TINASHE CHIDURA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 27 November 2014

Bail Pending Appeal

F. Murisi, for the applicant
Ms *S. Fero*, for the respondent

TAGU J: On the 27th November 2014 I heard submissions from both the defence and the state counsels and gave an *ex-tempore* judgment, dismissing an application for bail pending appeal. I have been requested by the defence counsel to furnish full written reasons for judgment for purposes of appealing to the Supreme Court. These are they.

The applicant was convicted on the first count after a protracted trial for contravening s 136(1) of the Criminal Law (Codification and Reform) [*Cap 9:23*] - fraud involving US$4000.00, of which nothing was recovered. He was further convicted on his own plea of guilty to the second count of contravening s 185(1) (a) of the Criminal law (Codification and Reform) Act [*Cap 9:23*] - escaping from lawful custody.

For the fraud charge the applicant was sentenced to 3 years imprisonment of which 6 months imprisonment were suspended for 5 years on the usual condition of good conduct. Further, 6 months imprisonment was suspended on condition of restitution, leaving an effective sentence of 2 years imprisonment. In respect of the second count the applicant was sentenced to 12 months imprisonment of which 3 months imprisonment were suspended on the usual condition of future good conduct, leaving an effective term of 9 months imprisonment.

Dissatisfied by both conviction and sentence in respect of the first count of fraud, and by

the sentence only in respect of the second count of escaping from lawful custody, the applicant noted an appeal with this Honorable Court under case number CA942/14.

While waiting for the outcome of his appeal in case AC 942/14, the applicant is now making this application for bail.

The application is strongly opposed by the respondent.

At the hearing of the application, Mr *Murisi* for the applicant, indicated that the applicant was now abandoning his appeal against conviction in respect of the fraud charge. He further, submitted that the applicant was now pursuing bail pending appeal against sentence only in respect of both counts. Mr *Murisi*'s argument was that the applicant should have been sentenced to pay a fine of $ 300.00, and that the two counts should have been treated as one for purposes of sentence.

Some of the principles that govern applications of this nature were outlined in the case of *S* v *Dzawo* 1996 (1) ZLR 536 as follows-

(i) Prospects of success on appeal;
(ii) Likelihood of abscondment;
(iii) Likely delay before an appeal is heard, and
(iv) Right of an individual to liberty.

The position taken by Mr *Murisi* of abandoning the appeal against conviction in respect of the fraud charge is very laudable. Perusal of the record of proceedings shows that there are no real prospects of success on appeal at all in respect of conviction on the fraud charge. The evidence in the record is overwhelming against the applicant.

In respect of sentences imposed by the court *a quo*, again there are no prospects of success on appeal. Firstly, there is no way a different court can sentence the applicant to pay a fine of $300.00 for a serious fraud involving $ 4000.00 of which nothing was recovered. To do so would mean that crime pays, yet the applicant is supposed to disgorge the ill- gotten proceeds. An effective term of imprisonment is called for. Further, there is no basis for treating both counts as one for purposes of sentence. The two charges are not kindred offences, and they were committed on totally deferent dates. If the applicant is to succeed, he may have a slight reduction in the term

of imprisonment, such that it is in the interest of justice for him to prosecute his appeal while serving. This time appeals are no longer taking long time before they are heard.

In the case of *S* v *Williams* 1980 ZLR 466 (AD), it was pointed out that-

> "But it was putting it too highly to say that bail should only be granted where there was a reasonable prospect of the appeal succeeding. On the one hand, in serious cases even where there was a reasonable prospect of success on appeal bail should sometimes be refused, notwithstanding that there is little danger of the convicted person absconding." (Emphasis added).

In my view the fraud charge is a very serious offence that involved preplanning. The applicant was arrested and taken to the police station on some other misdemeanors while he was now avoiding the complainant, and when taken into police custody at a police station, had the guts to sneak out and was rearrested after a chase. He is therefore not a good candidate for bail.

In casu, there are no prospects of success. Applicant is likely to abscond once released on bail.

In the result, the application for bail pending appeal is dismissed.

Murisi & Associates, applicant's legal practitioners
Prosecutor- General's Office, respondent's legal practitioners