ROBSON CHERE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 7 October & 10 October 2022

Bail application

D Coltart, for the applicant
CT Mutimusakwa, for the respondent

MUREMBA J: This is an application for a variation of bail conditions.

Background

The applicant is facing a charge of murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:27*]. It is alleged that on 11 June 2016 at night the applicant and his accomplices were drinking beer with the now deceased Roy Issa at Cresta Jameson Hotel, Harare in room 712 that was booked by one Obert Masaraure in the 7th floor. A misunderstanding arose amongst them. The applicant and his accomplices assaulted the now deceased to death. They then lied that the deceased had died as a result of jumping from the balcony of room 712 to the ground. The pathologist who examined the remains of the deceased concluded that death was due to brain damage, compound skull fracture and head trauma. He further remarked that "police to investigate".

An inquest into the death of the deceased was conducted in 2016. The applicant even testified as one of the witnesses. It was only in May of 2022 that a decision to charge the applicant and his accomplices with murder was made. The first person to be arrested was Obert Masaraure. He was arrested in mid-June of 2022 and was placed on remand.

In June 2022 the police went to the applicant's place of residence in Acturus looking for him, but were told that he was no longer residing there. They later learnt from the applicant's Facebook page that he was in the United States of America (the USA). Apparently when the applicant was in the USA, he learnt that his friend Obert Masaraure had been arrested in connection

with the murder of the deceased. It was being alleged that Masaraure's accomplices had fled upon learning of his arrest. The applicant suspected that he could be one of the alleged accomplices since he had testified at the inquest. Whilst still in the USA he made efforts through his lawyers to inquire from the police, CID Homicide and the Law and Order sections as to whether he was a suspect in the matter. However, the police asked the applicant to present himself at the police station. The applicant returned to Zimbabwe on 29 June 2022 and on 5 July 2022 he presented himself to the police in the company of his lawyers. He was arrested and taken to the Magistrates Court where he was placed on remand on 7 July 2022. He approached this court and applied for bail pending trial which was granted by consent on 13 July 2022. One of the applicant's bail conditions was that he was to deposit with the Clerk of Court at Harare Magistrates Court, his passport.

The application

The applicant is seeking a temporary release of his passport. He needs to travel outside of Zimbabwe to South Africa in connection with his work as the National Secretary General of the Amalgamated Rural Teachers Union of Zimbabwe. He was invited to attend the second ASM Baraza which was organized by the Wits Business School's Centre on African Philanthropy and Social Investment. A copy of the invitation letter was attached to the application. The order that the applicant is seeking is as follows.

> "1. The applicant's passport held by the Clerk of Court, Harare, be released to him upon the granting of this order.
> 2. The applicant be and is hereby authorized to travel to South Africa from the 11th of October to the 15th of October 2022, provided that he returns to Zimbabwe immediately thereafter.
> 3. The applicant shall deposit his passport with the Clerk of Court, Harare Magistrates Court at his next remand appearance scheduled for 1st November 2022."

It is the applicant's averment that he has already demonstrated that he is not a flight risk and intends to stand trial. The fact that he travelled from the United States of America to this jurisdiction on 29 June 2022 before his arrest is enough proof. It is averred that if he was a flight risk he would have absconded from the jurisdiction of this court at that stage.

It is averred that the application is made in terms of s 126(1) of the Criminal Procedure and Evidence Act [*Chapter 9:23*] (the CPEA) as read with s 66 of the Constitution of Zimbabwe, 2013 which provides for freedom of movement and s 64 which provides for freedom of profession, trade or occupation and s 65 which provides for labour rights.

Section 126(1) of the Criminal Procedure and Evidence Act [*Chapter 9:23*] provides that a judge may alter an accused person's bail conditions "if he is of the opinion that it is necessary or advisable in the interests of justice". The following averments were made in support of the present application. It is in the interests of justice for the applicant's passport to be returned to him temporarily to allow him to travel. This is because s 66 of the Constitution accords every Zimbabwean a right to a passport and to leave Zimbabwe. Whilst the right is not absolute, the limitation of the right should be reasonable. In the circumstances to deny the applicant his passport in order to travel for an important work-related meeting would not be a reasonable limitation. In terms of s 64 of the Constitution, every person has the right to choose and carry on any profession, trade or occupation. The applicant chose a profession as a teacher and also as a trade unionist. The profession involves continued capacity building. This may be done through seminars such as the one the applicant has been invited to. In terms of s 65(2) of the Constitution, every person has the right to form and join a trade union of their choice and to participate in the lawful activities of that union. The applicant's participation in the seminar to which he has been invited is part of the lawful activities of the union which he chose to join. The release of the applicant's passport will not prejudice the administration of justice. The applicant's dates of travel do not interfere with his reporting conditions set for the last Friday of each month. The applicant has no reason not to come back as he considers the charges against him to be extremely weak.

The State filed its response to the application indicating that it was not opposed to the relief being sought as the applicant had been adhering to his bail conditions. It was averred that there is no prejudice if the applicant is temporarily given his passport to enable him to travel.

I had reservations with the State's concession considering that the accused is now formally charged with a serious charge which attracts severe punishments such as the death penalty, life imprisonment or a long term of imprisonment in the event of a conviction. When this court granted the applicant bail on 13 July 2022, it was alive to this issue. This is the reason why it granted the applicant bail on condition he, amongst other things, surrendered his passport to the clerk of court

even though the applicant had returned to Zimbabwe and surrendered himself to the police when he suspected that he might be wanted by the police. If this court had decided that he was not a flight risk simply because he had travelled back from the USA before he was arrested, then it would not have ordered him to surrender his passport. It would have allowed him to keep his passport to enable him to travel in and out of the country as he pleases because he is trustworthy and not a flight risk. The fact that the surrendering of the passport was put as one of the bail conditions means that despite the applicant's cooperative conduct with the police prior to his arrest, the court harboured the fear that the applicant could still be tempted to abscond trial. I also took note that in the initial bail application the applicant is the one who offered to surrender his passport to the court as an assurance that he would stand trial. If he believed or knew that he was not a flight risk, why did he offer to surrender his passport then?

What was apparent from the State's response was that the State had not sought the views of the investigating officer on the application for variation.

It must be understood that whilst the right to bail is constitutionally provided in s 50 (1) (d), the right is not absolute. If there are compelling reasons for the court not to grant the accused bail, the right can be denied. S 50 (1) (d) of the Constitution reads,

> "Any person who is arrested must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention."

What is considered as compelling reasons for denying an accused person bail are the grounds that are listed in s 117 (2) of the CPEA. These are:

i. Whether the accused will stand trial.
ii. Whether the accused will attempt to influence or intimidate witnesses or conceal or destroy evidence.
iii. Whether the accused's release will undermine or jeopardise the objectives or proper functioning of the criminal system including the bail system.
iv. Whether the accused if released on bail will endanger the safety of the public or any particular person or will commit any offence referred to in the first schedule.
v. In exceptional circumstances, whether there is likelihood that the release of the accused will disturb the public order or undermine public peace or security

The CPEA makes it clear that the grant of bail is subject to the interests of justice. See s 117 (1) of the CPEA. If one or more of the grounds in s 117(2) are established, the refusal to grant bail shall be in the interests of justice. It is on this basis that it has been said times without number

in a plethora of cases that bail is about striking a balance between the interests of the accused or the liberty of the accused and the proper administration of justice. See *S* v *Kavaro & Ors* HMA 14-21; *Shamu v The State* HMA 18-21; *S v Mwonzora* & Ors HH 72-11 and *S v Ndlovu* 2001(2) ZLR 261(H). If the admission of the accused to bail will jeopardise the proper administration of justice, bail must be denied. What this means is that the interests of the administration of justice take precedence over the right to bail. L. Zuma has said when an accused is granted bail, he or she will be entering into a contract in which he or she is set at liberty upon giving an undertaking to comply with the conditions relating to his or her release. See L. Zuma "Lecture notes 1 – Bail." Accessed on 8 October 2022.*https://www.studocu.com/en-za/document/university-of-kwazulu-natal/criminal -procedure/bail-lecture-notes-1/12077353*. In *casu* when the applicant was granted bail on 13 July 2022, he entered into a contract in which he was set at liberty upon giving an undertaking to comply with the conditions relating to his release. One of the conditions was that he would surrender his passport. This condition is set to ensure that the accused stands trial. It is a requirement of the proper administration of justice that the accused stands trial. If there is any cognizable indication that the accused will not stand trial if released on bail, the court will serve the needs of justice by refusing to grant bail. See *Makamba* v *The State* SC 30-04 @ p 4 and *State* v *Fourie* 1973 (1) SA 100 @ 101.

The law on bail does not change when an accused then approaches the court seeking a variation of the bail conditions. The interests of justice continue to take precedence. If there is a likelihood that the interests of justice may be prejudiced by a variation of the bail conditions, the variation should be denied. Section 126(1) of the CPEA which is the provision which provides for alteration of bail conditions makes this position clear. It reads:

> Any judge or magistrate who has granted bail to a person in terms of this Part may, if he is of the opinion that it is necessary or advisable in the interests of justice that the conditions of a recognizance entered into by that person should be altered or added to or that that person should be committed to prison, order that the said conditions be altered or added to or commit the person to prison, as the case may be.

The provision shows that judicial officers consider variation applications using the same principle of balancing the accused's interests and the interests of the administration of justice. See also *Bilal* v *A.G* HH -105-11 wherein it was held that in terms of s 126 (1) of the CPEA conditions of recognizance can only be altered or added to if necessary or advisable in the interests of justice. *In casu* the applicant was ordered to surrender his passport. The reason was to ensure that he

stands trial by restricting his movement outside the borders of this country. However, in less than two months after being granted bail on condition he surrendered his passport, the applicant filed the present application for the temporary release of the same passport. The argument which is now being advanced is that the applicant has the rights to a passport and to leave Zimbabwe. He has the right to choose and carry on any profession, trade or occupation. He has the right to form and join a trade union of his choice and to participate in the lawful activities of that union. The limitation of these rights should be reasonable. To deny the applicant his passport in order to travel for an important work-related meeting would not be a reasonable limitation. The applicant's participation in the seminar to which he has been invited is part of the lawful activities of the union which he chose to join. The release of the applicant's passport will not prejudice the administration of justice as his dates of travel do not interfere with his reporting conditions. The applicant has no reason not to come back as he considers the charges against him to be extremely weak.

I do acknowledge that the applicant is entitled to all the rights enumerated above. I am particularly happy that the applicant's counsel acknowledged that all these rights are not absolute and that they cannot be enjoyed at the expense of the interests of the administration of justice. Let me hasten to point out that when the applicant made his initial application for bail, he was aware that he was entitled to all these rights. However, despite that, he is the one who volunteered in his application to surrender his passport to the court. Obviously, he wanted to give an assurance that he would stand trial. He did this despite knowing that his duties as a trade unionist involve travelling outside the country. When he was arrested, he had just returned from the USA on trade union business. This means that when the applicant made his application for bail, he was willing to forgo having his passport, travelling outside the country and participating in the activities of the trade union outside the country. This was despite the fact that he knew then that the State case was weak. This means that the applicant viewed the limitation of his rights as reasonable in the interests of justice. If at that time of the initial bail application the limitation of the applicant's rights was reasonable, I do not see how the limitation of the rights is now unreasonable. Nothing has changed about the case the applicant is facing and his personal circumstances. The case is still as weak as it was on the day that he was granted bail. Since nothing has changed there is still need to ensure that the applicant stands trial and that his movement outside the country is restricted. The fact that the applicant has been invited to a seminar outside the country does not all of sudden make the

limitation of his rights unreasonable when all along the limitation was reasonable. The applicant cannot be allowed to shift goal posts as and when it suits him. When he wants his liberty, he voluntarily surrenders his passport and the limitation of his other rights that are affected by the surrendering of the passport is reasonable. After obtaining his liberty he now wants the release of his passport so that he can go back to enjoy all those rights that were taken away by the surrendering of the passport. The question is what about the main interest of justice that the applicant stands trial? If the applicant's passport is released what guarantee is there that he will stand trial and not abscond from the jurisdiction of this court? When an accused is granted bail, the agreement is that he or she will return to court to respond to the charges levelled against him or her by the State. When an additional condition is imposed for the accused to surrender his or her passport the objective is to ensure that he or she complies with the main condition of standing trial until the criminal proceedings are completed.

When an accused person then approaches the court seeking a variation of the bail conditions, he or she will obviously be seeking to have the terms of the original contract of bail varied. On that basis the accused has the onus to show that the interests of the administration of justice will not be prejudiced by the variation and that he or she will stand trial despite the variation that he or she will be seeking. This is more so if the accused is seeking the release of his or her passport because a passport enables a person to leave the country lawfully and settle in another country legally without any hassles. The accused person should therefore not simply look at his interests without considering the interests of justice when he or she files an application for variation of bail conditions. The balancing of the interests of the accused and the interests of the administration of justice continues to be of paramount importance. In *casu* I was keen to hear the view of the investigating officer and to see the applicant's passport. So, I called for the passport from the Magistrates Court. This was in view of the fact that before his arrest the applicant had been to the USA. I noticed that the applicant has a valid visa to the USA which expires on the 31st of May 2023. When the investigating officer testified he indicated that he harboured the fear that the applicant could abscond to another jurisdiction if his passport was released now that he has been formally charged with murder which is a charge which attracts a severe penalty in the event of a conviction. He said that nothing guarantees the return of the applicant once he goes to South Africa.

My concern is that with a valid visa to the USA, there is nothing to stop the applicant from proceeding there from South Africa if he so decides. This is more so when it is considered that there was no disclosure in the application for variation that the applicant has a valid visa to the USA. The question that continued to exercise my mind was what if the applicant decides to abscond to the USA or to any other country when he gets to South Africa? I did not find the submission by Mr. *Coltart* to the effect that Zimbabwe and South Africa have bilateral relations which enable the extradition of the applicant should the applicant abscond helpful for two reasons. Firstly, from South Africa the applicant can abscond to a jurisdiction which does not have an extradition treaty with Zimbabwe. Secondly, extradition procedures are generally by their nature complex and arduous. It means relying on foreign processes which this country has no control over for the arrest of the applicant. Obviously, this will delay the due administration of justice unnecessarily. The applicant's reason for wanting to travel outside the country which is to attend a trade union seminar is not a matter of life and death as there was a time when the applicant himself was willing to forego travelling outside the country, i.e. at the time he made his initial bail application. Mr. *Coltart* suggested to the investigating officer that the police could make arrangements with the South African police to monitor the applicant for the duration of his stay/meeting in South Africa. The investigating officer indicated that such an arrangement was not possible given the short notice. The applicant was due to leave on Tuesday 11 October 2022 and the application was being heard on Friday 7 October 2022. The investigating officer said that such an arrangement would need written communication at high levels between the two countries. He was not even sure of the feasibility of making such an arrangement.

It is my considered view that releasing the applicant's passport solely on his promise to return for trial is untenable. It was argued on the applicant's behalf that he ought to be trusted because it had come to his attention before his arrest that the police might be looking for him when he was in the USA. However, despite that he had travelled back home and surrendered himself to them. While the applicant should be applauded for his honest conduct before he was arrested, it should not be taken for granted that the applicant is not a flight risk. This is why when he was granted bail, the court ordered that he surrendered his passport. The court did not take the attitude that the applicant should and could be trusted solely because he had come back home and surrendered himself to the police. Besides, the applicant himself had volunteered to surrender his

passport when he filed his application for bail. He did this because he was aware that despite his good conduct before his arrest, the court still considered him a flight risk because of the serious charge he is facing. I do not see how that position has changed hardly three months down the line now that he is applying for the temporary release of his passport. If anything the applicant's circumstances have since changed for the worst from the time the applicant surrendered himself to the police. He has since been formally charged. He was incarcerated a little before being released on bail and is yet to stand trial for a very serious offence which attracts a severe punishment in the event of a conviction. It cannot be taken for granted that the applicant is not worried by all these developments. What if he is having second thoughts about the case and standing trial? A mere promise that he will return to this jurisdiction for his trial after his passport is released is not enough. The applicant needed to do more to assure the court that he will return for his trial if his passport is released.

Whilst the applicant wants his passport to be released, he has offered nothing in return for the release of the passport. He could have offered some form of security in exchange for his passport such that if he decides not to return to Zimbabwe the security may be forfeited to the State. Besides, the applicant in his draft order does not give a specific date for his return from South Africa when his meeting ends on 15 October 2022. He simply states in para 2 that he should be authorized to travel to South Africa from 11 October to 15 October 2022 provided that he returns to Zimbabwe immediately thereafter. The words 'immediately thereafter' make it uncertain when exactly the applicant will return. The failure to give the exact date when he will return to Zimbabwe makes the applicant's intentions suspicious. A person who has a pending case, let alone a very serious one such as murder would want to put the court into his confidence by being candid with it about his exact date of return. Para 3 makes things worse. It says that the applicant shall deposit his passport with the clerk of court, Harare Magistrate Court at his next remand appearance scheduled for 1 November 2022. From 15 October 2022 when the meeting ends to 1 November 2022 there is a period of two weeks. If the applicant is taking the offence that he is charged with and his bail conditions seriously, why did he not give a specific date for his return and offer to surrender his passport back to the clerk of court on the very day of his return or on the next day? Why would the applicant want to keep the passport for a further two weeks after the meeting has ended? All this makes the court suspicious of the applicant's intentions in seeking

the release of his passport. He might have been cooperative with the police and surrendered himself to them before his arrest, but the court has no way of knowing what is going on in his mind now. It could be that he wants a period of two weeks with his passport so that he can make arrangements to flee or to make good his escape to a foreign country before the legal system starts looking for him. If this is his plan, the legal system will be relaxed thinking that he will turn up for court on 1 November 2022 and surrender his passport. If he then does not turn up on the day, it will be too late to catch up with him. He would have made good his escape.

When an accused person who is on bail seeks the release of his passport, that should be seen as a red flag. The accused person might be intending to flee to a foreign jurisdiction in order to abscond trial. He or she therefore bears the onus to assure the court that he or she does not intend to flee and that the interests of justice will not be prejudiced by the release of the passport. *In casu* the applicant who is a teacher by profession and is under the employment of the Public Service Commission indicated in his application that he is on indefinite unpaid leave. However, he did not come clean with the court as to why he is on indefinite unpaid leave. This increases the applicant's chances of absconding. He has no job to rush back to.

In view of the foregoing, I am not inclined to grant the application for the temporary release of the applicant's passport to enable him to travel to South Africa to attend a trade union seminar.

In the result, it be and is hereby ordered that the application is dismissed.

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