REPORTABLE (16)

MARRY MUBAIWA CHIWENGA

V

(1) THE NATIONAL PROSECUTING AUTHORITY (2) THE CLERK OF COURT ROTTEN ROW MAGISTRATE'S COURT

THE SUPREME COURT OF ZIMBABWE

HARARE: FEBRUARY 22, 2021 & MARCH 19, 2021

B. Mtetwa, for the appellant

S. Fero, for the first respondent

No appearance for the second respondent

IN CHAMBERS

UCHENA JA: This is an appeal against the judgment of the High Court dismissing the appellant's application for variation of bail conditions.

FACTS

The details of this case can be summarised as follows. The appellant was in 2018 injured during a bomb blast in Bulawayo. She sustained injuries on her arms. She sought medical treatment in South Africa. Until her arrest on 4 December 2019 she was receiving treatment from a South African specialist doctor.

On her arrest she was charged with:

1. 6 Counts of contravening s 5 (1) (a) of the Exchange Control Act [*Chapter 22.05*] ‘exporting foreign currency.'

2. 6 Counts of contravening s 8 (2) of the Money Laundering and Proceeds of Crime Act [*Chapter 9.24*] 'concealing, disguising the true nature, source, location, disposition movement or ownership of or right's with respect to property, knowing or suspecting that such property is proceeds of crime.

3. 1 Count of contravening s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*] (fraud).

She was subsequently charged with the attempted murder of her husband and assault for assaulting their maid.

According to documents attached to form 242s in the applicant’s application for variation, the appellant’s charges of 6 (six) counts of contravening s 5 (1) (a) of the Exchange Control Act are based on the following facts:

Count One: That she sent her driver Carrington Kazingizi and Terrence Mutandwa to China with US$114,000-00 without any declaration being made to the authorities.

Count Two: That she instructed Memory Chakuinga to issue a proforma invoice for the supply of event tents and chairs which were sent to CBZ Bank and the appellant. The appellant then applied to CBZ Bank for the transfer of US$201, 846-81 by telegraphic transfer into Falcon Projects Suppliers Private Limited’s South African FNB bank account no 62576755105. Thereafter the appellant instructed Memory Chakuinga to divert

the money from the purchase of event tents and chairs to Range Rover Centre Menyln towards the purchase of her personal vehicle a Range Rover Autobiography which she registered in South Africa in her name bearing registration number HW40JNGP.

Count Three: That she instructed Memory Chakuinga to raise a proforma invoice for the supply of household electric meters which she sent to CBZ Bank and the appellant. The appellant used that proforma invoice to cause CBZ Bank to transfer US$307 545-05 into Falcon Projects Suppliers Private Limited's South African FNB Bank account number 62576755105. Thereafter the appellant instructed Memory Chakuinga to divert the funds towards purchasing house number 1309 Kingstone Heath Close, Waterkloof Golf Estate, Pretoria, South Africa. The house was registered in the name of LaChelle Travel and Tours Pty Ltd South Africa of which the appellant is the sole shareholder.

Count Four: That the appellant requested Judith Gamuchirai Goredema to source for three million rands for the purchase of the appellant's two cars a Range Rover and a Ranger. Thereafter the appellant gave Judith Gamuchirai Goredema US$230 769-23. The Range Rover was registered in South Africa in the appellant's names bearing registration number HX61PSGP. The registration details for the Ranger had not been established at the time the charges were preferred.

Count Five: That the appellant externalised US$36 923 08 for the purchase of furniture for her South African house number 1309 Kingstone Heath Close, Waterkloof Golf Estate, Pretoria, South Africa.

Count Six: That appellant instructed Memory Chakuinga to prepare an invoice for the supply of prepaid meters. Thereafter the appellant used it to cause CBZ Bank to

transfer US$ 142 859 3 into Bonnette Electrical Pty Ltd's South African Standard Bank account number 371164540. Instead of the money being used to purchase prepaid meters the appellant instructed Memory Chakuinga to divert it towardas the purchase of her second house being number 149 Valderana Close, Pretoria, South Africa.

The allegations involve the unlawful externalisation of US$1,033,943.1.

The other 6 (six) counts are for money laundering. The charge of fraud is for misrepresenting to the Judge President and the Acting Chief Magistrate that her husband had consented to the solemnisation of their marriage when he had not, resulting in marriage arrangements and documents being prepared and the Acting Chief Magistrate going to No 614 Nick Price Drive, Borrowdale Brooke to solemnise the marriage which did not take place.

The attempted murder charge is based on what she is alleged to have done in South Africa when her husband who was critically ill had been airlifted to South Africa for treatment. It is alleged that she instead of taking him to hospital kept him in a hotel room for more than 24 hours until her husband's security personnel intervened and took him to hospital. Thereafter the appellant visited her husband who was in a private ward and on life saving intra Venous Giving Set as well as Central Venous Catheter in order to sustain his life. She requested for privacy with her husband. Her husband's security personnel left the ward after which the appellant removed the life-saving equipment from the complainant who started bleeding profusely. She is alleged to have pushed him off the bed and left the ward. Thereafter her husband's security personnel, on seeing what had been done to the complainant raised alarm and hospital staff came and reconnected the life-saving equipment.

The assault charge is based on allegations that she assaulted their maid who she had met at their children's school.

Her bail applications in the Magistrate's Court were dismissed. She appealed to the High Court which granted her bail for the initial charges, on the following conditions:

1. That she deposits RTGS $50 000-00 with the clerk of court at Harare Magistrate's Court.
2. That she reside at 614 Nick Price Drive, Borrowdale Brooke, Harare.
3. That the Clerk of court shall accept as surety the property known as Lot 1 of Lot 343 A Highlands Estate measuring 3642 square metres held by KM Auctions Private Limited, under Deed of Transfer 2244/2006 accompanied by the necessary resolution of the directors and shareholders of KM Auctions Private Limited, Keni Mubaiwa and Helga Junior Mubaiwa.
4. That applicant shall surrender her diplomatic passport to the clerk of court at Harare Magistrate's Court.
5. That the applicant shall report at Borrowdale Police Station once a fortnight on Friday between 6am and 6pm.
6. The applicant shall not interfere with state witnesses.

In respect of the attempted murder charge the none monetary conditions imposed in respect of the initial charges were ordered to cover this charge in addition to her being ordered to pay additional bail in the sum of RTGS $10 000-00. The condition that she resides at No 614 Nick Price Drive Borrowdale Brooke was varied to No 64 Follyjon Crescent Glen Lorne, Harare.

In respect of the assault charge the following bail conditions were ordered by the High Court:

1. That she deposits $1500-00 with the clerk of court Harare Magistrate's Court.
2. She resides at number 64 Follyjon Crescent Glen Lorne Harare until the matter is finalised.
3. She reports at Borrowdale Police Station every fortnight on Friday between 6am and 6pm.
4. She does not interfere with state witnesses including Delight Munyoro and Batsirai Furukiya. She does not attend at Hellenic Primary School except in connection with consultations with school authorities.

Thereafter the appellant's initial bail conditions were altered to include the surrendering of her ordinary passport number CN 701555 which had not been previously disclosed when bail was granted by the High Court, to the clerk of court at Harare Magistrate's Court.

Subsequently the appellant applied to the court *a quo* for the variation of her bail conditions. She sought the release to her of her ordinary passport so that she could travel to South Africa for medical treatment by Dr van Hedeen a specialist on lymphoedema. She also sought the temporal suspension of the condition that she reports to Borrowdale police every fortnight on Fridays. This was to enable her to travel to South Africa where she was to receive treatment for a period which would result in her not being able to meet the reporting condition.

In her application for variation the appellant concentrated on the condition of her health. She did not explain how the interests of justice should be balanced with her need for medical treatment if her application was to be granted. She merely said she would not abscond as she could not risk the forfeiture of her parents' property which was offered as surety when she was granted bail by the High Court.

On the other hand the first respondent opposed the application alleging that the appellant has strong ties with South Africa and that most of the charges preferred against her involve the externalisation of foreign currency to South Africa. The attempted murder is alleged to have occurred in South Africa. The first respondent also opposed the application for variation on the basis that the evidence led by the appellant left grey areas on the issue of whether or not there are specialists in Zimbabwe, who can treat the appellant's condition.

The court *a quo* accepted that the appellant needed medical treatment by specialists. It accepted that prior to her arrest she was being attended to by Dr J van Hedeen a South African specialist. The court *a quo* however did not accept the evidence of Dr J van Hedeen who authoritatively spoke about the appellant's current condition without disclosing how he got that information as the appellant has not travelled out of Zimbabwe since her arrest on 4 December 2019. It also did not accept the evidence of Specialist Neurologist Mr Makarawo on his statement that there are no specialists on lymphoedema in Zimbabwe. It held that the appellant's application was based on inadequate evidence.

The court *a quo* gave its reasons for dismissing the appellant's application on pp 33 to 34 of the record as follows;

> "What I have before me by way of applicant's medical condition is one sided. It is true that first respondent concedes that she is unwell. It is true also that she needs treatment. But that cannot be the end of the matter.

Indeed, papers from her own doctors contain some grey areas. Mr Makarawo first attended to her on 6 November 2020. He diagnosed her with lymphoedema and recommended that she be treated in South Africa because he believes that there are specialiists there. I have already rejected his assertion that there are no lymphoedema specialists in Zimbabwe. I have explained why I have done so.

DR J van Heeden may have been treating applicant before the later's arrest on 4 December 2019. But no evidence was presented before me to prove that he or she has attended to her since then. Applicant concedes that she has not travelled out of the country since her arrest. But in October and November 2020 Dr J van Heeden is giving a fairly detailed narration of applicant's medical condition and the specialist care required.

Applicant says she sought medical treatment in Zimbabwe post 4 December 2019. She says those efforts have not alleviated her condition. Instead her health has deteriorated. She has produced neither medical reports nor other medical records to substantiate her assertion that she has failed to obtain the care that she needs in this country. I only have Mr Makarawo's letter written on 6 November 2020. So there is that gap in the evidence.

Applicant has placed inadequate information before the court to warrant alteration of her bail conditions.

ORDER

In the result the application is dismissed."

It is for these reasons that the court *a quo* dismissed the appellant's application without considering the issue of whether or not it was in the interest of justice to vary the appellant's bail conditions and if so on what conditions.

Aggrieved by the court *a quo*'s decision the appellant appealed to this Court on grounds of appeal which raise the following issues:

1. Whether the court *a quo* misdirected its self when it held that the applicant's evidence left gaps which justified the dismissal of her application for variation.
2. Whether on the evidence on record it was established that the alteration of bail conditions sought by the appellant is in the interest of justice.

SUBMISSIONS BY THE PARTIES.

In view of the lockdown due to Covid 19, I did not call the parties to appear before me to make oral submissions. I however invited their counsels to file Heads of Arguments as provided by Part III paragraph (4) of the Chief Justice's Practice Direction No 2 of 2021.

Mrs Mtetwa for the appellant submitted that the court *a quo* erred when it dismissed the appellant's application on the basis that the applicant had given the court inadequate information on whether or not there are lymphoedema specialists in Zimbabwe who could treat her locally. She submitted that the court *a quo* erred when it relied on the armchair evidence of Dr Magure while disregarding that of Neurologist Mr Makarawo who had examined the appellant and formed the opinion that her condition required the attention of specialists on lymphoedema in South Africa as there are no specialists on lymphoedema in Zimbabwe. Mrs Mtetwa further submitted that the court *a quo* also erred by dismissing the application without deciding the issue of whether or not it was in the interest of justice to vary the appellant's bail conditions. She also argued that the first respondent had alleged that the appellant will abscond if variation is granted as she has roots in South Africa without leading evidence on that aspect. She, in conclusion, urged this Court to allow the appeal and grant the appellant's application for variation.

Mrs Fero for the first respondent in response submitted that the court *a quo* had correctly held that the evidence led by the appellant left the court with inadequate information on whether or not her condition could not be treated locally. She submitted that the evidence led from neurologist Mr Makarawo and Dr J van Heeden had gaps which left the court with inadequate information. On the issue of whether or not the state had led evidence on the

likelihood of the appellant absconding because she has ties with South Africa, she submitted that it is not a rule of thumb that evidence has to be led in bail applications in rebuttal of what is placed in issue. The written documents and affidavits sufficed. She further argued that she had through her written response and in oral argument urged the court *a quo* to strike a delicate balance between the two conflicting interests. She further submitted that the court *a quo* considered the totality of the evidence and properly dismissed the application.

THE LAW

Section 126 of the Criminal Procedure and Evidence Act provides for the variation of bail conditions. It reads:

> "**26 Alteration of recognizances or committal of person on bail to prison**
> (1) Any judge or magistrate who has granted bail to a person in terms of this Part may, **if he is of the opinion that it is necessary or advisable in the interests of justice that the conditions of a recognizance entered into by that person should be altered or added to** or that that person should be committed to prison, order that the said conditions be altered or added to or commit the person to prison, as the case may be:" (emphasis added)

It is clear from the wording of s 126 (1) that before bail conditions can be altered the judicial officer must be satisfied that it is necessary and advisable in the interests of justice for him to do so. The key words are "necessary or advisable". The use of the word "or" between the words "necessary" and "advisable" introduces two factors which must be considered before bail conditions can be altered. According to the Oxford Advanced Learner's Dictionary the word "or" is used to introduce another possibility. It is also used in negative sentences when mentioning two or more things.

The court must therefore ask its self if it has been established that the alteration is necessary after which it must also consider whether or not in the circumstances of the case before it, it is advisable to vary the applicant's bail conditions. The necessity to vary the conditions must therefore be balanced against whether it is advisable in the interests of justice in the circumstances of that case to vary bail conditions. If the facts of the case make it not advisable to vary the conditions a judicial officer can judiciously exercise his/her discretion and dismiss the application.

In considering the interests of justice, the court must take into consideration the applicant's justification of the need for variation and the interest of the proper administration of justice which requires that conditions of bail must be imposed which will ensure that an accused person will remain available to stand trial.

Whether the court *a quo*, misdirected itself when it held that the applicant's evidence left gaps which justified the dismissal of her application for variation.

In her heads of argument the appellant's counsel submitted that the court *a quo* misdirected itself when it disbelieved Mr Makarawo's evidence that there are no specialists on lymphoedema in Zimbabwe. A reading of the record establishes that the court *a quo* did not disbelieve Mr Makarawo's evidence on the condition of the appellant and her need for a specialist to treat her condition. It is a well-known fact that doctors refer their clients to specialists if they cannot treat them themselves. It is a notarious fact courts can take judicial notice of. The court *a quo* could therefore only disbelieve Mr Makarawo's evidence on the basis of evidence to the contrary being led that there are indeed specialists on lymphoedema in Zimbabwe. The court *a quo* said it relied on the evidence of Dr Tsitsi Mildred Magure. A

reading of her evidence establishes that she did not say there are specialists on lymphoedema in Zimbabwe. She, in her statement said:

> "I cannot therefore commit myself to whether we have expertise locally to manage the condition or not without knowing the underlying cause of the lymphoedema. Determination of which expertise is best placed to manage the case depends on the cause and grade of the lymphoedema. Assessment by a multi-disciplinary team **might conclude which expert to lead the management"**. (emphasis added)

The questions which the Prosecutor General's office had asked were not answered directly. The Prosecutor General's office had asked the Ministry of Health which forwarded the question to Dr Magure:

1. Whether medication and the necessary facilities for its cure are readily available in Zimbabwe and
2. Whether there are any lymphoedema specialists in Zimbabwe.

Dr Magure's response did not address the question whether medication and the necessary facilities for its cure are readily available in Zimbabwe. She also refused to commit herself as to whether or not there are specialists on lymphoedema in Zimbabwe. Her suggestion, that a multi-disciplinary team might conclude which expert to lead the management" suggests that an experiment has to be undertaken to establish which expert can lead the management. This does not prove that there is readily available medication and the necessary facilities for the cure of lymphoedema in Zimbabwe. The question whether there are specialists on lymphoedema in Zimbabwe could have been answered by simply saying yes and stating the names of the specialists.

I am therefore satisfied that the court *a quo* misdirected its self when it preferred the evidence of Dr Magure to that of specialist neurologist Mr Makarawo.

The finding by the court *a quo* that Dr van Hedeen's evidence left a grey area as to when he examined the appellant cannot be faulted. It is the duty of an applicant to lead evidence which can satisfy the court and enable it to make a finding in its favour. The court *a quo* correctly observed that the appellant had not left Zimbabwe since her arrest on 4 December 2019. The court *a quo* therefore correctly questioned how Dr van Hedeen who lives in South Africa could have examined the appellant to enable him to give a detail narration of the appellant's current condition.

The court *a quo* also correctly held that the appellant had not substantiated her claim that she had sought treatment locally in Zimbabwe without success. It observed that no supporting documents were placed before the court in support of that claim, from doctors who were attending to her. A reading of the record proves that the appellant did not produce such documents. I am however of the view that the omission was cured by Mr Makarawo's report to the effect that there was gross swelling of appellant's arms and legs and the first respondent's concession that the appellant is unwell. That on its own is proof that whatever treatment she might have received after her arrest had failed to cure the lymphoedema. While the court *a quo*'s observation is correct it is an irrelevant and unnecessary quest for further evidence in circumstances where the first respondent had made a concession. It is trite that what is not disputed need not be proved.

I therefore agree with Ms Mtetwa that the appellant had, through the evidence of Mr Makarawo, proved that her condition required a specialist's attention in South Africa where she was receiving treatment before her arrest.

Whether on the evidence on record it was established that the alteration of bail conditions sought by the appellant is in the interest of justice.

The interests of justice should consider the appellant's need for treatment in South Africa against the interests of the proper administration of justice. The appellant merely gave an undertaking that she will come back to stand trial. The first respondent argued that she will abscond as she has roots in South Africa. The record establishes that it is alleged that 5 of the 6 charges of contravening s 5 (1) (a) of the Exchange Control Act involve the externalisation of foreign currency to South Africa where she is alleged to have used the money to purchase two houses and three motor vehicles. She is alleged to be a sole shareholder of a South African company into whose name the first house was registered. The three motor vehicles she is alleged to have bought are in South Africa, two of them having been registered in her name there. The attempted murder charged occurred in South Africa. The proper administration of justice involves consideration of the possibility that the appellant is likely to abscond and interfere with witnesses some of whom live in South Africa.

The question which must be answered is, is it advisable to vary three of her weighty bail conditions especially without their being substituted with other conditions which would dissuade the appellant from absconding . The court which granted her bail considered it important that she surrender her passports to the clerk of court. It also considered it important that she stay at the stated address and periodically present herself at Borrowdale Police station to prove that she will be available to stand trial. If these three bail conditions are temporally altered without substitution they will severely weaken the possibility of her standing trial. The appellant did not offer any security in substitution of the conditions to be varied.

An applicant for variation in circumstances where the variation removes the safeguards intended to ensure that he or she will stand trial, must offer to provide other forms of security in substitution of those to be suspended if variation is to be granted. In this case the appellant is alleged to have bought two houses in South Africa. She is alleged to have bought three motor vehicles, two of which were registered in her name in South Africa. She is alleged to be the sole shareholder of her South African company. She is alleged to have furnished one of the houses she bought in South Africa. The charges preferred against her are serious. They give details which make them strong. Details of persons, who allegedly helped her to externalise foreign currency are given. The Bank which transferred the money which was subsequently diverted is mentioned. The South African Bank and account numbers into which the money was deposited by the Zimbabwean Bank are stated. The details of the houses and motor vehicles she is alleged to have bought with the externalised foreign currency are given. The strength of the charges preferred against her offers a strong incentive for her to abscond.

These facts, make it unadvisable to vary her bail conditions, on the mere promise that she will not abscond. In the case of *Chombo v The State* HH 753/19, the applicant offered to pay additional monetary bail of ZWL$ 50,000-00 when he sought the release of his passport to enable him to go to South Africa for medical treatment. When the court indicated hesitation because of the inadequacy of the amount offered he offered title Deeds of his young brother's house against the release of the passport. The court was thus satisfied that it was advisable to order the release of the passport on condition that he, surrender title Deeds of the house which surety was to be released to him on his surrendering his passport back to the clerk of court. The commitment to offer additional security swayed the court in finding it advisable to grant the application.

I am therefore satisfied that in spite, of the court *a quo* having misdirected itself on some aspects the appellant failed to satisfy the court that it is advisable to vary her bail conditions on her mere assurance that she will not abscond.

The appeal is dismissed with no order as to costs.

Mtetwa & Nyambirai, appellant's legal practitioners.

Prosecutor General's Office, 1st respondent's legal practitioners.