

KESEGOFETSE DIKATHOLO

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 8 NOVEMBER 2006 AND 9 NOVEMBER 2006

Mr S Mlaudzi for the applicant
Mr W B Dube for the respondent

Bail pending appeal

CHEDA J: This is an application for bail pending the determination of an appeal.

Applicant a Botswana national filed notice of appeal on the 7th day of August 2006 which appeal was heard on the 9th day of October 2006.

The brief facts of this matter are that applicant was convicted by the Regional court, Bulawayo for fraud and was sentenced to 7 years imprisonment of which 2 years imprisonment was suspended on condition he restitutes complainant and a further 1 year imprisonment was suspended on condition of future good behaviour.

He applied for bail pending appeal before the trial court which application was dismissed.

He again applied for bail pending appeal on the 11th day of July 2006, which application was struck off the roll on the 17th day of August 2006 by consent of the applicant and respondent's legal practitioners. The reasons for striking off are not essential.

Applicant's appeal was heard on the 9th day of October 2006 and judgment was reserved.

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Applicant has now lodged this application for bail pending appeal on the following basis: -

- (1) that respondent conceded during the hearing that there were misdirections by the court *a quo* and accordingly his appeal has bright chances of success, and
- (2) that applicant is of ill health as he is undergoing treatment at Bulawayo prison.

On the other hand, respondent is of the view that in as much as they conceded that there were some misdirections on the part of the court, a quo, applicant's chances of success were not bright.

In view of that they are of the view that he may abscond thereby failing to await the outcome of his appeal.

I now deal with two basis for this application.

(1) Concession by respondent

Firstly, I will treat this application as a first application as the previous one before my brother Ndou J, was not heard but was struck off the roll by consent.

It is correct that respondent noted some anomalies by the trial court in this matter. However, in my view, the fact that respondent has also made a concession to these anomalies it is not a foregone conclusion that the appeal court will view these concessions as having been properly made to justify success of the appeal. The court or Judge has a final say in deciding whether or not a "concession" has indeed been properly made by any party in a trial or proceedings before it. The court, for its own reasons, can conclude that the concessions have been improperly made, thereby dismissing the said appeal.

It is, therefore, not proper to assume that the fact that respondent has made concessions, the court will be bound by those concessions. The fact that there has been a

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concession by respondent is a factor, which, no doubt has to be taken into account by the appeal court, but, the said concession on its own is not enough persuasion for the court to determine in applicant's favour. The court is still bound to examine other factors in the application for bail. To easily agree with respondent is tantamount to merely rubber-stamp the decision of the respondent without the court fully applying its mind to the matter at hand.

The appeal has not been determined and to accede to applicant's submission in that regard would in my view be an attempt to influence the determination of the appeal court.

Ill Health

Applicant, also through his counsel submitted that he is of ill health and in support of his assertion he filed a medical report compiled by Dr A. M Dube of Bulawayo prison.

The report in question states: -

"MEDICAL REPORT FOR KESEGOFETSE DIKATHOLO:

PRISON NUMBER 212/06

The above has been coming to the clinic with minor ailments i.e. viral influenza on and off during the time of his admission in this Prison. He was last seen at our clinic on the 13th of October 2006 and today 25 October 2006 as well. As for today he has chest pains and slight cough and has been diagnosed mild Pneumonia. He is presently on medication.

(signed)

DR AM Dube".

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The doctor does not in any way suggest that applicant has either a terminal illness or is not receiving treatment in prison. He has been “diagonised with mild pneumonia and is presently on medication”.

It was further applicant’s submission that he needs medical attention outside prison. I find no justifiable reason for this, bearing in mind that he is already on treatment in prison. There is no evidence that prison health authorities have failed to attend to his ailment.

Against this background is the cardinal principle which guides these courts in the determination of bail pending appeal, being that bail is granted on the assumption that applicant will await the outcome of his appeal. In the event that there is a real likelihood that he may not avail himself for the appeal if granted bail the court or Judge will not grant it.

In casu, the following factors should be taken into account in determining bail: -

- (1) that he is a Botswana national
- (2) that he is facing a serious offence, and
- (3) that he has already been convicted, albeit that he has noted an appeal against that decision.

The question, then is, in the event that he is granted bail is he likely to avail himself until his appeal is determined. This question is to be weighed against his possible abscondment, which if it occurs will no doubt result in the frustration of the proper administration of justice.

In my opinion, the factors referred to above which are against him are enough to induce him to abscond thereby frustrating the proper administration of justice, see *S v Kilpin* 1978 RLR 282. In my opinion, an applicant whose circumstances are similar to

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applicant's should not be admitted to bail as his chances of absconding are glaringly clear and to ignore them is to render injustice to the judicial delivery system.

It is my opinion therefore that applicant will not await the outcome of the determination of his appeal.

The application is accordingly dismissed.

Messrs Samp Mlaudzi and Partners, applicant's legal practitioners

Attorney General's Office, respondent's legal practitioners