PRISCAH MUPFUMIRA
versus
THE STATE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 1, 2, 5 & 15 August 2019

Bail Ruling

L Uriri and C Chinyama, for the appellant
Ms Fero & M Reza, for the respondent

NDEWERE J: The appellant is Prisca Mupfumira, a politician and member of Parliament. At the time of the hearing she was the Minister of Tourism and Hospitality. She appeared at the Magistrates Court on 26 July, 2019 and the State made an application that she be placed on remand for offences summarised as follows:

Count 1:

After being appointed Minister of Public Service, Labour and Social Welfare in 2014, the accused took advantage of her position as the Minister responsible for the National Social Security Authority (NSSA) and instructed Ngoni Masoka, the former Permanent Secretary of the Ministry to get a loan advance of US$90 000 from the National Social Security Authority (NSSA), a parastatal under the Ministry for the purchase of a Toyota Land cruiser, ADX 0878 from Croco Motors well knowing that NSSA had no provision to issue such loans. After acquiring the Toyota Land cruiser, she went on to receive another Ministerial vehicle, a Range Rover, ADY 6878 from Government, which she accepted knowing that she had already obtained a Ministerial vehicle through a loan advanced by NSSA, thereby prejudicing NSSA of US90 000.

Count 2

Sometime in 2016 and on different occasions, using her position as Minister and through her Ministry the accused unlawfully and corruptly directed payment of money amounting to US$101 814.80 from NSSA's Corporate Social Responsibility Budget which she received and used on activities outside the mandate of NSSA.

Count 3

Sometime in 2017, the accused person directed NSSA to set up a budget of US$350 000 for her Ministry's financial demands on top of the financial demands on the normal NSSA corporate social responsibility budget. For that year, the accused claimed a total of US$313 520.03 for activities furthering her personal and political interests.

Count 4

Sometime in 2014, the accused abused her duty as a public officer by showing favour to Metbank when she instructed NSSA to financially bail out Metbank, against the representations and advise from NSSA's risk management department highlighting concerns over the bank's financial vulnerability and its high risk of default status. As a result of the undue influence from the accused NSSA authorities ended up purchasing four Metbank properties with a cumulative inflated value of $4 908 750 which they had not intended to purchase.

Count 5

Sometime in March 2017, the accused criminally abused her duty as a public officer by showing favour to Metbank when she directed NSSA to favourably consider an investment proposal from the bank for command agriculture in which Metbank presented itself as fertilizer advisers. This was against the advice of NSSA's risk management department based on concerns over the bank's financial vulnerability and its high risk of default. Metbank intended to borrow US$13 000 000 from other sources and requested NSSA to provide it with double cover security in the form of Treasury Bills. As a result of the accused's undue influence, NSSA sent Treasury Bills valued at US$62 250 000.00 to Metbank on custodial arrangement but Metbank ended up using Treasury Bills valued at US$37 035 000.00 under unclear circumstances and they are currently unaccounted for, to the prejudice of NSSA.

Count 6

Sometime in June, 2017 the accused person abused her duty as a public official when she directed NSSA represented by Kurauone Chiota the then NSSA Chief Property Investment Officer into low cost housing projects/contracts with Metbank within 48 hours. As a result of that directive, NSSA entered into off-take housing projects for St Ives and State land in Chinhoyi with Metro Realty, an entity related to Metbank, without carrying due diligence assessments, or going to

tender; to the prejudice of NSSA. The projects are valued at $6 145 000.00 and $4 710 000.00 respectively.

Count 7

Sometime in August 2017, the accused corruptly used her position by directing NSSA to enter into a contract with Drawcard (Pvt) Limited for $6 500 000.00 Housing Project in Munyeza, Gweru, without going to tender and without a board resolution, to the prejudice of NSSA.

After presenting the charges on which the State wanted the accused to be placed on remand, the State Counsel produced a Certificate by the Prosecutor-General in terms of s 32 (3b) of the Criminal Procedure and Evidence Act, [*Chapter 9:07]*. The applicant did not object to the production of the certificate but counsel intimated that the certificate should have been given to them earlier. Thereafter, the State applied that the accused be remanded in custody for 21 days as provided for in the certificate. The applicant, through her counsel then addressed the court. The summary of her address was that s 32 (3b) was no longer functional because of the provisions of s 50 (1) of the Constitution of Zimbabwe which made bail a right for the accused person unless there are compelling reasons to deny bail. She said the right to bail could no longer be taken away by the certificate of the Prosecutor General which was just his opinion on whether the accused could be released or not. Applicant's counsel said the certificate simply provided what the Prosecutor-General thought to be special circumstances which the court should consider in making a determination on whether or not to deny the accused bail. She said s 50 (1) (d) of the Constitution made bail a Constitutional right and s 32 (3b) could not take away that right.

Applicant further said the certificate was a document which the state could rely on as a compelling reason on why the accused should be in custody, but the certificate could not bar the court from hearing a bail application. Thereafter, applicant's counsel started attacking the charges, count by count, pointing what he considered to be the weaknesses of the state's case against the accused. After running through his perceived weaknesses in the state case, he urged the court to find that there was no reasonable suspicion that the accused had committed the offences. He then asked the Court to consider s 50 (1) (d) of the Constitution in relation to bail and requested that he be allowed to get into the bail application. From p 64 to p 65 of the record, there is an exchange between the Acting Chief Magistrate and the applicant's counsel, with applicant's counsel insisting that the court should consider the issue of bail.

On p 66, the court a *quo* said once a certificate is produced in terms of s 32 (3b) (a) of the Criminal Procedure and Evidence Act, and the court is satisfied that there is reasonable suspicion that the accused person committed an offence, then the court has no power to entertain a bail application. The court said it was unprocedural for the court to proceed and hear submissions relating to bail before it had dealt with the issue of whether or not there was a reasonable suspicion that the accused person committed the offences alleged by the state and the challenge relating to the validity of the certificate produced by the state. After being addressed by the state on the validity of the certificate and on the reasonable suspicion that the accused committed the offences in question, the court a *quo* delivered a ruling on 27 July, 2019. On p 84 of the record, the Acting Chief Magistrate concluded thus;

> "The court therefore has no hesitation to find that all the requirements necessary for the production of the Prosecutor General's certificate produced in terms of s 32 (3b) have been met. The effect of that certificate is to oust this and every other court's jurisdiction in determining issues relating to the accused person's admission to bail during its lifespan. The Court holds that the certificate is valid and effective. I therefore order the detention of the accused person for 21 days as prayed for in the Prosecutor-General's certificate"

Consequently; The Acting Chief Magistrate refused to entertain the appellant's bail application.

On 31 July, 2019 the appellant approached the High Court in terms of r 6 (i) of the High Court of Zimbabwe (Bail) Rules, 1991. In its bail statement, the appellant submitted that a bail appeal in terms of the above rule was an appeal in the wider sense which included the exercise of review powers under s 28 and 29 of the High Court Rules. She referred to *Kadungure* v *Makwande* N.O and *the Prosecutor General N.O* HH 800/18 as authority for that proposition. The applicant submitted that the court a *quo* had erred when it refused to entertain her bail application and that if the court found that the Acting Chief Magistrate indeed erred and set aside his decision, the court was at liberty to substitute its discretion for that of the court below.

Thereafter the applicant went into the merits of the bail application and filed submissions in support thereof and the bail conditions she proposed.

The matter appeared in the bail court on 1 August 2019 and by consent, the state applied that the matter be postponed to 2 August 2019 to enable it to file its response. True to its word, the state filed a response on 1 August, 2019 and on 2 August, 2019 the matter was back in court for argument.

The state raised two preliminary points in its response and prayed that the matter be struck off the roll on those two points. Thereafter, it also responded on the merits of the bail application.

Preliminary Objections by the State

1. There is no proper appeal in terms of r 6 of the High Court (Bail) Rules, 1991.
2. This Honourable Court has no jurisdiction to determine the present appeal in light of the provisions of section 32 (3b) as read with section 32 (3c) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]

On the first preliminary point the State submitted that the question of bail did not arise in the court a *quo.* It said the question of recognizances or bail conditions also did not arise. The State said the question that arose was about the validity of the Prosecutor General's Certificate in terms of s 32 (3b).

On the second preliminary point of jurisdiction, the State submitted that since section 32 (3b) of the Criminal Procedure and Evidence Act, [*Chapter 9:07]* provided that no court shall admit a person for whom a certificate in terms of s 32 (3b) of the Criminal procedure and Evidence Act [*Chapter 9:07*] has been issued, the court had no jurisdiction to hear the appeal.

Before the State addressed the court orally on the preliminary points raised, applicant's counsel applied to amend the applicant's draft order to include a clause declaring sections 32 (3b) and 32 (3c) unconstitutional. In its reply, the state objected to such an amendment to the Draft Order. It argued that the issue of a declaratory order striking out s 32 (3b) and 32 (3c) did not arise during the remand hearing in the court *a quo*. It said the applicant should not sneak in such an amendment and ambush the State and the court who had not come prepared to deal with that issue. State counsel said before the cited section and subsections could be declared unconstitutional and struck out, submissions have to be made by both sides on the constitutionality or otherwise of the section and two subsections.

The court asked the applicants why they were raising the issue of a constitutional declaratur for the first time at that stage of proceedings. The applicant then abandoned the issue of the declaration and did not pursue it any further, choosing instead to rely on section 50 (1) (d) of the Constitution and the inconsistency of sections 32 (3b) and 32 (3c) with s 50 (1) (d) of the Constitution.

Thereafter, the State addressed the court on the points *in limine* which it had raised in its response.

I dismissed both points *in limine* after arguments and I said detailed reasons would follow later, I proceed now to give the court's reasons for dismissing the points in limine.

Regarding the first preliminary point, that the question of bail did not arise, all I did was to look at the record of proceedings in the court *a quo*. I noted that from page 54 to 66 of the record of proceedings there were exchanges between the court a *quo* and applicant's counsel concerning bail. Applicant's counsel was arguing that the production of the certificate did not bar the court from determining the bail application in view of the provisions of s 50 (1) (d) of the Constitution of Zimbabwe which required that arrested persons "must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention". The court was saying the Prosecutor General's certificate barred it from dealing with the bail application. From p 67, the State responded. It too referred to bail rights from p 67 and said section 50 (1) (d) of the Constitution did not give absolute rights because bail could be denied when there were compelling reasons justifying the continued detention of the accused person. From, page 68 to page 69, the State referred to some of what it considered as the compelling reasons to deny bail. I noted that even the remand Form on p 40 and 41 of the record of proceedings referred to bail. On section C, on bail, the State indicated that it was opposing bail and the investigating officer attached an affidavit by him indicating why he was opposed to bail. The whole of paragraph 4 of the investigating officer's affidavit which was attached to the Request for Remand Form is about the State's opposition to bail and the reasons thereon from s 4.1. to 4.8. So it is clearly erroneous for the State to suggest that the question of bail did not arise in the court *a quo*. The record of proceedings clearly shows that the question of bail arose and both the applicant and the State addressed the court about it. It is the magistrate who refused to make a determination of bail after the submissions by both parties, citing the Prosecutor-General's Certificate. The first preliminary point was therefore dismissed.

After finding that the question of bail arose, I then looked at the Bail Rules to see if the applicant could appeal against the magistrate's refusal to consider and grant bail.

Rule 6 (1) of the High Court of Zimbabwe (Bail Rules, 1991, provides that an appeal in terms of section 111 of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] by a person

aggrieved by the decision of a magistrate on an application relating to bail or the entering by him into recognizances, shall be noted by filing with the registrar a written statement setting out the appellant's name, address, employment and employer's name and address. Rule 6 (1)(d) covers situations where the appeal is brought against the decision of a magistrate before conviction, Rule 6 (1) (e) covers situations where the appeal is after conviction and sentence. Rule 6 (1) (f) is the relevant rule in the present appeal. It provides as follows:

> "(f) where the appeal is brought against a refusal by a magistrate to grant bail-
> (i) the grounds on which it was refused, if the grounds are known to the appellant and the date on which it was refused."

In the present case, we have a case where the Acting Chief magistrate refused to grant bail when the applicant asked for it and the State opposed it. Therefore the appeal is properly before the court in terms of Bail Rule 6 (1) (f). The reason why he refused is known, he said the Prosecutor-General's certificate barred him from hearing the bail matter. A refusal to grant bail because you think you have no power to entertain such an application is still a refusal to grant bail.

In the case of *James Makamba* v *The State* SC 11/04 the court dealt with different legislation which had a provision which the court felt prohibited it from determining the issue of bail. I cite this case simply as authority to show that where bail is refused because the court felt it had no power to determine the bail issue, an aggrieved person has a right of appeal to a higher court because of that refusal; despite the absence of a determination on bail.

On the 2nd page of the cyclostyled judgment, ZIYAMBI J.A., as she then was stated as follows:

> "The learned magistrate before whom the appellant appeared placed him on remand but declined jurisdiction to grant bail to him because of the provisions of the Presidential Powers (Temporary Measures) Amendment of Criminal Procedure and Evidence Act) Regulations statutory Instrument 37 of 2004 (the Amendment Regulations) which she felt prohibited her from doing so"

So the appellant was refused bail, without any determination in the James Makamba case. He approached the High Court on an urgent basis, challenging the refusal. The High Court, dismissed the application, without a determination of bail on the merits. On the same second page of the cyclostyled judgment, ZIYAMBI JA stated as follows:

> "The learned judge did not consider the merits of the application for bail, presumably because of her conclusion that the provisions of the Amendment Regulations were applicable to this case."

The appellant then appealed to the Supreme Court, despite the fact that the High Court, just like the Magistrate Court before it, had not considered the merits of the bail application.

The James Makamba case is authority that the absence of a determination by a lower court does not deprive an aggrieved person of their right of appeal to a higher court.

Consequently, the appellant has a right to appeal to this court despite the court *a quo's* refusal to determine bail, believing that it had no power to do so because of the production of the Prosecutor General's certificate.

The second preliminary issue by the State was that the High Court had no jurisdiction to determine the appeal because of the provisions of s 32 (3b) as read with s 32 (3c) of the Criminal Procedure & Evidence Act [*Chapter 9:07*]. Section 32 (3b) provides as follows:

> "Where the person arrested without warrant is charged with any offense referred to in the 9th Schedule and there is produced to the judge or magistrate before whom the person is brought in terms of this section—
>
> (a) A certificate issued by or on behalf of the Prosecutor General stating that, in the Prosecutor General's opinion,
>
> i) The offence in question involves significant prejudice or significant potential prejudice to the economy or other national interest of Zimbabwe; and
>
> ii) The further detention of the person arrested for a period of up to twenty-one days is necessary for any one or more of the following reasons—
>
> A. The complexity of the case; or
>
> B. The difficulty of obtaining evidence relating to the offence in questions; or
>
> C. The likelihood that the person arrested will conceal or destroy the evidence relating to the offence in question or interfere with the investigation of the offence or both; and
>
> a) The following, where the arrest is made in circumstances referred to in para (b) of subs (i) of s twenty-five—
>
> i) Proof that the arresting officer was an officer of or above the rank of assistant inspector at the time of the arrest, or that the arresting officer made the arrest with the prior leave of such an officer; and
>
> ii) Where the alleged offence was disclosed through an anonymous complaint, a copy of the complaint as recorded in accordance with subparagraph (ii) of the proviso to para (b) of subs (1) of s twenty-five; the judge or the magistrate shall, if satisfied that there is a reasonable suspicion that the person committed the offence, order that person's detention or issue a warrant for his or her further detention for a period of twenty-one days or the lesser period specified in the certificate.

Section 32 (3c) provides as follows:

> A person referred to in subs (3a) or (3b) shall, unless the charge or charges against him or her are earlier withdrawn, remain in detention for twenty-one days or the lesser period specified in a certificate mentioned in subs (3b), as the case may be, from the date when an order or warrant for the person's further detention was issued in terms of the relevant subsection, and no court shall admit such person to bail during that period."

Because of the above sections, the State submitted that the High Court had no jurisdiction to consider the appeal against bail refusal.

The applicant maintained his submissions as argued in the court *a quo*. She submitted that ss 32 (3b) and (3c) are not in conformity with the provisions of s 50 (1) (d) of the Constitution. The applicant referred the court to s 10 of the Sixth Schedule which provides as follows:

> "Subject to this Schedule, all existing laws continue in force but must be construed in conformity with this constitution."

So the issue is whether ss 32 (3b) and 32 (3c) of the Criminal Procedure and Evidence Act are in conformity with the Constitution.

Indeed, the sections are still law, but are they in conformity with s 50 (1) (d) of Constitution? There is also s 49 (1) (b) of the Constitution, which is against the deprivation of liberty arbitrarily or without just cause. Are ss 32 (3b) and (3c) in conformity with the provision against arbitrary detention?

Section 50 (1) (d) of the Constitution is about the rights of arrested and detained persons. The appellant was arrested and detained, so s 50 (1) (d) applies to her. It provides as follows:

"50 Rights of Arrested and detained persons

(1) Any person who is arrested –
  (a) must be informed at the time of arrest of the reason for the arrest;
  (b) must be permitted, without delay—
    i) at the expense of the State, to contact their spouse or partner, or a relative or legal practitioner, or anyone else of their choice; and
    ii) at their own expense, to consult in private with a legal practitioner and a medical practitioner of their choice; and must be informed of this right promptly;
  (c) must be treated humanely and with respect for their inherent dignity;
  (d) must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention; and
  (e) must be permitted to challenge the lawfulness of the arrest in person before a court and must be released promptly if the arrest is unlawful."

The above section is the law which was relied on by the appellant. It provides for unconditional release, or release on reasonable conditions, unless there are compelling reasons justifying her continued detention.

Section 50 (1) (d) of the Constitution was ushered in by the Constitution of Zimbabwe Amendment (No 20) Act 2013 whereas ss 32 (3b) and 32 (3c) were brought in by Act 4 of 2004.

Sections 32 (3b) and 32 (3c) existed before the 2013 Constitution; so they are included in the provisions of s 10 of the Sixth Schedule of the Constitution which says all existing laws continue in force but must be construed in conformity with this Constitution. So we go back to the question; are ss 32 (3b) and 32 (3c) which provide for the detention of an accused person without even hearing her in conformity with the 2013 Constitution? Are ss 32 (3b) and 32 (3c) which reduce all the courts into mere spectators while the State becomes the sole player over the detention of an accused person in conformity with the Constitution?

If we contrast the sections; we will see that section 50 (1) (d) of the Constitution is balanced. It caters for the interests of both players in the detention game. If there are no compelling reasons; release the person; with or without conditions. If there are compelling reasons continue detaining them.

In fact, the adage, "catch and release" is in conformity with the Constitution where there are no compelling reasons for detention. Both the accused and the State have a say and the courts have a role before the final decision is made. If ss 32 (3b) and 3c) are to conform to the constitution, they too must be balanced. The accused should be heard, and the State, then the court must be involved as the impartial arbiter and come up with a determination. So clearly, ss 32 (3b) and 32 (3c) are not in conformity with the Constitution. Whereas the Constitution gives an accused the right to be heard on bail before being detained, ss 32 (3b) and 32 (3c) do not give that right. An accused person is detained solely on the opinion of the Prosecutor General. Whereas the Constitution gives the courts a role; s 32 (3c) provides that no court shall determine bail once there is a Prosecutor-General Certificate.

In terms of ss 32 (3b) and (3c), even the progress on investigations is the domain of the State alone. One arm of the State, the police, will be reporting to another arm of the State; the Prosecutor General. If an accused is aggrieved or the Prosecutor General's opinion is wrong, the accused is stuck with it, there is no right of appeal anywhere.

But the Constitution provides courts with an appeal structure. Both the applicant and the state will have the right to appeal if they are aggrieved with my determination.

So clearly ss 32 (3b) and 32 (3c) are not in conformity with the Constitution of Zimbabwe.

What then is the effect of the failure of a piece of legislation to conform to the Constitution?

In *Tawanda Mukungurutse and Patrick Chikohora and Cledwyn Mutete* v *City of Harare & the Minister of Local Government Rural and Urban Development*, HH 558/16, my brother Justice TAGU, was faced with a similar issue of legislation that was inconsistent with the provisions of the Constitution. The City of Harare wanted to demolish illegal structures on the basis of the alleged illegality. The applicants invoked the provisions of s 74 of the Constitution which provide that no person may be evicted without an order of court made after considering all the relevant circumstances. The applicants cited s 10 of the 6th Schedule to the Constitution and argued that S.I. 109 of 1979 was not in conformity with the Constitution.

Just like the State in the present case, the City of Harare argued that a law which remains on the Statute book remains enforceable unless declared unconstitutional by a court of competent jurisdiction. They argued that S.I. 109 of 1979 gave them power to demolish the structures without a court order because it had not been declared unconstitutional. The State, in the present case, made a similar argument, that ss 32 (3b) and 32 (3c) are still law and applicable because they have not been declared unconstitutional.

On p 3 of the cyclostyled judgment, my brother judge stated the following:

> "In my view the Constitution of Zimbabwe is the supreme law of the land. Any law inconsistent with the provisions of the Constitution is *ultra vires* the Constitution. The provisions of s 74 are clear and unambiguous. Before any person whatsoever can lawfully demolish the houses or homes of any person, that person has to first of all obtain a court order.....Failure to do so renders the conduct of the first respondent unlawful and unconstitutional. Therefore the first respondent cannot rely on S.I. 109 of 1979 in as far as it is inconsistent with the provisions of the current Constitution of Zimbabwe."

I associate myself fully with the views expressed in the judgment by my brother judge TAGU. Without much ado, he declared the demolitions unlawful. His judgment was confirmed by the Supreme Court after an appeal. See *City of Harare* vs *Tawanda Mukungurutse* and others SC 46/18.

On the first page of the cyclostyled appeal judgment, ZIYAMBI AJA as she then was stated the following;

> "The matter turns on a determination of the question, at what stage does the invalidity of existing legislation inconsistent with the Constitution of Zimbabwe occur? The appellants in that court were contending that the invalidity occurs when it is pronounced as such by a court.The respondents maintain that the invalidity occurred upon coming into effect of the Constitution."

On the 3rd page of the judgment in para 8, the Supreme Court referred to section 2 on Founding Provisions about the supremacy of the Constitution.

> 2. Supremacy of the Constitution
>
> (1) This Constitution is the Supreme law of Zimbabwe and any law, practice custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
>
> (2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislature and judicial institutions and agencies of government at every level, and must be fulfilled by them"

The court thereafter referred to s 74 of the Constitution.

In para 9 of the judgment, the Supreme Court stated as follows:

> "The Constitution is the Supreme law. Upon its promulgation every law inconsistent with it immediately became invalid. Therefore no existing law can stand which is inconsistent with the Constitution. This is because the Constitution itself invalidates the inconsistency. That this is clearly the intention of the framers of the Constitution is emphasized by the sixth schedule which provides that all laws in existence at the time of the coming into effect of the Constitution must be construed in conformity with the Constitution. In my view nothing can be clearer. An existing law inconsistent with the Constitution is invalid to the extent of the inconsistency. To the extent that the law on which the appellant relies is inconsistent with the Constitution, that inconsistent provision became invalid on the date the Constitution came into force."

In the constitutional matter of *Loveness Mudzuri & Anor* vs *Minister of Justice, Legal and Parliamentary Affairs* NO & 2 Others, CCZ 12/15 the Constitutional Court at p 47, through the Deputy Chief Justice, as he then was, stated as follows:

> "The invalidity of existing legislation inconsistent with a constitutional provision occurs at the time the constitutional provision comes into force and not at the time a fundamental right is said to be infringed or when an order of invalidity is pronounced by a court."

The only reason advanced by the state for submitting that the High Court had no jurisdiction to entertain the appellants appeal against refusal of bail were the provisions of s 32 (3b) and 32 (3c) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*]. I have already analysed how these two sections are inconsistent with the Constitution. In fact the sections are not inconsistent with s 50 (1) (d) only. They are inconsistent with s 49 (1) (b) of the Constitution which forbids arbitrary deprivation of liberty and they are inconsistent with s 171 of the Constitution which confers original jurisdiction on the High Court over all civil and criminal matters throughout Zimbabwe and jurisdiction to supervise magistrates courts and other subordinate courts and to

review their decisions as well as jurisdiction to decide constitutional matters except those that only the Constitutional Court may decide. The inconsistency is that whereas the Constitution forbids arbitrary deprivation of liberty, the ss 32 (3b) and (3c) denied the applicant the right to be heard before she was placed in custody. The other inconsistency is that whereas the Constitution confers unfettered jurisdiction of the High Court on the criminal and civil matters in Zimbabwe, the two sections deny the High Court and all other courts jurisdiction to determine bail after an arrest. The two sections purport to create unconstitutional exceptions to the jurisdiction clause of the High Court which is in the Constitution. Such an exception is invalid because of its inconsistency with the Constitution

In view of the fact that the inconsistent legislation became invalid on the date the Constitution came into force as clarified by the precedents referred to above, the High Court has jurisdiction to determine the Appellant's appeal. Its jurisdiction cannot be ousted in 2019, 6 years after the promulgation of the 2013 Constitution invalidated the inconsistent provisions of s 32. The provisions referred to became invalid when the Constitution came into force in 2013. There has been no Constitutional amendment to validate them. The respondent's point in *limine* on jurisdiction is therefore dismissed.

The preliminary points having been dismissed as illustrated above, what remained was for the court to consider the bail appeal on the merits.

Submissions on the merits of the Bail Appeal

The court *a quo* heard submissions on bail from both the applicant and the State on the merits. The applicant argued that the Acting Chief Magistrate erred when he said that the certificate filed by the Prosecutor-General barred him from entertaining the bail application. The court agreed with the applicant's submissions. The magistrate erred when he refused to consider the bail application and make a determination. As illustrated above in my reasons for dismissing the preliminary point on lack of jurisdiction, the magistrate relied on a provision of the law which is inconsistent with the provisions of s 50 (1) (d) of the Constitution and is therefore invalid to the extent of that inconsistency. The magistrate should have been guided by the provisions of s 50 (1) (d) of the Constitution on the arrest and detention of persons. Despite the production of the certificate, the State itself made written and oral submissions on bail, arguing that there were compelling reasons as envisaged by s 50 (1) (d). The magistrate should therefore have determined

the issue and made a finding of whether there were compelling reasons or not. There is precedent that s 50 (1) (d) of the Constitution is now the relevant provision on bail. See *Munsaka* vs *The State* 2016 (1) ZLR 427where the court spoke strongly against the prosecution authority's failure to appreciate the effects of s 50 (1) (d) of the Constitution on inconsistent provisions of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] namely s 117 as read with 32 of the Criminal Procedure and Evidence Act on bail applications.

The refusal by the Acting Chief Magistrate to determine the bail application was therefore a misdirection. That means the detention order which the magistrate made for the detention of the appellant for 21 days must be set aside and substituted with a determination on bail which this court will make.

On the merits the applicant stood by her written submissions and emphasized that she was a good candidate for bail. Through her legal Counsel, she said she had been travelling in and out of the country, on state business, and she had not absconded despite having known about the allegations against her since 2018 when the auditors sought her response. She said the allegations against her were civil in nature therefore the state's case against her was weak. She offered to surrender her two passports, to deposit RTGS $3 000 as bail deposit and to surrender title deeds for a property. She stated that she would not interfere with witnesses and she could be ordered to report to the police once a week.

When it was the State's turn to make submissions, the State Counsel applied for leave to call the investigating officer to give evidence of compelling reasons. The applicant opposed the application. Applicant's counsel pointed out that the investigating officer's affidavit was already on record, having been attached to the request for remand form. The Court ruled in favour of the State and allowed it to call the investigating officer. The basis of the court's ruling was the fact that it was common cause to the parties that the appeal the court was dealing with was an appeal in the wider sense. As indicated by the applicant in her Heads of Argument, the appeal was "a complete re-hearing of and fresh determination on the merits of the matter with or without additional evidence or information." It was not an appeal limited to the record of proceedings in the court a *quo*. So the case, though an appeal in terms of Bail Rule 6 (1) (f), took the form of an initial bail hearing. The State wanted to provide additional evidence or information through the investigating officer and there was no basis to deny it that opportunity. Although the investigating

officer had provided an affidavit, affidavits cannot be questioned and cross examined. In many bail applications, the calling of the investigating officer has clarified issues better than just relying on his affidavit. In fact some applicants ended up being granted bail after clarifications from the investigating officer's oral evidence. Furthermore, the issue of compelling reasons, although raised by the State in the Court a *quo*, had not been fully ventilated because of the court a *quo's* unwillingness to consider bail. I therefore granted the postponement.

The matter was postponed to Monday, 5 August 2019 to enable the State to call the investigating officer.

On Monday 5 August 2019, to the Court's surprise, the State started by applying that the case be referred to the Constitutional Court in terms of s 175 (4) of the Constitution. The applicant's counsel promptly stood up and objected to the application for referral. He pointed out that what the State intended to refer to the Constitutional Court was the issue of the preliminary points raised by the State which the Court had dismissed on Friday, 2 August 2019, with detailed reasons to follow. Applicant's Counsel said if the State was unhappy with the court's decision, its remedy lay in an appeal. The State could not take the Court back to a determined issue. Applicant's Counsel submitted that the case had been postponed to 5 August, 2019 for one specific reason, which was to call the investigating officer and nothing else.

The court agreed with applicant's submissions. Before dismissing the application for referral, the court reminded the state that in fact, when applicant had sought to include a declaration of the unconstitutionality of ss 32 (3b) and 32 (3c) at the outset, it was the State which had objected and said the issue of a declaratur had not arisen in the court a *quo* and could not be brought in by ambushing the State which had not come prepared for such an argument.

Needless to say, the application by the State for referral to the Constitutional Court, coming in that manner and at that stage of the proceedings, was frivolous and vexatious and it had to be dismissed. So the court dismissed the State's application for a referral to the Constitutional Court. The bail appeal hearing continued as scheduled.

The State started by addressing the Court on compelling reasons to deny the applicant bail. Thereafter it called the investigating officer to testify on compelling reasons. The investigating officer chose to speak in the Shona language. There was no interpreter in court so the court had to adjourn at about 1.30 pm to give the State the opportunity to arrange for an interpreter.

The court resumed at about 2:30 pm. The investigating officer gave his evidence. He said the applicant was still a Cabinet Minister and very powerful. He said even accessing her in order to interview her had been very difficult. He said she had been avoiding the police and ignoring their messages. He said while she was out of custody, progress in the investigations had been difficult because people were afraid to speak against her because of her powerful position as a politician and serving Cabinet Minister. His evidence was that after she was remanded in custody, they made some headway in their investigations because people were freer to speak. He said within ten days after her detention, they were able to complete investigations in three counts and they were now left with four counts. So he pleaded with the court to continue the applicant's detention so that they complete investigations in the remaining four counts. He said they would need two to three months to complete the rest of the investigations.

In brief what the investigating officer was saying was that the appellant, because of her powerful position in society as a politician, a member of Parliament and a Cabinet Minister, if released on bail, she was likely to interfere with witnesses and investigations. From his testimony it appeared the matter went beyond interference in the sense of her directly interfering with a witness or investigations, but that because of her powerful position in society, just the fact of her being out of custody would intimidate witnesses from coming forward to witness against her.

In A*itken & Another* v *A-G* 1992 (1) ZLR 249 at p 252, the court said the purpose of bail "is to strike a balance between two competing interests, the liberty of the accused and the requirement of the State that the accused stands trial to be judged and that the administration of justice be safeguarded from interference or frustration." The investigating officer's evidence was that if the appellant is released from custody, the investigations will be frustrated in that witnesses will be too scared to witness against her. On p 258 of the same Aitken case, the court said in the absence of actual interference to stifle investigations a well-grounded apprehension will suffice. The investigating officer said while she was out of custody, because of her powerful position, they made little headway with their investigations because people would not come forward and reveal her involvement, but when she was remanded in custody, they made great headway and managed to complete investigations in three counts, from the seven counts she is facing. The investigating officer substantiated his assertion by telling the court his experience while she was out of custody and how things changed when she went into custody. In fact, from his evidence, it appeared that

just the fact of her being out of custody would intimidate people from coming forward to witness against her. The investigating officer illustrated this fear of witnesses when he narrated to the court what one of the witnesses said to him during an interview;

> "Do you really know this woman? Who am I to refuse to implement her directive when she has spoken?"

The investigating officer gave his evidence well. He remained unshaken during cross-examination. He maintained his plea for more time whilst appellant is in custody. He also testified about her likelihood to abscond and said she had money, two passports and a ten year visa to the United Kingdom. The court found him to be a credible witness.

Indeed, it was common cause, during the appeal hearing that the appellant was a politician, a member of Parliament and a serving Cabinet Minister. Although the allegations against her became known during 2018, she had not resigned from her Cabinet post, neither had she been relieved of her duties. So as far as the investigating officer was concerned if the appellant was released on bail, she would walk out with all the trappings and power of a Cabinet Minister and scuttle his investigation efforts.

The court cannot ignore the fact that powerful people in society have a manner of affecting the ordinary people around them, using their power and authority. They can summon them at any time and the person summoned cannot refuse, for fear of reprisals. The ordinary person has nowhere to hide against the powerful people they work with or have worked with previously. The interference is not open, it is overt and is therefore difficult for others to detect or prove. Professional people like the auditors, the police and lawyers dealing with powerful people can withstand the interference because of their training. But that is not the case with ordinary people. For ordinary people the fear of the powerful in society is real. In fact, the fact that she continued in her post as a Cabinet Minister despite the allegations, representing the country at national and international fora is taken by the ordinary people as a sign of her invincibility. If she is released from custody that too could be viewed by ordinary people as a testimony of her invincibility. The ordinary people could then be scared to witness against her. The investigating officer's fear of interference because of her power therefore has merit.

During the 8.00 pm news of 8 August 2019, there was an announcement that the President had relieved the appellant of her duties as a Cabinet Minister. But she is still a politician and a

member of Parliament. So she is still powerful especially in her community; within the political structures of her political party and in her constituency as a member of Parliament.

Count 3 refers to an amount of US$303 520.03 which the appellant is alleged to have claimed in 2017 for activities furthering the accused's personal and political interests. Some of the evidence for that count is likely to be required from persons politically connected to the appellant, within her party or within her constituency as an MP. So investigations may be negatively affected if she is released at this stage. Members of Parliament are very powerful and influential within their constituencies. Very few people would voluntarily speak against their member of Parliament.

The other challenging factor brought out by the investigating officer in his evidence was the complexity of investigating corruption and abuse of power allegations. He said investigations in a corruption related case are complex in that the informants are usually complicit in the commission of the offence. This is true. The investigations are about allegations where various people stood to benefit from the appellant's alleged abuse of power. So the beneficiaries of the alleged abuse of office are unlikely to come forward and volunteer information to nail their benefactor. It therefore takes a while for the police to unravel the case. In this regard, the investigating officer said the police required two to three months to finalise investigations. In the court's view, that is not too much to ask, given the complex nature of the case and given the need to balance the appellant's interest and the interest of the State in fanalising investigations and bringing her to trial.

Regarding the strength of the State case, the applicant submitted that the State case against the accused is weak. The reason which applicant's counsel gave was that the applicant did not benefit personally and the names of the persons who received the money in some of the charges are known. This submission is flawed because the allegations against the appellant are about the improper use of her office as the then Minister of Public Service Labour, and Social Welfare to induce people to act in a manner favourable to the persons and institutions referred to in the charges.

It is not an essential element of the charges that she is facing that she must have received all the funds personally. The allegations are that after she had abused her office as Minister in their favour, the recipients got paid what they received. In another count, she herself has admitted having the motor vehicle purchased through a NSSA loan. Even when she states that the claims are civil

in nature, she is missing the point. The criminal element in the case against her is that in order to get that loan, she allegedly abused her position as the Minister responsible for NSSA and used her weight as Minister to get the subordinate officers to do as she pleased. This shows that the State case against the appellant is strong.

However, the strength of the State case on its own has been held to be insufficient to deny bail pending trial. The crux of the matter appears to be whether the accused is likely to abscond and avoid standing trial or likely to interfere with investigations, to the prejudice of the state.

On the issue of likelihood to abscond beyond the jurisdiction of the court. The applicant is well travelled. She has a ten-year visa to the United Kingdom which was granted in 2016. She is a woman of financial means. The State submitted that she was travelling and returning to the country before she knew the evidence which the State had obtained against her. Now that she was in the picture about most of the evidence available, she is likely to abscond if released on bail.

The contents of a meeting which she held with Mr Vela of the then NSSA Board was given as an example of some of the overwhelming evidence against her which she was not aware of previously. The State submitted that now that she is aware of the evidence which the State has, if she is released from custody, she will flee from the jurisdiction of this court.

Indeed, the appellant has offered to surrender her two passports. But having no passport will not stop her from leaving the country. It is common knowledge that some people leave the country even without passports, using unauthorised exists. Some of them appeared before our courts afterwards and were convicted for exiting through unauthorised exits. A case in point is that of Dickson Mafios. Others were before our courts, had surrendered their passports then asked for them to travel for medical reasons. Up to now they have not returned to the jurisdiction of this court, to the prejudice of the trial process. A case in point is that of former Minister Mzembi. Others had appeared before our courts, and whilst still on bail left the country and went to settle elsewhere. A case that comes to mind is that of former High Court judge Benjamin Paradza.

I have cited these cases to show that the State's fear of abscondment is real, and not a baseless fear.

Likewise, even without her passports, the appellant, a well-travelled person, with a valid ten-year visa; with money, can easily leave the jurisdiction and settle elsewhere and thus abscond

facing trial. In *Aitken & Another* v *AG* 1992 (1) ZLR 249; the court held that in judging the risk that an accused person would abscond the court, the court would be guided by the following factors

a) the nature of the charges and the severity of the punishment likely to be imposed after conviction.
b) the apparent strength or weakness of the State case;
c) the accused's ability to reach another country and the absence of extradition facilities from that country;
d) the accused's previous behaviour when previously granted bail,
e) the credibility of the accused's own assurance of her intention and motivation to remain within the jurisdiction.

In the *Aitken* case above the court held that the court *a quo* had properly exercised its discretion in deciding that even if the appellants were admitted to bail on the most stringent conditions, there was a real risk that they would abscond. My view is that we have a similar situation here. The appellant is 68 years old, a politician and member of Parliament. She is facing charges of abuse of office and the total value of the prejudice is given as US$95 million. If convicted on the seven counts, even if not on all of them, she is likely to face a lengthy prison term. In her defence, she admits facilitating the release of some of the amounts of money referred to, but says she did not benefit personally. She is now aware of some of the strong evidence. against her and she has since been fired as a Cabinet Minister and no longer has a full time job. Then she has some money; she is not destitute and she has a ten-year visa to live in another country. Would a person facing such serious charges just sit and wait for the day of reckoning and not abscond if granted bail? The answer is after looking at what she is up against, the appellant is likely to abscond from the jurisdiction of the court, no matter what the bail conditions are.

In the *Aitken* case, on p 254, the Court went further and stated as follows:

> "It is apparent that the more serious the charge and the heavier the sentence is expected to be, the greater will be the temptation to flee."

In the *Aitken* case the prejudice was just $24 million dollars. He was denied bail for fear of abscondment. In the present case, the prejudice is $95 million. So the risk of abscondment is even greater.

To conclude, the court will consider once more the provisions of s 50 (1) (d) of the Constitution and ask if there are compelling reasons to deny the appellant bail. The court considered the nature of the charges and the severity of the likely punishment if convicted. It said the charges are serious and the State case is strong and a lengthy custodial sentence is likely. The court noted that the longer the likely sentence, the greater the risk of abscondment. The court also considered the likelihood of abscondment and the appellant's ability to reach another country and concluded that indeed it was possible for the appellant to leave the country and avoid standing trial. The court further considered the appellant's likelihood to interfere with investigations and witnesses and concluded that because of her still powerful position as politician and an MP, if she is released from custody, she is likely to interfere with witnesses and investigations.

In my view, the above factors of the appellant being likely to abscond and likely to interfere with witnesses and investigations are compelling reasons why she should remain in custody.

Consequently the appeal against bail refusal partially succeeds in relation to the refusal by the magistrate to determine the issue of bail; but fails in relation to the appellant being granted bail.

It is ordered that:

1. The order for the detention of the appellant for 21 days granted by the Acting Chief Magistrate on 27 July 2019 be and is hereby set aside.
2. In view of the compelling reasons justifying the appellant's continued detention, the appeal to be granted bail is hereby dismissed.

Chinyama and Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners