JABULANI MUKOMAZI
and
DENFORD ZHUNGU
and
TAWANDA MUTENHABUNDO
versus
THE STATE

HIGH COURT OF ZIMBABWE
**CHIKOWERO J**
HARARE; 27 August and 2 September 2024

***Bail Appeal***

*G Manokore*, for the appellants
*F Kachidza* with *L Chitanda*, for the respondent

CHIKOWERO J:

1) With the consent of Counsel, the Court consolidated the two bail appeals because it was convenient to do so. Thereafter, argument was presented in respect of the consolidated appeal. I reserved judgment to consider the matter closely. This is the judgment and the reasons thereof.
2) The appellants and one Never Murerwa are appearing before the Magistrates Court sitting at Harare. They are jointly charged with the crime of criminal abuse of duty as public officers as defined in s 174 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Criminal Law Code).
3) The allegations, as set out in the Request for Remand Form, are that they criminally abused their duties as public officers as follows. They were members of the City of Harare Tender Evaluation Committee. On a date not material to this judgment, sitting as members of such Committee, they unprocedurally awarded a tender to refurbish street lights in Harare to a company called Juluka Enndo Joint Venture in breach of procurement provisions which required the procurement to be done through a competitive bidding process. Further, they disregarded their earlier decision at a previous sitting of the same City of Harare Tender Evaluation Committee to disqualify

Juluka Enndo Joint Venture for having failed to meet the tender requirements. In addition, the directors of Juluka were not in good standing with the City of Harare because, as directors of Synlak (Pvt) Ltd, they had in 2019 been awarded a One Million United States dollar tender by the City of Harare but had failed to deliver. The standard bidding document disqualified bidders who were not in good standing with the City of Harare.

4) Without being couched as an alternative, the annexure to the Request for Remand Form reflects the allegations (although still presented as a contravention of s 174 of the Criminal Law Code) as not being an award of the tender to Juluka but a recommendation that the tender be awarded to that company.
5) For my purposes, nothing turns on this detail for at least two reasons. First, the appellants and the one not before me did not challenge their placement on remand at all. In other words, they must be taken to have conceded, a quo, that the allegations as set out in the Request for Remand Form as read with the annexure thereto establish a reasonable suspicion that they committed the crime of criminal abuse of duty as public officers. It mattered not to them then (and must not matter now) whether it was alleged that their misdeed lay in unprocedurally awarding the tender to Juluka or in unprocedurally recommending such award. Second, the investigating officer, in explaining why the prosecution was opposed to the admission of the appellants and Murerwa to bail, clarified that the allegations were that the quartet had criminally abused their duties as public officer by unprocedurally recommending the City of Harare traffic lights refurbishment tender to be awarded to Juluka.
6) Bail was refused on two bases. The Magistrates Court was satisfied that the appellants (and Murerwa) will not stand trial if admitted to bail pending trial. It gave reasons for this finding. The Court, not without reasons, also found that the appellants will interfere with witnesses and police investigations.
7) The appellants are aggrieved with the decision rendered a quo. Hence this appeal. They have raised four grounds of appeal.
8) Before interrogating those grounds, I bear in mind the law applicable in an appeal of this nature. In *S* v *Malunjwa* 2003 (1) ZLR 275(H) the Court was clear that the approach to be adopted is to look at whether the Magistrate misdirected himself when he refused bail. It was emphatic that the appeal should be directed at the judgment sought to be

overturned. It is that judgment that the appeal must attack. In *S* v *Ruturi* HH 26/03 the Court explained that the appellant has to show that the court *a qou* committed an irregularity or a misdirection or exercised its discretion so unreasonably or in an improper manner to such an extent that its decision cannot be upheld. Barros and Anor v Chimponda 1999 (1) ZLR 58(S) sets out, at 62F – 63A,

the circumstances wherein an appellant Court can interfere with a lower Court's exercise of discretion. The decision on bail involves the exercise of discretionary power by the Court at first instance.

9) I think it useful to set out the first ground of appeal. It reads:

> "The Court a quo erred in denying the appellant bail on the ground that appellant is facing a serious offence in circumstances where no cogent evidence or information was advanced by the State to establish any compelling reason justifying continued detention of the appellant." (emphasis mine)

This ground of appeal is faulty in two respects. First, it does not attack the judgment appealed against. It completely misses the point. The appellants were not denied bail because they are facing a serious offence. Indeed, as submitted by Ms *Kachidza*, the learned Magistrate clearly explained that the seriousness of the offence on its own was an invalid reason to deny bail. To that extent, the first part of the first ground of appeal is misplaced. It merits no further attention. The second part of the first ground of appeal (the one underlined) ought not to have been there in the first place because a ground of appeal must be exactly that, namely a ground. It must not be a combination of more than one ground. It must not be a combination of a ground and argument. For my purposes, I disregard the second part of the first ground of appeal on the basis that it is vague. It is as if the drafter did not know why the Court a quo refused to admit the appellants to bail. His remedy would have been to read and understand that judgement before composing grounds attacking the same. That which the appellants did not do at the drafting stage cannot be cured in argument at the hearing of the appeal. This is so because an appeal is determined on the grounds of appeal. If the ground of appeal misses the mark, for whatever reason (as is the case with that under discussion) then the Court has nothing to relate to. Ultimately, the entirety of what was placed before me as the first ground of appeal raises no issues. I disregard it in disposing of this matter.

10) Next, the appellants take issue with the finding that if admitted to bail they will interfere with witnesses and investigations. In respect of the first and third appellants the evidence of interference with investigations was overwhelming. Armed with a letter from the City of Harare authorities, the investigating officer in the company of his team members appeared in the first appellant's office. They requested to be furnished with certain documentation specified in that letter. Instead of simply handing up such documentary evidence the first appellant made a phone call to Murerwa. Thereafter, he lied that the documentation requested was at the offices of the Procurement Regulatory Authority of Zimbabwe (PRAZ). The documentation was right there on the first appellant's desk. The investigating officer saw it. He enquired of the first appellant whether what he was beholding on the desk was not that which the first appellant claimed to be with PRAZ. Thus cornered, the first appellant feigned surprise and only then did he release the documentary evidence requested by the investigators. There can be no doubt that the first appellant attempted to interfere with investigations by endeavouring to conceal evidence. That he did in the face of a team of police officers who were investigating the matter. There can be no doubt that if given another chance, by being admitted to bail, the first appellant would have gone all out to interfere with investigations by not only prevailing upon State witnesses not to cooperate with the police but causing the disappearance of outstanding documentary evidence. Further, the investigating officer testified, and was believed, that on going through the first appellant's phone he discovered that the latter had been communicating with State witnesses. As the Court a quo was seized with a bail application, that the record of the call history was not placed before it (the investigating officer explained that the mobile phone service provider was yet to furnish him with the same) could not stand in the way of the learned magistrate, having assessed the credibility of the witness, believing what the witness said he saw on going through the first appellant's call history.

11) As for the third appellant, the investigating officer was surprised to see this appellant's legal practitioner in possession of documentation which lie at the heart of the investigations. The investigating officer had been unable to lay his hands on those documents using official investigative channels. It was never explained to him how the third appellant's legal practitioner (who is not a police officer) came by those documents. Copies of those documents were used to cross – examine the investigating

officer at the bail hearing. He was reluctant to comment thereon because he took the view that the documents raised issues for the trial proper. In disposing of the bail application, the learned magistrate shared the same view. She had perused those documents as they were attached to the third appellant's closing submissions relative to the bail application. I have also seen them. What is critical is that the third appellant also interfered with the investigations by uplifting critical documentation and placing the same in the hands of his legal practitioners. As observed by the learned Magistrate, it could not be ruled out that those documents had been tampered with to suit the appellants' cause.

12) Given the foregoing background of interference with investigations by the first and third appellants, I do not see anything outrageous in the learned Magistrate's finding that, if admitted to bail, all the appellants will team up, connive and, in paraphrase, go into overdrive in interfering with investigations. The attempt to conceal the documents eventually recovered in the first appellant's office, had it succeeded, would have benefitted all three appellants. The once upon a time disappearance of the other documents which eventually surfaced in the hands of the third appellant's legal practitioner was no doubt designed to benefit all three appellants. The allegations as set out in the annexure to the Request for Remand Form speak to all the appellants (together with Murerwa) as having connived in the commission of the offence. In light of all this, there can be neither misdirection, irregularity, improper exercise of discretion nor merit in the submission that the learned Magistrate's finding that if admitted to bail pending trial there was a likelihood that the appellants will interfere with investigations and State witnesses was outrageous.

13) The third ground of appeal ascribes error on the part of the Court a quo in finding that the appellants' defences were not plausible. They said their defence was predicated on an exemption letter from the PRAZ. The learned Magistrate took the view that a reading of that letter discloses that in so far as lights refurbishment was concerned, PRAZ did not exempt City of Harare from adhering to general public procurement requirements, in particular the need to adhere to the law on tender procedures. I have seen that exemption letter. It indeed is completely silent on the tender relating to street lights refurbishment. The specific works exempted from adherence to public tender procedures are listed therein. The learned Magistrate did not err in finding that the

appellants' defences were not plausible. That finding had a bearing on the Court's view of the apparent strength of the case for the prosecution and its place in the likelihood or otherwise of the appellants standing trial if admitted to bail.

14) The first appellant sat on the City of Harare Tender Evaluation Committee as the Principal Buyer. His role on that Committee was to determine the correct procurement method to be followed. He did not, at the initial bail hearing, deny that tender procedures were not followed in recommending that Juluka be awarded the street lights tender. The record shows that Juluka did not qualify under the tender requirements. Indeed, it had been, earlier, disqualified by the same Committee. The first appellant's reliance on the exemption having been found not to be a plausible defence, the Court a quo was on firm ground in finding that the prosecution has a strong case against him.

15) The second appellant was employed by the City of Harare as the Principal Accountant, but sat on the Tender Evaluation Committee on appointment by Murerwa. His responsibility was to review the bids against the requirements set out in the invitation to tender documents. He was required to check the financial capacity of bidders and to make sure that a bidder had certified audited financial statements. The bidder had to furnish an audit report. Juluka met none of these requirements. Previously, Juluka had been one of the six companies disqualified from the tender process by the same Committee. Its status was found to be irregular. It drew the following comments from the Committee:

> "Juluka provided a set of financial statements for years 2022 and 2023. Only the statement for 2023 was stamped by purported Auditors. The purported Audited Statements did not have opinions from the purported Auditors. The financial statement for the joint venture also did not have an opinion. Ultimately, the bidder cannot be considered for award."

The second appellant had thus previously disqualified Juluka on this basis. There is nothing on record suggesting that when the second appellant, just like the first and the third, recommended that Juluka be awarded the street lights refurbishment tender that company had regularized its financials. The second appellant's defence that all he did was above board was thus properly found to be implausible.

16) The third appellant was employed by the City of Harare as an Engineering Technician at the material time. He sat on the Committee on appointment by Murerwa. He was the engineering expert on that Committee. The allegations are that he recommended the

award of the street lights refurbishment tender to Juluka without following proper procedures. He had to be satisfied that the said company was capable of refurbishing the street lights on the capital City's roads before recommending that it be awarded the tender. In other words, he had to be satisfied that Juluka had a track record of having successfully performed work of the same nature and magnitude that it was bidding to do for City of Harare. His defence was that, going by the pictures attached by Juluka to its documents, he was convinced that it was capable. The investigating officer testified that, being an engineering expert, the third appellant should have gone beyond the pictures. It seems to me that the witness was alluding to the need by the third appellant to have put his finger on actual work done by Juluka and references for purposes of verification. The learned Magistrate cannot be faulted for formulating the opinion that the third appellant's defence was also implausible.

17) While observing that a bail application is not a trial, the Court was mindful of the significance of a plausible defence in assessing the apparent strength of the case for the prosecution, the prospect of conviction and the likelihood of abscondment if appellants are admitted to bail. It was guided by the sentiments expressed in S v Nyengera HB 7/15. The Court also adverted to the likely sentence in the event of conviction and its impact on the chances of the appellants standing trial if liberated in the interim. These were relevant considerations, taken together with the seriousness of the offence among other factors set out in s 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

18) Finally, the appellants complain that the court a quo found that this was not a suitable case for admission to bail on conditions. That Court did consider the issue of conditions and was satisfied that no amount of conditions would allay fears of interference with witnesses and investigations as well as abscondment. I consider that the learned Magistrate, exercising a discretion in that regard, gave sound reasons for finding as she did. Considering the evidence and finding of the Court a quo on interference, I would have concluded as she did had l been in her position. We are in the digital era. Simply ordering the appellants not to interfere with investigations and witnesses and barring them from appearing at their places of work would surely not have sufficed. There was evidence from the investigating officer, which was not disputed, that he was inundated with calls from third parties to exercise leniency pursuant to his arrest of the appellants.

This speaks to interference by the appellants through third parties. Thus, the appellants do not need to be at Town House to interfere with witnesses and investigations. They are not limited to direct interference.

19) As for conditions to curtail abscondment, none offered security in the form of immovable property. None disclosed whether they own immovable property in this country. All were legally represented a quo. They did not disclose whether they are holders of passports. Conditions virtually transforming the appellants into frequent visitors at police stations by dint of the nature of such reporting conditions would not have safeguarded the interests of the administration of justice. The paramount interests are that the appellants must not only desist from interfering with witnesses and investigations but must stand trial. See *S* v *Fourie* 1973 (1) SA 100.

20) The charge is grave. The case for the prosecution appears to be so strong that there is a real prospect of the appellants being convicted. If that eventuates, the appellants are likely to receive stiff custodial sentences. The Legislature has provided a penalty of a fine not exceeding level 13 or imprisonment for a period not exceeding 15 years or both, for this offence. *S* v *Gomba and Ors* HH 391/23 illustrates the current sentencing range for a contravention of s 147 of the Criminal Law Code. In that matter the accused were each sentenced to 8 years imprisonment of which 2 years were suspended on the usual conditions of good behaviour. The sentence imposed on each accused was upheld on appeal. While it is correct that an appropriate sentence varies from case to case, I observe that the real fear of conviction and lengthy incarceration convinced the learned Magistrate that the present is not a suitable case for admittance to bail on conditions. She took this in tandem with the real likelihood of interference. The appeal is meritless.

21) In the result, the appeal be and is dismissed.

**CHIKOWERO J**: .....

*M D Hungwe Attorneys at Law*, appellants' legal practitioners
*The National Prosecuting Authority*, respondent's legal practitioners