

ELVIS MUCHERI
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 31 December 2019

Bail Pending Appeal

R. Chikosha, for the respondent
Applicant in person

CHITAPI J: The applicant applied for bail pending appeal No. CA 651/19 which he filed on 10 October, 2019. The applicant is serving a sentence of 16 years following his conviction for the offence of rape by the regional magistrate on 30 November, 2017. The State counsel in his response to the bail application did not oppose the admission of the applicant to bail. Counsel prepared and filed a detailed response outlining the reasons why he considered it to be in the interests of justice that bail pending appeal should be granted. Counsel pointed out to material shortcomings in the judgment of the lower court which if established could result in the appeal court setting aside the conviction of the applicant. In short, counsel submitted that the proposed and noted appeal had good prospects of success. Further, counsel submitted that the applicant was not a flight risk as he immediately handed himself over to the police when requested by the police to present himself at the police station after the offence was reported. I was of the view that the concession and consent by the State was properly made. I was inclined to grant the applicant the relief sought and to impose conditions proposed by the State.

Due to experiences I have had in bail court especially where self-actors are involved wherein bail applications pending appeal are made when the appeal has not been validly noted, I held over issuing the bail order and directed the Registrar to avail the appeal record opened for the appeal, that is record CA 651/19. I noted that the applicant had also filed his appeal pursuant to an order for condonation of late noting of appeal and extension of time to note appeal having been granted by CHIKOWERO J on 19 September, 2019. In the order of

condonation, CHIKOWERO J had ordered that the notice of appeal should be filed within 10 days of service of the condonation order on the applicant. Service of the order for condonation was to have been effected by the Registrar. It was therefore necessary to confirm if the notice of appeal filed on 10 October, 2019 was not filed out of time since the period between the date of the granting of the order and the noting of the appeal was in excess of 10 days, being 16 days to be precise. Out of further abundance of caution, I directed the Registrar to also avail the condonation application record CON 231/19 for my perusal.

Upon perusal of the records CA 651/09 and CON 231/19 I noted that the applicant had attempted to file the notice of appeal on 3 October, 2019. The Clerk of court however raised a query in a letter of that date addressed to the Registrar of this court to the effect that the order of condonation did not grant the applicant leave to prosecute the appeal in person. The Registrar sought directions from CHIKOWERO J and the learned judge issued an order granting leave to the applicant to prosecute his appeal in person. The learned judge however commented that it was implicit in his order granting condonation and extension of time to appeal that the appeal had prospects of success. I understood the learned judge's remarks clearly and I consider that it is important that the law on the granting of what has become to be colloquially referred to as a certificate to prosecute the appeal in person should be elucidated.

Section 36 of the High Court Act, [*Chapter 7:06*] provides as follows:

- “(i) A person who has noted an appeal in a criminal case to the High Court shall not be entitled to prosecute such appeal in person unless a judge of the High Court has certified that there are reasonable grounds for appeal.”

The other subss 2, 3, 4 and 5 to s 36 deal with how the application for a certificate is made, that is, that it shall be made in terms of the rules of court. The subsections also deal with the judge's powers to allow the appeal and quash the conviction without hearing argument from the parties or their legal practitioners or having them appear before the judge. This latter power is exercisable wherein an application to prosecute the appeal in person, the Prosecutor General gives notice that for reasons which he gives, he does not support the conviction.

The point which arises is the relevance of requiring the applicant to make another application to prosecute the appeal in person where condonation and extension of time to note appeal has been applied for by a self-actor and granted. In an application for condonation, the primary consideration which determines whether condonation should be granted is the

prospects of success on appeal which to me translates to the same as reasonable grounds for appeal as espoused in s 36 (1) of the High Court Act. It amounts to unnecessary duplication of process to require that the self-acting applicant who has filed an application for and been granted condonation should again separately apply for leave to prosecute his appeal in person. Whether or not the procedure is not necessary or the law should be revisited and rules clarified is a separate matter. It appears to me though that s 36 (1) presupposes that the self-acting appellant will have timeously noted the appeal in person and the judge has not determined the prospects of success. I leave it as a moot point but certainly one which needs addressing. In applications for condonation by self-actors, where the applicant has indicated that he or she wishes to prosecute the appeal in person the judge should deal with the request at that time, rather than require the applicant to make another application on the turn. Where the self-acting applicant has not indicated his wish to prosecute the appeal in person, he or she should be asked whether he or she will be represented at the hearing. It is little wonder that CHIKOWERO J on being asked to give directions in relation to the certificate to prosecute appeal in person, commented as follows:

“To give practical effect to the said paragraphs, and in light of the time line in paragraph 2 (the judge was referring to his order for condonation) I have exercised inherent jurisdiction to grant leave to prosecute the appeal in person. I do so because applicant is a self-actor.”

The legislature and rule makers need to revisit the law and rules on the necessity for a formal application for a certificate to appear in person to be made separately from the application for condonation of late noting of appeal where a self-actor wishes to prosecute the intended appeal in person. In the interim judges must be innovative because the High Court has inherent jurisdiction to regulate its own processes. The innovation which I postulate is that in dealing with an application for condonation filed by a self-actor the judge should also deal with the issue of the leave or certificate to prosecute appeal in person upon granting condonation. It is with respect illogical to separate the two application when considerations for the grant of either of them dovetail.

The above digression aside, when I considered my notes and was about to grant the order admitting the applicant to bail, I noted that I had recorded state counsel as having indicated that he believed that the applicant had made a previous application for condonation of late noting of appeal. I had made the note on 8 November, 2019 when state counsel applied

for a postponement to prepare a response. I then directed that there be searches made to ascertain whether or not the applicant had not made a previous application for condonation and its fate. On enquiry of the applicant, he agreed that he previously made an application. He however stated that he had not been favoured with any response or the result thereof since filing that application in April, 2019. He assumed that it was misplaced, He gave out the reference of the previous application as CON 94/19. He stated that out of frustration at waiting for 7 months without a response to his application, he filed the present application.

The Registrar upon my further directive located and placed the record Con 94/19 before me. Apparently the applicant filed the same application as therein on 5 April, 2019. A different state Counsel filed a statement in opposition to the relief sought on 9 April, 2019. The record was then placed before MANZUNZU J who on 27 May, 2019 endorsed on the record as follows:

“This application for condonation of late noting an appeal has no merit and is hereby dismissed.”

A copy of the order was given to Zimbabwe Prison Service as evidence by their stamp franked thereon to give to the applicant. The applicant stated that he was never given a copy of the order. Prison Services did not have any record to prove delivery of the order on the applicant.

I find myself again having to express my views on the unsatisfactory systems which obtain in the handling of criminal and bail cases especially those involving unrepresented inmates who make applications other than for bail. There is no mechanized case management system in place. The same applies to the Prosecutor General’s Office. Convicts who are unscrupulous duplicate applications which will have previously been refused and detection is not easy. The same goes for bail applications. Instead of following up on a dismissed bail application by filing an application based on changed circumstances, the unscrupulous convict will file a fresh application and the Registrar oblivious to the previous dismissed application opens a new court record and case number. Other applicants may actually not be in the know that it is not permitted to file a fresh bail application outside of the dismissed one. The system does not capture that the applicant has another record already opened. Electronic case management and an appropriately suited programme would upon the filing of the application and entering the name of an applicant in the database immediately pop out other cases already entered into the system pertaining to the particular applicant. The confusion as happened here would have been avoided had a proper case management and monitoring system been in place.

It reflects badly in the eyes of the public that the same matter is brought under two records which are dealt with by two different judges and two different prosecutors who contradict each other in their determination and State responses as the case may be.

This application is an example where two different prosecutors who handled the same or duplicated application albeit filed on different dates expresses contradictory views on the prospects of success of the proposed appeal by the applicant. The two applications were determined by two different judges who gave contradictory determinations with the first judge MANZUNZU J dismissing the application on the basis that there were no prospects of success on appeal and the second judge CHIKOWERO J granting the same application on the basis that the proposed appeal enjoyed prospect of success. A third judge, being myself had prior to discovering the earlier order of MANZUNZU J expressed the view that there were prospects of success on appeal and would have granted bail had I not thought of calling for the whole paper trail to be placed before me and discovering that condonation had in fact been denied in the first application.

It is trite that once the court determines a case on the merits it will have exercised its jurisdiction and consequently become *functus officio*. The matter which has been decided is said to be *res judicata* and may not be re-opened before the same court. There are of course exceptions to the rule like where statute provides for variations of the original decision or the common law allows for it like in family law proceedings. The rationale for the above principles is that there must be finality to litigation and safeguard of the integrity of the judicial function. The judicial system would certainly be brought into disrepute were judicial officers and bodies to change their minds and judgements on a matter in which a full decision has been given.

In this matter, it was not brought to the attention of CHIKOWERO J when he decided the application for condonation that MANZUNZU J in the exercise of the same powers and jurisdiction as exercised by CHIKOWERO J had dismissed the application in an earlier order. Had CHIKOWERO J been made aware of the prior application and its determination on the merits, the learned judge would have struck off the roll the condonation application on the basis that it had already been determined. See *Triangel Ltd v Mukanya & Ors* HH 105/17; *Unitrack (Pvt) Ltd v Telone* SC 10/2018. The judgment of CHIKOWERO J was therefore granted in error. It must be set aside. The purported appeal No. CA 651/19 was filed in consequence of an order of condonation which was granted in error. The setting aside of the order of CHIKOWERO J has

the effect that the order of MANZUNZU J is the one which remains extant. In short there is no valid appeal or pending appeal before this court on which the application for bail pending appeal may be founded or anchored.

The applicant and state counsel were invited to make representations on the propriety of this application. State counsel Mr *Chikosha* initially took the view that the latter order of CHIKOWERO J should be the one that I should have regard to. He however properly capitulated on his erroneous view of the procedural law when I exchanged with him the purport and import of *res judicata* and *functus officio* principles. The applicant understood the procedural shortcoming of his application and as a self-actor, I advised him of his right to appeal against the dismissal order of MANZUNZU J to a judge of the Supreme Court.

The only other issue which I need to address is my jurisdictional competence to set aside the order of CHIKOWERO J. The issues at play arise out of criminal proceedings which were completed before the regional magistrate. Application to appeal out of time to this court from judgments of the magistrates court following conviction and sentence are made in terms of r 47 and 48 of the Supreme Court (Magistrates Court) Criminal Appeals Rules **S.I 504/79**. As regard the procedure for correction or setting aside of judgments granted in error neither the High Court (Criminal Procedure) Rules 1964 RGN 452/1964 nor the Criminal Procedure and Evidence Act, [*Chapter 9:07*] deal with the matter. This is unlike the position in civil cases where the court is granted the right to vary, correct or rescind a judgment given in error as more fully set out in s 449 of the High Court Civil Rules 1971. However, rule 2 (2) of the Civil Rules provides as follows:

“9) These rules shall not have effect in relation to any criminal proceedings other than proceedings to which Order 33, Order 34 and Order 35 relates.”

Orders 33, 34 and 35 are specific as to the matters which are otherwise criminal in nature to which the Civil Rules apply. An application for condonation of late noting appeal to this court against the judgment of a magistrates court in a criminal matter does not fall under the above orders. Rule 449 does not therefore have application in criminal cases.

The court however has power at common law to correct or rescind its judgment which was granted in error where the error is common to both the applicant or accused and the State. The court or judge needs to notify the parties of the error where the court or judge acts *mero motu* and to give the parties the opportunity to make representations before setting aside the

impugned judgment. In *casu* as I have already adverted to, I invited parties to address me on the existence of the error and it was accepted as common cause that the judgments of MANZUNZU and CHIKOWERO JJ, granted separately dealt with the same application and were in conflict with each other. A judgment granted in error is one which clearly ought not to have been granted. It should not be allowed to stand. I cannot envisage any jurisprudential basis or justification to disqualify the court from rescinding or setting aside such a judgment. It is not rational to burden the appeal court with the duty to set aside such a judgment. An appeal court is established and sits to determine the correctness of a valid judgment from the lower court. Where the judgment is invalid by reason that it purports to determine a matter which is *res judicata* and parties accept that position, then the court has power to set the invalid judgment aside and the appeal court if the matter is taken further will then contend itself with determining the correctness or otherwise of the valid judgment.

Further to the common law powers which I have discussed above, this court in terms of s 176 of the Constitution as with the Constitutional and Supreme Court has inherent power to protect and regulate its own process and develop the common law or customary law taking into account the interests of justice and the provisions of the Constitution. It is not in the interests of justice for this court not to rescind or set aside a judgment given in criminal proceedings where such was granted in error common to and accepted to be so by the State and the applicant or accused as the case may be. The interests of justice and policy considerations in my view dictate that the Supreme Court should not constitute itself to sit to make a pronouncement that an order or judgment granted subsequent to an extant one involving the same parties and subject is invalid on the bases of *res judicata*. This court must correct its error by setting aside the incompetent subsequent judgment unless there is a dispute between the parties on whether or not *res judicata* applies.

In the circumstances, I therefore dispose of this application in the following terms:

- a) It is declared that the applicant's application for condonation of late noting of appeal and extension of time to note appeal was determined by order of its dismissal granted by MANZUNZU J on 27 May, 2019 under case no. CON 94/19.
- b) Resultantly, the orders of CHIKOWERO J dated 19 September, 2019 and 8 October 2019 respectively granted under case no. CON 231/19 purporting to grant the applicant condonation and leave to prosecute appeal in person were granted in error as

MANZUNZU J's order rendered the relief sought *res judicata* and the court *functus officio*.

- c) The orders granted by CHIKOWERO J as aforesaid are accordingly rescinded and set aside as they are a nullity.
- d) Consequently the notice of appeal purportedly filed by the applicant under case no. CA 651/19 having been noted pursuant to the nullified orders of CHIKOWERO J is hereby struck out and off the record.
- e) The bail application pending appeal is similarly struck out and off the roll in consequence of the striking out of the purported appeal on which the bail application was anchored.
- f) Copies of this judgment should be filed in case records CON 94/19; CON 231/19; CA 651/19 and B 1845/19.
- g) The Registrar is directed to ensure that a copy of this judgment is served by him on the applicant and the exigencies of this order explained to the applicant so that the applicant may if advised seek relief before a judge of the Supreme Court..

National Prosecuting Authority, respondent's legal practitioners