Judgment No. HB 79/2003
Case No. HCB 40/2003

SIDINGIMUZI SIBANDA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 25 MARCH AND 10 JULY 2003

N K Fuzwayo for the applicant
Mrs M Cheda for respondent

Bail Application

NDOU J: The allegations against the applicant are that on 27 December 2001, at Johannesburg International Airport, he, in the company of others, who are on remand here and in South Africa, armed with firearms and using threats and violence stole jewellery, cash in United States dollars all valued at ZAR117 million. The applicant and some of his co-accused absconded from South Africa and sought refuge in Zimbabwe. The applicant was on the run until his arrest in Zimbabwe on 22 October 2002. The police also recovered the robbery weapon at the applicant's home. The applicant was also found with part of the stolen money. As the offence was committed in South Africa, the South African Police Service indicated their interest in having the applicant formally extradited to their jurisdiction. The Zimbabwe authorities can only hold the applicant for up to two months pending extradition. After the lapse of the two months period the applicant is entitled to have his bail application considered like any other suspect pending trial in Zimbabwe. The applicant was arrested on 22 October 2002. The question of holding applicant in custody pending extradition is, therefore, no longer a determining factor *in casu*. The South Africans have had their two months and have failed to make a formal request

for extradition. The applicant's bail application stand to be determined just like any other suspect in Zimbabwe. In the circumstances all the submissions made by both counsel in respect of compliance with the provisions of the Extradition Act [Chapter 9:08] are rendered irrelevant for the determination of this application. Further, the issue of the legality of the applicant's arrest is not, in my view, affected by the provisions of the Extradition Act. This is so because the applicant was arrested for an armed robbery allegedly committed in the city of Bulawayo in Zimbabwe. For the arrest for the latter robbery the police are not at all governed by the provisions of the Extradition Act. The arrest for the latter robbery is governed by the provisions of the Criminal Procedure and Evidence Act [Chapter 9:07] . Looking at the facts and submissions at my disposal, the arrest of applicant is not assailable. In light of the above findings the applicant's bail application will be determined pursuant to the provisions of section 116(7) of the Criminal Procedure and Evidence Act.

Further allegations against the applicant are that he has interfered with police investigations in that he connived and colluded with police officers by bribing them thus hindering his early arrest and recovery of the proceeds of crime. As alluded to above, the applicant, according to Detective Assistant Inspector Sibanda, "was only arrested on 22 October 2002, having committed a case of armed robbery at the Chicken Inn, Robert Mugabe Way and 9th Avenue, Bulawayo, where in the company of four others they robbed Lee Roy and Lorraine Moyo of $1 700,00 and $9 500,00 respectively, Bulawayo Central CR 1353/10/2002 refers."

Further, upon his arrest the applicant held a forged Zimbabwean National Identity Certificate acquired in contravention of applicable legislation for registration of birth.

Further, the applicant was arrested in possession of a Taurus revolver loaded with

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Strength of state case

The strength of the state case and the probability of securing a conviction are factors relevant in bail applications – see *S* v *Lulame* 1976(2) SA 204 (N); *S* v *Hartman* 1968(1) SA 278(T) and *Ndlovu* v *S* HH177-01. The applicant was, therefore, on the right patch where he pointed out weaknesses in the state case. He however, concentrated on the South African armed robbery and not the other local charges. As far as the South African charge is concerned, I agree with his submission that armed robbery is not, per se, a continuing offence. But once it is established that he brought the stolen property to Zimbabwe he can only be charged with theft as the theft will have continued into our jurisdiction. Save for the other charges, I agree that if the applicant was facing the South African armed robbery only I would have ruled in favour of his liberty on account of the fact that he had been in custody for around five months with no discernible steps taken by the South African authorities to have the applicant extradited. After two months the state would have problems in holding

him in custody pending extradition. The applicant would, in such circumstances, be a suitable candidate for bail.

Risk of absconding

As all highlighted above the applicant has other charges of armed robbery, corrupting police officers, unlawful possession of a firearm and forging official documents. Individually, these are serious charges. The armed robbery would

invariably attract a long custodial sentence – see *S* v *Zuze* GS 261/81; *S* v *Dumani* HB-64-82; *S* v *Chimone* HH-327-83 and *S* v *Chidoipa & Ano* HH-60-84. The same applies to the charge of corruption.

In the circumstances, the seriousness of these offences and the likelihood of severe sentence being imposed is an inducement for the applicant to abscond. Lengthy custodial sentences are likely to tempt the applicant to abscond – see *S* v *Hudson* 1980(4) SA 145(D) and *S* v *Ito* 1979(3) SA (W) 740. This is just one of the factors that I will take into account against the applicant. I cannot however, deny the applicant bail solely on this factor.

Fears of interference with evidence and/or investigations

There is chance that the applicant, if released on bail may interfere with evidence and investigations against him. He has already shown not only a propensity, but also capacity to do so. He allegedly bribed the policemen investigating this matter. He tried to conceal his identity by acquiring a forged identification certificate under that name of Melusi Moyo. The serial numbers on the robbery weapon were filed off. He absconded from the Rainbow Hotel room 103 after he learnt that the police were looking for him. This is a factor that will weigh against him. In terms of section 116(7)(b) *(supra)* the court is empowered to refuse to admit a person to bail if

it considers that such person when granted bail is "likely to interfere with evidence". The use of the word likely is indicative of a possibility. The state has to establish a mere likelihood to interfere with evidence.

In casu, the fact that the applicant is facing serious charges coupled with the fears that he may abscond or interfere will constitute sufficient ground from refusing

him bail – see *S* v *Hussey* 1991(2) ZLR 187; *S* v *Chiadzwa* 1988(2) ZLR 19; *S* v *Maharaj* 1976(3) SA 205 and *S* v *Maratera* SC 93-91.

It is trite that in such applications the court has to strike a balance between the interests of society (the applicant should stand trial and there should be no interference with the administrations of justice) and the liberty of an accused (who, pending the outcome of his trial, (is) presumed to be innocent) – see *Attorney-General, Zimbabwe* v *Phiri* 1988(2) SA 696 (ZHC) and *R* v *McCarthy* 1906 TS.

The onus is upon the applicant to prove on a balance of probability that the court should exercise its discretion in favour of granting him bail. In discharging this burden, the applicant must show that the interests of justice will not be prejudiced, namely, that it is likely that he will stand his trial or otherwise interfere with the administration of justice or commit an offence.

Taking all the above factors into consideration I hold the view that the applicant is not a suitable candidate for bail. It is for the above reasons that I refused him bail on 25 March 2003. I indicated then that the reasons for the order will follow and this judgment provides the reasons.

Calderwwod, Bryce Hendrie & Partners applicant's legal practitioners
Attorney-General respondent's legal practitioners