MOSES MABHONGO
versus
THE STATE

IN THE HIGH COURT OF ZIMBABWE
SIZIBA J
MUTARE, 12th December 2024 & 18th December 2024

Application for bail pending trial

Mr *E. S Kadirire* for the applicant
Mr *M. Musarurwa* for the respondent

SIZIBA J: This is a chamber application for bail pending trial. After hearing counsel in chambers on 12 December 2024, I dismissed the application and gave reasons *ex tempore*. The applicant's legal practitioners have requested reasons for my decision and such reasons are the subject of this judgment.

Background of the case

The application was filed on Thursday 5 December 2024 and it came to my attention on the same date. Having noticed that no proof of service upon the respondent had been uploaded, I directed the Registrar to advise the applicant's legal practitioners to serve the application upon the respondent. I also directed that the application should be set down for hearing on Monday 9 December 2024. The Registrar duly complied. On Monday 9 December 2024, Mr *Kadirire* appeared before me in chambers and submitted that he had been instructed by applicant's legal practitioners to seek a postponement of the matter. By then, the application had still not yet been served upon the respondent. I then postponed the matter to Thursday 12 December 2024 for hearing and ordered that the respondent must be served with the application.

When the matter came up for hearing on Thursday 12 December 2024, again Mr *Kadirire* appeared in chambers geared to apply for a postponement and he did apply for such postponement, advising that he had been instructed by applicant's legal practitioners to apply for postponement of the hearing as they wished to file a response to the respondent's preliminary point. Mr *Musarurwa* was initially unopposed to the application for postponement

but when it came to his attention that the matter had been postponed on the previous date of hearing, he then moved that the matter should be dealt with to finality. I refused to postpone the matter. Applications for bail are urgent in their nature since there are concerned with the liberty of accused persons. This court treats bail applications as urgent and that is what the rules of this court require. The parties must also treat bail applications as urgent and such urgency is apparent in the letter and spirit of the rules of this court which specifically direct that these matters should be treated with urgency. Rule 90 (5) of the High Court Rules, 2021 provides as follows:

"(5) The registrar shall set down an application for bail for hearing by a judge within forty-eight hours after the application was filed in terms of sub rule (4), and shall ensure that—

(a) a copy of the written statement referred to in sub rule (4) is served on the Prosecutor-General as soon as possible after it was filed; and

(b) the Prosecutor-General and the applicant and his or her legal representative are notified as soon as possible of the date and time of the hearing:

Provided that—

(i) if the applicant is legally represented, the registrar may require the applicant's legal representative to serve a copy of the written statement on the Prosecutor-General, and the legal practitioner shall forthwith comply with such request;

(ii) the forty-eight-hour period may be extended—

A. by written agreement between the applicant and the Prosecutor-General if a copy of their agreement is filed with the registrar; or

B. if the judge so orders in terms of sub rule (3)."

It is inconvenient to the court and also to other litigants for a party to file an urgent application with the court and then fail to prosecute it with the urgency that it requires or deserves. The court under such circumstances cannot be held at ransom but it will do what it deems appropriate in the interests of justice.

Having dismissed the application for postponement, Mr *Kadirire* indicated that he had only been instructed to postpone the matter and that he had not read the papers. I indicated that

I was going to hear the respondent and decide the applicant's fate on the basis of the papers before me. I must caution that legal practitioners or parties who intend to apply for postponement must know and anticipate and also be prepared to accept that such an application for postponement can either be granted or refused by a court and they should therefore make provision for the worst case scenario rather than taking it as if a court will always accede to such a request for postponement. Unless there are compelling reasons involving such emergencies as bereavement or ill heath to counsel or a litigant, a diligent lawyer or party who seeks a postponement on ordinary procedural reasons should always make provision to proceed with the matter in the event that the postponement is refused by a court. To hold otherwise will be to take away the court's discretion to grant or refuse a postponement and repose such discretion to each litigant at his or her own whim and such state of affairs will not serve the interests of justice. It has been said time and again that a postponement is not there for the mere asking. The court will only postpone a matter if it is satisfied that such a postponement is necessary and expedient. In this scenario, I was not advised of any good reason why the applicant's legal practitioners had not attended the hearing and I was also not convinced that the respondent's preliminary point should detain me from hearing the case on the merits.

The respondent's preliminary point

The respondent's preliminary point was to the effect that the applicant's failure to file an affidavit together with his bail statement was fatal to the application for bail. I was not persuaded by this point in *limine* and I dismissed it. In terms of r 90 (4) of the High Court Rules, 2021, what is peremptory in an application for bail is a written statement by an applicant. An affidavit only serves to discharge the evidential burden which rests upon an applicant for bail in Third Schedule offences in terms of s 115C of the Criminal Procedure and Evidence Act (*Chapter 9:07*) to prove that the interests of justice will not be jeopardised by his or her release on bail. In terms of s 117A (4) of the Criminal Procedure and Evidence Act (*Chapter 09:07*), it is stipulated thus:

"(4) In bail proceedings the court ***may****—*

(a) postpone such proceedings;

(b) subject to subsection (5), ***receive****—*

(i) ***evidence on oath, including hearsay evidence****;*

(ii) ***affidavits and written reports which may be tendered by the prosecutor, the accused or his or her legal representative;***

(iii) ***written statements made by the prosecutor, the accused or his or her legal representative;***

(iv) ***statements not on oath made by the accused;***

(c) ***require the prosecutor or the accused to adduce evidence;***

(d) require the prosecutor to place on record the reasons for not opposing bail."

(Emphasis added)

Given the wide range of evidential material that a court may receive in an application for bail as articulated above, I am not therefore persuaded that the failure by the applicant to file an affidavit is fatal to the application and hence I dismissed the preliminary point by the respondent.

The merits of the application for bail

The applicant is a 60 year old man who hails from Munoendevhunye Village, Chief Ndima in Chimanimani. He is charged with murder in terms of s 47 of the Criminal Law (Codification and Reform) Act (*Chapter 9:23*). It is common cause that on 18 November 2024 at 0030 hours, he had a misunderstanding with the deceased Cosmas Mabhongo. It is also common cause that the deceased took a pick and started demolishing his homestead. One Proud Mabhongo intervened between the applicant and the deceased and he thereafter went away to his home. The deceased continued demolishing the applicant's home. It is alleged that the applicant who was hiding at a banana plantation nearby used a bow and arrow to fight the deceased. The first arrow that he launched missed the deceased while the second arrow went into the left side of the deceased's neck and caused the deceased the injuries which resulted in the instant death of the deceased. The applicant was subsequently arrested and he is appearing for remand at Chimanimani Magistrates' Court.

The respondent has opposed the application for bail pending trial on numerous grounds. It is alleged that the applicant may interfere with the witnesses most of whom are his relatives who reside at his homestead. Since the attached Form 242 indicated that the investigations would be complete by 2 December 2024 and also since there was no evidence placed before

me that the applicant had ever attempted to interfere with any of these witnesses, I was not persuaded by this ground of opposition and hence I dismissed it as a mere bald allegation. I also dismissed the assertion that the applicant may flee and not stand trial since he resides near the porous border with Mozambique as no evidence was put before me to prove that the applicant had made any attempt to cross the border to Mozambique as alleged.

There was a concern by the respondent that the applicant could be tempted to flee and not stand trial since he was facing a serious offence which could attract a lengthy prison term on conviction. In motivating this submission, the respondent boasted of having witnesses who allegedly witnessed the applicant committing the alleged crime. The respondent also indicated that the bow and arrow had been recovered and hence there was overwhelming evidence against the applicant. On the other hand, the applicant's version as articulated in his written statement was that he never attacked the deceased with a bow and arrow as alleged. His version was that in trying to restrain the deceased from demolishing his homestead, the deceased attacked him with a spear and then inadvertently the spear turned and injured the deceased. This version was articulated at paragraphs 20 to paragraphs 23 of the applicant's written statement. If that was all, one would then have thought that perhaps the applicant is denying having caused any injuries to the deceased. However, in the same paragraphs, the applicant repeatedly mentions that he acted in self - defence. At the same time, applicant denies having inflicted the fatal injuries. This is clearly contradictory. How could he have acted in self-defence if he never attacked the deceased at all? It is on this basis that I could not lightly dismiss the respondent's fears that the applicant may be tempted to flee because of the prospect of a lengthy prison term. The applicant has failed to demonstrate that he may escape a lengthy prison term if convicted. The respondent denies that any spear was used and none was recovered on the crime scene. What was recovered was a bow and arrow.

The law and its application to the case

In terms of s 50 (d) of the Constitution, bail is now a constitutional right. Bail will be granted where the State has failed to provide compelling reasons for the denial of bail to an accused person. In terms of s 115C of the Criminal Procedure and Evidence Act, an applicant for bail in a Third Schedule offence has the burden to show on a balance of probabilities that his release on bail will not hamper the interests of justice.

Where, as in this case, it appears to the court that the state has strong evidence to link the applicant to a serious offence that might attract a lengthy prison term, the court will ordinarily be persuaded not to grant bail unless there are factors which show that the applicant may be spared such lengthy prison term for one reason or another. This position is supported by the cases of *Jongwe v The State* SC – 62 – 02*, Moyo* v *The State* HB – 25 - 22**.**

In this case it is common cause that the applicant was at the crime scene. He is accused of the crime of murder which ordinarily attracts a lengthy prison sentence. His version of events as well as his defence is contradictory and he has not demonstrated how he can escape a lengthy prison sentence in face of strong evidence from the prosecution which points to a high likelihood of his conviction. Despite the submission at paragraph 10 of his statement that the allegations against him are frivolous and his claims that he has a *bona fide* and arguable defence to the charge, the contrary seems to be true. The State's fears have been elaborated quite clearly in my view. Although the applicant is still presumed innocent, he has failed to advance any convincing reasons warranting his release on bail. It is clear that the interests of justice will be defeated by his admission to bail pending trial.

It is for the reasons articulated above that I dismissed the application for bail pending trial.

Mabundu and Ndlovu Law Chambers applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners