

CHARLES THOMAS

And

JOHN GAZI

And

PAUL SIWELA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 21 AND 24 MARCH 2011

L. Nkomo with S S Mazibisa, M. Ncube for the applicants
Ms M. Cheda with W. Mabhaudhi for the respondents

Bail Application

NDOU J: The applicants seek bail pending trial. The background facts are the following. The applicants are jointly charged with the crime of treason as defined in section 20(1)(b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The 2nd and 3rd applicants are executive members of an organization known as Mthwakazi Liberation Front (“MLF”). The 1st applicant is the Deputy Secretary for Security, 2nd applicant is the Secretary General and the 3rd applicant is the National Economic Advisor. MLF was launched as a political party on 28 December 2011 in Bulawayo and its main objective is to create a separate state from Zimbabwe called the Republic of Mthwakazi. According to the applicants in their bail statement, MLF’s agenda “is to campaign for the revival of the autonomous Mthwakazi nation which existed prior to colonization by way of engaging the government of Zimbabwe in negotiations with a view to agreeing to a referendum where people will vote to decide whether or not an autonomous Mthwakazi nation should be revived.” A copy of MLF’s constitution was filed in this application. In Article 2 the purpose is stated as follows:

“The prime purpose of MLF is to represent, support, assist, defend and promote the people of Mthwakazi, their culture and languages, in spite of race, gender or ethnic origin.”

The constitution has an annexure in the form of a map of the proposed Mthwakazi state, which includes Bulawayo, Matabeleland North, Matabeleland South and parts of Midlands Province. The MLF held an executive meeting on the 1st March 2011 at the 3rd applicant's office located at number 3 Princess Park Mansions, Bulawayo. The proceedings of the meeting were recorded and a copy of the minutes was recovered from the 2nd applicant on his arrest. A copy of these minutes was filed in this application. The specific factual allegations as contained in the Request for Remand Form 242 are the following:

"On 1st of March 2011 at office 3, Princess Court Mansion, Bulawayo, the accused persons conducted an executive meeting together with other seven who are still at large. During the meeting they connived and agreed on ways to influencing people to rise and demonstrate against the government which would result in creation of a separate state of Republic of Mthwakazi. Accused agreed to distribute fliers of which amongst others had the following messages "*Vukani njengabantu base Ethiopia, Sudan, Egypt le Tunisia*" (literally translated to mean rise up like people of Ethiopia, Sudan, Egypt and Tunisia, they are people like us and have blood as well.)"

The evidence on which the factual allegations are based is stated in the Request for Remand as being that:

1. All the three accused persons were found in possession of Mthwakazi Liberation Front fliers and calendars.
2. There are minutes of the meeting in which the accused persons and others agreed to distribute.
3. Pamphlets were recovered from accused number one."

At the commencement of this application Ms *Cheda* sought to amend paragraph 1 to say accused 1 was distributing the fliers. The applicants have indicated that they will deny the charge of treason. The 1st applicant is a family member who lives with his family at F78 Njube, Bulawayo. He is not employed. He did not attend the MLF executive meeting of 1 March 2011 and is not eligible. This is common cause or at least beyond material dispute. The respondent, while conceding that indeed 1st applicant did not attend the MLF executive meeting where alleged treasonous resolution was made, alleges that he was "in the vicinity" performing his security duties. Initially the factual basis for the charge against him was that he was found in possession of 3 MLF fliers and a calendar. As alluded to above the respondent later amended those facts to say he was actually distributing the said fliers. The 1st applicant is married and has three children. He is HIV positive (he declared his status in this application). He holds a passport. He has resided in South Africa but returned in 2010.

The 2nd applicant is a family man who lives with his family at number 21 Chopping Road, Barham Green, Bulawayo. He is married with four children. He is a businessman and runs a construction company. He is a veteran of the war of liberation, having fought under Zimbabwe People's Revolutionary Army (ZIPRA). He denies the treason charge. He attended the MLF executive meeting of 1st March 2011 and is the one who recorded the minutes of the meeting. He holds a passport.

The 3rd applicant is a family man who lives with his family at number 18, 4th Avenue, Woodville, Bulawayo. He is married with four children. He is a businessman running his own company. He has participated in presidential elections before. He attended the MLF executive meeting of 1st March 2011. He has a passport. The respondent opposes the granting of bail on the following grounds.

- “1. The applicants are facing a serious offence.
2. The applicants are likely to pursue their agenda of removing the government through unconstitutional means.
3. The applicants may interfere with police investigations.
4. The 2nd and 3rd applicants have a propensity of committing similar offences.”

The respondent alleges that the language used in the fliers is “insulting, inflammatory and incites members of the army to defect from the army, refuse to carry out orders from their superiors, to take their weapons and join the army in Mthwakazi Republic. The messages also incite members of the public, civil service to rise against the government like the people of Tunisia and Egypt. The messages also incite members of the non-governmental organizations, political parties, labour unions, churches to join Mthwakazi Liberation Front in order to liberate the people of Mthwakazi from 30 years of dictatorship, 30 years of one man rule and 30 years of fake independence. It is submitted that the messages in the fliers are treasonous.”

The respondent further alleges that because 1st applicant was staying in South Africa and has contacts there. As far as 2nd and 3rd applicants are concerned, they have travelled to South Africa and Botswana for MLF meetings because the MLF President and Vice President are resident in Botswana and South Africa respectively. All these facts are alleged to indicate capacity to abscond on their part.

Whilst the respondent concedes that the witnesses it has so far are all police officers it is convinced that its evidence against the applicants is overwhelming. The respondent's case is that the message in the fliers is the creation of Mthwakazi Republic through unconstitutional

means. The 2nd applicant is said to have a 1981 previous conviction for armed robbery and a pending case of attempted murder.

The gravamen of the treason charge as alluded to above is the minutes of the meeting of 1 March 2011, *supra*, and the fliers. The respondent excised parts of the minutes under the heading "Documents". Because of the nature of the charge *in casu*, it is only fair that this paragraph is cited in full to avoid an incomplete understanding of the meaning of this paragraph. This paragraph reads:

"Documents

Visitors now under surveillance could not carry docs 2 mting. When it is appropriate the docs will be availed to all [pamphlets 1-10. 12 lc copies per pamphlets. 10 lc goli, 10 lc Bots. Bulk in Z. WI be presented 2 security to distribute]. Last paper "Restoration Form" campaign form. "Cession" form now changed 2 "Restoration form. 200 names per form 2000 copies. Campaign 4rm indig Mthwakazi residents. The form is not final. Put 4ward recommendations – terms of reference, historical background of Mthw Liberation [History – Boundaries – Map] Reach consensus on map. Land area. Indig ppl belonging 2 Mthw state 1893-1980. Post indep Mthw history 2 present survivors of violence. Father Motsi interviews. (5) Policy of Mthw. Governance. What are we saying about minorities e.g. gays. Plug loopholes in the constitution & society at large. How do we conclude this issue. Security concerns voiced by certain members. "Underline "WE WANT MTHW PEACEFULLY" Suggestions 4rm local Mthw welcome. MLF rumoured to b part of uprising that was pegged 4 march.. They say secession is MLF agenda. How do we counter that? MLF should come up with position paper & issue press statement. We shud dissociate ourselves 4rm the national issue & state that we stand 4 Mthwakazi. We have 2 b careful about these things that they want to include us in. Let us thank our colleagues 4 their effort." (emphasis added)

Thereafter the meeting discussed the constitution and other bread and butter issues not relevant to this application. Read in context, the above paragraph does not advocate for the removal of the government by unconstitutional means as alleged by the respondent. The only alleged treasonous statements can be traced in some of the fliers found in the applicants' possession. I have already quoted from some of them. The respondent was particularly concerned by the flier addressed to the Zimbabwe Armed Forces which reads-

"Please remember the current Zimbabwe national Army was created in 1980 with the merging of two liberation forces ZPRA and ZANLA. It's a fact ZANLA was composed of combants whose ranks were mainly drawn from the Northern part of the country (Mashonaland) and ZPRA whose ranks were mainly drawn from the southern part of the

country (Matabelaland). All it means now then is that the people of Mthwakazi (Matabelaland) have equal interest and representation in the army. We have as a people of Mthwakazi invested as much interest as anyone else in the army structures. The notorious 5th Brigade was never part of the national Army – it was ZANU-PF murder squad. When merging with ZANLA to form the Zimbabwe National Army, ZPRA cadres brought with them all their weapons and equipment, at the time of separation you are all urged to come back to your country and establish your own sovereign army. Aluta Continua! Aluta Continua! Aluta Continua! Abantu Yithi!

Stop being used to kill your parents and the very people who fed and protected you during the war of liberation. It's a great shame. Stop taking orders from murderers. Come back home and establish your own Mthwakazi Armed Forces. We need you.

Refuse to protect murderers

Refuse to shoot your parents

Refuse to kill the masses

Refuse to carry guns

Refuse to intimidate the masses

Refuse to be used!

Refuse to take part in politics

Refuse to protect political lunatics

Join the People's Forces Now!!

It's your time to be free!!

Friendly message from General Nandinatoli, President MLF.

Vuka Mthwakazi Vuka" (Emphasis added) The other fliers are mainly recruitment material and list of grievances against the government. One that is worth commenting on reads-

"Move out of our land!!

And we mean it!! Move out please!

The earlier the better!

Move out of our borders!

Move out of our towns!

Move out of our villages!

Move out of our farms!

Move out of our mines!

Move out of our hospitals!

Move out of our schools!

Move out of our rivers!

Move out of our dams!

We need an independent referendum today!!

Mthwakazi must be independent!!

All murderers, rapists, tribalists and killers, leave our land today!!

We mean final business!!!”

Whether all these fliers’ contents are treasonous is for the trial court to decide. I have just highlighted the contents to deal with the strength of the respondent’s case. The latter is a relevant factor in the determination of the bail application - *S v Makamba* SC-30-04. These fliers do not expressly advocate for the removal of the government by unconstitutional means. The investigating officer, Mupungu and the state counsel have paraphrased the contents of these fliers and interpreted them to be advocating for treasonous removal of the government. It is trite that in bail applications the primary question for consideration is whether the applicant will stand trial or abscond. Of equal importance however, is whether the applicant will influence the fairness of the trial by intimidating witnesses or tampering with evidence – section 117 (1) and (2) of the Criminal Procedure and Evidence Act [Chapter 9:23]; *Attorney General v Phiri* 1987 (2) ZLR 33 (H); *S v Ndlovu* 2001 (2) ZLR 261 (H); *S v Biti* 2002 (1) ZLR 115 (H); *S v Essack* 1965 (2) SA 161 (D); *S v Jongwe* 2002 (2) ZLR 209 (S); *Aitken & Anor v Attorney General* 1992 (1) ZLR 249 (S); *S v Tsvangirai* 2003 (1) ZLR 650 (H) and *S v Gwisai and Ors* Harare HCB 283-8/11 (unreported). The approach is one of striking a balance between the interest of society (i.e. the applicant should stand trial and there should be no interference with the administration of justice) and the liberty of an accused person (who, pending the outcome of

his/her trial, is presumed innocent). I now propose to deal with the grounds raised in opposition in turn.

Seriousness of the offence

There is no doubt treason is a serious offence. This is a relevant factor. An expectation of a lengthy custodial sentence or capital punishment may be an incentive to abscond. I have to take this factor into account – *S v Makamba, supra*, and *S v Biti, supra*. However, this factor has to be balanced against the apparent weaknesses in the state case highlighted above. Further, *in casu*, the conduct complained of comprise possession (and in the case of 1st applicant, distribution) of a few fliers and calendars. There are no objective facts on the ground that any member of the public took these fliers and/or calendars seriously.

Likelihood of interference with police investigations

In casu, the only known state witnesses are the arresting police offices and the state has not shown how the applicants can interfere with such police witnesses. The averment of interference is unsubstantiated and bald.

Propensity of committing similar crimes to treason (2nd and 3rd applicants)

Even if this contention is well founded, it is not itself not necessarily a valid reason for denying the applicants bail. In *S v Tsvangirai, supra* it was held that even though the state's fears were not totally unfounded, this could be catered for by the imposition of appropriate bail conditions. Taking all the above factors into account I conclude that the applicants are suitable candidates for bail characterized by stringent conditions to cater for the state fears. These conditions will unfortunately limit their aspirations as in the political arena but they are necessary in the face of the serious allegations they face and their previous brushes with the law.

Accordingly, I admit all applicants to bail on the following conditions.

1. Each applicant to deposit US\$2 000 with the Registrar of the High Court, Bulawayo.
2. The 1st applicant to reside at house number E78 Njube Township, Bulawayo until the matter is finalized.
3. The 2nd applicant to reside at number 21 Chopping Road, Barham Green, Bulawayo until the matter is finalized.
4. The 3rd applicant to reside at number 18, 4th Avenue, Woodvale, Bulawayo until the matter is finalized.
5. Each applicant is to report at Bulawayo Central Police at CID Law and Order three times a week on Mondays, Wednesdays and Fridays between 6am and 6pm.

6. The applicants are to surrender their passports respectively to the Registrar of the High Court, Bulawayo
7. Each applicant is not to interfere with any state witnesses or evidence.
8. Each applicant shall not leave 40 kilometres radius of Bulawayo Main Post Office without written leave of a Bulawayo magistrate.
9. Applicants shall not attend political gatherings.

*Cheda & Partners, R Ndlovu & Partners, Phulu and Ncube, applicants' legal practitioners
Criminal Division Attorney General's Office, respondent's legal practitioners*