

DISTRIBUTABLE (94)

JAISON ZHUWAKI
v
THE STATE

SUPREME COURT OF ZIMBABWE
HARARE: 09 APRIL 2021

J. Zhuwaki in person

K. Kunaka, for the respondent

IN CHAMBERS

CHITAKUNYE AJA: On 9 April 2021 I struck off this matter from the roll and gave reasons extempore. The applicant has requested for written reason for my decision. These are the reasons.

In this application the applicant seeks to challenge the decision of the High Court handed down on 3 May 2018 dismissing his application for condonation and leave to appeal in person. The application was purportedly filed in terms of r 21 of the Supreme Court Rules 2018. The applicant seeks an order in the following terms:

1. The application against refusal for condonation for the late filing of an appeal be and is hereby granted.
2. The appellant is hereby granted leave to prosecute an appeal in person to the High Court.
3. The appellant shall file his notice of appeal by the Registrar of the High Court.

BACKGROUND

The applicant was convicted for contravening s 65(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9.23*] and sentenced to 20 years imprisonment of which 2 years were suspended on condition of future good behaviour on 19 November 2013 by a Regional Magistrate at Chinhoyi Regional Court. He did not appeal against both conviction and sentence within the requisite period.

On 21 March 2017, the applicant applied for condonation of late filing of an appeal and leave to appeal in person with the High Court. That application was dismissed by CHATUKUTA J on 3 May 2018 under case number CON 61/17. On 29 May 2018 the applicant filed a similar application before the same court. It is pertinent to note that in this second application the applicant did not disclose the fact that he had a similar application dismissed on 3 May 2018 by the same court. The respondent did not file any response to that second application. This second application was heard and granted by MUNANGATI - MANONGWA J on 22 July 2019 under case number CON 142/18. The applicant did not, however, proceed to file the appeal despite the granting of that order. Instead on 13 August 2020 the applicant filed another application in case number CON 308/20 for extension of time within which to file the appeal. This application sought an extension of time within which to comply with the order granted in CON 142/18. In response to this latest application the respondent contended that in case number CON 142/18 the applicant did not disclose to the court that his initial application had been dismissed in CON 61/17 on 3 May 2018. The respondent thus contended that the order in case number CON 142/18 was a nullity as the court was *functus officio*. As a consequence TAGU J dismissed the application to extend the order in CON 142/18 on 3 November 2020.

The applicant having considered and conceded that both orders by MUNANGATI-MANONGWA J and TAGU J were invalid at law, decided to approach this Court in a bid to challenge the order of 3 May 2018. In that case (CON61/17) the Judge had found that the period of delay of 2½ years (it was in fact 3 ½ years) was inordinate, and that the reasons for the delay were also contradictory and were not reasonable in the circumstances. The Judge *a quo* also held that there were no prospects of success on appeal against both conviction and sentence as such the application was dismissed *in toto*. It is that determination that the applicant seeks to challenge but he is out of time hence this application titled ‘application against refusal of condonation and leave to prosecute his appeal in person in terms of r 21 of the Supreme Court Rules 2018’. This application was filed on 23 December 2020 some two years and seven months after the determination in question. The delay is certainly inordinate.

In his submissions the applicant averred that he was in fact appealing against the court *a quo*’s determination of 3 May 2018. It was in this regard that he indicated that this application was in terms of r 21 of the Supreme Court Rules 2018 as he had not appealed in time.

ISSUES FOR DETERMINATION

1. Whether or not there is a proper application before this Court.
2. Whether or not the applicant has established a good cause for the granting of the application.

APPLICATION OF THE LAW TO THE FACTS

This application was purportedly filed in terms of r 21 of the aforesaid rules. That rule provides that:

“Application for extension of time or leave to appeal out of time

- (1) A person who wishes to apply for an extension of time in which to institute an appeal in terms of rule 18 or for leave to appeal in terms of rule 20 shall do so in Form 5 signed by himself or herself or his or her legal representative.
- (2) The form referred to in subrule (1) shall be accompanied either by the documents required in terms of subrule (1) of rule 18 or the documents required in terms of subrule (2) of rule 20, whichever rule is applicable, together with an affidavit setting out why the applicant did not institute his or her appeal or apply for leave within the time specified.”

It is trite that a litigant approaching this Court must provide an acceptable explanation for failure to comply with the rules of the court. The explanation in the founding affidavit must be *bona fide* and satisfactory. The applicant must give a satisfactory explanation for the delay in noting the appeal and show that there are prospects of success in the intended appeal. The application under this rule is in effect an application to appeal out of time and is not in itself an appeal. The relief sought must relate to the purpose of the application which is to appeal out of time.

It is clear from the founding affidavit and the relief sought that the applicant is at a loss as to the nature of the relief envisaged under r 21 and the relief he seeks before me. The application ought to be for condonation of his failure to note the appeal in time and for leave to file the appeal out of time. The current application was filed on 23 December 2020, two years seven months out of time. The applicant has not sought for condonation for the failure to comply with this Court’s rules. In essence the applicant has not tendered any reasons for the delay herein. Without a proper application for condonation having been made, the applicant is therefore improperly before this Court. In *Bonnyview Estates (Private) Limited v Zimbabwe Platinum Mines (Private) Limited and Anor* SC 01/05 MAKARAU JA (as she then was) noted that:

“Condonation is an indulgence granted when the court is satisfied that there is good and sufficient cause for condoning the non-compliance with the Rules. Good and sufficient cause is established by considering cumulatively, the extent of the delay, the explanation for that delay and the strength of the applicant’s case on appeal, or the prospects of its success. This is trite.”

See *S v Sibanda* 2001(2) ZLR 524

In *casu*, such a consideration is not possible as the explanation provided pertains to the delay from the time of conviction and sentence on 19 November 2013 to the time when he filed his application for condonation and leave to appeal in the High Court on 21 March 2017. The import of the applicant’s case is that I must consider those reasons favorably and grant the application that was placed before the High Court. The delay that ought to have been explained clearly is the delay from 3 May 2018 to 23 December 2020 when this application was filed with the Supreme Court. It is, however, discernible from the history of the matter that after the dismissal of the first application the applicant made two applications before the same court seeking condonation and extension of time within which to note his appeal. This was, however, not the pith of his explanation before me. These applications were premised on misrepresentations by the applicant in not disclosing the fate of his first application. He thus wasted time pursuing irregular applications. It may also be noted that despite the granting of the second application, albeit irregularly, the applicant did not file his appeal until the time given for filing the appeal lapsed hence he re-approached the same court for an extension of that lapsed order. The applicant was not serious. I am of the view that the delay from 3 May 2018 to 23 December 2020 is inordinate and the explanation thereof is not acceptable at all. It is simply a result of his own misrepresentation to the court *a quo* and this cannot rebound to his benefit.

It is trite that the intended appeal must be against the decision of the court *a quo*. The grounds of appeal in the draft notice of appeal filed with the application must relate to the findings by the court *a quo* in dismissing his application for condonation and leave to appeal in person. It is from such grounds that the court will assess whether there is an arguable case for appeal warranting a hearing of the appeal.

It is only upon a favorable result that an appeal will be before this Court in terms of the filed draft notice of appeal.

It is imperative to note that the draft notice of appeal filed with this application is a draft notice of appeal to the High Court and not an appeal to the Supreme Court. It pertains to findings by the Regional Magistrate; in short the notice of appeal is against the Regional court's judgment and not the determination by the High Court. The prospects of success I am enjoined to consider must relate to the judgment of the court *a quo* on the application that had been placed before it.

The applicant's failure to appreciate the matter before me is epitomized by the nature of the relief he sought. The relief, in effect, is for the setting aside of the court *a quo*'s judgment and substituting it with an order granting leave to note his appeal in the High Court out of time and leave to prosecute the appeal in person. Such a relief is incompetent as this is not an appeal but ought to be an application to note an appeal to the Supreme Court out of time. It is not the appeal itself.

DISPOSITION

As the applicant was a self-actor the nature of the relief to eventually grant would have been within my discretion had he properly set out a case for extension of time within which to appeal. However, the failure to proffer any acceptable explanation or justification for steps taken after the dismissal of the initial application and the lack of any grounds of appeal attacking the court *a quo*'s judgment make it clear that there is no proper application for extension of time within which to note an appeal in terms of r 21. The applicant was for all intents and purposes seeking to be granted what the court *a quo* denied him without filing a proper appeal.

Accordingly the matter was struck off the roll.

National Prosecuting Authority, respondent's legal practitioners