

REPORTABLE ZLR (52)

Judgment No. SC 53/07
Civil Appeal No. 279/06

DOCTOR ANNAMORE JAMU v CITY OF HARARE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & MALABA JA
HARARE, JULY 10, 2007 & MARCH 4, 2008

No appearance for the appellant

D Kanokanga, for the respondent

MALABA JA: On 5 October 2006 the appellant noted an appeal against the judgment of the Administrative Court dismissing an appeal from a decision of the respondent by which it rejected an application for a permit to establish residential clinic on the premises where the appellant was operating a private surgery. The appeal was set down for a hearing on 10 July 2007. The appellant did not appear at the hearing in person or by counsel. She had, however, filed heads of argument.

Mr *Kanokanga* produced a document containing a notice of set down which showed that it had been uplifted from the Registrar's Office by a person who purported to be acting on behalf of the appellant. Mr *Kanokanga* argued that in the circumstances the appellant was in wilful default of appearance. He said that he was entitled to present the respondent's case on the merits. The Court canvassed with counsel the question whether the best course was not to have the appeal struck off the roll in case the appellant was not aware of the date of the hearing. Mr *Kanokanga*'s position was that in the light of the evidence of the document made available to it the Court was to proceed on the basis that the appellant was aware of the date of the hearing of the appeal. The court allowed Mr *Kanokanga* to make submissions on the merits of the appeal, at the conclusion of which it reserved judgment.

On 11 July 2007 a letter was written to the Registrar by the appellant's legal practitioners alleging that the appellant had not been served with the notice of set down of the appeal for the hearing on 10 July. The letter reads in part:

“Further to our letter of 10 July wherein we sought your clarification regarding the service of the notice of set down of the above appeal which was enrolled for yesterday (10 July 2007) and the appellant was in default, we discovered from your offices that the endorsement on the notice of set down was to the effect that the notice had been uplifted from your offices by NYASHA MAKWANISE on 14 June 2007. We do not have anyone in our employ by the name NYASHA MAKWANISE and neither our offices nor Advocate Matinenga were aware of the set down. We record as well that NYASHA MAKWANISE appears to be an employee of the respondent's legal practitioners.”

The letter was copied to Mr *Kanokanga*. There has been no denial of the allegation that the person who uplifted the notice of set down of the appeal was an employee of the respondent's firm of legal practitioners. It must be accepted as a fact that the appellant was not served with the notice of set down and had no knowledge of the date of the hearing of the appeal.

Rule 36(4) of the Rules of the Supreme Court provides that:

“Where, at the time of the hearing of an appeal, there is no appearance for the appellant and no written arguments have been filed by him, (my emphasis) the court may dismiss the appeal and make such order as to costs as it may think fit.

Provided that an appeal dismissed in terms of this subrule may thereafter on application by the appellant be reinstated.”

The question arises as to what course the Court has to take in a case in which the appellant has filed heads of argument and there is sufficient proof that he or she had notice of the date of the hearing of the appeal but does not appear at the hearing. Upon a proper construction of r 36(4) the Court in the circumstances does not have to dismiss the appeal without a hearing. It may proceed to hear the appeal and make a

determination taking into account the written representations made by the appellant in the heads of argument. A discretion manifestly rests in the Court in a matter of this kind. In *R v Mokwena* 1954(1) SA 256(A) the appellant, who had been duly served with a notice of set down, did not appear at the hearing of the appeal. Considering the course the court could take CENTLIVRES CJ at p 257 B said:

“In my view the court has a discretion, depending on the circumstances of each case, to hear the appeal or strike it off the roll or to postpone the hearing.”

The court in that particular case dealt with the facts and dismissed the appeal. It is clear that r 36(4) confers a discretion on the Court whether to dismiss the appeal with the prospects of an application for an order of reinstatement being made later where the circumstances mentioned thereunder are present, that is to say, the appellant was aware of the date of the hearing of the appeal and had not filed heads of argument.

Whilst the appellant filed heads of argument in this case she had no knowledge of the fact the appeal had been set down for a hearing on 10 July 2007. The subrule does not apply. The Court is not in a position to hear the appeal either. The best course to take is to strike off the appeal from the roll with no order as to costs.

The appeal is struck off the roll with no order as to costs.

CHIDYAUSIKU CJ: 4
I agree

CHEDA JA: I agree

Kanokanga & Partners, respondent's legal practitioners