe –
> (a) organizes or sets up, or advocates, urges or suggests the organization or setting up of, any group or body with a view to that group or body-
> (i) ……
> (ii) …….
> (iii) coercing or attempting to coerce the Government
> (b) …….
> shall be guilty of subverting constitutional government and liable to imprisonment for a period not exceeding twenty years without the option of a fine"

The word coercing is defined in s 22 (1) as follows:

> "(1) In this section –
> 'coercing means constraing, compelling or restraining by-
> (a) physical force or violence or, if accompanied by physical force or violence or the threat thereof, boycott civil disobedience or resistance to any law, whether such resistance is active or passive; or
> (b) threats to apply or employ any of the means described in paragraph (a);
> 'unconstitutional means' any process which is not a process provided for in the constitution and the law'

The state alleges that on 13 January 2013 the applicant and his accomplice Peter Mutasa who is the President of the Zimbabwe Congress of Trade Unions (ZCTU) published a video to the generality of the Zimbabwe population and that the video went "viral" on social media platforms that included You Tube, Twitter and Face Book. It was alleged that the said platforms are accessible to the Zimbabwe population and the entire world. The state alleged that the contents

of the video were intended to subvert a constitutional government in that it "coerced the Zimbabwean workers to boycott from reporting for duty and encouraging civil disobedience or resistance to any law". It was further alleged that the applicant and his accomplice by *modus* of the video aforesaid, "coerced or attempted to coerce the constitutional government by making demands that the boycott or civil disobedience would only end if the constitutional government attended to their demands which are as follows:

(i) address economic challenges
(ii) pay workers in US dollars.
(iii) remove bond notes"

The state alleged that the utterances in the video "caused members to commit acts of public violence and rampant looting."

The full extent of the video clip which give rise to the charge read as follows:

"Fellow Citizens, Pastor Evan Mawarire. I am here with Mr Mutasa President of the Zimbabwe Congress Trade Unions. He is the President of Z.C.T.U. We have united, we have decided we must stand together, citizens and workers and reject what is happening in our country. We cannot accept what's happening, increase of fuel, the bond note which is there, people are suffering, people are struggling in life and we can't just sit and watch this and so we are calling a stay away, a shut down of the nation, no one is going to work together with Z.C.T.U and other organisations we have united we must do this together, this is not an individual thing this is not for just one person, it's everyone, so Monday and Tuesday, the date tomorrow is Monday the 14th , Tuesday the 15th and Wednesday, the 16th , we are staying away, we are shutting it down. Mr Mutasa tell us what are our key demands, what are we saying to the government and to the people (Peter). Firstly we believe that Zimbabwean majority is in support of the call by Z.C.T.U that we boycott work and stay home. The main issue is that everyone is suffering, everyone is suffering, if we look at the kids in our schools, those in boarding schools are starving and those at tertiary schools they are going to be dropouts their parents are failing to make ends meet, we are earning low salaries on average of 300 just for transport and we have decided as the Z.C.T.U that this cannot go on so we have three key demands the first one is that the government must quickly address the economic challenges that we are facing, the second is that workers must be paid in US dollars, we must dollarize the economy (Evan Mawarire). So we must remove the bond note (Peter) bond note should be trashed away RTGS should be trashed away, everyone to receive salaries in the same currency so that there will be no corruption of all forms. So that are the main key demands incorporating everyone. As for farmers if you are to sell tomatoes you will suffer. Students who are renting apartments soon rentals will be hiked everything is going up Evan. Everything is gone up. So Monday, Tuesday, Wednesday, Monday the 15th , Tuesday the 16th ,Wednesday the 17th is a stay away. The whole country send this message to everyone, Zimbabwe Council Congress of Trade Unions together with social movements, this flag and everyone we are all coming together, we can't accept this, we must do this together the next three days we must stay away and shut the country down Peter) just look at your family how your family is suffering, just look at your neighbor you could look at you parents, this is nothing to do with any political affiliation but everyone is suffering let's unite. Evan) Let's unite. So no violence, no no no burning things or destroying things, its our constitutional right, we stay at home don't go to work, let's stay at home and let's do this together the next three days and then we are going to call, give another call after these three days are done, please please don't be left out, don't go to work let's let us just make those people understand that human life is not to be toyed around with, So thank you very much, we let's make it happen,

> Monday, Tuesday, Wednesday shut down stay away no going to work and then we hear what follows as we go forward, Thank you very much God bless you and continue to pray for this beautiful country pray for our country for God to help us. God bless."

The applicant was also charged in the alternative with the offence of "inciting Public Violence" as defined in s 187 (1) (b) as read with s 36 (1) (a) of the Criminal Law Codification and Reform Act. Section 36 (1) provides for the offence of public violence and does so in the following wording:

> "36 Public Violence
> (1) Any person who, acting in concert with one or more other persons, forcibly and to a serious extent-
> (a) disturbs the peace, security or order of the public or any section of the public or
> (b) invades the rights of other people;
> Intending such disturbance or invasion or realizing that there is a real risk or possibility that such disturbance or invasion may occur, shall be guilty and liable to a fine not exceeding level twelve or imprisonment for a period not exceeding ten years or both."

Section 187 provides for incitement to commit a crime through communication to persuade another person to commit any crime.

It is apparent from a reading of both the main and alternative charges that they are viewed by the legislature as very serious. The penalty provisions provide for stiff sentences and in the case of a conviction on the main count, the applicant would be imprisoned to an effective term of imprisonment of up to 20 years and there is no option of a fine. The offence in the main count is classified as a Part 1, Third Schedule Offence. Third Schedule offences are considered as of such serious magnitude that the magistrate court does not have unqualified jurisdiction to hear and determine bail applications relative to such offences. Magistrates Courts as provided for in the *proviso* to s 116 of the Criminal Procedure and Evidence Act may only exercise jurisdiction to hear and determine bail applications in cases involving the Third Schedule offences where the Prosecutor General has given his or her personal consent to have the magistrate exercise the jurisdiction to determine the question of bail. This application was accordingly directed to this court for want of the jurisdiction on the part of the magistrate before whom the applicant first appeared in the magistrates court on 17 January 2019. The fact that the offence is serious and has been brought before this court does not mean that bail is never granted in serious offences. See *S* v *Hussey 1999* (2) ZLR 187. The seriousness of the offence however is properly considered together with other factors relevant to the grant of bail.

In considering this bail application, I shall be mindful that I have to exercise this court's jurisdiction taking into account that the charge preferred against the applicant involves an alleged violation of the subversion of a lawful government or of the constitutional order. In such cases, there is need to balance the interests of citizens in upholding the constitutional order against the interests of the individual. In terms of s 115 C (2) (ii) (A) in of the Criminal Procedure and Evidence Act, offences listed under part 1 of the Third schedule as in *casu*, the applicant bears the burden on a balance of probabilities to show that it is in the interests of justice that he should be released on bail. See *Vincent Kondo and Anor* v *State* HH 99/2017; *Taurai Chikwizhu* v *State* HH 396/17. Section 115 does not however derogate from the peremptory provisions of s 50 (1) (d) of the constitution which provides as follows:

> "50. Rights of arrested and detained persons
> (1) Any person who is arrested-
> (a) …….
> (b) ……..
> (c) …….
>
> (d) must (own underlying) be released unconditionally or on reasonable conditions, pending a charge or trial unless there one compelling reasons justifying their continued detention …"

By casting the burden on the applicant to show that it is in the interests of justice that he or she be granted bail, this does not absolve the State of its duty to establish the existence of compelling reasons why bail should be denied. The applicant's burden should be interpreted as no more than he or she is required to satisfy the court that despite the State's allegations on compelling reasons as the State may advance, it would still be in the interests of justice to admit the applicant to bail.

The determination of the question whether or not it is in the interests of justice to admit the applicant to bail has somewhat been simplified by the provisions of s 115 C (1) of the Criminal Procedure & Evidence Act. The grounds or factors listed in s 117 (2) are to be considered as compelling reasons for the court to deny the applicant bail. Therefore where the grounds as listed are shown by the State to exist, then unless the applicant can show on a balance of probabilities that despite their existence, the interests of justice will be served by the applicant's admission to bail, then bail should be denied. Section 117 (2) provides as follows:

> "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) endanger the safety of the public or any particular person or commit an offence referred to in the First Schedule; or
  (ii) not stand his or her trial or appear to receive sentence; or
  (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
  (iv) undermine or jeopardize the objectives or proper functioning of the criminal justice system including the bail system; or
  (v) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security."

I should point out that in arguments by the State counsel; a lot of reliance was placed on the averment that to grant bail in the circumstances of this case, which I will deal with in due course, would undermine or jeopardize the objectives and proper functioning of the criminal justice system including the bail system. The tenor of the State's argument was that the video clip in issue had led to boycott, civil disobedience and damage to property including the death of a police officer and looting of shops. To release the applicant on bail would in the State's submission undermine or jeopardize the proper functioning of the justice system. I shall return to this issue and also deal with the issue that the applicant allegedly made similar pronouncements in 2017 and that he has expressed his intentions to make further pronouncements.

Dealing with the application itself, the applicant averred in his papers that he is a male adult aged 41 years and resident at a rented house which he has occupied for the past 3 years. The address is No. 19 Monmouth Close Avondale. The request for remand form prepared by the police confirms the address as the applicant's residential address. The form also lists as his business address, 24 Van Praagh Road, Milton Park, Harare. It is therefore not in dispute that the applicant is of fixed abode and in employment. He averred that he is a pastor of His Generation Church in Harare. He stated that he is married with three minor children and that his wife and children are solely dependent on him for their sustenance. He considers Zimbabwe as his permanent home. He holds a Zimbabwe passport which he offered to surrender as part of bail conditions and averred that he did not have previous convictions nor any pending cases before the courts. He averred that his personal assets comprised two motor vehicles, viz, a Toyota wish and Ford focus. Apart from the vehicles, he owns household furniture and goods estimated at $20 000-00. He earns $1 500-00

per month. He does not have assets, family or close relatives outside Zimbabwe. All these averments were not denied or put into issue by the State as respondent.

The applicant admitted or averred that he recorded and uploaded on social media platforms the video whose contents inform or found the charge he is facing. He averred that in doing so he was exercising his rights to freedom of conscience and freedom of expression as enshrined in ss 60 and 61 of the Constitution.

The applicant averred that he made application before the magistrate that his remand on the current charge be dismissed on the basis that the allegations made against him did not constitute a cognisable offence or the offence charged. The application was dismissed and he was remanded to 31 January, 2019. The applicant does not appear to have appealed against the magistrates court's findings nor sought a review of that decision by this court. I therefore proceed on the premise that the applicant is properly on remand awaiting trial for the alleged offence.

The applicant averred that he still believed that his publication and dissemination of the video clip did not constitute an offence. He cites judgment No. HH 802/17 delivered by this court wherein he was acquitted at his trial on similar charges to support his argument that he did not commit any offence. I have read the judgment aforesaid and noted that the applicant faced the same main charge and alternative as charged herein in that he was charged with having during the period April to July 2016 and using social medial platforms advocated for and urged Zimbabweans to shut down the country by "inviting workers to stay at home", parents not to take their children to school and inciting commuter omnibus operators not to ferry people and that by so doing he was inciting the Zimbabwean people to engage in boycotts and acts of civil disobedience well knowing that government functions would be paralyzed.

The applicant's argument was that he engaged in the same conduct for which this court cleared him as not constituting criminal conduct.

As I have indicated the lower court has already dismissed the applicant's application for a remand to be refused. Whether or not the applicant's admitted conduct will be adjudged not to constitute a crime is an issue that I cannot determine in a bail application. What I am however able to express is the applicant's desire to argue for his acquittal at trial using the precedent of the previous ruling of this case. The facts of the case as alleged by the state in the case for which the applicant is pending trial will be properly ventilated at his trial. The applicant must however be

taken as not having second thoughts but that he is innocent of the charges. From a bail perspective, an applicant who entertains a strong expressed conviction that he is innocent of charges leveled against him or her is likely to stand his or her trial and clear his or her name as opposed to absconding trial.

In its response the State submitted that by stating' "let's do this together, the next three days and then we are going to call, give another call after these three days are done….." the applicant was expressing his intentions to make further pronouncements. I agree that the applicant expressed an intention to make further pronouncements. However, the intention should be put in context in that the applicant at the time he did so entertained the view as he still does that by making pronouncements as he did he was not committing any offence and was protected by ss 60 and 61 of the constitution. He was however arrested before he made the promised further pronouncement. He has not stated that he will continue making the pronouncement despite his now being on remand. Only a fool would be advised to commit a similar offence whilst on remand before he has been cleared of the pending case. During the hearing, I enquired of the applicant's counsel whether the applicant would be intent on making further pronouncements on the issues before the court and counsel submitted that the applicant was not intent on doing so and would even agree to a gag order being imposed on him.

The next issue relevant to this application concerns the manner of the applicant's arrest. The applicant averred and the state did not dispute that he was arrested at his home and did not offer any resistance. He stated that police raided his flat in the early hours around 7:00am on 16 January, 2019. They ordered him to await the arrival of investigating officers. He averred that he co-operated went into prayer and waited for the investigating officers who came around 10:00am. On arrival, police carried out a search of the premises, recovered his apple Macbook and I phone cellphone handset and placed him under arrest. He averred that he was subsequently charged and taken to the offices of the National Prosecuting Authority on the following day for docket vetting. He states that the vetting process was sustained owing to unending consultations between the vetting officers and their superiors. He was then taken to the magistrates court for remand in the afternoon after alterations and additions were made to the original charges of inciting public violence.

In his application in para 10 of his bail statement the applicant averred that "…..the onus falls squarely on the shoulders of the State to prove or show the existence of compelling reasons justifying refusal to grant me bail pending trial." The applicant in para 11 of his bail statement averred that "….assuming that I have the onus (which is denied) to show that its in the interest of justice for me to be released on bail, I have discharged that onus…". I have already indicated that the onus to show that it is in the interests of justice for the applicant to be admitted to bail is reposed on the applicant because the charge against him is a Part 1 Third Schedule offence.

I indicated earlier in this judgment that the casting of the onus upon to the applicant to establish on a balance of probabilities that it is in the interest of justice to grant him bail did not derogate from the provisions of s 50 (1) (d) of the Constitution which is peremptory and provides that an accused person facing a charge or trial must be released unconditionally or on reasonable conditions pending trial unless there are compelling reasons to justify the continued detention. The State as the party that requires that there be a continued detention must provide the existence of the compelling reasons. The applicant as the party that desires release unconditionally or on reasonable condition is saddled with the onus to show that it is still in the interests of justice for his release on bail to be ordered despite the State having argued the existence of special circumstances. Ordinarily, the onus to prove that bail should not be granted would be on the state. By shifting the onus to the applicant to show that the interests of justice will be served by the applicant's admission to bail, this is in manner of speaking progressive. I reason so because a reading of s 50 (1) (d) leads me to the conclusion that once compelling reasons to justify continued detention have been established, then, the continued detention is ordered. By giving the applicant the burden to show that the interests for justice will be served by the applicant's admission to bail, it means then that even where compelling reasons to justify continued detention have been established by the State, the applicant can still rebut them.

*In casu*, the state counsel incorporated the content of the affidavit of the investigating officer in opposing bail. The grounds alleged therein for opposing bail were basically four on number. The first one was that because the situation in the country remained tense and the need to bring back sanity in the country, malcontents and other citizens would team up with the applicant to cause chaos and demonstrations leading to looting, property destruction and loss of life. This ground presents itself with commendation but missed the link. There is no doubt that the events

that ensued in the country on the days that the so called stay away ought to have taken place marked a dark episode in the country's history. No civilized society should engage in wanton acts of destruction of property and public infrastructure and utilities. There was reportedly loss of life and loss of limb sustained by citizens. It does not matter that people may have grievances against the constitutional order. Taking to the streets and engaging in acts of lawlessness is not protected by the constitution and such conduct does not fall for entitlement by any person to exercise as protected rights and freedoms under the Declaration of Rights. The culprits should be brought to book with the law taking its course following the rule of law. I have indicated however that the allegation in opposition of bail misses the link. This is so because, as I indicated at the hearing of the application, the video clip had to be considered as a whole. Without engaging in much debate on it, the video clip generally called upon the citizenry to stay at home and not take to the streets. It emphasized that there should not be any acts of violence. Thus, contrary to what the investigating officer states, that the applicant would team up with malcontents to demonstrate and cause chaos and mayhem, when arrested he was not part of the malcontents who instead of staying away, took to the streets. There was no allegation made that the applicant commandeered the malcontents. I do not find that there is a basis to hold that there is a likelihood that the applicant will take to the streets and be joined or join malcontents as alleged.

The second ground was that the applicant's accomplice was at large and that if released the applicant would team up with the accomplice and engage in acts of public violence including boycotting reporting for work. Withholding labour is not an offence per se. Section 65 (3) of the Constitution excepts only members of the security services from participating in collecting job actions, sit in, withdrawal of labour and engaging in strikes or other concerted similar action. A law may also restrict the exercise of the rights to maintain essential services. It would therefore not be an offence for the applicant to advocate for boycott of labour as long as this is done within the confines of the law. I would therefore not hold that this ground provides compelling reasons to deny the applicant bail. As regards the accomplice said to be at large it was accepted that the accomplice was Peter Gift Mutasa, the President of the Zimbabwe Congress of Trade Unions (ZTCU) also mentioned in the video clip. A letter dated 18 January 2019 by Peter Mutasa's legal practitioners addressed to the Police Officer-In-Charge CID Law & Order – Harare) and delivered on that date was produced in court wherein the said accomplice was offering to avail himself to

the police if required was produced. The issue of an accomplice in the nature of a fugitive from justice did not therefore arise. Further, the comments I have made concerning the non-participation of the applicant physically in the mayhem and there being no allegation or evidence of his commandeering the protests apply with equal measure, *mutatis mutandis*, in relation to this ground.

The third ground raised in the affidavit was that the applicant was likely to abscond because of the seriousness of the offence. The investigating officer alleged that the applicant if convicted was likely to be sentenced to life imprisonment. As regards the likely sentence, the investigating officer was misdirected. I have already discussed the issue of the competent sentence hereinbefore. I also indicated that the seriousness of the offence on its own was not a bar to the grant of bail. In *casu*, the seriousness of the offence would have to be considered against other factors like the applicant's conviction that he will be acquitted as he does not believe that the State case can sustain a conviction.

The last ground was that the applicant was a flight risk with contacts outside the country and was a holder of a passport. Such outside contacts were not listed and the applicant denied having any contacts outside the country. He also offered to surrender his passport. It was also argued that the countries borders are porous, an argument which I have always found amusing because it is not the applicant's fault that the borders are porous. It also appears to me that the surrender of a passport does not guarantee that an applicant will not cross the border by stealth. What it does is to make it difficult for the applicant to lawfully leave the jurisdiction of the court. If the applicant escapes through the borders by stealth, he becomes a fugitive from justice and it will be difficult for such fugitive to move freely in the country of escape.

Another strange allegation made in the request for remand form in opposing bail is that the applicant resides in the same area as witnesses and will interfere with them if granted bail. The allegation is strange because the offence charged is grounded on a video clip released to the public. The applicant admits that he authored and released it. One is left wondering who the witnesses referred to are. The applicant averred that no details of the witnesses was given to him. The State counsel did not motivate this ground or give it flesh. It appears that the inclusion of the ground was just put there perfunctorily without much thought put into it.

In disposing of the application, I have considered that the applicant's allegations to motivate his prayer for release on bail have not been controverted. He has undertaken to stand trial

and to argue that his conduct did not amount to an offence. In my view where a person is charged with the commission of a Part 1, Third Schedule offence and everything points to the fact that he can present sound argument based on a previous court judgment which is extant that his conduct does not constitute an offence, this, taken together with other factors about his reliability as to place of abode, personal circumstances and other factors relevant to the grant of bail, must constitute a sound basis to hold that the applicant has discharged the onus to show that the interests of justice will be served by his release on bail. I also consider that the applicant has shown that he is not a flight risk and there is no evidence of interference with State witnesses or investigations and thus the release of the applicant will not undermine or jeopardize the proper functioning of the criminal justice system including the bail system. Society does not crave for suspects who have an arguable defence to be committed to custody pending trial. Whilst, it is true that society abhors the lawlessness that took place, it cannot be said that the abhorrence will be atoned by denying bail to suspects whose involvement in the mayhem consisisted of calling upon the citizenry to stay away in protest over listed grievances against government and for persons exercising the stay away to remain in their homes and not engage in violence.

Counsel for the State submitted that if I were to exercise my discretion to admit the applicant to bail, I should impose more stringent conditions than offered by the applicant. Counsel suggested an upward revision of the amount of the bail bond from $500.00 to $1000.00. I also directed both counsel to engage and agree on the value of the surety being offered as the value would assist me in considering the overall effectiveness of the conditions put together as an incentive to ensure that the applicant would not abscond but stand his trial. Counsel did so and I express my gratitude to them. The immovable property offered as surety was valued at $40 000.00 USD. That said, I must remain cognizant that the constitution provides that a person's freedom should not be arbitrarily deprived of him or her unless compelling reasons are shown to exist. A balance must therefore be struck between the societal interests and those of the applicant as accused. In striking the balance, I am persuaded on the facts and circumstances of the case and the applicant that the interests of justice will best be served by the admission of the applicant to bail on stringent conditions attaching thereto. I determine to admit the applicant to bail pending trial on the following conditions:

1. He deposits the sum of $2000.00 with the Clerk of Court, Magistrate Court, Harare.

2. He reports at Avondale Police Station three times a week on Mondays, Wednesdays and Fridays between the hours 6 am and 6 pm.
3. He resides at 19 Monmouth Close, Avondale, Harare until the matter is finalized.
4. He surrenders his passport to the Clerk of Court on depositing the bail bond amount in para (1).
5. He shall not interfere with state witnesses and investigations.
6. He surrenders as surety the title deed No. Deed of Transfer 2057/2011 dated 16 December 2011 registered in the names Kinson Mawarire and Thamary Mawarire wherein the property described as Lot 1 of Stand 245 Que Que Township of Que Que Townlands was conveyed to the Clerk of Court.

*Mupanga Bhatasara*, applicant's legal practitioners
*National Prosecuting Authority*, respondent's legal practitioners