REPORTABLE (111)

CITY OF HARARE
v
SAUL KENNETH MANYASHA

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, CHITAKUNYE JA & MWAYERA JA
HARARE: 30 MARCH 2023 & 27 OCTOBER, 2023

D. Kanokanga for the applicant

P. Kawonde for the respondent

MAVANGIRA JA:

1. This is a court application in terms of r 40 of the Supreme Court Rules, 2018 (the Rules). In the papers that it presented to the court, the applicant seeks an order in the following terms:

> "1. The application for leave to lead further evidence on appeal be and is hereby granted.
> 2. The applicant shall lead the further evidence set out in its founding affidavit used in support of this application.
> 3. The respondent shall bear the costs of this application should he oppose same."

During the course of the proceedings, the applicant applied for an amendment of para 2 as will appear in para 17 hereunder.

The application is opposed.

FACTUAL BACKGROUND

2. The applicant and the respondent entered into a lease agreement in September 1993 in respect of one of the applicant's properties, namely, Number 4 Hampshire Road Eastlea, Harare. On 13 March 2007, the applicant wrote a notice of cancellation of the lease, in terms of clause 2 of the lease agreement. It gave the respondent until 30 April, 2007, to vacate the property.

3. On 17 June 2008, the applicant instituted eviction proceedings in the High Court (the court a *quo*) under HC 3174/08. The applicant sought the respondent's eviction on the basis that he no longer had a legal right to remain in occupation of the leased property.

4. The respondent contested the eviction proceedings. He averred that it was an implied term of the lease agreement that the applicant would sell the said property to him in due course. He averred that in 1997 the applicant offered to sell the property to him and did in fact sell it on a rent to buy basis. He contended that the terms of the lease agreement were thus varied and that he now had "right, interest and title" in the property. It was thus no longer tenable to rely on the original clause 2 of the lease agreement. He further averred that he had "every right to remain in the property in question."

5. On 4 November 2008, the applicant filed a notice of amendment to its summary of evidence to introduce the following:

> "On 1 March 1999, the plaintiff wrote to the defendant advising him that Council intended to sell its tied houses to sitting tenants. The plaintiff invited the defendant for an interview. On 25 August 1999, the plaintiff wrote to the defendant advising him that he had failed to qualify for the purchase of the house as he owned another residential property in Harare. The defendant responded to this advice by proving to the satisfaction of the plaintiff that he did not own another residential property in Harare. On the 24 September 1999, the plaintiff offered to sell the property in question to the defendant for $1 685 200.00. The said offer which was in writing was valid for three months. The defendant neither accepted the offer nor paid the purchase price. Accordingly, the offer lapsed."

6. On the same date, the respondent also lodged a counter-claim seeking an order in the following terms:

> "(a) declaring that the agreement of lease to buy was entered into between plaintiff and defendant.
>
> (b) That within 10 days of service of this order upon it, the plaintiff provide to defendant the balance of the amount due if any of the purchase price.
>
> (c) That upon payment of such amount and within 10 days thereof, the plaintiff shall do all such things as are necessary to ensure transfer of the property in question into the defendant's name.
>
> (d) Should plaintiff fail to comply with the terms of paragraph (b) and (c) above, the deputy sheriff be and is hereby ordered to do all such things as are necessary to cause such transfer into the defendant's name.
>
> (e) The plaintiff shall pay the costs of this suit."

On a later date but during the same month, the respondent issued summons and a declaration under HC 6675/08 claiming the same relief quoted in para 6 above. He averred, *inter alia*, that after a process of valuation of the leased property, the purchase price was fixed at the sum of $675 000.00. He averred that he commenced paying the said amount to the respondent at the rate of $6 200.00 per month and that he had since completed payment of the purchase price. He contended that in breach of the agreement the applicant had purported to cancel the lease to buy and was seeking to evict him from the property.

7. The two matters were consolidated under HC 3174/08.

8. The court *a quo* dismissed the eviction suit and granted the respondent's claim for transfer. After one or two false starts, the applicant filed an appeal with this court. Subsequently, the

applicant filed this application for leave to lead further evidence on appeal. The appeal and the application were set down for hearing on the same date. Judgment in the application, which had of necessity to be heard and disposed of first, was reserved, thereby suspending the hearing of the appeal. The determination that will be made in this application, so Mr *Kanokanga*, for the applicant, submitted, would have an important impact on the appeal, more particularly the first two grounds thereof.

9. The applicant's contentions in support of its application are captured in the following paras of the applicant's acting town clerk's affidavit:

> "4. I outline hereunder the further evidence that is sought to be led on appeal.
>
> 4.1 The property which the respondent is occupying and alleges to have bought from the applicant, namely No. 4 Hampshire Drive, Eastlea, is an institutional property.
>
> 4.2 The property in question is a public asset which is owned by the City of Harare rate payers through the applicant.
>
> 4.3 When the applicant is disposing of its disposable assets, it is mandated to follow the provisions of section 152 (2) of the Urban Councils Act [*Chapter 29; 15*].
>
> 4.4 Before selling any institutional immovable property the applicant must in terms of the aforesaid provision, give notice of its intention to do so, describing the land concerned and stating the object, terms and conditions of the proposed sale.
>
> 4.5 The aforesaid notice must be published in two issues of a newspaper and posted at the office of the council.
>
> 4.6 The notice must advise the public that a copy of the proposal is open for inspection during office hours at the office of the council for a period of twenty-one days from the date of the last publication of the notice in a newspaper and that any person who objects to the proposal may lodge his objection to the town clerk within the period of twenty-one days.
>
> 4.7 The aforesaid provision seeks to ensure that there is transparency in the disposal of immovable properties owned by council as they are public assets.

4.8 The aforesaid notice is published pursuant to a council resolution
4.9 Section 152 (2) of the Urban Councils Act [*Chapter 29:15*] does not seem to have been complied with in this matter.

4.10 As the provision is mandatory, failure to comply with same renders any purported sale null and void for want of compliance with a mandatory provision of the law.

4.11 Whatever contracts the applicant enters into are entered into by its council. This is in terms of section 209 (1) of the Urban Councils Act [*Chapter 29:15*].

4.12 A council is made up of councilors.

4.13 In other words, council officials have no power to enter into contracts on behalf of the applicant. Only applicant's council can do that.

4.14 The disposal of council owned immovable assets cannot be done orally. There must be written council resolutions authorizing the sale. If authorized, the sale agreement must be reduced to writing and signed by council. This does not seem to have been done in this case. Thus there was no compliance with section 209 (1) of the Urban Councils Act [*Chapter 29:15*].

5. I am advised that during the trial the parties and the trial court overlooked the fact that the immovable property in question is an institutional property whose disposal is governed by the aforesaid provisions of the Urban Councils Act.

6. The further evidence sought to be led on appeal is credible.

7. The further evidence has an important influence on the result of the case. It is materially relevant for the future of this case.

8. There has not been any change in circumstances since the trial. The fresh evidence will therefore not prejudice the respondent.

9. The evidence in question could have with reasonable diligence, have been obtained in time for the trial. (*sic*)

10. The applicant can call a council official to give the said evidence orally."

10. The applicant's counsel's affidavit also filed in support of this application sheds further light on the matter as will appear from a reading of the following pertinent paras:

> "14. The further evidence that needs to be led on appeal in SC 596/22 relates to whether or not the provisions of section 152 (2) and section 209 (1) of the Urban Councils Act [*Chapter 29:15*] were complied with.
>
> 15. The aforesaid evidence affects the matters in issue in that:
> 15.1 The legal provisions in question are mandatory.
> 15.2. The sale of immovable property owned by the applicant is a matter of public interest as the properties are owned by applicant's rate payers.
> 15.3. The evidence goes to the root of whether or not the applicant sold and the respondent bought from the applicant the property in question.
> 15.4. The evidence is materially relevant to the outcome of the case."

11. In opposing the application, the respondent filed an opposing affidavit and averred, *inter alia* that by bringing this application the applicant is seeking to surreptitiously amend its papers in the court *a quo* after judgment has been passed. He averred that in the process, the applicant seeks to introduce a new cause of action through the back door. The purported new cause of action, as phrased by the respondent, is to the effect:

> "Whilst there may have been a sale of the property by the applicant, the sale was void by reason of lack of authority required in terms of the Urban Councils Act [*Chapter 29:15*]

The respondent also took issue with the perceived amendment averring that it was improper as it was being made 13 years after judgment was made in the matter and some 25 years after the sale. It was contended that as the applicant has always related to these sales of its immovable properties, there was no good reason why the issue meant to be covered by the craved evidence was not raised *a quo*.

12. He further contended that the new cause of action, if allowed, will be highly prejudicial to his case. Furthermore, that the applicant cannot rely on the said cause of action because it

has prescribed and if allowed, would be argued without him being heard as that would disable him from raising the defence of prescription.

13. The respondent also averred that "the evidence sought to be introduced is back door attempt to cure the deformities in the applicant's appeal. Applicant now realizes that on the evidence on record, a sale was clearly established. To counteract this, it now seeks new evidence and a fresh cause of action to vitiate the proceedings of the court *a quo*." *(sic)*.

14. The respondent further contended that the application is in effect urging the Supreme Court to re-litigate the matter and that this is not what is contemplated in applications of this nature.

THE APPLICANT'S SUBMISSIONS BEFORE THIS COURT

15. Mr *Kanokanga*, for the applicant, submitted that once it is accepted that the dispute in the court *a quo* related to the disposal of an institutional property, it is inevitable that the provisions of ss 152 (2) and 209 (1) of the Urban Councils Act come into play. He also submitted that it is critical that the question be asked whether those provisions were complied with because anything done contrary to the law is a nullity. The issue, he submitted, can only be related to through the adduction of further evidence. Furthermore, that it is this court's obligation to correct errors made in and by inferior courts.

16. Counsel submitted that both parties had in their extensive heads of argument correctly cited the applicable law as enunciated in case authorities. However, the said authorities are different from the case before the court because they do not deal with statutorily required evidence. He had been unable to find any authority that addresses the issue before the court. It was his submission that this court has this unique opportunity to pronounce itself and

develop our jurisprudence on what should happen in a case like this where there are mandatory statutory provisions which have not been heeded. Counsel argued that the requirements set out in the cited cases including *Warren-Codrington v Forsyth Trust (Pvt) Ltd* 2000 (2) ZLR 377 (SC) at 380-381 should be applied *in casu*, *mutatis mutandis*. In this regard, he submitted that in that process, the first requirement therein, that the evidence must not with reasonable diligence have been obtainable for use at the trial, would be overridden by a statutory provision which lays out the required evidence, in this case being s 152 (2) of the Act. In his submission, the inquiry would then be: "Is this evidence statutorily required?" if the answer is "Yes", then it must be led as failure to do so would result in a contravention of the statute."

17. Mr *Kanokanga* commented on the respondent's averment in his opposing affidavit that if this application were to be allowed, that would be to effectively introduce a new cause of action and that such new cause of action would, consequently, be determined without him being heard. His comment was in the following words:

> "Whilst there may have been a sale of the property by the applicant, the said sale was void by reason of lack of authority required in terms of the Urban Council's Act [*Chapter 29:15*]."

He submitted that in its response in the answering affidavit the applicant had aptly responded that it would not be averse to this court remitting the matter to the court *a quo* for adduction of the further evidence thereby enabling the respondent to test the evidence through cross examination. In that light, he submitted that the applicant was thus seeking an amendment of para 2 of its Draft Order (captured in para 1 above) so that in addition to what is set out therein, para 2 would, instead, read:

> "HC 3174/2008 is remitted to the court *a quo* for the abduction of the further evidence set out in the applicant's founding affidavit in support of this application."

18. Counsel submitted that the situation arising in this application is unique and different from what is dealt with in other cases where requirements for adduction of further evidence on appeal have been set out because the disposal of municipal immovable properties is governed by statute, whereas the sale of ordinary immovable properties is not. In sales for ordinary houses, the parties agree and fix the purchase price, but with municipal property there must be transparency and the purchase price only becomes fixed or final when members of the public have seen the advertisement in terms of s 152 (2) of the Act and accepted the price. A non-compliant sale is unlawful and unenforceable. In support of these submissions, he cited, inter alia, *Independence Housing Co-operative v City of Harare* HH 253/2014 and *Thyolo (Pvt) Ltd v City of Harare & Ors*, 2015 ZWHHC 811.

19. In answer to the question whether the applicant was not using the "backdoor approach" to amend its case and thereby depriving the respondent of the opportunity to raise the defence of prescription, counsel submitted that as the applicant's case in the proceedings *a quo* was for the eviction of the respondent, there was no scope for the raising of such defence. He also submitted that in the court *a quo* there was an omission on the part of either party, to raise the issue of compliance with statutory requirements. Furthermore, that the court *a quo* could have itself raised the issue as there was no hindrance for it to do so. However, he made no submission as to why the issue was not raised in the applicant's opposition to the respondent's claim for transfer.

20. Mr *Kanokanga* also highlighted that the Acting Town Clerk indicated in his affidavit that there is no evidence that ss 152 (2) and 209 (1) of the Act had been complied with. He submitted that the respondent may want to test that evidence by cross examination. He submitted that the Acting Town Clerk's averments that there was no compliance with statutory provisions ought to be viewed in the light of the fact that Council is the custodian of the documents or file relating to the property in issue. He also highlighted that in the papers filed by the respondent in this appeal, the respondent indicated that he was going to request the file relating to this property from the City Council.

THE RESPONDENT'S SUBMISSIONS BEFORE THIS COURT

21. Mr. *Kawonde,* for the respondent, vehemently opposed the application and submitted as follows. The court *a quo* was bound by the pleadings placed before it by the parties. The issue of the applicability of ss 152 (2) and 209 (1) of the Act did not arise. No further evidence needs to be led as it would not affect the issue at hand as required by r 40. The issues that were before the court *a quo,* were defined in the parties' joint pre-trial conference minute as:

> "**ISSUES**
> (a) Whether or not there was an agreement of sale in respect of the property in dispute?
> (b) Whether the plaintiff is entitled to receive transfer of the property into his name?
> (c) Whether defendant is entitled to evict the plaintiff?"

Thus, without amendment of the pleadings in the court *a quo*, the issue of adducing further evidence *a quo* cannot arise as this was not an issue that the court *a quo* had to grapple with.

22. He submitted that the issue ought to have arisen by way of rebuttal of the respondent's assertions. The question of *onus* would then have been fixed or determined by the pleadings. On this aspect, counsel referred to *Pillay v Krishna* 1946 AD 946. He submitted that assuming that the matter would have arisen, the *onus* was on the applicant because it is the party which needs the evidence. The applicant would have been urging the court *a quo* that the so-called sale was invalid as statutory requirements were not complied with. He submitted that the requirements for the success of an application of this nature have not been met and that no explanation has been given for the failure to lead the evidence timeously as these provisions have always been available to the applicant.

23. Counsel further submitted that without an amendment to the pleadings in the court *a quo*, the evidence sought to be led would be irrelevant to the pleadings and the court *a quo* would be "participating in a misdirection." Furthermore, there would be enormous prejudice to the respondent occasioned by this backdoor amendment. In addition, the cited provisions do not require a court dealing with a matter to be satisfied that they have been complied with. It is the applicant's role to raise them.

24. Mr *Kawonde* conceded that the cited provisions of the Act are mandatory. He submitted that the success of the application would lead to a completely new trial that would be interrogating whether the provisions of the Act were taken into account. This would entail the amendment of pleadings by both parties. This is not what is contemplated by the rules or requirements for leading further evidence on appeal. He urged the court to dismiss the application.

THE LAW AND ITS APPLICATION

25. Rule 40 provides:

> "An application to lead further evidence on appeal shall be accompanied by that evidence in the form of an affidavit and also by an affidavit, or a statement from counsel, showing why the evidence was not led at the trial, together with a copy of the judgment appealed from and a statement indicating in what manner it is alleged the evidence sought to be adduced affects the matters at issue."

In *Bendezi Sugar Farm (Pvt) Ltd v Mhene Estates (Pvt) Ltd* 1995 (1) ZLR 135 (S), the following was enunciated at 142 E-H.

> "The principles upon which this court allows the adduction of further evidence were set out in *Farmers Co-op Ltd v Borders Syndicate (Pvt) Ltd* 1961 R & N 28 (FS). They have been applied many times since, most recently in *Beval Trading (Pvt) Ltd v Voest-Alpine Intertrading GmbH* S-149-94 (not reported).
>
> There are four criteria:
> 1. The evidence must not with reasonable diligence have been obtainable for use at the trial;
> 2. The evidence must be such as is presumably to be believed or is apparently credible;
> 3. The evidence must be such as would probably have an important influence on the result of the case, although it need not be decisive;
> 4. Conditions since the trial must not have so changed that the fresh evidence will prejudice the opposite party,"

26. It was also stated in *ZOU v Magaramombe & Anor* SC 5/16 at p 6 of the judgment:

> "It is clear from the first requirement for adduction of further evidence on appeal that the applicant must show that the evidence sought to be adduced was available at the time the issue in respect to which it would have been led was determined. The evidence should not have been obtainable with reasonable diligence. Evidence which is not in existence at the time an issue is determined is not further evidence which was available but not obtainable with reasonable diligence. The other requirements follow from a finding that the evidence sought to be adduced on appeal was available at the time the issue in respect to which it is sought to be led was determined. Once it is found that the evidence sought to be adduced on appeal was not in existence at the time the issue in respect to which it is sought to be led was determined there is no need to consider the other requirements of the test for adduction of further evidence on appeal."

27. In *casu*, the unavoidable and real probability is that the evidence now sought to be adduced was in existence and available at the time the court *a quo* heard the matter. Common sense would also tend to indicate that the evidence would have been obtainable with reasonable diligence. However, the issue of the compliance or lack thereof with the statutory provisions referred to, in respect to which it is sought to lead further evidence, was not placed or ventilated before the court *a quo.* On a cursory glance, the matter may appear not to fit into the parameters so far established by the authorities for guidance in applications of this nature. However, what is also unavoidable is the observation that the evidence sought to be adduced relates to the question of the compliance or lack thereof, with the peremptory statutory requirements that must be adhered to for the sale of any immovable property belonging to the applicant to be valid. In other words, it relates to the legality of the agreement of sale that eventually birthed the order that the applicant now seeks to appeal against in the concomitant appeal. Without such adherence to the law, the legality of the sale agreement comes into issue. The question whether there was a true sale of the applicant's immovable property arises.

28. The evidence sought to be adduced will have to be tested in the usual manner, for the court *a quo* to be able to make a determination that accords with the law. The parties will thereafter be in a position to assess their respective positions and decide how to navigate the matter. This court cannot possibly be found to consciously turn a blind eye to the issue so raised, bearing in mind that it impacts on the legality and or validity of the sale agreement on which the judgment obtained by the respondent in the court *a quo* was premised.

26. S. 152 (2) of the Act provides as follows:

> "**152 Alienation of council land and reservation of land for State purposes**
>
> (1) Before selling, exchanging, leasing, donating or otherwise disposing of or permitting the use of any land owned by it the council shall, by notice published in two issues of a newspaper and posted at the office of the council, give notice—
>
> (*a*) Of its intention to do so, describing the land concerned and stating the object, terms and conditions of the proposed sale, exchange, lease, donation, disposition or grant of permission of use; and
>
> (*b*) That a copy of the proposal is open for inspection during office hours at the office of the council for a period of twenty-one days from the date of the last publication of the notice in a newspaper; and
>
> (*c*) That any person who objects to the proposal may lodge his objection with the town clerk within the period of twenty-one days referred to in paragraph (*b*)."

27. S. 209 (1) of the Act further provides:

> "**209 Contracts**
> (2) A council may enter into contracts for any purpose authorized by law and may require and take security from any person for the due performance of his obligations under any such contract."

29. The question naturally immediately rears its head as to why the applicant should ostensibly seek to benefit from its own wrongdoing, if it can be called that, or its oversight, at the expense and to the potential prejudice of the presumably innocent respondent. The answer to these questions would, it seems to me, be answered by the fact that what the applicant raises in this application is in fact a point of law. The point of law is of such a nature that if the said evidence is led, it is likely to have an important impact on the matter and possibly dispose of it. It is also a point of law of such a nature that the court could not possibly turn a blind eye to as doing so would, on the face of it, be tantamount to allowing the possible and probable contravention of the law. A court has no such power or discretion. The

authorities establish that it is trite that the court has no such discretion. At this juncture I might point out that Mr *Kawonde* accepted that the statutory provisions raised by the applicant are mandatory. The respondent's contention however, is, inter alia, that they are not relevant to the appeal before this court as they were never raised *a quo*.

30. As this Court has no discretion to turn a blind eye to a possible and probable contravention of the law, the question that now needs to be determined is whether this is a proper case to grant to the applicant the relief that it seeks. It is undeniable, in my view, that with regard to the first criterion laid out in the *Farmers Co-op* case (*supra*), the evidence now sought to be adduced would, with reasonable diligence, have been obtainable for use at the trial. With regard to the second listed criterion, the evidence if successfully adduced, would, by its nature, be "presumably to be believed" or "apparently credible." On the third criterion, the evidence would also, if successfully adduced, have an important influence on the result of the case. The fourth criterion raises the issue of there being no prejudice to the respondent. It is my view, however, that because the evidence sought to be adduced relates to possible contravention or noncompliance with mandatory statutory provisions, the issue of any potential prejudice is eclipsed or overshadowed by the nature of the evidence sought to be adduced, as related to above. This, in my view, affects both the first and fourth criteria.

31. For the reasons set out in para 30 above, I find merit in Mr *Kanokanga's* submission that as the property in question is an institutional property whose disposal is governed by mandatory provisions of the Urban Councils Act, the first requirement that the evidence must not with reasonable diligence have been obtainable for use at the trial, is overridden by the statutory provision, s 152 (2) of the said Act. In terms thereof certain procedures

ought to have been complied with for any sale to be valid and in this case clothe with legality any judgment that has the effect of conferring on the respondent the rights of an owner of institutional property.

32. There is thus merit in the relief, as amended, sought by the applicant. The amendment sought to the Draft Order will give both parties the opportunity to ventilate and or test the fresh evidence. Such adduction will properly be conducted before the court *a quo*.

The said approach finds support in the authorities from this court. In this regard, I refer to *inter alia, Warren-Codrington v Forsyth Trust* (*supra)* where McNALLY JA stated the following principle:

> "When a request is made to lead further evidence on appeal this court will normally, unless the evidence is simple, straightforward and uncontested, remit the matter to the High Court so that the witness can be tested by cross-examination. But we will only do so where certain criteria are satisfied."

Similarly, in *S v de Jager* [1965] 2 All SA 490 (A); 1965 (2) SA 612 (A) at 613C- D, although dealing with an appeal in a criminal matter, the principle as stated in the following terms by HOLMES JA, applies with equal force in *casu*:

> "This Court, can, in a proper case, hear evidence on appeal; … but the usual course, if a sufficient case has been made out, is to set aside the conviction and sentence and send the case back for the hearing of the further evidence, as was done, in …
> However, it is well settled that it is only in an exceptional case that the Court will adopt either of the foregoing courses. It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified. …"

Notably, *S v de Jager* was followed by this Court in *Kalevala (Pvt) Ltd v Minister of Lands, Agriculture and Rural Resettlement* S-52-04.

33. The case of *Zimbabwe Homeless People's Federation & Ors v Minister of Local Government & National Housing & Ors* SC 94/20 may not be fully applicable in the consideration of applications as the one in *casu*. However, the court in that case found it prudent to do so and did *mero motu* remit the matter before it to the court *a quo* for adducement of further evidence. PATEL JA (as he was then) stated at p 42 of the judgment:

> "These are matters which, as I have already stated, should have been thoroughly and meaningfully addressed *a quo* but remain unresolved at this stage. In the event, it seems to me that the most judicious way forward is to remit this matter to the court *a quo* to enable it to fully adjudicate and definitively determine these outstanding issues. In this respect, it will be necessary for all the parties to present the requisite additional evidence in such form and manner as the court *a quo* may direct as being best suited to achieve that purpose."

34. For the reasons already debated above, this application will be allowed in order to enable the applicant to adduce the further evidence related to. The matter will be remitted to the court *a quo* for it to consider the said evidence while also giving the respondent the opportunity to test the same by way of cross examination and or other manner as the court may direct, in order for it to determine the matter accordingly.

35. For the avoidance of doubt, this matter will be remitted to the court *a quo* for the singular purpose of the court hearing the necessary evidence and thereafter determining the question whether there was compliance with s 152 (2) and/or s 209 (1) of the Urban Councils Act. That determination will be relevant in the determination by this court of the appeal in respect of which this application was made. The said appeal, SC 685/22 was postponed *sine die* pending the determination of this application. It remains so suspended. By extension, the determination of this application will, for that specific purpose, be consummated by the determination that the court *a quo* will make upon this remittal. In

other words, the appeal will only be eligible for re-enrolment before this court after the court *a quo*'s determination is made.

36. With regard to costs, it seems that this is a proper case for the applicant to bear the respondent's costs because it appears that this application has largely been necessitated by the lack of diligence on the applicant's part.

37. It is accordingly ordered as follows:

    1. The application to lead further evidence succeeds.
    2. HC 3174/2008 is remitted to the court *a quo* for the adduction of the further evidence set out in the applicant's founding affidavit in support of this application.
    3. The applicant shall bear the respondent's costs.

CHITAKUNYE JA : I agree

MWAYERA JA : I agree

Kanokanga & Partners, applicant's legal practitioners

Kawonde Legal Services, respondent's legal practitioners