TENDAI RICHMAN CHIGODORA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 16 January, 2020

Application for condonation of late noting of appeal

HBR Tanaya, for the applicant
R. Chikosha, for the respondent

CHITAPI J: This is a composite application for

"(a) Leave to seek condonation for late filing of an application for condonation.

(b) for condonation for late filing of application for leave to appeal to the Supreme Court.

(c) for leave to appeal to the Supreme Court."

In summary the applicant is out of time in relation to the time limits set by the rules of court for seeking leave to appeal to the Supreme Court from a judgment of this court sitting as an appeal court.

The brief background to the application is that the applicant was on 27 March, 2017 convicted in the magistrates court in case no. MUTRE 306/17 for the offence of fraud as defined in section 136 of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. He was sentenced to 4 years imprisonment with 1 year suspended for 5 years on conditions of future good behaviour. Being dissatisfied with the judgment and sentence, the applicant noted an appeal to this court. The appeal was heard on 7 June, 2018 and subsequently dismissed as devoid of merit by judgment of HUNGWE J (as he then was) with WAMAMBO J concurring on 22 May, 2019.

The applicant appears to be dissatisfied with the judgment of this court on appeal as aforesaid. The full judgment is referenced HH 348/19 and is an annexure to the current application. In terms of section 44 (4) of the High Court Act, [*Chapter 7:06*], a dissatisfied appellant in a judgment of the High Court on appeal from a decision of an inferior court or Tribunal against conviction or sentence may escalate the appeal to the Supreme Court. The right of appeal to the Supreme Court is however subject to the grant of leave to appeal being applied for and granted by a judge of this court or of the Supreme Court should a judge of this court refuse to grant leave and the appellant is dissatisfied with the refusal and wants to escalate the application for leave further. I do not herein deal with instances when a direct appeal can be made to the Supreme Court without leave as such situation does not obtain in this case. It suffices however to mention that a direct appeal without leave may be made to the Supreme Court in terms of the Proviso to paragraph (b) of subsection (2) to section 44. Subsection 4 of section 44 provides that the process of applying for leave to appeal to the Supreme Court in terms thereof should follow the procedure which obtains when a person convicted on trial by the High Court appeals wishes to appeal to the Supreme Court against conviction and / or sentence.

The process of applying for leave to appeal is governed by Order 34 of the High Court, 1971. In terms of rule 262, an oral application should be made immediately after sentence has been passed. By parity of reasoning, where an appeal from the inferior court or tribunal has been dismissed by the High Court, the application for leave to appeal should orally be made upon the pronouncement of the dismissal of the appeal. In terms of the provisions of r 263, where such application is not made orally upon the pronouncement of the decision of the High Court, an application in writing may be made in special circumstances within twelve days of the date of the decision. The rule is specific that such application should state the reason(s) why the application was not made at the hearing in terms of r 262 in addition to listing the grounds of appeal and the grounds on which it is contended that the appeal should be granted. In the event that the application is not made within 12 days as aforesaid, a further window is given to the would be appellant to apply for condonation in terms of r 266. In terms of r 267, no application for condonation may be made after the expiry of 24 days from the date that the High Court pronounced its final decision “unless the judge otherwise orders.”

In terms of case allocation, the applications made in terms of either rr 263 or 266 is placed before the presiding judge. Rule 268 provides that any other judge may deal with the application if the presiding judge is not available. In *casu*, the two judges who presided in the appeal hearing are not available. For the record HUNGWE JA (then a judge of this court) is now a Supreme Court judge and is also seconded to the Lesotho High Court. WAMAMBO J is now assigned to Masvingo High Court. Both judges not being available at Harare High Court where they presided the appeal and dismissed it, there is justification for another judge to deal with the application.

Another procedural matter arises which requires legislative intervention in my considered view. Procedurally two judges preside in an appeal against conviction and/or sentence from the decision of the inferior court or tribunal. Where the two judges are not agreed on the decision on appeal, a third judge is roped in, in which case the decision of the majority carries the day. In the event that the appeal is dismissed and the unsuccessful appellant is minded to appeal to the Supreme Court, on any ground which involves a question of fact or a question of mixed fact and law, such applicant requires to first obtain the leave of a judge of this court. This procedure results in an undesirable situation in which a single judge must of necessity and to all intents and purposes review the judgment of two judges sitting as an appeal and to find fault in that judgment. A judgment is composed of findings of fact, statement of the law and the decision based on the effects of the combination of such findings of fact and the law. The decision of two appeal judges bind a single judge inasmuch as where for example a third judge is called in the event of the two judges disagreeing, the decision of the two out of three will bind the dissenting judge. The procedure of requiring a single judge to deal with an application for leave to appeal in which the most determinant consideration are prospects of success on appeal where such appeal is against a decision of two judges of this court sitting on appeal flies in the face of the principle of judicial precedent. It is an area which needs a revisitation because it just places the judge determining the application for leave to appeal in a very invidious position of finding fault with the judgment of two of his peers. The problem may not arise where the judge is of the view that there are no prospects of success of the proposed appeal. Where however, the opposite is the position then the problem I have set out arises.

I have also considered the wording of the rr 263, 266 and 267. They cause confusion. Rule 263 provides that special circumstances be established for not making an oral application for leave to appeal upon the conclusion of the case whose decision is intended to be appealed against. The default position is as set out r 262, which is to make the oral application upon the pronouncement of sentence or dismissal of appeal as the case may be. With appeals, judgments are sometimes reserved. They are handed down not necessary by the same set of judges who presided over the appeal. The prospects of making an oral application as envisaged in r 262 becomes a practical challenge. Further, whilst r 263 requires that there be special circumstances shown for not making an oral application at the end of the hearing, r 266 provides that the would be appellant may apply for condonation where there has been failure to apply for leave in terms of r 263. Rule 267 provides a cut off period in terms of which an application for condonation in terms of r 266 may not be made after 24 days from the date of sentence "unless the judge otherwise orders". The judge can only order otherwise if the would be appellant applies for condonation. When rr 262, 266 and 267 are read together and in context, they smack of tautology because they in essence say the same thing in that the would be appellant who fails to make oral application as envisaged in r 262, must of necessity seek an indulgence from the judge to make the application which simply implies that the would be appellant seeks condonation. The rules should just be synchronized to reflect the one implicit intent of the rule giver which is that the would be appellant who fails to make oral application for leave to appeal at the end of the hearing can only do so after the grant of condonation. It is already a principle of the law that in applications for condonation, the extent of and explanation for the delay are relevant considerations. No practical purpose is served by providing for the general time limitation of 24 days in r 266 when the judge can still use his or her discretion to grant condonation in terms of r 267.

The tautologous nature of rr 263, 266 and 267 has caused the applicant to make a hybrid or composite application seeking one condonation after another in addition to seeking leave to appeal. The gravamen of the applications is that the application for leave to appeal has been made out of the time periods provided for in rr 263 and 266 and the judge is being called upon to act in terms of r 267. In terms of approach, I would say, since special circumstances must be established where an application for leave to appeal has been made in terms of r 263 and

condonation is required thereafter if application is not made within 12 days of completion of proceedings to a limit of time for applying for condonation of 24 days whereafter further condonation is required in terms of r 267, tautologous as it might appear and sound, the intention behind rr 263, 266 and 267 is that there should be finality to litigation. In this regard, I have read the *dicta* of CHIRAWU-MUGOMBA J in the case of *Tafadzwa Watson Mapfoche* v State HH 438/18 wherein in allowing an application for leave to note appeal out of time the learned judge condoned the late filing of the application in terms of r 267. The learned judge pointed out that the right to appeal against conviction and sentence was now part of the declaration of rights in terms of the current constitution. This right is however subject to reasonable restrictions which the law may impose as provided for in s 70 (5) of the constitution. It is a reasonable restriction to impose reasonable time limitations for noting appeals and applying for condonation of failure to abide the time limitations. A person who is arrested must be tried for the offence within a reasonable period. It should follow that where the person contests the judgment of the court, he or she should also seek a review or note an appeal within a reasonable period. Cases cannot drag on and on without finality as this would lead to society losing confidence in the efficacy of the criminal judicial system whose repute would be seriously compromised. It must follow in my view that allowing further condonations in terms of r 267 is a discretion which must not be lightly granted and should be exercised in applicant's favour or granted in exceptional circumstances. It would however be futile to define or do a digest of such exceptional circumstances as they are to be considered on a case by case basis. It suffices that the window for making an application for leave to appeal cannot be left open forever and thus applications made beyond the period granted in r 266 should only be granted as an exception rather than the norm.

In *casu*, the applicant averred that he became aware of the dismissal of his appeal on 23 May, 2019 when his legal practitioner advised him. He stated in para 6 of his affidavit as follows:

> "My legal practitioner contacted me and I met them on the 23rd May 2019 whereat they advised me of the outcome of the appeal and my right of appeal. We discussed the judgment and they advised me that whilst I had good prospects of success on further appeal, there was no certainity that leave to appeal would be granted or that the appeal would succeed. I was advised I need to decide the way forward urgently. However I had no funds to instruct them to immediately initiate the process of noting an appeal in the Supreme Court and I was shocked and confused with the judgment – so I simply indicated to them that I would think about it and get back to them."

The applicant did not make up his mind quickly as advised of him by his legal practitioners. He averred that he could not even tell his family what had happened and had become "so disoriented" that he failed to even revert to his legal practitioners. He then stated that he was a layman with no knowledge and experience with the law and procedures such that he could not note an appeal as a self- actor. He was committed to prison on 24 June, 2019 to serve his sentence. He averred that it was then that his family became aware of the dismissed appeal and committed to raise lawyers' fees which they did. They engaged the legal practitioners on 11 July, 2019 and paid the fees deposit on 5 August, 2019. The application was only filed another 15 days later on 20 August, 2019. No explanation was proffered for the extended delay beyond 5 August, 2019. The legal practitioners needed to treat the matter with urgency given the delays in seeking condonation which delays they were aware of. Rule 267 as I have indicated will be resolved in applicant's favour in exceptional circumstances. The application does not address the issues of the legal practitioners' delays. I must remark as well that I did not find the explanation that the applicant was so disoriented by the dismissed appeal that he hid the fact from his family to be plausible. It appears to me that the applicant was resigned to accept the result and only decided to try his luck after he had been committed to serve the sentence following the dismissal of the appeal. The explanation for the delay is convulated. On one hand the applicant pleads indigence in not having legal fees at hand. On the other hand, he pleads that he was resigned to his fate. A would be appellant who procrastinates in deciding whether to appeal or not cannot claim an infringement of his right to appeal. The applicant was legally represented and informed of his rights. Any decision he took thereafter was taken by him whilst conscious of his legal rights. I do not accept as plausible, his explanation that he did not file an application as a self-actor as he did not know the procedures because not only had he been appraised of his rights, but he did not consult the same legal practitioners for advice of how he could go about filing the application as a self-actor. The reasons proffered for the delay considered in the light of the surrounding circumstances of the case, are unreasonable.

I have already indicated that the court has a discretion in terms of r 267 to grant condonation and that because the condonation envisaged is additional to the condonation in r 266, exceptional circumstances must be established to merit the court in the judicious exercise of

its discretion to condone the late filing of the appeal. I have found that the explanation of the reasons for the delay is unreasonable. I have considered together with the reasons and explanation for the delay, the applicants prospects of success on appeal. A consideration of the notice and grounds of appeal proposed to be filed related to both points of fact and law which were adequately canvassed in the judgment on appeal. In the appeal judgment, HUNGWE J stated as follows on p 1 of the cyclostyled judgment:

> "The appeal against conviction amounts to this: the state witnesses were not credible. The defence witnesses were credible and truthful. The court should have called the expertise of a handwriting expert rather than rely on the mere observation of the questioned document to settle the disputed issue of who wrote the agreement of sale which formed the basis of the order for default judgment against the complainant. In short this appeal attacked the factual findings by the court *a quo* and the deductive reasoning in making finding of fact upon which the appellant was convicted.
> As against sentence, the ground of appeal is that the sentence of 4 years is excessive in the circumstances of the case."

A reading of the proposed grounds of appeal show that they do not allege any misdirection of law or fact or a combination of both purportedly made by the appeal judges. On page 3, of the judgment, it is stated;

> "In our assessment of the rationale of the magistrates findings, we are unable to say that it has been shown that the decision by the court a quo on the question of credibility was wrong. In any event, the State witnesses' evidence reads well. The finding that State witnesses lied is an unimpeachable finding. I am of the view that there is no basis to upset the factual findings of the court *a quo*."

In regard to the authenticity of the agreement and the need to call an expert witness, the appeal court found that what was at play was not the authenticity of the agreement but the fact of whether or not any sale agreement was executed. The finding by the trail court that no agreement was executed was found by the appeal court to be unimpeachable. It was a factual issue determined on the credibility of the appellant and complainant and the respective witnesses. It is further stated in the appeal judgment on p 4-

> "It would have been different if the complainant only disputed his signature and acknowledged the rest of the agreement."

The proposed ground of appeal are not directed at the sentence which was imposed. It is also noted that the grounds of appeal do not fault the judgment of this court on appeal. An appeal

must attack the judgment for it to be valid or be meaningful. In my determination there are no reasonable prospects of success on appeal.

In consequence of my findings that the explanations for the delay do not commend themselves as justifying the grant of condonation coupled with the want of prospects of success on appeal, the justice of the case does not favour the granting of the relief sought.

In the result, the composite application for condonation of failure to apply for leave to timeously appeal and for leave to appeal are dismissed.

Tanaya Law Firm, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners