STANLEY KASUKUWERE
and
BATSIRAI MARTHA BAKARE
versus
OLIVER MUTYAMBIZI
and
MIDROC HOLDINGS (Pvt) LTD

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
HARARE, 6 September, 12 October 2022

Opposed Application

Mr *T Sengwayo,* for the applicant
Mr *A Chimhofu,* for the 1st and 2nd respondents

BACHI-MZAWAZI J: This is an application for leave to appeal against the decision of this court of 7 July 2021 in case HC 4469/20, judgment HH 352/21.

After hearing arguments from both parties I dismissed the application *ex tempore*.

Dissatisfied with the outcome, the applicants requested for reasons for judgment. The reasons are detailed herein. These are best appreciated within the context of a brief background of the facts.

Applicants filed two applications, HC 1230/19 and HC 3457/19, with this court which they did not persue until the respondent filed a chamber application for their dismissal for want of prosecution under case HC 4469/20. On 19 March 2021, the day of the hearing of the initial chamber application, applicants persuaded the court that they be given more time to set down their two matters.

The presiding judicial officer granted their request and by consent from the other party directed applicants to re-set the matters HC 1230/19 and HC 345/19 within the next 14 days from the date of the directive. A further term of the court's directive was to the effect that the respondents were to reset their application for dismissal for want of prosecution, in the event the applicants failed to comply with the 14 day set down directive.

On 2 July 2021, the application for dismissal was re-set by the respondent, being apparent that the applicants had not set its two matters in contention, within the time frame stipulated by the court's directive mentioned above.

It is undisputed that, the notice of the above set down was served to the applicants. They in turn, on 29 June 2021 filed notices of withdrawal of the matters which where the subject of the matter which had been set down for 2 July 2021. Apparently, this was three days before the hearing date of case HC 4469/20.

However, on the set down date, the trial court went on to disregard the notice of withdrawals and dismissed both the matters.

The reasoning of the court is that, the two matters, purportedly withdrawn by the notices of withdrawal, where not severable from the application for dismissal for want of prosecution. This was so, for the fact that there would not have been an application for dismissal, if there was no application to dismiss. On that basis the court concluded that, the notice of withdrawal could not withdraw a set down matter, without the consent of the other party or leave of the court to do so. The court further reasoned that, the set down of case HC 4469/20, meant the set down of the other two cases HC 1230/19 and HC 3437/19.

The ruling of the court in case HC 4469/20 was delivered in motion court and the applicants submit that they could therefore not launch their application for leave to appeal against that judgment.

Unhappy with the turn of events, the applicants approached this court applying for leave to appeal against the said judgment. The respondents opposed the application.

Applicants argue that they have prospects of success on appeal, in that the setting down of a chamber application for dismissal is not the set down of the other matters which exist independently. They contend that their two matters HC 1230/19 and HC 3457/19, were not set down, at all for 2 July 2021. As such they were within their right in electing to withdraw both without seeking the consent of the other party or the leave of the court. In their view, the only matter that had been set down for 2 July 2021 was matter HC 4469/21. Therefore, it is their argument that, the court should not have dismissed the other two cases not before it. In addition they state that they do have an arguable case. They therefore submit that they should be given the chance to test the court's judgment on appeal on the grounds of appeal outlined in their application.

They also argue that on 2 July 2021 both their matters had become moot as they had been withdrawn. As such, therefore the court erred in making a decision concerning the two.

In support of their submissions, applicants relied on the cases of the *Church of the Province of Central Africa* v *the Diocesis Trustees* for the Diocese of Harare SE48-12 and *S* v *McGown* 1995(2) ZLR 81(S), amongst others. In response, the respondents countered that an application for dismissal for want of prosecution cannot be divorced from the application or matter it is sought to dismiss. They contend that the two are inseparable. Therefore, from their perspective there is no way that the application for dismissal for want of prosecution can have a set down separate from those applications it is meant to dismiss. As such, withdrawal of the main applications was no longer feasible without the consent of the other party or the leave of the court. In that regard, they argue that, the decision of the trial court, which is in their view *obiter* cannot be faulted. In that vein, they submit that there are no prospects of success on appeal. On that basis they state that the matters were not moot. They also pointed out, that the applicants' grounds of appeal were not precise, clear and concise, in that regard the appeal will not succeed.

In casu, the main issue is whether or not the court application in case HC 4469/20, which was in terms of the then r 236(3)(b) of the 1971 rules of this court, now r 59(15)(b) of the 2021, High Court rules, for the dismissal of matters HC 1230/19 and HC 3457/19 for wont of prosecution can be said to be separate from the two matters it is sought to dismiss?

The second issue is whether or not the applicants have made a case for leave to appeal against the decision of this court of 7 July 2021 in case HH 352/21.

In consideration, I also observed that the applicants' grounds of appeal as borne by the record are convulated, long and winding. Precisely, they are not clear and concise. It is difficult to discern what exactly they are attacking on the judgment of the court in HH 352/21.

Rule 22(1) of the Supreme Court Rules (Magistrate Courts) Criminal Rules) which apply *mutatis mutandis* or in equal force to civil proceedings provides that, the grounds of appeal must be clear and concise. In other words, they must be short and to the point, directing the Appellate Court to the impugned facts and law in the judgment under attack.

In *Chikura N.O and Another* v *AL Sham's Global Pvt Limited* SC 171/17, it was remarked that:

> "It is not for the court to sift through several pages of grounds of appeal in order to determine the real issue. The real issue for determination should be easily ascertainable on perusal of the grounds of appeal."

See *S* v *Chimwaiwashe* SC 18/13. In my considered opinion, it will be very difficult for the applicant to overcome the hurdle of non-compliance with rules in regard to grounds of appeal. Rules of the court, like law are to be obeyed for standardization and general observation. Rubber stamping or endorsing flagrant noncompliance with the rules perpetuate the non-compliance instead of correcting them. Applicants are likely not to succeed on the point raised by the respondents.

In the event that I may have erred in coming to the conclusion, I am still of the view that there are no prospects of success on appeal on the salvaged grounds of appeal, on the following reasons.

It is established law that for an application for leave to appeal to the Supreme Court against the decision of the High Court in particular, and all the applications of this nature in general, the overriding factor is the prospects of success on appeal. In the case of *Kereke* v *Maramwidze and Anor* SC 86/21 the Appellate Court discussed the factors to be considered in such an application as highlighted in *Chikurunhe* v *Zimbabwe Financial Holdings* SC 10-18, which is authority that,

> "The party seeking leave to must show *inter alia* that he has prospects of success on appeal. In other words leave is not granted simply because a party has sought such leave."

In *S* v *Mutasa* 1988(2) ZLR 4(S) it was held that;

> "the test to be applied when considering the application is whether the applicant has a reasonable prospect of success. If he has, then leave to appeal should be granted."

See *Madamombe* v *The State* SC 117/21.

What constitutes reasonable prospects of success was pronounced in the case of *Smith* v *S*, 2012 (1) SACR 567 (SCA) para 7 as;

> "What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal that are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal, or that the case cannot be categorized as hopeless. There must, in other words, be a sound rational basis for the conclusion that there are prospects of success on appeal."

On further analysis, the judgment of the court in case HC 4469/21 was the dismissal of applicants' matters, HC 1230/19 and HC 3457/19. The attack by the applicants as can be sifted through its ground of appeal which I have already condemned, is against the reasoning of the court. In my view the court clearly reasoned that, the notices of withdrawal where invalid based on the fact that the main application was for dismissal for want of prosecution, which was the application that was before it and could not be separated from those matters it was set to dismiss.

I agree with the respondent, that these there where obiter remarks and not subject to an appeal. In *JF Schalkwyk and 3 others* v *The Ministry of Justice* and *Constitutional Development and 2 ors* SC 5439/2017 it was noted that,

> "I am mindful of the fact that an appeal is solely aimed at an order of the court and not its reasons."

I am also not persuaded by the applicants' argument that they do have prospects of success on appeal. The reasoning of the court under impugn cannot be faulted. It is supported by the facts and the law. My summation of what emerges from the facts is undisputedly that.

a. Applicants' two matters HC 1230/19 and HC 3457/19 were the subject matter of HC 4469/21.
b. When matter HC 4469/21, was reset for 2 July 2021 the two matters had not been withdrawn. As such they were withdrawn three days before the set down date on 29 June 2021.
c. The court used its discretion to determine the matter before it and dismissed the main matters on the basis that the notice of withdrawals filed of record where invalid as they had been filed after the matter to decide their fate had been set down.

Of significance is, what prompted the withdrawal of the matter is the notice of set down. It was a pre-emptive strike to save applicants faces from the inevitable dismissal of their matters for want of prosecution. Had the matters been withdrawn before the set down date they had the right and were *dominus litus* to withdraw them.

Their position, as observed by MANZUNZU J in HH 352/21, fell short of the requirements of the law, as the notices of withdrawal were filed after the matter launched solely to determine them had been set down.

Clearly, it is my finding that the findings of the court in case HH 4469/21 cannot be faulted. It is illogical that, a matter for dismissal for want of prosecution, clearly stating in its papers the cases that are to be dismissed is severable and its setting down is not the setting down for the sole purpose for hearing them. I am fortified in this view by the following decision,

Meda v *Maxwell Matsvimbo and others* CCZ 10/2016, in which MALABA DCJ (as he then was) at p 4 enunciated.

> "While parties may at any stage before a matter is set down, withdraw a matter, with a tender of costs, the same does not hold true, for a matter that has already been set down for hearing. Once a matter has been set down for hearing it is not competent for a party who has instituted such proceedings to withdraw them without the consent of all the parties or the leave of court. In the absence of such leave a purported notice of withdrawal will be invalid."

I need not say more, the Apex court of this land clearly pronounced itself on that point. All what the applicants are saying is that they have an arguable case which they want to test on Appeal. I fail to find a sound rational basis for the conclusion that there are reasonable prospects of success on appeal. In that regard I am of the view that there are no prospects of success on Appeal.

The moot argument was not motivated in the oral argument. For that reason nothing turns on the point.

I would have granted costs at a higher scale as prayed for by respondents. However I am of the view that this is not a case where such costs are justified.

Accordingly, the application is dismissed with costs.

Trust Law Chambers, applicants' legal practitioners
Matsikidze Attorney s at law, first and second respondents' legal practitioners