THE STATE
versus
MISHROD GUVAMOMBE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 24 January 2019 and 29 January 2019

Criminal Abuse of Office

E. Makoto, for the applicant
J. Samukange, for the respondent

CHITAPI J: In this matter, the State has filed an appeal against the decision of the Deputy Chief Magistrate Mr Mutevedzi Esq in which he granted bail to the Chief Magistrate, the respondent herein on 12 January, 2019. The respondent appeared before the court *a quo* facing a charge of Criminal Abuse of Duty as a Public Officer as defined in s 174 of the Criminal Law Codification & Reform Act, [*Chapter 9:23*]. The allegations against the respondent in brief were that he abused his position in allowing accused persons Supa Collins Mandiwanzira and Saviour Kasukuwere to be attached to the Magistrates Court as part of their law degree training, the two being 2nd years students of the University of Zimbabwe. The two students were also accused persons facing criminal abuse of office charges at the Magistrate Court. The charges against them related to the period that they were still State Ministers in government. The attachment which the respondent allegedly authorised resulted in the two students being attached to the Civil Courts albeit their cases being pending in the criminal courts. It was alleged that the said students attachment wherein they would be involved in "actual magisterial duties" would bring the name of the Judicial Service Commission and the whole justice administration into disrepute.

Following submissions and arguments by counsel for the parties wherein the appellants counsel opposed the admission of the respondent to bail, the Deputy Chief Magistrate determined that there were no compelling reasons shown by the State to warrant the denial of bail. The respondent was admitted to bail on stringent conditions in terms of which apart from being ordered to deposit the sum of $3000-00 with the clerk of the court, he was to surrender his passport, report to the police three times a week, surrender title deeds to an immovable

property whose value was to be at least $30 000-00, not to travel anywhere within a radius outside 50km of Harare, to reside at his usual residence and not to interfere with named witnesses as listed in the order.

The appellant was not satisfied with the Deputy Chief Magistrate's decision aforesaid. On 17 January, 2019, the appellant's counsel purported to file an appeal in terms of s 121 (1) (a) of the Criminal Procedure & Evidence Act, [*Chapter 9:07*]. The provisions of that section provide as follows:

> "121 **Appeal against decisions regarding bail**
> (1) Subject to this section, where a judge or magistrate has admitted or refused to admit a person to bail –
> (a) the Prosecutor-General or the public prosecutor, within forty-eight hours of the decision; or
> (b) the person concerned, at any time; may appeal against the admission to or refusal to bail or the amount fixed as bail or any conditions imposed in connection with bail".(own underlining)

When the application was first placed before me on 21 January, 2019, the appellant's counsel Mr *Makoto* applied for the postponement of the hearing on the grounds that his colleague Mr *Reza* was the one who had prepared the application and was not available on the day due to other work engagements. Mr *Samukange* for the respondent opposed the postponement on the basis that the appeal had been filed out of time and was accordingly non suited. There was therefore in Mr *Samukange*'s submission, no valid appeal and consequently nothing to postpone. Mr *Makoto* submitted that he was ill prepared to deal with the matter as he had not even read the record. I considered that the issue of the validity or otherwise of the appeal was of jurisprudential importance. I accordingly exercised my discretion to postpone the hearing to 24 January, 2019 and gave directives that counsel should file heads of argument on the legal point raised *in limine*. Both counsel filed heads of argument.

In arguing for the validity of the appeal, Mr *Makoto* who appeared for the appellant now having acquintained himself with the case argued that the court had an inherent discretion to condone the late filing of the appeal. He referred to r 4 (a) of the High Court of Zimbabwe (Bail) Rules 1991 which provide that this court or judge may "condone a departure from any provisions of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice". Counsel submitted that the quoted rule gave the court or the judge the power to condone or extend the time for filing the appeal.

Appellant's counsel then referred to r 7 of the same rules. Rule 7 (1) provides as follows:

> "Appeals by Attorney-General against grant of bail
> (1) An appeal by the Attorney-General in terms of paragraph (b) of subsection (1) 111A of the Criminal Procedure and Evidence [*Chapter 9:07*] shall be noted within seven days after the magistrate granted bail, by filing with the registrar a written statement setting out…"

Mr *Samukange* submitted that s 121 which the appellant relied upon does not provide for condonation. I agree with Mr *Samukange*.

Section 121 (1) is clear that it is subject to its provisions and thus to no other enactment. Its terms are clear that the State's window for filing an appeal is "within forty eight hours", from the making of the bail decision. The accused person however is not time barred and can file an appeal at any time. It is important to reflect on the history of s 121 and its evolution. Prior to the enactment of the Criminal Procedure Amendment Act No.2/2016, the State if dissatisfied with the grant of bail, would through the prosecutor indicate to the court its intention to appeal. It would then be allowed a window of 7 days from the date that the prosecutor indicated the State's intention to appeal, to file the appeal. If no appeal was filed, then the bail order suspended by the intimation of the intention to appeal would then become operative. When section 121 was revisited, the law maker provided for the appeal to be noted within 48 hours of the making of the order and provision was further made in s 121 (3) that the noting of the appeal would not suspend the decision appealed against unless in the interests of justice, the court determines otherwise.

As regards the Bail Rules, they are antiquated because they refer in r 7 to s 111A of the Criminal Procedure and Evidence Act, yet the section was repealed and not replaced by Act No. 9/2006.

Lastly, it would not be competent for rules of court which are made through subsidiary legislation to amend or vary an Act of Parliament unless the Act itself gives the court the power to amend or vary its provisions. There is nothing in s 121 to indicate that the court can arrogate itself power to condone a failure by a party to comply with the time limits given therein. The rules of statutory interpretation are clear. Subsidiary legislation cannot vary or amend an Act of Parliament. The tail cannot wag the dog so to speak meaning that "the regulation cannot vary or determine the interpretation," of a section in an enactment see *Hamilton Broson* v *Chief Registrar of Deeds* 1968 (4) SA 735 (T) at 737 D and on appeal; 1969 (2) SA 543 (A) at 547 (H), *Somers* v *Director of Indian Education & Anor* 1979 (4) SA 716 D-E.

It must follow in my determination that the time limit of 48 hours given to the Prosecutor General in s 121 to note an appeal is absolute. The court cannot extend it. If the appeal is not noted within that time frame, the right to appeal is lost. *In casu* the right to appeal is lost. *In casu* the right to appeal lapsed on 15 January, 2019. State counsel submitted that there were hurdles faced by the appellant because of riots. I pointed out that this court continued to sit throughout the period and I was presiding it. The Registry was open for filing appeals. In fact Mr *Reza* himself appeared for the State on 15 January, 2019 in this court. The argument on vis-major does not arise and is a red herring.

I determine therefore that there is no valid appeal before the court and consequently the matter is struck off the roll.

National Prosecuting Authority, appellant's legal practitioners
Venturas and Samukange, respondent's legal practitioners