ESAU CHEMBE

versus

THE STATE

HIGH COURT OF ZIMBABWE  
TSANGA J

HARARE, 9 & 10 April 2015

**Bail Application**

*A Taruvinga,* for the applicant *I Muchini,* for the respondent

TSANGA J: This is an application for bail pending appeal in a matter in which the applicant Esau Chembe was convicted of contravening s 45 (1)b of the Parks and Wildlife Act [*Chapter 20:14*] which relates to possession of ivory. He was however sentenced under s128 (1) (b) of this Act which, in the absence of special circumstances, imposes a mandatory sentence of nine years for a first offence where the possession involves the unlawful possession of trading in ivory or any trophy of a specially protected species. He has appealed against both conviction and sentence and accordingly seeks bail pending the hearing of the matter.

In his papers the applicant addressed the key essentials of bail pending appeal which hinge on prospects of success; likelihood of abscondment; potential lengthy delay in hearing the appeal and the right to freedom in tandem with the offence. It was on prospects of success on appeal that the applicant laid most emphasis on at the hearing largely on the ground that the issue of special circumstances was canvassed inadequately by the court and that in any event the fact that the accused would be sentenced under this provision was only brought out at the sentencing stage. Whilst the accused was represented during the presentation of the state case in the magistrate’s court, his lawyer had renounced agency when the defence case was heard. He was thus a self-actor at the time of his defence. Suffice it note that the impugned portion of the record dealing with special circumstances reads as follows:

**“SPECIAL CIRCUMSTANCES**

Purpose explained to accused and understood

Q Did you understand my explanation

A Yes

Q Do you have special circumstances?

A Yes

Q Go ahead

A. I was trying to fend for my family that is why I committed the offence. Life is difficult

nowadays. I could not pay for the bills, school fees and to buy fertilisers.

N.F.S

STATE.

This does not amount to special circumstances. There are other means in which accused could have resorted to.”

It is indeed apparent from the above that what special circumstances are as explained by the magistrate was not captured in the record. The state opposed bail on the grounds that there no prospects of success against both conviction and sentence since the evidence led clearly shows that he was in possession of the ivory in question. The state also fears that he will abscond if he is granted bail since where there are no special circumstances, the mandatory sentence is nine years. It was the state’s position that no special circumstances were shown and that in any event, even if the details of what was put forward by the magistrate as constituting such was not captured in the record, the inference is that they were explained and deemed understood.

Much therefore depends on the prospects of success against conviction and sentence in light of the objections raised to the manner in which special circumstances are captured on record. The accused relied on the case of *S* v *Chaerera* 1988 (2) 226 (S) in which the court was of the view that the magistrate should have gone into detail in explaining special circumstances and where the matter was sent back to the magistrate’s court for these to be properly explained. Without the record capturing what it is exactly that was explained as constituting special circumstances, it would appear to me that the accused has a point at least regarding prospects of success on the sentence, since there is a likelihood that the case may in fact be remitted back to the magistrate’s court for the explanation of special circumstances to be fully captured, or the court may decide that the mandatory sentence was unwarranted.

Also, purely as *obiter dicta* whether poverty can repeatedly be said to not constitute a special circumstance in this country where more than 80% of the population for over a decade and counting, continue to lack formal employment, is arguable. Such an approach would seem to be a blinkered approach to the reality encountered by ordinary citizens in their quest for survival since a state of economic collapse in itself fuels illegality on a massive scale as people try to cope by all means possible. Whilst criminality can never be excused, the context that has fuelled it, such as that which currently characterises the local economic situation, cannot in my view, be entirely overlooked as a special circumstance. The amount of ivory involved, was 4.35 kgs said to be valued at $739.00 according to the state outline – perhaps an indicator “survival induced criminality”.

In essence, my view is that the appeal, at least on sentence, is arguable. However there would appear to be less prospects of success on the conviction itself. One of the primary consideration in determining bail pending appeal is whether the accused will serve his sentence if released on bail in the event of the appeal not succeeding. On abscondment it was argued that he is unlikely to do so as he is of fixed abode and has lived in Zimbabwe all his life. As the accused has already been convicted, there is of course a heightened risk of abscondment in light of the fact that imprisonment still looms as a possibility. Abscondment is real rather than imagined under the circumstances since accused already has a fair idea of what he can expect to serve should the appeal go against him.

The amount of bail suggested of $100.00 pending appeal is in my view unsatisfactory to allay the real fear of abscondment. Moreover it treats the accused as if he still has the presumption of innocence when he does not. It has to be an amount that will induce him to return to serve whatever sentence rather than risk the forfeiture of such sum of money should the court find that the appeal lacks merit.

1. Accordingly, Applicant is hereby admitted to bail on the following conditions:-

1.1 That he pays the sum of US$400.00 (four hundred United States Dollars) to the Registrar of the High Court in Harare.

1.2 That he resides at 5875 Dzivarasekwa Extension Harare, until the finalisation of the matter.

1.3 That he reports once every week on Fridays between 06:00am and 06:00pm at

Dzivarasekwa Police Station.

1.4 That he shall not interfere with State witnesses until the matter is finalised.

*Mutuso, Taruvinga and Mhiribidi Attorneys,* applicant’s legal practitioners

National Prosecuting Authority, for the respondent