REPORTABLE (40)

Judgment No SC 54/05
Civil Application No 136/05

RENSON GASELA vs (1) CONSTITUENCY ELECTIONS OFFICER FOR GWERU RURAL CONSTITUENCY (2) CHAIRMAN OF THE ZIMBABWE ELECTORAL COMMISSION (3) JOSPHAT MADUBEKO

SUPREME COURT OF ZIMBABWE
HARARE JUNE 2 & OCTOBER 11, 2005

E. Matinenga, for the appellant

G. Chikumbirike, for the respondents

Before CHIDYAUSIKU CJ, in Chambers

This is an application for an extension of time to appeal. The application is headed "court application for extension of time in which to appeal in terms of Rule 30 subrule 3". The notice reads:-

> "Take notice that the applicant intends to apply to the Supreme Court for an order in terms of the draft order annexed to this notice and that the accompanying affidavits and documents will be used to support the application."

The draft order provides as follows:-

"IT IS ORDERED:

1. That leave be and is hereby granted to the Appellant to file an appeal against the order of the High Court made under Case No HC 495/2005 awarding costs in favour of the 1st, 2nd and 3rd Respondents on an attorney and client scale.

2. That such notice of appeal be filed with the Registrar of this Honourable Court within 7 days of the date of this order.

3. That Respondents should pay the costs of this application only if they oppose it."

The application was opposed. The applicant avers that he was unable to note an appeal on time because of the delay in the handing down of the reasons for judgment. The reasons for judgment were handed down some time after the judgment. The applicant submitted that the appeal has prospects of success. The applicant's grounds of appeal are:-

"1. The court *a quo* erred in law in concluding that the procedural flaws in the application were of such a nature as to warrant an award of costs on a punitive scale.

2. The court *a quo* erred in considering the scale of costs in not lending weight to the fact that the reason the appellant proceeded by way of an urgent application was that the appellant wanted the matter determined before the holding of a parliamentary election which was only a week away and to that extent the matter was urgent.

3. The court *a quo* erred in considering costs by ignoring the fact that the period between the 18th February 2005 and the 18th March 2005 when the urgent application was filed was only a month during which appellant had sought legal advice before deciding to approach the court and therefore could not be said to have waited until the last minute before approaching the court.

4. The court *a quo* should have found it a factor in favour of the appellant when considering costs, that the contents of the application met all the requirements of the High Court Rules dealing with review applications but for the fact that it was an urgent chamber application.

5. The court *a quo* should have given due weight, in determining the scale of costs, to the fact that the issues raised in the application against 3rd respondent's nomination were meritable and, if considered by the court, would have led to the disqualification of the 3rd respondent from contesting the election.

RELIEF SOUGHT

The appellant prays that this Honourable Court sets aside the order of the court *a quo* awarding costs against appellant on an attorney and client scale and substitute the following order:-

> 'Accordingly the application is dismissed with costs on an ordinary scale.'"

The respondents opposed the application on the grounds that the appeal has no prospects of success. It is quite clear on the papers that the applicant is not appealing against the entire judgment but against the order as to costs on attorney and client scale. The applicant contends costs should have been on the ordinary scale.

The issue therefore is whether this was a proper case for the awarding of costs on attorney and client scale. The reason for awarding costs at attorney and client scale was that the application was riddled with procedural flaws and was an abuse of court process. The court also held that the urgency of the matter was created by the applicant's failure to act timeously and that the matter should not have been brought to court on an urgent basis.

A perusal of the record clearly establishes that this matter was handled most ineptly particularly by the legal practitioners for the applicant. The conclusion of the court *a* quo in this regard cannot be faulted. Even this application is characterized by ineptitude and incompetence.

Firstly this application states that it is being made in terms of Rule 30 subrule 3. There is no indication as to whether this is Rule 30 subrule 3 of the High Court or Supreme Court Rules. The court expects such indication for the purposes of clarity. The rule cited is the wrong rule. There is no Rule 30 subrule 3 of the High Court Rules. Rule 30 of the Supreme Court Rules does not have subrule 3. It is Rule 31 subrule 3 of the Supreme Court Rules that deals with applications for extension of time to appeal. It would appear this is the rule that the applicant must have intended to cite or should have cited.

Secondly this application does not comply with s 43(2)(c)(ii) of the High Court Act [Chapter 7:06] which provides:-

> "43(2) No appeal shall lie -
>
> (a) …
>
> (b) …
>
> (c) from –
>
> (i) …
>
> (ii) an order as to costs only which by law is left to the discretion of the court, without the leave of the High Court or of the judge who

> made the order or, if that has been refused, without the leave of a judge of the Supreme Court."

It is clear from s 43 of the High Court Act that an appeal against an order of costs has to be with the leave of the court *a* quo. In the event of such leave being refused only then can application be made to this Court. In *casu*, no such leave was applied for and, therefore, such leave was neither granted nor refused. The applicant is seeking, in this application, an extension of time to note an appeal in respect of which he has no leave. Such leave is required in terms of the Act. The applicant should have first applied for leave to note an appeal against the order of costs. Once such leave has been granted by the court *a quo* or such leave has been refused by the court then the applicant can approach a judge of the Supreme Court for an extension of time. If leave to appeal has been refused then the applicant can approach this Court for: (a) the granting of such leave and, (b) for the extension of time within which to note an appeal. The failure by the applicant to first seek the leave of the court *a quo* before approaching this Court is a fatal irregularity and on that ground alone this application cannot succeed.

Apart from this the prospects of success on the merits are virtually non-existent. The issue of costs is a matter for the discretion of the court *a quo*, see s 43 of the High Court Act. This Court can only interfere with the exercise of such a discretion if there has been a misdirection or the order is so unreasonable that no reasonable court applying its mind to the facts of the case could have made such an order. A perusal of the judgment of the court *a quo* reveals no misdirection nor can the order be said to be

unreasonable let alone grossly unreasonable. Thus, even if the application were properly before me it was bound to fail on the ground that there were no prospects of success.

In the result and for the foregoing reasons the application is dismissed with costs.

Coghlan & Welsh, appellant's legal practitioners

Chikimbirike & Associates, respondents' legal practitioners