JAMES CHAFUNGAMOYO MAKAMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE 29 AND 31 MARCH 2004

APPLICATION FOR BAIL

Mr *G. Chikumbirike*, for the applicant
Mr *R.* Gwatidzo, for the respondent

KAMOCHA J: At 10 a.m. on 9 February 2004 the applicant was arrested by the police on allegations of contravening section 5(1)(a)(i) of the Exchange Control Act [*Chapter 22:05*] "the Act" as read with section 4(1)(a) and section 11(1)(a) of the Exchange Control Regulation Statutory Instrument 109/96.

Since that day the applicant has been to this court on no less than three times seeking to be admitted to bail without success. The last time was on 8 March 2004 when CHITAKUNYE J when dismissing the application stated that, "The applicant's application for bail can be reviewed or reconsidered after about 3 to 4 weeks." Emphasis added.

On 15 March 2004 applicant went before a magistrate seeking to have his arrest declared illegal. After hearing argument from both sides the magistrate ruled, on 18 March 2004, that the arrest of the applicant on 9 February 2004 and his detention up to that date were illegal as that contravened section 25(1)(a)(b) and (c) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The applicant had been arrested without a warrant when the allegations levelled against him were not any of the offences mentioned in the first schedule. However, the applicant was immediately re-arrested, but this time around, with a warrant. He was thereafter placed in custody and has been there ever since.

The applicant submitted that his re-arrest and fresh remand gave rise to this new application for bail. He based his argument on the fact that since the

magistrate had declared his arrest and detention in custody illegal it was the re-arrest with a warrant which has landed him in custody again. But for the arrest with a warrant he would have been out of custody since the magistrate had ordered his release forthwith. The decision by the magistrate has not been appealed against and the State appears to have accepted its validity by regularising the arrest. By so doing the State is accepting that the previous arrest and detention were invalid.

It therefore seems to me that the applicant is entitled to make a fresh application based on the re-arrest and a new detention order though this may sound technical. It is also significant to note that the re-arrest was also still predicated on the same charges of contravening the provisions of the Act as read with the provisions of the regulations made there under.

Even, if I were wrong in holding that the applicant is entitled to make a fresh application for bail based on his re-arrest and new detention, he still would be entitled to have his application for bail reviewed or be reconsidered as per his lordship's recommendation.

It seems common ground now that a period of 3 weeks has since lapsed. The matter can indeed be reviewed or be reconsidered. The question to be answered in that connection is whether the review or reconsideration of the bail application should be dealt with by the same judge or by any other Judge of this court. The applicant submitted in his papers that these proceedings could be taken before his lordship to continue dealing with the matter as if he were considering afresh the information which he had and the new information to be presented before him. By that, I understood the applicant to be saying that his lordship would reconsider the matter on the basis that there was a new arrest and detention.

On the other hand counsel for the respondent submitted that nothing had changed at all. The situation that prevailed when the learned Judge dealt with the application still prevailed. He went on to say that this court should strongly discourage the repetition of cases by placing them before different judges. It was the respondent's view that treating this application as new would ignore the effort another Judge put in laying the matter to rest. It was further

contended that once the police regularised the applicant's arrest his lordship's judgement remained in force and any further application for bail should begin from where the erstwhile legal practitioners left, in light of the fact that there is no order declaring the proceedings null and void. Neither was the issue of the applicant's arrest a factor in the proceedings relating to bail. It was submitted in conclusion that the need to craft another judgement did not arise but that the court should endorse his lordship's judgement to still apply to this state of affairs.

While it is correct that the police regularised the arrest it cannot be correct in my view, that the previous arrest and detention were not illegal. Where the law lays down a procedure to be followed when effecting an arrest, that procedure ought to be followed. *In casu* it seems to me that an arrest for a contravention of the provisions of section 5(1)(a)(i) of the Act as read with section 4(1)(a) and section 11(1)(a) of the regulations made there under can only be done with a warrant unless the offender commits such an offence in the presence of the police officer.

I now turn to answer the question whether or not any Judge of this court can review or reconsider the applicant's bail application. I do not agree with the suggestion that the matter can only be dealt with by the Judge who recommended the review or reconsideration. The practice in bail applications is that review of applications is done by any Judge of this court. I, therefore, will proceed to deal with the matter.

My first port of call in dealing with the matter is section 116(7) of the code. The relevant provisions recite thus.

> "(7) subject to subsection (4) of section 13 of the constitution, in any case in which the Judge or magistrate has power to admit the accused person to bail, he may refuse to admit such person to bail if he considers it likely that if such person were admitted to bail he would -
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> (a) not stand his trial or appear … to receive sentence; or
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> (b) interfere with evidence against him; or
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> (c) commit an offence;
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> but nothing in this subsection shall be construed as limiting in anyway the power of the Judge or magistrate to refuse to admit an

> accused person top bail for any other reason which to him seems good and sufficient."

I shall make reference, with approval, to the judgement of the learned judge which summerised the state's objections to the granting of bail. When dealing with the question of abscondment the learned Judge held a view that it (abscondment) could not be entirely ruled out. However, the level of its likelihood was not clear to his lordship.

There is no basis whatsoever for believing that the applicant would commit other offences if admitted to bail. That point is therefore ruled out.

The only point that his lordship could not rule out was that applicant would interfere with evidence against him. At that stage the police stated that they had visited South Africa between 17 and 27 February 2004 intending to access the applicant's bank accounts. Interpol South Africa took them to a magistrate in Pretoria who ordered that the sought records be submitted to the police within 21 days from 23 February 2004. The 21 days expired on 14 March 2004. The police were then opposed to the granting of bail before the expiration of the 21 days. They had hoped that they would have been supplied with the necessary bank documents by then. They have since obtained applicant's bank records from South Africa.

In an affidavit sworn to by Chief Superintendent Mabunda filed for the purpose of this case the police had this to say:-

> "It is now intended to visit Luxembourg, Switzerland, Germany, London and New York to again solicit - interpol's assistance to access accused's bank accounts so that the documentary evidence can be used for court proceedings. While police have written to interpol in the host countries, to clear the way for our approach, the Attorney General has also applied for diplomatic clearance through the Ministry of Finance.
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> In light of pending trip for external investigations, we are totally opposed to the granting of bail to the accused who has the potential of interfering with police investigations by communicating with State witnesses before they are interviewed by the police. The value involved is so high that the temptation to flee is high. The breakdown of the value is as follows: "US$2 117 444.00, G.BP £3 773 650.00, EURO 24 413.29, ZAR 14 977 996.03, DM 16 000.00, and $3 908 038.00"

Unlike the previous affidavit which had given some indication of the time frame of 21 days within which the police would expect to receive the applicant's bank record the one above does not. Meaning that the applicant will languish in custody indefinitely. May be even up to 16 June when his matter is scheduled for trial. That is an unsatisfactory state of affairs. Finally the affidavit does not reveal the amounts contained in the applicant's bank accounts obtained from South Africa.

The passage quoted supra seems to suggest to me that a lot of time is still required to complete the investigations in foreign states. It also seems that the investigations are far from being completed yet the respondent sought to have the matter set down for trial during the month of April or May 2004. The matter could not be set-down for trial during the suggested dates because the defence counsel had other matters which occupied the suggested dates in April or May. How then was the State going to proceed to trial when it had not yet completed its investigations? It still has to send a team to investigate in four foreign countries. The procedures involved in order to get to those countries are not easy at all. If it took 21 days to obtain documents from neighbouring South Africa it is likely to take much more time to secure the required documents from the said countries.

The State does not seem to be acting *bona fide*. One moment it says the investigations are complete and the matter is ready to go to trial as early as April. In the next breath it says investigations are still far from completion and yet it wants applicant to remain in custody. There does not seem to be any fairness especially when it seems the State is acting *mola fide*. Why is the matter being set down when investigations are still in progress? The normal practice is for investigations to be completed before the matter is set down for a hearing.

Is there any other reason why I may refuse to admit the applicant to bail which may seem to me good and sufficient? I propose to deal with the questions of the amounts involved and the provisions of the Exchange Control Act. It admits of no doubt that amounts are huge regard being had to the fact that the amounts involved hard currencies. To my mind £3 773 650, $2 117

444 US and ZAR 14 977 996.03 are huge sums of money. If the applicant were to be convicted he would be required by law to repatriate those amounts within a period of three months in terms of section 5(6)(b). Section 5(7)(b) makes it mandatory where an individual who has been convicted fails to repatriate the property whose value exceeds two hundred dollars to be sentenced to imprisonment for such a period the court deems fit in addition to any fine required by subsection (4). The relevant provisions are these:

> "(7) Where a person convicted of an offence referred to in paragraph (a) of subsection (6) does not satisfy the court as to one or other of the requirements mentioned in subparagraph (i) and (ii) of paragraph (b) of subsection (6) the court shall -
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> (a) in all cases have regard to that as a factor in aggravation of sentence; and
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> (b) if the convicted person is an individual and the value of the property concerned exceeds two hundred dollars, impose a sentence of imprisonment for such a period as the court deems fit in addition to any fine required by subsection (4)" Emphasis added.

I am mindful of the presumption of innocence until an offender is proved guilty but in the event of a conviction imprisonment is a certainty should applicant fail to repatriate the huge sums involved which all exceed the paltry $200.00. There is a real danger that if the applicant has the capacity to repatriate such huge sums of hard currency there is great temptation for him to abscond and live outside this country on those monies for the rest of his life. It therefore seems to me that on this ground the applicant is not a suitable candidate for bail.

I would, in the result, dismiss his application.

Chikumbirike & Associates, applicant's legal practitioners

The Attorney General, respondent's legal practitioners