REMO INVESTMENT BROKERS (PRIVATE) LIMITED
v
INTERFIN SECURITIES (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
HARARE JULY 17 & NOVEMBER 14, 2014

J Samukange, for the applicant

A B Chinake, for the respondent

Before MAVANGIRA AJA, in Chambers.

On 14 November 2014 I granted an order in the terms sought by the applicant and gave my reasons to the parties in chambers. Written reasons have now been requested. The following are the reasons for my decision.

This is an application for dismissal of appeal brought in terms of r 36(1) as read with r 46(5) of the Rules of the Supreme Court, 1964. On 12 February 2014 the applicant obtained a judgment in its favour in case number HC 3624/12 for the return of specified shares and share certificates. On 18 February 2014 the respondent filed a Notice of Appeal against the said judgment with this court. On 4 April 2014 the applicant filed this application seeking an order in the following terms:

"It is hereby ordered that:

1. The Notice of Appeal and Grounds of Appeal under case number SC 68/14 is hereby dismissed.
2. The Respondent pays costs on an attorney and client scale."

The uncontested facts of the matter are that after the respondent's legal practitioners filed a Notice of Appeal on 18 February 2014, the applicant's legal practitioners wrote to them on 27 February 2014 demanding security for costs. As the appeal was noted on 18 February 2014 it accordingly followed that in terms of r 46(5), security for costs ought to have been furnished by 18 March 2014. In their letter dated 27 February 2014 to the respondent's legal practitioners, applicant's legal practitioners made reference to the provision for security for costs in r 46(5) and demanded the provision of security for such costs in the sum of USD$55 000. By letter dated 5 March 2014 the respondent's legal practitioner indicated that they appreciated the import of r 46(5) and were taking instructions from their client. On 6 March the applicant's legal practitioners again wrote to the respondent's legal practitioners indicating, among other things, that the applicant was inclined to exercise the option to have the appeal dismissed on the basis that the respondent had failed to comply with the cited rules of this Court. There was no reply to this letter. The applicant's legal practitioners yet again wrote on 26 March 2014, referred to the previous correspondence referred to earlier herein and made demand for payment of security for costs in the sum of US$55 000 by 1 April 2014 failing which, they had instructions to file an urgent chamber application for dismissal of the appeal. The demand was not met. For this reason and guided by the rules, this application was then filed on 4 April 2014.

No opposing papers were filed by or on behalf of the respondent. Mr *Chinake* who appeared for the respondent submitted that he had not filed opposing papers and that he

had no meaningful submissions to make. He further advised the court that the respondent was no longer trading. Mr *Chinake* submitted further that he had advised the respondent that even though it was not trading, potentially the application for dismissal of appeal would be granted. The respondent had then placed at the disposal of his law firm an amount of US$5 000. Thereafter he then by letter dated 2 May 2014 advised the Registrar that they were in a position to tender US$5 000. He accepted that the respondent was obliged to pay security for costs but that there was a dispute which the court had to determine as to what constituted a sufficient amount for security for costs.

Rule 46 provides as follows: "***46. Security***

(1) If the judgment appealed from is carried into execution by direction of the court appealed from, security for the costs of appeal shall be as determined by that court and shall not be required under this rule.

(2) Where the execution of a judgment is suspended pending an appeal and the respondent has not waived his right to security, the appellant shall, before lodging with a registrar copies of the record, enter into good and sufficient security for the respondent's cost of appeal:
Provided that where the parties are unable to agree on the amounts or nature of the security to be provided, the matter shall be determined by the registrar.

(3) A judge may on application at the cost of the appellant and for good cause shown exempt the appellant wholly or in part from the giving of security under subrule (2).
[Subrule amended by RGN 421 of 1975]

(4) No security need be furnished by the Government of Southern Rhodesia or by a municipal or city council or by a town management board.

(5) Where an appellant is required by this rule to furnish security for the respondent's costs of appeal, such security <u>shall</u> be furnished within one month of the date of filing of the notice of his appeal in terms of rule 29."(emphasis added)

Rule 36 provides:

"36. Dismissal of appeal without hearing

(1) If an appellant who is required to furnish security for the respondent's costs of appeal fails to furnish such security within the period prescribed in subrule (5) of rule 46, the respondent may

forthwith give notice to the appellant that, on the date specified in the notice, being not less than five days after service of the notice, he will apply to a judge for dismissal of the appeal by reason of such failure, and for such other order specified in the notice as he may require.

[Subrule amended by s.i. 14 of 1992]

(2) The date specified in the notice given in terms of subrule (1) shall be a date which a registrar has previously signified to the respondent as being a suitable date.

(3) The judge, on an application for dismissal by the respondent brought in terms of subrule (1), may dismiss the appeal and, additionally or alternatively, may make such other order as he thinks fit, including any order as to costs, whether or not one or other or both the parties to the appeal appear at the hearing.

(4) 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, 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.

(5) A registrar shall notify the Registrar of the court whose judgment is appealed against of the dismissal of any appeal under this rule."

It is common cause between the parties that security for costs is required in this matter in terms of the Rules. Mr *Chinake* made that concession in his submissions. The Rules provide for the furnishing of such security within one month of the date of the filing of a notice of appeal. In this regard r 46(5) is couched in peremptory terms. The respondent filed a notice of appeal on 18 February 2014. It was only by letter dated 2 May 2014 that an indication was made to the Registrar of an intention to meet the requirement for the furnishing of security for costs albeit not in the amount specified by the applicant. A period in excess of two months had elapsed by the time this indication was made to the Registrar. Rule 46(5) was therefore flouted. Rule 36(1) provides that where there has been such failure to comply with r 46(5) the respondent may give notice to the appellant that he will apply to a judge for dismissal of the appeal by reason of such failure.

On the facts of this matter the respondent was given more than the stipulated 5 days' notice of the applicant's intention to file this application. Despite being made aware of the provisions of the law and the consequences of non- compliance the respondent did not take appropriate action. Neither did it explain why it did not do so. On these facts I found no justification for not exercising the discretion granted in r 36(3) to a judge, to dismiss the appeal as prayed for by the applicant. This in effect can properly be viewed as an unopposed application. The submission by Mr *Chinake* that there was a dispute as to what constitutes a sufficient amount for security for costs was not substantiated. He made no submission as to how and or when the dispute allegedly arose. It appears to be a half-hearted submission made without any seriousness, particularly when viewed against Mr *Chinake's* other submissions captured earlier herein. Nevertheless he has in these circumstances now requested written reasons for my decision.

No real or substantial opposition was made to the prayer for costs on an attorney and client scale.

In the result on 14 November 2014 I granted an order in the terms prayed for by the applicant in the draft attached to the application.

Venturas & Samukange, applicant's legal practitioners.

Kantor & Immerman, respondent's legal practitioners.