

LINCOLN TENDAI MUBAKI

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 17 JANUARY 2012 AND 19 JANUARY 2012

Mr T. Muganyi for the applicant
Mr K. Ndlovu for the respondent

Bail Application

MAKONESE J: The applicant and a co-accused Mcniel Mbombi are facing allegations of robbery in breach of section 126 of the criminal Law (Codification and Reform) Act [Chapter 9:23], it being alleged that on the 20th of December 2010 at around 0230 hours they robbed Total Garage in Entumbane, Bulawayo.

The brief facts as contained in the outline of the State case are that on the day in question at around 0230 hours the accused persons acting in common purpose with his accomplices, Mcniel Mbombi and others who are still at large drove to Total Garage Entumbane in Bulawayo in a Toyota Hiace minibus, registration number AAZ 9823, belonging to the accused person which they parked at a secluded place. They approached the garage on foot where on arrival they attacked the two complainants who were on guard with logs and iron bars. After overpowering them they tied their hands and legs using pieces of wire. Two of the accused persons were left guarding the complainant, whilst others broke inside the garage where they used explosives to blast open the safe and made away with US\$15000-00 and R10000 in cash. The accused persons escaped in a gateway vehicle being a Toyota Hiace motor vehicle registration number AAZ 9823 belonging to the applicant.

On the 18th of October 2011 the applicant was arrested after being implicated by his co-accused Mcniel Mbombi who is also in custody pending trial. The applicant lodged a bail

application on the 4th of November 2011 arguing that he is a family man with two (2) minor children and has a fixed abode. He claimed that he is a good candidate for bail and would not abscond. The State opposed the bail application and filed in support of its opposition a detailed affidavit by Assistant Inspector Noel Mpofo of Criminal Investigation Department (CID) Homicide Bulawayo, the Investigating officer.

In a written judgment filed under case number HC 284/11 the Honourable Justice MATHONSI denied Applicant bail. In the court's judgment the court declined bail on the basis that the case against Applicant was very strong and Applicant faces serious allegations. The court ruled that if found guilty the risk of abscondment was high. It was also the court's view that if found guilty the Applicant was likely to be sentenced to a lengthy term of imprisonment and this was likely to motivate the Applicant to abscond.

The Applicant has filed this second application for bail pending trial premised on the fact that there are changed circumstances in this matter.

I will not deal with the personal circumstances of the Applicant which were dealt with by MATHONSI J and needless to repeat that the allegations being faced by the Applicant are very serious and if convicted the Applicant is likely to be sentenced to a lengthy prison term. The possibility of abscondment is therefore real.

I will only examine whether there are changed circumstances in this matter which would warrant a departure from the findings of MATHONSI J in the first bail application.

The Applicant submits that there has been a significant and "exonerating" change of circumstances in favour of the Applicant. He further states that he was arrested after being implicated by his co-accused Mciel Mbombi who made a sworn statement implicating him. The Applicant has now tendered in support of this application another sworn statement by Mciel Mbombi dated 7th December 2011 wherein he states as follows:

"I am accused person incarcerated at Khami and facing five counts of armed robbery currently appearing in count 2. I am writing this affidavit freely and voluntarily without having been influenced and in sober mind. I am charged together with LINCOLN TENDAI MUBIKA, who is currently on remand as well. I am the one who implicated LINCOLN MUBIKA, thereby leading to his arrest and current incarceration. I only know LINCOLN

as a cross border trader, I used to deal with him to import clothes for me. I have no other connection with him. I only implicated LINCOLN MUBIKA as he was the only person who crossed my mind when I was severely assaulted by the police when they were forcing me to disclose alleged accomplices who they said were at large. I have soul-searched and thought at great length, it is unfair to have LINCOLN incarcerated for an offence he knows nothing about...”

The applicant has also attached an affidavit sworn to by his wife ABIGAL TAFIRA wherein she says that the police lied when they claimed that some explosives were found at applicant’s house. She says that she was present when a search was conducted and nothing was found linking the applicant to the offence.

The applicant submits that the court has a duty to reconsider its position where it is presented with satisfactory change of circumstances and that in the case in *casu* there exists changed circumstances.

It is important to closely examine the so-called changed circumstances presented to this court by the Applicant.

1. **AFFIDAVIT BY APPLICANT’S CO-ACCUSED**

The affidavit of applicant’s co-accused was recorded at Khami Prison on the 7th December 2011 where Applicant is also being held in custody pending trial. The affidavit by Mcniel Mbombi indicates that the author has had some soul-searching and has decided that it is wrong to implicate the Applicant. The deponent states that he only implicated the applicant because “that was the only name that crossed his mind” and he knew him as a result of his cross-border activities when he used to send him to buy clothes. Mcniel Mbombi also says that he wants to exonerate him since he is the one who implicated him.

The affidavit by Mcniel Mbombi raises a lot of questions for consideration:-

- (a) it is reasonable that Mcniel Mbombi only implicated the Applicant because it is the only name that came to his mind?
- (b) why did Mcniel Mbombi only think of applicant’s name and not any other person?

- (c) is there any proof that these two individuals actually had any other relationship other than the alleged robbery?
- (d) when did they know each other regarding the buying and selling of clothes and where?
- (e) why did Mcniel Mbombi not mention anyone else other than the accused?
- (f) it is not possible that Mcniel Mbombi and Applicant hatched this bogus plan to exonerate each other?

It is my considered view that the Affidavit by Mcniel Mbombi is a false statement designed to defeat the ends of justice. It is clear that the affidavit is an attempt to create changed circumstances which do not exist. The evidence presented by the Investigating Officer indicates that Applicant's Toyota Hiace minibus was used as a gateway car. This piece of evidence has not been rebutted and in any event that is the province of the trial court.

2). AFFIDAVIT OF APPLICANT'S WIFE

The affidavit of Abigal Tafira has also been used in support of this bail Application. This affidavit does not present a change of circumstances but instead it is the type of defence evidence which can be used by the Applicant at trial. The contents of the affidavit can only be tested at trial and does not amount to a change of circumstances.

The Applicant further contends that the identification parade was not conducted properly and again these are matters to be raised by the applicant in his defence at trial.

I must point out her that in his judgment MATHONSI J made a finding that the applicant was not a suitable candidate for bail because there was a likelihood of abscondment because the case against the applicant was strong. This court must therefore decide whether there is any changed circumstance in that regard. It is my view that there are no changed circumstances in regard to this matter. The allegations against the applicant remain strong and the issues raised by the Investigating officer still remain intact. The attempt by the Applicant to get his co-accused to exonerate him is clearly an attempt to hoodwink the court and those are matters which can be raised in the defence case at trial. Applicant's motor vehicle is alleged to

have been used to escape from the crime scene and explosives are said to have been recovered at his residence. I am of the view that the risk of abscondment is high and there are no changed circumstances at all. The fact that a co-accused presents to court an affidavit wherein he seeks to exonerate an alleged accomplice does not amount to a changed circumstance primarily because the issues raised therein can only be tested under cross examination at trial. Changed circumstances refer to circumstances surrounding the case which did not exist at the time of the first bail application. The issue of changed circumstances was discussed in the case of *Edward Moris Barrons vs The State* SC 61/2002. The court established that bail can be applied for on the basis of changed circumstances justifying a reconsideration of the bail application. If the court does not find changed circumstances the application will not succeed.

It is clear that each case will depend on its own merits but clearly where the state has presented strong allegations against an accused person there can be no doubt that the risk of abscondment is always high. I am not persuaded that there exist any factors pointing to a change of circumstances in this matter and accordingly the application is hereby dismissed.

Dube-Banda, Nzarayapenga and partners, applicant's legal practitioners
Criminal Division, Attorney General's Office, respondent's legal practitioners