TENDAI BONDE

v

(1) NATIONAL FOODS LTD (2) REGISTRAR SUPREME COURT OF BULAWAYO

SUPREME COURT OF ZIMBABWE
BULAWAYO, 6 JULY & 17 SEPTEMBER 2021

Applicant in person

S Chamunorwa, for the first respondent

IN CHAMBERS

MAVANGIRA JA:

INTRODUCTION

1. Before me is an application filed by the applicant on 23 December 2020. The applicant styled it "Chamber Application for Reinstatement of an Application in terms of Rule 70 (2) of the Supreme Court Rules, 2018."

2. The application is ill-fated for the reasons that appear hereunder

3. The relief that the applicant seeks in terms of the draft order attached to the application reads:

> "IT IS ORDERED THAT
>
> 1. The application for reinstatement of application in case number SCB 96/20 be and is hereby granted.
>
> 2. Notice of application shall be deemed to have been reinstated on the date of this order.
>
> 3. There shall be no order as to costs."

FACTUAL BACKGROUND

4. The applicant, in SCB 96/20, filed a "Chamber Application for Condonation and Extension of Time to Note Review." (sic). It was heard by MATHONSI JA on November 4, 2020, yielding judgment SC 159/20 on November 18, 2020. The judgment records that the application was made in terms of r 13 of the Supreme Court Rules, 2018 (the rules).

5. At p 4 of the judgment, and for reasons canvassed from the beginning of the judgment, MATHONSI JA dismissed an application for his recusal made by the applicant the commencement of the hearing, for his recusal.

6. At p 5 of the judgment the learned judge stated *inter alia:*

> "The applicant asserts that this Court has jurisdiction to hear the application under r 13 of the court's rules. He makes it clear that he is not relying on r 56 of the rules because he seeks a review of the registrar's conduct as well as the taxation proceedings. The application is therefore convoluted."

7. The learned judge further stated at p 6:

> "If the applicant is unhappy with the costs allowed by the taxing officer, r 56 (2) affords him an opportunity to seek a review of the taxation. The review in terms of subrule (2) of r 56 should be made within 15 days. Where, as in this case, the applicant has failed to bring a review application within the prescribed period of time, then he is at liberty to bring an application for condonation of the failure to abide by the rules and for an extension of time within which to do so.
>
> The applicant has categorically stated that he is not proceeding in terms of r 56 and that he is not certainly seeking a review of taxation. He however, seeks the setting aside of the taxed bill of court (costs) the applicant has specifically said that this is an application in terms of r 13." (the underlining is mine)

8. Finally, at pp 7 and 8 he stated as follows:

> "I have said that the application is convoluted. What the applicant states in his founding affidavit would ordinarily appear in an application for rescission of judgment. The application is fundamentally flawed. I find it unnecessary to relate to its merits. The application being improperly before me, it has to be struck off the roll.
> …

In the result, it be and is hereby ordered that the application be and is hereby struck off the roll with costs."

THIS APPLICATION

9. It is the application that was heard and determined by MATHONSI JA as canvassed above that the applicant now seeks to be reinstated by way of this application.

10. It is necessary, if only for completeness' sake, that I place on record the applicant's oral submissions made in support of this application. The applicant raised two preliminary points. The first point was that the first respondent had proceeded to execute an order of costs that was awarded in its favour without waiting for what he termed "the normal process of the law." He urged the court to find that for that reason the first respondent was not properly before the court as its hands were dirty. He prayed that this court must first order the first respondent to restore his property before it could proceed with the hearing on the merits.

    The applicant further indicated, as part of the first preliminary point, that he had at some stage filed an urgent chamber application after a writ attaching his property had been issued by the Sheriff of the High Court. The application was ruled to be not urgent. He stated that the effect of that ruling was that "normal process was to treat it on the ordinary roll." He however did not say what steps he had taken to have the matter enrolled on the ordinary roll. He also made reference to "p 4 of a Symposium Report" which he said stated that no single judge can deal with a court application. He thereafter requested the court to refer to the Constitutional Court the question regarding what happens to what he termed "decisions pending because of normal process of law."

11. The applicant's second preliminary point was that his application was "not properly opposed" because after filing it on 23 December 2020, opposing papers were only filed

on 3 March 2021, way beyond the five (5) days that r 39 (3) stipulates. Presumably, he therefore expected the court to treat his application as unopposed.

12. Regarding the merits of his application, the applicant for the most part virtually reiterated the submissions that he made in respect of his preliminary points. He also indicated that in his view a chamber application that had earlier been ruled to be not urgent and had not yet been heard, was still pending. He said that he had also filed a chamber application for review and before it was heard his property which had been attached earlier, was sold. The first respondent had therefore taken the law into its own hands. He urged the court to order the first respondent to restore his property and wait for the finalisation of what he described as an application "to rescind the order which was already executed."

    In his submissions in reply to the first respondent's legal practitioner's, he stated that he still abided by his founding and answering affidavits. This, notwithstanding that the order that he sought in the papers that he filed of record as quoted earlier in this judgment differs from the order that he now sought during the hearing.

13. It was also in his reply to the first respondent's legal practitioner's submissions that the applicant contended that MATHONSI JA "confused the two rules of the Supreme Court", these according to him, being rules 13 and 52 (2). He contended that r 13 relates to the setting aside of a bill of taxation done "*in absentia*" while r 52 (2) relates to a "*bona fide* bill of taxation." As far as he was concerned the learned judge ought not have struck his application off the roll because by so doing His Lordship was effectively punishing him for saying "I am sorry" when there is no law that allows for a court to adopt such course of action. His lordship's judgment, so his argument went, must not be relied on. In any event he had filed an urgent chamber application SCB 91/2020.

Furthermore, in terms of Practice Direction 3/2013 when a matter is struck off the roll the only remedy is to correct the defect and reinstate the matter.

Needless to say, the applicant exhibited a lack of appreciation of the flaws attendant on his application in terms of which the draft order sought the reinstatement of the application in SCB 96/20. He also did not appreciate the effect of the judgment by His Lordship in the application that was before him.

14. On his part, Mr *Chamunorwa*, for the first respondent, raised four preliminary points. The first was that by his application the applicant was in fact asking the court to review its own decision. The second was that on the strength of *Bindura Municipality v Mugogo* SC 32/15, once a matter is struck off the roll it cannot be reinstated. The third, which is related to the first one, was that the relief sought in this application would, if granted, conflict with the judgment by MATHONSI JA, thereby resulting in two different judgments by this court on the same issue. The fourth and final one was that r 70 (2) is inapplicable to this matter because it only applies to reinstatement of appeals whereas the applicant seeks the reinstatement of an application for condonation and extension of time to file for review.

Mr *Chamunorwa* prayed for the application to be either struck off the roll or dismissed with an order of costs on the legal practitioner and client scale. He described the application as an abuse of process by "a serial litigant in this court" who presents himself as well read and conversant with the rules of this court.

15. Regarding the preliminary points raised by the applicant it was his submission that as reflected in the opposing affidavit, the first respondent decided not to proceed with execution after the filing by the applicant of the urgent chamber application as well as the application in SCB 96/20. At that given time there had only been attachment of the

applicant's property but not execution. At the time that execution was eventually proceeded with, the two applications had been considered and disposed of and there was no order in existence barring execution. He submitted that there is no constitutional issue arising from the execution of the order of costs and that there was therefore no basis for any referral of any issue or matter to the Constitutional Court. The issue raised by the applicant does not arise from the founding affidavit or from the relief that he is seeking. The order of costs which was executed does not arise from the application SCB 96/20.

Mr Chamunorwa further submitted that the applicant was mistaken as to the date when the first respondent was served with this application. The date stated in the opposing affidavit as the date of service differs from the date now alleged by the applicant to be the date of service. He submitted that the opposing papers were filed within the stipulated time limits, taking into account the suspension, in terms of a Practice Direction that had been issued during the pertinent period, of the filing of documents, such having been occasioned by the Covid 19 pandemic.

16. Counsel also responded to a point raised in the applicant's papers but which he had not motivated in his oral submissions. The applicant challenged the regularity and or authenticity of the board resolution that authorised the deponent to the opposing affidavit to so depose. Mr *Chamunorwa* submitted in response that there was no basis laid by the applicant for his contentions on the issue. The document was an authentic regular document indicating that a meeting had been held and a resolution arrived at and that two directors had signed it.

17. Regarding the merits it was counsel's submission that the applicant was merely re-arguing the matter in SCB 96/20 and thereby inviting the court to overrule the judgment by

MATHONSI JA. As for the order sought by the applicant from the bar for the first respondent to be ordered to restore the applicant's property, the issue does not arise from the papers and is in any event irrelevant to the determination of an application for reinstatement of an application.

ANALYSIS

18. In the main, paras 1 to 4 of the founding affidavit *in casu*, identify the parties to this application. Para 4 explains the nature of the application as being one for the reinstatement of the application filed under SCB 96/20 which was struck off the roll by MATHONSI JA. Paras 6 to 11 relate to the applicant's complaint or grievance about His Lordship's refusal to recuse himself from that application. Paras 12 to 18 are headed "Degree of non-compliance." Paras 19 to 20 are headed "Importance of the matter and prospects of success." Para 21 relates to the issue of costs.

19. A perusal of the application leaves one with no doubt that the applicant is challenging the judgment in SCB 96/20 (Judgment No, SC 159/20) and wants the matter to be reargued. The papers filed by the applicant are very clear in this respect. In his oral submissions he prevaricated between that clear position and a belated and seemingly confused contention that the first respondent's counsel ought not to refer to SCB 96/20 because he had also filed an urgent chamber application under SCB 91/20.

20. It is also clearly stated on the papers filed that the application is made in terms of r 70 (2) of the rules. Rule 70 reads:

> "*Reinstatement of appeals generally*
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> 70 (1) Where an appeal is-
>
> (a) deemed to have lapsed; or
> (b) regarded as abandoned; or
> (c) deemed to have been dismissed in terms of any provision of these rules;

the registrar shall notify the parties accordingly.

(2) The appellant may, within 15 days of receiving any notification by the registrar in terms of subrule (1), apply for the reinstatement of the appeal on good cause shown."

21. The rule specifically refers to the reinstatement of appeals. It does not apply to orders made by the court but to decisions of the Registrar in the stated circumstances. The reinstatement that the applicant craves is of an application for reinstatement of an application. The reinstatement of applications is not covered by the rules. In *Bushu v GMB* HH 326/17 the following was stated:

> "The need to cite the relevant provision of the law under which the application is made, where applicable of course, cannot be overemphasised. The citation of the correct and relevant provision attunes the court to its jurisdiction and the judge or court as the case may be immediately opens up to the provision and if need be researches on the provision if it is not one that immediately comes to mind.

22. The rule cited by the applicant does not provide for the application that he has filed in this case. In addition, the application seeks relief that would be contrary to the judgment that was rendered in SC 159/20 on the same application. The effect of such a course of action would be to result in a judge of this court reviewing the judgment of another judge of the court. That is not competent. The law does not countenance that. The grievance that the applicant expresses about the refusal of His Lordship to recuse himself cannot be reviewed or revisited by any judge of this court. Similarly, His Lordship's finding that the matter was not properly before him cannot be revisited by another judge of this court. It can neither be circumvented by placing the application before another judge of the court. The applicant's dissatisfaction with the judgment does not confer jurisdiction on another judge of this court to revisit the application as effectively sought by his application *in casu*.

23. The energy exerted by the applicant in persisting with this application was ill spent. Despite his constant and consistent emphatic "lectures" to enlighten the court on the law, given during the hearing, the applicant merely succeeded in exposing his lack of understanding of legal concepts and issues. In his quest to establish why his application must succeed, he purported to quote from a paper allegedly presented by the Honourable Chief Justice at some forum in Victoria Falls. He quoted the Chief Justice as having said that "it is a non-derogable duty of a judge to punish litigants who approach this court!" He also referred to Practice Direction No. 3 of 2013 and said that in terms thereof, MATHONSI JA having struck his application off the roll, it meant that there was nothing before the Judge and therefore all that he needed to do as applicant was to "correct the defect and reinstate the matter. It was also his submission that it was not in the interests of justice that he be denied the opportunity for his matter to be considered by three judges of the Supreme Court as provided in the Supreme Court Act. The position of the law in this last respect is quickly answered by the famous statement in *MacFoy v United Africa Co. Ltd* [1961] 3 All ER 1169. You cannot put something on nothing and expect it to stay there; it will collapse. You cannot rectify or correct a nullity. If an act is void it is void for all purposes.

24. The net effect of the above discourse is that the application cannot succeed and stands to be dismissed. Costs must follow the cause. The first respondent sought costs on the legal practitioner and client scale. The appellant's only response to this was that "there is no law that a litigant can be punished for saying 'I'm sorry.' "

25. Tempting as it may be to grant the first respondent costs on the higher scale, it is my view that the higher scale is not called for *in casu.*

26. It is accordingly ordered as follows:

The application is dismissed with costs.

Calderwood, Bryce Hendrie and Partners, the 1st Respondent's Legal Practitioners.