REPORTABLE (61)

(1) LEAH NACHIPO (2) GERALD NACHIPO
v
(1) ADMIRE MATICHA (2) TREVOR MWARAMBA (3) CLEOPAS MANYIKA (4) LEWIS CHASAKARA (5) WONDER MUSHURE (6) CITY OF HARARE N.O.

SUPREME COURT OF ZIMBABWE
GUVAVA JA, BHUNU JA & MUSAKWA JA
HARARE: JUNE 24, 2021 & JUNE 24, 2022

T. Mpofu, for the appellants

S. M. Hashiti, for the first - fifth respondents

No appearance for the sixth respondent

GUVAVA JA:

INTRODUCTION

[1] This is an appeal against the whole judgment of the Administrative Court ('the court *a quo*') dated 25 September 2020 in which the court granted an application sought by the first to fifth respondents ('the respondents') for condonation of late noting of appeal and extension of time to note an appeal against a decision to issue a permit to the appellants.

BACKGROUND FACTS

[2] The appellants and the respondents are neighbours and owners of residential properties in Shawasha Hills, Gletwyn Township, Harare. The appellants have converted the use of their property from residential to a wedding venue. As a result, from time to time, wedding

ceremonies take place at the appellants' property and with it, the corresponding noise and merry making normally associated with wedding celebrations. The respondents were unhappy that the appellants are using their residential stand as a wedding venue. On 12 August 2018 a meeting was held between the appellants, first to fifth respondents and some of the residents of the area. The respondents aired their complaint. The gist of the complaint was that the functions conducted by the appellants on their property were causing noise thus disturbing the peace expected in a residential area. They also alleged that the appellants were polluting the environment contrary to Environmental Management Regulations.

[3] On 17 August 2018 the residents of Shawasha Hills submitted a petition headed, "Petition against noise pollution in Shawasha Hills' neighborhood" to the sixth respondent. The petition was against the noise pollution emanating from wedding events held by the appellants on their property. In spite of having received the petition, on 12 June 2019, the sixth respondent granted a permit to the appellants to use their property as a wedding and events venue.

[4] Dissatisfied by the decision of the sixth respondent, the respondents sought to appeal against that decision. However, the *dies induciae* for appealing against the decision had lapsed. The respondents thus made an application for condonation and extension of time within which to appeal in the Administrative Court.

DECISION OF THE COURT *A QUO*

[5] In granting the application the court *a quo* held that the respondents were not notified about the application for the permit and that was the reason why they had failed to appeal against the issuance of the permit at an earlier date. The court also held that the respondents were not in

willful default as they had a reasonable explanation for the delay. The court noted that the intended appeal had good prospects of success as the respondents had to be given an opportunity to show whether or not the permit was improperly granted.

[6] Irked by this decision of the court *a quo* the appellants noted the present appeal. At the hearing of the appeal counsel for the respondents raised a preliminary point to the effect that in terms of s 20 (2) of the Administrative Court Act [*Chapter 7:01*] ('the Administrative Court Act'), the appeal being against an interlocutory ruling, the appellants ought to have sought leave to appeal from the court *a quo* before noting the present appeal.

SUBMISSIONS MADE ON THE PRELIMINARY POINT

[7] In motivating the preliminary point counsel for the respondents, Mr *Hashiti*, submitted that an application for condonation is an interlocutory order and as such an appeal against the grant of such an application must be noted after leave to appeal has been sought and granted. Counsel submitted that s 20 of the Administrative Court Act requires that leave to appeal must be sought when an appeal against an interlocutory order is made. Further it was counsel's submission that the appellant could not argue that the appeal was being made on the basis of s 61 of the Regional Town and Country Planning Act [*Chapter 29:12*] ('The Act') as this provision only applies where there is an appeal on a question of law on the substance or merits of the matter.

[8] Counsel argued that s 61 of the Act does not give a blanket right of appeal. He submitted that the provisions of the Administrative Court Act apply as the present appeal relates to an interlocutory order. Counsel further submitted that s 38 (1) of the Act, the basis on which he averred the application for condonation *a quo* was made, is an interlocutory procedure and as

such an appeal against such an order requires leave to appeal. With that counsel prayed that the matter be struck off the roll with costs.

[9] In opposing the preliminary point counsel for the appellants, Mr *Mpofu*, in a spirited response, submitted that the appeal was not governed by s 20 of the Administrative Court Act as the provision specifically provides that it does not govern the noting of all appeals. It was counsel's argument that by the express mention that s 20 subjects the right to appeal against a decision of the court to any other enactment it means that not all appeals require leave to appeal. Counsel argued that it is of no moment that s 20 establishes the jurisdiction of the court to hear an appeal as the section only applies where there is no enactment with contrary provisions.

[10] Counsel further submitted that s 61 of the Act provides for an appeal against a decision from the court *a quo* on a point of law and therefore there is no need to seek leave to appeal in terms of the section. Counsel maintained that as the court *a quo* made its decision in terms of s 38 of the Act, the decision was to be appealed in terms of the provisions of the Act and that leave was not a requirement when making such an appeal. Counsel thus prayed for the dismissal of the preliminary objection with costs.

ISSUE FOR DETERMINATION

[11] The issue for determination arising from the preliminary point raised by the respondents is; whether or not the appellants were obliged to seek leave to appeal in terms of s 20 of the Administrative Court Act before noting the present appeal.

ANALYSIS

[12] *In casu,* the respondents made the application for condonation before the court *a quo* on the premise of s 38 of the Act which provides for the procedure to be followed in noting an appeal before the Administrative Court. In the founding affidavit to the application *a quo* the first respondent averred that:

> "I believe I should lodge an appeal against the issuance of the permit as provided in s 38 of the Regional, Country and Town Planning Act. I have high prospects of success on appeal."

The application and decision of the court *a quo* was thus made in terms of the provisions of the Act.

It is not in dispute that the respondents would have a right of appeal against the decision of the City of Harare in terms of s 38 of the Act where they are aggrieved by any decision made in terms of the Act. The provision provides:

"(1) Any person—
(*a*) who is aggrieved by any decision made or deemed to have been made by a local planning authority in connection with an application for—
(i) a permit or preliminary planning permission; or
(ii) any permission required in terms of a development order, building preservation order or tree preservation order; or
(iii) an extension of time as contemplated in paragraph (*d*) of subsection (1) of section *twenty-two* or subparagraph (ii) of paragraph (*a*) of subsection (2) of section *twenty-four*;
may, within one month from the notification of such decision; or
(*b*) upon whom—
(i) a building preservation order; or
(ii) a tree preservation order; or
(iii) an enforcement order; or
(iv) a notice in terms of section *thirty-five*;
has been served or who is otherwise aggrieved by such order or notice, may, within one month from the serving of the order or notice; or
(*c*) who is permitted in regulations made in terms of section *sixty-eight* to appeal in respect of any matter specified in such regulations may, within the period provided for in such regulations;
or such longer period as the President of the Administrative Court may in writing authorize, appeal to the Administrative Court"

The above provision clearly gives an aggrieved person the right to seek condonation and extension of time within which to appeal in the event that the aggrieved party has shown good cause to appeal outside the prescribed period.

[13] Section 20 of the Administrative Court Act provides for the procedure to be followed when one seeks to appeal against the decision of the Administrative Court. It provides as follows:

> "**20 Appeal from decision of Court**
> (1) Subject to subsection (2) and **except as otherwise provided in any other enactment,** any person who is dissatisfied with any decision of the Court may lodge an appeal with the Supreme Court within the period of twenty one days immediately following the announcement by the Court of such decision.
> (2) **Except as otherwise provided in any other enactment**, no appeal shall lie from—
> (*a*) any order of the Court or the President of the Court made with the consent of the parties;
> (*b*) an order as to costs only or **an interlocutory order or an interlocutory judgment without the leave** of the Court or the President of the Court or, if such leave has been refused, without the leave of a judge of the Supreme Court." (emphasis added)

[14] In my view, s 20 of the Administrative Court Act simply reaffirms the common law principles that an appeal against an interlocutory order must be with leave. A reading of s 20 shows that except where any other enactment provides otherwise, no appeal shall be made against an interlocutory order of the Administrative Court without leave of the court. In their heads of argument, the respondents argue that the judgment of the court *a quo* was an interlocutory judgment and that the appellant had to seek leave before noting the appeal as provided for in s 20 of the Administrative Court Act. *Per contra*, the appellants in argument and in their supplementary heads of argument, whilst accepting that the order of the court *a quo* was an interlocutory order, argue that s 20 of the Administrative Court Act subjects the right to appeal against an interlocutory order to any other enactment. In this regard the

appellants argue that s 61 of the Act applies in this matter as it provides for the noting of such an appeal provided it is on a point of law.

[15] In *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R. Barber (Pvt) Ltd & Anor* SC 3/20 at page 7 the court took occasion to discuss how courts must interpret statutes. The Court noted the following:

> "It is the duty of a court to interpret statutes. Where the language used in a statute is clear and unambiguous, the words ought to be given their ordinary grammatical meaning. However, where the language used is ambiguous and lacks clarity, the court will need to interpret it and give it meaning."

Also, in *Coopers and Lybrand & Ors v Bryant* 1995 (3) SA 761 (A) at 767 the Court noted that:

> "According to the 'golden rule' of interpretation, the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument."

[16] A literal interpretation of s 20 (1) of the Administrative Court Act shows that unless provided otherwise in any other enactment any person dissatisfied by any decision of the Administrative Court Act may lodge an appeal with the Supreme Court within twenty one days. Section 20 (2) further provides that unless provided in any other enactment no appeal shall lie from an interlocutory judgment without leave of the Court. Section 20 (2) is unambiguous and clearly worded. In other words, s 20 of the Administrative Court Act constitutes a prohibition to act. It specifically prohibits the lodging of an interlocutory appeal without the leave of the court. It is a procedural provision which regulates the lodging of appeals to this Court. Its application is therefore mandatory unless there is any other enactment which provides to the contrary.

[17] Section 61 (1) of the Regional, Country and Town Planning Act provides the following:

> "**61 Appeal to Supreme Court on point of law**
> (1) Notwithstanding section 19 of the Administrative Court Act [*Chapter 7:01*] an appeal against the decision of the Administrative Court or the President thereof may only be made in respect of—
> (*a*) a matter of law which has arisen for decision; or
> (*b*) a question as to whether a matter for decision is a matter of fact or a matter of law; or
> (*c*) a question which has arisen as to the admissibility of evidence."

The reference to s 19 of the Administrative Court Act in my view has no application to the determination of this case as s 19 only deals with the determination of costs before the Administrative Court.

[18] We do not find merit in the arguments made by counsel for the appellants. It is not in dispute as between the parties that s 38 of the Act applied in the application for condonation and extension of time to note an appeal to the court *a quo*. It is also not in dispute that the application for condonation and extension of time to note an appeal was interlocutory and purely procedural as it did not have the effect of resolving the real dispute as between the parties. The point of departure as between the parties is whether or not s 61 of the Act takes away the obligation to obtain leave which is set out in s 20 of the Administrative Court Act.

[19] An examination of s 61 of the Act indicates that it is restricted in application to matters specified under subs (1) (a), (b) and (c). This section simply restricts appeals to this court which have been made in terms of the provisions of the Act to appeals on points of law and issues dealing with admissibility of evidence. It does not in any way regulate the question of leave to appeal. Section 61 does not mention or make reference to interlocutory appeals or how they should be processed. In our view, s 61 is totally irrelevant to the question of whether or not leave to appeal is required before lodging an appeal of an interlocutory nature to this Court. On

the other hand, s 20 of the Administrative Court Act is directly on point and is relevant in that it prohibits the lodging of interlocutory appeals to this Court without leave. A proper interpretation of s 20 of the Administrative Court Act and s 61 of the Act will lead to the inescapable conclusion that these provisions are not contradictory at all but actually complement each other and must be read *in pari materia.* Section 61 of the Act merely restricts interlocutory appeals to points of law and issues dealing with admissibility of evidence. It does not give a litigant an open gate pass to appeal an interlocutory order without leave. It goes without saying that the rule of interpretation that the general gives way to the specified must not be overlooked. If properly applied this rule thus favours s 20 of the Administrative Court Act as the applicable law for the procedure to be applied when dealing with appeals against interlocutory orders. This section deals directly with the question of leave to appeal an interlocutory order whereas s 61 does not even mention the subject matter.

[20] It should always be borne in mind that, the rationale which is considered by this court is that, a wholly unrestricted right to appeal from every judicial decision by a lower court, is frowned upon and may have serious consequences. For instance a wealthy party may, at every turn and every ruling appeal thus causing immense problems and a grave injustice upon the other party who may not be so well heeled. It can also have the adverse effect of delaying justice. It is against this backdrop that the requirement to filter cases which come on appeal arose particularly in unterminated judicial proceedings. The decision by the legislature to enact legislation that makes it mandatory for a person to seek leave before appealing an interlocutory decision of a court has been provided in order to ensure that only the most deserving cases proceed on appeal. This, in our view, clearly explains the basis for enacting s 20 of the Administrative Court Act and makes it wholly applicable in this case. (see *Mwatsaka v ICL Zimbabwe* 1998 (1) ZLR 1 @ pg 4)

DISPOSITION

[21] It is our considered view that the preliminary point raised by the respondents is with merit. The appellant approached this Court on appeal in respect of an interlocutory order from the court *a quo* without leave. The appeal is thus fatally defective as it is in breach of s 20 of the Administrative Court Act. It must be struck off the roll.

The respondents, having succeeded, we find no cause for departing from the time honoured principle that costs follow the cause.

Accordingly, it is ordered as follows:

1. The point *in limine* be and is hereby upheld.
2. The matter is hereby struck off the roll.
3. The appellant shall pay the respondents' cost of suit.

BHUNU JA: I agree

MUSAKWA JA: I agree

AnesuBryan & David, 1st and 2nd appellants' legal practitioners

Chivore Dzingirayi Group of Lawyers, 1st to 5th respondents' legal practitioners