NEVERSON MWAMUKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 10 March 2021 & 31 March 2021

Reasons for Dismissing of Application for Bail based on changed Circumstances

E Mavuto, for the applicant
Ms *V Mtake*, for the respondent

FOROMA J: On 5 March Applicant's application for bail came before me and after an exchange with the applicant's counsel I dismissed the application. It is not always necessary that the bail court provides detailed reasons for the decision in an opposed application especially in those cases where the court has through an exchange with counsel made clear its reasons for the decision reached. In *casu* the applicant has requested reasons for the dismissal of his application for bail – these are they.

Applicant was arrested on 9 January 2021 and was remanded in custody on 13 January 2021 by the Magistrate Court. He then applied for bail pending trial to the High Court which was argued before CHITAPI J. Applicant's application was consolidated for purposes of hearing with that of Gerald Rutizira under Case No. B 152/21. CHITAPI J dismissed both applications and his reasons are contained in his judgment *per* HH 62/21.

A brief background of this matter in particular the allegations against applicant is pertinent. Applicant and accomplices are alleged to have conspired to rob a ZB cash in transit truck transporting cash amounting to $2 775 000 to the bank branches in Chinhoyi, Kadoma, Gweru, Bulawayo, Gwanda and Zvishavane towns.

It was alleged that the applicant and his accomplices armed with pistols, a knife arranged for three vehicles in order to dispossess the cash in transit CREW of the cash which they would share. The cash in transit vehicle a Toyota Hilux truck with a canopy was stopped at the 60 km peg on the road to Chinhoyi to drop one of the accomplices who pretended to have

reached his destination. This accomplice was among the persons given a lift along the way to Chinhoyi. It was at this point when the cash in transit crew was allegedly dispossessed of the cash in boxes after a simulated robbery.

In the "robbery" the cash and a 9 mm Hama pistol and an SMLS rifle were allegedly stolen by the robbers who loaded their loot into their Toyota Twin Cab and drove away. The applicant is alleged to have received his share the precise amount of which has not been determined. However, at the hearing of applicant's initial bail application which was opposed by the State, one Assistant Inspector Chipwazvo was called by the prosecution to testify in support of the opposition to bail.

In regard to the applicant who was second applicant in the consolidated application before CHITAPI J, Assistant Inspector Chipwazvo testified that applicant was arrested at the Goromonzi toll gate where police were waiting for him after receiving information that applicant was en-route to Mozambique where he was fleeing to through the Forbes border post.

According to the witness the applicant was driving a motor vehicle which upon search by the police details resulted in the recovery of US$74 944.00 and ZWL$675.00. The money was recovered from a monarch suit case, a satchel and in a purse and among his parked clothes and inside a blanket including from his pockets. According to the police applicant had allegedly not been to his residence erroneously recorded as 2004-183 block 3 Mbare Harare. As it turned out the address which police entered in the Form 242 for applicant was not the correct one.

The witness for that reason considered that the applicant was of no fixed abode and could just abscond the rented accommodation.

In denying applicant bail CHITAPI J said "further I found the evidence of the investigating officer to be very credible when he testified that the arrest of second applicant was not coincidental but planned by police after they received information of applicant's intention to abscond to Mozambique."

Applicant was considered by CHITAPI J to be a likely flight risk who would not stand trial. His Lordship put it in very emphatic terms when he said "the second applicant is a demonstrated flight risk who was caught while in the process of leaving Harare. The applicant is not only a flight risk but his release on bail given the serious uncontroverted allegations which were not challenged upon his remand will undermine the objective and proper functioning of the criminal justice system and the bail institution."

Despite these positive findings against applicant another attempt at getting his freedom was made by applicant on 18 February 2021 which was an application for bail pending trial

based on changed circumstances. That application was argued before me on 25 February. It was opposed by the respondent on the basis that there were no changed circumstances. I did not find any changed circumstances and accordingly dismissed the application.

Applicant was back in court with another application for bail pending trial on the basis of changed circumstances on 5 March 2021. The application was filed on 3 March 2021. The application averred the changed circumstances to be:

"(a) That the investigating officer had since conceded that the applicant's residential address as indicated to the police was incorrect thus the failure to find applicant at the incorrect address cannot be support that applicant was on the run or is a flight risk." In support of the changed circumstances applicant attached an affidavit by one Pikisai Chipwazvo a member of the investigation team in which he accepted that he had been misled into believing that applicant was resident at 2004-183 Block 3 Mbare. This he discovered after arresting applicant when the correct residential address for applicant was indicated to be Number 4 Adam Chigwida Street Mbare Harare. The deponent also indicated that he made an error when completing the Request for Remand Form, (Form 242) where he reflected applicant's address as No 2004-183 Block 3 Mbare Flats Harare instead of No 4 Adam Chigwida Street Mbare Harare.

It is significant to note that both the State and respondent knew as a matter of fact and before the hearing of the bail application before CHITAPI J that applicant's correct residential address was Number 4 Adam Chigwida Street Mbare even though none of them brought this to the attention of the court. In fact, going by the judgment of CHITAPI J aforesaid (p 5 of the cyclostyled judgment) the investigating officer Assistant Inspector Chipwazvo told the court that applicant had not been to his rented house for two days and police had been checking for him there at number 2004-183 Block 3 Mbare Harare. It is significant to note that information as to applicant's correct address was available to applicant's counsel as at the time of the hearing of the applicant's application for bail before CHITAPI J despite the defence counsel's failure to correct the record (Form 242) and the investigating officer through cross-examination at the time he (the investigating officer) initially incorrectly told the court that such residence was No. 2004-183 Block 3 Mbare.

I am alive to CHITAPI J's comment in his judgment that the investigating officer opined that applicant could therefore just abscond the rented accommodation.

However, it is important to note that the learned judge was not swayed by this opinion of the Investigating Officer as infact he noted that the said evidence as to applicant's residence at No. 2004-183 Block 3 Mbare was corrected by the witness. This is clear from the following portion of the judgment on p 5 aforesaid— "He also agreed that he made a mistake in the request for remand form and mistakenly recorded the address of the same Tendai Zuze as that of second applicant.

Clearly therefore the learned judge was not swayed by the investigating officer's testimony or opinion as he accepted the investigating officer's evidence of the error made in relation to applicant's address as noted in the Form 242.

In his detailed submission applicant on p 4 of his application made the following submission under detail submissions – 4.1. "In *casu* it is submitted that at the time the previous bail application was heard and determined, the following fact was not before the court –
That before the arrest the police looked for the applicant at a wrong residential address which had been supplied to them by an informer." In further motivation of the application applicant says "Applicant submits that in the previous hearing it was not known that police had looked for the applicant at a wrong residential address supplied to them by an informer. This new fact was discovered after the investigating officer deposited (sic) to an affidavit which is attached as Annexure F clarifying the correct residential address of the applicant." This as will be demonstrated below is a misrepresentation of facts by the applicant's counsel.

Applicant's counsel under para 4.1.2 says "It is apparent from the contents of the affidavit (by the I.O.) that before the arrest the police checked for the applicant at no. 2004-183 Mbare flats and they did not find him --- the investigating officer acknowledged (in the affidavit Annexure F) that this was not the place where applicant was residing. In fact, he only discovered the correct address from the applicant himself after the arrest. The correct address where applicant was residing before the arrest is no. 4 Adam Chigwida Mbare Harare, (the underlining is mine to show that the address was typed in bold font). What it therefore means is that the police searched the applicant at a wrong address supplied them by their informer. This new fact goes to the root of the judgment by CHITAPI J and the previous ruling, in that it is a changed circumstance which requires this Honourable court to reconsider bail." The quoted paragraph is totally misleading regard being had to CHITAPI J's observation aforesaid and for the avoidance of doubt the judge said referring to the investigating officer's evidence – "He also agreed that he made a mistake in the request for remand form and mistakenly recorded the address of the same Tendai Zuze as that of second applicant". Having noted the investigating

officer's error, the court disabused itself of the opinion of the investigating officer. As a matter fact the conclusion that the court came to and which was the gravamen for dismissing applicant's bail application was that applicant was arrested at Goromonzi Toll Gate as he was absconding. Applicant's residential address played no role in this finding. It was on the basis of this finding by CHITAPI J that on 25 February 2021 I dismissed the applicant's application for bail based as it was on alleged changed circumstances as I did not find any changed circumstances. The law makes clear as to what constitutes changed circumstances. Changed circumstances are facts which were not placed before the judge or magistrate who determined the previous application either because if they were already in existence they were not discovered until after that determination or new facts which have arisen subsequent to the determination. Such facts whether pre-existing or new must be such that when viewed in conjunction with the other relevant factors both adverse or favourable they tend to reduce in significant degree the risk of abscondment before trial – *S* v *Daniel Rance* HB 127/2004 where CHEDA J reasoned that "In determining changed circumstances the court must go further and enquire as to whether the changed circumstances have changed to such an extent that they warrant the release of the suspect on bail without compromising the reasons for the initial refusal of the said bail application.

In the circumstances the applicant has not demonstrated any changed circumstances. Instead what applicant has demonstrated is that it has either failed to understand the ratio of CHITAPI J's judgment or deliberately misconstrued same. The applicant regrettably seeks to challenge CHITAPI J's judgment without following the appeal procedure– an exercise in futility. In his para 4.1.4 the applicant's counsel erroneously submits ... "since the issue of the wrong address is a new fact (which I have demonstrated it is not) this court is urged to consider the material contradictions in the investigating officer's affidavit attached as Annexure B and his oral evidence in opposing bail. Applicant's counsel further submitted that it was clear that in the affidavit there is nowhere the investigating officer stated that applicant wanted to flee to Mozambique. He further submitted that there is no evidence placed before the court to substantiate the claim that he was fleeing the country. …it appears the allegations that applicant was arrested while trying to run away from the country is a mere speculation". This attempt to impugn the judgment of CHITAPI J without noting an appeal deserves censure.

Applicant contents that when the fact that police checked for applicant at the wrong address is taken in conjunction with the undisputed fact that applicant's co-accused persons have since been admitted to bail by this Honourable Court these constitute changed

circumstances which are favourable to him and warranting release on bail. Applicant argued that all his co-accused granted bail were facing similar allegations and were found in possession of substantial amounts in US Dollars note and led police to recover properties bought using proceeds of crime. The applicant so it is further argued cannot be distinguished from the co-accused as they also did not challenge placement on remand on their initial remand.

Applicant overlooks the material point distinguishing the co-accused's case from his own. None of the applicants was found by a competent court in a judgment to have been caught absconding. I note that applicant challenges the finding that he was caught in the act of absconding but this challenge should be pursued in the correct forum. I have neither appeal nor review jurisdiction over the work of another judge of this court. The criticism that the applicant's application was dismissed on 25 February 2021 despite the fact that his co-accused had since been granted bail is an attempt to assail my judgment in an irregular manner. Applicant ought to have noted an appeal against my judgment of 25 February 2021 instead of coming back to court with an application based on changed circumstances without seeking to assail the judgment of 25 February 2021. Applicant will not be allowed a second bite of the cherry.

It was on the basis of the foregoing reasons that I dismissed applicant's application. In the assessment of the court it was not found necessary to hear respondent's counsel beyond consideration of respondent's opposition as filed.

Maposa & Ndomene, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners