

MALVERN CHIMUTASHU  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 14 – 16 & 20 June 2023

### **Bail Application**

*P Patisani*, for the applicant  
*A Masamha*, for the State

MUREMBA J: The applicant who is facing a charge of theft of a motor vehicle as defined in s 113(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] is applying for bail pending trial.

The allegations are that on 12 December 2022 the applicant sold a Mercedes Benz Registration Number AFX4285 to the complainant for USD 6728.00. The complainant then put up the motor vehicle for sale and he was asking for USD15 000.00. After learning that the complainant was selling the motor vehicle, the applicant told the complainant that he had secured a buyer and was given directions to Morgan's Garage where the car was. On 15 February 2023, the applicant in the company of some two men proceeded to the garage where the applicant misrepresented that he wanted to buy the motor vehicle. The applicant was given the car keys and was allowed to test drive the motor vehicle. He drove the motor vehicle away and never returned it. When the complainant was notified, he made a report to the police. The applicant was arrested on 6 June 2023.

In his bail statement the applicant explained that he did not steal the motor vehicle in question. He said that this is his motor vehicle which he never sold to the complainant, but he got a loan from the complainant and used the said motor vehicle as collateral security for the loan. After the applicant had paid what he thought he owed the complainant, the two failed to agree on what the agreed interest was. The complainant said that it was 30% per month whilst the applicant believed that it was 30% per annum. The applicant said that he then repossessed his motor vehicle.

Aggrieved by the repossession, the complainant maliciously reported to the police, a case of theft of the said motor vehicle. The applicant stated that the State's allegations are based on conjecture and are frivolous.

The applicant further averred that there is no risk that he will abscond because he is a man of fixed abode, his address being 11 Ridgeway North, Highlands, Harare. He is a family man. He is also a self-employed businessman. He said that the State harbours fears that he will abscond but it did not advance cogent reasons that substantiate the fear.

In opposing the application, the State adduced evidence which shows that other than the current charge of theft of motor vehicle, the applicant has three other matters that are pending in the Magistrates Court. There is CRB HRE P 158821/19, a fraud matter which is at defence case stage. However, the applicant defaulted court and was issued with a warrant of arrest on 14 February 2023. At the time of hearing of the present application the default inquiry had not yet been conducted. To begin with, the applicant did not disclose in his present bail application that he had some pending matters before the courts. He did not disclose that he is on a warrant of arrest in one of them. It was only after he had been served with the State's response that he filed a supplementary bail statement making an averment that he has a pending fraud case at Harare Magistrates Court under CRB HRE P 158821/19. At the hearing it was submitted by the applicant's counsel that the default inquiry in the matter was scheduled to be heard on 16 June 2023.

The second matter relates to another fraud charge for which the applicant is supposed to appear for trial on 24 August 2023. It is a summons case whose reference is Harare Central CR 13/08/17. In respect of that matter the applicant was listed by the police as a wanted person on 23 March 2020. In applying for the applicant's warrant of apprehension, Blessing Mutumbi, the acting officer in charge of the Commercial Crime Unit, Harare stated that the applicant could not be located at the address which was supplied. In that case the applicant is alleged to have defrauded the complainant of USD3000 in 2013 after lying to him that he was a lawyer and that he could represent him in his case. From 2020 the applicant was only arrested on 6 June 2023 in respect of the present charge of theft of motor vehicle. The police then served the applicant with a summons to appear in court on 24 August 2023. Again in the present bail application the applicant never disclosed that he had this pending summons case in the Magistrates Court. It was

only after he had been served with the State's response that he filed a supplementary bail statement stating that he had such a matter.

The third case is another fraud matter which is at defence case stage in the regional court at Harare Magistrates Court under CRB HRE R 636/2017. Again, the applicant did not disclose it in his bail application. The State counsel, Mr. *Masamha* did not refer to it in his response to the application because he was not aware of it. In his supplementary bail statement, the applicant did not disclose it yet he was fully aware of it. On the first day of hearing on 14 June 2023, Mr. *Masamha* then submitted that he had just learnt from a prosecutor at Harare Magistrates Court that the applicant has another warrant of arrest in another fraud matter under CRB 666/17 which matter involves a huge amount of money of over USD235 000.00. Mr. *Masamha* submitted that copies of that record could be availed to show that the applicant had defaulted court more than 10 times in that matter.

In responding to the State counsel's submissions Mr. *Patisani* professed ignorance of this third matter. He said that he was not aware of this matter. We had to postpone the hearing to 15 June 2023 to enable the State counsel Mr. *Masamha* to bring forth proof of this third fraud matter.

On 15 June 2023, Mr. *Masamha* tendered a copy of the record cover of the matter and submitted that the correct CRB for the matter is HRE R 636/17 and not HRE 666/17 as he had submitted on 14 June 2023. The record cover shows that the applicant was issued with ten warrants of arrest from 2017 up to 2023. It however, turned out that further remand was then refused on 26 January 2023. Mr. *Masamha*'s submission that the applicant had been issued with a warrant of arrest was not correct. I asked Mr. *Patisani* to explain at what stage of trial the matter was when further remand was refused and he said that he did not know. Fortunately, the applicant was in attendance, virtually. I asked him to clarify things. He then explained that in that case he is jointly charged with a company called Vernmal Investments. The company's representative relocated to the United Kingdom hence a warrant of arrest was issued against the company. The applicant said that he is not the director of the company but its Chief Executive Officer and that is why he was charged as well. The applicant said that further remand was refused to enable the company to find a replacement representative. He explained that when further remand was refused in the matter the State had closed its case and the matter was now proceeding to the defence case. The company representative then defaulted court.

When Mr *Masamha* furnished the court with the extract from the Magistrates Court which shows that further remand was refused on 21 January 2023, he also furnished copies of the Police Diary log from Harare Central Police Station. The entries show that the prosecutor in the matter one Mr. Zinyandu had decided to separate the trials and proceed with the applicant in the meantime whilst the issue of the company representative was being sorted. Entry 51 shows that the applicant's trial was set down to continue on 5 April 2023. On 22 March 2023 Detective Sergeant Mutambo was instructed to serve the applicant for trial. He prepared the applicant and visited the applicant's residence Number 11 Ridgeway North, Borrowdale, Harare on 29 March 2023. He saw the applicant's maid one Tinotenda Mapuranga NR 45-213122 K 45 who said that the applicant was not at home and went on to say that he had been away for some time and that she did not know his whereabouts. The applicant could not be served for 5 April 2023 for his trial to continue. Entry 57 states that the Prosecutor, Mr. Zinyandu was contacted and he asked that the docket be referred to him so that another date for continuation of trial could be set.

What is clear from the foregoing is that the applicant is not a suitable candidate for bail. The applicant was not honest with the court in his application as he did not disclose that he has the three pending cases discussed above. He only filed a supplementary bail statement disclosing two of them, after the State counsel had disclosed them in his response to the application. Despite knowing that he had a third one, he did not disclose it in his supplementary bail statement. This was because the State counsel had not referred to it in his response to the application. The applicant's counsel professed ignorance about it until after the State counsel had sought a postponement and subsequently furnished a copy of the record cover from the Magistrates Court. This means that if the State counsel had not received information about this matter on the morning of the hearing, the applicant was not going to disclose it to the court yet he was aware of it. There is nowhere the applicant could have forgotten a matter which had been partly heard up to defence case stage which matter was removed from remand because his co-accused, a company for which he is the Chief Executive officer was issued with a warrant of arrest after the person representing it had defaulted court.

In terms of s 117A(5)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPEA) "*in bail proceedings the accused is compelled to inform the court whether there are any charges pending against him and whether he has been released on bail in respect of those*

*charges*". The applicant is guilty of contravening this provision because nowhere in his application did he disclose the three pending fraud matters that he has. In terms of s 117A(8)(a) of the CPEA, an accused who willfully fails to comply with subsection (5)(b) shall be guilty of an offence and liable to a fine not exceeding level 7 or to imprisonment for a period not exceeding two years or both. So, it is a chargeable offence for an accused person applying for bail not to disclose that he or she has pending cases. What makes the applicant's case worse is that he is legally represented. His legal representative must be aware of this provision. The applicant has no excuse for failing to comply with this requirement of the law. A person who withholds information about his pending cases cannot be trusted. There is no assurance that if he is granted bail he will stand trial.

As it is, the applicant is facing a serious charge of theft of a motor vehicle. Although he has given some defence to the charge, he does not dispute taking the motor vehicle without the complainant's consent. The motor vehicle has not yet been recovered. From the time the offence was reported in March 2023, the applicant was only arrested on 6 June 2023 as reflected on the Form 242 and in the investigating officer's affidavit. The investigating officer averred that the applicant is too nomadic and does not have a specific place of residence making it difficult to locate him. The police only managed to arrest him after making frantic efforts. The applicant has given his address as 11 Ridgeway North, Highlands, Harare yet this is the same address the police visited on 29 March 2023 in respect of HRE R 636/17 intending to serve him with summons for continuation of trial on 5 April 2023 and failed to locate him. They learnt from his maid that he had been away from home for some time and that his whereabouts were unknown. In respect of that matter the police totally failed to locate him. He was only arrested for the present charge on 6 June 2023. Over and above that, the record cover for CRB HRE R 636/17 shows that the applicant was issued with ten warrants of arrest from 2017 to 2023. No wonder why the trial could not be finalised for 6 years. It is actually a mystery that despite defaulting ten times, the applicant continued to be remanded out of custody. The trial still has not yet been finalised because his co-accused's representative then in turn defaulted and this resulted in further remand being refused for the applicant. The State later resolved to separate the trials and continue with the applicant's trial in the meantime, but as already been discussed above, attempts to serve him at his given address hit a brick wall. What this means is that from March 2023 to 6 June 2023 when the applicant was eventually arrested, he could not be found or located at 11 Ridgeway North,

Highlands in respect of the two matters; the present matter for theft of motor vehicle and HRE R 636/17.

In addition to the above, the applicant was on a warrant of apprehension since the 23<sup>rd</sup> of March 2020 in respect of the summons case. In respect of HRE P 158821/19 the applicant is on a warrant of arrest since 14 February 2023 and the matter is at defence case stage. What is interesting is that the applicant is seeking to be released on bail in respect of the present matter before he has even had his warrant of arrest cancelled in that other matter. His counsel submitted that the default inquiry was set for hearing on 16 June 2023. I was curious to know why the applicant was on a warrant of arrest from February 2023 up to the time he was arrested on 6 June 2023. The explanation was that he had fallen sick and that when he recovered he had then approached the clerk of court asking for his record to be pulled but the record could not be found. However, as was correctly submitted by Mr. *Masamha*, the applicant did not say he ever approached the prosecutor dealing with the matter or the investigating officer in order to have the warrant of arrest cancelled.

The key question is if the applicant is granted bail will he stand trial or he will evade it? The foregoing discussion has demonstrated that the applicant has given no assurance that he intends to stand trial. In *Ashton Mlilo v State* HB 49/18 it was held that:

“The State cannot succeed in contesting bail merely by raising those grounds without pointing to any evidence suggesting propensity to abscond.....”

In *casu*, the applicant’s conduct in his two pending cases with CRBs clearly demonstrates that he has a propensity to abscond and to evade the police. If the police could not locate him at 11 Ridgeway North, Highlands from March to June 2023 there is no guarantee that they will be able to locate him at this same address if he is granted bail and he decides to abscond. It appears that he spends quite some time away from this home. In CRB HRE R 636/17 the applicant defaulted ten times. This means that the applicant was simply dictating the pace of his or her trial. The number of times the applicant defaulted shows that he comes to court as and when he wants. It is not in the interests of the administration of justice for an accused person to be dictating the pace of the trials. The essence of bail is that the accused will appear in court at the appointed times and places until proceedings are completed. See Reid Rowland *Criminal Procedure in Zimbabwe*,

LRF,1997 @ 6-1 – 6-2. Therefore, it is not in the interests of the administration of justice for bail to be granted to a person who will not stand his or her trial.

In *James Makamba v The State* SC 30/04 @ 4 ZIYAMBI JA quoted with approval what was said in *S v Fourie* 1973 (1) SA 100 @101:

“It is a fundamental requirement of the proper administration of justice that an accused stands trial and if there is any cognizable indication that he 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 and despite the presumption of innocence.**”

The above case authorities show that although the right to bail is constitutionally guaranteed, it does not take precedence over the interests of the administration of justice. In cases where it is shown that the interests of justice will be jeopardised by the granting of bail to the accused, the courts will not grant bail. Even under international law the release of an accused person on bail pending trial is subject to guarantees that he or she will appear for trial. Article 9 (3) of the International Covenant on Civil and Political Rights, 1966 provides that;

“...It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.”

Bail is thus granted on the understanding that the accused will stand trial. The accused's past conduct whilst out on bail on another case is a relevant consideration for the granting or refusal of bail – see *S v Fourie* 1973(1) SA 100 @ 122(D). In *casu* the applicant's past conduct shows that he has no respect for the rule of law and the administration of justice. The applicant said that he is a businessman without even disclosing to the court the business(es) he is into. He did not even give his business address. An accused person cannot withhold vital information from the court and expect to be released on bail solely on his or her promise to return for trial when his or her past conduct has demonstrated that he or she cannot be trusted. This is a case where the State has proved that there are compelling reasons for the applicant to be detained in custody pending his trial. The risk that he will abscond trial if granted bail is very high. The risk is worsened by the fact that the applicant is facing a very serious charge which attracts a lengthy custodial sentence in the event of a conviction. Whilst the applicant claims to be a businessman, he chose not to disclose whether or not he has any valuable assets and their location. He chose not to disclose

whether or not he has a passport. He chose not to give information about his personal circumstances so that if he starts his games of defaulting court as he was doing in Hre R 636/17 the police will not be able to locate him.

Before concluding this judgment I need to comment that in hearing this application I postponed it twice. The reasons were that on the morning of the hearing the State counsel had received information that the applicant had a third pending case, HRE R 636/17 which the applicant had not disclosed in his bail application and in his supplementary bail statement yet this is a matter that he was fully aware of. Mr *Masamha* wanted to gather full information about the matter from the Magistrates Court. Despite Mr *Patisani* objecting to the postponements, I granted them because in terms of s 117A (4) of the Criminal Procedure and Evidence Act, the court is allowed to postpone bail proceedings. Legal practitioners and accused persons must realise that bail applications are not all about the rights of the accused persons. They are also about considering the interests of the administration of justice. The two have to be weighed and balanced against each other and as I have already discussed elsewhere above, the interests of the administration of justice take precedence over the accused person's rights to bail and liberty. Whilst bail applications are urgent, courts cannot be rushed to finalise hearings when vital information has not been placed before them. This is more so when the accused person who has the obligation to furnish that information to the court has deliberately chosen to withhold the information. Courts are mandated to get as much information as they can to enable them to decide the applications fairly. If information is needed on a particular point, courts should allow that information to be availed. This is why the law permits postponements in bail proceedings. If accused persons want their matters dealt with urgently and expeditiously, they should ensure that they put all relevant information in their applications. They cannot withhold information and then seek to rush the courts in making decisions in the absence of vital information. They cannot have their cake and eat it. In *casu* if the applicant had been candid with the court right from the start about all his pending cases, we would not have postponed the hearings to enable the State to get the information from the lower court.

In view of the foregoing discussion, the application for bail pending trial is dismissed.

*Antonio & Dzvetero Legal Practitioners*, applicant's legal practitioners  
*National Prosecuting Authority*, State's legal practitioners