HOPEWELL CHIN'ONO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 4 February, 2021 & 11 February, 2021

Application for alteration bail conditions: s 126 of the Criminal Procedure & Evidence Act, [*Chapter 9:07*]

D. Coltart, for the applicant
E. Makoto, for the respondent

CHITAPI J: The applicant was granted bail by myself on application filed under case number B1359/20. The bail was granted on 2 September, 2020. The applicant faces charges of incitement to commit public violence as defined in s 187 (1) (a) as read with s 36(1) (a) and s 36 (a) (b) of the Criminal Law (Codification and Reform) Act. The details of the bail orders which I granted were as follows:

> "IT IS ORDERED THAT:
> 1. Accused is granted bail on the following conditions:-
> 1.1. The conditions of bail imposed on accused in case number CRB ACC 77/2020 shall apply in this order.
> 1.2 Additionally the accused is to pay the sum of $20 000 to the clerk of court Harare Magistrates Court as additional recognizance."

After being granted bail, the applicant was arrested on 3 November, 2020 on a different charge of Defeating or Obstructing the course of justice as defined in s 184 (1) (c) of the Criminal Law Codification and Reform Act. [*Chapter: 9:23*]. The applicant was admitted to bail under case number B1941/20 in terms of which the conditions imposed in case no. B1359/20 would apply to that case. The applicant was again arrested on false statements prejudicial to the state as defined in s 31 (a) (iii) of the Criminal Law [Codification and Reform] Act, [*Chapter 9:23*]. He was granted bail by this court in case no. B95/21 on 27 January, 2021. The applicant was ordered to abide by the same conditions imposed in case no. B1395/20. In addition, the applicant was ordered to deposit a further $20 000.00 as bail deposit.

The sum effect of the above background is that the bail conditions imposed in the first case B1359/20 have been carried over to apply to the subsequent two cases on which the

applicant is on remand pending trial. As part of the background facts, the applicant applied for a temporary release of his passport for purposes of receiving medical attention in South Africa. This court granted the application on 15 December, 2021. The applicant's passport was released to him for a period of 21 days. During that period the applicant's reporting conditions were suspended. The applicant duly travelled to South Africa and upon his return, he surrendered the passport back to the Clerk of Court.

In this application, the applicant prays for the complete removal of reporting conditions imposed in case no. B1359/20. It must be noted that if the application succeeds, it will be implicit in the order that the applicant would not be required to report to the Police in relation to the two subsequent cases B1941/20 and B95/21 where bail was granted with conditions imposed in case number B1359/20 being exported to also apply to the two cases. The respondent opposes the application.

The applicant is required to report twice a week at Highlands Police Station on Mondays and Fridays between 06:00 hours and 1800 hours. The applicants main ground for seeking the removal of reporting conditions is health based. He submitted that he stood at risk of contracting COVID 19 virus and dying from it if the number of visits he has to make to Highlands Police Station to report as part of the bail conditions is not removed. He averred the COVID 19 infections cases had increased compared to September 2020 when bail was first granted. He attached data from the Ministry of Health which showed that at the time that bail was initially granted in September, 2020, the reported new COVID cases were 1201 in number with 25 death resulting therefrom. By contrast the data which he produced showed that in January, 2021, there were 19512 new cases recorded and 854 COVID deaths. The respondent counsel did not dispute the statistical data produced by the applicant. Respondents' counsel instead submitted that the applicant did not raise the issue in case no. B95/21 which was determined a week before this application. Counsel submitted that the applicant was estopped from relying on this ground for relief because it was not a new fact nor a changed circumstance to warrant the visitation of the bail order and alteration of the bail conditions.

The respondents counsel submitted further that although the increase in COVID 19 cases was a given fact which saw the Government imposing a level four lockdown it was in the interests of justice for the applicant to continue to report as ordered twice a week because the applicant faces several charges before the court making reporting necessary in the

interests of justice. *Mr Makoto* also submitted that upon being charged with an offence and placed on remand, the applicant forfeited many of his rights. He did not list the rights which were forfeited. He submitted that the applicant had to be treated like "other similarly placed accused persons…." The submission was made as a general proposition without supporting facts. There was no case of a similarlily treated applicant facing the same circumstances as the applicant. A general proposition of law which is hollow and not applied to facts is not helpful to a party because it remains just a proposition and without application it is irrelevant. Where a proposition relates to a comparison of accused persons for purposes of equal treatment before the court, sufficient details of the similarities or differences must be specifically pleaded. A judicial officer determines a matter by applying the law to proven or established facts. The burden upon the respondent on this point was to place such facts before the court as demonstrated the similarities of the applicant's circumstances with those of other persons in similar positions and to then make the legal proposition and relate it to proven facts. This was not done. The proposition therefore lacked supporting facts.

The applicant attached in support of his application, a letter dated 2 February, 2021. The letter was written by a consultant specialist Physician, Dr Nyasha Maboreke. The contents thereof read as follows:-

> "Re Medical report for Hopewell Rugoho-Chin'ono. Hopewell is under my care as you might be aware and I reviewed him yesterday.
>
> He has dyslipi deamia, worsening pre-diabetes and he remains slightly overweight despite the recent loss of weight experience following his recent jail time.
>
> His overall cardiovascular and irretabilic risk remains high for picking COVID -19 I strongly recommend that he adheres to the strict WHO guidelines of preventing infection: social distancing, sanitization and masking up.
>
> I therefore recommend limiting unnecessary and non-priority human contact."

In commenting on the letter, respondents' counsel submitted that it was not necessary to alter or reduce the reporting conditions because the applicant only needed to put on his mask, sanitize and keep social distance "as recommended by Dr Nyasha Maboreke in his letter". During the making of oral submissions before me, I drew the attention of *Mr Makoto* to the need to read the whole letter and not just cherry pick a part which supported his argument. The doctor stated that the applicant had dyslipi daemia which is a condition defined by abnormal levels of cholesterol in the blood. Of importance was the doctor's comment that the applicants' cardio vascular and metabolic risks remained too high for picking COVID -19. The doctor

recommended limiting unnecessary and non-priority human contact. *Mr Makoto* whilst conceding that the doctor had recommended limiting human contact nonetheless persisted in his argument that it was not in the interests of justice to dispense with reporting conditions. When I sought *Mr Makoto'*s input on whether consideration had been given to a reduction in the reporting frequency as opposed to a total removal, *Mr Makoto* submitted that if I was persuaded to alter the reporting conditions, they should not be completely dispensed with. *Mr Coltart* then submitted that the applicant was persisting in a total removal of reporting conditions but would be prepaid to increase the bail deposit by a further $5000.00. He submitted that if account is had to the fact that the applicant surrendered title deeds to his dwelling house, the state holds sufficient surety and the applicant would be the loser were he to abscond trial.

An application for alteration of bail conditions as provided for in s 126 of the Criminal Procedure and Evidence may be made by the accused who is on bail or by the State. The application is not based upon proof by the applicant of the existence of changed circumstances as envisaged in the provisos to s 116 (c) (iii) and 123 (1) (b) 9ii) of the Criminal Procedure and Evidence Act, [Chapter 9:07]. Those provisos provide that where the judge or magistrate has dismissed an application for bail pending trial or bail pending appeal as the case may be, any subsequent or follow up application may only be entertained where the applicant pleads and establishes facts which were not pleaded in the first application. The facts must not have been in existence when the first application was dismissed. The facts must have arisen or been discovered after the initial determination.

By contrast, the provisions of s 126 on which this application is based provide for the power of the judge or magistrate who has granted an accused person bail where he or she is of the opinion that it is "necessary or admissible in the interests of justice that conditions of recognizance entered into by the person should be altered or added to or that that person be committed to prison .." to make an order as deemed fit or appropriate. The powers aforesaid can be exercised by any other judge or magistrate if the one who dealt with the initial application is not available. Proviso (ii) to subs 1 of s 126 is important. It provides as follows:

> "(ii) A judge or magistrate shall not act in terms of this subsection unless facts which were not before the judge or magistrate who granted bail are brought to his attention."

There are therefore distinctive factors between the proviso 116 (c) (iii) and 123 (1) (b) (ii) and proviso 126 (1) (ii) of the Criminal Procedure and Evidence. Proviso's 116 (c) (iii)

and 123 (1) (b) (ii) are limited in scope because they regulate the making of follow up bail applications where the initial application was refused by providing that a follow up application should be "based on facts which were not placed before the judge or magistrate who determined the previous application and which have arisen or been discovered after that determination." Therefore not only should facts relied upon not have been placed before the judge or magistrate but additionally, such facts must have arisen or been discovered after the determination to refuse bail.

The provisions of the proviso 126 (1) (ii) are much wider in scope than the proviso 116 (c) (iii) and 123 (1) (b) (ii). The applicant, be it the accused person or the State may allege any facts relevant to bail which were not placed before the judge or magistrate who granted the bail. The facts do need not to have arisen or been discovered after the initial determination. It sufficient that the facts were not placed before the judge or magistrate. The timing of when the facts arose is not a relevant consideration. The facts may be personal to the applicant or they may relate to the circumstances surrounding the allegations on which the applicant was placed on remand or any other relevant fact. It is therefore wrong to refer to the application made in terms of s 126 as an application based on changed circumstances in the same manner as an application based on the provisos 116 (c) (iii) and 123 (1) (ii). In short an application under s 126 will be incompetent if it is based on facts which were pleaded in the first application when bail was granted. The application will be competent where it is based on facts not pleaded in the first application irrespective of whether the unpleaded facts were in existence or not.

In *casu*, when the initial application B 1359/20 was determined, the existence of COVID-19 was already a known public menace or pandemic. The figures of infected persons was however not as high as now pleaded by the applicant. There has been a spiral in numbers of infected persons and new infections. The Executive was forced as a control measure to arrest the incidence of and localize new infections, to impose a level four lockdown on 2 January 2021 by Statutory Instrument No. 10/2021. Amongst other measures imposed under the lockdown is the limitation of gatherings to not more than two persons. The lockdown regulations aim to limit human traffic unless the person has absolute need to move from home to do errands like purchasing food, medicines and limited exercises among other exemptions. Only declared essential services continue to be exempt but even then the essential service is required to strictly observe safety measures and WHO guidelines. It is

therefore a new fact which was not before the judge, that the level four lockdown S.I 10/2021 had not been enacted. The effects of new COVID-19 and increased numbers of new infections and deaths were not placed before the judge. These are new facts which make the application a competent one to be determined on the merits.

The only issue which remains to be determined is whether or not it is "necessary or advisable in the interests of justice" to alter the reporting conditions by scrapping them totally. The issue to be addressed is the advisability of the courts to be covid spread conscious when dealing with a bail application or review of an existing bail order. The judiciary is an organ of Government. Courts should not grant orders which defeat government policy as may be contained in an existing law. Courts must in my view play a positive role in the prevention of the risk of COVID-19 spread. The judiciary is however bound by the Constitution and the law which must be applied impartially without fear or favour. There is however scope for the judicial officer to tinker round with the application of the law where the judicial officer is given a discretion in decision making. Section 126 is an example of a law which gives the judge or magistrate the discretion to alter or vary bail conditions including recalling the bail.

The gravamen of s 126 is that whatever opinion the judge or magistrate forms and whatever he or she consideres necessary or advisable to do whether to vary, add or recall the bail and commit the accused who is on bail to prison, the interests of justice is the determinant factor. In the case of *Bilal* v *Attorney General* HH 105/11 the applicant who was on bail on a fraud charge involving US$1000 000.00 made an application for alteration of bail conditions on humanitarian grounds to visit his wife who was reportedly ill with cancer and heart problems for which a heart transplant was required. The medical reports to evidence the wife conditions which the applicant produced were not properly authenticated in terms of High Court Rules rendering them inadmissible. It was held in that case that the interests of justice was the main determinant. It was further held that humanitarian considerations as raised by the applicant had no basis in law as a ground for alteration of bail conditions and that such considerations do not serve the interest of justice. The view was expressed in the judgment that moral or humanitarian considerations had no place in the bail jurisprudence and that every accused who is denied bail will invariably have a moral or humanitarian crisis or challenge.

I am in agreement with the views expressed in the quoted judgment. Section 117 (4) of the Criminal Procedure & Evidence Act provides that the court determining a bail application pending trial "… shall decide the matter by weighing the interests of justice against the

right of the accused to his or her personal freedom and the prejudice he or she is likely to suffer if he or she were detained in custody…" The focus is on the accused and not third parties.

Various factors are listed as considerations to be interrogated in deciding whether or not to grant or refuse the accused bail. The relevance of my reference to the provisions of s 117 (4) lies in appreciating that as regards bail jurisprudence the interests of justice are determined by balancing the rights of the accused to his or her freedom, pre-trial taking into consideration the presumption of innocence until proven guilty and the need to safeguard the due administration of justice. The balance between the two cannot be achieved upon a consideration only of moral and humanitarian considerations. In *casu*, the applicant also based the application on his state of health which again was an issue not controverted by the State.

In my view, the extent of COVID-19 infections, the imposition of a COVID-19 level four lockdown, the need to minimize human contact to avoid the virus spread, a consideration of the uncontroverted report of the applicant's doctor recommending barest of human contact on the part of the applicant, the applicant's past history of religiously abiding conditions albeit his being arrested twice in the interim and granted bail nonetheless, it is clear that the applicant does not harbour an intention to abscond as he has had ample opportunity to do so including when he travelled to South Africa and returned are factors which favour the alteration of bail reporting conditions to minimize human contact and in turn help the Executive to implement the lockdowns aims of limiting human traffic and arrest COVID-19 spread.

The applicant has prayed for the total removal of reporting conditions. I would have considered such request to be reasonable but for the fact that after I granted the applicant bail, he was subsequently arrested on to separate occasions. He was granted bail by the High Court in the two cases. Even accepting as I must that the applicant is presumed innocent until proven guilty. I must hold that the applicant is properly on remand on allegations of having committed those offences. There remains need for the applicant's presence within the jurisdiction to be monitored by retaining limited or reduced reporting conditions. I have also considered that the order I make automatically applies to the two subsequent cases aforesaid since bail conditions in those cases are the same as granted in case No. B 1359/20. The applicant faces three charges and the interests of justice require that bail conditions should reflect the seriousness of the cases which the applicant is facing. I am persuaded to accept

that the totality of the facts alleged justify an alteration of bail conditions. The complete removal of reporting conditions are not in the interests of justice.

The following order reached in the exercise of my discretion will be in the interest of justice:

IT IS ORDERED THAT

1. Condition No. 3.6 imposed in case No. CRB 6801/20 Ref ACC 77/20 granted on 2 September 2020 in case No. CRB 1359/20 wherein the applicant is required to report to Highlands Police Station every Mondays and Fridays between 6 a.m. and 6 p.m. is altered to read that:
   "3.6" – The applicant shall report at Highlands Police Station once fortnightly on Fridays between 0600 hours and 1800 hours
2. The applicant shall make an additional deposit of ZW$10 000.00 to the ZW$10 000.00 ordered in case No. B 1359/20.
3. The bail orders granted in case No. B 1941/20 Ref ACC 235/20 and B 95/21 Ref ACC 353/20 remain subject to the altered conditions aforesaid and no additional recognisances are required to be made in regard thereto.

Mtetwa & Nyambirai, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners