REPORTABLE (69)

Judgment No. SC 88/04

Civil Application No. 406/02

LEE GROUP OF COMPANIES v ANN CLARE ELDER

SUPREME COURT OF ZIMBABWE
HARARE, JUNE 30 & OCTOBER 6, 2004

B Mtetwa, for the applicant

The respondent in person

Before: MALABA JA, in Chambers, in terms of Rule 39(1) of the Supreme Court Rules

This is an application for an order of reinstatement of an appeal regarded as abandoned and deemed to have been dismissed in terms of subrule (1) of Rule 44 of the Supreme Court Rules ("the Rules").

On 6 December 2002 the applicant filed a notice of appeal against the whole judgment of the Labour Relations Tribunal ("the Tribunal") delivered on 14 November 2002. On 31 March 2004 the registrar of this Court ("the registrar"), acting in terms of subrule (1) of Rule 43 of the Rules, sent a letter to the applicant's legal practitioners calling upon them to file heads of argument within fifteen days after the date of notification and warning that should they fail to comply with the requirement the appeal would be regarded as abandoned and deemed to have been dismissed.

The applicant's legal practitioners received the notification on 5 April 2004, two days into the first term vacation. Heads of argument were not filed within the time limit specified in the written notification. On 4 May 2004 the registrar wrote to the applicant's legal practitioners indicating that the appeal was, in terms of subrule (1) of Rule 44 of the Rules regarded as abandoned and deemed to have been dismissed.

On 10 May 2004 the applicant's legal practitioners wrote to the registrar in these terms:

> "Thank you for your letter dated 4 May 2004 and received by us on 5 May 2004. We received your notice on 5 April 2004 which was the last week of the first term. We immediately briefed counsel to prepare heads of argument but as the reckoning of time period for the filing of heads excludes the period of vacations we believed the heads would be due on 18 May 2004. As we understand it, this is because most advocates are away during the vacation and the High Court has in fact accepted this interpretation of the Rules. However, we have never had to deal with this interpretation in the Supreme Court and we would be grateful if you could kindly advise whether the Supreme Court accepts such an interpretation."

When the registrar refused to accept that the reckoning of the time specified in the written notification of 31 March 2004 was wrong, an application for an order of reinstatement of the appeal was made on 28 May 2004. The explanation given for non-compliance with subrule (2) of Rule 43 of the Rules was that the legal practitioners believed that the days when the court was on vacation were excluded from the reckoning of the time within which heads of argument were required to be filed with the registrar.

Ms *Mtetwa*, for the applicant, argued that there was an omission in the Rules to provide, as was done under Rule 238(2a)(i) of the High Court of Zimbabwe Rules ("the High Court Rules"), that in computing the time within which heads of argument are required to be filed before applications, exceptions or applications to strikeout were set down the period during which the court is on vacation shall be excluded. She stated that she believed that Rule 238(2a)(i) was applicable to the reckoning of the time within which heads of argument were required to be filed because subrule (1) of Rule 58 of the Rules provided that in any mater not dealt with in its Rules the practice and procedure in the Supreme Court shall, subject to any

direction to the contrary by the Court or a judge, follow, as near as may be, the practice and procedure of the High Court.

It is clear that Rule 58 of the Rules is only applicable where there has been an omission in the Rules to deal with a matter and not where, as in this case, the matter is dealt with in the Rules in a manner which is different from the practice and procedure of the High Court.

Rule 3 of the Rules provides that:

> "Where anything is required by these Rules to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of the period."

In terms of Rule 3, the reckoning of the time within which the applicant was required under subrule (2) of Rule 43 of the Rules to file heads of argument included all days embracing the period when the court was on vacation except Saturdays, Sundays or public holidays. Rule 3 of the Rules differs from Rule 238(2a)(i) of the High Court Rules in that it deals with the period when the Court is on vacation by requiring that it be included in the reckoning of the time within which heads of argument are required to be filed under subrule (2) of Rule 43 of the Rules, whilst the latter deals with the same period by requiring that it be excluded from the computation of the time within which heads of argument are to be filed in the High Court before applications, exceptions or applications to strike out can be set down for hearing.

It seems to me that Ms *Mtetwa* acted upon her belief that Rule 238(2a)(i) of the High Court Rules was applicable to the reckoning of the time within which to file heads of argument as required by subrule (2) of Rule 43 of the Rules without having carefully studied the provisions of Rule 3 of the Rules.

The fact that the time within which the applicant ought to have filed the heads of argument in the appeal included the period when the Court was on vacation lends support to the explanation that non-compliance with the Rules was due to a genuine but mistaken belief that the period when the Court was on vacation was not included in the reckoning of the time within which to file heads of argument. I accept the explanation as reasonable.

The delay in making the application for an order of reinstatement of the appeal was eight days, which is not an inordinate delay. In *Ellis and Anor v Maceys Stores Ltd* 1983 (2) ZLR 17 (S) the extent of the delay of eight days to note an appeal was held to be by no means inordinate and an explanation that non-compliance with the Rules was as a result of a misinterpretation of Rule 30 of the Rules, influenced by the position under the High Court Rules, was also accepted as a reasonable explanation.

It was argued that the applicant had good prospects of success on appeal. The contention was that the Tribunal applied wrong principles of law to the facts and directed its mind to matters that had not been placed before it for determination. The question the Tribunal ought to have determined was whether or not the respondent had resigned from employment.

It does appear that the Tribunal failed to apply the correct law to the resolution of the dispute between the parties. It cannot be said on the merits that the prospects of the appeal succeeding are not reasonable.

I would accordingly grant the order for the reinstatement of the appeal in terms of the draft order.

Kantor & Immerman, applicant's legal practitioners