LEE WAVERLYJOHN
versus
PRINCIPAL IMMIGRATION OFFICER
and
CO-MINISTERS OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 22 October, 5 November 2014 and 21 January 2015

**Opposed Application**

*T.M. Kanengoni*, for the applicant
*S. Chihuri*, for respondents

MUSAKWA J: This is an application to strike out the appeal noted by the respondents in case number 'CIV 'A'503/10 for being void.

The first respondent previously declared the applicant a prohibited person in terms of s 21 as read with s 22 (1) of the Immigration Act [*Cap 4: 02*]. The applicant lodged an appeal with the Magistrates Court. The appeal was upheld on 23 June 2010. It is against the decision of the Magistrates Court that the first respondent noted an appeal with this court.

The grounds of appeal in the notice in contention are as follows:-

"1. The learned Magistrate erred in law in finding that the Respondent's status as a prohibited person be set aside and that his deportation be declared null and void.

2. The learned Magistrate erred in law in finding that Respondent had acquired domicile and was therefore protected from being declared a prohibited person in terms of section 14 (1) of the Immigration Act [Chapter 4:02]."

In seeking to have the above-cited notice of appeal struck off, the applicant contends that there is no provision to appeal against the decision of the Magistrates Court when one has regard to s 21 (3) of the Immigration Act. It is also contended that the respondents should have sought a referral of the issue relating to domicile to the Supreme Court.

The applicant also raises issue with the respondents' failure to provide security for

costs as prescribed in Order 31 Rule 2 (b) of the Magistrates Court (civil) Rules, 1980.

In an opposing affidavit deposed to by Prosper Kambarami, it is contended that the High Court has jurisdiction to hear the appeal. It is further contended that the Magistrates Court may, on its own accord refer a question of law for determination by the Supreme Court. There was no response to the allegation of failure to provide security for costs.

In support of this application, Mr *Kanengoni* submitted that they sought the striking off of the notice of appeal because the appeal process is taking too long. This has created uncertainty on the part of the applicant as he has to plan his life. Mr *Kanengoni* also submitted that the appeal is defective as no security for costs was furnished.

On the other hand, Ms *Chihuri* for the respondents did not make submissions. She chose to abide by the heads of argument filed of record.

Section 21 (1), (2) and (3) of the Immigration Act reads as follows:-

"(1) Subject to subsection (2), subsection (2) of section *eighteen* and section *twenty-two*, any person who receives notice in writing in terms of paragraph (*a*) of subsection (4) of section *eight* that leave to enter Zimbabwe has been refused or that he is a prohibited person, may appeal to the nearest magistrates court against the refusal of leave to enter Zimbabwe or the allegation that he is a prohibited person, as the case may be.

(2) An appeal in terms of subsection (1) shall be noted—

(*a*) where the person is in Zimbabwe when he receives the notice referred to in that subsection, not later than three days, Saturdays, Sundays and public holidays excluded, after receiving such notice;
(*b*) where the person is outside Zimbabwe when he receives the notice referred to in that subsection, not later than ten days, Saturdays, Sundays and public holidays excluded, after receiving such notice.

(3) A magistrates court—
(*a*) may, of its own motion, and shall, at the request of the appellant or of an immigration officer, reserve for the decision of the Supreme Court any question of law which arises upon an appeal heard before such magistrates court; and
(*b*) shall state such question in the form of a special case for the opinion of the Supreme Court and transmit such special case to the registrar thereof; and for the purpose of paragraph (*a*) a question of domicile shall be treated as a question of law."

The contention by the applicant is that there is no right of appeal against the decision of the Magistrates Court following a determination made in terms of s 21. As can be noted from subs(s) (3), the appellant or an immigration officer may state a case arising from such appeal for determination by the Supreme Court.

In support of the contention that no appeal lies against the decision of the Magistrates Court, counsel for the appellant cited the Supreme Court decision in*Bheka*v *Disablement Benefits Board* 1994 (1) ZLR 353 (S). In that case the Supreme Court had to decide on the import of a provision in the State Services (Disability Benefits) Act [*Cap 16:05*] which is almost similar to that in s 21 (3) of the Immigration Act. In that regard s 13 (4) thereof states that:-

> "Where in the opinion of the Appeal Board any matter to be determined by it rests wholly or partly on apoint of law, the Appeal Board may on application by the appellant or the Board state a case for the determination of such question of law by the Supreme Court."

In interpreting the provision in the State Services (Disability Benefits) Act GUBBAY CJ had this to say at 356:-

> "This provision envisages that where a matter brought before the Appeal Board concerns a point of law, the Supreme Court becomes involved in an advisory capacity if a case is stated to it. The application to state a case must be made to the Appeal Board by either the appellant or the Board. Once made, the Appeal Board is vested with a discretion whether to grant or refuse the application. Obviously it will not state a case if of the opinion that the point of law is of a trivial nature or one directly covered by judicial authority. Nor will it state a case meromotu. What is plain is that the application to the Appeal Board must be made during the hearing of the matter and precede its determination of the appeal. It cannot be moved once the appeal has been upheld or dismissed. Upon referral, the Supreme Court sits as a court of first instance and does not exercise appellate jurisdiction. See McTaggart v Disabled Benefits Board 1975 (1) RLR 53 (A). After the stated question of law has been answered, the hearing before the Appeal Board is resumed. It is that body which must then render its decision on the appeal before it.
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> No such application was made to the Appeal Board, either on behalf of the appellant or the Board. Consequently access to this court under s 13(4) was lost.
>
> Mr Mutsonziwa, who appeared for the so-called appellant, correctly conceded that the decision of the Appeal Board was final and that the present appeal had been improperly enrolled. He sought to argue, however, that in the exercise of this court's inherent jurisdiction it should set aside the decision of the Appeal Board and remit the appeal to it, thereby enabling the appellant to present the requisite application under s 13(4)."

Applying the reasoning in *Bheka*'s case, it follows that, if the respondents had a point of law that required determination, they ought to have stated their case through the immigration officer. This, they should have done at the time of hearing of the appeal before the Magistrates Court. They cannot seek to do so by way of appeal which they have noted.Their failure to exercise such an option means they forfeited that right and cannot do so

by way of appeal. It therefore means that the appeal noted is a nullity and should be struck out.

On the issue of security for costs, Order 31 Rule 2 of the Magistrates Court(Civil) Rules provides that-

> "An appeal shall be noted by—
> (*a*) the delivery of notice; and
> (*b*) unless the court of appeal otherwise directs, giving security for—
> (i) the respondent's costs of appeal to the amount of one hundred dollars;
> (ii) the costs of the preparation of a copy of the record to the amount estimated by the clerk of the court:
>
> Provided that a clerk of the court may, in his discretion, accept a written undertaking from theappellant to pay for the costs of the preparation of the record."

The rules are silent on what happens when an appellant does not furnish security for costs. It does not follow that where an appellant fails to furnish security for costs, the appeal should be dismissed. In this respect see Order 33 r (1) of the Magistrates Court (Civil) Rules which states that-

> "Except as is otherwise provided in these rules, failure to comply with these rules or with any request made in pursuance thereof shall not be a ground for judgment against the party in default."

Contrast this provision with Rule 36 of the Rules of the Supreme Court which provides that-

> '(1) If an appellant who is required to furnish security for the respondent's costs of appeal fails to furnish such security within the period prescribed in subrule (5) of rule 46, the respondent may forthwith give notice to the appellant that, on the date specified in the notice, being not less than five days after service of the notice, he will apply to a judge for dismissal of the appeal by reason of such failure, and for such other order specified in the notice as he may require."

In the absence of such a provision in the Magistrates Court (Civil) Rules it means then that a respondent can apply for an order to compel an appellant to furnish security for costs. In this respect see Order 33 Rule (2) of theMagistrates Court (Civil) Rules which states that:-

> "Where any provision of these rules or any request made in pursuance of any such provision has not been fully complied with, the court may on application order compliance therewith within a stated time."

The applicant did not seek an order compelling the respondents to furnish security for costs. Therefore it would not be competent to strike out a notice of appeal on that basis.

In the result, it is ordered as follows:

1. The Notice of Appeal filed by the respondents in Civ 'A'503/10 be and is hereby struck out.
2. The respondents shall pay the applicant's costs.

*NyikaKanengoni&Partners*, applicant's legal practitioners
*Civil Division of the Attorney-General's Office*, respondents' legal practitioners