REPORTABLE (9)

(1) FRANCIS MADYAZVIZI (2) MAKUWAZA MOSES (3) ZEALOUS NYABADZA (4) ARTWELL SHIRIPINDA (5) TENDAI MAKORE
v
(1) THEODORE SANDU (2) JEDDIE BERE (3) VALENTINE SWARAYI (4) MAXWELL CHINHORO (5) DAVID BHAMU (6) GERALD CHIUTSI (7) MUNYARADZI MPOFU (8) MALVIN MUTSVANGIRI (9) MRS MUCHECHE

SUPREME COURT OF ZIMBABWE
HARARE: 10 NOVEMBER 2021 & 26 JANUARY 2023

CHAMBER APPLICATION

S.T. Mutema, for the applicants

C.T. Tinarwo, for the respondents

KUDYA JA:

[1] The first and third applicants seek condonation for the late noting of an appeal and extension of time within which to appeal. The application is contested by the first, third, fourth and sixth respondents.

[2] The parties are fighting over the control of the Stoneridge Residents Association (the association).

[3] The association was formed on 5 June 2013. The parties did not provide its constitution. It, however, took over the servicing of the Stoneridge Farm in Waterfalls Harare from Amalish (Private) Limited, a land developer who failed to do so. The applicants (inclusive of the three who did not institute the present proceedings) became members of the management committee of the association from its inception. On 5 September 2015, the applicants refused to attend a meeting convened by some members of the association to discuss the management committee's stewardship. The applicants were dethroned and replaced by a new management committee consisting of all the above cited respondents. They were advised of the new position by letter dated 8 September 2015.

[4] On 1 October 2015, the applicants executed a notarial trust deed of the Stoneridge Residential Trust. They registered it with the Registrar of Deeds on 2 October 2015. The two settlers of the deed were the first and third applicants, who together with the other 'applicants' comprised the trustees. Clause 3 of the deed stipulated that the beneficiaries would be "all the people who subscribe to this Trust". The objectives of the Trust were, *inter alia*, to develop the stands that had purportedly been allocated to the association by Amalish (Private) Limited, service them and administer the finances of the association.

[5] Incensed by the trust deed, the respondents filed an application for an interdict in the Magistrate's Court in which they sought to bar the applicants from interfering with their interim committee's management of the affairs of the association. They, however, withdrew that application with a tender of costs on the higher scale. They, thereafter, proceeded to institute a similar application, Case No. HC 11 789/15, in the High Court.

[5] On 10 January 2016, the respondents caused the Sunday Mail to publish allegations of financial impropriety and unlawful registration of the trust deed against the applicants. This prompted the applicants to file an urgent chamber application for an interim interdict in the High Court under Case No. HC 314/16, on 13 January 2016. They sought to bar the respondents from purporting to be the interim management committee and publishing harmful information of the association pending the finalization of Case No. HC 11 789/15. They premised the return date on the respondents' compliance with the order to be issued in Case No. HC 11 789/15.

[6] The application was struck off the roll of urgent matters for lack of urgency.

[7] On 11 May 2016, the association, respondents and 500 other members issued summons out of the High Court in Case No. HC 4976/16 seeking a declaration of invalidity and deregistration of the trust deed. On 6 July 2019, the application was dismissed for want of prosecution with costs on the higher scale in Case No. HC 7025/18.

[8] Emboldened by the dismissal, the applicants re-set case No. HC 314/16 on the opposed roll. On 27 February 2020, the matter was struck off the roll with costs on the higher scale by Tagu J on the basis of the preliminary points raised by the respondents. Resultantly, on 10 March 2020 applicants filed an "Amended Court Application for an Interdict made in terms of Order 32 of the High Court Rules 1971" and a draft order. Other than these changes, the application comprised the urgent chamber application documentation that had been filed on 13 January 2016.

[9] The application was, again, argued before Tagu J on 18 June 2020. He handed down judgment on 16 September 2020. It was common cause that the parties were only advised of the judgment on 20 November 2020.

[10] Disgruntled by the judgment, the applicants applied for condonation and extension of time within which to appeal on 25 November 2020 in Case No. SC 522/20. The application was opposed on 3 December 2020. It was granted by consent on 31 March 2021.

[11] The appeal, Case No. SC 90/21, was heard by this Court on 21 September 2021. It was struck of the roll by consent and the applicants ordered to pay costs on the higher scale for the reason that the relief sought was discordant with the grounds of appeal.

[12] On 6 October 2021, the applicants filed the present application. They recast their prospective grounds of appeal and realigned the relief to conform with them.

[13] The prospective grounds of appeal are these.

1. The court *a quo* erred at law by dismissing an application for the prohibitory interdict on the basis of a relief which was never sought after, consequently, it did not articulate the answer to the issues for determination, particularly that there was a Notarial Deed authorizing the applicants to act for Stoneridge Residents Association.

2. The court *a quo* erred in law by striking off the roll and subsequently dismissing the application before it in direct contravention of r 229C of the High Court Rules and legal precedents on what procedure to follow after a finding that the matter is not urgent.

3. The court *a quo* erred in law by dismissing the application with an order of costs on a higher scale in circumstances were the dismissal of the application was occasioned by its own misapprehension of issues for determination.

The relief sought is the success of the appeal with costs on the higher scale, vacation of the judgment *a quo* and remittal of the matter *a quo*, before a different judge.

[14] At the hearing, Mr *Mutema* for the applicants abandoned the second ground of appeal on the basis that that it was in dissonance with the other two grounds.

[15] It is trite that the main cumulative requirements for an application of this nature are the length of the delay, the reasonableness of the explanation for the delay and the prospects of success on appeal.

[16] It is common cause that the judgment sought to be appealed against was handed down on 16 September 2020. The present application was filed on 6 October 2021. The delay of over a year is inordinate.

[17] Mr *Mutema* advanced three explanations for the delay. The first, which was conceded by Mr *Tinarwo* for the respondents was that the delay to 25 November 2020 was caused by the Registrar of the High Court's failure to advise the parties of the date on which the judgment was handed down. The second, was that the delay to 21 September 2021 was in part occasioned by the consent order in respect of the first application for condonation, which lulled the respondents into believing that their grounds of appeal were in order. The third was that the present application complied with the requirement stipulated in para 5 of the Practice Direction No. 3 of 2013, which obliges a party whose matter has been struck off to file a corrected application within 30 days. It is clear to me that the comedy of errors between 31 March 2021 and 6 October 2021 were occasioned by the failure of the applicant's erstwhile legal practitioners to abide by the rules of this Court. At all material times, the applicants exhibited a strong desire to appeal the judgment of the court *a quo*. I am satisfied that this is not a proper case to visit the sins of their legal practitioner on them. I, accordingly, accept that the applicants' cumulative explanation for the delay is reasonable.

[18] The last consideration relates to the prospects of success on appeal. It was common cause that the court *a quo* did not relate to the correct draft order, which the applicants filed together with the amended court application. Instead, it inexplicably relied on an attachment which was explained in the body of the founding affidavit as the draft order sought by the respondents in the matter they withdrew in the Magistrate's Court. That draft order was on the face of it appropriately referenced to the Magistrate's Court.

[19] Mr *Mutema* contended that the court *a quo* went on a frolic of its own, when it premised its decision on the wrong draft order. He also contended that the court *a quo*'s failure to deal with the merits of the case, which were extensively argued before it, constituted a gross misdirection. He further argued that the court *a quo* erred in awarding a punitive costs order that was premised on its own failure to determine the real issues before it. He, therefore, submitted that there were prospects of success on appeal arising from these three factors, which warranted the success of the application. *Per contra*, Mr *Tinarwo* supported the determination of the court *a quo*. He argued that the applicants' cause of action was divorced from the actual relief sought *a quo*. He strongly argued that the prospects of success on appeal would be adversely affected by the dichotomy between the founding affidavit and the amended draft order, which was not adverted to by the court *a quo*. He considered the application to be an abuse of process and sought its dismissal with costs on a higher scale.

[20] The court *a quo* dismissed the application on the basis that the founding affidavit did not support the relief sought. This is the effect of its *ratio decidendi* that appears on p 3-4 of its judgment, which reads:

> "Having read the case of *Yunus Ahmed* v *Docking Station Safaris (Private) Limited t/a CC Sales* (*supra*) referred to by the respondents I tend to agree with them that this is a confused application. On the face of it it's a court application for an interdict. The next page and the following pages talk of an urgent chamber application. The founding affidavit supports an urgent chamber application and not a court application for an interdict. Worse still there are two orders in the same file. One for a provisional order and the other a final order for an interdict. An application stands or falls on the founding affidavit. See *Fuyana* v *Moyo* SC-54-06, *Muchini* v *Adams & Ors* SC- 47-13 and *Austerlands (Pvt) Ltd* v *Trade and Investments Bank Ltd & Ors* SC- 80-06".
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> ……

> "In casu, the applicants ought to have drafted another founding affidavit dealing with a court application rather than using the urgent chamber application papers since that had been struck off the roll. I have no option but to dismiss the application with costs on a legal practitioner and client scale".

[21] It is apparent to me that there is no likelihood that the *ratio decidendi* of the court *a quo* would be overturned on appeal. An application, such as the one sought to be appealed against, indeed stands on the *causa* pleaded in the founding affidavit. The founding affidavit under which the court application was settled, pleaded a *causa* of an interim interdict. The relief sought in the amended order, which the applicants filed on 10 March 2020, was for a declarator. The requirements and evidence for an interim interdict that were averred in the founding affidavit and those for a declarator are not the same. Compare *Airfield investments (Pvt) Ltd* v *Minister of Lands & Ors* 2004 (1) ZLR 511 (S) at 517 D-E and *Johnsen v Agricultural Finance Corporation* 1995 (1) ZLR 65 (S) at 72 E-F. The applicants could not plead a cause of action for an interdict and seek the relief of a declarator.

[22] The inevitable fate of a case, whether brought by way of action or application, which is based on totally disconnected and irrelevant evidence is a dismissal. This is because such evidence cannot establish on a balance of probabilities the pleaded cause of action.

[23] The award of costs *a quo* was a proper exercise of its discretion. Clearly, the applicants were abusing the court process and harassing the respondents by re-enrolling a half-baked matter.

[23] In the circumstances, I agree with Mr *Tinarwo* that the applicants have no prospects of success on appeal. An order for punitive costs is not warranted. This is because the appeal order in Case No. SC 90/21 may have genuinely encouraged the applicants to seek a second bite of the cherry.

[24] Accordingly, it is ordered that:

The application be and is hereby dismissed with costs on the ordinary scale.

Stansilous & Associates, applicants' legal practitioners.
Zimudzi & Associates, respondents' legal practitioners.