PETRONELLA KAGONYE
versus
THE STATE

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 5, 8, 13 and 15 July & 26 September 2022

Application for Bail Pending Appeal

Judgment

KWENDA J:

Introduction:

The applicant has applied for bail pending appeal following her conviction and sentencing by the Anti-Corruption Division of the Regional Court sitting at Harare for Theft of Trust Property as defined in s 113(2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. She was sentenced to imprisonment for 36 months of which 12 months were suspended for 5 years on condition of good behavior and a further 8 months suspended on condition she pays restitution. She has noted appeal against both conviction and sentence and now seeks bail pending the appeal.

In terms of s 115C (3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] the applicant bears the onus to show that it is in the interests of justice for her to be granted bail pending the prosecution and determination of her appeal. After considering written and oral argument for and against bail pending appeal I have come to the conclusion that factors militating against her admission to bail outweigh arguments made in her favour based on the following: -

1. The applicant is not likely to succeed on appeal both against conviction and sentence as will more fully appear later in this judgment.
2. The applicant neglected to place before me sufficient guarantees as contemplated in the peremptory provisions of s 123(10) of the Criminal Procedure and Evidence Act, necessary to satisfy me that she has the genuine intention to prosecute her appeal timeously and abide by the outcome of her appeal even if she does not succeed. The onus imposed on her by s 115 C (2) (b) obliged her to make the undertaking in the body of her application and the

draft order together with the details of her offer of recognisance to be taken by her and her surety(ies) and conditions of the recognisance in order to persuade this court to exercise its discretion in her favour and draw from that in granting the order, if merited.

3. I take judicial notice of the statistics gathered from the returns of this court, details of which are discussed later in this judgment, which reveal a predictable pattern of perverse conduct by convicts released on bail pending appeal without making the undertaking backed by the guarantees mandated by s 123 (10), *supra*. Such persons have exhibited a high propensity to abandon their appeals and disappear. The appellant's omission to express the undertaking to abide by any adverse judgment on appeal and offer acceptable guarantees in compliance with s 123(10) left the court suspicious of her intentions and heightened fears of abscondment.
4. At the time of hearing this bail application the record of proceedings was ready for appeal, the only outstanding thing being the applicant's heads of argument. Sound public policy demands that the appeal be set down and disposed of promptly on the merits without giving priority to a peripheral issue and that is achievable because this court has ceased to have a backlog of criminal appeals.

The background facts

The following is a summary of the facts leading to the applicant's conviction: -

1. At the time of committing the crime the applicant was the Honourable Member of Parliament for Goromonzi South Constituency and Minister of Labour and Social Welfare. She made written requests to the Minister responsible for information, communications and technology, for computers to be distributed to schools and the underprivileged in her political constituency. Pursuant to the request the Postal and Telecommunication Regulatory Authority of Zimbabwe disbursed 20 laptops with the written instruction that they would be held in trust for distribution to certain named schools in the Goromonzi constituency but acting contrary to the trust agreement she stole the laptops which are unaccounted for.
2. On the 20th June 2018 the applicant submitted a written request to the then Minister of Information, Communication and Technology, Mr Super Mandiwanzira for a donation of computers to be distributed among 28 schools in her constituency which had been

electrified. She asked for computers sufficient to give each of the twenty-eight schools, listed by her, 10 to 15 computers. She attached to the request the list of the 28 schools to benefit from the donation.

3. On the same day Minister Mandiwanzira penned a letter to the Chairperson of the Board of Trustees of the Universal Services Fund recommending the donation. The Trustees of the Universal Services Fund is an appendage of the Postal and Tele Communication Regulatory Authority of Zimbabwe (POTRAZ) responsible for financing and running the Government of Zimbabwe E-learning project.
4. On the 26th June 2018 the applicant wrote another letter to Minister Mandiwanzira requesting another donation of 20 laptops for distribution to the disadvantaged in her constituency. In the same letter she reminded the Minister of her earlier request for computers for schools in her constituency. In the letter she reminded Minister Mandiwanzira that the schools were still waiting to receive the computers in terms of her earlier request.
5. When the donation became available the appellant wrote a letter dated 12th July 2018 authorising POTRAZ to release the computers to her through her brother, Evans Kagonye who collected the computers on or about the 14th may 2019 and delivered and gave them to the applicant's personal assistant. Evans Kagonye signed the handover takeover pre-typed form on behalf of the applicant. It contained the specifications and serial numbers of the laptops received on behalf of the applicant. Evans appended his signature at the bottom of the handover form.

   > "I Evans Kagonye have collected and agree to hold in trust the above ICT equipment for eLearning purposes on behalf of the beneficiaries intended under the USF learning project. I undertake to handover the ICT equipment to the intended beneficiaries and submit a list of the beneficiaries and contact details to USF/POTRAZ within 30 days of receipt of the ICT equipment."

6. The applicant did not account for the laptops in terms of the trust agreement in that the laptops did not reach schools in her constitution and they were not distributed for E-learning. She did not submit the required list of beneficiaries to POTRAZ.
7. The appellant denied the charge and her defence was that she was unaware of the requirement to account for the laptops. She made two separate written requests. One

request which she made on the 20th June 2018 was for computers and the other which she made on the 26th June 2018 was for laptops. She believed that computers are different from laptops. Her state of mind was that computers would be distributed to schools and laptops were for the benefit of the underprivileged in her constituency. The laptops were distributed by her campaign manager during campaigns and only three were traced. The recipients were not documented. The trust agreement was not brought to her notice. She was therefore not aware that the 20 laptops were subject of a trust agreement.

8. The only issue to be determined by the court was whether the appellant knew of her duty to account for the laptops.
9. The court found that the appellant knew that she had requested computers for distribution among the schools which she had identified and listed. She was not justified in disposing of the computers in a manner different from the purpose for which she requested them. It did not accept the applicant's argument that computers are different from laptops. The trial court found it unbelievable that laptops could just be given away without record. Only 3 laptops were recovered and the rest disappeared without trace.
10. The court rejected the appellant's defence for the reasons stated leading to his conviction and sentence as aforementioned.
11. Aggrieved by the conviction and sentence she appealed against both. She attacked the conviction on the grounds that the trial court erred in finding that the laptops were subject of a trust agreement alternatively that even if the laptops were released to her subject to the so called trust agreement she never became aware of its existence. She attacked the sentence imposed on her on the ground that the trial court erred when it failed to prefer available non-custodial sentencing options and that imprisonment was not called for in view of the order to restitute.

Argument for the applicant

For the applicant, Mr *Uriri* argued as follows.

When sections 123 and 117(1) of the Criminal Procedure and Evidence Act *[Chapter 9:07]* are read together and appropriately 'modified' to apply to bail pending appeal their combined effect: -

> "…, is that bail pending appeal is a right on the same footing as bail pending trial. It therefore necessarily follows that the grounds set out in sections 117(2) and (3) of the Act

come into play together with the common law on bail pending appeal suitably adapted to the statutory framework of section 117(1) (e) thereof"

He argued, further, that it is trite that in an application for bail pending appeal: -

"..... the court looks into two main factors. These factors were set out in ***Gomana* v *State* SC 166/20**

"The main factors to consider in an appeal against a refusal of bail by a person convicted of an offence are twofold: Firstly, the likelihood of abscondment. See Aitken, supra. Secondly prospects of success on appeal in respect f both conviction and sentence. See Sv Williams 1980ZLR 466 (A) at 468 G_H; S v Mutasa 1988 (2) ZLR 4 (s)Tat 8D; S v Woods SC 60/93 at 3-4; S v Mg Gowan 1995 (2) ZLR 81 (S)at 83 E-H and 85 C-E. Other factors to bear in mind are the right of the individual to liberty and the delay before the appeal can be heard. See Mungwira v S HH 216/20

See also *Kereke* v *Maramwidze* HH 632-16, *S v Dzvairo* 2006 (1) ZLR 45 (H)."

His argument continued: -

"The fact that the applicant has been convicted even though being one of the considerations that the court takes into account in deciding whether to release an applicant on bail is not a decisive factor that the court can lean on in denying bail pending appeal. The critical issues that the court places on the centre in an application for bail pending appeal are the applicant's right to liberty and interests of justice.

The position is that the emphasis is on the right to liberty that must give effective meaning to the right appeal against conviction and sentence as provided for in s 70 (5) (b) of the Constitution of Zimbabwe. The scared right to liberty, universal as it is to all men, takes the center stage in bail pending appeal applications see Van der Berg, Bail: *A Practitioner' Guide*, *2nd Ed* at p 95.

That the above is the approach that the court has to follow is not without authority. The position has been stated by Snyckers and le Roux, *Criminal Procedure: Rights of Arrested, Detained and Accused Person in Woolman and Bishop (Eds) Constitutional Law of South South Africa, 2nd Edition*, Revision Service 6 2014 at 51-98 thus:

"the most jurisprudentially noteworthy point about the Constitutional Court's bail judgment in Dlamini was its treatment of the presumption of innocence. Although the court found that the 'basis objective' of the institution of bail was to maximize personal liberty' its dismissal of objections to placing an *onus* on the applicant was essentially founded on the unexpressed premise that the presumption of innocence had to do with the determination of guilty, not on the protection of liberty….

This argument, with respect, ignores the fact that the presumption of innocence is but an incident of the presumption in favour of liberty, and is scared only because liberty is scared. We are concerned about the dubious convictions because they entail unjustified deprivations of liberty, not because we have qualms about using the term "guilty without adequate justification"

It is clear that the fact of conviction of the applicant in an application for bail pending appeal notwithstanding, the critical issue is that liberty of subjects or citizens must not be lightly trampled upon. It is therefore, proper that the court strives as much as it can to protect the sacred tight to liberty of citizens until a final determination of their criminal liability is pronounced. In *S* v *Dzvairo* 2006 (1) ZLR 45 (H) at 60E- 61A, PATEL J (as he then was) elegantly state that:

> "Where bail after conviction is sought, the *onus* is on the applicant to show why justice requires that he should be granted bail. The proper approach is not that bail will be granted in the absence of positive grounds for refusal but that in the absence of positive grounds for granting bail it will be refused. First and foremost, the applicant must show that there is a reasonable prospect of success on appeal. Even where there is a reasonable prospect of success, bail may be refused in serious cases, notwithstanding that there is little danger of the applicant absconding. The court must balance the liberty of the individual and the proper administration of justice and where the applicant has already been tried and sentenced it is for him to tip the balance in his favour. It is also necessary to balance the likelihood of the applicant absconding as against the prospects of success, these two factors being interconnected because the less likely are the prospects of success the more inducement there is to abscond. Where the prospects of success is weak, the length of the sentence imposed is a factor that weighs against the granting of bail. Conversely, where the likely delay before the appeal can be heard is considerable, the right to liberty favours the granting of bail"

Mr *Uriri* further argued "…….. The net effect is thus that bail pending appeal is a right whose denial must be on the grounds provided for in s 117, which grounds must be established by the State."

> "The approach adopted by FIELDSEND CJ, is in *S* v *Williams* 1980 ZLR 466 (ad), 1981 (1) SA 1170 (ZAD) at page 1173 A must be adopted with a suitable alteration to the question of onus considering the current statutory framework. His Lordship said:
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> "……. The proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. In my view, to apply this test properly it is necessary to put in the balance between both the likelihood of the applicant absconding and the prospects of success. Clearly, the two factors are inter-connected because the less likely are the prospects of success there more inducement there is on an applicant to abscond. In every case where bail after conviction is sought the onus is on the applicant to show why justice requires that he should be granted bail"

Argument by the State

In opposing the application, the State relied on the cases of *S* v *Dzawo* 1998 (1) ZLR 536 and *S* v *Ndhlovu Anor* HB9-10/15 and made the following submissions: -

The appeal lacks merit both against conviction and sentence because the applicant was correctly convicted and sentenced. The considerations in an application for bail pending appeal are: -

- Whether there are prospects of success on appeal
- Whether the appeal is reasonably arguable and not doomed to failure

- Whether the applicant may abscond and defeat the ends of justice
- The likely delay before the appeal is heard.

The consideration of prospects of success of appeal takes precedence and should be the starting point. Where there are no prospects of success that should weigh heavily against admitting the applicant to bail pending her appeal. In this case, the applicant is unlikely to succeed on appeal against conviction because it is clear that the applicant requested for computers for distribution to schools. The release form clearly set out the conditions attaching to the release of the laptops which included the requirement to record the names of the recipients, their contact details and to submit the same to POTRAZ within 30 days. She did none of the above. With regards sentence, the State argued that the appellant's moral blameworthiness was high because the applicant abused the office of Minister of Government. The trial court was correct in expressing its indignation at the applicant for abusing a facility intended to benefit underprivileged schoolchildren. Her imprisonment was therefore called for.

The law

I was not persuaded by Mr Uriri's argument that when sections 123 and 117(1) of the Criminal Procedure and Evidence Act [*Chapter 9 :07*] are read together and appropriately 'modified' to apply to bail pending appeal the import is that bail pending appeal is a right on the same footing as bail pending trial. My reasons are as follows: -

The Right to bail for persons who have appeared in Court pending trial is protected in s 50 (6) of the Constitution of Zimbabwe (Amendment No 20) Act 2013 and couched in the following terms (The underlining is mine for emphasis): -

> "(6) Any person who is detained <u>pending trial</u> for an alleged offence and is not tried within a reasonable time <u>must</u> be released from detention, either unconditionally or on reasonable conditions to ensure that after being released they—
> (*a*) attend trial;
> (*b*) do not interfere with the evidence to be given at the trial; and
> (*c*) do not commit any other offence before the trial begins."

The use of the word 'must' in s 50(6), supra, underscores the entitlement to bail for an accused person detained 'pending trial'. The section is however unambiguous in that it speaks to entitlement to bail before the conclusion of a criminal trial. It is obviously intended to minimise the limitation on fundamental rights and freedoms of unconvinced persons protected by the Bill of Rights. Section 50 (6) of the Constitution is operationalised by s117 (1) of the Criminal Procedure

and Evidence Act [Chapter 09:07] which I also quote below and highlighting the pertinent portions thereof for emphasis): -

> "**117 Entitlement to bail**
> (1) Subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody."

I am unaware of similar provisions either in the Constitution or in the Criminal Procedure and Evidence Act [*Chapter 9:07*] which speak to equal entitlement to bail after conviction and sentence. The only right given after conviction is the right to appeal in s 70(5) but even then, not without restrictions.: -

> "Any person who has been tried and convicted of an offence has the right, subject to reasonable restrictions that may be prescribed by law, to—
> (*a*) have the case reviewed by a higher court; or
> (*b*) appeal to a higher court against the conviction and sentence."

One such restriction which immediately comes to mind in that the right lapses if not exercised within a certain specified number of days. (See rule 106 of the High Court Rules, 2021). Another restriction is that noting appeal does not suspend the execution of a sentence. The law requires a person convicted and sentenced by a competent court to immediately start serving the sentence thereby ousting the common law principle that execution of a judgment is automatically suspended by the noting of an appeal. See s 63 of the magistrates Court Act *[Chapter 7:10]*.

> "**63 Execution of sentence of imprisonment, fine or community service not suspended pending review or appeal unless bail granted**
> The execution of any sentence of imprisonment, fine or community service shall not be suspended by—
> (*a*) the transmission of or the obligation to transmit the record of the proceedings in the case for review in terms of section *fifty-seven* or for scrutiny by a regional magistrate in terms of section *fifty-eight*; or
> (*b*) the noting of an appeal referred to in section *sixty*;
> unless
> (i) in the case of imprisonment or fine, bail is granted by a judge or magistrate in terms of section 123 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]; or
> (ii) in the case of community service, an application is granted by the magistrate to suspend the operation of the sentence pending determination of the appeal"

I also reject the argument by Mr *Uriri* that "… bail pending appeal is a right whose denial must be on the grounds provided for in s 117, which grounds must be established by the State."

I disagree. Section 115C (2)(b) of the Criminal Procedure and Evidence Act unmistakably imposes no onus on the State in an application for bail pending appeal. To the contrary it places

the onus on the applicant to show that her admission to bail pending appeal would be in the interests of justice. The applicability of s 117 of the Criminal Procedure and Evidence Act means that the following apply to bail pending appeal: -

> S 117 (2)
> "(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;
> or
> (*b*) 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."
>
> S 115C
>
> "115C Compelling reasons for denying bail and burden of proof in bail proceedings
> (1) In any application, petition, motion, appeal, review or other proceeding before a court in which the grant or denial of bail or the legality of the grant or denial of bail is in issue, the grounds specified in section 117(2), being grounds upon which a court may find that it is in the interests of justice that an accused should be detained in custody until he or she is dealt with in accordance with the law, are to be considered as compelling reasons for the denial of bail by a court.
> (2) Where an accused person who is in custody in respect of an offence applies to be admitted to bail—
> (a) before a court has convicted him or her of the offence—
> (i) the prosecution shall bear the burden of showing, on a balance of probabilities, that there are compelling reasons justifying his or her continued detention, unless the offence in question is one specified in the Third Schedule;
> (ii) the accused person shall, if the offence in question is one specified in—
> A. Part I of the Third Schedule, bear the burden of showing, on a balance of probabilities, that it is in the interests of justice for him or her to be released on bail, unless the court deter-mines that, in relation to any specific allegation made by the prosecution, the prosecution shall bear that burden;
> B. Part II of the Third Schedule, bear the burden of showing, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his or her release on bail;
> (*b*) after he or she has been convicted of the offence, he or she shall bear the burden of showing, on a balance of probabilities, that it is in the interests of justice for him or her to be released on bail."

The use of the word 'may' in sub section (1) of s 123 denotes exercise of discretion fettered only by case law and legislation and is inconsistent with an entitlement to bail after sentence. The State and the defence are largely in agreement on the guidelines emanating from case law in the

exercise of discretion in an application for bail pending appeal except the legal expositions by Mr *Uriri* which I have specifically rejected. I place emphasis on the following decided cases.

S v *Dzvairo* 2006 (1) ZLR 45 (H) at 60E- 61A, PATEL J (as he then was) elegantly state that:

> "Where bail after conviction is sought, the *onus* is on the applicant to show why justice requires that he should be granted bail. The proper approach is not that bail will be granted in the absence of positive grounds for refusal but that in the absence of positive grounds for granting bail it will be refused. First and foremost, the applicant must show that there is a reasonable prospect of success on appeal. Even where there is a reasonable prospect of success, bail may be refused in serious cases, notwithstanding that there is little danger of the applicant absconding. The court must balance the liberty of the individual and the proper administration of justice and where the applicant has already been tried and sentenced it is for him to tip the balance in his favour. It is also necessary to balance the likelihood of the applicant absconding as against the prospects of success, these two factors being interconnected because the less likely are the prospects of success the more inducement there is to abscond. Where the prospects of success is weak, the length of the sentence imposed is a factor that weighs against the granting of bail. Conversely, where the likely delay before the appeal can be heard is considerable, the right to liberty favours the granting of bail"

The position is that in the balancing act that the court must do in bail pending appeal applications, the *corpus* of jurisprudence developed as part of the common law regarding bail pending appeal is additional to the considerations given in s 117 as read with s 123 (3) of the Act and not a stand- alone code. It becomes "any other factor which is because there is a presumption against the alteration of the common law to the extent not expressly provided for by statute. The net effect is thus that bail pending appeal is a right whose denial must be on the grounds provided for in s 117, which grounds must be established by the State.

S v *Williams* 1980 ZLR 466 (ad), 1981 (1) SA 1170 (ZAD) at page 1173 per FIELDSEND CJ:

> "……. The proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. In my view, to apply this test properly it is necessary to put in the balance between both the likelihood of the applicant absconding and the prospects of success. Clearly, the two factors are inter-connected because the less likely are the prospects of success there more inducement there is on an applicant to abscond. In every case where bail after conviction is sought the onus is on the applicant to show why justice requires that he should be granted bail"

I also give due regard to the legislative purpose discernible from a proper construction of the various legislative provisions listed below, whose intended combined effect is to preserve the effectiveness and credibility of the criminal justice. These are they: -

- s 63 of the Magistrates Court Act [*Chapter 7:10*]

  This has already been discussed. Section 63 underscores the legislative intention to oust, in criminal procedure, the common law principle that the noting of an appeal from an appeal to a higher court suspends execution of the judgment appealed against otherwise the criminal justice

system will be rendered sluggish and in effective. Effectiveness of the criminal justice system requires that the authority of the court should not be easily undermined or frustrated by the prisoner who may note appeal which lacks merit just in order to overpower the court. The discretion is left to the court to decide whether or not execution of sentence should be suspended.

- s 123 ss (10), of the Criminal Procedure and Evidence Act Chapter 9:07

> "(10) A recognizance shall be taken on the admission of a person to bail either from that person alone or from him and one or more sureties, in the discretion of the judge or magistrate according to the nature and circumstances of the case, and it shall be a condition of such recognizance that the person shall, upon service on or for him at some place to be mentioned in the recognizance of a notice signed by the registrar of the High Court or, where the conviction or sentence appealed against took place in a magistrates court, by the clerk of that court informing that person of the decision of the High Court or the Supreme Court, as the case may be—
> (a) pay the fine, if any, due by him within such time and to such person as shall be specified in the notice; or
> (*b*) surrender himself within such time and to such person as shall be specified in the notice in order to undergo any other punishment which he is liable to undergo, and the judge or magistrate may add any or all of the conditions mentioned in subsection (3) of section *one hundred and eighteen* which he may think necessary or advisable to impose."

The provisions of s 123(10), supra, are peremptory. s is a peremptory. Thy have however been sadly overlooked by the courts, legal practitioners and unrepresented actors over the years. As stated above statistics reveal that in the majority of cases appellant disappear as soon as they admitted to bail. The following are the statistics showing defaults for one of the criminal appeals court for the period from March 2021 to March 2022

March	2021	1	October	2021	2
April	2021	vacation	November	2021	4
May	2021	5	December	2021	vacation
June	2021	11	January	2022	7
July	2021	10	February	2022	4
August	2021	vacation	March	2022	10
September	2021	5			

Statistics are just as important to bail pending appeal as prevalence of crime is to sentencing. They are used to gauge the effectiveness of the criminal justice system.
In reality prisoners sentenced to imprisonment do not voluntarily hand themselves in to abide by the court's sentence. They also rarely take the risk to prosecute their appeals. Actually the expectation that the appellant who has been sentenced to imprisonment will prosecute his or her appeal with vigor and hand himself or herself in when the appeal is

dismissed is preposterous. Before sentence accused persons are not entirely trusted and must appear in person at their trial up to sentencing stage for the court to monitor their movements every 14 days. In a surprise twist in legislation, after conviction the same person is deemed worthy of trust and is allowed to stay at home for days on end, to prosecute an appeal at his own pace and hand himself or herself in when the appeal fails. Reporting conditions serve no purpose because the Registrar or the Clerk of Court has no capacity to deliver them at the outlying Police Stations and the appellants do not bother to take them there.

In the meantime, in order to deal with the *lacuna* arising from the fact that all current bail orders pending appeal are non-compliant with s123(10) of the Criminal Procedure and Evidence Act, supra, this court has drawn from its inherent power to protect its own processes to demand the presence of appellants at the determination of their appeals to enable it to regulate the execution of the judgment on appeal, if adverse. This is because bail terminates upon the determination of the appeal.

- Sub section 13 of s123 of the Criminal Procedure and Evidence Act Chapter 9:07

> "(13) When a person has been admitted to bail in terms of subsection (1), a judge, in the case where the conviction or sentence took place in the High Court, or a magistrate in any other case, may, upon the application of the Prosecutor-General or local public prosecutor, as the case may be, and upon information being made in writing and upon oath that default has been made in any condition of the recognizance taken from such person—
> (a) issue a warrant for the arrest of such person; and
> (*b*) issue an order calling upon him and his sureties, if any, to appear on a day and at a place specified in the order to show cause why the recognizance should not be declared forfeited;
> (*c*) if cause to the satisfaction of the judge or magistrate, as the case may be, is not shown against any such declaration, declare the recognizance to be forfeited, and such declaration of forfeiture shall have the effect of a judgment on"

The Registrar and the clerk of court lack the capacity to deliver the bail orders to Police Stations, let alone to monitor compliance. Meanwhile persons admitted to bail do not make it their business to take the orders to the Police. The result is a grey area whereby the compliance contemplated in s 123(13) is not achieved. This court has bridged the gap by demanding the presence of appellants in order to be satisfied that they are still available to abide by the judgment on appeal which is the purpose of s 123 (10) and (13).

I am aware of the case of Zabika *Umali* v *The State* HH 600/22 wherein Mr *Murisi* perhaps in a feat of misinformed enthusiasm sought to confound the court by

misrepresenting, hopefully innocently, that there is no law which empowers this court to demand the presence of the appellant at the place of hearing of his or her appeal. Such a challenge to the authority of the court should not arise because the settled position, at common law, is that this court, as a court of inherent jurisdiction, has the power to make any order to protect the integrity and efficacy of its own processes, which the law does not prohibit it from making. The inherent power is now entrenched in s 176 of the constitution. If anything such intransigence exhibited in defying lawful commands of the court in the course of regulating its processes is a mischief called contumacy which is normally visited with sanctions. See *Supiya v Mutare District Council & Ors* 1985 (2) ZLR53 (HC)

In reality s123 (10) as read with s 118 (3) does empower to require the presence of the appellant at the hearing as a condition of her recognizance.

> "(3) The judge or magistrate referred to in subsection (1) may require to be added to the recognizance any condition which he may think necessary or advisable in the interests of justice as to—
> (a) the surrender by the accused of his passport; or
> (b) the times and place at which, and the persons to whom, the accused shall personally present himself; or
> (c) the places where the accused is forbidden to go; or
> (d) the prohibition against communication by the accused with witnesses for the prosecution; or
> (*e*) any other matter relating to the accused's conduct."

Section s 50(5) of the High Court Act [*Chapter 7:06*] is mere permissive in that it allows this court, at its discretion, to determine a criminal appeal in the absence of the appellant admitted to bail and that is if the condition of recognizance is that the appellant will hand himself in voluntarily. The *lacuna* capitalized on by counsel is just a misconception created by non-adherence to s 123 (10) of the Criminal Procedure and Evidence Act.

- S 38 of the High Court Act [*Chapter 7:06*]

The exercise of discretion in cases of bail pending appeal involves an honest assessment of prospects of success on appeal which must not be whimsical. The bail court must be guided by an understanding of how appellate jurisdiction is exercised. This court does not necessarily interfere with a conviction on appeal or review simply because it has found a misdirection. A conviction may only be upset in the exercise of appellate and

review jurisdiction where there is an established connection between a misdirection and a miscarriage of justice.

With respect to appeals I will reproduce s 38 of the High Court Act Chapter 7:06 and underline subsections 2 and 3 which are self-explanatory for emphasis: -

> "38 Determination of appeals in ordinary cases
> (1) Subject to this section and section *thirty-nine*, on an appeal against conviction the High Court shall allow the appeal and quash the conviction if it thinks that the judgment of the court or tribunal before which the appellant was convicted should be set aside—
> (*a*) on the ground that—
> (i) it is unreasonable; or
> (ii) it is not justified, having regard to the evidence; or
> (*b*) on the ground of a wrong decision on any question of law; or
> (*c*) because on any other ground there was a miscarriage of justice;
> and in any other case shall dismiss the appeal.
> (2) Notwithstanding that the High Court is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be set aside or altered unless the High Court considers that a substantial miscarriage of justice has actually occurred.
> (3) If any point raised is decided in favour of the appellant and it consists of a misdirection by the trial court or tribunal of itself on a question of law or a question of fact or a question of mixed law and fact, the High Court shall dismiss the appeal if it is satisfied that the evidence which has to be considered has not been substantially affected by the misdirection and that the conviction is justified having regard to the evidence."

With respect to the exercise of review jurisdiction I reproduce s 29 (3) of the High Court Act

> "(3) No conviction or sentence shall be quashed or set aside in terms of subsection (2) by reason of any irregularity or defect in the record or proceedings unless the High Court or a judge thereof, as the case may be, considers that a substantial miscarriage of justice has actually occurred."

Applicant's prospects of success on appeal

I am not persuaded that the applicant has prospects of succeeding on appeal against conviction. It is common cause that she received twenty laptops from the State as a donation not for her personal benefit but for the purpose of distribution to deserving citizens in her political constituents. According to the State the intended beneficiaries were certain schools name by her in her request for the donation and listed in the Handover Form signed on behalf of the applicant. According to the applicant the intended beneficiaries were underprivileged citizens in her constituents. It is also common cause that the donor was a State entity created for the sole purpose of procuring and distributing Information and Communications Technology (ICT) Equipment for

E-learning purposes, that the laptops were handed over to the applicant subject to an agreement and written undertaking signed by the recipient to handover the equipment to the intended beneficiaries and submit a return containing a list of the beneficiaries and their contact details within 30 days of receiving the laptops. It is common cause, further, that the applicant received the laptops and that she did not submit the expected return to the donor and that she still failed to come up with the required list of the beneficiaries at the trial. Her defence was that although the laptops were released at her written request made on behalf of her constituency and indeed subject to the terms of the written trust agreement, she was not privy to the agreement because it was signed by her brother who received the laptops on her behalf. The defence was rejected. The narrow issue to be determined on appeal is therefore whether the defence was correctly rejected. The chances are that the appeal court will find that in either case the applicant had the implied duty to deal with the laptops in a manner that ensured the laptops reached the intended beneficiaries and that such beneficiaries are known.

As against sentence, in the likely event that the conviction is confirmed on appeal, it is unlikely that this court, exercising appellate jurisdiction, will interfere with the trial court's exercise of sentencing discretion. The court is not likely to interfere, on appeal with the trail court's decision to incarcerate the applicant who, at the time of committing the crime was an Honourable member of Parliament who abused trust property destined for the less privileged. The appellant has not convinced me of any misdirection in assessing sentence or that the sentence is disturbingly inappropriate or so severe as to induce a sense of shock.

Disposition

In this case I conclude that the touted prospects of appeal are fanciful and unlikely to carry the day at the determination of the applicant's appeal. In any event the applicant failed to make a firm commitment that she will abide by the sentence if her appeal does not succeed. The appeal is ready to be heard on the merits and the court is ready and available to hear the matter without delay. The issue for determination is very narrow. Judgement is not likely to be delayed.

In the result I order as follows: -

The application is dismissed.

Mahuni, Gidiri Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners