DISTRIBUTABLE (60)

YUNUS AHMED

v

DOCKING STATION SAFARIS PRIVATE t/a CC SALES

SUPREME COURT OF ZIMBABWE
BHUNU JA
HARARE, JUNE 7, 2018 & NOVEMBER 1, 2018

Lawman Chimuriwo, for the applicant

Kevin J. Arnott, for the respondent

CHAMBER APPLICATION

BHUNU JA: After reading papers filed of record and hearing counsel in this matter, I dismissed the application that was before me with costs, and indicated that the reasons for judgment would be available in due course. These are they.

The facts of this case can be summarised as follows: The applicant, Yunus Ahmed was the Director of a company known as Foldaway Investments Private Limited. The respondent, Docking Station Safaris Private Limited t/a CC Sales is a company duly registered in accordance with the laws of Zimbabwe.

The respondent and Foldaway Investments used to conduct business together and during the course of doing business, Foldaway Investments fell into debt with the respondent. This caused the respondent to institute legal proceedings against it for the recovery of the debt. The respondent was successful against Foldaway Investments and it obtained an order for the recovery of the debt. The respondent then instituted proceedings against the applicant imploring the court *a quo* to make an order declaring that the applicant be jointly and severally liable with Foldaway Investments for all the debts of Foldaway Investments to the respondent. The dispute went for trial and the court *a quo* held that the applicant should rightly be found jointly liable with Foldaway Investments for all the debts it owed the respondent.

On 19 July 2017, the applicant noted an appeal against the judgement of the court *a quo.* The applicant however, did not serve the notice of appeal on the Registrar of the High Court as stipulated by r 29 (2) of the Supreme Court Rules, 1964 thereby necessitating the present application.

Before I delve into the merits of this application, I find it pertinent to highlight the irregularities that accompany this application. On the face of the application it is indicated that the application is for condonation and extension of time in terms of r 31 of the Rules of the Supreme Court, 1964. The contents of the founding affidavit tell a different story. The application is said to be an application for condonation and reinstatement of appeal arising from the fact that the applicant did not serve the notice of appeal on the Registrar of the High Court. The applicant seems to be confused as to the nature of the application that he is supposed to bring before this Court.

It is trite that an application stands or falls on its founding affidavit. (See *Fuyana v Moyo* SC 54-06, *Muchini v Adams & Ors* SC 47-13 and *Austerlands (Pvt) Ltd v Trade and Investment Bank Ltd & Ors* SC 80-06). In cases where the headings on the cover of an application tell one thing and the contents of the founding affidavits tell another, the nature of the application that is before the court is determined by the contents of the founding affidavit and not the headings on the cover of the application. This was aptly captured by GOWORA JA in *Zimbabwe Posts (Pvt) Ltd v Communication & Allied Services Union* SC 20/16 as followings:

> "The issue that begs an answer is how the court *a quo* should have dealt with the matter given the apparent confusion that had been created by the appellant in settling its papers. **An application must be disposed of on the basis of the founding affidavit**. …" (my emphasis)

In *casu*, it is averred twice, in the applicant`s founding affidavit that the application is for condonation for non-compliance with the rules and reinstatement of appeal. The contents of the founding affidavit thus take precedence over what is written on the headings of the application. It is however expected, generally, that the headings of an application should marry with the contents of the founding affidavit. This application is thus one for condonation and reinstatement of appeal as averred in the founding affidavit.

An application for condonation and reinstatement of appeal is not the proper application to make given the circumstances of this case. The applicant failed to comply with r 29 (2) of the Supreme Court Rules, 1964, a peremptory rule of the court which reads:

> "The notice of appeal **shall** be served on the registrar, the registrar of the High Court, and the respondent."

Failure to comply with a peremptory rule therefore renders the notice of appeal fatally defective. In *Econet Wireless (Pvt) Ltd v Trustco Mobile (Proprietary) Ltd & Anor* SC 43/13, GARWE JA stated as follows:

> "The position is now well established that a notice of appeal must comply with the mandatory provisions of the Rules and that if it does not, it is a nullity and cannot be condoned or amended. See *Jensen v Acavalos* 1993 (1) ZLR 216 (S)."

The notice of appeal that the applicant seeks of reinstatement is therefore a nullity. A nullity cannot be reinstated, it is dead at law and hence it cannot be resuscitated by means of an application for reinstatement of an appeal. This point was clearly made in *Bindura Municipality v Mugogo* SC 32 - 15 where GUVAVA JA stated that:

> "It however seems to me that the applicant has filed a wrong application. Where a matter has been struck off the roll because it has failed to comply with the rules of court, one cannot simply apply for reinstatement of the appeal as such an appeal is a nullity. This position has been stated in a number of decisions of this Court."

In view of the above, it is clear that the applicant has approached this court with a wrong application. The circumstances of this case require the applicant to make an application for condonation for non-compliance with the rules and extension of time within which to file and serve a notice of appeal. This, the applicant failed to do. The net effect of bringing a wrong application before the court is that there will be virtually nothing placed before it and, to that end, this application cannot stand.

Apart from the above irregularity, the applicant`s draft order is in shambles. It reads as follows:

"**WHEREUPON**, after perusing documents filed of record;-

IT IS ORDERED AS FOLLOWS:

1. The Application for condonation for non-compliance with the rules of the Supreme Court and is hereby granted.*(sic)*
2. The application for extension of time with which *(sic)* to file and serve a notice of appeal in terms of the rules and is hereby granted.
3. The Applicant be and is hereby ordered **to serve the Registrar of the Labour Court** *(sic)* the notice of appeal within 7 days of this order.
4. No order as to costs." (my emphasis)

This draft order is incompetent in various ways. Apart from the several typographical errors, para 1 does not state the Rule that the applicant failed to comply with, which the court should condone. Secondly, having established that this is an application for condonation and reinstatement of an appeal, para 2 does not pray for the reinstatement of an appeal. Lastly, the applicant, in para 3, prays that the notice of appeal be served on the Registrar of the Labour Court when it is common cause that he seeks to appeal against a decision of the High Court. The sum effect of these errors render the draft order meaningless and inevitably fatally defective.

Such tardiness is least expected in court process that is drafted by a legal practitioner. Legal practitioners must be meticulous in drafting pleadings and process. Shoddily drawn process confuse the court and the other party. The need to be meticulous is most important when drafting the relief sought. If the relief sought is imprecise and defective, the court cannot grant it.

It also goes without saying that, as a general rule, where the Rules of Court or a Practice Direction prescribe a form to be followed when drafting court process, legal

practitioners are enjoined to make use of that form. *In casu*, Practice Direction 1 of 2017 gives the form to be followed when crafting a draft order for an application for reinstatement of appeal but the applicant simply neglected and failed to follow it. The purpose of forms in Rules of Court and Practice Directions is to guide litigants as to the format of pleadings and process for the proper running of the courts. The applicant has however, neglected the use of the appropriate Practice Direction to his own peril. In this regard therefore, the applicant has not placed anything before the court to grant.

In view of these irregularities I found it proper to dismiss the application instead of striking it off the roll. In *Mudyavanhu v Saruchera* SC 75/15 GWAUNZA JA (as she then was) stated that;

> "It is noted that a number of matters have been struck off the roll by this Court on the ground that the relief sought was not exact in nature and that as a result the related notice of appeal was incurably defective. See *Ndlovu & Anor v Ndlovu & Anor* (*supra*). **However, in this case, the court found that the appeal was not only incurably defective but wrong and bad in law. The appeal could therefore not properly be struck off the roll because the appellant had no avenue, legally or procedurally, to follow in case he was inclined to bring the same appeal before this Court**." (my emphasis)

The grave irregularities that accompany this application warrant a dismissal. The applicant`s draft order is fatally defective and the application as a whole is wrong and bad in law. This application can only be dismissed.

There being no reason to depart from the general rule that costs follow the result, the general rule shall prevail.

It is accordingly ordered that:

The application be and is hereby dismissed with costs.

Lawman Chimuriwo Attorneys At Law, applicant`s legal practitioners

Kevin J Arnott, respondent`s legal practitioner