REPORTABLE ZLR (48)

Judgment No. SC 58/07
Civil Appeal No. 303/99

BESSIE MAHEYA v INDEPENDENT AFRICAN CHURCH

SUPREME COURT OF ZIMBABWE
HARARE, NOVEMBER 14, 2007

H Zhou, for the applicant

R H Hood, for the respondent

Before MALABA JA: In Chambers, in terms of r 34(5) of the Supreme Court Rules.

This is an application in terms of r 34(5) of the Rules of the Supreme Court of Zimbabwe ("the Rules") for an order of reinstatement of the appeal in case SC 303/99 which lapsed following failure by the applicant to comply with the provisions of r 34(1). The subrule provides that:

"(1) The appellant, unless he has been granted leave to appeal *in forma pauperis*, shall at the time of noting the appeal in terms of r 29 or within such period therefrom, not exceeding five days, as the Registrar of the High Court may allow, deposit with the said Registrar the estimated cost of the preparation of the record in the case concerned:

Provided that the Registrar of the High Court may, in lieu of such deposit, accept a written undertaking by the appellant or his legal representative for the payment of such cost immediately after it has been determined."

The applicant is the widow of the late Bishop Isaac Maheya who was the head of the respondent church before its congregation split into two factions in 1993. At the time of his death on 24 June 1996, Bishop Maheya was a leader of one faction of the congregation whilst one Mpisaunga led the other. He lived with the applicant in a house

at Stand 4070 Old Highfield, Harare leased by the respondent from the City of Harare. The applicant remained in occupation of the house as her place of residence after the death of her husband. She had the support of the followers of her late husband who were now led by Bishop Chitanda.

In June 1998 the faction led by Mpisaunga instituted proceedings in the High Court in the name of the respondent claiming an order for the eviction of the appellant from the house. The cause of action as pleaded was the alleged unlawful occupation of the house for residential purposes by the applicant after her husband who had occupied it in the exercise of a right of the office of a Bishop of the church and through whom she had derived the right to live in the house had died. Considering that the determination of the question of ejectment of the applicant from the residential property depended upon the resolution of the question which of the two factions of the congregation constituted the Independent African Church the learned Judge referred the matter to trial. After hearing evidence at the trial, the court *a quo* held in the judgment dated 13 October 1999 that the faction of the congregation led by Mpisaunga enjoyed the support of the majority of members.

The learned Judge said:

> "The conclusion I have come to is that this dispute can best be resolved on the basis that the majority will should prevail. I have little doubt that if an election were held at the time of the … and even now, the plaintiff would command an overwhelming majority. Bishop Chitanda did not dispute this."

An order was then made to the effect that:

> "(1(a) … the defendant Bessie Maheya, shall give the plaintiff vacant possession of the residential building on Stand 4070 Old Highfield ('the Church House') within 90 days of the date of this Order.
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> … if the defendant or any persons occupying the property through her remain in occupation of the church house, after that date the Deputy Sheriff be and is hereby authorized to remove her or them and their possessions from the said property."

The effect of the judgment of the court *a quo* was that the applicant in her individual capacity or as a widow of the late Bishop Maheya had no right to continue using the "church house" as her residence, particularly in the face of demands which represented the will of the majority of the members of the congregation that she should vacate the premises.

The applicant was represented at the trial by a legal practitioner *Mr T Masendeke* of *Honey & Blanckenberg*. On 11 November 1999 a notice of appeal against the judgment of the court *a quo* was filed out of time. It took the respondent's legal practitioners to point out to the appellant's legal practitioners the defect in the noting of the appeal before an application for condonation of the non-compliance with the Rules and extension of the time within which to file the notice of appeal was made. The application which was not opposed was granted on 15 December 1999.

The notice of appeal was filed on 7 January 2000. No estimated cost of the preparation of the record of proceedings was deposited with the Registrar of the High Court at the time the appeal was noted, nor was a written undertaking to pay the cost given to the Registrar by the applicant or her legal practitioners in lieu of the deposit as required by r 34(1).

Under r 34 notice of appeal which is filed without the mandatory requirements of subrule (1) being specifically satisfied must be deemed to have lapsed. The notice of appeal lapsed on the day it was filed. By letter dated 17 January 2000 the respondent's legal practitioner brought to the attention of the applicant's legal practitioners the fact that the mandatory requirements of r 34(1) may not have been complied with and the consequences that would follow.

The letter reads in part:

> "We presume that you have in terms of r 34 of the Supreme Court Rules lodged security with the Registrar of the High court for the preparation of the record. If you have done so and the appeal is still pending, on behalf of the respondent we call upon you to lodge security with the Registrar of the Supreme Court by not later than the 7th February in the sum of $50 000. This request is made in terms of r 46(2) of the Supreme Court Rules as your client's Notice of Appeal has delayed execution of the judgment appealed against."

Instead of making an application for condonation of the non-compliance with r 34(1) and an order of reinstatement of the lapsed appeal, the applicant's legal practitioners renounced agency on 21 March 2000. On 1 September 2000, *Mandizha, Chitsunge & Company* assumed agency on behalf the applicant. The new legal practitioners must have become aware of the fact that there had been no compliance with r 34(1) in the noting of the appeal because on 29 December 2000 they wrote the following letter to the Registrar of the High Court:

> "RE: BESSIE MAHEYA v INDEPENDENT AFRICAN CHURCH CASE SC 303/99

> We refer to the above matter in which we assumed agency on behalf of Mrs Bessie Maheya, the appellant. We kindly request that you prepare the record of proceedings and hereby undertake to pay your costs for preparing same."

The appeal had lapsed and there was no appeal pending before the Supreme Court at the time the written undertaking to pay the cost of the preparation of the record of proceedings was given. The cost was not even estimated. Its amount was unknown to the applicant's legal practitioners. There has in fact been no appeal pending before the Supreme Court in this case for the past seven years. On 25 September 2006, *Messrs Mandizha & Company* renounced agency and a third firm of legal practitioners, *Musunga & Associates* assumed the agency on behalf of the applicant.

The question for determination is whether the applicant has shown a cause for the re-instatement of the appeal. 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 therefor; the prospects of success on appeal; the importance of the case; the 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. *Bishi v Secretary for Education* 1989(2) ZLR 240 (H) at 242D-243C.

The applicant has been in a position of no right in respect to her occupation of the "church house" for the past seven years and the same period of time

marks the degree of non-compliance with r 34(1) of the Rules of the Supreme Court. She has blamed her erstwhile legal practitioners for non-compliance with the Rules. There has indeed been no explanation from the legal practitioners concerned for failure to act in terms of r 34(1) at the time the notice of appeal was filed. They failed to appreciate at any time during the period of seven years that the appeal had lapsed and institute appropriate proceedings to regularize it. The absence of an explanation of the non-compliance with the Rules shows a wilful disdain for the Rules of Court, the consequences of which the applicant cannot escape.

In *Beitbridge Rural District Council v Russell Construction Co* 1998 (2) ZLR 190 (S) there was no explanation by the applicant's legal practitioners as to why they had failed to enter appearance to defend the respondent's claim timeously and why they had not applied for the upliftment of a bar which led to the default judgment which was sought to be rescinded being granted. SANDURA JA applied the principle that in such a case a court should visit a party with the consequences of the negligence of his legal practitioner. He said at p 192H:

> "Whilst it is true that the fault was largely that of the appellant's former and present legal practitioners who failed to take appropriate action to protect the appellant's interests, that fact, in my view, does not assist the appellant. This court has, on a number of occasions, clearly stated that non-compliance with or a willful disdain of the Rules of Court by a party's legal practitioner should be treated as non-compliance or a wilful disdain by the party himself."

In *S v McNab* 1986 (2) ZLR 280 (S) DUMBUTSHENA CJ held that in cases similar to the applicant's case a party should be punished for the negligence of his legal practitioner. He said at p 284A-E:

> "In my view, clients should in such cases suffer for the negligence of their legal practitioners. I share the view expressed by STEYN CJ in *Saloojee & Anor NNO v Minister of Community Development supra* at 141 C-E when he said:
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> > 'There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court … The attorney, after all, is the representative whom the litigant has chosen himself and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be dissolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are'."

In this case not only did the legal practitioner who had attended to the noting of the appeal on behalf of the applicant on 7 January 2000 fail to have deposited with the Registrar of the High Court the estimated cost of the preparation of the record at the time he noted the appeal or give a written undertaking to pay the cost in lieu of the deposit, he did not take heed of the clear warning contained in the letter written by the respondent's legal practitioner on 17 January 2000 to the effect that the appeal had lapsed for failure to comply with r 34(1) of the Rules of the Supreme Court. The only reasonable inference to be drawn from such conduct and absence of an explanation for it is that the legal practitioner was disdainful of the Rules of Court.

One is unable to appreciate, in the absence of an explanation for what was done, the purpose of the written undertaking to pay the cost of the preparation of the record of proceedings given in the letter of 29 November 2000. Failure to appreciate the fact that such an undertaking is required to be given at the time the appeal is noted and that the cost estimated shows that the legal practitioner who wrote the letter did not even bother to read r 34(1).

In the circumstances, the applicant cannot escape the consequences of the lack of diligence on the part of her legal practitioners. They failed to comply with the Rules of this Court on her behalf.

There is yet another equally important principle applicable to the facts of this case. It is the principle that there should be finality in litigation. In *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298, TROLLIP JA observed at p 309A that:

> "Public policy demands that the principle of finality in litigation should generally be preserved rather than eroded."

See also *Ndebele v Ncube* 1992(1) ZLR 288(S) at p 290C.

As the facts show, the court *a quo* made a final determination of the question whether the applicant had a right to use the "church house" as her residence eight years ago and that judgment has not been appealed against for the past seven years. A careful examination of the grounds of the complaint against the judgment is that the learned Judge applied the principle of majorities to decide the question whether the applicant had a right to use the "church house" as her place of residence after the death of her husband. Nowhere is it suggested that the applicant in her individual capacity or as a widow of the late Bishop Maheya has a right to remain in occupation of the church house and what the source of that right is. It is clear that she has no such right. The absence of prospects of success on appeal further justifies the application of the principle that there

be finality to the litigation and the rights and obligations of the parties be as determined by the court *a quo* in the judgment of 13 October 1999.

The application for an order of reinstatement of the appeal against the judgment of the court *a quo* is dismissed with costs.

Musunga & Associates, applicant's legal practitioners

Atherstone & Cook, respondent's legal practitioners