

**THABISA KHUMALO**

**And**

**BINARY MKANDLA**

**Versus**

**NTOMBIZODWA MUKONDIWA-MAZHANDU**

**And**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 6 FEBRUARY & 8 MARCH 2012

*N. Mlala with S. Mguni for the applicants*  
*Miss A. Munyeriwa with L. Maunze for the respondents*

Urgent Chamber Application

**NDOU J:** This order was granted by consent of the Attorney-General's representative on 6 February 2012. The facts of this case are disturbing and I wish to comment thereon in this judgment.

On the 1<sup>st</sup> February 2012 the applicants appeared before the 1<sup>st</sup> respondent, a Bulawayo Provincial Magistrate jointly charged with the crime of fraud as defined in section 136 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. This was their initial appearance after their arrest. They were represented by a legal practitioner, one N. Dube of Cheda & Partners Legal Practitioners. The public prosecutor was one Masimba Saruwaya. In the founding affidavit in this application, the deponent avers that he was instructed by the applicants to bring to the attention of the magistrate that they were severely assaulted by the police after their arrest. The public prosecutor advised the court *a quo* that the state was not opposed to bail being granted to the applicants. The 1<sup>st</sup> respondent asked why the state was not opposing bail in court whereas in the "Request for Remand" Form 242 the police were opposed to the granting of bail. The 1<sup>st</sup> respondent's notes reflect the following on this issue:

“State consents to bail.

Q - The form 242 says the State is opposed to bail, has the State changed its attitude?

A - Yes

Q - Why

A - We have just changed

Crt:

Q - Can we stand the matter down, PP [Public Prosecutor] may you confirm with I/O [Investigating Officer] that indeed he is no longer opposed to bail.

[Resumes] 2:15

Q - State are you still not opposed to bail?

A - Yes

Q - How much bail

A - D/C [Defence Counsel] \$100 and any conditions the court may impose

PP [Public Prosecutor]- No conditions except that they can hand in their passports if they have any

Crt Q - Do you have any

A - PP – I don't know

Crt:-

Bail granted as per State's consent in the sum of \$100”

Thereafter, the applicants' legal practitioner left the court as the applicants' relatives went to pay bail at the Clerk of Court's office. Bail was indeed paid for the applicants as evinced by Bail Deposit Receipts BR 148924 and 148922 respectively issued by the Clerk of Court. However, the applicants were not released. The prison officer indicated to the applicants that the magistrate [1<sup>st</sup> respondent] had directed them not to release the applicants. The relatives contacted the applicants' legal practitioners about this unpleasant turn of events. The legal practitioner enquired from the 1<sup>st</sup> respondent why she had unilaterally stopped the release of the applicants. The 1<sup>st</sup> respondent told the legal practitioner that the police were alleging that

she [1<sup>st</sup> respondent] had been bribed to the tune of US\$300,00 by the applicants' relatives. It was this approach by the police [presumably in her office] that caused her to revoke the bail that she had granted earlier on. The 1<sup>st</sup> respondent has provided her notes on the issue. The notes were written a day after the applicants paid their bail on 1 February 2012. On 1 February 2012 the 1<sup>st</sup> respondent noted:

"Crt:

After getting back to my chambers I was informed by a colleague that the relatives were saying they gave me \$300 bribe to grant bail. With that in mind I tried to enquire from the relatives who they gave money to and asked them to get back their money as I did not take any bribe. I remanded the 2 accused persons I/C [in custody] to the following day.

02/02/12

Crt to relatives of the accused persons.

Q - Did you get back your money

A - No

I did not get your money & I hope you get it back from whoever you gave. Because of all the above claims I have decided I may no longer be objective enough to deal with the matter I therefore recuse myself. Accused persons are remanded to 03/02/12 so that they can be moved to another court for their bail hearing.

(Signed) 02/02/12"

The applicants, their legal practitioner and public prosecutor were not involved in the proceedings between the 1<sup>st</sup> respondent and applicants' relative. It is not clear how 1<sup>st</sup> respondent managed to convene a meeting between her and the applicants' relatives. It is not clear where such meeting took place. There is no record of who attended the meetings. If the allegations of bribery were from the applicants' relatives it is not clear why 1<sup>st</sup> respondent told the applicants' legal practitioner that the claims came from the police. Be that as it may, after confronting the 1<sup>st</sup> respondent, the applicants' legal practitioner approached the Area Public Prosecutor. The latter were of no assistance as they referred him back to 1<sup>st</sup> respondent. This culminated in this application being instituted. The actions of the 1<sup>st</sup> respondent are perturbing. The 1<sup>st</sup> respondent had already granted the applicants in an open court. The State was right from the start not opposed to the granting of the bail. The State is the *dominis litus*. For some reason the 1<sup>st</sup> respondent wanted the prosecutor to check with the police. This was done and the prosecutor still indicated that the police were not opposed to the granting of bail.

The 1<sup>st</sup> respondent granted the applicants and she then became *functus officio*. The applicants paid bail and would have been released had it not been for the instruction 1<sup>st</sup> respondent gave to the prison officers. There is no legal basis for denying the applicants their liberty. If the police or the applicants' relatives alleged that 1<sup>st</sup> respondent had been bribed that is not a legal ground to recall the matter and alter the decision that she had already taken. The applicants did not do anything to warrant the revocation of their bail. The 1<sup>st</sup> respondent should have dealt with the allegations of bribery levelled against her without denying the applicants their liberty. A detained person's right to liberty is fundamental and should not be taken away on such grounds. In any even the 1<sup>st</sup> respondent knew that the applicants were represented by a legal practitioner and there is nothing that stopped her from reconvening the court with both parties present. In the presence of the public prosecutor and applicants' legal practitioner the issue of the alleged bribery would have been dealt with inputs from both sides. Magistrates should not be having informal discussions elsewhere on issues that took place in court. The approach adopted by the 1<sup>st</sup> respondent can easily lead to anarchy and negatively affect the criminal justice system. This kind of approach can easily lead to a breeding ground for corruption. The Deputy Registrar of this court is directed to forward a copy of this judgment to the Chief magistrate. It is for the above reasons that the order was granted.

*Cheda & Partners*, applicants' legal practitioners

*Criminal Division, Attorney General's Office*, respondent's legal practitioners