MIKE MATANGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 1 February 2013

Applicant, in person
R. Chikosha, for the defendant

Bail Application

CHATUKUTA J: On 1 February 2013, I dismissed the applicant's application for bail pending appeal. I gave *ex tempore* reasons for my decision. The applicant requested the written reasons for my decision. The following are my reasons.

The applicant was convicted on 14 May 2008 of murdering his wife. He was sentenced to 15 years imprisonment. The applicant filed an application for leave to appeal against both the conviction and the sentence. It appears that the application was made out of time and was dismissed on 29 March 2010. The applicant appealed on 1 April 2010 against the dismissal of his application.

This court has been seized over the past five years with the applicant's application for bail pending appeal and the applicant has been a visitor to the bail court on no less that 35 occassions. On 3 July 2011 the bail application was struck off the roll on the basis that applicant had not obtained leave to appeal in the Supreme Court in person. On 31 August 2010, the application was postponed indefinitely pending the outcome of an application to the Supreme Court for leave to appeal. Since then the applicant has had his bail application reset

or page 17 on *** occasions in some instances as applications for bail based on changed circumstances and in one instance under the pretext of an application for rescission of the order of 31 August 2010 in which his application for bail had been postponed indefinitely.

The application before me was an application for bail based on changed circumstances or in the alternative an application for bail in terms of *s* 123 of the Criminal Procedure and Evidence Act [*Cap 9:07*] (CP&E Act). The applicant submitted that the changed circumstance was that the basis upon which the application was postponed indefinitely was inconsistent with section 123 of the CP&E Act. The second changed circumstance which also formed the basis for the alternative application was that the applicant is entitled in terms of *s* 123 of the CP&E Act to apply for bail pending an appeal.

I found it difficult at the time I determined the application to understand the exact nature of the applicant's submissions and I still find it difficult to do so. The applicant's application for bail has not been determined by the court on the numerous occasions the matter has been set down. It has either been struck off the roll or postponed with the court indicating to the applicant the limitations of the application (which I will allude to later). Changed circumstances can only exist where an application has been determined on the merits which circumstances would persuade the court to vary its earlier decision in favour of the applicant. As the application had not been determined there cannot be any question of c/s. It is my view that the application is misplaced.

The application before the court, which has been doing the rounds is premised on s 123 of the CP & E Act. S 123 (1) empowers the High Court power to admit a person to bail pending appeal or review. The applicant cannot therefore on section 123 as the alternative to changed circumstances as the court is already seized with an application in terms of the section.

The limitations of the applicant's bail application are that there is a pending appeal against the order of 29 March 2010 before the Supreme Court and that the applicant has not yet obtained a certificate to appeal in person before the Supreme Court.

S 44 (2)(b) of the High Court Act [Cap 7:06] permits a person convicted by the High Court to appeal which involves a question of fact alone of a question of mixed law and fact with the leave of a judge of the High Court. Where a judge of the High Court refuses to grant leave the convicted person may seek the leave of a judge of the Supreme Court. The applicant has since appealed against the dismissal of his application for leave to appeal. Until the leave is granted, he cannot be said to have an appeal before the Supreme Court. Correspondingly, there cannot therefore be an application for bail pending on a non-existent appeal.

Further, one cannot be properly before the Supreme Court under the present circumstances until a certificate to prosecute an appeal in person has been granted by that court. S 11 of the Supreme Court Act [*Cap 7:13]* does not permit a person who has been denied leave to appeal to the Supreme Court to prosecute an appeal in person.

It appears to me from the papers filed of record by the applicant and the oral submissions he has made that he cannot be said to be illiterate and does not understand what has been explained to him by the court on the various occasions (on the limitations of his application). It is therefore clear that the applicant is abusing the court by continually setting down the bail application before his application for a certificate and his appeal against the order of 29 March 2010 in the Supreme Court have been determined. The court would be forgiven under the circumstances for assuming that the applicant is merely seeking an opportunity to catch a breath of fresh air from prison more particularly given the number of times that he has had the application for bail set down and has appeared in court. The applicant cannot therefore be allowed to continue abusing the court.

It is my view that the bail application is completely misplaced and is accordingly dismissed.