JACOB NGARIVHUME
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 3 February 2021 & 12 February 2021

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

M Nkomo, for the applicant
E Makoto, for the respondent

CHITAPI J: On 2 September 2020, the applicant was granted bail by this court on appeal against the refusal by the Magistrate Court to admit him to bail on a charge of incitement to commit public violence as defined in s 187 (1) (a) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] as read with s 36 (1) (a) of the same Act. He was charged in the alternative with two related charges arising from the same course of conduct. I have noted that the bail order indicates that it is myself who granted the applicant bail. The order needs correction because the applicant was not granted bail by myself but by MUSITHU J in a detailed judgment HH 562/20 dated 22 September 2020. The mix up of the judges names in the order issued has no effect on the determination of the application before me.

As regards the details of the bail order granted by MUSITHU J, the order provided as follows:

"**IT IS ORDERED THAT**

1. The appeal is allowed.
2. The ruling of the court *a quo* is set aside and substituted with the following:-

   "The accused person is admitted to bail on the following conditions:-
3. The accused person shall deposit the sum of ZWD$ 50 000.00 with the Clerk of Court, Harare Magistrates Court, Harare.
4. The accused person shall continue to reside at No. 1998 Mainway Meadows, Waterfalls, Harare until the matter is finalized.

5. The accused person shall surrender his passport with the Clerk of Court, Harare Magistrates Court, Harare.

6. The accused person shall not post on his twitter handle @jngarivhume pending the finalization of his matter.

7. The applicant shall report three times every week on Mondays, Wednesdays and Fridays between 6am and 6pm at Waterfalls Police Station until his matter is finalized."

On 1 December 2020, the applicant filed an application for alteration of bail conditions as in the present application. The respondent opposed the application. The hearing of the application was set down on 11 December 2020 before CHIKOWERO J who dismissed the application. The current application is therefore a second attempt to have the bail conditions altered. The applicant in the application before CHIKOWERO J sought an order for a reduction of the frequency of the reporting conditions as set out in para 7 of the order of MUSITHU J from three times a week on Mondays, Wednesdays and Fridays to once weekly on Fridays.

In the dismissed application by CHIKOWERO J, the applicant based his application on the grounds that there had been a delay by the respondent to furnish the applicant with a trial date. The applicant accused the respondent of routinely remanding him, the respondent being unprepared or not being ready to proceed to trial. The applicant submitted that upon his initial remand hearing, the request for remand form indicated that police needed three weeks to complete investigations and that the period expired on 12 August 2020 being a date before the applicant was granted bail by MUSITHU J. The applicant complained that having to report three times a week was onerous and not in the interests of justice, since, without a trial date, it meant that he would be required to report in perpetuity (an overstatement I would say). The applicant argued that it was necessary and advisable in the interests of justice that the reporting conditions be reduced from three times to once a week.

The respondent countered the application by submitting that the applicant remained a flight risk even though he had abided his bail conditions particularly reporting conditions. The respondent relied on the *dicta* in the decision of the High Court in *Tungamirai Madzokere and Others* v *State* HH 53/13 expressed by BHUNU J (as he then was) as follows:

> "The mere fact that the accused persons have religiously observed their bail conditions cannot without more be evidence of the fact that they will not abscond if such conditions are relaxed. Another way of looking at it is that the accused persons have not defaulted because the bail

> conditions are working as a restraint against default… as regards to the relaxation of bail conditions, that can only be done in light of changed circumstances warranting such alteration of bail conditions."

The respondent's counsel; submitted that the seeking of the alteration of reporting conditions was not a new fact. Respondent's counsel further submitted that the perceived delay in setting down the matter for trial was not inordinate and that the reporting frequency was intended to ensure that the applicant did not abscond trial. CHIKOWERO J as already recorded, dismissed the application.

I have set out the facts of the previous dismissed application and issues considered therein in order to appreciate that case and determine whether or not the applicant has not brought the current application on the same basis as was pleaded in the application dismissed by CHIKOWERO J. It would not be competent to make a fresh determination on an issue already determined by CHIKOWERO J since this court would have exercised its jurisdiction and come up with a decision that is extant. The court would have become *functus officio* on the issue determined by it in the previous application.

The current application was filed on 28 January 2021. The relief sought has been extended to seek not only the relaxation of reporting conditions but in addition, the setting aside of condition 5 in the bail order granted by MUSITHU J in terms of which the applicant was ordered to surrender his passport to the Clerk of Court. The applicant has referred to the earlier application which was dismissed by CHIKOWERO J and submitted that the court held that there were "no sufficiency changed circumstances to warrant alteration of his bail conditions."

In this application, the applicant has listed the following factors which he submits as constituting changed circumstances warranting the grant of the relief which he seeks. Firstly he submitted that the spiraling rate of COVID-19 infectious requires that travel be restricted to the barest minimum only when necessary to travel. It is true that the Government through a Statutory Instrument No. 10 of 2021 enacted by the Minister of Health on 2 January 2021 imposed a level three lockdown and a 6.00 a.m. to 6.00 p.m. curfew. Significantly s 2 of the Regulations provides as follows–

> **"(2) The Public Health (COVID-19) Prevention**;
>
> Containment and Treatment (national Lockdown) (No. 2) Order 2020 (published in Statutory Instrument 200 of 2020) (hereinafter called "The principal order"), is amended in s 5 ("Prohibition of gatherings") (1) by the deletion of "no gathering of more than one hundred individuals in any

public place" and the substitution of "no gatherings of more than two individual in any public place."

The effect of the current lockdown is that unless a person is in the essential services category, she or he must minimize movement from one's home and only travel to the nearest exempted essential service like supermarkets, pharmacies, hospitals and such other essential services as by law are provided for. Additionally the Government has urged strict observance of WHO guidelines to wash one's hands periodically, sanitize, put on a mask and maintain social distance from the next person of at least two metres. The mischief sought to be arrested by the regulations is to minimize the risks of exposing people to possible infection by carriers of the virus thereby expanding the number of infections as infected persons continue to infect others and so on in a vicious circle

In considering the submission by the applicant on his concerns about being exposed to the risk COVID infection, I must take judicial notice of the current high COVID-19 infections being reported across the country by number released by Government. I must take into consideration the Government efforts punctuated by legislation to seek to contain the COVID 19 pandemic through preventive measures. I will approach the issue from a consideration that the Judiciary as an arm of Government will be abdicating its constitutional duty imposed by s 44 of the Constitution to "respect, protect, promote and fulfill the rights and freedoms" in [*Chapter 4*] (Declaration of Rights) if it does not promote the right to life which is given in s 48 of the constitution. COVID-19 virus has no treatment. The whole world is working flat out to control its spread in various ways principally by enforcing various interventions which minimize human contact and consequent transfer of the virus from one person to another. The world is also working hard to find effective vaccines to protect people not infected to remain immune from the virus. The judiciary must play its part in helping to curb the virus without compromising the due administration of justice. The judiciary derives its authority from the people of Zimbabwe as stated in s 162 of the constitution. The judiciary must therefore, whilst enforcing the laws of the country avoid being blind to the existence of life threatening pandemics like the COVID -19 virus especially so where as in the case there is in existence legislation intended to safeguard the lives of the people. The judiciary cannot be left out of the equation in relation to arresting the COVID-19 pandemic. Where decisions to be made are based upon the exercise of a judicial discretion, then such direction as is the norm should be exercised judiciously taking into account the circumstances of each case and the

exigencies of life threatening pandemics like currently COVID -19 which has a potential to decimate a sizeable chunk of the population if left uncontrolled.

The second factor relied upon by the applicant to justify the reduction aforesaid, was that he had religiously abided the bail conditions since their imposition in September, 2020. The applicant submitted that if he had intended to abscond he would have done so and that his compliance with reporting conditions as ordered was an indication that he did not harbor any intention to abscond as he could have easily done so in the intervening period. I have kept in mind the dicta by BHUNU J in the *Madzokere* case *supra* that where reporting conditions are imposed and the accused has abided them and did not abscond, it can be reasoned that it is the reporting conditions which will have ensured that the accused does not abscond. With due respect, I am not persuaded by the dicta to hold the same view. I suggest that the reasoning is too narrow and fails to take into account that a bail order will usually consist of various other conditions to be fulfilled by the accused person such a bail bond, non-interference with witnesses, confining the accused to stay at a specified place and reporting conditions and any others which the court may deem necessary and advisable to impose. It cannot be held that any one condition is the one which ensures non-abscondment by the accused who is granted bail.

In regard to conditions of recognizance to be ordered by the court which has granted the accused bail, they are set out in s 118 of the Criminal Procedure and Evidence. There are various conditions which can be imposed. I do not find it necessary to quote the provisions of s 118 *ex tenso.* It suffices for me to comment that the imposition of conditions is again the province of the Judge or magistrate who has granted bail. No condition is more important than the others. It is the totality of the conditions which is considered in deciding on the efficacy of the conditions. It would therefore be wrong in my view, to pick upon or pluck out one condition and hold that it is that particular condition which acts as the restraint to abscondment. The efficacy of a bail order in ensuring that the accused will stand trial and not commit of other conduct listed in s 117 (2) (a) is achieved by the package of bail conditions as a whole. I will therefore determine this application on the basis that it is not the reporting conditions which ensure that the applicant will not abscond but the whole cocktail of imposed conditions. Revisiting them or altering them does not invariably result in the applicant absconding trial.

The applicant averred that frequent reporting had become too risky and would likely expose him to contract the COVID-19 virus. The applicant submitted that there was a risk of infection even to or by the Police and other persons who would interact with him during his movement to and from reporting. He further submitted that the current lockdown did not exist when bail was initially granted in September, 2020 and when the application for alteration of bail conditions was dismissed by CHIKOWERO J. In response Mr *Makoto* submitted in the state response that the COVID-19 pandemic had been in existence throughout 2020 and that there had been previous lockdowns imposed. He submitted that there was nothing new regarding the COVID pandemic as merited the alteration of bail conditions imposed. I disagree, I have already noted that there is a lockdown imposed on 2 January, 2021. It prohibits gatherings of more than two people and people must stay home unless there is absolute necessity to leave home. The new wave of the pandemic has seen an increased number of people dying including political and government leaders. It is in my view dishonest or a deliberate refraining from acknowledging an obvious reality for anyone to pretend that the situation with COVID has not worsened. It has and nothing needs to be debated on this. It is imperative then that in bail applications courts acting within the confines of existing law should consider putting in place bail conditions which are COVID-19 adapted or conscious without prejudicing the due administration of justice.

In casu, and given the circumstances of the effects of COVID-19, its spread, the need to arrest or minimize the spread, the applicants' past history of complying with reporting conditions without fail in the last four to five months post the grant of bail and the fact that the court has a discretion to alter bail conditions, add to them or commit the applicant to poison as provided for in s 126 as quoted herein before, I am persuaded that the application for alteration of reporting conditions has merit. The only issue is whether the reduction in frequency of reporting will compromise the interests of justice. I do not think so and neither has the respondents' counsel attempted to convince me otherwise. The thrust of the respondents' argument has been that there are no changed circumstances which justify the alteration and /or variation of bail conditions. The argument that this application must be based on changed circumstances in the form of new facts which have arisen since the last determination is a creation of the respondent. Section 126 requires that the applicant should place facts not previously pleaded. There is no qualification that the facts

must not have existed at the time of the last application. This approach adopted by Mr *Makoto* is incorrect.

The proviso's to s 116 (c) (ii) and 123 (i) (ii) provide respectively that where an application for bail pending trial and bail pending appeal as the case may be has been dismissed by the Judge or Magistrate again as the case may be, any follow up application if the applicant files one, may only be made if it is "based on facts which were not place before the judge or magistrate who determined the previous application and which have arisen or been discovered after the determination of such follow up applications have in practice come to be called "application based on changed circumstances."

By contrast however there is nothing in s 126 to suggest that applications made there under are based upon the same considerations as provided for in the provisos to s 116 and 123 as referred to above s 126 applications are wider in scope.

In regard to s 126, the judge or, magistrate, must be of the opinion that it is necessary or advisable in the interests of justice that conditions entered into by that person (who will have been granted bail) be altered or added to or not that the person be committed to prison. The judge or magistrate will act on information brought to his or her attention. Such information may be pleaded by the accused who was granted bail, by the police through the Prosecutor General or any person again through the Prosecutor General. The provisions of section 126 ensure that the judge or magistrate who granted bail has control over the accused and is empowered to revisit the court's order to ensure that the bail order is not defeated. The judge or magistrate retains the powers to regulate their bail orders whose conditions they can review and change if in their opinion, it is necessary and advisable in the interests of justice to do so including committal of the bailed person to person. There should therefore be no conflation between the provisions sections 116 (c) (ii) s 123 (1) (ii) of the Criminal Procedure and Evidence Act and s 126.

The reference to changed circumstances when regard is had to the provisions of section 126 may be misleading. The consideration to be taken into account revolve around the judge or magistrate being of the opinion that it is "necessary or advisable in the interests of justice" that bail conditions be altered or added to. The proviso on changed circumstances in regard to section 123 (1) (ii) and 119 (c) (ii) apply to circumstances of applying for bail on subsequent occasions following the initial denial of bail. Section 126 however relates to circumstances where bail has been granted and the accused is in fact on bail. Therefore whilst it is true that there would have to

be some reason or a circumstance to motivate the judge or magistrate to Act in terms of section 126, a distinction must be, made on the requirements to be considered if one is acting in terms of the provisions aforesaid. It follows that under s 126 the judge or magistrate can consider any circumstance new, old or then existing at the time of the grant of bail as long as the circumstances(s) is such that it sways the judge or magistrate's opinion to hold that it is necessary or advisable in the interest of justice to alter bail conditions or cancel the bail. As to the nature of such facts, the circumstances of each case should be the determinants. Mr *Makoto*'s submission that COVID-19 was in existence when bail was granted and that the applicant can't rely on it as a changed circumstance is a misplaced argument. The judge or magistrate is entitled to take into account the COVID-19 current effects and to decide whether in his or her opinion and in any particular case brought to his or attention the judge or magistrate considers it necessary or advisable in the interest of justice to alter, vary or add to bail conditions including termination of bail.

Consequent on the undeniable fact that COVID-A9 is now a menace and a dangerous pandemic to life which has led the Executive to impose a strict lockdown, I consider this fact to be one which in my opinion makes it necessary or advisable in the interests of justice to reconsider the likely impact or consequence of the applicant having to report to the police three times a week. There is no doubt that frequent movement carries the risk of contracting the COVID-19 virus. The police station where the applicant has to report is a public place. With the applicant having been reporting religiously to the police since the grant of bail on 2 September 2020, I did not consider that a reduction in the reporting frequency, which in turn minimizes exposure to the persons whom the applicant may come into contact with including the police, will not be in the interest of justice. I consider that in lieu of the reduction in the reporting frequency other remaining conditions can be tinkered with to ensure that the bail conditions remain effective enough as an inducement for non abscondment. The application therefore has merit and the reporting conditions will be reduced.

The applicant's second prayer that his passport is released to him must fail. He submitted that he cannot travel outside Zimbabwe to visit his clients. He indicated that he cannot disclose the identities of the clients. He thus fails to put the court in his confidence. He did not plead the nature of the business which requires that he should travel out of country. He did not place before the court any documentation to show scheduled business meetings their nature and at whose invitation

the applicant wants to travel. It is also contradictory that the applicant has sought a reduction in reporting conditions to avoid exposure to COVID-19 yet he applies for the release of the passport to travel outside Zimbabwe at will. The applicant can always apply for the release of the passport on a need basis in that should the specific need to travel out of Zimbabwe arise, he can approach the court for such release for the specific purpose. A blanket release of the passport will not be in the interests of justice. Mr *Nkomo* did not motivate the issue of the release of the passport with any degree of conviction. It had to be so because there was no merit in the claim for the unconditional release of the passport since the need for external travel was not established by the applicant.

Having determined that there is a necessity and that it is advisable in the interests of justice to reduce the frequency of reporting condition, it is necessary to consider whether the remaining conditions are adequate to ensure the effectiveness of the bail order. Having considered the rest of the other conditions which remain, I do not consider that there is need to make an addition to any of them. The applicant has religiously reported to the police three times a week. He has offered to report once a week. The position would have been otherwise had the applicant applied for a total removal of reporting conditions. The respondent's counsel only addressed in opposition asking for a dismissal of the application. He did not make submission in regard to any addition of conditions in the event that the respondent's opposition fails. By not addressing the adequacy or inadequacy of the applicant's prayer in the event that the opposition to bail fails, it is taken that the prosecution has no *qualms* with the suggested order.

I accordingly dispose the applications as follows:

IT IS ORDERED THAT

a) The application for reduction of the reporting frequency in para 7 of the bail order dated 2 September 2020 in case No. B 1358/20 is granted and the reporting condition is varied by the deletion of the words "three times" and "Mondays, Wednesdays…" so that it reads "(7) The applicant shall report every week on Fridays between 6 a.m. and 6 p.m. at Waterfalls Police Station until his matter is finalized.

(b) The application for the release of the applicant's passport is hereby dismissed.

D. N. M Attorneys, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners