CHRISTOPHER KURUNERI
versus
THE STATE

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 8 April and 14 April 2005

Bail Application

Mr *Chikumbirike*, for the applicant
Mr *Nemadire*, for the respondent

PATEL J: The applicant is a businessman and commercial farmer. He also holds the post of Minister of Finance. He has been remanded in custody since 26 April 2004, pending his trial on four counts of contravening section 5 of the Exchange Control Act [*Chapter 22:05*] and one count of contravening section 21 of the Citizenship Act [*Chapter 4:01*].

The applicant has previously applied for bail on several occasions without success. In the present proceedings, he applies for bail under proviso (ii) to section 116(1)(c) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The relevant portions of this proviso stipulate that –

> "a further application (for bail) …….. may only be made …….. if such application is based on facts which were not placed before the judge or magistrate who determined the previous application and which have arisen or been discovered after that determination".

The argument proffered by counsel on behalf of the applicant runs as follows:

(i) In Judgement No. HC B481/04, HUNGWE J (at p.3 of the cyclostyled judgement) held that "In all the

circumstances of this case, I am unable to say that the delay has been so unreasonable as to entitle him to the order of release". A few paragraphs later, he stated that "Had not the applicant faced the extra charge involving the

holding of a foreign passport, I would not have hesitated to come to the conclusion that the delay in bringing him to trial had become unreasonable and that he be released on reasonable conditions".

(ii) On appeal against this decision, in Judgement No. SC 12/05, the Supreme Court was primarily concerned with the question of changed circumstances. As regards HUNGWE J's treatment of the delay in bringing the applicant to trial, the Supreme Court observed (at p. 10 of the cyclostyled judgement) that counsel for the appellant "was on firm ground in arguing that the learned judge misdirected himself in placing any weight at all on the possession by the appellant of a current passport issued in his name by the government of a foreign country".

(iii) This "finding" by the Supreme Court constitutes a new fact which has arisen after the previous determination by this Court and which must now be considered in terms of proviso (ii) to section 116(1)(c) of Chapter 9:07.

(iv) If HUNGWE J's statement were to be shorn of its "misdirection", his apparent conclusion that the delay in bringing the applicant to trial had become unreasonable

> stands intact and now comes into play so as to oblige this Court to release the applicant on reasonable conditions.

At first blush, this argument on behalf of the applicant seems almost ingenious. However, on fuller scrutiny, the argument taken in its entirety is as tortuous as it is misconceived. It purports to bind this Court to an apparently contradictory statement which has been questioned by the Supreme Court and the

precise import of which is difficult to divine in the context of the entire judgement in which it appears.

Taking the argument on its merits, it is in my view wholly untenable for the following reasons.

Firstly, the Supreme Court's observation, properly regarded, does not constitute a definitive finding that HUNGWE J had misdirected himself. The supposed finding was made *obiter* in addressing a question that was not strictly before that Court. In any event, it is conceptually difficult to classify it as a new fact that has arisen after the previous determination by this Court within the ordinary meaning of proviso (ii) to section 116(1) (c) of Chapter 9:07.

Secondly, even if the ambit of that provision were to be stretched to accept the proposition that a new fact has since arisen, the Supreme Court's decision as to the effect of the two contradictory findings in Judgement No. HC B481/04 unquestionably obliterates the applicant's argument. At page 10 of

its judgement, the Supreme Court (*per* MALABA JA) found that "The effect of the contradiction is that no finding of fact was made on the question whether reasonable time in which the appellant could be detained without trial had expired". I see no acceptable reason to deviate from this conclusion. Accordingly, I must hold that HUNGWE J's arguable conclusion, viz. that the delay in bringing the applicant to trial had become unreasonable, falls away entirely and cannot be relied upon to uphold the applicant's argument.

Apart from my findings as to the merits of the applicant's argument, there is a further adjectival difficulty that bedevils his case. The indirect but inevitable effect of a decision in favour of the applicant would be to hold that there has been an unreasonable delay in bringing him to trial and that, therefore, his constitutional right to be released from custody pending trial is being violated. As pointed out by the Supreme Court (at pp. 2 & 10 of its judgement), these issues are currently

pending determination by the Supreme Court in a separate application before it. As I see it, the matter is *lis pendens* and for that reason alone this Court would be
precluded at this juncture from granting the application on the basis upon which it is sought.

To conclude, I am fully alive to the fact that the applicant has been in custody for almost a full year and that his inalienable right to liberty is at stake. Although his trial has now at long last been scheduled to commence on the 16th of May 2005, this does not

mean that he is disentitled from seeking his release from custody. (See *S v Chiadzwa* 1988 (2) ZLR 19 (SC)).

As pointed out by the Supreme Court in that case, it is necessary to strike a balance between the liberty of the applicant and the administration of justice, so as to safeguard both. However, in order to achieve the requisite balance, the applicant's case needs to be mounted on a proper and logical footing and not predicated on some specious argument that cannot possibly be sustained.

In the result, the application is dismissed.

Chikumbirike & Associates, the applicant's legal practitioners
Attorney-General's Office, the respondent's legal practitioners