GENIUS KADUNGURE
versus
THE HON MAGISTRATE MAKWANDE N.O
and
THE PROSECUTOR GENERAL OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 17 November, 2018 and 20 November 2018

Urgent Criminal Review

S. Hashiti, for the applicant
No appearance for the 1st respondent
T. Mapfuwa, for the 2nd respondent

CHITAPI J: Mangota J and myself were the urgent cases duty judges from 12 November, 2018 to 19 November, 2018 when another set of judges would take over. Duty judges are called upon to deal with urgent applications filed by litigants after normal court hours and during weekends. In the exercise of its mandate of providing people access to justice at all times, the courts' administrative authority has put in place systems which ensure that people are not denied access to justice on the excuse that it is after normal court hours, a weekend or public holiday. Not every case may however be brought to court outside of the normal work or business hours. In the case of this court, only urgent application may be entertained outside such hours. It would in fact be correct to say that the High Court is open for urgent applications determinations 365 days or 366days if it's a leap year and for 24 hours on each day.

The way the system operates at High Court, Harare station is that, there is at all times and on standby to receive urgent applications, a duty registrar. It is the duty registrar whom a litigant approaches with his or her urgent application. The duty registrar after carrying out the administrative formalities *inter-alia* of record opening and case number allocation then advises either of the two duty judges whom the Registrar is able to contact, of the filing of the urgent application. The judge who is contacted attends on the registrar in chambers and peruses the

application. If the judge in his or her discretion considers that the application is not urgent, he or she endorses such fact on the record and brief reasons why. In such a case the applicant is free to prosecute the application on the ordinary roll, withdraw it or pursue his or her rights in any other manner procedurally as such applicant may be advised.

This application was placed before me as one of such urgent application in regard to which the duty registrar telephoned me to advise of its filing on 17 November, 2018 around 7.00am. I duly attended in my chambers to peruse it and to give directions as to its disposal. From the depositions made in the application, I formed the view that the application merited consideration and determination on an urgent basis. I accordingly directed the registrar as follows and l endorsed on the record:

> "1. Set down application for hearing at 2.30pm in chambers today.
>
> 2. All parties must be served with notice of set down and the respondents to be served with the application.
>
> 3. The magistrate court record CRB 1393/18 must be availed and you arrange that l have it for purposes of the hearing."

The reason why it was necessary that the magistrates' court record be placed before me for perusal was that the applicant in his application alleged the commission by the first respondent of gross procedural irregularities in the hearing and determination of his bail application as rendered the decision which deprived him of his liberty pending trial, an unlawful one.

The parties, that is, the applicant and second respondent's legal practitioners appeared before me in chambers at 2.30pm as per the notice of set down. The duty registrar, thanks to his efforts, had successfully arranged for a photocopy of the record of proceedings in the magistrate to be placed in the record. The parties agreed that the copy of the record placed before me was a true copy of the original record. I heard submissions from both counsel and reserved judgment to 19 November, 2018. On 19 November, 2018, I further postponed judgment to 20 November, 2018 as I was only able to access some case authorities referred to by counsel on 19 November, 2018.

<u>The application and its propriety</u>

1. The application is for urgent review of bail proceedings held before the 1st respondent on 17 November, 2018 wherein the 1st respondent denied the applicant bail in alleged controversial circumstances which culminated in the applicant petitioning this court by way of urgent chamber application for review and the setting aside of the decision of the 1st respondent. Mr *Mapfuwa* took a point *in limine* that the application was improperly before me because the applicant should have noted an appeal and not filed a review application.
2. Ordinarily an accused person who appears before the magistrates' court for initial remand, applies for and is denied bail has two options. The first option is to appeal to a judge of the High Court against the denial of bail in terms of s 121 (1) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Where the accused opts for this option, the procedure for appeal is laid down in the High Court of Zimbabwe (Bail) Rules, 1991 S.I.109 of 1991 and specifically as set out in rule 6 thereof. The second option is for the accused person to abide the decision of the court and file a subsequent application with or before the same court. That court can only entertain the subsequent application if it is based on changed circumstances which must not have been in existence at the time that the first application was dismissed. The second option is an example of an exception to the *functus officio* doctrine in terms of which a court that makes a decision on a matter before it, is taken to have exhausted its powers and may not revisit its decision on the point determined. See *Matanhire* v *BP Marketing* SC 5/2005, *PSL* v *Mangoma* HH 291/17; *Ignatius Masamba* v *Secretary Judicial Service Commission* HH 283/17. Bail refusals by the magistrates court, everything being equal, and where the accused wishes to have the magistrate's ruling considered by this court on appeal or that the magistrates court reconsiders its decision follow this route.
3. There is no provision in the Criminal Procedure and Evidence Act that specifically provides for the review of a magistrates court's decision denying an accused person admission to bail. The power of this court to review decisions of the magistrates court are to be found in the Constitution as read with the High Court Act. [*Chapter 7:06*]. In terms of s 171 of the Constitution on the jurisdiction of the High Court, it provides;

   "171 Jurisdiction of High Court

(1) The High Court –
   a) Has original jurisdiction over all civil and criminal proceedings throughout Zimbabwe.
   b) Has jurisdiction to supervise magistrates court and other subordinate courts and to review their decisions.
   c) ….
   d) ….

(2) An act of Parliament may provide for the exercise of jurisdiction by the High Court and for that purpose may confer the power to make rules of court.
(3)….
(4)…….”

4. An act of Parliament, viz, the High Court provides for the exercise of review powers of the High Court. Section 26 provides –

   “Power to review proceedings and decisions subject to this Act and any other law.
   The High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe.”

5. The grounds for review by this court are set out in s 27 of the High Court Act, which provides as follows:-

   “27 Grounds for review
   1. Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court, shall be –
   (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
   (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
   (c) gross irregularity in the proceedings or the decision.
   2. Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities.”

So far as I am aware there is no other law which limits or ousts the powers of this court to review bail proceedings of the magistrates court. The Magistrates Court Act, [*Chapter 7:10*] provides for review of proceedings of that court by this court after conviction and sentence as provided for in ss 57, 58 and 59 of that Act. The powers of review in criminal cases given in those sections do not impact on the review powers which this court may exercise in relation to magistrates’ court proceedings prior to sentence or in relation to other matters falling outside those sections. See *S* v *Prandini* HH 94/10.

Following on the above, this application was properly brought before this court by way of review because the constitution provides for review of decisions of the magistrates court and for the supervision of that court. The review powers of magistrates’ court proceedings may be

exercised on application by an affected party or by the court or a judge of this court *mero motu* whenever it comes to the notice of the judge or court that "any criminal proceedings of any inferior court are not in accordance with real and substantial justice." In *S* v *Elizabeth Kalenga* HH 416/18, CHITAKUNYE J exercised review powers *mero motu* following the publication of a newspaper article which reported on a case in which a student nurse was reportedly jailed for 15 months by the magistrates court for using a forged certificate to gain admission into a nurse training programme. The learned judge called for the record, reviewed the proceedings in terms of s 29 (4) of the High court Act, and with the concurrence of MUSAKWA J, the learned judge confirmed the conviction, but set aside the sentence of imprisonment which he substituted with a fine. The review jurisdiction of this court in criminal proceedings is therefore original, inherent and very wide save where a law provides limitations on the exercise of the jurisdiction. The High Court can therefore properly review a bail issue or decision. See *S* v *Moyo* 1988 BLR 113 (HC). This court should not shy away from ensuring quality control in the magistrates' court.

Having espoused the jurisdictional powers of this court to review criminal proceedings of the magistrates court including bail proceedings and decisions, I determine that Mr *Mapfuwa's* point *in limine* be dismissed. I should mention that to his credit, Mr *Mapfuwa* at the end of argument on this point conceded that this court had jurisdiction to deal with the application on review for so long as the grounds of review were established by the applicant.

Urgency of the application

The issue of whether or not the application was urgent was not raised by Mr *Mapfuwa*. Despite the fact that no issue or objection is raised pertaining to urgency, a court or judge who directs the enlisting of a matter to be dealt with on the urgent case roll must be satisfied on the papers or where oral application has been made, on submissions by the applicant that the case is urgent. See *Saltlakes Holdings (Pvt) Ltd & Anor* v *CBZ Bank & Anor* HH 636/15; *Kuvarega* v *Registrar General* 1998 (1) ZLR 188. Since the procedure of urgent applications enrolment is court driven in the exercise of the court's discretion to deem the matter urgent and attend on it on that basis, the court may *mero motu* raise the question of urgency with the parties where it has not outrightly struck off the matter from the roll without a hearing but has enrolled it with reservations as to urgency.

The purport of this application was an alleged gross irregularity committed by the first respondent on 16 November, 2018 when she dealt with applicant's bail application. The applicant through an affidavit deposed to by his legal practitioner Mr *Samukange* who represented him at his initial appearance and bail hearing averred that:

(1) the first respondent considered the applicant's suitability as a good candidate to be admitted to bail pending trial;

(ii) the second respondent consented to the applicant's admission to bail and proposed conditions which would allay the state's fears that the applicant may not stand his trial.

(iii) the first respondent considered that additional surety in the form of immovable property be surrendered to the court.

(iv) it was determined that bail be considered in light of the prosed conditions and the surrender of title deeds to a property.

(v) the first respondent then made a ruling that the case be stood down to allow the applicant's legal practitioners to uplift title deeds from his office and submit the same to the first respondent to then issue the bail admission order.

(vi) on the legal practitioner's return the first respondent then read out a bail dismissal ruling which she prepared during the adjournment granted to the legal practitioner by the court to collect title deeds to present to the court to support the applicant's plea for bail.

(vii) the court did not consider the evidence of title deed yet the court had allowed that it be collected and produced before it for consideration.

(viii) that the first respondent could not change her previous ruling as by agreeing to admit the applicant to bail on the additional condition of surrender of title deeds to an immovable, she had exercised her jurisdiction and could not just turn round and give a contrary decision without giving the parties the opportunity to be heard.

(viii) that the first respondent must have been improperly interfered with during the time of the court's adjournment leading her to make a sudden change of mind.

On the above allegations, the application was in my view urgent because not only did it concern the liberty of the individual but more importantly, the loss of liberty was allegedly brought about in a procedurally irregular manner thus rendering the decision reached invalid. In this regard it must be noted that although the constitution allows for limitation of fundamental rights and freedoms as provided for in s 86 of the constitution, there are safeguards to the limitations. Of particular note is that fundamental human rights and freedoms may only be limited by a law of general application. Some rights cannot however be limited. The rights which cannot be limited by any law whether of general or specific application are set out in s 86 (3) of the constitution. One such right is the right to a fair trial. Section 86 (3) of the constitution reads as follows;

> "No law may limit the following rights enshrined in this chapter and no person may violate them –
> (a) ……
> (b) ……..
> (d) …….
> (e) the right to a fair trial
> (f) ……."

The allegations made by the applicant presented themselves to me as requiring urgent intervention because it is an urgent matter without reserve for the individuals to be deprived of his or her liberty in violation of the right to procedural fairness and consequently the right to a fair trial which right is absolute. Further, the constitution in s 165 provides as follows:

> "165 Principles guiding the judiciary
> 1. In exercising judicial authority, members of the judiciary must be guided by the following principles-
> (a) justice must be done to all, irrespective of status;
> (b) ……..
> (c) the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law
> 2 ……..
> 3. …….
> 4. …….
> 5. …….
> 6. …….
> 7. ……..."

The rule of law requires that judicial decisions are made in terms of a process that accords with the both procedural and substantive law. It is a matter requiring urgent intervention where a judicial decision has been reached in violation of the rule of law. The allegations made in this application satisfied me that urgent intervention was justified and that the review application be

determined as an urgent matter more so considering that where the protection promotion and fulfillment of fundamental rights are concerned, the last line of defence or last man standing in correcting alleged violations of the rights is the judiciary. Where the judiciary as in this case is the alleged violater, it must self- correct without delay. I was therefore not only satisfied of the urgency of the application but derived comfort from the fact that l had jurisdiction to review the proceedings as given by the constitution.

The proceedings before the court *a quo*

Having perused the record of proceedings of the court *a quo*, it shows that the applicant appeared before the first respondent on initial remand on 3 charges set out in the request for remand form. In the 1st count he was charged in his personal capacity and in his capacity as director of his company, of fraud as defined in s 136 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. The allegations were that during the period February 2009 to May 2016, he misrepresented the value of the total sales of gas sold by his company. The misrepresentation allegedly resulted in prejudice to Zimbabwe Revenue Authority (Zimra) of $417 940.58.

In the second count the applicant faced a charge of Money Laundering as defined in s 8 (3) of the Money Laundering and Proceeds of Crime Act, [*Chapter 9:24]*. In the third count he was charged with contravening s 81 (1) of the Income Tax Act, [*Chapter 23:06*]. An annexure to the request for remand form however refers to "count 2 -6". The annexure purports to set out the allegations against the applicant in more detail. It is however convoluted and difficult to follow or comprehend. One cannot match the allegations outlined therein to the second and third charges as appears *ex facie* the request for remand form in section B thereof.

The allegations are that Zimra conducted life style audits in 2015 "on socialites" who engaged in excessive expenditure not matching with their tax declarations. On 2 May 2016 the applicant was interviewed. He declared property which he owned. The property included a residential home and a number of expensive motor vehicles and furniture. The applicant allegedly failed to provide the source of funds for his declared property. It is not clear to me from the allegations whether these allegations ground the Money laundering charge because s 8 (3) of the Money Laundering and Proceeds of Crime Act, reads

> "Any person who acquires, uses or possesses property knowing or suspecting at the time of receipt that such property is the proceeds of crime, commits an offence"

The allegations did not inform which property is the proceeds of crime or what the crime was.

The further allegations is made that for the period January 2010 to December 2015 the applicant failed to declare sales of gas. Zimra then assessed tax on the sales in the sums of $2 134 549 and $306 866.21 which the applicant was then ordered to pay. The allegation is then made that the applicant "violated s 81 (1) (a) of the Income Tax Act, [*Chapter 23:06*]. Section 81 (1) (a) of the Income Tax Act provides as follows:

> "81 (1) Any person who without just cause being shown by him……..
> (a) fails or neglects to furnish, file or submit any return or document required by the Commissioner under the powers conferred by this Act; shall be guilty of an offence and liable to a fine not exceeding level 7 or to imprisonment for a period not exceeding three months or to both such fine and such imprisonment"

So much about the seriousness of the offence and the likely penalty which a court may impose if the severity be considered as a factor that may induce an accused charged for the offence to want to abscond. The further allegations were made that during the same period in question the applicant smuggled gas valued at $672 533.03. No further particulars were made or outlined. Further still, the allegation was made that the applicant failed to deduct Pay As You Earn (PAYE) in respect of his eleven employees and in respect of himself as director. The amount was put at $ 355 000-00.

There is, as indicated, no correlation between the facts as alleged and the specific charges made. What however can be deduced from the facts is that the allegations against the applicant all had to do with tax issues and an alleged prejudice on the fiscus. Even the first count charged as fraud relates to an offence under the Income Tax Act. In particular s 85 (1) of the Income Tax Act, makes it an offence to render or falsify a tax return and the penalty for that is a fine not exceeding level 7 or imprisonment not exceeding one year or both the fine and imprisonment. Again so much about the severity of the sentence if one considers the level of punishment as so severe as to induce the likelihood of abscondment.

The above were the facts alleged against the applicant. The record shows that the defence counsel was the first to address the court. He indicated that he had gone through the allegations with the accused. He said,

> "The I.O. (Investigating Officer) and myself met at the P.G.'s (Prosecutor General's) office and agreement was reached on bail."

The prosecutor next addressed the court and said,

> "We apply for placement on remand on allegations read and explained by the defence counsel. The state is not opposed to bail. If the court finds favour, accused may be granted bail on conditions in section E. we pray that the matter be remanded to 14 December, 2018."

The first respondent then asked whether the applicant had any other case. The prosecutor responded that there was a fraud case before another magistrate, Nemadire. The existence of this other case was common cause because the details of the same were clearly shown on the request for remand foam. The other case was therefore not a new fact solicited by the first respondent as would have made her believe that the state's consent was made without considering it. The first respondent then next asked whether the accused had any security which could be surrendered. His legal practitioner then indicated that the accused could provide title deeds which were in the legal practitioner's custody. The record indicated the following endorsement.

> "Ruling
> Matter stood down for legal practitioner to avail deed and also for court's consideration."

The legal practitioner subsequently brought the title deed. The first respondent it is alleged had in the interim and during the adjournment prepared a ruling in which, much to the surprise of both the defence counsel and state prosecutor bail was denied.

<u>The Alleged irregularity</u>

The first respondent endorsed an interim ruling that she would consider bail after taking into account evidence which it was agreed with her leave, to be availed. The evidence of the title deed was not dealt with and the bail ruling does not refer to it at all. In arguments before me, both the applicant and the second respondents' counsel were in agreement that the failure to consider the evidence of the provision of title deeds by the applicant constituted a gross irregularity which rendered the proceedings unfair. The preparation of a ruling prior to considering additional evidence for which the court had adjourned to allow for its production and consideration in the process of making the determination meant that the first respondent pre-judged the matter. She made a ruling before closure of the arguments and in the process failed to consider or comment on the additional evidence. Section 117 (3) (b) requires the magistrate as a matter of law to consider

the evidence of assets held by the accused. In considering whether or not the accused is likely not to stand his or trial if released on bail, the section provides that the court shall and not may take into account;

i. The ties of the accused to the place of trial;
ii. The existence and location of assets held by the accused;
iii. The accused's means of travel and his or her possession of or access to travel documents;
iv. The nature and gravity of the offence or the nature and gravity of the likely penalty therefore;
v. The strength of the case for the prosecution and the corresponding incentive of the accused to flee;
vi. The efficacy of the amount or nature of the bail and enforceability of any bail conditions.
vii. Any other factor which in the opinion of the court should be taken into account.

The law required that the first respondent should have interrogated the evidence of the title deed which had been brought since consideration of assets held by the accused inter alia other factors must be considered. The irregularity committed was glaring and centred on a matter of ignoring a statutory provision to the prejudice and loss of liberty of a subject. To leave it uncorrected and to let the decision stand and wait for an appeal process would have amounted to making the judge and this court complicit in a violation of the accused's rights to freedom and of the law.

Allegations were made before me and in the applicant's legal practitioners affidavit that the first respondent was interfered with. The applicant's counsel argued that the first respondent could have been influenced by what was discussed at a Judicial Services Commission workshop concerning laundering of criminals by the courts and the need for courts not to tolerate corruption. Newspaper articles which were published in the Herald, Newsday and Daily News of 17 November 2018 were referred to by counsel. My comment was that the fight against corruption had to be embraced by everyone including the judiciary. The judiciary however should not in the process abdicate its role of being the custodian of the Constitution and the law. There has to be maintained

the separation of powers enshrined in s 3 (2) (e) of the Constitution as a founding value and principle of good governance. The judiciary must in the fight against corruption maintain its independence and perform its role of keeping executive excesses in check by applying the law impartially and dispartionately. I did not read the newspaper articles as stating that the workshop advocated for a subordination of the judiciary to the executive in the fight against corruption. Such a situation would constitute judicial capture by the executive. I could therefore not hold that the first respondent was influenced by the workshop to act as she did. This review determination is therefore informed by the irregularity which occurred in the conduct of the proceedings and the fact that the procedural irregularity was so gross that it vitiated the decision of the first respondent. The allegations that the first respondent was interfered with was not backed by admissible evidence and l will hold that her error of commission and omission resulted from human failings to which every person is susceptible.

Powers of the court

Once, it is accepted that the nature of the irregularity was so gross as to vitiate the determination reached, that determination should be set aside.

Even if one was to have regard to the ruling made, the first respondent also misdirected herself in other ways in her approach to bail. Section 115C (2) of the Criminal Procedure and Evidence should have guided the first respondent. It provides as follows:

> "Where an accused 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."

Section 117 which the first respondent relied upon lists factors which the court should consider as justifying the making of a finding that it is in the interests of justice to detain an accused pending trial. The section does not override s 115 C (2) which requires that the prosecutor discharges the burden of showing on a balance of probabilities, the existence of compelling reasons why an accused should be denied bail. Admission to bail is to be considered as the default position and the denial of bail, the exception in respect of offences, other than those listed in the Third Schedule. Simply put, for offences other than Third Schedule offences bail is a right to be granted

to the accused person unless the court finds on a balance of probabilities, compelling reasons established by the State why the right to bail should be denied. This much as the new approach consequent to the introduction of s 115C in 2016, is the current legal position which courts of law must be guided by.

The prosecution in this case bore the burden to proffer compelling reason for the continued detention of the applicant. It did not proffer any reasons nor did it argue for a continued detention. The first respondent before making her own decision did not ask the defence counsel or prosecutor to make submissions. It was incumbent upon the first respondent to invite submissions from the parties before giving a determination which was adverse to the consent by the prosecution. She should have sought the views of the prosecutor on what she considered as compelling reason for the continued detention of the applicant. A court should always be impartial and act as an independent arbiter. The Supreme Court has held that it amounts to a gross irregularity justifying interference by the review court where a court reaches a material decision on its own without input from the parties concerned see *Proton Bakery (Pvt) Ltd* v *Takaendesa* 2005 (1) ZLR 60 (S). In *Kausea* v *Minister of Home Affairs* 1996 (4) SA 965 it was held that it is wrong for judicial officers to rely for their decisions on matters not put or argued before them. This principle has again been restated in *Shorai Mavis Nzara & 3 Ors* v *Cecilia Kashamba N.O. and 3 Ors* SC 18/18. The first respondent committed a gross misdirection in this case in basing her decision on her own perception of the case without giving the parties an opportunity to address her.

Mr *Mapfuwa* again to his credit conceded the misdirection. In the premises the only justifiable decision is to set aside the first respondents' decision. In terms of s 29 of the High Court Act, the High court on review of criminal proceedings is *inter-alia* empowered to set aside or correct the proceedings of the inferior court and make such order as should have been made by the inferior.

Mr *Mapfuwa* did not submit that the second respondent's attitude to bail had changed nor that the state now had any compelling reasons to advance for the continued detention of the applicant. He was however of the view that the title deeds which had been offered by the applicant should be incorporated in the substituted order of this court. I also felt comfortable in that the state's consent to bail was said to have been informed through discussions involving the investigating officer, the prosecution and defence counsel. The first respondent in reaching a

contrary decision could only justifiably have relied on the evidence from the police and the prosecutor to establish compelling reasons to justify a continued decision. It must be in rare and extreme case that where the police and prosecutor do not oppose bail on initial remand, the magistrates trashes such consent without hearing the parties to the consent.

Before l conclude, I need to caution against a possible conflict of function between the judiciary and the Prosecutor –General. There is a risk of creating an unnecessary disagreeable relationship or stand off between the two bodies if courts do not uphold the independence of the National Prosecuting Authority as given under our Constitution 2013.

The Prosecutor General exercises the rights and powers and all functions reposed on him or her and the National Prosecuting Authority as given in s 258 – 263 of the Constitution. Of particular note is s 258. It provides as follows;

> "258 Establishment and functions of the National Prosecuting Authority
> There is established a National Prosecuting Authority which is responsible for instituting and undertaking criminal prosecutions on behalf of the State and discharging any functions that are necessary or incidental to such prosecutions."

It is my view that in issues pertaining to bringing a suspect to court for initial remand and where applicable or competent, the court is called upon to determine whether bail should be granted or not, the process is all part of prosecution. The prosecutor either consents to the grant of bail to the accused or opposes the grant of bail. Where the prosecutor chooses to oppose the application and the offence charged is not a Third Schedule offence, the prosecutor is saddled with an onus to establish compelling reasons why the court should deny bail. One way of dealing with the application is for the court on initial remand in cases other than those in the Third Schedule to ask the prosecutor, Is bail opposed? If the answer r is negative, then the prosecutor will be saying he or she cannot discharge the onus. If the onus cannot be discharged, my view is that the court should grant bail on appropriate conditions. The court should not *mero motu* find compelling reasons to deny bail because in doing so, it then ceases to be impartial and will be assisting the State. If the prosecutor says that bail is opposed, the court must direct the prosecutor to the provisions of S 115C 2 (a) (i) on the requirement for the State to establish compelling reasons to deny the accused person bail.

There is no onus placed on the accused persons to establish compelling reasons that it is in the interests of justice to grant them bail. In relation to bail applications involving Third Schedule offences as well as applications made after conviction and sentence, the onus is reposed on the accused and depending on whether the Third Schedule offences falls in Part 1 or Part II, the extent of the burden differs because for Part 1 offences the accused must establish facts which show that it is in the interests of justice to grant him bail whilst for Part II, the accused must establish exceptional circumstances why it is in the interests of justice to grant him bail. Magistrates must be guided by what this court laid down in *S* v *Kachigamba & Anor* HH 335/15 and *Vincent Kondo & Anor* v *S* HH 99/2017. It amounts to defiance of the constitutional powers of this court and an irregularity for the Magistrates Court not to be bound by precedent of this court.

Generally speaking, it should only be in rare cases that the court must be found to refuse to accept the consent to bail given by the prosecutor general in cases falling outside the Third Schedule. The accused is arrested by the police and taken to the prosecutor who vets the grounds for arrest and the two discuss the merits of the case and the liberty status of the accused. They agree that there are no compelling reasons to ask the court to order the detention of the accused pending trial. The prosecutor tells the court so and the court trashes the consent without further enquiry of the prosecution who then does not discharge any onus as required by law. I am in no doubt that such conduct by the judicial officer would be highly irregular and a serious misdirection.

It also appears to me that there was a misunderstanding of the procedural law by the first respondent when she trashed the state's consent basing the decision on s 117 (5) of the Criminal Procedure & Evidence Act. The provisions of that section reposes on the court a duty in cases where the prosecuter does not oppose the grant of bail to nonetheless weigh the interests of the accused against the interests of justice "as contemplated in subsection 4" of the same section. Subsection (4) lists factors which the court may have in regard to weighing the balance of the

personal interests of the accused against the interests of justice where the State has consented to bail. It is not necessary to list the factors. There is nowhere in that section that provides that the court should dismiss the consent. What is envisaged is that the consent is considered together with other facts which impact on the court's exercise of discretion to grant bail as envisaged in subsection (4). From a procedural point of view, the court must give the accused and the prosecutor the opportunity to address it on points which the court seeks to base its

determination on. The first respondent failed or omitted to do so. Determining an issue concerning the rights of and entitlement of an accused to liberty irregularity to such accused's detriment or prejudice constitutes a misdirection of grave proportions. This is so because as BHUNU J (as he then was) aptly summarised the new approach to bail in *Kachigamba's* case (*supra*) "….where a litigant applies for bail, the presumption is that he is entitled to bail unless the State proves otherwise.

I would however add the caution that this applies to offences other than Third Schedule offences.

I therefore determine the application as follows in the light of the irregularity which vitiate the first respondent's decision;

1. The order of the first respondent dismissing the applicant's bail application in Case NO. CRB 13931/18 made on 16 November, 2018 is set aside and the following order substituted in its place -

   "Accused is admitted to bail pending trial on the following conditions-

   (i) He shall deposit $1 000.00 with the Clerk of Court, Harare Magistrates Court.

   (ii) He shall report every Fridays fortnightly at Police C.I. CCD section.

   (iii) He shall reside at Kadungure Village, Chief Chinamhora, Domboshava.

   (iv) He shall not interfere with state witnesses.

   (v) He shall surrender his passport to the Clerk of Court.

   (vi) He shall surrender title deed to Lot 3 of Subdivision J of Subdivision B of Quinnington of Borrowdale Estate measuring 8064 square metres held under deed of transfer No. 0002969/2018 in the name Nomatter Zinyengere."

Venturas & Samukange, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners