MOSES MPOFU
and
MIKE CHIMOMBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 27 December 2024 & 16 January 2025

Application for bail pending trial

T Dzvetero for the 1st applicant
L Madhuku, GRJ Sithole & A Mugiya for the 2nd the applicant
W Mabhaudhi & L Masuku for the respondent

KWENDA J**:** This judgment deals with separate applications for bail, pending trial, filed by the applicants in terms of s117A of the Criminal Procedure and Evidence Act *[Chapter 9:07]* herein after Criminal Procedure and Evidence Act as read with 90 (4) of the High Court Rules, 2021. I heard oral submissions from the parties, in both applications, at the same sitting, with the agreement of the parties. The applicants are jointly charged in a criminal trial which is ongoing before me and two assessors and the issues raised by their applications are substantially the same. The trial is presently adjourned for continuation on the 10th February 2025.

The first applicant is Moses Mpofu, a Zimbabwean national aged 49 years. He resides at 5 Cambridge Drive, Greendale. He is a businessman. The second applicant Mike Chimombe, a Zimbabwean national who resides at 541 Helensvale Township, Borrowdale, Harare. He is a farmer and businessman.

The fraud charge emanates from the alleged use, by Blackdeck Livestock & Poultry (Pvt) Ltd (Blackdeck), of falsified documents as supporting documents, in a bid to secure a tender to supply 500 000 goats to the Ministry of Agriculture, Water, Fisheries and Rural Development for a Presidential Empowerment Scheme. The allegedly falsified documents, allegedly submitted with the bid for the purposes of meeting the requirements of the tender were, a Zimbabwe Revenue Authority Tax Clearance Certificate and a National Social Security Authority Compliance Certificate, both in the name of Blackdeck Livestock & Poultry (Pvt)

Ltd. The State alleges that the applicants connived to and did submit the falsified documents well knowing that Blackdeck Livestock & Poultry (Pvt) Ltd was not registered in terms of the laws of Zimbabwe. The State was allegedly misled into accepting the bid believing that the said Blackdeck was a juristic person and that documents submitted with a bid submitted in Blackdeck's name were genuine, culminating in the acceptance of the alleged bid and a subsequent award of the tender to Blackdeck, to the prejudice of the State and other bidders. The State counsel has listed and summarised the evidence of State witnesses who will testify that they interacted with the applicants during the tender processes that culminated in the State awarding the tender to Blackdeck Livestock & Poultry (Pvt) Ltd, which, the State alleges, was falsely characterised as a registered company. Other state witnesses will say that the applicants falsely gave out and pretended that Blackdeck Livestock & Poultry (Pvt) Ltd, had either tendered performance or performed in fulfilment of the tender and that payment was due to it, intending the State to act on such misrepresentations. Other witnesses will testify that the State disbursed the sum of US$7 712 197.00 into bank accounts provided by the applicants following such misrepresentations, to the loss and prejudice of the State

The applicants are in custody as a result of a series of juristic events. They were, initially, denied bail by a magistrate on the 16th of July 2024 when they appeared in court on the charge of fraud following their arrest in June 2024. They noted appeal against the refusal of bail on the 30th of July 2024. The appeal was set down for hearing on the 6th of August 2024 but could not be heard on that date because record of appeal containing proceedings before the magistrate was incomplete, whereupon the hearing was postponed to the 8th of August 2024 to allow applicants' counsel to attend to the record and for the State to file a response. On the date of hearing the appeal was opposed by the State both on a point of law and on the merits. On a point of law, the State placed it on record that the applicants had, on the 7th of August 2024, been served with indictment papers, to be tried on the fraud charge on the 1st of October 2024. The Registrar had been notified of the development. The State submitted that the legal implications of the indictment were, among others, that it was no longer necessary for the appeal to be heard on the merits because the outcome, even assuming it was in favour of the applicants, was not going to affect the fact that the magistrate had issued a warrant for the applicants' detention until they appeared before the trial court on the 1st October 2024. The detention was mandatory in terms of s 66 (2) of the Criminal Procedure and Evidence Act. The State's objection was upheld by the judge who dismissed the appeal. The applicants accepted the decision. Following the dismissal of their appeal, the applicants filed an application in this

court, on 22 August 2024, for bail pending trial, under case number HACC 148/24. The State objected to the hearing of the bail application before the trial court had ben constituted and the trial judge had been identified. The State argued that the applicants' detention was in terms of a warrant that had not been cancelled. The objection was upheld whereupon the bail application was removed from the roll on the 11th day of September 2024 pending setting down before the trial judge. The applicants accepted the outcome.

The applicants appeared before us on the 1st of October 2024 for trial. The trial did not start because the accused's counsel required more time to prepare. On the following day, 2nd of October 2024, both accused persons pleaded not guilty to the charge marking the commencement of their trial. In terms of 167 of the Criminal Procedure and Evidence Act, when a trial is postponed or adjourned, the court may direct that the accused be detained until liberated in accordance with law or release him on bail or extend his bail if he has already been released on bail, and may extend the recognizances of the witnesses. In terms of s169of the Criminal Procedure & Evidence Act an accused person who was on bail and such bail is not reinstated, following termination, by operation of law when he pleads, shall be detained in custody until the conclusion of the trial in the same manner in every respect as if he had not been admitted to bail. The underlining is for emphasis. The effect of sections 167 and 169 combined was that the warrant in terms of which the applicants were being held since being indicted, lapsed and, unless granted bail, they would remain in detention until the finalisation of their trial.

Submitted with their bail application are the following annexures: - the notice of indictment, the charge, summary of the state case, the summary of the anticipated testimonies of the state witnesses, the record of the bail proceedings before the magistrate in the Magistrates court in June and July 2024. The record reveals the evidence that was led, the respective submissions by the applicants and the State and the decision of the magistrate. The documents were placed before me by the applicants as annexures to their bail statements. The applicants' have given their defences to the charge. The first applicant dwelt at length on his defence in his bail statement. The second applicant did not burden me with a detailed exposition of his defence. I think that was informed by the realisation that, at this stage the judge is concerned, more, the gravity of the crime charged and the strength of the state case. The applicants benefit from the presumption of innocence. The applicants are only required to place the facts required in terms of s117A of the Criminal Procedure and Evidence Act and rule 90 of the High court

rules, and in the case of a further application, the new facts on which the further application is based, as contemplated in s 116 (c) (ii) of the Criminal Procedure & Evidence Act.

When the applicants' trial commenced on the 2nd October 2024 and as part of their defence, the applicants applied to the judge for referral of seventeen constitutional matters for determination by the constitutional court. The application was argued over a period of three months which constitute the entire third term of the High court in 2024. That was unusually long. The State had expected the trial on the merits to conclude within a week. The applicants are, however, entitled to exhaust all local remedies in defending themselves. I dismissed the application following my finding that the requests were all frivolous and vexatious.

The applications, before me, were made two weeks into the third term vacation. The bail statement by the first applicant is unnecessarily long and argumentative. It, clearly, does not comply with the mandatory template of a bail statement set out in rule 90 of the High Court Rules, 2021. The template in rule 90 of the High Court Rules, is in the form of a questionnaire meant to solicit basic information from the applicant about who he is, details of the state allegation against him and perhaps his attitude to the charge, the relief sought, whether, before making his application in the High Court, he had made an application before a magistrate and if so, and whether or not bail was denied, the reasons thereof, as well as, any other facts which may persuade the court to grant him bail. The first applicant's bail statement ought to have been a simple and unemotional presentation of the facts required in terms of s 117A as read with r 90 of the High Court Rules which assist the judge in considering the applicant's' entitlement to bail in terms of s 117 of the Criminal Procedure & Evidence Act. There is no place in the template for lengthy narrations, case law and argument. Mr *Madhuku*, for the second accused, adhered to the template. Argument may be presented at the hearing, although one may want to place his authorities before the court, beforehand, usually in a separate document.

I will, therefore, not go through all the lengthy exposition of the first applicant's defence. In essence, the first applicant's defence is that, while admitting that he is a director of the company which benefited from the impugned transaction, he denies personal involvement in the tender processes. He denied making the alleged misrepresentations. He denied benefiting personally from the transaction. He avers that the charge arises from dealings between a duly registered company, for which he just happens to be the director, and the State. The matter before the court is a contractual dispute with no criminal connotations or consequences. The second applicant denies personal involvement in the tender processes and says his presence at

some instances was innocent. The first applicant cited a lot of authorities. Mr *Dzvetero* submitted, both, in the applicant's bail statement and in oral argument that s 50 (6) of the constitution guaranties the first applicant's right, as a person arrested, detained and on suspicion of having committed crime, to be released unconditionally or on appropriate conditions pending trial unless there are compelling reasons justifying continued detention. The right is concomitant with the right to liberty which must not be interfered with unless there are compelling reasons justifying their continued detention pending trial. He cited the cases of S *v Muntsaka* 2016 (1) ZLR 427 (H). Citing *S v Biti* 2002 (1) ZLR 115 (H) and of S *v Ncube* 2001 (2) ZLR 556 (S). He urged me to lean in favour of the liberty of the accused if this will not prejudice the interests of the administration of justice and to balance the interests of the administration of justice against the constitutional right of the accused to liberty. He submitted that the right to liberty becomes more important in the light of the presumption of innocence. He submitted that s 117 of the Criminal Procedure & Evidence Act provides a general entitlement to bail unless the interests of justice dictate otherwise. He submitted that the State Case against the first applicant is very weak and doomed to collapse. He submitted that the applicants had the right to apply for bail since the trial date is now set for 10 February 2025 and also considering the time spent by the applicants before being tried, the present application is properly before the court. The State had not adduced evidence to show the existence of compelling reasons, after completion of investigations, to justify the applicants' continued detention.

Mr *Dzvetero* submitted that I was supposed to treat the applications before me as initial applications. I was not supposed to be concerned or distracted by the earlier application before the magistrate because the application together with its outcome had been rendered irrelevant and inconsequential by the indictment of the applicants for trial in the High Court and their detention in terms of warrant. I was not even supposed to pay attention to the evidence led at the earlier bail application before the magistrate. The state was required to recall the witnesses to give evidence afresh. He submitted that the applications before me were, therefore, initial applications as opposed to further applications as contemplated in s116 (c) of the Criminal Procedure & Evidence Act. The High Court could not be reduced to the level of the Magistrates Court. The applications were 'initial or fresh' in that the High Court had never been seized with the issue of the applicant's entitlement to bail. The State had the burden to show the existence of compelling reasons to deny bail as if the matter had never been the courts before.

Mr *Dzvetero* submitted that the applicants are willing to stand trial as shown by their conduct before and during arrest. They became aware the allegations which were widely publicised before their arrest. They contacted Zimbabwe Anti – Corruption Commission from China indicating their willingness to attend at the Commission. They did that as soon as they were back in the country. Initially they were excused but were later invited to go back to the commission. They complied, whereupon they were arrested and taken to court. He cited the authority of *S v Mambo* 1992 (1) 245 ZLR (H**)** where the accused who had been aware of the charges for some time and had not absconded after travelling to South Africa and back, then surrendered himself to the police, was granted bail on appeal. Although the applicants were being tried for a serious crime, that factor, on its own, was not a ground to deny them bail because their defence was plausible. See *S v Makamba* (3) 2004 ZLR (S). He submitted that the applicants had no intention to interfere with evidence. The fear of interference was just speculation and bold assertions. He cited *S v Hussey* 1991 (2) ZLR 187 (S). In any event investigations had concluded, hence the indictment of the applicants for trial. There was no risk that the applicants would commit further offences if is released on bail because they had never been convicted of a crime in the past. see *A-G v Phiri* 1987 (2) ZLR 33 (H). He submitted that the applicants had no intention to disturb public order.

Mr *Madhuku* for the applicant, associated himself with Mr *Dzvetero's* submissions and made a few additions, just by way of emphasis.

The applications were opposed by the State counsel who resisted that the submission that earlier application before the magistrate was irrelevant. He said the matters before me are further applications contemplated in s116 (c) (ii) of the Criminal Procedure and Evidence Act. In other words, they were supposed to be bail named applications "based on changed circumstances". Failure to name the application that name rendered them nullity and they ought to be struck off. The State submitted that nothing had changed with respect to the finding made by the magistrate that there were compelling reasons to deny the applicants, bail. The state listed the compelling reasons found by the magistrate as the following: -

a) There was a likelihood of the two interfering with evidence, investigations and state witnesses.
b) The applicants likely to abscond. The first applicants' residence remained disputed regard being had to the issue of uncompleted building referred to by the State. The title deeds offered by the second applicant was just a piece of paper without physical verification on the ground. The second applicant had given a false address where a

certain white man, a Mr Brown was staying in respect of the second applicant. There was a manhunt after the accused persons had failed to appear at the ZACC offices. Mr *Mugiya* for the second applicant told ZACC at the time that the applicants were hostile and hence they could not be secured.

c) Their admission to bail was going to undermine public order. There was a likelihood of public outcry.
d) There was a likelihood of the undermining of peace, security and order.
e) Their admission to bail would jeopardize the proper administration of justice including the bail system.

The findings remained extant and relevant because it triggered the automatic effects of section 66(2) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] in terms of which a warrant for their further detention was issued by the magistrate and the accused persons were detained until they appeared in court on the 1st October 2024. The State submitted that, the trial having commenced and adjourned, applicable law was set out in s167(1) of the Criminal Procedure and Evidence Act which provides that when a trial is postponed or adjourned, the court may direct that the accused be detained until liberated in accordance with law or release him on bail or extend his bail if he has already been released on bail, and may extend the recognizances of the witnesses. The State submitted that the record of bail proceedings before the magistrate was already before me as part of the record of the applicants' trial as provided in s117A (7) of the Criminal Procedure and Evidence Act. There was, therefore, no way I could not pay attention to evidence properly before me. That record contains all the evidence adduced at the bail hearing and the court's finding on compelling reasons. There was no need to adduce that evidence afresh. There was also no reason to disregard the findings by the magistrate. The applications before me were further applications and they could only succeed if they based on new facts. There was no sound legal basis to treat them as initial application where evidence all over again. All that the State was required to do was to rebut the existence of changed circumstances or, where circumstances, ad indeed changed, to prove that the compelling reasons still exist despite the changed circumstances. The present application ought, therefore, to have been made in terms s117A as read with section 116(c)(ii) of the Criminal Procedure and Evidence Act. See *Mwamuka v The State SC 69/21*, S *v Barros and Ors* 2002 (2) ZLR 17 (H), *Daniel Rance v The State* HB 127/04, *Katsamba v The State HH 642/, Shopa & Ors* HH 816/22, S v Chikumba 2015(2) ZLR 424

The State submitted that the applicants have already shown their unwillingness to let the trial proceed. They put up a brave show of resistance at the commencement of their trial. The state obviously referred to the refusal by the applicants to plead, to have their defence outlines read and their initial resistance to be tried by assessors above 70 years of age. The State submitted that such resistance is not consistent with the expectation that the applicants to assert their right to a trial within a reasonable time in terms of section 69 of the Constitution. The trial which was meant to be concluded within the 3rd High Court term of 2024 had not made any meaningful progress.

The State counsel submitted that, in addition to their failure to highlight changed circumstances from the time they were denied bail up to now, the applicants' situation had since worsened from the time they were denied bail by a magistrate. The likelihood of both applicants absconding was higher. Their legal problems have increased. Upon their indictment the applicants were served with detailed summaries of the State case together with copies of documentary exhibits. Witness statements were provided to them. They made a request for further details which had been furnished to them. They were therefore now properly informed about the gravity of the evidence implicating them in the commission of the offence. The applicants, being men of means could sustain life outside the country. The failure by the applicants to disclose that they are facing other charges for which they have be denied bail betrayed a sinister motive. The matter, which was also a fraud involving prejudice to the fiscus in the sum USD9 million was ready for trial. Service of indictments on the applicants was imminent. They realised that disclosing the pending case would influence the judge to find that there was a greater incentive for them to abscond. Section 117A (5) of the Criminal Procedure and Evidence Act required them to make that disclosure in their bail statement and wilful non-disclosure was punishable as a crime. The assertion by the first applicant that the State's case was hopeless, if *bona fide, ought* to have translated into a demand for the finalization of the case. The State argued that the applicants had wasted lot of time on what the State described as, peripheral issues. The State was convinced that the applicants stalling their trial on the merits because the first applicant had used the words "If we are going to trial at all" and the second applicant had in para 28.5 of his bail statement stated that the trial may not be completed in the near future given the constitutional litigation that has preceded the trial, including the fact that the applicant is in the process of preparing an application for direct access to the Constitutional Court. The state submitted that the intended application for direct access had no direct bearing on the conduct of the trial before this court. The State submitted that in the case

of *S v Tapfuma* HH 565/19 the Hon Muzofa stated the following on the fact that the applicant had cooperated with the police during initial stages of the investigations:

> "The court's attention was drawn to the events before the appellant was arrested. That investigations commenced in December 2018 he was cooperating with the investigating officers. He had the opportunity to abscond but he did not. It was submitted that the State did not point to any instance where a likelihood to abscond can be inferred from. The Court is alive to case law that such should exist before a finding can be made. However, each case depends on its circumstances taken in totality with other factors. It is my considered view that at the time of the investigations the circumstances were different. There was no real incentive to abscond. It was an investigation. The appellant has since been arrested, he is now aware of the evidence and the likely penalty, this creates a different outlook of the circumstances. There is no reason to interfere with the magistrate's decision on this aspect."

The State submitted that the sentiments by the Hon. MUZOFA J in the *Tapfuma* case, supra, were relevant in the present case. Stringent conditions were not enough to allay the fears of abscondment and interference with state witnesses.

In response to the allegation by the State that the applicants failed to disclose pending matters in their bail application the applicants submitted that a perusal of the High Court proceedings under HH 359/24 (HCHACC 126/24) and HH 409/24 (HCHACC 183-4/24 and the applications for referral of constitutional at their trial will demonstrate that the applicants made the disclosure. They argued that nothing turned on the requirement of disclosure because the pending matters were irrelevant to the bail applications.

Analysis

The bail applications were argued over two days. That was extraordinary. Bail matters have, despite being very important and strategic, been made simpler through codification. Bail applications are important because they are concerned with the issue of pretrial liberty. Bail applications are strategic in that a bail matter is not an end in itself, it is a procedural step towards trial. The rule of law enjoins the judiciary to ensure that the availability or presence of those, among us, reasonably suspected of committing crime, so that they are dealt with in accordance with the law. Therefore, the interests of the accused, on one hand and the interests of justice, on the other, must be balanced carefully in a bail application.

All the principles developed at common law were collated and modified through codification. They are, now, presented as a compendium, modified and made simple in Part IX of the Criminal Procedure and Evidence Act. A judge deployed in the bail court is usually expected to hear and determine not less than twenty bail applications, which literally translates to roughly 30 minutes per bail application. The speedy resolution of bail matters cannot be achieved if counsel argue matters over two days. Unfortunately, as the legal profession we have

the uncanny tendency to be unnecessarily creative. Our legal system exists for the sole purpose of resolving disputes with minimum delay. However, as a profession, we are easily tempted to park the resolution of the disputes brought before us for resolution, while we engage in side shows. The irony is that the delays that we cause while engaging in gruesome fights over extraneous issues, say in a bail application, tend to infringe on the true essence of the very right to pretrial liberty and the urgency of bail applications filed ostensibly, to protect that right. The simple issue before me was, and remains, whether the applicants should be granted bail upon the adjournment of their trial. (See s 167 of the Criminal Procedure and Evidence Act). Presenting argument on that issue would not require two full days, sitting up to 6pm, especially because the applicable principles, factors and facts to consider are now codified for easy access in s117 of the Criminal Procedure and Evidence Act.

Following the adjournment of the applicants' trial, the applications before me call for the exercise, by me, of the discretion given to the trial judge in s 167 of the Criminal Procedure and Evidence Act. My judgment regarding the mootness of their bail appeal following their indictment should be understood in that context. As soon as they appeared before the trial judge on the 1st October 2024, the warrant issued in terms of s 66 (2) of the Criminal Procedure and Evidence Act lapsed and their status pending trial became a matter to be determined by the judge in terms of s167 of the Criminal Procedure and Evidence Act. They were, thus at liberty to apply for bail when we adjourned the trial proceedings on the 2nd October.

A lot of time was lost while the parties could not agree and tussled over the nature of the bail application before me. On one hand, the State counsel argued, strenuously, that the application before me should have been named a bail application 'based on changed circumstances and the applicants' failure to give the matter that name was fatal and nullified the applications which deserved to be struck off. On the other hand, the applicants' counsel argued, equally energetically, that what were before me, were initial bail applications for bail pending trial notwithstanding the indisputable fact that that the applicants had previously been denied bail following an application which they had made to a magistrate on the same charge.

Both sides were just being unnecessarily creative. The dispute is resolved by r90 of the High court rules. There is no need to give a process which is simply a bail application the name 'application based on changed circumstances' when such words do not appear in the Criminal Procedure and Evidence Act. Section 116 (c) (iii) provides for a further application based on new facts but such application is made in terms of s117A of the Criminal Procedure and Evidence Act and following the template in r90 of the High Court. Invariably, when an accused

person applies for bail pending trial in the High Court, he must state whether he made an earlier application before a magistrate, state the outcome and if bail was denied, state the reasons therefore. That a bail mater is a further application is determined from the content of the bail statement and not the name ascribed to the application. Rule 90 of the High Court Rules was framed with s116 (c) (iii) in mind. To avoid legislating it is neater, maybe just for completeness, to name a bail matter an 'application in terms of s117A of the Criminal Procedure and Evidence Act', if there is no other application was made earlier', or an application in terms of an application in terms of s117A as read with s 116 (C) (iii)' if it is a further application or an 'application in terms of s117A as read with s167 of the Criminal Procedure and Evidence Act' if it is made when the accused's trial has been either postponed or adjourned. But the omission of such completeness is not fatal. Every bail application must be supported by a bail statement which complies with r90 of the High Court Rules. The structure is the same in all cases. I can do no more that quote rue 90 sub rule (4): -

> "(4) **An application to a judge for bail in terms of section 116 or 123 of the Act shall be filed with the registrar and shall consist of a written statement setting out—**
> [Incorrect reference to ss. 106 or 112 corrected to read ss. 116 or 123: Law Reviser]
> (a) the name of the applicant; and
> (b) the applicant's residential address; and
> (*c*) if the applicant is employed his or her employer's name and address and the nature of his or her employment; and
> (d) where the application is made before the applicant is convicted—
> (i) the offence with which the applicant is charged; and
> (ii) the court by which and the date on which the applicant was last remanded; and
> (iii) the criminal record book number, if that number is known to the applicant; and
> (iv) the police criminal record book number of the case, the name of the police officer in charge of investigating the case and the police station at which he or she is stationed, if those particulars are known to the applicant; and
> (e) where the application is made after the applicant has been convicted and sentenced
> (i) the offence of which the applicant was convicted and the sentence that was imposed; and
> (ii) the court or courts which convicted the applicant and imposed sentence upon him or her; and
> (iii) the court criminal record book number, if that number is known to the applicant; and
> (iv) the date or dates on which the applicant was convicted and sentenced; and
> **(*f*) whether or not bail has previously been refused by a magistrate and, if it has been refused—**
> **(i) the grounds on which it was refused, if the grounds are known to the applicant; and**
> **(ii) the date on which it was refused; and**
> **(*g*) the grounds on which the applicant seeks release on bail having regard to the provisions of section 50(1)(d) of the Constitution;**
> (*h*) the amount of bail which the applicant is prepared to give and the names of any persons who are prepared to stand as sureties for his or her attendance and appearance."

The choice of the word 'shall' by the Legislature means that the rule is peremptory. Every bail application pending trial before a judge of the High Court, whether as an initial

application or as a further application, must adopt the structure set out in rule 90 of the High Court Rules. Every bail statement must, therefore, answer the question, whether the applicant has previously been refused by a magistrate and, if so, stating the grounds on which it was refused, if such are known to the applicant; the date on which it was refused; and the grounds on which the applicant seeks release on bail having regard to the provisions of section 50(1)(d) of the Constitution. That is standard. Therefore, the theory that the judge of the High Court before whom an application for bail is made pending trial should disregard the fact that an earlier application was made, all be it, before is contrary to r90 of the High Court Rules. At the same time, the argument that a further application based on new facts is a nullity if it is not named a bail application 'based on changed circumstances' is not correct. A further application remains a bail application which the accused is entitled to make at any time in terms of s117 of the Criminal Procedure and Evidence Act. That the bail application is further to a previous one is an averment that appears in the body of the bail statement. The words 'changed circumstances' are to be found in case law where they were used by judges interpreting s 116 (c) of the Criminal Procedure and Evidence Act in the peculiar circumstances of the cases before them. It could not have been the intention of the judges to replace the words in the statute with their own.

The applicants did not seem to realise that they were contradicting. They are detained in custody now, six months after their arrest, because they were initially denied bail by a magistrate and that juristic event triggered the events that have kept them detained in custody until now. They are making this application now after several new developments have taken place since the denial of bail by the magistrate. Investigations are now complete. They have been indicted. They have been served with the state evidence. To be led at their trial. The statee witnesses have been subpoenaed and have been ready to give evidence since the 1st day of October 2024. The applicants have filed their defences. They have pleaded to the indictment. The trial is set to continue on the 10th of February 2025. Among other reasons, the applicants submitted that discovered, after receiving the State papers, the allegation of their personal involvement in the alleged fraud and the state case is doomed to collapse.

In substance, therefore, the bail applications before me are further applications as contemplated in s116 (C) (iii) of the Criminal Procedure and Evidence Act because they are based on developments which took place after the applicants had been denied bail by a magistrate. The developments constitute new facts.

It is not correct that the state did not make submissions regarding compelling reasons. State counsel simply argued that he does not have to regurgitate what is already on record. The

compelling reasons were demonstrated in the earlier application before the magistrate and the findings remain extant. The State simply abode by their submissions filed of record and by the findings of the magistrate in the earlier application. It was up to the applicants to show that the developments to date have affected the existence of compelling reasons. The State argues that the compelling reasons have persisted and have even become 'more compelling' for want of a better word. The applicants now have another pending case of fraud involving public funds for which indictment papers are ready and the applicants will be tried before the High Court this term. He submitted that, in this case, the evidence of the applicants' alleged personal acts or omissions constituting fraud has become, even clearer, as appears in the summaries of evidence and the state evidence remains intact because it remains untested in cross-examination. He submitted that compelling reasons have become aggravated by the fact that the accused have pleaded to the charge and the likely penalty, if convicted, is so stiff. The is now greater incentive to flee. The risk of interference with witnesses is greater, now, since the witnesses' names have been disclosed and their expected testimonies are known.

Invited by the State's argument regarding the seriousness of the crime charged, I have looked at the presumptive penalty in the sentencing guidelines. Seriousness of a crime is based on the penalty prescribed by statute. The presumptive penalty in a case of fraud involving a large amount of actual prejudice, public funds or a huge amount which was not recovered, is imprisonment for 20 years. A presumptive penalty is the sentence which the court must start from depending on whether the crime was committed in aggravating or migratory circumstances. The charge which the accused is facing involves millions of public funds which are alleged not to have been recovered. The presumptive penalty is likely to act as an incentive for the applicants to flee irrespective of whatever surety is offered. I accept that the accused have ties to the venue of the court, but that is outweighed by the seriousness of the crime. The summarized testimonies of the state witnesses are that they dealt with the accused. I know that the accused persons deny that. Their alleged personal involvement is the subject matter of the trial which is continuing before the court.

There has been some delay in concluding this trial. That is just because of the number of issues raised by the applicants which had to be addressed. The trial started almost promptly because it was delayed by only one day. I gave the applicants' trial priority over other cases and even deferred other trial matters. The matter is likely to be concluded in February, 2025.

The applicants have offered surety in the form of title deed to immovable property and to surrender their passports. I am not persuaded that the offer will be adequate to allay the risks

of interference with witnesses which increased with the full disclosure of the witnesses and their testimonies. The risk of abscondment also remains in view of the amount involved the sureties and the likely penalty. The applicants conceded the seriousness of the charge. The issue of the applicants' alleged personal involvement in the alleged fraud will turn on the veracity of the testimonies of the witnesses who say they personally interacted with the applicants during the tender processes and disbursement of funds. It will not require more than a week to deal with such testimonies when the trial continues on the 10th February 2025. The applicants should also be eager to clear their names, as business men, of such serious allegations. The trial is therefore likely not to be delayed

The applicants conceded that the direct application to the Constitutional Court would not affect the trial.

An important fact which has cropped up since their denial of bail by the magistrate is that they are both and jointly facing another charge involving loss of millions of public funds. The matter is ready for trial. It potentially attracts a similar presumptive penalty thereby increasing the risk of abscondment.

I accept the State's argument that the risk of abscondment is now greater for the reasons stated above repetition. Likewise, the risk of interference with witnesses has increased. The State did not specifically motivate the persistence of the other compelling reasons found by the magistrate. It may well be that the passage of time has affected them However, in terms of s 117 (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 compelling grounds are established. I therefore find that the likelihood that the accused, if he were released on bail, will not stand trial and that the likelihood that he will or attempt to influence or intimidate witnesses or to conceal or destroy evidence remain.

In the result I order as follows:

The applications are dismissed.

KWENDA J: …….

T Dzvetero, 1st applicant's legal practitioners
Madhuku law Chambers, 2nd applicant's legal practitioners
National Prosecuting Authority, State's legal practitioners