MICHAEL MAHACHI
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 23 November 2018

Appeal against refusal of bail pending trial

M. Hogwe, for the appellant
Mrs *S Fero* with *M Reza*, for the respondent

HUNGWE J: This is an appeal against the decision of the magistrate denying the appellant bail pending trial.

The appellant appeared in the court of the magistrate on 17 November 2018 facing two counts. The first count alleged that the accused corruptly concealed from a principal, a personal interest in a transaction as defined in s 173 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The second count was one of criminal abuse of duty as a public officer as defined in s 174 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

The allegations from which these two counts arose are set out in the Police Form 242 commonly called Request for Remand Form. It states:

> "During the period extending from 2008 to 2010, City of Harare and Augur Investments (Pvt) Ltd signed a Memorandum of Understanding and a Memorandum of Agreement worth US$80 million dollars for upgrading and construction of the Harare Airport Road, and the accused engaged Classique Project Management, a company in which he is one of the Directors without disclosing his personal interest and secondly, abusing duty as a public officer by corruptly and fraudulently engaging Augur Investment (Pvt) Ltd without carrying due diligence in duties (sic). See attached (Annexure)."

The evidence linking accused to the Commission of the offence, according to this form 242, is given as:-

1. The Memorandum of Understanding and Agreement entered between City of Harare and Augur Investments (Pvt) Ltd.
2. Shareholder Agreement between City of Harare and Augur Investments (Pvt) Ltd.

3. Statements
4. Proof of payment to Classique Project Management.

Nothing is said to have been recovered.

The reasons given for opposing bail by the Police are set out under section C of Form 242. That section suggests possible reasons which the State may rely on in opposing bail. One necessarily assumes that police carry out investigations before effecting an arrest. As such they will be aware of the suspect's predilections to behaviour that militates against the grant of bail. They will naturally be expected to lay this information before the court seized with an application for bail as was the court *a quo*. Out of the possible six grounds for opposing bail, police relied on three. The reasons relied on by the State in the present case, as reflected in that section, are the following:

"1. The accused can relocate to any country if granted bail.

2. The accused still holds a position of influence as former Chairperson of Council and is likely to interfere with witnesses from City of Harare.

3. Accused is facing serious charges and is likely to abscond."

The court *a quo* heard the submissions made on behalf of the applicant as well as those made on behalf of the State in opposition to the application. After the submissions were made the court dismissed the application for bail pending trial. It is important that I recite the full judgment here. It says:-

Ruling

This is an application for bail. The State opposed the application on the basis that this is a serious offence and that accused has the potential to interfere with investigations and also that he can comfortably escape from the jurisdiction of the court and start his life somewhere.

On the other hand, the defence argued that the State has not placed before the court evidence to show that there are serious allegations.

On the issue of interference they have also not placed before the court evidence of such and all what the State gave are bold allegations not substantiated.

Bail is now a Constitutional right unless there are cogent and compelling reasons.

In the instant matter indeed the allegations against the accused are of a very serious nature.

In terms of s 117 (2) (a) (iv), the Court is empowered to deny bail where there is a likelihood that if the accused is released on bail that will undermine or jeopardise the objectives or proper functioning of the Criminal justice system.
The accused is indeed the owner of the company in issue. It goes without saying that he has the capacity to influence his workers.
Moreso the accused is not a man of straw. He indeed can remove himself from the jurisdiction of their court and leave comfortably anywhere in the world as he is not a man of straw.

R Mugwagwa
Provincial Magistrate

The appellant submitted that the judgment of the court *a quo* is liable to be set aside as the learned magistrate seriously misdirected herself. The misdirection relied on is that the magistrate, in the assessment of the application before her, did not address her mind to the issues that she was expected to. As an example, although the Court *a quo* correctly, adverted to the fact that bail is a constitutional right, the refusal of bail when there were no compelling reasons to do so, constituted a serious misdirection. This demonstrates that the learned magistrate only paid lip service to the fact that an accused is entitled to bail as of right.

Bail is a means of procuring the release of a prisoner from legal custody upon posting sufficient security, for his appearance at a time and place designated, to answer to a criminal charge. The court gives liberty to the prisoner and, at the same time, secures the intent of the law to punish the offender, by insuring his future attendance in court and by compelling him to remain within the jurisdiction of the court.

This qualified freedom was devised to meet conflicting interests of society and the individual. Its primary purpose is to prevent the punishment of an innocent person and yet, at the same time, administer criminal justice. Such an allowance is favoured by law, being based on the cardinal principle of justice that every man is presumed innocent until proven guilty. However it is an equally accepted principle of society that the guilty should suffer. These two principles work against each other from the time of arrest until the suspect is finally adjudged in a competent court. Any imprisonment before that decision would punish an innocent person. Therefore in order to meet these conflicting interests, an interval of time is necessary to ascertain the truth of the accusation and to set in motion machinery fashioned for that purpose. During the interval bail is generally allowed for all offences except those set out in the third and fifth schedules in Part 1 and Part 2 respectively. The rights of an accused

person are firmly entrenched in the Constitution of Zimbabwe. Section 70 protects the right of any person accused of an offence to be presumed innocent until proven guilty. As a corollary to that right, section 117 entrenches the entitlement to bail as follows:-

117 Entitlement to bail

(1) Subject to this section and section 32, a person who is in custody in respect of an offence **shall be entitled to be released on bail** at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody.

(2) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established—

(*a*) where there is a likelihood that the accused, if he or she were released on bail, will—

(i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or

(ii) not stand his or her trial or appear to receive sentence; or

(iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system; or

(*b*) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security. (my emphasis)

It is manifestly evident that entitlement to bail exists as of right. As a constitutional right, its enjoyment can only be limited if exceptional circumstances are established. The legislature in its wisdom set out elaborated situations in which the right to bail would be forfeited in s 117 (2).

The question that falls for decision in this court is whether, on the facts before it, the court erred and misdirected itself in denying the appellant bail.

In order for this court to make a determination on the issue, this court is restricted to the reasons for the judgment rendered by the court *a quo*, which judgment is quoted verbatim above.

The specific right of an accused person to be presumed innocent until proven guilty, is sacrosanct and is the basis for the entitlement to bail set out in s 117 (1) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. Section 117 (1) uses peremptory language

Where the court refused or declines to comply with the peremptory provisions of s117 (1) above, it can only do so if certain specified grounds are established. These are set out in s 117 (2) (a). That subsection provides:

(2) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established—

(*a*) where there is a likelihood that the accused, if he or she were released on bail, will—

(i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or

(ii) not stand his or her trial or appear to receive sentence; or
(iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
(iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system; or

(*b*) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security.

The factors to be taken into account in considering whether the grounds referred to in s 117 (2) (a) are set out in s 117 (3) (a) to (e).

In the present matter it is clear from the brief reasons given in the judgment that the court held that appellant ought to be denied bail because;

(a) he can easily relocate out of the jurisdiction;

(b) he can influence witnesses;

(c) his release will undermine or jeopardise the objectives or proper functioning of the criminal justice system.

Put differently the court anchored the dismissal of the application for bail on grounds set out in s 117 (2) (a) (ii) to (iv).

In respect of 117 (2) (a) (ii), the first ground for denying bail, it was not in dispute that the appellant has strong ties with Zimbabwe and no other jurisdiction. (s117 (3) (b) (i)). His known assets are in Zimbabwe (s117 (3) (b) (ii)). He has only one travel document, a Zimbabwean passport. (s117 (3) (b) (iii)). It was accepted that the allegations are serious but that was not a basis to refuse bail as it can be counter-balanced with the measures set out in s 117 (3) (vi).

As for the second ground regarding his ability to influence witnesses, (s117 (2) (a) (iii)), the State did not intimate, either in form 242 or elsewhere, that there are witnesses which are known to appellant who he can influence or intimidate. It would appear that, on its own admission, the State will, at the trial, rely more on documentary evidence and other witnesses outside the immediate sphere of appellant's influence. In any event, it appears to me that if appellant was minded to influence any witnesses, he would have done it over the ten year period since the commission of the alleged offence. Whatever evidence that stood the test of time would be that evidence in the State or City of Harare's custody. Any proposed witness would have been long influenced, if such witnesses exists.

Regarding the third ground upon which bail was refused, s 117(2) (a)(iv), that his release will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, no averment was made by the State at the hearing of the application, nor was any evidence led to substantiate this or the other grounds. Sight should not be lost that in

every application of this nature, the State, rather than the applicant, bears the onus to establish the grounds why bail should not be granted, as long as the applicant is not charged with the scheduled offences. This appears to have been lost to the court *a quo* as both it and the State adopted a lackadaisical approach to the matter.

Consequently, and importantly, the court *a quo* did not demonstrate that State had established any of the grounds required to be established by the Criminal Procedure and Evidence Act. The record shows that not even the Investigating Officer was called to testify on any of the grounds set out in section C of the Form 242.

In my judgment this explains the lack of depth in the reasons given for the judgment.

A court which gives an order adverse to the interest of a party before it is expected to give reasons for its decision. Those reasons must be detailed enough, and at least sufficient, to demonstrate the rationale of the judgment. To do otherwise will be to invite derision of the order. The reader will be left to think that it was capricious and therefore irrational.

In fact the facts in this matter suggest that appellant knew of these allegations at least a week before he was called by the authorities. When he was eventually called, he agreed to meet the officials at his offices at an agreed time and date. He together with his lawyer, waited for them but they did not pitch up. The officials advised him telephonically, to report at their offices on the other side of town the same day. He complied and went to those offices. He was interrogated and detained at a local police station where he slept. He appeared in court the following day, 17 November 2018. He was then taken to court where he expected to be granted bail. He was not granted bail for the obscure reasons given by the court.

For these reasons I find that the court *a quo* erred at law by failing to find that the State had not given compelling reasons why bail should be refused. I therefore find that the appellant is a proper candidate for bail.

There will be an order in terms of the draft proposed by the appellant.

Hogwe, Dzimirai & Partners, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners