THE PROSECUTOR GENERAL OF ZIMBABWE

Versus

LYLE SMITH

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 15 AND 21 JULY 2022

Urgent Chamber Application for suspension of bail in terms of section 121 (3) of the Criminal Procedure & Evidence Act (Chap 9:07)

K.M Guveya, for the applicant

T. Runganga and Ms N. Moyo, for the respondent

MAKONESE J: In terms of section 121 (3) of the Criminal Procedure and Evidence Act (Chapter 9:07) it is provided that:

> "Where a Judge or Magistrate has admitted a person to bail, and an appeal has been noted by the Prosecutor General or Public Prosecutor under subsection (1), the decision to admit to bail remains in force unless, on the application of the Prosecutor General or Public Prosecutor, the Judge or Magistrate is satisfied that there is a reasonable possibility that the interests of justice may be defeated by the release of the accused on bail before the decision on appeal, in which event the Judge or Magistrate may suspend his or her decision to admit the person to bail and order the continued

detention of the person for a specified period or until the appeal is determined, whichever is the shorter period."

This is an application brought by the applicant on the grounds that the order made by this court on the 14th of July 2022 granting bail to the respondent be suspended pending the hearing of an appeal in the Supreme Court.

The respondent was duly served with the application and filed an opposing affidavit and Heads of Argument. The respondent took a preliminary point challenging the validity of the Certificate of Urgency filed by the applicant. Firstly it was argued that the Certificate of Urgency was filed by Mr T. Nyathi a subordinate of the applicant who has a clear interest in the outcome of the matter. Secondly, it was argued that Mr T. Nyathi was not a legal practitioner as envisaged by rule 60 (4) and 60 (6) of the High Court Rules, 2021. Mr T Nyathi is a legal practitioner registered of this Honourable Court. He is employed by the National Prosecuting Authority. I am in no doubt that he is authorized to execute a Certificate of Urgency. The fact that he is employed by the National Prosecuting Authority is not a bar for him deposing to a Certificate of Urgency. The court was referred to the case of *Chafanza* v *Edgars Stores & Anor* HB 27-2005. In this matter CHEDA J expressed the following view;

"To my mind it is totally undesirable for a legal practitioner to either attest to an affidavit or sign an urgent certificate for and on behalf of a client who is being represented at his firm as such lawyer clearly has an interest in the matter at hand."

In *Mudekunye and Ors* v *Mudekunye & Ors* HB 190-2002, BERE J took a different view and noted that;

"To my mind rule 242 (2) does not in any way prescribe that a legal practitioner who signs an urgent certificate must not be from the same law firm representing the applicant. Rule 242 (2) is very clear in its wording and it requires no complicated interpretation. If it was intended that a legal practitioner other than the one from the law firm representing the applicant prepares the Certificate of Urgency the rule would have specifically stated so."

I do not believe that there is further debate at this stage that the rule on who must sign a Certificate of Urgency seems to have been resolved. It is now the accepted view that rule 242 (2) of the old rules, which is now Rule 60 (4) of the High Court Rules, 2021, did not preclude a legal practitioner from the same firm from signing a Certificate of Urgency. It is however desirable, where possible, for a legal practitioner from a different firm to execute the Certificate of Urgency. In the present case there is nothing wrong in Mr T. Nyathi deposing to the Certificate of Urgency. Nothing therefore turns on the point *in limine*.

ON THE MERITS

Submissions by the applicant

The applicant submits that they intend to lodge an appeal against the decision I made admitting the respondent to bail pending trial. It is argued that it is in the interests of justice to keep the respondent in custody pending the finalisation of the appeal. Further, the applicant contends they have no other remedy for bringing the respondent to trial if he is released on bail and then absconds again. Applicant's argument is pivoted on the fact that respondent was brought to Zimbabwe after an extradition process. Applicant is not

persuaded by the fact that the complainant in this matter has indicated that he is no longer interested in pressing charges and that that fact would eliminate the risk of absondment.

Submissions by the Respondent

Respondent avers that this court may only order the suspension of bail pending an appeal to the Supreme Court where it considers that the continued detention of the accused is necessary because there is a reasonable possibility that the interests of justice may be defeated. The respondent contends that the applicant systematically and persistently negated to address the issue of the substantial possibility of the respondent absconding to avoid trial.

It is my view that the applicant has established the basis for the relief it seeks. In the event that I decline to suspend the order granting bail to the respondent, and the respondent then in fact absconds, the applicant would not have a remedy. I agree that extradition is a lengthy and costly exercise. The balance of convenience favours the granting of the order sought.

In the result, and accordingly, I would grant the order in terms of the draft order.

National Prosecuting Authority, applicant's legal practitioners

Tanaka Law Chambers, respondent's legal practitioners