1. THABANI MPOFU
   versus
   THE STATE
2. THABANI MPOFU
   and
   FELIX FINR FANI
   and
   WARSHIP DUMBA
   and
   METHULI TSHUMA
   versus
   THE STATE

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 26 March 2013 and 27 March 2013

A. Muchadehama, for the applicants
E. Nyazamba, for the respondent.

Bail Application

BHUNU J: I have deliberately consolidated both bail applications because they are related and interlinked. In case number 309/13 the first appellant Thabani Mpofu is jointly charged with Felix Matsinde, Warship Dumba and Methuli Tshuma with contravening s 4 (3) of the official Secrets Act [*Cap.11: 09*], Contravening s 179 (1) of the Criminal Law (Codification and Reform) Act [*Cap:9:23*] and s 40 (1) of the same Act. The offences have to do with the unlawful communication of certain official Information and possession of certain articles for criminal use.

The first appellant is facing two separate counts under the Fire Arms Act [*Cap. 10:09*] involving failure to renew his firearm licence and to secure the fire arm. These offences were discovered during a search at his premises in connection with the first count.

The appellants are to some extent well known members of the public. The first appellant Thabani Mpofu is employed as a Principal Director in the Prime Minister's office based at 14 Bath Road, Belgravia.

The second appellant, Felix Matsinde is also employed in the Prime Minister's Office as a researcher at the same address. The same applies to the third appellant Warship Dumba.

The fourth appellant is a law officer in the Attorney General's office but is currently on suspension.

All the 4 accused persons applied for bail without success in the Magistrates Court. In both cases the Magistrate after hearing both applications denied all the appellants bail in the most cursory and perfunctory manner. In the first case this is all what the presiding magistrate had to say in denying the accused bail?

> "Court rules that accused has the propensity to commit similar offence since he's once convicted of the offence. A fire arm is a danger to public safety and State security and can't be traced if not renewed or can be abused by other people with criminal intent
>
> That the gun was taken by police doesn't stop accused if released on bail to further secure another gun and commit similar offences.
>
> Accordingly accused is not a good candidate of bail and bail application is dismissed."

With respect the magistrate's line of reasoning appears rather illogical and inconsistent with common sense and reality. It seems to me strange logic to suggest that a fire arm cannot be traced simply because the licence has not been renewed. It also makes strange reasoning to say that the appellant has a propensity of not renewing his firearm licence to the extent that even if he has been dispossessed of the firearm if released on bail he will acquire another one for the sole purpose of not renewing the licence. If that line of reasoning is pursued to its logical conclusion, then, the appellant will never be released from prison. In saying so the Magistrate was totally oblivious to the fact that the State is in total control of the issuance of firearm licences. The State could easily deny him a licence or the court could bar him from acquiring a firearm licence for a specified period.

It is therefore self evident that in denying the appellant bail the presiding magistrate misdirected herself in some material respect.

Turning to the other charges the magistrate again gave truncated scanty reasons for denying the appellants bail without laying the factual basis for her decision. In her ruling this is what she had to say"

> "Court rules that accused are facing serious offences which interfere with public safety and State security. There is a likelihood that if granted bail they can interfere with investigations and or witnesses. The likelihood of absconding Court is high considering the seriousness of the offence. For these reasons Court denies all the accused bail."

Detention pending trial amounts to administrative detention rather than penal detention. It is therefore of utmost importance for judicial officers to always bear in mind that the presumption of innocence still operates in favour of the accused at every stage of the proceedings before conviction. Thus the arrest and detention of an accused person may constitute a serious infringement of his right to freedom should it turn out that he was innocent after all.

That is however, not to say that undeserving accused persons should not be denied bail. Judicial officers should by all means deny undeserving applicants bail. The tragedy is however that there is no magic want for determining who is guilty or innocent at this critical bail application stage, hence the development of crucial guidelines developed over the years by our Superior Courts.

It is needless to say that judicial officers are duty bound to meticulously observe laid down judicial safeguards propounded through the cases so as to avoid straying into the wilderness of injustice. A casual perusal of the magistrate's handling of both matters betrays scant regard to the guiding principles laid down by the Supreme Court and this Court.

The presiding judicial officer is duty bound to give cogent well reasoned basis for his decision. The absence of such reasons needlessly creates a situation of impunity and insecurity even where the ultimate decision may be correct. Failure to adhere to laid down procedures and guidelines in determining bail applications may provide an escape route for unsuitable candidates on the basis of fundamental misdirection.

Had the magistrate looked at the judicial safeguards laid down in the leading cases of *S* v *Hussey* 1991 (2) ZLR 187 (SC*)* and *S* v *Maharaj* 1976 (3) SA 205 she would undoubtedly have realised the need to back up her conclusions by cogent findings of fact. This she did not do resulting in a serious misdirection and a travesty of justice. That being the case this Court is at large to determine the matter on the merits.

As I have already pointed out all the appellants are well known public figures who really have nowhere to hide in this country save to skip our borders. Though our borders have

been held to be porous our police force has a proven track record of tracking and apprehending fugitives from justice as amply demonstrated in the legendary cases of *Masendeke* and *Chidumo*. The nature of the offences charged and the attendant penalties providing the option of a fine are unlikely to provide sufficient incentive for the appellants who are of fixed aboard and have firm roots in this country to abscond.

I am therefore of the firm view that granting the appellants bail with stringent conditions will meet the justice of the case. The draft orders filed in respect of each case are sufficient to ensure that the ends of justice are not compromised. Each appellant is accordingly granted bail in terms of the draft orders filed of record.

Mbidzo Muchadehama and Makoni, appellants' legal practitioners
The Attorney-General's Office, respondent's legal practitioners