Judgment No. HB 125/04
HCB 185-6/04

JOSEPH MOYO

And

ENOCK MOYO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 23 SEPTEMBER 2004

S Mazibisa for the applicants
A Gaibie for the respondent

Bail Application

NDOU J: This is an application for bail pending trial. The applicants aged 58 and 64 are alleged to have murdered their nephew Natural Ndebele. It is alleged that prior to the murder, the applicants had each, on several occasions made advances to the deceased's wife who is alleged to have turned down their love proposals. On 17 May 2003 the applicants are alleged to have killed the deceased by *inter alia*, stabbing him with an "Okapi" knife in the chest. They thereafter threatened to kill the deceased's wife, the witness to the murder if she reported the matter to the police. The threats had the desired effect for a period of almost a year she did not report the murder to the police. A blood stained Okapi knife was recovered at the scene. The deceased's wife eventually broke her silence and reported the matter to the police. The respondent opposes the application on the basis, first, that the applicants will abscond and, second, that they will interfere with state evidence or witnesses. The applicants' attitude is that there is no likelihood of their abscondment as they are not linked to the murder. They state that they have no passports or travel

documents to enable them to depart from the jurisdiction of the court. As they perceive the allegations against them to be weak for want of a nexus between them and the offence they say that there is no inducement to abscond. Their defence is one of an alibi. On the question of interference with the state witnesses or evidence they briefly state that they did not threaten the deceased's wife as alleged by the state.

In such applications the court has to strike the balance between the interests of society (the applicant should stand trial and there should be no interference with the administration of justice) and the liberty on accused (who pending the outcome of his trial) is presumed to be innocent – see *Attorney-General, Zimbabwe* v *Phiri* 1988(2) SA 696 (ZC); *R* v *McCarthy* 1906 TS; *Sibanda* v *S* HB-79-03; *S* v *Hussey* 1991(2) ZLR 187 and *S* v *Aitken* (2) 1992(2)ZLR 463(SC).

The respondent filed an affidavit deposed to by the investigating officer in support of its opposition. I will consider the factors raised in turn. Fears of interference with evidence and/or witnesses are genuine in this case. The applicants have already shown ability to do so by successfully preventing the witness from reporting to the police. They threatened a key witness and she consequently did not report the murder for almost a year. The respondent's fears are genuine. In terms of section 116(7)(b) of the Criminal Procedure and Evidence Act [Chapter 9:07] 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 respondent has to establish a mere likelihood to interfere with evidence. The onus is upon the applicants to prove on a balance of probability that the court should, in light of the evidence adduced or facts placed before the court exercise its discretion in favour of granting them bail. They have to show that it is likely that they will stand trial and

that they will not interfere with the administration of justice – *De Jager* v *Attorney-General, Natal* 1967(4) SA 143(D) and *Masuku* v *S* HB-57-03. In this case, the applicants have submitted that there is no casual link between them and the murder as alluded to above. I understand them to imply that the case against them is weak. I agree that the strength of the prosecution case (and the probability of conviction) is a factor considered in bail applications – *S* v *Lulame* 1976(2) SA 204(N); *S* v *Hartman* 1968(1) SA 278(T) at 281 and *Ndlovu* v *S* HH-177-01. The respondent states that the deceased's wife witnessed the murder. This cannot be said to be weak testimony. If she is believed by the trial court the respondent has a strong case. This factor, coupled with the seriousness of the murder, i.e a capital offence constitute sufficient inducement for the applicants to abscond. Their children in South Africa merely present an opportunity they can take advantage of. If one adds their death threats against the key witness to the murder the inescapable conclusion is that they are not suitable candidates for bail. Accordingly, I refuse them bail. Their application be and is hereby dismissed.

Cheda & Partners applicants' legal practitioners
Attorney-General respondent's legal practitioners