

ANGELINE SIMENDE
and
SOPHIE BADZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 2 May 2014

Bail Application

S. Hashiti, for the applicants
E. Nyazamba, for the respondent

MWAYERA J: The respondent opposed the application for bail pending appeal tabled before this court by the applicants. The background to the application is that the two applicants were convicted and sentenced in the magistrates court for fraud as defined in s 136 of the Criminal Law Codification, Reform Act. The brief allegations being that the two applicants, with Tendai Kausiyo and Selfridge Bosha and Tendai Simende unlawfully misrepresented to Beauty Evernice Mtombe the Sales Manager Northern Region Hwange and inflated prices of SADC and COMESA pads being sold by ZIMTRADE, whereas in truth and actual fact when the accused so misrepresented they knew well that the pads were being sold at a lower. As such Hwange Colliery Company suffered financial prejudice as a result of the difference between paying the inflated price instead of the actual price.

In applications for bail pending appeal, the position of our law is well settled. One has to look at the following core aspects:-

1. The prospects of success on appeal.
2. The likely delay before the appeal is finalised.
3. The risk of abscondment and any other factors which the court views as necessary to arrive at a decision.

Of necessity in order to consider whether or not there are prospects of success one has to look at the record of proceedings of the court *a quo*. I will not seek to dignify the insulting manner of analysing the finding of the court *a quo* by Mr Hashiti as I felt the manner he

addressed the issue of whether or not there are prospects of success on appeal smacked of contempt as opposed to really addressing substance. This was more so during oral submission and only belatedly did he realise he was not only attacking finding of the trial court but the person and he also appeared like he was arguing the appeal at bail stage.

I will go straight to the evidence adduced before the court and the conclusion reached by the court *a quo* in a bid to assess whether or not there are prospects of success on appeal. The record of proceeding clearly shows that the conviction of the appellants was on circumstantial evidence as there was no direct evidence linking them to the commission of the offence. It is very procedural to convict on circumstantial evidence where from the circumstances and evidence adduced the conclusion is the only reasonable inference that could be drawn. To this end the court *a quo*'s reliance on circumstantial evidence cannot be criticised. A close look at the evidence documentary and oral however does not seem to state that the applicants made a misrepresentation to the complainant upon which complainant acted to its prejudice. The first applicant was a clerk who would receive a request from COMESA and then raise a requisition. This price would be given by the third accused the one who was acquitted. There is no evidence to show if the first applicant had duty to verify or not the authenticity of the price. It remained haze whether or not she presented the requisition knowing that the price was inflated so as to make her action a misrepresentation with an intention to steal from the employer. The second applicant was an accounts officer his duty was to prepare payment based on purchase requisition. There is no evidence to show that she connived with the first applicant to pay an inflated requisition. The second applicant's defence was that she had a duty to pay against authorised requisition even after a human resources officer testified it was not clear whether or not she had a duty to verify the transactions brought before her from superiors who checked authenticity of transactions and authorised payments. Clearly the evidence showed maybe the applicants improperly carried out their duties but that does not show they committed fraud. The conviction was not well grounded on evidenced adduced and it appears the State left out a lot of aspects for speculation. Given the loopholes briefly noted, it is possible that another court might take it. The state did not prove the case beyond reasonable doubt and come up with a different conclusion. It follows that there are prospects of success in respect conviction.

The factors for consideration are directly linked to the first factor alluded to. If there are prospects of success on appeal then the likelihood of abscondment is minimised given

there is no motivation. These factors taken cumulatively with the delays appeals take to be prosecuted given the short prison terms imposed on applicants tilts in favour of applicant being admitted to bail. Clearly, it would not be in the interest of justice to have applicant serve the full prison term and then succeed in the appeal just for academic purpose.

In my view therefore, given the personal circumstances of the applicants and that there are prospects of success on appeal, the applicants are admitted to bail.

Dube, Manikai & Hwacha, Applicants' Legal Practitioners
Attorney General, Respondent's Legal Practitioners