

REPORTABLE (21)

(1) GETRUDE PAZVICHAINDA STEMBILE MUTASA (2) DIDYMUS
NOEL EDWIN MUTASA
v
(1) THE REGISTRAR OF SUPREME COURT (2)
NYAKUTOMBWA MUGABE LEGAL COUNSEL (3) SHERIFF OF
ZIMBABWE

SUPREME COURT OF ZIMBABWE
GUVAVA JA
HARARE: FEBRUARY 14, 2018 & MAY 14, 2018

D. T. Mwonzora, for the applicants

F. Mahere, for the second respondent

CHAMBER APPLICATION

GUVAVA JA: This is a chamber application made in terms of r 12 of the Supreme Court Rules, 1964.

The brief background to this application may be summarised as follows:

The applicants are husband and wife. They approached the court *a quo*, by way of urgent chamber application, seeking a stay of execution and return of goods which had been removed pursuant to a writ of execution following a default judgment which was granted in favour of the second respondent. The default judgment, related to a claim by the second respondent, who was the legal practitioner for the second applicant, claiming unpaid legal fees for services rendered to the second applicant and his political colleagues.

On 2 March 2017, the High Court granted a provisional order, for the return of all the goods that had been attached and removed in execution. The court also ordered first and second applicants to refrain from selling the goods until the dispute between the parties had been resolved.

On 3 March 2017 the second respondent filed an appeal against the judgment of the court *a quo*. The applicants contend that the legal practitioners, should not have successfully filed the appeal without the leave of the court. It was their contention that as the order related to an interim order, the second respondent should have sought leave from the court *a quo* in compliance with s 43 of the High Court Act [*Chapter 7:06*]. They thus sought an order setting aside the decision of the registrar accepting the notice of appeal and an order declaring the appeal that was before the Supreme Court a nullity.

The registrar filed a report in terms of r 12 of the Supreme Court Rules 1964 stating that they had accepted the notice of appeal as the order which had been granted was in the form of a mandatory interdict and thus did not require the leave of the court *a quo*. The second respondent denied that they required leave to appeal from the court *a quo*. He also argued that the matter was not properly before the court as the order sought could not be granted by a single judge in chambers. The second respondent also raised the point that the applicants were in fact seeking a declaratur and this could not be granted.

It is trite that when the Supreme Court is seized with an appeal, such an appeal cannot be struck off the roll by one Judge in Chambers. In the case of *Blue Rangers Estates (Pvt) Ltd v Muduviri* 2009 (1) ZLR 376 (SC), an applicant approached a single Supreme Court judge in Chambers seeking the relief that the matter be struck off the roll. Applicant therein

alleged that the matter for which notice had been filed was interlocutory in nature and required leave to appeal in terms of s 43 of the High Court Act. It was counsel's contention that without leave to appeal nothing was pending before the court. MALABA DCJ, as he was then, stated the following:

"I agree with Mr Mlotshwa that a single Judge of the Supreme Court sitting in chambers has no power derived from any provision of the relevant statutes, to make an order striking an appeal pending in the Supreme Court off the roll. The answer to the question whether a single Judge sitting in chambers has power to hear and determine an application for an order striking an appeal off the roll lies in the relevant provisions of the Statute in terms of which the Supreme Court was created and the Rules regulating its proceedings. It is also necessary to take into account provisions of the enactments by which the right of access to the Supreme Court on appeal is given." [My emphasis]

Mr. Mwonzora for the applicants submitted that the above cited case could be distinguished from the present matter as they were seeking an order that the notice of appeal be declared a nullity on the basis that the Registrar should not have accepted it in the first place. He sought to make the distinction that this was not an application for the striking off of an appeal which was on the Supreme Court roll, but for the setting aside of a decision of the registrar who had improperly accept such notice of appeal.

In my view this point brings to the fore the question of the role of the registrar when accepting process. The registrar's office is established by s 169 (4) of the Constitution. The provision provides:

"An Act of Parliament may provide for the conferring, by way of rules of court, upon a registrar of the Supreme Court, duly appointed thereto, of the jurisdiction and powers of the Supreme Court in civil cases in respect of—

- (a) the making of orders in uncontested cases, other than orders affecting status or the custody or guardianship of children;
- (b) deciding preliminary or interlocutory matters, including applications for directions but not including matters affecting the liberty of the subject."

Section 33 of the Supreme Court Act establishes the officers of the registrar in compliance with the Constitution. It provides:

"(1) There shall be a registrar of the Supreme Court and such deputy registrars, assistant registrars and other officers of the Supreme Court as may be required, whose offices shall be public offices and shall form part of the Judicial Service."

The role of the registrar is set out by the authors *Herbstein and Van Winsen, The Civil practice of Superior Courts of South Africa*, (3rd ed, Juta and Co Ltd, Cape Town) at p.35 as follows:

“the Registrar is an official of the court, responsible for the smooth functioning of the court and is charged with multifarious duties which duties are administrative in nature. For the purposes of clarity, these duties include but are not limited to the issue of process, recording, preserving and directing the flow of all documents filed by the litigants. The Registrar is also responsible for the setting down of cases and issuance of court orders. It is common cause that the Supreme Court is a court of record and the Registrar is the custodian of all court records. Case management which includes maintaining records and scheduling hearings is also the Registrar’s prerogative.”

From the above, it is clear that the registrar provides a full range of administrative and support services to the Judges by managing cases coming to court. However, he or she can also perform quasi-judicial functions but only in limited circumstances that are prescribed by statute. An examination of the Supreme Court Act and Rules clearly illustrates that it is not one of the functions of the registrar to decline a notice of appeal which has been filed in time. Where a notice of appeal is defective for whatever reason it is for the court seized with the matter to make such a determination.

The registrar cannot refuse to receive a notice of appeal on the basis that it is defective, in the sense that it does not comply with r 29 of the Supreme Court Rules. The registrar may suggest to a party that their document is defective in order for them to make the necessary amendments and bring the document back for filing. However, because of the administrative nature of the registrar’s duties, if a party insists on filing its document as it is after such direction has been offered, the Registrar is obliged to accept the document.

The rationale is that a registrar does not have the power to prevent a litigant from filing their court process, if it is filed within the times prescribed in the rules, as this falls outside the ambit of the registrar's mandate.

This is not a situation that is peculiar to this jurisdiction only but is found in a number of jurisdictions. I have examined the practice in various jurisdictions and found that it is the same. The registrar of the Supreme Court of Canada exercises the following functions:

- i. Processing, recording, preserving and directing the flow of all documents filed by parties and recording all proceedings which take place during the life of a case.
- ii. Providing information to litigants, the media and the public on the court's processes and activities and scheduling of cases.
- iii. Maintaining the court library and providing a full range of library and information services to judges, staff of the court and legal researchers.
- iv. Publishing the Supreme Court reports.
Providing administrative and operational support to the judges and court staff.
- v. Providing protocol services to the judges.

In Nigeria the duties of the registrars are also administrative in nature. Through these functions they aide in quick dispensation of justice, and this includes but is not limited to the following:

- i. As the head of the registry, he ensures proper day to day administration of the court registry.
- ii. He co-ordinates the handling of all court processes e.g. issuance of hearing notices, warrant of arrest, summons.

- iii. He undertakes supervision of work of all staff deployed on litigation duties.
- iv. He makes arrangement for court sitting and give necessary assistance to the judge in the open court.
- v. He helps in the administration of Oath and Affirmation on witnesses appearing in court.
- vi. He maintains record books in accordance with the rules of court and preparation of the court proceedings eg. rulings and judgments for interested litigants and lawyers in addition to when such matter is going on appeal.
- vii. He must ensure proper maintenance and disposal of attached property and exhibits in his custody
- viii. He must ensure the preparation of quarterly returns of cases filed and disposed.
- ix. He must see to the execution of court judgments and orders.

It should be noted that once a notice of appeal has been filed with the registrar of this court, the appeal is, from that point, pending before the Supreme Court.

In my view once the second respondent filed the notice of appeal within the prescribed time, it ceased to be an issue upon which the registrar's decision could be questioned or one where a single judge of the Supreme Court could declare a nullity.

I was thus not convinced by the argument that there was a distinction between this case and the Blue Rangers Case (*supra*) as the net effect of such an order would be the same. If the matter, were to be struck off the roll, it would no longer be before the court. Similarly, if the registrars decision accepting the notice of appeal were to be set aside on the

basis that it did not comply with s 43 of the High Court Act, the matter would no longer be before the court. In any event, as I have stated above, it should be stressed that once a matter has been filed with the registrar only that court can remove it from the roll on the basis that it does not comply either with the rules of the court or a statute.

In instances where the registrar has been granted quasi-judicial functions these are specifically spelt out either in the relevant legislation or the rules of this court. For instance where a party is called upon to inspect a record and he fails to do so within the prescribed time r 15 (8a) of the Supreme Court Rules specifically authorizes the registrar to deem the appeal abandoned. The rule also specifies the remedy that the party has against the decision of the registrar.

In relation to the point raised on whether or not the Supreme Court has the jurisdiction to issue a declaratur in the first instance, the point has already been determined. In *Guwa v Willoughby's Investments (Pvt) Ltd* 2009 (1) LR 368 (S) a litigant approached a single Judge of the Supreme Court in Chambers seeking a notice of appeal to be set aside as a nullity. It was not disputed by the respondent that the notice of appeal was fatally defective, and the court stated that there was in effect nothing pending before the Supreme Court. However, in spite of this being apparent to both parties, the single Judge approached in Chambers made the point that the Supreme Court does not have the jurisdiction to make a declaration in the first instance. The Supreme Court is a creature of statute and as such is governed by the Statute that established it – the Supreme Court Act. Such courts are distinct from courts of original jurisdiction such as the High Court. A statutory body can only act within the confines of its enabling Act, and nowhere in the Supreme Court Act, is the Supreme Court given the jurisdiction to entertain, in the first instance, an application for a declaratur.

In this case, the court stated that the Supreme Court, as an appellate court, cannot act in the first instance and issue such a declaratur, in spite of the parties accepting the notice of appeal to be invalid. On that basis the court declined to grant the relief sought as it highlighted that the court is not clothed with that authority and stated as follows:

“In other words, whilst the Supreme Court may do nothing that the law does not permit, the High Court may do anything that the law does not forbid.”

Clearly the Supreme Court cannot grant a declaratur in the first instance, even where the parties may be in agreement and approach the court by consent seeking an order beyond the courts’ jurisdiction, such consent does not and cannot compel a judge to issue an order beyond his or her jurisdictional authority.

This application cannot therefore succeed. The Blue Rangers case presented the option for a respondent in an appeal to raise its opposition to a notice of appeal by way of a point in *limine* before the court. This application therefore was ill-founded and premature. The parties should have waited for their day in court to raise their objections to the notice of appeal.

Ms *Mahere* applied to be awarded costs on a legal practitioner scale, on the basis that the case was ill conceived as the issues had already been determined by this court. Mr *Mwonzora* submitted that the applicant should not be visited with costs on a punitive scale as it was not clear from the rules that they could not approach a judge in chambers to impugn the registrar’s decision. I was inclined to agree with him that there was no decision dealing with the role of the registrar. However, in respect to the other points I was of the view that after the case authorities were highlighted to him he should not have persisted. Thus whilst I am not

inclined to award costs on a punitive scale, I take the view that the second respondent has been successful in defending the application. He should be awarded costs on the ordinary scale.

For the reasons given above, the application is dismissed with costs.

Mwonzora & Associates, Applicants Legal Practitioners

Nyakutombwa, Mugabe Legal Counsel, 2nd Respondent's Legal Practitioners