

BINDURA MUNICIPALITY
v
PAISON CHIKEYA MUGOGO

SUPREME COURT OF ZIMBABWE
HARARE, JUNE 26, 2015

Before **GUVAVA JA**, in chambers.

This chamber application was placed before me in terms of r 5 of the Supreme Court Rules, 1964. Although it was unopposed it raised an issue concerning the interpretation of Practice Directive 3/13.

BACKGROUND

The appeal relating to this matter was set down before the Supreme Court on 5 September 2014. It was struck off the roll because it did not comply with r 4 (2) and r 7(b) of the Supreme Court (Miscellaneous Appeals and References) Rules 1975. Firstly, the notice of appeal reflected the wrong date on which judgment was delivered by the Labour Court. It was quite clear *ex facie* the judgment that it had been hand down on 29 June 2012. However the notice of appeal stated that it was handed down on 29 May 2012.

Secondly, a copy of the notice of appeal was served on the Registrar of the Labour Court contrary to the order by **GOWORA JA**. The order granted by **GOWORA JA** stated as follows:

1. “Leave be and is hereby granted to the applicant to note an appeal against the judgment of the Labour Court No LC/H/196/2012 handed down on 29 June 2012.
2. The Notice of appeal shall be noted within fourteen (14) days of the date of this order.
3. There be no order as to costs.”

It was thus incumbent upon the applicant to serve the notice of appeal with the registrar of the Labour Court within fourteen days of the grant of the order. The order was granted on 28 January, 2014. It was only filed with the Registrar of the Labour Court on 28 February, 2014, a month later.

WHETHER THE APPLICATION IS PROPER

Following the decision to strike off the appeal, the applicant filed this chamber application seeking to reinstate the appeal. The applicant stated in his founding affidavit that the application was being made in terms of The Supreme Court (Miscellaneous Appeals and References) Rules 1975 as read with Practice Directive 3/13.

In support of the application, Mr *Muzangaza*, the applicant’s legal practitioner, conceded that there was an error on the notice of appeal since the date the judgment had been delivered was 29 June 2012 and not 29 May 2012. He however sought to explain the error by stating that it was a genuine mistake on the part of the legal practitioner dealing with the matter.

He further explained that the failure to serve the registrar of the Labour Court with the notice of appeal within the time specified in the order was due to the fact that the Labour Court registrar had refused to issue out any court process in the absence of the record

of proceedings. The notice of appeal was only accepted on 28 February 2014 after the record had been located. He therefore submitted that the delay in the service of the notice of appeal to the Labour Court was occasioned by circumstances beyond the control of the applicant.

It was his submission that since no prejudice had been occasioned to the respondent by his failure to comply with the rules of the court the application should be granted.

It however seems to me that the applicant has filed a wrong application. Where a matter has been struck off the roll because it has failed to comply with the rules of court, one cannot simply apply for reinstatement of the appeal as such an appeal is a nullity. This position has been stated in a number of decisions of this Court. The leading case in this regard is the case of *Jensen v Acavalos* 1993 (1) ZLR 216 at 220 B (S) where KORSAH JA stated as follows at :

“... a notice of appeal which does not comply with the rules is fatally defective and invalid. That is to say it is a nullity. It is not only bad but incurably bad, and, unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice of appeal to be filed, it must be struck off the roll....”

INTERPRETATION OF PRACTICE DIRECTION 3/13

It was the applicant’s contention that the application was being brought in terms of paragraph 5 of Practice Direction 3 of 2013. In my view it is necessary for the sake of completeness that I cite the relevant portion of the practice direction which relates to matters which have been struck off the roll:

“Struck off the roll

3. The term shall be used to effectively dispose of matters which are fatally defective and should not have been enrolled in that form in the first place.
4. In accordance with the decision in *Matanhire v BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLA 147 (S) and *S v Ncube* 1990 (2) ZLR 303 (SC), if a

Court issues an order that a matter is struck off the roll, the effect is that such a matter is no longer before the Court.

5. Where a matter has been struck off the roll for failure by a party to abide by the Rules of the Court, the party will have thirty (30) days within which to rectify the defect, failing which the matter will be deemed to have been abandoned.

Provided that a judge may on application and for good cause shown, reinstate the matter, on such terms as he deems fit.” (Underlining is my own)

It seems to me that a proper interpretation of para 5 of the Practice Direction 3/13 is that the applicant must, within thirty days, rectify the defect by applying for condonation for the late noting of appeal and an extension of time within which he should comply with the rules. He may not do so after the window period which he has been given to rectify the defect as the matter will be deemed to have been abandoned. It seems to me that the restriction on the period within which to rectify the defect was included in the practice directive in order to manage cases which would have been struck off the roll so that the registry would not be cluttered with “dead” files. Thus a litigant who wished to pursue his matter was granted a limited time within which to apply to cure the defect failing which the matter would be deemed abandoned.

In this case the applicant correctly filed an application within the prescribed period of thirty days. However an application for reinstatement is not the appropriate remedy.

This position is confirmed by the case of *Hattingh v Pienaar* 1977 (2) SA 182 (0) where the court had occasion to deal with a defective compliance of the rules, such as in the present matter. The court held as follows:

“... a fatally defective compliance with the rules regarding the filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule.”

I respectfully agree with this view.

The appeal, having been found to be fatally defective, cannot be reinstated after being struck off the roll. The applicant’s remedy to rectify the defect is to apply for condonation and extension of time within which to file a fresh notice of appeal in terms of rule 6 of the Supreme Court (Miscellaneous Appeals and References) Rules. He should do so within the period of thirty days provided for in the practice directive.

DISPOSITION

In the result, the matter is struck off the roll with no order as to costs.

Muzangaza, Mandaza & Tomana, applicant’s legal practitioners

Messrs Gill, Godlonton & Gerrans, respondent’s legal practitioners