SPARE SITHOLE t/a ERIC 9 MINE

Versus

NOMUHLE MCLAREN

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & KABASA JJ
BULAWAYO 20 & 30 SEPTEMBER 2021

Civil Appeal

S.T. Farai with A.S. Madzima for the appellant
Advocate L. Nkomo, for the respondent

KABASA J: This is an appeal against a determination made by the Provincial Mining Director for Matebeleland South. The determination filed of record has 15th June 2020 as the date of determination and T. Makaza as the official who made such determination. The notice of appeal however has a different date as the date of the determination and a different name of the official who is said to have made that determination.

The parties to the dispute as reflected on the determination are New Barrier Mines (Pvt) Ltd Annedale 12 and Spare Sithole: Eric 9. The dispute related to encroachment by Spare Sithole into New Barrier Mine Annedale 12. The determination revealed that following a field visit by the Provincial Mining Director, the disputing parties, the Inspector of Mines and a geologist, it was observed that the boundaries of the claims for Annedale 12 and Eric 9 were overlapping. Annedale 12 claim was registered on 2nd November 1991 and Eric 9 on the 11th April 2003. The Provincial Mining Director proceeded to conclude that Annedale 12 was pegged earlier than Eric 9 and in terms of section 177 of the Mines and Minerals Act Chapter 21:05 Eric 9 claim was subordinated to Annedale 12. Spare Sithole was then ordered to adjust the boundaries of Eric 9 outside Annedale 12 boundaries failure which the Provincial Mining Director's office would consider recommending cancellation of certificate of registration for Eric 9.

Seemingly aggrieved with this determination, the appellant appealed on the following grounds:

1. The court *a quo* erred at law when it entertained a dispute brought by a claimant who had no legal standing.
2. The court *a quo* at law, at any rate, *(sic)* when it eventually passed a determination in favour of a party who was not a party to the proceedings.
3. The court *a quo* erred both at law and in facts in passing a determination which is not supported by evidence.
4. The court *a quo* erred at law in determining a dispute which had prescribed in terms of the relevant legislation.
5. The court *a quo* erred at law in passing a determination which has the effect of giving a private party perpetual rights on state land.
6. The court *a quo* erred at law when it heavily violated the appellant's right to be heard and make adequate representations before a determination is made.

I used the word 'seemingly' in reference to the notice of appeal for reasons which will become clear later on in this judgment.

In response to the appeal, the respondent raised four points *in limine*. These are:

1. No valid appeal was instituted before the court because;
   (a) The appeal was filed out of time.
   (b) The appeal is not directed at the substantive determination of the tribunal *a quo*.
   (c) The appeal is not directed at the other party in the tribunal *a quo*.
   (d) The appeal does not state the correct date of the determination a quo and the officer who gave it.

This judgment is concerned with these points *in limine*. I propose to consider each one in turn.

a) Was the appeal filed out of time

In terms of rule 5 of the High Court (Miscellaneous Appeals and Reviews) Rules 1975, "an appeal shall be delivered and filed in accordance with the provisions of rule 4 within fifteen days of the decision appealed against being given …"

The record of appeal which was certified as correct by one K. Mhlangeni on behalf of the Mining Director, Matabeleland South as a true reflection of

the proceedings and equally certified to be so by both parties has 15th June 2020 as the date of the determination.

In paragraph 8.2 of the heads of argument counsel for the appellant acknowledged that the determination by the court *a quo* was made on 15th June 2020. This was the basis for the grievance raised in the sixth ground of appeal which is to the effect that the determination of 20 June 2020 was made before the appellant had made adequate representations. It was only in supplementary heads of argument that counsel sought to suggest that the record was not a correct reflection of what transpired.

The point however is that this is the record before the court and which all parties duly certified as correct. There is no other determination on record except the 15th June 2020 one.

That said, the appeal ought to have been filed within 15 days of that determination. There is no dispute that it was filed outside the 15 days. No application for condonation was sought and granted.

In *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S) GUBBAY CJ made the point that condonation cannot be granted *mero motu*.

> "For it is the making of the application that triggers the discretion to extend the time."

It matters not that the delay was by a few days. The court would have been inclined to grant condonation given the slight delay but such condonation could only be granted upon application. Such application need not have been a formal written application to trigger the court's discretion to grant condonation. Counsel did not seek such condonation ostensibly because the date of the determination was incorrect. Such an argument was not available to counsel given the fact that the record was certified as correct as already alluded to. In any event there is only one determination which resolved the parties' dispute and could therefore be appealed against, it is the decision of 20 June 2020.

In the *Forestry Commission* case *(supra)* GUBBAY CJ cited, with approval, the case of *Matsambire v Gweru City Council* S-183-95 where the court held that where proceedings by way of review were not instituted within the specified eight week period and condonation was not sought, the matter was not properly before the court.

I would say the same applies with equal force *in casu*. The fact that this is an appeal and not a review as was the case in the Matsambire case(supra) does not change the complexion of this matter as regards the delay in filing the appeal and the consequences of such.

The first point *in limine* was therefore properly taken and is accordingly upheld.

I move on to the second point *in limine*.

b) **Is the appeal directed at the substantive determination of the tribunal *a quo?***

As already alluded to, the determination on record was by T. Makaza. There is no determination by K. Mhlangeni.

Rule 4 of the High Court (Miscellaneous Appeals and Review) Rules, 1975 states that:

> "4 (1) An appeal or review shall be instituted by means of a notice directed and delivered by the appellant to the presiding officer of the tribunal or the officer whose decision or proceedings are in question, and to all other parties affected."

The presiding officer who made the determination is T. Makaza but there is no reference to this official as required by the rules of court. It therefore follows that the appeal is also not directed at the substantive determination of the court *a quo*. There is no determination of 3rd July 2020 by K. Mhlangeni. The notice therefore attacks a non-existent determination and falls foul of the provisions of the rules.

In *Passmore Matanhire* v *B P Shell Marketing Services (Pvt) Ltd* SC-113-04 MALABA JA (as he then was) had this to say;

> "This judgment has been written for purposes of drawing the attention of legal practitioners to the fact that all the matters required by the rules of court to be stated in a valid notice of appeal are of equal importance so that failure to state one of them renders the notice of appeal invalid." See also; *Copier Kings (Pvt) Ltd* v *Dumisani Msindazi* SC-52-17)

Rules of court serve a purpose, otherwise why have them? Whilst a slavish adherence to rules for their sake, may not always be justified, it is inescapable that;

> "The rules are made for the proper running of the court. Failure to comply with its mandatory provisions will render an appeal a nullity. (*John Chikura N.O. and Another* v *Al Sham's Global BVI Ltd* SC-17-17).

This point *in limine* equally has merit and it too is upheld.

I move on to the third point, which in essence still speaks to the non-adherence to the rules of court.

(c) **Is the appeal directed to the other party in the tribunal *a quo?***

The record filed by the parties gives the other party's name as New Barrier Mines P/L c/o Nomuhle Mclaren, Annedale 12 Mine. The notice of appeal is directed at Nobuhle Mclaren in her personal capacity. It follows therefore that the notice falls foul of the provisions of rule 4.

Counsel for the respondent referred the court to the case of *Econet Wireless (Pvt) Ltd* v *Trustco Mobile (Pty) Ltd and Anor* 2013 (2) ZLR 309 (S) where the Supreme Court said;

> "A notice of appeal must comply with the mandatory provisions of the rules, if it does not, it is a nullity and cannot be condoned or amended."

Mr Farai's contention that the court ought not to place reliance on the certified record as it does not tell the truth of what occurred at the tribunal *a quo* does not find favour with the court for the reasons already alluded to. The record was certified as correct by all the parties and the court has no other record to look to but that which the parties agreed is reflective of the proceedings being brought on appeal.

This point *in limine*, like the others before it also has merit and is accordingly upheld.

I move on to the last point *in limine*. I must point out that all these points are subsumed under the overarching point which speaks to the invalidity of the notice of appeal.

d) Does the notice of appeal have the correct date of the determination and the officer who gave it?

This point has already been covered and dealt with. The point was made that the date of the determination as reflected on the notice of appeal is not as per the substantive determination by T. Makaza.

I do not intend to repeat the observations I have already made. Suffice to say the point is validly taken.

The effect of the foregoing renders the notice of appeal defective and therefore a nullity. There is therefore no appeal before the court.

Having regard to *Mr Farai's* reasons for not accepting the points *in limine* raised by the respondent, I am unable to say the appellant's conduct is deserving of censure and mulct him with punitive costs, as prayed for by the respondent. Costs being in the discretion of the court, I am not persuaded that this is one case deserving of censure.

In the result, I make the following order:

1. The points *in limine* be and are hereby upheld.
2. The appeal is accordingly struck off the roll, with costs.

Makonese J …… I agree

Messrs Malinga & Mpofu Legal Practitioners, appellant's legal practitioners
Messrs Farai & Associates Law Chambers, respondent's legal practitioners