REPORTABLE (8)

Judgment No. SC 7/08
Civil Application No. 32/08

CHURCH OF THE PROVINCE OF CENTRAL AFRICA v

(1) DOCTOR NOLBERT KUNONGA (2) REVEREND MUNYANI

SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 28, MARCH 6 & 13, 2008

M P Mahlangu, for the applicant

V Chizodza, for the respondents

Before: CHIDYAUSIKU CJ, In Chambers

This is an urgent Chamber application in which the applicant seeks the following relief set out in the draft order:

> "(1) The Notice of Appeal filed by the respondents in the matter SC 17/08 be and is hereby declared as being of no force and effect and is hereby struck out.
>
> (2) The High Court's provisional order in the matter HC 345/08 remains in effect.
>
> (3) The first and second respondents jointly and severally the one paying the other to be absolved are to pay the costs of this application at attorney and client scale."

This application is voluminous, but only two issues emerge on the papers

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(1) Is the judgment of MAKARAU JP in case no. HC 345/08 final or provisional?

(2) Does the applicant's failure to note an appeal render the notice a nullity entitling the applicant to have it struck out?

I also raised with counsel for the applicant whether I had jurisdiction in the event of my accepting his contention that the notice was a nullity, as that would mean there was no appeal pending in this Court. Counsel asked for leave to make written submissions in that regard. Both counsel made written submissions in due course. In the light of the contents of the written submissions, I invited both counsel to further address me.

On the issue of jurisdiction, counsel referred me to some orders that were issued by this Court. It was contended that the orders were issued in similar circumstances. I shall revert to this later on. No authority was cited and I was not able to find any authority on all fours with the case before me.

After giving this issue careful consideration, I came to the conclusion that I had jurisdiction. I came to this conclusion on the basis that once an appeal is noted to this Court, this Court is seized with the matter, otherwise how else can the issue of

validity of the notice of appeal be determined? I accordingly accept that I have jurisdiction to adjudicate in this matter as it relates to an appeal with which this Court was seized.

I now turn to the applicant's first ground of challenge, namely that the judgment of MAKARAU JP is an interim judgment. Consequently the respondent required the leave of the court *a quo* to appeal. Such leave was neither sought nor granted. Accordingly, the appeal was a nullity for failure to comply with s 43 of the High Court Act. Section 43 of the High Court Act provides as follows:

> "**43 Right of appeal from High Court in civil cases**
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> (1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction.
>
> (2) No appeal shall lie –
>
> (a) from an order allowing an extension of time for appealing from a judgment;
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> (b) from an order of a judge of the High Court in which he refuses an application for summary judgment and gives unconditional leave to defend an action;
>
> (c) from –
>
> (i) an order of the High Court or any judge thereof made with the consent of the parties; or
>
> (ii) an order as to costs only which by law is left to the discretion of the court, without the leave of the High Court or of the judge who made the order or, if that has been refused, without the leave of a judge of the Supreme Court;

(d) from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, except in the following cases –

(i) where the liberty of the subject or the custody of minors is concerned;

(ii) where an interdict is granted or refused;

(iii) in the case of an order on a special case stated under any law relating to arbitration.

(3) An order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order within the meaning of subsection (2)."

I do not accept that the judgment of MAKARAU JP is an interlocutory judgment. The application before MAKARAU JP reveals that a provisional order seeking interim relief pending the final order was sought. The learned JUDGE PRESIDENT invited both parties to a hearing and granted the final order sought in the provisional order. It is quite clear from the judgment that the learned Judge did not intend to sit on the return day to grant another order. In any event, the judgment of the court *a quo* is covered by s 43(1)(d)(ii) of the High Court Act and leave to appeal is not required. I am therefore satisfied that the appeal is not invalid for lack of compliance with s 43 of the High Court Act.

The second ground of challenge relates to failure to note an appeal timeously.

It is common cause that the notice of appeal was filed out of time and therefore does not comply with the Rules of this Court, in particular r 30.

The issue that arises is whether a Judge in Chambers can strike out an appeal for failure to comply with the Rules of this Court. Where the Rules provide that a Judge can do that, I see no problem. Where, however, such jurisdiction is not conferred by statute or the Supreme Court Rules, I entertain serious doubt.

Rule 31 subrules (1) and (7) provide as follows:

> "**31 Application for leave to appeal and extension of time to appeal**
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> (1) An application that leave to appeal be granted or for an extension of time in which to appeal shall be by notice of motion signed by the applicant or his legal representative and shall be accompanied by a copy of the judgment against which it is sought to appeal. …
>
> (7) A Judge may make such order on the application as he thinks fit and shall, if an extension of time be granted, deal also with any question of leave to appeal which may be involved."

It is quite clear from the above that a Judge who dismisses an application for extension of time has jurisdiction to have the notice of appeal struck out after the refusal to grant the extension of time within which to note the appeal. The case of *ZESA v Mangwengwende* case no. SC 180/05, cited by the applicant, is pertinent. The notice of appeal was struck out after refusal to grant leave to appeal and an extension of time. The application was not, as *in casu*, an application to strike out an appeal because it was noted out of time.

I have some doubt whether the same inherent jurisdiction is enjoyed by a Judge sitting alone in Chambers. The difficulty that I have in accepting this proposition

arises from the fact that where a Judge strikes a matter off the roll for non-compliance with the Rules, he pre-empts the discretion of the Court to grant condonation or not and assumes that power.

I was referred to two orders of this Court in this regard, namely case nos. SC 180/2005 and SC 345/2006.

In regard to the first case, this was an application for leave to appeal and an extension of time within which to appeal. The learned Judge in that matter, after reading documents filed of record and hearing counsel, ordered that: "The matter be and is hereby struck off the roll with costs". Rule 31 of the Rules of this Court specifically makes provision for an application for leave to appeal or for an extension of time within which to note a belated appeal. Subrule 31(7) of the Rules provides that:

> "Subject to the provisions of subsection (3) of section 17 of the Act, a Judge may make such order on the application as he thinks fit and shall, if an extension of time be granted, deal also with any question of leave to appeal which may be involved."

Thus, the Rules specifically empower a Judge in Chambers to whom an application for leave or for an extension of time within which to note an appeal is made to strike out the appeal. In my view, the learned Judge in this matter was acting within the Rules of the Supreme Court.

However, the second matter, namely case no. SC 345/2006, was an application for the striking out of the notice of appeal. The learned Judge issued the following order:

> "IT IS ORDERED THAT:
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> 1. The respondent's notice of appeal in the matter SC 48/05 be and is hereby struck out.
>
> 2. The respondent pays the applicant's costs of suit."

It is not clear from that order or from the record itself the basis upon which the appeal was struck off. However, the Rules of the Supreme Court specifically provide instances where dismissal of an appeal is made without hearing the matter. The Rules also provide for where an appeal shall be deemed to have lapsed for failure to comply with the Rules – see rules 36 and 44.

I am not aware of any provision in the Rules of the Supreme Court that authorises the dismissal of an appeal other than on the basis provided for in the Rules. Where an appeal does not comply with the Rules of this Court it is up to the Court, and not a Judge in Chambers, to order the striking off of the matter for failure to comply with the Rules or to grant the indulgence for failure to comply with the Rules.

In my view, a distinction has to be made between those matters where the notice of appeal is invalid by reason of failure to comply with the provisions of the statutes, such as s 43 of the High Court Act, and a situation where a notice of appeal is invalid by reason of failure to comply with the Rules of the Supreme Court. Where the

notice of appeal does not comply with the provisions of an Act of Parliament, the Court has no discretion in the matter and the defect is incurable. In a situation like that, it is open to the Court, and indeed a Judge of the Supreme Court, to order that the appeal is a nullity and is incurably defective. However, where the notice of appeal does not comply with the Rules of the Supreme Court, it is not incurably defective because the Court has a discretion to overlook the defect and a Judge in Chambers should not preclude the Court from considering whether the failure to comply with the Rules should be condoned or not.

It is on this basis that I am unable to grant the draft order sought by the applicant. I have no problem in pronouncing that the notice of appeal filed by the respondent does not comply with the Rules of this Court. It is open to the Court that will sit to adjudicate the appeal to determine whether the appeal should be struck off for that reason or to grant the respondent the indulgence for failure to comply with the Rules. There will be no order as to costs. Costs will be costs in the cause.

Gill, Godlonton & Gerrans, applicant's legal practitioners

MV Chizodza-Chineunye, respondents' legal practitioners