JAMES MAKAMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 15, 17 May 2004 and 19 May 2004

Bail Application

Mr *Chikumbirike*, for the applicant
Mr *Kandemiri*, for the respondent

BHUNU J: The accused a man of considerable wealth and political substance was arrested and detained in custody on the 9th February 2004 on various allegations of contravening the Exchange Control act [*Chapter 22:05*] as read with the Exchange Control Regulations Statutory Instrument 109 of 1996.

At the time of his arrest it was believed that the accused had unlawfully dealt in and externalised huge amounts of foreign currency amounting to billions of dollars.

It was alleged that the total amount involved on all counts amounted to 3 773 650 British pounds, USD 211 744 and SAR 1 497 966.03.

The amounts were based on properties the accused allegedly purchased in and outside Zimbabwe. The allegations were that:

1. In November 1998 the applicant sold a Harare property being number 19 Willowmead Lane Colne Valley for 210 000 British pounds of which a deposit of 30 000 British pounds was paid. The balance was to be paid by instalments. It was alleged that the applicant was the owner of the property.
2. During the period extending from 2003 to 2004 the applicant bought immovable property known as Unit 1 Solitaire, 73A Pretoria Avenue, Athol, Johannesburg, South Africa for SAR 6 800 000.00 making a down payment of SAR 680 000.00.
3. Sometime in October 2000 the applicant bought Ravine House, 87 George Hill, Wry Bridge, London, United Kingdom for 3 500 000.00 British pounds.
4. In December 2000 the applicant purchased the entire shareholding of

Forthworth Properties (Private) Limited for SAR6.1 million.

It was further alleged that the applicant illegally sold foreign currency to his company Telecel (Pvt) Ltd, a charge which he admits. He is also alleged to have operated 5 foreign accounts without prior authorisation from the Exchange Control Authority.

In dismissing the applicant's initial application for bail, CHITAKUNYE J had occasion to remark as follows:-

> "In judging the risk of abscondment, the court ascribes to the accused the ordinary motives and fears that sway human nature. Accordingly, it is guided by the character of the charges and the penalties which in all probability would be imposed if the applicant is convicted the strength of the State case, the ability to flee to a foreign country and the assurance given that it is intended to stand trial. It is apparent that the more serious the charge and the heavier the sentence is expected to be, the greater will be the temptation to flee."

I am in respectful agreement with the learned judge's observations. I can only add that the converse is also true, that the less serious the charge and resultant penalty, the lesser the risk for abscondment. In dismissing the applicant's subsequent bail application KAMOCHA J in judgment number HH 83/2004 also weighed in with the following observations:-

> "Is there any other reason why I may refuse to admit the applicant to bail which may seem to me good and sufficient?
>
> I propose to deal with the question of the amounts involved and the provision of the Exchange Control Act. It admits of no doubt that the amounts are huge regard being had to the fact that the amounts involved are hard currencies. To my mind £3 773 650.00, $2 117 444US and ZAR14 977 996.03 are huge sums of money. If the applicant were to be convicted he would be required by law to repatriate those amounts within a period of 3 months in terms of section 5(6)(b). Section 5(7)(b) makes it mandatory where an individual who has been convicted fails to repatriate the property whose values exceeds two hundred dollars to be sentenced to imprisonment for such a period as the court deems fit in addition to any fine."

The long and short of it all is that the applicant was denied bail on the basis that he was facing serious charges involving millions of foreign currency which converts to billions of local currency.

With the passage of time and further investigations new evidence has since emerged establishing that the allegations against the accused are not as serious as previously thought.

It is now conceded by the State that apart from the Number 19 Willowmead Lane Colne Valley property the applicant did not purchase and

does not own any of the immovable properties as previously alleged.

It will be remembered that the Colne Valley property was allegedly purchased for 210 000 British pounds but only 30 000 British pounds was paid. It follows therefore that if convicted the applicant will be required to repatriate only $30 000 British pounds.

This substantial huge reduction in the amount to be repatriated upon conviction is coming in circumstances where the applicant has already voluntarily repatriated £9 047.56 British pounds.

Despite the substantial change of facts in favour of the applicant, the State still vigorously opposes bail.

In opposing bail it has been submitted that although there may be no evidence of commission there may very well be evidence of an attempt to contravene the Exchange Control Act and Regulations. The defence countered that the mere fact that the applicant negotiated the purchase of properties does not amount to an attempt. The decision as to whether or not the applicant's conduct amounts to an attempt to contravene the Act and its regulations is for the trial court.

At this juncture, it is sufficient to say that even if the applicant was to be convicted of attempt on each count he will not be required to repatriate anything on those counts in the absence of evidence establishing that he actually expatriated foreign currency in those counts.

The State also placed reliance on an affidavit sworn by Marcshulman the Managing director of Odyssey Reality in South Africa. In that affidavit he deposed that on 30 March 2004 he obtained default judgment against the applicant pertaining to breach of contract to purchase Unit No. 1 Solitaire 73A Pretoria Avenue Athol for R581 500.00. Despite Mr *Chikumbirike's* objections the affidavit is admissible at this stage merely to determine whether or not the applicant is a good candidate for bail and not to prove his guilt or otherwise.

In my view the applicant's failure to pay is evidence of the fact that he did not pay for the property in contravention of the Exchange Control Act and Regulations. He will therefore not be required to repatriate anything if convicted in respect of this count.

It is further alleged without giving details that the police have now uncovered other foreign accounts and that he used his American express card to pay hotel bills. These hezzy allegations do not form part of the facts upon which the applicant was refused bail. The State has not as yet preferred charges against the applicant in respect of those allegations. It will therefore

be unfair and prejudicial to take those unsubstantiated allegations into account in determining whether or not to grant the accused person bail.

In dismissing the applicant's appeal against the refusal to grant bail her Ladyship ZIYAMBI JA quoted with approval in case number SC 30/04 the remarks of DUMBUTSHENA CJ in S v Chiadzwa 1988(2) ZLR 19 when he said:

> "It is the fundamental requirement of the proper administration of justice that an accused person stands trial and if there is any cognisable indication that he will not stand trial, if released from custody, the court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused and despite the presumption of innocence."

It appears clear to me that in this case the real incentive for the applicant to abscond was the prospect of incarceration following failure to repatriate what was believed to be huge amounts of foreign currency running into millions. That position has since drastically changed. Now that the amount has since dwindled to no more than 30 000 British pounds of which 9 047.56 British pounds have since been repatriated, can it honestly be said there is still a high risk of abscondment? I think not.

Given the applicant's vast wealth in this country and foreign contacts it is inconceivable that he would fail to repatriate the balance of 20 952.44 British pounds.

Even if the applicant was to be incarcerated based on that amount I do not think that the period of imprisonment would be so frightening as to prompt the applicant to flee leaving his vast wealth behind.

The mere fact that he is struggling to repatriate more than what he has done despite his desperate attempt to gain his freedom tends to suggest that he does not own much foreign currency beyond our borders as previously believed. In my view abandoning his wealth in Zimbabwe will be fool hardy.

It is therefore my considered view that the ends of justice are unlikely to be prejudiced if the applicant is granted bail at this juncture.

The sudden change of facts has prompted counsel for the applicant to launch a scathing attack on the police. I am of the view that the attack was wholly unwarranted. The applicant set himself on a trail suggesting that he was engaging in a massive contravention of the Exchange Control Act and Regulations by negotiating the purchase of properties worth millions of dollars in foreign currency which converts to billions of dollars in local currency. He did

this in circumstances where he was illegally selling foreign currency. The police are therefore not to blame for following and pursuing the criminal trail which the applicant himself laid.

That police investigations may not have yielded the required effect is not evidence of bad faith or malice on the part of the police and the State. On the contrary the concessions made by the police and the State are a mark of honesty and good faith. I can only conclude that the predicament the applicant finds himself in is to a large extent self-inflicted. He is the author of his own problems. This however is not to detract from the fact that the accused has now discharged the onus that it is now safe to release him on bail without compromising the ends of justice.

Given the applicant's vast wealth, resources, contacts outside the country and the need to guard against economic sabotage, there is need to impose rigorous bail conditions to ensure that the applicant will stand trial. The stringent bail conditions will not be unduly oppressive as they will operate for a relatively short time because his trial has been set down for the 16t[h] to the 18[th] of June 2004.

The applicant is accordingly granted bail subject to the following conditions:-

1. That the applicant shall deposit an amount of $50 million dollars with the clerk of court at Rotten Row Magistrate's Court, Harare.
2. That the applicant shall surrender title deeds for the immovable property known as 8 Rowland Close Kambanji, Chisipite registered in the applicant's name being recognisance in the amount of $500 million dollars to the clerk of court, Rotten row Magistrate's Court.
3. That the applicant shall surrender all travel documents to the clerk of court, Rotten Row Magistrate's Court.
4. The applicant is to remain within the confines of 8 Rowland Close, Kambanji, Chisipite pending the completion of his trial in this case.

   Provided that the applicant may leave the confines of the aforementioned property for the purpose of reporting to the police and attending court returning no later than 2 p.m. unless delayed by the police or court officials in which case he shall return no later than 5 p.m.
5. That the applicant shall report once daily at Highlands Police Station between the hours of 6 a.m. and 1 p.m.
6. The applicant shall not interfere with State witnesses or investigations.

7. The applicant shall provide sureties acceptable to the clerk of court, Rotten Row Magistrate's Court in the sum of $10 million dollars.

Chikumbirike and Associates, the applicant's legal practitioners
The Attorney-General's Office, the respondent's legal practitioners