

HB 50-19  
HCB 81/19  
XREF BYO P503/19

SIDINGUMUZI NDABEZITHA NCUBE  
**versus**  
THE STATE

HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 2 APRIL 2019 AND 9 MAY 2019

### **Bail Application**

*T Muganyi with M Mahaso & N Sibanda* for the applicant  
*K Ndlovu* for the respondent

**MAKONESE J:** The applicant is jointly charged with one Jephath Chaganda who is separately applying for bail under case number HCB 80/19. Applicant and several others are currently undergoing trial at the High Court on a charge of theft of gold. The applicant finds himself facing fresh charges relating to obstruction of justice in contravening section 184 (1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The state alleges that following theft of gold the applicant and his accomplices were arrested and are appearing before this court. The state alleges that the applicant sought to influence Vusumuzi Sayi to change his testimony before the court in return for a reward of US\$3000-00. The applicant further stands accused of violating section 12 (a) of the Immigration Act [Chapter 4:02], that is to say entry by invasion. The state alleges that applicant exited Zimbabwe on the 7<sup>th</sup> of July 2018 and that there is no official report that applicant lawfully re-entered Zimbabwe. The applicant's legal practitioner confirms that the applicant has no explanation for his passport not showing a date stamp reflecting his re-entry into Zimbabwe. The allegations on this second count are clear and his defence has been set out as a bare denial. On the first count of obstruction of justice the state makes specific allegations that applicant interfered with a state witness with a view that he changes his testimony. These allegations are serious in nature. The applicant's defence is that he did not in fact interfere with the state witness concerned.

In terms of section 116 of the Criminal Procedure and Evidence Act [Chapter 9:07], the court is empowered upon application, to admit an accused person who is in custody to bail pending trial. Section 50 (1) (d) of the Constitution of Zimbabwe (Amendment No. 20) (2013), it is provided that the release of an accused on bail pending trial is a fundamental human right, which can only be denied in exceptional circumstances, and where it is shown that there are compelling reasons that exist in the particular case for denying bail. This was the position laid down in *Munsaka v The State* HB 55/16. There is therefore, a heavy onus on the state to show that there exist compelling reasons in the case at hand for bail to be denied. In terms of section 117 (6) (a) of the Criminal Procedure and Evidence Act it will be in the best interests of justice to refuse to grant bail to an applicant, where there is a likelihood that the applicant will abscond and not appear to stand trial, or where the applicant will attempt to influence or intimidate witnesses or interfere with investigations or the evidence or where the release of the applicant on bail will undermine or jeopardise the proper functioning of the criminal justice system, including the bail system.

### **The background**

On 1<sup>st</sup> February 2019 applicant appeared before a Bulawayo magistrates court and was remanded to 14<sup>th</sup> February 2019. The applicant faces one count of obstruction of justice and another count of a contravention of the Immigration Act. The matter has now been set down for trial on the 11<sup>th</sup> April 2019 at Bulawayo. The applicant denies the charges. He asserts that he never interfered with Vusumuzi Sayi in the manner alleged or at all. Applicant contends that the alleged witness has already testified in the High Court and during the trial that applicant had sought to interfere with the witnesses. The applicant avers that the allegations are malicious, frivolous and vexatious. Further, applicant avers that Vusumuzi Sayi never indicated that he had been interfered with. The state responded to this assertion by indicating that the docket for obstruction of justice opened under CR 34/08/18 is a matter standing on its own. In other words, the allegations faced by the applicant in this matter are fresh allegations and considerations for bail have to be examined in the four corners of the allegations in this particular matter. The

applicant recognizes that the charges he faces are relatively serious offences. The seriousness of the charge on its own is not a good ground for denying an applicant bail.

### **Application of the Law**

It is trite that where it is shown that the applicant has interfered with evidence or investigations the court is justified in denying bail. See: *S v Chiadzwa* 1988 (2) ZLR 19 (SC) and *S Murambiwa* SC 62/92.

Applicant's legal practitioner, *Mr Muganyi* argued with much conviction that there was no proof that the applicant did interfere with a state witness. In his view the allegations are merely frivolous and vexatious. I must point out at this stage that the allegations of interference with a state witness strikes at the foundation of the criminal justice system. The fact that the applicant may have failed to convince the witness to change his testimony, does not lead to the conclusion that such interference did not occur. The applicant is at liberty to advance his defence at the trial and at the appropriate time. In this bail application the court must be satisfied that the granting of bail will not compromise the due administration of justice. The courts take very seriously any allegations of interference with witnesses and investigations. The applicant does not need to prove his defence in a bail application. What the applicant must do is to set out a plausible defence. In this application the defence is a mere denial.

I must restate the position that has been laid out in our law, that where an accused who is facing trial, is charged with an offence similar in nature, or which has the potential to jeopardise the case for which he is on trial, then in such an event, the applicant would not be a suitable candidate for bail. On the facts of this case, the applicant, allegedly, and knowingly interfered with a witness who was to testify in the theft of a gold case being heard at the High Court under case number HC 118/18. Applicant allegedly offered cash to Vusumuzi Sayi, to persuade him to change his testimony. This alleged interference with witnesses and investigations shows that applicant is not the perfect candidate for bail.

Where the state has a strong *prima facie* case against the applicant in a bail application, for the court to exercise its discretion in favour of the applicant, the applicant must place the court in its confidence on all material aspects of the case and profer an explanation which seeks

HB 50-19  
HCB 81/19  
XREF BYO P503/19

to provide a defence which is plausible. Applicant has simply proffered a bare denial to the effect that he did not at any point confer or seek to influence the witness. The applicant ultimately argues that the charges are malicious. No basis for such allegations were laid out. Counsel for the applicant was at pains to give the impression that some individuals were desperate to keep the applicant in custody. Such an impression clearly has no basis or foundation.

The court in exercising its discretion to grant bail must do so on consideration of hard facts placed before it. In this matter it is common cause that accused is on trial in the High Court. The matter is pending. While the applicant is on trial serious allegations of interference and obstruction of justice have been raised against the applicant. The court has to strike a balance between the interests of justice and those of the applicant. It seems to me that the interests of justice will be severely compromised if applicant were granted bail at this stage. There is a real and substantial risk of the trial being compromised. The applicant's right to bail must be taken into account together with the alleged attempts at interference with evidence and investigations.

In the result, the application for bail is accordingly dismissed.

*Tanaka Law Chambers*, applicant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners