ENOCK SIBANDA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO, 12 MARCH 2021

Application for extension of time in which to file leave to appeal

M. Mahaso, for the applicant
K. Jaravaza, for the respondent

DUBE-BANDA J: This is a court application for extension of time within which to file leave to appeal. The application was filed on 6 October 2020. Respondent filed a response on 20 October 2020. Applicant filed heads of argument on 23 October 2020. This matter was set-down for 12 November 2020. It was postponed to 26 November 2020. On 26 November, the matter did not take off. On 17 February 2021, I informed the parties, *via* the office of the Registrar that I intended to dispose of this matter on the papers, without oral submissions. I directed that parties file further heads of argument on or before 23 February 2021. This directive was meant to ensure the parties file further heads of argument, should they wish to do so. None of the parties filed such heads of argument. The application was then considered on the papers and heads of argument filed by the parties without oral argument.

The brief background to this application is that on 17 July 2020, applicant was convicted for murder as defined in terms of section 47 (1) (b) of the Criminal Law (Codification and Reform Act) Chapter 9:23. He was sentenced to fifteen years imprisonment. Aggrieved by both the conviction and sentence, on 22 July 2020, filed a notice of appeal to the Supreme Court. The notice of appeal was followed by a bail application filed at the Supreme Court. On 23 September 2020, the Supreme Court, struck off the roll the bail application for failure to comply with section 44(2) (b) of the High Court Act and rule 18(1) of the Supreme Court Rules Act, 2018. In essence the Supreme Court struck off the matter

from the roll on the basis that applicant had not sought leave to appeal from this court, hence there was no valid leave of appeal. The notice of appeal has since been withdrawn.

Applicant then turned to this court, to seek an extension of time within which to file an application for leave to appeal. In essence, this is an application for condonation. The procedure and time lines for applying for leave to appeal are contained in section 41A of the High Court Act, as read with Order 34 of the High Court Rules, 1971. A person who has been convicted by the High Court may apply for leave to appeal against such conviction and/or sentence, and must satisfy the court, on a balance of probabilities, that there are reasonable prospects of success on appeal. Such application may be made orally at the end of the trial to the presiding Judge. Alternatively, the accused person may submit a written application for leave to appeal within a prescribed period. The procedure allows for condonation of late applications in appropriate circumstances.

In *casu*, no oral application was made for leave to appeal as required in terms of rule 262. No written application was made for leave to appeal within twelve days of the passing of sentence as required by rule 263. No application was made within twenty-four days after the passing of sentence by this court. Applicant may still, in terms of section 41A(3) of the High Court Act, as read with rule 266 and 267 of the High Court Rules, apply for condonation for the late filing of an application for leave to appeal. The grounds on which the courts will condone the late noting for leave to appeal are in the discretion of the court. In *Rheeders v Jacobsz* 1942 AD 395, the court expressed its approval of the view 'that the court will take a liberal view of the matter but must be careful to see in each instance that there is some reasonable ground for the exercise of its discretion in favour of the applicant.' In *Mohlathe* 2000 (2) SACR 530 (SCA), the court decided on the criteria to be applied when considering an application for condonation, that whether an explanation is acceptable or not for the purpose of granting condonation is essentially a matter for the discretion of the court to be exercised judicially. Such discretion is exercised in the light of all the circumstances of the case, including the merits of the case; the degree of lateness; the explanation for it; and the prospects of success. All the factors are interrelated and not decisive on their own. See: Geldenhuys T *at al Criminal Procedure handbook* (Juta 10th Edition - 2011) p. 406.

The degree of lateness and the explanation thereof

Applicant was sentenced on 17 July 2020. This application was filed on the 6 October 2020. At the latest, in accordance with rule 267 of the High Court Rules, this application should have been filed within twenty-four days starting from 18 July 2020, which is by the end of August 2020. This application was filed approximately one month and a few days out of time. It is apparent from applicant's founding affidavit, as confirmed by the supporting affidavit of his legal practitioner, a *Mr M. Mahaso*, that he was led on a tangent by his legal practitioners. The legal practitioners did not familiarise themselves with the legislative framework and the jurisprudence on leave to appeal. Instead of applying for leave to appeal from this court, the lawyers merely filed with the Supreme Court a defective notice of appeal. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence and the dilatoriness. (See: *S v Tandwa* [2007] SCA 34 (RSA) on the duty of legal practitioners to provide competent and effective legal representation).To hold otherwise might have a disastrous effect upon the observance of the rules of this court.In *George Tanyanyiwa Chikanga v The State* SC 93/04, the court said:

> In any event, even if I were to accept that that the legal practitioner was negligent in failing to note the appeal, because of the increase in applications for condonation on precisely this ground the courts are less inclined to take a same benevolent view of the negligence of applicant's legal practitioner.
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> There is a limit beyond which a litigant cannot escape the results 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.

Unlike in the *George Tanyanyiwa Chikanga*case, where the errant legal practitioner did not file a supporting affidavit, and the delay was nineteen months, which was inordinate, in *casu*, the legal practitioner filed a supporting affidavit corroborating the version of the applicant, and the delay is not inordinate. On the facts of this case, I am inclined to find that the delay is not inordinate, and it has been satisfactorily explained. However, this finding is not dispositive of the matter, I still have to consider other requirements.

The prospects of success

To exercise its discretion in favour of condonation, applicant has a duty to prove that there are reasonable prospects of success on an appeal. The test of reasonable prospects of success on appeal is lower than that which is applied in deciding whether the appeal ought to succeed or not. See: *S v N* 1991 (2) SACR 10 (A) at 13 B - C.This test is expressed in *S v Smith* 2021 (1) SACR 567 (SCA) as follows at para [7]:

> What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court in proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.

The high water mark of this application, which is in essence an application for condonation for the late application for leave to appeal, is the criticism of the factual findings of this court. It being contended that the version of the applicant ought to have been regarded as reasonably possibly true. That the evidence of Edith Sibanda and Jacob Mwanga contained contradictions, which can have a bearing on their credibility if analysed by a different court. That the evidence of Dr Jekenya was challenged by the applicant, who led evidence from an expert witness, who is more senior and more qualified than the former. That the court anchored the conviction on circumstantial evidence, and further made speculative findings.

I am not persuaded by these contentions. I re-iterate the factual findings made in the main judgment; that when the applicant caught up with the deceased on the 22nd May 2019, deceased had no injuries. He disappeared with the deceased, according to the time-line, from approximately 8 p.m. and returned with her at approximately 11: 40 pm. a period of approximately three and a half hours. When he emerged with the deceased, she was now stark naked and unconscious. She could not talk. She was only groaning. She remained in this comatose position until she died on the 25 May 2019. Applicant had someone stark naked in the back seat of his car. A person who suffered serious injuries. Does not tell Edith Sibanda, he pretends everything is normal until Edith hears groans from the back seat. He decided to

keep a very injured person, first in the car, and second at home the whole night. On the morning of 23 May 2019, he left the deceased home and went to Marondera Polyclinic, to look for a private doctor. Deceased was only taken to Mpilo Hospital, as a result of the intervention of the landlady. Got a fake police report to avoid an arrest.

This court had a post mortem report before it. The report described the external marks of violence observed by the doctor on the body of the deceased. According to the post mortem report the deceased's body exhibited serious marks of violence, and that severe force was used to inflict such multiple injuries. Such injuries, which the doctor described as callous, could not have been caused by the beatings as described by the accused. According to Dr. I Jekenya, whose evidence the court accepted, the causes of death are intracranial haemorrhages, head and multiple injuries and callous assault. Furthermore, according to the doctor, the head injuries observed on the body of the deceased were consistent with assault, and not jumping from a moving motor vehicle. The doctor who examined the body of the deceased, ruled out or discounted jumping from a moving vehicle. He found that the deceased did not jump from a moving motor car. What is apparent is that the injuries were too severe. Inflicted with severe force as observed by Dr Jekenya, e.g. multiple bruises, whiplashes and scratches of the head, upper limbs, lower limbs, buttocks, back and chest wall. These and many more could not have been caused by four mere beatings on the face and five moderate beatings with a belt. These could not have been caused by jumping from a moving vehicle. The grounds of attack raised by the applicant do not raise reasonable prospects of success on appeal.

In conclusion, it is submitted that the right to appeal against conviction and sentence is constitutionally guaranteed, and cannot be easily discarded. Applicant who is currently incarcerated ought to be afforded an opportunity to test the correctness of the decision which sent him to prison. Reliance is placed on section 70(5) of the Constitution of Zimbabwe Amendment (No.20) Act, 2013, which says any person who has been tried and convicted of an offence has the right, subject to reasonable restrictions that may be prescribed by law, to—(*b*) appeal to a higher court against the conviction and sentence.This point is without merit. Section 70(5) of the Constitution does not confer an absolute right of appeal on a convicted person, or an unlimited constitutional right of appeal on such a person. It is a reasonable restriction to impose reasonable time limitations for noting appeals and applying for

condonation of failure to abide with the time limitations. See: *Tendai Richman Chigodora v The State* HH 47/20.

Disposition

In the result, I am not satisfied that the applicant has made out a case that warrants the granting of the application for condonation for the filing of an application for leave to appeal. There are no reasonable prospects of another court reversing the conviction or interfering with the sentence of imprisonment. In the result, I order as follows: the application is accordingly dismissed.

Tanaka Law Chambers, applicant's legal practitioners
Prosecutor-General's Office, respondent's legal practitioners