PRISCAH MUPFUMIRA
v
THE STATE

SUPREME COURT OF ZIMBABWE
HARARE, AUGUST 26, 2019 & SEPTEMBER 3, 2019

C Chinyama with *R Tsvaki* and *Z Makwanya,* for the appellant

Ms S Fero with *A Kumire* and *C Chakawa,* for the State

IN CHAMBERS

GOWORA JA: This is an appeal against the refusal of bail in terms of s 121 (1) (b) as read with s 121(8)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], "the Act" or alternatively with r 67 (1), (2) and (3) of the Supreme Court Rules, 2018.

FACTUAL BACKGROUND

The appellant is Priscah Mupfumira, a politician and a member of Parliament in the government of Zimbabwe. Until recently she was also the Minister of Tourism and Hospitality.

On 25 July 2019 she was arrested by members of the Zimbabwe Anti-Corruption Commission and is facing seven counts of criminal abuse of office in terms of s 174 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

In the first count to the charges levelled against her, it was alleged that sometime in 2014 after having been appointed the Minister of Public Service, Labour and Social Welfare, the appellant, taking advantage of her position as the Minister responsible for the National Social Security Authority (NSSA) a parastatal under the ministry, instructed one Ngoni Masoka, the then Permanent Secretary of the ministry, to obtain on her behalf an advance in the sum of US$ 90 000 from NSSA for the purchase of a Toyota Land Cruiser, registration number ADX 0878 knowing full well that NSSA had no provision to avail such loans. It is alleged that thereafter the appellant received an official vehicle Range Rover from the Government which she accepted in the knowledge that she had already obtained another ministerial vehicle.

In the second count it is alleged that sometime in 2016 and on diverse occasions, using her position as Minister, the appellant unlawfully and corruptly directed the payment to herself sums of money totalling US$ 101 814.80 from NSSA's corporate Social Responsibility Budget which money she received and used outside the mandate of NSSA.

Regarding the third count, it is alleged that the appellant directed NSSA to set up a budget of US$ 350 000 for her ministry's financial demands on top of the financial demands on the normal NSSA corporate social responsibility budget. It was alleged further that during that

year the appellant claimed a total of US$ 313 520.03 for activities furthering her personal and political interests.

In respect of the fourth count, the allegation was to the effect that sometime in 2014, the appellant abused her duty as a public officer by showing favour to Metbank when she instructed NSSA to financially bail out Metbank. This was against the advice of the NSSA risk management department which raised concerns over the bank's financial vulnerability and its high risk default status. As a result, due to the appellant's undue influence, NSSA ended up purchasing four Metbank properties at an inflated sum of US$ 4 908 750.

As regards the 5th count, the allegation against her was that sometime in March 2017, the appellant criminally abused her public office by again showing favour to Metbank when she directed NSSA to consider an investment proposal from the bank for command agriculture. This was against NSSA's risk management advice. It was alleged that Metbank intended to borrow US$ 13 000 000 from unrelated sources and requested NSSA to provide it with double cover security in the form of Treasury Bills. As a result of the appellant's undue influence NSSA is said to have sent Treasury Bills valued at US$ 62 250 000 to Metbank on custodial arrangement but Metbank ended up using Treasury Bills valued at US$ 37 035 000 under unclear circumstances and which are currently unaccounted for, to the prejudice of NSSA.

In the 6th count the appellant is alleged to have abused her duty as a public official by directing one Kurauone Chiota, the then NSSA Chief Property Investment Officer, into engaging NSSA in low cost housing projects with Metbank within 48hours. As a consequence of

that directive, NSSA is alleged to have entered into off-take housing projects for St Ives and State land in Chinhoyi with Metro Realty, an entity related to Metbank, without carrying out due diligence as is the norm. The projects are valued at US$ 6 145 000 and $ 4 710 000 respectively.

In the 7th count it is alleged that sometime in August 2017, the appellant corruptly used her position by directing NSSA to enter into a contract with Drawcard (Pvt) Ltd for a $ 6 500 000 housing project in Munyeza, Gweru without going to tender and without a board resolution, to the prejudice of NSSA.

She appeared for initial remand on 26 July 2019, before the Acting Chief Magistrate. Counsel for the State then applied for the appellant to be remanded in custody for 21 days. He produced a certificate issued by the Prosecutor General in terms of s 32(3b) of the Criminal Procedure and Evidence Act [*Chapter* 9:07].

In response, the appellant raised an objection to the production of the certificate. It was contended on her behalf that s 32(3b) had been rendered dysfunctional because of the provisions of s 50 (1) of the Constitution, 2013 which made bail a Constitutional right for every accused person which right could not be taken away on the basis of a mere opinion from the Prosecutor General. Thereafter, counsel for the appellant, proceeded to attack the charges count by count thereby submitting that there was no reasonable suspicion that the appellant had committed any of the alleged offences. Counsel for the appellant then moved for a hearing of a bail application.

The Acting Chief Magistrate held that he was satisfied that there was a reasonable suspicion that the appellant had committed the offences with which she was being charged. He concluded that all the requirements necessary for the production of the certificate in terms of s 32 had been met and he accordingly accepted its production. He then invoked s 32(3c) and held that the effect of the production of the certificate was to oust the court's jurisdiction in determining issues related an accused person's admission to bail during the lifespan of the certificate. In the result, he refused to entertain the appellant's bail application. He thereafter ordered that the appellant be detained for 21 days.

This is the determination that is the genesis to the appeal before the court *a quo*.

THE APPEAL TO THE HIGH COURT

On the 31 July 2019, the appellant approached the High Court. She filed a bail statement in terms of r 6 of the High Court of Zimbabwe Bail Rules S.I 109/91. RULE 6 provides as follows:

> (1) An appeal in terms of section 111 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] by a person aggrieved by the decision of a magistrate on an application relating to bail or the entering by him into recognizances, shall be noted by filing with the registrar a written statement setting out—
> (*a*) the name of the appellant; and
> (*b*) the appellant's residential address; and
> (*c*) if the appellant is employed, his employer's name and address and the nature of his employment; and
> (*d*) where the appeal is brought against the decision of a magistrate before the appellant has been convicted—
> (i) the offence with which the appellant is charged; and
> (ii) the court by which and the date on which the appellant was last remanded; and
> (iii) the court criminal record book number, if that number is known to the applicant; and
> (iv) the police criminal record number of the case, the name of the police officer in charge of investigating the case and the police station at which he is stationed, if those particulars are known to the applicant; and
> (*e*) where the appeal is brought against the decision of a magistrate after the appellant has been convicted and sentenced—
> (i) the offence of which the appellant was convicted and the sentence that was imposed; and

(ii) the court or courts which convicted the appellant and imposed sentence upon him; and
(iii) the court criminal record book number, if the number is known to the applicant; and
(iv) the date or dates on which the applicant was convicted and sentenced;
(*f*) where the appeal is brought against a refusal by a magistrate to grant bail—
(i) the grounds on which it was refused, if the grounds are known to the appellant; and
(ii) the date on which it was refused; and
(*g*) where the appeal is brought in relation to any recognizance or condition thereof—
(i) the terms of the recognizance or condition concerned; and
(ii) the date on which the magistrate required the recognizance to be entered into or imposed the condition, as the case may be; and
(*h*) the grounds on which the applicant seeks release on bail or the revocation or alteration of the recognizance or condition, as the case may be.

However, on close scrutiny it becomes evident that the appellant sought reliance on ss 116 and 117 of the Act, which sections apply to initial applications for bail. The relevant section of the Act, s 121 was not applicable for reasons that will be discussed later during the course of this judgment. In my view, the appeal filed by the appellant to the High Court having been made in terms of ss 116 and 117 was irregular. Those sections are relevant to initial applications for bail before a court of first instance, which in this case the High Court was not, nor was it the contention by the appellant that it was. Section 117 provides in relevant part as follows:

117A Application for bail, bail proceedings and record thereof
(1) Subject to the proviso to section 116, an accused person may at any time apply verbally or in writing to
the judge or magistrate before whom he or she is appearing to be admitted to bail immediately or may make such application in writing to a judge or magistrate.

(2) Every written application for bail shall be made in such form as may be prescribed in rules of court.
(3) Every application in terms of subsection (2) shall be disposed of without undue delay.
(4) In bail proceedings the court may—
(*a*) postpone such proceedings;
(*b*) subject to subsection (5), receive—
(i) evidence on oath, including hearsay evidence;
(ii) affidavits and written reports which may be tendered by the prosecutor, the accused or his or
her legal representative;
(iii) written statements made by the prosecutor, the accused or his or her legal representative;
(iv) statements not on oath made by the accused;
(*c*) require the prosecutor or the accused to adduce evidence;
(*d*) require the prosecutor to place on record the reasons for not opposing bail.

(5) In bail proceedings the accused is compelled to inform the court whether—
(*a*) the accused has previously been convicted of any offence; and
(*b*) there are any charges pending against him or her and whether he or she has been released on bail in
respect of those charges.
(6) Where the legal representative of an accused submits the information referred to in subsection (5) the accused
shall be required by the court to declare whether he or she confirms such information.
(7) The record of the bail proceedings excluding the information referred to in subsection (5), shall form part
of the record of the trial of the accused following upon such bail proceedings:
Provided that if the accused elects to testify during the course of the bail proceedings the court must inform
him or her that anything he or she says may be used against him or her at his or her trial and such evidence becomes
admissible in any subsequent proceedings.
(8) Any accused who wilfully—
(*a*) fails or refuses to comply with subsection (5); or
(*b*) furnishes the court with false information required in terms of subsection (5);
shall be guilty of an offence and liable to fine not exceeding level seven or to imprisonment for a period not
exceeding two years or both.
(9) The court may make the release of an accused subject to conditions which, in the court's opinion, are in
the interests of justice.
(10) Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail
proceedings, have access to any information, record or document relating to the offence in question, which is
contained in, or forms part of, a police docket, including any information, record or document which is held by
any police officer charged with the investigation in question, unless the Prosecutor-General otherwise directs:
Provided that this subsection shall not be construed as denying an accused access to any information, record
or document to which he or she may be entitled for the purposes of his or her trial.

The appellant was not appearing before the High Court in proceedings under the Act. She appeared before the Acting Chief Magistrate on initial remand and it is to that court that an application under s 117 should have been made and determined. No such application was made or determined.

It becomes evident therefore that reliance on s 117 by the appellant for the determination of an appeal under r 6 was incorrect. The proceedings before the High Court were therefore irregular. Over and above this, it becomes pertinent to consider whether the appeal, notwithstanding its defective nature, was properly before the court *a quo*.

WAS THE APPEAL PROPPERLY BEFORE THE COURT *A QUO*?

In the bail statement filed by her in accordance with the requirements of r 6, the appellant stated that the magistrates' court erred in refusing to hear her bail application. It was contended further that the appeal before the High Court was an appeal in the wider sense and that as a consequence the High Court was empowered to hear the application on the merits.

In opposition, the respondent raised two points *in limine*. The first preliminary point raised by the State was to the effect that there was no proper appeal before the High Court. It was contended that r 6 under which the appellant had approached the court only related to a situation where bail had been refused or in relation to the recognizance relating to bail. The rule, it was submitted did not apply to situations where the magistrate had declined jurisdiction as was the case in the present.

The second point raised was that the admission of the certificate by the magistrate pursuant to the provisions of s 32(3b) of the Criminal Procedure and Evidence Act ousted the jurisdiction of the court to admit an accused person to bail during the lifespan of the certificate and that as a consequence the High Court just like the Acting Chief Magistrate in the court *a quo* had no jurisdiction to entertain the bail application.

The court *a quo* dismissed both preliminary points and proceeded to hear the appellant on the merits of the bail application. Thereafter, the appellant went into the merits of the bail application and made submissions in support thereof and the bail conditions she proposed.

The court *a quo* also determined the issue, whether or not s 32 (3b) and (3c) are not in conformity with the Constitution and it was held that they were not. The court *a quo* held that the Magistrates Court erred when it refused to determine the bail application and as such its consequent order for the 21 day detention of the appellant should be set aside.

On the merits, the appellant stated that she had been travelling in and out of the country on state business notwithstanding these allegations being levelled against her. She offered RTGS 3 000 as bail deposit and to surrender title deeds for a property, her two passports, non-interference with witnesses as well as reporting to a local police station every once a week.
The court *a quo* also heard evidence from the investigating officer as to the reasons by the State for opposing the grant of bail. He told the court that the appellant is a politician, member of parliament and Cabinet minister and that therefore she was a very powerful individual in society. The investigating officer further stated that she should be held in custody.

The court *a quo*, held that the issue for determination in the present circumstances was whether the appellant was likely to abscond and avoid standing trial. In dealing with this question the court had regard to the fact that the appellant was well travelled and had a ten year visa to the United Kingdom. The court found that in light of the case that was building against her, it was highly likely that the appellant would abscond court. The court *a quo* took cognisance of

the amount of money involved in the present case and held that there was a likelihood of absconding. In view of these factors taken cumulatively the court *a quo* dismissed the appeal.

An appeal against the refusal of bail or the giving of recognizance is provided for under s 121 of the Act. That section provides:

121 Appeals against decisions regarding bail
(1) Subject to this section, where a judge or magistrate has admitted or refused to admit a person to bail—
(*a*) the Prosecutor-General or the public prosecutor, within forty-eight hours of the decision; or
(*b*) the person concerned, at any time;
may appeal against the admission to or refusal to bail or the amount fixed as bail or any conditions imposed in
connection with bail.

(2) An appeal in terms of subsection (1) against a decision of—
(*a*) a judge of the High Court, shall be made to a judge of the Supreme Court;
(*b*) a magistrate, shall be made to a judge of the High Court.
(3) Where a judge or magistrate has admitted a person to bail, and an appeal is noted by the Prosecutor-
General or public prosecutor under subsection (1), the decision to admit to bail remains in force unless, on the
application of the Prosecutor-General or public prosecutor, the judge or magistrate is satisfied that there is a
reasonable possibility that the interests of justice may be defeated by the release of the accused on bail before the decision on appeal, in which event the judge or magistrate may suspend his or her decision to admit the person to bail and order the continued detention of the person for a specified period or until the appeal is determined, whichever is the shorter period.

(4) An appeal in terms of subsection (1) by the person admitted to bail or refused admission to bail shall not
suspend the decision appealed against.
(5) A judge who hears an appeal in terms of this section may make such order relating to bail or any condition
in connection therewith as he considers should have been made by the judge or magistrate whose decision is
the subject of the appeal.

(8) There shall be no appeal to a judge of the Supreme Court from a decision or order of a judge of the High
Court in terms of paragraph (*b*) of subsection (2), unless the decision or order relates to the admission or refusal of admission to bail of a person charged with any offence referred to in
(*a*) paragraph 10 of the Third Schedule; or
(*b*) the Ninth Schedule in respect of which the Prosecutor-General has issued a certificate referred to in subsection (3b) of section *thirty-two*; in which event subsections (3) to (7) shall apply to such appeal.

Of particular importance in this inquiry are the provisions of ss (1)(b) and (4) which make it clear that an appeal is against the refusal or the grant of bail. In this case, the magistrate before whom the appellant appeared on initial remand did not make a determination on the issue of bail. He did not refuse bail. Instead, he declined jurisdiction to hear the application based on the certificate produced in terms of s 32(3b). Thus, as submitted by the State there could not be an appeal before the High Court premised on s 121 of the Act because there was no decision to appeal against.

It is settled law that an appeal must always be premised on the determination of the court *a quo*, it being a logical supposition that the grounds thereof would seek to impugn the decision being appealed against. Grounds of appeal ought not to be divorced from the decision appealed against, otherwise the appeal is deemed irregular.

In casu, the determination of the Magistrate's Court was centred specifically on the validity of the certificate of the Prosecutor General and its effect as to the jurisdictional limits to determine the question of bail. As a result, the appeal by the appellant to the High Court ought to have raised issues that were limited to the validity of that certificate and the refusal of jurisdiction consequent thereto. Clearly this was not the case with the appeal brought before the High Court as is evident from the appeal noted purportedly in terms of r 6 of the Bail Rules, which is applicable to the refusal of bail, or the challenge to recognizance set by a magistrate when affording an accused person bail.

The learned magistrate did not consider issues relating to bail. He made a specific finding that the certificate was valid and that during its lifetime the jurisdiction of a court to admit the appellant to bail was ousted by virtue of its acceptance. That judgment is extant and has not been set aside. Its effect in my view was to disable the High Court from hearing the application, for want of a better word, brought by the appellant in reaction to the determination by the magistrate.

The next issue is the contention by the State that the High Court, like the magistrates court did not have jurisdiction once the certificate issued in terms of s 32(3b) was accepted by the magistrate under the section in question.

The proceedings before the Magistrates Court arose when the State, sought to have the appellant placed on remand consequent to the charges of criminal abuse of office levelled against her in terms of s 174 (1) (a) of the Criminal Code. After presenting the charges the respondent produced a certificate from the Prosecutor General in terms of s 32 (3b) of the Criminal Procedure and Evidence Act. Thereafter the respondent applied that the appellant be remanded in custody for 21 days. The appellant opposed the production of the certificate to the court on the basis that s 32 (3b) was *ultra vires* s 50 (1) of the Constitution. The magistrate rejected the argument by the appellant and went on to say:

> *"The court has no hesitation to find all the requirements necessary for the production of the Prosecutor General's certificate produced in terms of s 32 (3b) have been met. The effect of the certificate is to oust this and every other court's jurisdiction in determining issues relating to the accused person's admission to bail during its life span. The court holds that the certificate is valid and effective. I therefore order the detention of the accused person as prayed for in the Prosecutor General's certificate."*

Based on this determination, the appellant launched an appeal to the High Court. It is the correctness of the appeal that must be explored.

The Acting Chief Magistrate concluded that the production of the certificate has the effect of ousting the jurisdiction of the Courts in determining issues relating to the accused person's admission to bail during its pendency. On the basis of that reasoning the High Court's jurisdiction to determine the appellant's matter was ousted. Consequently, everything that the High Court did would be contrary to the law and null. The provisions upon which the Acting Chief Magistrate relied and on which the State premised its preliminary challenge to the jurisdiction of the court *a quo* read as follows:

> (3b) Where the person arrested without warrant is charged with any offence referred to in the Ninth Schedule
> and there is produced to the judge or magistrate before whom the person is brought in terms of this section—
>
> (*a*) a certificate issued by or on behalf of the Prosecutor-General stating that, in the Prosecutor-General's
> opinion□
>
> (i) the offence in question involves significant prejudice or significant potential prejudice to the
> economy or other national interest of Zimbabwe; and
>
> (ii) the further detention of the person arrested for a period of up to twenty-one days is necessary for
> any one or more of the following reasons□
>
> A. the complexity of the case; or
> B. the difficulty of obtaining evidence relating to the offence in question; or
> C. the likelihood that the person arrested will conceal or destroy the evidence relating to the
> offence in question or interfere with the investigation of the offence or both;
> and
>
> (*b*) the following, where the arrest is made in the circumstances referred to in paragraph (*b*) of subsection
> (1) of section *twenty-five*—
>
> (i) proof that the arresting officer was an officer of or above the rank of assistant inspector at the
> time of the arrest, or that the arresting officer made the arrest with the prior leave of such an officer;
> and
>
> (ii) where the alleged offence was disclosed through an anonymous complaint, a copy of the complaint

as recorded in accordance with subparagraph (ii) of the proviso to paragraph (*b*) of subsection
(1) of section *twenty-five*;
the judge or the magistrate shall, if satisfied that there is a reasonable suspicion that the person committed the
offence, order that person's detention or issue a warrant for his or her further detention for a period of twenty-one days or the lesser period specified in the certificate.

(3c) A person referred to in subsection (3a) or (3b) shall, unless the charge or charges against him or her are
earlier withdrawn, remain in detention for twenty-one days or the lesser period specified in a certificate mentioned in subsection (3b), as the case may be, from the date when an order or warrant for the person's further detention was issued in terms of the relevant subsection, and no court shall admit such person to bail during that period.
Provided that the arresting officer or other officer in authority over him or her shall, at intervals of not more
than forty-eight hours beginning on the date when the order or warrant for the person's further detention is issued, make a report to the Prosecutor-General on the progress of the investigations into the charge or charges against the person in detention, and if the Prosecutor-General is satisfied on the basis of any such report that the person's detention is no longer justified, the Prosecutor-General may order the immediate and unconditional release of the detained person.

If regard is heard to the above provisions, once the magistrate had accepted the certificate upon its production and, in accordance with the provisions of ss (3c) the only way the High Court would be clothed with jurisdiction to hear this matter would have been if the appeal was made properly, that is to say, if the appellant had appealed against the decision of the court to validate the Prosecutor-General's certificate and give it full effect. Therefore the respondent's second preliminary point also had merit and ought to have been upheld. The proper course to take for the appellant was to appeal against the decision to validate the Prosecutor General's certificate and had a decision been made in its favour, it ought to have then prayed for the remittal of the matter to the court *a quo* for a determination on the merits which is the issue of whether or not the appellant should be granted bail. This would have been the correct procedure to adopt. The appellant chose not to follow this route and embarked upon an appeal not supported by law.

As matters stand, the High Court, in my view, went outside the purview of its jurisdictional mandate and determined a bail application that was never before the court *a quo*, dealing with a supposed appeal that lacked jurisdictional foundation. This renders the basic foundation upon which the appeal was noted shaky. It also affects the matter before me. If there was nothing before the court *a quo*, it follows that there is no appeal to be dealt on the merits before me.

The preliminary points had merit, and before the court could entertain the appellant, the decision of the magistrate had to be dealt with properly on the substance.

That being so, it then becomes evident that the appellant's appeal suffered an incurable defect and should not have been entertained by the court *a quo*. The appeal was a nullity and it is a trite position of our law that nothing can stand on a nullity. See *Mc Foy v United Africa Co. Ltd* 1961 93) ALL ER 1169 (CPC)**.** As such the court *a quo* ought to have upheld the preliminary point raised by the respondent in which it contended that the question of bail did not arise in the court *a quo*. The fact that it was raised in argument by the appellant does not necessarily mean that this was an aspect which informed the decision of the court *a quo*.

THE DECLARATION BY THE COURT *A QUO* THAT S32(3B) WAS ULTRA VIRES S 50 OF THE CONSTITUTION

For purposes of completeness, I must comment on the decision of the court *a quo* to declare s 32 (3b) and (3c) of the Criminal Procedure and Evidence Act unconstitutional. This was an issue that was not brought before the court *a quo* for determination. An attempt to seek a

declaration as to the constitutionality of the provision through an application to amend a draft order which sought bail was abandoned. In the absence of a challenge as to its constitutional validity it was not open to the court *a quo* to declare a provision in a statute unconstitutional.

As far as the law is concerned these provisions are not *ultra vires* the Constitution especially if regard is had to the provisions of s 50 (1) of the Constitution. It states as follows:

"50 Rights of arrested and detained persons

(1) Any person who is arrested—

(a) must be informed at the time of arrest of the reason for the arrest;

(b) must be permitted, without delay—

(i) at the expense of the State, to contact their spouse or partner, or a relative or legal practitioner, or anyone else of their choice; and

(ii) at their own expense, to consult in private with a legal practitioner and a medical practitioner of their choice; and must be informed of this right promptly;

(c) must be treated humanely and with respect for their inherent dignity;

(d) must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention; and

(e) must be permitted to challenge the lawfulness of the arrest in person before a court and must be released promptly if the arrest is unlawful." (my emphasis)

It must be noted that the right to liberty is not an absolute right, therefore where there are "compelling" circumstances the Courts are at liberty to detain the accused person. A closer look at s 32 (3a) and (3b) would show that the Prosecutor General does not issue such a

certificate in every situation but where the situation is one that satisfies the requirements under s 32 (3b). This is what would constitute "compelling" circumstances as stated under s 50 (1) (d) of the Constitution.

Therefore, the reasoning behind the finding of the unconstitutionality of these provisions, is with respect irregular and without legal foundation. In point of fact a reading of s 117, which provides for the entitlement to bail puts paid to the assumption by the court *a quo* that the provisions in the Act regarding bail are unconstitutional. Section 117 provides in relevant part:

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.

(3) In considering whether the ground referred to in—

(*a*) subsection (2)(*a*)(i) has been established, the court shall, where applicable, take into account the following
factors, namely—

(i) the degree of violence towards others implicit in the charge against the accused;

(ii) any threat of violence which the accused may have made to any person;

(iii) the resentment the accused is alleged to harbour against any person;

(iv) any disposition of the accused to commit offences referred to in the First Schedule, as evident
from his or her past conduct;

(v) any evidence that the accused previously committed an offence referred to in the First Schedule
while released on bail;

(vi) any other factor which in the opinion of the court should be taken into account;
(*b*) subsection (2)(*a*)(ii) has been established, the court shall take into account—
(i) the ties of the accused to the place of trial;
(ii) the existence and location of assets held by the accused;
(iii) the accused's means of travel and his or her possession of or access to travel documents;
(iv) the nature and gravity of the offence or the nature and gravity of the likely penalty therefor;
(v) the strength of the case for the prosecution and the corresponding incentive of the accused to
flee;
(vi) the efficacy of the amount or nature of the bail and enforceability of any bail conditions;
(vii) any other factor which in the opinion of the court should be taken into account;
(*c*) subsection (2)(*a*)(iii) has been established, the court shall take into account—
(i) whether the accused is familiar with any witness or the evidence;
(ii) whether any witness has made a statement;
(iii) whether the investigation is completed;
(iv) the accused's relationship with any witness and the extent to which the witness may be influenced
by the accused;
(v) the efficacy of the amount or nature of the bail and enforceability of any bail conditions;
(vi) the ease with which any evidence can be concealed or destroyed;
(vii) any other factor which in the opinion of the court should be taken into account;
(*d*) subsection (2)(*a*)(iv) has been established, the court shall take into account—
(i) whether the accused supplied false information at arrest or during bail proceedings;
(ii) whether the accused is in custody on another charge or is released on licence in terms of the
Prisons Act [*Chapter 7:11*];
(iii) any previous failure by the accused to comply with bail conditions;
(iv) any other factor which in the opinion of the court should be taken into account;
(*e*) subsection (2)(*b*) has been established, the court shall, where applicable, take into account the following
factors, namely—

(i) whether the nature of the offence and the circumstances under which the offence was committed
is likely to induce a sense of shock or outrage in the community where the offence was
committed;
(ii) whether the shock or outrage of the community where the offence was committed might lead to
public disorder if the accused is released;
(iii) whether the safety of the accused might be jeopardised by his or her release;
(iv) whether the sense of peace and security among members of the public will be undermined or
jeopardised by the release of the accused;
(v) whether the release of the accused will undermine or jeopardise the public confidence in the
criminal justice system;

(vi) any other factor which in the opinion of the court should be taken into account.

(4) In considering any question in subsection (2) the court shall decide the matter by weighing the interests of
justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is
likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following
factors, namely—

(*a*) the period for which the accused has already been in custody since his or her arrest;
(*b*) the probable period of detention until the disposal or conclusion of the trial if the accused is not released
on bail;
(*c*) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused
with regard to such delay;
(*d*) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation
which may be brought about by the detention of the accused;
(*e*) the state of health of the accused;
(*f*) any other factor which in the opinion of the court should be taken into account.

(5) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty
to weigh up the personal interests of the accused against the interests of justice as contemplated in subsection (4).

(6) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in—

(*a*) Part I of the Third Schedule, the judge or (subject to proviso (iii) to section 116) the magistrate hearing
the matter shall order that the accused be detained in custody until he or she is dealt with in accordance
with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence
which satisfies the judge or magistrate that exceptional circumstances exist which in the interests of justice
permit his or her release;
(*b*) Part II of the Third Schedule, the judge or (subject to proviso (iii) to section 116) the magistrate hearing
the matter shall order that the accused be detained in custody until he or she is dealt with in accordance
with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence
which satisfies the judge or magistrate that the interests of justice permit his or her release.

(7) Where a person has applied for bail in respect of an offence referred to in the Third Schedule—

(*a*) the Prosecutor-General; or
(*b*) the Minister responsible for the administration of the Public Order and Security Act [*Chapter 11:17*], in
respect of offence referred to in paragraph 6 of Part I of the Third Schedule;
may issue a certificate stating that it is intended to charge the person with the offence.

(8) If the Minister responsible for the administration of the Extradition Act [*Chapter 9:08*], certifies in writing
that a person who has applied for bail has been extradited to Zimbabwe from a foreign country and that the

Minister has given an undertaking to the government or other responsible authority of that country—
(*a*) that the accused person will not be admitted to bail while he or she is in Zimbabwe, the judge or magistrate
hearing the matter shall not admit the accused person to bail;
(*b*) that the accused person will not be admitted to bail while he or she is in Zimbabwe except on certain
conditions which the Minister shall specify in his or her certificate, the judge or magistrate hearing the
matter shall not admit the accused person to bail except on those conditions:
Provided that the judge or magistrate may fix further conditions, not inconsistent with the conditions
specified by the Minister on the grant of bail to the accused person.
(9) A document purporting to be a certificate issued by a Minister or the Prosecutor-General in terms of subsection (7) or (8) shall be admissible in any proceedings on its production by any person as *prima facie* evidence of its contents.

As the question of the invalidity of S 32(3b) is not an issue for determination in this appeal, I do not intend to dwell on that aspect. I will confine my remarks to the obvious provision of an accused person's entitlement to bail in s 117(1) unless there are compelling reasons for his detention in custody.

It is worth noting that the section has made provision for almost every factor that a court should consider in the accused's person favour in order to ensure that detention in custody may be ordered only where compelling reasons for such detention have been established by the State. That this provision accords with s 50(1) (d) of the Constitution is not in dispute.

The last issue for discussion is the question of the validity of the certificate issued by the Prosecutor General and accepted by the Chief Magistrate under s 32(3b).

WHETHER THE CERTIFICATE WAS CORRECTLY SET ASIDE BY THE COURT *A QUO*

The appellant filed an appeal under r 6 of the High Court Bail rules. The appeal itself was defective as commented above. The determination by the Acting Chief Magistrate on the certificate by the Prosecutor General was not appealed against. The court *a quo* was invited and persuaded to set it aside on the basis of submissions made to it by appellant's counsel premised on the alleged constitutional invalidity of s 32(3b) of the Act. I have already found that those remarks by the court *a quo* have no legal justification.

In my view, as a result of these comments the court *a quo* proceeded to set aside the certificate in the absence of an appeal against the decision of the magistrates' court to accept or a challenge properly mounted to have it set aside. It was never placed before the court *a quo* by the appellant as an issue for determination justifying its setting aside. It was merely discussed as an issue for consideration during the purported bail hearing. In my view, the court *a quo* was not properly seized with this matter and the decision to set aside was a gross irregularity.

There was no legal premise before the court *a quo* to interfere with the certificate. Its acceptance by the Acting Chief Magistrate was an exercise of his discretion in terms of the Act which exercise was never challenged. The decision by the court *a quo* to set the certificate aside without interfering with the Acting Chief Magistrate's decision is an irregularity.

In circumstances such as these, the Supreme Court or a judge of the Supreme court would be called upon to invoke review powers in terms of s 25 of the Supreme Court Act [*Chapter 7:13*]. In my view, this is a proper case for the invocation of this provision. It is couched as follows:

"25 Review powers

1. *Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, tribunals and administrative authorities.*
2. *The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court.*
3. *Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or any particular review shall be instituted before or shall be referred or remitted to the High Court for determination."*

It admits of no doubt therefore, that in terms of s 25(2) of Supreme Court Act a judge of the court is imbued with powers to set aside proceedings that are irregular even if those proceedings are not the subject of an appeal or application before the Court or the judge. I am

fortified in this view by the remarks of ZIYAMBI JA in *The Chairman Zimbabwe Electoral Commission & 2 Ors v Roy Bennet & Anor* SC 48/05. The learned Judge of Appeal said:

> *"Section 25(2) confers additional jurisdiction which may be exercised when it comes to the notice of the Supreme Court or a judge of that court that an irregularity has occurred in proceedings not before it on appeal or application. Thus s 25(2) deals with irregularities in respect of which no appeal or application is before the Supreme Court and the review is undertaken at the instance of the Supreme Court and not of any litigant."*

In *Zimasco v Marikano* SC 6/14, GARWE JA made remarks that are apposite and pertinent to this principle at p 8 of the cyclostyled judgment to the following effect:

> *"In other words the Supreme Court has the power of review over matters coming before it for adjudication by way of appeal or whenever it comes to the notice of the court that an irregularity has occurred in any proceedings or in the making of a decision and it is felt that such an irregularity should not be allowed to stand."*

In *P.G Industries v Bvekerwa* SC 53/2016 this Court held that due to the irregularity in the proceedings in the court *a quo*, the appeal could not be decided on the merits. In that case the Judge of the Labour Court had failed to provide reasons for his judgement. This Court went on to say that the absence of reasons made the task of the court even more difficult as the reasons for the decision by the court *a quo* remained locked in the mind of the judicial officer.

In view of all the defects and irregularities set out above the only course open to me is to set the proceedings of the High Court aside. This includes the decision of the court *a quo* setting aside the certificate issued by the Prosecutor General resulting in its revival. The effect of the setting aside of the decision of the court *a quo* in this respect is the reinstatement of the certificate.

Counsel for the appellant was alive to the defective nature of the proceedings before the High Court. He indicated that he would withdraw the appeal. In my view that is a proper attitude to adopt as the appeal would have no merit.

Accordingly, it is ordered as follows:

1. The appeal is dismissed.
2. In the exercise of my review powers under s 25(2) of the Supreme Court Act [*Chapter* 7:13], the proceedings of the High Court brought by the appellant under Case No HREP 10641/19 be and are hereby set aside.
3. For the avoidance of doubt, the decision by the High Court to set aside the certificate issued by the Prosecutor General and produced to the Acting Chief Magistrate on 26 July 2019 is hereby set aside in accordance with the provisions of s 25(2) of the Supreme Court Act.

Chinyama and Partners, legal practitioners for the appellant

The Prosecutor General, for the State