

**MZAMO DALE NDEBELE**

**VERSUS**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE

CHEDA J

BULAWAYO 12 JUNE 2013 AND 27 JUNE 2013

*L. Ncube* for applicant

*T Hove* for respondent

For Reinstatement of an appeal

**CHEDA J:** This is an application for a re-instatement of an appeal filed under case No.HCA 277/12.

Applicant was charged with contravening section 113 (2) of the Criminal Law (Codification and Reform) Act [Chapter 9:23], "Theft of Trust Property."

He pleaded not guilty, but, was, however, convicted and sentenced to 5 years imprisonment wholly suspended on condition that he restitutes complainant in the sum of \$9500-00 by 31 July 2012.

He was 74 years at the time of the offence. Upon conviction he instructed his legal practitioners Messrs *Advocate SKM Sibanda* to note an appeal for him. He was advised that there was an amount of

\$49.00 which was required to pay for the preparation of the record. He was further advised that Heads of argument were already due. He was subsequently advised that his appeal had been deemed abandoned because of his failure to comply with court rules.

It is further his argument that his default in complying with the rules was not wilful as he was looking for money to pay for the record.

What applicant is asking the court to do is to use its discretion to re-instate his appeal. These courts indeed have done so in the past and will no doubt continue to do so as it is their discretion to do. Such discretion however, should be judicially exercised all the time upon proper considerations of a particular case.

In *Palmer v Goldberg* 1961 (3) SA 692, the court laid down the following factors which should be considered:

1. the reason for the delay in complying with the rules;
2. the nature of the case before it;
3. the probability of success on appeal;
4. benefit to the applicant and
5. the nature of the default.

Applicant noted his appeal timeously through his erstwhile legal practitioners. After noting this appeal, he naturally expected his legal practitioners to act as per their mandate. . However, applicant was not adequately resourced to fund the preparation of the record hence this was not done and the time limit for the filing of Heads of argument lapsed and accordingly his appeal was deemed abandoned.

In my opinion the matter which is due to be argued on appeal *prima facie* casts some doubt as to the propriety of a conviction in the circumstances. It will be in the best interest of justice if applicant is given an opportunity to prosecute his appeal. In *Fortman v SA Railways & Hunborn* (2) 1947 (2) SA 505 (N) at 509, Shaw A.J stated that a factor which might well influence the court in favour of granting relief would be that where applicant had given timeous, even if defective notice of appeal failed to do so on good grounds.

Applicant had taken a reasonable and expected step towards the prosecution of his appeal even though he fell short of fulfilling at one of the requirements due to his financial disability. This assertion stands uncontroverted. He has, therefore, shown that he had done something towards the furtherance of his appeal. In *Cairn's Estate v Gaarn* 1912 AD 181 INNES, J. A. remarked that in such instances applicant must show "something which entitles him to ask for the indulgence of the court."

In the event of a success on appeal, applicant obviously stands to benefit as he is not only a first offender but an elderly one for that matter, who is already a pensioner.

These courts tend to sympathise with genuine failure to comply provided that prospects of success are bright and failure to allow the appeal will result in injustice, see *Radebe v Hough* 1948 (3) SA 583.

These courts recognise the need for people, litigants included to be kept within their rights. In making this determination the court should play a balancing act, all in the interest of attaining justice for both parties.

There is no prejudice if applicant is granted this order in my view.

In light of the above, respondent's argument have been sufficiently dealt with and I find that

applicant has a plausible case.

The application is granted.

*Advocate S.K.M. Sibanda and partners*, appellant's legal practitioners

*Attorney General's Office*, respondent's legal practitioners