JAISERE MADHUME
versus
THE PROVINCIAL MAGISTRATE
and
MRS WAKATAMA N.O
and
REBECCA KUNAKA

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE 02 February 2012 and 8 May 2013

Opposed Matter

J. Mambara, for the applicant
Ms *S. Njerere*, for the 3rd respondent

MAKONI J: The background to the matter is that on 10 March 2006, the applicant noted an appeal to this court against the decision of the second respondent under case No. CIV(A) 162/06. The appeal was set down for hearing on 31 October 2006. The applicant withdrew the application after the presiding judges had raised concern about the state of the record. Pursuant to this, the applicant filed a court application in this court seeking the setting aside of the same decision of the second respondent. On 26 October 2007, the applicant withdrew the application. On 19 November 2007 he then filed the present application seeking the re-instatement of the appeal in case No CIV(A) 162/06.

His basis for seeking the relief is that he is now in possession of the "Reasons for Judgment" which he did not have at the time of hearing of the appeal. He now intends to proceed with the appeal. The application is opposed on the basis that it is not proper or competent for this court to re-instate an appeal which has consciously withdrawn by the applicant. The matter is in fact *res judicata*.

The issue before me is whether this court has jurisdiction to re-instate an appeal which would have been withdrawn. Mr *Mambara* for the applicant submitted that this court is a court of inherent jurisdiction and it can regulate its own proceedings more so when justice cries for same to done. He suggested that the court can proceed in terms of 049 r 449 of the High Court Rules 1971. He argued that the appeal was erroneously withdrawn when the

applicant erroneously concluded that without a complete record the appeal could not be dealt with.

Ms *Njerere* for the third respondent submitted that the fact that the appeal was erroneously withdrawn is not supported by the founding affidavit. She further submitted that r 449 does not apply in that both terms were present and there was no mistake common to both parties and that there is no procedure in our law to re-instate a withdrawn appeal.

I entirely agree with the submissions made by Ms *Njerere.* There is no averment in the applicant's founding affidavit supporting the contention that the appeal was erroneously withdrawn. A reading of the affidavit particularly para 10-11 clearly shows that there was no question of error. It was a deliberate conscious withdrawal of the appeal which was then followed by an application to set aside the decision of the second respondent. A case stands or falls on its founding papers. In the case of *Auster Lands (Pvt) Limited* v *Trade and Investment Bank Limited and the Sheriff of Harare and Bernard Construction (Pvt) Limited* SC 92/05 at p 8 of the cyclostyled judgment CHIDYAUSIKU CJ stated:-

> "… The general rule that has been laid down in this regard is that an application stands or falls on the founding affidavit and the facts alleged in it. This is how it should be, because the founding affidavit informs the respondent of the case against the respondent that the respondent must meet. The founding affidavit sets out the facts which the respondent must meet. See *Pounts' Trustee* v *Lohamas* 1924 LRD 67 at 68…"

Even assuming the averment of error was present in the affidavit, r 449 still does not apply. Rule 449(1)(a) permits this court to interfere with a judgment or order that was erroneously sought or erroneously granted in the absence of any party affected thereby. The applicant was present on the day of the hearing when he then made the decision to withdraw the matter.

Mr *Mambara*, in the applicant's Heads of Argument, quoted r 449(1)(c) as r 449(1)(b). It relates to an order or judgment that was granted as a result of a mistake common to the parties. As was submitted by Ms *Njerere*, this was a unilateral decision by the applicant. There was therefore no mistake common to both the parties.

I have also researched on the issue. It appears there is no procedure in our law allowing the re-instatement of an appeal that has been withdrawn. It affects the reason for that is obvious. A party would have said 'I am removing my matter from your hands'. He would have removed the proceedings from the purview of the court, whether the court wanted to determine the matter or not. In effect the claim no longer exists on the court's roll. Put

differently, the applicant would have abandoned its claim. Such a party cannot therefore seek to re-instate that which is no longer there as you will be asking the court over something on nothing. The situation would have been different if the appeal had been struck out on some technical issue such as late filing of same, a defect in the notice of appeal or absence of a legal practitioner on the hearing date. In such instances the matter would have been struck off or removed from the roll. The party can then seek to have it re-instated when he would have attended to the deficiencies that caused it striking off or removal from the roll.

It appears the issue of the inherent jurisdiction of the High Court is misunderstood. It does not mean that the High Court is endowed with jurisdiction to entertain all manner of applications brought before it regardless of whether there is a legal basis or not. Before a party brings an application before this court it must be satisfied that there is a legal basis either in terms of common law or statutory law. The application and the relief sought must be authorised by statute or common law. The concept only distinguishes the High Court from inferior courts which are creatures of statute and are bound by the four corners of its enabling legislation.

In *casu* the applicant, when he encountered problems with his appeal, did not did not apply to have it struck out or removed from the roll. He instead opted to withdraw. He cannot therefore avail himself on the procedure of re-instatement of the appeal.

In view of the above, I will make the following order.

1. The application is dismissed
2. The applicant to pay the third respondent's costs.

J. Mamabara & Partners, applicant's legal practitioners
Honey & Blackenberg, 3rd respondent's legal practitioners