Judgment No. HB 95/08
Case No. HCB 133/08
Xref No. HC HCB 25/08

BONGANI MOYO

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 21 AUGUST 2008 AND 23 OCTOBER 2008

Mr G Nyathi for the applicant
Mr W. B. Dube for the respondent

Bail Application

CHEDA J: This is a bail application on the basis of changed circumstances. Applicant is facing the charge of murdering his wife which charge he is denying.

He initially applied for bail and was denied in judgment HC 48/08. This application is now brought on the basis that the circumstances have now changed to warrant the court to revisit this application. The basis upon which the application is based are that:-

(1) the post mortem report number 06/06/08 is incorrect and

(2) I missed or ignored vital information in his initial bail application.

(3) The witnesses' statements have already been recorded.

I will deal with those points *seriatim.*

(1) **Post mortem report**

When this initial application was heard applicant who was represented was aware of the contents of the post-mortem report, but, he did not raise any query as to the authencity or correctness of the said report. His failure to raise this point at the initial hearing was a result of counsel's oversight. This is a fact which he has also acknowledged. This argument cannot be taken any further as it was his own fault.

(2) **The Judge/court missing a point.**

It is also his argument that the court ignored or failed to consider a certain point in his favour. The point in question is that, if granted bail he would reside at number 64638/28 Tshabalala, Bulawayo. This argument, is, in my view, misplaced in that in my judgment cited above I dealt with the question of abscondment wherein I stated that in view of the overwhelming evidence against him, he was likely to abscond. That stands a reason therefore that irrespective of the amount of money proof of residence and his undertaking he had all the reason to abscond, thereby defeating the otherwise smooth administration of justice. This argument is therefore not persuasive.

(3) **Intereference with witnesses**

The fact that evidence of witnesses has been recorded can not stop him from interfering with witnesses who are his relatives.

It should be borne in mind that interference with witnesses does not mean to say the evidence with ultimately change, but, that, should that occur the State witnesses may become hostile which in no doubt interferes with the otherwise proper administration of justice.

Mr Dube for the respondent argued that there is no basis for this application as there are no changed circumstances in this matter.

The current legal position is that an application of this nature is permissible on the basis of changed circumstances, in other words, should be on new facts which were not available at the initial bail application. In *casu* all the facts relied on by applicant were initially submitted before me and considered hence my conclusion that applicant is not a proper candidate for bail pending trial.

The fact that his counsel overlooked to submit certain factors before the court which factors were known to him then, in my opinion can not be regarded as new facts which warrant a consideration of this application; see *S v Vermaas* 1996(1) SACR 528 (T) at 531 e-f; where VAN DIJKHORST stated:

> "obviously an accused cannot be allowed to repeat the same application for bail based on the same facts week after week. It would be an abuse of the proceedings. Should there be nothing new to be said. The application should not be repeated and the court will not entertain it."

From the submissions made by the applicant's counsel, there are no new facts at all other than the fact that he overlooked to submit them initially. In as much as one can symphathies with his plight, it is unfortunate that the law takes precedence over sympathies.

If there is anybody to blame it is applicant's legal practitioners who did not handle his case deligently enough. This court can not entertain after thoughts at the expense of clearly laid down procedures.

This is one of the cases where applicant can not escape the sins of his legal practitioners, see *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998(2) ZLR 249 at 252 H-253C:

> "although the fault was most probably that of the appellants' legal practitioners , the appellant cannot escape the consequences of the lack of diligence on the part of its lawyers. As Steyn CJ said in the *Saloojee* case *supra* at 141B-E:
>
> > 'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise, might have a disastrous effect upon the observance of the rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court was due to negligence on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regarded to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'

In light of the above this application is dismissed accordingly.

Sansole and Senda, applicant's legal practitioners
Attorney General's Office, respondent's legal practitioners