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Judgment No. SC 3/08
Civil Appeal No 2/08

CAPITAL ALLIANCE (PRIVATE) LIMITED (2) DOUGLAS HOTO (3) NOEL BITI (4) SHEILA LORIMER (5) PELAGIA KAFESU v NORMAN ELIAS SACHIKONYE

SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 6, 2008

C Dube, for the applicants

A B Chinake, for the respondent

Before GWAUNZA JA: In Chambers in terms of r 31 of the Supreme Court Rules.

This is an application for condonation and an extension of time within which to appeal against a judgment of the High Court.

At the beginning of the hearing before me, the respondent raised two points *in limine*, *viz*:

(1) that the applicants had not made a proper application for the relief sought; and

(2) that the deponent to the applicants' founding and answering affidavits, *Mutsa Remba*, lacked the authority to depose to such affidavits on behalf of the applicants.

I dismissed the points *in limine* and indicated the reasons would be contained in this judgment. These are the reasons.

The applicants' application is entitled "application for extension of time to appeal" while, according to their draft order, the applicants' prayer is for an order granting them an extension of time within which to appeal. However in the body of the application, the applicants specifically refer to their application as being one for "condonation for the late filing of an appeal, and for extension of time in which to appeal in terms of r 31 of the Supreme Court Rules".

The respondent's point *in limine* is to the effect that, in circumstances where the *dies induciae* have passed without a proper notice of appeal having been filed, there is an automatic bar that comes into effect against the applicant. In such circumstances, it is the respondent's argument that the course of action recognized by this Court is the filing of an application for condonation of the late filing of the appeal. The respondent contends that, by contrast, an application for the extension of time within which to appeal can only be properly considered whilst the *dies induciae* are current.

The applicants dispute the respondent's contention regarding the nature of the application they have made and make the point that, by its wording, rule 31(3) of the Supreme Court Rules envisages a situation where such an application is properly made after the expiry of the *dies induciae.* The relevant part of the provision reads as follows:

> "(3) an application for extension of time in which to appeal shall have attached to it a notice of appeal containing the matters required in terms of subrule(1) of r 29 and an affidavit setting out the reasons why the appeal was not entered in time or leave to appeal was not applied for in time …". (My emphasis)

I am persuaded by the applicants' submissions.

While the appropriateness of an application for condonation of the late filing of an appeal in circumstances such as those *in casu* cannot be doubted, for some reason the rules of this court provide only for an application for the extension of time within which to appeal. In doing so the rules clearly anticipate a situation where the application is made after the *dies induciae* have expired. Had the intention been to cater exclusively for applications made before the expiry of the *dies induciae,* the provision would have been so worded as to give effect to such intention.

It is, in my view, pertinent to mention that the requirements for an application for condonation of the late noting of an appeal and one for extension of time within which to appeal are the same. That would perhaps explain why the Rules are silent on the question of condonation but provide only for an extension of time within which to appeal. Certainly in practice, the terms seem to be regarded as being interchangeable. The applicants *in casu* have made the effort to ensure that they are "covered" either way. While, according to the title of their papers, they suggest they are applying for an extension of time within which to appeal, they took the precaution to refer to that application as being one for condonation of the late noting of their appeal.

They have therefore not only complied with the strict letter of r 31(3), they have also ensured that all doubt as to the nature of the application they seek is removed.

It was for this reason that I dismissed the respondent's first point *in limine.*

The second point *in limine* raised by the respondent relates to the authority of the applicants' legal practitioner, Ms *Remba,* to depose to both the founding and answering affidavits on behalf of the applicants'. It is the respondent's submission that courts "frown" on the practice by legal practitioners, of preparing and filing affidavits on behalf of their clients. This is particularly so, the respondent further avers, where the clients were themselves available in the country to depose to the affidavits in question.

In defending Ms *Remba*'s authority to depose to the affidavit in question, the applicants again make reference to r 31 of the Rules of this Court. It is argued for them that subrules (1) and (3) of r (31) allow for a situation where a legal practitioner can, properly, depose to the affidavits in question. Subrule 31(1) provides that an application such as the one *in casu* "shall be by notice of motion signed by the applicant or his legal practitioner". Subrule 31(3), which talks about the requirement for an affidavit to set out the reasons for the delay in filing a notice of appeal, specifically goes on to provide that "counsel may set out any relevant facts in question".

It is argued for the applicants that the two provisions ascribe an active role to the legal practitioner, in the process of preparing an application and setting out therein the facts relevant to the relief sought, that is, an order for the extension of time within which to appeal. The applicants contend that the legal practitioner, Ms *Remba* went further than merely setting out the relevant facts in a statement; she had done so under

oath, by way of affidavit. In any case, the applicants further contend, the facts deposed to by Ms *Remba* were within her personal knowledge and not necessarily that of the applicants, since they related to procedural matters.

I am fully persuaded by the applicants' contentions and find that Ms *Remba* properly deposed to the applicants' founding and answering affidavits. Hence my dismissal of the respondent's second point *in limine*.

Merits

On the merits of the application, the respondent has conceded:

(i) that the delay in filing the notice of appeal was not inordinate;

(ii) that the explanation given for the delay was good and reasonable; and

(iii) that no blame could be attributed the applicants for the delay in question.

These concession by the respondent notwithstanding, the applicants still had to satisfy the Court, firstly, that no prejudice would be suffered by the respondent if the application were granted; secondly, that their application was *bona fide*, and lastly, that they enjoyed real prospects of success on appeal.

On the question of prejudice the applicants deny that the respondent would be prejudiced in any way if the application was granted. It is contended in this respect that delay in contested litigation was unavoidable and that the applicants' wish to exercise their right to appeal should be respected. Further, that the respondent would still be able

to enjoy his rights as a shareholder in the event that the appeal court, despite the resultant delay, dismissed the applicants' appeal.

The respondent submits on the other hand that the granting of the appeal would further extend the denial to him of his rights, as a shareholder, in circumstances where the applicants continue to abuse his property, ie the shares. He was now unemployed and needed access to his investment so that he could carry on with his life.

That the granting of the application *in casu* would result in some prejudice to the respondent, I believe cannot be denied. I am, however, not satisfied that such prejudice would be substantial. Delay in litigation is indeed sometimes unavoidable as the applicants submit, and the respondent would still be able to enjoy his rights as a shareholder in the event that the appeal in question is dismissed.

The respondent also puts in issue the applicants' *bona fides* in making the application. It is averred for him that the applicants, after initially taking steps to enforce the judgment in question, had only turned around and sought to file a notice of appeal, after the respondent had attempted to exercise his rights as a shareholder by calling for a meeting. He contends the application has only been filed in order to frustrate his attempt to enforce his rights as a shareholder of Capital Alliance (Pvt) Ltd.

I find that the *bona fides* or otherwise of the applicants in making this application are directly linked to the explanation for the delay in filing it. It is not in

dispute that on the day the judgment was handed down in the court *a quo* only the operative part of it was read out. The full reasons for the judgment were only availed to the parties much later. The operative part of the judgment read

"The application is dismissed with no order as to costs".

Since it was the respondent who in that application had been the applicant, and without having had sight of the reasons for the judgment, I do not believe it was unreasonable for the applicants *in casu* to proceed on the assumption that the status *a quo* ante as regards the parties' respective rights in Capital Alliance, had been restored. Nor would it, in my view, be unreasonable to suppose that only upon sight of the full reasons for the order did the applicants realise that the status *a quo* had in fact not been restored. Quite the contrary, since the respondent, whom they had considered to be no longer a shareholder, had been confirmed as such by the court, and was set to exercise his rights. While all this was happening the *dies induciae* expired, hence the necessity to file the present application.

In my view, it is somewhat contrary for the respondent, after conceding the merits in the explanation tendered for the delay in filing the application, to now question the applicants' *bona fides* in making the application, based on the same explanation. As the applicants contend, the allegation of *mala fides* against them is not supported by the evidence.

Prospects of success

Having passed the other tests referred to, for an application of this nature, the applicants have one last hurdle to overcome, and that is to show that they enjoy good prospects of success on the merits of their appeal.

It is not in dispute that the applicants seek to appeal against a judgment which in almost all respects was in their favour. They were, after all, the respondents in the court *a quo*, and had, for all intents and purposes, successfully defended the claim against them. The applicants had, however, as part of their defence, put in issue the respondent's *locus standi* in bringing the proceedings against them. They alleged that since he was no longer a shareholder of Capital Alliance (Pvt) Ltd, (the present first applicant), he did not have the capacity to seek a *declarator* to the effect that the present applicants had violated the provisions of the Company's Act by disposing of some shares held by Capital Alliance in First Mutual Life (FML). Nor, it was the applicants' further contention, did the respondent have the *locus standi* to seek consequential relief thereon.

After ruling that the respondent was still a shareholder of Capital Alliance (Pvt) Ltd, and therefore had the *locus standi* to bring the proceedings in question, the court went on to dismiss the application for a *declarator*.

It is against the court's determination on the status of the respondent as a shareholder that the applicants wish to appeal.

The relevant background to the dispute concerning the respondent's status as a shareholder is aptly summarised as follows in paras 1.1-1.5 of the applicants' submissions -

1.1. On or about 17 November 2003, First Mutual Society demutualised into First Mutual Limited ("FML") listed on the Zimbabwe Stock Exchange ("ZSE").

1.2. As part of demutualisation, twenty percent (20%) of FML's issued shareholding was allocated to executive management to incentivise them. The 20% shareholding was acquired through Capital Alliance (Private) Limited, ("Capital Alliance") formerly Neotrangus (Private) Limited and was paid for by loan and quasi-equity investments. This 20% shareholding was the only asset for Capital Alliance.

1.3. The respondent was one of the executive managers entitled to participate in the 20% shareholding along with the second to fifth applicants.

1.4. Following some challenges, FML was suspended from the ZES and on 2 June 2004, the respondent's contract of employment with FML was terminated by mutual agreement.

1.5. Capital Alliance failed to pay the loans and entered into a compromise with the lenders in terms of which some 45 million shares held by Capital Alliance in FML were sold to offset the sums due and owing.

The court *a quo* found on the papers before it that the respondent had indeed participated in the 20% shareholding along with the second to fifth applicants. The applicants in paras 13.1 and 13.4 of their answering affidavit concede this point as follows:

> "13.1 The simple issue is that the respondent *was a shareholder* and ceased to be a shareholder in the First Applicant Company … and;
>
> 13.4 … what the applicants essentially put before the court *a quo* was that one of the terms of the shareholders' agreement by which the respondent was a shareholder in the first applicant, was that once a shareholder ceases to be an employee or member of First Mutual Limited, then they automatically cease to be a shareholder in the First Applicant company." (my emphasis)

From these averments and others not repeated herein, it is quite evident that the applicants accepted that the respondent did indeed become a shareholder of the first applicant before he left FML, and following the allocation of 20% of FML's issued shareholding to executive management. Despite this clearly stated position of the applicants, they sought, in a clear reversal of their earlier stance, to argue before me that:

> "… the real issue on appeal was whether or not the respondent ever became a shareholder of Capital Alliance (Pvt) Ltd, and if (he) did, whether he lawfully ceased to be."

The applicants then sought in their written submissions to rely on their own default (that is, failing to register the allocation in the share register,) to impugn the allocation of the shares to the respondent. This is despite their concession that such allocation had been made to the respondent and his other colleagues.

The respondent submits, and the applicants have not disputed it, that this argument was not advanced in the court *a quo*. The documents placed before the court *a quo* made it clear that the respondent had been allocated shares, while the applicants themselves have conceded that the respondent became a shareholder in Capital Alliance before his departure from FML. In my view, it is improper for the applicants to now seek to backtrack on this concession on the basis of new arguments not advanced in the court *a quo*. It is tantamount to an attempt to argue their case differently on appeal or to launch "a wholly new line of defence[1]". It is, in my view, no longer open to the applicants to seek to do so.

I will accordingly accept that the question of the respondent having become a shareholder of Capital Alliance is not in issue.

This leaves the sole issue for determination being the question of whether or not the respondent ceased to be a shareholder when he left FML.

The court *a quo* found that the respondent never ceased to be a shareholder. It noted as follows in its judgment:

[1] See *S Donnelly v Barclays Bank*, 1990 (1) SA 375 at 380

> "The respondents have not produced any document to show that the applicant has either given up his shares or transferred them and consequently he is still entitled to the same."

Expanding on this theme in argument before me, the respondent poses the following questions in his heads of argument:

> "3.2.1. If it is accepted and indeed it is common cause that was a shareholder in Capital Alliance from inception, how did he cease to be such a shareholder?
> 3.2.2. Was due process followed in that regard?
> 3.2.3. Who assumed ownership of the shares?
> 3.2.4. How did they assume such shares and through what legal instrument"?
> 3.2.5. What value did Mr Sachikonye receive for his shares?
> 3.2.6. Were such shares compulsorily acquired or voluntarily surrendered?".

The respondent asks these questions against the pertinent background, which is common cause, that two of the other directors allocated shares at the same time as the respondent and under the same circumstances, had duly been paid for such shares when they, in their turn, left FML.

That the respondent by his own action never gave up, sold or transferred his shares is not disputed. Indeed the court *a quo* observed in this respect that the applicants had not tendered any evidence to suggest he had done so. The court *a quo* accordingly assumed, and in my view justifiably so, that the shares had been distributed in the manner suggested in the minutes of the board meeting of Capital Alliance, held on 26 October 2005. It was recorded in those minutes that the Board had agreed that when

an executive left his employment with FML, the shares allocated to him would be offered to the remaining shareholders since the scheme was for the benefit of senior employees of FML. Even though the said agreement seems to have been selectively applied, that is, only in respect of the respondent and not the others, the fact remains that the respondent did not, on his own volition, dispose of, transfer or otherwise give up his shares. He therefore remains, as the court *a quo* correctly found, a shareholder to this date.

Clearly therefore, the applicants enjoy no prospects of success on the merits of their proposed appeal on this ground.

Thus in the final analysis, while I find that the applicants have tendered a good explanation for the delay in filing their notice of appeal and have demonstrated their *bona fides* in making this application, I must nevertheless dismiss the application on the basis that there are no prospects of success on appeal.

It is accordingly ordered as follows -

'The application be and is hereby dismissed with costs.'

Dube, Manikai & Hwacha, applicants' legal practitioners

Kantor & Immerman, respondent's legal practitioners