SINGATHINI RAYMOND CHIGOGWANA
ACCESS FINANCE (PRIVATE) LIMITED
versus
THE STATE

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 12 October 2021, 15 October 2021

Appeal against refusal of bail pending trial

T. Magwaliba, for the appellants
G. Ziyadhuma & *T. Mapfuwa*, for the State

KWENDA J: Introduction**:** The second appellant is a company registered in terms of the laws of Zimbabwe and thus a juristic person. It is a registered *bureau de change* licensed to deal in foreign currency. The first appellant is its managing director. The appellants are jointly charged with unlawfully dealing in foreign currency as defined in s 5(1) (a) (i) of the Exchange Control Act [*Chapter 22:05*] and appearing before the Anti-corruption court at Harare magistrates court. The simple allegation against both appellants is that they both and each unlawfully conducted the business of dealing in foreign currency on the informal market commonly referred to as the 'black market' in violation of the first appellant's foreign exchange permit. In January 2020 they transferred various sums adding up to ZWL 185 420 444.37 from the second appellant's Steward bank account into the Ecocash wallets of twelve Econet lines belonging to the first appellant. Econet is a cellular service provider. Ecocash is a platform linked to Econet whereby Econet subscribers are able to receive and store money in certain wallets which the service provider has linked to their lines. A wallet is similar to a bank account. The wallet holder is able to store and receive money from a bank account or another Ecocash/Econet subscriber's wallet, store the money, withdraw the cash, move money among wallets or pay for goods and services. The whole sum of ZWL 185 420 444.37 transferred from the second appellant's Steward bank account into the first appellant's ecocash wallets was quickly disbursed to several natural and juristic persons through the Ecocash platform for the use by runners or touts or as direct exchange for foreign currency. As stated above the events took place in January 2020 and the appellants have been charged one year nine months after the alleged commission of the crimes. The foreign exchange was conducted in breach of

exchange control regulations issued by the Reserve Bank which prohibit trading in foreign currency at any place other than inside the registered premises. The first appellant and its employees are required to conduct their business of foreign exchange inside second appellant's place of business at 7th floor, Finsure House, Corner of Second street and Kwame Nkurumah Avenue, Harare only. They are prohibited from trading online, transacting remotely, touting for clients or accosting people. In short clients are required to approach the appellants inside their registered place of business.

This is an appeal by the first appellant against the decision of the Magistrates court to detain him pending trial. Access Finance (Pvt) Ltd is inappropriately cited as the second appellant because it is a person only in the eyes of the law and does not exist in flesh. It did not have to apply for bail. The issue of bail is irrelevant to its existence.

Proceedings *a quo*

At the appellants' initial appearance before the lower court the first appellant applied for bail in terms of s 117A of the Criminal Procedure and Evidence Act *[Chapter 9:07]*. [hereinafter the Act]. The State opposed bail on the following grounds. The first appellant was likely to interfere with State witnesses. He was likely to abscond. The State case is so strong that a conviction is inevitable. The State called the investigating officer as a witness as contemplated in s 117A of the Act. He added more grounds of opposition to bail. His testimony was to the effect that the first appellant holds a valid passport and frequently travels out of the country and has the means to sustain a life outside Zimbabwe. The investigating officer was still to locate and interview at least 25 witnesses and the first appellant was likely to interfere with evidence or the witnesses not yet interviewed. His co-directors had not been arrested. The first appellant was likely to commit similar crimes. In response the appellant averred that the State evidence is weak. His counsel subjected the investigating officer to intense cross-examination recorded over 38 typed pages aimed at exposing weaknesses in the State's case.

The bail application was dismissed by the court *a quo* after it found that the State had discharged the burden upon it of showing, on a balance of probabilities, that there are compelling reasons justifying the first appellant's continued detention. The State had shown that there were compelling reasons for the first appellant's continued detention as contemplated in s 115 (2) (a) (ii) of the Act. The court's ruling is on six typed pages of the transcript. The court dedicated five pages of the ruling to a statement of the law which applies to bail applications pending trial. It started by stating the various principles coming out of case law. It then followed that by quoting s 117 of the Criminal Procedure and Evidence Act in full.

Thereafter it gave its reasons for denying bail on half a page where it made the following findings. The case involved vast infringements of the law by many people. Many of those people were accomplices who were susceptible to interference by the first appellant. It concluded that the first appellant is a flight risk because the State had adduced evidence of his frequent journeys out of the country. The journeys showed that the first appellant has a 'destination' outside the territorial jurisdiction of the court. Fleeing from this country is now easier than before and the surrender of a passport by the first appellant was unlikely to prevent him from fleeing. The State evidence against the first appellant was clear and overwhelming. In addition, the first appellant was likely to interfere with witnesses. The witnesses were vulnerable to his influence because they appeared to have been complicit in the commission of the crime. No conditions of bail could adequately deal with the State's fears. Citing *S* v *Porthen and Others* 2004 (2) SACR (C) at p 249 B-D, the court concluded by stating that the State had proved "a *prima facie* case" for the denial of bail.

Before this court

The court *a quo's* conclusions on compelling circumstances were all contested on appeal by the first appellant on the grounds that the court *a quo* had misunderstood and in some cases misapplied the principles of law applicable to bail pending trial. Some findings are not supported by the evidence on record. The first appellant could not possibly interfere with witnesses who had not been identified and thus unknown to him. The court had failed to take into account the appellant's fundamental right to pre-trial liberty as enshrined in s 50(1) of the Constitution. The court was wrong in concluding that the first appellant was a flight risk. It is not correct as concluded by the court below that the State case is simple, straight-forward and easy to prove. In fact, the court mistakenly had in mind an offence different from the offence charged. The ruling reveals that the court was labouring under the misapprehension that the appellants were charged with unlawfully dealing in foreign currency in contravention of s 5(1) (a) (i) of *the Exchange Control Regulations* Statutory Instrument 109/1996 as read with s (5) (a) (i) of the *Exchange Control Act* [*Chapter 22:05*]. The court *a quo* was wrong in concluding that the State's fears of abscondment and interference could not be adequately dealt with by stringent bail conditions.

The State argued that the court *a quo* had not misdirected itself. The court *a quo* was correct in finding that the first appellant was likely to skip the border. The court was correct in finding that appellant was in the category of persons who could flee even after surrendering travel documents to the court. The court had weighed the proposed surrender of the first

appellant's passport against the circumstances of the case and had properly concluded that surrendering the passport was not enough deterrence. The court had correctly decided that the State evidence is strong against the first appellant. The first appellant had not offered any plausible defence to the charge. The erroneous reference by the court *a quo* to the exchange control regulations was inconsequential because the penalty provisions were identical. The State case is indeed clear, simple and straight forward. The persons to whom the appellants transferred money did not attend at the first appellant's offices for the transactions to take place. They were all accosted by runners in the streets. Most of the witnesses were employees of the second appellant and accomplices. Many were yet to submit statements.

Findings on appeal

The court below fell into error in the manner in which it ranked the sources of bail law. The main source of law in as far as it applies to bail is codified in the Criminal Procedure and Evidence Act. Section 117 of the Criminal Procedure and Evidence Act *[Chapter 9:07]* operationalises the right to pre-trial liberty and the presumption of innocence as enshrined in ss 50 (1) and 70(1)(a) of the Constitution respectively. The constant reference to the above quoted provisions of the Constitution in bail matters is therefore sterile because s 117 reproduces the words of the constitution regarding the right to pre-trial liberty and the limitation to that right. Section 117(1) is unambiguous that any person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody. The accused can therefore be properly detained pending trial notwithstanding the constitutional right to pre-trial liberty and the operation of the presumption of innocence. Section 117 of the Criminal Procedure and Evidence Act also codified and harmonised the various legal principles in bail matters by case law over the years. The principles were harmonised because there they are just too many and their application tended to confuse the law in bail matters. The grounds for refusing or granting bail were often confused with and ranked the same with mere factors that should be taken into account in deciding whether the grounds for denying or granting bail existed. Case law is only relevant in assisting the bail court in interpreting and applying the bail provisions in the Criminal Procedure and Evidence Act. The Act now enjoins the bail court to undertake what I may describe as a guided thought process. The bail court must always be alive to the closed list of compelling circumstances to be taken into account as stated in s 115 (C) as read with s 117 (2) of the Act or exceptional circumstances stated in s 115 (C) of the Act depending on whether

the nature of the crime and incidence of 'burden of showing'. The bail court may only dismiss an application for bail where one or more of the compelling reasons have been shown to exist or have not been negatived, depending on who between the State and the accused, bears the burden. There is a closed list. The Act does not leave room for any other compelling reasons. Care must therefore be taken in referring to case law. The law has changed. For example, while the words 'fear of abscondment or fleeing the jurisdiction' are used in case law, those are not the words of the statute when it describes compelling reasons for denying bail. As will more fully become clearer hereunder, the ability to travel outside the country, frequency thereof and the capacity to sustain a life outside the country now rank lower than compelling reasons as mere factors which the bail court must weigh against other factors in considering whether the accused is unlikely to stand trial if released from custody. Compare s 117 (2) and s 117 (3)

The compelling reasons are in s 117 (2). They are as follows:

The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established: -

1. where there is a likelihood that the accused, if he or she were released on bail, will
   a. endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule to the Act; *or*
   b. not stand his or her trial or appear to receive sentence; *or*
   c. attempt to influence or intimidate witnesses or to conceal or destroy evidence; *or*
   d. undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system;

   or

   2. where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security.

Assuming the compelling reason put forward by the State is that 'there is a likelihood that the accused will not stand his or her trial or appear to receive sentence', the Act mandates the court to weigh the following factors against each other. The court must do so and it has no discretion to leave out any. See the use of the word 'shall' in s 117(3) of the Act. These are they: -

1. the ties of the accused to the place of trial;
2. the existence and location of assets held by the accused;
3. the accused's means of travel and his or her possession of or access to travel documents;

4. the nature and gravity of the offence or the nature and gravity of the likely penalty therefor;
5. the strength of the case for the prosecution and the corresponding incentive of the accused to flee;
6. the efficacy of the amount or nature of the bail and enforceability of any bail conditions;
7. any other factor which in the opinion of the court should be taken into account.

The guided thought process is therefore clear. The starting point is the entitlement to pre-trial liberty. See s 117 (1) of the Criminal Procedure and Evidence Act. Where the State has moved the court to remand the accused in custody pending trial, the court must consider whether it is in the interests of justice and may only deny bail pending trial only on the limited grounds stated in s 117(2) of the Act which are also known as compelling reasons. See s 115 (C) of the Act. It is up to the State to name the compelling reason (s) and show that through evidence that the reason(s) exists or the accused to demonstrate their non-existence depending on the incidence burden of showing. See s 115 (C) of the Act. In certain types of offences, the accused is required to do more by showing that there are exceptional circumstances for his admission to bail. See s 115 (C) of the Act. The next thing is that the court must determine whether or not the alleged compelling circumstance(s) exist and in so doing the court must take into account all the factors stated in s 117(3). The court must therefore demonstrate in its ruling that it took into account all the factors that the law requires it to consider. It has no discretion to omit any factor. What is clear however is that the legislature made a distinction between compelling reasons for denying bail and factors which the court must take into account in determining whether or not the alleged compelling reason(s) exist. Compelling reasons in s 117 (2) therefore rank higher than factors in s 117 (3). The accused's means of travel and his or her possession of or access to travel documents is therefore not a compelling reason but a factor to be taken into account in considering whether or not the accused is likely not to stand trial. A person does not have to cross the border in order to avoid trial**.** If one approaches a bail application systematically it becomes clear that equal treatment of persons facing the same charge is now codified. It is now a mere factor under 'any other factor which in the opinion of the court should be taken into account', but the admission of one accused to bail is not a compelling reason for the admission of his or her co accused to bail. Each accused person's peculiar personal circumstances must be tested against all the factors. The outcome is not always the same because it depends on the peculiar facts affecting the particular accused. Lastly

there are factors to be taken into account that apply to all and each of the compelling reasons Stated in s 117 (2). These are (1) the interests of justice, (2) any other factor relevant to the specific compelling reason under consideration and (3) the factors listed in s 117 (4) of the Act. Section 117 (4) reads as follows:

> "(4) In considering any question in subsection (2) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely
> (*a*) the period for which the accused has already been in custody since his or her arrest;
> (*b*) the probable period of detention until the disposal or conclusion of the trial if the accused is not
> released on bail;
> (*c*) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the
> accused with regard to such delay;
> (*d*) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
> (*e*) the State of health of the accused;
> (*f*) any other factor which in the opinion of the court should be taken into account."

It is however, not only the court that is guided. All involved in a bail application are equally guided. Where the onus is on the State, the State counsel must start by putting forward the specific compelling ground(s) which the State will seek to show out of those listed in s 117 (2). Once the compelling reason has been made known the State must then proceed in terms of the procedure in s 117 (A) to place facts which will enable the bail court to consider the mandatory factors in s 117 (3) of the Criminal Procedure and Evidence Act. The reverse is true where the onus is on the accused to show that compelling reasons do not exist. The State evidence, cross examination of State witnesses and submissions must therefore revolve around fitting the peculiar facts of the case and the personal circumstances of the accused into the legal framework set out in s 117 of the Act. Such a process must not detain a court for a whole day as happened in this case with cross examination spanning over 38 pages. A bail application is not a trial. The bail court must be in control. In cross examination the defence counsel must aim at simply putting to the investigating officer or any other witnesses called by the State evidence of the existence of the factors which the bail court must take into account in assessing whether a compelling reason exists. Whether the accused has strong ties to the venue of trial or has assets in the jurisdiction of the court can be tested by simple questions laying bare those assets and inviting the investigating officer to comment or allowing him or her to verify. There is very little room for what is called 'cross examination to credit'. A bail application is largely a quick, simple, formal exercise because it involves just applying the guidelines in s 117 to the

circumstances of each accused whether charged jointly or separately. The common mistake in bail matters is to start with case law. Case law only assists in the interpretation and application of the statutory framework. The weighted effect of those factors considered together will tilt the scale one way or the other on a balance of probabilities. In this case the appellant has the means of travel but may still be a good candidate for bail if the court finds that he has strong ties to the venue of the trial because he works there or is of fixed abode in the vicinity or that he has assets of value within the jurisdiction of the court or the seriousness and type of crime and the alleged circumstances of its commission may outweigh other factors. A person charged with unlawfully killing another in a drunken brawl is less likely to have the guts to abscond as compared to another who is alleged to have killed a person in a robbery. The alleged method of operation may influence the court's decision. A person who is very visible is more likely to stand trial than a very mobile person who appears to surface only to commit crime in the middle of the night.

It is that thought process which is missing in this case. The miscarriage of justice then becomes clear. The court *a quo* erroneously elevated the fact that the State had proved that the first appellant has the means and capacity to travel outside Zimbabwe to a compelling reason to detain the first appellant in custody. The legislature makes it clear that this is merely a factor to be weighed against others. It is not decisive. It was necessary to weigh the factor against the first appellant's ties to the trial venue, the existence of assets within the jurisdiction and the strength of the State evidence and the seriousness of the crime. The court *a quo* did not place sufficient weight on the fact that the second appellant has a fixed residence in its jurisdiction and owns the property. It could have, in its discretion, ordered that such property be surrendered as security. With regards to seriousness of the crime, although it is not clear how the appellants were able to move such large sums of money without raising eyebrows, the State case is not based on any stated financial prejudice to the fiscus but just that the foreign exchange transactions were conducted not at the registered premises and that the manner of business does not contemplate the involvement of vendors or touts accosting people operating outside the premises. The essence of the charge faced by the appellants is therefore that while they could lawfully trade in foreign currency, they failed to comply with the restrictions imposed by the Reserve Bank of Zimbabwe. Clearly such fiscal controls imposed by the Reserve Bank target a mischief. The State papers and submissions *a quo* do not give the slightest hint of the harm which ensued pursuant to the mischief complained of. Details of the harm or prejudice to the fiscus caused by the appellants' blameworthiness are conspicuous by their absence. This goes

to show that while the fight against corruption is noble and the public sentiment that courts must deal decisively and ruthlessly with corruption and fiscal offences is justified, the crusade will only succeed if the State accepts that prosecution should not ride on public sentiment but proof. Courts of law deal with specific averments and proof.

Special care must be taken in settling for the charge (s) to prefer or formulation of the charge. In this case the prosecutor was completely not up to the task. S 5(1) (a) (i) of the Exchange Control Act criminalises and penalises any person who, either within or outside Zimbabwe contravenes or fails to comply with any provision of the Exchange Control Act or the terms or conditions of any permit, authority, permission, direction. It is not concerned with the offence of unlawful dealing in foreign currency. Unlawful dealing in foreign currency is an offence committed by non-licensed people in contravention of the prohibition imposed by the exchange control regulations. The prosecutor therefore combined two offences. It is very likely he or she did not bother to read the statutes. The court *a quo* found itself embarrassed and took it upon itself to amend the charge. Unfortunately, while the commitment to duty is understandable our law does not allow the court to be a litigant. Perhaps the alleged unlawful conduct caused serious harm to the economy judging from the public outcry and strenuous opposition to bail but that remains conjecture because the harm is not stated anywhere in the State papers and evidence. The nature and extent of the prejudice is paramount and is what determines the seriousness of the transgression and that is discerned not from the pitch of the voice of opposition to bail but the weight of facts placed before the court.

The seriousness of the crime was also not adequately articulated. The conclusion that the first appellant, if released, is likely to interfere with witnesses and evidence, as a compelling reason, could only be properly decided after the State had placed sufficient facts before the court *a quo* to enable it to take into account the mandatory factors which are: -

> "(i) whether the accused is familiar with any witness or the evidence;
> (ii) whether any witness has made a Statement;
> (iii) whether the investigation is completed;
> (iv) the accused's relationship with any witness and the extent to which the witness may be influenced by the accused;
> (v) the efficacy of the amount or nature of the bail and enforceability of any bail conditions;
> (vi) the ease with which any evidence can be concealed or destroyed;
> (vii) any other factor which in the opinion of the court should be taken into account;"

In this case the court failed to place sufficient weight on the fact that the witnesses had not been named. The crimes were committed one year eight months ago. Investigations should be complete by now. In any event the Police could have completed their investigations without

arresting the appellant since the crimes were not recent. Those witnesses who are described as employees and runners are actually alleged employees and runners of the first appellant which has not been subjected to any restrictions. It continues to operate one and half years after allegedly committing the offences. The licensing authority has not withdrawn the trading licence or otherwise shut the business. Confining the second appellant who is only one of its many employees will not achieve the intended purpose.

The danger of giving precedence to common law ahead of statute where the law has been codified is clear from the court *a quo's* concluding remarks: -

> "the strong *prima facie* case against him and the substantial flight risk involved should bail be granted, constituted cogent reasons for the refusal of bail."

Maybe that was the law in South Africa when the *Porthen* case, supra was decided but it is certainly not the law in Zimbabwe now.

Had the court *a quo* properly considered the factors mentioned in s 117 (4) of the Criminal Procedure and Evidence Act, it would have realised that it was not in the interests of justice to deny the first appellant bail. The courts have always discouraged detention of suspects for the purpose of investigation in circumstances where it was possible to investigate before arresting. In this case the first appellant was aware of the investigation for over a year. The court is required to consider the possible delay in bringing the accused to trial. See s 117 (5) which reads as follows: -

> "(5) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty to weigh up the personal interests of the accused against the interests of justice as contemplated in subsection (4)".

In the result there is a legal basis to interfere with the exercise of discretion by the lower court. In the result I order as follows:

1. The appeal against the decision of the Harare Magistrates Court denying the 2nd appellant bail in CRB ACC 202/21 be and is hereby allowed.
2. The decision of the court *a quo* is set aside and is substituted with the following: -
   (a) The 2nd accused be and is hereby admitted to bail pending trial
   (b) The 2nd accused shall deposit the sum of RTGS200 000.00 with the clerk of court at Harare Magistrates Court
   (c) The 2nd accused shall reside at 17 Springfield close, Chisipite, Harare

(d) The 2nd accused shall surrender to the clerk of court the property known as Lot 6 of Lot 6 of Subdivision B of the Grange measuring 4048 square meters held under Deed of Transfer 11697/2002.

(e) The accused shall report to the Police at Highlands Police Station once a fortnight on Friday between 6 am and 6 pm

(f) The accused shall not interfere with State witnesses.

Wintertons, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners