

MARY MUBAIWA
versus
THE STATE

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 30 December 2019, 6 January 2020

Appeal against refusal of bail pending trial

S.M. Hashiti, K. Kachamwa and T Nyamakura, for the appellant
S. Fero, A Masamha & L Masuku, for the State

KWENDA J: **Introduction:** The appellant is a female adult. She is the wife of the Vice President of Zimbabwe. The couple live together in an unregistered customary law union. The union is blessed with children who are all minors. They live in the Borrowdale Brooke in Harare. She is a successful business person in her own right.

On the 16th December 2019 the appellant appeared before the Deputy Chief Magistrate charged with six counts of exporting currency in contravention of s 5 (1) (a) of the Exchange Control Act [*Chapter 22:05*] as read with s 20 (1) b of the Exchange Control Regulations Statutory Instrument 109/1996. She is also charged with five counts of Money Laundering in contravention of s 8(2) of the Money Laundering & Proceeds of Crime Act [*Chapter 9:24*]. She also faces a charge of fraud as defined in s136 of the Criminal Law (Codification and Reform Act [*Chapter 9:23*]). She applied for bail pending trial. The Deputy Chief Magistrate, who presided, dismissed the application for bail on the 19th December 2019. Appellant has therefore remained in custody since her arrest on the 14th December 2019.

On the 18th December 2019, the appellant appealed against the refusal of bail in terms of s 121(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The hearing was delayed because the preparation of the record of proceedings took time. The transcript only became available on the 27th December 2019 and was received by this Court on the same day. The 27th of December 2019 was a Friday so the matter was set down for argument on the 30th December 2019 to give time to the State to peruse the record and consider as informed response. A bail application is inherently urgent because it is concerned with infringement of

the right to liberty, human dignity and personal security, among other fundamental rights and freedoms. The High Court of Zimbabwe (Bail) Rules, 1981 enjoin the Registrar to ensure that every bail application or appeal is set down with utmost urgency.¹ The mandate on the Registrar can only be properly discharged if the Registrar ensures that all things that need to be done for the application or appeal to be properly adjudicated on are completed expeditiously. Delaying the availability of a transcript of simple bail proceedings in the court *a quo* by two weeks is inexcusable. The rules contemplate a situation where the appeal is heard within 98 hours, except where there is a written agreement between appellant and the State or an order of the court.² Purporting to set a matter down in terms of the rules without ensuring that everything is in place for the matter to be heard is an empty delivery of a statutory duty. There is no obligation on the appellant to make the record available. Should such conduct persist the Court may in future make remedial orders.

The background facts.

Exchange control violations

The appellant faces six counts of exporting currency in contravention of s 5 (1) (a) of the Exchange Control Act [*Chapter 22:05*] as read with s 20 (1) b of the Exchange Control Regulations Statutory Instrument 109/1996. These counts can be summarised as follows:-

Count one

It is alleged that certain named two personal assistants of the appellant unlawfully took a total of USD\$114 000-00 to the Republic of China on behalf of the appellant after exiting Zimbabwe through Robert Mugabe Airport without declaring such currency. The alleged exportation of the currency was in contravention of the Exchange Control Act [*Chapter 22:05*].

Count two

In November 2018, the appellant allegedly unlawfully externalised a sum of USD201 846.81 through a CBZ bank telegraphic transfer after misrepresenting in writing to the bank that the money was for the purchase of event tents and chairs. She allegedly instructed one

¹ See rule 8

² see rule 6(2) of the High Court Bails Rules

Memory Chakuinga to prepare an invoice which she (the appellant) presented to the bank as proof that the money was payment for event tents and chairs. The bank transferred the foreign currency from Zimbabwe to the alleged suppliers' South African bank account. Thereafter, the appellant allegedly diverted the money with the help of Memory Chakuinga to Land Rover Centre in South Africa as payment for a Range Rover Autobiography which appellant registered in her name in South Africa.

Count three

Using the same method of operation as described in count two, the appellant allegedly caused the CBZ Bank in Zimbabwe to transfer USD307 545-05 to Project Suppliers (Pvt) Ltd Bank account in South Africa, ostensibly to import prepaid meters. The money was not used to buy prepaid meters but was diverted with the help of Memory Chakuinga and used to buy an immovable property at 1309 Kingstone Heath Close Waterkloof Gold Estate, Pretoria, SA. The property is registered as the property of Lachelle Travel and Tours (a company wholly owned by the appellant) It is alleged that the appellant therefore externalised the sum of USD 307 545,05 through misrepresentation

Count four.

In February and March 2019, the appellant allegedly asked one Judith Gamuchirai Goredema to pay ZAR 3 000 000 for the purchase of two vehicles, namely a Range Rover and Ford Ranger in South Africa. The money was sourced and paid, in South Africa on appellant's behalf. In return the appellant gave Judith Gamuchirai Goredema USD 230 769-23 in Zimbabwe. The Range Rover is registered as the appellant's personal property in South Africa. The registration of the Ford Ranger is yet to be ascertained. The appellant therefore allegedly externalised USD 230 769-23

Count 5

Sometime in February and March 2019 the appellant allegedly bought furniture in South Africa with the help of one Judith Gamuchirai Goredema who sourced and paid ZAR 480 000 in South Africa on her behalf. In return the appellant gave Judith Gamuchirai Goredema USD 36 923-08. The property was delivered at the appellant's newly acquired residential property at Waterkloof Golf Course (See count three). The appellant allegedly externalised USD36 923-00.

Count 6

In May 2019, the appellant allegedly instructed Memory Chakuinga to raise a false invoice for the supply of prepaid meters. The appellant allegedly used the invoice to effect transfer of USD142 858,93 to Bonnette Electrical (Pty) Ltd in South Africa through the CBZ bank. When the money was received in South Africa, the appellant allegedly diverted the funds to Attorneys in South Africa for the purchase of a certain immovable property at 149 Valderana Close, Pretoria, South Africa. The appellant allegedly externalised USD142 858,93.

Money laundering

The appellant is also facing five counts of Money Laundering in contravention of s 8(2) of the Money Laundering & Proceeds of Crime Act [*Chapter 9:24*]. The simple allegation is that in every case where she managed to obtain transfer of funds to South Africa by uttering fake invoices to the CBZ bank in Zimbabwe and diverted the money upon receipt in South Africa she laundered the funds in that she concealed, disguised the true nature, source or disposition of property knowing or suspecting such property to be proceeds of crime. The appellant therefore laundered the funds mentioned in counts 2 to 6 of the externalisation offences described in detail above.

Fraud

The appellant is also facing the charge of fraud in that she fraudulently tried to procure registration or upgrade of her marriage to Vice President, Constantino Guvheya Dominic Nyikadzino Chiwenga from an unregistered union to a marriage under the Marriage Act [*Chapter 5:11*] by misrepresenting to the marriage officer that her husband had consented to the registration, well knowing the same to be false. Through the alleged misrepresentation, she induced the Acting Chief Magistrate to prepare marriage licences and complete the marriage register in preparation to solemnise the marriage at a private ceremony at the parties' residence. The appellant was already living with the Vice President as husband and wife in an unregistered customary union and children were born to the marriage. The ceremony did not take place because the Acting Chief Magistrate did not find anyone at the parties' residence when he went there to solemnise the marriage. The State alleged that the appellant's alleged misrepresentation caused prejudice to good administration and reputation

of the Vice President. The good administration referred to was neither explained in the charges nor by the State counsel who appeared before me to argue the bail appeal.

Proceedings in the lower court

The court *a quo* considered the appellant's suitability for bail pending trial on the various charges in one hearing. At the hearing which commenced on the 16th December 2019, the State began by stating the grounds for opposing bail. State counsel, Messrs M Reza, J Murombedzi and T Makiya (Messrs M. Reza, as lead State counsel) relied on s 117 (2) (a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which reads as follows:

Refusal to grant bail and detention of an accused in custody shall be in the interest of justice where one or more of the following grounds are established.

The State then listed the various grounds. State counsel submitted that there was a likelihood that the appellant, if released on bail, will (a) endanger public safety or the safety of any person or commit an offence in first schedule; or (b) not stand her trial or appear to receive his/her sentence(s) (c) attempt to influence or intimidate witnesses or conceal or destroy evidence (d) undermine or jeopardise the objectives or proper functioning of the criminal justice system including bail system. The State made the following detailed submissions: -

If released on bail, the appellant was likely

- (i) to endanger the safety of the public or commit an offence referred to in 1st schedule in that she had attempted to kill the Vice President and she might still want to kill him.
- (ii) not to attend trial or attend to receive her sentence.
- (iii) to interfere with witnesses since she allegedly committed the money laundering and funds externalisation crimes with the help of her friends or people known to her. She could talk to them to undermine the course of justice. According to the State, there was a real possibility that the appellant would interfere with investigations outside Zimbabwe by interfering with key witnesses who are her friends and destroying evidence held by her companies.

In the court *a quo*, the State relied on *S v Ndlovu* 2001 (2), ZLR @ 261, which states that:

“In deciding whether there is a risk of accused absconding, the court should consider such failure as the seriousness of the offence, the likely sentence the incentive to abscond, the accused’s mobility and access to cross border travel and strength of the prosecution case.”

The State made the following further submissions in the court *a quo*. The crimes of money laundering and externalisation of funds are serious. The appellant allegedly externalised USD1 033 943,10 and laundered USD 919 943-10 none of which had been recovered. The appellant faced a jail term and that was an incentive to her to abscond. She was not likely to reconcile with living in a prison cell, being used to an “opulent house as Vice President’s wife.” The appellant could skip the border at any point along the length of the Limpopo River which is on the border of South Africa and Zimbabwe. The prosecutor probably focused on Limpopo or South Africa and no other neighbouring country presumably (he did not say) because the State allegation is that the appellant bought residential properties in South Africa.

The State submitted further, that it had very strong evidence against the appellant. State counsel relied on the case of *Aitken & Anor v AG* 1992 (1) ZLR @ 249 where the Supreme Court upheld a decision of the High Court when, in the exercise of its discretion, it denied bail to Aitkem and another because:

“even if the appellants were admitted to bail, on the most stringent conditions, there was real risk that they would abscond.”

The State also relied on *S v Fourie* 1973 (1) SALR @ 100 where the court observed that

“It is fundamental requirement of the proper administration of justice that an accused person stands trial and if there is a cognisable indication that he (or she) will not stand trial if released from custody the court will serve the needs of justice by refusing to grant bail even at the expense of the liberty of the accused, despite the presumption of innocence.”

Additionally, the State submitted that the appellant was supposed to be remanded in custody because investigations were in their infancy. The State was investigating several other matters which would result in more charges being preferred against the appellant.

The State also alleged that the appellant was likely to undermine or jeopardise the objectives or proper functions of the criminal justice system – including the bail system. According to the State, there is a very unfortunate narrative doing the rounds that people are

being arrested in order to be released. The prosecutor, *Mr Reza*, put it as follows in the court *a quo*: -

“We are looking at a situation where (suspects) are arrested, granted bail, they never come back to court either because they have been given back their passports or not. The bail system is becoming a laughing stock. It is not a secret that there are other accused persons similarly placed to the accused person. The moment they are granted bail they wave their hands to Zimbabwe.... there is need to put a stop to that. Accused persons, if they are not suitable candidates for bail must remain in custody for the proper administrative of justice in this country.”

The State called the investigating officer, Victor Masimba, to testify. He opposed bail. He gave evidence to buttress what State counsel had submitted from the bar concerning the seriousness of the offence, extra territorial investigations and the risk of abscondment. Mr Masimba was subjected to lengthy cross examination by the defence team of Mr Nyamakura and Mr Mbaisa (then led by Mr Nyamakura). The cross examination revealed that V Masimba had a combined experience in the Zimbabwe Republic Police and Zimbabwe Anti-Corruption Commission of 24 years. He was steadfast that appellant was likely to abscond to South Africa where she has properties. The investigating officer however made the following concessions:

- (a) that Zimbabwe has an extradition treaty with South Africa. He however argued that the appellant would still abscond despite the extradition treaty.
- (b) the immovable properties allegedly purchased with the laundered funds had been identified in South Africa.
- (c) that appellant travels on a diplomatic passport and as wife of Vice President she was known to the general populace and could be easily noticed at points of exit
- (d) the purpose of the Money Laundering Act is to dislodge gains from proceeds of crime.
- (e) that all funds telegraphically transferred to South Africa through the CBZ bank came from company accounts and not appellant’s personal accounts. The investigating officer, however, insisted that the appellant could still be criminally charged in her personal capacity for acts she did on behalf of a company.

- (f) that, ordinarily, a company should be charged for its acts or omissions constituting offences *albeit* through human agents.
- (h) that there was no evidence that the funds allegedly laundered were proceeds of crime. He did not quite concede that the money was clean.

The investigating officer was taken to task about his allegation that the appellant could interfere with witnesses. The impression given was that his fear was farfetched in view of the stature/standing of the State witnesses who included high ranking officials and trained security agents. It was also put to the investigating officer that fears of interference, if found to exist, could be dealt with under conditions of bail. He was also attacked for arresting and unnecessarily bringing the appellant before the court before concluding investigations. He replied that he has few extra territorial investigations to do and then “wrap up the case” Defence counsel put it to him that his fears could also be catered for by appropriate conditions. It is worth observing that if the date for completing investigations stated by the investigating officer on the Request for Remand form, as the 27th December 2019, is anything to go by, then the docket was complete on the 30th December when this appeal was argued.

The investigating officer confirmed that the appellant has wounds on her arms which she sustained during an assassination attempt and that the prison doctor recommended that she ought not to be incarcerated due to her poor state of health. The investigation officer conceded that the appellant holds no other citizenship.

In winding up its submissions, the State also relied on *S v Bongani Moyo* HB 95/01 which is authority for the position that even where statements have been recorded from witnesses that cannot stop an accused from interfering with witnesses if they are his relatives or friends. The state relied on *William Sabanda v The State* HB 88/02 wherein the court rejected the submission that the fact that the accused has no passport or a travel document is in itself a guarantee that he/she will attend trial. People have skipped border without travel documents to evade trial. Let me comment that my observation is that the State misunderstood these cases. There are cases where the court may infer from the accused’s past conduct, propensity, the nature of crime or any other indicator that confiscating a passport would not be a sufficient deterrent. This court will take judicial notice of the fact that the clamour for passports and travel documents and the long queues at the passport office are an indication that it is not easy to enter another country and let alone stay in that other country without having entered the foreign land lawfully.

The appellant's counsel also submitted in the court *a quo* that all case law predating the year 2013 should be relied upon with the realisation that section 50 (1) d of the Constitution of Zimbabwe has now entrenched the right to bail. For that submission, he cited *S v Khumalo* HB 243/15, which acknowledge that:

“An accused person cannot be denied the fundamental right to bail without satisfying the requirements set out in the Constitution.”

He also cited *Dumisani Moyo v The State* HMA 20/18, which asserted that:

“Our Constitutional dispensation stresses the presumption of innocence of an accused until proven guilty by a trial process. The right to bail in the absence of compelling reasons to deny it has been entrenched a one of fundamental human rights and freedom.”

The defence counsel posed the following rhetoric questions in the context of compelling reasons why bail should not be granted.

“Very closely linked to them (compelling reasons) is the question ... why should the State therefore benefit from making a decision to arrest before concluding investigations? It is a fundamental rule of our law that a person cannot benefit from his own wrongdoing.

Appellant's counsel submitted further that there was no basis upon which the appellant's children should be deprived of their mother's care during investigations and trial. In addition, defence counsel submitted that bail remains a right, even to Zimbabweans who can travel to other countries. For this proposition he relied on *Michael Mahachi v State* HH 99/19.

Ruling by the court *a quo*

The ruling by the court *a quo* on the 16th December 2019 is contained in 4 pages. I take the view that the ruling could have been longer if the court *a quo* had fully considered all submissions on the facts and the law presented by the opposing sides as I will demonstrate hereinafter. In its ruling, the court *a quo* observed that the bail application came up...

“at a time when the nation is in the middle of a concerted anti-corruption drive where there has been a buy in from (all sectors) of the nation. There has also been, understandably, a dose of scepticism. the court must at all times be alive to national policies than are relevant to the administration of justice and dealing with certain crimes and a court dealing with anti-corruption matters must give voice to such and a court is not only able to support the drive by renovating courtrooms and putting televisions in the court room but by making appropriate rulings in appropriate cases, so that the scepticism can be stemmed.”

At the appeal hearing the State conceded that the statement by the court *a quo* quoted immediately above amounted to a misdirection. However, the State argued that it was not the basis upon which bail was denied, so miscarriage of justice resulted. I reject that argument. The finding was an acceptance by the court of the State's submission summarised earlier in this judgment. The State submitted there was a perception of catch and release. The State suggested that the perception arose from the fact that persons facing corruption charges who were admitted to bail absconded trial after their passports were returned to them and in some cases without passports. The submission by the State in the Court *a quo*, which was accepted and adopted by that court, constituted the kind of megaphone posturing or grandstanding not only misplaced and unfortunate, but which must be avoided by an officer of the court. It is not fair for a court official to mislead the public by blaming the bail system for the inertia in the fight against corruption. A stakeholder in the fight against corruption should self-introspect and resist the temptation to locate reason for the inertia in combating the scourge elsewhere except oneself. The State is the dominant litigant in the prosecution of cases at public instance. It is in charge of investigation and timeous prosecution of crime. There is no point in commencing a prosecution without the necessary seriousness to start the trial. Trials have been delayed by postponements to complete investigations or failure to prefer correct charges or add alternative charges or failure to serve the person accused with relevant state papers or attending to interlocutory matters that could be anticipated by the State. The fight against corruption cannot be achieved through detention without trial or pre-trial incarceration.

Any person who is accused of an offence in Zimbabwe is presumed innocent until proved guilty.³ The presumption of innocence started as a common law principle and is now enshrined in the Constitution. Accordingly, it is inappropriate for the State to argue for pre-trial incarceration as a matter of policy to deal with the problem of corruption. Such a policy would be invalid due to inconsistency with the Constitution. The court *a quo* erred when it accepted the argument. The prosecution is encouraged to change tact. I urge the State to avoid arresting before investigating a matter in so far as that is possible without the risk that the suspect may interfere with such investigation. The advantage is that when an arrest is eventually made, all evidence would have been secured and recoveries made in terms of the law relating to confiscation of proceeds of crime. The perception of catch and release arises

³ See section 70 (1) 9 of the Constitution

from non-prosecution of cases or lack of thorough preparedness or underwhelming presentation of the state case. It does not arise from release of accused persons on bail generally. The generality of the citizenry know that accused persons are entitled to bail unless there are factors militating against admission to bail. The situation where the courts are clogged with applications for variations of bail including the so-called ‘temporary variation of bail conditions’ (including temporary release of passports) arises only if commencement of trial is delayed. Day in, day out, the courts are inundated with applications for variations and appeals leaving no time for the real issues in the fight against corruption. Such issues would never arise if trials are started at once.

In this case, the Zimbabwe Anti-Corruption Commission investigated the matter before arresting and presented all facts to the prosecution. Investigations were complete in record time on the 27th December 2019. The allegations may be serious but they are not complex. The trial could have already commenced through what is commonly described as the fast track system. I will take judicial notice of the existence of that system whereby the accused person can appear at court for the first time on a full docket (as opposed to a request for remand) and the state is ready to start the trial. It is therefore baffling that at the appeal hearing, the State counsel had no clue when the trial would commence. The State submitted that it intends to amend the charge to incorporate the provisions of s 177 of the Criminal law (Codification and Reform) Act [*Chapter 9:23*] so that it is clear why the appellant is being charged in her personal capacity for the acts and omissions of a company. There is no reason why that could not be done before the charges were put to the appellant.

I therefore find that the court *a quo* misdirected itself when it failed to place weight on the submission that the interests of justice in this matter (government fight against corruption) justified pre-trial incarceration. I note, however the overstatement by appellant’s counsel in the court *a quo* that insinuated that the State or ZACC arrested in order to investigate. It is clear that thorough investigations were made in Zimbabwe and extra territorially before arresting, going by the detailed circumstances. Whether they will be proved or not is a different matter. However, in deciding whether to commence prosecution or remand proceedings the prosecution must always be alive to constitutional provisions that govern the presumption of innocence and right to pre-trial liberty.

The court *a quo* also made the following finding

“An arrested person in the shoes of the accused person is clearly able to flee the jurisdiction when there is compelling fear of imprisonment upon conviction. The only question is, is there

compelling fear of imprisonment upon conviction or in fact is the State case presenting the possibility that the accused person could be convicted.”

The court *a quo* concluded that the State had overwhelming evidence and the chances of conviction after a proper prosecution were high. It also found that there was a real chance that the appellant would be convicted of the fraud charge and that could also frighten her. The court observed many prominent people have taken flight to avoid trial. I find that the court *a quo* fell into error again. It completely failed to consider the guidelines given by this court in the case of *S v Ndlovu* 2001 (2) ZLR 261 cited by the State during the bail hearing. Indeed, the moral blameworthiness of the appellant would be very high if she externalised scarce foreign currency in a staggering amount of UDS2 000 000 in order to buy luxury cars and houses in South Africa where she is not living, depriving the essential services sector. However, that is not what induces flight. What induces flight are the sentencing provisions. At the hearing it became clear that in all probability the worst that will happen if the appellant is convicted of money laundering are non-custodial sentences. I will reproduce the sentencing provision *verbatim*.

“8 Money laundering offences

(1) Any person who converts or transfers property—

(a) that he or she has acquired through unlawful activity or knowing, believing or suspecting that it is the proceeds of crime; and

[Paragraph substituted by Act No. 4 of 2014]

(b) for the purpose of concealing or disguising the illicit origin of such property, or of assisting any person who is involved in the commission of a serious offence to evade the legal consequences of his or her acts or omission; commits an offence.

(2) Any person who conceals or disguises the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing or suspecting that such property is the proceeds of crime, commits an offence.

(3) Any person who acquires, uses or possesses property knowing or suspecting at the time of receipt that such property is the proceeds of crime, commits an offence.

(4)

(5) Knowledge, suspicion, intent or purpose required as elements of an offence referred to in subsections (1), (2), (3) and (4) may be inferred from objective factual circumstances.

(6)

(7)

(8) The offences referred to in subsections (1), (2), (3) and (4) shall be punishable—

(a) by a fine not exceeding five hundred thousand dollars (US\$500 000) or not exceeding twice the value of the property involved or the gain derived by the offender, whichever is greater; or

[Paragraph substituted by Act No. 4 of 2014]

(b) by imprisonment for a period not exceeding twenty-five years; or

(c) both such fine and such imprisonment.”

What is clear is that money laundering is, in essence, a fiscal offence which is punished, as a first option, by a fine which is beyond the usual levels or double the illicit gain/ advantage. The sentencing provisions are peculiar to fiscal offences. Similar provisions are to be found in the Customs and Excise Act [*Chapter 23:03*], itself, another fiscal offence. The intention is to dislodge the illicit gain and as much as possible compensate the *fiscus*. The preamble to the Money Laundering and Proceeds of Crime Act describes same, among other things, as

“the Act to suppress the abuse of the financial system and enable the unlawful proceed of all serious crimes... to be identified, traced, frozen, seized and eventually confiscated...”

The court *a quo*, therefore, erred when it concluded that the appellant was a flight risk because she will be imprisoned if convicted. The misdirection arises from its failure to consider the sentencing provisions. The misdirection is even more glaring with regards to the externalization offences. There sentencing provisions provide for a fine and a prison term **wholly suspended** on condition of repatriation of the funds. In other words, the Legislature, in its infinite wisdom, contemplated a situation whereby a person retains his/her freedom even after being convicted for externalising funds unlawfully.

I quote the sentencing provisions hereunder:

“(4a) Where the offence of which a person is convicted in terms of subsection (1)(a) or (b) involves the exportation, externalisation or expatriation from Zimbabwe of any foreign currency, gold or precious stone that originated from Zimbabwe or is the proceeds of any trade, business or other gainful occupation or activity carried on by him or her in Zimbabwe, the court shall—

(a) impose—

A. a fine not exceeding than the value of the currency, gold or precious stone concerned; and

B. a sentence of imprisonment not exceeding ten years, the whole of which shall be suspended on condition that the currency, gold or precious stone concerned is repatriated to Zimbabwe within a period specified by the court;

and

(b) in addition to the penalty specified in paragraph (a), impose a fine of three times the value of the currency, gold or precious stone concerned, unless the convicted person satisfies the court that there are special reasons in the particular case, which shall be recorded by the court, why a lesser fine should be imposed.”

Arguments on appeal

I am indebted to the helpful submissions made by both State and defence counsel.

Adv Hashiti argued there is a sound basis for this court to interfere with the exercise of discretion by the lower court. *Barros and Anor v Chimphonda* 1999(1) ZLR 58 at 62-63:

“It is not enough that the appellate court considers that if it had been in the position of the primary court; it would have taken a different course. It must appear that some error has been made in exercising discretion. If the primary court acts on a wrong principle, or if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account relevant ... consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always has the materials for so doing. In short this is not imbued with the same broad discretion as was enjoyed by the trial court.”

Advocate Hashiti also cited *RBZ v Granger and Anor SC34/01*, where the apex court observed:

“Where a court makes a decision which is unreasonable that constitutes a misdirection in the exercise of judicial function.”

Advocate Hashiti submitted in that the court *a quo* did not demonstrably take into account the presumption of innocence protected by s 70(1) (a) of the Constitution. Section 50(1)(d) enjoins the court before which an accused person appears charged with an offence to release the person charged unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention. He said the court *a quo* did not apply its mind to those constitutional provisions as read with section 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which lists the factors that constitute compelling circumstances. I do not quite agree. The court does not always have to cite the relevant sections of the Constitution or statute in *extenso*. In this case the Court *a quo* picked on the risk of abscondment which is to be found in s 117(2) of the Criminal Procedure and Evidence Act. It is clear that the Court was conscious of the presumption of innocence and the duty to admit the appellant to bail in terms of s 50(1)(d) of the constitution because it adopted the procedure whereby the State counsel began by stating the compelling reasons militating against granting of bail.

I however accept *Advocate Hashiti's* submission that the Court *a quo* took into account irrelevant considerations and at the same time, failed to take into account relevant factors. It failed to take into account that the acts and omissions constituting the money

laundering offences were attributable to a registered company. The transactions involved movement of money between companies. Section 358 of the Criminal Procedure and Evidence Act is unambiguous in that a company may not be incarcerated. He submitted that there is, therefore, no justification for the appellant's detention. I also accept *Advocate Hashiti's* submission that the court failed to take into account that the investigating officer conceded that the *actius reus* was constituted by acts and omissions of a company duly registered. The court *a quo* did not consider that appellant was a well-known figure who could be noticed easily at any exit point. The court *a quo* failed to consider the submission that the fears of abscondment and interference with witnesses could be catered for by stringent conditions. It did not take into account that the appellant had a nagging condition of a swelling hand and severe injuries on both arms (always bandaged) and the condition has persisted for a long time despite attempts to treat it. The prison doctor had recommended that prison conditions were likely to worsen her condition. In all probability the arms needed constant medication and review by specialist doctors. The court *a quo* did not take into account that the appellant is a mother of four minor children who need her care and supervision.

On the fraud charge, both counsel were not helpful. The appellant was content with bare denials of all charges including the allegation that she fraudulently sought to upgrade her marriage to the vice president upgraded from a customary law union to a [Chapter 5:11] marriage in the absence of the other party. A marriage is a contract and the parties must declare their intention and eligibility to marry before the marriage officer under oath, in the presence of each other. The State alleges that the licence and marriage certificate were completed without the knowledge and involvement of the appellant's husband. I do not have adequate facts to assess the veracity of that allegation and decrypt appellant's possible motive. Whether or not there is a flight risk depends on the likely sentence which, in turn, would be informed by her *prima facie* motivation for allegedly seeking to register the marriage at all costs, at that point in time. While not disputing that the facts alleged against her gave rise to a reasonable suspicion that she committed the act of fraud, the appellant did not attempt an innocent explanation for her alleged conduct. At the same time, the State did not argue before me why the alleged fraud would attract a prison term. Ordinarily, the desire to upgrade a marriage which is extant from customary union to a Chapter 5:11 marriage *per se*, even if shown to be overzealous, would not be abhorrent unless an ulterior motive is demonstrated. It is not necessary for the court to speculate.

Ms Fero argued correctly that this court must consider the misdirection(s) alleged and the appropriate remedy should this court find (a) misdirection(s) by the *court a quo*. She relied on *S v Chikumbirike* 1986(2) ZLR 145

“The appeal court will only interfere with the lower court’s decision if it committed an irregularity or misdirection or exercise of discretion was so unreasonable as to vitiate the decision”

See also *S v Malundya* 2003(1) ZLR 275(H)

“The appeal court must not hear an appeal as if it is the court of first instance. The approach is whether the Court *a quo* misdirected himself or herself. It is the findings of the court *a quo* which must be attacked.”

and *S v Ruturi* 2003(1) ZLR 537

To certain extent I agree with *Ms Fero*. The misdirection must be located in the judgment of the court *a quo* but the appeal court is not confined to what the court stated in its ruling. An omission to take into account relevant factors could also constitute a misdirection. *Ms Fero* conceded that the court *a quo* did pronounce itself on certain things. However, in her submission, the court *a quo* had refused bail on two grounds, namely: -

1. Policy considerations relating to corruption
2. That appellant was a flight risk.

Ms Fero complained that the grounds of appeal were not specific. *Ms Fero* submitted, correctly, that an accused person applying for bail must disclose what his/her defence on the merits shall be in a nutshell. Such defence may be helpful and, at times decisive, when the court deliberates on whether or not to exercise discretion in favour of the accused applying for bail. She submitted that the State did not have to prove that the appellant had committed an offence or that anyone ought to be convicted of an offence for the appellant to be guilty of laundering proceeds of crime in contravention of the Money Laundering Act. She quoted *S v Mlambo* 1995(1) ZLR 50-52. I agree. She finds support in the Act.

“8 Money laundering offences

- (1).....
- (b)
- (2)
- (3)
- (4)
- (5)

(6) In order to prove that property is the proceeds of crime, it is not necessary for there to be a conviction for the offence that has generated the proceeds, or for there to be a showing of a specific offence rather than some kind of criminal activity, or that a

particular person committed the offence.”

Ms *Fero* further argued that the crimes with which the appellant is charged are serious. I find that she fell into error because she based her submission on moral blameworthiness only. While she conceded that the court *a quo* did not consider the sentencing provisions, she had also not done so. She submitted that the State was going to amend the charge and the outline of the State case to bring the appellant within the ambit of s 177 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] to include the necessary averments which justified making the appellant, as director of a company, personally criminally liable for acts or omissions of the company. She could not explain why that had not already been done. Ms *Fero* said it was up to the State to decide whether to proceed against the company or the individual or both. She was unable to give an indication of when the accused person’s trial would commence.

Disposition

The court *a quo* misdirected itself on the two grounds upon which it refused bail. Firstly, policy considerations do not override the Constitution. If anything policy must be informed by the supreme law. The court *a quo* erred in considering irrelevant issues and failing to take into account relevant considerations. Secondly, the appellant does not risk imprisonment if convicted.

This judgment would not do justice if it ends without commenting on a submission by the State at the initial bail hearing and completely overlooked by the court *a quo*. It will be recalled that the State argued that the appellant had set out to kill her husband and she had unfinished business in that regard. The court *a quo* did not place any weight on that submission. The oversight was not fatal. The attempted murder is alleged to have been committed at a time when appellant’s husband was admitted in hospital and dependant on life support system. That situation was no longer obtaining at the time of the bail application. The averment in the bail statement that the parties had interacted subsequent to the alleged attempted murder was not controverted by the State.

See *Fawcett Security Operations (Pvt) Ltd v Director of Customs & Excise and Ors* 1993(2) ZLR 121(S) at 127 F

The court *a quo* ought therefore to have granted the appellant bail pending trial.

Bail conditions

In terms of subsection 5 of section 121 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the judge who hears an appeal against a bail ruling may make such order relating to bail and any conditions in connection therewith as he considers should have been made by the ... magistrate whose decision is the subject of the appeal.

I invited *Ms Fero* to make submissions on the adequacy of the bail conditions suggested by the appellant, in the event I found a legal basis to set aside the court *a quo*'s decision and grant bail. She abstained. It soon became clear that her fear was that she could be misconstrued to be conceding to bail. Her stance is regrettable. Any submissions she was going to make were at the instance of the court. If indeed judicial officers have interpreted submitting in the alternative as implied concessions, I am of a different opinion. It is not advisable for a party to proceedings to put all eggs in one basket. Counsel can always make it clear that no concession is intended but still acknowledge that that court may exercise its discretion in favour of a bail applicant and against the State and that if the appellant succeeds, the court should be properly guided on the conditions of bail. At the same time the appellant had not considered offering more realistic bail conditions in the event that the court found a misdirection, because the court then then would be at large to consider appropriate bail conditions. Appellant would be expected to offer conditions which demonstrate to the court her desire to attend trial in the face of an offence with serious fiscal/financial implications. Appellant's counsel is commended for conceding that oversight and acting quickly during the court sitting to secure reasonable surety on behalf of the appellant which was placed before the court without objection. Of course, the State could not possibly object to an offer. An offer is either accepted or rejected by the court.

In the result I order as follows: -

1. The appeal against the decision of the Harare Regional Court for the Eastern Region sitting at Harare denying the appellant bail pending trial in case number ACC96/19 is upheld and the decision of the court *a quo* is hereby set aside
2. The decision of the court *a quo* is substituted with the following: -
 - (a) The accused be and is hereby admitted to bail pending trial
 - (b) The accused shall deposit the sum of RTGS50 000.00 with the clerk of court at Harare Magistrates Court
 - (c) The accused shall reside at 614 Nick Price Drive, Borrowdale Brooke, Harare
 - (d) The clerk of court shall accept as surety, the property known as Lot 1 of Lot 343 A Highlands Estate measuring 3642 square meters held by K M Auctions (Pvt) Ltd under Deed of Transfer 2244/2006 accompanied by the necessary resolution of

the directors (and shareholders) of K M Auctions (Pvt) Ltd, Keni Mubaiwa and Helga Junior Mubaiwa.

- (e) The accused shall surrender her diplomatic passport to the clerk of court at Harare Magistrates Court
- (f) The accused shall report to the Police at Borrowdale Police Station once a fortnight on Friday between 6 am and 6 pm
- (g) The accused shall not interfere with State witnesses.

Mtewa and Nyambirai, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners