

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE  
(CRIMINAL DIVISION)**

**CR-HC-POS-BAIL-572-2022-1**

**IN THE MATTER OF THE**

**BAIL APPLICATION OF**

**ANDREW FELIX**

**APPLICATION TO VARY A BAIL ORDER**

**Before The Hon. Mr. Justice Geoffrey Henderson**

**Appearances:**

Ms. Stacy Laloo-Chong on behalf of the State

Mr. Darren Mitchell on behalf of the Applicant

**DATE DELIVERED: 16<sup>th</sup> March 2023**

## **RULING ON AN APPLICATION TO VARY A BAIL ORDER**

### **Background**

1. On 1<sup>st</sup> November 2018, the Applicant was committed, before a Port of Spain Magistrate, to stand trial for the offence of murder and he is awaiting the filing of an indictment in his matter. The Courts now have a discretion to grant bail to persons charged with the offence of murder<sup>1</sup>.
2. By Order dated 14<sup>th</sup> November 2022, this Court granted bail to the Applicant with a surety to be approved by the registrar of the Supreme Court in the sum of One Million, Two Hundred Thousand Dollars (\$1, 200,000.00). The further conditions of bail were
  - i. that the Applicant surrender, if any, his Passport to the Registrar, Supreme Court.
  - ii. the Applicant report to the Barataria Police Station every Tuesday and Friday between the hours of 7:00 a.m. and 7:00 p.m.
  - iii. the Applicant reside at LP 56, 7th Avenue, Malick, Barataria. If the applicant has to move, he is to make an application to the Court for a review of this order.
  - iv. the Applicant remain indoors between the hours of 7:00 p.m. and 7:00 a.m., daily
3. To date, the Applicant has been unable to access bail. He now applies to this Court to have the bail order of 14<sup>th</sup> November 2022 varied in light of the recent decision of Gobin, J. in the matter of **Nillon Baggoo v The Attorney General CV2020-03015** and **Benjamin Martin v The Attorney General CV2021-00626** in which the Court declared the bail policy for the approval of sureties of the Judiciary to be illegal, ultra vires and unconstitutional.

### **The case of Nillon Baggoo v The Attorney General CV2020-03015 and Benjamin Martin v The Attorney General CV2021-00626.**

4. The decision in **Baggoo** and **Martin** deals with the problem confronting the Judiciary as it deals with bail applications. While all persons charged now have the right to apply for bail, a criminal justice system characterized by lengthy pre-trial delay serves to

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<sup>1</sup> Attorney General of Trinidad and Tobago v Akili Charles [2022] UKPC 49

incentivize a greater number of applications from persons to exercise this right, where in the case of such applicants, there may be grounds to believe that if granted bail, these applicants may fail to appear at their hearing. Where bail is granted in those circumstances, the use of a surety or sureties is appropriate.

5. The claimants in **Baggoo** and **Martin** challenged the constitutionality of the process instituted by the Judiciary for the approval of a surety before bail can be accessed by the accused. The claimants submitted that the practice breached the rights of an accused person to protection of the law and due process. The claimants remained in custody for 18 days in the case of Nillon Baggoo and 7 days in the case of Benjamin Martin, pending the approval of a surety.
6. The decision in **Baggoo** and **Martin** found that the process<sup>2</sup> used by the Judiciary as ordered by the respective Magistrates, to investigate the satisfactoriness of such sureties was misconceived and without jurisdiction and that the resultant delay breached the constitutional rights of both applicants.
7. At paragraph 90, the learned Judge had this to say

*“The surety approval policy of the Judiciary is illegal. Approval of a surety to take the recognisance – a relatively simple exercise – has been replaced by an oppressive regime of rules and requirements that effectively deprives persons granted bail of their constitutional rights to liberty, to bail, to due process and to protection of the law. It inflicts unlawful executive detention in circumstances that amount to pre-trial punishment. In the circumstances the Court holds that the Claimants are entitled to Judgment.”*

### **The Law and Reasoning**

8. There is no dispute that this Court has a discretion in granting or refusing an application for bail. In making an order for bail of an accused, the Court can make such an order upon the condition that a surety be provided to secure the surrender of an accused.
9. **Section 12** of the **Bail Act Chap 4:60** contains general provisions relating to bail. It states that a Court may require any person applying for bail to provide, as a condition for bail before his release, a surety to secure his surrender to custody<sup>3</sup>. Where it appears that the applicant is unlikely to remain in Trinidad and Tobago until the time required

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<sup>2</sup> The process to which Gobin, J. refers is thoroughly outlined at pages 5 to 9 of her judgment

<sup>3</sup> Bail Act Chap 4:60 , section 12(2)

for his appearance, he may be required, before being released on bail, to give security, and the security may be given by him or on his behalf.<sup>4</sup> Such security can be in the form of cash, a certified cheque, a bond issued by a licensed financial institution, a charge on immovable property or such other forms of security or combinations as the Court sees fit.<sup>5</sup>

10. The Court may require any person applying for bail to provide, as a condition for bail before his release, a surety to secure his surrender to custody<sup>6</sup>. The surety takes on the responsibility of securing the attendance of the accused at trial and ensuring his compliance with any other bail conditions set by the Court. **Section 16(3)** of the **Bail Act** provides that the Court may fix an amount by which the surety is to be bound. In addition to this, the surety understands that they may forfeit the court determined sum of money in the event that the accused fails to comply with one or more of the bail conditions or fails to appear at his hearing when required.
11. The policy of the Judiciary that was under consideration in **Baggo** and **Martin**, related to the procedure consequent upon the Magistrate granting bail, where in both cases, an express condition of the applicants' bail was that a surety was required and that such surety had to be approved by the Clerk of the Peace.
12. **Section 16** of the **Bail Act** applies where a person is granted bail on the condition that he provides a surety for the purpose of securing his surrender to custody. **Section 16 (2), (3) and (4)** of the **Bail Act** provides as follows:
  - (2) In considering the suitability of a proposed surety referred to in subsection (1), the Court shall—
    - (a) have regard, amongst other things, to—
      - (i) the surety's profession, occupation, trade or business;
      - (ii) his character and his previous convictions, if any; and
      - (iii) his proximity, whether of kinship, place or residence or otherwise, to the person for whom he is to be a surety; and

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<sup>4</sup> *Ibid*, section 12(4)

<sup>5</sup> Bail Act Chap 4:60 as amended by Bail ( Access to Bail ) Act, no 11 of 2017

<sup>6</sup> *Ibid*, section 12(2)

(b) require the surety to make a statutory declaration in the form set out in the Second Schedule.

(3) Where a Court grants a person bail in criminal proceedings under subsection (1), but is unable to release him because no surety or no suitable surety is available, the Court shall fix the amount in which the surety is to be bound and subsections (4) and (5) shall apply for the purpose of enabling the recognisance of the surety to be entered into subsequently

(4) A recognisance of the surety under subsection (3) may be entered into before such of the persons or descriptions of persons as the Court may by order specify or, if it makes no such order, before any of the following persons:

(a) where the decision is taken by a Magistrate's Court, before any Magistrate or Clerk of the Peace;

(b) where the decision is taken by the High Court or the Court of Appeal, before any of the persons specified in paragraph (a) or, where the Rules of the Supreme Court so provide, by a person of such other description as is specified in the Rules.

13. In my respectful view, there appears to be a genuine confusion with the application of **section 16 (3)** which imposes some requirement on court officials to make enquires to ensure that any surety tendered would, if necessary, be able to meet his or her financial obligation and that the recognizance is realistic on the one hand, and the relevance of **section 12 (4A)** of the **Bail Act as amended**<sup>7</sup>, on the other hand. **Section 12** deals with general provisions of bail and **section 12 (4)** allows a court to require a defendant to give security for his surrender to custody and provides that such security may be given by him or on his behalf. The inserted **section 12 (4A)** provides that such security can be given in the form of cash or by way of certified cheque. Clearly no such security provided pursuant to **section 12(4A)** by an accused or a person acting on his behalf, requires any investigation by judiciary staff.

14. Unlike the position with security in the form of cash, certified cheques or bonds, there are clear obligations on practitioners and court staff where a surety is used. The learning in **Blackstone's Criminal Practice 2008** paragraph D7.36 is quite helpful:

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<sup>7</sup> Bail (Access to Bail) Amendment Act No 11 of 2017

*“Taking the Surety*

*The normal consequence for a surety if an accused fails to answer to his bail is that the surety is ordered to forfeit the entire sum in which he stood surety. As the surety is promising to pay money rather than handing over any money at the outset, it is important for the court to be assured that the surety has sufficient funds with which to honour the undertaking to the court. When a surety is taken in court, he is asked how he would pay the sum in which he is to stand surety were the accused to abscond. It is also standard practice for the police to check whether the surety has any convictions; if he has and depending on their age and nature but the court is willing to grant bail subject to the provision of a satisfactory surety, the court simply fixes the amount in which the surety is to be bound and the accused remains in custody until the court’s requirement can be fulfilled.”<sup>8</sup>*

15. In my view, the magistracy in both the applications of **Baggo** and **Martin** acted consistent with its obligations of assuring itself that the surety had sufficient funds with which to honour its undertaking to the court consistent with **section 16(3)** and was not conducting any investigation under **section 12(4A)** as there was no question of any form of security described in that section being under consideration.
16. The Judiciary’s vetting process for sureties is set out in paragraph 10 of the decision of **Baggo** and **Martin** which refers to the affidavit of Savitri Birbal, Magistracy Registrar and Clerk of the Peace, Arima District Court.
17. In my view, the basis of the finding that the Judiciary’s vetting process is unconstitutional appears to be found in paragraph 11 of the decision where my learned sister when dealing with the affidavit of Ms Birbal and her use of the term “ security” while describing the surety approval process said of this that “the evidence confirms a fundamental legal error, one which confuses and conflates the conditions that may be imposed on a surety to be approved under **section 16(3)** and the provisions of security by a defendant under **section 12(4)**”. In my respectful view this conclusion is misconceived. Notwithstanding her use of the term security, it remains clear that the entire investigative process was directed to assuring that a potential surety, would be in

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<sup>8</sup> Blackstone’s Criminal Practice 2008, para D7.36, p 1371. See also the learning in Halsbury’s Laws of England/ Criminal Procedure (Volume 27 (2021), paras 1-442; Volume 28 (2021. Paras 443-938)/4. Bail/(3) Court Bail Generally/82. Bail with sureties

a position to meet his obligation should the accused abscond. Nothing in her affidavit pointed to her investigating any of the forms of security listed in **section 12(4A)**.

18. At paragraph 74-76 of her judgment the learned Judge addressed the submission that the Court is open to consider the financial resources of the surety. The **UK Bail Act 1976 section 8(2)** allows the court to consider the financial resources of a proposed surety in determining the suitability of that surety. This provision was omitted from the local statute. It was submitted before the learned Judge that the inclusion, in our legislation, of words which provide that “the Court may have regard “among other things”, to the specific matters in **16(2) (a)(i)(ii) and (iii)** allows for a wide discretion that permits the Clerk of Peace to consider the financial resources of a proposed surety. The Court opined, at paragraph 74 of the judgment, “the Judiciary cannot by a policy effectively re-introduce the consideration which appears to be the overriding one in the UK Legislation when our Parliament omitted to enact it”.
19. In my view, the vetting process does not amount to a broad inquiry or investigation into the financial resources of the surety but rather a process for authentication of the documents, and, in the case of real property, ensuring that said property is free from encumbrances. The necessity of the vetting process is even more evident where the proposed surety has undertaken to be bound by large sums of money. It seems impractical that an individual may stand as a proposed surety and enter into a recognisance in relation to a large sum, and there be no process for checks and balances to ensure that the proposed surety can, in fact, meet that obligation if the sum by which he or she is bound becomes forfeit.
20. The Court must be satisfied that the property intended to be used by the surety is capable of being utilised in that manner. Anything less would render the requirement for a surety entering into a recognisance, ineffectual.
21. This Court agrees that there are sanctions which deal with the issues of forged deeds, fraud, giving false statutory declarations and professional bailors. However, it is unlikely that persons seeking to perpetuate fraud or professional bailors will come to the knowledge of the judicial officer without these checks being made as outlined.

### **The Basic Complaint**

22. The basic complaint of both applicants is that the approval process is unnecessarily lengthy and that the time taken to meet all the requirements is oppressive and results in accused persons unnecessarily being kept in custody or kept in custody far longer than

they should. There is merit in this criticism. While it must be acknowledged that the vetting process is driven by the existence of extensive fraud of which some judicial notice can be given to the history of fraud investigations arising from fraudulent deeds, many of the conditions that are required are often impossible to obtain in under 10 working days. As an example, regarding the requirement of providing a Certificate of Payment for Land and Building Taxes, the provision of a certified copy of a registered deed or certificate in title, or where the property is leasehold, the consent of the landlord, the absence of any one of these requires that an application be made to the relevant public authority with a possible waiting period of days or even weeks.

23. Clearly this is an area in need of reform and given the challenges identified in **Baggoo** and **Martin**, steps are being taken to address these concerns.

## **Conclusion**

24. This Court does not consider itself bound by the decision of the Court in **Nilon Baggoo v The Attorney General CV2020-03015** and **Benjamin Martin v The Attorney General CV2021-00626** and will depart from reasoning in that judgment for the foregoing reasons.
25. Mindful of the challenges encountered by the Applicant and having heard submissions from attorneys in this matter, the Court will vary the order and allow Ashmead Mohammed, the named surety proposed by the Applicant, to be used as his surety upon his signing the appropriate recognizance. In doing so, the court has had regard to his Statutory Declaration produced to this court, his national identification card, the certified copy of ownership of his property, the valuation of the property to be used that was provided by a Fellow of the Royal Institute of Chartered Surveyors, as well as proof of payment of land and building taxes and water rates.

**Geoffrey A. Henderson**

**Judge**