

GUILTY MUNKOMBWE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 7 FEBRUARY 2022 & 3 MARCH 2022

Bail Pending Trial

B. Robi, for the applicant

T.M Nyathi, for the respondent

MAKONESE J: This is an application for bail pending trial. Applicant is facing a charge of unlawful possession of raw ivory in contravention of Section 82 (1) of the Parks and Wildlife (General Regulations 362/1990) as read with section 128 (b) of the Parks and Wildlife Act (Chapter 20:14). The applicant denies the charges and avers that he is a proper candidate for bail. The State opposes this application.

Factual Background

The State alleges that on the 15th November 2021 at Mlibizi Turnoff, Binga, the applicant and his co-accused were found in possession of one piece of raw elephant tusk without a permit, after they were intercepted by officers from National Parks and Police Detectives who were on patrol to contain poaching activities.

In his bail statement, the applicant makes the following averments:

- (a) that on the day in question 1st accused asked to meet him over to discuss a business opportunity.
- (b) the applicant was curious and agreed to a meeting being arranged between himself and 1st accused.
- (c) upon meeting at Mlibizi Turnoff, three vehicles used by Police officers and National Parks Officers appeared and surrounded them leading to their arrest.
- (d) that he had no knowledge of the same being possessed by 1st accused.
- (e) that he had no knowledge of the existence of the ivory
- (f) that he was trapped into something he had no knowledge of.

During oral submissions, *Mr Robi* appearing for the applicant submitted that the applicant had no knowledge of the raw ivory and that he was meeting with the 1st accused concerning a business proposal. He further explained that the applicant assisted the police with investigations and that the docket which had been opened by the police was missing which has caused the delay in the provision of trial dates. It is difficult to understand why the applicant chose not to disclose the nature of his dealings with 1st accused what the business proposal was all about and whether or not he and 1st accused were in business together. It is not clear what this business proposal was about. No evidence was shown that indeed the applicant assisted the police in investigations and that the docket was missing. *Mr Nyathi*, appearing for the state argued that the state has a strong *prima facie case* against the applicant. Applicant has not raised a recognizable defence at law in his denial of the allegations.

The Law

The Law is now settled in this jurisdiction regarding matters of bail pending trial. In deciding whether or not to grant bail, a court must consider the constitutional rights of the accused person. Section 50 (1) (d) of the Constitution states that a person who has been arrested, “must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention.” According to Section 117(1) of the Criminal Procedure and Evidence Act, every accused person has a right to bail, subject to the interests of justice,

“A person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody”

In terms of Section 50(4)(d) of the Constitution of Zimbabwe (Amend No 20) 2013, as read with section 117 of the Criminal Procedure and Evidence Act (Chapter 9:07) an accused person is entitled to release unless there are compelling reasons to why their detention should continue. It is the applicant’s contention that he had no knowledge of the ivory.

It is a fundamental principle of our criminal law justice system that in admitting or denying an applicant to bail, the due administration of justice must not be endangered. See *S v Fourie 1973(1) SA 100*. The liberty of the individual must be balanced against the interests of the State and due administration of justice.

In general, courts consider that the stronger the state case, the greater the probability of abscondment. Each case, however, must be decided on its own merits. There is a stronger temptation to abscond when the State has a strong case against an accused person. In *S v Nichas & Anor 1977 (1) SA 257 (C)* it was noted that if an accused person faces a possibility of a heavy sentence being imposed on them, the accused will be tempted to abscond after being granted bail. See *State v Jongwe 2002(2) ZLR 209 p 215 F-G*

In the case of *S v Hudson 1980 (4) SA (D) 146* it was observed that,

“The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country.”

Disposition

The case against the applicant is serious and in the event of conviction the applicant faces a mandatory prison term of 9 years in the absence of a finding of special circumstances. See: section 11 of the General Law Amendment No 5 of 2011. For this reason, I find that applicant may abscond to avoid trial. The administration of justice would be compromised if he is granted

bail pending trial, as he may be tempted to flee to avoid trial. The applicant is not a suitable candidate for bail.

In the circumstances, I would accordingly dismiss the application.

Macharaga Law Chambers, applicants' legal practitioners

National Prosecuting Authority, respondent's legal practitioners