

HH 48-03
Case No: 161/03
Ref Case No: CA 988/2003
NOT REPORTABLE AND NOT FOR DISTRIBUTION

SAMSON RUTURI
versus
THE STATE

HIGH COURT OF ZIMBABWE
OMERJEE J
HARARE, 19, 20 and 26 March, 2003

Bail Appeal

Mr *Chikumbirike* for the applicant
Mr *Jagada* for the respondent

OMERJEE J: The appellant and one Musona (who is not a party to the present appeal) were placed on remand at the Magistrates Court Harare on 3 February 2003 on allegations of fraud, alternatively theft, involving a sum of \$958 651 946,56 from their employer, First National Building Society ("FNBS").

The appellant and his accomplice were ordered to be held in custody. Thereafter a series of bail applications was made before the magistrates court without success. The magistrate's refusal to grant the appellant bail on 4 February 2003 became the subject of an appeal to this Court. That appeal was heard and determined by MAKARAU J, who dismissed the appeal on 28 February 2003 in Case No HH 31-03.

The present appeal is brought in respect of the decision of the magistrates court on 11 March 2003 wherein the trial magistrate ruled that there were no "changed circumstances" so as to merit the granting of bail to the appellant. It is the appellant's contention in summary that the learned magistrate misdirected herself in that matter on the following grounds:

- a) the lapse of a period of six weeks since the date of the appellant's arrest;
- b) the contents of a letter dated 4th March 2003 produced as "Annexure B" before the magistrate and the findings of credibility made;
- c) the attitude of the investigating officer;
- d) the risk of abscondment.

On that basis, so the submission goes, this court by way of an appeal, can exercise the powers conferred upon it by s 121(7) of the Criminal Procedure and Evidence Act [Chapter 9:07] ("the Code") and make an order as if it were making "the order in terms of the appropriate section of this Part by the learned magistrate whose decision was the subject of the appeal". A preliminary matter relates to the submission on behalf of the applicant regarding the accuracy and fullness of the record kept by the magistrate who determined the

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matter. It is apparent that there were omissions and perhaps inaccuracies in the record. Mr *Jagada* was prepared to accept the corrections to the record made by Mr *Chikumbirike* for the purposes of the appeal hearing. At the stage of the resumed hearing of the appeal, the presiding magistrate had filed a written response in this matter.

a) The passage of time:

A total of forty one days had elapsed by the time the hearing took place before the magistrate, the subject of this appeal. One has to bear in mind that the investigation of an offence of this nature and magnitude is time consuming and the authorities must be afforded reasonable and ample opportunity to investigate this matter. In saying so, I am mindful of the fact that simply because investigations are on going cannot, of its own, be a justifiable reason to deny a person bail. The status of the investigation is but one relevant factor, which must be taken together with other factors in considering the question as to whether or not a person ought to be admitted to bail.

b) The Document "Annexure B" dated 4th March, 2003:

The appellant relies significantly on the letter written by Mlotshwa to the appellant on 4 March 2003, wherein he is notified of the intention by his employer to terminate his employment. Under the heading "**Unauthorised Loan Advances**" the following appears -

'By your own admission, as contained in signed acknowledgements of debt dated 26 January, 2003, and as reflected in the accounts of First National Building Society ("FNBS"), the flagship subsidiary of FNHL, you and Nicholas Bordah Musona are jointly liable to FNBS in the combined sum of \$544 875 933.00.

Such conduct on your behalf amounts to an act, conduct or omission inconsistent with the fulfillment of the express or implied conditions of your contract of employment. It was an implied term of your contract of employment that you would not undertake any activities calculated to financially prejudice FNBS and that you would not enter into any transactions for personal gain without the knowledge, consent and/or ratification of the Board.

Permission to terminate your contract of employment in terms of Section 3 (a) is hereby sought from the Minister of Public Service, Labour and Social Welfare ("the Minister") on the basis of the above".

It was submitted with some vigour by Mr *Chikumbirike* that the amount of the

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prejudice had been significantly reduced from \$958m to \$544m (in round figures). Put differently, the figure representing prejudice had been revised downwards by about 45%. It is however apparent from a consideration of this letter that "Annexure B" was in effect making reference to an amount that the appellant had acknowledged or admitted was owing and not that this figure represented the total amount missing. The author of the letter could have been more concise in the use of language. In the view of this Court the document "Annexure B" focused on what was acknowledged by the appellant as owing but did not reflect the total figure as to prejudice. As the magistrate observed with some cogency, if someone is accused of taking \$10 million and acknowledges taking \$5m, does that reduce the figure as to the prejudice suffered? This Court is of the view that the appellant is seeking to rely on a technicality in asserting that an acknowledgment by him that a certain sum was owing reflected the actual sum owing. That is not so.

Furthermore, it was contended that the magistrate in finding that Mlotshwa was a credible witness, did not support such findings with reasons. The gist of Mlotshwa's testimony was to the effect that "Annexure B" was written by him and reflected what was acknowledged by the appellant as owing, and not the actual amount owing or missing. Whilst there may be some criticism of his testimony, it is clear that he was consistent in regard to the effect and import of "Annexure B". The letter related to a disciplinary hearing. Mr *Jagada*, in his submissions filed, indicated that he did not rely on "Annexure B" in regard to the figure representing prejudice. The onus is upon the appellant to prove, on a balance of probabilities, that the Court should find in his favour with regard to the issue of prejudice. The appellant, for the reasons given, has not succeeded in doing so. The allegations against the appellant in relation to the issue of prejudice is the same as when the investigations began.

c) The attitude of the Investigating Officer:

As a general proposition of law the attitude of the Attorney-General is a relevant consideration regarding the issue of bail - see *S v Kantor* 1964(3) SA 377(W). It should be said, however, that the Attorney-General's *ipse dixit* cannot be substituted for the Court's discretion. The investigating officer stated in evidence before the magistrate that he had done substantial investigations and left the question of the grant of bail to the Court. Significantly, the investigating officer did not state that his investigations revealed a reduction in the amount alleged to be missing. The Court, in its assessment, determined that there existed a risk of abscondment and accordingly declined to admit the appellant to bail.

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d) The risk of abscondment:

It is not in issue that the appellant's assets (being fixed, movable and incorporeal) have been frozen by order of Court. That information was known to the Court at the time of the bail application. The State is concerned that some part of those assets which are valued at approximately \$2 billion, may have been acquired from the proceeds of the crime. The State is investigating the source and acquisition of those assets. It was submitted by Mr *Chikumbirike* that, as part of the bail conditions, the Court may require some of these assets to be surrendered. The difficulty at this stage is to determine which assets may be "tainted" or "untainted", as the case may be. It did emerge in evidence that the appellant does not hold accounts in a foreign country, although he does hold foreign currency denominated accounts in this country. The appellant is undeniably facing a serious charge and there is substantial evidence against him. In the event of a conviction and notwithstanding restitution, the appellant is likely to undergo a period of incarceration. The temptation to flee the country represents a real risk in this matter at this stage.

Looked at as a whole, it is the view of this Court that the magistrate's finding that there are no "new circumstances" cannot be faulted. It should be pointed out, however, that with the passage of time and with clarity emerging from ongoing Police investigations, the situation may change and lead to the Court viewing this matter differently.

In the result and for present purposes I make the following order -
The appeal is dismissed.

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Chikumbirike & Associates, applicant's legal practitioners
Office of the Attorney-General, for respondent