F. M. KATSANDE & PARTNERS LEGAL PRACTITIONERS
and
FRANCIS MUNETSI KATSANDE
versus
MYDAL INTERNATIONAL MARKETING (PVT) LTD & ANOR

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 22 March & 5 April 2017

Opposed Application – Leave to appeal

FM Katsande, for the applicants
S Mutema, for respondent

CHAREWA J: This is an application for leave to appeal against a provisional judgment for the release of trust funds which I granted in favour of the respondent on an urgent basis on 8 June 2016.

Background

The brief history of the case is that the applicants were the duly appointed corporate legal practitioners of the respondent at various times in the past as attested to by the reference records, some of which are captured on the case reference. In addition, the applicants were also the personal legal practitioners of one Peter Valentine, a director of the respondent, particularly with reference to the criminal prosecution which culminated in SC 307/09 and the civil matter in HC 557/14.

With the legal assistance of the applicants, the respondent obtained an order, in HC 1687/10, for the release to it, of $28 500 from the Registrar of the High Court. Such release was predicated upon the Registrar satisfying himself of the directorship of Peter Valentine for the respondent. The funds were indeed released to the applicants by the Registrar as ordered by the court, upon the Registrar satisfying himself of the directorship of Peter Valentine for the respondent.

These being its trust funds, the respondent then demanded the release of the same from applicants who failed to so release the money. The matter then came before me on an urgent basis in HC 5654/16, for a provisional order compelling applicants to release respondent's trust funds into the trust account of its new legal practitioners.

The applicants opposed the urgent application, claiming a lien over the trust funds. The applicants averred that the trust funds ought to be set off against fees amounting to $360 000 owed by Peter Valentine as ordered in HC557/14. Further, the applicants claimed set off against unspecified fees owed by the respondent company. In addition, applicants averred that the import of HC 2470/13 and HC2453/16 was to bar the release of the trust funds to respondent. In any event, respondent was not properly before the court as it was represented by Peter Valentine who lacked authority to represent the company. And finally, applicants claimed that they were the duly appointed legal practitioners of the respondent, and thus entitled to withhold release of the trust funds to any other firm

I granted the provisional order on 8 June 2016, for the trust funds to be released into the trust account of Stanislous & Partners, the respondent's new legal practitioners. The reasons for my judgment are concisely dealt with in my written reasons and can be summarised as follows:

1. Despite demand, no fee notes had been submitted for work allegedly done on behalf of the respondent.
2. Applicants could not legitimately refuse to release the trust funds predicated on the judgment in HC2470/13 as the release of the funds by the Registrar meant that the conditions in that judgment had been fulfilled.
3. Therefore the issue of *locus standi* fell away once the Registrar had found Peter Valentine to be the duly authorised representative of respondent.
4. In any event, HC2453/16 did not create any bar to the release of the funds.
5. The judge in HC1049/09 did not order that the respondent should pay any fees as it was not a party to that suit.

6. The respondent's trust funds could not be withheld by the applicants *in lieu* of fees owed by Peter Valentine. In any event, HC 557/14 did not make any order for respondent to pay $360 000 to applicants.
7. In any case, the documents and evidence before me did not show that applicants claimed any lien over the trust funds in lieu of fees.
8. And finally, respondent had the right and freedom to appoint any number of law firms to represent it, and could not be forced into an exclusive attorney/client relationship with applicants entitling them to withhold its trust funds.

I therefore concluded that the applicant did not, *prima facie*, prove any entitlement to withhold trust funds upon demand in lieu of their fees, but that, pending confirmation of my provisional order, respondent had made a *prima facie* case for the release of its trust funds.

Aggrieved by my decision, the applicants then filed this application.

Note must be made that the applicants did not file any notice of opposition to the provisional order which was duly confirmed by MAKONI J on 3 August 2016. Further, the applicants, on 15 June 2016, filed an urgent application, in HC 6045/16 for stay of execution on the provisional order pending appeal. Such application was dismissed for lack of merit. The applicants have also appealed that judgment.

Technical challenges raised *in limine*

Various technical arguments were made by both parties which I will not deign to give undue weight by analysing them in depth or making a decision thereon. It is my view that this is a matter which calls for a substantive ruling to satisfy the requirement that as far as is possible, matters must be disposed of on the merits. I therefore believe I am within my rights to resort to the provisions of r 4C.

For example, it was argued by the applicants that the respondent was not properly before the court, having been automatically barred for filing its notice of opposition or filing its heads of arguments out of time. My view is that it does not matter whether or not the respondent is barred for failure to file their notice of opposition and heads of argument

timeously. I am not obliged to grant leave to appeal by default. Rather, I am still required to consider whether applicants merit the grant of leave to appeal.

Likewise, whether or not the applicants are in contempt of the provisional order by failing to comply therewith within 48 hours or are barred by prescription from claiming the fees, or even whether the provisional order was suspended upon noting of the notice of leave to appeal, are issues which are not germane in my view.

Therefore, being alive to the general rights of parties to be heard on appeal, I am of the view that it is only proper to deal with this application on the merits and make a determination, whether or not this is an application I should grant.[1]

The requirements to succeed in an application for leave to appeal

It is trite that in interlocutory matters, the right to appeal is not absolute. It is, of necessity, limited by the requirements of the good and due administration of justice: that the time of an appellate court should not be wasted on frivolous and vexatious matters to the detriment of parties with a stronger claim to the attention of the court. For that reason, leave is required, as a screening measure, to ensure the protection of processes of the appellate court from unnecessary appeals.[2]

Therefore a court has a wide discretion to decide whether or not to grant an application for leave to appeal. In exercising this discretion, the court must consider the following:

i. The prospects of success on appeal
ii. That the amount in dispute is not trifling
iii. The importance of the matter to either party.[3]

However, in considering these requirements, the prospects of success on appeal are paramount.[4]

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[1] See also *Golden Reef Mining (Pvt) Ltd & Anor* v *Mnjiya Consulting Engineers PTY Ltd & Anor* HH 631/15
[2] See A-G v Muchadehama & Anor (SC316/2011[2014]ZWSC23
[3] *Pitchanic NO* v *Patterson* 1993(2)ZLR 163(H)
[4] *Castel & Metal Allied Workers Union* 1987(4) SA 795.

Analysis

It cannot be gainsaid that the amount involved is substantial and that resolution of the matter is of substantial importance to both parties.

For me, therefore, the question is whether or not, in my judicious opinion, this is a matter with any prospects of success, however minimal, that require that another court should be given the opportunity to have sight thereof. I think not.

Firstly, rather than basing their appeal on the issues and evidence before the court *a quo* and the decision arrived at, the applicants grounds of appeal are heavily laden with evidence that was not before the court *a quo.* There is, therefore, no basis to impute that a different court might reach a different conclusion based on the information that was before the court *a quo*.

For instance, the applicants base their appeal on bills of costs which were rendered after my judgment and which they conceded were not before me at the hearing of the urgent application. The record shows that these bills of costs were only prepared in July 2016. Obviously, had they been before me, and I had reached the same conclusion that I did, my judgment could rightly be set aside. But this is not the case, and no application has been made that on appeal, new evidence, that could not possibly have been available in June 2016, would be sought to be adduced.

In any event, the bill at p 44-50 of the application still does not relate to the respondent, which trust funds are sought to be set off against it. I cannot comprehend how a senior legal practitioner who is a principal in a law firm and liable to give guidance to junior lawyers, can seek to successfully take on appeal as against one party, a claim for fees owed by another party.

Further, applicant raises the argument of the effect and import of s 20 of the Legal Practitioners Act, [*Chapter 27:07*], which allows set-off of trust funds against fees, as another ground of appeal. I note that the applicants also conceded that this issue was never argued before the court *a quo*.

The applicants claim that it being a point of law, it can be argued for the first time on appeal. I will not deign to decide for the appellate court what it will allow or not allow to be

argued for the first time on appeal. However, regardless of whether or not the Legal Practitioners Act allows set off for fees owed, I doubt that the appellate court would allow an appeal based on a claim of set off of fees owed by one party as against trust funds due to another party, or fees which were not due at the time of the judgment of the court *a quo*.

The issue of *locus standi* was peremptorily dealt with in the last paragraph of p 4 of my judgment dated 8 June 2016: had the Registrar of the High Court, after carrying out the investigations ordered by the court, established that Peter Valentine was not a director of the respondent entitled to represent it, then he would not have released the trust funds to applicants. After all, applicants' own authority to receive the funds was derived from Peter Valentine's instructions for and on behalf the respondent. In other words, if Peter Valentine had no authority to act for respondent, then applicants also had no authority to act for respondent and receive its trust funds. The applicants cannot seek to have their cake and eat it too.

It seems to me, as noted by the respondent, that the applicants are only seeking to buy time, and do not seriously think that they have any prospects of success in this appeal. This is particularly so since applicants made no effort to file opposing papers against the confirmation of the provisional order. Consequently, they left the provisional order to be confirmed thus rendering any decision on the appeal against that order a *brutum fulmen*.

I therefore tend to agree with the respondent, that this court no longer has any jurisdiction to grant leave to appeal against a provisional order where a final order exists. Either, the applicants ought to have opposed the confirmation of the provisional order, failing which they ought to have applied for rescission of the final order or simply filed their appeal against that final order.

As for the appeal against the order of costs on a higher scale, the conduct of the applicants to withhold trust finds in circumstances where they had failed to submit fee notes upon demand, and to go on to seek to set off fees owed by another party against respondent's trust funds was certainly opprobrious and unbecoming of legal practitioners with any ethics or integrity. The applicants' conduct was even more repugnant, given the fact that they sought to deceive the court by claiming that they were entitled to those fees in terms of the

order of the Court in HC 557/14, when this is patently untrue. Further, they sought to claim that respondent's representative was not properly authorised when they themselves were acting for respondent and received its money under the instruction of that very same representative, in circumstances were the registrar had carried out investigations as directed by the court and concluded that such authority was proper. If such conduct by senior legal practitioners does not call for punitive costs, then one wonders what does.

In light of the above, I would be very surprised if the appellate court reached a different conclusion from the decision I made on the facts, issues and arguments that were made during the hearing of the urgent application before me. I therefore do not see that the applicants have any reasonable prospects of success on appeal.

In the premises leave to appeal is denied.

Costs

Respondent requested that in the event of the dismissal of the application, they be granted costs on a higher scale as the applicants have unnecessarily dragged respondents to court well knowing that the provisional order they seek to appeal against has since been confirmed. Further the notice and grounds of appeal are mostly predicated on information which was not before the court *a quo*. Besides, the notice of appeal does not deal with the *raison d'etre* of the decision of the court a quo. Therefore, there is no reasonable prospect of success on appeal, such that the only inference is that the notice of appeal is frivolous and vexatious. For these reasons, costs on the higher scale ought to be awarded as there is no justification on the facts or at law for this application.

I cannot agree more with the applicant's position. It seems to me that the applicants merely seek to belabour the appellate court with an unnecessary appeal. I certainly cannot say that the applicants' conduct leaves them smelling of roses.

In the premises, the application for leave to appeal is dismissed with costs of suit on the scale of legal practitioner and client.

FM Katsande & Partners, applicants' legal practitioners
Stanislous & Associates, respondent's legal practitioners