

NOT REPORTABLE/ NOT DISTRIBUTABLE

RIOZIM LIMITED
v
NIGEL DIXON - WARREN N.O

SUPREME COURT OF ZIMBABWE
MUSAKWA JA
HARARE, 19 JANUARY 2022

L. Uriri, for the applicant

S. Hashiti, for the respondent

IN CHAMBERS

EX TEMPORE

MUSAKWA JA: At the hearing of this matter I dismissed the application and gave my reasons *ex tempore*. Counsel for the applicant subsequently requested for the reasons.

This is an application for leave to appeal against the decision of the High Court sitting at Harare on 4 March 2020. In that case (HC 9000/19) the High Court dismissed an application by the applicant for the dismissal of case number HC 11505/18 for want of prosecution. Then in HC 3278/20 the same court dismissed an application for condonation of late noting of appeal filed by the applicant.

Although Mr *Hashiti* for the respondent raised three points *in limine*, the matter falls for determination on whether there is a proper application for leave to appeal before me.

Mr *Hashiti* submitted that leave to appeal is only sought before this Court if it has been refused by the High Court. The application before the High Court was for condonation of late noting of appeal. What was denied by the High Court was condonation and not leave to appeal. The remedy available to the applicant is to appeal against refusal of condonation. This is because the refusal of condonation is final and does not require leave to appeal. In support thereof he cited the case of *H. J. Vorster (Private) Limited v Save Valley Conservancy* SC 20/14.

Mr *Uriri* for the applicant submitted that the repealed High Court Rules under which the application in the court *a quo* was determined provided for a composite application for condonation of late noting of appeal and for leave to appeal. He acknowledged that ordinarily a party cannot seek leave to appeal where condonation is a requirement. Therefore what was before the court *a quo* was a composite application. The *Vorster* case *supra* did not deal with rules 262 and 263 of the repealed rules. The disposition of the court *a quo* did not distinguish between the application for condonation and for leave to appeal.

The disposition of the application by the court *a quo* reads as follows:

“The applicant failed to prove its case on a balance of probabilities. The application is, in the result, dismissed with costs.”

In its analysis of the application and submissions made before it, the court *a quo* never made reference to the application for leave to appeal and the requirements for

such an application. Its analysis was restricted to the issue of condonation. The disposition could have been worded differently to reflect that it related to condonation. Notwithstanding that shortcoming, taking into account that the analysis is confined to the issue of condonation, I form the view that the disposition related to condonation. It would serve no purpose for the court *a quo* to determine leave to appeal where it did not grant condonation. In such a situation the applicant's recourse was to note an appeal against that decision. It follows that the application is improperly before the court as leave to appeal was not determined.

The application being improperly before the court, it is ordered that it be and is hereby struck off with costs.

Coghlan Welsh & Guest, applicant's legal practitioners

Manokore Attorneys, respondent's legal practitioners