HB 113/18
HCA 22/18
X REF HCA 55/15; 56/15;
VF 65/15; VF 64/15

MUNYARADZI NHANHANGA

And

FREEDOM MANDUNDU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 28 MARCH & 17 MAY 2018

Application for reinstatement of an appeal

M. Mpofu for the applicants
T. Hove for the respondent

MAKONESE J: The applicants appeared before a magistrate at Victoria Falls on the 5th of February 2015 facing allegations of contravening section 82 (1) of SI 362/1990 as read with section 128 (b) of the Parks and Wildlife Act (Chapter 20:14), that is possession of raw ivory.

The applicants pleaded not guilty to the charge and following a protracted trial, the applicants were convicted and sentenced to the mandatory 9 years imprisonment. The trial magistrate enquired into the existence of special circumstances, and having found that none existed imposed the prescribed mandatory sentence. On the 18th March 2015 the applicants filed a notice of appeal against conviction and sentence. The grounds of appeal are brief and are in the following terms:

"…

1. *The learned magistrate erred in disregarding the accused's defence that he was waiting for National parks personnel.*
2. *The court a quo misdirected itself in restricting the special circumstances to only those peculiar to the commission of the offence.*

Ad sentence

The court a quo erred in imposing the mandatory sentence when there were special reasons."

In this application for reinstatement of an appeal, the court is enjoined to consider:

(a) Whether the applicant has advanced a reasonable explanation for this dismissal of the appeal for want of prosecution.
(b) Whether the applicant's appeal has prospects of success of an appeal.

The applicants were convicted for possession of raw ivory in contravention of the Parks and Wildlife Act. The learned magistrate gave detailed and extensive reasons for convicting the applicants. The applicant's defence was proved to be palpably false. No reasonable court would have accepted the applicants' defence to the charge.

The brief facts of the matter are that the applicants are both residents of Victoria Falls. On the 27th January 2015 police detectives received information to the effect that the applicants and two other persons (accused 3 and 4 in the trial) were in possession of an elephant tusk which they intended to sell. The applicant's were tracked down and it was established that they were on their way to the Kingdom Hotel. A team of police officers ambushed the applicants at a car park at the Kingdom Hotel. Police officers surrounded a Sunny motor vehicle that was bring driven by the applicants, and had been driven to the hotel for the purposes of selling the elephant tusk to a prospective buyer. The elephant tusk and a digital scale were recovered from the boot of the Sunny motor vehicle by the police.

The applicants and the two other persons were arrested for illegally possessing raw ivory and escorted to Victoria Falls police station. The raw ivory weighed a total of 9.4 kgs and was valued at US$2 335. The applicants who were represented throughout the trial alleged that they had picked up the elephant tusk in a bush. They alleged, further that at the time of their arrest

they intended to surrender the elephant tusk to the department of National Parks. The learned magistrate in the court *a quo* did not have any difficulty in rejecting the applicant's defence as false. It is not necessary for the purposes of this application to go over the evidence presented in the court *a quo*. In her response to the notice of appeal the learned trial magistrate had this to say:

> *"1. The defence was disproved by many factors that came out during the trial including his good friends' witnesses, testimonies in court, what he said about, how he got the tusk, the time it happened, the place they were caught at. In addition to the informants prior communication which placed them at the exact place, the same member, specific car and time which the informant had said earlier.*
> *2. According to the reading of the Act, the special circumstances inquiry was proper.*
> *3. No special reasons were found considering all the circumstances."*

The applicants contend that the appeal was dismissed for want of prosecution after their elected legal practitioner failed to appear on the date of set down. The applicants allege that they were initially represented by Messrs Marondedze, Mukuku and Partners who prepared and filed heads of argument. The matter was set down for hearing on the 27th March 2017. The notice of set down was served on applicant's legal practitioners who failed to attend court on the set down date.

The applicants allege that they were serving their prison time and were not aware of the matter having been dismissed for want of prosecution. The applicants became aware of the dismissal of their appeal on 23rd November 2017. The reason for the failure to attend court by the applicants is not reasonable. An applicant who elects to be represented by a particular legal practitioner gives that legal representative the full mandate to represent him. The applicant's legal practitioner did file heads of argument in the matter. The notice of set down was served at the legal practitioner's offices. The legal practitioner did not renounce agency at any stage. If the legal practitioner had any problems in not attending court he ought to have instructed another legal practitioner to argue the matter. It is not acceptable for a legal practitioner to fail to appear

in court despite a notice of set down being served upon him. Such conduct is clearly unethical and affects the smooth administration of justice. There are far too many applications for condonation and for reinstatement of appeals that are being brought to this court after legal practitioners fail to attend court or fail to file papers in terms of the prescribed time limits. The explanation given for the failure to attend court in this matter is not credible and the applicants may not hide behind the failure of their legal practitioners to appear on the date of set down.

The remarks of ZIYAMBI JA in *Apostolic Faith Mission in Zimbabwe & 2 Ors* v *Titus Innocent Murefu* SC-28-03, albeit relating to applications for condonation for failure to comply with the rules, are relevant. In that case the learned judge had occasion to restate the words of STEYN CJ in *Saloojee and Anor* v *Minister of Community Development* 1965 (2) SA 135E, where the learned CJ had this to say:

> *"It is necessary once again to emphasise as was done in Meintjies v H D Combrinck (Edms) Bpk at page 264.*
>
> *That condonation of the non-observance of the rules of this court is by no means a mere formality. It is for the applicant to satisfy this court that there is sufficient cause for excusing him from compliance and the fact that the respondent has no objection, is although not irrelevant, is by no mens an overriding consideration."*

There appears to be a tendency among legal practitioners generally, in relation to applications for condonation and reinstatement of appeals, to take the view that an appeal that has been dismissed by reason of failure by a legal practitioner to respond to a notice of the set down will be reinstated on the mere asking. The court, however, must be satisfied not only that the explanation given for failing to attend court is credible but that there are prospects of success.

As regards the prospects of success, the record of proceedings is very clear on the role of the applicants. The applicants were jointly charged with Ignatious Msipa and Francis Simbarashe Nyandoro. The applicants do not deny that they were found in possession of raw ivory in violation of the Parks and Wildlife Act. The applicants claim that they intended to

surrender the elephant tusk to the department of National Parks. The evidence presented in court is that the applicants intended to sell the elephant tusk.

The applicants were intercepted by police detectives and arrested before the alleged sale of the raw ivory. The defence proffered by the applicants is absurd and no reasonable court would have accepted such defence. There was no misdirection on the part of the learned magistrate in her assessment of the evidence.

I find that this application is an abuse of court process. There are no prospects of success and the application has no merit.

In the circumstances, and accordingly, the application is dismissed.

Samp Mlaudzi & Partners, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners