

THE ATTORNEY GENERAL

Versus

CHARLES THOMAS

And

JOHN GAZI

And

PAUL SIWELA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 30 & 31 MARCH 2011

Mrs M. Cheda for the applicant
L. Nkomo for the respondent

Application for Leave to Appeal

NDOU J: On 23 March 2011 this court granted the respondents bail pending trial. The applicant seeks to protest that judgment in the Supreme Court. This is an application for leave to appeal in terms of section 44 of the High Court Act [Chapter 7:06]. The basis of the appeal is that this court did not give due weight to the state's fears that the respondents are likely to pursue their agenda of removing the government through unconstitutional means. The fear is founded on the premise that:

- “(i) Thousands of fliers are said to be awaiting distribution by the security department of Mthwakazi Liberation Front.
- (ii) These fliers have not been recovered by the police.
- (iii) The respondents once released on bail, are likely to cause them to be distributed to members of the public and therefore continue to pursue their agenda of removing the government through unconstitutional means.
- (iv) The 3rd respondent has a pending case of a similar nature i.e. contravening section 19(1) (c) of Public Order and Security Act [Chapter 11:17], Regional Court CRB 71-2/04 and High Court Bulawayo No. 3373/04 wherein he circulated the

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114 page document “wherein he was advocating for the creation of the “province of Matabeleland by the Ndebele speaking people fighting with spears and arrows against the government and the Shona speaking people”.

This court is said to have misdirected itself in dismissing the totality of the messages in the fliers as not being treasonous and therefore insinuating that the case was not serious. In judgment HB-53-11 this court dealt in detail with these issues and I do not wish to repeat them. It is trite that the approach to adopt when considering an application for leave to appeal should not be based on whether an appeal is arguable or not, but on its prospect of success. In other words the test to be applied when considering an application for leave to appeal is whether the applicant has a reasonable prospect of success on appeal- *R v Baloi* 1949(1) SA 523 (AD) and *S v Mutasa* 1988 (2) ZLR 4 (SC) at 8D-9B. I will now consider whether the applicant has a reasonable prospect of success on appeal. For a start this court should guard against passing a vote of confidence in its judgment. The issue is whether there is reasonable prospect of the Supreme Court arriving at a different judgment from the same facts. This is an appeal against the granting of bail by this court. It is trite that in this regard that the power of the Supreme Court to interfere with a decision of this court in a bail application is rather limited. It may only interfere where the High Court committed an irregularity or misdirection, or where the manner in which it exercised its discretion was so unreasonable as to vitiate the decision made – *S v Ncube* 2001 (2) ZLR 556 (S). This court will now apply these principles to the facts of this case.

The applicant is relying on misdirection. The charge is indeed treason, a serious offence. The question is whether the Supreme Court may reasonably arrive at a decision that the respondents may commit similar offence i.e. inciting members of the public to revolt and remove government by unconstitutional means. I will consider the issues raised by the applicant in this application in turn.

First, there is no evidence to show the existence of “thousands of fliers”. The police say they have not recovered them so it is not clear how they arrived at the number. The applicant’s allegation and fear in this regard is not based on cogent facts. The police searched the respondents’ places of work and abode at the time of arrest. They recovered some fliers. It is not clear why they believe there are thousands more concealed somewhere. Second, the issue of a pending similar case is only applicable to the 3rd respondent. There is no nexus between the 1st and 2nd respondents and this conduct by the 3rd respondent.

As far as the 1st and 2nd respondents are concerned there are no reasonable prospects of success on appeal. As regards the 3rd respondent, because of the question of the charge under POSA there is a reasonable prospect of the Supreme Court arriving at a different judgment. There is merit in distinguishing his case from that of the other two respondents.

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Accordingly, it is ordered that leave to appeal in terms of section 44 of the High Court [Chapter 7:06] against the judgment granting respondents bail on 24 March 2011 be and is hereby refused against 1st and 2nd respondents but granted against 3rd respondent only.

Criminal Division, Attorney General's Office, applicant's legal practitioners

Cheda & Partners, R. Ndlovu & Partners, Phulu & Ncube, respondents' legal practitioners