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PATIENCE KANYENGA
v
(1) HARARE INSTITUTE OF TECHNOLOGY
(2) ENGINEER MERCY MUSAIDA MANYUCHI
(3) PROFESSOR LILIAN TICHAGWA
(4) AFRICAN REGIONAL INTELLECTUAL PROPERTY ORGANISATION

SUPREME COURT OF ZIMBABWE
HARARE: 4 MAY 2021 & 26 NOVEMBER 2021

G. Nyamayi, for the applicant

G. Maginga, for the respondents

IN CHAMBERS

BHUNU JA: This is an application for leave to prosecute an appeal *in forma pauperi*s brought in terms of r 49 of the Supreme Court Rules, 2018. The application was opposed.

FACTUAL BACKGROUND

The first respondent is a tertiary institution established in terms of Zimbabwean law. The applicant is a former student of the first respondent. She graduated with a Bachelor

of Technology (Honours) Degree at first respondent's college. In fulfilment of the degree, she submitted a project titled Design of a Plant Producing 24TPD Fuel Briquettes from Cornstover (the invention). The second and third respondents supervised the project.

The applicant issued summons in the High Court seeking an order that she be declared the sole proprietor of the intellectual property rights in the invention. It was her case that the respondents were manufacturing and selling fuel briquettes using the slow pyrolysis and briquetting technology without her authority. She claimed sole intellectual property rights in the invention. As a result, she sought an order interdicting the respondents from interfering with her property rights in the invention. She claimed that the invention was her intellectual property. As such, the respondent could not adopt and sell fuel briquettes using the slow pyrolysis method without her consent.

In response, the first respondent argued that the production of fuel briquettes from agricultural waste by the method of slow pyrolysis or other technology is common and not her invention. It further argued that the invention was owned by it as the applicant was an undergraduate at the time she did the invention. It contended that the invention was supervised, approved and marked by it hence the applicant could not claim ownership of any intellectual rights in it.

The court *a quo* dismissed the applicant's claim. It found that there was no evidence to prove that the respondents were manufacturing briquettes commercially. It also found that the applicant had failed to establish that copyright existed in respect of the invention. The court also held that the applicant had failed to prove that the first respondent benefited financially

from the invention. It was the court's finding that an invention is not work in which copyright can subsist.

The applicant was not pleased with the decision of the court *a quo*. She intends to appeal against that decision. She however claims that she does not have the means to prosecute the appeal hence the present application for leave to prosecute the appeal *in forma pauperis*.

ANALYSIS OF THE FACTS AND THE LAW

Rule 49 of the Supreme Court Rules, 2018, allows indigent litigants to appeal or defend a civil appeal *in forma pauperis*. The rule provides that:

> "1. Any person without means may apply for leave: to prosecute or defend a civil appeal in *forma pauperis.*
>
> 2. Where the opposite party consents to the applicant proceeding *in forma pauperis* an application for leave to proceed as aforesaid may be made either to a registrar or orally from the bar at the hearing of the appeal and where an application is so made the registrar or court as the case may be, may forthwith grant the application.
>
> 3. Where the opposite party after having been consulted does not consent to the applicant proceeding in *forma pauperis,* an application shall he made to a judge.
>
> 4. An application in terms of sub rule (3) shall set forth fully the financial position of the applicant, and in particular, shall state that the applicant is unable to provide sureties and that, excepting household goods, wearing apparel, tools of trade and his or her interest in the subject matter of the appeal, he or she is not possessed of property to the amount of ten thousand dollars (USD 10 000). Such particulars shall be supported by a verifying affidavit and shall be accompanied by a certificate of a legal practitioner that he or she has considered the case of the applicant and that prima facie he or she has reasonable ground to prosecute or defend the appeal."

What is critical from the above-mentioned rule is that the applicant must lack the means to prosecute the appeal. The Supreme Court Rules do not provide for the definition of the term *in forma pauperis. A*s a result I have to resort to the dictionary definition. The Black's Law Dictionary (8th ed. 2004) defines *in forma pauperis* as follows:

> "*in forma pauperis* ...[Latin "in the manner of a pauper"] In the manner of an indigent who is permitted to disregard filing fees and court costs."

The same dictionary defines an indigent person as a person who is too poor to hire a lawyer and who, upon indictment, becomes eligible to receive aid from a court-appointed attorney and a waiver of court costs.

To that end, the applicant avers that she is not employed. She survives by making detergents which she sells to her neighbours with measly earnings. In support of her application she has filed her bank statements as well as her husband's pay slip. The applicant's husband is employed by the Zimbabwe National Army. The bank statements show that she earns about RTGS 25 000 per month whereas her husband earns RTGS 25 653.08. They therefore have a combined earning of RTGS 50 653.08.

In terms of the rules any person who owns goods valued at less than USD10 000 does not qualify as a *pauper*. Both the applicant and her husband's properties do not exceed USD 10 000. The applicant therefore qualifies to be granted *in forma pauperis* status.

In the court *a quo* the applicant was granted leave to institute proceedings *in forma pauperis.* No allegations have been made that her circumstances have changed. As a result I find that the applicant does not have means to meet the costs associated with prosecuting the appeal. This is so especially given that the costs associated with prosecuting the appeal in the Supreme Court are higher than those in the High Court. I now turn to consider the prospects of success.

PROSPECTS OF SUCCESS

Having found that the appellant qualifies to be granted *in forma pauperis* status it is pertinent to look at whether or not the intended appeal has reasonable prospects of success. There is a verifying certificate from a legal practitioner on record attesting that the main matter enjoys good prospects of success. I do not agree with the contents of the certificate. In dismissing the application the court *a quo* found that the work of the applicant was an invention which is not protected by copyright law. It was the court's view that the creation made by the applicant is an invention and for it to be protected by intellectual law it ought to be registered under the Patents Act [*Chapter 26:03*]. The applicant's claim is however founded on copy right law which is inapplicable to her claim based on her alleged invention.

Copyrights are protected under the Copyright and Neighbouring Rights Act [*Chapter 26:05*]. Works which are eligible for copyright protection in terms of s 10 of the Act include a literary work, audio-visual work, musical work, artistic work, sound recording, broadcasts, programme carrying signals and published editions. Section 10(5) of the Copyright and Neighbouring Rights Act provides that:

> "The following matters and things shall not be eligible for copyright— (a) ideas, procedures, systems, methods of operation, concepts, principles, discoveries, facts or figures, even if they are explained, illustrated or embodied in a work;"

In discussing what is protected by copyright law CHINHENGO J in *S v Chiadzwa* 2004 (1) ZLR 211(H) remarked as follows:-

> "Copyright protects only the forms of expression not the ideas themselves, it protects creativity in the choice and arrangements of words and colours, shapes etc. Copyright is not in the idea but the material that embodies the ideas. Thus there cannot be an infringement of copyright unless there is existing material which the infringer has copied."

From the above authorities it is clear that copyright law only protects artistic works and not inventions. It is common cause that the creation created falls under inventions and not artistic work. The court *a quo* found that the applicant admitted that she had invented the invention. Once it is established that the invention falls under inventions it follows that it cannot be protected under copyright law. Consequently, the decision of the court *a quo* cannot be faulted.

In the main matter the applicant challenges the decision of the court *a quo* in finding that the respondent did not benefit from the applicant's invention. The question of whether or not the respondent benefited involves a factual inquiry. It is an established principle of our law that a court of appeal will not lightly interfere with the factual findings of a lower court unless such findings are established to have been so grossly unreasonable that no sensible person applying his or her mind to the facts would have reached the same decision. In *Zimre Property Investments Ltd v Saintcor (Pvt) Ltd t/a V Trade & Anor* SC 59-16 it was held that:

> "The position is now settled that an appellate court will not interfere with the findings of fact made by a trial court unless the court comes to the conclusion that the findings are so irrational that no reasonable tribunal, faced with the same facts, would have arrived at such a conclusion. Where there has been no such misdirection, the appeal court will not interfere. This position was aptly captured by this Court in *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S). At 670, Korsah JA remarked:"
> "The general rule of law as regards irrationality is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion……"

The court *a quo* found that there was no proof that the first respondent had financially benefited from the invention. The applicant in this application does not state how this finding is grossly unreasonable. In the absence of evidence to the contrary this Court cannot

conclude that the decision of the court *a quo* is grossly unreasonable. Consequently, the intended appeal does not have good prospects of success.

In the result, it is ordered that the application, be and is hereby dismissed with no order as to costs.

Honey & Blanckenberg, applicant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners