REPORTABLE (10)

TINASHE M. ZENDA
v
(1) VERONICA DURO (2) KUSHINGA NEDI (3) TARIRO NEDI (4) REBECCA RUSERE (5) MONICA MUDAVANHU

SUPREME COURT OF ZIMBABWE
GARWE JA, HLATSHWAYO JA *et* MAVANGIRA AJA
HARARE, JUNE 9, 2015 & FEBRUARY 14, 2017

T. Mpofu, for the appellant

T.J. Magaya, for the respondent

GARWE JA:

[1] This is an appeal against a decision of the High court dismissing with costs a request by the appellant for the grant of default judgment and damages against all the respondents, jointly and severally, the one paying the others to be absolved.

BACKGROUND

[2] The appellant is a duly admitted legal practitioner in terms of the laws of this country and at the time of the institution of civil proceedings in 2014, had been a practising lawyer for nineteen (19) years.

[3] The appellant was appointed executor dative to the estate of the late Micah Duro. Micah Duro was the father of the first, second and third respondents. He was an ex-husband of the fourth respondent and brother to the fifth respondent.

[4] A dispute arose between the appellant, as executor, and the respondents over the distribution of the deceased estate. As a result, the respondents filed fraud charges with the CID, Serious Frauds Squad. Pursuant thereto the appellant was arrested and detained for four days.

[5] The charge of fraud was abandoned and in its place three other charges were substituted. These were theft, perjury, alternatively, supplying false information to a public authority and wilfully making a false inventory contrary to the provisions of the Administration of Estates Act, [*Chapter 6:09*].

[6] The appellant appeared for initial remand on 27 March 2013. He was remanded on $20 bail. In the Herald issue of 25 June 2015, an article appeared carrying details of the allegations levelled against him. Thereafter the matter was set down for trial and the appellant appeared in court on several occasions. On 18 February 2014, he was acquitted.

[7] The appellant instituted proceedings against the respondents for damages for malicious prosecution on 20 February 2014. More specifically he claimed the sum of $14 000 being loss of income, legal practitioners' costs in the sum of $25 000 and $100 000 for *contumelia* and deprivation of liberty.

[8] On 16 April 2014, the respondents, as defendants, filed their plea, disputing that they had acted maliciously against the plaintiff. They stated that all they had done was report their complaint to the police authorities and that what happened thereafter was at the discretion of the police. Whilst accepting that the appellant had been acquitted by the Magistrates' court, they however averred that the National Prosecuting authority had since appealed against the

decision to acquit the appellant. The appellant requested for a copy of the notice of appeal but this was refused on the basis that this "was a matter of evidence."

[9] The appellant filed a court application to compel the respondents to furnish the further particulars sought. On 23 July 2014 the High Court made an order directing the respondents to furnish a copy of the notice of appeal within five days of the date of the order. The High Court further ordered that should the respondents fail to furnish such copy to the appellant within the period stipulated "their defence shall be struck out and Case No. HC 1450/14 shall be set down on the unopposed roll for quantification of damages." The court further ordered the respondents to pay the costs of the application jointly and severally.

[10] The order was served on the respondents' legal practitioners on 4 August 2014. There was no compliance. Consequently, the appellant filed an affidavit on 4 September 2014 in proof of his damages.

[11] In the affidavit, the appellant gave further detail in support of his claim that the respondents were liable. In particular, he averred that the respondents had played a dominant role in his arrest, had brought the police to his residence at midnight on Friday 22 March 2013, that they had no reasonable or probable cause against him and that his prosecution had been actuated by malice following his refusal to accede to certain requests by some of the respondents for preferential treatment in the distribution of the deceased estate.

[12] In a further supplementary affidavit, the appellant abandoned his claim for $14 000 representing loss of business and $25 000 being legal fees expended in defending the

allegations. He made it clear that he now wanted the court to confine itself to assessing damages for malicious prosecution only.

[13] The matter was heard by the High Court on 20 October 2014 and judgment handed down on 26 November 2014. The court found that there was no evidence establishing that the respondents had done anything more than merely reporting the matter to the police; that a copy of the judgment of the Magistrate' court would have assisted the court in ascertaining the basis of the acquittal and, in particular, whether the respondents lacked probable cause; that the appellant had not placed sufficient evidence before the court to establish whether the respondents' actions were actuated by malice and lastly that, in light of the averment that an appeal had been noted against the acquittal, the papers did not show, on balance, whether or not the proceedings had been finally terminated.

Consequently, the court dismissed the request for default judgment. Hence this appeal.

GROUNDS OF APPEAL

[14] In his grounds of appeal, the appellant has attacked the decision of the court *a quo* on the following bases:

(a) That the court *a quo* erred in failing to appreciate that the respondent's defence had been struck out and consequently the court *a quo* was wrong in considering the defence tendered by the respondents, as defendants.

(b) That the claim for malicious prosecution was no longer opposed and the sole issue was the *quantum* of damages. The court *a quo* therefore misdirected itself in considering the defence raised by the respondents.

(c) That the court *a quo,* in any event, erred in coming to the conclusion that the requirements for the delict of malicious prosecution had not been met.

(d) That the court *a quo* erred in failing to appreciate the actual claim before it, namely the sum of $100 000, the other two claims for legal expenses and loss of business having been abandoned.

(e) That the court *a quo* erred in dismissing the request for default judgment with costs when it was clear that there was no other party before the court.

[15] The appellant consequently seeks an order setting aside the order of the court *a quo* and for it to be substituted with one granting damages in the sum of $100 000 for malicious prosecution.

RESPONDENTS CITED BUT NOT SERVED

[16] In drafting his notice of appeal, the appellant cited all the five respondents. However, he did not serve them with the notice of appeal. The respondents only became aware that they had been cited when the Registrar of the High Court served their legal practitioner with a notice to inspect the record of the proceedings.

[17] At the hearing of the matter the respondents, *inter alia*, raised the preliminary point that the notice of appeal was fatally defective on account of the failure by the appellant to serve them with the notice of appeal as required by r 29(2) of the Rules of this court. They therefore submitted that the appeal was irregular and should therefore be struck off the roll.

[18] A further related issue arose as to whether, their defence having been struck out in the court *a quo* and the matter having proceeded as an unopposed matter, the respondents were

entitled to audience before this court and, in particular, to file heads of argument and make oral submissions. Both parties were given leave to file supplementary heads of argument, which they did.

APPELLANT'S SUPPLEMENTARY HEADS OF ARGUMENT

[19] Mr *Mpofu*, for the appellant, submitted that, despite diligent search through the law reports, he has not found any authority which deals with the propriety of a respondent non-suited in a lower court participating in the appeal process. He further submitted that, on the basis of case law authority, a party who is in default in a lower court remains barred and cannot be heard by any court unless he purges his default. The fact that the matter is the subject of an appeal before the Supreme Court makes no difference. The party remains with no right of audience in the Supreme Court, having lost the right to participate as a result of an order of the court *a quo*.

[20] He admitted that the respondents are cited as such in the notice of appeal. This, he agreed, is proper because relief is sought against them. However, in obedience to the order of the High Court, the notice of appeal was not served on them. It was as a result of the Registrar's "mistake in alerting them to the proceedings that they found their way into court."

RESPONDENTS' SUPPLEMENTARY HEADS OF ARGUMENT

[21] Mr *Uriri*, for the respondents, submitted that the respondents are free to appear before this court and to make submissions on the issues raised before, and pronounced upon by, the court *a quo*. The party debarred is entitled to be heard on the issues that arose from the pleadings it had filed before the bar came into effect and on that part of the judgment that canvasses or disposes of the issues raised by the pleadings. In short he submitted that the

respondents would suffer prejudice if this court were to determine the appeal without hearing them.

PRELIMINARY ISUE FOR DETERMINATION

[22] On the basis of the papers before this court and submissions made by counsel, it is clear that, although a number of issues arise, there is one preliminary issue that requires determination before the remaining issues on the merits are dealt with. That issue is whether, in the particular circumstances of this case, the respondents have a right of audience before this court. A related issue is whether the respondents were properly cited and, regard being had to r 29 of the Rules of this court, whether they should have been served with the notice of appeal. It is common cause that they were not so served and that they became involved in the appeal proceedings when the Registrar of the court called upon them to inspect the record of proceedings.

WHETHER THE RESPONDENTS HAVE A RIGHT OF AUDIENCE

[23] The judgment that is the subject of this appeal emanated from a request for default judgment following an order by the same court striking out the pleadings filed by the respondents in their defence. That judgment dismissed the request made by the appellant for default judgment to be entered against the respondents and for them to pay a certain sum in damages. In a sense therefore the judgment is in favour of the respondents. The respondents have an interest in any proceedings in which this position is sought to be altered.

[24] In my view, the respondents have the right to make submissions on why the judgment of the court *a quo*, which exonerates them, should not be set aside. By order of the court *a quo*, they do not have to pay anything. Appellant wants that changed. If the judgment is set aside

and the prayer allowed, they stand to pay over a hundred thousand dollars in damages. It is clear that, whilst the respondents have no right to revisit the matter on the basis of their erstwhile pleadings, they stand to be adversely affected in the event that the appeal succeeds and the judgment of the court *a quo* is set aside. For this reason, I am of the view that the respondents should have the right of audience before this court.

[25] There is a further reason why the respondents should participate in these proceedings. In an appeal, there must be an appellant and a respondent. An appeal in which there is no respondent would hardly be described as such.

[26] Indeed the appellant, in his heads, accepts that it was necessary that the respondents be cited as they have an interest in this matter. He accepted that they were cited because relief is sought against them. His submission that, despite being so cited, they have no right of audience as a consequence of an order of the High Court, is not tenable. Why would it make sense for the respondents to be cited as parties to the appeal but have no right to make submissions before this court?

[27] I am aware that the Rules of the High Court, 1971, apply to this court and that in particular r 83 provides that whilst a bar is in operation, the party barred shall not be permitted to appear personally or by legal practitioner in any subsequent proceedings in the action or suit, except for the purposes of applying for the removal of the bar. In my view, the subsequent proceedings referred to in r 83 are proceedings before the High Court and cannot possibly be interpreted to include appeal proceedings before this court. Proceedings before this court are regulated by the Supreme Court Rules, 1964 and, in particular, r 29 thereof which provides that a notice of appeal shall be served on, amongst others, the respondent.

WHETHER THE RESPONDENTS SHOULD HAVE BEEN SERVED

[28] Having reached the conclusion that the respondents have the right of audience in this matter, it follows that the notice of appeal, which identifies them as respondents, should have been served on them. It is common cause they were not served, the appellant having been of the view that they had no right to participate in these proceedings.

[29] The failure to serve the notice of appeal on the respondents, a requirement in terms of r 29 of the Rules of this court, is fatal. Various decisions of the courts both in this country and South Africa have emphasized the position that the failure to comply with the mandatory requirements of r 29 is a fatal irregularity which nullifies the entire appeal. I do not believe that it is necessary to cite authorities for this proposition.

COSTS

[30] On the question of costs, I am of the view that each party should pay its own costs. The issue just determined is a novel one, and, like counsel, I have not come across any decided cases in this country or South Africa dealing with the same. Moreover, this is an issue that arose during oral submissions as a result of which both parties were directed to file supplementary heads of argument addressing the propriety of the respondents appearing before this court.

DISPOSITION

[31] In the result the appeal must be struck off the roll.

It is accordingly ordered that the appeal be struck off the roll, with each party paying its own costs.

HLATSHWAYO JA: I agree

MAVANGIRA AJA: I agree

Hungwe & Partners, appellant's legal practitioners

Magaya – Mandizvidza, respondents' legal practitioners