

SETTLEMENT CHIKWINYA**And****LLOYD MUKAPIKO****Versus****THE STATE**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 1 & 7 FEBRUARY 2019

Bail application

B. Dube for applicants

T. Maduma for respondent

MAKONESE J: The first applicant is a member of the House of Assembly for Mbizo Constituency in Kwe Kwe. The second applicant is also a member of the House of Assembly for the Redcliff Constituency. Both applicants were arrested on the 18th January 2019 on allegations of subverting a constitutional Government as defined in section 22 (b) as read with section 22 (1) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). In the alternative the applicants are charged with inciting public violence in contravention of section 187 (1) as read with section 36 (1) of the Criminal Code. The applicants deny the charges.

The brief allegations are set out in the form 242 Request for Remand Form are that on the 12th January 2019 at around 2100 hours the two accused persons addressed a public meeting at Red Lion bar in Kwe Kwe inciting the general public

to embark in violence in a nation-wide campaign dubbed “National Shut Down”. As a result of these remarks various civic groups and their affiliates went on a rampage committing acts of violence in the City of Gweru, the town of Gokwe, Harare and Bulawayo. Scores of people were injured in the demonstrations which turned violent resulting in shops being looted and torched in some major cities in the country. The first applicant is alleged to have posted in his “face book” page a “**thank you**” message to all that had heeded to the call for a mass stay- away and total shut down of shops, schools and businesses across the country. It is alleged that first applicant encouraged people to continue putting pressure on government in whatever form to force the government to bow to the needs of the masses.

The state has opposed bail in this matter raising two principal grounds namely:

- (a) that the applicants are likely to abscond if granted bail.
- (b) there are high chances the applicants are likely to interfere with state witnesses

In bail applications of this nature, the primary consideration, is whether there are compelling reasons or grounds justifying an applicant’s continued detention. The nature of that application is one of striking a balance between the interests of society and the due and proper administration of justice and those of the applicants. It is paramount that before bail is granted, the court is satisfied that if granted bail, the applicants will not abscond, and that they will attend trial when the trial date falls due. In opposing bail, the state argued that the applicants are highly influential people and that chances are that they are likely to interfere with the proper administration of justice. The state argues that a strong *prima facie* case

has been established against the applicants and that if convicted they are likely to be sentenced to lengthy terms of imprisonment. The state contends that the temptation to abscond and avoid trial is high and that the interests of justice ought to be safeguarded by denying the applicants bail.

The applicants are both members of the House of Assembly for their respective constituencies. They are of fixed abode and they have undertaken to continue residing at their given addresses until the finalisation of their cases. Both applicants have undertaken to surrender their travel documents. Both have undertaken through their defence counsel to report once weekly at CID Law and Order, Kwekwe.

The Law

It is now well established that in an application for bail pending trial, the presumption of innocence operates in favour of the applicant. That position is amplified under section 50 (1) (d) of the Constitution of Zimbabwe (Amend 20), 2013. Further in making a determination whether an applicant is a suitable candidate for bail, the court must be guided by the provisions of section 117 (1) (2) (a) (b) of the Criminal Procedure and Evidence Act (Chapter 9:07), which provides as follows:

- “(1) Subject to this section and section 32, a person shall be released on bail ... unless the court finds that it is in the interests of justice that he or she should be detained in custody.*
- (2) The refusal to grant bail and detention of an accused in custody shall be in the interest of justice where one or more of the following grounds are established:*

- (a) *where there is likelihood that the accused if he or she is released on bail will-*
- (i) *endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule*
 - (ii) *Not stand his or her trial or appear to receive sentence; or*
 - (iii) *Attempt to influence or intimidate witnesses or to conceal or destroy evidence; or*
 - (iv) *Undermine or jeopardize the objectives or proper finding of the criminal justice system including the bail system;*
- (b) *Where in exceptional circumstances there is likelihood that the release of the accused will disturb the public order or undermine public peace and security.”*

The primary considerations in bail applications were laid out in *State v Makamba* SC-30-04, wherein the following were listed as the essential factors to be taken into account in considering whether an accused person is entitled to bail pending trial.

- (a) whether the applicant will stand trial
- (b) whether the applicant will interfere with investigations or temper with evidence or witnesses
- (c) whether the accused will commit offences whilst on bail
- (d) other considerations the court may consider good and sufficient.

It is the position of our law, that the seriousness of an offence on its own is not a good ground for denying bail. See; *State v Aitken* 1992 (1) ZLR 249 (S).

As regards interference with witnesses, there must be a well grounded apprehension of such fear. A mere suspicion that applicants may interfere with witnesses will not suffice. In opposing bail, the Investigating Officer contends that

mass demonstrations are still happening across the country and that applicants are likely to continue meeting members of the public and encourage them to continue committing criminal offences. This allegation is not in any way supported by the facts. At the time of the hearing of this bail application there are no mass demonstrations going on. In any, event peace has prevailed since the arrest of the applicants as a result of various interventions by the security services. It is not adequate, to make bold unsubstantiated allegations and use such to oppose the granting of bail. I do not consider that the applicants who have been in custody for nearly two weeks have the capacity to interfere with investigations, which by all accounts must be complete at this stage.

In the circumstances, I do not find merit in the grounds that have been raised in opposition to this application for bail.

In the result, it is ordered that the applicants be and are hereby admitted to bail in terms of the amended draft order.

Gundu Dube & Associates, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners