

DUMISANI MOYO
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO: 30 October 2017 and 28 February 2018

Bail pending extradition

Mr *O. Mafa*, for the applicant

Mr *T. Chikwati*, for the respondent

MAFUSIRE J:

[1] At one stage the applicant, a local citizen, faced allied charges in both Zimbabwe and Botswana relating to the unlawful hunting, killing and possession of rhinoceros horns, in contravention of kindred statutes that deal with the protection and preservation of wild life in the two countries. The charges arose out of the applicant's alleged conduct, in league with other persons, both in this country and in Botswana, and at different times. In one statement, which was later retracted, the Zimbabwean police had described him as

“... a leader of a syndicate whose membership extends beyond the geographical boundaries of this country. His ability to link up with undocumented foreign nationals suggests knowledge on his part of the means that are employed to smuggle them into and out of the country without being detected ...”

[2] On 30 June 2017 I granted the applicant bail pending trial in respect of the Zimbabwean charge of unlawfully hunting and killing a rhinoceros, in contravention of the Parks and Wildlife Act, *Cap 20:14*. At that stage the applicant had not yet been arrested in respect of the charge in Botswana. No information pertaining to his alleged criminal activities there was as yet available to the court.

- [3] The bail conditions were more stringent than usual. The applicant would pay a recognizance in the sum of \$200; surrender his passport; cede as collateral security his right, title and interest in a certain immovable property; and report to the police once every week.
- [4] Three months later the applicant was back in court, this time seeking bail in respect of the charge in Botswana. Soon after his release on bail in respect of the charge in Zimbabwe, he had been placed in custody at the instance of the Botswana Government which had formally applied for his extradition.
- [5] The State opposed the application for bail. But on 30 October 2017 I granted it. The bail order was on the same terms and conditions as the June 2017 order. The State had now withdrawn the charge the applicant faced locally. He was in custody solely for the purpose of extradition.
- [6] The applicant had apparently skipped bail in Botswana. According to the application for extradition that the Government of Botswana submitted to the Zimbabwean authorities, he had been arrested in Botswana in 2012. Together with three other persons – all Botswana nationals – he had been charged with the unlawful possession of a rhinoceros horn. On 23 October 2012 he had been remanded out of custody on bail by a Botswana magistrate's court sitting at Francistown. He would be wanted back at that court on 29 November 2012 and subsequent months. However, he failed to appear, either on that date, or on any other. On 17 December 2014 the Botswana magistrate's court issued a warrant for his arrest. The warrant was subsequently lodged with the Zimbabwean authorities, eventually leading to his arrest in July 2017.
- [7] The current bail application pending extradition was lodged in September 2017. However, it had to be postponed. The information initialled placed before the court was woefully inadequate to enable an informed decision to be made. Eventually some salient details emerged, albeit sporadically.
- [8] The applicant said soon after his release on bail by the Botswana court, he had simply come back to Zimbabwe because his daughter had fallen sick. He had told no one. He

claimed he had not appreciated that he had to tell anyone. I did not believe him. Nonetheless this was just one of several factors that I would take into account.

- [9] In terms of the Botswana Wildlife Conservation and National Parks Act, *Cap 38:01*, the equivalent of our own Parks and Wildlife Act, a conviction for unlawful possession of a rhinoceros horn carries a mandatory fine of one hundred thousand Botswana Pula [P100 000], and imprisonment for fifteen [15] years. Comparatively, that is quite steep. The equivalent in our jurisdiction, for a first offence, is a mandatory minimum of nine [9] years imprisonment, which can be reduced if there are special circumstances justifying a lesser sentence.
- [10] The State's opposition to the applicant's release on bail largely hinged on the fact that the applicant was on a warrant of arrest because he had skipped bail in Botswana. It said a person such as him was not a suitable candidate for bail because he had already shown a propensity to evade justice.
- [11] Undoubtedly, there are obligations thrust on state parties to extradition agreements or treaties to make such instruments effectual by handing over cross-border criminals to thwart their designs to escape justice for crimes committed by them in one country and taking refuge in another. John van der Berg: *Bail – A Practitioner's Guide*, 3rd ed., Juta, at pp 287 – 288, says a [judicial officer] must exercise his power to grant bail with extreme caution in a manner that would not conflict with treaty obligations between the foreign state and the custodian one.
- [12] Initially the applicant's application for bail pending extradition substantially relied on the fact that he was facing another charge here in Zimbabwe and that therefore the extradition process had to be postponed pending the finalisation of his trial locally. In this regard, he had already applied to the Ministry of Home Affairs, the relevant authority, for that postponement. The application to the Ministry was based on s 28 of the Extradition Act, *Cap 9:08*. It says:

“28 Postponement of extradition

If, in terms of this Act, a request is received for the extradition of a person against whom criminal proceedings have been instituted in Zimbabwe or who is undergoing any punishment in Zimbabwe in respect of any offence, the Minister may postpone the issue of an authority to proceed in terms of this Act or direct that all proceedings in connection with the extradition of the person in terms of this Act be postponed, as may be appropriate, until—

- (a) the criminal proceedings have been completed and the person concerned has undergone any punishment that may have been imposed upon him in respect of those proceedings; or
- (b) the person concerned has undergone the punishment that he was undergoing when the request was received; as the case may be:

Provided ...[*irrelevant*] ...”

[13] However, the State’s withdrawal of the Zimbabwean charge completely disarmed the applicant with regards to his reliance on s 28 aforesaid. His further argument for bail reverted to the usual bail principles as set out in the Constitution of Zimbabwe, the Criminal Procedure and Evidence Act *Cap 9:07*, and case authority. Section 26 of the Extradition Act says:

“26 Bail and legal representation

- (1) A person who has been arrested for the purposes of extradition in terms of this Act shall have the same right to bail and legal representation as if he were arrested in connection with a criminal offence for which he was to be charged within Zimbabwe.
- (2) [*irrelevant*]

[14] In considering this application, I took into account the fact that the criminal justice process is such that there is an inevitable delay between the arrest of the accused and his subsequent trial. Extradition worsens the situation. It is an inherently cumbersome process which often involves extensive communication and negotiations between participating states, followed by a trial and, in some instances, an appeal or review. It follows that an accused can be deprived of his liberty for lengthy periods: see John van der Berg, *supra*, at p 286. Therefore, in such situations the court should lean in favour of granting bail, unless compelling reasons militate against doing so.

- [15] Our new constitutional dispensation stresses the presumption of innocence of an accused person until proved guilty by a trial process: s 70. The right to bail, in the absence of compelling reasons to deny it, has been entrenched as one of the fundamental human rights and freedoms: s 50.
- [16] In the present application, the major factor militating against the applicant's quest for pre-trial liberty was the fact that he had skipped bail in Botswana and absconded to Zimbabwe. However, other than the statements and depositions by the Botswana prosecuting authorities; the evidence in support of the charge there; and the warrant of arrest against the applicant, the bail order of the magistrate's court at Francistown was not placed before me. As such, none of the Counsel could enlighten me as to the bail conditions, if any, imposed by the Botswana court. However, this factor alone was not decisive. It was common cause that the applicant had jumped bail.
- [17] The other negative factor against the applicant was that from the perspective of the prescribed penalty, unlawful possession of a rhinoceros horn seems a very serious offence in Botswana. It also is in Zimbabwe. It is a bail principle that the seriousness of an offence is a relevant factor to take into account in an application for bail, the assumption being that the prospect of a lengthy custodial sentence is an inducement for an accused person to abscond. But again, this factor is not by itself decisive: see *S v Hussey*¹ and *Aitken & Anor v Attorney General*². No single factor is by itself decisive anyway.
- [18] The major factor in favour of the applicant was that the Botswana charge pre-dated the Zimbabwean one, but that despite his having been released on bail in respect of the Zimbabwean charge, he had not absconded. The State did not refute his submission that he had religiously complied with the bail conditions locally.
- [19] The other factor in favour of granting bail was that the order of June 2017, whose conditions the applicant was willing to abide by, was quite stringent. The quantum of bail

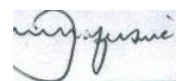
¹ 1991 [2] ZLR 187 [S], at p 190

² 1992 [1] ZLR 249 [S]

amounts generally ordered by this court at this station is \$50. Sometimes they are as low as \$20, or even less; sometimes even free. Rarely are they pegged at \$100 or above. But in the June 2017 order, the bail amount had been assessed at \$200 which, incidentally, the applicant had struggled to raise³. On top of that, should he abscond, the applicant stood to lose his family residence which he had ceded as security. Therefore, coupled with the fact that the charge in Botswana was mere allegations which he denied, he stood to lose more if he absconded than if he were to wait and be extradited to Botswana to clear his name there.

[20] After weighing all the above factors, and taking into account the constitutional imperatives aforesaid; the age of the applicant [52 years old]; his marital status [married with four children], and his assurance that whenever the authorities from the two countries were ready for his extradition, he would present himself, I considered that it was in the interests of justice that he be released on bail upon the same stringent conditions as before.

28 February 2018



Mutendi, Mudisi & Shumba, legal practitioners for the applicant
National Prosecuting Authority, legal practitioners for the respondent

³ It was made known that despite the order having been granted on 30 June 2017, it was not until mid-July 2017 that the applicant finally raised the bail money.