

**TAFADZWA BLESSING GOREMUSANDU**

**And**

**LANGTON CHARLES MUZA**

**And**

**TRUST MPOFU**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 22 JULY 2021 & 29 JULY 2021

**Application for bail pending trial**

*Ms. S. Sithole*, for the applicants  
*K.M. Nyoni*, for the respondent

**DUBE-BANDA J:** This is a bail application pending trial. Applicants are jointly 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 22<sup>nd</sup> May 2021, 1<sup>st</sup> applicant and 3<sup>rd</sup> applicant phoned the complainant on the pretext that they had 200 grams of gold which they intended to sell to the complainant. On meeting complaint, instead of producing the gold, 3<sup>rd</sup> applicant grabbed him from behind whilst 2<sup>nd</sup> applicant stabbed him thrice on the back. 1<sup>st</sup> applicant stood guard while 1<sup>st</sup> and 3<sup>rd</sup> applicant attacked the complainant. The applicant forcibly took complainant's cash amounting to USD \$16 000.00, a cell phone and gold worth USD \$4 000.00, and drove away with complainant's motor vehicle a Toyota Belta registration number AEP 0634.

This application is opposed in respect of the 1<sup>st</sup> applicant. It is not opposed in respect of 2<sup>nd</sup> and 3<sup>rd</sup> applicants. It is contended that there are no compelling reasons for the continued incarceration of 2<sup>nd</sup> and 3<sup>rd</sup> applicants pending trial. At the commencement of this hearing, *Ms. Sithole*, counsel for the applicants filed a notice of withdrawal in respect of the 1<sup>st</sup> applicant. According to the affidavit filed by the investigating officer, 1<sup>st</sup> applicant is on a warrant of arrest. This warrant arises from the fact that he was charged, convicted and sentenced to

eighteen years imprisonment for the crime of stock theft. He noted an appeal, and pending the finalisation of his appeal he was released on bail. His appeal has been dismissed. He has not submitted himself to commence serving his sentence, and warrant of arrest has since been issued. In the result, they are now two applicants before court.

In support of their bail application, applicants filed a bail statement in terms of rule 5(1) of the High Court of Zimbabwe (Bail) Rules, 1991.<sup>1</sup> The bail statement is not in compliance with the peremptory requirements of the rule 5(1). In their bail statement applicants aver that they are gainfully employed. Rule 5(1) (c) requires that if the applicant is employed, he must provide his employer's name and address and the nature of his employment. The employer's name is not provided; the address of the employer is not provided; and the nature of their employment is not provided. Rule 5(1) (d) (ii) require that the court by which and the date on which the applicant was last remanded must be provided. The court by which the applicants were placed on remand, has not been provided. The date on which the applicants were last remanded is not provided. Rule 5(1) (d) (iii) require that the police criminal record number of the case, the name of the police officer in charge of investigating the case and the police station at which he is stationed be provided. This requirement has not been complied with. Rule 5(1)

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<sup>1</sup> **5. Bail applications**

(1) An application to a judge for bail in terms of section 106 or 112 of the Criminal Procedure and Evidence Act [Chapter 9:07] shall be filed with the registrar and shall consist of a written statement setting out —

- (a) the name of the applicant; and
- (b) the applicant's residential address; and
- (c) if the applicant is employed, his employer's name and address and the nature of his employment; and
- (d) where the application is made before the applicant has been convicted—
  - (i) the offence with which the applicant is charged; and
  - (ii) the court by which and the date on which the applicant was last remanded; and
  - (iii) the court criminal record book number, if that number is known to the applicant; and
  - (iv) the police criminal record number of the case, the name of the police officer in charge of investigating the case and the police station at which he is stationed, if those particulars are known to the applicant;and
- (e) where the application is made after the applicant has been convicted and sentenced—
  - (i) the offence of which the applicant was convicted and the sentence that was imposed; and
  - (ii) the court or courts which convicted the applicant and imposed sentence upon him; and
  - (iii) the court criminal record book number, if that number is known to the applicant; and
  - (iv) the date or dates on which the applicant was convicted and sentenced;and
- (f) whether or not bail has previously been refused by a magistrate and, if it has been refused—
  - (i) the grounds on which it was refused, if the grounds are known to the applicant; and
  - (ii) the date on which it was refused; and
- (g) the grounds on which the applicant seeks release on bail; and
- (h) the amount of bail which the applicant is prepared to give and the names of any persons who are prepared to stand as sureties for his attendance and appearance.

(f) require applicants to state whether or not bail has previously been refused by a magistrate and, if it has been refused, (i) the grounds on which it was refused, if the grounds are known to the applicant; and (ii) the date on which it was refused. This requirement has not been complied with. This court, on the papers is in the dark whether it is being approached as a court of first instance, or as a court of appeal. The distinction is necessary to be always borne in mind. This is because in the former, the High Court exercises its original jurisdiction, whereas in the latter it is being called upon exercise its appellate jurisdiction.

What has exercised my mind is whether the noncompliance with rule 5(1) may be condoned in terms of rule 4(a) of the Rules.<sup>2</sup> I take the view that on the facts of this case the noncompliance with rule 5 (1) constitutes substantial departure from the rules. Applicants are charged with a serious crime of robbery, where violence was allegedly deployed to forcefully deprive the complainant of his cash, gold and motor vehicle. It is important in such a bail application that there be compliance with rule 5, to enable this court to carefully consider the competing interests, on one hand the liberty of the applicants, and on the other hand the interests of society and the proper administration of justice. I hold the view that in the circumstances of this case, the noncompliance with the peremptory requirements of rule 5 (1) is fatal to this application.

In a bail application, there are two competing interests. Both derive from the Constitution. On one hand is the constitutional right to right to liberty. A court does not lightly deprive an individual of his or her liberty. On the other hand the interests of society and the proper administration of justice. Although the presumption of innocence is enshrined in the Constitution, the Constitution also provides that the deprivation of an individual's liberty may be authorized by law. In this balancing act, a court has to make a determination whether the interests of justice permit that the accused be released on bail pending trial. For the court to discharge such a function, all the relevant material facts required in terms of rule 5(1) of the Rules must be explicitly and succinctly provided in the bail statement. These are matters of

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<sup>2</sup> 4. Departures from rules and directions as to procedure

The High Court or a judge may, in relation to any particular case before it or him, as the case may be—  
(a) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice.

substance and not form. The court may then, with all the material facts and evidence before it, perform its judicial function.

It is trite that a bail application should in principle be heard as a matter of urgency because it affects personal liberty. See: *Magistrate, Stutterheim v Mashiya* 2003 (2) SACR 106 (SCA). However, this court must balance the right to liberty of the applicants with the interests of society and proper administration of justice. This court may only do so when the requirements rule 5(1) are met and complied with. All the relevant matters required by the rule 5(1) must be stated in bail statement, and are of equal importance. The application merely contains detailed submissions of law. This application is fatally defective in that it is not in compliance with rule 5(1) of the Rules. This court cannot engage with the merits.

The grant or refusal of bail is a judicial function.<sup>3</sup> It is the court that releases, or declines to release an accused on bail, it must therefore be satisfied that the concession made by the prosecution factors into the equation the law on bail and the particular facts of the case. The court must be satisfied that the concession has been properly made. Representations made by the prosecution form part of the mosaic that the court has to consider in the determination of the matter. On the facts of this case, this court would not even start to engage with the concession, until such time there has been compliance with rule 5(1).

In terms of rule 4(b) this court may give directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient. I hold the view that in such a case, the proper course would be, in terms of rule 4(b), for this court to strike off this application from the roll. The applicants can then comply with the rules and re-set down this bail application. See: *Vincent Kondo and Edmore Marwizi Mapuranga versus The State* HH 99/17.

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<sup>3</sup> Section 117(5) of the Criminal Procedure and Evidence Act [Chapter 9:07] says:- Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty to weigh up the personal interests of the accused against the interests of justice as contemplated in subsection (4).

**Disposition**

In the result, I order as follows: This application being fatally defective, it be and is hereby struck off the roll for noncompliance with rule 5(1) of the High Court of Zimbabwe (Bail) Rules 1991.

*Mutatu, Masamvu & Da Silva-Gustavo*, applicants' legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners