

THANDOLWENKOSI TSHABALALA

And

HAPPYMORE MPOFU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 27 SEPTEMBER & 4 OCTOBER 2021

Bail application

Ms A. Kunda for the applicants
B. Gundani for the respondent

MAKONESE J: The applicants are facing a charge of robbery as defined in section 126 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). The applicants deny the allegations and aver that they have been wrongly implicated.

On the 26th of August 2021 and at around 0100 hours the four complainants in this matter were asleep in their tents pitched up at N and N Syndicate Mine. The applicants and their co-accused are alleged to have arrived at the mine armed with torches, spears, axes and knives and robbed the complainants of gold ore, 6 cellphones and various items of clothing. On the 27th of August 2021 police detectives received information leading to the arrest of the first accused Lungisani Mpfu. Upon interviewing Lungisani the police were led to the other suspects, including Methuli Ngwenya and the two applicants in this matter. The police seized a Mazda Bongo registration number AFA 2316 and a Mazda B 1600 registration number ACG 9211. These vehicles belong to the applicants. The vehicles are being held by the police as exhibits. The applicants deny the charge of robbery. 1st applicant admits that on the day in question he drove the Mazda B 1600 to the mine on hire. He was not aware that the co-accused persons were on a mission to commit the crime of robbery. 2nd applicant admits that he was driving the Mazda Bongo. He was hired by Lungisani Mpfu from Insuza to Inyathi on the pretext that Lungisani wanted to collect his gold ore at a mine before proceeding to Inyathi Growth Point. The Mazda Bongo departed carrying

passengers whilst the Mazda B 1600 was to carry the gold ore. Applicants contend that upon arrival at the mine, Lungisani Mpofu and his crew disembarked and went to collect the ore. After a while Lungisani and his crew came back to the vehicle. Lungisani and his associates appeared unsettled and said they had ran into a conflict with some people whilst collecting their ore. The applicants then proceeded to Inyathi before parting ways.

Applicants later got to know that Lungisani and the other co-accused had committed a crime of robbery at the mine. Following investigations by police detectives, applicants were implicated as the ones who were driving the vehicles used in the commission of the offence. Applicants have emphasized in this application that they were not part of the robbery and had no prior knowledge that Lungisani and his colleagues had gone to the mine to commit a criminal act. Applicants maintain that they provided transport services on hire and were duly paid. Both applicants state that they are in the business of ferrying people and goods from Insuza to Inyathi and at certain times to Bulawayo. On the day in question the applicants were conducting their business as usual.

Ms Kunda appearing for the applicants argued that applicants are suitable candidates for bail. They are both men with fixed abode and are not a flight risk. 1st applicant is aged 30 years. He resides at Insuza and is a family man who is self-employed as a driver ferrying people along Insuza – Bulawayo road. 1st applicant has no travel documents and ready to stand trial if granted bail pending appeal. 2nd applicant is a male adult aged 36 years. He is employed as a police Constable employed by the Zimbabwe Republic Police based at Fairbridge Support Unit Eco troop. 2nd applicant is also a family man, who according to his legal counsel has no reason to abscond. 2nd applicant maintains his innocence.

Mr Gundani appearing for the state did concede that the state cannot reject the applicants' defence outright. In this regard, the state makes the concession that there is a possibility that the applicants were genuinely hired for a fee on the night in question. Whilst there is a certain suspicion that the applicants ought to have known or suspected that Lungisani and his associates were engaged in some criminal enterprise, it cannot be said that the applicants have raised not a plausible defence which could not be reasonably possibly true.

The law on bail applications is well settled in our jurisdiction. The essence of a bail application is to conduct an enquiry that seeks to strike a balance between the liberty of an accused individual facing criminal charges and the overall interests of the orderly administration of justice. It is only when in all reasonable probability, the accused's release on bail is likely to pose a real and substantial

threat to the interests of justice and the sound administration of justice, that the court will be inclined to deny the accused bail.

The Constitution of Zimbabwe (Amend No. 20) 2013 provides in section 50 (1) (d) provides as follows:

“Any person who is arrested must be released unconditionally or on reasonable conditions pending a charge or trial unless there are compelling reasons justifying their continued detention.”

The refusal or grant of bail shall be in the interest of justice where there is a likelihood that the accused if granted bail will:

- (a) endanger the safety of the public or any particular person or will commit an offence referred in the first schedule; or
- (b) not stand his or her trial or appear to receive sentence; or
- (c) attempt to influence or intimidate witness or to conceal or destroy evidence; or
- (d) undermine or jeopardize the objectives or proper functioning of the criminal justice system including the bail system.

In this matter the applicants are facing serious allegations. If convicted, the applicants face lengthy prison terms. I have closely examined the information placed before me by the state and defence counsel. I have safely concluded that the applicants have raised a plausible defence to the allegations against them. Applicants have not raised a bare denial. They admit having driven to the mine to ferry gold ore after being hired by Lungisani Mpofu. If this defence is not controverted at trial by other evidence linking applicants to the offence of robbery the state may very well have difficulty in establishing a solid case against them.

This court is alive to the fact that pre-trial incarceration cuts across the presumption of innocence. An accused has a right to remain out of custody pending his trial, unless in the interests of justice, his release on bail is likely to endanger the interests of the administration of justice. Where the state has not established compelling reasons justifying the accused being denied bail, ordinarily, bail will be granted.

See: *S v Ncube* 2001 (2) ZLR 556 (S) and *AG v Phiri* 2011 (2) ZLR 88 (H).

As a matter of policy and law, and where possible, the courts have leaned in favour of the liberty of the individual. I am satisfied that there are no compelling reasons justifying the denial of bail pending trial.

In the result, the application for bail is granted in terms of the draft order.

Dube & Associates, applicants' legal practitioners

National Prosecuting Authority, respondent's legal practitioners