REPORTABLE (07)

GEORGE MUSANHU
v
CITY OF HARARE

SUPREME COURT OF ZIMBABWE
HARARE: 5 DECEMBER 2024 & 27 JANUARY 2025

Ms *G. Makina,* for the applicant

A. A Moyo, for the first respondent

IN CHAMBERS

MATHONSI JA:

This is an opposed application for condonation for non-compliance with the rules and reinstatement of an appeal which was deemed abandoned and dismissed for failure to enter into good and sufficient security for the respondent's costs of appeal as required by r 55 (2) and (5) of the Supreme Court Rules, 2018. The application is made in terms of r 70 (2) of the Court Rules and was filed on 25 November 2024.

THE FACTS

The respondent, which is the local authority running the affairs of Harare, is the undisputed owner of business premises known as Shop 16 Samora Machel Parkade, Harare (the premises). It leased the premises out to one P. S. Sigauke several years ago. In due course, the said Sigauke failed to pay rentals due to the respondent thereby accumulating a significant amount of arrears. While that state of incongruency subsisted, Sigauke purported to either sell his business, run from the premises or to sublet the premises without the involvement of the respondent.

Although the applicant has alleged that Sigauke passed away either in 2012 or 2013, no tangible evidence of his death has ever been produced. Whatever the case, it is common cause that the applicant is the one in occupation of the premises by virtue of his agreement with Sigauke.

Unhappy with that state of affairs, the respondent moved to vindicate against the applicant, instituting a claim for eviction and damages against the applicant out of the Magistrates Court of Harare. The foundation of the respondent's claim was that the applicant "was an illegal sub-tenant of Mr. Sigauke" who continued to operate illegally after the termination of Sigauke's tenancy.

The applicant contested the action, his defence, as outlined in his plea, being that:

> "1. The defendant denies owing the plaintiff the sum claimed in the summons. The plaintiff must put strictest proof thereof.
> 2. The plaintiff should be honest before this Honourable Court.
> 3. The defendant was not given notice to vacate in terms of Commercial and Institutions Regulations (sic) of 2 and half months' notice (sic) to vacate the premises only shocked to receive an action before this Honourable Court."

Following a full trial, the Magistrates Court found in favour of the applicant holding that he had a right to occupy the premises by virtue of a letter allegedly written by the respondent's Town Clerk on 24 June 2010 which accepted Sigauke's cession of his lease to the applicant. The said letter was disputed by the respondent as a forgery which did not emanate from the Town Clerk's Office. Notwithstanding that assertion, the trial Court dismissed the respondent's eviction claim.

The respondent was disgruntled and noted an appeal to the High Court on two grounds. Firstly, that the finding by the trial court that it failed to prove its case on a balance of probabilities when there was no agreement between the parties entitling the applicant to occupy the premises, was a misdirection "so gross that no reasonable person applying his mind

would have arrived at such a conclusion." Secondly, that no sensible person applying his mind would have relied on the forged letter produced by the applicant to find in his favour.

The High Court resolved the matter on the simple basis that even were the letter alleged to have been authored by the Town Clerk authentic, it would not give rise to a valid agreement which the applicant could enforce. In doing so, it relied on the authority of the judgment of this Court in *City of Harare* v *Munzara & Ors* SC 1/23. The import of that judgment is that there is an elaborate process that has to be followed by a municipal authority before it can lawfully dispose of or lease out immovable property. The procedure to be followed is set out in s 152 (2) of the Urban Councils Act [*Chapter 29:15*] ("the Act") which provides:

> "152 **Alienation of Council land and reservation of land for State purposes**.
>
> (1)….
>
> (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)."

Where the procedure for alienating municipal property set out in the Act is not followed, the result is a nullity which does not bind anyone. On that premise, the High Court allowed the appeal and ordered the eviction of the applicant, and those claiming occupation through him, from the premises. It is that judgment of the High Court which the applicant sought to appeal against by filing a notice of appeal to this Court on 3 October 2023.

THE APPLICATION

After filing his notice of appeal aforesaid, the applicant did not enter into good and sufficient security for the respondent's costs within the prescribed period or at all as required by r 55. On 8 April 2024, the Registrar of this Court demanded to be furnished with proof of compliance with the requirement of security of costs. This was more than six months after the appeal was noted.

On 11 April 2024, the applicant deposited a sum of US$ 700-00 into the AFC Bank account of Gambe Law Group, the legal practitioners of the respondent, towards the respondent's security of costs. He says it was in response to the Registrar's inquiry which made him realize that an earlier attempt to make a similar deposit on 23 October 2023 by an acquaintance of his on his behalf had been unsuccessful.

In an attempt to prove that an attempt to deposit the money was made on 23 October 2023, the applicant produced a completely illegible cash deposit slip. Only two endorsements are legible on that document, namely, a date stamp of 23 October 2023 purportedly endorsed by the bank and another date stamp for the same date purportedly endorsed by "Chenge" at Gambe Law Group. It is completely unhelpful.

Perhaps more reliable evidence of that alleged deposit would have been of assistance in establishing what the applicant alleges, which is that he had tried to pay security of costs within the time prescribed by the Rules but the depositor made an error by entering a wrong account number on the deposit slip. Unfortunately the explanation given is wholly unsatisfactory. What remains fact therefore, is that the applicant deposited US$700-00 into the bank account of the respondent's legal practitioners, more than six months after filing his appeal.

The applicant has asserted that his intended appeal enjoys very good prospects of success because the High Court erred in finding that there existed no valid lease agreement between the respondent and himself even though Sigauke's lease was ceded to him. As such, so the applicant argued, there was no need to follow the procedure for alienation set out in s 152 of the Act as it had already been complied with when the premises was leased to Sigauke. I mention in passing that, at the trial the applicant produced an agreement of sale entered into between himself and Sigauke for the sale of "the business called Vision Supermarket or Shop number 16 Samora Machel Parkade Harare." He did not produce a cession.

In opposing the application, the respondent drew attention to the fact that at no time after filing the notice of appeal did the applicant engage its legal practitioners on the security of costs and when he deposited US$700-00. The respondent also refuted acknowledging receipt of the proof of payment. To underscore that fact, a supporting affidavit deposed to by one Chengetai Maggie Mushayi, an employee of Gambe Law Group, was submitted.

The deponent stated that she is the respondent`s legal practitioner dealing with the matter and, with the aid of clearly marked copies of her passport, she stated that between December 2022 and November 2023 she was in the United Kingdom. As the only person

answering to the name "Chenge" at the law firm, she insisted that she could not have made the endorsement on the illegible bank deposit slip.

The respondent maintained that as an illegal sub-tenant, the applicant had no prospects of success on appeal.

THE LAW

The import of r 55 regulating the provision of security of costs was discussed at length by this Court in *Watermount Estates (Pvt) Ltd & Anor* v *The Registrar of the Supreme Court N.O & Ors* SC 135/21. Rule 55 (2) requires an appellant to enter into good and sufficient security for the respondent`s costs of appeal. Such an appellant is required by r 55 (5) to do so within one month of filing the notice of appeal.

In the event of the failure to do so within the prescribed period, r 55(6) provides the sanction that the appeal shall be seemed to have been abandoned. The dismissal of the appeal deemed abandoned takes effect by operation of law. All that the Registrar is required to do by dint of r 70(1) is notify the parties of what is a *fait accompli.*

An appellant whose appeal has been dismissed by operation of law for failure to enter into good and sufficient security for the respondent`s costs of appeal, has a window of opportunity presented by r 70 (2) to apply for the reinstatement of the appeal "on good cause shown". The use of that expression in the Rule triggers the application of what has to be considered in determining whether there is good and sufficient cause to grant an indulgence.

In *Bonnyview Estate (Pvt) Ltd* v *Zimbabwe Platinum Mines (Pvt) Ltd & Anor* SC 58/18 at p 3 MAKARAU JA (as she then was) expressed the sentiments:

> "Condonation is an indulgence granted when the court is satisfied that there is good and sufficient cause for condoning the no-compliance with the Rules. Good and sufficient

> cause is established by considering cumulatively, the extent of the delay, the explanation for that delay and the strength of the applicant`s case on appeal, or the prospects of its success. This is trite."

When seeking the indulgence of the Court, an applicant must be careful not to take the Court for granted but must give a frank and plausible account which will persuade the court to exercise its discretion favourably. Similar views were expressed in *Zimslate Quartzite (Pvt) Ltd & Ors* v *Central African Building Society* SC 34/17 at p. 7 where the Court remarked:

> "An applicant, who has infringed the rules of the court before which he appears, must apply for condonation and in that application explain the reasons for the infraction. He must take the court into his confidence and give an honest account of his default in order to enable the court to arrive at a decision as to whether to grant the indulgence sought. An applicant who takes the attitude that indulgences, including that of condonation, are there for the asking does himself a disservice as he takes the risk of having his application dismissed."

In an application for reinstatement the authorities are clear that good prospects of success on appeal constitute one of the essential elements to be established in deciding whether good cause has been shown. See *Doves Funeral Assurance (Pvt) Ltd* v *Harare Motorways (Pvt) Ltd* SC 64/23 at p. 6.

EXAMINATION

I now turn to determine whether the applicant has shown good cause for the relief sought. In doing so, it is settled that one zeros in on whether a reasonable explanation has been given for the delay or non-compliance and whether there are reasonable prospects of success on appeal.

The applicant was required by the Rules to settle the issue of security of costs within one month of filing the appeal which was filed on 3 October 2023. He did not do so. The story about an acquaintance who deposited US$700.00 in a bank account of the respondent`s legal practitioners appears, in all aspects, to be an elaborate hoax. To begin with,

the amount in question has not been shown to have been agreed upon between the parties or fixed by the Registrar. It is just a figure from the blue.

Apart from that, the deposit is said to have been made by a person who now conveniently shouts from Bournemouth in the United Kingdom where he immediately found shelter without attempting to check if the deposit was properly receipted by the receiving bank. That is not all, the alleged recipient of the proof of payment could not have possibly received it, even by Bluetooth, from far afield in the United Kingdom.

It does not assist the applicant at all that absolutely nothing can be gleaned from that deposit slip. It is unbelievably illegible and no effort has been made to authenticate it. We are therefore left with the inescapable reality that the applicant attempted to pay an amount determined by himself without the input of the respondent, as security of respondent`s costs, more than six months after filing a notice of appeal. This, the applicant did only after some probing from the Registrar.

A disdain of the Court Rules has never been so glaring and a delay has never been so inordinate in such circumstances. It is inexcusable and cannot be condoned.

Turning to the prospects of success of the intended appeal, I desired to know from Ms *Makina,* counsel for the applicant, what agreement the applicant intends to enforce against the respondent which, undoubtedly is the owner of the premises and therefore entitled, on the basis of the *actio rei vindicatio,* to vindicate its property against whomsoever possesses it. Counsel`s response was far from satisfactory. It was that the applicant purchased a business from Sigauke who was permitted to cede such business.

The applicant`s resistance of the *rei vindicatio* must be grounded in the law. See *Chetty* v *Naidoo* 1974 (3) SA 13 (A). It does not come anywhere near that. Significantly, the

High Court took a simple and straight forward approach to the dispute. Even assuming officials (Town Clerk) of the respondent wanted to endorse the applicant`s occupation in the absence of privity of contract between the parties, so the High Court reasoned, that was a nullity for want of compliance with the provisions of the Act.

In arriving at that conclusion, the High Court was following the precedent set by the Supreme Court in *City of Harare* v *Munzara & Ors, supra*. The High Court was bound by that decision by virtue of the doctrine of precedent. The Supreme Court is not expected to fault the High Court for following precedent set by the same Supreme Court. Evidently, the appeal has no shouting chance. It would be the height of irresponsibility to indulge the applicant in the circumstances, just for him to have his day in Court at the expense of the respondent and the Court.

Regarding costs, there is no reason why the applicant should not be made to pay the costs of the unsuccessful litigation.

In the result it be and is hereby ordered that the application is dismissed with costs.

Muvhami Attorneys, applicant's legal practitioners.

Gambe Law Group, respondent's legal practitioners.