

REPORTABLE ZLR (68)

Judgment No. SC 20/08
Civil Application No 142/04

(1) MICHAEL MTAMBO (2) SITHOKOZILE NGWENYA
(3) FELIX MUNYORO (4) NOEL MATORERE (5) NHAMOINESU
DZENGA (6) FARAI MAMBWERE (7) WASHINGTON MEDA v
(1) ZESA PENSION FUND (2) MESSENGER OF COURT,
HARARE

SUPREME COURT OF ZIMBABWE
HARARE, JUNE 4, 2008

S Mushonga, for the applicants

S T Tavenhave, for the first respondent

No appearance for the second respondent

CHEDA JA: In Chambers in terms of r 31(4) of the Supreme Court Rules.

This is an application for an order to be granted in the following terms:

IT IS ORDERED THAT:

- (1) The Registrar of the High Court be and is hereby directed to reinstate the applicant's appeal.

- (2) The Registrar of the High Court is to inform the applicants within fourteen days of the costs of the preparation of the record and the applicants are to pay within (14) days of receipt of the confirmation of the cost of the record.
- (3) The cost of this application be costs in the cause if the respondent do not oppose it but if they oppose the respondents are to pay the costs of suit.

Two issues arise in this application and they are:

- (1) Did the applicants comply with r 34(1); and
- (2) Are there prospects of success.

Rule 34(1) provides as follows.

“The appellant unless he has been granted leave to appeal in *forma pauperis*, shall, at the time of noting an 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 applicants have argued that they requested the registrar to prepare the record and made an undertaking to pay. This is denied. In view of the denial, all the applicants needed to do was to produce a copy of the undertaking filed together with the notice of appeal. The appellants' have not done so but only argue that the registrar could not have prepared the record if such undertaking had not been made. This is not

sufficient. The point still stands that it has not been shown that there was an undertaking to pay.

In the absence of the deposit being made or an undertaking to pay acceptable to the registrar, then the notice of appeal did not comply with the Rules and was therefore defective.

The applicants request that they be allowed to pay for the record after 14 days of notification of the cost. This is not in accordance with the Rules. The Rules require that payment of such cost be made immediately after it has been determined.

The Court cannot alter this requirement in that way.

PROSPECTS OF SUCCESS

The applicants were indeed granted an opportunity to purchase the properties as sitting tenants. However, when they were called upon to pay they failed to do so within the period provided.

The period was extended. Again they still failed to pay. The applicants cannot hold the first respondent to an agreement that fell away as a result of their failure to pay.

There are therefore no prospects of success on appeal.

In the result the application for the reinstatement of the appeal is dismissed with costs.

Mushonga & Associates, applicants' legal practitioners

Manase & Manase, first respondent's legal practitioners