

CHARLES JENAMI  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 9 December & 29 December 2016

### **Bail Pending Appeal**

*F. Murisa*, for the applicant  
*E. Mavuto*, for the respondent

CHITAPI J: The applicant after a contested trial at which he was legally represented was convicted by the Provincial Magistrate sitting at Chinhoyi on 11 November 2015. He was convicted of 9 counts of Fraud as defined in s 136 of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. The applicant was sentenced to 35 months imprisonment of which 17 months were suspended on condition that the applicant paid restitution of US\$9 900.00 to the complainant through the clerk of court by 30 January, 2016.

The applicant was dissatisfied with the judgment of the court *a quo*. He noted an appeal against conviction only on 25 November, 2015. The appeal filed under case No. CA 1016/15 is pending determination. I should mention in passing that of the 9 counts charged, the applicant was convicted on all of them. Each count was treated separately for purposes of sentence and a term of imprisonment imposed per count. The total imprisonment on all the counts totalled 78 months. Some counts were made to run concurrently leaving a total of 35 months which were further reduced on condition of restitution as noted above. I will not comment on the issue of sentence since the applicant as indicated has confined his appeal to conviction.

The trial court record shows that the applicant was charged with 9 counts of fraud as aforesaid and in the alternative 9 counts of impersonating a public official as defined in s 179 of the Criminal Law (Codification & Reform) Act. The allegations against him involved 9 complainants and hence the 9 counts. In regard to 7 of the counts, the allegations against the applicant were that between the period extending from an unknown date in 2013 to March,

2015 at Banket, the applicant misrepresented to the 7 complainants that he had capacity to allocate them farms in his misrepresented position of a land official in the Ministry of Lands & Rural Resettlement. The applicant purportedly allocated or showed pieces of land to the complainants. He then hoodwinked the complainants into paying him various amounts of money for purposes of processing offer letters. The complainants were in the process cheated of their money through the misrepresentations because the applicant was neither an official in the relevant Ministry which allocates land, had no authority to allocate any land and could not process any authentic offer letters. The complainants were prejudiced of the amounts of money which they paid to the complainant. In the other 2 counts the applicant allegedly misrepresented that he had the capacity to farm certain hectrages of maize and soya beans on behalf of the complainants for payment. Acting upon the misrepresentations, the complainants parted with diesel and cash which they passed on to the applicant. The applicant when he made the misrepresentation was alleged to have been aware that he had no such capacity. The complainants parted with their diesel and money to their prejudice since the applicant did not perform the promised tasks.

In his defence outline, the applicant proffered a bare denial more particularly in that he denied ever making any misrepresentations to any of the complainants that he could allocate land. He denied purporting to allocate any land nor receiving any payments from the complainants as alleged or at all. He also denied entering into any transactions or arrangements to hire out his services to farm any crops for the complainants. He averred that his cellphone number 0773258996 is used by him or his siblings for transacting farming business. In short the applicant's defence was therefore that the complainants were falsely implicating him.

The applicant was convicted on all the counts after a contested trial. I have carefully considered the evidence led, the reasons for judgment and the applicant's grounds of appeal against conviction. I have also considered the magistrate's response to the grounds of appeal. The grounds of appeal as correctly observed by the State counsel simply attack the magistrate's findings that the State witnesses were credible in their testimony. The magistrate's judgment is also attacked on the basis that he relied on hearsay evidence to convict the applicant.

I am of the view that the magistrate's judgment was well reasoned and the convictions were proper. The complainants sufficiently identified the applicant as the fraudster who

defrauded them of their money. Fake letters which the applicant gave to the complainants were produced in evidence. Some of the money was paid to the applicant by the complainants through eco-cash. The eco-cash number to which the money was sent is registered in the applicant's name. The applicant could not satisfactorily account for the payments made to him by eco-cash. There was nothing to prove that the money related to any other transactions. The complainants would meet with the applicant at the applicant's house or residence. The court was led to the house where transactions took place during an inspection in loco. The applicant used to reside thereat. The applicant's new residence was again identified by the other complainants who testified that they dealt with the complainant personally. The magistrate justifiably made a finding that in instances where Luckmore Jenami was involved, he was acting as an agent for the applicant.

It is clear that the appeal is doomed to fail as no misdirection of law or fact can be said to have been committed by the magistrate. The alleged inconsistencies in the complainants' evidence if any can be said to exist relate to matters of detail and would hardly affect the convictions. The inconsistencies pointed out by the applicant's counsel do not relate to the essential elements of fraud. Even if it was argued that the inconsistencies would affect the credibility of the complainants, the applicant's woes arise from the nature of his defence. Once the court made a finding that the applicant was properly identified as the person who made the misrepresentations, details of how much exactly he fleeced the complainants of and when, become matters of details which should not upset the conviction. In a fraud case, the issue of the actual amount of loss or prejudice is not material. The issue would be material with regards sentence and such related matters like restitution and compensation. In this matter, there is no appeal against sentence.

Both counsel have referred me to several cases as a guideline on principles which a judge or court considers before granting bail pending appeal. I am grateful to counsel and wish to record that I have been guided accordingly. I will repeat the principles as stated, these being

- (a) prospects of success on appeal
- (b) likelihood of abscondment
- (c) right to individual liberty
- (d) likely delay before the appeal is disposed of

See *S v Dzawo* 1998 (1) ZLR 536 (S).

The applicant in terms of s 115 C (2) (c) of the Criminal Procedure & Evidence, [Chapter 9:07] bears the burden on a balance of probabilities in an application for bail pending appeal to show that it is in the interests of justice for such applicant to be released on bail pending the determination of his appeal. The effect of s 115 (2) (c) is therefore to require the applicant to satisfy the court or judge of the existence of the factors set out in the Dzawo case (*supra*).

The applicant has failed to discharge the onus or burden cast upon him. In particular my finding that there are no prospects of success necessarily render the consideration of the other factors academic. I note however that the record of proceedings was transcribed. Appeals in this court no longer take long before they are set down. The applicant should if advised pursue the set down of his appeal so that it is determined expeditiously.

There being no prospects of success of the appeal succeeding and applicant having thus failed to sway me to be persuaded that it is in the interests of justice that he be admitted to bail pending appeal, I hereby dismiss the application.

*Murisi & Associates*, applicant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners