

OSCAR ZENDA  
**versus**  
THE STATE

HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 21 APRIL 2017 AND 27 APRIL 2017

*Ms S.V. Padera* for the appellant  
*W Mabhaudi* for the respondent

### **Bail Appeal**

**MATHONSI J:** The appellant is facing a charge of fraud the allegations being that sometime in February 2017 himself and three other persons defrauded Resten Mukozho Magumise of the sum of \$1500-00 after they purported to allocate to the complainant's sons two nonexistent pieces of land. He denies the charge and has tendered some explanation as to the circumstances under which he received that money. That is not relevant at this stage. When he appeared before a magistrate in Mvuma for initial remand on 28 March 2017 the state consented to bail and suggested certain conditions for his release. The magistrate was unmoved and denied him bail. In his extremely short judgment which, short as it was, consigned the appellant to pre-trial incarceration, the magistrate reasoned as follows:

“The court will not accept the state's consent. It is a naked consent. It is important to note that the accused person committed this offence while on bail on another case. It makes no sense to grant bail to such a person. Accused was on bail for fraud committed in 2016 and committed another similar case in February 2017. I am alive to the fact that the state is not opposed to bail but the court is not bound by that consent. Consequently I will deny accused person bail. Accused is free to approach the High Court for bail.”

Honestly if the rights of accused persons are to be decided in such a lackadaisical and indeed shockingly faulty manner, there is need for us all to be deeply concerned. The reasoning of the magistrate is faulty in many respects. The appellant has accordingly noted an appeal to this court on essentially two grounds namely that the *a quo* erred in denying him bail when there

was no evidence that he was a flight risk or that he would interfere with evidence and secondly that it was a misdirection to ignore the consent of the prosecution to his admission to bail. There is merit in both grounds of appeal.

In considering the appeal the starting point is to note that in terms of the new s115C (2) (a) of the Criminal Procedure and Evidence Act [Chapter 9:07] introduced by Act No 2 of 2016, the relevant provision coming into effect on 10 June 2016, the burden of showing that there are compelling reasons justifying the continued detention of an accused person facing a charge which is not a Third Schedule offence lies with the state. This is in respect of an application for bail pending trial and it is in line with the provisions of s50 (1) (d) of the Constitution of Zimbabwe. The accused person only bears the burden in respect of offences specified in Parts I and II of the Third Schedule to the Criminal Procedure and Evidence Act [Chapter 9:07].

Understanding where the onus lies will assist the lower court to appreciate the folly of appearing to descend onto the arena and in the process misdirecting itself as the court *a quo* did in the present case. I say this because the prosecution came to court wielding a consent to bail and did not even begin to discharge the onus of showing the existence of compelling reasons for the denial of bail. Whichever way one looks at it, bail could not be denied where the prosecution did not discharge the onus. Therefore in rejecting the consent of the prosecution and inventing reasons for denying bail which were not placed before him, the magistrate was usurping the duty of the prosecution, parading on borrowed robes and deciding the matter on facts which were not before him.

In any event, if indeed the appellant was on remand on a separate case of fraud, so what? He has not been convicted of such offence. Therefore the presumption of innocence operates in his favour. The magistrate proceeded on the wrong premise that he had already been convicted. This was a serious misdirection. It is that misdirection which sent the court *a quo* horribly astray.

This is a matter in which there was no basis whatsoever for denying the appellant bail. Accordingly I have to uphold the appeal.

In the result it is ordered that:

1. The appellant is hereby admitted to bail pending trial on the following conditions:

HB 101-17  
HCB 51-17  
XREF MVUMA 96-17

- a) The appellant shall deposit with the Registrar of the High Court the sum of \$100-00.
- b) The appellant shall reside at No G 58 Athens Mine Mvuma until the matter is finalized.
- c) The appellant shall surrender his passport or travel document if any, to the Registrar of the High Court.
- d) The appellant shall report to Mvuma Police Station once every fortnight on Fridays between 0600 hours and 1800 hours.

*Pundu and Company*, appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners