TENDAI KAVHU

And

TAWANDA JOMO

And

CTME CENTRE (PVT) LTD

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 22 JULY 2022 & 29 JUNE 2023

Bail pending appeal and application for suspension of a forfeiture order pending appeal

B. *I. Masamvu* with *C. Nyathi* for applicants
K. Ndlovu for the respondent

TAKUVA J: The applicants filed twin applications which they termed "Application for Bail Pending Appeal and Application for Suspension of a Forfeiture Order Pending Appeal."

The two applications were opposed by the respondent.

Background facts

1st and 2nd applicants were arrested by the police and arraigned before the court of the Regional Magistrate on a charge of smuggling as defined in s182 of the Customs and Excise Act (Chapter 23:03). The 3rd applicant is a juristic person and South African registered company which employs 1st and 2nd applicants. The two who were represented by their legal practitioners of record pleaded not guilty but were convicted of the offence charged and sentenced to

undergo five years of imprisonment. The goods and heavy truck were forfeited to the State.

Dissatisfied and aggrieved by their conviction 1st and 2nd applicants through their legal practitioners of record filed a notice of appeal on 17 May 2022 informing their intentions to contest such conviction and sentence. In the interim here and now, applicants have approached this court seeking for bail pending appeal and suspension of the forfeiture order pending appeal.

At the hearing *Mr K. Ndlovu* for the respondent submitted that the application for bail pending appeal by the 2nd applicant was not opposed as it was not proved that he acted in common purpose with 1st applicant. Therefore, he was not part and parcel of the importation of the undeclared goods. After assessing the totality of the evidence, this court concluded that the concession by the State is proper at law and I granted the 2nd applicant bail as indicated in the order. The State Counsel raised a point *in limine* relating to the 3rd applicant arguing that the company was not properly before the court. The reason given is that the coupling of an application for bail pending appeal together with an application for suspension of an order for forfeiture is impermissible and unknown at law.

The applicants argued that since there was *a lacuna* in the law as regards the procedure to be adopted, what they have done is not an illegality but want to bring in the court's inherent jurisdiction. In order to comply with the general procedure for forfeiture in s62 of the Criminal Procedure and Evidence Act, the applicants would have to apply for condonatioon.

I do not agree with this argument for the following reasons;

(a) the 3rd applicant intends to consolidate two motion proceedings where he was not a party to one of them.

(b) the 3rd applicant has coupled provisions dealing with forfeiture from two different Acts of Parliament namely The Customs and Excise Act Chapter 23:03 (see sections 193, 209 (1), (209 (3), 209 (6) and s209 (9) and the Criminal Procedure & Evidence Act Chapter 9:07 (see sections 62, 62 (4) and 62 (5).

(c) these provisions have different procedures, different timelines and different consequences making joint reliance on them in one application not only confusing but vague and embarrassing.

(d) an application for bail pending appeal against an accused cannot be heard jointly with an application by a 3rd party owner of the goods in question seeking to suspend a forfeiture order pending appeal. See section 62(5) of the Criminal Procedure and Evidence Act where this is only permissible where an application for the release of goods has failed and the "owner" appeals the decision. Such an appeal can be heard jointly with accused's appeal against conviction and sentence.

In the result, I find that the coupling of an application for bail pending appeal together with an application for the suspension of an order for forfeiture in respect of a 3rd party is improper and impermissible at law. The application is not properly before the court. Accordingly it is struck off the roll.

Turning to the application for bail pending appeal in respect of the 1st applicant, the starting point is section 123(1)(b)(ii) of the Criminal Procedure and Evidence Act (Chapter 9:07) which empowers the court to admit a convicted person to bail pending the determination of his appeal by the High Court.

It is trite that the granting or refusal of bail pending appeal turns on the interrelated factors of prospects of success on appeal and on whether or not the granting of bail will jeopardize the interests of the due administration of justice (See *S* v *Mutasa* 1998 ZLR 4 (SC).

Further in an application for bail pending appeal, the onus is on the applicant to establish that there are prospects of success on appeal. The onus will be lighter if he can show that there is an irregularity or misdirection attendant to his conviction and sentence – *S* v *Poshai* HH-89-03.

The test for the existence or otherwise of prospects of success on appeal was explained as follows in the South African case of *S* v *Smith* 2021 (1) SACR 567 (SCA).

> "what the test of reasonable prospects postulates is a dispassionate decision, based on the facts and the law that a Court of Appeal could reasonably arrive at a conclusion different to that of the Trial Court. In order to succeed therefore, the appellant must convince the court on proper grounds that he has a realistic chance of succeeding. More is required to be established that a mere possibility of success ,,,"

Application of the law to the facts – 1st applicant

The 1st applicant drove the truck transporting the allegedly smuggled goods from South Africa past Beitbridge border post into the country. His defence is that he crossed into Zimbabwe with the truck empty of goods and that he only picked up the goods subject to the charge at Beitbridge border town. Therefore, so the argument goes, he had nothing to do with the importation of the allegedly smuggled goods. He insisted that the goods belonged to one Lawrence who had hired him when he had already entered the country and at Beitbridge border town.

It is common cause that at the point that the applicants were stopped by the police and up to their driving to Bulawayo Central Police Station, they were in the company of the said Lawrence. The police let go of the said Lawrence. He was neither charged for this offence or interviewed as a potential witness nor brought to court.

The issues for determination were – whether or not the twin questions of ownership and origin of the goods, i.e. whether or not the goods were imported from the Republic of South Africa into Zimbabwe and by who? The court *a quo* disbelieved the 1st applicant's explanation whose gist is that he did not know Lawrence and that Lawrence is the alleged importer of the goods.

On the evidence, it is common cause that the registration numbers of 1st applicant's truck and trailers were captured in the Bill of Entry (Exhibit 3). Under cross-examination by the Prosecutor. The following exchange ensued:

"Q - Correct you arrived at the border on the 1st of December 2021?
A - Yes
Q - The date on the Bill of Entry is 29 November 2021. Do you dispute that?
A - No
Q - This was before you arrived?
A _ Yes
Q - This was before your truck was seen by agents at the border is that not so?
A - Yes
Q - So there was no way where agents could give your registration number to Lawrence because your truck had not yet arrived like you agreed?
A - I agree with you."

See page 105 of the record of proceedings.

Noteworthy is the fact that the vehicle registration numbers could not have found their way into the Bill of Entry without 1st applicant's knowledge and consent. To the extent that it could only have been him who supplied the vehicle details to whomever was the importer, the 1st applicant was actively participating in the smuggling of the goods. In view of the evidence as captured and highlighted above, the trial court properly assessed the evidence found and concluded that the 1st applicant was the importer of the smuggled goods found in the truck.

In light of the foregoing, I find that the 1st applicant's conviction is safe. Nothing turns on it. He has no fighting chance on appeal as it is completely doomed to failure. Therefore, the 1st applicant is not a good candidate for bail pending appeal.

In the result it is ordered that;

1. The 3rd respondent's application for suspension of a forfeiture order pending appeal be and is hereby struck off the roll.

2. The 1st applicant's application for bail pending appeal be and is hereby dismissed.

Masamvu & Da Silva-Gustavo, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners