

JEPHANY T MWALUZA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
ZHOU J  
HARARE 6 & 24 November 2015

### **Bail Application**

*Z Macharaga*, for the applicant  
*E Makoto*, for the respondent

ZHOU J: This is an application for bail pending appeal. The applicant was convicted of contempt of court as defined in s 182(2) (e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The facts upon which the applicant's conviction was predicated are that he remained in occupation of gazetted land after being ordered to vacate same by the Magistrates Court. He was sentenced to 10 months imprisonment of which 6 months imprisonment were suspended on the condition that he complied with the order directing him to vacate the farm by 31 July 2015. The 12 months imprisonment which had been previously suspended were brought into effect thereby making an effective sentence of 16 months imprisonment.

It is settled that the considerations in an application for bail pending appeal are different from those which are applicable in an application for bail pending trial. At this stage the applicant would have been convicted and sentenced. The applicant must show that there are positive grounds justifying his admission to bail. In the absence of such positive grounds the application for bail will not succeed. In the case of *S v Dzvairo* 2006 (1) ZLR 45 (H) at 60 E - 61 A, PATEL J said:

“First and foremost, the applicant must show that there is a reasonable prospect of success on appeal. Even where there is a reasonable prospect of success, bail may be refused in serious cases, notwithstanding that there is little danger of the applicant absconding. The court must balance the liberty of the individual and the proper administration of justice, and where the applicant has already been tried and

sentenced it is for him to tip the balance in his favour. It is also necessary to balance the likelihood of the applicant absconding as against the prospects of success, these two factors being interconnected. . .”

See also *S v Tengende* 1981 ZLR 445(s) at 448; *S v Labuschagne* 2003 (1) ZLR 644(S) at 649A-B; *S v Dzawo* 1998 (1) ZLR 536 at 539E-F.

The respondent’s ground of opposition is that there is no valid appeal which is pending, and upon which the applicant’s application is predicated. The notice of appeal which is attached to the applicant’s supplementary papers is date stamped 12 November 2015. That notice of appeal relates to CRB 432/12. The judgment which is the subject of that appeal was given on 8 November 2012. The applicant noted an appeal against that judgment on or about the date by which he should have vacated the farm which he occupied unlawfully. He states that his notice of appeal suspended the order of eviction which had been granted by the Magistrates Court. Clearly, the applicant is mistaken as to the unlawfulness of his occupation of the farm. The fact that the Magistrates Court order was suspended, whether by his notice of appeal or by the provisional order granted by this Court, did not have the effect of conferring rights upon the applicant to occupy the farm without lawful authority. But that is not the notice of appeal which is relevant for the purposes of the instant application.

The appeal which is relevant for the purposes of this application is the one which is directed at the judgment in terms of which the applicant was found to be in contempt of court. The respondent’s submission that there is no appeal which is pending in respect of the applicant’s conviction relates to the earlier conviction for contravening section 3 of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. There is no evidence that the appeal which was filed on 6 August 2015 has been disposed of. For the purposes of the instant application an inquiry into prospects of success is not directed at whether the appeal will or should succeed but whether it has substance in the sense of it being reasonably arguable. The applicant contests the decision of the Court *a quo* of bringing into effect a previous sentence. That matter cannot be relevant to prospects of success, as it is not directed at the substance of the judgment. While it may be relevant in relation to the sentence, there is no evidence that the sentence imposed upon the applicant was more than would have been appropriate for the offence involved or that the suspended sentence played any role in the sentence which was imposed other than that it was brought into effect. The applicant submits that he lacked the intention to commit the offence. The applicant’s submissions in that respect

are premised upon the existence of a provisional order of this court suspending the operation of the sentence of eviction which had been imposed as well as his view that the appeal which he had noted suspended the operation of the eviction order. If the views held by the applicant are found to be genuine, even though they may be mistaken, they might have a bearing on the intention element of the offence. That is a matter which the appellate court will inquire into. For the purposes of this application I am prepared to accept that the applicant has raised an arguable matter. On that account, the appeal does have prospects of success.

The court also considers that there is no evidence to suggest that the applicant would abscond if he is to be released on bail. The effective sentence, though considerable, is not lengthy. This is therefore a matter in which the court would be prepared to uphold the liberty of a convicted person. Although the record of the proceedings in the court *a quo* is ready there is no assurance that the appeal will be heard before the appellant has completed serving the effective term of imprisonment.

The amount of US\$50 which has been proposed by the applicant is too small given the fact that he has been convicted on at least two occasions, and that even before conviction the applicant was on the face of it in contravention of the law by remaining in occupation of gazetted land without any lawful authority. A sum of US\$100 would be reasonable in the circumstances of this case. The applicant has offered to move off the farm pending determination of the matter. That will form part of his bail conditions.

In the result, IT IS ORDERED THAT:

1. The applicant be and is hereby admitted to bail pending the determination of his appeal on the following conditions:
  - 1.1 That he deposits a sum of US\$100 with the Clerk of Court, Mbare Magistrates Court.
  - 1.2 The applicant shall reside at Stand Number 406 Beatrice, Manyame Rural District Council, until his appeal has been finalised.

*Mugiya & Macharaga Law Chambers*, applicant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners.