

**PHUMULANI SIBANDA**

**And**

**CRISPEN NDLOVU**

**And**

**SUNDAY MOYO**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABAWE  
MAKONESE J  
BULAWAYO 27 & 30 MAY 2019

**Application for bail pending trial**

*Ms T. Mazendeme* for the applicants  
*Ms N. Ngwenya* for the respondent

**MAKONESE J:** The applicants are game scouts at Bubiana Conservancy in Gwanda. They are facing a charge of murder as defined in section 77 of the Criminal Law (Codification and Reform) Act (Chapter 9:22). The applicants deny the charges. They have filed this application seeking bail pending trial. They aver that there are suitable candidates for bail and that there is no risk of abscondment. The state has opposed the application. The state argues that the applicants have offered a bare denial and the evidence against them is overwhelming as borne by the allegations in the Request For Remand Form 242. The likelihood of applicants absconding to avoid trial therefore is real.

**Factual background**

The allegations against the applicants are that on the 3<sup>rd</sup> of April 2019 at Boulder Creek Dam, Bubiana Conservancy ranch, along Bubi River, Gwanda, the three applicants acting in concert ambushed the deceased who was in the company of his two colleagues whilst they were preparing to cast their nets into a dam. The deceased was a fisherman. Two of the deceased's

colleagues managed to flee before they could be surrounded by the applicants. The deceased was left at the mercy of the applicants who then took turns to brutally assault the deceased all over the body. The deceased sustained serious injuries leading to his death. The applicants threw the body of the deceased into the river. The deceased's body was found floating in the river on the 5<sup>th</sup> April 2019. Upon its retrieval on the 6<sup>th</sup> April 2019, it was observed that the deceased had sustained serious injuries and had a swollen right eye, swollen left pelvis, swollen testicles and penis. The deceased was biting his tongue. In response to the allegations the applicants deny that they assaulted the deceased in the manner alleged. Further, the applicants state that they did not have any physical contact with the deceased person. The applicants aver that the deceased, fearing apprehension for poaching, fled and jumped into the river regardless of having been vehemently warned against doing so. The applicants further allege that generally there is friction between the settlers on the opposite bank of the river who are well known for poaching, and the game rangers, who are tasked with the duty of apprehending poachers. The applicants allege that there is possibility that the accused persons were framed by unknown persons as a matter of retaliation. The applicant portray themselves as victims of circumstances.

*Ms Mazendeme*, appearing for the applicants did concede that the applicants did communicate with the deceased before he met his death. She indicated that applicants did not, however, have any physical contact with the deceased. They did not assault him, but instead tried to dissuade him from jumping into the river. State counsel *Ms Ngwenya* indicated that the applicants could not be trusted to stand trial if granted bail pending trial. She indicated, further that they were eye-witnesses whose evidence presented a *prima facie* case. In otherwords, the applicants's story does not add up.

### **Whether applicants are suitable candidates for trial**

The primary considerations in assessing whether or not an applicant is a suitable candidate for bail pending trial are now established in our law. The applicant's assurance that he will stand trial if granted bail is assessed objectively. See *S v Kuruneri* HH-11-04. In that matter it was held that there is a constitutionally guaranteed presumption of innocence that

operates in favour of an accused person. The court must assess those factors indicated in the Criminal Procedure and Evidence Act, under section 116 (7) and if the state case and applicant's case are equally balanced, the accused should be granted bail.

It is now settled that if the state opposes bail, it must prove that justice will be served by denying bail. In this matter the applicants have not been candid with the court. Incidentally, prior to the deceased's death the applicants had encountered the deceased. The deceased's colleagues positively identified the applicants. There was evidence of an assault having been perpetrated upon the deceased prior to him being dumped into the river.

The bail principles were aptly summarised by ZIYAMBI JA in *James Makamba v The State* SC-30-04. The primary considerations are:

- (1) Whether the applicant will stand trial in due course.
- (2) Whether the applicant will interfere with the investigations.
- (3) Whether the applicant will commit other offences when on bail.
- (4) Other considerations the court may deem good and sufficient.

It seems to me, that where an applicant in a bail application seeks to mislead the court by removing himself from the scene of the crime and tell a lie about the cause of death, he is not a suitable candidate for bail. The presumption of innocence does not operate in a vacuum as it were. The applicant who is dishonest cannot be trusted to stand trial if granted bail. See; *Musonza v The State* HB-43-19.

### **Disposition**

In this matter, the applicants seek to mislead the court as to how the deceased met his demise. There are eye-witnesses who saw the applicants prior to the commission of the offence. These eye-witnesses were present at the scene and the last time they saw the deceased he was being surrounded by the applicants. Regard being had to the strength of the state case and the defence proffered by the applicants there is a likelihood that the applicants may very well

abscond if granted bail pending trial. In the event of a conviction the applicants are most likely to face a lengthy custodial sentence which could induce them to abscond once granted bail.

In the result, the applicants are not suitable candidates for bail pending bail.

The application for bail is hereby dismissed.

*Titan Law Chambers*, applicants' legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners