REPORTABLE: (127)

DR PETTY MAKONI
V
ZIMBABWE ELECTRORAL COMMISSION

SUPREME COURT OF ZIMBABWE
HONOURABLE JUSTICE CHATUKUTA JA
HARARE, 15 SEPTEMBER 2021 & 28 OCTOBER 2021

Mr *Chikono*, for the applicant

Mr *Kanengoni*, for the respondent

CHATUKUTA JA: This is a chamber application for reinstatement of an appeal deemed abandoned and dismissed in terms of Rule 53 (1) of the Supreme Court Rules, 2018. The appeal was against the decision of the High Court granting a spoliation order against the applicant in case number HH 237 20.

BACKGROUND FACTS

At the heart of this application is a dispute between the applicant and respondent over the possession of a Toyota Prado registration number ACH 2506.

The respondent is the Zimbabwe Electoral Commission, a body corporate constituted in accordance with the laws of Zimbabwe. The applicant is a former commissioner for the respondent.

In 2011, the respondent received 11 Toyota Prado motor vehicles as a donation from United Nations Development Program (UNDP). The vehicles were donated for use by

the respondent in general activities and functions in anticipation of the 2013 general elections. The donation had a condition attached to it that the respondent transfers ownership of the vehicles into its name within thirty days of the donation which the respondent failed to do. This meant that the UNDP retained ownership of these vehicles which remained registered in the name of the organisation. The applicant was issued one of these vehicles, Registration Number ACH 2506 in her capacity as a commissioner of the respondent for the purpose of discharge of her duties and functions as a commissioner. Upon the expiry of the applicant's tenure as a commissioner the respondent requested the applicant to surrender the vehicle. The applicant however failed to do so. The respondent instituted spoliation proceedings in the High Court against the applicant seeking restoration of possession of the vehicle in question.

The respondent argued in the High Court that it had peaceful and undisturbed possession of the vehicle through the applicant. The applicant was enjoined in terms of a standing vehicle policy to surrender the vehicle to the respondent upon termination of her tenure. She failed to do so and thus despoiled it.

The applicant argued that she was in peaceful and undisturbed possession of the vehicle after it was issued to her as she used the vehicle not only for business activities but also for personal activities. The respondent was required to issue her with a vehicle as part of her conditions of service. It failed to do so. She retained the vehicle as lien pending delivery of her vehicle as per her conditions of service.

On 18 March 2020, the court *a quo* held that the respondent, being a juristic person could not exercise physical possession of the vehicle. Such possession was held through its functionaries and employees. It further held that the right to a lien is exercisable

against the owner of a property. The ownership of the vehicle rested with the UNDP. The applicant could not therefore exercise her right to a lien against the respondent who was not the owner of the vehicle.

The court ordered the applicant to restore possession of the motor vehicle to the respondent. The Sheriff was authorised to seize the motor vehicle if she failed to do so. The court *a quo* also ordered the applicant to pay the respondent's costs on a legal practitioner and client scale.

Dissatisfied with the decision of the court *a quo*, the applicant noted an appeal with this Court on 24 March 2020. On 20 April 2021, the Registrar of this Court wrote a letter to the applicant's legal practitioners inviting them to file heads of argument within 15 days of receipt of the letter. Despite receiving the letter on 22 April 2021, the applicant did not file her heads of argument by 13 May 2021, which was the due date. This resulted in her being barred from filing the same in terms of r 53 of the Supreme Court Rules, 2018, and the appeal being deemed as having been abandoned and dismissed.

PROCEEDINGS IN THIS COURT

Submissions by the applicant

The applicant submitted that an attempt was made to file the heads of argument on 14 May 2021 but the Registrar rejected the heads on the basis that they were being filed out of time. It is against this background that the applicant made the present application seeking reinstatement of that appeal so dismissed.

The applicant's legal practitioner deposed to an affidavit acknowledging that the infraction on the rules of the Court was due to his fault. He explained that when he attended to his sister-in-law's funeral, he forgot to leave the keys to his office to enable his co-workers to access the draft heads of argument. He averred that his colleagues only managed to access a copy of the draft heads of argument on the last day of filing being 13 May 2021 after getting assistance from the caretaker around 1500 hours. The applicant's legal practitioner further averred that the accessed heads of argument could not be typed and filed on the same day. He asserted that he arrived from the funeral on 13 May 2021 around 1600 hours and managed to go to the office on 14 May 2021.

The applicant submitted that she has strong prospects of success on appeal in that the court *a quo* erred in its finding that she was holding or using the vehicle merely as a functionary of the Respondent yet she used the vehicle for both business and personal errands.

Mr *Chikono,* for the applicant, submitted that the delay was not inordinate and the explanation for the delay was reasonable. He further submitted that the applicant had prospects of success on appeal. She had not dispossessed the respondent of the vehicle as the respondent had willingly given it to her. It was submitted that the applicant had peaceful and undisturbed possession of the vehicle which she used for both business and personal activities.

Submissions by the respondent

The respondent opposed the application. Mr *Kanengoni,* for the respondent, argued that the application is now moot as the dispute between the parties has been resolved.

He submitted that the matter had been resolved through developments that occurred after the noting of appeal. The appointing authority undertook to issue the applicant her condition of service vehicle and the applicant indicated her preference from the two options given to her by the appointing authority. The respondent attached to its notice of opposition a letter dated 29 March 2021 from the Secretary for Finance and Economic Development and another dated 7 May 2021 from the Chief Secretary to the President and Cabinet letter dated 7 May 2021 setting out options available to senior government officials and constitutional appointees. Also attached was an email sent by the applicant to one Dominic Chidakuza on 31 May 2021 wherein the applicant opted for a vehicle worth US$18 000. It was submitted that the matter was now moot as the applicant had accepted the offer extended to her.

The respondent submitted that the explanation by the applicant's legal practitioner was not entirely plausible. Mr *Kanengoni* argued that the instruction ought to have been given to the caretaker to access his office on 12 May 2021 when the legal practitioner realised that he was unable to return on the day. He further submitted that the applicant does not have prospects of success on appeal. It was argued that the respondent being a juristic person could not physically possess the vehicle in question and could only do so through functionaries or employees. The applicant possessed the vehicle on its behalf in that capacity. The respondent had peaceful and undisturbed possession of the vehicle at all times through the applicant. When the applicant refused to surrender the vehicle she despoiled the respondent.

On costs, the respondent submitted that the applicant persisted with the application when the controversy between the parties had been resolved by the appointing

authority. The application is an abuse of process. The applicant should be visited with an order of costs on a punitive scale.

THE LAW

The law on mootness of proceedings was traversed in *Khupe & Anor* v *Parliament of Zimbabwe & Anor* CC 20/19 where it was remarked at pages 7-8 that:

> "A court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy. The position of the law is that if the dispute becomes academic by reason of changed circumstances the court's jurisdiction ceases and the case becomes moot….The constitutional limits on the exercise of judicial power, combined with notions of the limited nature of judicial power, have evolved into a broad doctrine known as justiciability."

Therefore where no live controversy exists between the parties there is no justiciable question to put before the Supreme Court.

See Zimbabwe School Examinations Council v Victor Mukomeka & Anor SC 10/20.

With regards an application for reinstatement of a matter regarded as abandoned and deemed to have been dismissed the applicant is required in terms of rule 70 (2) of the Supreme Court Rules to show good cause for the default. Rule 70 provides,

> "(1) Where an appeal is-
> (a) deemed to have lapsed; or
> (b) regarded as abandoned; or
> (c) deemed to have been dismissed in terms of any provision of these rules;
> the registrar shall notify the parties accordingly.

(2) The appellant may, within 15 days of receiving any notification by the registrar in terms of subrule (1), apply for the reinstatement of the appeal on good cause." (my emphasis)

What constitutes "good cause" was outlined in *FBC* v *Chiwanza* SC 31/17 where GWAUNZA DCJ remarked as follows

"In considering an application for reinstatement, MALABA JA (as he then was), held that: -

'The question for determination is whether the applicant has shown a cause for the reinstatement of the appeal. In considering applications for condonation of non-compliance with its Rules, the court has a discretion, which it has to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are the degree of non-compliance; the explanation, therefore; the prospects of success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the court and the avoidance of unnecessary delays in the administration of justice.'

See also T***el-One (Pvt) Ltd v Communication and Allied Services Workers Union of Zimbabwe*** **SC 01/06**,

It, therefore, follows that in an application of this nature the factors to be taken into account are as follows:

(a) the degree of non-compliance and explanation thereof

(b) the prospects of success on appeal;

(c) the importance of the case; the respondent's interests in the finality of the judgment;

(d) the convenience to the court and the avoidance of unnecessary delays in the administration of justice.

ISSUES FOR DETERMINATION

After hearing submissions, the following issues arise for determination:

1. Whether or not the application is moot; and
2. Whether the applicant has established good cause for the default.

APPLICATION OF THE LAW TO THE FACTS

Is the application moot

In my view, the present case cannot be deemed moot. The communication that occurred between the appointing authority and the applicant only proves that there was an assurance that applicant will get her conditions of service vehicle. This assurance cannot render the matter moot because it only exists on paper and is yet to be fulfilled. As rightly submitted by the applicant, there is no timeframe within which the option selected by the applicant will be realised if at all. The assurance was made on 7 May 2021. As at the date of hearing of this application, nothing had materialised. In fact the assurance has the potential of creating another cause of action in the event that the conditions of service vehicle is not delivered to the applicant. In the absence of a deed of settlement between the applicant and the appointing authority, the assurance cannot be said to have resolved the controversy between the applicant and the respondent. It is the court's finding that the agreement between the appointing authority and the applicant for the conditions of service vehicle is a separate claim that the applicant can pursue should the need arise. Therefore, these developments do not in any way affect the proceedings that were instituted in the court *a quo*.

THE DEGREE OF NON- COMPLIANCE AND EXPLANATION THEREOF

Turning to the merits of the application for reinstatement of the appeal, the applicant was required to have filed her heads of argument by 13 May 2021. It was not controverted that she attempted to do so on 14 May 2021. A one day delay cannot be considered as inordinate.

It is my view that the explanation tendered is not entirely unreasonable. There is nothing amiss in a person who is under bereavement to fail to act immediately upon realising that there is unfinished business which needs attention. The explanation becomes even more reasonable considering that the delay was for just a day.

PROSPECTS OF SUCCESS

The court *a quo* cannot be faulted for finding that the applicant exercised possession on behalf of the respondent. The respondent being a juristic person can only act or exercise possession through its agents or servants. The applicant held and used the vehicle in question in her capacity as a commissioner of the respondent. Once her tenure of office ended, she ceased to have the right to possess the vehicle on behalf of the respondent. She was required to surrender the vehicle to the respondent.

I am persuaded by the view expressed in *Wille Principles of SA Law 7th Ed at 196—7* where the author said,

> "If the person who has detention of a thing has the intention of holding it not for himself but for another person, he does not have possession, he is a custodian merely and the possessor is the person on whose behalf he is holding."

It is also important to note that the applicant, in her answering affidavit, agreed that she never claimed permanent entitlement to the motor vehicle. She also argued that her retention of the vehicle is justifiable on the basis that the appointing authority has not met her entitlement to a conditions of service vehicle and until it is met she considers it her right to retain the said project vehicle.

The submission by the applicant that she was holding the vehicle as a lien is therefore a veiled concession that she was in possession of the vehicle on behalf of the respondent and was required to return the vehicle upon termination of her tenure. She contended that once she received her conditions of service vehicle there would be no need to persist with this application and any other proceedings in future on the same issue. That she was in possession of the vehicle on behalf of the respondent is reinforced by the fact that other commissioners in her circumstances surrendered the vehicles issued to them back to the respondent at the end of their tenure as commissioners. This was consistent with the agreement between the respondent and all commissioners that the vehicles would be surrendered on termination of the latter's tenures of office.

In any event, the applicant is not entitled to hold onto the vehicle as a lien. In ***Bak Storage (Pvt) (Ltd) v Grindsberg Investment (Pvt) Ltd 2015 (2) ZLR 477 (H)*** it was held that:

"A lien is a form of security, it does not create a cause of action".

It was further held that:

"It merely affords a defence against the owner's vindicatory action, *rei vindication*."

The applicant can only rely on the defence against the owner of the vehicle and not the respondent who in this case is not the owner of the vehicle in question. The owner of the vehicle in question is UNDP and not the respondent and so this defence is therefore not available to the applicant.

In my view, there was nothing irrational about the findings made by the court *a quo*. Therefore, it is my finding that the applicant does not have an arguable case on appeal. This Court is unlikely to overturn the decision of the court *a quo*. Under the circumstances I find it not necessary to deal with the two remaining factors. The application lacks merit and cannot succeed.

COSTS

The respondent's prayer for costs on a punitive scale is premised on this court finding in its favour that the application was moot. Having found that the application is not moot, there is no basis for awarding the respondent costs on a punitive scale.

DISPOSITION

Accordingly, it is ordered that the application be and is hereby dismissed with costs.

Messrs Moyo, Chikono & Gumbo, applicant's legal practitioners

Nyika, Kanengoni & Partners, respondent's legal practitioners