

REPORTABLE (51)

ILASHA MINING (PRIVATE) LIMITED
v
YATAKALA TRADING (PRIVATE) LIMITED t/a VIKING
HARDWARE DISTRIBUTORS

SUPREME COURT OF ZIMBABWE
BHUNU JA
HARARE: JULY 9, 2018 & OCTOBER 5, 2018

J. Sibanda, for the applicant

S.M. Hashiti, for the respondent

CHAMBER APPLICATION

BHUNU JA: This is an application for reinstatement of the appellant's appeal deemed dismissed in terms of r 44 (1) of the Supreme Court Rules 1964 for failure to file heads of argument on time.

The applicant was originally represented by Messrs Z Ncube Legal Practitioners in the main appeal but is now represented by Messrs Job Sibanda and Associates. The changeover of legal practitioners was done with scant regard to the Rules of court. There was neither a notice of renunciation of agency by the erstwhile legal practitioners nor a notice of assumption of agency by the current legal practitioners Job Sibanda and Associates. The only reference to the change of legal practitioners is to be found in the applicant's founding affidavit.

Both the Supreme Court Rules 1964 and the current Supreme Court Rules S.I. 84 of 2018 provide for renunciations of agency in Rules 12A and 14 respectively using identical language. The giving of notice of renunciation of agency is a vital legal requirement meant to regulate the representation of parties in an orderly manner such that the court and everyone concerned know which legal practitioner they are dealing with at every stage of the case.

Although the Rules refer to an appeal and is silent on applications, it is however pertinent to note that in such applications, they remain a component part of the original appeal, hence the need to adhere to the Rules. This enables the court and the other party to know exactly which legal practitioner they are dealing with at every stage of the case to avoid process and communication straying to the erstwhile legal practitioner with no interest in the application.

The procedure of giving notice for renunciation and assumption of agency is also vital in that it avoids legal practitioners scrambling over a client. While a litigant is entitled to a choice of a legal practitioner at any stage of the proceedings that choice must be known to avoid confusion. The importance of transparency in this regard was articulated by GWAUNZA JA, as she then was in *Masiwa v Masiwa* SC 46/2006 when she said:

“The court going by its own Rules normally accepts the notices of renunciation and assumption of agency as indications of a litigant’s choice of legal practitioner where a change happens in the process of prosecuting his/her case. This is for convenience of the court and allows for order and efficiency in the prosecution of legal proceedings”.

Already it appears that there is now conflict between the applicant and its then legal practitioners who refused to cooperate when asked to file a supporting affidavit in this application. The refusal of the applicant’s erstwhile legal practitioners to shed light on why the heads of argument were not filed on time has seriously handicapped the applicant’s application.

The applicant at paragraph 41 of the founding affidavit deposed to by its Director Delma Luppepe had this to say:

“Unfortunately, Mr Ncube has flatly told the applicant’s legal practitioners that he is not prepared to depose to an affidavit and has instead referred the applicant’s legal practitioners to Mr Uriri”.

Despite the applicant’s legal practitioners being referred to Mr *Uriri* for an explanation they have taken the gamble of approaching this Court without his explanation for delay. The net result is that the applicant is unable to proffer a reasonable explanation for the inordinate delay and disdain of the Rules. The best it could do in the circumstances was to blame its erstwhile legal practitioners without affording them a chance to be heard. No reason has been proffered as to why they shied away from approaching Mr *Uriri* for an explanation.

Apart from the above irregularity the application is a parody of more serious fatal procedural irregularities, chief among them failure to provide a copy of the impugned judgment. It is an exercise in futility for a litigant to attack a judgment of a lower court in a higher court without availing the court *a quo*’s judgment for scrutiny by the higher court to assess the veracity of the applicant’s criticism of the judgment. The applicant’s failure to avail the impugned judgment before me renders its criticism of the judgment hollow and nugatory.

That finding of fact and law renders the applicant’s submissions on its prospects of success valueless and not worth the paper upon which they are written as no weight can be placed on the submissions in the absence of the impugned judgment. ZIYAMBI JA echoed the same sentiments in *MM Pretorious (Pvt) Ltd & Anor v Chamunorwa Charles Mutyambizi SC 39/12* when she said:

“As to the prospects of success on appeal, the applicants make no mention thereof in their affidavits and no determination can be made on this issue particularly as the judgment appealed against does not form part of the record. It follows that the applicants have not established that there are any prospects of success”.

Failure to attach the impugned judgment was therefore a fatal grave error.

The applicant at paragraph 41 of its founding affidavit avows that the notice and grounds of appeal filed by its erstwhile legal practitioners are fatally defective. The irony is that it now wants to reinstate the fatally defective notice and grounds of appeal. At paragraph 42 - 43 of its founding affidavit its deponent Delma Luppepe says:

“42. Applicant’s current legal practitioners on studying the file also confirmed their view that the notice and grounds of appeal filed in SC 99/18 are fatally defective.

43. For this reason, Applicant is applying for the reinstatement of the appeal in SC 99/18 so that that appeal can properly be withdrawn and an Application for Condonation and Extension of time for Noting a fresh appeal be filed”.

It is trite and a matter of elementary law that a fatally defective application is a nullity. It is dead and non-existent; it cannot be resuscitated or resurrected as it is beyond redemption. In other words, there is no cure or remedy for a fatally defective application which is a nullity in the eyes of the law. In the words of Lord Denning in the famous case of *Macfoy v United Africa co. Ltd* [1961] 3 All ER 1169 (PC) at 1172:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court, to be set aside. It is automatically null and void without more ado, although it is sometimes convenient to have a court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

What this means is that since this application is founded on an application which is fatally defective, it undoubtedly follows that an application founded on it is also incurably bad and a nullity at law. A valid application cannot be founded on a void application which is a nullity at law. If the fatally defective original application be the mother of the current application, it follows that its offspring is equally defective and a nullity at law.

While the applicant's current legal practitioners are bent on apportioning blame to their colleagues, they do not appear to have done better themselves. The applicant's application remains in a mess and beyond redemption.

There being no valid application before me, the application cannot succeed.

It is accordingly ordered that:

1. The application be and is hereby struck off the roll with costs.

Takawira Legal Practitioners, applicant's legal practitioners.

M.C Mukome, 1st to 3rd respondents' legal practitioners.

Gambe Legal Practitioners, 4th respondent's legal practitioners.