

THOBANI NCUBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 6 JULY 2017 AND 3 AUGUST 2017

Bail Application

K Ngwenya for the applicant
T Hove for the respondent

MOYO J: This is an application for bail pending appeal. At the hearing of this matter I dismissed the application and stated that my reasons would follow. Here are the reasons:

The applicant was convicted of fraud as defined in section 136 of the Criminal Law Codification and Reform Act [Chapter 9:23]. He was sentenced to 36 months imprisonment of which 6 months imprisonment was wholly suspended for 5 years on condition the applicant does not within that period, commit an offence involving dishonesty for which upon convicted he shall be sentenced to imprisonment without the option of a fine. A further 12 months imprisonment was suspended on condition that the applicant restitutes the complainant Vainah Moyo the sum of \$9500-00 on or before 30 June 2017 through the clerk of court at Tredgold magistrate's court. The remaining 18 months imprisonment was wholly suspended on condition the applicant completes 630 hours of community service at ZRP Hillside CID.

Dissatisfied with the conviction the applicant then filed a notice of appeal against the conviction.

The gist of the notice of appeal is that the trial court erred in convicting the applicant yet there was no evidence to prove a misrepresentation or intention to deceive the complainant on applicant's part.

The facts of the matter were that applicant sold a stand to the complainant and later sold it to another person. The complainant made a deposit payment for the stand. Applicant claims to have later cancelled the agreement with the complainant and sold the stand to someone else.

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He did not refund the complainant's dues, and he later even received funds from the complainant after the purported cancellation of the agreement (which complainant disputes was ever communicated to her).

In his defence before the trial court applicant averred that he sold the stand to the complainant, cancelled the agreement when complainant breached it and then sold it to someone else. He does not tell the court about refunding the complainant's dues. He does not tell the court that even the further payment that complainant made in October 2016, when the agreement was purportedly cancelled, he refunded the complainant. Neither does he tell the court that he communicated the cancellation to the complainant. He only attempts during his cross examination to say he refunded complainant the second batch of funds.

At page 24 of the record of proceedings complainant says the accused person never informed her of the breach and the subsequent cancellation.

It is trite that an applicant for bail pending appeal has already been tried and convicted by a court of law and in order to succeed he must show the court that he has reasonable prospects of success.

I held the view that there are no reasonable prospects of success against the conviction in this matter for the following reasons:

- a) The applicant sold a stand that he was yet to purchase from the City of Bulawayo, meaning that at the time he bought it he had already sold it to the complainant and one other person. Although it could be argued that he had a reasonable expectation to own the stand at a later date and thereafter deliver it to the complainant, at the material time he did not own any stand and if he never made an agreement with a suspensive condition to that effect, he did deceive the complainant and made her believe he owned a stand at the material time and yet the proven facts show that he did not. It was indeed a misrepresentation to make the complainant believe that he owned a stand which he was yet to buy. He should have told the complainant the truth about the ownership or otherwise of the stand. Then his *bona fides* could not be doubted.

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- b) He then purportedly cancelled the agreement after complainant had allegedly breached same. He then did not refund the complainant her deposit but went on to collect further funds on the same stand from one Xaba. Complainant says she was not informed of the cancellation which allegedly took place in August 2016. Her conduct in October 2016, of paying a further \$2500-00 into the accused person's account is consistent with that of a person who was not aware that the deal had been cancelled. It therefore cannot be true that the cancellation was communicated to the complainant. Even the applicant's conduct of not returning the \$3500-00 that was paid by the complainant into his account, shows that he was indeed bent on receiving double funds for the stand. He sold the stand to complainant he cancelled the agreement, he did not refund the complainant her deposit, he sold the same stand to Xaba, he later, after selling the stand to Xaba, received \$3500-00 from the complainant and kept it. I say he kept it because the accused had a duty to rebut that aspect of the state case now that it was common cause that he had allegedly been paid an extra \$3500-00 after he had already sold the stand to a third party. It was incumbent upon the accused to rebut that aspect of the state case as it would point towards him being bent on cheating the complainant.

Proof beyond reasonable doubt is not proof beyond every shadow of doubt. The cumulative effect of the facts taken in their totality is what determines whether the state has proven the guilt of an accused. The court does not assess the facts in isolation. Refer to the case of *Isolano v S* 1985 (1) ZLR 62SC.

It is for these reasons that I held the view that there are no prospects of success in the appeal against conviction and as a result I could not exercise my discretion in applicants' favour resulting in the dismissal of the application.

T J Mabhikwa and Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners