

PETER MAKIWA
versus
THE REGISTRAR OF THE HIGH COURT OF ZIMBABWE
and
JUDICIAL SERVICE COMMISSION

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 10 & 24 March 2022

Opposed Application

N Mugiya, for the applicant
G Sithole, for the respondents

ZHOU J: This is an application for an order directing the respondents to “process” the applicant’s appeal and arrange for the said appeal to be set down within thirty days from the date of the order. Applicant also asks that the respondents provide a case number to his appeal. Costs of suit are sought against both respondents. The application is opposed by the respondents.

The background to the matter is as follows: The applicant states that he was convicted of theft by the magistrates court at Mutare on 21 November 1997. He was sentenced to 46 months imprisonment of which 12 months imprisonment was suspended on condition of good behavior. He states that he noted an appeal in this court against both conviction and sentence. He has attached a document, annexure “A” which is referred to in the founding affidavit as the notice of appeal. Applicant further states that he was subsequently released on bail pending appeal. He has attached a copy of the bail order in terms of which he was released. Appellant alleges that he has tried several times to get his appeal to be heard without success.

In opposing the application, the respondents questioned the authenticity of annexure “A” to the applicant’s founding affidavit as a genuine notice of appeal. They point to the absence of an appeal case number on the document, as well as to the fact that there is no proof of service of the document on interested parties. The essence of the respondents’ case is, therefore, that the

applicant has not established the existence of an appeal which they may be compelled to “process” or set down. They also point to the applicant’s failure to provide the record of proceedings and to comply with the order of the constitutional court.

This matter can be disposed of on the basis of one issue namely:

Whether there is a valid notice of appeal which the respondents should be directed to set down. If there is a valid appeal the applicant like any other litigant, is entitled to have the appeal set down and determined by the court to which the appeal was noted.

In the founding affidavit, the applicant relies on the document attached as annexure “A”. He states that that document was filed with the first respondent. The document does not meet the requirements of a validly filed notice of appeal because it bears no reference number. The applicant’s attention was drawn to this fact by the respondents. It is the valid notice of appeal bearing the Criminal Appeal Number which triggers the preparation of the record of proceedings by the Clerk of the magistrates court unless the record has been requested for some other purpose not connected to an appeal. Applicant has not explained why the document that he is relying upon has no case number. Instead, he blames the respondents for that without any proof that there was an omission on the part of the respondents. If the document had been issued without a case number the applicant and his legal practitioners would have noticed that. It is unconvincing that a person can hold a document that is clearly irregular for so many years without noting the irregularities affecting it. The applicant has not availed an explanation from his erstwhile legal practitioners regarding the origins of this document which he seeks to rely on.

There are other features of this case which render the document relied upon by the applicant questionable. Firstly, the original thereof has not been exhibited to the court to enable the respondents to ascertain whether the stamps thereon are those of the offices to which they are attributed. Secondly, in its typed form, the document purports to be destined for the Supreme Court rather than for the High Court. There is what appears to be a crossing of the words: “IN THE SPUREME COURT OF ZIMBABWE” by pen on the first page of the document. Applicant has not explained who cancelled those words. Equally, after the cancellation there was no insertion of the words “IN THE HIGH COURT OF ZIMBABWE” which means that the document does not state the court in which the appeal is to be heard. Thus, on the face of it, the document does not show in which court it was to be filed after that cancellation. On the second page the document

shows in its typed form that it was being copied to the Registrar of the Supreme Court. However, the word “Supreme” is cancelled by pen, and replaced with the word “High”. The cancellation is not authenticated by a signature. Applicant does not state who made the handwritten alteration. In any event, if it was indeed an appeal to a higher court then the document would have been directed to the Registrar of the High Court first, then copied to the clerk of court and the respondent’s legal practitioner. In this case, the document is primarily directed to the “clerk of the criminal court” (whatever that means) first, then copied to the Registrar and the Attorney-General’s office. The document is dated at “Mutare”. It is common cause that at the time that it purports to have been dated there was neither a High Court nor a Supreme Court station at Mutare. Thus, the document attached does not qualify as a notice of appeal.

The applicant’s case is obfuscated by the attitude of his legal practitioner, Mr Mugiya, who initially in his submissions disowned the document as the “notice of appeal” upon which his client’s application was based. However, when the legal practitioner’s attention was drawn to para 5 of the founding affidavit he made a somersault, and sought to now rely on the document as the “notice” filed by the applicant. As noted earlier on, the document is not a notice of appeal to the High Court. It has the hallmarks of a fraudulent document which may have been used to get the applicant to be released from prison. There is no way that the clerk of court in the magistrates court could rely on such a document to prepare an appeal record.

The applicant, through counsel, placed reliance on what is presented as an order for the admission of the applicant to bail in order to prove the existence of a valid notice of appeal. In para 15 of the heads of argument which were filed on behalf of the respondent in the Constitutional Court it was stated that the bail application was dealt with without a transcribed record. Even if such a record had been transcribed for the purpose of bail it would not prove the existence of a valid notice of appeal. The copy of what, on the face of it, appears to be an order for the admission of the applicant to bail does not refer to an appeal to enable one to assess whether or not this was an order for bail pending appeal. It does not even state the names of those who appeared for the parties in chambers at the hearing of the bail application. In other words, the bail order does not in any way assist the applicant to prove that he has a valid appeal which is pending before this court. In any event, while the order is dated 18 May 1998, the applicant in his letter dated 8 June 2020

(Annexure “C”1) states that he was granted bail on 16 January 1998, which would have been more than four months before the bail order was granted.

Equally, the order of the Constitutional Court in CCZ 87/13 which was given on 29 October 2014 does not confirm or prove the existence of a valid notice of appeal. If anything it shows that the notice was not exhibited to that court. In terms of that order the applicant was directed to produce a copy of the Notice of Appeal duly stamped and issued by the clerk of court, Mutare magistrates court, within thirty days from the date of the order. He did not comply with that order. If such a notice of appeal had ever existed then the applicant would have readily produced it as directed by the Constitutional Court.

There is also nothing by way of evidence to show that the applicant took the necessary steps to ensure that the record of the criminal proceedings in the magistrates court was transcribed or otherwise produced. If he had filed a notice of appeal and served a copy thereof upon the clerk of court he would have had to pay or tender payment for the preparation of the record. No proof of such payment or tender of payment has been produced. Instead the applicant seems to have been barking up the wrong tree by expecting the first respondent herein to generate that record. In the absence of such a record and a notice of appeal, as well as the heads of argument if the appellant is to be legally represented, there will be no appeal which this court can order the first respondent to set down. Also, the first respondent cannot be ordered to give a reference number in the absence of a valid notice of appeal. The reference number is given on the date that the appeal is filed. As noted earlier on, the document that the applicant relies upon is not only questionable, it is not a valid notice of appeal noted in the High Court of Zimbabwe.

In the result, the application is dismissed with costs.

Mugiya & Muvhami, applicant’s legal practitioners
Kantor & Immerman, respondents’ legal practitioners