SYDNEY MACHINGURA

Versus

THE STATE

HIGH COURT OF ZIMBABWE
HARARE 22 May 2022
CHILIMBE J

Chamber application for condonation of late
Noting of appeal

CHILIMBE J

BACKGROUND

[1] On 22 May 2022, I dismissed the applicant`s prayer for condonation of late noting of appeal. Applicant addressed a letter on 9 August 2023 requesting written reasons thereof. The letter went thus; -

> "Kindly take note that, I filed an application for condonation of late noting of appeal with the High Court on 11th November 2021 under case number CON 279/21. The application was dismissed in chambers before honourable Mr. Justice Chilimbe on the 22nd of May 2022.
>
> Take note that I filed a fresh application under case number CON 178/22 with the High Court and it is before honourable Mr. Justice Foroma.On the 3rd of August 2023 the application was removed from the roll, on condition that I should serve the court with the reasons for dismissal of the initial application of CON 279/21 from honourable Justice Chilimbe, it was ordered that I should do so within 90 days as provided by the rules of the court. The period of 90 days is being calculated from the 3rd of August 2023.
>
> Therefore, I do hereby request to be furnished with the reasons for dismissal of the application in reference above from the honourable Mr. Justice Chilimbe."

[2] I furnish hereunder, the reasons thereof. But before doing so, a few comments. The application for condonation was dismissed on 22 May 2022.That decision was communicated to applicant on 29 July 2022. A request for the reasons was only made on 9 August 2023. The letter was brought to my attention on 13 September 2023. It took another 10 days for me to eventually receive the record/case file to be brought to me.

[3] Even then, the record reached me bereft of the charge sheet and state outline. I had to take steps to secure these from the trial court station. I refer to these incidents in order to emphasise the need for administrative promptness in processing matters generally, and those of incarcerated litigants in particular. This brief observation aside, I proceed to issue the reasons for my ruling.

A HISTORY OF THE MATTER

[4] Applicant was convicted on 25 February 2021 at Norton Magistrates Court of contravention of section 2 (3) (b) of the Electricity Amendment Act Number 12 of 2007. (Section 60A (3) (b) of the Electricity Act [Chapter 13: 19]).

[5] He was sentenced, on each count, to 10 years imprisonment on each count. The trial court`s reasons for sentence capture the essence of the matter; -

> "The two accused stand convicted of two counts of contravening the Electricity Act. They cut the cables that distribute electricity to harvest the copper which they sell for a living. The accused are damaging national infrastructure when the country is battling with crippling power outages. [There] are no special circumstances in this matter in spite of accused`s first offender status and plea of guilty the minimum mandatory sentence should be imposed. Accused committed these offences separately. Given the gravity of the offences, the adequate prior planning and daring manner of tempering (sic) with high voltage they deserved to be sentenced for each count separately."

[6] Applicant filed present application for condonation on 11 November 2022.The respondent did not object to the relief sought. Its view was that the delay in noting the application was reasonable and that the applicant enjoyed prospects of success on appeal. Especially regarding his protest against sentence.

THE LAW ON APPLICATIONS FOR CONDONATION

[7] Well-established are the principles governing the exercise of discretion in condonation applications. In *Read v Gardiner and Another SC 70-19*, PATEL JA distilled these requirements to a simple list. In the same matter, the Supreme Court stated as a truism, that the list is not exhaustive. In this particular matter, one critical consideration is the bona fides of the application.

[8] I will revert to this last point shortly. In *Read v Gardner* (supra), it was held as follows at pages 4-5: -

> "The factors to be considered in an application for the condonation of any failure to comply with the rules of court are well-established. They are amply expounded in several decisions of this Court in which the salient criteria are identified. They **include t**he following:
>
> - The extent of the delay involved or non-compliance in question.
> - The reasonableness of the explanation for the delay or non-compliance.
> - The prospects of success should the application be granted.
> - The possible prejudice to the other party.
> - The need for finality in litigation.
> - The importance of the case.
> - The convenience of the court.
> - The avoidance of unnecessary delays in the administration of justice.
>
> See *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S); *Maheya* v *Independent African Church* SC 58/07; *Paul Gary Friendship* v *Cargo Carriers Limited & Anor* SC 1/13. As was observed in the latter case, the factors listed above are not exhaustive." [underlining for emphasis]

[9] Secondly, the authorities give guidance of how the above principles are to be treated, weighed and balanced. The Supreme Court in *Read* v *Gardiner and Another* (supra), cited with approval, the approach taken by DUBE J as then was, in *David Chiweza and Anor* v *Munyaradzi Paul Mangwana and 4 Others, HH 176-17* where the court held at page 4 that:

> "A party who has failed to comply with the requirements of the rules is required to apply for condonation as soon as he becomes aware of the non-compliance and without further delay. He has the onus to convince the court that he has a good excuse for the delay. Condonation is not there simply for the asking. The interests of justice are paramount in an application for condonation. Condonation will only be granted where it is in the interests of justice to do so, regard being had to all the pertinent factors. The applicant is required to give a full, detailed and reasonable explanation for the delay in bringing the application. The full period of the delay and the date when action was eventually taken should be spelt out in the application to assist the court in determining the degree of non – compliance. The court is required to consider the requirements for an application for condonation cumulatively and weigh them against each other. The application for condonation is not decided on one exclusive factor. The existence of strong prospects of success may compensate for any inadequate explanation given for the delay. Where the applicant proffers a good explanation for the delay this may serve to compensate for weak prospects of success in the main matter. Good prospects of success and a short delay, albeit with an unsatisfactory explanation, may lead to granting of the application. The court dealing with the application has a wide discretion which it must exercise judicially after considering all the circumstances of the case. The factors are not to be individually considered, but cumulatively considered with the strong making up for the weak. The court should endeavor to be fair to all the parties involved." [Emphasis added].

APPLICATION OF THE LAW TO THE FACTS

Explanation for the delay

[10] The delay of 8 months involved herein is by any standard, quite lengthy. The consideration of whether or not applicant must carry some blame for it is an entirely different matter. The

starting point must be a recognition that the demand for finality to litigation and speedy dispensation of justice are, as a general rule, not well-served by delays. As such, delays as lengthy as 8 months should not, for any reason become normalised.

[11] Secondly, I do note the adversities cited by applicant as impediments to a timeous filing of his notice of appeal. Incarceration indisputably inhibits an inmate`s capability, in more ways than one, to exercise initiatives necessary for the protection of his or her interests. That truism therefore calls for the incarcerated litigant to particularise the impediments that he faced. For the reason that (a) such reasons can be limitlessly diverse and (b) that some inmates are not at all hampered by factors which affect their peers[1].

[12] And that is exactly where the applicant`s explanation for the reasons for delay falls. He has not set out what it is that specifically precluded him from acting. Incarceration on its own does not become an automatic excuse for failure by a party from adhering to the rules. The rules themselves make no distinction between an incarcerated and free litigant. Where imprisonment impedes an applicant, then the exact circumstances must be fully articulated. This empowers the court to properly evaluate their veracity. This was the view taken by this court in *Chikasha v The State* 101-21.

[13] In *Chikasha,* the court was fully appraised of the applicant`s predicament -failure to secure writing paper. The applicant therein submitted that he needed that resource in order to progress his appeal. The court was able to properly consider the reason tendered by applicant for filing his notice of appeal on time. The court recognised, as a valid reason, the difficulty faced by applicant in securing writing paper. On the facts placed before it, the court concluded that the setback cited by applicant amounted to a plausible reason for not filing his notice of appeal on time.

[14] Herein, no specific explanation has been tendered. Apart from the short excuse that "I could not process my appeal because I was incarcerated". In fact, the explanation proffered in

[1] In *Chikasha v The State* 101-21, the applicant expressed how the imposition of a lengthy prison term had plunged him into despondency and inactivity.

a bid to explain the delay sounds decidedly evasive. It constitutes a brief comment in an application bundle that is otherwise brimming with detail. In *Chikasha v The State*, the court held that the reasons for a delay must be "cogent, compelling and strong". I am not convinced that applicant has placed sufficiently cogent, compelling and strong reasons for his failure to file his notice of appeal within the period prescribed by the rules.

Prospects of success-conviction

[15] I would however, be disinclined to dismiss the application on this grounds alone. If the applicant (a) enjoys decent prospects of success on appeal, and (b) is motivated in by a legitimate quest for justice, then he must succeed. What he has failed to do is tender a reasonable explanation for the delay. But his circumstances as an incarcerated litigant would, nonetheless in my view, persuasively entitle him to the court`s magnanimity for the reasons explained.

[16] In assessing the prospects concerned, I must reiterate the age-old position at law that an applicant seeking the court`s clemency must dress his application in the frocks of candour. In *Terera v Lock* SC 93-21 it was held thus at page 6; -

> "One must be candid with the court in their explanation in order to satisfy the court that the explanation is reasonable and deserves the court's empathy and that there are prospects of success on appeal if granted the indulgence"[2]

[17] I draw no great comfort from the papers before me. I have not been able to disabuse my mind from the conclusion that the application is an attempt at lottery. I say so for the following reasons. The applicant`s protestations herein are most spirited. But in all that vehemence, he has not specifically indicated his attitude toward the offences in respect of which he was convicted. He has not unequivocally argued that he did not at all commit the offence. Nor has he candidly admitted such before the court. He has retreated behind the cloak of perceived adjectival failures of the court a quo.

[2] See also *Sadiq v Muteswa & 7 Ors* HH 281-20)

[18] Herein is an applicant who was arraigned before the magistrate and accused of having cut down electricity conductors (copper cables). The allegations related to two separate occasions and at different two different locations. The record bears an admission from him that he intended to sell the material. Yet there is not an iota or comment in the lucidly argued papers before me, (complete with legal jargon and case authorities) as to whether or not he committed the offence.

[19] In addition, (albeit a point more concerning sentence), applicant has not, this far into his quest to for freedom, indicated if there were special circumstances surrounding the commission of the offence. And if so, what exactly those circumstances were. I am fully associated with the sentiments, observations and caution expressed by MAKONESE J in *Tichawangana v The State* HB 126- 21. The learned judge recognised, ahead of all else, the right of litigants who have fallen foul of the rules of court to approach it for a pardon. He however cautioned on the need for to guard against abuse of process. I set out hereunder the remarks by the court at page 1; -

> "Condonation is not a formality and the courts will not indulge an applicant who does not make full disclosure of the basis of the application. In recent times, there has been an upsurge in applications of this nature. While every litigant enjoys the right to seek condonation, the courts should not be flooded with countless applications for condonation with no merit. This is an abuse of court process and the court must emphasise that only deserving cases for condonation for non-compliance with the rules of court will be entertained."

[20] In attacking the court a quo`s verdict in convicting him, applicant raises 5 points in argument. Firstly he said he was compelled to face, without the aid of legal representation, "sophisticated allegations which required sophisticated legal brains". Secondly, he complains that he was drunk. Not when he committed the offence, but when he appeared in court. The third argument is obscure. Applicant seems to suggest that the trial court violated his right to legal representation by denying him such.

[21] Fourthly, applicant impugns the manner in which the court a quo recorded his guilty plea. A gross irregularity it was, he says, because the trial court "did not record his [applicant]

explanation" as prescribed by section 271 (3) of the Criminal Procedure and Evidence Act [Chapter 9:07]. Finally as his fifth point, applicant contended that the trial court did not explain the essential elements to him and his co-accused separately. This again amounted to a fatal irregularity as held in *S v Dube & Anor* 1986 (2) ZLR 385 (S).

[22] I will deal with the arguments in turn. Before doing so, I make two general observations. To begin with, it must be noted that an attack on the lower court`s decision "*must indicate why each finding of fact or ruling of law that is to be criticised as wrong is said to be wrong*."[3] Secondly, not every misdirection by a lower court will warrant the interference of an appellate of reviewing court. A misdirection must be so severe as to lead to an irregularity which amounts to an injustice. The superior court only interferes in order to cure the injustice [4].

[23] The court a quo recorded its exchange with the applicant. He was appraised of his constitutional right to legal representation. He elected to dispense with such. He was also invited to recount any complaints that he may have had. He responded by confirming that he had none. I have no cause to doubt the accuracy of the court record. Applicant himself has not raised any. If this exchange occurred in the trial court, on what basis then are the complaints of not being fit to stand trial and deprivation of legal representation being made? Unless the present complaints amount to mere mischief on the part of applicant.

[24] Nowhere in his papers does applicant aver that he neither understood the charge nor its essential elements as put to him by the trial court. The exact basis of why he says what went wrong went wrong is not borne out in the application. I see no valid reason for attacking the manner in which the court a quo framed the essential elements to applicant. Applicant cited *S v Dube & Anor* (supra) being a decision where the Supreme Court opined that the trial court ought to have put the charge and elements separately to the two accused before it.

[25] The decision of S *v Dube* is distinguishable from the present. In that matter, the Supreme Court addressed its concerns to the peculiar difficulties issuing from the Parks and Wild Life

[3] *Kunonga v The Church of The Province of Central Africa* SC 25-17 GARWE JA (as he then was citing with approval at [26] *Van de Walt v Abreu* 1994(4) SA 85 (W).
[4] See *Vengesai v Mujaya & Anor* HH 163-22.

Amendment Act No 14 of 1975 as read with the Parks and Wild Life Amendment Act No. 35 of 1985. There were technical terms ("possession" and "being in a prohibited area") which the Supreme Court held ought to have been further elaborated by the trial court. In the present matter, the elements were presented and clearly understood by the applicant and his co-accused.

Prospects of success on sentence

[26] The applicant was convicted of two counts of contravening section 60A (3) (b) of the Electricity Act. The first offence was committed between 16 January 2020 and 20 February 2020 along South Road opposite Tips Camp. The second was committed on 24 January 2020 along Mtukudzi Way, Knowe Phase 2 in Norton. The trial court, having found no special circumstances sentenced the applicant to 10 years imprisonment in respect of each count.

[27] The respondent agreed with applicant that the court a quo misdirected itself. It ought to have ordered the two sentences to run concurrently given the weight and severity of the resultant concurrence order. I hold the view that the concession by respondent was ill taken. Below are my reasons.

[28] The trial court set out its reasons for sentence in the excerpt quoted above. It must be recognised that the trial court was well within its rights to exercise its sentencing discretion. No reason has been tendered to suggest how the trial court misdirected itself. Section 343 (1) of the CP&E Act empowered the court to pass the sentences it imposed-namely 10 years for each count. More importantly, the court was obliged to do so. This is the guidance issued in *S* v *Chawasarira* 1991(1) ZLR 66 (H); v *Banda* 1984 (1) ZLR 96(H) and *S* v *Huni & Ors* HH 147-09 where KUDYA J (as he then was) held at 2-3:

> "where the accused has been convicted on more than one count, to treat both or all of them as one for the purposes of sentence defeats the clear intention of the legislature, that there should be an effective mandatory minimum penalty of nine years per count."

[29] Section 343 (2) extended the discretion to the court to order the sentences to run concurrently. The court declined to do so. It exercised its discretion as articulated in authorities such as *S v Nhumwa* SC 40/88, *S v Ramushu and Ors* SC 25/93; and *S v de Jager* 1965(2) SA 616 (A) at 628-9. The trial court noted the aggravating features characterising the offence. It is not necessary to repeat them. I carry the view that applicant has dim prospects of upsetting the trial court`s sentence. I am further fortified in that regard by the following; -

[30] The sentencing provisions in the Electricity Act (particularly 60A (4) and (5)) fetter the court`s usual discretion in its sentencing options. But section 60A (4) grants the court the discretion to impose a fine if special circumstances are proven. This facility ought to have greatly appealed to, and invigorated applicant in proffering special circumstances. None were tendered in the court a quo, nor have any been offered herein. And the most likely explanation being that no special circums5tances were associated with the commission of this offence.

DISPOSITION

[31] For the aforegoing reasons, I discern little prospects of success on appeal. On that basis, the application cannot succeed.

It is hereby ordered; -

That the application for condonation of late noting of appeal be and is hereby dismissed.

*Prosecutor General`s Office*-respondent`s legal practitioners

[CHILIMBE___ 18/10/23]