TRYMORE CHAPFIKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 21 April 2021, 31 May 2021 & 25 June 2021

Bail Application pending Trial – Further Application

B Kazembe, for the applicant
B Murevanhema, for respondent

KWENDA J: This applicant, having previously been denied bail pending trial, submitted this further application which he named 'bail application for bail based on changed circumstances in terms of r 5 of the high court rules 1991 as read with s 116(c) (ii) of the Criminal Procedure and Evidence Act [C*hapter 9:07]'*. Having perused the Act, I am satisfied that the nomenclature does not emanate from proviso (ii) of s 116 of the Criminal Procedure and Evidence Act. The phrase changed circumstances may have been used in practice and case law in discussing the circumstances under which a fresh bid for bail can be made by an accused person previously denied bail. *Dicta* in interpreting the law does not supplant the wording of the statute. This court has previously taken issue with the practice by litigants of naming applications using words or terms or phrases that do not appear in the enabling Statute in order to suit the specific relief prayed for. The result is that jurisprudence may develop around the words or phrases so invented. It is preferable to use words/phrases used by the legislature because the choice of words is deliberate and intended by the Legislature to convey a certain meaning. In interpretation the first rule is to give effect to the plain meaning of the Statute unless that leads to absurdity. See *ZRA & Anor* v *Murowa Diamonds (Pvt) Ltd* 2009 (2) ZLR 213 (S). Therefore, ascribing to a court application a name different from the wording preferred by the Legislature may convey a meaning different from that which was intended by the Legislature.

In the cases of *S* v *Chitukutuku* HH 277-20 and *Stanley Nyasha Kazhanje* v *The State* HH 276-20 this court criticised the use of phrases like 'Application for suspension of bail condition", "Application for temporary release of passport" and "Application for variation of bail conditions" because the Criminal Procedure and Evidence Act does not contain such terms but speaks of alteration of recognizances.

CHATUKUTA J made the point very clear in the case of *Ignatius Chombo* v *The State* HH 256/21 (Chombo case). See page 1 of her cyclostyled judgment where she observed as follows

> "This is an application referred to by the applicant as 'Court application for the Second Revival of Temporary Variation of Bail Conditions in B1836/19: HH 735/19' being made in terms of s 126 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the Act). The application was initially not opposed. On 3 May 2021 I directed that the parties file supplementary heads of argument on whether or not this court has jurisdiction to determine the application.
> It is necessary to remark at the onset that this is a novel application."

The proviso (ii) to s 116 of the Criminal Procedure and Evidence Act provides as follows:

> "**116. Power to admit to bail**
> Subject to this section and sections 32 and 34, a person may, upon an application made in terms of section 117A, be admitted to bail or have his or her conditions of bail altered
> *a*) ……..;
> (*b*) …….;
> (*c*) …….:
> Provided that
> i) ……..
> (ii) where an application in terms of section 117A is determined by a judge or magistrate, a further application in terms of section 117A may only be made, whether to the judge or magistrate who has determined the previous application or to any other judge or magistrate, if such application is based on facts which were not placed before the judge or magistrate who determined the previous application and which have arisen or been discovered after that determination;"

It is better to just name the application an 'application for bail in terms of proviso (ii) of s 116 of the Criminal Procedure and Evidence Act Chapter 9:07' (because that is what it is) and then state grounds of the application in the bail statement using the words of the statute while trying to fit the circumstances of the particular case into the statutory framework.

In this case the applicant is charged with robbery in aggravating circumstances as defined in s 126(1) as read with ss (2) thereof. The crime was inappropriately named 'Armed Robbery' which is not the crime created under s 126 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. It is therefore, always necessary to refresh one's memory on the basic provisions of the applicable law irrespective of one's experience in a particular area of the law.

The applicant made his first appearance in the Magistrates court on 13 January 2021 jointly charged together with 12 others. The allegations are that the applicant and his accomplices stole USD 2 775 000 cash-in-transit belonging to the ZB Bank after faking a robbery. The false robbery allegedly involved employees of the bank, security guards who were providing security for the cash in transit and other accomplices. It is alleged that that the applicant and his accomplices stole a sum of USD 2 775 000 which was being transported in seven boxes in transit security vehicle from Harare for distribution to ZB bank branches in Chinhoyi, Kadoma, Kwekwe, Gweru, Bulawayo and Zvishavane. The vehicle picked some purported passengers at along the road from Harare to Chinhoyi. The passengers are believed to have been accomplices of the security guards. Other accomplices followed in tow vehicles. About 60kms from Harare the accused persons staged a fake robbery and the money was loaded into the getaway cars.

The applicant in this case is not employed. He was arrested following certain information picked by the Police and investigations yielded a sum of $38 900 which was recovered from him. The State alleges that it has evidence of eye witnesses and accomplices linking the applicant with the offence. There is also evidence which allegedly proven that he was communicating with his colleagues in the vicinity of the crime scene. The applicant was denied bail by this court in a detailed judgment per CHITAPI J handed down on 26 February 2021. In denying the applicant bail CHITAPI J concluded as follows at p 7 his cyclostyled judgment.

> "The ...applicant had the onus to show that it is in the interests of justice to grant him bail. The onus cannot even on a balance of probabilities be discharged through bold allegations being made'

At pages 7 & 8 he remarked as follows

> "...I make that on the facts alleged and the circumstances of the commission of the offence and the applicants' bare denials of involvement in the commission of the offence by advancing unsubstantiated *alibis* which are not clothed by any facts or proof, and the failure to address the factors listed in s 117(3) the applicants are a flight risk. There is a likelihood upon conviction which ranges from life to a definite term of imprisonment given the circumstances of aggravation which are alleged to be present in that firearms were used in the robbery."

At p 6 of the judgment CHITAPI J observed as follows:

> "For the avoidance of doubt s 177(2)(a) of the Criminal & Procedure Act, provides that
>
> > '(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 will 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 jeopardise the objectives or proper functioning of the criminal justice system,
> including the bail system;

"Subsection (3)(b) of s 117 the provides

> '(i) the ties of the accused to the place of trial;
> (ii) the existence and location of assets held by the accused;
> (iii) the accused's means of travel and his or her possession of or access to travel documents;
> (iv) the nature and gravity of the offence or the nature and gravity of the likely penalty therefor;
> (v) the strength of the case for the prosecution and the corresponding incentive of the accused to
> flee;
> (vi) the efficacy of the amount or nature of the bail and enforceability of any bail conditions;
> (vii) any other factor which in the opinion of the court should be taken into account;"

It is therefore imperative that the above factors are directly addressed by the applicant in the bail application."

The applicant has now made this fresh bid for bail based on developments affecting his co-accused persons. He says all his co-accused persons were admitted to bail and he has attached a bail order dated 17 February 2021.

The application is opposed by the State on the grounds that the applicant is still facing a charge of robbery committed in aggravating circumstances and the evidence is still overwhelming. The State has also submitted that the co-accused were admitted to bail based on their peculiar circumstances and each application should be determined on its own merits. Bail is not granted as a matter of course. The gravity of bail to a co-accused does not entitle the appellant to bail.

This case is a typical example of a trend where co-accused persons, whether deliberately or not, file separate applications and those who do not succeed on the first attempt ground further or fresh applications on the success of a co accused person's bail application. In other words, the success of a co-accused on his own peculiar circumstances is touted, on its own, as a 'change in circumstances' justifying a further application by an accused who was previously denied bail. I have examined s 117 carefully and my conclusion is that the enquiry mandated by the detailed guidelines contained in s 117A introduced by Act 9 of 2006 must be made with respect to the

person applying for bail taking into account his or her peculiar circumstances. I am aware of the often cited judgment of this court in *S* v *Samson Ruturi* 2003 (1) ZLR 537 (H). I quote from p543 E-F

> "The question of equal treatment of persons jointly charged with a criminal offence, whether in respect of bail or sentence is one which in general terms can always be answered with the words 'of course they should be treated in the same manner'. By so saying, one is really saying that if there is no basis for differentiating the treatment accorded to persons jointly charged with an offence, then they should be treated in like manner, whether in respect of bail, sentence or any other ground"

The judgment is often misunderstood. The judgment clearly states that co-accused persons should be treated in like manner in bail matters if there is no basis for differentiating. The judgment therefore contemplates that the personal circumstances of co accused persons may differ. Bail has always been assessed based on the personal circumstances of the applicant concerned. This judgment was written before the amendment to the Criminal Procedure and Evidence Act which introduced s 117A. It should therefore now be understood in the context of the guidelines now contained in s 117A. The legal principle set out in the *Ruturi* case, supra has now been codified. The *Ruturi* judgement must be understood as authority for a uniform 'approach' to bail consideration which has now been to codified with each accused person which is that 'with respect to each applicant the bail court must show that it considered all the factors. Where personal circumstances differ, indeed there is reason to differentiate between or among accused persons. The factors listed in s 117A must be considered with respect to each accused person. Co-accused persons may differ with regards to their individual ties to the place of bail, their ownership of assets, their procession or access to travel documents the strength of the state case with respect to the individual also pertain and other stipulated considerations. The nature and gravity of the crime is only one out of eight considerations listed sub sect (3)(b) of s 117. The fact that the applicant was denied bail and his co-accused were granted bail only means that their peculiar circumstances provided different answers to the questions that must be asked under the relevant subs of s (3)(b) of 117. It is therefore normal for an accused person to be denied bail while another charged with him is admitted to bail.

In my view, the admission of a co-accused to bail does not necessarily constitute a new fact in the personal circumstances of the accused person previously denied bail. In this case the applicant has already been denied bail. In denying the applicant bail CHITAPI J gave detailed reasons

contained in a judgment on 8 pages. The applicant has not addressed the facts taken into account by this court in denying bail. He has simply attached a bail order subsequently granted to his co accused persons. The bail order naturally does not tell any story about the *ratio decidendi* because it is bereft of the reasons for judgment. It is the *ratio decidendi,* not just the outcome, which binds or persuades a court and not the outcome or court order.

I am not satisfied that the applicant has justified a further application.

In the result this application cannot succeed. It is hereby dismissed.

Macharaga law chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners