CHAUYA SHOPA
and
ZEPHANIA CHINEMBIRI
and
ZECKS MAKONI
and
ROAN TSOKA
and
SHEPHERD BULAKASI
and
TATENDA PINDAHAMA
and
ENOCK TSOKA
and
EMMANUEL TSOKA
and
PRECIOUS JECHE
and
MISHECK GUZHA
and
ODIUS MAKOMA
and
EPHRAGE GWAVAVA
and
CLEVER SIBANDA
and
ROBERT MADZOKERE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 16 and 28 September 2022

Bail on changed circumstances

F Nyahunzvi, for the respondent
T Mpofu, for the applicants

MUNGWARI J: The 14 applicants have approached this court seeking to be admitted to bail on changed circumstances. A brief background of the matter is pertinent.

Background

On 14 June 2022 violence of significant proportions erupted in an area called Nyatsime in Chitungwiza. The disturbances allegedly left a trail of destruction. Houses were stoned, their windows were broken, some buildings were razed to the ground, shops were looted, motor vehicles were damaged whilst ordinary citizens were assaulted. In total it is alleged that properties and houses for about 53 families were damaged.

Following that riotous episode, the police started arresting the alleged perpetrators on 20 June 2022. All those who were arrested were subsequently charged with Contravening Section 36(1) (a) of the Criminal Law (Codification and Reform) Act *[Chapter 9:23*] that is the offence of Public Violence. The first to be arrested were Precious Jeche, Misheck Guzha and Odious Makoma who are ninth, tenth and eleventh applicants respectively. The three of them appeared in the Magistrates' Court where they applied for admission to bail pending their trial. On 23 June 2022, their application for bail was dismissed. On 29 June 2022 they appealed against that decision of the Magistrate's Court to this court. The matter was set down for hearing on 1 July 2022 before MUTEVEDZI J. For unexplained reasons, counsel representing the applicants simply did not turn up at court. The court was left with no choice but to strike off the matter from the roll for non-appearance of counsel.

Chauya Shopa, Zephania Chinembiri, Zecks Makoni, Roan Tsoka who are first, second, third and fourth applicants respectively were arrested on 22 June 2022, two days after the arrest of the first lot. They also applied for bail in the Magistrate's Court. On 28 June 2022 their applications were dismissed.They too approached the High court on appeal against the lower court's decision. On 8 July 2022 counsel for the 4 appellants appeared before myself. He chose not to argue the matter. His reasons were that he required time to consolidate the first, second, third and fourth applicants' appeals with those for the appellants who had been arrested earlier. He therefore moved the court to remove the appellants' matters from the roll. I granted the request and the appeals were duly removed from the roll.

In the meantime, the police made further arrests. Sherphered Bulakasi, Tatenda Pindahama, Enock Tsoka and Emmanuel Tsoka who are fifth, sixth, seventh and eighth applicants respectively,

were picked up on 23 June 2022, three days after the first group was arrested. Like all the other applicants before them, they too applied to be admitted to bail pending their trial in the Magistrate's Court. On 28 June 2022 their bid for freedom failed after their application was also dismissed. They approached this court appealing against the decision of the lower court to deny them bail. Their appeal was scheduled to be argued before myself on 15 July 2022. Once again, counsel representing them inexplicably did not attend. The appeal was inevitably struck of the roll.

An application for re- instatement of the appeals was subsequently made. It was granted by this court on 26 July 2022. All this while, the eleven applicants remained in custody.

The matters were eventually consolidated on 18 August 2022 that is about two months since the first arrests and initial applications for bail were made. On 19 August 2022, the consolidated appeals were finally set down for determination. This court heard arguments and dismissed the appeals after noting that there had been no misdirection by the lower court in its findings and decision to deny the appellants bail.

The above background illustrates a very disturbing trend which I need to comment on. Needless to point out, bail applications are by their nature urgent applications. The dilatoriness, lack of interest and sometimes laziness with which counsel for the applicants approached the matters smacked of a ploy to keep the matters undetermined. There is no excuse for a legal practitioner to apply for the set down of an urgent matter and then for no apparent reason fails to turn up at court, abandons the matter and leave it to be struck off the roll. The bail court is a motion court where invariably scores of legal practitioners are ever present. Serious legal practitioners who get tied up elsewhere and fail to attend court for one reason or another always find it useful to instruct another legal practitioner to stand in for them and seek a postponement of their cases to other dates. In these cases and as explained above, counsel did not think that route necessary and decided that the appropriate course was to ignore his applications and not bother to explain his failure to attend court. Had the right course of action been taken, the striking of and removal of the matters from the roll as well as the making of the subsequent applications for re-enrollment of the matters could have been avoided. Thereafter, a consolidation of the matters was sought but again was not timeously attended to. In the first place, applications for bail are individual applications. Whilst the charge was admittedly the same for all of them the applicants' personal circumstances and bail statements were individualized. They could have been dealt with individually by any

judge before whom the matters would have been set down for hearing. So whilst it may have been expedient for counsel it was not absolutely necessary that the cases be consolidated and the appeals be delayed to the heard for months on end. The inherent urgency with which bail matters should be attended to was lost in that confusion. I advert to the above indiscretions to debunk the conspiracy and political undertones such as those which appear at p 10 paragraph of this application insinuating that the criminal justice system is being abused for political purposes.

In between the above confusion and the time the appeals were ultimately set down for hearing the fourteenth applicant Robert Madzokere was arrested on 13 July 2022 and the thirteenth applicant Clever Sibanda was arrested on 18 July 2022. The twelfth applicant Ephrage Gwavava was the last to be arrested on 2 August 2022. The three also sought bail. Their applications were turned down in the Magistrates' Court. What is unique about them amongst the applicants before me is that the three of them did not appeal against the Magistrates' Court decision. Regardless of that significant difference they have since joined hands with the other 11 whose appeals were dismissed by this court on 19 August 2022.

From the above synopsis, there is no gainsaying that none of the applicants went back to the Magistrates' Court to seek bail on changed circumstances. Instead, they all chose to approach this court for that purpose. Needless to say, that approach is unprecedented in this jurisdiction.

In their application the applicants insisted that the High court has the necessary jurisdiction to determine the matter.

Applicants' argument

The applicants argued that the High Court is a court of original jurisdiction. An application for bail on changed circumstances can be dealt with by any court of original jurisdiction. The only precondition is that there must be a change of circumstances which change, so they argued, undoubtedly exist.

Applicants' counsel's argument at the hearing

During oral arguments *Mr. Mpofu* appearing for the applicants sought to advance the argument that this court has jurisdiction by placing reliance on s 116 (c) (ii) of the Criminal Procedure and Evidence act [*Chapter 9;07*] (herein after the CP&E Act) He also sought to rely on Rule 90 (4) (f) of the High Court Rules, 2021(The Rules) and s 176 of the Constitution of Zimbabwe. His view was s 116(c) (ii) simply requires an applicant to place his/her application for bail before a court with original jurisdiction to entertain a bail application. A litigant is therefore

at large to approach either the magistrates' Court or the High Court with their application for bail. The second requirement, so *Mr. Mpofu* went on, is that the application must be based on changed circumstances. There is no doubt that this application is premised on changed circumstances. In that regard, the first scenario is that an application on changed circumstances can be made either to the magistrate or judge who refused the first application or to any other judge or magistrate. The applicant can either go to the authority which declined the first petition or any other judge or magistrate. Put differently he/she can go to any other court of original jurisdiction. In conformity with that provision, the applicants in this matter have approached any other judge who did not deal with the initial application. That to *Mr. Mpofu*, is the literal meaning of s116 (c) (ii). He added that his view derives from the modern approach to statutory interpretation which is to look at the text, the context and the purpose.

Further counsel argued that statutes set out jurisdiction and rules of court facilitate the exercise of that jurisdiction. In that regard he pointed the court to Rule 90 of the Rules which deals with applications for bail. He contrasted it with Rule 91 which deals with bail appeals. Rule 90 (4) (f) provides as one of the issues which must be indicated on the applicant's bail statement the indication of *"*whether or not bail has previously been refused by a magistrate or judge and if it has been refused, the grounds upon which it was refused if the grounds are known to the applicant and the date on which it was refused*."*

Counsel's view was that the rule therefore reposed in the court power to deal with this application outside its appellate jurisdiction in circumstances where the initial application was refused by a magistrate.

Turning to s 176 of the Constitution, counsel argued that the provision did not codify the High Court's inherent jurisdiction but merely gave it constitutional status. The effect was that the court is then required to interpret its wide powers in conformity to constitutional values. Those values included the following:

i. Jurisdiction must be interpreted in a manner which allows the court to grant the state's subjects access to justice as given in s 69
ii. Jurisdiction of the court must be interpreted in a manner that favours liberty as in s 50
iii. Jurisdiction must be interpreted in a manner that makes the exercise by the High Court of its powers, a living process

In counsel's view inherent jurisdiction of the High court means that it can grant any order and can exercise any power save those powers which it has been told by law that it cannot exercise. In view of that there is no law which says that the High Court cannot deal with an application for bail on changed circumstances simply because the initial application was dealt with by the Magistrates' Court. Rule 90 (4) (f) actually buttresses that view. He rounded his argument by reemphasising that this court has power to deal with the application.

The State's response

The State opposed to the application primarily on the basis that the applicants have approached the wrong court. The High Court cannot deal with the matter in the manner proposed by the applicants because the provisions of the law are clear that the first 11 applicants must approach the magistrate's court to apply for bail on changed circumstances. In relation to applicants twelfth, thirteenth, and fourteenth the state argued that if they were dissatisfied with the lower court's decision their recourse fell with appealing that ruling to the High court. In a clear illustration why the law deserves to be given all kinds of names, Mr. *Nyahunzvi* sought to rely on the same s 116 (c) (ii) to support his argument. He prayed that the application be thrown out on that ground.

State's arguments at the hearing

During oral argument, the prosecutor emphasized the point that the state was not seeking that the applicants be denied access to justice but that they had approached the wrong court for relief.

Issues

From the above arguments, the issue which immediately sticks out is whether the High Court has jurisdiction to entertain the application. Because jurisdiction means the power of a court to determine a matter before it, the issue must be resolved before this court can take any step further. If this court has jurisdiction, whether there are changed circumstances entitling the applicants to be admitted to bail.

The High Court's Original Jurisdiction

There is no argument that the High Court is a court of original jurisdiction. The meaning and extent of inherent jurisdiction has been discussed extensively in academic writings and pronounced on in many legal decisions. In recent times, the Supreme Court restated the concept of original

jurisdiction. In the case of *State* v *Gumbura* SC 25/2021, BHUNU JA, approved the meaning ascribed to the concept of inherent jurisdiction by DUBE J (as she then was) in the case of *Dardale Investments (Private) Ltd* v *Econet Wireless Private) Limited HH 656/14* where she said:

> "Inherent power is unwritten power which superior courts are endowed with. Inherent power gives the court wide ranging and all-embracing powers to deal with any matter that may be placed before them. This means that a court of inherent jurisdiction has default powers which it can exercise in the absence of express power and can deal with all areas of law and all procedural matters involving the administration of justice."

What is significant in the above definition is the recognition that inherent jurisdiction is default power which a court resorts to when there is no law that confers it with express authority to deal with a particular matter. My understanding of it then is that original jurisdiction is not a magic wand which a judge can indiscriminately wave and apply whenever he/she wishes to do something outrageous. It cannot be used to supplant statutory jurisdiction where such is clearly provided for. In view of that I agree that this court must resort to its inherent jurisdiction in instances where there is no statutory prohibition to hear and determine applications for bail in their different species and where statute does not provide the procedure to be followed. To put this into context, I need to point out the mundane fact that there are generally four types of applications for bail namely:

a. An initial application for bail pending trial
b. An application for bail on changed circumstances
c. An application for bail pending appeal and
d. An appeal against refusal or grant of bail

The Criminal Procedure and Evidence Act, confers the High Court with statutory power to decide each and every one of the species of bail indicated above. Where that statutory power is clear, it is unnecessary for the High Court to claim that it determines bail cases on the basis of inherent jurisdiction. For instance there is no doubt that there is nothing which precludes the High Court from hearing a bail application at the first instance by virtue of s116 of the CP&E Act which provides that:

> **116 Power to admit to bail**
> Subject to this section and sections 32 and 34, a person may, upon an application made in terms of section 117A, be admitted to bail or have his or her conditions of bail altered—

(a) in respect of any offence, by a judge at any time after he or she has appeared in court on a charge and before sentence is imposed;

Clearly, this court cannot and should not ascribe its power to deal with applications for bail pending trial to its original jurisdiction because it is provided for by statute.

Although not the subject of this application, the High Court is also statutorily empowered to deal with bail pending appeal against the decision of a magistrates' court at the first instance. This is in terms of s123 of the CP&E Act which provides as follows:

123 Power to admit to bail pending appeal or review
(1) Subject to this section, a person may be admitted to bail or have his conditions of bail altered—
(*a*) …
(i) …
(ii)…
by a judge of the Supreme Court or the High Court;
(*b*) in the case of a person who has been convicted and sentenced by a magistrates court and who applies for bail—
(i) …
(ii) pending the determination by the High Court of his appeal; or
(iii) pending the determination of an application for leave to appeal or for an extension of time within which to apply for such leave;
by a judge of the High Court or by any magistrate within whose area of jurisdiction he is in custody:

Equally, appeals against decisions regarding bail are catered for in the CP&E Act.

The above scenarios leave the court with the contentious aspect of bail on changed circumstances. As already said, in addition to the general original jurisdiction which exists, the High Court is given statutory power to deal with bail on changed circumstances. That power is however circumscribed in s 116(c) (ii) of the CP&E Act. I remarked earlier on that the issues raised by this application are both complex and novel. During the course of the hearing I asked both counsel to file heads of argument in the hope that the court would be assisted by their research endeavours to determine the question. Unfortunately, much as they tried, there appears to be no authority that has previously dealt with the issue.

Section 116 (c) (ii) which triggered this debate is worded in the following terms:

> "where an application in terms of section 117A is determined by a judge or magistrate, a further application in terms of section 117A may only be made, whether to the judge or magistrate who has determined the previous application, or to any other judge or magistrate, if such application is 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" (my underlining for emphasis.)

An analysis of the above provision shows that what is not contentious is that a person can reapply for bail before the magistrate or judge who determined the previous application. The wording means exactly that. It accepts of no ambiguity. Why it mentions a judge or magistrate is because both a judge and a magistrate have concurrent jurisdiction in initial applications for bail pending trial. As indicated above, an applicant has a choice whether to initiate his/her application in the Magistrates' Court or the High Court. Obviously therefore where for instance, the application was before a magistrate, the applicant goes back before that magistrate. Where it was before a judge, the applicant equally goes back before that judge. It is straight forward. The situation is different in circumstances where the applicant chooses to go before a judge or magistrate other than the one who previously determined the application. There is disagreement in interpretation. *Mr. Mpofu's* contention is that even where the application was determined by a magistrate, an applicant can choose to approach a judge with an application on changed circumstances. In other words his view is that an applicant can choose any judicial officer across courts. He/she is not restricted to the court in which the initial application was heard. I do not understand the law to mean that. After demystifying the inherent jurisdiction argument, it should follow that because the statute refers to both magistrate and judge the following analogy which illustrates the absurdity of the argument should be correct. One needs to consider the contrasting picture where an applicant chooses to file his/her initial application in the High Court and it is determined by a judge who refuses it. If the argument is to be followed, that applicant may decide to go down to the magistrates' court to apply for bail on changed circumstances as long as he meets the requirements of showing the change in circumstances. It is absurd, and senseless. The orderliness that is presumed from the law will be lost in that chaos. Ours is a unitary court system which clearly stipulates that cases move from a lower court to a higher court and not *vice versa.* Allowing the procedure advocated for by the applicants will result in lower courts overturning decisions of judicial officers of superior jurisdiction to them.

My comprehension of the provision as I have already stated, is that the applicant's choice of court applies at the time of filing of the initial application. It is at that stage that he/she decides to pursue his/her application either in the Magistrates' Court or in the High Court. That choice is at the heart of every subsequent step which the applicant may wish to take. Once an application for bail pending trial is made in the Magistrates' Court, an application for bail on changed

circumstances cannot be made before the High Court. An approach to the High Court can only be by way of appeal. My view in that regard is fortified by the construction of s116 (c) (ii). The important words to consider in that provision are *"*where an application in terms of section 117A is determined by a judge or magistrate, a further application in terms of section 117A may only be made …*"* (underlining is my emphasis).The legislature chooses its words deliberately. That choice is never an idle exercise. The phrase a further application is telling. The term application on changed circumstances is colloquial because it is not used in the statute. The correct nomenclature of the application is that it is a further application for bail pending trial. The changed circumstances simply refer to what an applicant must prove for the further application to succeed. The word *'*further*'* in s116(c) (ii) is used in its adjectival sense. It is employed to describe or qualify the noun *'*application.*'* The Oxford English Dictionary, 2019 defines further as meaning:

> Additional to what already exists or has already taken place, been done, or been accounted for.

It lists the synonyms of 'further' as additionally, to a greater extent and supplementary among others. The further application thus supplements the initial application. The definition and the kindred words leave no doubt in my mind that the initial application and the further application cannot be divorced from each other. They are one and the same thing except that the further application is an extension of the initial one. It is for that reason that MUTEVEDZI J in the case of *Grace Mandisodza* v *The State* HH 363/22 remarked at p.7 of the cyclostyled decision that:

> "In my understanding, it follows that a bail court cannot purport to consider an application on changed circumstances in isolation from the applicant's main application. Put differently an application on changed circumstances is by its nature intrinsically tied to the initial application. A refusal of bail on changed circumstances is therefore equally tied to the refusal on initial application. In fact a refusal of bail on changed circumstances necessarily means that bail had been refused in the initial application."

There can be no debate that as per the provisions of s 116(c) (ii) and in line with orderliness of litigation, an application for bail pending trial made in a particular court must be continued in that same court in instances where the applicant wishes to show that his or her circumstances have changed warranting that court to reconsider his/her admission to bail. Ordinarily, a court cannot revisit its decision after it has pronounced itself on a particular matter. It becomes *functus officio.* Cases of bail are an exception to this principle. A judicial officer is allowed to revisit his/her own decision and change it. That leeway is a further illustration of the incompleteness of the court's initial decision on bail. It shows that the matter will still be pending in the same court which made

that decision. An attempt to take such a matter out of the jurisdiction of the Magistrates' Court and place it before the High Court will amount to an unacceptable usurpation of the lower court's jurisdictions by the High Court. The High Court's inherent jurisdiction cannot serve to oust the Magistrates' Court's jurisdiction conferred by the applicant's choice to vindicate his/her right to bail in that court. The dicta of UCHENA J (as he then was) in the case of *Chiokoyo* v *Ndlovu* & *Ors* HH 321-14 is apposite. He remarked that:

> *"*The purpose for which the Constitution provides for various courts and vested in them concurrent civil and criminal jurisdiction with the High Court, should guide the court in establishing whether or not the High Court's original jurisdiction ousts other court's civil and criminal jurisdiction. The fact that the Constitution permits the Legislature, to create and confer jurisdiction of its choice, on such courts must also be taken into consideration. It is in-fact trite that the Constitution vests criminal and civil jurisdiction in courts inferior to the High Court in spite of the High Court having original jurisdiction over such cases"

I was referred to the case of *State* v *Barros and Ors* 2002(2) ZLR (H) which interpreted the use of the disjunctive *'*or.*'* Very little interpretation of that word if any is required in this instance. Notably, the word is used thrice in the same sentence. I have already explained the possibilities envisaged by the word in the three senses in which it is used. The first one is obvious. It's the judge or magistrate who dealt with the initial application. The second one is equally uncontentious. It again refers to the judicial officer who dealt with the application. The final one simply means to any other judge where the initial application was in the High Court or to any other magistrate where it was in the Magistrates' Court. I reiterate the point that the third scenario does not confer on an applicant the unfettered choice to run from a lower court to a higher court or *vice versa* with an application for bail on changed circumstances.

The High Court Rules 2021

Counsel for the applicant also placed reliance on rule 90 (4) (f).The rule in question states the following:

> (4) An application to a judge for bail in terms of section 106 or 112 of the Act shall be filed with the registrar and shall consist of a written statement setting out—
>
> (a) …
> (b) …
> (c) …
> (d) ...
>
> i. …
> ii. …

iii. …
iv. …
(e) …
(i) …
(ii) …
(iii) …
(iv) …
(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

The argument by counsel is that through its rules the High Court has interpreted its jurisdiction. His view is that the above rule permits this court to deal with an application for bail on changed circumstances in the manner which he proposes. I am not convinced by the argument for a variety of reasons.

To begin with and Mr. *Mpofu* admitted so at the hearing, Part XV of the High Court Rules needs a complete revision because it is so badly drafted that at times it is meaningless. For instance, it alleges in Rule 90 (1) that the Part shall apply to applications and appeals in terms of sections 106, 111, 111A or 112 of the Act. Those particular sections of the CP&E Act were repealed a long time ago. They are non-existent. Secondly, the Rules provide for all other species of bail which I enumerated earlier in this judgment i.e. bail pending trial, bail pending appeal and appeals against decisions regarding bail. The Rules however completely omit to make provision for bail on changed circumstances as a separate type of bail applications. The omission may in another way signify the acceptance that there is not much distinction between the initial application for bail and the further application envisaged in s 116(c) (ii). Thirdly, Rule 90 (4) (f) is subservient to s 116 of the CP&E Act. Should there be any inconsistencies between the Act and the Rules, the principle is that the Act shall take precedence. I have interpreted the essence of s116. Even if Rule 90 (4) (f) were to be taken to mean what is alleged, which unfortunately it is not, the provisions of the Act will carry the day. Fourthly, besides once again referring to non-existent sections of the Act, Rule 90 (4) does not confer jurisdiction on the High Court. It simply provides for the format of an application for bail where there is such jurisdiction. Generally, the purpose of rules of court is to govern procedure. Conferment of jurisdiction is the domain of Acts of Parliament.

Constitutional provisions

Lastly counsel for the applicants, cited the provisions of s 176 of the Constitution of Zimbabwe, 2013 as another illustration that this court has to deal with the application. The section provides as follows:

> **176 Inherent Powers of Constitutional Court, Supreme Court and High Court**.
>
> "The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution."

I am not sure if the provision advances the applicants' argument in any way. Indeed the High Court has inherent jurisdiction as demonstrated and discussed earlier. That inherent jurisdiction does not confer this court with power to alter legislation and claim to be developing the law. It cannot misinterpret legislation in the guise of regulating and protecting its own processes. The only law which s 176 allows the superior courts of Zimbabwe to develop is the common law. Even then, the courts must take into consideration the provisions of the Constitution and the interests of justice. In that regard I cannot do more than MAFUSIRE J observed in the case of *Zimbabwe Rural District Councils Workers' Union* v *Nyanga Rural District Council* HH 118/22where he stated that:

> "Inherent jurisdiction is not an excuse for a court to assume despotic power and clothes itself with legislative capability to craft new laws."

I fully to subscribe to that interpretation of inherent jurisdiction. A court resorts to its inherent jurisdiction within specified parameters. Where there is a statute that resolves the issue before a court, the invocation of inherent jurisdiction is unnecessary. *In casu*, as already demonstrated, the clear provisions of s 116(c) (ii) of the Criminal Procedure and Evidence Act cannot be overridden by an extravagant application of that principle.

DISPOSITION

It is unfortunate that I cannot determine the application on the merits. I am constrained to point out that the applicants' biggest undoing is their desire to experiment with the unprecedented procedure they urged this court to adopt. The finding of this court is that whilst it can entertain an application for bail on changed circumstances in a case where the initial application was before a judge of the High Court it has no power where the initial application was made in the Magistrates' Court. As is the rule, where a court declines jurisdiction, it cannot take one step further than that. The applicants must approach the Magistrates' Court for the relief they seek.

Zimbabwe Human Rights NGO Forum, for the applicant
National Prosecuting Authority, for the respondent