

DIVINE MHAMBI HOVE

vs

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MOYO AND NDLOVU JJ
BULAWAYO 16 SEPTEMBER 2024, & 06 JUNE 2025

Criminal Appeal

Mr. S Chamunorwa, for the applicant
Miss D. E Kanengoni, for the respondent

NDLOVU J: This is a criminal appeal. The appellant was convicted of one count of theft, one count of malicious property damage, and one count of contempt of court by the Magistrates' Court.

[1] He was aggrieved by conviction and sentence in all counts and filed the present appeal. At the hearing of the appeal, *Ms Kanengoni*, for the state, raised points *in limine* to the effect that the Notice of Appeal was fatally defective as it was tainted with defective grounds of appeal as well as an invalid prayer. On the other hand, *Mr Chamunorwa*, for the appellant, also raised a point *in limine* that the respondent is barred as it had filed its Heads of Argument out of time.

[2] After extensive arguments by both counsel, we directed the parties to file supplementary heads of argument. They did. Their industry is appreciated.

[3] GROUNDS OF APPEAL

Ad conviction

“4. *The court a quo grossly misdirected itself on the point of fact in finding the appellant guilty of theft, that no reasonable court faced with the same facts would have arrived at the same decision in that:-*

- (a) *the complainant did not conclusively identify the property allegedly stolen by the appellant.*
 - (b) *The court did not consider and dispose of the evidence of the investigating officer, Jestina Moyo, to the effect that when they attended at the premises, they found the items of property that were alleged to have been stolen.*
 - (c) *The court did not consider and dispose of the evidence that showed that the complainant had instructed certain persons to remove cameras from the premises in issue.*
 - (d) *No one saw the appellant take the property in issue.*
 - (e) *It was not established that the appellant was the only person who had access to the bar having regard to the fact that the complainant alleges that when he returned to the bar, there were workers at the premises, that he found the door to the bar open and that it is not known when the alleged property was allegedly stolen.*
 - (f) *The court a quo did not consider and dispose of the fact that the investigating officer did not investigate the appellant's defence, which was that the property was taken by the complainant and some confiscated by police for lack of a trading licence.*
 - (g) *no evidence was led by the state to link the appellant to the alleged theft of all the items that it alleged were stolen.*
 - (h) *The court a quo did not critically consider and dispose of the evidence of Nqabutho Nkiwane regarding the property that he saw when the complainant let them into the bar and that he materially contradicted the complainant regarding the DVR and cameras.*
5. *The court misdirected itself on the point of law when convicting the appellant of theft by making adverse inferences against the appellant in that:*

- (a) *such inferences were not the only reasonable inferences that could reasonably be drawn.*
 - (b) *there was direct evidence to show that the appellant did not steal the alleged property.*
6. *The court a quo grossly misdirected itself on the point of fact that no reasonable court faced with the same facts would have arrived at the same decision when convicting the appellant of malicious damage to property, in that:-*
- (a) *none of the state witnesses led evidence to show that the appellant damaged the counter, VIP lounge and stage as alleged in the charge sheet;*
 - (b) *no one saw the appellant damage the alleged property, and*
 - (c) *the counter was, in any event, not damaged but removed.*
7. *The court a quo grossly misdirected itself on the point of law in that its judgment does not identify the property allegedly damaged by the appellant.*
8. *The court a quo erred on the point of law in disposing of the appellant's defence to the charge of malicious damage to property, that the counter was his personal property in that it sought to place an onus on the appellant to prove his defence.*
9. *As regards the charge of contempt of court, the court a quo fell into a gross error of fact that no reasonable court faced with the same facts would have arrived at the decision it did in that the events which relate to this charge are alleged to have occurred on 3 July 2022 before the court order, which was produced as Exhibit 2, was granted on 11 August 2022.*
10. *Alternatively, as regards the charge of contempt of court, the court a quo erred on a point of law in finding that the appellant was guilty as charged in that, in terms of the charge, the alleged court order was made under case no. HC 1387/22, but in its judgment, the court order relates to case no. BYO CD 1387/22.*

11. *Alternatively, the order of 11 August 2022 was a legal nullity in that it was incompetent for the Magistrates Court to grant the same order that it had previously granted ex parte on 22 June 2022, further that it was based on a rule nisi which was a legal nullity in that it was granted in violation of the appellant's right to be heard.*
12. *The finding that the appellant prevented the complainant from accessing the disputed premises is grossly outrageous in its defiance of logic that no reasonable court faced with the same facts would have arrived at the same decision in that:-*
- (a) *it is based solely on the alleged consistency of the complainant in giving evidence.*
- (b) *the court a quo did not consider and dispose of the appellant's defence that he did not prevent the complainant's access to the premises.*

AD SENTENCE

13. *In the event that the convictions are upheld, the appellant avers that:*

Ad all three charges

- 13.1 *The sentence imposed by the court a quo warrants interference on the basis that no reasons were provided by the court a quo.*
- 13.2 *The three counts ought to have been treated as one for the purposes of the sentence.*

Ad conviction of theft

- 13.3 *The sentence imposed by the court a quo is so severe as to induce a sense of shock having regard to the fact that the property allegedly stolen was not identified and its value was not established in evidence.*

Ad conviction for malicious damage to property

- 13.4 *The sentence is incompetent in that it is expressed in foreign currency because the sole legal tender in Zimbabwe is the Zimbabwe dollar, and the payment of fines is*

not one of the recognised exceptions in terms of which foreign currency may be used in Zimbabwe.

Ad conviction for contempt of court

13.5 *The sentence imposed on him is manifestly excessive and is so severe as to induce a sense of shock having regard to the circumstances of this matter and the alleged offence as to suggest that the court a quo did not consider the mitigatory factors.*

COSTS

The appellant hereby undertakes to pay the costs of the preparation of the record and the costs of the appeal.

WHEREFORE, *the appellant prays that his conviction and sentence be set aside and be replaced by the order that:-*

“The accused is found not guilty and acquitted.”

Alternatively, and in the event that the convictions are upheld, the sentence imposed by the court a quo be set aside and be replaced with an order that:

”The three counts are treated as one for purposes of sentence, and the accused is sentenced to pay a fine of ZWL3 000 000.00 and in default of payment of such fine 3 months imprisonment.

ARGUMENTS

[4] The respondent, through *Ms Kanengoni*, argued that the appellant’s grounds of appeal 4, 5, 6, and 12 appear to be heads of argument rather than grounds of appeal. She further argued that grounds of appeal 10 and 11 are stated in the alternative, rendering them vague and incomplete. The grounds of appeal against the sentence were invalid because they do not specify where and how the court a quo erred, which would invite this court’s jurisdiction.

[5] Furthermore, she argued that the appellant could not be condoned and allowed to amend these grounds of appeal, as the court cannot condone a nullity. The respondent contends that the proviso to Rules 95(10) and (11) of the High Court Rules, 2021 [the Rules], does not refer to the hearing

of the appeal. If this proviso were to be read or to mean that condonation or a verbal application to amend can be made at the hearing of an appeal, then it would conflict with Rule 96(6).

[6] When it comes to amending a notice of appeal, it cannot be amended under Rule 95. It will need to be amended under Rule 96(6). This is because Rule 96(6) states that where an amendment is sought for an appeal against conviction and sentence, it may be done as soon as possible and, in any event, not later than twenty days after the noting of the appeal.

[7] *Mr Chamunorwa*, for the appellant, argued that the grounds of appeal were all valid, as they were clear regarding the substance. The appellant argued that the grounds of appeal in this case are not defective in any way, having regard to what an appellant is supposed to do when submitting grounds of appeal. An appellant is required to establish their complaint, demonstrate the misdirection committed by the court *a quo*, and then show how the court *a quo* was supposed to rule. This is precisely what the appellant did to identify the issues that they believe the court *a quo* misdirected itself on. As long as the grounds of appeal have meaning, then the court can relate to them. Then, the court ought to address them and deal with the matter on its merits. The appellant further argued that grounds 10 and 11 are alternatives to ground 9.

[8] The essence of *Mr Chamunorwa*'s submission was that all said and done, as long as the Court and everyone concerned understood the appellant's complaint and the reasons for the complaint from the grounds of appeal, that is the end of the argument, as that is what matters. A ground of appeal is not vague simply because one says so; rather, it should be unclear upon an objective test. The grounds of appeal in this case are not ambiguous because the appellant has identified the issues that constitute a misdirection by the court *a quo*.

[9] He controverted the respondent's arguments that the appellant could not be condoned for the "form" taken by his grounds of appeal and be allowed to amend them in order to address the respondent's concerns over the form in which they are presented, which is where the possible error is and not in the substance. He argued that there is "no miracle" in stating the words "gross misdirection" if the spirit of the phrase is evident in substance. He prayed that the appellant ought to be condoned and be allowed to amend the notice of appeal to enable the appeal to be heard on merits and be finalised in the interests of justice.

[10] The appellant further argued that the Respondent does not have this court's audience, as it did not seek condonation for filing its Heads of Argument late.

[11] ISSUES FOR DETERMINATION

1. *Are the respondent's grounds of appeal 4, 5, 6, 10, 11 and 12 complying with the Rules?*
2. *Can the defect be condoned and the grounds of appeal be amended in terms of the proviso to Rule 95 Sub-rules (10) and (11)*
3. *What is the effect of the failure by the respondent to file its Heads of Argument on time?*

THE LAW.

[12] The Rules are, for the most part, clear, liberal, and revolutionary regarding the requirements for a Notice of Appeal.

[13] Rule 100, which relates to an appeal against conviction and sentence by a convicted person who is legally represented, provides as follows in Sub-Rule (2);

*(2) The appellant **shall**, within ten days of the passing of sentence, or, where a request has been made in terms of the Magistrates Court (Criminal) Rules, within five days of the receipt of the judgment or statement referred to in that rule, whichever is the later, note his or her appeal by lodging with the clerk of court a notice in septuplicate setting out **clearly and specifically the grounds of appeal** and giving for the purpose of service the address of his or her legal representative or, if a legal representative has yet to be appointed, the address of the appellant: "[my emphasis].*

[14] The proviso to Rule 95(10) & (11) reads as follows;

*"Provided that failure to comply with **this rule** shall not automatically render an appeal or review null and void and **at the hearing** the court or judge may on **good cause shown condone any failure to comply with this rule**"(my emphasis)*

[15] Rule 96(6) provides as follows;

"The Prosecutor-General or an appellant may amend his or her notice of appeal by lodging a notice in five copies with the registrar setting out clearly and specifically the amendment to the grounds of appeal-

- a) *in the case of an appeal against conviction or conviction and sentence, as soon as possible and in any event not later than twenty days after the noting of the appeal.*
- b) *in the case of an appeal against sentence only, as soon as possible and in any event not later than ten days after the noting of the appeal.”*

[16] In *Zvokusekwa v Bikita RDC SC44/15*, the court held that when dealing with grounds of appeal, one should be guided by substance rather than the form in which the grounds of appeal take.

[17] In *Mendson Mpofo v Bulawayo Public Library & Ors HB 183/21*, the court had this to say;

“Further, in any event, the grounds of appeal must be clearly and succinctly set out in clear and unambiguous wording to enable the court to discern what it is exactly that the appellant wants to argue on appeal. It is not for the appeal court to have to analyse a lengthy document in an attempt to establish what grounds the appellant intends to rely upon on appeal.”[my emphasis]

DETERMINATION

Are the respondent’s grounds of appeal 4, 5, 6, 10, 11 and 12 complying with the Rules?

[18] Grounds of appeal serve as a means of communication by the appellant to the trial court, the appellate court, and the respondents. All these readers must understand what exactly the appeal is all about. The trial magistrate must be able to understand and reply to the grounds of appeal, and so must the respondent. The Appeal Court Judges must equally understand the appeal the same way the trial magistrate and the respondent understood them, and there must be a common understanding between the two or three Judges of what exactly the appeal is all about.

[19] That common understanding by the readers must, of necessity, resonate with the exact complaint by the appellant. Once that commonality is lost, it means the grounds of appeal are unclear and not specific. Grounds of appeal must be brief but comprehensive. In other words, they must give a lot of information clearly in a few words. The clarity and specificity of the grounds of appeal achieves the commonality in understanding. There must be a clear distinction between grounds of appeal and heads of argument.

[20] The importance of grounds of appeal lies in setting out what is being challenged in respect of the court's decision. It is inadequate for an appellant approaching an Appeals Court to say the court

a quo misdirected itself on the evidence before it. He must specify precisely what it is that he is complaining about.

[21] In this case, the grounds of appeal are unduly and unnecessarily lengthy. They come across as heads of argument rather than as grounds of appeal. They are argumentative to be grounds for appeal. They are not set out “*clearly and specifically*”. They are not grounds for appeal as contemplated in the Rules.

[22] While the respondent has its issues with the notice of appeal, that is not all. The layout and presentation of the grounds of appeal could have been improved. The appellant was facing three counts, and he was convicted of all three counts. Subheading the grounds of appeal to indicate which count is covered under that subheading was an elementary necessity. A notice of appeal is supposed to be clear about which count each ground relates to. The Judges must read and understand the appellant’s complaint concerning *each* count with ease. It must be clear what the appellant is complaining about vis-à-vis a conviction or a sentence in respect of each count.

[23] While I agree with *Mr Chamunorwa* that substance is the cornerstone in conveying the appellant’s complaint through a ground of appeal, clarity and specificity are equally essential to avoid misinterpretations among the various parties involved. They are equally important conveyor belts of that substance to the reader. Grounds of appeal must not be structured in a way that requires one to search for their meaning.

[24] I also agree with counsel for the respondent that it is unclear what grounds 11 and 12 alternative to. It is difficult for one to understand what the appellant was complaining about. Appellants are encouraged to adopt the style of Bible verses when drafting grounds for appeal. It is not for this court to analyse a lengthy document in an attempt to establish what grounds of appeal are exactly pleaded. See *Mendson Mpofu v Bulawayo Public Library & Otrs* (supra). The point *in limine* taken is well taken and is upheld.

Can the defect be condoned in terms of the proviso to Rule 95 Sub-rules (10) and (11)

[25] In terms of the Rules, this Court sitting as an Appellant Court has the discretion to condone non-compliance with some parts of the Rules, except in circumstances where non-compliance invalidates the purported Notice of Appeal. It assists to have a close reading of Rule 95(10). It provides as follows;

(10) A notice instituting an appeal shall state-

(a) the tribunal or officer whose decision is appealed against and

(b) the date on which the decision was given, and

*(c) **the grounds of appeal, and***

(d) the exact nature of the relief sought and

(e) the address of the appellant or his or her legal representative.

[my emphasis]

[26] The proviso to Rules 95(10) & (11), as stated above, authorising condonation, deals with non-compliance with Rule 95 and not with non-compliance with all the Rules. The proviso to Rule 95(10) & (11) reads as follows;

*“Provided that failure to comply with **this rule** shall not automatically render an appeal or review null and void and **at the hearing** the court or judge may on **good cause shown** condone any failure to comply with **this rule**”*(my emphasis)

[27] The proviso does not come to the aid of he who pleads grounds that are not clear and specific, like in the present case. *In casu* the appellant complied with Rule 95(10) but did not comply with Rule 100(2). In other words, he stated the grounds of appeal but did so in not an elegant manner.

[28] An amendment of a notice of appeal is not done under Rule 95. It is done in terms of Rule 96(6). Rule 95 provides for condonation at the hearing of the appeal and not amendments. The appellant cannot be allowed to amend the defective grounds of appeal at this hearing.

Failure by the respondent to file its Heads of Argument on time.

[29] The appellant also argued that the respondent should have sought condonation from this court before filing its heads of argument late. Desirable as it might be, unfortunately, there are no Rule grounds providing for that course of action or any sanction. The norm in civil appeals is that a respondent becomes barred if they do not file their heads of argument or opposition on time. There is a *lacuna* in the current Rules concerning the repercussions for failure to file heads of arguments

at all or on time by the State as a respondent in a criminal matter appeal. That which is not mentioned is presumed to be excluded. The attention of the Rules Committee is drawn to this lacuna. The point *in limine* taken by the appellant is therefore dismissed.

DISPOSITION

The Notice of Appeal is fatally defective. I accordingly order as follows.

ORDER

The matter be and is hereby struck off the roll.

NDLOVU J......

MOYO J...... *Agrees*

Calderwood, Bryce-Hendrie and Partners, appellant's legal practitioners.
National Prosecuting Authority, respondent's legal practitioners.