LUCKMAN GUNMAN PONDO
versus
THE STATE

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE 21 April 2021

Bail application

Applicant in default
S.Masokovere, for the State

KWENDA J: There is a growing tendency by litigants to circumvent the law in bail applications through conduct calculated to usurp the power of this court to protect and regulate bail proceedings with the result that anarchy prevails to the detriment of the good administration of justice. Such conduct if allowed to continue has the potential of derailing the bail system and destroy its credibility. This court's power to regulate and protect the credibility of its processes is inherent at common law and codified in s 176 of the Constitution of Zimbabwe (Amendment No 20) Act 2013.

> "176 **Inherent powers of Constitutional Court, Supreme Court and High Court**
> The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution."

See also *The President of the Senate and Ors v Innocent Gonese and Ors* CCZ 01/21.

A very important provision of the High Court of Zimbabwe Bail Rules, 1991 contained in r 5 subr 2 may have been overlooked for a long time. It reads:-

> *"**5. Bail applications***
> (1) ……
> (2) The registrar shall set down an application for bail for hearing by a judge within forty-eight hours after the application was filed in terms of sub rule (1), and shall ensure that—
> (*a*) a copy of the written statement referred to in sub rule (1) is served on the Attorney-General as soon as possible after it was filed; and
> (*b*) the Attorney-General and the applicant and his legal representative are notified as soon as possible of the date and time of the hearing:
> Provided that—
> (i) if the applicant is legally represented, the registrar may require the applicant's legal

representative to serve a copy of the written statement on the Attorney-General, and the legal practitioner shall forthwith comply with such request;
(ii) the forty-eight-hour period may be extended—
A. by written agreement between the applicant and the Attorney-General if a copy of their agreement is filed with the registrar; or
B. if a judge so orders in terms of rule 4."

The above quoted sub rule is unambiguous. The Registrar shall set a bail application for hearing before a judge within forty-eight hours of filing thereof. The Registrar does not have any discretion. This is clear from proviso (i) to r 5 (2) quoted above. If anything, the rules underscore the mandatory nature of the sub rule by repeating in r 8 of the aforementioned High Court rules that the Registrar shall ensure that every application or appeal referred to in the rules is set down for hearing with utmost urgency. Proviso (ii) to r 5(2)(b) makes it clear that the 48-hour period is binding not only on the Registrar but on the parties as well. In my view the repeated choice of the word 'shall' is deliberate to leave no room for any delay. Neither party to a bail application, the accused nor the State, can unilaterally delay the hearing of a bail application beyond the 48 hours. The 48-hour period may only be extended in terms of either a written agreement between the applicant and the Prosecutor General which must be lodged with the Registrar or by order of a judge if he or she considers it in the interest of justice exercising the power given in rule 4 which provides that :-

"***4. Departures from rules and directions as to procedure***
The High Court or a judge may, in relation to any particular case before it or him, as the case may be—
(*a*) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;
(*b*) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient. I have presided in the bail court for over three years and I have not seen the mandatory procedure being adhered to.

In practice however the situation is different. The hearing of bail applications has been delayed following oral agreements between the applicant and the State which have not been reduced to writing and lodged with the Registrar. Bail applications are not treated with the urgency that the rules mandate with applicants' counsels erroneously believing that it is up to them, presumably as dominant litigants, to control the pace and determine the sitting at which the bail will be heard. The approach which seems to have been unwittingly condoned by this court has taken bail procedures outside the control of judges and the courts.

In *casu*, on the 16th April 2021 the applicant, who faces a rape charge, filed a written application for bail pending trial. The bail application was set down on the 21st April 2021 as Case No 14 on the roll for represented actors. The applicant is legally represented by Mudimu Law Chambers. I was the judge presiding in the bail court the week extending from Monday 19th to Friday 23rd April 2021. When the matter was called there was no appearance for the applicant. Following the non-attendance at the hearing by either the applicant or his legal practitioner I gave an *ex tempore* judgment and ordered as follows: -

"1. Matter is removed from the roll
2. Matter shall not be reset without leave of a judge."

These are the written reasons thereof.

In practice this court has removed bail applications from the roll when legal practitioners acting for the applicants fail to appear. There is no specific provision which stipulates what happens to a bail application when the applicant or his or her legal practitioner fails to appear. A matter is normally removed from the roll if it is an application which complies with the rules but for one reason or the other it is not ready for hearing. By way of example, a document could be faint or the pagination may not be correct. These are issues which do not affect the validity of the process. Orders removing matters from the roll are normally made in the presence of the litigants or their lawyers. Practice direction 3 of 2013 states that it applies to all matters. It must therefore find application in both criminal and civil proceedings. The practice direction applies to all the Superior Courts of Zimbabwe with a view to ensuring the uniform use and application of the terms "struck off the roll", "postponed *sine die*" and "removed from the roll" According to it the term 'struck off the roll' shall be used to effectively dispose of matters which are fatally defective and should not have been enrolled in that form in the first place. When a matter is struck off the effect is that the matter is no longer before the court. The term 'removed from the roll 'means a postponement *sine die* (without giving a date). However, in removing a matter from the roll the court "shall" direct what a party must do and the time frames by which the directions must be complied with. When the time frame expires the Registrar 'shall' advise the party of the non-compliance and call upon the party to rectify the defect within 3 months failing which the, matter

shall be deemed to have been abandoned. Once again the word 'shall' is used, which means that the court is ordinarily expected to give directions when removing a matter from the roll.

The practice of removing bail matters has not complied with Practice Direction 3/13, presumably because of the importance of personal liberty and that logically a person should not forfeit the right to bail. However, the Practice Direction makes it clear that a matter removed from the roll can be brought back but subject to compliance with the court's or judge's directions. Even if the application is deemed abandoned, there is nothing that prevents the accused from filing a new application should he or she remain in custody. It is clear, however that the judge who removes a matter from the roll must give directions depending on the reasons for removing the matter from the roll. The Practice Direction was clearly necessitated by the need for the superior courts to reclaim control of their own processes and maintain sanity. All legal or court processes obtain validation and respectability from transparency, openness, predictability and consistency.

I am aware of the criticism to the Practice Direction in the recent Supreme Court in the matter of *Cuthbert Elkana Dube* v *Benius Service Medical Aid Society and Anor* SC 73/19 per Garwe JA, as he then was. The criticism was with respect to the effect of paragraph 5 of the practice direction which seemed to conflict with rules of the Superior Courts to the extent that it provided for reinstatement of legal process which has been adjudged to be a nullity. The criticism does not apply to this case because I am dealing with removal of a matter from the roll. In any event, despite the criticism, the learned judge observed that the practice direction has the force of law and must be complied with. See paras 23 and 25 of the cyclostyled judgment where the learned judge stated as follows.

> "23. A practice directive (or direction) is a supplementary protocol to rules of civil or criminal justice in the courts – *English Legal System* Nineteenth Edition, 2018. Practice Directives are official announcements by the court laying down rules on how it will function. They are not the same as rules of court but express the view of the court on matters of practice and procedure. Litigants and practitioners are expected to comply with them or show good cause for doing otherwise.
> 24...
> 25. It is clear from the foregoing that a practice directive is binding and has legal force and effect. In this regard ..... the remarks of BHUNU JA in *Ahmed* v *Docking Station Safaris (Pvt) Ltd t/a CC Sales* SC 70/18".
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> 26. The litigants appearing before the courts are therefore obliged to comply with, not just the rules of court but also its practice directives."

I have resorted to Practice Direction 3 of 2013 because the Criminal Procedure & Evidence Act [*Chapter 9:07*] and the High Court Bail Rules do not provide for a situation where the applicant fails to prosecute his or her bail application. In a criminal appeal when the litigant or his or her legal practitioner fails to appear to argue an appeal after being served, the appeal is dismissed for want of prosecution. Such a decision is not on the merits and upon a proper application the appellant may be granted condonation and extension of time within which to appeal. What is obvious is that in criminal appeals the court retains full control of the appeal process and the applicant or his or her counsel may not disappear to reappear at his own convenience. I do not see why a bail application may not be dismissed for want of prosecution when the litigant or his or her lawyers fails to appear on the set date. Since the decision is not on the merits the applicant can always mount a fresh bid for freedom depending on the explanation for the default. In my view dismissal for of a bail application for want of prosecution where the applicant fails to appear is should be the more logical thing to do because the reason for the absence is not known at that stage. Very often accused persons try their luck both in the High Court and the Magistrates court by applying for bail simultaneously. When bail is granted in the magistrates court they just abandon the application before the High Court. Sometimes accused persons are acquitted or convicted before the bail application is heard rendering a bail application pending trial pointless. In the scenarios referred to above the applicant does not come back to court to inform the court that he or she is abandoning the application. There is therefore no need to keep the bail application alive.

In this particular case I considered that dismissing the application without prior warning would be too drastic and followed current practice thereby removing this application from the roll. However, moving forward, applicants risk having their bail applications dismissed for want of prosecution in situations of non- attendance at the hearing by either the applicant or his legal practitioner.

However, in the absence of a written agreement between the State and the applicant, I concluded that it is not up to the applicant in a bail application to extend the date of hearing beyond 48 hours by unilaterally changing the date of hearing or disappearing or absenting oneself from the venue of the hearing in order to reset the matter at his/her own convenience. There must be a written agreement which has to be placed in the court record and in the absence of a written

agreement, it is only a judge who can condone, direct, authorize or extend the hearing beyond 48 hours.

Before this matter was called I noticed that a few other matters involving represented actors/applicants had been called and there had been no appearance. I also noticed most cases showed a trend, discernible from the results sheet, in terms of which bail matters removed from the roll because lawyers representing the applicants failed to show up, were just being routinely reset/re-enrolled at the lawyers' convenience without any questions being asked. The result is that the lawyers concerned have staged a *coup d'etat* and have taken full control of court process and choose the sitting at which they want their matters to be heard. The pattern sadly gives the impression that litigants can forum shop and impairs the dignity of this court and the credibility of bail processes by creating the erroneous perception that this court condones wayward behavior.

My decision that this application may not be enrolled without leave of a judge was based on my understanding of the law as stated above.

The National Prosecuting Authority, State's legal practitioners
Mudimu Law Chambers, applicant's legal practitioners