

WEBSTER MUDUWA
and
AMOS MATANHIRE
and
CALISTO RUZANI
and
WESTON NYAWASHA
and
GERRY CHIKOROONDO
and
CHRISTOPHER GODINI
and
OBERT RUKWANHA
and
HAMUNYARI MUKUZE
and
JACOB SANYAMANDWE
and
THOMAS MUNDONDO
versus
THE TRUSTEES OF THE HARARE HOME INDUSTRY ASSOCIATION TRUST

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 17 July 2018 and 3 October 2018

Opposed Application

A Mugiya, for applicants
T E Mazarure, for respondent

TAGU J: There was drama in this case. At the hearing of the matter Mr *A Mugiya* who appeared on behalf of the applicants applied that this matter be deferred to some other date in the future to enable him to attach the record of proceedings as well as the Notice of appeal to his application for condonation for late filing of Notice of Appeal and extension of time within which to file Notice of Appeal. The application to defer the matter to another date was resisted by Mr *TE*

Mazarure on the basis that he was hearing of the intention to make the application for deferment that morning. He further submitted that the applicants were aware since October 2017 that their papers were not in order. He submitted that an application stands or falls on the papers filed of record. As to the attachment of the record of proceedings Mr *TE Mazarure* submitted that the record was attached to the application from pp 28 to 104 of the current record.

The court asked Mr *A Mugiya* to explain as to when he became aware that the record and Notice of appeal were not attached to the application. His response was that he had just become aware of it just now. The court found Mr *Mugiya*'s explanation not sincere because his law firm had prepared the application as far back as the 27th of September 2017 when the application was lodged with this Honourable Court. Besides that Mr *Mugiya* had come to Court to argue the matter that day meaning he had prepared for the matter and must have been aware of the short comings in his papers or worse still he may have wanted to buy time because he was not prepared. I say so because the record of proceedings he wanted to be attached is already attached in the application. I found no merit in his request and I dismissed it and ordered the parties to address me on the case.

That was not the end of the drama. Mr *Mugiya* raised a point *in limine* that there was no proper opposition to the application because the deposed affidavit by the Chairman and one of the founders and a trustee of the Harare Home Industry Association Trust Mr Gift Chigariro to the Notice of opposition was fatally defective because the deponent did not state how many trustees he was representing in the resolution filed of record, hence his application was not opposed. He prayed that I grant the relief he wanted. The resolution attached read as follows:

“EXTRACT FROM THE MINUTES OF THE MEETING OF THE TRUSTEES OF HARARE HOME INDUSTRY ASSOCIATION TRUST

HELD ON 2 OCTOBER 2017.

- It has been noted that a Chamber application for condonation for late filing of notice of appeal and extension of time within which to file a notice of appeal has been filed in the High Court of Zimbabwe by Webster Muduwa and 9 others against the judgment given in favour of the Harare Home Industry Association Trust in MC 33234/14.
- It has been resolved that this matter be opposed. It has further been resolved that Gift Chigariro, the Chairman be and is hereby authorized to represent the Trustees of Harare Home Industry Association Trust and to sign all relevant documents in the prosecution of this matter.”

My reading of the above clearly shows that the deponent to the opposing affidavit was authorized by other trustees. I therefore agree with the counsel for respondent that this meeting

was held by trustees and authorized Mr Chigaro to depose to this affidavit. That the trustees were not mentioned in this resolution does not make the resolution defective. I therefore dismiss the second point *in limine*.

Before dealing with the merits of the matter another drama unfolded as the respondent raised some preliminary points. The first preliminary point raised by the respondent was that the applicants did not comply with the rules making their application fatally defective. Mr *TE Mazarure* said r 55A (2) of the Supreme Court, 1964 says:

“Application for extension of time within which to note appeal

(1) If any party fails to note an appeal against the judgment of a magistrate within the time prescribed in Order XXX of the Magistrates Court (Civil) Rules, 1966, he may apply to a judge for an extension of time within which to note his appeal.

(2) Any such application shall be accompanied by a notice of appeal complying with the provisions of Order XXX of the Magistrates Courts (Civil) Rules, 1966, together with an adequate statement explaining why the appeal was not noted within the proper time.

3.....” (underlining is mine)

In *casu* the counsel for the respondent submitted that this application is fatally defective because there is no notice of appeal. He said the one made in 2015 was dismissed for failure to state the relief being sought in *Webster Muduwa and 9 Ors v The Trustees of the Harare Home Industries Association Trust* HH-802-16 by CHITAKUNYE J. He went on to say they raised this omission in the current Notice of Opposition but the applicants simply stated in their answering affidavit that the omission was not fatal. The counsel went on to say the applicants in their application referred to an attached Notice of appeal but it is not there, hence no new evidence can be adduced or attached to an answering affidavit.

The second point *in limine* was that the applicants’ answering affidavit was filed after the respondents had filed their Heads of argument on 15 December 2017. This answering affidavit was out of sequence. Leave of court should have been sought to file late. Hence he urged the court to expunge the answering affidavit from the record. Reference was made to the case of *Turner and Sons (Pvt) Ltd v Master of the High Court and Theresa Grimmel and Dobrock (Pvt) Ltd* HH-458-15. For the above omissions the respondents prayed that the points *in limine* be upheld and the application be dismissed with costs.

The applicants in answering to the points *in limine* submitted that the respondents cannot rely on a judgment that was cancelled by the Supreme Court in terms of s 25 of the Supreme Court Act. They averred that the respondents filed their heads of argument ahead of the applicants.

Be that as it may, as I said at the beginning of this judgment Mr A *Mugiya* actually asked the court to defer this matter to a future date to enable him to file a proper Notice of Appeal. As of today there is no Notice of Appeal attached to the application in breach of Order XXX of the Magistrates Courts (Civil) Rules 1966. This was a concession that his papers were not in order. His application will fall or stand on papers filed of record. I therefore find merit in the points *in limine* raised by the counsel for the respondents and I will dismiss this application with costs.

IT IS ORDERED THAT

1. The application is hereby dismissed.
2. The applicants to pay costs on a legal practitioner and client scale.

Mugiya and Macharaga Law Chambers, applicants' legal practitioners
Gasa Nyamadzawo & Partners, respondents' legal practitioners