HH 121-2004
HC 5066/04
B 531/04
CRB 5385/04

EMMANUEL ANESU FUNDIRA applicant
and
S TONGOGARA N.O. 1st respondent
and
THE ATTORNEY-GENERAL 2nd respondent

HIGH COURT OF ZIMBABWE
HLATSHWAYO J
HARARE, 1 JUNE, 2004

Bail Application

Mr. G. C. Chikumbirike, for the applicant.
Mr. J T Mabeza and Ms. F Chimbaru, for the respondents.

HLATSHWAYO J: On 3 May 4, 2004, I heard arguments for and against the granting of bail to the applicant and admitted the applicant to bail on terms and conditions which representatives of both sides had closely examined and found to be generally adequate. The respondents have noted an appeal against my decision to grant bail, and I herein provide my reasons for admitting the applicant to bail.

This matter was initially brought in the form of an urgent chamber application for review of the decision of the first respondent, the presiding magistrate who placed the applicant on remand and refused bail and in the alternative as a bail application in terms of the High Court of Zimbabwe (Bail) Rules. Given the background of the matter, especially that the initial charges considered by he learned magistrate were subsequently withdrawn and fresh ones instituted, and with the consent of the parties, I proceeded to consider the application as one for bail only.

In terms of section 116(7) of the Criminal Procedure and Evidence Act a judge or magistrate may only refuse to admit any person to bail if he or she considers it likely that such person when admitted to bail may abscond, interfere with evidence against him or her, commit an offence or for any other "good and sufficient" cause.

The State advanced two reasons for its opposition to the granting of bail,

namely; the risk of abscondment and the fear of interference with investigations.

To deal with the last objection first, it was submitted for the State that the nature of investigations were complex and involve traveling to South Africa and the United States of America, and that since the investigation were still at an early stage there was a real risk that the applicant may interfere if released on bail. In response, it was submitted for the applicant, and in my view with justification, that since this was an arrest with a warrant, it should be reasonably presumed that the police would have investigated first and verified the critical information, giving rise to their suspicion. Furthermore, in my opinion, an allegation that an applicant my interfere with investigations will not suffice to deny an applicant admission to bail if it is a bare allegation, unsupported by objective information that the applicant has actually interfered or attempted to do so or that in the totality of the circumstances of the case may so interfere and has the capacity so to do and such interference may not be forestalled through suitable bail conditions. Therefore, I concluded that the applicant may not be denied bail on this ground.

As far as the risk of abscondment is concerned, I considered the nature of the charges and the likely punishment and the apparent strength or weakness of the state's case. The accused's ability to reach another country and the absence of an extradition treaty are also factors relevant to the risk of abscondment which, however, in my view, should always be assessed against the nature and strength of the charges against the applicant, otherwise no person with connections, contacts and means abroad may ever be admitted to bail even on the flimsiest of charges.

The applicant faces two charges of contravening the Exchange Control Act, [*Chapter 22:05*] involving amounts in excess of US$100 000, being monies paid for hunting safari services provided by him to clients in his capacity as the chief executive officer of Makuti Game, Safaris and Lodges. The applicant's defense is that the operation of his enterprise was such that "funds would be placed in his foreign currency accounts abroad prior to clients coming into the country for services to be rendered by his company, and thereafter, when everything has been done, and necessary formalities completed with the Reserve Bank, the funds would be remitted into his bank accounts in the country". It must be noted that this is not a case of externalization of illegally or corruptly obtained foreign currency. It is, at

worst, a violation of exchange control regulations in the process of transacting genuine business operations or, according to the applicant, a mistaken appreciation of otherwise above board business transactions. Thus, in the final analysis, the State's case and the applicant's explanation in this regard are of equal weight and the benefit of the doubt must be given to the applicant. (GUBBY CJ, *Aitken & Anor v Attorney-General* 1992 (1) ZLR 249, *Kuruneri v The State* HH 111/2004).

Chikumbirike & Associates, applicant's legal practitioners
The Criminal Division, Attorney-General's Office, respondent's legal practitioners