HB 67/20
HCB 77/20

PHILIP NDLOVU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 18 MARCH 2020 & 24 APRIL 2020

Application for bail pending appeal

K. Ngwenya for the applicant
B. Gundani for the respondent

MAKONESE J: This is an application for bail pending appeal. The application is opposed by the state on the grounds that there are no reasonable prospects of success on appeal against both conviction and sentence.

Factual Background

Applicant appeared before a magistrate sitting at Tredgold Magistrates' Court on the 7th October 2019 facing one count of forgery in contravention of section 137 of the Criminal Law (Codification and Reform) Act (Chapter 9:23). Applicant faced a second count of fraud in violation of section 136 of the Criminal Code. After a full trial applicant was convicted on both counts. Both counts were treated as one for the purpose of sentence and applicant was sentenced to 48 months imprisonment of which 12 months imprisonment were suspended for 5 years on the condition of future good conduct.

Sometime in July 2015, the applicant approached the complainant looking for a house to rent. Complainant agreed to lease out to the applicant a 5 roomed property at number 3 Wentworth Road, Thorngrove, Bulawayo. A verbal lease was entered into, in terms of which applicant was required to pay rentals at the rate of US$300 per month. The house in question belonged to the complainant's son, Nkosinathi Mathe and Pathisiwe Samkele Mathe who were both resident in the United Kingdom at the time. The complaint was mandated by a Power of

Attorney to manage the property. On the 4th September 2015, the complainant proceeded to the United Kingdom on a visit and in turn authorized the applicant by virtue of a Power of Attorney to manage her personal affairs. This decision turned to be unwise. On 11th February 2016 the applicant took advantage of the Power of Attorney obtained from the complainant to craft an "Acknowledgment of Receipt" purporting to confirm that the complainant had sold the house at number 3 Wentworth Road, Thorngrove to the applicant for the sum of US$23 000. Complainant forged the complainant's signature on the receipt using a specimen signature on the Power of Attorney given to him by the complainant. The applicant's conduct in forging the signature was unlawful and was the basis of the first count on forgery. The trial magistrate was satisfied that the state had succeeded in proving its case against the applicant and rejected the applicant's defence.

On the second count of fraud, the state alleged that the applicant who was unable to pay the monthly rentals for number 3 Wentworth Road, Thorngrove for the period extending from August 2016 created a false acknowledgement of receipt claiming that the complainant had sold the property to him for the sum of US$23 000. The applicant alleged that he had paid a deposit of US$20 000 towards the purchase price leaving a balance of US$3 000. The complainant only got wind of the fraudulent sale when she appeared in a civil court seeking to evict the applicant for non-payment of rent. In his defence, the applicant alleged that he had purchased the property and was the new owner of the property. The state alleged that the potential prejudice to the complainant was US$40 000 being the value of the property. The applicant argued that the state had not proved the essential elements for fraud. He was nonetheless convicted by the trial magistrate.

The basis for the application for bail

In his bail statement in terms of section 5 (1) (e) of the High Court (Bail Rules, 1991, the applicant submits that his appeal has good and reasonable prospects of success in that:-

(a) The trial court erred and misdirected itself in fact and law by convicting the applicant of forgery and fraud yet the evidence adduced by the state did not prove the essential of the charges beyond reasonable doubt.
(b) The trial court erred and misdirected itself in fact and in law by convicting applicant of forgery and fraud and yet the evidence placed before the trial court proved that the signature on the alleged forged documents were identical in construction and size thus casting a reasonable doubt and possibility that the signatures were that of the complainant.
(c) The trial court erred in convicting the applicant yet the evidence by the state did not rebut or controvert the applicant's defence and explanation.

As regards sentence, the applicant contends that the trial court improperly exercised its sentencing discretion in imposing a custodial sentence which is manifestly excessive so as to induce a sense of shock. The applicant argues that the trial court failed to adequately give due weight to all the mitigating features of the case. Applicant avers that on appeal, there is reasonable possibility that a sentence other than a custodial and may be imposed.

The legal principles applicable

Prospects of success

The applicant contends that there are reasonable prospects of success on both the conviction on forgery and fraud. It is my view that the evidence led in the court *a quo* was compelling and credible. The complainant denied ever signing the acknowledgment of receipt. She denied that she had sold her property to the complainant. She testified that there was no way applicant could have afforded to purchase the property when he was failing to pay monthly rentals amounting to US$300. The questioned document was sent for forensic examination. In terms of section 275 of the Criminal Procedure and Evidence Act (Chapter 9:07), the evidence of the forensic scientist was admitted into the record by consent. The forensic report confirmed that indeed the signature on the acknowledgement of debt and the "purported agreement of sale" and a notice of opposition filed in the civil suit were *"copies of the same signature as they are*

identical in construction and size are superimposed". The forensic expect further observed that the signature of one Nkala appearing on the acknowledgement of receipt and the agreement of sale was identical in construction and size and was superimposed. This clearly proved that the signatures had been uplifted from the primary source document that is why it was identical in construction and size.

The conclusion was that it was rare to have one person executing his/her signature in a similar and like manner where the signatures are identical and similar. In normal circumstances there would slight variations in construction and size. The inescapable conclusion was that the signature on the questioned documents were copied and pasted thereon. The documents in question originated from the applicant who failed to avail the original documents. All the purported documents were scanned documents. There were no original documents. Applicant failed to give a reasonable and acceptable explanation. The state correctly convicted the applicant on the count of forgery.

In the case of *Chikumba* v *The State* HH-724-15, the court held that in applications for bail pending appeal the question is not whether the appeal will succeed, but it is whether the appeal is free from predictable failure. In this matter, I am of the view that the appeal carries no prospects of success on the count of forgery. On the second charge of fraud, there is overwhelming evidence that applicant unlawfully and with intent to deceive the complainant misrepresented that Emily Mathe had signed an acknowledgment of receipt as proof that she had sold house number 3 Wentworth, Thorngrove, Bulawayo. The applicant used the forged document in a civil claim and resisted eviction the grounds that he had bought the property. There was potential prejudice suffered in the sum of US$40 000.

In *State* v *Tengende & Ors* 1987 ZLR 445, the Supreme Court held that the proper approach in applications for bail pending appeal is that in the absence of positive grounds for granting bail it will be refused. In my view, the granting of bail pending appeal involves the exercise of the court's discretion. The court is enjoined to balance the interests of the applicant and the proper administration of justice. Where the applicant has been tried and properly

convicted and sentenced, it is for him to tilt the balance in his favour. Whilst the liberty of the applicant in an application for bail pending appeal must be carefully considered, the absence of reasonable prospects of success is a major factor in assessing whether the application must be granted.

See also; *S* v *Williams* 1980 ZLR 466 AD

As regards sentence the trial court exercised its sentencing discretion judiciously and took all the facts placed before it into consideration. An appeal court will not lightly interfere with the sentencing discretion of a lower court, unless it is shown that the sentence is manifestly excessive and wholly inappropriate.

The risk of abscondment

The state has not argued in its opposition to bail pending appeal that there is a likelihood that the applicant may abscond. I shall therefore not venture to explore that possibility. Suffice it to say that the prospects of success and the possibility of abscondment are interconnected. The less likely the prospects of success, the more the inducement there is on an applicant to abscond. In every case where bail is sought after conviction the onus is on the applicant to show why justice requires that he should be granted bail pending his appeal.

I am satisfied that the applicant's appeal carries no reasonable prospects of success as regards both conviction and sentence. In the exercise of my discretion, I am not inclined to grant the application for bail pending appeal.

In the result and accordingly, the application is hereby dismissed.

T. J Mabhikwa & Pasrtners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners