IGNATIUS MORGEN CHOMBO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 3, 11, 18 & 21 May 2021

Bail

L Madhuku, for the applicant
F Nyahunzvi, for respondent

CHATUKUTA J: This is an application referred to by the applicant as "Court Application for the Second Revival of Temporary Variation of Bail Conditions in B1836/19: HH 735/19" being made in terms of s126 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the Act). The application was initially not opposed. On 3 May 2021, I directed that the parties file supplementary heads of argument on whether or not this court has jurisdiction to determine the application.

It is necessary to remark at the onset that this is a novel application. Mr *Madhuku* referred to it in his oral submissions as an application *sui generis*. It is a novel application because neither s 126 (1), nor any other provision of the Act for that matter, provides for the ranking of applications where more than one application is filed. Therefore there cannot be a first, second or third application for variation of bail conditions. This is simply an application for the alteration of bail conditions. There is no legal basis, either, for the application to be referred to as *sui generis*. The fact that an order is sought for "the second revival of temporary variation of bail conditions" does not bestow on it a special status.

The application is improperly before me as I do not have the jurisdiction to vary bail orders of the magistrates court except on appeal.

The background to the application is that on 27 November 2017, the applicant was denied bail by the magistrate court. He appealed against the dismissal and was granted bail by this court

on 11 April 2018 in case number HH 196/18. On 16 September 2018, he applied before the magistrate court under case number CRB NO ACC54/19 for a variation of the bail conditions. He, *inter alia*, applied for the temporary release of his passport to enable him to travel to South Africa for medical attention. The application was dismissed. The applicant appealed to this court against the dismissal under case number B 1836/17. His appeal was upheld by CHITAPI J. He was granted an order for the variation of the bail condition. The order allowed for the temporary release of the passport on condition that the applicant surrendered the title deed of an immovable property registered in the name of Nimrod Willard Chiminya. The passport was to be returned on or before 3 December 2019. Upon return of the passport, the title deeds were to be released back to the applicant. Full reasons for the court's decision were rendered in the judgment in case number HH 753-2019.

On 11 February 2020, the applicant applied before this court for "revival of a temporary variation of the applicant's bail conditions" seeking the release of his passport. The order was granted by FOROMA J on 26 February 2020 on condition the applicant surrendered the same title deeds as in HH 753-2019. The passport was to be returned on 16 March 2020. And, as in HH 753-2019, the title deeds were to be returned to the applicant following the surrender of passport to the Clerk of Court. There are no reasons for judgment.

The applicant is back seeking the release of his passport yet again to enable him to go to South Africa for medical attention. He is seeking a variation of the order granted on appeal under case number HH 753-19 (B 1836/17). In lieu of the passport, the applicant offers to surrender a title deed for yet another immovable property registered in the name of Pomlic Investments (Pvt) Ltd.

Mr *Madhuku* submitted that this court accepted jurisdiction when an order for "revival of a temporary variation of the applicant's bail conditions" was granted by FOROMA J. He submitted that it is contrary to the rule of law for the same court to seek now to question the basis of its jurisdiction involving the same parties and the same matter.

The submissions by Mr *Madhuku* are unmeritorious. Jurisdiction is founded on the provisions of the Act and not on the basis that another judge assumed jurisdiction.

Mr *Madhuku* also submitted that this court has jurisdiction to revive the temporary variation as sought by the applicant in terms of s 126 (1) of the Act as read with s 46 (2), 50 (1)

(d), 70 (1) (a), 76 and 176 of the Constitution of Zimbabwe. He submitted that when a court sits on appeal it can grant an order on the basis of s 121 (5) or its inherent jurisdiction. The context of the application before CHITAPI J, the order he granted and the reasoning thereof implied that the court was not proceeding in terms of s 121(5) but was exercising its inherent powers. The order under HH 753-19 is therefore a High Court order. It can be varied or altered in terms of s 126 (1).

The respondent abandoned its concession to the application. Mr *Nyahunzvi*'s submissions were on the question whether or not s 126 (1) provides for the temporary suspension of a bail order. The submissions are not relevant to the resolution of the question of jurisdiction.

The answer to the question for determination is found in s 121 subsections (5) and (7) of the Act and in the reasons for judgment and the order issued by CHITAPI J. The subsections provide as follows:

> "(5) A judge who hears an appeal in terms of this section may make such order relating to bail or any condition in connection therewith as he considers should have been made by the judge or magistrate whose decision is the subject of the appeal.
>
> (6) …….
>
> (7) Any order made by a judge in terms of subsection (5) shall be deemed to be the order made in terms of the appropriate section of this Part by the judge or magistrate whose decision was the subject of the appeal."

A judge dealing with an appeal in terms of s 121 is therefore empowered in subsection (5) to make an order he considers appropriate which should have been made by a magistrate. The status of that order is provided for in subsection (7). Whatever order the judge makes is deemed to be the order of the magistrate whose decision was the subject of an appeal. Both subsections are clear and unambiguous. They both relate to an appeal filed in terms of s 121.

A reading of the judgment by CHITAPI J is specific that the judge was considering an appeal made by the applicant in terms of s 121 (1). There is nowhere in the judgment that the judge indicated or can be assumed that he was exercising inherent jurisdiction. The order shows that the judge was mindful of subsection (7). Paragraph (a) of the order reads:

> "(a) The order of the magistrate made on 18 September, 2019 dismissing the appellant's application for a temporary release of his passport held as a bail condition in case No. CRB 11633/17 as read with case No CRBs 12182/17, 12251-53/17, 2254/18 and 9388/19 is set aside and substituted with the following order."

The judge set aside the order of the magistrate and substituted it with the new order. The order is couched in clear and unambiguous peremptory terms. The order became the order of the

magistrates court. The judge ordered the surrender of the title deed to the immovable property to the Clerk of Court and not to the Registrar of the High Court.

The applicant was aware that the order was an order of the magistrate court. He duly complied with the order by surrendering the title deed to the Clerk of Court. He retrieved his passport from the Clerk of Court. Upon his return he surrendered the passport back to the Clerk of Court and retrieved the title deeds. It is therefore inexplicable why the applicant has been approaching this court for a variation of an order of a magistrate. He can only approach this court on appeal in the event that he is dissatisfied with the decision of the lower court as he did in case number HH 753-19.

The applicant referred to various provisions of the Constitution on the rights of an accused person. The constitutional provisions are of no relevance to the determination of the question of jurisdiction. It seems they were referred to so as to give "flavour" to the otherwise unmerited submissions so that the submissions would be high sounding. I therefore find it not necessary to be detained by making any reference to the provisions, suffice to remark that this court is not denying the applicant his right to protection of the Constitution. It is simply pronouncing that the application for the realization of those rights has been made at the wrong forum.

It is this court's finding that this court does not have jurisdiction to entertain the application. The application is improperly before the court. It was ill- conceived and amounts to an abuse of court process. Applicants in general and the present applicant in particular, are strongly discouraged from forum shopping and in the process abusing court process.

The application is accordingly struck off the roll.

Lovemore Madhuku Lawyers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners