PORTIA MANANGAZIRA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 5 March & 12 March 2021

Bail Appeal

Mr H Nkomo with T. Mhishi, for the appellant
T. Mapfuwa with R. Chikosha, for the respondent

CHIKOWERO J: This is an appeal against the magistrates Court's refusal to admit the appellant to bail pending trial. The appeal is made in terms of s 121 (1) of the Criminal Procedure and Evidence Act [*Chapter9:23*] ("the CPEA") as read with r 6 (1) of the High Court of Zimbabwe Bail Rules, 1971.

THE FACTUAL BACKGROUND

The appellant, a Principal Director of Epidemiology and Disease Control in the Ministry of Health and Child Care ("the Ministry") appeared before the Regional Court at Harare (Sitting as an Anti-Corruption court) on 22 February 2021 facing 4 counts 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*] ("the Code")

The allegations, in brief, were as follows.

In respect of the first count, that during the period extending from 16 July 2020 to 19 January 2021 the appellant acted unlawfully and contrary to or inconsistent with her duties as a public officer by authorising the procurement of goods and services amounting to US$280 529.76 without following tender procedures as prescribed in the Public Procurement and Disposal of Public Assets Act [Chapter 22:23] thereby showing favour to the selected suppliers. The sum of US$280 529.76 was portion of an allocation of US$796 675 availed to the Ministry by a non-governmental organisation in response to a request for funding to fight the COVID -19 pandemic.

As for the second count, the allegations were that between 23 July 2020 and 1 November 2020 the appellant acted contrary to or inconsistent with her duties as a public officer by sanctioning the payment of facilitation fees amounting to US$8 835 to undeserving Ministry employees during their routine duties without the accounting officer's authority thereby showing favour to those employees and herself.

The third count was that during the period from July 2020 to January 2021 the appellant acted contrary to or inconsistent with her duties as a public officer by identifying 1000 community health workers to be deployed throughout the country to raise awareness on the COVID-19 pandemic without involving Provincial and District Medical Directors and Officers. These workers were paid US$600 each over a three month period. Preliminary investigations revealed that out of the 1000 community health workers 28 were related to the appellant contrary to the requirement that the community health workers were to be drawn from the country's key religious, traditional and cultural groups and geographical coverage of the prevailing COVID -19 pandemic hotspots to enhance intensified surveillance, testing, improved case management and response to the pandemic. Through her conduct, the appellant is alleged to have shown favour to her relatives and disfavour to other communities across the whole country.

Finally, from July 2020 to January 2021 the appellant is alleged to have acted contrary to or inconsistent with her duties as a public officer by unlawfully directing the issuance of 3290 litres of diesel coupons to privately owned motor vehicles not registered with the Ministry in contravention of the transport policy which stipulated that the accounting officer should authorise the issuance of fuel to privately owned vehicles. Accordingly, the appellant is alleged to have shown favour to the beneficiaries and disfavour to the Ministry.

Appellant consented to her placement on remand. Her entitlement to bail was opposed on the grounds that she was likely to abscond and to interfere with witnesses.

In a somewhat unclear judgment, the Court below found that the case for the prosecution was strong hence the prospects of conviction were high and the imposition of a custodial sentence, if convicted, a virtual certainty. Therefore, the appellant, to avoid being incarcerated, might not stand trial. However, the Court *a quo* then made it clear that imposition of suitable conditions would have sufficed to allay any fears of abscondment. The learned magistrate also found that appellant was likely to interfere with her subordinates at the Ministry's Head Office where appellant is also stationed. However, the Court *a quo* went on to

find that imposition of a condition requiring the appellant not to appear at the Head Office would suffice to allay fears of interference with her workmates and police investigations at that work place. At the end of the day, therefore, the only reason why appellant was denied bail was that the Court below found that it was inevitable that appellant would interfere with her 28 relatives whom the State was going to call as witnesses at the trial. It is necessary at this stage that I reproduce the relevant portion of the judgment *a quo*. It reads at pages 6-7:

"If what the State submits is true, it would follow their case as against accused is strong. Accused is a senior medical doctor who was managing COVID 19 funds, which function is important in the country's drive towards managing the pandemic. It is function which requires transparency and accountability. If convicted therefore any reasonable judicial officer is bound to impose a custodial sentence. This may induce accused to flee, it can be argued like any other serious offence there is efficacy in granting bail on conditions. *In casu*, however while I may agree on that, I am more worried about the second ground laid of interference with witnesses. The accused is still employed by the Ministry of Health she works closely with her juniors to the extent that given the seriousness of the offence if granted bail, there is a likelihood of interference. Further, accused is closely related to 28 persons who are to be used as witnesses. Statements have not been recorded from them, there is a great extent that these can be easily influenced by accused. This is real and not imagined in that they initially benefitted from a recruitment exercise headed by accused, to which accused is now being charged of, given that close relations it is inevitable that accused will interfere with them. No bail condition can stop accused from interacting with all her 28 relatives, there is no way that this can be tracked. This is different from a situation where accused is barred from visiting her workplace. It therefore would be in the interests of justice that accused remain in custody pending the recording of statements, retrieval of documents and completion of investigations.

Bail is therefore denied"

THE GROUNDS OF APPEAL

The grounds of appeal read as follows:

"1. In general, the Court *a quo* misdirected itself by concluding that the State had placed before it, compelling reasons warranting the denial of bail to the Appellant.
2. The Court *a quo* erred at law in denying the appellant bail without making specific finding that it had upheld the grounds preferred by the State in opposing bail.
3. The Court *a quo* grossly misdirected itself in denying the appellant bail without making clear findings establishing the basis for denying the appellant bail.
4. The Court *a quo* grossly misdirected itself by making a finding that the appellant was likely to interfere with witnesses if granted bail, a finding which is not backed by any evidence or supported by the evidence.
5. The Court *a quo* erred at law in making a finding that a trial Court convicting the appellant would be bound to impose a custodial sentence, a finding which coloured the rest of the determination of the matter before it.
6. The Court a quo grossly misdirected itself in denying the appellant bail on the basis that the appellant would interfere with the evidence of 28 witnesses when the State in its 'unamended' papers seeks to rely on 6 witnesses only.
7. The Court a quo grossly misdirected itself in denying the appellant bail without considering and attaching due weight to the conduct of the appellant prior to her arrest and after her arrest.
8. The Court a quo grossly misdirected itself in basing its finding that there was a likelihood that the appellant would abscond or evade justice only one factor, the likely sentence to be imposed in the event of a conviction yet the law requires such a finding

to be made on a mandatory consideration of at least six factors provided for in s 117 (3) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

9. The court *a quo* grossly misdirected itself in denying appellant bail 'pending the recording of statements, retrieval of documents and completion of investigations' without making specific findings that the appellant would jeopardise the conduct of investigations and retrieval of documents.

10. The court *a quo* grossly misdirected itself on the facts in failing to find that due to the COVID-19 lockdown imposed by the government, the appellant was not a flight risk.

THE COURT'S APPROACH IN A BAIL APPEAL

A court of appeal will only interfere with a decision made relating to bail if the court *a quo* committed an irregularity or exercised its discretion so unreasonably or improperly as to vitiate its decision. See *S* v *Chikumbirike* 1986 (2) ZLR 145 (SC); *Chimwaiche* v *State* SC 18/13.

In this matter, I will therefore interfere with the Magistrates Court's decision only if I am satisfied that appellant is correct in arguing that the judgment *a quo* is marred by an irregularity or misdirection or that the court below exercised its discretion so unreasonably or improperly as not to have been judicially exercised.

I note that some of the grounds of appeal overlap, some are duplicated, others seem to be inconsistent with each other while others raise aspects which are not issues in the appeal. For this reason, I will address the issues emanating from the grounds which were argued before me. I record that due to want of clarity in the judgment appealed against Mr *Nkomo* admitted at the hearing of the appeal that he could not be certain of the magistrate's findings. Out of abundance of caution he argued everything.

ABSCONDMENT

Although the learned magistrate could have expressed herself in clearer terms, it is evident from a reading of her judgment that she did not make a finding that appellant was likely to abscond. If anything, what she really said was that the strength of the State's, case the likelihood of conviction and the virtual certainty of imposition of a custodial sentence may prompt the appellant to abscond. She did not say the appellant was likely to abscond. Abscondment becomes a compelling reason for purposes of denial of bail if it passes the stage of speculation (may or may not abscond) and reaches the threshold of likelihood not to stand trial or passing of sentence (likely to abscond). The latter stage requires evidence which would compel the court to find that the ground has, on a balance of probabilities, been established on

a balance of probabilities. In any event, the judgment *a quo* is clear that suitable conditions would have sufficed to minimise the danger of abscondment.

The result is this. Abscondment was not the reason why bail was refused. It is not an issue in this appeal.

LIKELIHOOD OF INTERFERENCE WITH APPELLANT'S WORKMATES AND RETRIEVAL OF DOCUMENTS FROM THE MINISTRY

I agree with Mr *Nkomo* that the learned magistrate grossly misdirected herself. The available evidence was that an audit had been conducted at Head Office over 11 days without the appellant, despite knowledge of that exercise, interfering with her subordinates and retrieval of documents at Head Office. In this regard, the following exchanges occurred when Detective Sergeant Richard Machinya, who gave evidence in opposition to the release of appellant to bail, was being cross-examined by appellant's legal practitioner (record pp 38, 41 and 42):

"Q If I say the courts have said reasons which are convincing, you have agreed with me, reasons which are strong or forceful, you agree with me that is the duty as you stand there?

A Maybe I will take the strong part of it in the sense that they will be supported by something else

...

Q Since this audit was carried out from the 9th to the 17th February at her place of work, do you have any evidence of her interference with any witnesses?

A At the moment, I don't have, I don't know.

Q You will agree with me that the audit report that you are making reference to was successful, leading to her arrest, pointing to the fact that she never interfered with any witnesses.

A The audit is still in progress.

Q When the report is already out?

A This is just an interim

Q But you will agree that so far she has not shown any attempt to interfere with evidence?

A Yes, to me, yes, Sir

...

Q In respect of documentation have you received all the documentation that you require from the Ministry of Health and Child Care?

A Not yet your Worship

...

Q You will agree with me that if she is ordered by the honourable court not to visit her place of work, you ordinarily would not have difficulties in retrieving the documentation?

A If she is what?

Q Ordered by the honourable court not to visit her place of work until you finalise your investigations?

A I don't believe so.

Q You don't think so. How do you think, when she is not visiting the office, how will she interfere with your retrieving of documents?

A She can still interfere with our retrieving of the documents, is interference can be directly or indirectly

Q But so far you have said she has never made an attempt to interfere?

A Yes, she has never.

Q So future interference is not something that is tangible, it is something that you are imagining in your mind?

A ... (Pause)

Q I will take it that there is no answer I will move forward. Although it is not contained in your Form 242, you allege that in your evidence, now in court you allege that she will interfere with her family members, correct?

A Confirmed."

The evidence therefore showed that appellant's past conduct was not that of interference with her subordinates, the audit exercise and police investigations. In addition, the witness despite correctly conceding that his reasons for opposing the granting of bail had to be supported by evidence, completely failed, under cross-examination, to substantiate his assertion that pre-trial release of the appellant was likely to result in the latter interfering with her subordinates and police efforts to retrieve outstanding documents from her workplace. My view is that it was not, in these circumstances, a judicious exercise of discretion for the learned magistrate to refuse bail merely because the police had not yet recovered all the required

documentation from the appellant's workplace, had not recorded statements from her subordinates and had not completed their investigations. A decision on bail involves a judicious exercise of discretion. Section 50 (1) (d) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 requires that there be compelling reasons if bail is to be refused. There was nothing compelling warranting the continued detention of the appellant. The outstanding investigations could be completed with appellant enjoying her liberty since she had not hindered the audit and the police investigations at all.

Indeed, a close reading of the judgment *a quo* makes it manifest that the learned magistrate did not make any finding that the release of the appellant would militate against the retrieval of the outstanding documents from the latter's workplace and was likely to lead to appellant interfering with her juniors. This is so because the learned magistrate had already made a finding that a condition barring the appellant from visiting her workplace until investigations were completed would suffice.

I am constrained to say this. It appears to me that the reasoning process of the court a quo is not clear, containing as it does suggestions of contradictions and inconsistencies. Mr *Mapfuwa* had no option but to concede that the learned magistrate misdirected herself, at the end of the day, in not making a finding on whether appellant was likely to interfere with her juniors and the retrieval of outstanding documentation and, if so, whether a condition barring her from visiting the workplace until investigations were completed would not suffice to protect the interests of the administration of justice. In *Gwaradzimba N.O* v *CJ Petron* SC 12/16, GARWE JA said:

> "The position is also settled that where there is a dispute on some question of law or fact, there must be a judicial decision or determination on the issue in dispute. Indeed, the failure to resolve the dispute or give reasons for a determination is a misdirection, one that vitiates the order given at the end of the trial – *Charles Kazingizi* v *Revesai Dzinoruma* HH 106/2006; *Muchapondwa* v *Madaka and Ors* 2006 (1) ZLR 196 D-G, 201A (H); *GMB* v *Muchero* 2008 (1) ZLR 216, 221 C-D (S)."

The learned magistrate simply ruled or ordered that appellant must be kept in custody pending the recording of statements, retrieval of documents and completion of investigations. This ruling or order was made in the absence of any finding.

It follows that the failure to determine whether the appellant was likely to interfere with her juniors and the retrieval of documents from her work place and, if so, whether it was necessary to bar her from visiting the Head Office, was a misdirection, one that vitiates the order refusing bail.

INTERFERENCE WITH APPELLANT'S 28 RELATIVES

At page 45 of the record, the cross-examination of the witness proceeded as follows:

"Q You see you don't believe in justice.
Okay, how may witnesses do you intend to call?

A We are not sure about the number but currently there is a provision of six witnesses but as we go on, we will interview some of the people and try to see if they can be our witnesses because from the list that we have some of them are family members and for those family members they would have been our key witnesses to strengthen our case but for them to testify against their daughter or their mother, it will be very difficult. So we will find out as we progress with the investigations.

Q You accept Detective Sergeant that your testimony so far as regards interference is not supported by any evidence of previous conduct by the accused person?

A. Is not supported by what?

Q. Evidence?

A. There is evidence that witnesses are family members. There is evidence that some of the witnesses are her subordinates, they are workmates. What other evidence do you want?

Q. I risk repeating myself but I have to because it looks like you are not getting it. You accept that so far she has not made an attempt to interfere with any of your witnesses?

A. Yes."

Still under cross-examination, the witness revealed that some of those family members were already in court, following the proceedings. He pointed out that it would be difficult to enforce a condition that appellant should not communicate with her relatives.

I consider that the court *a quo* misdirected itself in refusing bail on the basis that it was inevitable that, if released, appellant would interfere with those 28 relatives.

Despite the opportunity presented by the 11 day audit exercise, appellant had not interfered with those 28 relatives.

Even after her arrest it was common cause that she had neither interfered with any of those relatives nor attempted to do so.

Naturally, some of the relatives were in court, following the bail proceedings *a quo*.

It follows that whether she was in or out of custody pending the trial there was nothing precluding the relatives from visiting her. Refusing to release the appellant on bail was therefore not the answer. It was not reasonable. It is not a forceful ground. It does not address anything.

The answer, in my view, really lies in how this and possibly other alleged corruption matters may be investigated. I think it is possible to arrest and take a suspect to court only after investigations are completed. There should be nothing precluding the National Prosecuting

Authority from perusing a complete docket and giving advice before a suspect is arrested and taken to court to be furnished with a trial date on that initial court appearance.

The learned magistrate mistook the facts by refusing bail on the basis that it was inevitable that appellant would interfere with her 28 relatives who would be called as State witnesses at trial. The evidence before her shows that although there was a provision of six witnesses the actual number of witnesses was unknown. Further, appellant's past conduct was evidence contrary to the finding that it was inevitable that she would interfere with her 28 relatives. None of those 28 relatives testified that they had been interfered with. The court *a quo* misdirected itself in inventing its own reasons for refusing bail. See *Zenda* v *The State* 2017 (1) ZLR 284 (H). It decided the issue on facts which were not before it.

Dealing with the issue of interference with the administration of justice in an application for bail pending trial in *S* v *Malunjwa* 2003 (1) ZLR 275 (H) NDOU J said at 278 D-G:

> "The court *a quo* found that the likehood of interference with evidence by the appellant was high. It also found that there had already been attempts to do so. It was found that appellant works with most of the witnesses who were his subordinates. The court *a quo* also found that there was evidence of interference with the administration of justice attributable to the appellant. First, in respect of the arrest and subsequent release of suspect Sidingumuzi's mother (the learned trial magistrate erroneously refers to Sidingani). Second, the disappearance of Ntokozo. In the circumstances, the court *a quo*, after making reference to *S* v *Maratera* S-93-91, held that it has been shown that there had already been attempts (page 2) to interfere with evidence. I agree that it is trite that where it has been shown that the accused had interfered with evidence, a court is justified in denying him bail-see also *S* v *Chiadzwa* 1988 (2) ZLR 19 (S); *S* v *Murambiwa* A 62-92; *S* v *Maharaj* 1976 (3) SA 205 (D). The court should however, not refuse bail on the basre assertion of the State, there must be enough reason for such a conclusion- see *Sahumani* v *S* HB 91/84 and *S* v *Hussey* (*supra*.) In other words, grounds for refusal of bail should be reasonably substantiated – See *Mbele* v *Prokuer-General* 1966 (2) PHH272 (T). The court *a quo* did not misdirect itself in this regard." (underlining is mine)

Malunjwa (supra) was decided before the advent of the current constitutional dispensation on bail. But the decision is still relevant in so far as it makes it abundantly clear that evidence is required to ground reasons to refuse bail. Put differently, bail should not be refused on the basis of a bare assertion of the state that a particular ground exists. As NDOU J put it "grounds for refusal of bail should be reasonably substantiated." In the present appeal no evidence was placed before the learned magistrate to ground the finding that the appellant would inevitably interfere with her 28 relatives. If anything, the evidence pointed towards non-interference. Similarly, there was no evidence placed before the court *a quo* to substantiate the assertion by the witness that appellant would interfere with any of her relatives. Neither the auditor nor any one of the 28 relatives testified *a quo*.

In *S* v *Ruturi* (2) 2003 (1) ZLR 537 (H) CHINHENGO J said at 550 C:

> "It must also be borne in mind that the process of reasoning which a judicial officer applies in determining an application for bail goes to the probable future conduct of the accused which has to be determined on the basis of certain information which relates to the past and the future and that what has to be determined is not a fact or a set of facts but merely a future prospect which is speculative in nature even though it is based on proven facts (see *Ellish en Andere* v *Prokueur-General*, WPA 1994 (4) SA 835 (W)."

What comes out clearly from this passage is that in determining the probable future conduct of an accused in a bail application evidence and facts relating to the accused's past conduct is fundamental because that is the material used in assessing, on a balance of probabilities, the likely future conduct of the accused.

In my judgment, it was a misdirection for the learned magistrate to make a finding of inevitable future interference by the appellant. That finding went against the grain of the evidence placed before her.

Although he defended the learned magistrate's decision on the issue of interference as it relates to the future, Mr *Mapfuwa* was gracious enough to concede that the court *a quo*'s use of the word "inevitably" in her finding of future interference was a misdirection. To me, the use of that word is evidence of an injudicious exercise of discretion. I do not think the learned magistrate could even have attempted to predict that which she found to be inevitable. A court's function is not to predict anything. It does not have those powers.

In referring me to *Munsaka* v *State* 2016 (1) ZLR 427 (H) Mr *Nkomo* argued that the unsubstantiated allegations of future interference in the matter before me failed to meet the Constitutional threshold of compelling reasons. He therefore submitted that the court a quo also misdirected itself in principle because it acted on an incorrect appreciation of that law, namely what compelling reasons entail.

I am not aware of any decision in which the Supreme Court has been called upon to define the phrase "compelling reasons" in the context of s 50 (1) (d) of our Constitution. However, in a number of decisions, various Judges of this court have taken the position that the Constitutional provision in question sets a high standard[1]. They took the same approach as that laid out in *Mayende and Others* v *Republic of Kenya Criminal* case 55/2009 where, in interpreting the replica of section 50 (1) (d) of our Constitution, the High Court of Bungoma (per GIKONYO J) said at page 2 of the cyclostyled judgment:

[1] Ngundu v The State HH 701/15, Munyanyi v State HH 830/15, Ncube v State HB 136/18, State v Nemaringa HMA 3/16

> "….and accordingly, the phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution."

I too associate myself with the approach of the Kenyan High Court as espoused in *Mayende* (*supra*) and follow the decisions of this court wherein my colleagues have expressed the view that our Constitution has set a high standard for refusal of bail.

Accordingly, I consider that the court *a quo* misdirected itself in principle in acting on an incorrect appreciation of the import of the constitutional imperative entailed by the phrase "compelling reasons". I am convinced that, in all the circumstances of this matter, the reason expressed by the court a quo in refusing bail is flimsy.

Finally, Mr *Nkomo* submitted that should I uphold the appeal I could impose such additional conditions as I consider to be in the interest of justice. Hence, I more than double the suggested bail amount and bar appellant from appearing at her workplace until the matter is finalised.

DISPOSITION

In the result, the following order shall issue:

1. The appeal be and is allowed.
2. The judgment of the Magistrates Court Regional Eastern Division Harare in case number ACC 14/21 dated 23 February 2021 denying the appellant bail be and is set aside and substituted with the following:
3. The accused is admitted to bail on the following conditions:

3.1. The accused shall deposit RTGS$50 000 with the Clerk of Court at Harare Magistrates Court.
3.2. The accused shall surrender her passport to the Clerk of Court at Harare Magistrates Court.
3.3. The accused shall reside at number 12-5th Street Winston Park Marondera until this matter is finalized.
3.4. The accused shall report at Marondera Police Station every Friday between 8am and 6pm.
3.5. The accused shall not interfere with State witnesses and police investigations.
3.6. The accused shall not appear at the Ministry of Health and Child Care, 4th Floor Kaguvi Building Corner 4th Street/Central Avenue Harare until the matter is finalized.

Mhishi NKomo Legal Practice, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners