

BORROWDALE RESIDENTS AND RATEPAYERS' ASSOCIATION
and
THE TRUSTEES FOR THE TIME BEING OF HARARE WETLANDS TRUST
versus
CITY OF HARARE
and
IAN MAKONI N.O (Chairman of the Harare City Council Environmental Committee)
and
SEATRITTE PROPERTIES (PRIVATE) LIMITED
And
HONOURABLE JUSTICE MANDEYA N.O.
INSURANCE COUNCIL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 27 January 2023 & 23 January 2024

Opposed application – Declaratory Order

Mr *A Dracos*, for the applicant
Mr *A Moyo*, for the 1st & 2nd respondents
Mr *B Mahuni*, for the 3rd respondent

MUSITHU J: This is an application for review in terms of which the applicants seek the setting aside of the decision of the fourth respondent rendered on 13 May 2022 under ACC 26/21 and judgment number AC 7/22. Additionally, the applicants also seek costs of suit against the first, second and third respondents jointly and severally, the one paying the others to be absolved.

The Applicants' Case

The applicants issued process out of the Administrative Court under ACC 26/21, challenging the decision of the first and second respondents to grant a development permit in favour of the third respondent. The applicants also challenged the issuing of an environmental impact assessment certificate by the Environmental Management Agency (EMA) to the third respondent before consultations were made with them.

A case management meeting was held before the fourth respondent on 18 November 2021, where it was agreed that the parties would file their heads of argument before the matter was heard. The applicants filed a document titled “Appellant’s Case”, which was queried by the first to third respondents in their heads of argument in the court *a quo*. In its heads of argument, the third respondent sought the striking out of the said document from the record. The first and second respondents averred that the document labelled “Appellant’s Case” was irregular and that the appeal ought to be struck off with costs. The respondents’ positions were further motivated at the hearing when that issue was dealt with as a preliminary point.

The fourth respondent apparently accepted the contention that the said document was filed irregularly and proceeded to dismiss the matter on that basis. The applicants contend that in dismissing the matter, the fourth respondent also pointed to the confusion arising from the use of both the new Act and the old Act that was caused by the filing of the said document. The applicants’ view is that whatever confusion was caused by the filing of that document would have been cured by the striking out of that irregular document.

It is the applicants’ further contention that the decision by the fourth respondent was grossly irregular for the following reasons: Firstly, after having made a finding that the applicants filed an irregular document and having been requested to strike off such document from the papers, the fourth respondent committed a serious error by proceeding to dismiss the matter. This he did without justifying why the remedy sought by the third respondent was not appropriate.

Secondly, dismissing the matter was punitive, grossly capricious and unreasonable in the circumstances. The merits of the matter were not traversed. Thirdly, the decision to dismiss the matter was grossly unreasonable and not proportionate to the complaint of having filed an irregular document because it then closed the doors of justice to the applicants based on the plea of *res judicata*.

It was in view of the foregoing that the applicants prayed for the setting aside of the fourth respondent’s decision. It had the effect of violating the applicants’ fundamental right of access to justice, and that of protection of the law.

The second applicant filed a supporting affidavit through Dorothy Wakeling. Nothing much turns on her supporting affidavit as she essentially associated herself with the averments made on behalf of the first applicant.

First Respondent's Case

The opposing affidavit raised two preliminary points. The first was that the High Court had no review powers over decisions or proceedings of the Administrative Court. The High Court could only exercise review powers over inferior courts or other quasi-judicial bodies exercising administrative powers. The Administrative Court was at par with the High Court in terms of hierarchy and for that reason its decisions could not be reviewed by the High Court. Its decisions could only be challenged on appeal at the Supreme Court. The relief sought in the draft order was one which could be competently granted by the Supreme Court on appeal. The applicants were on a forum shopping venture, being aware that an appeal to the Supreme Court was out of time.

The second preliminary point was that the applicants had mounted the application based on a wrong law. The founding affidavit referred to s 27 of the High Court Act [*Chapter 7:06*]. Rule 27 of the High Court Rules, 2021 (the Rules), dealt with applications for rescission of judgment. The applicants also highlighted that they sought relief in terms of s 28 of the High Court Act, which the first respondent found to be improper. The court was urged to strike the matter off the roll based on the above points *in limine*.

Concerning the merits, the first respondent denied that there was any gross irregularity in the decision sought to be reviewed. It also denied that the decision was grossly irrational, unreasonable or capricious as alleged by the applicants. The applicants were responsible for the demise of their appeal at the Administrative Court after they failed to abide by the rules of that court, which regulate the appeal procedure in that court. The present application was just intended to have this court sanitise the applicants' wilful disobedience of the Administrative Court rules.

The first respondent averred that the court was not at fault in dismissing the appeal because when the matter was set down, there were no heads of argument filed on behalf of the appellants despite them being legally represented. Only the respondents' heads of argument had been placed before the court. In the absence of heads of argument, the appeal was therefore properly dismissed.

It was also averred that the confusion alluded to by the court could not be cured by striking off the irregular document. This was because firstly, the applicants never prayed for that relief, despite having been warned that the document was irregular, they chose to abide

by the same papers to their prejudice. The applicants could not seek to rely on the third respondent's papers to argue that their appeal should not have been dismissed. The second point was that it was wrong for the applicants to allege that the third respondent sought the striking off of the irregular document and thereafter for the appeal to proceed. The effect of filing the irregular papers was that there were no heads of argument on the day of the hearing, which was a pre-requisite. The appeal was therefore properly dismissed.

The first respondent also attacked the relief sought by the applicants in their draft order as being incompetent. The applicants only sought the setting aside of the decision of the Administrative Court but did not specify what had to be done thereafter. Was the matter supposed to be remitted back? What became of the irregular documents? It was not clear what the applicants wanted the court to do with their matter. The relief sought did not help progress or resolve the matter. The applicants were merely abusing the court process and ought to be reprimanded by award of costs on the punitive scale.

Third Respondent's Case

The opposing affidavit raised two preliminary points. The first was that the decision of the Administrative Court was not reviewable by the High Court. The averments made in support of this point were like those made on behalf of the first respondent.

The second point was that the application was incompetent and therefore improperly before the court. This was because the procedure of judicial review was not concerned with the decision, but with the decision-making process. The review process was not directed at correcting a decision on the merits. What the applicants were seeking was the correcting of the decision of the Administrative Court on the merits. A determination by the court *a quo* that the applicants relied on an inapplicable law was directed at the merits of the matter. According to the third respondent, the applicants strenuously argued in their heads of argument that they had relied on the correct law. The court ruled against them on this point. After making this finding, the court exercised its discretion and dismissed the appeal. That was a finding on the merits which was not subject to a review, but an appeal.

As regards the merits, the third respondent insisted that the court did not commit any reviewable irregularity. Instead, it decided on what the law is, and this was not the kind of a reviewable irregularity envisaged under s 27 (1) of the High Court Act. It was further averred that the applicants failed to comply with the court's directive issued at the case management meeting. Regardless of what the respondents had prayed for in their papers, the court still exercised its discretion and dismissed the matter because of the applicants' reliance on an

inapplicable statute. The applicants ought to have appealed if they felt aggrieved by the decision of the court, since it was on a question of law.

It was further averred that once the court determined that the appeal was premised on a wrong statute, the only logical decision was to dismiss the appeal. The wrong legislation relied upon by the applicants tainted their appeal before the court. The preliminary point raised in the court *a quo* was dispositive of the entire appeal without a consideration of the merits. The third respondent further averred that it would have been anomalous for the court to determine that the appeal was based on the wrong legislation on one hand but then proceed to determine it, nevertheless.

It was also averred that the right of access to court was limited by the provisions of the law which regulated the circumstances under which the right was exercisable. In the present matter the applicants committed a fatal error of relying on an inapplicable piece of legislation which threw them out of court. Not even the constitution could save them. No grounds for review had therefore been established. The fact that the applicants did not agree with the conclusions of law reached by the court did not constitute a basis for seeking a review.

The Answering Affidavit

In their reply, the applicants insisted that the path they had chosen to challenge the fourth respondent's decision by way of review was the correct one. The dismissal of their appeal by the court without entertaining the merits of the matter was irrational, unreasonable and capricious. The filing of the irregular document did not warrant the dismissal of their appeal.

The appellants further averred that the statutory assignation of the right of appeal did not take away their rights to challenge the fourth respondent's decision by way of review. The court *a quo* was an inferior court whose decisions were the subject of a review.

The Preliminary Points

Whether the High Court has review powers over decisions of the Administrative Court

At the commencement of oral submissions, both counsel for the respondents abandoned the preliminary point that this court could not exercise its review powers over the Administrative Court since the two courts were at par. The concessions by both counsels were well taken. In making that objection they seemed oblivious of the implications of the Constitution of Zimbabwe Amendment (No. 1) Act, 2017, which introduced subsections (2)

and (3) to s 174 of the Constitution. Subsection (2) of s 174 makes the Administrative Court a subordinate court to the High Court.

The first respondent also appears to have abandoned the second preliminary point raised in its opposing affidavit. The point was that the applicants had mounted the present application on the premise of a wrong law. It was not pursued in oral submissions, and I considered it abandoned.

Whether the application is properly before the court

The next preliminary point which was raised by all the respondents in their heads of argument and oral submissions was that the application was incompetent and improperly before the court. It was submitted on behalf of the first respondent that the applicants had approached the court for an appeal disguised as a review. This was because the final order sought was clearly one on the merits as it sought the setting aside of the judgment of the court *a quo*. The applicants ought to have challenged the decision of the court *a quo* by way of an appeal rather than a review.

It was submitted on behalf of the third respondent that judicial review is not concerned with the decision made by a lower court or tribunal, but with the decision-making process. A judicial review was not directed at correcting a decision on the merits. The applicants were clearly seeking a correction of the Administrative Court decision on the merits. In his oral submissions, Mr *Mahuni* for the third respondent submitted that there existed no reviewable grounds in this matter. The point that was argued in the court *a quo* was whether the applicants had utilised the correct statute in mounting their appeal. That point was decided against the applicants, and it was clearly a point of law. An erroneous finding on a point of law was not reviewable, but it was appealable because it was an attack on the merits.

In response, Mr *Dracos* for the applicants argued that the application was properly before the court. From a reading of s 27(1)(c) it was clear that one could challenge a decision of an inferior court on review in the High Court on the grounds of a gross irregularity in the decision itself. The decision by the fourth respondent was grossly irregular because he proceeded to dismiss the matter without hearing the merits. There was no relationship between the complaint and the decision made by the court.

Analysis

Authors *Herbstein & Van Winsen*¹ had the following to say about the distinction between appeals and reviews:

“The reason for bringing proceedings under review or on appeal is usually the same, viz to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or on the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review.....”

Ordinarily, judicial review is concerned not with the decision, but with the decision-making process. However, in terms of s 27 of the High Court Act, one can approach the High Court on review because of a gross irregularity in the proceedings or the decision. To put the legal question into context, it is pertinent to have a critical appraisal of the decision of the court *a quo*. The court first disposed of a preliminary point raised by the respondents that the appeal was filed out of time. This was the first issue before the court. The first two pages of the judgment dealt with this point. The court determined the point in favour of the applicants herein and dismissed the complaint that the appeal had been filed out of time.

The court then proceeded to deal with the issue concerning the confusion emanating from the use of the old law and the new law. I will reproduce the relevant part of the judgment since it is crucial to the disposal of the issue that is before the court.

“CONFUSION OF OLD ACT AND NEW ACT

The notice of appeal in this case boldly states:

“Notice of Appeal under s 38 of the Regional Town and Country Planning Act [Chapter 29:12]”

It is common cause that on 18 November 2021 parties appeared before me for a case management meeting. At that meeting the court directed that parties would file their heads of argument in accordance with the rules of this court.

For the appellant to later turn around and rely on the Town Planning Rules, 1971, is as submitted by counsel for the third and first and sixth respondents irregular and not proper. No party should be taken by surprise in our civil law. If the notice of appeal was filed in accordance with the current Regional, Town and Country Planning Act, [Chapter 29:12], why did the appellants turn around and rely on an old statute?

At the case management meeting the appellants did not disclose that it would seek to rely on the old statute. The confusion caused by the appellants’ conduct is undesirable and not acceptable. The appellants have been successful on the first issue. There will be no order as to costs in this case.

DISPOSITION

Although the appellant was successful on the first issue the appellant has been found responsible for the confusion in mixing up the old Act and the new Act. That ultimately rendered the appeal a nullity. The appeal is dismissed.” (Underlining for emphasis)

¹ The Civil Practice of the High Courts of South Africa, Vol 2 Fifth Edition at p1271

It is clear from a reading of the above extract that the court dismissed the appeal having determined that the mix up caused by the application of the old Act and the new Act effectively rendered the appeal a nullity. The position of the Superior Courts in this jurisdiction is that a failure to comply with the peremptory rules of the court or the law renders an appeal a nullity. In *Ahmed v Docking Station Safaris t/a CC Sales*², BHUNU JA held as follows:

“Failure to comply with a peremptory rule renders the notice of appeal fatally defective. In *Econet Wireless(Pvt) Ltd v Trustco Mobile (Proprietary) Ltd & Anor* SC 43/13, GARWE JA stated as follows:

“The position is now well established that a notice of appeal must comply with the mandatory provisions of the Rules and that if it does not, it is a nullity and cannot be condoned or amended. See *Jensen v Acavalos* 1993 (1) ZLR 216 (S).”

The court *a quo* was therefore at large to dismiss the appeal once it made a finding that the appeal did not comply with the correct law. Mr *Dracos* argued that the court ought to have simply struck off the irregular document that the respondents had complained about in their heads of argument. But from a reading of the judgment of the court *a quo* it seems to me that the court was not concerned with the irregular document. The court was concerned with the defects that afflicted the notice of appeal because the applicants had invoked the wrong law.

Regrettably for the applicants, the transcribed record of proceedings of the court *a quo* was not placed before this court in order for this court to evaluate how those proceedings progressed before the fourth respondent. The transcribed record of proceedings would have shown what exactly was said by counsel in motivating the parties’ cases before the court. It’s not unusual for parties to depart from their heads of argument or make concessions during oral submissions.

It is for that reason that the transcribed record of proceedings of the court whose decision is being challenged must always be part of the review proceedings. The reviewing court needs to have a first-hand appreciation of how the proceedings leading to the decision that is being challenged, were handled by the lower court or tribunal. Afterall judicial review is concerned with the decision-making process. From a reading of the judgment of the court *a quo*, it is unclear what issues were argued before the court *a quo* and how counsel presented their oral submissions. This court would have benefited from perusing the transcribed record of the proceedings as they unfolded in that court. This court must therefore rely on what was placed before it by the parties.

² SC 70/18

Having considered counsels' submissions and the papers before me, I am persuaded by the respondents' argument that the applicants' complaint is misdirected. If the court *a quo* misdirected itself in its application of the law, leading to the conclusion that the appeal was a nullity, then the proper recourse would have been to appeal the decision of the court *a quo* instead of approaching this court on review. From a reading of the judgment of the court *a quo*, and the conclusion it reached, I am satisfied that the court determined that the applicants misapplied the law rendering their appeal a nullity. In reaching that conclusion, the court must have considered the submissions made on behalf of the parties and the papers before it. The court decided on a point of law. This court cannot interfere with the court *a quo*'s finding on the question of law based on the review procedure adopted by the applicants. The decision of the court *a quo* went to the foundation of the applicants' case and it must be challenged by way of appeal instead of a review.

In the final analysis, this court determines that there is merit in the respondents' preliminary objection. The application is improperly before the court as the applicants ought to have challenged the decision of the court *a quo* by way of an appeal instead of the review procedure.

COSTS

The general rule is that costs follow the event. I find no reason to depart from the general rule. The second and fourth respondents did not oppose the application. Costs shall only be awarded in favour of the first and third respondents who were before the court.

DISPOSITION

Resultantly it is ordered that:

1. The application is hereby dismissed.
2. The applicants shall pay the first and third respondents' costs of suit.

Honey & Blanckenberg, legal practitioners for the applicant
Gambe Law Group, legal practitioners for the first respondent
Scanlen & Holderness, legal practitioners for the third respondent