

**PHUMULANI SIBANDA**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 24 & 25 NOVEMBER 2021

**Application for bail pending trial**

*B. Ndlovu* for the applicant

*K. Ndlovu* for the respondent

**DUBE-BANDA J:** This is an application for bail pending trial. Applicant is being charged with the crime of robbery as defined in section 126 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. It being alleged that on the 30<sup>th</sup> October 2021, at around 23:00 hours, applicant and other accomplices some who are still at large, connived and went to rob Golden Touch Mine, in Filabusi. It is alleged that they used machetes, stones and axes to assault and subdue the mine workers and forced some mine workers to load gold ore into the applicant's truck being a Toyota Town Ace registration number AFE 7868.

In support of his bail application applicant filed a bail statement and two supporting affidavits. In the bail statement he contends that it is in the interests of justice that he be released on bail pending trial. He argues that he has a strong defence to the allegations against him, in that he was hired by his co-accused and other accomplices who are still at large to transport gold ore from Golden Touch Mine to a stamp mill. He was paid USD\$80.00 which he remitted to his employer. He contends that he did not see any weapons carried by his co-accused and the other accomplices as it was dark. He just believed they were carrying tools in line with their mining work. At the mine he remained seated in the vehicle while his co-accused and other accomplices were loading gold ore into the loading box of the vehicle. On the return journey he had a puncture, saw a mob approaching, sensing danger he abandoned the vehicle and absconded. The following day he received a telephone call from his employer who informed him that the police were looking for him in connection with a robbery case. He surrendered himself at Filabusi Police Station where he was arrested.

In his supporting affidavit applicant avers as follows: that he resides at number 1653 Bekezela, Filabusi. He was born and bred in Zimbabwe and he does not have a passport, and

he has never been outside the country. He is married with one minor child. He is employed as a driver by one Sam Sibanda. His duties are to drive a Toyota truck for hire, he is sometimes hired to carry river sand, pit sand and gold ore. He is paid on commission bases and his net taking ranges between USD\$200.00 to USD\$300.00 per month. He neither has a previous conviction nor a pending case. He was arrested when he surrendered himself at Filabusi Police Station.

Further applicant avers that on the 26 October 2021, at approximately 18:00 hours he was hired by his co-accused to transport gold ore. He was paid USD\$80.00 for the hire which amount he remitted to his employer before proceeding to transport the gold ore. He avers that he was only involved in this matter as the driver of the hired truck. He says there was a fight at the mine, and when it got tense he drove away, along the way the vehicle had a puncture, he abandoned it and ran away. His employer informed him that the police were looking for him, he then surrendered himself to the police leading to his arrest.

Applicant filed an affidavit deposed to by Sam Sibanda. The deponent avers that he is the owner of the Toyota truck used in the commission of this offence. Applicant is his employee, his duties are to drive the truck which is used for hire and he is paid on commission. Applicant usually receives a salary of around USD\$200.00 to USD\$300.00 per month depending on the number of hires. On the 26 October 2021, applicant was hired to carry gold ore at a fee of USD\$80.00. The fee was paid before the trip to transport the gold ore. He received a telephone call from the police who informed him that his car was involved in a robbery matter. He told the police that the driver was the applicant. He then informed applicant and advised him that he must contact the police.

The respondent filed an affidavit deposed to by the investigating officer- Detective Constable Siwela Kudakwashe. His evidence is that on the 28<sup>th</sup> October 2021, he was assigned to investigate a case of robbery where a group of accused persons went to Golden Touch Mine, Filabusi aboard a white Toyota truck registration number AFE 7868. Investigations revealed that applicant was the driver of the vehicle used in the robbery. In his opposing affidavit the investigating officer opposed bail citing the following reasons: that applicant has no permanent place of residence; not gainfully employed and hence a flight risk; accomplices are yet to be identified and arrested; and one victim of the attack is battling for his life in hospital. Further it is averred that his release on bail may jeopardize evidence.

Further the same investigating officer adduced oral evidence in court. He testified that he is a detective constable of thirteen years' experience. The owner of the vehicle told the police that the vehicle was hired by the applicant. Applicant was the driver of the vehicle used in the robbery, and was present during the commission of the offence. However he testified that the police are no longer opposed to the release of the applicant on bail pending trial, for the following reasons: the docket is complete; the applicant handed himself to the police; the offence was committed by approximately ten to eleven accomplices, and only three have been accounted for; applicant is co-operating with the police; he gave information that led to the arrest of the other two accomplices who are now in custody; he also gave information that is being used to track down the other accomplices who are still at large. This witness testified that the police prefer that applicant be released on bail, as his release will help account for the other accomplices still at large.

This respondent is not opposed to the release of the applicant to bail. It is contended that there are no compelling reasons for the continued incarceration of the applicant pending trial. Mr *Ndlovu* counsel for the respondent submitted that there is no risk that applicant will abscond if released on bail, because he surrendered himself to the police and he is co-operating with investigations.

### **The application of the law to the facts**

A court hearing a bail application must express a balanced judgment taking into account the factors mentioned in the empowering statutory provisions and the jurisprudence developed by the courts over years. Underlying the concept of bail is the presumption of innocence, whereby every person is presumed innocent until he is adjudged guilty. The general principle is that the courts should always grant bail where possible and should lean in favour of liberty of the applicant provided that the interests of justice will not be prejudiced. In essence the principles and considerations underlying bail is that no one should remain locked up pending trial without good reason.

In the exercise of its discretion and depending on the facts and circumstances of the case a court may rely on the opinion of the investigating officer, even though the officer's opinion is not supported by direct evidence. See: *S v Hlongwane* 1989 (4) SA 79 (T) 113H-114A. Evidence of an investigating officer that a bail applicant was not a flight risk and was not likely to interfere with State witnesses and the investigation led the court in *S v Porthen & Others* 2004 (2) SACR 242 (C) @ 58 to the conclusion that the bail applicant had discharged

the burden of showing that it was in the interests of justice that he be released on bail. In accepting the opinion evidence of the investigating officer, the court must guard against being used as a mere rubber stamp of such an opinion. The grant or refusal of bail is a judicial function. In *S v Jones* 1973 (1) SA 841 (C) 847 A-C the court said:

As regards bail we find increasingly that prosecutors and even magistrates allow themselves to be used as mere rubber stamps for the opinion of the police as to whether or not bail should be granted, as well as the amount of bail. The dangers of such an approach are obvious. A strictly independent adjudication of the facts of each case should be made by the presiding officer, including a careful evaluation of the circumstances of each accused, the seriousness of the crime, and the interests of the community. The investigating officer's view is clearly a relevant consideration but is not the only and not even the most important one that should weigh with the court with regard to the whether or not an accused ought to be released on bail and what the amount of bail ought to be. (Translated from Afrikaans in van der Berg *Bail A Practitioner's Guide*) Juta 3<sup>rd</sup> Ed. P116.

In *casu*, I have given earnest consideration to all relevant factors individually and cumulatively in the consideration of this matter. I have considered that applicant is facing a serious charge of robbery and also that it is trite that the seriousness of the offence charged standing alone, cannot be a ground to refuse to release an applicant to bail pending trial. I have considered that he still enjoys the presumption of innocence. I have considered the State case, and I take the view that on the facts and evidence before court, and for the purposes of this application it does not appear to me that the State has a strong *prima facie* against the applicant. I have taken into account that the police have completed investigations in respect of the applicant. I have considered that applicant surrendered himself to the police and that he is co-operating with police investigations. It is his co-operation that has assisted the police to account for the two accomplices currently in custody, and the tracking of those accomplices still at large. I have factored into the equation the opinion of the investigating officer that if applicant if released on bail, his co-operation will help account for the other accomplices still at large. I am of the view that the facts and evidence in this case tip the balance in favour of releasing applicant on bail.

I am persuaded by the arguments advanced on behalf of the applicant that there is no likelihood that if released he would evade his trial or attempt to influence or intimidate witnesses. There is no likelihood that applicant, if released on bail will commit further offences. Having considered all relevant factors individually and cumulatively in this matter, my finding is that it is in the interests of justice to release applicant on bail.

### **Disposition**

In summary, I am convinced that it is in the interest of justice that the applicant be released on bail. In the result, I grant the following order:

1. The applicant be and is hereby released on bail on the following conditions:
  - i. That he deposits an amount of RTGS \$10 000.00 (ten thousand dollars) to the Registrar of the High Court, Bulawayo.
  - ii. That he resides at house number 1653 Bekezela Filabusi until the finalisation of this matter.
  - iii. That he does not interfere with state witnesses and/or police investigations in connection with this matter.
  - iv. That he reports at Filabusi Police Station every Monday and Friday between 6 am and 6 pm until the finalisation of this matter.

*Malinga & Mpofu Legal Practitioner*, applicant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners