DOUGLAS TAPFUMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 7 November 2019, 11 November 2019 and 13 November 2019

Bail Application – Changed Circumstances

J Samukange, for the applicant
E Mavuto, for the respondent

CHITAPI J: I reserved judgment at the end of argument on 7 November, 2019. On composing this judgment and going through the history of the matter, I considered that there were no compelling reasons present to justify the continued pre-trial incarceration of the applicant. I did not find that the prosecution had, as required of it by the provisions of s 115 C (2) (a) (i) of the Criminal Procedure and Evidence Act, C*hapter 9:07* discharged the burden of showing, on a balance of probabilities that there are still compelling reasons to justify the applicant's continued determination. Mr *Mavuto* who appeared for the prosecution found himself in a difficult position to argue for the justification of the continued incarceration of the applicant. Counsel submitted that he had nothing to add to the curt written response which he filed and referred to the affidavit deposed to by the trial prosecutor Mr *Chimbari*. I shall comment on the response and affidavit in due course. I however need to deal with the paper trail and background facts first.

The background facts of this matter were succinctly set out in the judgment of MUZOFA J ON 23 August, 2019 under reference HH 565/19. To briefly recap, the applicant is a senior government official whose position in government was designated as Principal Director in the department of State Residencies. He was arrested by the Zimbabwe Anti-Corruption Commission on 30 July, 2019 on 3 counts of the offence of Criminal Abuse of Duty as a public officer as defined in s 174 (1) (a) of the criminal law (Codification and Reform) Act, *Chapter 9:23*. From the initial request for remand form, the allegations contained thereon were that in the period extending from 10 April, 2018 to 13 August, the applicant connived with unnamed accomplices

and illegally imported 76 motor vehicles and that he evaded payment of duty. The applicant allegedly applied for and obtained duty exemption certificates purporting that the vehicles were exemptible from paying assessed duty after passing them off as government vehicles, yet the vehicles were the applicant's personal property. Although the face of the request for remand form indicated 76 vehicles, the expanded facts as set out in the annexure to the request for remand form itemized two vehicles in count 1, 3 vehicles in count 2 and 2 vehicles in court 3. The prejudice to the State in duty was US$3 189 in count 1; US$4 340 in count 2 and US$4 416 in count 3. The total prejudice is therefore US$11 936 in respect of all the 3 counts.

When the applicant appeared before the regional court on his initial court appearance on 31 July, 2019, the learned regional magistrate entertained the applicant's bail application. He dismissed the bail application and the applicant was committed to custody. The learned regional magistrate, amongst other issues, correctly reasoned that the offences charged were serious as the applicant was in fact charged with acts of corruption. The seriousness of the offence was therefore not manifest in the amount of duty which the applicant avoided paying but in the abuse of his office to unlawfully benefit himself. The learned regional magistrate also determined that the applicant was likely to abscond. The ruling denying applicant bail was very brief and covered two and a quarter pages despite the bail application and submissions by counsel having covered 45 pages. Be that as it may, the applicant's legal practitioners noted an appeal against the learned regional magistrate's decision to deny the applicant bail.

Consequent on the noting of the appeal as aforesaid, the appeal was filed in this court under case No. B 1287/19 on 7 August, 2019. MUZOFA J before whom the appeal was argued, dismissed the appeal on 23 August, 2019. I need to point out that the application for bail would have been made before the learned regional magistrate in terms of s 116 (b) as read with s 117 A of the Criminal Procedure and Evidence Act. In terms of the provisions thereof, a magistrate may, upon application by a person who is in custody for any offence, other than one listed in the third schedule admit the person to bail on such person's initial appearance in court or anytime after appearance but before sentence or alter the bail conditions if bail was already granted. There is a proviso to s 116 (b) which provides that where the personal consent of the Prosecutor General has been given, the magistrate will have jurisdiction to hear and determine a bail application in relation to a third schedule offence. By contrast s 116 (a) provides that a judge may admit a person to bail

in relation to any offence after such person has appeared in court but before sentence has been passed. Therefore a person who has appeared in court on any charge has a choice to choose the High Court as the court of first instance for purposes of applying for bail or the magistrates court subject to jurisdictional limitations as I have outlined them. The choice of court in which to apply for bail is important because it informs the designation of the court to which the applicant may progress the matter in the event that the applicant is not satisfied with a decision made upon such applicant's initial bail application.

In terms of the provisions of s 121 (1) (b) of the Criminal Procedure and Evidence Act, an appeal is available against the decision to deny the person admission to bail. The appeal is also available where bail has been granted but the person is dissatisfied with the amount of bail ordered to be deposited or with any conditions imposed in connection with bail. Where the person has chosen the High Court as the court of first instance and is dissatisfied with the judgment of a judge of the High Court as aforesaid, an appeal is made to a judge of the Supreme Court. Where the appeal is against the decision of the magistrate, such appeal is made to a judge of the High Court. In terms of s 121 (8), where bail has been denied by a judge of the High Court on appeal from the decision of the magistrate, the High Court judge's decision is final. A further appeal will only be available to a Supreme Court judge if the offence charged falls under para 10 of the Third Schedule or the Ninth Schedule. The procedure above must be properly understood. Although one would assume that the above procedure is well laid out, this application unfortunately finds itself murked in procedural shortcomings.

I have indicated that the provisions of s 116 of the Criminal Procedure & Evidence Act must be read with the provisions of s 117A. I must therefore relate to s 117A. The provisions of s 117A complement the provisions of s 116. Section 117A is an enabling or permissive section. It simply provides that subject to the jurisdictional limitation in the *proviso* to s 116 as already discussed, an accused person may verbally or in writing at any time apply to a judge or magistrate before whom the person is appearing to be admitted to bail. The rest of the provisions of s 117A relate to procedure, evidence and requirements that such applicants must satisfy. I do not consider it necessary to enter into an interrogation of s 117A any more than I have done because its provisions and interpretation are not the focal point of this application.

The next relevant section which is relevant to this judgment is s 116, specifically *proviso* (ii) thereof. It reads as follows:

> "Where an application in terms of s 117A is determined by a judge or magistrate, a further application in terms of s 117A may only be made, whether to the judge or magistrate who has determined the provisions application and which have arisen or been discovered after that determination."

In everyday parlance or colloquially, the courts and legal practitioner have invented and coined subsequent applications after the first one, "application based on changed circumstances." The innovative expression is convenient to use and there is no problem with its use for as long as the strict provisions of the *proviso* are properly understood and applied. What is important to understand about the *proviso* is that it is a limitation section. A person whose bail application has been determined and such person does not agree with the decision must if so minded or advised escalate the matter to the next level by appealing to the next hierarchy. There must be finality to litigation and recognition of the *functus officio* doctrine in terms of which, once a court has made a final determination on an issue before it, its jurisdiction in regard thereto has been exhausted and discharged. Its decision should not be reopened by the same court. The *proviso* (ii) aforesaid is an exception to the *functus officio* doctrine. Its purport is that, under limited circumstances as set out in the *proviso*, the decision which was otherwise final can be reviewed by the same judge or magistrate or in their absence by any other available judge or magistrate. Again I shall revert to this issue in due course.

Reverting to the paper trial, following on the dismissal of the applicant's appeal by MUZOFA J, the matter ended there as in terms of s 121 (2) (b) as read with subsection 8 of the same section, no further appeal lay to any other court beyond this court since the offence charged was neither a para 10, Third Schedule offence nor a Ninth Schedule offence in which the Prosecutor General had issued a certificate referred to in subsection (3b) of s 32 of the Criminal Procedure & Evidence Act.

The applicant changed legal practitioners and engaged his present legal practitioners with Mr *Samukange* in particular conducting the applicant's case. On 16 September 2019, the applicant made another application for his release on bail before the same learned regional magistrate. The application was made in terms of s 116 (c) (ii), "changed circumstances." The learned regional magistrate dismissed the application on the same date. In consequence of the dismissal, the

applicant was aggrieved by the decision and noted an appeal to a judge of this court. The appeal was heard before FOROMA J and the learned judge then dismissed the appeal on 13 October 2019. Following arguments presented before me on 7 November 2019 in the current application, I caused the record of proceedings wherein decisions were made by MUZOFA and FOROMA JJ to be placed before me. The record case no B1287/19 contains full judgments by the learned judges. In the case of the judgment of FOROMA J it is fully typed but not allocated an HH reference which is just a procedural step which is done to reference judgments. I however noted a letter addressed to the Registrar from the applicant's legal practitioners dated 29 October, 2019 wherein they request for a written judgment by FOROMA J to enable them to note an appeal. In view of the views l expressed in relation to the provisions of section 121 (8) of the Criminal Procedure and Evidence Act, the proposed appeal would be incompetent.

I revert to the current application. I have already expressed my view that after hearing arguments, I was inclined to admit the applicant to bail because there was no longer any compelling reason for the continued incarceration of the applicant. The new facts which informed my view were the abortive failure of the trial to commence on 29 October, 2019 at the instance of the State and the further failure of the trial to commence on 4 November, 2019 in circumstances where the applicant had come ready to have the trial kick off and had a defence outline prepared. The trial did not take off because without prior warning, the applicant's counsel was taken by surprise when the State sought to amend the charges by preferring an alternative charge of fraud. It was obviously necessary for the applicant to reconsider and redo his defence outline. It was not disputed by Mr *Mavuto* that it would have been necessary for the applicant in safeguard of fair trial or hearing tenents of procedure to afford the applicant the opportunity to prepare his defence fully. The matter had to be postponed. Quite clearly therefore, the applicant has not been a cause for any of the delays. In the trial prosecutor's affidavit, he submitted that it was the applicant who applied for the postponement following the prosecutor's application to amend the charge. Such application if made was not dilatory but the applicant had a justifiable excuse to reconsider his defences. It cannot accord with real and substantial justice for the court to continue to hold the applicant in custody where the State prevaricated on what charges to prefer. Mr *Mavuto* did not dispute that the amended charges were not available on the date of trial and neither were they available when this application was being argued. When l asked Mr *Mavuto* to advance compelling reasons for

denial of bail in the light of the prosecution's failures and unpreparedness for trial, counsel said that he had nothing further to submit beyond the trial prosecutor's affidavit, a clear sign that he could not support the continued denial of bail.

Notwithstanding my inclination to grant the applicant bail, a procedural hurdle presented itself. The applicant could not make a fresh application for bail before a judge of this court at first instance. I noted that a new record was opened with the offence captured as fraud. However, the fraud charge was not before me as a separate offence. It was common cause that it was a mooted charge to be preferred in the alternative at the trial but was not and is yet to be charged. MUZOFA and FOROMA JJ heard the applicant's applications on appeal. The appeal judgments are final. It would be incompetent for either the same judges or myself to reopen the appeal judgments and to reconsider the same under the "changed circumstances" review procedure. The judges of this court are *functus officio* on their appeal judgments. The applicant should have applied for bail on changed circumstances before the Magistrates court and if denied, he should have then approached this court on appeal. I lack jurisdiction to determine this matter at first instance because the fraud charge at best was mooted but not yet preferred. More importantly, a change of circumstances application cannot be competently brought before this court because this court was petitioned as an appeal court and remains so in relation to the application for bail first made in the magistrates court.

Accordingly, on account of the procedural jurisdictional limitation of this court in regard to the application, the application is struck off the roll. The applicant if advised may make his application in the court *a quo* and come to this court on appeal or review as he may be advised to, should he be dissatisfied with the court's decision.

Ventures & Samukange, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners