KISIMUSI DHLAMINI
and
GHANDI MUDZINGWA
versus
KEMBO MOHADI N.O.
(CO-MINISTER OF HOME AFFAIRS)
and
GILES MUTSEKWA N.O.
(CO-MINISTER OF HOME AFFAIRS)
and
AUGUSTINE CHIHURI N.O. AND 6 OTHERS
(COMMISSIONER-GENERAL OF POLICE)

HIGH COURT OF ZIMBABWE
PATEL J

Urgent Application

HARARE, 27 and 30 April 2009

Adv. Zhou, for the applicants
Mr. Mutangadura, for the respondents

PATEL J: The applicants in this matter were granted bail by this Court on the 9th of April 2009. Immediately thereafter, the Attorney-General invoked section 121(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the Code) giving notice of his intention to appeal against the decision and thereby precluding the release of the applicants from custody for a period of 7 days. The Easter weekend intervened and, as enjoined by section 121(1) of the Code as read with section 44(5) of the High Court Act [*Chapter 7:06*], the Attorney-General filed an application for leave to appeal on the 14th of April 2009. This application was granted by this Court on the 17th of April 2009 and the appeal against the grant of bail was then filed with the Supreme Court on the same day.

Again on the same day, in circumstances that are not entirely clear but which are not relevant for present purposes, the applicants paid the prescribed bail amount and were released from custody. They were then admitted to the Avenues Clinic for medical treatment. At the hospital they were placed under guard, initially by Prison Officers and then later by Police Officers. They now seek an order removing the police guard and declaring unlawful any form of guard imposed upon them.

For the applicants, it is submitted that the notice of appeal by the Attorney-General was filed out of time and, since there is no appeal presently pending before

the Supreme Court, there is no legal basis for the police guard. On behalf of the respondents, it is contended that the appeal was filed within the prescribed period, taking into account the intervening weekend and public holidays, and that the liberation of the applicants was premature and therefore unlawful.

Section 121(1) of the Code stipulates that the Attorney-General must appeal against the admission of any person to bail "within seven days of the decision" appealed against, failing which such person must be released from custody in terms of section 121(3) after "the expiry of seven days". The crisp and critical question for determination *in casu* is this: In reckoning the 7 day period referred to in section 121 does the law require that weekends and public holidays be included or that they be excluded?

As I have already indicated, section 121(1) of the Code allows an appeal against the admission of a person to bail by a judge subject to section 44(5) of the High Court Act [*Chapter 7:06*]. This subsection provides that where a judge has made an interlocutory order or given an interlocutory judgement in relation to any criminal proceedings, the accused person or the Attorney-General may appeal to the Supreme Court against that interlocutory order or judgement. However, any such appeal is "subject to rules of court" and requires "the leave of a judge of the High Court" in the first instance.

In my view, it is very doubtful that the admission of a person to bail can properly be perceived as an **interlocutory order or judgement**. The same doubt was clearly shared by CHIDYASIKU CJ in *Attorney-General v Mpofu & Anor* 2002 (1) ZLR (S) 670, at 673. In any event, as was aptly observed by the learned Chief Justice, the refusal or grant of bail is to be regarded as an interlocutory order or judgement "for the purposes of" section 121 of the Code as read with section 44(5) of the High Court Act, and "the practical effect" of these provisions is that where the Attorney-General wishes to appeal against an admission to bail he has to obtain the leave of a judge.

What also appears to follow from the foregoing is that the "rules of court" referred to in section 44(5) of the High Court Act must be construed as being the rules governing appeals against interlocutory orders and judgements in criminal proceedings as distinguished from the rules governing bail applications and bail appeals. In other words, the reference to "rules of court" in section 44(5) of the High

Court Act has no direct bearing on the interpretation and application of section 121 of the Code.

Turning to the central question at hand, the Code itself contains no express guidance on the computation of the period of 7 days prescribed for the filing of an appeal against the refusal or grant of bail. Again, I am unable to find any assistance on the point in the Interpretation Act [*Chapter 1:01*]. For the applicants, it is argued that the period in question must be calculated as 7 days, inclusive of weekends and public holidays, and that this is so notwithstanding anything contained in the relevant rules of court inasmuch as such rules cannot modify the clear words of an Act of Parliament. As against this, it is submitted for the respondents that the prescribed period must be construed in conformity with the governing rules of court.

Section 34 of the Supreme Court Act [*Chapter 7:13*] provides for the enactment of rules of court as follows:

"(1) Subject to subsection (4), the Chief Justice, after consultation with a committee appointed by him, may make rules of court <u>for regulating all matters in relation to the proceedings of the Supreme Court</u>, including any matter in respect of which rules of court may in terms of this Act be made.
(2) Rules of court made in terms of subsection (1) may provide for the following matters—

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(s)   the time within which any requirement of the rules is to be complied with and the extension of such time;

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(x)   generally, any matter in respect of which, in the opinion of the Chief Justice, it is necessary or desirable to make provision in order to ensure or facilitate the proper dispatch and conduct of the business of the Supreme Court and, <u>in relation to criminal cases, for carrying the criminal law, practice and procedure into effect</u>."

Rule 6 of the Supreme Court of Zimbabwe (Bail) Rules 1991 restates the stipulation that an appeal from the High Court against the grant of bail must be filed within 7 days and then prescribes the specific procedure to be followed in noting such an appeal. Rule 3 deals with the reckoning of time as follows:

"Where anything is required by these rules to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of such period."

In marked contrast, Rule 3 of the High Court of Zimbabwe (Bail) Rules 1991 explicitly includes Saturdays, Sundays and public holidays as part of the 7 day period for filing an appeal to the High Court, in terms of Rule 7, against the grant of bail by a magistrate. I presume that the reason for this distinction is that an appeal from the decision of a magistrate is not conditioned by the need to seek and obtain leave to appeal and can therefore be processed more expeditiously.

It is trite that in the interpretation of an Act of Parliament any subsidiary legislation made under that Act (viz. regulations, notices, rules, by-laws, etc.) must be construed and applied in conformity with the Act. In the event of any conflict or inconsistency, the provisions of the Act must prevail and the subsidiary legislation must either be struck down or be applied, *mutatis mutandis*, so as to conform with the Act.

The rules of statutory interpretation also require that all subsidiary legislation that is lawfully and procedurally made under an Act of Parliament must be construed as an integral part of that Act. In this regard, section 3(1) of the Interpretation Act [*Chapter 1:01*] specifically states that:

> "In every Act ………………………….. "this Act" includes any statutory instrument made and in force under the Act."

For present purposes, it is not in issue that the Supreme Court Bail Rules were lawfully and procedurally enacted in terms of section 34 of the Supreme Court Act. Moreover, to the extent that they are *intra vires* and consistent with that Act, they must be duly applied "for regulating all matters in relation to the proceedings of the Supreme Court" and "in relation to criminal cases, for carrying the criminal law, practice and procedure into effect".

In my view, Rule 3 of the Supreme Court Bail Rules is clearly *intra vires* the enabling Act and consistent with the provisions of that Act. I also take the view that Rule 3 does not conflict with anything contained in section 121 of the Code. As I have already stated, there is nothing in section 121 or in any other provision of the Code to provide direction or guidance as to the reckoning of the prescribed period of 7 days. In this respect, Rule 3 does not purport to alter or deviate from what section 121 explicitly stipulates. On the contrary, it is specifically designed to carry into effect the criminal law, practice and procedure, including section 121 of the Code, in accordance with section 34 of the Supreme Court Act.

Adopting this holistic approach by having regard to all of the relevant statutory provisions cited above, I conclude that the 7 day period stipulated in section 121 of the Code must be reckoned as excluding Saturdays, Sundays and public holidays. It follows that the appeal noted by the Attorney-General against the grant of bail to the applicants was timeously filed within the prescribed period of 7 days. It also follows that the applicants have failed to establish that the police guard imposed upon the applicants is in any way unlawful. They are therefore not entitled to the relief that they seek *in casu*.

As regards costs, I take the view that the principal question raised in this matter is of significant public importance in relation to a point of law that has not previously been canvassed. Accordingly, I am inclined not to penalise the applicants with any award of costs against them.

In the result, this application is dismissed with no order as to costs.

Mbidzo, Muchadehama & Makoni, applicants' legal practitioners
Civil Division of the A-G's Office, respondents' legal practitioners