

GODFREY TANYANYIWA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
BHUNU J  
30 September 2013 and 22 October 2013.

### **Bail Application**

*MR. Rubaya*, for the applicant  
*Mrs. S Fero*, for the state

BHUNU J: The applicant was employed as a Town clerk for Chitungwiza Municipality. He was charged with 8 counts of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Cap* 9:23]. In count 9 he was charged with corruptly concealing from a principal a personal interest in a transaction as defined in s 173 of the Code. In the 10<sup>th</sup> count he was charged with defeating or obstructing the course of justice as defined in s 184 (1) (e) of the Code.

Of the 10 criminal charges he was convicted after contest of one count of fraud involving theft of US\$80 000.00, corruptly concealing a transaction from his principal and defeating or obstructing the course of justice. He was acquitted on the remaining 8 counts of fraud.

In respect of the fraud charge forming the basis of his conviction, he was sentenced to 6 years imprisonment of which 18 months was suspended on appropriate conditions of good behaviour. A further 2 years imprisonment was suspended on condition of restitution of the stolen money leaving 2½ years effective period of imprisonment.

On the charge of concealing a transaction from his principal he was sentenced to pay a fine of US\$300.00 or in default of payment 1 month imprisonment.

As regards the charge of defeating or obstructing the course of justice he was sentenced to 1 month imprisonment to run concurrently with the sentence in the fraud charge. The net result was that he is currently serving 2½ years of imprisonment. He now applies for bail pending appeal. For that application to succeed he has the onus among other things of

establishing on a balance of probabilities that he has bright prospects of success on appeal and that his release on bail will not compromise the ends of justice.

The real contest is on the fraud charge as the other two charges are relatively minor such that standing on their own would not warrant refusal of bail pending appeal. The allegations against him in respect of the fraud charge are that he fraudulently instructed or connived with his subordinates one Omega Mugumbate the Chamber Secretary and Joshua Manyepa the then Finance Director to siphon his employers' funds under the pretext that the money was required for servicing municipal stands known as Nyatsime stands when in truth and in fact the funds were meant to purchase his own house in Highlands. Although Manyepa who effected the RTGS transfer of the funds died before testifying, it is common cause that the funds which were allegedly designated for the Nyatsime Stands ended up paying the deposit for the applicant's Highlands house. He admitted that the funds were in fact used for his own benefit but countered that he was in fact granted a loan in that amount by his employer.

The RTGS did not need Manyepa to speak on its behalf regarding the purpose for which the funds were withdrawn because it speaks for itself. An authentic copy of the RTGS at p 513 of the transcribed record of proceedings in the Magistrates Court clearly states that the purpose of the transfer was, "*Servicing of Nyatsime Stands.*"

Once the state had discharged beyond reasonable doubt that a misrepresentation had been made to the effect that the funds in question were meant for servicing the Nyatsime Stands but ended up benefitting the applicant, it was incumbent upon him to explain how he ended up being the beneficiary of such funds.

The applicant was however, unable to explain how funds initially designated by his subordinate as being meant for servicing Nyatsime Stands ended up in his pocket purchasing his own property. His assertion that the funds were in fact a loan extended to him by his employer sounds hollow and unconvincing in the absence of any paper trail pointing to the existence of the loan and repayment terms. His attempt to blame others for the chaotic manner in which loans were allegedly being dished out without any proper accounting procedures does not wash because he was the man in charge. It would appear that the chaotic accounting procedures were deliberately meant to conceal the fraud.

As regards sentence the accused was employed in a position of trust of public funds. The funds pilfered involved a substantial amount of money which has proved elusive to recover despite the complainant's efforts in suing the applicant in the civil courts. Offences of

this nature are prevalent and on the increase. In the circumstances of this case it is difficult to say that an effective sentence of 2 ½ years of imprisonment is so severe as to induce a sense of shock in the mind of any right thinking appeal Court acting reasonably.

In my view the prospects of success on appeal are virtually nil. That being the case, it is difficult to perceive any misdirection on the part of the trial magistrate. It is accordingly ordered that the application for bail pending appeal be and is hereby dismissed.

*Nyamushaya, Kasuso and Rubaya*, the applicant's legal practitioners.  
*Prosecutor General's Office*, the respondent's legal practitioners.