THE STATE
versus
COSMAS ZIWONDE

HIGH COURT OF ZIMBABWE
OMERJEE & MAVANGIRA JJ
HARARE

Criminal Appeal

MAVANGIRA J : The then 20 year old appellant was on 11 October 2005 convicted, after a trial, of two counts of fraud involving a total prejudice of $41 737 257.00. He was sentenced, apparently both counts being taken as one for the purposes of sentence, to 26 months imprisonment of which 6 months imprisonment was suspended on the usual and appropriate condition of future good behaviour. A further 10 months imprisonment was suspended on condition the accused restitutes the complainant in the sum of $41 737 257 by 30 April 2006. The total effective sentence was thus 10 months imprisonment.

The appellant now appeals against sentence only on the following grounds:

1. that the trial "magistrate erred in not placing due weight on the fact that the appellant is a young first offender whose moral blameworthiness could not be measured with the same yardstick as for adults";
2. that the trial magistrate erred in over emphasising the seriousness of the offence in assessing sentence thereby resulting in a severe sentence being imposed;
3. that the trial magistrate erred in not taking due regard of the fact that the appellant had lost his job but had thereafter secured another which he would lose due to the term of imprisonment imposed upon him; and
4. that the trial magistrate erred in over emphasising the need to rehabilitate the appellant through imprisonment thus resulting in a manifestly harsh sentence being imposed.

The notice of appeal concludes:

"RELIEF SOUGHT

Wherefore the appellant pray, (sic) that the sentence imposed by the court be set aside."

This is where the appellant's problems start. In terms of the Rules a notice instituting an appeal shall state, *inter alia,* the exact nature of the relief sought. A notice of appeal that does not comply with the Rules is defective. If the above quoted statement is to be taken literally as to the exact nature of the relief sought, then in effect the appellant would be seeking that the sentence of the court *a quo* be set aside and he be set free. His stated grounds of appeal however do not justify why he should be set free without any penalty being imposed on him. Rather, his grounds of appeal indicate that he is aggrieved by the severity of the sentence imposed. The heads of argument later filed on his behalf seek the relief of the setting aside of the sentence of the court *a quo* and a substitution thereof with the imposition of either a fine or the performance of community service. That cannot, however, cure his defective notice of appeal.

In *Jensen v Acavalos* 1993(1) ZLR 216(s) at 219G to 220D KORSAH JA stated:

> "On 3 January 1990, the applicant's legal practitioners filed the grounds of appeal, which were promised in the defective notice of appeal noted on 20 December 1989. They were, just as the legal practitioners had described then, "grounds of appeal", without a prayer for relief.
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> The notice of appeal, being bad for non-compliance with the rules, was not cured by the filing on 3 January 1990, of grounds of appeal without a prayer. Indeed, even if the grounds of appeal filed on 3 January 1990 had contained a prayer for relief, it would not have been effectual in validating the defective notice of appeal.
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> The reason is that a notice of appeal which does not comply with the rules is fatally defective and invalid. That is to say, it is a nullity. It is not only bad but incurably bad, and, unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice of appeal to be filed, the appeal must be struck off the roll with costs: *De Jager v Diner & Anor* 1957(3) SA 567(A) at 574C-D.

In *Hattingh v Pienaar* 1977(2) SA 182(O) at 182 at 183, KLOPPER JP held that a fatally defective compliance with the rules regarding the filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule. With this view I most respectfully agree; for if the notice of appeal is incurably bad, then, to borrow the words of LORD DENNING IN McFoy v *United Africa Co. Ltd* [1961]3 A11ER 1169 (PC) at 1172I, "every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

In *S v McNab* 1986(2) ZLR 280(SC) DUMBUTSHENA CJ at 283H to 284E stated:

"…in cases in which defective notices of appeal are filed it is in most cases the applicants' legal practitioners who are to blame. In such cases the court has to consider whether to punish the applicants for the negligence of their legal practitioners. In my view clients should in such cases suffer for the negligence of their legal practitioners. I share the view expressed by STEYN CJ in *Saloojee & Anor NNO v Minister of Community Development Supra* at 141C-E when he said:

> "There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. (Cf *Hepworths Ltd v Thornloe & Clarkson Ltd* 1922 TPD 336; *Kingsborough Town Council v Thirlwell & Anor* 1957(4) SA 533(N).)"

I have dwelt at length on this point because it is my opinion that laxity on the part of the court in dealing with non-observance of the Rules will encourage some legal practitioners to disregard the Rules of court to the detriment of the good administration of justice."

It appears therefore that there is no appeal properly before us as the purported notice of appeal is fatally defective. It cannot be condoned or amended. The appeal must therefore be struck of the roll. It is so struck off.

OMERJEE J, I agree:……

Chadyiwa & Associates, appellants' legal practitioners
Attorney-General's Office, respondent's legal practitioners