DISTRIBUTABLE (125)

JOHN NYAKAMHA
v
LOBELS BREAD (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MATHONSI JA, CHIWESHE JA & MUSAKWA JA
HARARE: 5 OCTOBER 2021

T.T.G. Musarurwa, for the appellant

T. Zhuwarara, for the respondent

MUSAKWA JA: This is an appeal against the decision of the High Court handed down on 30 September 2020. In that judgment the High Court dismissed for want of prosecution an application that had been filed by the appellant. We dismissed the appeal with costs and gave reasons *ex tempore*. The appellant subsequently requested for the full reasons which we now provide.

THE BACKGROUND

The appellant was employed by the respondent as a transport manager. He was dismissed from employment in 2001. Having successfully challenged the dismissal before a labour officer it was determined that he be reinstated to his post. With reinstatement no longer possible, the matter went for quantification of damages which were assessed at ZW$1 721 555.80. Since then there has been a dispute over the adequacy of the damages due

to the appellant, with the respondent insisting that it paid what was due. The dispute arose from the currency changes that were introduced subsequent to the quantification.

The appellant filed an application before the court *a quo* for the payment of an unspecified sum of money. He based the application on an arbitral award issued in 2008. In the same application the appellant claimed a sum of ZW$9 273 857.87 being a sum purported to be the equivalent of an unspecified arbitral award. The application was filed in the court *a quo* on 20 December 2019. The appellant only served it on the respondent on 16 January 2020. The respondent filed opposition on 29 January 2020.

In terms of r 236 (3) of the now repealed High Court Rules, 1971, the appellant had one month, that is up to 29 February 2020 to either file an answering affidavit or set the matter down for hearing. He did neither thereby triggering the option available to the respondent in terms of that rule to either set the matter down itself or make a chamber application for dismissal for want of prosecution. The respondent elected to make an application for dismissal for want of prosecution.

The application was opposed by the appellant who argued in the main, that he was not out of time in complying with r 236 (3). It may be noted that in contending that he was not out of time, the appellant relied on an erroneous computation of what constitutes a month. The appellant based his calculation on ordinary working days. In addition, despite his contention that he had already filed an answering affidavit (albeit out of time) he obviously overlooked that he would need to seek condonation before he could place reliance on it. He also proffered

an explanation for his failure to file an answering affidavit, namely that he was awaiting an expert witness who was out of the country to submit a supporting affidavit.

Having been addressed on the merits of the case for dismissal, the court *a quo* rejected the appellant's explanation for his failure to act timeously and his argument that the failure to file an answering affidavit was not a bar. It found that the appellant had infringed r 236 (3) by failure to either file an answering affidavit or to set the matter down within the prescribed timeframe. The court *a quo* also held that the period within which the appellant should have set the matter down or filed an answering affidavit was a calendar month. As regards the definition of calendar month, the court *a quo* referred to the Interpretation Act [*Chapter 1:01*]. For these reasons the court *a quo* accordingly granted the application.

Dissatisfied by the decision of the court *a quo*, the appellant noted an appeal to this Court. The grounds of appeal are as follows:

1. The court *a quo* erred in holding that no answering affidavit was filed in the main matter when the same had been filed and the main matter had been set down.
2. The court *a quo* erred by not appreciating that it had the discretion to grant or not to grant the application.
3. The court *a quo* erred by making a determination without considering the merits of the main matter.
4. The court *a quo* erred in not giving due weight to the lengthy time the main matter had taken.

On appeal, the appellant relied on the four (4) grounds of appeal, all of which challenged the decision of the court *a quo* on extraneous grounds. Whilst conceding that the appellant breached r 236(3) Mr *Musarurwa* submitted that the reasons proffered by the appellant were not considered by the court *a quo*. He submitted that the delay by the appellant was not inordinate. The court *a quo* improperly exercised its discretion by adopting the view that it had no discretion in the matter. Thus he further submitted that the court *a quo* should have exercised its discretion in favour of the main application being heard on its merits.

Mr *Zhuwarara* submitted that once a party fails to set a matter down, the other party is entitled to dismissal in terms of r 236 (3) (b). A party cannot continue prosecuting a matter in which it has not complied with the rules. This is on account that the other party would have asserted its procedural rights. He also submitted that the appellant could have sought condonation in writing or from the bar.

In granting the application, the court *a quo* was exercising judicial discretion reposed in it by r 236 (3) (b) to either dismiss the matter with costs or make such order on such terms as it deems fit. The court *a quo* was not satisfied by the explanation given by the appellant. Given that the appellant had an erroneous view of the computation of a month, it cannot be said that the court *a quo* erred in rejecting his explanation for the delay.

For an appellate court to interfere with the exercise of discretion by a lower court, it must be shown that the discretion was exercised injudiciously. In this respect see *Barros & Another v Chimpondah* 1999 (1) ZLR 59 (S). In that case it was held that it is not for an appellate court to assume the position that if it had been in the place of the lower court it would

have reached a different decision. There must be a demonstration that the lower court erred in its assessment of the facts or its application of the law to the facts. The grounds of appeal in the present matter do not advert to that. The submissions made on behalf of the appellant did not fully address the requirements for interference with the discretion of the court *a quo*.

Accordingly, the appeal is without merit and ought to fail with costs as we see no reason why the costs should not follow the result. In the result it be and is hereby ordered as follows:

"The appeal is dismissed with costs."

MATHONSI JA: I agree

CHIWESHE JA: I agree

Kamusasa & Musendo, appellant's legal practitioners

Mawere Sibanda Commercial Lawyers, respondent's legal practitioners