DISTRIBUTABLE (14)

THE PINNACLE PROPERTY HOLDINGS (PRIVATE) LIMITED
v
(1) THE MUNICIPALITY OF REDCLIFF (2) THE MINISTER OF LOCAL GOVERNMENT PUBLIC WORKS AND NATIONAL HOUSING

SUPREME COURT OF ZIMBABWE
HARARE: 7 MARCH 2022 & 13 FEBRUARY 2023

T.Sibanda, for the applicant

T. W. Nyamakura, for the first respondent

No appearance for the second respondent

CHAMBER APPLICATION

BHUNU JA:

[1] This is an opposed chamber application for condonation of late noting of appeal and extension of time within which to note an appeal. The application is brought in terms of r 43 of the Supreme Court Rules 2018 pursuant to the applicant's failure to file a proper notice of appeal within 15 days of the judgment intended to be appealed against in breach of r 37.

THE PARTIES

[2] The applicant is a company duly incorporated in terms of the laws of Zimbabwe whereas the first respondent is a municipal council duly established in terms of the

Urban Councils Act [*Chapter 29:15*]. The second respondent is the Minister responsible for the administration of local municipal councils.

FACTUAL BACKGROUND

[3] The first respondent is the owner of a certain piece of land commonly known as The Remainder of Renin of the Main Belt situated in the district of Redcliff measuring 466 hectares in extent. On 27 July 2009 the parties concluded a written contract of sale of the land. The applicant failed to make full payment of the purchase price within the prescribed time limit. This prompted the first respondent to write to the applicant notifying it of cancelation of the contract of sale for breach of contract.

[4] The applicant challenged the cancellation of the contract in the court *a quo* under case number HC 3439/11 in which it sought an order for specific performance. In a bid to settle the dispute, the first respondent offered the applicant 240 hectares of land proportionate to the amount it had paid. Under the proposed settlement the applicant was required to pay rates for the land in advance for a period of five years together with 10 percent endowment fees.

[5] The applicant rejected the proposed terms of settlement in relation to the advance payment of rates and payment of endowment fees. The applicant in turn made a counter offer. The first respondent was amenable to compromise on the period within which the applicant was to pay rates but not on the payment of endowment fees. Consequently the first respondent refused to sign the draft consent order unilaterally signed by the applicant.

[6] Despite lack of consensus on the terms of settlement, the applicant filed an application for specific performance in the court *a quo* under case number HC 4221/19 seeking to enforce the disputed compromise. The court *a quo* dismissed the application on account that the purported compromise was invalid and unenforceable because the deed of settlement had been unilaterally signed by the applicant. It further found that the purported contract of sale was illegal and unenforceable as it was concluded in breach of s 152 of the Urban Councils Act.

[7] Disgruntled, the applicant filed a notice of appeal through its legal practitioners on 20 March 2022. The notice of appeal was however deemed dismissed for want of compliance with r 37 in that there was no service of the notice of appeal on the Registrar of the High Court.

[8] It is on these facts that that the application stands to be determined in terms of the applicable law.

THE LAW

[9] The law in applications of this nature is settled and hardly needs any authority to be cited. In *Apostolic Faith Mission & Two Ors v Murefu* SC 28/03, this Court articulated the law as follows:

> "Essentially, in an application of this nature, the applicant must satisfy the court, firstly, that he has a reasonable explanation for the delay in question and secondly that his prospects of success on appeal are good."

[10] It is on the basis of the above entrenched procedural law that I proceed to determine the merits of the application at hand.

WHETHER THE APPLICANT HAS A REASONABLE EXPLANATION FOR THE DELAY

[11] The court *a quo* issued the impugned judgment on 4 March 2020. The applicant ought to have filed a valid notice of appeal within 15 days of the judgment. It did not do so. It filed a defective notice of appeal which was deemed dismissed in terms of r 37 (3) which provides that:

> "(3) If the appellant does not serve the notice of appeal in compliance with sub rule (2) as read with rule 38, the appeal shall be regarded as abandoned and shall be deemed to have been dismissed."

[12] In a bid to salvage its case, the applicant filed an inappropriate application for reinstatement of the appeal on 12 November 2020. Upon realisation of its ineptitude in this respect it withdrew the defective application and filed the current application on 9 February 2022. This was almost 2 years after the expiry of the *dies induciae*. A delay of this magnitude is undoubtedly inordinate considering that the applicant was obliged to file the notice of appeal within 15 days of the impugned judgment.

[13] The applicant's explanation for the delay is to blame its erstwhile legal practitioner Advocate *Uriri* for failure to serve the notice of appeal on the Registrar of the High Court. This explanation is woefully unreasonable. It was remiss of the applicant and its instructing attorneys to sit back and assume without checking that the notice of appeal had been properly served in terms of the rules of court. I accordingly hold that there is no reasonable explanation for the inordinate delay of close to two years

WHETHER OR NOT THERE ARE GOOD PROSPECTS OF SUCCESS ON APPEAL

[14] In the court *a quo*, the applicant sought to enforce the compromise agreement which it had unilaterally drafted and signed without consensus from the first respondent. On 14 May 2019 the first respondent's legal practitioners wrote to the applicant's legal practitioners rejecting the applicant's proposed deed of settlement. The letter reads:

> "We refer to your letter of 27 March 2019 and the attached Deed of Settlement and documents.
>
> We now have our client's instructions and have been instructed to respond thereto as follows:-
>
> 1. That the proposed terms of the Deed of Settlement are not acceptable to our client and have accordingly been rejected.
> 2. That the resolution passed by our client attached to your letter under reply was rescinded on 6th May 2019,
>
> We have accordingly been instructed to have this matter resolved at court."

[15] It is trite that consensus is of the essence of contract. There cannot be any contract without offer and acceptance. It is therefore astounding to say the least that the applicant sought to enforce the deed of settlement in the face of an out and out rejection by the first respondent. In dealing with this aspect of the case, the learned Judge *a quo* at p 4 of his judgment had this to say:

> "Pinnacle wants me to declare that the settlement between council and itself for transfer of the 240 hectares of land is binding.
>
> This means I have first of all to find as a fact that the two parties settled HC 3439/2011. I am unable to grant the declaratory order. The evidence is clear that the parties did not settle HC 3439/2011.
> I have seen the Draft Deed of Settlement. It remains a draft. It bears the lone signature of Pinnacle's legal practitioners.
> …
> I am unable to sign the Draft Deed of Settlement, and date it on behalf of council. That is the relief that is sought in the present matter. This Court is not a party to HC 3439/11."

[16] It is needless to say that the learned judge *a quo*'s articulation and application of the law to the common cause facts in this respect is beyond reproach and unassailable. There is therefore absolutely no merit at all in the applicant's endeavour to enforce a disputed compromise Deed of Settlement not signed by the first respondent.

WHETHER THE CONTRACT WAS LAWFUL AND ENFORCEABLE

[17] The applicant seeks to upset on appeal the learned judge *a quo's* finding to the effect that the so called Deed of Settlement is unlawful and unenforceable for want of compliance with the provisions of s 152 (2) of the Urban Councils Act. The effect of non-compliance with the mandatory provisions of that section has been the subject of interpretation by our superior courts. The section provides as follows:

Section 152

> "(2) Before selling, exchanging, leasing, donating or otherwise disposing of or permitting the use of any land owned by it the council shall, by notice published in two issues of a newspaper and posted at the office of the council, give notice
>
> *(a)* of its intention to do so, describing the land concerned and stating the object, terms and conditions of the proposed sale, exchange, lease, donation, disposition or grant of permission of use; and
>
> *(b)* that a copy of the proposal is open for inspection during office hours at the office of the council for a period of twenty-one days from the date of the last publication of the notice in a newspaper; and
>
> *(c)* that any person who objects to the proposal may lodge his objection with the town clerk within the period of twenty-one days referred to in paragraph (*b*)."

[18] In interpreting the meaning and import of s 152 the learned judge *a quo* placed reliance on the case of *Bruce v Econet Wireless (Pvt) Ltd and Another 2009 (1) ZLR 284 (H) at 290C* where OMERJEE J, as he then was, had occasion to say that:

> "Before dealing with the merits of the case, I wish to make the following observation. A local authority, such as the City of Harare, is empowered by section 152 of the Urban Councils Act to alienate any land it owns through sale, lease, donation, or otherwise dispose of, or permit the use of it. In doing so, **the local authority is obliged to comply with the requirements stipulated in that provision."** (My emphasis)

[19] Undoubtedly the interpretation placed upon s 152 of the Urban Councils Act in the *Bruce Case supra* is correct. The section is couched in simple unambiguous language admitting of no other meaning. It is axiomatic that the section infact constitutes a condition precedent which must be fulfilled before a municipality can alienate its land. The object for the laid down procedure is to give interested members of the public the right to object as provided for under s 152 (2) (c) of the Act.

[20] The applicant admits that there was no compliance with the mandatory terms of the section. It however argues that a public body is presumed to have complied with the law. That argument though ingenious is defective and untenable at law in that it seeks to supress the purpose of the section and advance the mischief for which the section was enacted. It amounts to an absurdity in that it divests the first respondent of the obligation to comply with the law under the fictitious illusion that it is deemed to have complied with the law in circumstances where it has not. That construction of the law amounts to an absurdity in that it deprives interested members of the public of their right to object to the proposed sale of public land.

DISPOSAL

[21] In the absence of a reasonable explanation for the inordinate delay of almost two years and it being plain that the learned judge *a quo's* judgment is beyond reproach, I hold

that there are no reasonable prospects of success on appeal. That being the case, the application can only fail. Costs follow the cause.

[22] It is accordingly ordered as follows:

The application be and is hereby dismissed with costs.

Mhishi Nkomo Legal Practice, applicant's legal practitioners

Wilmot & Bennett, 1st respondent's legal practitioners