TRINITY NDLOVU

And

MXOLISI DUMANI

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE JP & DUBE-BANDA J
BULAWAYO 15 January 2024 & 25April 2024

Criminal appeal

P. Butshe, for the appellants
K.M. Guveya, for the respondent

DUBE-BANDA J:

[1] This is an appeal against sentence. The appellants were convicted on their own pleas of guilty on a charge of contravening s 45(1)(b) as read with s 128 of the Parks and Wildlife Life Act [Chapter 20:14]. The State alleged that the appellants were in unlawful possession of a specially protected animal, i.e., a live pangolin. The court *a quo* did not find special circumstances and sentenced each of them to nine years imprisonment.

[2] Aggrieved by the finding of the court *a quo* that there were no special circumstances and the ultimate sentence of nine years imprisonment, the appellants noted an appeal to this court. At the commencement of the hearing, Mr *Butshe* counsel for the appellant was requested to address the court on whether the notice of appeal was valid. This is so because the jurisdiction of an appellate court to entertain an appeal is engaged by a valid notice of appeal. Without a valid notice of appeal, there would be no appeal before court and an appellate court would not have jurisdiction to hear the matter. The starting point is that a valid notice of appeal must comply with the requirements of r 95(10) of the High Court Rules, 2021 which states thus:

> (10) A notice instituting an appeal shall state –
> (a) the tribunal or officer whose decision is appealed against;
> and

(b) the date on which the decision was given; and

(c) the grounds of appeal; and

(d) the exact nature of the relief sought; and

(e) the address of the appellant or his or her legal representative.

[3] The jurisprudence in this jurisdiction is that all the matters required by the rules of court to be stated in a valid notice of appeal are of equal importance so that failure to state one of them renders the notice of appeal invalid. In *Matanhire v BP Shell Marketing* SC 113-04 at page 1 of the cyclostyled judgment MALABA JA (as he then was) highlighting the importance of complying with the rules of court said:

> "It is not usual to write a judgment on a matter that has been struck off the roll – see *S v Ncube* 1990 (2) ZLR 303 (S). This judgment has been written for purposes of drawing the attention of legal practitioners to the fact that all the matters required by the Rules of Court to be stated in a valid notice of appeal are of equal importance so that failure to state one of them renders the notice of appeal invalid.*"* (emphasis added).

[4] In *casu* what is of concern is the relief sought by the appellants. The rule is clear that a notice of appeal shall state the nature of the relief sought. The relief sought must be the relief that the appellants would have been granted in the court *a quo* had he succeeded. In other words, the nature of the relief sought means the relief that could have been granted in the court *a quo*. See *Sambaza v AL Shams Global BVI Limited* SC 3/18; *Bonde v National Foods Limited* SC 11/21; *Movement for Democratic Change-Alliance & Ors v Muchekahanzu & Ors* SC 116/22.

[5] In the notice of appeal, the relief sought is couched as follows:

> "The appellants seek the following relief:
>
> i. That there are special circumstances in the case.
>
> ii. That the appeal be upheld and the sentence be set aside and substituted with the following: each appellant is sentenced to pay a fine of 200 000 RTGS in default 1 year imprisonment."

[6] The court *a quo* could not have imposed a sentence reading thus "each appellant is sentenced to pay a fine of 200 000 RTGS in default 1 year imprisonment." The case before the court *a quo* was not an appeal. The court *a quo* was sitting as a court of first instance, and there

were no appellants before it, there were accused persons. Therefore, the nature of the relief sought was wrongly framed and is incompetent as it refers to the appellants, a remedy which could not have been granted by the court *a quo* in a court sitting as a court of first instance. See *Sambaza v AL Shams Global BVI Limited* SC 3/18. Accordingly, I conclude that the notice of appeal is defective for want of compliance with the mandatory provisions of Order 31(2)(4) of the Magistrates Court Rules, 2019.

[7] Mr *Butshe* submitted that in the event this court finds that the notice of appeal was defective, he sought an amendment of the relief sought. The *proviso* in r 95(10) permits on good cause shown to condone any failure to comply with this rule. In *casu* no good cause was shown to permit the amendment sought by Mr. *Butshe.* It is for these reasons that the notice of appeal is defective and must be struck off the roll.

[8] As a fallback argument, Mr *Butshe* submitted that this court must invoke its review jurisdiction located in s 29(4) of the High Court Act [Chapter 7:06] and review the proceedings of the trial court.

> "29 Powers on review of criminal proceedings
> (4) Subject to rules of court, the powers conferred by subsections (1) and (2) may be exercised whenever it comes to the notice of the High Court or a judge of the High Court that any criminal proceedings of any inferior court or tribunal are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review."

[9] The import of the provisions of s 29 (4) of the High Court Act is simply to promote and extend the supervisory role and review powers of the High Court over the Magistrates Court proceedings. This empowering provision caters for situations where it comes to the notice of this court or a judge of this court that criminal proceedings of an inferior court are not in accordance with real and substantial justice. This court or a judge of this court is empowered to review such proceedings notwithstanding that such proceedings are not the subject of an application to the High Court and have not been submitted to the High Court or the judge for review. See *Potifa Sawaka versus The State* HH 262-20; *Ncube & Ors v The State* HB 187/20.

[10] A procedural irregularity contemplated by this section becomes the subject of adjudication when the court, of its own accord, decides to exercise its jurisdiction to review it. In the absence

of a decision to that effect, the proceedings cannot be reviewed by this court under section 29 (4) of the High Court Act. In short, the decision of the court to invoke its review jurisdiction is a threshold requirement to review and to set aside or correct the impugned proceedings. See *Schroeder and Another v Solomon and 48 others* 2009 (1) NR 1 (SC) 8.

[11] The section makes it clear beyond doubt that this court has jurisdiction to review proceedings of the inferior courts if they are tainted with an irregularity. It is also the view I take: that the court may only invoke its jurisdiction under the section if it appears to the court or any of its judges that there was an "irregularity" in the proceedings. See *S v Bushebi* 1998 NR 239 at 242E-G. The phrase "are not in accordance with real and substantial justice" as a ground for review relates to the conduct of the proceedings. Where the error is fundamental in the sense that the lower court has declined to exercise the function entrusted to it by the statute the result of which is to deny a party the right to a fair hearing, the matter is reviewable.

[12] I agree that in the event this court finds that the proceedings at the trial court were not in accordance with real and substantial justice it can invoke its s 29(4) of the High Court Act and review the proceedings. I say so because it would have come to the notice of this court that the proceedings were not in accordance with real and substantial justice.

[13] The appellants were charged with the crime of contravening s 45(1)(b) as read with s 128 of the Parks and Wildlife Act. Mr *Butshe* submitted that the accused were sentenced on the basis of an incorrect provision of the law. Counsel submitted that the appropriate penalty provision in this instance is s 45(2)(b) and not s 128. Mr *Guveya* counsel for the respondent submitted that the appellants were sentenced on the basis of a correct penalty provision which applied to the circumstances of their case. Section 45(1)(b) of the Act provides thus:

> "Control of hunting of specially protected animals and possession or sale of specially protected animals and products thereof
>
> (1) No person shall—
> (*a*) hunt any specially protected animal; or
> (*b*) keep, have in his possession or sell or otherwise dispose of any live specially protected animal or the meat or trophy of any such animal; except in terms of a permit issued in terms of section *forty-six*.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level eight or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment."

[14] The accused were in possession of a pangolin a specially protected animal in terms of s 45 of the Act as read with the provisions of Parks and Wild Life (Specially Protected Animals) Regulations, 2020. Section 128 reads thus:

"128 Special penalty for certain offences

(1) Notwithstanding any other provision of this Act, any person who is guilty of an offence under this Act involving—

(a) the unlawful killing or hunting of rhinoceros, or any other specially protected animal specified by the Minister by statutory instrument; or

(b) the unlawful possession of, or trading in, ivory or any trophy of rhinoceros or of any other specially protected animal that may be specified by the Minister by statutory instrument;

shall be liable—

(i) on a first conviction, to imprisonment for a period not less than nine years;

(ii) on a second or subsequent conviction, to imprisonment for a period of not less than eleven years:

Provided that where on conviction the convicted person satisfies the court that there are special circumstances in the particular case justifying the imposition of a lesser penalty, the facts of which shall be recorded by the court, the convicted person shall be liable to a fine four times the value specified in a notice published under section 104(2) for a rhinoceros, elephant or other specially protected animal, or four times the value of the ivory or any trophy, as the case may be, or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

(2) Where no special circumstances are found by a court as mentioned in the proviso to subsection (1), no portion of a sentence imposed in terms of subsection (l) shall be suspended by the court if the effect of such suspension is that the convicted person will serve—

(a) in the case of a first conviction, less than nine years imprisonment;

(b) in the case of a second or subsequent conviction, less than eleven years.".

[15] Section 128(b) targets those persons who are in unlawful possession of, or trading in, ivory or any trophy of rhinoceros or of any other specially protected animal. Simplified it also targets those persons who are in unlawful possession of specially protected animal. When it comes to any other specially protected animal it is not about the unlawful possession of any trophy, but the specially protected animal itself. Again, s 128 opens by the phrase "Notwithstanding any other

provision of this Act, any person who is guilty of an offence under this Act involving" which means that this penalty provision applies notwithstanding any penalty provision provided for in the Act. Therefore, the appellants were correctly sentenced in terms of s 128 of the Act. No irregularity was committed and the proceedings are in accordance with real and substantial justice. It is for these reasons that there is no basis at law to invoke the s 29 review jurisdiction of this court. The invitation is accordingly declined.

Disposition

[16] It is clear that the notice of appeal in this case does not comply with r 95(10) of the High Court Rules. It is fatally defective. It is therefore not necessary to deal with the merits of a fatally defective notice of appeal.

In the circumstances the appeal is fatally defective and is struck off the roll.

DUBE JP…… I agree

Mathonsi Ncube Law Chambers, appellants' Legal Practitioners
National Prosecuting Authority, respondent's legal practitioners