

FRANK MPOFU  
Versus  
THE STATE

IN THE HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 24 NOVEMBER 2014 AND 12 FEBRUARY 2015

### **Bail Application**

*Mr T. Zishiri* for the appellant  
*Mrs Ndlovu* for the state

**MOYO J:** This is an application for bail pending appeal. The applicant was convicted of three counts of stock theft by the magistrates court sitting at Gweru on 14 October 2013. He was sentenced to 12 years imprisonment in respect of each count for count one and two. He was further sentenced to 10 years imprisonment for the third count. One year was suspended on each count, on condition the applicant paid restitution in the following sums per count, \$400, \$266, and \$200 respectively. This left the applicant with 31 years effective.

It would appear from the court record that the applicant had previously applied for bail pending appeal before the trial magistrate and it was denied. The applicant has however instead of appealing the magistrate's decision to refuse bail, filed another application for bail pending appeal before this Honourable court. The title of the application before me is "Notice of application for bail pending appeal."

In the application itself it is stated as follows:

"Be pleased to take notice that the applicant Frank Mpofu hereby applies for bail pending appeal in terms of the draft order annexed hereto."

In fact even in all the papers the applicant is addressed as "Applicant" and not "Appellant." The respondent in its opposing papers has raised a point *in limine* contending that the applicant is not properly before court as the application before court is not an appeal against

the refusal of bail pending appeal by the magistrate in the court *a quo*, but is instead a fresh application being made for bail pending appeal before this Honourable court. Ms *Ndlovu* for the state argued that applicant should not have made a fresh application for bail pending appeal before this Honourable court, but that he must have noted an appeal against the refusal of bail pending appeal by the magistrate in the court *a quo*. That he must, attack the court *a quo*'s decision and show before this court the misdirection of the court *a quo* in refusing bail pending appeal. In the application itself, the applicant has tried though to attack the learned magistrate's reasons for failure to find that the applicant does not have prospects of success on appeal. In the interests of justice, I will overlook the procedural hurdles that applicant faces for the simple reason that in the body of the application he does try to show how the magistrate misdirected herself in the refusal to grant bail pending appeal. This information is given in a very scant manner though.

Central to the determination of such an application are the prospects of success on appeal although it is incumbent on the applicant to show that his admission to bail pending appeal would not endanger the interests of justice. Refer to the cases of *S v Tengende and Others* 1981 ZLR 445 and that of *Manyame v S* HH 1/03 wherein it was held that even if there were prospects of success on appeal, that does not entitle an applicant to bail, he should, in addition to the prospects of success on appeal, show that the interests of justice would not be endangered if he is granted bail. There are no prospects of success on appeal in this matter because applicant is one of the three accused persons that were met by Lamulani Dube driving four herd of cattle. Lamulani Dube knew the three accused prior to that date as he alleged that he attended school with them and generally knew them from his area. He even greeted and talked to them on the date in question. Accused 6, although he is an accomplice, the court exercised caution in dealing with his testimony. He did implicate the applicant and the evidence of Lamulani Dube does corroborate that of accused 6. There are therefore no prospects of success on appeal in this matter. I accordingly can not find that the interests of justice would not be endangered by releasing the applicant on bail pending appeal. The applicant faces a lengthy jail term ahead of him and with no chances of success on appeal, the risk of absconding and not waiting for the

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Xref No. HCA 598/13

appeal court to decide on his fate is very high. The application for bail pending appeal is accordingly dismissed.

*Garikayi and company*, appellant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners