WILFRED TAKAONA MAPFUMO
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 31 May 2016 and 21 September, 2016

Chamber Application

Application for condonation of late noting of appeal and for leave to Prosecute the Appeal in Person

Applicant in Person
I. Muchini, for the respondent

CHITAPI J: I called for this record when I presided over the applicant's bail application pending appeal B 528/16 which was set down on 31 May, 2016. The State in its response to the bail application indicated that the bail application was non suited because the applicant did not have a pending appeal against which bail could be considered pending its determination. It was brought to my attention that an application for leave to appeal out of time was in fact pending under case No. Con 108/15. At the same time it was submitted by the State that such application had been struck off the roll by MATANDA-MOYO J for procedural irregularities. It was further pointed out that the applicant had after MATANDA-MOYO J's order filed another defective application under the same court record book reference and that such application had not been determined. I decided to deal with and dispose of both the bail application and case No. Con 108/15 as the two are related and in the process to bring finality to the cases.

The court record indicates that MATANDA-MOYO J on 15 January, 2016 commented as follows on the applicant's application Con 108/15.

> "There is no proper application before me-
>
> Applicant seems to be applying for:
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> 1. Leave to prosecute appeal in person
> 2. Condonation of late noting of appeal and
> 3. Application for bail pending appeal.

> These applications are improperly joined. Applicant should first pursue an application to prosecute appeal in person and pursue the rest should he be granted that authority. The applicant is also expected to file the full record. Accordingly, the application is removed from the roll."

Effectively therefore, there was no cognisable or competent application that MATANDA-MOYO J dealt. It is necessary to next determine whether or not the applicant then subsequently filed a competent application. MATANDA-MOYO J's comments were relayed to the applicant by letter dated 15 January, 2016 from the Registrar advising the applicant of the judge's observations.

The applicant by letter dated 26 February, 2016 responded to the Registrar's letter. The operative part of his letter reads as follows:

> "….. As per your said letter, I really appreciate the judge's comments, 'who said, the court will not consider my application, until filed in order'. Being the case in issue, may your good office find pleasure in receiving herewith, my condonation of late filing of appeal, my application for leave to prosecute the appeal in person, 'as self-actor', for consideration by the Honourable Court.
>
> Be pleased to note that my appeal is one based on a question of law and question of fact, as such I am not compelled to first seek to appeal in person and to file my condonation of late noting an appeal from the Honourable Court. I refer to para (a) and (b) of Subsection (2) of s 44 of the High Court Act, [*Chapter 7:06*] of which the latter expressly reads: provided that a person who appeals to the High Court on a ground of appeal must seek authority first". As such, I am praying that your most respected office of justice expedite the determination of my application for late noting appeal and for leave to prosecute my appeal in person.
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> I will appreciate your every effort to afford my case timely to justice, and respond me in writing".

I have quoted the contents of the applicant's letter verbatim including punctuation marks.

The applicant is a self-actor. His knowledge of the law and procedure is limited since he is not a trained lawyer or legal practitioner. A court dealing with a matter involving such an applicant should always mindful of such a petitioner's limitations. In terms of s 165 (1) (a) of the Zimbabwe Constitution it is a principle which should guide the judiciary that "justice must be done to all, irrespective of status". The fact that the applicant is not a trained legal person should not unduly prejudice him in his pursuit of justice. In terms of s 70 (5) of the Constitution a convicted person like the applicant herein has a right "subject to reasonable restrictions that may be prescribed by law "to either seek a review of his conviction or to appeal against his conviction and sentence to a higher court. The reasonable restrictions encompass the obligations which the law may prescribe with respect to the procedures which

must be followed when an applicant wishes to follow his rights as aforesaid. The applicant in this case finds himself in problems vis-à-vis following or asserting his rights from his lack of knowledge of procedure.

Whilst an accused person who faces trial has a right in terms of s 70 (1) (e) of the Constitution "to be represented by a legal practitioner assigned by the State and at State expense. if substantial injustice would otherwise result", no such entrenched right is afforded a convicted person who seeks a review of his conviction or appeals against his conviction and sentence by and to a higher court. Such person in terms of s 69 (3) and (4) has the right of access to the courts and to choose and be represented by a legal practitioner at such person's own expense. In short the convicted person is left to act for himself or fund costs legal representation.

In this application the applicant's papers present a serious indictment upon the judicial officer's patience. The inclination to simply dismiss the application for want of form beckons as the easy way out of the medley, hotchpotch or mutton stew with mixed vegetables dish presented by the applicant's papers. A judge's function is to dispense justice and even where papers before a judge present a dog's breakfast, the judge is required to consider the mixed grill and not just dismiss the matter out of hand. See *Mwanyisa* v *Jumbo & Ors* HH 3/10 per MAKARAU JP (as she then was). A litigant is entitled to know why his case has been dismissed. In short there should be reasons given for a decision made by the court. An informed decision cannot be properly reached unless the judicial officer has considered the content of the material on which he is being asked to make a determination. I will be guided accordingly and take into account the legal principles I have adverted to, to the extent that they may be relevant to my determination.

Having responded to the Registrar's letter as quoted (*supra*) it will be noted that the applicant was not in agreement with the contents of the letter. He reasoned that his application was grounded in s 44 of the High Court and that he did not require leave to "seek to appeal in person" because his appeal was based on a "question of law and a question of fact". The applicant clearly was offside in his response. Firstly, no one ever advised him to seek leave to appeal. What MATANDA-MOYO J pointed out to the applicant was that the applicant needed to apply for leave to prosecute his appeal in person. For the avoidance of doubt, in terms of s 36 of the High Court Act, [*Chapter 7:06*], a self-acting person does not have an automatic right to prosecute his appeal in person before the High Court unless a judge of the High Court grants such person a certificate to prosecute the same in person. For

the avoidance of doubt, a self-acting convicted person is entitled to note an appeal in person. What he cannot do is to prosecute it or rather to appear before the High Court in person and argue his appeal unless a judge of the High Court has granted such person leave through a certificate issued for such purpose. A judge will only grant such certificate if he/she considers that the person appealing has "reasonable grounds for appeal".

The procedure for dealing with the issuance of a certificate to prosecute an appeal in person against conviction and sentence as *in casu*, is set out in Part IV rules 26-30 of the Supreme Court (Magistrates Courts) (Criminal Appeals) Rules 1979 S.I 504/79. I do not intend to dwell on the provisions of the rules save to point out that the grant or refusal of a certificate to prosecute an appeal in person is the second rung in the appeal procedure. The first rung is that the appellant must have filed or noted his appeal in terms of r 27, that is, timeously with such notice of appeal indicating that the appellant intends to prosecute the appeal in person apart from setting out the grounds of appeal. It is this notice of appeal as aforesaid which the clerk of the court from which the appeal originates should refer to the magistrate whose decision has been appealed against for his comments or response. Once the response by the magistrate is to hand, the clerk of court should forward the notice of appeal, the magistrate's response and record of proceedings to the Registrar of this court. The Registrar will immediately lay the documents before a judge of this court to consider whether or not a certificate to prosecute the appeal in person by the appellant should be granted. If it is granted as the case maybe, the Registrar will notify the Clerk of Court who will then prepare the records for appeal. If the certificate is refused, the Registrar will likewise notify the Clerk of Court and the appellant. Where the certificate is refused, the proceedings which are subject of the appeal become subject of review in terms of s 29 of the High Court Act. In broad summary, the process of the granting or refusal of a certificate to prosecute an appeal in question should be handled in the manner aforegoing and is not brought about by way of a specified type of application as it were. The reference to an appellant wishing to prosecute his appeal in person being required to apply for a certificate to do so should be understood against the rider that the process is automatic and administrative once the self-acting appellant noting the appeal indicates that he intends to prosecute his appeal in person. *Ex-abundata cautela*, I should mention in passing that by Act No. 9 of 1997, appeals from the magistrates court were moved from the Supreme Court to the High Court. The High Court however still applies S.I 504/79 with necessary changes in reference to the Supreme Court and its procedures in the handling of the appeals.

In this application, the applicant when he responded to the Registrar's letter as aforesaid, filed at the same time on 26 February, 2016 a document headed "Re Notice of Chamber Application": Take Notice that: Applicant hereby makes an application for condonation of late noting an appeal, and an application for leave to prosecute the appeal in person, "as self-actor". Further Take Notice that: Applicant's Statement together with documents – attached hereto, will be used to support both applications". Before I consider the content of the applicant's papers in detail, I need to indicate that the State responded to the application aforesaid and filed its response with the Registrar on 8 March, 2016. The full content of the State response reads as follows:

> "STATE RESPONSE: APPLICATIONS FOR CONDONATION FOR LATE NOTING OF APPEAL, LEAVE TO APPEAL IN PERSON AND BAIL PENDING APPEAL
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> 1. The applicant has not filed an affidavit duly sworn before a Commissioner of Oaths to accompany the applications as required by Rules of Court in a chamber application.
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> 2. The applications are confusing since it is not clear how applicant wants the court to grant him bail pending appeal yet there is no appeal pending at this stage.
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> 3. The respondent prays that the applicant be directed to comply with the Rules in this regard before the application may be entertained.
>
> DATED AT HARARE THIS 7TH DAY OF MARCH, 2016
>
> I MUCHINI
>
> Counsel for respondent"

The mass and mess of papers filed by the applicant comprise what purports to be an affidavit by the applicant to support his "application for condonation of late filing of appeal against both conviction and sentence." The document reads, "I, Wilfred Takaona Mapfumo do hereby take oath and state that …… and ends with the wording "Dated on 28th October 2013 by 194/13 Wilfred Takaona Mapfumo". The document does not qualify for an affidavit. An affidavit should indicate that the deponent has sworn to its truthfulness before a Commissioner of Oaths or such other official as may properly administer the prescribed oath. The deponent signs the affidavit before the Commissioner of Oaths who must likewise sign it as well.

The further documents included in the application include a draft order which reads as follows:

"Whereupon after reading documents of record and hearing counsel:

IT IS ORDERED THAT:

1. Applicant be and is hereby granted condonation for late noting of appeal; and that;
2. Applicant be and is hereby granted leave to prosecute the appeal in prison (*sic*) as self-actor.
3. The applicant to deposit a sum of $50.00 as bail to the Clerk of Court of Harare Court.
4. The applicant to reside at house number 12339 Kuwadzana Extension until this matter is finalized.
5. Applicant to report once after two weeks at Kuwadzana (2) two police station Harare between 0830hrs and 1630hrs until further notice.
6. Applicant not to interfere with State's witnesses until this matter is finished.
7. Applicant not to abscond court until this matter is finished."

There is yet another document headed "APPLICANT STATEMENT: GROUNDS OF APPEAL AGAINST BOTH CONVICTIONS AND SENTENCES". In this document, the applicant stated that he intends to appeal against both conviction and sentence and believes that the sentence imposed on him is very excessive and induces a sense of shock since he is disabled and moves on clutches apart from requiring specialist medical attention. He then outlines reasons why he should be admitted to bail. He further goes on to attack the magistrate's judgment. He attached a medical report. Additionally he attached an unintelligible document which purports to be another notice of the applications he is making. Lastly, he attached a document in which he cites a plethora of cases on identification evidence and bail pending appeal. All in all the applicant cites 15 decided cases from the local and South African jurisdictions. He even summarised them. I was left wondering as to whether Chikurubi Prison is well resourced with legal material or someone legally trained prepared the papers for the applicant from outside the prison confines. Unfortunately as I have indicated, the papers are a mess because there is just no correlation nor fluidity in sequence of the documents, what they are designed to achieve and their relevance. I have patiently tried to synchronize the mass and mess of papers but have failed to do so. I had thought that I could make head and tail of what the applicant seeks to establish and try to see if I could not condone the failure to comply with the rules. Regrettably, due to lack of sequence in the documentation I have come stuck.

Lastly, the record of proceedings which the applicant attached to the mass and mess of his papers is in shambles. It is not paged nor paginated. It is incomplete as the charge sheet and state outline are missing therefrom. I was unable to put the record in sequence. With an incomplete record, the task of a judicial officer becomes well-nigh impossible much as he or

she may try to be sympathetic to short comings in papers filed by a self-actor. It did not surprise me therefore that the State in its response submitted that the applicant should be directed to comply with rules. The State Counsel in a follows up response filed on 2 June, 2016 stated that he could not properly respond to the application because the record was incomplete and it was not authenticated.

An application for condonation of late noting of appeal or for leave to appeal out of time is not just there for the giving. The starting point is to recognise that by not noting the intended appeal on time, the applicant will have lost his right to file an automatic appeal. The applicant seeking leave to appeal out of time basically seeks an opportunity to take another bite at the cherry which was available to him. Such a second opportunity if it is to be granted comes at cost. The applicant seeking the indulgence of condonation as indicated by the Chief Justice, CHIDYAUSIKU CJ in *Vigour Busilizwe Fuyana* v *Ntombaza Moyo* SC 54/06 is required to satisfy basic and essential elements which are stated as:

(a) a reasonable explanation for the failure to note the appeal within the prescribed period.
(b) some prospects of success on the merits; and
(c) the *bona fides* of the application.

In the South African jurisdiction, the approach of the courts in similar applications is set out in *S* v *DiBlasi* 1996 (1) SACR (1) at 3f-g as follows:

> "The general approach of this court to applications of this kind is well established. (see e.g. *Federated Employers Fire & General Insurance Co. Ltd Anor* v *McKenzie* 1969 (3) SA 360 (A) at 362 F-H; *S* v *Adonis* 1982 (4) SA 901 (A) at 908 H-909A and *Ferreira* v *Ntshingila* 1990 (4) SA 271 (A) at 281 D-F. Relevant considerations include the degree of non-compliance, the explanation therefor, the prospects of success, the importance of the case, the respondent's interests in the finality of the judgment, the convenience of the court and the avoidance of unnecessary delays in the administration of justice."

In my view, the approach articulated above is the same as the one followed in this jurisdiction because other factors additional to what is provided for in the *Fuyana* case *supra* would be covered by the *bona fides* of the application.

I would have been willing to bend over backwards and be sympathetic to the applicant by not giving undue weight to what might appear to be restrictive procedures which should be satisfied and/ or followed in such an applications since the applicant is self-acting. As already indicated however, the applicant's papers are a mess. His explanation for not

appealing on time is not set out in affidavit form. The proposed notice and grounds of appeal is not attached to the application. The documents forming the application are mixed up and muddled. To simply heap together a morass of paper work and hope that a judge will make out what the applicant intends to convey is to simply abuse the process intends to convey is to simply abuse the process of court. The application is so devoid of merit as to form and substance that much as I tried to painstakingly consider the same with all the patience I could master and exercising due diligence, I threw in the towel because it is not possible to salvage the application and make it stand in its present form.

The applicant was convicted and sentenced on 11 March, 2013. The inordinate in delay in not making the application for leave to appeal out of time when the applicant should have noted his appeal within 5days of sentence weighs heavily against the applicant. See *Aaron Zingani* v *State* HH 154/15. The granting of applications of this nature are clearly in the discretion of the court. A discretion is always exercised judiciously. A basis must however be laid for the judge to be armed with sufficient facts from which to formulate an opinion and exercise a discretion. I just could not formulate an objective overview of the whole application to be able to decide it.

The applicant is serving a sentence of 10 years of which 4 years was suspended on condition of good behaviour. He was convicted of 2 counts of robbery and acquitted on 16 counts. I do not propose to dismiss this application as this will make it even more complicated for the applicant to pursue the matter further since he will have to surmount my decision first. This application is not in order. There is no proper application before me both as to form and substance. The applicant may still want to continue to pursue the remedy of condonation of late noting of appeal. The best I can do is to leave it open for him to do so with advice that he may consider withdrawing this application and preparing another application and trying his luck. The applicant may well consider legal representation because he seems to be totally lost as to the nature and form of the application he is making yet his determination to bring the matter on appeal is from the mass and mess of papers filed, beyond question.

I consider the appropriate order in this case to be the same as was granted by MATANDA MOYO J which is to strike off the matter from the roll since there is no proper application before me. The following order is therefore made:

This application is struck off the roll. Since the applicant is in custody, the Registrar is directed to cause a copy of this judgement to be availed to the applicant at no cost to him.

National Prosecuting Authority, respondent's legal practitioners