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Judgment No S.C. 50\2002
Crim. Application No 180\2002

THE ATTORNEY-GENERAL v (1) SAZINI MPOFU (2) KETHANI SIBANDA

SUPREME COURT OF ZIMBABWE
HARARE JUNE 20, 2002

M. Nemadire, for the applicant

E. Mushore, for the respondents

Before: CHIDYAUSIKU CJ, in Chambers, in terms of Rule 19 of the Supreme Court of Zimbabwe Rules

This is an appeal by the Attorney-General against the grant of bail to the respondents by the High Court, Bulawayo.

The grounds of appeal appear in a notice of appeal which provides as follows:-

"1. The Learned Trial Judge did not give due weight and consideration to the State's fears that the Respondents' may abscond if granted bail.

2. The Learned Trial Judge did not give due weight to the facts placed on record pointing to the very real possibility that the Respondents' will abscond if granted bail."

There is, also before me, an application headed Urgent Court Application". That application is supported by a certificate of urgency, a founding affidavit, a condonation affidavit (sic) and a draft order. The draft order reads as follows:-

> "That the application is granted and for the avoidance of doubt, it is hereby ordered that the decision liberating the Respondents, given by a High Court Judge in Bulawayo, on 14 June 2002, whilst a Condonation Application filed under SC 180/02 was still pending, is suspended."

The founding affidavit was deposed to by the Director of Public Prosecutions. It reads, in part, as follows:-

> "When the two respondents were granted bail I instructed our Bulawayo Office to immediately note an appeal in terms of section 121 of the Criminal Procedure and Evidence Act [Chapter 9:07]. I also instructed our Bulawayo Office to prepare the necessary notice which they duly did.
>
> Subsequently I received by way of fax, copies of the notice and grounds of appeal which I assigned to our Appeals Section.
>
> It was subsequently brought to my attention that no notice of appeal had been filed with the Supreme Court. I checked with Mr Nemadire who explained that he was under the impression that papers had been duly filed with the Supreme Court.
>
> I thereafter instructed Mr Nemadire to rectify the anomaly. He subsequently did so and deposed to an affidavit annexed to this application in which he explains what took place.
>
> May it be noted that the notice of appeal was filed with the Bulawayo High Court and served on respondents' Counsel on 31 May 2002, two days after bail had been granted. This shows that the Attorney-General was serious in his intention to appeal.
>
> The condonation sought by Mr Nemadire had not been deliberated upon when the High Court subsequently ordered the release of the respondents on the basis that no appeal had been heard within seven days of the suspension of the order granting bail.

I pray that the order of the High Court to release respondents prior to the hearing of the application for condonation for late noting of appeal and the actual hearing of the appeal be set aside."

Also in support of the Urgent Court Application was an affidavit from Mr *Nemadire* which reads as follows:-

"I, the undersigned, MORGEN NEMADIRE, duly sworn gives the Honourable Court to understand that:

1. I appear in this matter as Counsel for the Appellant.

2. The Notice of Grounds of Appeal have been filed after the required 7 day limited today (12 June 2002) with this Court.

3. There was some **mix-up** between the Appellant (The Attorney-General's two Offices (i.e. Bulawayo and Harare):

After the Court *a quo* delivered its judgment on 29 May 2002, the State Counsel then, compiled and filed Notice and Grounds of Appeal against the judgment on 31 May 2002.

See: Date Stamp on Notice and Grounds.

It is most probable that State Counsel then, rest assured that Appellant (the State), had duly notified the Court as well as provided the Grounds upon which the appeal was to be made.

It was only as late as the 12th of June 2002, when Appellant's Counsel (in the Harare Office), realized that the Notice and Grounds had not been duly filed with the Supreme Court.

All in all, it is a result of communication breakdown between or amongst all parties concerned, here (i.e. State Counsel, Bulawayo's High Court Assistant Registrar and Respondent's Counsel).

4. Could this Honourable Court, condone the late filing of Notice and Grounds of Appeal in the matter under SC 180/02."

It is quite apparent from the relief sought and the supporting affidavits that this application is a Chamber application and not a court application. A court application is an application to this Court usually made up of a minimum of three

judges. A Chamber application is an application to a single judge of this Court. I will, accordingly, treat this application as a Chamber application. It is quite apparent that both parties wish this matter to be treated as an urgent Chamber application.

It is not clear on the papers which particular Rule of this Court the Attorney-General had failed to comply with and was now seeking condonation. However, the issue of condonation became irrelevant when Mr *Nemadire* conceded that no leave to appeal against the admission to bail of the respondents had been sought and granted from the learned judge who presided over this matter. The failure by the Attorney-General to seek leave to appeal against the order granting bail is a fatal omission to this appeal.

A proper reading of section 121 of the Criminal Procedure and Evidence Act [Chapter 9:07] as read with section 44(5) of the High Court Act [Chapter 7:06] reveals that an appeal from the High Court to this Court against the granting or refusal to grant bail is not as of right. The leave of the presiding judge is required. If such leave is refused only then can a judge of this Court entertain an application for leave to appeal and, if such leave is granted, the appeal itself. While there might be some doubt as to whether the refusal or granting of bail is an interlocutory order or judgment in the usual sense it is so for the purposes of sections 121 of the Criminal Procedure and Evidence Act as read with section 44(5) of the High Court Act. In the case of *S v Dzawo* 1998 (1) ZLR 536 (S) this Court proceeded on the basis that such leave is required. Indeed, the Attorney-General did not seek to argue that such leave is not required.

Rule 4 of the Supreme Court Rules empower a judge of this Court to condone or authorise a departure from the Rules of this Court. That empowerment does not include the condonation of failure to comply with a statutory requirement. The requirement that the leave of the court *a quo* be obtained prior to this Court hearing the appeal is a statutory requirement which I have no jurisdiction to condone. In the absence of an application for that leave to the court *a quo* the Attorney-General has no leg to stand on.

The practical effect of section 121 of the Criminal Procedure and Evidence Act as read with section 44(5) of the High Court Act is that where the Attorney-General wishes to appeal against an admission to bail he has to obtain the leave of the court *a quo* or the leave of a judge of this Court within seven days of the court order if the accused person is to remain in custody beyond seven days. This was not done in this case.

By reason of the Attorney-General's failure to comply with the provisions of section 121 of the Criminal Procedure and Evidence Act [Chapter 9:07] as read with section 44(5) of the High Court Act this appeal is not properly before me. The appeal, if one can call it that, is accordingly dismissed.

Webb Low & Barry, respondent's legal practitioners