DREW FRASER INTERNATIONAL (PVT) LTD
and
EUPHRASIA MUPEDZISI
versus
NICODIMUS KUIPA N.O.
and
ESTATES AGENTS COUNCIL

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 20 June & 9 August 2023

Opposed Matter

Ms *M Chinyangarara Kaseke,* for the applicants'
Mr *S Hoko,* for the respondents'

MANGOTA J: HC 5357/ 22 is intertwined with the present application. The parties are the same and the substance of the two cases rests on the same subject-matter. In *casu*, Drew and Fraser International (Pvt) Ltd and Euphrasia Mupedzisi ("the applicant) are a legal entity and a natural person respectively. The applicant applies for leave to appeal the decision which I made on 15 February 2023 under HC 5357/22 which is the decision of one Nicodimus Kuipa N.O. and the Estates Agents Council of Zimbabwe, the respondent *a quo,* as well as in this application which the applicant filed under HC 1398/23. The applicant contends that it is aggrieved by the order which I made when I struck HC 5357/22 off the roll with costs. It indicates its intention to appeal the same. It advises that it engaged counsel to prepare a notice and grounds of appeal in draft form. It avers that the grounds, as couched, articulate issues of law and they carry with them prospects of success. It tabulates the grounds of appeal in para(s) 12, 14 and 16 of its founding affidavit. It claims that the absence of the respondent's Heads in the record could not invalidate its application. It insists that its application complied with r 62 of the rules of this court and was, therefore, valid. It alleges that the validity of the application could not be lost because of a subsequent deficiency in the pagination and indexing of the record.

It states that it devised the grounds of appeal without the aid of the court's record and it reserves its right to raise more grounds of appeal when the reasons become available. It claims that my granting of leave to it to appeal would not visit the respondent with any prejudice. Its view is that any prejudice which may be suffered by the respondent would have to yield to the pursuit of its right to appeal. It accepts that there should be finality to litigation. It insists that such finality can only be achieved if it is allowed to explore its excellent prospects of success on appeal. It couched its draft order in the following terms:

"IT IS ORDERED THAT:

1. Applicants are granted leave to appeal against the order of this court striking case number HC 5357/22 off the roll with costs.
2. The appeal shall be filed and served within the timelines set out in the Supreme Court Rules, 2018 as reckoned from a day after the date of this order.
3. Each party shall bear its own costs".

The respondent opposes the application which it claims is frivolous and vexatious. It alleges that the same is designed to frustrate and delay the inquiry into the applicant's conduct which the respondent is conducting. It avers that this application is part of the many applications which the applicant filed to delay the respondent's inquiry into the applicant's conduct. It gives a background of the inquiry in which the applicant raised preliminary points, amongst them that the tribunal was biased and that there was no valid charge against it. It states that it dismissed the preliminary points which had been raised on account of the fact that they were devoid of merit. It alleges that the applicant simultaneously filed an application for review at this court and also appealed its decision to the Administrative Court which application and appeal were based on the same cause of action and seeking the same relief; namely dismissing the ruling on the preliminary points. It states that, with a view to further delay the commencement of the inquiry, the applicant applied to the Administrative Court to refer its appeal to the Constitutional Court arguing that it was unconstitutional for the Administrative Court to sit with assessors. HC 5357/22, it insists, was struck off the roll for the reason that the record was incomplete. It claims that, following the striking off of HC 5357/22 from the roll, the applicant proceeded to apply for a new set down date and served upon it the corrected index as well as the new set down date. It takes the view that the applicant's conduct, as described, was consistent with the fact that the applicant accepted the ruling of the court as it took steps to remedy the defect. It is for the mentioned reason, according to the respondent, that, after it had corrected the defect, the applicant served upon it the corrected index

and the application for a new set down date. It insists that, by its conduct, the applicant waived its right to challenge the decision of the court. It, according to the respondent, accepted the ruling of the court that the record was incomplete and had remedied the defect. That, it claims, was inconsistent with a person who would have wanted to challenge the decision of the court. It observes that the same matter which has been applied for a new set down date is the same case which is the subject of the application for leave to appeal. It states, on the merits that the applicant, being *dominus litis*, has the obligation to create an index, paginate the record and inspect it to ensure that the same is complete including the copy which the court will use at the oral hearing of the case. It insists that, if the applicant had inspected the record, it would have rectified the record and the inconvenience to the court would have been avoided. It avers that the applicant's failure to ensure that the record was complete led to the court's record being incomplete making the court to strike the case off the roll. It states that it is improper for the applicant to apply for leave to appeal before HC 5753/22 which it set down for hearing has been heard and determined. Its view is that the present application is not genuine but *mala fide*. It alleges that the claim that the application was improperly struck off is a clear mischief of the applicant. It poses the question as to how the court would have adjudicated upon a matter where its Heads were not part of the court's record. It insists that it is within the court's discretion to strike the application off the roll as it did. The order which the court issued, according to it, ensures that the court's processes are efficient. It states that the court exercised its powers properly notwithstanding that it did not pray for the order. It insists that the striking of a case off the roll occurs when an application is so defective that the court cannot continue to hear the matter unless and until the defect has been cured. The court, it claims, has the power to regulate its own processes including that of an order to strike a case off the roll for reasons which it deem fit. It avers that the absence of the Heads from the record makes the same incomplete. This, according to it, made the application for review defective. It states that it filed its Heads on 22 September, 2022 and therefore within the *dies*. It alleges that the applicant is abusing court process through appeals, reviews, application for referral to the Constitutional Court as well as application for leave to appeal a matter which is awaiting a new set down date. The application, it avers, lacks merit and it is designed to delay the inquiry. It moves me to dismiss the application with costs which are at attorney and client scale.

The application cannot succeed.

The application, it is observed, is filed in terms of r 94 (8) of the rules of this court. This reads:

> "In a case in which leave to appeal is necessary in respect of a judgement of the court given in such proceedings as are described in subparagraph (ii) of paragraph (c) and in paragraph (d) of subsection (2) of section 43 of the High Court Act (Chapter 7:06), the provisions of subrules (1) to (7) of this Rule shall apply to an application for leave to appeal and to an application for condonation as if the words 'Prosecutor-General' there were substituted the word 'respondent' and in addition….."

The rule, as quoted in the above-mentioned paragraph, opens the avenue for the applicant to apply as it is doing. For it to succeed, however, its prospects of success must be beyond question. The test to be applied when considering an application of the present nature is whether the applicant has a reasonable prospect of success: *S* v *Mutasa*, 1988 (2) ZLR 4 (S). Leave to appeal, in other words, should be granted if the applicant makes out a reasonably arguable case: *S* v *Tengende & Ors* 1981 (1) ZLR 445. The test for reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in the matter need not convince the court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound, rational basis for the conclusion that there are prospects of success must be shown to exist: *Smith* v *S*, 2012 (1) SACR 567 (SCA).

The Constitutional Court of Zimbabwe weighs in on the same subject-matter when it remarks in *Chombo* v *NPA & Ors* CCZ 8/22 that:

> "Regarding prospects of success, the practice has been to look for more than an arguable case. Prospects of success are established if, on appeal, this court is likely to reverse the finding of the lower court or to materially change the order *a quo*".

The question which begs the answer is whether or not the applicant is able to cross the hurdle which the Constitutional Court of Zimbabwe placed in its way. Before that question is answered, however, it is pertinent for me to relate to HC 5357/22 which forms the basis of this application for leave to appeal. To start with, the applicant did not request reasons for my decision to strike the application off the roll with costs. All it did was to make an effort to rectify the defect which compelled me to strike HC 5357/22 off the roll as well as to set the same case down for hearing. Reference is made in the mentioned regard to Annexures A and B which respectively appear at pp 30 and 31 of the record.

Whilst the applicant rectified the defective matter, HC 5357/22, on 16 February, 2023 it proceeded to file its notice of appeal on 28 February, 2023. Its flip-flopping cannot assist its cause at all. It places both the court and the respondent in a quandary. It leaves them without a clearly defined position which it is taking in respect of HC 5357/22. One does not know if the applicant intends to have the case heard following its correction of the defect or if it intends to appeal my decision. It is within its interests to adopt one course of action and not both. If its intention is to appeal as it has applied *in casu*, then it should have withdrawn its notice of set down which it filed on 16 February, 2023 as well as its corrected index which also remains part of the record. It cannot have it both ways. The law of practice and procedure does not allow it to maintain both approaches as it is doing *in casu*. It should therefore make up its mind and spell out its intention clearly for the benefit of the court and the respondent.

I, at this stage, proceed to relate to the hearing of 20 June 2023. HC 5357/22 was an application for review of the decision of the respondent which, on 4 May 2022, preferred charges against the applicant whom it accused of having committed unprofessional, dishonourable or unworthy conduct in terms of s 31 of the Estates Agents Act [*Chapter 27:17*]. The applicant challenged the proceedings of the respondent. Its challenge centered on the claim that the tribunal and the complainant were one and the same party causing a breach of the *nemo judex in sua causa* principle. Its further challenge was that s 31 of the Act under which it was charged did not create any offences. Its three grounds of review are stated in HC 5357/22. It moved me to set aside the proceedings which the respondent commenced and conducted against it.

At the hearing of the application for review, it dawned to Advocate Mubaiwa, for the applicant that the respondent's Heads were not in my record. They were absent from the same notwithstanding that the index which the applicant prepared indicated under item 20 that the same appeared at pp 139 to 150. The fact of the matter is that the record did not have pp 139 – 150. It ended at p 138.

Having observed the shortcoming of the judge's record, Mr Mubaiwa was candid enough to admit that the respondent's Heads were not in the judge's record. He apologized for the unfortunate set of circumstances. He moved me to allow him to paginate the record. I inquired from him if he had an extra copy of the respondent's Heads which I could use in the hearing of the application. His response was that he had none. The response which he gave made it impossible

for me to proceed to hear the review application which the applicant placed before me. I, accordingly, had no option but to strike HC 5357/22 off the roll with costs on the ground that the incomplete record was, to the observed extent, fatally defective.

In ruling as I did, I remained alive to the fact that the applicant, being *dominus litis*, had the *onus* cast upon it to ensure that the record which it placed before me should have been complete and not incomplete as it was. I, in the circumstances of the case which was before me, placed reliance on two matters. These were/are that:

a) the applicant set the review application down when it knew or should have known that the same was incomplete on account of lack of the respondent's Heads having been included in my record – and
b) the negligence of the applicant rendered the record incomplete making it impossible for me to proceed to hear the application which it placed before me.

I, in the observed regard, placed reliance on *Konjana* v *Nduna*, CCZ 9/21 wherein it was stated that:

> "In this light, the court *a quo* correctly held that the applicant, as the *dominus litis*, ought to have been vigilant in monitoring and managing the progress of his case….".

The applicant was, no doubt, negligent. The index which it prepared told a lie about itself. It portrayed the impression that the respondent's Heads were filed of record under item 20 of the same when they were not. Counsel for it took the blame and apologized for the unfortunate incident. He, correctly in my view, moved that he be allowed to paginate the record. What he failed to appreciate was that HC 5357/22 was set down for hearing on the date and at the time to which it was scheduled. The clear position of the matter is that the applicant did not inspect the record before it proceeded to set the matter down. It should have satisfied itself that the matter was indeed ready to be heard before it set it down for hearing. Its argument which is to the effect that it could not be blamed for what occurred on 20 June, 2023 cannot be made by a serious litigant. This is a *fortiori* so when counsel for it accepted blame and moved to rectify the defect which was in the application.

In ordering as I did, my mind was quickly drawn to the *dictum* of MCNALLY JA who complained bitterly in regard to the manner in which legal practitioners and litigants, of late, refuse to pay attention to detail when they push their cases through the system of justice delivery. His

views which continue to echo in the minds of many a judicial officer have relevance to the present case. He remarked in *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S) at 290 C – E that the law helps the vigilant and not the sluggard. The intention of any judicial officer is to get on with a case which has been placed before him or her. He or she remains unhappy and, therefore, disconcerted when litigants fail to pay attention to necessary detail causing cases which they place before the court to unnecessarily collapse on account of the fact that the litigant who is *dominus litis* and whose duty it is to ensure that the matter is indeed ready to be heard has failed to pay attention to detail.

The obligation to ensure that the record which the court will use in a case in motion proceedings is in order rests with no one else but the applicant. It does not rest on the respondent or the registrar of court as the applicant seems to suggest in this application. He (includes she) paginates the record and prepares the index of the same. He cannot therefore relegate that duty to the respondent let alone to the registrar. When a fault occurs in respect of the record, as happened in HC 5357/22, he remains answerable for the same. The respondent or the registrar does not answer to that mishap.

The principle which the court enunciated in *Jensen* v *Acavalos* 1993 (1) ZLR 216 at 220 B is relevant to the circumstances of the present case. Although the principle related to a defective notice of appeal, the substance of the *dictum* remains the same. It reads:

> "….a notice of appeal which does not comply with the rules is fatally defective and invalid. That is to say it is a nullity. It is not only bad but incurably bad, and, unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice of appeal to be filed, it must be struck off the roll…".

The applicant's statement which is to the effect that HC 5357/22 should not have been struck off the roll because it did not violate any rule of court is not only unfortunate. It is also misplaced. It is evident that the applicant violated r 58 (1) as read with r 59 (18) and (20) of the rules of court. The applicant, it is sad to observe, takes a narrow view of r 58 (1) of the High Court Rules, 2021. The rule is couched in peremptory language and so is r 59 (18) and (20) which refer to the filing of Heads of the applicant and the respondent respectively. Once it is accepted, as it should, that, where a party is legally represented, Heads should be filed, Heads should therefore be made part of the record, that of the judge in particular. The necessity of Heads being included in the pagination and indexing of the judge's record cannot be wished away. Those matters are a

sine qua non aspect for the hearing of an application. The record will be incomplete and therefore defective without them.

The applicant's argument on the above-mentioned part of the case is self-defeating. It is self-defeating in the sense that item 20 of the index which it prepared under HC 5357/22 portrays the picture that the respondent's Heads were at pp 139 – 150 of the record when they were not there. It cannot persuade me to overlook the negligence which occasioned its preparation of the record. Nor can it persuade me to take a narrow construction of r 58 (1) of the rules of court. A record, it is my view, is complete when all what should go into it has been included in it. It is trite that where a party is legally represented, its Heads should be filed of record and, once so filed, they should be bound together with all the pleadings which constitute the record. Where they remain unbound or worse absent from the record, the court does not hesitate to censure the party whose responsibility it is to have them not only indexed and paginated but also bound as part of the record.

The applicant's concern is that the respondent did not move me to strike HC 5357/22 off the roll. It states that I acted *mero motu* without being prompted into striking the review application off the roll. The striking of the application off the roll, it insists, constitutes an irregularity. It refers me to a number of case authorities in which it claims that the Supreme Court spoke against the judicial officer making a decision *mero motu* without seeking the views of the parties. Among the cases to which it drew my attention in the mentioned regard are those of *A. Adam & Sons (Pvt) Ltd* v *Good Living Real Estate (Pvt) Ltd* SC 18/21; *Central Africa Building Society* v *Stone & Ors* SC 15/21; *Mazarire* v *Retrenchment Board & Anor* SC 105/20; *Chiwenga* v *Chiwenga* SC 86/20 and *Nzara & Ors* v *Kashumba & Ors* SC19/18.

The respondent, on the other hand, places reliance on s 176 of the Constitution of Zimbabwe. It submits that the section confers power and authority upon the court to regulate its own processes amongst them striking off the roll of a matter without the order it makes having been prayed for. The section, it submits, imposes a duty on the court to utilize its inherent jurisdiction to develop the law. It anchors its argument on *Barbarosa De Sa* v *Barbarosa De Sa* SC 34/16 which, according to it, echoes the provision of s 176 of the Constitution. It insists that the court has the power to make directions and rulings which it deems fit in any given case.

Whilst I respect the case authorities to which the applicant referred me, I state that my decision to strike the review application off the roll was not outside the law or decided case authorities. The applicant fails to appreciate that I did not act *mero motu*. I sought the views of Mr Mubaiwa who represented it before I struck HC 5357/22 off the roll. I inquired from him if he had another copy of the respondent's Heads which I could use in hearing the application. His response was that he had none. I inquired from him further as regards the way forward. His response was that he be allowed time to index and paginate the defective record.

In stating as he did, he acknowledged the existence of the fatal defect which was inherent in the record and, therefore, the application which the applicant placed before me. He indeed corrected the defect on 16 February, 2023 and set HC 5357/22 down for hearing. The application for leave to appeal is, as the respondent correctly observes, an after-thought on the part of the applicant. It filed it for reasons which are known to no one else but itself. The fact that it did not withdraw the corrected index and the notice of set down which it filed on 16 February, 2023 evinces that its application for leave to appeal is neither serious nor *bona fide*. Its intention is, in my view, not to test the correctness of my decision of 20 June, 2023. It filed it for reasons which are divorced from the actual intention to appeal. It is *mala fide* in form as well as in substance.

That the application for leave to appeal is *mala fide* is evident from the uncontroverted evidence of the respondent which states in para(s) 8, 9 and 10 of its notice of opposition that, when it dismissed the applicant's *in limine* matters for lack of merit, the applicant simultaneously filed an application for review and an appeal in the Administrative Court with the application and the appeal being both based on the same cause of action and seeking the same relief as well as that, in an effort to further delay the inquiry, the applicant applied to refer the appeal it filed with the Administrative Court to the Constitutional Court of Zimbabwe. The applicant, it is noted, did not challenge the allegations which had been made against it in the mentioned regard. It is trite that what is not denied in affidavits is taken as having been admitted: *Fawcett Security Operations* v *Director of Customs & Excise* 1993 (2) ZLR 121 (SC); *D.D. Transport (Pvt) Ltd* v *Abbot* 1988 (2) ZLR 92.

The above-observed matter finds confirmation in para(s) 4 and 5 of Practice Direction 3 of 2013. These read, in part, as follows:

> "4….if a court issues an order that a matter is struck off the roll, the effect is that such a matter is no longer before the court.

5. Where a matter has been struck off the roll for failure by a party to abide by the Rules of Court, the party will have thirty (30) days within which to rectify the defect, failing which the matter will be deemed to have been abandoned.
Provided that a Judge may on application and for good cause shown, reinstate the matter, on such terms as he deems fit".

The applicant does not tell why it failed to take advantage of the Practice Direction which offers an avenue to it to reinstate its application. The avenue is open to it. Its application for leave to appeal is nothing other than an intention on its part to delay finality of what the respondent preferred against it. Nothing prevented it from employing the most expeditious course of action which was/is open to it if its intention is to have its dispute with the respondent resolved in an as expeditious and inexpensive manner as it should.

GARWE JCC (JA as he then was) remained at pains to emphasize the need for finality to litigation. The learned judge stressed in *NMB Bank Ltd* v *Tawanda Mushaya & Ors* SC 164/21 that:

> "There is need for finality in litigation. If every ruling by a subordinate court or tribunal were to be the subject of an appeal or review or in some cases an application for a mandamus, there would be no end to litigation. Assuming, arguendo, that a ruling is made by a lower court and made the subject of appeal, the appellate court might uphold or dismiss the appeal. The matter will be remitted to the subordinate court for continuation. In the course of the continuation of those proceedings, further rulings may be made. These would again be subject to further appeal proceedings. Such a situation would stultify the litigation process and could easily be taken advantage of by persons who stand to benefit from the delay in the final determination of the dispute between the parties."

MAKARAU JCC (JP as she then was) put the same subject matter crisply when she stated in *Eugene Kondani Chimpondah & Anor* v *Gerald Pasipamire Muvami*, HH 81/07 that:

> "To allow litigants to plough over the same ground hoping for different result will have the effect of introducing uncertainty into court decisions and will bring the administration of justice into disrepute."

I cannot add to, or subtract from, the appropriate *dicta* of the two eminent judges. They place finality on litigation. They acknowledge a litigant's right to test the correctness of the decision of the lower court but to do so within accepted limits. It troubles the mind of serious litigants as well as judicial officers if a party to a case rushes to the Administrative Court, the High Court, the Supreme Court, the Constitutional Court and back to High Court with one and the same matter. His intention becomes difficult, if not impossible, to comprehend. The long and short of

his conduct is that he does not know what he wants to achieve other than to waste the time of well-deserving litigants whose cases wait in the queue to be heard and determined.

In observing as I am doing, it is not my intention to close the door against the applicant. Its right to appeal is guaranteed. Its conduct, however, closes the door against it. It refuses to follow procedures and avenues which are open to it. It, in the process, confuses itself, the court and the respondent when it fails to take a definitive course of action. The provisions of the Practice Direction are available to it. It advances no reason for not taking those. Its grounds of appeal lack merit. Its application for leave to appeal is, in the view which I hold of the same, not only frivolous but also vexatious. There is no serious intention on its part to appeal other than to delay the day of reckoning.

The applicant failed to prove its case on a balance of probabilities. The application is, in the result, dismissed with costs.

Hove Legal Practice, applicants' legal practitioners
Chihambakwe Mutizwa and Partners, respondents' legal practitioners