MARY MUBAIWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 16, 18 August and 7 September 2022

Urgent Chamber Application

R A Sitotombe, for applicant
C Muchemwa, for respondent

TAGU J: This urgent chamber application for the temporary release of the applicant's Passport has been brought in terms of Rule 60(6) of the High Court Rules, 2021.

The applicant has four outstanding criminal matters before the Magistrates Court. She is on bail and some reporting conditions including surrendering her passport to the Clerk of Court to ensure she does not abscond until all her cases are finalized. The offences she is facing are:

(a) Contravention of Section 35 of the Marriage Act [*Chapter 5.11]* on which she has been convicted and a fine imposed together with a suspended prison term. Both conviction and sentence have been appealed before this Honourable Court under Case No. ACC 234/21;
(b) Assault in contravention of the Criminal law (Codification and Reform) Act *[Chapter 9.23]* where the State has closed its case and an application for discharge has been made and ruling was due to be delivered on 10 August, 2022;
(c) Charges relating to Money Laundering whose trial date has not yet set; and
(d) An Attempted Murder charge which commenced trial on 29 July 2022 but is yet to get into motion after applicant challenged the jurisdiction of the court to preside over the trial. Ruling was to be made on 12 August 2022.

The deponent to the applicant's founding affidavit HELGA MUBAIWA, applicant's mother, submitted that the applicant was supposed to attend court on 5 August 2022 for a ruling on the

preliminary objection in respect of the Attempted Murder charge, but noted that applicant was so unwell that she could not walk or talk and supported by a domestic staff. After court session applicant was taken to Hospital where she was admitted pending amputation of her right arm as gangrene had set in. This recommendation was made by Dr Muchuweti, a specialist surgeon. However, applicant's father refused to sign the consent form as applicant was heavily sedated. When applicant came round, she also refused to authorize the amputation scheduled for 11.00hrs on 6 August, 2022 on the basis that she wishes to seek a second opinion in South Africa.

The applicant has now approached this court on a certificate of urgency seeking the following relief:

"IT IS ORDERED THAT:

1. The urgent chamber application filed in terms of Rule 60(6) of the High Court Rules, for the temporary release of the applicant's passport is hereby granted.
2. The applicant's passport held by the Clerk of Court, Harare shall be released to her upon the granting of this Court Order.
3. The applicant is and hereby authorized to travel to South Africa to seek a second medical opinion and treatment for at least six weeks from the date of granting of this Court Order.
4. The applicant shall deposit her passport with the Clerk of Court, Harare, after her return to Zimbabwe.
5. The applicant's bail conditions be and are hereby suspended for the duration of her absence in Zimbabwe.
6. The applicant's pending criminal cases at the Magistrates Court, Rotten Row, be and are hereby postponed to a period beyond six weeks from the date of granting of the order.
7. The respondent shall pay the costs on an attorney –client scale if it opposes this application."

The application is opposed by the respondent. The respondent raised one Preliminary objection to the effect that the applicant is out of custody having been granted bail but the bail order or orders with the specific conditions have not been attached to this application despite the fact that it is the conditions of that bail are being applied for an alteration. The respondent submitted that applications of this nature are supposed to be brought before the bail court as they form part of the bail system. The respondent further submitted that Bail matters are urgent by their nature and it is not necessary to labour this court with this urgent application when the right court is inexistence and operative. The application is therefore improperly before this court. For its contention the respondent referred the court to section 126 of the Criminal Procedure and Evidence Act [*Chapter 9.07*], hence prayed that the application be removed from the roll of urgent matters.

In response the applicant submitted that the purported point *in limine* raised by the State that the applicant ought to have approached the Bail Court is without merit. Mr. R.A. Sitotombe

for the applicant submitted that there is no law that sets up a Court known as the Bail Court which creates a Court known as the Bail Court or a division of the High Court which is known as the Bail Court. To amplify this point, he referred the Court to Statutory Instrument 123 of 2020 (High Court Commercial Court Rules, 2020) which created the Commercial Division of the High Court now known as the Commercial Court. These rules set out the jurisdiction of the Commercial Court Division and a Registry was created that fall under the Commercial Court's jurisdiction can be filed.

He said further that *in casu*, the respondent did not refer the Court to any law which created a Court or a Division of the High Court which is known as the Bail Court. He said the respondent did not do so simply because there is no law that either creates a Court/Division of the High Court or demands that an application such as this one be brought before a Court which the respondent refers to as the Bail Court. All that the applicant has done is to approach this Court for relief in terms of Rule 60(6) of the High Court Rules, which in any case, allows the applicant to bring this application before this Honourable Court for relief that the applicant is seeking. He prayed for the dismissal of the point *in limine.*

Rule 60(6) of the High Court Rules, 2021 provides as follows:-

> "Where a chamber application is accompanied by a certificate from a legal practitioner in subrule (4) (b) to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to the duty judge, handling urgent applications who shall consider the papers forthwith."

In deed the Rule is clear. This is what the registrar did in this case. Further, the applicant submitted that in terms of the law, the High Court enjoys inherent and constitutional jurisdiction to hear any matters which involve the protection of human rights, particularly where the rights to life are concerned.

The respondent admitted that bail applications are indeed urgent matters. It conceded that the High Court has inherent jurisdiction to hear matters involving the protection of human rights, but such applications should be brought before the proper Court. However, the respondent submitted that though the application is urgent, it has been lodged before the wrong Court. According to the respondent this application should have been brought before the Bail Court which has the power to grant bail, impose bail conditions, remove a person from remand temporarily, refuse further remand etc. In motivating its argument the respondent referred the court to Section

126 of the Criminal Procedure and Evidence Act [*Chapter 9.07]*. The relevant section reads as follows:-

> "126 **Alteration of recognizances or committal of persons on bail to prison**
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> (i) Any judge or magistrate who has granted in terms of this Part, may, if he is of the opinion that it is necessary or advisable in the interest of justice that the conditions of recognizance entered into by that person should be altered or added to or that person should be committed to prison, or added to or commit the person to prison, as the case may be.
>
> Provided that-
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> (i) If the judge or magistrate who granted bail is not available, any other judge or magistrate, as the case may be, may act in terms of this subsection.
>
> (ii) A judge or magistrate shall not act in terms of this subsection unless facts which were before the judge or magistrate who granted bail are brought to his attention." Emphasis added.

Despite having been served with the respondent's Notice of Opposition containing the preliminary objection the applicant did not comment on the import of section 126 of the Criminal Procedure and Evidence Act in her written heads of argument. The legislature in its wisdom promulgated this section for a purpose.

The current position is that either a judge or a magistrate may grant bail with or without conditions. Except at small stations where there are few or one magistrate who deals with everything on a daily basis in one court room, the same magistrate can deal with bail applications, impose bail conditions, alter bail conditions, remove an accused from remand or even refuse further remand or extent or limit period on which accused should be on remand. At such small court or centers there is no court set aside as a bail court. However, at large centers such as BULAWAYO and HARARE, to name but a few, there are Bail Courts which specifically deal with initial remands, bail applications, setting of conditions of bail and alteration of bail conditions. At the High Court there are various divisions to deal with various matters such as Criminal Division to deal with criminal trials, criminal appeals, and bail applications. An accused is free to apply for bail initially at magistrate court, and appeal to the High Court. When matter comes to the High Court on appeal against refusal to grant bail or anything to do with bail application, the matter is heard in the court reserved for that purpose known as the "BAIL COURT." Alternatively, an accused may decide to make an initial application for bail at the High Court. The application is dealt with in the BAIL COURT a division set for that purpose. The High Court may grant bail with appropriate conditions.

The import of section 126 of the Criminal Procedure and Evidence Act is that a judge or magistrate may grant bail. That if anyone has been granted bail either by a judge or magistrate

and wants bail conditions to be varied or some more conditions to be added, the person has to approach the judge or magistrate who initially granted bail. It is only where the judge or magistrate is not available that another judge or magistrate may hear the application on condition that facts that were not before the initial judge or magistrate have been brought forward.

I do not agree with the applicant that there is no law that creates a Court or High Court Division known as the Bail Court. It would be absurd for an applicant seeking a divorce order to make an application in the Criminal Division. Equally it would be absurd for an applicant seeking bail to do so in the Family Division of the High Court.

Section 171 of the Constitution of Zimbabwe provides for the jurisdiction of the High Court. Subsection 3 provides that an Act of Parliament may provide for the High Court to be divided into specialized divisions, but every such division must be able to exercise the general jurisdiction of the High Court in any matter brought before it.

Also s 46A of the High Court Act *[Chapter 7:06]* provides for the creation of specialized divisions of the High Court. *In casu*, the "Bail Court" is a subdivision of the High Court, which is a specialized division.

In this case what the applicant is seeking is an alteration to her bail conditions. These bail conditions have not been stated fully. It has not been stated whether all the bail conditions were granted by a judge or magistrate. It has not been stated whether or not the judge or magistrate who granted the bail and the accompanying conditions is available or not. The judge or magistrate who granted the applicant bail and bail conditions are better placed to entertain this application. In my view, as stated by the respondent, this application is improperly before this court. It is not necessary to labour this court with this urgent application when the right court is inexistence and operative. The point *in limine* has merits.

I had raised reservations on the reliefs being sought on an urgent application without a provisional order which are final in nature. The applicant insisted that one can apply for a final order through an urgent chamber application. The applicant referred the court to the case of *Air Namibia Proprietary Limited* v *Mawumba & Ors* HH 520/18. Having found that the application is improperly before this court, I will not labour to deal with the issue any longer.

IT IS ORDERED THAT

1. The point *in limine* is upheld.
2. The application is improperly before this court and is removed from the roll.
3. No order as to costs.

Mtetwa & Nyambirai, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners