SOLOMON MADZORE
versus
THE STATE

HIGH COURT OF ZIMBABWE
ZIMBA-DUBE J
HARARE, 5 December 2011

G. Mtisi, for the applicant
F. Nyazamba, for the respondent

ZIMBA-DUBE J: Applicant faces a charge of murder. The allegations are that applicant and others threw stones, empty bottles and other missiles at uniformed officers. One of the objects struck Inspector Petros Mutedza and he was pronounced dead on arrival at hospital. On 10 October 2011 he applied for bail pending trial together with his co-accused. The matter was placed before MWAYERA J who dismissed applicant's application for bail on 20 October 2011 as follows*:*

> "The first applicant is a holder of a valid passport and it is not in dispute he is well travelled across the border. The state's allegation that the first applicant is a flight risk is well founded and in fact his diverse movements out seem to fortify the state's assertion that he was evading the police and only got picked up when he was at home thinking the storm had weathered down. The first applicant has capacity to travel and it would not be farfetched to conclude that judging by the "diverse movements" quoting Mr. *Mtisi*'s words, he has foreign contacts who with or without a passport he goes to-----.The first applicant went in and out of the country and did not surrender self to police despite the fact that police are said to have gone to his place on several occasions and if the person at his house was his wife then one wonders why information was not relayed. Further the first applicant in his application p 3 outlines that he was aware police were arresting MDC-T youth leadership for murder. He is a NATIONAL YOUTH LEADER, the question is why then did he choose to go on errands outside the country instead of surrender to police. In fact the application, p 3, shows he was aware the police were after him but ignored or evaded".
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> This is the only basis for the refusal of bail.

On 16 November 2011 the applicant filed the current bail application on the basis of changed circumstances in terms of s 116 (c)(ii) of the Criminal Procedure And Evidence Act, [*Cap 9:07*], (hereinafter referred to as the code).

Applicant cites the following factors as changed circumstances,

a) That investigations are now complete and a trial date has been set for 12 March 2012. That there is now no fear of the applicant interfering with witnesses and investigations.

b) That at the time of the first bail application, the applicant did not have proof to his defence of an alibi and namely that when the alleged offence was committed he was at a clinic in Highfields attending to his sick wife. He attaches an affidavit of the doctor who attended to his wife. That circumstance have since changed in that Dr Munyoro has confirmed that he attended to the applicant's wife and that the applicant was with her all day. That there is no longer any inducement to abscond and that the applicant would want to stand trial and clear his name.

c) That at the time the previous bail application was heard, there was no proof that the applicant is the husband to Charity Moyo who was attended to by Dr Munyoro. Applicant attached a copy of his marriage certificate to the application.

d) That during the initial or previous bail application, the applicant offered certain conditions for his release on bail. That the security offered at that stage was taken to be not enough security for his assurance that he would stand trial. That the applicant's circumstances have changed in that the applicant assures his presence at the trial and offers to raise his surety to US3000. His brother and another person have offered to stand as sureties and undertake to pay US 5000 each if applicant defaults and fails to stand trial. Applicant offers to surrender his car registration book, offers house arrest and that he be restricted to a 40 km radius of Harare and offers to surrender his passport.

e) That he has been offered the green light to resume his studies at the UZ and stands to lose if he attempts to abscond. That he is only left with a dissertation and will lose if he absconds. He attaches a letter from the university dated 3 October 2011 confirming resumption of studies and a registration form filled in by the applicant with a stamp of the Faculty of Social Studies dated 11 October 2011.

f) Applicant produced three CD'S, an affidavit of Douglas Mwonzora and minutes of an MDC meeting held at Kwekwe on 31 July 2011 to show that at the time when the police were looking for him he was present in Zimbabwe and went about his normal party business which includes attending meetings and addressing rallies.

Section 116 (c)(ii) of the code provides that an offender may make an application based on changed circumstances if,

> "- - - -such application is based on facts which were not placed before the judge or magistrate who determined the previous application and which have arisen or been discovered after the determination."

In order to succeed in an application for bail based on changed circumstances the applicant must show:

a) that the bail application is based on facts which were not placed before the judge, are new and in addition,

b) that the facts were either discovered or arose after the initial bail application .

The intention of the legislature in including this section in the code was so that offenders whose circumstances would have changed would be able to adduce evidence of changed circumstances in the same court without the necessity of an appeal. The legislature, being mindful of the fact that this provision may be abused set down parameters under which these applications can be brought in order to minimise abuse. The application must be based on facts which were not placed before the court that made the earlier determination. These facts should have arisen or been discovered after the determination. The use of the term "and which", implies that that the legislature intended that the facts not placed before the court, be facts that would have just arisen or been discovered after of the determination of the bail application. The section does not cover a situation where applicant either deliberately or out of a mistake on his part fails to highlight facts which he was aware of at the time of the application. Applicant's submission that s 116(c) (ii) does not exclude information or facts which were deliberately or mistakenly omitted does not find favour with this court.

Applicant should show that the facts were not placed before the court and in addition that the facts arose or were discovered after the determination. These facts should be new, and should have arisen after the determination and or been discovered by the applicant after the previous determination. They should be facts applicant was not aware of at the time of the initial application.

As clearly put in *S vVermaas.*1996 (1) SACR 528,

> "Obviously an accused cannot be allowed to repeat the same application for bail based on the same facts week after week. It would be an abuse of the proceedings. Should there be nothing new to be said the application should not be repeated and the court will not entertain it."

The new application should not be allowed to be an extension of the initial application.

In order to make a determination regarding the existence or otherwise of changed circumstances, the court will have regard to, the initial bail application, state response, any notes and judgement of MWAYERA J and the current bail application and state response. This court is not concerned with the correctness or otherwise of Justice MWAYERA's findings.

The court is going to adopt a two pronged approach to this matter. It will investigate firstly whether there are any changed circumstances in this application. If the finding is in the negative the matter ends there. If the finding is in the affirmative the court will proceed and determine if the new facts justify the grant of bail and reconsider bail. The court may at that stage consider not only the new matter but the entire body of evidence including all facts placed before the court during the initial application. The court will at that stage be required to focus mainly on the reasons for the denial of bail.

Applicant makes this application on the basis of changed circumstances which favour him being granted bail at this stage. Besides considering whether or not the facts were placed before the court during the initial bail application, are new and whether or not they have arisen or been discovered after the first determination of bail, the court is required to determine whether or not the factors raised are relevant to the finding that he is a flight risk as found by Justice MWAYERA.

Applicant was denied bail on the basis that he is a flight risk. This court is not concerned with the correctness of that finding. This court has no power to review the work of another court of similar jurisdiction.

THE ALIBI

This fact is relevant to the determination of whether or not applicant is a flight risk as this fact has a bearing on the strength of the state case and is therefore a fact relevant in assessing whether or not new and changed circumstances exist. Applicant's counsel submitted that at the time the initial application was made, there was lack of clarity regarding the defence of an alibi as there was no proof that applicant was with his wife at the doctor. The alibi is covered on p2 paragraph 5 of the first application and on p3 of the judgement. Applicant told the court that he was at the doctor with his wife and spend the whole day there. He attached a confirmation letter from the doctor, Annexture B, stating that Charity

Moyo was with her husband at the doctor. The affidavit of the doctor attached to the second application does not contain any new details save to confirm that the doctor attended to applicant's wife after she had a miscarriage, that she was discharged at 17:30 hours and was in the company of her husband. The information has simply been put in a different format. This information was before the court and was considered. The judge was aware that applicant was raising the defence of an alibi. Further information or confirmation of the alibi does not constitute a new fact or changed circumstances. Applicant simply wants to extend the previous application by recycling information.

MARITAL STATUS

Applicant stated on para13.4 on p 5 of his first application that he is a family man. The court was aware that he was married. The attachment of a marriage certificate only confirms the marriage and is not a new circumstance. This fact did not seem to be in issue at the first hearing. Applicant's counsel argued that the affidavit of the doctor and the marriage certificate were attached to the current application because Justice MWAYERA was not convinced that he was married. He has simply repeated facts which were placed before MWAYERA J and cannot be new facts or changed circumstances.

In *S v Mbofana* 1998 (1) SACR 4C, the court said the following of new facts

> "that while a new application for bail was not merely an extension of the initial bail application, the court which entertained the new application had to come to a conclusion about whether, viewed in the light of the facts that were placed before the court in the initial application, there were indeed new facts warranting the granting of the application"

It is clear from this case, that courts will not entertain further applications for bail unless satisfied that applicant has shown the existence of changed circumstances.

UNIVERSITY STATUS

Applicant has been a student at the University of Zimbabwe since 2005 and is still to complete his course. He was accepted to continue his studies and actually registered as a student through his wife who was able to do so by 11 October 2011. He was aware of this fact at the time he made the initial application for bail on 12 October 2011. Applicant also raised this fact on parag3 of the first application. His situation was considered. It is not as if applicant discovered that he has been accepted to continue his studies after the determination.

Applicant's counsel submitted that when the letter confirming his place was received, his wife advised him and went on to register on his behalf. Applicant's counsel did not explain why the information about the registration form and letter of admission were not brought before the court at the initial hearing. The fact however is that the judge was aware that applicant was a university student. This is not a fact that has been discovered or arisen after the determination. What applicant has done in the second application is to appraise the court on further developments he has made regarding his registration for the next semester. This fact does not constitute a new circumstance. This point fails.

AFFIDAVIT OF CHARITY MOYO

Applicant attaches the affidavit of Charity Madzore denying ever having been visited by the police inquiring about the whereabouts of applicant. The court made a finding that applicant evaded the police or ignored them on p 4 of the judgment. This was after consideration of the state evidence that applicant evaded the police. This evidence does not raise anything new but is simply a denial of averments made by the state in the first bail application. Applicant challenges the finding of the court on whether or not he evaded the police. This is not a changed circumstance and applicant is free to appeal against the judgment of MWAYERA J.

INVESTIGATIONS

The fact that investigations are complete and that a trial will be held in the first term of 2012 is a fact the court was aware of as applicant stated in the application that this fact was stated in the 242. The fact that he has now been furnished with his trial date is neither here or there and is not a new circumstance. This issue was not the basis of the denial of bail. It is not relevant to the fact of applicant being a flight risk and the court never made a finding that he is likely to interfere with witnesses or investigations. This information was placed before the court, was considered, is not new and has not just arisen or been discovered after the first determination and does not amount to changed circumstances.

BAIL CONDITIONS

Applicant offers more stringent bail conditions and undertakes to avail himself for trial. The bail conditions he initially offered were considered and the court kept in mind the possibility of using the suggested conditions to minimize the risk of abscondment and

discounted all the conditions. The newly proposed conditions include a travel restriction, stiffer reporting conditions, 24 hour house arrest and surrender of motor vehicle. Applicant further submitted that the conditions are assurance that he does not intend to flee but stand trial. Applicant raises the question of whether or not the surety given is sufficient and this is not the reason why bail was denied.

The vehicle offered as part of the bail conditions was registered on 2 November 2011. It is a wonder how applicant was able to effect change of ownership when he was already in custody. The state submitted that the ownership of the vehicle was cooked up in order to buttress the quest for applicant's release. The police are still investigating how he acquired ownership of the vehicle as the original owner is now a mental patient and there does not seem to be any authority to sell or transfer the vehicle. Applicant seems desperate and has resorted to making up information in a bid to get bail. The offer of surrender of the vehicle as surety and other conditions on their own without regard to other factors do not constitute changed circumstances. As the offer of conditions was made at the initial bail hearing, the court was aware that he was offering certain conditions for his release and had regard to these before making its decision. It eludes me how an offer of more stringent conditions can amount to changed circumstances in terms of this section. An offer of more stringent bail conditions, unlike a fact or circumstance cannot be said to have arisen or been discovered after the determination.

If offers of more stringent bail conditions were to be taken as changed circumstances, this would open floodgates to litigation. This is one such mischief that the legislature sought to address by requiring that the facts should not have been placed before the previous court, and should have arisen or been discovered after the determination. This point fails.

EVIDENCE OF RALLIES AND MEETINGS

The videos submitted capture moments when the applicant addressed or was introduced at some rallies and other MDC party activities. Minutes of a meeting of MDC Congress National Executive held at a hotel in Kwekwe on 31 July2011 were also tendered. The video relating to the press conference has no dates and does not assist the court. The second one relating to the rally or meeting in Chitungwiza reflects that it was taken on 5 October and shows applicant present at the gathering. It is inconceivable how he was able to attend the gathering when he was in custody. He was arrested on 4 October. The video was

clearly doctored. The third video captures events at the Twelfth Anniversary rally of the MDC purportedly made on 9 September 2011 and shows that he was present at the gathering. The police do not deny that applicant carried out MDC related activities during the period in issue. Their position is that it was not tactful to arrest him during the at least one of the activities due to the mobs which they feared might disrupt their efforts to arrest their national youth leader. These are facts which applicant was aware of at the time of the application. The state papers are clear that they were of the view that he was evading the police and applicant failed to rebut this assertion.

These facts were not brought to the attention of the court as the defence omitted to raise evidence of these activities. The Judge's reasoning is not that he was not in the country but rather that he went in and out of the country and never bothered to surrender and that he has contacts outside the country. The court was aware that he was generally in the country. The court found that due to his circumstances considered in total, he is likely to abscond and further that despite the fact that the police looked for him at his house, he never surrendered to the police. The fact that a document has now been submitted to show that applicant addressed rallies during the relevant period does not constitute a changed circumstance. Further this applicant was aware at the time of the initial bail application that he had carried out all the activities and he failed to raise these with the court. It does not require a third party to raise a changed circumstance on the premise that that person has just become aware of the fact. The legislature must have intended that changed circumstances be determined considering applicant's position, use and reaction to the information. The issue remains whether or not applicant was aware of the existence of these facts and the answer is yes. This is not information or facts that have arisen or been discovered after the determination. Applicant has been aware all along that he attended all these functions. Applicant was aware at the time of the initial bail application that he had carried out all these activities. He did not find out or realise the existence of these activities after the determination. The reason why the legislature used the term, "has arisen or been discovered after the determination" is to prevent the mischief of applicants bringing applications in a piece meal fashion. Applicant never thought it was necessary to raise this fact. This is information that he was privy to and failed to raise with the court .The evidence of the activities he carried out was not placed before the court by either the state or applicant. Applicant did not raise this evidence and chose to hide it. This evidence was not discovered nor did it arise after the determination. An applicant for

bail is expected to raise all pertinent issues regarding his application. He chose not to raise this fact at the previous application and cannot now cry foul. The circumstances do not constitute changed circumstances. I am fortified in my reasoning by the judgement of KUDYA J in Tungamirai Madzokere and Others B632/11

Most of the facts raised as changed circumstances, are not new as they were raised in the first application and therefore do not constitute changed circumstances. They are facts which were in existence at the time that the first bail application was made but have been regurgitated and clothed with a bit more detail. Applicant was seized with all the information he is now raising but forgot or neglected to raise it out of his own ineptitude. The court does not assist those that are sleeping.

If the court were to allow applicant to repeat the same application for bail based on the same facts this would amount to an abuse of process. Applicant should have produced all his evidence and made all his submissions at the first bail hearing. Applicant did a shoddy job and cannot now complain. Applicant has not been able to show that there are changed circumstances justifying this court reconsidering the issue of bail. The application is misguided and improperly before the court.

Application is dismissed.

Musendekwa-Mtisi, applicant's legal practitioners
E. Nyazamba, respondent's Counsel Attorney General's Office