

REPORTABLE (07)

CAINOS CHINGOMBE
v
THE STATE

SUPREME COURT OF ZIMBABWE
HARARE: 19 FEBRUARY 2021

L. Madhuku, for the appellant

R. Chikosha, for the respondent

BAIL APPEAL (CHAMBER APPLICATION)

MAKONI JA: This is an appeal against refusal of bail by the High Court handed down on 21 January 2021. The appeal is made in terms of rule 67 (1) of the Supreme Rules, 2018 (the rules) as read with s 121(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPEA).

WHETHER OR NOT THE APPELLANT HAS A RIGHT OF APPEAL TO THIS COURT

The appellant anticipated, and correctly so, that an issue might arise whether the appeal is properly before this Court. In his Written Statement, filed in terms of r 67 (1), under the heading “Reasons Why Bail Should Be Granted” he stated his reasons in two parts. The first part is headed, “**Why this appeal is an appeal in terms of s 121(1) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].**”

In the Written Statement he avers that this is an unusual novel appeal that is contemplated by s 121(1)(b) of the CPEA. The learned judge *a quo*, in determining an appeal against the refusal of bail by a magistrate, found that the magistrate had misdirected herself by accepting the appellant's grounds of appeal. Instead of allowing the appeal he proceeded to determine the bail application himself on the basis of the record that was before the magistrate. He refused to admit the appellant to bail. The appellant further avers that it is the judge *a quo* who refused to grant him bail within the contemplation of s 121(1) (b) of the CPEA. He further avers that the disposition of the judge dismissing the appeal, against the refusal of bail, is an error. The correct disposition should have read "In the result bail is dismissed." His only immediate course of action is to appeal in terms of s 121(1)(b) of the CPEA.

The appellant becomes more specific in his heads of argument when he addresses the issue under the heading, **"IS THIS MATTER PROPERLY BEFORE THE COURT? IS THERE AN APPEAL?"**

As predicted, the respondent raised a point, *in limine*, that the appellant does not have a right of audience before this Court due to s 121(8) of the CPEA. The relevant portions of s 121 of the CPEA read:

" 121 Appeals against decisions regarding bail

(1) Subject to this section, where a judge or magistrate has admitted or refused to admit a person to bail

(a) the Prosecutor-General or the public prosecutor, within forty-eight hours of the decision; or

(b) the person concerned, at any time; may appeal against the admission to or refusal of bail or the amount fixed as bail or any conditions imposed in connection with bail.

(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) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) There shall be no appeal to a judge of the Supreme Court from a decision or order of a judge of the High Court in terms of paragraph (b) of subsection (2), unless the decision or order relates to the admission or refusal of admission to bail of a person charged with any offence referred to in—

(a) paragraph 10 of the Third Schedule; \or

(b) the Ninth Schedule in respect of which the Prosecutor-General has issued a certificate referred to in subsection (3b) of section *thirty-two*;"

In other words the appellant, having appealed to the High Court, had no right to appeal again to the Supreme Court. It is pertinent at this stage to give the factual conspectus leading to the filing of the present appeal.

The appellant, who is the Human Capital Director and Acting Town Clerk of the City of Harare, was arraigned before the Magistrates Court facing a charge of criminal

abuse of duty as a public officer as defined in s 174(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ('the Code'). In the alternative he was charged with theft of trust property in terms of s 113(2) (b) of the Code. The basis of the charges was that on 30 October 2014, the appellant in his capacity as the Human Capital Director of the City of Harare and in collusion with other City of Harare employees unlawfully appropriated US\$130 000 from the Traditional Beer Levy Account which is maintained by the Council. The said amount was transferred into the appellant's personal bank account, without ministerial authority and to the prejudice of the City of Harare residents. The appellant was also said to have purchased a motor vehicle (Land Cruiser Prado) worth USD119 000 which he registered in his name. He thereafter retained the balance.

The appellant sought admission to bail pending his trial in the Magistrates Court. The magistrate refused him bail for the reasons that he was likely to abscond and to interfere with investigations and witnesses.

Aggrieved by that decision, the appellant noted an appeal to the High Court (court *a quo*) in terms of s 121 (1) of the CPEA, against the refusal of bail. He contended that the magistrate improperly exercised her discretion in finding that the appellant was likely to abscond and interfere with witnesses when this was not supported by evidence. He further contended she did not properly analyse his submissions.

The court *a quo* held that the magistrate court's findings were flawed and found that she had misdirected herself in a number of respects. Having made this finding, the judge *a quo* stated that "...I am at large to exercise my discretion...". He proceeded to determine the matter and ultimately dismissed the appeal.

Aggrieved by the dismissal of his appeal by the *court a quo*, the appellant noted the present appeal.

Mr *Madhuku*, for the appellant, in addressing the question whether the appeal was properly before the court, made the following submissions.

The above question arises because of s 121 (8) of the CPEA. Before its amendment the section merely reads:

“There shall be no appeal from a decision or order of a judge in terms of this section.”

The decisions in *S v Dwawo* 1998(1) ZLR 536 (S) and *Chiyangwa v Attorney General & Ors* 2004(1) ZLR 57 (S) which refer to a “single appeal” or “one chance to appeal” were made in terms s 121(8) before its amendment. These decisions do not apply *in casu* as the section, as it currently stands, is fundamentally different from its predecessor making the above authorities distinguishable and inapplicable.

The crux of the matter is that only a decision or order made in terms of 121 (2) (b) of the CPEA is not appealable to a Judge of the Supreme Court. *In casu*, it is contended that although the judge of the court *a quo* was approached in terms of s 121 (2) (b) he made his decision in terms s 121 (1) OF THE CPEA making his decision appealable.

He concluded by submitting that the matter raises a novel issue which calls for careful consideration. The novel issue arises in the following manner;

- “A judge of the High Court is approached on appeal in terms of s 121 (2) (b) of the Criminal Procedure & Evidence Act [*Chapter 9:07*].
- The judge is asked to set aside a magistrate’s decision denying bail, with the appellant arguing that the learned magistrate misdirected herself.
 - The judge accepts the appellant’s grounds of appeal by agreeing that indeed the learned magistrate misdirected herself in denying bail in the manner she did.
 - Despite agreeing with the appellant’s grounds of appeal in respect of the misdirections of the learned magistrate, the judge still does not allow the appeal. Instead, the judge switches to being a court of first instance and determines the bail application himself. He refuses bail on the basis of his own reasons.
 - The judge refuses bail, not on the basis of dismissing the grounds of appeal, but after accepting the grounds of appeal, but after accepting the grounds of appeal: in other words, the judge rejects the learned magistrate’s findings and substitutes his own findings.”

The ordinary and grammatical construction of s 121 of the CPEA reveals the following points.

- (a) Section 121(1) (b) of the CPEA gives an accused person the right to appeal against a magistrate or judge’s decision refusing to admit him to bail. The exercise of this right of appeal is subject to subsection 2 which provides the relevant fora to exercise that right. If bail has been refused in the magistrates’ court, one’s recourse is in the High Court in terms of s 121(2) of the CPEA
- (b) Section 121(8) of the CPEA is the limitation to that right. It stipulates that where the High Court has determined an appeal from the magistrates court, no appeal shall lie to this Court. Only accused persons whose charges fall under para 10 of the Third Schedule or the Ninth Schedule in respect of which the Prosecutor-General has issued a certificate under s 32(3b) can approach the Supreme Court against the High Court’s ruling on appeal.

The appellant sought to argue that the court *a quo*, after accepting the appellant's grounds of appeal, by finding that the learned magistrate had misdirected herself, switched to being a court of first instance and refused the appellant bail on the basis of its own reasons. Thus its decision was made in terms of s 121 (2) (a) of the CPEA and is therefore appealable. This proposition is however, not borne out by the record of proceedings of the court *a quo*. A thorough examination of the judgement of the judge *a quo* reflects that the judge was clear in his mind what he was seized with, which is an appeal. At the outset he sets out the provisions in terms which the matter was before him. These are s 121(1) of the CPEA and r 6 (1) of the High Court of Zimbabwe Rules 1991. Both provisions deal with appeals against the refusal of bail by an accused. He then proceeds to lay out the powers of an appellate court as laid down in *Barros and Another v Chimponda* 1999 (1) ZLR 58 (S) and concludes this part by stating "it is with these principles in mind that I proceed to determine **the appeal**".

After analysing the decision of the learned magistrate and having found that she misdirected herself he states, "The error means I am at large to exercise my discretion on the issue of abscondment **using the same materials as were before the court *a quo***".

Further down when dealing with the strength of the state case he remarked "it seems to me that one cannot say, **for purposes of this appeal...**"

In dealing with the issue of surrendering title deeds as part of the bail conditions he stated "I raised this aspect with Mr *Madhuku* **at the hearing of the appeal**. He said if **the appellate court** were minded **to allow the appeal** and were to order the surrendering of the title deed then the applicant could do so. **I heard this matter on appeal. The title deed is not part of the record.**"

Expressing his views regarding the issue of abscondment the judge *a quo* stated **“In short, I can only exercise my discretion based on the materials before me. That is my understanding of the dicta that I have quoted from the decision in *Barros and Another v Chimponda supra.*”**

Under the heading “THE OTHER GROUNDS OF APPEAL” the judge *a quo* stated **“I have addressed the issue in the other grounds of appeal in the course of disposing of the grounds of appeal on abscondment and interference. The need for a separate treatment of the other grounds of appeal therefore falls away.”**

He then disposes of the matter in the following manner:

“In the result, the appeal against the refusal of bail be and is dismissed.” (sic)

I have taken a deliberate decision to make reference, *in extensor*, to the above instances so that there is no doubt in anyone’s mind as to what the judge *a quo* was seized with. He was clearly dealing with an appeal and disposed of it as such. Nowhere in the judgement does he create an impression that he was dealing with the matter as a court of first instance. Whether or not the court *a quo* improperly exercised its discretion in dismissing the appeal, having found that the magistrate misdirected herself, does not confer upon the appellant an additional for a of appeal to this Court which right is not recognised in the CPEA.

In casu, the appellant has no right of appeal for the following reasons. He approached the court *a quo* in terms of s 121(1)(b) of the CPEA. That appeal was against

the magistrates court's refusal of bail. By approaching the court, *a quo*, he exercised his right in terms of s 121(2)(b) therefore s 121(8) of the CPEA automatically applies. There is no right of appeal to the Supreme Court except under the specified exceptions. The appellant has not shown that the crime he was charged with falls under any of these exceptions. To that end, he has improperly approached this Court as he exhausted his right of appeal upon the filing of the appeal in the court *a quo*.

Mr *Madhuku* also sought to persuade the court not to have regard to the decisions in *S v Dzawo and Chiyangwa v Attorney General supra* which refer to a "single appeal" or "one chance to appeal". His basis for so arguing was that the decisions were made before the amendment to s 121 (8) of the CPEA was made. The section as amended so the argument goes, is fundamentally different from its predecessor making the *Dzawo* and *Chiyangwa* cases distinguishable and inapplicable so he contended.

I am not persuaded by the submissions. Firstly, Mr *Madhuku* deliberately avoided to present argument distinguishing the two cases from the present facts before me. Secondly and critically, the amendment did not change the crux of the provision which is to prohibit endless appeals. All it did, after the legislature realised there was need to cater for such matters, was to provide exceptions to the general principle. The amendment did not change the position of the law as enunciated in the two cases.

Both cases state categorically that s 121(8) of the CPEA ousts the right of an accused person who has appealed to a judge of the High Court against the bail decision of a magistrate to take the judge's decision on appeal to the Supreme Court.

In *S v Dzawo supra* when refusing the appellant leave to appeal, the court construed s 121 (8) as follows:

“In construing s 121(8) in context, guidance may be derived as to the intention of the legislature from the background to the passing of the Criminal Procedure and Evidence Amendment Act 1997. The position which obtained before 1 October 1997, when this Act came into operation and repealed and replaced s 121, was this. Under s 44(5) of the High Court Act, an appeal lay to the Supreme Court with leave of either a judge of the High Court or, if he refused the grant, a judge of the Supreme Court, against an interlocutory order or judgment in relation to criminal proceedings before the High Court. See *S v Aitken* 1992 (2) ZLR 84 (S) at 87A-E. In enacting the new section 121, the lawmaker must be taken to have been aware of the decision in Aitken’s case. The clear inference is that an alteration to the existing procedure was aimed at. Subsection (1) of s 121 of the Act provides that where a judge or magistrate has admitted, or refused to admit, a person to bail, the Attorney-General, or the person concerned, may appeal. That right is made subject to: (i) s 44(5) of the High Court Act, which specifies that leave must be obtained where the decision is that of a judge of the High Court; and (ii) any restrictions contained in the other subsections. Subsection (2) provides that an appeal in terms of subs (1) against a decision of a judge of the High Court shall be made to a judge of the Supreme Court and against the decision of a magistrate to a judge of the High Court. Thus, where the initial application for bail was to a judge of the High Court, an appeal with leave lies to a judge of the Supreme Court; but where the initial application was before a magistrate, there is an absolute right of appeal to a judge of the High Court. Subsection (5) reads: —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. The term —judge refers to both a judge of the High Court and a judge of the Supreme Court. Subsection (8), which provides that: —There shall be no appeal from a decision or order of a judge in terms of this section, can only mean, in the context of the subsections referred to, that the aggrieved person is entitled to a single appeal. If the initial application was made to a magistrate, the appeal must be to a judge of the High Court; but if made to a judge, then an appeal lies, with the grant of leave, to a judge of the Supreme Court. In sum, the change brought about by the amendment to s 121 has removed the right of the person concerned who had appealed to a judge of the High Court against the decision of a magistrate in relation to bail, to take the judge’s decision, subject to leave, on appeal to a judge of the Supreme Court. (Emphasis added)

In *Chiyangwa v The State supra* the applicant applied to the magistrate's court for bail pending his trial. The application was refused and the applicant was remanded in custody. He then appealed against the refusal to grant him bail to the High Court which

allowed his appeal. Acting in terms of s 121(3) of the CPEA, the Attorney-General, advised the learned judge that he intended to appeal against his decision. Irked by that development, the appellant approached the Supreme Court on the basis that the Attorney-General had no right of appeal against the High Court order. In dealing with the issue before it of whether the Attorney-General had, in terms of s 121 of the CPEA, the right of appeal against the order of the High Court, the court held:

“I have no doubt in my mind that subs (8) of s 121 deprives any party – both the accused person and the Attorney-General – of any right of appeal against any order made by a judge in terms of subs (5) of s 121 of the Act. Thus, when a judge of the High Court hears a bail application in the first instance he is exercising his power in terms of s 121(1) and whatever decision he makes is appealable. However, when he hears a bail application as an appeal judge he does so in terms of s 121(5) of the Act and any order he makes when sitting as such is not appealable because of the provisions of subs (8) of s 121.” See also *Attorney General V Fundira* SC33/04

What is fortified in the above cases is that the Supreme Court has no jurisdiction to again hear an appeal which has been determined by the High Court. In other words the accused person is only entitled to a “single appeal” or a “one chance appeal”.

In *Nyamande & Anor v Zuva Petroleum*, CCZ 8/15 the Court stated that where there is no right of appeal, the appeal filed is a nullity. The present appeal suffers the same fate, it ought to be struck off the roll.

The appellant makes an alternative argument that if the appeal were to be held not properly before the court, this is a proper case to invoke s 25 (2) of the Supreme Court Act [Chapter 7:13] and set aside the decision of the court *a quo*. His basis for so seeking is that the judge *a quo* offended against a fundamental principle of the law being that an appeal court that finds merit in the grounds of appeal by agreeing that the court below it misdirected itself, has to allow the appeal.

It is my considered view that dealing with this issue will be delving into the appeal itself, through the back door, as that is the appellant's first ground of appeal. This I cannot do as the appellant has exhausted his right to appeal. Further there is no irregularity as the judge *a quo* gave his reasons for proceeding in the manner that he did. Whether he was right or wrong is a debate which can only be dealt with in an appropriate case. This position was made clear in *Dzawo supra* where the court, having found some misdirection by the High Court, sitting as an appeal court, remarked.

“Be this as it may, the unfortunate reality is that, although satisfied that the applicant has been unfairly treated, this Court is powerless to grant him the relief he deserves.”

The court was “powerless” owing to s 121 (8) which ousted its jurisdiction in the matter since the High Court had sat as an appeal court in the matter. Therefore, despite its decision being wrong, the Supreme Court could not set aside the High Court's decision since the High Court sat as the final court of appeal per s 121 (8) CPEA. The applicant had no further recourse in the Supreme Court.

In *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Ltd & Anor CCZ 11/18*, in dealing with the principle of finality of Supreme Court decisions on non-constitutional matters the Constitutional Court held, at p 23 of the judgment, that:

“What is clear is that the purpose of the principle of finality of decisions of the Supreme Court on all non-constitutional matters is to bring to an end the litigation on the nonconstitutional matters. A decision of the Supreme Court on a non-constitutional matter is part of the litigation process. The decision is therefore correct because it is final. It is not final because it is correct. The correctness of the decision at law is determined by the legal status of finality. The question of the wrongness of

the decision would not arise. There cannot be a wrong decision of the Supreme Court on a non-constitutional matter.”

The same can be said of a decision made by a judge of the ahigh court in terms

Both parties did not pray for costs. I will therefore not make an order for costs.

Accordingly, it is ordered as follows;

The matter is struck off the roll with no order as to costs.

Lovemore Madhuku Lawyers Legal Practitioners, appellant’s legal practitioners

National Prosecuting Authority, respondent’s legal practitioners