REPORTABLE (13)

UNKI MINES (PRIVATE) LIMITED
v
(1) SHURUGWI TOWN COUNCIL (2) JUSTICE A EBRAHIM N.O

SUPREME COURT OF ZIMBABWE
BULAWAYO: 14 NOVEMBER 2023

A.B Chinake, for the applicant

T.O Tavengwa, for the first respondent

No appearance for the second respondent

IN CHAMBERS

Judgment No. SC 13/24
Chamber Application No. SCB 82/23

UCHENA JA:

[1] This is an opposed chamber application in terms of r 43 of the Supreme Court Rules 2018, for condonation and extension of time within which to note an appeal.

BACKGROUND FACTS

[2] The applicant and the first respondent entered into an agreement of sale of land belonging to the first respondent. The land is held under Deed of Transfer 1989/08. The first respondent proposed a subdivision of the piece of land. The proposed subdivisions were never taken out of the original land identified under deed of transfer 1989/08. The

proposed subdivisions were made the subject of a sale agreement between the applicant and the first respondent.

[3] It was a term of the agreement that in the event of a dispute, the parties would refer the matter for arbitration. The merx of the sale were the proposed subdivisions as depicted on the map. The said map was later found to be invalid as it identified wrong portions of the land. A new map was produced which identified land which is different from the land identified in the agreement of sale itself. A dispute arose concerning the number of stands or subdivisions bought by the applicant. The dispute was brought before an arbitrator who is the second respondent in this matter. The arbitrator's award held that there was a binding agreement between the parties. The first respondent was aggrieved by the arbitrator's award. It filed an application for the setting aside of the arbitrators award before the court *a quo*, on the basis that the arbitral award is contrary to public policy. At the hearing of the matter, the first respondent raised a point *in limine* to the effect that the arbitrator failed to keep a complete record of proceedings with regards to the matter. It also averred that the applicant's counter application was incompetent as it was lodged through an opposing affidavit. It averred that an application in the High Court is made in the form of a founding affidavit and under Form 29. On the merits, the first respondent argued that the award given by the arbitrator is a *brutum fulmen* in that the disposition of the award is incapable of enforcement as it did not make an enforceable order. It argued that the arbitrator did not give a formal order directing either party to do anything. It further argued that the arbitrator failed to comply with the provisions of Article 31 and 33 of the Arbitration Act. It further argued that the arbitral award is contrary to public policy

because the order interfered with the sanctity of the parties' agreement and the agreement is contrary to mandatory provisions of the law.

[4] On the contrary, the respondent who is the applicant in this case raised a point *in limine* to the effect that the application for the setting aside of the arbitral award could not be heard before its application for dismissal for want of prosecution is heard and completed. On the merits, it argued that there was no basis for the setting aside of the arbitral award as the findings of the arbitrator were factually and legally correct. It disputed that the first respondent bought individual stands. It contended that it bought the whole subdivision through an addendum to the Main Agreement.

[5] The court *a quo* ruled that in the absence of the arbitrator's record, it would not be possible for it to scrutinize the proceedings in terms of Article 34 and 36. It held that at law, any tribunal whose proceedings may be challenged before another tribunal ought to keep and maintain a record of proceedings. Regarding the applicant's counter application, the court struck it off on the basis that it was not filed in the prescribed form. It found that the arbitral award was contrary to public policy in that it made additions to the express terms of the parties' agreement which was itself made contrary to mandatory provisions of the law. The court *a quo* therefore set aside the arbitrator's award. The applicant wishes to appeal against the decision of the court *a quo* but it is out of time hence the application for condonation and leave to note the appeal out of time .

[6] At the hearing of this application on 14 November 2023, Mr *Chinake* for the applicant submitted that the applicant failed to note an appeal on time because he was not advised of

the handing down of the judgement which the applicant seeks to appeal against. He submitted that in the circumstances a delay of a period of not more than 22 days is not inordinate. He further submitted that the fact that he was not advised of the handing down of the judgment proves that the applicant was not in willful defiance of the rules of this Court and that the explanation for the delay is reasonable. Regarding the issue of prospects of success, he submitted that the application has good prospects of success.

[7] Mr *Tavengwa* for the first respondent agreed that the parties were not notified of the handing down of the judgment which the applicant seeks to appeal against and that it was handed down in the absence of the parties. He submitted that the intended grounds of appeal enjoy no prospects of success as real rights to land can only be sold after a subdivision permit has been issued. He further submitted that there was no approved diagram. He submitted that the contract entered into by the parties is unenforceable because it does not comply with mandatory provisions of the law. Counsel further averred that without a record of proceedings by the arbitrator, it is impossible for the court to make an informed decision.

[8] After hearing submissions from both parties, I postponed the matter to 20 November 2023 and directed the parties to file supplementary heads on the interpretation of s 39 (1) and (2) of the Regional Town & Planning Act [*Chapter 29:12*] (hereinafter referred to as the RTP Act") and s 152 (1) - (4) of the Urban Councils Act [*Chapter 29:15*] (hereinafter referred to as the UC Act").

[9] In his supplementary heads Mr *Chinake* for the applicant submitted that in terms of s 39 (2), s 39 (1) does not apply to the subdivision of land which is owned by an urban council or town council. He averred that the first respondent owned the piece of land in dispute and it could sell it before the subdivision. He submitted that the first respondent took all necessary steps to comply with the provisions of s 152 (1) – (4) of the UC Act.

[10] Mr *Tavengwa* for the first respondent submitted that the consideration of these mandatory statutory provisions are for purposes of determining whether or not the contract entered into by the parties was lawful and enforceable. He submitted that the provisions of s 152 (1) – (4) of the UC Act requires council to publish a Notice of Intention to sell the land in a Newspaper and in terms of subs 4 Council cannot dispose of land without an approved Town planning scheme. He further averred that non-compliance with the mandatory provisions of s 152 of the UC Act renders the agreement a nullity. In support of his argument, Counsel cited the cases of *Bruce v Econet Wireless (Pvt) Ltd & Anor* 2009 (1) ZLR 284 (H), *Ndemera v The State* HH528/23 (HACC15/23) and *Pinnacle Property Holdings (Pvt) Ltd v Municipality of Redcliff & Another* SC 14/23.

[11] Counsel for the first respondent further submitted that the Turquand Rule which counsel for the applicant submitted was applicable does not apply to the circumstances of this case. In addition, Mr *Tavengwa* contended that an arbitral award founded on an agreement that does not comply with mandatory provisions of statute law is contrary to public policy.

THE LAW `

[12] An application for condonation and extension of time within which to note an appeal must satisfy specified requirements before the court can grant the indulgence sought. In the case of *Bessie Maheya v Independent Africa Church* SC58/07, MALABA JA (as he then was) said:

> "In considering applications for condonation of non-compliance with its Rules, the court has a discretion which it has to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefore; the prospects of success on appeal; the importance of the case; the 1st respondent's interests in the finality of the judgment; the convenience to the court and the avoidance of unnecessary delays in the administration of justice".

APPLICATION OF THE LAW TO THE FACTS

[13] Mr *Chinake*'s argument is that the delay in noting the application is not inordinate. Mr *Tavengwa* agreed that the judgment *a quo* was handed down in the absence of both parties. He does not deny that it caused the delay in the noting of the appeal. I am satisfied that the delay is not inordinate and that the explanation for the delay is reasonable. In spite of the applicant's success on these requirements it must prove that the application enjoys good prospects of success.

[14] The test of prospects of success on appeal is an assessment of whether or not a different court can arrive at a different finding than the court *a quo*. In the case of *Essop v S,* [2016] ZASCA 114, the court in defining prospects of success held that;

> "What the test for reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a

realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal." (emphasis added)

[15] Prospects of success on appeal are ascertained from the grounds of the intended appeal.

[16] On the issues covered by the parties' filed supplementary heads on the interpretation of s 39 (1) and (2) of the RTP Act and s 152 (2) - (4) of the UC Act I make the following observations:

"Section 39 (1) and (2) of the RTP Act reads as follows:

(1) Subject to subs (2), no person shall—
(a) subdivide any property; or
(b) enter into any agreement—
(i) for the change of ownership of any portion of a property; or
(ii) for the lease of any portion of a property for a period of ten years or more or for the lifetime of the lessee; or
(iii) …
(iv)….
(c) consolidate two or more properties into one property; except in accordance with a permit granted in terms of section forty:

Provided that an undivided share in any property, whether or not it is coupled with an exclusive right of occupation, shall not be regarded for the purposes of this subsection as a portion of that property.

(2) **Subsection (1) shall not apply to—**

(a) **land within the area under the jurisdiction of a municipal council or town council which is owned by the municipality or town concerned; or**

(b) land within a local government area administered and controlled by a local authority which is owned by that local authority or by the State; or." (Emphasis added)

[17] A reading of s 39 (2) establishes that the provisions of s 39 (1) do not apply to the first respondent which is a Town Council. The land in dispute belongs to the first respondent. It can therefore be sold before it is subdivided. That supports the applicant's intended ground of appeal No 5 which attacks the court *a quo*'s finding that the entering of the parties into an agreement of sale of land, in the absence of a sub-division permit renders the agreement a nullity and the arbitrator's award contrary to public policy. That part of the court *a quo's* decision is therefore not correct and gives the applicant prospects of success.

[18] Section 152 (2) – (4) of the UC Act provides as follows:

> "(2) Before selling, exchanging, leasing, donating or otherwise disposing of or permitting the use of any land owned by it the council shall, by notice published in two issues of a newspaper and posted at the office of the council, give notice —
>
> (a) of its intention to do so, describing the land concerned and stating the object, terms and conditions of the proposed sale, exchange, lease, donation, disposition or grant of permission of use; and
>
> (b) that a copy of the proposal is open for inspection during office hours at the office of the council for a period of twenty-one days from the date of the last publication of the notice in a newspaper; and
>
> (c) that any person who objects to the proposal may lodge his objection with the town clerk within the period of twenty-one days referred to in para (b).
>
> (3) The council shall submit a copy of the notice referred to in subsection (2) to the Minister not later than the date of the first publication of that notice in a newspaper.
>
> (4) A council may not, subject to section one hundred and fifty-three, sell, exchange, lease, donate or otherwise dispose of or permit the use of any land owned by the council which lies within an area for which—
>
> (a) there is no approved town planning scheme, unless—
>
> (i) a copy of the proposal and of the notice published in terms of subs (2), together with any objections which

have been lodged and the comments of the council on such objections, have been transmitted to the Minister; and

(ii) the Minister has consented to the sale, exchange, lease, donation or other disposition or permission to use, as the case may be:

Provided that the Minister shall not consent unless he is satisfied that an adequate area of land, suitable for the purpose, has, where necessary, been reserved for State purposes or for postal and telecommunication services; or there is an approved town planning scheme, unless—

(i) the period of twenty-one days referred to in subsection (2) has expired; and

(ii) if any objections have been lodged they have been considered by the council."

[19] In terms of s 152 (2), (3) and (4), land owned by a Town Council cannot be sold or leased, before the requirements stated in subs (2) to (4) have been complied with. The requirements are issuing two notices in a newspaper, submitting the notice to the Minister, the Minister's approval and that there should be an approved town planning scheme.

[20] In this case there is no direct documental evidence to prove that the notices were given and the Minister's consent obtained. There is also no direct documental evidence that there is a town planning scheme or a diagram which forms part of the record besides indirect references in the first respondent's minutes and resolutions in which it is recorded that these requirements were complied with and that authority was granted.

[21] Section 152 of the UC Act is couched in peremptory terms. The use of the word "shall" as opposed to "may" proves that the provisions are mandatory. The provisions have to be

strictly complied with. Failure to comply with mandatory provisions of the law renders the agreement of sale a nullity.

[22] In the case of *Pinnacle Property Holdings (Pvt) Ltd v The Municipality of Redcliff & Another* SC 14-23 BHUNU JA commenting on the provision of s 152 of the UC Act, said:

> "Undoubtedly the interpretation placed upon s 152 of the Urban Councils Act in the *Bruce Case supra* is correct. The section is couched in simple unambiguous language admitting of no other meaning. It is axiomatic that the section in-fact constitutes a condition precedent which must be fulfilled before a municipality can alienate its land. The object for the laid down procedure is to give interested members of the public the right to object as provided for under s 152 (2) (c) of the Act."

[23] Further, in *Bruce v Econet Wireless (Pvt) Ltd and Another* 2009 (1) ZLR 284 (H*)* at 290C OMERJEE J, (as he then was), said:

> "Before dealing with the merits of the case, I wish to make the following observation. A local authority, such as the City of Harare, is empowered by s 152 of the Urban Councils Act to alienate any land it owns through sale, lease, donation, or otherwise dispose of, or permit the use of it. In doing so, the local authority is obliged to comply with the requirements stipulated in that provision." (Emphasis added)

[24] As already indicated there are allegations in the minutes and resolutions of the first respondent's minutes that authority to sell was obtained. It cannot therefore be confidently held that there was failure to comply with s 152 (2) to (4) of the UC Act.

[25] In the case of *ZESA v Maposa* 1999 (2) ZLR 452 (S) at 466E-H GUBBAY CJ commenting on how to determine issues of public policy said:

> "An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact and or in law. In such a situation the court would not be justified in setting the award aside.

> Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award **by having regard to what it considers should have been the correct decision. Where however the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it."** (Emphasis added)

[26] The above calls for caution in a judge's gate keeping function. The intolerable level of an award being contrary to public policy should not be lightly assumed by a single judge in chambers, especially when some proposed grounds of appeal point to the applicant's prospects of success. I would therefore allow the application to enable the full bench to determine proposed appeal.

[27] It is accordingly ordered as follows:

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

2. The applicant shall file its notice of appeal within five (5) days from the date of the granting of this order.

3. The costs of this application shall be costs in the cause.

Kantor & Immerman, applicant's legal practitioners

Mutuso, Taruvinga & Mhiribidi, 1st respondent's legal practitioners.