RAFIQ KHAN
versus
THE PROVINCIAL MAGISTRATE
and
MS JACKIE MANYONGA
and
THE ATTORNEY–GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAKARAU J
Harare 15 and 20 March 2006.

URGENT CHAMBER APPLICATION

Adv E Matinenga for applicant
Mr M Nemadire for respondents.

MAKARAU J: This is an urgent application to review the proceedings conducted by the respondents on 6 and 7 March 2006 that resulted in the imprisonment of the applicant for a sentence imposed upon him in April 1992.

The facts forming the backdrop to this application are largely common cause. They are as follows.

The applicant was convicted of one count of theft from a motor vehicle by the magistrates' court in April 1992. He was sentenced to 3 years imprisonment with one year suspended on condition of good behaviour. Three days after sentence, the applicant applied for bail pending appeal and was released by an order of this court.

From April 1992 to January 2004, the appeal was not prosecuted as no steps were taken to have the appeal set down and finalized. In January 2004, one Aaron Munautsi approached this court by way of a court application, under case no HC 592/04, seeking an order rescinding the appointment of the applicant as Chairman of the Zimbabwe Football Association on the ground that he had been convicted of a criminal offence, thereby disqualifying him from holding a post in the Association by virtue of the provisions of the constitution of the association. Munautsi also prayed for an order

directing the Attorney- General to enforce the conviction and sentence imposed on the applicant. The applicant opposed the application while the Attorney-General indicated that he was not interested in the proceedings before the court but would independently inquire into the status of the applicant's appeal. When the matter was called up before GOWORA J on 12 November 2004, the applicant did not appear and the application was, on that basis, dismissed without any determination on the merits of the matter.

Meanwhile, on 29 October 2004, the applicant had filed a chamber application for reinstatement of his appeal and for ancillary relief. In the main, the applicant prayed that the matter be referred to the Supreme Court in terms of section 24 of the Constitution for a determination of whether or not the non - prosecution of the appeal by the appellant did not contravene the applicant's right to a speedy trial. In the alternative, the applicant prayed that his appeal be deemed to be operational and if a copy of the appeal was not found in the record, then a copy that he attached to the application be deemed to be the operational notice of appeal. The matter was placed before MAKONI J who queried the basis upon which the application was being made. The applicant responded to the query and the matter is pending at that stage.

From the papers before me, it is clear that there was no activity in the matter until November 2005 when correspondence was exchanged between the applicant's legal practitioners and the third respondent's office with a view to bringing the applicant to court to explain the status of his appeal. An agreement had been reached between these two parties that the applicant present himself to court on 13 March 2006 to explain the status of his appeal when on 2nd March 2006, the first respondent issued a warrant of arrest bringing the applicant before court. The applicant was brought before the court on the strength of the warrant on 6 March and an

inquiry was held in the matter on 7 March 2006 resulting in the imprisonment of the applicant. It is the holding of the inquiry that the applicant wishes to have reviewed.

As stated above, the applicant brought this application on an urgent basis, seeking a review of the proceedings held before the second respondent. I am satisfied that the matter is urgent as it involves the liberty of a subject.

In his application, the applicant contends that the proceedings before the second respondent are susceptible to review as the second respondent lacked jurisdiction to conduct such proceedings in view of the fact that the matter is pending before MAKONI J. In oral argument before me, Mr Matinenga for the applicant agreed with my summation of his argument to the effect that there is a pending appeal noted by the applicant in 1992 and therefore the first respondent had no jurisdiction to issue a warrant for the arrest of the applicant.

In my view, I first have to determine whether the appeal by the applicant is pending before this court. The second issue is whether the decision by the second respondent to hold the inquiry is reviewable. In my view, if there is no appeal pending in the matter that should end the inquiry before me.

It is common cause that in April 1992, the applicant filed an application to be admitted on bail pending appeal. It is further common cause that in a paragraph in that application, it was indicated that an appeal had been noted to the Supreme Court against both the conviction and the sentence imposed on the applicant. No copy of the alleged notice of appeal was attached to the application. The applicant was then admitted to bail pending appeal.

It is further common cause that no record of the appeal having been noted with the Supreme Court has been found. I have been

invited to draw the inference that an appeal must have been noted in the matter as HWACHA J (as he then was), would not have granted bail pending appeal without having had sight of the notice of appeal. I have also been referred to the concession made by the State to the effect that a notice of appeal was probably filed in the matter as further basis for the alleged inescapable conclusion that the applicant noted an appeal in the matter in 1992.

With respect, the concession made by the State that an appeal was probably noted in the matter in 1992 is not supported by the facts before me. The fact that bail pending appeal was granted in the matter does not in itself indicate that an appeal was indeed noted. The copy of the application that was placed before HWACHA J did not have attached to it the notice of appeal as is the usual practice in this court to enable the court determining bail to assess the prospects of success on appeal. No copy of the notice of appeal has been seen by the Supreme Court, the High Court, the Magistrates' Court, the applicant himself or his legal practitioners or by the State. All these parties, at one stage or another, would have been served or furnished with a copy of the notice of appeal as they dealt with the matter. It is conceivable that documents such as notices of appeal will go missing from time to time from court records or the records kept by the state and accused persons. It is stretching coincidence beyond credulity that the notice of appeal filed and served by the applicant in accordance with the rules of court and to all relevant parties went missing in all those offices and coincidentally, the applicant's own copy was misplaced. In my view, even if all the copies of the notice of the appeal had gone missing, the reference number in the Supreme Court where the appeal ought to have been noted would have been found. No such reference number has been produced before me by the parties. It does not exist for if it did, the

applicant would have referred to it in the applications that have come before this court concerning the appeal.

I further note that in 2004, an attempt was made in the application pending before MAKONI J to note the appeal by attaching an annexure with the grounds of appeal and for an order deeming this annexure to be the notice of appeal. Such an order would not have been sought were the applicant confident that an appeal had indeed been noted on his behalf in 1992.

It is therefore my finding that no appeal was ever noted on behalf of the applicant and accordingly, there is no appeal pending in the matter.

I would dismiss the application on the above basis alone. However, in the event that I have erred in holding that no appeal was ever filed in this matter, I shall deal with the first argument raised on behalf of the applicant. The argument raised is that the matter of the status of the applicant's appeal is pending before this court and thus the second respondent lacked jurisdiction to conduct the inquiry she did on 7 March 2006.

It is necessary in my view that I set out in full the relief that the applicant is seeking before MAKONI J. It is as follows:

"1. (*a) The above matter be referred to the Supreme Court on the constitutional point of whether or not the Appellant's Constitutional Rights as enshrined in section 18 (2) being the right to a speedy hearing have not been violated and contravened.*

(b) The Registrar of the High Court be ordered to refer the matter to the Supreme Court.

ALTERNATIVELY

2. (a) The appellants bail paid herein is still operating and in force.

(b) The appeal filed of record be deemed to be still operative

(c) In the absence of an appeal being located in the record, Annexure "K", being the notice
of Appeal against sentence and conviction be deemed to be the operative appeal
herein."

From the above, it is clear to me, and I make this observation well aware of the risk I run of fettering MAKONI J' s discretion when she determines the matter, that the applicant is setting up his own failure to prosecute his appeal timeously to have the matter referred to the Supreme Court for relief. It is only in the alternative that he seeks to regularize his appeal by seeking to have his bail recognized and his appeal deemed pending. The issues that he raises in this matter do not, in my view, invalidate the sentence imposed upon him in 1992. He is seeking some relief in the Supreme Court which if granted, may affect the sentence but until that eventuality occurs, the sentence remains valid and enforceable. Again, he is requesting MAKONI J to validate his bail and the notice of appeal. Until MAKONI J grants the order sought, there is no legal impediment in the way of the course of conduct taken by the second respondent. I am not conversant with a legal principle by which the mere filing of the application before MAKONI J to have the matter referred to the Supreme Court or alternatively, to resuscitate the applicant's appeal and bail pending appeal would have the effect of stalling any proceedings to enforce the sentence imposed on the applicant. I have not been addressed on any such principle. *Lis pendens* is not that principle. The first and second respondents are not parties to the application before MAKONI J as the issue of the enforceability of the sentence at the instance of the first and second respondents is not an issue in that matter. The dispute pending before MAKONI J is whether the matter of the applicant can be referred to the Supreme Court in terms of the Constitution and in the alternative, whether the appeal by the applicant can be deemed to be pending. These

disputes while related to the matter that came before the second respondent are legally immaterial to the issue that confronted the second respondent. She was enquiring into the enforceability of a sentence imposed by her court earlier and against which no appeal was pending at the time she held the inquiry as MAKONI J had not yet deemed the appeal pending. In the event that MAKONI J deems the appeal to be pending, then the applicant will then be entitled to his immediate release. Similarly, in the event that the matter is referred to the Supreme Court in terms of the Constitution, other considerations will come into play. In the absence of a decision by MAKONI J, there was no consideration barring the second respondent from proceeding as she did.

It is therefore my finding that the matter of the enforceability of the sentence imposed on the applicant is not pending before MAKONI J.

Assuming I have erred in my finding above, I still would have dismissed the application on another basis. The exception of *lis pendens* is never a complete bar to further proceedings concerning the same dispute. It is a discretionary tool in the hands of the court used by the court to stay the latter proceedings having regard to the equities and to the balance of convenience in the matter. (See *DW Hattingh & Sons (Pvt) Ltd v Cole N.O*. 1991 (2) ZLR 176 (SC; and *Mhungu v Mtindi* 1986 (2 ZLR 171 (SC)).

In casu, the second respondent decided to proceed with the inquiry after being informed that the matter was pending before this court. She exercised her discretion in the matter. The applicant is not impressed by the manner in which that discretion was exercised and believes that the trial magistrate erred. In complaining about the erroneous exercise of that discretion, the applicant appeals and does not seek a review of the second respondent's exercise of her discretion. This is trite. The differences between a review and an

appeal have been dealt with in several judgments of this and the Supreme Court. An appeal seeks to attack the correctness of the decision of the inferior court or tribunal while a review seeks to attack the manner in which the decision of the inferior court or tribunal has been arrived at. Grounds of appeal are unlimited and cannot be prescribed as they relate to the errors in law or in fact made by the court whose decision is under attack. On the other hands, grounds of review are limited by law and have to be laid out in the application for review.

An error in exercising one's discretion can never be the basis for bringing a review. It is a ground of appeal.

It is therefore my alternative finding that the applicant has used the wrong procedure in approaching this court for relief. He ought to have noted an appeal against the decision of the second respondent not to stay the inquiry pending the decision by MAKONI J.

Before I dispose of this matter, there is one other issue that I feel I must remark on.

The applicant was sentenced in April 1992. It has taken the offices of the first and third respondents almost 14 years to realize that there is no appeal pending in the matter. No indication has been given in the affidavit of the first respondent of what it is that occurred to move him and the third respondent sufficiently to enforce the long outstanding sentence with the efficiency with which they have suddenly acted. Against this background, the perception that it was the application by Aaron Munautsi, a private citizen, which brought the whole matter to light in 2004, gains some credibility. The overall perception created by the facts of this matter is that the offices of the first and third respondents are grossly inefficient or select against whom they are going to enforce prison sentences. Gross inefficiency or selective justice are both not complimentary attributes for the two offices and the perception that the two offices

are either of the two merely serves to bring the administration of justice into disrepute.

By the same token, the applicant was lulled into a false sense of security by the inactivity on the part of the State over the years. Being desirous of appealing against his conviction and sentence, he ought to have prosecuted his appeal timeously. Having realized that there was no record of the appeal in any of the relevant courts, he ought to have regularized his appeal at the earliest opportunity to avoid the current situation where the State has capriciously pulled the rug from underneath his feet after a lengthy period of inactivity.

In my view, both the applicant and the respondents have conducted themselves in a manner that gravely undermines the integrity of the justice delivery system. As a mark of my displeasure with the parties, I decline to make an order as to costs.

In the result, I make the following order:

The application is dismissed.

T K hove and Partners, applicant's legal practitioners.

The Attorney- General's office, respondents' legal practitioners.