SILAS SIBANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO, 17 February & 9 March 2023

Application for bail pending trial

P Ngulube, for the applicants
K Shava, for the respondent

DUBE-BANDA J:

[1] This is a bail application pending trial. The applicant is facing a crime of robbery as defined in section 126(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It being alleged that on 1 January 2023 the applicant in the company of accomplices who are at large used a fire arm to subdue the complainant a robbed him of ZAR2 000.00.

[2] The applicant filed a bail statement in support of his application. It was contended that the applicant is of fixed abode. He is a married man and has young children of school going age. The applicant was arrested without a scene and he co-operated with the police, in fact it was argued that he knew that the police where considering him a suspect, but he did not abscond. The applicant contended further that he is not a flight risk, and he is eager to clear his name. He has no travel documents. It was contended further that the State does not have a strong *prima facie* case against the applicant. It was submitted that the complainant is a convicted stock thief, and he made this report to stop the applicant from enquiring on the whereabouts of his (applicant's) grandmother's goats.

[3] The application is opposed. The opposition is predicated on the basis that the applicant is a flight risk, and if released on bail he will abscond and not stand his trial. In support of its opposition the respondent filed an affidavit from the investigating officer. In his affidavit the investigating officer averred that he was opposed to the

release of the applicant on bail pending trial. He premised his opposition primarily on the contention that:

> "The accused person if released on bail might abscond and it will be difficult to re-arrest him as he is currently based in the Republic of South Africa and had come into the country on 24 December 2022 for the festive holidays. Accused upon sight of the police at his residence attempted to run away but was cornered by the police who had come in their numbers. His accomplices who are also based in South Africa and had come for the holidays managed to flee away upon sight of the police vehicle and up to now there (*sic*) whereabouts are not known. In this view, if given bail, accused might also team up with his outstanding accomplice and continue committing similar offences or skip the border going back to South Africa."

[4] The applicant deposed to an affidavit and vehemently denied that he was based in South Africa. Further, in support of his averment that he was not based in South Africa he filed a supporting affidavit from the village head. The village head avers that the applicant is permanently resident at the village under his jurisdiction. Consequent to this factual dispute as to whether the applicant is based in the republic of South Africa or at the village under the jurisdiction of village head who deposed to a supporting affidavit, I called the oral evidence of the investigating officer for the purposes of clarification. The investigating officer testified that investigations have shown that the applicant has a homestead at the village, but he is based in South Africa. He came into the country for the festive holidays. The officer testified that the same applies to his accomplices, who have apparently escaped and retuned to South Africa. The investigating officer further testified that the investigations have been completed and the matter was ready for trial, and in fact a trial has been set down for the 7 March 2023.

[5] Mr *Ngulube* Counsel for the applicant argued that the evidence of the investigating officer amounted to inadmissible hearsay. The inadmissible hearsay argument was predicated on the fact that the investigating officer said he obtained statements from witness who say the applicant is based in South Africa. No such statements were produced in court.

[6] The correct position is that in a bail application the court may in suitable cases place reliance upon hearsay evidence. It is not a question of admissibility, but of weight. The weight to be accorded to such evidence is subject to the particular circumstances of the case. See: *S* v *Tshabalala* 1998 (2) SACR 259 (C) 265g. In *casu* the investigating officer testified that investigations revealed that the applicant is indeed a Zimbabwean, he has

a homestead at Sinai Village, but he is based in South Africa. He came to the country for the festive holidays.

[7] In considering the weight to attach to the investigating officer's evidence I factor into the equation that this crime was allegedly committed on 1 January 2023. This is during the festive period. And I take judicial notice of the fact that this is the time that many Zimbabweans who are based in South Africa visit their homes in the country. And his accomplices who also have homesteads at the village have since fled, and their whereabouts are now not known. In the circumstances of this case, the probability is that they have since returned to their bases in South Africa. It is for these reasons that the evidence of the investigating officer is accorded sufficient weight. The applicant has neither a passport nor any travel document. If released on bail, nothing can stop him from returning to South Africa using the same *modus operandi* he used to enter this country.

[8] It is trite that in this jurisdiction an accused is presumed innocent until his guilty is established by due process of the law. The court should always grant bail where possible and should lean in favour of the liberty of the accused provided that the interests of justice will not be prejudiced. But in determining the question of bail, too much emphasis cannot be placed upon the presumption of innocence. See: *S* v *Fourie* 1973 (1) SA 100 (D) 101G. The applicant is facing an armed robbery charge. Generally armed robbery carries a heavy term of imprisonment, and if convicted there is a likelihood of heavy sentences being imposed on the applicant. The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the applicant to abscond. See: *S* v *Jongwe* SC 62/2002. I repeat, if released on bail, nothing can stop him from returning to South Africa using the same *modus operandi* he used to enter the country.

[9] It is a fundamental principle of the administration of justice that an accused person stand trial and if there is any cognizable indication that he will not stand trial if released from custody, the court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused and despite the presumption of innocence. See: *S* v *Fourie* 1973 (1) SA 100 (D) 101g.

[10] Furthermore, the applicant is not only a flight risk but his release on bail given the serious allegations against him of the use of a gun in the alleged commission of this offence will undermine the objective and proper functioning of the criminal justice system and the bail institution. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.

In the result, it ordered as follows:

The bail application be and is hereby dismissed.

7/03/2023

Sengweni Legal Practice, applicant's legal practitioners
National Prosecution Authority, respondent's legal practitioners