HH 47-2009
HC NO. B427-9/09
REF CASE NOS:
HC CA 294-300/09
B 122-8/09
B 30-40/09
B 35-6/09
CRB 8887-91/08
CRB 8894-95/08
SC 35/09

THE STATE
versus
KISIMUSI E DHLAMINI
and
GANDHI MUDZINGWA
and
ANDRISON MANYERE

HIGH COURT OF ZIMBABWE
BHUNU J:
HARARE, 15 April 2009 and 17 April 2009.

Mr *Mutangadura,* for the applicant.
Mr *Muchadehama,* for the respondents.

Urgent Chamber Application for leave to appeal in terms of s 121 of the Criminal Procedure and Evidence Act [Cap 9:01] as read with s 44 (5) of the High Court Act [Cap 7:06]

BHUNU J. This is an urgent chamber application for leave to appeal against the decision of my brother HUNGWE J dated 9 April 2009 in which he granted bail to the 3 respondents on stringent conditions despite strenuous opposition from the state. I consider that the application is urgent as it has to do with the liberty of the subjects as enshrined in the constitution of the land.

The background to this application is that the 3 respondents were arrested together with 4 others who have since been released on bail. They are facing 5 counts of crimes against the state, that is to say, insurgency, banditry, sabotage or terrorism in contravention of s 23 (1) (a) (i) (ii) of the Criminal Law (Codification and Reform) Act [*Cap 9:23*] or Alternatively aggravated malicious damage to property in contravention of s 143 of the Code.

The respondents appeared before KARWI J for their initial bail application on 19 January 2009. His Lordship after hearing argument from both sides denied all the 7 applicants bail. In denying them bail he made 3 specific findings of fact as follows:

1. that the offences are serious.

2. that the applicants were likely to commit similar offences.

3. that the applicants were likely to interfere with witnesses

In denying the applicants in that case bail the learned judge cautioned the state to expedite its investigations as his refusal to grant the applicants bail at that juncture did not mean that they could stay in prison forever. He therefore endorsed on the record file:

"1. Dismissed.
2. Matter to be considered after 7th February.
3. Police to reconsider the case of Nkomo, Ezekiel or Zachariah."

There was no appeal against the decision of KARWI J to deny all the 7 applicants bail. All the 7 applicants however, again approached this Court for bail on 10 February 2009 arguing that there existed changed circumstances warranting their release on bail. After hearing full argument OMERJEE J decided to grant the 3 applicants' co accused bail on 19 February 2009 primarily on the basis that the state case against them was rather weak. By the same token he denied the 3 respondents in this case bail on the grounds that the state had a strong case against them.

Aggrieved by OMERJEE J's decision they approached the Supreme Court on 6 April 2009 for redress under case number SC 35 of 2005. The appeal was unsuccessful in the highest court of the land. In dismissing the appeal the learned Chief Justice pointed out that in view of the fact that there had been no appeal against KARWI J's judgment OMERJEE J's decision could not be faulted. Undeterred by that set back the applicants again approached this Court appearing before HUNGWE J, seeking bail on the basis of changed circumstances. The

main thrust of their argument was that the coming into being of the inclusive government had brought about change which now warranted the granting of bail to the 3 respondents.

The state resisted the application on the basis that the formation of the inclusive government did not constitute any changed circumstances as this had always been a burning issue before both KARWI J and OMERJEE J. The state further argued that the alternative charge had nothing to do with the formation of the inclusive government as it did not constitute a crime against the state. It was further pointed out that KARWI J's finding to the effect that the applicants were likely to interfere with investigations had nothing to do with the formation of the inclusive government

The respondent's argument found favour with HUNGWE J. in consequence whereof he ruled that the formation of the inclusive government constituted a changed circumstance warranting the granting of bail to the applicants. He therefore granted the 3 applicants bail on specified stringent conditions.

Aggrieved by that determination the state invoked the provisions of s 121 of the Criminal Procedure And Evidence Act [*Cap 9:07*] which provides among other things that:

> **121 Appeals against decisions regarding bail**
>
> (1) Subject to this section and to subsection (5) of s 44 of the High Court Act [*Cap 7:06*], where a judge or magistrate has admitted or refused to admit a person to bail—
>
> (*a*) the Attorney-General or his representative, within seven days of the decision; or
>
> (*b*) the person concerned, at any time; may appeal against the admission or refusal or the amount fixed as bail or any conditions imposed in connection therewith.
>
> (2) An appeal in terms of subsection (1) against a decision of—
>
> (*a*) a judge of the High Court, shall be made to a judge of the Supreme Court;
> (*b*) a magistrate, shall be made to a judge of the High Court.
>
> (3) A decision by a judge or magistrate to admit a person to bail shall be suspended if, immediately after the decision, the judge or magistrate is notified that the Attorney-General or his representative wishes to appeal against the decision, and the decision shall thereupon be suspended and the person shall remain in custody until—

(*a*) if the Attorney-General or his representative does not appeal in terms of subsection (1)—

(i) he notifies the judge or magistrate that he has decided not to pursue the appeal; or

(ii) the expiry of seven days; whichever is the sooner; or

(*b*) if the Attorney-General or his representative appeals in terms of subsection (1), the appeal is determined.

(4) An appeal in terms of subsection (1) by the person admitted to bail or refused admission to bail shall not suspend the decision appealed against.

(5) A judge who hears an appeal in terms of this section may make such order relating to bail or any condition in connection therewith as he considers should have been made by the judge or magistrate whose decision is the subject of the appeal. (My underlining).

The state now seeks leave to appeal such that if the application is successful it will have the effect of suspending the order of HUNGWE J until the appeal is determined or the respondents are granted bail by the appeal Judge.

It is always difficult to preside over a case determined by a fellow judge of the same Court. Fortunately my lot is made lighter in that I am not being asked to determine the correctness or otherwise of my colleague's judgment. All I am being asked to do though not an easy task, is to determine the applicant's prospects of success on appeal as determined in the case of *Rex v Baloi* 1949 (1) SA 523 (AD) which held that in determining whether or not to grant leave to appeal in a criminal case the trial Judge must, both in relation to questions of fact and law, direct himself specifically to the enquiry of, "whether there is a reasonable prospect that judges of Appeal will take a different view."

It is correct to say that the issue of the existence or otherwise of the inclusive government was specifically raised and argued before KARWI J under case number 30 – 4/09. In that case and at paragraphs 22.3 to 22.4 of the application the respondents had this to say:

"22.3 The Applicants are being charged under section 23 of the Criminal Law Codification and Reform Act where the offence committed must be for the purpose of either **causing or furthering an insurrection in Zimbabwe or causing the forcible resistance to government or the defence forces or any law enforcement agency; or**

procuring by force the alteration of any law or policy of the government, It is alleged that the applicants are MDC-T employees or activists. It surely cannot be said that they committed these offences to cause resistance to the government because effectively there has been no government in Zimbabwe since the election in March 2008. There is therefore no government to fight.

22.4. The entire allegations pertain to the bombing of police establishments which fall under the Ministry of Home Affairs. It is common cause that currently the main political parties are haggling over the control of the Ministry. It is one of the major reasons why there is no agreement on the perceived unity deal. Would it therefore make any sense that the same party which is insisting on singularly controlling the Ministry of Home Affairs send its members to destroy the same establishments and infrastructure that it seeks to control. This is a serious contradiction which betrays the *bona fides* of the allegations. It also defies logic that the same MDC_T which is effectively the ruling party as they control the lower house of parliament would cause an insurrection when it is poised to be part of the same executive that it is said to be planning to topple ." (My underlining)."

Thus KARWI J made his determination to the effect that the offences are serious, the applicants are likely to commit similar offences and that the applicants were likely to interfere with witnesses with the full knowledge of the impending inclusive government.

The same argument was placed before OMERJEE J under case number B122-8/ 09 on 18 February 2009. By that time the Prime Minister to the inclusive government who happens to be the leader of the respondents' party had already been sworn in on 11 February. In view of that important political development counsel for the respondents made the following submissions at paragraphs 9 to 11 of his written submissions::

"9. The state must also consider the prevailing political environment. The political partners have now come together to form what they are now calling an inclusive government.

9.1 The Applicants who the State alleges are MDC-T activists are less inclined to engage in any criminal activity in view of the new political developments. Of course this (*sic*) denies ever committing any offences.

10. It is submitted that the applicants have to had (*sic*) the balance tilted in their favour.

10.1 This is a proper case in which to now consider bail. The State has had its chance including abusing applicants.

10.2. It is respectfully submitted that that the justice of this case demands that applicants be released on bail (My emphasis)".

It is needless to say that the same argument was then placed before HUNGWE J on 9 April 2009. In submitting that the formation of the new inclusive government constituted a new changed circumstance warranting the grating of bail counsel for the respondents advocate *Zhou* had this to say at page 1 of the learned judge's hand written notes.

> "The formation of the inclusive government is common cause which fact has changed the complexion of the case. This new fact was not placed before the Court when the application was made. MDC-T being part of the government one must consider whether if grated bail, the applicant will abscond,"

Undoubtedly advocate *Zhou's* submission to this effect was incorrect and misleading. We now know as I have amply demonstrated above that before OMERJEE J it had been specifically argued in paragraph 9 of the respondents' written heads of argument that, 'The state must also consider the prevailing political environment. The political partners have now come together to form what they are now calling an inclusive government.'

It is trite and a matter of elementary law in our jurisdiction that where bail has been previously denied by the same court, subsequent bail applications can only be entertained on the basis of changed circumstances. OMERJEE J had denied the respondents bail in the face of submissions to the effect that the new political dispensation constituted a change in circumstances now warranting the granting of bail to the respondents.

It is my considered view that if the respondents were unhappy with the learned judge's handling of that submission they should have taken the matter on appeal and not place the

same issue in the same Court before a deferent judge, pretending that the issue had previously not been placed before the same Court.

It therefore appears to me that had the correct facts been placed before HUNGWE J it is reasonable to infer that he might have reached a different conclusion from the one he arrived at ridding on the back of incorrect facts. That being the case, it stands to reason that the Appeal Court seized with the correct facts might also reach a different decision from that made by HUNGWE J on the basis of incorrect and misleading facts.

Before me it was argued that the formation of the inclusive government was incomplete when OMERJEE J presided over the case on 18 February 2009 whereas when HUNGWE J presided over the case in April 2009 the formation of the new inclusive government was now complete. I consider that to be idle double talk in view of the categorical factual submission before OMERJEE J to the effect that the new inclusive government was now in place.

For the foregoing reasons I hold that the applicant has reasonable prospects of success on appeal. That being the case, I consider that that the ends of justice can only be met by according him his day in the Supreme Court.

Having said that, I cannot over emphasise the need for legal practitioners to thoroughly check their facts before presenting them in a Court of law. The presentation of incorrect facts may lead to disastrous legal consequences. In this case persons who may constitute a danger to the state and society at large could have been released from prison. On the other hand the granting of bail premised on the wrong facts may have unduly prejudiced the respondents for the simple reason that they may have been deserving of bail on other grounds such as delay, passage of time and lack of progress in the state case.

For the foregoing reasons I had no hesitation whatsoever in concluding that the applicant has reasonable prospects of success on appeal. It is accordingly ordered that the application for leave to appeal be and is hereby granted.

Attorney General's Office, applicant's legal practitioners
Mbidzo Muchadehama, respondent's legal practitioners