

MISHECK MSIMANGA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 9 FEBRUARY AND 16 FEBRUARY 2023

Bail Application

T. Runganga, for the applicant
K.M Guveya, for the respondent

MAKONESE J: This application has been brought before this court as an appeal against the refusal of bail. In essence however, this is an application for reinstatement of bail in terms of recognizance and conditions of a previous bail order granted by a Magistrate.

The draft order is couched in the following terms:-

- “1. Appellant be immediately released from prison.
2. Appellant to continue residing at the given address until the matter is finalized.”

The application is opposed by the state on the grounds that applicant has not shown any manifest error on the part of the court *a quo* that warrants this court to vitiate the decision of the court.

Factual Background

Applicant is facing allegations of contravening section 157 (1) (c) of the Criminal Law Codification and Reform Act (Chapter 9:23). It is alleged by the state that on the 2nd of September 2020 and at around 1200 hours detectives from Criminal Investigations Department, Drugs and Narcotics, Bulawayo, carried out a raid at appellant's residence at 214 Harrisvale, Bulawayo. Detectives searched the yard and discovered 51 dagga plants in a garden. The plants measured between 15 to 150 cm in length. Appellant was granted bail on his initial appearance. The trial commenced and at the close of the state case appellant applied for discharge. The application was dismissed. Appellant approached this court on review. The state did not oppose the application for review. On 21 January 2023, appellant who is of poor health fell sick and failed to attend remand court. A warrant for his arrest was issued. On 23rd January 2023 appellant's legal practitioner appeared in court and produced a medical certificate by Dr Mhlanga indicating that appellant required medical attention.

On 27th January 2023 the appellant attended court on his own to explain the reason for his default. A default inquiry was held and the court ruled that appellant was in willful default. Appellant was remanded in custody. He remains in custody. His trial has been stalled pending a hearing of his application for review.

Whether the court *a quo* exercised its discretion correctly in finding appellant in willful default.

In this application the issue before the court is a narrow one. The decision to be made by this court is whether or not the court *a quo* was correct in finding that the appellant was in willful default. The court reasoned that the appellant could not explain why he was in default. On the 23rd of January 2023. The court did not accept the explanation that appellant was not

well when he failed to attend court. The court rejected the medical certificate by Dr Mhlanga on the grounds that it did not comply with the provisions of section 278 of the Criminal Procedure and Evidence Act (Chapter 9:07). The section provides as follows:-

“In any criminal proceedings in which it is relevant to prove –

- (a) any fact ascertained by an examination or process requiring knowledge of or skill in bacteriology, chemistry, physics, microscopy
- (b) any opinion relating to any fact ascertained by an examination or process referred to in paragraph (a) a document purporting to be an affidavit relating to any such examination or process and purporting to have been made by any person qualified to carry out such examination or process shall on its mere production in those proceedings by any person. be *prima facie* proof of the fact or opinion so stated

It is clear that an affidavit compiled in terms of section 278 of the Criminal Procedure and Evidence Act relates to an affidavit made for the benefit of the court in criminal proceedings. Such documents are produced and are admissible as proof of the opinion stated to prove the opinion sought by the court in criminal proceedings.

It is clear that the learned Magistrate in the court *a quo*, mistook the Doctor's Certificate produced in a default inquiry with an affidavit tendered in court in terms of section 278 of the Criminal Procedure and Evidence Act. In my view, where a person defaults court through illness or some other cause, he is required to present himself in person in court, or with his legal practitioner to explain the reason for his default. Where the explanation proffered is reasonable and probable, a warrant of arrest ought to be cancelled.

On the facts of this case the learned Magistrate clearly misdirected himself by placing reliance on the provisions of section 278 of the Criminal Procedure and Evidence Act in ousting the validity of the “Doctor’s note.”

I would, therefore grant the application and reinstate the bail on the same conditions as provided on the initial appearance. I do not have the original bail conditions before me, and therefore make the following order.

1. The order of the court *a quo* dated 27 January 2023 be and is hereby set aside.
2. The appellant is ordered to deposit bail recognizance in the sum of Z\$50 000.00 with the Clerk of Court, Bulawayo Magistrates Court.
3. The applicant is to continue residing at the given address pending the finalisation of the matter.”

Tanaka Law Chambers, applicant’s legal practitioners
National Prosecuting Authority, respondent’s legal practitioners