

Civil Application No 246\03

ELECTORAL SUPERVISORY COMMISSION v MORGAN
TSVANGIRAI

SUPREME COURT OF ZIMBABWE
HARARE OCTOBER 13, 2003

G.C. Chikumbirike, for the appellant

B. W. Elliot, for the respondent

Before CHIDYAUSIKU CJ: in Chambers, in terms of the
Supreme Court Rules

This is an application for the late noting of an appeal or an extension of time within which an appeal should be noted in terms of Rule 31 of the Supreme Court Rules.

It is well settled that an extension of time within which to note an appeal will be granted where good cause has been shown. In considering whether good cause has been shown the following facts will be considered:

- 1) the duration of the delay;
- 2) the explanation for the delay;
- 3) the prospects of success on the merits

Dealing with the first and second requirements Mr *Chikumbirike*, for the applicant, deposed to an affidavit that reads, in part, as follows:-

“That I am the Appellant’s legal practitioner and the facts deposed to hereunder are within my personal knowledge and are true and correct.

On the 15th of August 2003, I prepared and filed a Notice of Appeal. I attach hereto the Notice of Appeal. As can be seen from the Notice of Appeal, a mistake was made and it was issued out of the High Court instead of this Honourable Court.

This mistake went unnoticed until I received a letter from Messrs Gill, Godlonton & Gerrans who represent the respondent on the 8th of September. As soon as I noticed the mistake, I corrected the error and filed this application. It was a genuine error which, unfortunately, went unnoticed by me when I signed the appeal.

There are prospects of success in this appeal as can be seen from the Notice of Appeal. I therefore seek for condonation of late noting of appeal.”

According to the Notice of Appeal attached to these papers, judgment intended to be appealed against, was handed down on 6 August and the appeal was lodged within the period required by the rules of the High Court but the appeal was lodged in the wrong court - in the High Court - and not the Supreme Court. If it were not for that mistake there would be no need to apply for condonation. Upon the mistake being pointed out to the applicant he immediately launched this application.

The above facts are not in dispute. I am accordingly satisfied that the delay, if one can call it a delay, was not inordinate and the explanation for the delay is plausible.

Turning to the prospects of success on the merits Mr *Elliot* raised a number of points.

Firstly he argued that the numbering of cases was erroneous. This, Mr *Chikumbirike* accepted and applied to amend the case number. I have no problem in allowing the application for amendment as it is really trivial.

Secondly, Mr *Elliot* raised the issue that the Notice of Appeal that was filed did not contain a prayer and, therefore, was fatally defective. There would be substance in this point had it not been for the fact that, accompanying this application was also an application to amend the notice of appeal to take care of the defect. The respondent suffers no prejudice by the granting of an application to amend the Notice of Appeal. I, accordingly, grant the application for amendment of the Notice of Appeal.

Mr *Elliot* also raised the issue that leave of the learned judge who issued the order was necessary as the point appealed against was interlocutory. Mr *Chikumbirike* contended that the effect of the order was final, therefore, no leave was required. The issue, in my view, is debatable and justice and fairness demands that I leave this issue open for determination of the court after hearing argument on the matter. The applicant's prospects on the merits cannot be said to be so hopeless that this application cannot but be intended to buy time.

In the result I am satisfied that the delay was minimal and the explanation for the delay is satisfactory. I accordingly would grant the application and an order in terms of the draft is granted.