DISTRIBUTABLE (52)

BONNYVIEW ESTATES (PRIVATE) LIMITED
v
(1) ZIMBABWE PLATINUM MINES (PRIVATE) LIMITED (2) THE MINISTRY OF LANDS AND RURAL RESETTLEMENT

SUPREME COURT OF ZIMBABWE
MAKARAU JA,
HARARE, JULY 19, 2018 & SEPTEMBER 26, 2018.

F Chinwadzimba for the applicant

D Muchada for the first respondent

Second respondent in default.

IN CHAMBERS

MAKARAU JA:- This is a chamber application for condonation for the late filing of an appeal and extension of time within which to note an appeal in terms of r 31(3) of the Supreme Court Rules, 1964.

The facts giving rise to this application are common cause.

On 21 June 2017, the High Court dismissed with costs an application filed by the applicant, seeking an order declaring that the applicant was entitled to all benefits deriving from the first respondent's occupation of a section of a farm known as Bulfield Farm, over which it had passed a servitude in favour of the first respondent. On 12 July 2017, the applicant duly noted an appeal against the decision. Whilst it filed the notice of appeal within the

prescribed period, the appellant failed to serve a copy of the notice of appeal on the Registrar of the High Court within the period, thereby rendering the notice out of time and fatally defective. The applicant then filed this application seeking condonation for the late filing of the notice of appeal.

The period of delay in serving the Registrar of the High Court with the notice of appeal was one day. The delay between the date the applicant became aware of the defect in the notice of appeal and the filing of the present application is ten months.

In the draft notice of appeal attached to this application, the applicant raises one ground of appeal as follows:

> "The court *a quo* erred and misdirected itself at law in finding that the appellant did not have *locus standi in judico* to institute action seeking the relief it sought against 1st respondent arising out of a purported compulsory acquisition of portion of Bulfield Farm by 2nd respondent, which portion of Bulfield Farm was the subject of a notarial deed of servitude registered in favour of the 1st respondent on 11th July 1995."

The application for condonation and extension of time within which to note an appeal was not opposed. At the hearing of the matter, counsel for the first respondent indicated that he was content to have the application granted as he was confident that he would have his day in court when the appeal was argued.

Notwithstanding the consent of the first respondent to the order sought, I am not persuaded to grant this application.

Condonation is an indulgence granted when the court is satisfied that there is good and sufficient cause for condoning the non- compliance with the Rules. Good and sufficient

cause is established by considering cumulatively, the extent of the delay, the explanation for that delay and the strength of the applicant's case on appeal, or the prospects of its success. This is trite.

In *casu*, as stated above, the delay that resulted in the notice of appeal being out of time was negligible. It was a delay of one day. However, the delay between the dates when the applicant realised its failure to serve the notice of appeal on time and the date of this application, being some ten months, was not only inordinate but was neither adverted to nor explained in the application. In the interests of allowing access to justice, I may have been inclined to overlook the delay if the applicant had some prospects of success on appeal. It is the absence of any prospect of success on appeal in this case, that has moved me to deny this application.

The applicant has raised the ground of appeal that I have set out in full above. This is not a ground of appeal that can be properly raised in this matter.

The applicant was the owner of the land in question, holding a deed of transfer in respect of the land. In that capacity, it passed a servitude in favour of the respondent's predecessor in title over part of the land in 1995 and in respect of which it was paid the sum of $4 million. In addition to the rights granted to it under the servitude, the respondent also concluded a lease agreement with the applicant in respect of the property. In 2000, the farm was compulsorily acquired under the Land Acquisition Act [*Chapter 20.10*]. The lease agreement between the parties expired by effluxion of time but the respondent remained in occupation of the land. It refused to renew the lease agreement on the basis that the land had been acquired by the State and the applicant has lost all title to it.

Before the court *a quo*, the applicant conceded that the land over which it had passed a servitude in favour of the respondent's predecessor was compulsorily acquired by the State.

In cannot be disputed that acquisition of the land by the State necessarily meant the extinction of rights in the land held by the applicant as owner and the consequent loss of *locus standi* on its part to bring any action based on the extinguished rights, which was the *ratio decidendi* of the court *a quo's* decision. The correctness of this finding is beyond reproach. To its credit, the applicant does not seek to challenge it on appeal. Instead and incorrectly so, the applicant seeks to challenge the correctness or otherwise of the acquisition of the land itself by the second respondent on behalf of the State. It argued that it intends on appeal, to raise the constitutionality or otherwise of the acquisition of its land by the State as the land in dispute is not agricultural.

With respect, this issue was not before the court *a quo* and therefore cannot be an issue on appeal. It is clearly an incompetent ground of appeal in the matter. An incompetent ground of appeal cannot be raised or sustained on appeal and it therefore does not and cannot enjoy any prospects of success on appeal. A ground of appeal that enjoys prospects of success on appeal is one that if successfully argued on appeal will result in the setting aside of the decision appealed against. An improperly raised ground of appeal cannot be argued on appeal and will thus have no effect on the judgment appealed against.

I am fortified in my decision to deny this application by the concession by both parties in the hearing before me that the point sought to be raised by the sole ground of appeal

was not raised *a quo*. It is therefore a novel point, calling not only for fresh arguments but for a fresh determination on appeal. This Court is loath to assume the jurisdiction of the lower court and pronounce at first instance on issues that were not canvassed and fully argued before the court *a quo*. (See *ANZ Grindlays Bank (Zim) (Private) Limited v Hungwe* 1994 (2) ZLR 1 (S)).

I have considered whether or not the applicant is entitled to raise this point for the first time on appeal as a point of law. It is not. Two principles stand in its way. Firstly, this is the sole ground of appeal that it intends to raise. It is not additional to any other valid ground of appeal. As it is an incompetent ground of appeal it cannot be the basis of any valid appeal before this Court. Secondly, the point that the applicant seeks to argue for the first time on appeal does not arise from the pleadings that were before the court *a quo*. The constitutionality or otherwise of the acquisition of the land was not challenged before the court *a quo*. (See *Austerlands (Pvt) Ltd & Anor v Trade and Investment Bank Limited* SC 92/05).

On the basis of the foregoing, I remain of the firm view that this application cannot succeed.

Regarding costs, the respondent was willing to have this application granted with no order as to costs in its favour. During the hearing, when I expressed my reservations on the propriety of its concession, it did not change its position regarding costs. Accordingly, I will make no order as to costs.

In the result, I make the following order:

The application is dismissed with costs.

Venturas & Samkange, applicant's legal practitioners.

Dube, Manikai & Hwacha, 1st respondent's Legal Practitioners.