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Judgment No S.C. 38/04

Criminal Application No 154/04

THE ATTORNEY-GENERAL v EMMANUEL ANESU FUNDIRA

SUPREME COURT OF ZIMBABWE
HARARE JUNE 3, 2004

F. Chimbaru, for the appellant

G. Chikumbirike, for the respondent

Before: CHIDYAUSIKU CJ, in Chambers

This is an appeal by the Attorney-General against the granting of bail by the High Court to the respondent.

The respondent is facing charges of contravening s 5(1) of the Exchange Control Act [Chapter 22:05] as read with s 11(1)(a) and, secondly, s 5(1)(b) of the Regulations as read with s 5(2)(9a)(ii) of the Regulations. It is alleged that the respondent has two active foreign accounts, one with the Bank of America and the other with Nedbank South Africa in which monies in foreign currency were deposited for clients who wanted hunting safari services from the respondent. The respondent, from January 2003 up to the time of his arrest, did not cause the money amounting to US101,388.00 to be repatriated to Zimbabwe as required by the Exchange Control Act. Instead he ordered the Bank of America to deposit it into other foreign accounts without the approval of the Reserve Bank.

As I have already stated bail was granted by HLATSHWAYO J and the Attorney-General now appeals against that judgment.

In the court *a quo* the State raised two grounds for opposing bail,

namely that the respondent was likely to abscond and, secondly, the respondent was likely to interfere with investigations. The learned judge in a very well reasoned judgment dismissed both these grounds. He reasoned thus:-

> "The State advanced two reasons for its opposition to the granting of bail, namely; the risk of abscondment and the fear of interference with investigations.

To deal with the last objection first, it was submitted for the State that the nature of investigations were complex and involve travelling to South Africa and the United States of America, and that since the investigations were still at an early stage there was a real risk that the applicant may interfere if released on bail. In response, it was submitted for the applicant, and in my view with justification, that since this was an arrest with a warrant, it should be reasonably presumed that the police would have investigated first and verified the critical information, giving rise to their suspicion. Furthermore, in my opinion, an allegation that an applicant may interfere with investigations will not suffice to deny an applicant admission to bail if it is a bare allegation, unsupported by objective information that the applicant has actually interfered or attempted to do so or that in the totality of the circumstances of the case may so interfere and has the capacity so to do and such interference may not be forestalled through suitable bail conditions. Therefore, I concluded that the applicant may not be denied bail on this ground.

As far as the risk of abscondment is concerned, I considered the nature of the charges and the likely punishment and the apparent strength or weakness of the State's case. The accused's ability to reach another country and the absence of an extradition treaty are also factors relevant to the risk of abscondment which, however, in my view, should always be assessed against the nature and strength of the charges against the applicant, otherwise no person with connections, contacts and means abroad may ever be admitted to bail even on the flimsiest of charges.

> The applicant faces to charges of contravening the Exchange Control Act [Chapter 22:05] involving amounts in excess of US$100 000, being monies paid for hunting safari services provided by him to client in his capacity as the chief executive officer of Makuti Game, Safaris and Lodges. The applicant's defence is that the operation of his enterprise was such that 'funds would be placed in his foreign currency accounts abroad prior to clients coming into the country for services to be rendered by his company, and thereafter, when everything has been done, and necessary formalities completed with the Reserve Bank, the funds would be remitted into his bank accounts in the country.' It must be noted that this is not a case of externalization of illegally or corruptly obtained foreign currency. It is, at worst, a violation of Exchange Control Regulations in the process of transacting genuine business operations or, according to the applicant, a mistaken appreciation of otherwise above board business transactions. Thus, in the final analysis, the State's case and the applicant's explanation in this

> regard are of equal weight and the benefit of the doubt must be given to the applicant. (GUBBAY CJ, *Aitken & Anor v Attorney-General* 1992 (1) ZLR 249; *Kuruneri v The State* HH-111-2004). In the event that the applicant is convicted on these charges, he would be required to repatriate the amounts within three months, failing which the imposition of an additional sentence of imprisonment, over and above any fine, would be considered. (See s 5 of the Exchange Control Act). The applicant is a citizen of this country, married with a family and roots in the country, a director of various companies, some quoted on the local bourse and is also the chairman of the Tourism Authority. It is more than likely that such a person would rather stand trial on the above charges than flee, and that if convicted would be in a position to ameliorate punishment through partial or total repatriation of the amounts involved."

The Attorney-General, in his grounds of appeal relied mainly on the ground that the respondent has funds outside the country and is likely to abscond. In my view the learned judge in the court *a quo* took into account all the relevant factors and concluded that this was an insufficient basis to deny the respondent bail. There was no misdirection and, therefore, no basis for interference by this Court even if it were of a different view.

At the hearing of this matter Mr *Chikumbirike* produced credible documentation to prove that the respondent has repatriated US$90,000.00 of the US$103,000.00 he is alleged to have failed to repatriate. Faced with this situation Mrs *Chimbaru*, for the Attorney-General, submitted that if the money was indeed repatriated she had no legal basis to persist with the appeal but as she had no instructions to abandon the appeal she would leave the matter in the hands of the court.

In my view the Attorney-General's stance is predicated on the respondent holding funds outside Zimbabwe. I am satisfied that the funds that the respondent held outside Zimbabwe have been repatriated with the exception of US$9,000.00 which has not as yet been accounted for. I am of the view that the appeal has no merit and is accordingly dismissed.

Chikumibirike & Associates, respondent's legal practitioners