MACDONALD S.
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 17, 25 April 2014

BAIL APPLICATION

S. Mpindu, for the applicant
B. Murevanhema, for the respondent

CHIGUMBA J: This is an application for bail pending trial, in which the applicant seeks to be admitted to bail on the following conditions:

1. That he deposits US$50,00 with the clerk of court, Mutoko Magistrates Court
2. That he resides at 1620-1st crescent Warren Park, Harare
3. That he reports on every Friday at VTS Police Station between 6am and 6pm
4. That he surrenders his passport with the clerk of court Mutoko Magistrates Court
5. That he be ordered not to interfere with any state witnesses.

Applicant was charged with theft, as defined in s 113(1), as read with s 121(2)(a) of the Criminal Law, Codification and Reform Act [*Cap 9:23*], it being alleged that, on 25 of January 2014, at Wierdabrug Township Johannesburg, South Africa, he unlawfully took a motor vehicle, a Toyota Fortuner, white in color, registration number CV 23ND GP, Engine number 1KD5320331 and chassis number AHTYZ59G908014490, knowing that J.G. Superb Auto Dealers was entitled to own, possess and control the motor vehicle, and intending to deprive it permanently of its ownership, possession or control.

According to the outline of the state case, the applicant is a Malawian national aged forty years, from Likotima Village, Chief Kapeni, Blantyre, Malawi, and his address when he

is in South Africa is 67 South Road, Regents Park. He has resided at that address since 1995. It is the state's case that, on 29 January 2014, at 1400 hours, the accused arrived at Nyamapanda border post in Mudzi. He was coming from South Africa driving the vehicle in question. He went through immigration procedures, intending to go to Mozambique. Police at the border post had received information that the registration book was not authentic. They obtained information that the vehicle had been reported stolen on 26 January 2014, at Wierdabrug Police Station in Johannesburg, under case number 654/01/14. Information was received that the vehicle's correct registration number was CV 23 ND GP, not CRT 893 L, which had been presented on the motor vehicle at the border post. The value of the vehicle is SAR 357 600-00.

Applicant is denying the allegation of theft of the motor vehicle. He proffered an explanation for how he came to be in possession of the vehicle, he was hired by Charles Ogala, who he knew from Malawi, to deliver the vehicle to Malawi, for payment of ZAR11 000-00. He was given a down payment of ZAR5000-00. The balance would be paid to him on delivery of the vehicle. He drove the vehicle from Johannesburg, through Beitbridge, to the Nyamapanda border post. Applicant contended that Charles Ogala confirmed to the police in a telecon that he was the owner of the vehicle. He tendered a car registration book and an affidavit deposed to by one Noel Goves Quta, as proof that his explanation was genuine.

Applicant's personal particulars are that, he is married with 5 children, he is self employed as a driver who drives cars for importers, and he is H.I.V positive and is on treatment. He submitted that if released on bail he will stand trial and not abscond. He has relatives in Zimbabwe, a Mr. Wonder Mpita, who resides at 1620 1st Crescent, Warren Park, and who has deposed to an affidavit that he is willing to house him and look after him until the trial is finalized. He submitted that he is willing to be subjected to stringent conditions to minimize fears that he will abscond if admitted to bail. On the risk of interference with state witnesses, applicant submitted that none of the state witnesses are known to him, and that, all the evidence from those witnesses has so far been recorded. Applicant contended that most of the witnesses are police detectives, and that it is unlikely that they would be susceptible to

his influence if he tried. He submitted that it is not likely that he will interfere with any of the witnesses in these circumstances, and relied on the case of *S* v *Ncube & Anor HB* 27/03 as authority for that proposition.

Applicant submitted that there is no evidence that he will commit other offences if admitted to bail. He contended that there is no evidence that he is a habitual criminal, and that the state has not alleged that he is a person of criminal disposition who has a propensity to commit similar offences. Applicant submitted that the docket is complete, and that the matter is ready for trial but he has not yet been allocated a trial date, so he surmises that the state is not ready to proceed to trial. He submitted that his health is deteriorating daily, and seeks to be admitted to bail for reasons of compassion. The respondent opposed the admission of the applicant to bail, on the basis that he is likely to abscond if admitted to bail pending trial. The respondent submitted that the offence that applicant was charged with is a serious one, regard being had to the likely penalty on conviction, and that applicant would be likely tempted to abscond. Respondent relied on the case of S v *Hudson* 1980 (4) SA 145 as authority for thus proposition.

The respondent submitted further, that the applicant, a Malawian national, was of no fixed *abode*, and that, the address supplied here in Zimbabwe was of a property which had no title deeds and which could not be forfeited to the state if he failed to stand trial. The respondent submitted that, even if the court were to order the applicant to surrender his travel documents this would not stop him from taking flight because our borders are porous, applicant can use unorthodox means to cross the border into neighboring countries at undesignated points. It was submitted that the evidence against the applicant is overwhelming. It was submitted that applicant failed to supply the name of the vehicle's new registered owner. He indicated that he had been authorized to drive the vehicle in question by a third party who could not be located at the mobile phone number supplied by the applicant. Such details could exculpate him, and the respondent submitted that his reluctance to provide viable information is an indication of his collusion in the theft of the motor vehicle. The respondent relied on the case of S v *Ndlovu* 2001 (2) ZLR 261, as authority for this proposition.

The applicant filed an affidavit in terms of s 117(6) (a) of the Criminal Procedure and Evidence Act [*Cap 9:23*], on 10 April 2014, in response to a challenge by the respondent that his failure to comply with that mandatory provision, coupled with applicant's failure to provide information which would exculpate him, combined, pointed strongly to the conclusion that applicant was not a suitable candidate for admission to bail pending trial. Finally the respondent indicated that applicant's trial date had been set, it was 23 April 2014. As part of its response to the bail application, the respondent filed an affidavit deposed to by the Investigating officer, (the I.O.) in terms of s 33(1) of the Criminal Procedure and Evidence Act, on 4 April 2014. The I.O. deposed to the fact that he had received a tip off from an informer at Nyamapanda border post that the registration book presented by the applicant was forgery.

Courts are guided in their consideration of the suitability of any candidate for bail pending trial, by the provisions of s 117(1) of the Criminal Procedure and Evidence Act, [*Cap 9:07*], hereinafter referred to as the CPEA, which provides that:

> "**117 Entitlement to bail**
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> (1) Subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody."

The question that the court must determine in this matter is whether it is in the interests of justice that the applicant be detained in custody because the concerns raised by the state have merit, that he is likely to interfere with witnesses, and or that he is likely to abscond and not stand trial. In other words, the court must consider the evidence tendered on behalf of the state, to substantiate these allegations, and it is only where the court makes a finding that the state's allegations are well founded, and the applicant fails to discharge the onus on him to establish that he is a good candidate to be admitted to bail, that a finding can be made that it is in the interests of justice that the applicant be detained in custody. Some of the factors that the court ought to consider in establishing whether the state's allegations are well founded are set out in s 117 of the CPEA. In considering whether it will be in the interests of justice to detain the accused in

custody on the basis of cogent evidence that if released on bail he is not likely to stand trial, or that he will attempt to influence and intimidate witnesses, the court is enjoined to consider the following factors:

Where it is alleged that accused will abscond and not stand trial:

> " (i) the ties of the accused to the place of trial; (ii) the existence and location of assets held by the accused; (iii) the accused's means of travel and his or her possession of or access to travel documents; (iv) the nature and gravity of the offence or the nature and gravity of the likely penalty therefor; (v) the strength of the case for the prosecution and the corresponding incentive of the accused to flee; (vi) the efficacy of the amount or nature of the bail and enforceability of any bail conditions; (vii) any other factor which in the opinion of the court should be taken into account;".

The applicant has supplied an address in Warren Park where he proposes to reside until his trial is finalized. The state has raised fears that since the applicant is of Malawian origin, residing in South Africa, he is likely to abscond and there is no incentive for him to reside at the given address because that property has no title deeds which can be used to forfeit it to the state in the event that applicant fails to stand trial. It is the court's view that this factor on its own cannot support the state's contention that applicant is likely to abscond. Most people in this country reside in properties without title deeds. It is true that applicant has no assets of value here in Zimbabwe, and from the record, none have been tendered in any of the jurisdictions that he is affiliated with, South Africa and Malawi. Applicant has offered to surrender his travel documents.

The offence that applicant is charged with is a grave one, with a penalty of a fine not exceeding level fourteen or twice the value of the stolen property, whichever is the greater; or imprisonment for a period not exceeding twenty-five years; or both. The gravity of the offence and the likely penalty are factors which a court can consider in determining whether an applicant for bail is likely to abscond, especially where the prosecution case is strong, such as in this case. The registration book of the vehicle in question is in the name of Noel. Goves. Quta. Applicant's affidavit, deposed to, on 24 January 2014, by this gentleman, purports to give him permission to use the motor vehicle for a period of thirty days for purposes of doing business in any SADC country. It would have exculpated applicant if he had simply supplied information

leading the Mr. Quta's whereabouts. There is an original registration book which shows the vehicle as belonging to JG Superb Auto Dealers. The vehicle bore a different number plate when it was presented at Nyamapanda border post, to the one on the original registration book.

The motor vehicle was stolen in South Africa, on 26 January 2014, and a report made to Wierdabrug police station in Pretoria. The applicant initially told the investigating officer that the fake registration book and the affidavit of Mr. Quta were given to him by Charles Ogala, a fellow Malawian National living in South Africa. In his affidavit in terms of s 117(6)(a), filed of record on 10 April 2014, applicant clearly states, in para 4, that he was engaged as a driver by Charles Phiri, who gave him the affidavit authorizing him to take the vehicle to Malawi. We are not told whether Charles Phiri and Charles Ogala is the same person. Finally, applicant initially told the police that he had no relatives living in Zimbabwe. He has since discovered that he has a cousin brother here, Wonder Mpita, of Warren Park. Applicant's failure to give a reasonable explanation for all the discrepancies listed above, or to provide Mr. Quta's particulars, is worrying, and raises a rebuttable inference that he is not being candid with the court.

The discrepancies also make the prosecution case against the applicant, strong. The court finds that, applicant tendered an affidavit by Mr. Quta, as evidence that he was authorized to drive the vehicle. Now he has tendered an affidavit, sworn to by a Zimbabwean national to the effect that they are related and he can reside in Warren Park until the trial is finalized. The veracity of Mr. Quta's affidavit is doubtful, in light of applicant's failure to provide his particulars. The discrepancy in the name of the person who hired applicant to drive the vehicle shows clearly that applicant is not being candid with the court. How then can the court formulate the view that he indeed intends to reside in Warren park until the trial is finalized, in light of all these discrepancies? The court finds that applicant is likely to abscond and not stand trial. The state's case against him is strong, the likely penalty is severe, which will likely induce him to abscond, which is why he has not been candid with the court in regard to a myriad of issues. It has been held that the more serious the charge the greater will be the temptation to abscond regard being had to the likely penalty upon conviction. Coupled with the strength of the state, and on examination of all the circumstances of the case, the court finds that applicant is likely to abscond, if admitted to bail. In *S* v *Hudson (supra)* at p 149*,* the court stated that*:*

> "Where an accused applies for bail and confirms on oath that he has no intention of absconding due weight has of course to be given to this statement on oath. However, since an accused that does have such an intention is hardly likely to admit it, implicit reliance cannot be placed on the mere say-so of the accused. The court should examine the circumstances."
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> > "(i) whether the accused is familiar with any witness or the evidence; (ii) whether any witness has made a statement; (iii) whether the investigation is completed; (iv) the accused's relationship with any witness and the extent to which the witness may be influenced by the accused; (v) the efficacy of the amount or nature of the bail and enforceability of any bail conditions; (vi) the ease with which any evidence can be concealed or destroyed; (vii) any other factor which in the opinion of the court should be taken into account".

It is this court's view that the state's fears that the applicant will attempt to interfere with witnesses is baseless and without foundation. The witnesses are police officers who are not known to the applicant, who is a foreigner to this country. All witness statements have been recorded, a trial date has been set, which means that investigations are complete. There is no evidence that the applicant has a relationship with any of the witnesses. There is no real risk that applicant will interfere with witnesses. See *S* v *Bennett* 1976 (3) SA 652 (C). The imposition of bail conditions in this case is not likely to deter the applicant from absconding, for reasons which the court has already canvassed above.

The court must weigh the interests of justice against the right of the accused to his personal freedom, with particular emphasis on the likely prejudice he would suffer were he to be detained in custody. In its analysis, and balancing act, the court is enjoined to consider:

> " (*a*) the period for which the accused has already been in custody since his or her arrest; (*b*) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail; (*c*) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (*d*) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused; (*e*) the state of health of the accused;(*f*) any other factor which in the opinion of the court should be taken into account."

The applicant has been in custody since February 2014. The trial date is 23 April 2014. The applicant is a family man who is HIV positive and on medication. There is no evidence

before the court that the applicant has been unable to access his medication whilst in custody. There is no evidence that his health has deteriorated in any way, other than an unsubstantiated averment in applicant's founding affidavit. The right of the applicant to his personal freedom does not trump the interests of justice in securing his attendance at trial. The trial date is imminent, so there is no likelihood of prejudice caused by a long wait.

The court finds that the interests of justice would be prejudiced by the admission of the applicant to bail, because there is cogent evidence that applicant has not been candid with the court in various material respects, the prosecution case against him is strong, the penalty severe, the court is not satisfied that applicant intends to reside at the given address in Warren Park until the finalization of the trial, the court is not satisfied that the applicant has sufficient incentives to stay in Zimbabwe until the finalization of the trial, the court is satisfied that, the imposition of bail conditions would not be a sufficient deterrent to keep the applicant in Zimbabwe, he has no ties to the local community, he has access to regional syndicates whose details he deliberately refrained from disclosing. The applicant failed to discharge the onus on him, to place sufficient evidence before the court, to satisfy the court that, on a balance of probabilities, he will stand his trial if released on bail. This means that he is not a suitable candidate for admission to bail. The application for bail is dismissed for these reasons.

Mupindu Legal practitioners, Applicant's Legal Practitioners
Prosecutor General, Respondent