NMBZ HOLDINGS LTD v THE LIQUIDATOR OF CONTINENTAL SECURITIES TRADING PRIVATE LIMITED

SUPREME COURT OF ZIMBABWE
HARARE, OCTOBER 29, 2008 &
FEBRUARY 4, 2009

H Zhou, for the applicant

F Mutamangira, for the respondent

CHEDA JA: In Chambers, in terms of r 31 of the Supreme Court Rules.

This is an application for an extension of time in which to note an appeal in terms of r 31 of the Supreme Court Rules.

On 27 August 2008 the respondent obtained judgment against the applicant for the return of a number of vehicles listed in the order together with costs of suit.

On 18 September the applicant filed a notice of appeal against that judgment. The notice of appeal was defective in that it did not give the date of the judgment concerned. When the respondent was served with this application it filed its opposition to it.

The respondent pointed out that the applicant had not given a reasonable explanation for the delay and reasonable prospects of success. The respondent also pointed out that applicant admitted that it uplifted the judgment on 1 September 2008, yet the judgment was delivered in Motion Court on 27 August 2008.

The applicant, in its affidavit sworn to by Mr Narotam, only referred to an affidavit by Mr Lloyd and said the applicant was not manifestly in wilful default.

On the prospects of success, again Mr Narotam only referred to Annexures D & E and said the directors and shareholders of Continental Securities Trading (Pvt) Ltd were all perfectly aware of the terms of the contractual arrangements which had been entered into which resulted in the motor vehicles in question remaining in the possession of the applicant. Annexure D is referred to in the Index as a Notice of Appeal on pages 16-18 on the papers. Annexure E is a Notice of Appeal which is an amended Notice of Appeal.

Reference to the Notice of Appeal is inadequate as it only tells the Court the findings against which an appeal is made. It does not deal with the prospects of success required in the procedure for this type of application.

It is a requirement in our law that the affidavit should deal with this aspect of the application, that is, the prospects of success.

The respondent, in opposing the application, raised these issues, and, in addition, pointed out that the applicant only instituted the application when a writ of execution was served.

It also pointed out that the applicant sought to blame its legal practitioners instead by reference to the fact that the matter was to be dealt with by Mr Lloyd who later declined saying he was about to leave the country.

In *Director of Civil Aviation v Hall* 1920 (2) ZLR 354 it was pointed out that the prima facie prospects of success needed to be set out in the application.

The judgment which the applicant seeks to have set aside raises an important point, which is that the applicant could not deal with company property as if it was its own when it is a shareholder.

In response to that, the applicant then attempted to counter that by giving a history of the matter which was never raised in the papers.

These are matters that the applicant had the opportunity to deal with in its affidavit. They were not part of the grounds of appeal either.

Once it was noted that the matter was opposed, both Mr Narotam and Mr Lloyd filed replying affidavits.

Mr Narotam submitted that it was not necessary to argue in detail the question of prospects of success on appeal. He said the Notice of Appeal speaks for itself and argument would be addressed at the hearing of the application. This is clearly the opposite of what the Rules say. The end result is that the applicant was not willing to say anything about its prospects of success.

Mr Lloyd also said absolutely nothing about the prospects of success. Instead he said the failure to act timeously rested with the applicant's advisors. The fact that the applicant was only a shareholder and should not have dealt with the company property as its own was not challenged.

The fact that in so doing the applicant had ignored the interest of the other shareholders was not challenged. It is difficult to see how, in such a situation, the applicant believed that there were prospects of success.

In conclusion, the application fails on the basis that no reasonable explanation for the delay was given, and no attempt was made to proffer any prospects of success.

The application is therefore dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Mutamangira & Associates, respondent's legal practitioners