

JEALOUS NGURINGA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 5 OCTOBER 2011

Z. Ncube for the applicant
K. Ndlovu for the respondent

Bail Application

NDOU J: The appellant is facing charges of fraud (i.e. three counts) as defined in section 136 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The *modus operandi* in all the matters seems to be more or less similar. The appellant is a managing director of Sable Logistics a company that does clearing of imported goods and is based in South Africa. The appellant received money for clearing and transporting the complainant's consignment from South Africa. He did not clear the goods and did not transport them to Zimbabwe. Instead, he fraudulently converted the money into his own use. The applicant did all this when he was out of bail on similar matter.

On 15 September 2011 the appellant applied for bail pending trial before a Bulawayo magistrate. The learned magistrate determined that the appellant was not a good candidate for granting of bail and consequently denied him bail.

This is an appeal against this finding of the magistrate. The appeal is opposed by the respondent on the ground that the magistrate exercised his discretion properly and there was no misdirection. Further, it cannot be said that the exercise of the discretion by the magistrate defies reason and common sense or is characterized by misdirection. In *S v Makamba* SC-30-40 it was held that such an appeal against a refusal to grant bail is an appeal in a narrow sense. The powers of the appeal court to interfere with the judgment of the lower court are limited to a finding of an unreasonable exercise of court *a quo's* discretion with the resultant effect of a substantial miscarriage of justice. *In casu*, the learned magistrate pointed out that the appellant committed three serious charges of fraud. The penal clause evinces that fraud is a serious offence. The monies involved in these offences are substantial and as alluded to above, the same *modus operandi* was used to dupe the complainants into parting with their monies. The systematic dealing and wheeling with the complainants betrays a criminal element.

In my view the court *a quo* did not err in its finding that looking at the nature of the charges and the strength of the case for the prosecution the appellant was likely to abscond and not stand trial. Further, the charges which the appellant is now facing were committed while he was on bail in respect of another fraud matter under Bulawayo Magistrates' Court CRB 3859/10. A person who commits crimes while on bail shows a disregard for the rule of law. He is in contempt of justice and the onus would be on him to satisfy the court that there is no likelihood of repetition if granted bail – *AG v Phiri* 1987 (2) ZLR 33 (S). Looking at all the facts of this case I do not find any unreasonable exercise of discretion by the court *a quo*.

Accordingly, the appeal against the learned magistrate's refusal to grant bail be and is hereby dismissed.

Phulu & Ncube, appellant's legal practitioners

Criminal Division, Attorney General's Office, respondent's legal practitioners