

MATHIUS MUTENHABUNDO  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MUSITHU J  
HARARE, 10 & 13 December 2019

### **Revocation of bail order for bail pending appeal**

*S. Chabuka*, for the applicant  
*F.A. Nyahunzvi*, for the respondent

MUSITHU J: This matter was set down before me in the bail court on 10 December 2019. The represented applicant was applying for bail pending appeal under case number B1935/19. He was convicted at the Bulawayo Magistrates Court of 9 counts of theft as defined in section 113(2) (d) of the Criminal Law (Codification and Reform) Act<sup>1</sup>. He was sentenced on 12 June 2019 to 48 months imprisonment of which 12 months imprisonment was suspended on condition he retribute the complainant the sum of \$5, 149.40, through the clerk of court Bulawayo Magistrates Court on or before 11 July 2019. The applicant appealed against his conviction and sentence on 13 June 2019.

At the hearing of the application for bail pending appeal, the respondent was not opposed to the application, conceding to prospects of success on appeal against sentence. Having considered the application and the concession by the respondent, I was satisfied that it was in the interests of justice to grant the application for bail pending appeal. I consequently issued an order granting the applicant bail pending appeal on the following conditions:

1. That he deposits \$500.00 with the clerk of court Bulawayo Magistrates Court.
2. That he resides at number 1 Emsizini Flats Makokoba, Bulawayo until this matter is finalized.
3. That he reports at Bulawayo Central Police station every week on Fridays between 6am and 6pm.

Before granting the order and out of an abundance of caution, I asked the applicant's counsel why this application had been filed at the High Court in Harare instead of High Court

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<sup>1</sup> [Chapter 9:23]

Bulawayo since the applicant had been convicted and sentenced by a Bulawayo Magistrate. His explanation was that the applicant's family had relocated to Mutare following his conviction and incarceration. He and the applicant's family knew each other well from Mutare, and when the applicant's family approached him with instructions to apply for bail pending appeal, it was convenient to file the application at the High Court in Harare since he practices law in Harare. The applicant's family also had difficulties raising legal fees to cover costs attendant on making an application at the High Court in Bulawayo. Satisfied with the lawyer's explanation and in view of the concession by the respondent, I proceeded to grant the order.

When the applicant's relatives attempted to pay the bail deposit at the Bulawayo Magistrates court, the clerk of court noted that there was another order by MOYO J, dismissing a similar application which had been filed at the Bulawayo High court. The clerk of court referred the two conflicting bail orders to the provincial magistrate, who in turn forwarded them to the registrar in Harare for guidance. The registrar escalated the matter to the office of the honourable judge president who then requested me to comment on the circumstances surrounding the issuing of the second bail order. This anomaly had also been brought to my attention by Mr *Nyahunzvi* who had appeared before me in another matter on 12 December 2019. I had then instructed my assistant to uplift the applicant's record from registry and invite both parties' legal practitioners to my chambers on 13 December 2019, so that I could interrogate the issue further. Both legal practitioners appeared before me in chambers on 13 December 2019, and advised that they were not aware of the prior application and the order by MOYO J at the time they appeared before me in the bail court. Mr *Chabuka* for the applicant indicated that he had not been informed of the prior application by the applicant's relatives. He had not interviewed the applicant, and neither had he spoken to the legal practitioner who had filed the first application and appeared on behalf of the applicant before MOYO J at the High Court in Bulawayo.

Under the circumstances it became clear that both counsel and I had dealt with the matter under the misapprehension that it was an initial application for bail pending appeal when in fact it was not. The applicant ought to have appealed against the dismissal of his application by MOYO J, or file a fresh application based on changed circumstances. Seeing as my order was issued in error, it stands to be revoked in terms of order 49 rule 449 (1) (c) of the High Court rules. Accordingly I issue the following order:

The order of the court admitting the applicant to bail pending appeal dated 10 December 2019 be and it is hereby revoked and set aside and substituted with the following order:

“The application is hereby struck off the roll”

*Magaya-Mandizvidza*, applicant’s legal practitioners  
*National Prosecuting Authority*, respondent’s legal practitioners