

FARAI NIGEL CHITSINDE v (1) NYASHA AMANDA
CHITSINDE (2) STANNY MUSA

SUPREME COURT OF ZIMBABWE
HARARE, OCTOBER 8, NOVEMBER 14 & 21, 2008
& JANUARY 20, 2009

G Chikumbirike, for the applicant

E Matinenga, for the respondents

Before GARWE JA: In Chambers, in terms of r 31 of the Rules of the
Supreme Court.

This is an application for condonation for the late noting of an appeal and for an extension of time in which to appeal.

Before I deal with this application there is one preliminary matter that needs to be disposed of. That matter involves the wasted costs of 14 November 2008. A decision on that issue was held over for determination at the conclusion of the application

The background to this issue is largely common cause.

In his founding affidavit to the present application, the applicant, who represents his two minor children, deposed to the fact that the judgment of the High Court had been handed down on 28 May 2008. He had only seen a copy of the judgment on 9 June 2008 and had then unsuccessfully tried to file a notice of appeal on 23 June 2008. The Registrar of the Supreme Court had refused to accept the papers stating that the time for noting the appeal had expired.

At the hearing of the application before me on 14 November 2008, the applicant sought to prove that, notwithstanding the averment in his affidavit, the judgment had in fact been handed down only on 9 June 2008. In that event, so it was submitted, the applicant would not have been out of time when he attempted to file his notice of appeal on 23 June 2008. There would therefore be no need for the applicant to apply for condonation for the late filing of his appeal.

To prove that judgment had not been handed down on 28 May 2008, the applicant through his lawyers, filed a photocopy of the High Court motion roll roster for 28 May 2008. The applicant further requested that the hearing be postponed to enable him, and possibly the respondent, to ascertain when exactly judgment had been handed down. The respondent was not opposed to the postponement provided the applicant paid the costs occasioned by such postponement.

The applicant had stated under oath that the judgment had been handed down on 28 May 2008. He sought to prove that the judgment was not in fact handed down on that day but rather on a subsequent day. This necessitated a postponement of the application to 21 November 2008.

I am satisfied on these facts that the applicant must meet the costs of the postponement. The respondents were ready to argue this matter. It was the applicant who decided that it was necessary to ascertain from the High Court when exactly judgment had been handed down. The applicant should have done this before the hearing of the application. The decision to do this in the middle of the hearing of the application necessitated the postponement of the hearing. The applicant must therefore meet the wasted costs of that day, i.e. 14 November 2008, and it is accordingly so ordered.

I now proceed to deal with the application for condonation of the late noting of the appeal.

On the papers the explanation for the delay does not appear to be entirely satisfactory. It is clear from the founding affidavit that the applicant was aware as at 28 May 2008 that the judgment had been delivered. On 9 June 2008 he obtained a copy of the written judgment. He only attempted to file his notice of appeal on 23 June 2008, i.e. five days out of time. The applicant has not explained what happened between 9 June and 23 June 2008. It is true that between 9 June and 18 June 2008 the applicant could have timeously filed his notice of appeal. He has not, however, clearly explained the delay. All he has said is that the appeal could not have been noted without his lawyers having read the judgment. I am, however, prepared to give the applicant the benefit of the doubt in this regard.

On the merits, various issues have been raised on the papers.

On the issue of citation of the applicant, the court *a quo* was satisfied that any defect in the citation had been cured in the founding affidavit which clearly indicated that the minor children were being represented by their father and natural guardian. I do not believe that the court *a quo* can be faulted for reaching this decision. The court *a*

quo is also criticized for *mero motu* raising the issue of illegality. Our law is clear that a court can do so. Both counsel are agreed that the three agreements giving rise to this matter were null and void.

Clearly, therefore, the court *a quo* cannot be criticized for not ordering transfer of the property against payment of the correct duty. The contract was *turpis*. It was intended to assist the seller evade payment of the correct duty. Further the court *a quo* cannot be criticized for not ordering a refund of the purchase price because that issue was not before it. On all these issues the applicant has no reasonable prospects of success on appeal.

However, the applicant is correct in submitting that the order that he should vacate the property is improper. Having found that the agreement was *turpis*, the court *a quo* should have simply declared it null and void and stopped there. The question as to the remaining rights of the parties should have been left to them to pursue.

It was not, in my view, for the court to assist the one party by ordering eviction. The issue of eviction should have been left to the parties to pursue separately but not as a consequence of the declaration of nullity of the agreement.

On that basis alone, the applicant has good prospect of success on appeal. To deny him condonation would be to shut the door even though it is apparent that the order of ejection was improperly made.

In the result it is ordered as follows –

1. The application for condonation for the late noting of the appeal and for an extension of time within to appeal be and is hereby granted.

The applicant is given leave to file his notice of appeal within five (5) days of today's date.

There will be no order as to costs.

For the avoidance of doubt the wasted costs of 14 November 2008 are to be paid by the applicant.

Chikumbirike & Associates, applicant's legal practitioners

C Nhemwa & Associates, respondents' legal practitioners