REPORTABLE (58)

MEIKLES LIMITED
v
WIDEFREE INVESTMENTS (PRIVATE) LIMITED T/A CORE SOLUTIONS

SUPREME COURT OF ZIMBABWE
BERE JA
HARARE: JULY 27, 2018 & OCTOBER 17, 2018

Ms D. Sanhanga, for the applicant

A. Mambosasa, for the first respondent

IN CHAMBERS

BERE JA: After perusing the papers and hearing counsel on 27 July 2018 I granted the following order;

It is ordered that:

"The application for condonation and reinstatement of the appeal in terms of Rule 70 (2) of the Supreme Court Rules, 2018 be and is hereby dismissed with costs."

I have been requested to provide the reasons for my order. Here are they.

The applicant seeks the following order in this case.

> "It is ordered that:
>
> 1. The application for condonation for non-compliance with Rule 12 (3) of the Rules of the Supreme Court, 2018 be and is hereby granted;
> 2. The application for reinstatement of the notice of appeal filed under case number SC433/18 be and is hereby granted;
> 3. The notice of appeal shall be deemed to have been reinstated on the date of this order;
> 4. Costs of suit"

THE BACKGROUND

The applicant and the respondent entered into a contract wherein the respondent provided debt collection services on behalf of the applicant. A dispute over payment arose after the respondent had provided the services.

To resolve the impasse between the applicant and the respondent and as per their contract their dispute was placed before an arbitrator. The arbitration proceedings were protracted owing to numerous applications by the applicant to the High Court, the majority of which were never prosecuted to finality.

However, despite all the challenges faced, the arbitrator eventually made a determination in favour of the respondent which proceeded to successfully apply to the High Court for the registration of the award.

The applicant responded by filing an appeal against the judgment of the High Court on 6 June 2018. The applicant failed to comply with r 12(3) of the Supreme Court Rules, 2018, in that it failed to furnish the Registrar with a receipt confirming payment for the Sheriff's security for costs of service of all notices of set down.

The non-compliance with r 12(3) led to the applicant's appeal being deemed to have been abandoned leading to the applicant's filing this application for the condonation and reinstatement of the appeal.

THE APPLICANT'S CASE.

In its founding affidavit the applicant attributed its failure to comply with r 12(3) (*supra*) to miscommunication between the legal practitioner handling the appeal and his clerk.

The applicant alleged that the result of the confusion led to the non-filing of the receipt for the Sheriff's costs which issue was subsequently rectified.

The applicant further reiterated in its application that it had prospects of success in that the court *a quo* had improperly registered the arbitrary award in that the court had proceeded to register same despite an application for review having been filed to challenge it.

The applicant also criticized the court *a quo* for failing to provide reasons for the registration of the award.

THE RESPONDENT'S CASE

In its notice of opposition, the respondent opposed the applicant's application on the following:

It criticized the applicant for its lackadaisical approach in failing to comply with r 12(3) (*supra*) and opined that the applicant had not given a reasonable explanation to support its position.

The respondent further attacked the applicant for having employed all the tricks in the book in an effort to obstruct the smooth conclusion of the arbitration proceedings and argued that the application for condonation was actually a furtherance of the same delaying strategy.

Finally, the respondent argued that the attack on the court's *a quo's* alleged failure to provide reasons for its decision to register the arbitrary award was most unfair and baseless since the court had in fact given such reasons.

All in all, the respondent expressed a very firm position that the filed appeal had no prospects of success and that, it was solely filed to buy time.

THE LEGAL POSITION

The law relating to an application for reinstatement of appeal was underscored by this Court in the case of *Champion Constructers vs Mkandla & Anor*[1] where the court outlined the requirements to be considered as follows:

> "i. the extent of the delay
> ii. the reasonableness of the explanation proffers for the delay and
> iii. the prospects of success on appeal"

See also *Susan Chipo Vera vs Mitsuli and Company Limited*.[2]

I now propose to deal with these requirements in detail taking into account the circumstances of this case.

THE EXTENT OF THE DELAY

I accept that the applicant ought to have filed the receipt with the Registrar for security for costs by 15 June 2018 and that the applicant's attention was drawn to this on 25 June 2018.

As soon as the applicant was notified of the abandonment of the appeal, the applicant immediately filed this application. I consider the delay not to be inordinate.

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[1] . Judgment No. SC18/07
[2] . Judgment No. SC32/04

THE REASONABLENESS OF THE EXPLANATION FOR THE DELAY

The reason given for non-compliance with r 12(3) (*supra*) was the alleged miscommunication between the legal practitioner and his clerk.

While the explanation might be genuine, it tends to lean on hearsay evidence given the absence of the clerk's supporting affidavit confirming what is now being attributed to her. This position was re-stated in the case of *Mafo v Ncube & Anor*[3] where the court held that in such situations, an affidavit from the person on whom blame is placed must be filed to give credence to the story told in respect of that person. In the absence of such an affidavit, the explanation remains highly improbable for it is easier for one to mess up and then look for a fictitious scapegoat.

PROSPECTS OF SUCCESS ON APPEAL

I consider this to be the greatest hurdle the applicant has to deal with in an application of this nature. To earn the sympathy or indulgence of the court the applicant must demonstrate that the desired appeal has prospects of success. See *Songore vs Olivine Industries (Pvt) Ltd*.[4]

The applicant alleged a litany of omissions on the part of the court *a quo* in its decision to register the arbitral award in the High Court in order to pave way for execution.

[3] . HB 04/14
[4] . 1988 (2) ZLR 210 (S)

It was stated that the court *a quo* did not furnish reasons for its decision to register the award. In my view, this averment by the applicant is simply not true and was raised in a desperate effort to cast aspersions on the court *a quo*. The court *a quo* gave a fairly detailed and reasoned judgement explaining why it registered the arbitrary award in favour of the respondent.

The court considered the issues now being raised by the applicant and made specific findings of fact against the applicant. In its judgment the court *a quo* dealt at length with the numerous attempts made by the applicant in its stout effort to delay the smooth conclusion of the arbitrary proceedings by mounting one application after the other, a large number of which were never prosecuted to finality. On page 14 of the judgment the court concluded as follows:

> "In conclusion, refusing to recognize the award in the present case will be allowing the respondent to take advantage of the situation it deliberately engineered. It deliberately chose not to proceed with the matter despite being given an opportunity to present its case. There was no breach of the rules of natural justice and as such the award is not contrary to public policy. The award is binding on the parties."[5]

What is most significant in the judgment of the court *a quo* is the undeniable fact that it made findings of fact which this court can only interfere with if it is demonstrated that such findings are coloured by irrationality or unreasonableness. This position of our law has stood the test of time. KORSAH JA put the test as follows, in the case of *Hama vs National Railways of Zimbabwe*;[6]

> "The general rule of law as regards irrationality is that an Appellate Court will not interfere with a decision of a Trial Court based purely on a finding of fact unless it is satisfied that, having regard to evidence placed before the Trial Court, the finding

[5] . Record page 33
[6] . 1996 (1) ZLR 664 at p.670

> complained of is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion…"

See also the case of *ZB Bank vs Maria Masunda*[7], per ZIYAMBI JA, and *Barnos & Anor vs Chimphonda*[8] per GUBBAY CJ.

A proper reading of the respondent's notice of opposition and in particular para 5 thereof demonstrates the applicant's well calculated attempt to tirelessly work towards the obstruction of the smooth conclusion of the arbitrary proceedings. The court *a quo* properly dealt with these maneuvers in its judgment and it is not possible for this Court to interfere with such findings of fact.

In my well-considered view deriving from a global perception of this case, it would be a serious miscarriage of justice if the applicant were to be granted condonation for the reinstatement of its appeal which is clearly grounded in hopelessness.

It was for these reasons that I gave the order of 27 July 2018 in chambers.

Messrs Chinamasa, Mudimu & Magwanyanya, appellant's legal practitioners.

Messrs Mambosasa Legal Practitioners, respondent's legal practitioners

[7] . SC 48/13 at page 8
[8] . 1999 (1) ZLR 58(S) at page 62 G-H