JAMES MAKAMBA
versus
THE STATE

HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE 15 February 2004

Urgent Chamber Application

Mr *Mamvura*, for the applicant
Mr *Gwatidzo*, for the respondent

GUVAVA J: This is an application for bail which was brought on a certificate of urgency. The certificate stated that the applicant had already been in custody for a period in excess of 96 hours the period stipulated in the Criminal Procedure and evidence Act [*Chapter 9:07*] ("the Act") and that therefore it warranted being dealt with on an urgent basis.

The facts which gave rise to this matter may be summarized as follows:

The applicant is a businessman, a farmer, and a politician. He operates a chain of supermarkets, is non executive chairman and non executive director of Telecel Zimbabwe (Pvt) Ltd, a Telecommunications company. He is also an ex-member of Parliament for the Mount Darwin Constituency and an ex-chairman for the ruling party for the Mashonaland West Province. The applicant is charged with contravening section 5(1)(a)(i) of the Exchange Control Act [*Chapter 22:05*]. He has been charged both in his representative and personal capacity. The applicant, in his representative capacity, is alleged to have on 45 separate occasions issued cheques in respect of foreign currency purchased from persons who are not registered dealers. The Company is not a registered dealer. On 11 separate occasions the applicant is alleged to have sold foreign currency to Telecel Zimbabwe (Pvt) Ltd. The applicant was not a registered foreign currency dealer. The applicant is

also alleged to have opened a foreign currency account with Ned Bank in Sandton Johannesburg without the requisite exchange control authority. Further allegations against him are that he illegally exported maize to South Africa. He would then cause the proceeds of the sale to be banked in a Telecel Zimbabwe (Pvt) Ltd foreign currency account in Luxembourg. The applicant was arrested on 8 February 2004. He was thereafter held in police custody until 14 February 2004 when this court granted an order that the applicant be taken – "for initial court appearance by 12:00 noon on 14 February 2004". The court also ordered that in the event that the applicant was not taken to court he should be released. The applicant was thus taken to court and placed on remand. At the hearing the learned trial magistrate who was seized with the matter indicated that she had no jurisdiction to grant the applicant bail because of a statutory instrument which had just been promulgated by way of an extraordinary Gazette.

At the beginning of the hearing Mr *Gwatidzo* for the respondent conceded that the application was urgent. I was satisfied that this concession was properly made in view of the lengthy period of incarceration of the applicant before he was placed on remand. In my view this distinguished this case from the usual bail applications which are dealt with by this court and thus warranted the urgent intervention of this court.

On the merits Mr *Mamvura* submitted three grounds in support of his argument that that applicant should be released on bail. He submitted firstly, that the state had not alleged in its response nor in the form 242 that the applicant may abscond or interfere with witnesses .He thus submitted that there was no ground for denying the applicant bail. Secondly, he submitted that the applicant was not placed on remand in terms of section 32 of the Act but pursuant to a court order. He thus argued that since the application was not made in terms of that section the provisions of the Presidential Powers (Temporary Measures)

(Amendment of Criminal Procedure and Evidence Act) Regulations, 2004 ("the Regulations") which sought to amend subsection (2) of section 32 of the Act did not apply. Finally he submitted that in any event the Regulations, being subsidiary legislation, could not amend a provision in an Act of Parliament.

I propose to deal with each of the issues raised. I will however begin with the issue of whether or not the applicant was placed on remand in terms of a court order or in terms of section 32 of the Act as amended as this will determine whether this court has jurisdiction to deal with the application for bail.

The order granted by CHITAKUNYE J stated as follows:

> "The respondent shall take the applicant for initial court appearance today the 14th February 2004 by 12:00 noon. Failing which the Applicant shall be released by 12:30 pm today the 14th February 2004."

The application before CHITAKUNYE J was for the release of the applicant from police custody. A perusal of the record shows that the complaint related to the fact that the applicant had been kept in custody for a period in excess of that prescribed by law. In fact the applicant had been unlawfully held for a period in excess of 96 hours. In his ruling he found that the warrant for further detention obtained on 14 February 2004 was unlawful and that the respondents were not entitled to continue holding the applicant without bringing him to court. From the reasons given in his ruling this order was made in accordance with section 32 of the Act.

The court in its ruling clearly did not order that the applicant be placed on remand. Indeed it could not do so as that application was not before it.

It is not in dispute that when the applicant was taken to the Magistrates Court later in the day the magistrate seized with the matter ruled that she had no jurisdiction to deal with an application for bail

because of the provisions of the new Regulations. In my view this was a clear acceptance by the Court that the applicant was being placed on remand in terms of section 32 of the Act as amended by the new Regulations. It appears to me that the applicant did not take issue with this finding by the learned magistrate as he would have sought to appeal against that ruling. The applicant has not done so but has sought to challenge this in his submissions before me. In my view, in this application, I cannot revisit the basis upon which the applicant was placed on remand. That would be the subject of an appeal which is not what has been brought before me. Clearly in my view the applicant was detained in terms of section 32(2) of the Act as amended by the Regulations.

I turn now to the provisions of the Regulations and the relevant provision provides as follows:

> " 2. Section 32 ("Procedure after arrest without warrant") of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is amended in subsection (2) by the repeal of the proviso thereto and the substitution of –
>
> "Provided that if the person arrested without warrant is charged with any offence referred to in paragraph 10 or 11 of the Third Schedule –

(a) the judge or magistrate before whom he is brought in terms of this section shall not decline to order his further detention or to issue a warrant for his further detention solely on the basis that there are no *prima facie* grounds for the charge, and no court shall admit such person to bail for a period of seven days from the date when an order or warrant for his further detention was issued in terms of this paragraph; or

(b) and the judge or magistrate before whom he is brought in terms of this section is satisfied that there are *prima facie* grounds for the charge, the judge or magistrate shall order his further detention or issue a warrant for his further detention for a period of twenty-one days (unless the charge is earlier withdrawn), and no court shall admit such person to bail for a period of fourteen days from the date when an order or warrant for his further detention was issued in terms of this paragraph."

My understanding of the provision is that paragraph (a) of subsection (2) of section 32 takes away the discretion of the magistrate or judge before whom a person is brought on initial remand from refusing to detain that person solely on the basis that a *prima facie* case has not been established. It also prohibits that court from granting such a person bail for a period of seven days. In terms of paragraph (b) of the provision, where the court finds that a prima facie case has been established for the charge, it shall order his further detention or issue a warrant for his further detention for a period of twenty one days. The provision also provides that no court shall admit such person to bail for a period of fourteen days. Thus a court dealing with an initial remand would proceed in terms of either paragraph (a) or (b). In this case the record of proceedings has not been made available to me and I am thus unable to determine whether the trial magistrate proceeded in terms of paragraph (a) or (b).

Mr *Mamvura* submitted that in the event that this court finds that the remand was in terms of the Regulations, the provisions of the Regulations were unlawful as they sought to amend an Act of

Parliament. It was also submitted that they were invalid as they contradicted the provisions of section 116 of the Act which grants this court the right to admit any person to bail in respect of any offence.

I however do not find any merit in this argument. The Regulations were made in terms of the Presidential Powers (Temporary Measures) Act [*Chapter 10: 20*] ("The Presidential Powers Act"). This is a unique Act as it gives to the President the authority to make law, a power which is ordinarily exercised by Parliament.

Section 2 of this Act provides as follows:

"**2 Making of urgent regulations**

1) When it appears to the President that –

(a) a situation has arisen or is likely to arise which needs to be dealt with urgently in the interests of defence, public safety, public order, public morality, public health, the economic interests of Zimbabwe or the general public interest; and

(b) the situation cannot adequately be dealt with in terms of any other law; and

(c) because of the urgency, it is inexpedient to await the passage through Parliament of an Act dealing with the situation.

then, subject to the Constitution and this Act, the President may make such regulations as he considers will deal with the situation.

(2) Regulations made in terms of subsection (1) may provide for any matter or thing for which Parliament can make provision in an Act:

Provided that such regulations shall not provide for any of the following matters or things –

(a) authorizing the withdrawal or issue of moneys from the Consolidated revenue Fund or prescribing the manner in which withdrawals may be made therefrom; or

(b) condoning unauthorized expenditure from the Consolidated Revenue Fund; or

(c) providing for any other matter or thing which the Constitution requires to be provided for by, rather than in terms of, an Act; or

(d) amending, adding to or repealing any of the provisions of the Constitution.

In my view these Regulations are different from subsidiary legislation which may be made, for instance by, by the Minister for Justice Legal and Parliamentary Affairs in term of section 389 of the Act. In terms of section 2(2) of the Presidential Powers Act regulations made in terms of this Act may provide for any matter or thing for which Parliament can make provision for in an Act of Parliament. There are however a few exceptions which are outlined in the proviso but these are not relevant to the case before me. It is clear to me therefore that the Regulations which were published in Statutory Instrument 37 of 2004 may amend an existing Act of Parliament. (See *s v Gatzi; S v Rufaro hotel (Pvt) Ltd* 1994 (1) ZLR 7 and *Forum Party of Zimbabwe & Ors v Minister of Local Government, Rural and Urban Development & Ors 1*997 (2) ZLR 194.

The submission too, that the Regulations are invalid because they are contrary to the provisions of section 116(1)(a) does not have merit. Section 5 of the Presidential Powers Act provides that regulations made in terms of that Act shall "to the extent of any inconsistency prevail over any other law to the contrary, apart from regulations made in terms of the Emergency Powers Act [*Chapter 11:04*]. Thus the provisions of the Regulations would prevail in this case.

It is clear therefore that having found that the applicant was placed in detention in terms of section 32 of the Act as amended by the Regulations this Court does not have jurisdiction to determine an application for bail in respect to this matter. The provisions in the Regulations clearly state that no court shall admit a person to bail who has been placed in detention in terms of the provision and whose

offence is an offence in terms of paragraph 10 and 11 of the Third Schedule. These provisions are clearly peremptory provisions particularly if one has regard to the wording and the test which was laid out in the case of *Sutter v Scheepers* 1932 AD 105. Indeed no submission was made that the provision was not peremptory. The applicant is facing the charges referred to and thus falls within the ambit of these provisions.

Accordingly the application is hereby dismissed.

Scanlen & Holderness, applicant's legal practitioners.
Attorney-General's Office, respondent's legal practitioners.