Judgment No. SC 48/06
Civil Application No. 172/06

GIBSON GABRIEL MARANDURE v SOUTHEY INVESTMENTS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
HARARE, OCTOBER 17, 2006

A Chizikani, for the applicant

P C Paul, for the respondent

Before: ZIYAMBI JA, in Chambers in terms of rule 5 of the Rules of the Supreme Court, 1964.

This is an application for an extension of time within which to appeal. The judgment was delivered on 15 March 2006 and the application was filed in this Court on or about 24 June 2006.

As has often been repeated in the many cases of this type which have flooded this Court in recent months the Court, in deciding whether or not to grant an application of this nature, will have regard to a number of factors which include the extent of the default and the reasonableness of the explanation tendered for it, the prospects of success on appeal, the prejudice if any, that is likely to be caused to the

respondent should the application be granted, and, generally, the need to bring finality to the proceedings. With this in mind I turn to consider the merits of the application.

The appeal should have been noted within 15 days of the delivery of the judgment. Thus the delay of some three months in noting the appeal is considerable. The explanation given by the applicant, who deposed to the founding affidavit, for the delay is that the applicant's legal practitioners were awaiting "the Honourable Judge's typed judgment and full reasons for the judgment to enable us to note an appeal". The applicant averred that his legal practitioners and himself were of the belief that they were "entitled to note an appeal only after receipt of the judgment". Notwithstanding that the typed reasons were not availed to the applicant's legal practitioners, an appeal was noted on or about 24 June 2006 (the date stamp of the Supreme Court does not appear on the face of the Notice of Appeal) by which time, the *dies induciae* had already expired.

Not surprisingly, the respondent challenged the validity of the appeal so noted and applied for leave to execute the judgment purported to be appealed against. The applicant's response was to file this application.

The respondent, in its opposing affidavit, averred that the judgment was delivered in the presence of the applicant and his legal practitioners in open court after the conclusion of argument by both parties and was in the exact terms as the written judgment filed with this application so that there was no need to request typed reasons when full reasons for the judgment were well known to the applicant's legal practitioner.

The allegation that the legal practitioner was well aware of the full reasons for the judgment from the date of its delivery is evidenced by the fact that the notice of appeal was filed without recourse to the typed judgment. Further, no affidavit by the applicant's former legal practitioners was attached in proof of his allegations.

This Court has stated time and time again that where allegations are made against a legal practitioner or blame is placed on him for failure to comply with the rules, an affidavit from the legal practitioner must be attached or failing that, proof that he was asked to swear an affidavit and has declined or refused to do so.

Besides, if the legal practitioner was of the view that despite reasons being handed down in open court he was entitled to note an appeal after the expiry of the *dies induciae* as specified in the rules of court, then he was failing in his duty to his client as the rules clearly state that the appeal must be noted within 15 days after delivery of the judgment. (See s 5 of the Supreme Court Miscellaneous Appeals and References Rules, 1975). A prudent legal practitioner would file a notice of appeal and, upon acquiring the written judgment, seek to amend the grounds of appeal filed should there be further grounds apparent in the written judgment that were not included in the notice of appeal filed of record. The actions of the legal practitioner, if the applicant has correctly portrayed them, were far from prudent. I do not, for the above reasons, consider the explanation for the default to be a reasonable one.

I turn to consider the prospects of success.

The subject of the dispute is a piece of land known as Maggios Plot situate in Mbare ("the plot"), which the applicant alleges was sold to him by the respondent pending the acquisition of a permit to subdivide the property of which it forms a part, and which the respondent avers was let to the applicant in 1987 for two years at a rental of $4000,00 per month. The judgment sought to be appealed against is one in which the High Court granted to the respondent, an order for the eviction of the applicant from the plot.

At the hearing before the High Court, the respondent's legal practitioners conceded that if there was an agreement of sale as alleged by the applicant, that agreement would be illegal and therefore null and void by reason of its contravention of s 39 of the Regional Town and Country Planning Act [*Cap 29:12*] ("the Act") in that the respondent did not, at the time of the agreement, have a permit for the subdivision of the property.

Section 39 provides as follows:

"39 No subdivision or consolidation without permit

(1) Subject to subsection (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) conferring on any person a right to occupy any portion of a property for a period of ten years or more or for his lifetime; or

(iv) for the renewal of the lease of, or right to occupy, any portion of a property where the aggregate period of such lease or right to occupy, including the period of the renewal, is ten years or more;

or

(c) consolidate two or more properties into one property; except in accordance with a permit granted in terms of section forty."

Not only is there an express prohibition of any subdivision without a permit granted in terms of s 40 of the Act, but the agreement alleged by the applicant is in direct contravention of s 39(1)(b). See also *X-Trend-A Home* (*Private*) *Limited v Hoselaw Investments Private Limited* 2000 (2) ZLR 348 (S).

The learned judge, in the face of the concession by the applicant's legal practitioners, granted the application by the respondent for the eviction of the applicant from the plot. The applicant now contends that there are prospects of success on appeal as *X-Trend-Home* was wrongly decided and the concession by his legal practitioners was unjustified. Further, the applicant alleges that he made improvements on the property on which he therefore holds a lien which entitles him to remain in occupation of the property until he has been paid for the said improvements.

However, the respondent's stance, with which I am in complete agreement, is that since the applicant did not raise the issue of the lien in his opposing affidavit but only addressed it in argument at the end of the hearing, the learned judge cannot be faulted for concluding that this issue was not properly before her.

As for the argument that *X-Trend-Home* was wrongly decided, the judgment being one of the Supreme Court, is binding on the High Court. In any event the judgment merely expounds the clear provisions of s 39 of the Act that an agreement such as the one alleged by the applicant is prohibited.

Accordingly, the applicant has neither given a reasonable explanation for the default nor has he established on the papers that there are reasonable prospects of success on appeal. The application must therefore be, and it is hereby, dismissed with costs.

Chingore & Associates, appellant's legal practitioners

Wintertons, respondent's legal practitioners