

TUNGAMIRAI NYENGERA

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 9 JANUARY AND 15 JANUARY 2015

Mr M. Ncube for the applicant
Mr T. Makoni for the respondent

Bail Application

MAKONESE J: The Applicant is a legal practitioner employed at a law firm in Bulawayo. He is aged 36. He was arraigned before the Magistrates' Court on charges of contravening section 136 and 184 (1) (e) of the Criminal Law (Codification and Reform) Act. It is alleged by the state that the Applicant and his co-accused, one Absolom Hlupo, a prison officer based at Khami Maximum Prison, connived to generate a fraudulent warrant of liberation to secure the release of a convicted prisoner.

The Applicant and his co-accused appeared before a magistrate sitting at Tredgold magistrates' court and applied for bail pending trial. The application for bail was refused on the following grounds:

- (a) the applicant is facing serious charges
- (b) the applicant faces charges which brings his profession (the legal profession) and the justice delivery system into disrepute.
- (c) the offences involve numerous individuals working as a syndicate to issue warrants of liberation.
- (d) if convicted the applicant faces a term of imprisonment and this will be an inducement to abscond.

The applicant has appealed against the refusal to grant bail on the grounds that the court *a quo* erred by finding that the Applicant was a flight risk in that there was no indication that the Applicant had any inclination to abscond. Further, the Applicant avers that the court grossly misdirected itself by making findings which were not supported by evidence placed before the

court. In addition the Applicant argues that the court failed to consider that whatever the States' fears were in regard to the Applicant's ability to stand trial, such could be safeguarded by the imposition of appropriate bail conditions. The Applicant contends that the seriousness of the offence in itself is not a sufficient ground to deny bail.

I will deal with each of the grounds for refusal of bail in turn:-

Applicant faces serious charges

There can be doubt that the allegations against the Applicant are fairly serious. The Applicant who is a legal practitioner is alleged to have been involved in an attempt to secure the release of a convicted prisoner by the use of a forged and fake Warrant of Liberation. The offence came to light when an alert prison officer at Khami observed an irregularity on the Warrant of Liberation. The Applicant denies the allegations and boldly avers that he knows nothing about the offence. It is settled law that the seriousness of an offence on its own is not a good ground for the refusal of bail pending trial. However it must be pointed out that the seriousness of an offence has a direct bearing on the application for bail with the likelihood of a severe prison term being imposed in the event that the State secures a conviction being an inducement to abscond. The seriousness of an offence, should in my view not be taken in isolation but must be considered together with the strength of the state case. Where the charge is serious and the state case is strong, the Applicant in a bail application may be induced to abscond to avoid a lengthy prison sentence.

See the case of *State v Biti* 2002 (1) 115 at page 118. In the circumstances of this matter I will take into consideration the seriousness of the offence.

The court misdirected itself by making findings not supported by evidence.

The argument has been made on behalf of the Applicant that the Applicant is presumed innocent until he is proven guilty in a court of law of competent jurisdiction. It has been argued that there is no evidence before the court to show that the Applicant may abscond if granted bail pending trial. While it is trite that the liberty of an individual must not be lightly interfered with, it is also important to safeguard the interests of justice by ensuring that suspects stand trial. What is most disconcerting about the allegations in this matter is that the Applicant, who is a legal practitioner,

sought to subvert justice by securing the release of a convicted and a serving prisoner. If the allegations are proved the Applicant will most likely face a prison sentence. The inducement to abscond lies in the fact that apart from the Applicant's bare denial of the allegations, the Applicant has not proffered any meaningful defence to the allegations. At the hearing of this matter I quizzed *Mr Ncube*, appearing for the Applicant and he seemed to suggest that the allegations are a mere fabrication. While an application for bail is not a trial on the merits of the case itself, an Applicant must and should take the court into its confidence by at least raising some plausible defence to the charge. I therefore do not agree that there was a misdirection on the part of the Magistrate in the court *a quo*.

The court failed to consider that whatever the state's fears were these could be dealt with by imposition of appropriate conditions

The imposition of appropriate bail conditions is always a factor to be given careful consideration. In circumstances where the court considers that the due administration of justice will not be endangered, the court may, impose appropriate reporting conditions. Bail is penal in nature and the court must always lean in favour of the granting of bail wherever possible. In this regard, it was stated as follows in *Attorney General v Phiri* 1987 (2) ZLR 33 (H), at page 39:

“The test in my view, should be one of deciding whether or not there is a real danger, or a reasonable possibility that the due administration of justice will be prejudiced if the accused is admitted to bail---.”

In all the circumstances of this case, I cannot find any misdirection on the part of the court *a quo* in dismissing the Applicant's application for bail. The court exercised its judicial discretion and in the absence of a misdirection, the court must not interfere with the court's findings. I must, however highlight the fact the reasons given by the court *a quo* for the denial of bail ought to be taken together and not in isolation.

In the result, the appeal against the refusal of bail by the magistrate in the court *a quo* is hereby dismissed.

Messrs Cheda and Partners ' applicant's legal practitioners
National Prosecuting Authority's Office, respondent's legal practitioners