

DAVIE FUKWA MUTINGWENDE
and
SALTANA ENTERPRISES (PVT) LTD
versus
KADYE N.O
and
STATE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 1 November 2017

Urgent Chamber Application

O. Chikitora, for the applicants
Ms F. Kachidza, for the 2nd respondent

FOROMA J: This is an urgent chamber application by the applicant for a provisional order seeking a stay of a criminal trial pending finalisation of an application for review filed on the 24th October 2017. The application for review which applicant has filed seeks to have reviewed by the High Court the decision by the first respondent refusing an exception to the charge preferred against the applicant wherein he claims that he was the owner of the property the disposal of which gave rise to the allegations of fraud. The exception was dismissed by first respondent. It is important to note that there is pending dispute in the High Court in which ownership of the property allegedly fraudulently sold to complainant by applicant is subject of dispute.

It is applicant's desire that the dispute pending in the High Court per HC 6243/15 be finally determined before his trial on fraud charges can continue as it will put paid to fraud allegations against applicant should the High Court rule in his favour on the issue as to who was the owner of the property allegedly fraudulently sold.

Applicant therefore impugns the dismissal of his exception as grossly irregular by reason of the fact that his desire is then shuttered. Applicant can still raise the defence which he hopes will be confirmed by a decision of the High Court favourable to him. Applicant

considers the refusal / dismissal of the exception as a gross irregularity quite why or how it is not made clear on the papers.

Applicant also believes that he if the criminal trial is not stayed pending finalisation of HC 6243/15 he will suffer irreparable harm if he is convicted. Quite why when infact he could appeal against conviction if he should feel the conviction is improper, is difficult to farthom.

Ms Kachidza opposed the application on the basis that there is no justification for a stay of trial proceedings pending review as applicant has an alternative remedy in the event of an unfavourable outcome of the criminal trial of applicant as applicant can always appeal against any conviction should he be so advised.

It should be noted that there is no bar to the applicant raising his defence that he did not commit a fraud as the property he sold was his own or the property was owned by his company should those be the facts. Once raised such defence has to be property supported by evidence and the court is obliged to make a determination on the validity of the defence as ventilated. It is improper for the applicant to pre-empt the trial court's decision on the defence he proposes to raise.

Applicant has therefore not shown any basis for assuming that first respondent will at the end of the trial make findings of fact and law against him leading to his conviction.

The applicant has not proved on a *prima facie* basis that he has a justifiable fear that the continuation of the trial pending review carries with it irreparable prejudice to his defence to justify a stay of the trial.

The applicant should be encouraged to have confidence in the court system and appreciate that the court treats all litigants alike and will not maliciously hand down a conviction where the evidence does not justify such a conclusion. In any event it is not a legal requirement that in all review cases of decisions in a pending trial such trials should be stayed pending determination of the application for review. In fact, stay of criminal proceedings pending review is more an exception than the rule.

I do not find any risk of irreparable harm to have been proved to justify a stay of the trial.

I accordingly dismiss the application.

Jarvis.Palframan, applicant's legal practitioners
National Prosecuting Authority, 2nd respondent's legal practitioner