DISTRIBUTABLE (36)

Judgment No. SC 40/04

Civil Appeal No. 164/04

CHRISTOPHER TICHAONA KURUNERI v THE STATE

SUPREME COURT OF ZIMBABWE
HARARE JUNE 9 & 17, 2004

Advocate J C Andersen SC, for the appellant

J Jagada, for the respondent

In Chambers, in terms of s 5 of the Supreme Court Rules.

GWAUNZA JA: After his arrest, the appellant appeared for initial remand on 26 April 2004. He is currently detained at Harare Central Prison. He filed an application in the High Court for bail pending trial, but the application was dismissed. Aggrieved by the decision of the court *a quo*, the appellant has now appealed to this Court.

The appellant is a member of Parliament for Mazoe West Constituency. He is also the Minister of Finance, in addition to being a businessman and a farmer. Although the appellant faces another charge under the Citizenship of Zimbabwe Act, [*Chapter 4:01*], this appeal is concerned only with the charges

pertaining to the violation of exchange control regulations. These charges are aptly summarised in the judgment of the court *a quo* and are repeated here for convenience –

"The other four charges relate to the violation of the provisions of the Exchange Control Act, [*Chapter 22:05*]. The State alleges that during the period extending from March 2002 to date, the applicant acquired foreign currency amounting to US$582 611,99, British Pounds 34 371,00 and Euro 30 000,00 from unauthorized dealers in Zimbabwe. The applicant thereafter exported the funds to South Africa where he gave it to Christopher Heyman, the Director of Venture Projects and Associates, a company he contracted to manage his businesses in South Africa, including the reconstruction of one of his properties. Part of the money, which was illegally exported to South Africa was used to purchase the following properties: a Mercedes Benz motor vehicle valued at R547 734,00 which is still in South Africa, three residential properties, one, 38 Sunset Avenue, Llandudno, Cape Town, valued at R2.7 million and the other two, comprising a house and a flat, valued at R2.5 million each. It is further alleged that on 6 March 2002, the applicant, being a Zimbabwean resident unlawfully caused a Zimbabwean bank, the Jewel Bank, to transfer R5.2 million to CB Niland and Partners, who are the applicant's lawyers in South Africa as payment for the purchase by the applicant of a property, number 17 Apostle Road, Llandudno, Cape Town. All the immovable properties were registered in the name of a company known as Choice Decisions 113 PTY Limited, in which he is the sole director."

It is submitted on behalf of the appellant that the learned judge *a quo* so misdirected himself in a number of respects, that interference in his decision by this Court is warranted. Mr *Jagada*, for the State, contends in response that the judge in the court *a quo* properly assessed the evidence before him and reached a decision that could not, in any way, be considered so unreasonable as to result in a substantial miscarriage of justice.

Before considering the appellant's submissions and other evidence before the Court, it is pertinent to re-state the principle of law, which is now settled, that in an appeal of this nature, this Court will only interfere if the court *a quo*

committed an irregularity or misdirection, or exercised its discretion "so unreasonably or improperly as to vitiate its decision." (See *S v Chimanikire* 1986(2) ZLR 145 (SC) at 146; also *S v Barber*, 1979 (4) SA 218 (D) at 220 E – G and recently *J Makamba v The State* SC 20/04).

I will therefore consider the appellant's submissions within this narrow context.

In his consideration of the matter, the learned judge *a quo* in my view correctly analysed the legal principles governing bail applications. He adopted the approach followed in the recent case of *James C. Makamba v The State supra* and considered what is set out therein as the primary considerations in the assessment of evidence in bail applications, which are;

(i) whether the applicant will stand trial in due course;

(ii) whether he will interfere with the investigations of the case against him or tamper with the prosecution of witnesses;

(iii) whether the applicant will commit offences when on bail; and

(iv) other considerations the Court may deem good and sufficient.

The learned judge then went on to consider the first issue, that is, whether the applicant would stand trial in due course and reached the decision now being appealed against. He did not, after that determination consider it necessary to examine the other three factors listed. The application in the court *a quo*, was therefore determined solely on the question of whether or not the appellant might abscond. The various incidents of misdirection alleged against the court *a quo* are similarly directed at that court's assessment of the evidence relating to the chances of the appellant absconding. It is not alleged that by not considering the other factors, the judge *a quo* misdirected himself.

The appellant has averred that he will not abscond. Although every case must be determined on its own merits, this Court has held in *Aitken & Anor v Attorney General* 1992 (1) ZLR 249 at 253 that although the court must heed such an averment, implicit reliance cannot be placed on the appellant's mere say so. This is because, the court noted, an accused who harbours an intention to abscond is not likely to admit it. In dealing with the issue of whether or not the appellant might abscond, the learned judge *a quo*, in addition to considering the credibility of the appellant's assurances to stand trial, relied on the test set out in *Aitken & Anor v Attorney General* (*Supra*) and correctly considered the following additional factors:

(i) the nature of the charges, and

(ii) the strength or weakness of the State case in the light of the appellant's explanations.

He then reached the following conclusion:-

> "On the other three charges (relating to Exchange Control) I have found that the State's case is quite strong, the applicant's explanation very weak or even improbable, that the charges are very serious and the punishment upon conviction is likely to be so severe as to induce the applicant who has both substantial means, family, friends and connections abroad, to abscond."

What has to be determined now is whether or not the learned judge *a quo,* in reaching the decision he did, committed an irregularity or misdirection, or exercised his discretion so unreasonably as to vitiate that decision. In order for me to do so, it is necessary to consider the various respects in which it is alleged the learned judge misdirected himself.

Firstly, Mr *Andersen* for the appellant submits that the learned judge *a quo* misdirected himself by neither mentioning nor taking into account the fact that even though the appellant had had an opportunity to abscond before his arrest (since he knew he was being investigated) he had not taken the opportunity to do so.

I am not persuaded there is merit in this contention. The learned judge *a quo* specifically listed among other "objective indications" of the appellant's intention to stand trial, the appellant's previous behaviour when he became aware of an impending arrest. Such "behaviour" included not absconding before his arrest. The learned trial judge correctly listed factors that he found worked in the appellant's

favour, for instance, that the appellant had shown a willingness to abide by fairly stringent bail conditions (he has before me expressed willingness to abide by even more stringent conditions), and a willingness to cooperate in the freezing of his accounts. Without adding the appellant's conduct in not absconding, to these factors, the learned judge then weighed these positive features against those he found to work against the appellant and concluded:-

"What is clear from the submissions is that the applicant commands substantial resources and properties outside the country which he can easily mobilise to reach another country and to live very well indeed for his the rest of his life. On this basis alone, and in respect of relatively less resources, it was held in *Makamba*'s case that the risk of abscondment was real. In this case, there is even a further capacity and incentive to abscond. The applicant, by his own admission, has a family in Canada. He is a holder of a Canadian passport. Although the passport itself may be surrendered, it is not known what residency or citizenship status he holds in Canada. To all intends and purposes the applicant may enjoy such a status as would entitle him to immediate replacement of any travel document and assistance to reach Canada."

The question to be asked then is whether a specific and favourable mention of the appellant's behaviour before arrest (i.e. not absconding) would, together with the other factors the judge said worked in his favour, have so outweighed the negative factors listed above, as to result in the judge reaching a different decision on the matter. In posing this question, I am cognisant of the fact that this Court is limited, not only to a finding that there was misdirection, but that such misdirection was so gross as to vitiate the decision of the court *a quo.*

I am not persuaded a case has been made for such a drastic outcome.

Secondly, it is submitted for the appellant that the learned judge *a quo* misdirected himself by not taking into account "the measure of the man", especially that the appellant was an important personality in the government, that the President of the country had had so much trust in him that he had appointed him a Cabinet Minister in charge of an important portfolio, and that he had not been stripped of his Cabinet Post, in effect, that he was therefore not the type of person to flee the country. It is not evident from the evidence before the Court whether this particular point was argued before the judge *a quo,* as he made no reference to it in his judgment. No mention of the fact is made in the appellant's grounds of appeal nor is it referred to in the opposing affidavit. It would appear the argument which Mr *Andersen* advanced, and as authority for which he cited the case of *S v Bennett* (1976) SA (CDD) 652, was raised for the first time on appeal. That being the case, there is in my view no basis for contending or finding that the judge *a quo* misdirected himself by not considering this issue, when it was not argued before him. However, even had the matter been put to the judge, and considered by him, I am not persuaded it would have swayed him, or this Court, to a different conclusion. While the appellant's enjoyment of Presidential favour and trust could conceivably have acted as a deterrent against his abscondment, one could argue with equal force that the apparent breach of the trust reposed in him by the President, (and its possible consequences to the appellant's standing), which the allegations against him point to, might have prompted him to flee. In any case, as contended by Mr *Jagada,* it was open to speculation whether the President would strip the appellant of his Cabinet post in light of the charges he is facing.

I am all in all not persuaded there is merit in Mr *Andersen*'s averments in this respect.

Thirdly, it is submitted on behalf of the appellant that the learned judge *a quo* misdirected himself by not considering the effect, to the appellant's personal means and standing, of abscondment. It is not in dispute that the appellant has substantial resources which include immovable property and money, both in Zimbabwe and South Africa. The judgment of the learned judge *a quo* makes reference to this circumstance. Mr *Jagada* contends that in dismissing the appellant's application for bail, the court *a quo* properly considered, as compared to his not insubstantial local investments, the fact that the appellant could easily mobilise his vast resources outside the country, which included a South African bank account holding R1 300 000, and various immovable properties, in order to live a comfortable prison free life for the rest of his life. He contends further that the ownership of huge local investments was not necessarily a deterrent against abscondment, as demonstrated in the case of a director of an asset management company who absconded while on bail even though his bail surety far exceeded in value, what the appellant *in casu* was offering.

I find Mr *Jagada*'s arguments to be persuasive. The learned judge must have, in his mind, entertained the question of what the appellant stood to lose if he were to abscond, since the matter was alluded to in the opposing affidavit of the respondent, in the court *a quo*, as follows:-

"The averments of what is owned by the applicant in Zimbabwe, when compared to his wealth outside Zimbabwe, would not rule out chances that the applicant would stand to lose more, if he takes the risk of staying in the country after being granted bail, than to abscond and escape both possible imprisonment upon conviction and loss of assets, through forfeiture in terms of s 7 of the Exchange Control Act [Chapter 22:05]."

It cannot, in my view, therefore, be said that the exercise by the learned judge *a quo* of his discretion in leaning towards the view that the appellant stood to lose more by absconding than by not doing so, was so unreasonable as to vitiate his decision on that point.

Fourthly, Mr *Andersen* contends that the learned judge *a quo* misdirected himself by finding that the appellant's defence was improbable, when the charges concerning the alleged externalization of huge amounts of money lacked particularity in terms of how and when such funds came into Zimbabwe, and how, by whom and when, they were smuggled out of the country.

While, in response, Mr *Jagada* concedes that investigations into the matter were still continuing and that a trial date is yet to be set, he denies that the charges lacked particularity. He avers that, according to witnesses' reports (which had not been given to the appellant's legal practitioner for fear of jeopardising

investigations), the appellant had carried a suitcase full of foreign currency out of Zimbabwe to South Africa and deposited it in a safe, (a picture of which was shown to the court), at one of his houses. Mr *Jagada* contends that while it is not unlawful to possess "free" funds, there was, in this case, no evidence of the funds in question having been obtained lawfully. The appellant, he contends further, had not furnished the court with copies of agreements or any records proving that the source of the funds in question was lawful. The letter from a consultancy firm, Filipe Solano SL, which the appellant relied on for his assertion that the funds in question were "free" funds earned by him for consultancy work done in a number of countries, did not indicate when the funds were earned, for what purpose nor in what quantities. The signatory to the letter, Felipe Solano, had, in fact, been in Zimbabwe at the invitation of the appellant and had been interviewed before the appellant's arrest. Mr *Jagada* contends the appellant has had ample time to put together the relevant documentation pertaining to the funds, or, alternatively, he could have asked Felipe Solano to bring them to Zimbabwe. He submits there must have been records of payments of the huge amounts of money the appellant asserts he received, even if they were, as alleged, paid in hard cash. In addition to lack of documentary proof of the lawful source of the funds, Mr *Jagada* contends the fact that the funds, said to have been earned well over 20 years ago, were only paid recently, casts serious doubt on the appellant's averment that they were free funds.

Against this background, which he contends constitutes sufficient cognizable indications that may

induce the appellant to abscond, Mr *Jagada* argues the judge *a quo* did not misdirect himself when he found that the appellant's explanation was "very weak or even improbable."

I find merit in Mr *Jagada*'s contentions. The appellant does not deny owning substantial investments and properties in South Africa. Pictures shown to the court, of two properties belonging to him, and the R1 300 000, are testimony to this fact. Although he does not deny that he used foreign currency to amass the resources in question, the appellant in my view has not helped his case by not providing evidence to substantiate his assertion that the funds were earned and paid legitimately outside Zimbabwe. As correctly contended for the respondent, at this stage of the proceedings, it is sufficient that the State has proved, on a balance of probabilities, that a *prima facie* case has been established against the appellant.

I am unable, when all is considered, to fault the learned trial judge's finding that as opposed to the State case, the appellant's explanation was both weak and improbable.

It is, lastly, contended for the appellant that the learned judge *a quo* misdirected himself by not considering the option of house arrest for the appellant, given his status in society, his health and the fact that as a Cabinet Minister, his home is already guarded twenty four hours of the day.

There is evidence in the form of a medical report prepared by Dr Mushonga that the appellant suffers from hypertension and chronic back ache. The respondent requested another report by a government medical officer and such report was prepared by a Dr I Gaka. The latter report was availed to the Court and the parties after the hearing of this appeal. According to that report, the appellant is currently receiving treatment prescribed by a specialist physician, Dr Matenga, whom the appellant initially resisted, but later consented to, seeing, almost two weeks later. Although there is indication that a medical report prepared by Dr Matenga was requested by the appellant's counsel, a copy of such report had not been availed to the Court by the time this judgment was issued.

The learned judge *a quo* did not have sight of these two reports. He therefore could not have considered the merits of the argument for placing the appellant on house arrest on the basis of ill health. Similarly as is evident from the record, the learned judge could not have gone into the merits of the argument that because the appellant's home is already guarded round the clock, the option of house arrest should be preferred. There is therefore no basis, in my opinion, for the allegation that the learned judge misguided himself by not considering house arrest for the appellant on those two grounds.

Be that as it may, it is evident from Dr Gaka's report that special effort has been made by the prison authorities to ensure that the appellant is examined and treated by appropriately qualified medical personnel. In addition to the treatment for

hypertension, the appellant is receiving treatment for his chronic backache, in the form of pain killers referred to as PRN. Dr Gaka also avers that the appellant refused to be admitted at Harare Central Prison for round the clock monitoring at the time when this was proposed.

It would appear from Dr Gaka's affidavit that despite initial resistance to treatment by some medical personnel and at a hospital suggested by the prison authorities, the appellant is receiving appropriate treatment for his medical condition. As long as it is not the appellant's case that he can only access appropriate medical attention outside of prison walls, there is in my view no justification for the preferential treatment that he is requesting, ie. house arrest.

Mr Andersen also makes the submission that even if he were to be convicted, the appellant would at worst be ordered to repatriate the funds in question, and also to pay a fine. In this respect, Mr *Jagada* contends that while the appellant might be ordered to remit to the State the funds he is alleged to have externalised, imprisonment could not be ruled out since that would be the punishment should he fail to repatriate the funds. The fear of imprisonment under those circumstances, Mr *Jagada* submits, could still influence the appellant to flee. The learned judge *a quo*, as indicated in his concluding remarks already referred to, did consider the fact that the punishment upon conviction, that the appellant faced, was "likely to be so severe as to induce the applicant … to abscond." No misdirection leading to such a finding has in my view, been shown.

Having considered the judgment of the court *a quo* in light of the evidence before me, I am satisfied the learned judge, in reaching his decision, properly applied the principles applicable to an application of this nature. I am as a result not persuaded that in exercising his discretion, the learned judge did so, so unreasonably as to vitiate the decision reached nor am I persuaded that there was any misdirection on his part, that was so gross as to result in a substantial miscarriage of justice. As such is the only finding that would move this Court to interfere with the decision of the judge *a quo*, it is in my finding that there is no merit in the appeal, which must, consequently, fail.

In the result, it is ordered as follows –

"The appeal be and is hereby dismissed."

Gollop & Blank, appellant's legal practitioners

Attorney-General's Office, respondent's legal practitioner