

DISTRIBUTABLE (04)

MARRY MUBAIWA - CHIWENGA
v
THE STATE;
NATIONAL PROSECUTING AUTHORITY;
CRIMINAL CLERK OF COURT, ROTTEN ROW MAGISTRATES
COURT

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA
HARARE JANUARY 7, 22 AND FEBRUARY 3, 2021

M. Mbuyisa and J. Ndlovu for the appellant
A. Muzivi and S. Fero for the State

BAIL APPEAL (In Chambers)

Judgment No. SC 04/21
Civil Appeal No. SC 03/21

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MAVANGIRA JA:

THIS APPLICATION

1. On 6 January 2021 the appellant filed with the Registrar of this Court papers titled
**“APPEAL BY THE APPELLANT IN TERMS OF SECTION 121 (1) (a) OF THE
CRIMINAL PROCEDURE AND EVIDENCE ACT [CHAPTER 9:07] AS READ
WITH RULE 67 OF THE SUPREME COURT RULES, 2018.”**
2. Attached to the cover page is an application for alteration of bail conditions that the appellant filed in the High Court as well as the attachments thereto, the State’s responses and the appellant’s heads of argument. Also attached is a Notice of Appeal

to the Supreme Court, appealing against the judgment of the High Court in the matter.
A copy of the judgment, HH825/20, also attached.

3. On 7 January 2011, in proceedings convened for that purpose, timelines were agreed for the filing of papers, and heads of argument by the parties and an order providing for the same was issued by consent. The order also provided for the hearing of the matter on 22 January 2021, such date being accommodative of the agreed dates for the filing of the necessary papers. Thereafter, and pursuant to the issuance of Practice Direction 2 of 2021 on 21 January, 2021, I directed that the registrar advise counsel for both parties that the hearing scheduled for 22 January would no longer be held and that I would accordingly determine the matter on the papers filed as the parties had already filed all the papers including their respective heads of argument.

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FACTUAL BACKGROUND

4. The pertinent and condensed facts for the purposes of this judgment are that the appellant, facing certain charges, was admitted to bail on certain conditions including the condition that she surrenders her diplomatic passport to the clerk of court at Harare Magistrates Court. Thereafter, in different proceedings and on different charges that were subsequently laid against her, she was admitted to bail after successfully appealing to the High Court against refusal of bail. The subsequent bail order was later altered by the addition of a provision requiring her to surrender her ordinary passport to the clerk of court at Harare Magistrates Court. She then applied for the alteration of the bail condition and sought an order for her ordinary passport to be released to her and that she be authorised to travel to the Republic of South Africa for medical attention. The court a quo dismissed her application.

POINT IN LIMINE

5. The first respondent filed a Notice of Opposition and opposing affidavit in which it raised a point *in limine*. The import of the point *in limine* is to the effect that the appeal is fatally defective for non-compliance with r 67 (1) and (5) of the Supreme Court Rules, 2018 (the Rules). It is contended that there being no written statement filed, the appeal is fatally defective because it is the written statement that lays the basis of the appeal. The submission is made that for that reason the matter must be struck off the roll. It is also contended that the appellant has failed to comply with the peremptory requirement stipulated in subrule (5) that the written statement and record of proceedings be served on the Prosecutor-General and the judge whose decision is the subject matter of the appeal.

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6. The appellant's contention in response is that the point *in limine* raised by the first respondent does not have any legal substance and ought to be dismissed as there is substantial compliance with the Rules. It is submitted that the Rules do not contain a form that the statement contemplated in r 67 (1) must follow. It is further submitted that the matters stated in paragraphs (a) to (c) of subrule (1) of r 67 are all covered and met or satisfied by the Notice of Appeal that was filed. The fact that the said requirements "have not been presented **in a manner that the 1st Respondent prefers**", so the argument goes, "does not change the substance of the present matter." The appellant's stance is that she is in substantial compliance of r 67 (1) because "all the documents served on the 1st Respondent meet the requirement of r 67 (1) as read with r 67 (5)." In other words, the Notice of Appeal suffices as the written

statement that is required or as an adequate replacement of the same, in the event that it is said not to be itself a “written statement.”

SECTION 121 (1) OF THE CRIMINAL PROCEDURE AND EVIDENCE ACT
(CHAPTER 9:07)

7. The reference to paragraph (a) of subsection (1) of section 121 of the Criminal Procedure and Evidence Act (Chapter 9:07) on the cover page of the appellant’s papers is wrong as the particular paragraph relates to appeals by the Prosecutor-General or the public prosecutor against the admission of a person to bail. It is paragraph (b) of the same section and subsection that allows the appeal against the refusal to admit a person to bail and by extension, an appeal against the refusal of an application for the variation of a bail condition. The Notice of Appeal attached to the papers cites s 121 (1) (b), that being the applicable provision in such appeals. It should in fact, in my view, be s 121 (1) (b) as read with subs (2) (a).

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8. The relevant parts of the provision read:

“Appeals against decisions regarding bail

- (1) Subject to this section, where a judge or magistrate has admitted or refused to admit a person to bail –
- (a) ...
- (b) the person concerned, at any time;
may appeal against the admission to or refusal to bail or the amount fixed as bail or any conditions imposed in connection with bail. (the underlining and special highlighting is added).
- (2) An appeal in terms of subsection (1) against a decision of –
- (a) a judge of the High Court, shall be made to a judge of the Supreme Court.”

9. I highlight at this juncture that this matter concerns not the refusal of bail but relates to the refusal by the High court of a variation of a condition of bail.

RULE 67 AND ITS APPLICABILITY

10. By virtue of the specially highlighted portion of the provision in s 121 (1) quoted in paragraph 8 above, r 67 of the Supreme Court Rules, 2018 is the only provision that is applicable in matters of the nature of the appellant's quest before this court. It provides in part:

“(1) An appeal against the refusal of bail in terms of section 121 (1) (b) of the Criminal Procedure and Evidence Act [Chapter 9:07] may be noted, at any time after the refusal of bail by the judge of the High Court, by filing with a registrar a written statement indicating –

- (a) the reason why bail should be granted;
 - (b) the proposed terms thereof; and
 - (c) whether or not bail has previously been refused by a judge or magistrate and, if it has been refused –
 - (i) the grounds on which it was refused, if the grounds are known to the appellant; and
 - (ii) the date on which it was refused.
- (3) In addition to the statement in subrule (1), the appellant shall simultaneously lodge with the registrar a record of the bail proceedings which are the subject of the appeal:

...

(5) As soon as possible after filing an appeal in terms of subrule (1), the appellant's legal practitioner, where the appellant is legally represented, or the registrar, where the appellant is not legally represented, shall –

(a) cause a copy of the statement and the record referred to in subrules (1) and (2) to be served on the Prosecutor-General and the judge whose decision is the subject of the appeal; and

...

Provided that a judge may permit an application to be heard without a copy of the judgment having been so filed, if he or she is satisfied that to obtain such a copy would unreasonably delay the hearing of the appeal.

(6) Where practicable, a judge on whom a statement and the record has been served in terms of subrule (5) shall file with the registrar his or her written comments on the appeal at least one day before the hearing of the appeal.

(7) The Prosecutor-General shall, at least one day before the hearing, file with the registrar and serve on the appellant a statement detailing his or her response to the appeal.

(8) The registrar shall set down an appeal referred to in subrule (1), after consultation with a representative of the Prosecutor-General and any legal practitioner representing the appellant, for hearing by a judge within four days after the appeal is filed:

Provided that the four-day period may be extended by agreement between the Prosecutor-General and the appellant or by order of a judge in terms of rule 4.” (the underlining is added)

11. Whilst no issue has been specifically raised about the applicability of r 67, it is important, in my view, for the avoidance of doubt or confusion, to confirm that it is applicable in this matter. The fact that an appeal relating to “**any conditions imposed in connection with bail**” (*per s 121 (1) (supra)*) is not specifically mentioned in r 67 does not, in my view, detract from the applicability of r 67 in this matter which relates to an intention to appeal against the refusal by the court *a quo* to alter a condition of bail.

12. Rule 67 prescribes the procedure by which an appeal provided for by s 121 (1) (b) of the Criminal Procedure and Evidence Act (which the appellant’s intended appeal is) may be noted. The appeal is noted by filing with the registrar **a written statement** indicating the matters stated in paragraphs (a) to (c) of subrule (1). In addition to the said statement the appellant must, (the underlining is for emphasis) in accordance with subrule (2), simultaneously lodge with the registrar **Judgment No. SC 04/21 Civil Appeal No. SC 03/21** proceedings which are the subject of the appeal. After filing the appeal the appellant shall, (the underlining is for emphasis) in fulfilment of the requirements of r 5 (a), cause a copy of the statement and the record of the bail proceedings to be served on the Prosecutor-General and on the judge whose decision is the subject of the appeal.

13. A perusal of the Rules in respect of provisions made for the noting of both criminal and civil appeals from the High Court as well as miscellaneous appeals reveals the following common and significant aspects. Rule 18 in respect of **criminal appeals** provides in relevant part that an accused person wishing to appeal against any conviction or sentence shall note his or her appeal by lodging a notice of appeal. Rule 37 provides that every **civil appeal shall be instituted in the form of a notice of**

appeal. Rule 59 that relates to Miscellaneous Appeals and References provides that every appeal under this Part shall be instituted by a notice of appeal.

14. I will proceed to quote each of the above cited rules *verbatim* in order to expose how in their similarity, they differ conspicuously from r 67 with regard to the manner or procedure by which an appeal is noted.

- R 18 pertains to **criminal appeals** and provides:

“(1) Subject to the provisions of subrule (4), an accused person wishing to appeal against any conviction or sentence shall note his or her appeal by lodging **a notice of appeal** with a registrar and a registrar of the High Court. Such notice shall be in Form 3 and shall be signed by the appellant or his or her legal representative and shall be accompanied by grounds of appeal in the form specified in rule 19.”

...

- R 37 (1) provides:

“(1) **Every civil appeal** shall be instituted in the form of **a notice of appeal** signed by the appellant or his or her legal practitioner, which shall state –

... (a) – (f)

(2) The notice of appeal shall be filed and served on a registrar, a registrar of the High Court and the respondent in accordance with rule 38.

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- R 59 which regulates **miscellaneous appeals** and references provides:

“(1) Every appeal under this Part shall be instituted by **a notice of appeal** signed by the appellant or his or her legal representative.

(2) The notice of appeal referred to in subrule (1) shall be directed and delivered by the appellant to the registrar or administrative officer of the tribunal, or to the officer whose decision is appealed against, and to all other parties affected, and shall also be filed with a registrar in accordance with rule 60.

(3) The notice of appeal shall state –

... (a) – (f)

15. What the above overview shows is that the manner of noting an appeal as provided in r 67, this being the filing of a written statement, differs from the manner provided for the noting of all other categories of appeals which require the lodging of a notice of appeal.

APPEALS GENERALLY

16. John Reid Rowland in **Criminal Procedure in Zimbabwe** (Legal Resources Foundation, 1997) states as follows:

“‘appeal’, in its ordinary sense, denotes an approach to a higher authority to alter the decision of an inferior; but in legal practice ‘appeal’ denotes a particular form of approach, which is distinguishable from other forms of relief, such as review. Appeals may take different forms, depending on the requirements of the statute in question.”

In the appeals that are noted under the Rules by filing a notice of appeal an appellant is required to set out grounds of appeal. In an appeal under r 67 the requirement is for the filing of a written statement indicating the reasons why bail (in this case the variation sought) should be granted; the proposed terms thereof; whether or not variation has previously been refused by a judge, and if it has been refused, the grounds on which it has been, if the grounds are known to the appellant and the date on which it was refused.

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THE WRITTEN STATEMENT

17. A Google search on the meaning of the word “statement” yielded the following results, among others:

- a communication or declaration in speech or writing, setting forth facts, particulars etc.
- A definite or clear expression of something in speech or writing.
(per www.dictionary.com)
- A statement is something that you say or write which gives information in a formal or definitive way.
(per www.collinsdictionary.com)”

18. In an appeal governed by r 67, the written statement is the document in which an appellant sets out and establishes his or her or its case including the justification for the granting of the relief that he or she or it seeks. It is the basis and the substance of the appeal. That, in my view, is the document in which the appellant makes out his or her or its case in much the same way as a litigant does in a founding affidavit. The

appellant's case is not made out in any subsequent documents or in heads of argument. The written statement is the document that is required, by subrule (5) (a), to be served on the Prosecutor-General and on the judge whose decision is the subject of the appeal. It forms the genesis of the appeal procedure. Without that genesis there can be no progression that can properly culminate in proceedings and a determination according to law. It is in the written statement that an appellant lays out his or her appeal, identifying himself or herself, explaining all that assists the court by informing it of all the pertinent exigencies of the appeal. It is also an appellant's opportunity to lay all relevant information before the court. It is a document that needs to be compiled with the meticulousness that its purpose and nature demand. Without it the court is disabled from relating to any intended appeal that is made in terms of r 67.

19. Rule 67 is specific and mandatory. It is pertinent to look at paragraph (a) which requires the written statement to indicate "the reasons why bail should be granted."

By its nature, a notice of appeal cannot meet this requirement. A notice of appeal is not a written statement. The regulated contents of a notice of appeal do not meet the requirements of a written statement as contemplated by r 67. In an appeal in terms of r 67 the court inquires into whether or not the relief being sought should be granted. The appellant's stance or case must be covered in the written statement. It is in the written statement that the grounds for granting the variation are required to be laid or set out or tabulated. Grounds of appeal as articulated in a notice of appeal are by nature restrictive in their character and construction. On the other hand, a written statement, as required by the Rules, informs the court in full of the appellant's case. It also informs the respondent(s) fully of the case that must be met. It does not leave the court and the respondent(s), as is the position in this case, to wade through the notice

of appeal, the record of bail proceedings and the judgment of the court *a quo* and try to make out for themselves the appellant's case in its true and full extent.

20. Paragraph (c) of r 67 (1) requires an indication in the written statement of whether or not bail has previously been refused by a judge and the grounds on which it was refused if these are known to the appellant. This requirement cannot possibly be adequately met in a notice of appeal by virtue of the nature of document that it is. The Rules require that a notice of appeal must, amongst other things, "set out clearly and specifically ... the grounds on which the appeal is made" (*per* rule 19 (1)) or to have grounds of appeal that are "set forth clearly and concisely" (*per* rule 44 (1)). An appeal under this rule stands or falls on the written statement.

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21. In an appeal instituted by way of a notice of appeal, the appellant must set forth whether or its case in full in heads of argument. It is in the heads of argument that the court and the respondent are finally informed in full of the appellant's case and the respondent then files its own heads of argument in response. Under r 67 it is the written statement and not any other document that so informs the court and the respondent(s) and must then be responded to in detail by the Prosecutor-General or commented on by the judge whose decision is the subject of the appeal. The filing of a notice of appeal as has been done *in casu* does not, in my view, serve the interests of justice bearing in mind that the interests of both parties must be considered. Such consideration can only be possible where the appeal is noted by way of a written statement to which the respondent will file a statement detailing his or her response. In any event, an appeal under r 67 would, if determined on the basis of a notice of appeal as urged by the appellant, not be determined in accordance with the law.

NO SERVICE ON THE PROSECUTOR-GENERAL AND ON THE JUDGE

22. The certificate of service filed by the appellant shows that the papers by which she purported to note her appeal were served on the first and the second respondents but not on the judge whose decision is the subject of the purported appeal. No explanation has been proffered why the judge was not served. The provision is mandatory. No justification has been laid as to how and why this court can and or must overlook this requirement. In this regard note must be taken that in terms of subrule (6), after the serving of the statement and the record of bail proceedings on the judge whose decision is the subject of the appeal, he or she shall, where practicable, file with the registrar his or her written comments on the appeal at least one day before the hearing of the appeal. It goes without saying that the judge's comments are meant, where provided, to be of assistance to the determination of the appeal. This is more so in view of the fact that matters of the liberty of the individual, especially so before conviction, are sacrosanct matters that require expeditious resolution by judicial decisions that are well informed and based on the law. The crafting of the Rules in the manner discussed was meant to achieve that objective. Such decisions can only be achieved when all the parties are fully and properly heard by the court. Critically, the initiator of the process has the obligation to ensure that all who must be heard by the court are brought before the court. *In casu*, the failure to serve the judge negated that obligation.

23. It cannot escape observation and mention that all this is overshadowed by the fact that even those parties, to wit, the first and the second respondents, that were purportedly served with papers were not served with a written statement. The service that was

effected on them can thus be described as futile and serving no purpose. The fact is therefore inescapable that neither the judge nor the Prosecutor-General were served with the requisite written statement. The failure to file a written statement, which is a pre-requisite for any appeal under this rule and the filing *in lieu* thereof of a notice of appeal, disables any ventilation of any intended appeal that an appellant desires to be placed before the court.

24. The judge in the court *a quo* exercised a discretion in determining the application that was before him for the variation of a bail condition. The Rules are designed to afford him (or her) an opportunity to make comments in the event of an appeal being noted against his (or her) decision. The judge's comments may well be supportive of the appeal or may not be so. The judge's comments are meant to be one of the cogs on the wheel of justice in so far as appeals in terms of r 67 are concerned. The net effect of compliance with the discussed provisions is that the court will be enabled to dispense and serve justice. As matters stand, there is non-compliance in fundamental respects that must of necessity impact negatively on the matter before me.

25. The requirement for the Prosecutor-General to, at least one day before the hearing, file with the registrar and serve on the appellant, **a statement detailing his or her response** to the appeal, reinforces the critical point that the written statement is the pivotal document that enables an appellant to lay before the court, in detail, her appeal and the merits thereof. That is also why the Prosecutor-General is, after being served with the written statement and the record, required to file a statement **detailing** his or her response. The fact however, as already noted earlier in this judgment, is that the Prosecutor-General was not served with a written statement.

26. The requirement for a written statement is thus not an idle requirement in the rules. It is purposeful. The written statement is certainly not a document that can be in the form of a notice of appeal and the difference is not merely cosmetic. The requirements of what must be indicated in a written statement cannot possibly be achieved within the confines of a notice of appeal. It is therefore unwarranted for the appellant to attribute the raising of the point *in limine* to the fact that the requirements of r 67 (1) **have not been presented in a manner that the first respondent prefers.** The issue is not about preferences. It is about compliance with a purposefully crafted rule that must be obeyed in order for justice to be dispensed. Serious reflection by the appellant's counsel after the raising of the preliminary point should, in my view, have led to the careful reading of the rule and appreciation of it, if proper attention had not been paid to the rule before then. This ought to have resulted in the realisation that r 67 had not been complied with at all and that there was need for timely and appropriate action that avoids persisting with a fatally defective appeal that unnecessarily deters the court and at the same time has the effect of delaying the determination of the appellant's craved or intended appeal on the merits. If the content of r 67 was paid attention to before the filing of the papers in casu, the court is left without explanation on why a written statement was not filed with the registrar for the purpose of noting the intended appeal.

27. The appellant appears to expect the court and the respondents to create for themselves and on her behalf, after reading all the papers that she filed attached to the cover page, the written statement by which the appeal ought to have been noted. Needless to say, it is not for the court to make out a case for a litigant. That, if it were even possible at

all, would lead to serious miscarriage of justice, for the respondent would not know the case that the court has conjured up on behalf of the appellant and would neither know what to respond to as the statement made up by the court would remain locked in the court's mind. The court could not perceivably produce a written statement of an appeal that it would thereafter proceed to make a determination on. It would neither be perceivable that the Prosecutor-General would have to "assemble" for himself (or herself) from the papers filed, the written statement that ought to have been filed by the appellant and then proceed to purport to respond to it in a statement detailing his or her response. Justice does not work that way at all. There cannot thus be said to be any compliance with the pertinent rule in such circumstances, let alone substantial compliance.

CONCLUSION

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28. In the absence of a written statement as stipulated, an appeal in terms of r 67 has not been noted. There is thus no appeal before this court. In addition, the failure by the appellant to serve the judge with that which she insists to be good enough to qualify as a statement would, **even if the notice of appeal were to be found to be or to qualify as a written statement**, amount to inexcusable non-compliance. As matters stand, the judge was completely "left out of the equation", for want of a better expression. In any event, the notice of appeal is not, as pointed out earlier, a replacement of the stipulated written statement. On the papers before me therefore, it follows that the appellant did not have any written statement to file with the registrar or to serve on the judge or on any party at all. The two pronged point *in limine* must therefore be upheld. Firstly, no written statement was filed. Secondly, neither the Prosecutor-General nor the judge whose decision is the subject of the intended appeal

was served with a written statement. In view of these observations, the inevitable fate of this matter is therefore that there being no appeal before me, the matter must be struck off the roll.

29. It is important that I highlight that I am alive to the provisions of r 4 of the Rules in terms of which a judge or the court may direct a departure from the rules where this is required in the interests of justice. It is my considered view that this is not one such case for the reasons appearing herein.

30. It is accordingly ordered as follows:

The appeal be and is hereby struck off the roll.

Mtewa & Nyambirai, appellant's legal practitioners

National Prosecuting Authority, first respondent's legal practitioners

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