

TRAVOLTA TAKUDZWA KASIYABVUMA

versus

THE STATE

HIGH COURT OF ZIMBABWE
MUZOFA J
CHINHOYI. 30th day of March, 2022

Chamber Application – Condonation and Reinstatement of appeal

MUZOFA J: This is a chamber application for condonation for late filing of an appeal and reinstatement of an appeal. This means the application for reinstatement of the appeal can only be considered if the application for condonation is granted.

I decided to write a short judgment for the benefit of the parties.

Background.

The accused was convicted on his plea of guilty on two counts under the Road Traffic Act (Chapter 13:11) ‘the Act’ for driving without a driver’s licence and negligent driving in contravention of s6 (1) (a) and s52 (2) of the Act respectively. On the first count he was sentenced to pay a fine of \$30 000.00 in default of payment 3 months imprisonment. In addition 5 months imprisonment was wholly suspended for five years on the usual conditions. The accused was also prohibited from driving all classes of vehicles for five years.

In respect of the second count, the accused was sentenced to 5 months imprisonment of which 3 months imprisonment was suspended for five years on condition he does not within that period commit a similar offence. The effective sentence was two 2 imprisonment.

Dissatisfied by the sentence the applicant noted an appeal against the sentence.

The applicant was granted bail pending appeal. The appeal was duly processed and set down for hearing. The matter was dismissed on the 7th of March 2022 for want of prosecution.

The Application

In his founding affidavit the applicant properly sets out the background to the case as already outlined. He avers that he truly intended to prosecute his case; however on the day of hearing his legal practitioner of choice *Mr Saizi* had a breakdown. An affidavit sworn to by *Mr Saizi* was attached confirming the position. The applicant then went on to address the requirements of such an application including the prospects of success in the main matter.

The respondent opposed the application on the one point that the applicant must not be heard until he purges his contempt. The applicant is aware that his appeal was dismissed therefore his bail pending appeal lapsed. He must submit to custody and if so inclined follow the proper procedure to be admitted to bail. The respondent relied on the case of *Sv Mbofana & 13 Others* HH524/21 to support its submission.

The Law

In the case of *Sv Mbofana* (supra) relied on by the respondent, the court exhaustively addressed the status of a litigant whose appeal has been dismissed. Where a person has been convicted in a criminal court, it is within his rights to note an appeal if so inclined. Once that right is exercised the accused may apply for bail and an appropriate court may grant bail pending appeal in terms of s123 of the Criminal Procedure and Evidence Act (Chapter 9:07). As the term implies the bail is granted pending the determination of the pending appeal. The determination of the appeal automatically terminates the bail. In the event that the appeal is dismissed the appellant's status reverts to the *status quo ante*, the decision of the court a quo remains valid. It means the appellant submit himself to custody pending any application to resuscitate the appeal.. In the *Mbofana* case the learned Judge correctly noted,

“even if he or she has the intention to apply for condonation or extension of time within which to appeal, he or she must submit to the custody first. There is not provision for admission to bail before the right to bail is revived or extended by order of court.”

In a nutshell then, if an appeal is dismissed, the accused must first submit to custody and then file his applications. Courts may not hear a litigant who has not complied with the law. All things being equal at the time the appeal is dismissed a warrant of arrest must be issued which means upon sight by the police the litigant must be arrested.

In this case, when the applicant's appeal was dismissed on the 7th of March 2022 his bail pending appeal automatically terminated. The applicant was required to then serve the sentence as imposed by the court a quo. As matters stand there is no legal basis for the applicant to be making this application from his home. He must be in custody until released on bail. Both the applicant and his legal practitioner did not explain why the applicant did not submit himself to the lawful authorities.

The proper administration of the criminal justice system requires that convicted persons are accounted for. It would be irresponsible for a court to give audience to an applicant who has not complied with the law. This is similar to the dirty hands principle in civil matters where the courts demand that a litigant purge his or her contempt first before approaching the court. The same principle applies in criminal matters. The applicant must first submit to the lawful authorities and then file his application.

On that basis the application is improperly before the court until the applicant purges his contempt. I cannot dismiss the matter since the merits of the case were not considered. The matter is improperly before the court it can only be struck off the roll.

Accordingly the application be and is hereby struck off until the applicant purges his contempt by submitting to custody.

Messrs Saizi Law Chambers for the Applicant's Legal Practitioners
National Prosecuting Authority for the Respondent's Legal Practitioners