WICKNELL MUNODAANI CHIVHAYO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 3 January 2020 & 17 January 2020

Appeal - variation of bail conditions

Adv S Hashiti, with Adv K Kachambwa, for the appellant
Mrs S Fero. with Mr B Vito for the respondent

CHINAMORA J: This matter came before me as an appeal against the refusal by the Magistrates Court to grant variation of the appellant's bail conditions. That application had been made in terms of section 116 (1) and 126 of the Criminal Procedure and Evidence Act *[Chapter 9:07]*. In this respect, section 116 (1) provides that a person may be admitted to bail or have his conditions of bail altered in respect of any offence at any time after he has appeared in court on a charge and before sentence is imposed. Then, section 126 allows a judge or magistrate, if he is of the opinion that it is necessary or advisable in the interests of justice that the conditions of a recognizance should be altered or added to, he shall so alter or add. The appellant seeks relief which can be summarized as follows:

1. The application for variation of bail conditions be and is hereby granted.
2. The bail conditions attaching to the bail granted to the appellant be and are hereby altered to require that the appellant shall:
   (a) deposit $500-00 bail with the Clerk of Court, Harare Magistrates Court.
   (b) reside at 14 Stonechat Lane, Borrowdale, Harare, until this matter is finalized.
   (c) not interfere with State witnesses.

3. The appellant be refunded the amount of $1500-00 that he deposited with the Clerk of Court, Harare Magistrates Court.
4. The appellant be given back his replacement title deed number 1375/2012 in respect of the property known as undivided 15.0827% share number 4 of certain piece of land situate in the District of Salisbury called Lot 3 of Lot 2 of Lot A of Colne Valley of Reitfontein, measuring 7931 square metres, held by Fife Chisholme Road Cluster Four (Private) Limited that was surrendered to the Clerk of Court, Harare Magistrates Court.

Background

The appellant and Intratrek Zimbabwe (Private) Limited ("Intratrek"), a company in which he is a director, were charged in the Magistrates Court with contravening section 136 of the Criminal Law (Codification and Reform) Act *[Chapter 9:23]* ("the Criminal Code") and for violating section 5 (1) (a) (ii) of the Exchange Control Act *[Chapter 22:05]* as read with section 4.1.18 of the Foreign Exchange Guidelines to authorized dealers of 2009 and the Exchange Control Authority GR1776 of 26 April 2016. The State alleged that prejudice in the sum of US$5,624,130-80 was suffered by the complainant, Zimbabwe Power Company (ZPC). On initial remand, the appellant was denied bail by the Magistrates Court. However, on appeal to the High Court, he was granted bail by Chikowero J on 10 August 2018, on terms which required that he:

1. deposits $2,000-00 bail with the Clerk of Court, Harare Magistrates Court.
2. resides at 14 Stonechat Lane, Borrowdale, Harare, until the matter was finalised.
3. surrenders to the Clerk of Court, the replacement title deed number 1375/2012 in respect of the property known as undivided 15.0827% share number 4 of certain piece of land situate in the District of Salisbury called Lot 3 of Lot 2 of Lot A of Colne Valley of Reitfontein, measuring 7931 square metres, held by Five Chisholme Road Cluster Four (Private) Limited.
4. surrenders his passport to the Clerk of Court, Harare Magistrates Court.
5. reports twice a week on Mondays and Fridays between 6.00 am and 6.00 pm at Criminal Investigations Department, Commercial Crimes Division.
6. does not interfere with State witnesses.

On 6 November 2018, the above bail conditions were varied by TSANGA J who granted an order releasing the appellant's passport to him and altered the reporting conditions to reporting once on the last Friday of each month.

Subsequently, the appellant appeared before the Magistrates Court on a charge of contravening section 170 (1) (b) of the Criminal Code, it being alleged that he gave Stanley Kazhanje (ZPC's Board Chairman) a bribe of $10,000-00 via his Barclays account in connection with Intratrek's contract with ZPC. He was granted bail on the same conditions as were imposed by Chikowero J on 10 August 2018. The appellant's co-accused, Stanley Kazhanje, was granted bail on one condition, namely, that he deposits the sum of $100-00 with the Clerk of Court, Harare Magistrates Court. In due course, the appellant pleaded and excepted to the fraud and exchange control charges in terms of section 171 (2) of the Criminal Procedure and Evidence Act *[Chapter 9:07]* on the basis that the facts did not disclose an offence. The exception was dismissed, prompting the appellant to apply to the High Court for review of the Magistrates Court's ruling. Tagu J set aside the court *a quo*'s decision and acquitted the appellant and Intratrek. (See *Intratrek Zimbabwe (Pvt) Ltd & Anor v Prosecutor General of Zimbabwe* HH 229-19).

This development prompted the appellant to apply in the Magistrates Court for his conditions of bail to be varied in order to place him on terms similar to his co-accused. The basis upon which the application was founded can be gleaned from the notice of appeal. The application was dismissed, hence this appeal before me, in support of which the appellant advanced the following grounds:

> "1. The court *a quo* erred in failing to consider, pronounce and give reasons on all issues raised by the appellant and thus abdicated judicial function.
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> 2, In particular, the court *a quo* erred in failing to find that the appellant's situation had materially changed constituting new facts warranting the variation of his bail conditions for the following reasons:
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> 2.1. The appellant was acquitted on the main charge of fraud, money laundering and breaches of the Exchange Control Regulations involving an alleged amount of US$5,6 million in HC 1114/18 reported under HH 229-19. The stringent bail conditions were imposed mainly on the basis of those charges;
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> 2.2. With the falling of those charges, the seriousness of the offence and the risk of abscondment had been thus materially reduced due to the acquittal on the main charges;

2.3 That the appellant had no other pending matter, hence the need for stringent bail conditions had fallen away;
3. The court *a quo* erred in failing to find that the only charge that the appellant faced was of bribery for an alleged amount of US$10,000-00, which standing alone in its seriousness or lack thereof did not warrant stringent bail conditions;

4, The court *a quo* erred in failing to find and consider that the appellant's co-accused in the same bribery matter had no reporting conditions, no recognizance and security demands on him and that the appellant ought to be treated similarly;

5, *A fortiori* the court *a quo* erred in effectively treating appellant differently and unfairly discriminating against him and abrogated his right to equal treatment and equal protection of the law;

6, In any event, the judgment of the court *a quo* has been rendered nugatory by the judgment of Phiri J in HC 9871/19 staying the criminal proceedings pending outcome of an application for review. On this new fact, appellant is a proper candidate for variation".

It is against this background that I have to consider the appeal against the decision of the Magistrates Court. I propose to deal with the law relating to appeals pursuant to an adverse decision by the court *a quo*.

The law on appeals after an adverse decision

In our law, the approach to be taken by an appellate court where an application for bail has been refused by a lower court is settled. Thus, in *State v Chikumbirike* 1986 (2) ZLR 145 (SC), the position was set out in the following terms:

> "The court of appeal will only interfere if the court *a quo* committed an irregularity or misdirection or exercised its discretion so unreasonably as to vitiate its decision".

See also S v Malundya 2003 (1) ZLR 275 (H), where this court affirmed:

> "The appeal court must not hear an appeal as if it is the court of first instance. The approach is whether the court *a quo* misdirected itself. It is the findings of the court *a quo* which must be attacked".

While the above decisions suggest that the misdirection has to be found in the judgment, I agree with KWENDA J when in *Mary Mubaiwa v The State* HH 15-20, he aptly stated:

> "The misdirection must be located in the judgment, but the appeal court is not confined to what the court stated in its ruling. An omission to take into account relevant factors could also constitute a misdirection".

Indeed, this was the position taken by the Supreme Court in *Barros v Chimphonda* 1991 (1) ZLR 58 (S) at 62F-63A, where GUBBAY CJ observed:

> "If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed, and the Appellate Court may exercise its own discretion in substitution…"

Arguments on appeal

Helpful submissions were made by Advocates Kachambwa and Hashiti, for the appellant and Mrs Fero for the State, who also made appropriate concessions where it was necessary. I commend all counsel for their assistive arguments. In *casu*, I have the task of deciding whether the Magistrates Court misdirected itself when it dismissed the application for variation of bail conditions. That assessment necessarily requires me to examine the rationale for granting bail to an accused person. My approach has judicial support. In this context, in *State v Tsvangirai* HH 92-03, Garwe JP (as he then was) instructively stated:

> "The issue that arises is: what is the purpose of bail and specifically is there any correlation between the offence of which the accused is charged and conditions added to the recognizance? The grant of bail has been defined in the *South African Criminal and Procedure*, Volume V by Landsdown and Campbell at 311 as:
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> > "the entering into a contract for the seeking of liberty of an accused person who is in custody upon payment of, or furnishing of a guarantee to pay, the sum of money determined for his bail, for his appearance at the place and on the date and time appointed for trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned…<u>The nature of the offence charged and other relevant considerations are factors to be taken into account in determining the grant or refusal of bail and where such bail is granted the conditions to be attached to a recognizance. The point to be made is that any conditions attached to a recognizance must have some bearing to the offence of which the accused is charged</u>". **[My own emphasis]**

Put differently, the conditions of bail are not set by a court in the abstract, but have an inseparable relationship with the offence charged, more so, its gravity. It is clear from the logic in *State v Tsvangirai supra* that, the more serious the offence, the more stringent the bail conditions that a court would impose. Conversely, if charges are less serious, it is unlikely for the court to stipulate terms of bail which are too onerous.

As is evident from the foregoing, the appellant advanced six grounds of appeal as the basis upon which this court should vacate the judgment of the Magistrates Court. I will deal with these grounds, but not necessarily in turn. In his first ground of appeal, the appellant argued that the court erred in failing to give reasons for its decision. The need to provide reasons by administrative functionaries is not a superfluous academic foray, but is set out in Section 68 of the Constitution and Sections 3 and 5 of the Administrative Justice Act *[Chapter 10:28]*. Starting with the constitutional imperative, section 68 provides as follows:

> "(1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
>
> (2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct".

On its part, the Administrative Justice Act enhances the constitutional dictates by requiring administrative authorities to act lawfully, reasonably and in a fair manner. More relevantly, this legislation obliges administrative institutions to supply written reasons for their decisions. The relevant provision, section 3, reads:

> **"3 Duty of administrative authority**
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> (1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—
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> *(a)* act lawfully, reasonably and in a fair manner; and
>
> (*b*) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
>
> *(b)* where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned."

The appellant argued that the unequal treatment was evident because, on the same charge of bribery, his co-accused had no reporting conditions, was granted bail in the sum of $100-00 and not required to provide surety. In this connection, it is important to note that in *Lotriet & Anor v The State* 2001 (2) ZLR 225 (H), this court confirmed the principle that justice must be evenly administered between accused persons in similar circumstances. This principle is enshrined in section 56 of the Constitution which guarantees the right to equal protection and benefit of the law.

In my view, the general principle of equal treatment before the law should be observed in the absence of compelling reasons for jointly accused persons to be treated differently. In other words, if a judicial officer elects to differentiate between accused persons in the same situation, he or she ought to justify such uneven treatment by cogent reasons. This is as much a matter of common sense as it is a requirement of the law. I would add that, what the court *a quo* effectively did, constituted a derogation from the imperative in section 56 of the Constitution guaranteeing equal protection and benefit of the law. The right to equal protection of the law was dealt with in *Nkomo v Minister of Local Government, Rural & Urban Development & Ors* 2016 (1) ZLR 113 (CC) at 118H-119B by ZIYAMBI JCC (as she then was) when she asserted:

> "The right guaranteed under s 56 (1) is that of equality of all persons before the law and the right to receive the same protection and benefit afforded by the law to persons in a similar position. It envisages a law which provides equal protection and benefit for the persons affected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected. In order to found his reliance on this provision the applicant must show that by virtue of the application of a law he has been the recipient of unequal treatment or protection that is to say that certain persons have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons."

I agree with, and endorse, the above germane observations of the learned judge. In light of this position of the law, the need was even greater on the court *a quo* to justify the intrusion on a constitutionally protected right in a reasoned judgment. In this context, it is compelling to place reliance on the jurisprudence from other jurisdictions where the concept of rational connection has been dealt with extensively. The Canadian case of *R v David Edwin Oakes* [1986] 1 SCR 103 is noteworthy, as the Supreme Court of Canada held that a party seeking intrude on a right protected by the Constitution, must demonstrate a rational connection between the derogation and the objective sought to be achieved. Thus, the court *a quo* should have shown by way of succinct reasons in its judgment why it found it necessary to treat the appellant unequally from Stanley Kazhanje since both were jointly charged on the bribery charge. This was not done, thus, amounting to a gross misdirection.

It is relevant to note that no objective was identified by the court *a quo* as justifying the differential treatment when it dismissed the bail variation application. I say this in light of the cursory manner in which the Magistrates Court dealt with the submission by the appellant that there was need for equal treatment of the appellant and Stanley Kazhanje. The following appears in the record:

> "It is accepted that bail conditions for the appellant and his co-accused are different. The conditions were differentiated by the court when bail was granted. The court obviously deemed it necessary to do so and that cannot be taken as a new fact at this juncture".

In fact, the admission that the conditions of bail for the appellant and his co-accused are not the same is damning in the absence of an explanation for the distinction. This raises issues of critical concern. Firstly, the cursory remarks demonstrate that no reasons were afforded to the appellant by the court *a quo*. It is trite that the failure to provide reasons for a decision amounts to a gross misdirection and error at law. In this respect, in *Kazingizi v Dzinoruma* HH 106-06, this court aptly proffered the rationale for the imperative to give reasons:

> "The absence of reasons for the judgment gave great cause for concern. It is trite that very trier of fact has to give reasons for his or her decision. A judicial decision that is not explained easily lends itself to criticisms of being arbitrary and/or capricious. Where the litigants have presented their competing facts and arguments before the trial court, they have a legitimate expectation to know whether their version of facts and their argument have been received and if not, why…One could very well argue that the failure to give reasons for judgment is a gross misdirection on the part of the trial court and one that vitiates the order given at the end of the trial…The integrity of the order lies in the procedure used to reach that order and the reasoning employed to opt for that particular result. On the basis of the foregoing, I feel constrained to set aside the proceedings in the court *a quo*".

With even greater clarity, in *Fox & Carney (Pvt) Ltd v Sibindi* 1989 (2) ZLR 173 at 179, DUMBUTSHENA CJ pointedly remarked:

> "In a contested matter in which issues, facts and law are disputed, there must be a judicial decision or determination on some question of law or fact in dispute. The merits and demerits of each party's case must be stated, so that the parties understand how disputed issues or questions were determined. A written judgment is the foundation upon which a litigant builds his hopes for success on appeal or lose hope of succeeding an appeal".

See also *Girjac Services (Pvt) Ltd v Mudzingwa* 1999 (1) ZLR 243 (SC) at 249B

Secondly, it was patently incorrect for the magistrate *a quo* to categorically state that the conditions of bail were differentiated by the court when bail was granted. The truth is that when the court dealt with the appellant's bail application in respect of the bribery charge, he was simply released on the bail terms set in connection with the fraud and exchange control charges. No comparative analysis was done of the respective bail conditions of the two co-accused since the fraud and exchange control charges had not yet been quashed. It is clear from the decided cases that the failure by the presiding magistrate to appreciate this factual reality and reach a conclusion based on a wrong appreciation of facts, amounts to a misdirection.

Thirdly, the court *a quo* misdirected itself by failing to treat the quashing of charges by TAGU J as a change in circumstances. It is self-evident that once the fraud and exchange control charges were set aside, the appellant fell squarely into the same position as Stanley Kazhanje. As previously noted, bail conditions are imposed consonant with the gravity of the offence(s) with which an accused is charged. It is common cause that when the appellant was facing charges of fraud and breaching the Exchange Control Act, the alleged prejudice suffered amounted to US$5,6 million. By any standard, those were very serious offences which potentially attract a custodial sentence upon conviction. Consequently, the quashing of those charges meant that the appellant was left with the comparatively less serious offence of bribery. The view I have expressed is informed by section 170 of the Criminal Code whose penalty part provides that a person found guilty of bribery shall be liable to:

> "A. a fine not exceeding level fourteen or not exceeding three times the value of any consideration obtained or given in the course of the crime, whichever is the greater; or
> B. imprisonment for a period not exceeding twenty years; or both".

As the appellant was facing only the bribery charge after the quashing of the other charges in respect of which stringent bail conditions had been imposed by this Court, it certainly smacks of failure to apply one's mind to the facts for the court *a quo* to say that circumstances had not changed.

The arguments by the State were clearly premised on an apprehension that the appellant was a flight risk even though facing the comparative lesser charge of bribery. It is instructive to refer to the following comments of KWENDA J in *Mary Mubaiwa v The State supra*:

> "What induces flight are the sentencing provisions. At the hearing it became clear that in all probability the worst that will happen if the appellant is convicted of money laundering are non-custodial sentences".

Those remarks are apposite and apply to the appellant in *casu* in view of the penal provisions for bribery. In my view, the likelihood of a financial penalty is a disincentive to absconding.

Mrs Fero argued that the judgment quashing the fraud and exchange control charges was appealed and has been set down for hearing before the Supreme Court on 10 February 2020. That being the case, she contended that the matter was still pending and variation should not be granted. In relation to this Adv Hashiti drew my attention to section 121 (3) of the Criminal Procedure and Evidence Act which provides as follows:

> "Where a judge or magistrate has admitted a person to bail, and an appeal is noted by the Prosecutor-General or public prosecutor under subsection (1), the decision to admit bail shall remain in force unless, on the application of the Prosecutor-General or public prosecutor, the judge or magistrate is satisfied that there is a reasonable possibility that the interests of justice may be defeated by the release of the accused on bail before the decision on appeal, in which case the judge or magistrate may suspend his or her decision to admit the person to bail for a specified period or until the appeal is determined, whichever is the shorter period.

I make two critical observations from the above submissions. Firstly, the argument relating to the filing of (and pendency of the appeal) was made for the first time before me and not in the court *a quo*. Therefore, the court *a quo* did not relate to it in its judgment, nor could counsel for the appellant have addressed the point. In any event, sitting as I am as an appeal judge to determine whether or not the court *a quo* misdirected itself, I am confined to the record of proceedings. Secondly, the State did not apply to suspend the decision appealed against. That resolves the issue.

The State further argued that there was no misdirection in relation to the refusal to remove the reporting conditions and to release the replacement title deeds to the appellant's property. On reporting conditions, the court *a quo* was curtly dismissive without providing reasons, merely saying:

> "Although the State has no qualms with the scrapping of reporting conditions, there is no legal basis for doing so. The reporting conditions cannot just be removed for the applicant's convenience".

Quite clearly, a legal basis had been established to the extent that the appellant was asking for parity in treatment between him and his co-accused. The need for equal treatment has a constitutional foundation. That being the case, a rational basis for the differentiation should have been established. While the court is not bound by the suggestions of counsel for either side, faced with a situation where the co-accused (Stanley Kazhanje) was not required to report to the police as opposed to the appellant, the court *a quo* ought to have given reasons for disregarding the opinion of the Prosecutor-General who conducts prosecutions in the name of the State.

In respect of the release of title deeds, the court *a quo* did not address this issue in the context of equality of treatment of persons in similar circumstances. The court therefore erred in failing to make a decision on a crucial issue that was before it, despite it being argued. That was a misdirection, and I rely on the case of *Gwaradzimba v C J Petron & Co (Pty) Ltd* SC12/16, where GARWE JA pertinently observed:

> "The position is well settled that a court must not make a determination on only one of the issues raised by the parties and say nothing about other equally important issues raised, "unless the issue so determined can put the whole matter to rest" – *Longman Zimbabwe (Pvt) Limited v Midzi* & *Ors* 2008 (1) ZLR 198, 203 D (S)"

Conclusion

Taking into account the foregoing, I come to the conclusion that the court *a quo* misdirected itself. I am satisfied that the failure to give reasons for a determination and the failure to make a determination on a matter argued before it is a misdirection that vitiates the order given at the end of the hearing. (See *Charles Kazingizi v Revesai Dzinoruma supra*; *Muchapondwa v Madake & Ors* 2006 (1) ZLR 196 D-G, 201 A (H) and *GMB v Muchero* 2008 (1) ZLR 216, 221 C-D (S). I am therefore at large to set aside the decision of the court *a quo* and grant an order, which in my discretion meets the justice of the case.

Before making a disposal order in this case, I am constrained to restate the obvious. Section 117 of the Criminal Procedure and Evidence Act vests a discretionary power in the court when granting bail. This power should be exercised judiciously in a way that safeguards the interests of the public in the proper administration of justice. Therefore, the order I give must ensure that a person charged with a criminal offence upon a reasonable suspicion of having committed it will appear on the appointed day to stand trial.

I am aware that section 120 of the Criminal Procedure and Evidence Act stipulates that bail must not be excessive, an argument forcefully made by counsel for the appellant. However, I do not agree that a portion of the bail amount (of $2,000-00) currently held by the Clerk of Court, Harare Magistrates Court should be refunded to the appellant. In a bid to achieve parity between the appellant and his co-accused, I remain conscious of my judicial responsibility of ensuring that no risk accrues to the interests of justice. I have decided to order the release of the appellant's title deeds and remove all reporting conditions. To still require the appellant's title deeds to be held in connection with the bribery charge seems to me disproportionate to the gravity of the remaining offence he is charged with. My decision has taken into account the sentencing provision in section 170 of the Criminal Code and the remoteness of the risk of absconding it creates. To counterbalance the effect of releasing the title deeds, in the exercise of my discretion, I have decided to increase the amount of bail to $10,000-00. This means the appellant will be required to pay an additional sum of $8,000-00 to the Clerk of Court.

No evidence has been placed before me to raise any alarm that the appellant is a flight risk. On the contrary, the evidence on record is that the appellant has travelled out of the country and returned when his passport was temporarily released. Thereafter, when the passport was permanently released to him, the appellant has travelled in and out of the country and not missed a single court date. I cannot ignore this evidence which demonstrates that, despite the opportunity to flee, the appellant has not shown such inclination. In fact, by availing himself whenever required by the court, even successfully excepting to charges, reveals an intention to stand trial and utilize legal procedures to vindicate his innocence.

Disposition

In the result, I make the following order:

1. The decision of the court a quo be and is hereby set aside.
2. The bail conditions attaching to the bail granted to the appellant be and are hereby altered to require the following:

(a) The bail amount shall be increased to $10,000-00, thereby requiring the appellant to deposit an additional sum of $8,000-00 with the Clerk of Court, Harare Magistrates Court.

(b) The Clerk of Court, Harare Magistrates Court, is hereby directed to release to the appellant replacement title deed number 1375/2012 in respect of the property known as undivided 15.0827% share number 4 of certain piece of land situate in the District of Salisbury called Lot 3 of Lot 2 of Lot A of Colne Valley of Reitfontein, measuring 7931 square metres, held by Fife Chisholme Road Cluster Four (Private) Limited.

(c) The appellant shall continue to reside at 14 Stonechat Lane, Borrowdale, Harare.

(d) The appellant shall not interfere with witnesses.

Manase & Manase, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners