HB 174-18
HCB 103-18
XREF INYATHI 300-18

MHLUPHEKI NCUBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 22 JUNE 2018 AND 28 JUNE 2018

Bail Application

V J Mpofu for the applicant
Ms N Ngwenya for the respondent

MATHONSI J: The applicant is a 28 year old man residing at Queens Mine Compound, Madala Site in Inyathi. He was arrested on 24 May 2018 and charged with murder the allegations being that on 10 May 2018, in the company of one Herbert Maseko who is still at large, he proceeded to Queens West Mine carbon tanks which were being guarded by a security guard by the name of December Ndlela. Upon arrival, they assaulted the security guard on the head with an unknown object and set his legs on fire.

The state further alleges that after fatally attacking the deceased the two then cut the carbon room padlocks and stole carbon before escaping leaving the deceased unconscious. The deceased was found at about 0200 hours on 10 May 2018 lying on the ground unconscious with his clothes soaked in blood and his legs burning. He was taken to Inyathi Hospital before being transferred to Mpilo Hospital in Bulawayo where he died the following day.

The applicant has approached this court seeking his admission to bail pending trial stating that he denies the charge as he is innocent and there is no evidence whatsoever linking him to the commission of the offence. In terms of section 70 (1) (a) of the Constitution he is presumed innocent until proven guilty. He should therefore be protected by the law and is entitled to bail pending trial. The applicant stated further that he is of fixed abode and is not a flight risk given that he would like to prove his innocence.

The application is opposed by the state which is of the view that the applicant will abscond if granted bail especially as his co-accused is still at large and has not been accounted for. The state has submitted an opposing affidavit sworn to by Jonis Chiduwo, a detective sergeant, of Zimbabwe Republic Police Lupane who is the investigating officer. He has set out the evidence linking the applicant to the offence including the statements recorded from a witness who had initially been part of the gang which constituted itself to embark on the criminal activity which resulted in the death of the deceased before he withdraw.

Chiduwo's fears are that, apart from the risk of abscondment arising from the fact that the applicant faces capital punishment, the murder having been committed in the course of a robbery, the witnesses who nailed the applicant are known to him. They fear him because he is of a violent disposition and as such, if granted bail, the applicant is likely to interfere with those witnesses. In addition the murder weapons, as well as the motor vehicle used in the commission of the offence, have not been recovered. If released the applicant is likely to interfere with investigations to the prejudice of the administration of justice.

It should be appreciated that murder is a Third Schedule offence and as such, in terms of section 115C of the Criminal Procedure and Evidence Act [Chapter 9:07] an applicant for bail charged with murder bears the onus of showing, on a balance of probabilities, that it is in the interests of justice that he or she be admitted to bail pending trial. In addition to that, where the murder is premeditated or was committed during aggravated robbery, section 115 C imposes upon the applicant for bail pending trial the extra burden of showing on a balance of probabilities, that exceptional circumstances exist which permit his or her release on bail. See *S* v *Mlalazi* HB 245-17.

It is now settled that it is a compelling reason which satisfies the provisions of section 50 of the constitution, to refuse bail to an applicant where there is a likelihood of abscondment if released on bail or where the applicant will endanger the safety members of the public or is likely to interfere with witnesses. In this case the applicant was only arrested on 24 May 2018, two weeks after the offence was committed. His arrest only came after one of his potential accomplices had betrayed him and given information to the police. It is that witness who had also secured more information relating to the commission of the offence. He is a person known

to the applicant and fears him. There is no doubt in my mind that the likelihood of interfering with that witness and also endangering his safety is high and real, should the applicant be let loose. In my view it would be irresponsible to admit the applicant to bail in those circumstances.

Indeed the applicant's bail statement does not even begin to allay any of the genuine concerns raised by the state. More importantly he has not discharged the onus resting on him to show that it is in the interest of justice that he be granted bail or that there are exceptional circumstances calling for his release.

In the result, the application for bail pending trial is hereby dismissed.

V J Mpofu & Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners