

**DISTRIBUTABLE (29)**

**(1) ZIMSLATE QUARTZITE (PRIVATE) LIMITED (2) ARMINCO  
INVESTMENTS (PRIVATE) LIMITED (3) TINASHE ABEL  
CHIMANIKIRE (4) MOHMED IQBAL MAHMED  
v  
CENTRAL AFRICAN BUILDING SOCIETY**

**SUPREME COURT OF ZIMBABWE  
HARARE, MARCH 17, 2017 & MAY 10, 2017**

*Mrs R Mabwe*, for the first to the third applicants

*E Samukange*, for the 4<sup>th</sup> applicant

*R Moyo*, for the respondent

**APPLICATION FOR REINSTATEMENT OF APPEAL**

**ZIYAMBI AJA:**

[1] On 29 January 2016 the applicants noted an appeal against a judgment of the High Court dated 20 January 2016 in which the applicants were ordered jointly and severally, the one paying the others to be absolved, to pay to the respondent the sum of US\$324 815.49 plus interest thereon at the rate of 20 per cent per annum from 24 October 2013, such interest to be calculated monthly in advance on the said sum and capitalized, to the date of payment in full. It was further ordered that the immovable property, being certain piece of land situate in the district of Marandellas called Stand 130 Marandellas Township, measuring 3, 1474 hectares, held by the second applicant under Deed of Transfer Number 4905/2002, be declared executable in recovery of the said sum and that the applicants pay costs of suit on the scale of legal practitioner and client.

[2] In the notice of appeal, the address for service was given as that of the applicants' legal practitioners, namely 10, Mold Crescent Avondale, Harare, for the first second and third applicants, and 2<sup>nd</sup> Floor Tanganyika House, Cnr 3<sup>rd</sup> Street & K. Nkrumah Ave, Harare, for the fourth applicant. Also in the notice of appeal was a statement to the effect that the applicants undertook to pay security for the costs of the appeal as soon as they were determined by the Registrar. Rule 34(1)<sup>1</sup> of the Rules of this Court ("the Rules") requires such costs to be paid at the time of filing the notice of appeal or within a period of not more than five days unless an undertaking is made, to the Registrar of the High Court, to pay the costs as soon as they are determined. It is not clear whether any undertaking was made to the Registrar of the High Court. I entertain grave doubt as to whether the statement in the notice of appeal amounts to an undertaking as required by the rule which stipulates that the undertaking must be made in writing 'to the Registrar of the High Court'.

[3] However, be that as it may, on 26 May 2016, the Registrar of the High Court wrote to the applicants instructing them to deposit \$3 200.00 with the Registrar, as costs for preparation of the appeal record, within five days of service of the letter upon them. A copy of the letter, annexed to the application, was delivered at the first to third applicants' address for service on 5 June 2016. The applicants' legal practitioners were not found at that address. They had

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<sup>1</sup>The rule provides:

"(1) The appellant, unless he has been granted leave to appeal *in forma pauperis* shall, at the time of the noting of an appeal in terms of rule 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".

relocated. No forwarding address was left. In terms of r 10 of the Rules, the applicants were to advise the Registrar of any change of address. They did not do so.

[4] On 6 July 2016, the Registrar of this Court wrote to the applicants' legal practitioners advising them that the appeal was deemed to have lapsed in terms of r 34(5) of the Rules. The letter, a copy of which is annexed to the applicants' founding affidavit, is directed to all the applicants at their respective addresses for service. The applicants did not respond despite the acknowledgement by Mr Musarira, who filed the supporting affidavit on behalf of the applicants, that:

“first to third Applicants’ new address for service is 5 Lomagundi Road, Harare, upon which the letter of lapse was served.”<sup>2</sup>

[5] On 14 July 2016, the respondent's legal practitioners wrote to the applicants' legal practitioners noting that their appeal had been dismissed and demanding payment in terms of the judgment by close of business on 19 July 2016 failing which they would proceed to execute the judgment without further notice. The letter addressed to the fourth applicant's legal practitioners was signed by the latter in acknowledgement of receipt. The letter to the first to third applicants was not acknowledged. The respondents aver that upon enquiry with the Law Society of Zimbabwe as to the whereabouts of the applicants' legal practitioners, they were furnished with the address from which the legal practitioners had moved.

[6] On 22 July 2016, the applicants filed an application ‘for REINSTATEMENT OF APPEAL AND EXTENSION OF TIME WITHIN WHICH THE APPEAL SHOULD BE HEARD IN TERMS OF RULE 31 OF THE SUPREME COURT RULES AS READ WITH PARAGRAPH 5 OF PRACTICE DIRECTIVE 3/13.’ That application was struck off the roll

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<sup>2</sup> Para 7 of the supporting affidavit.

with costs on 14 February 2017, by GUVAVA JA who heard it. The applicants aver that it was struck off because neither r 31 nor Practice Directive 3 of 2013 provides for such an application. In that application the applicants blamed the Registrar for making no effort to ascertain the new address of the applicants' legal practitioners.

[7] The present application was filed on 17 February 2017. It is, in essence, the same application filed before GUVAVA JA save that the citation of the rule in terms of which the application is brought has been omitted. It is entitled: APPLICATION FOR REINSTATEMENT OF APPEAL AND EXTENSION OF TIME WITHIN WHICH TO APPEAL. In the draft order, the applicants seek the following order:

- “1. The appeal under S-33-16 be and is hereby reinstated.
2. The registrar shall determined (sic) the costs of the record and ensure same is served on all the Applicants' address for service.
3. Respondent shall pay costs of suit.”

[8] At the hearing, the point was taken, *in limine*, by the respondent, that the application is a contradiction in terms in that a prayer for reinstatement suggests that an appeal was previously noted while an application for extension of time suggests that no (or no valid) appeal has previously been noted. The applicants' case was that the appeal had lapsed for non-payment of the costs of the record by reason of the provisions of r 34(5) which read as follows:

“(5) If the appellant fails to comply with the provisions of sub rule (1), or any written undertaking made in terms of the *proviso* to that sub rule, the appeal shall be deemed to have lapsed unless a judge grants relief on cause shown.”

[9] The confusion may have stemmed from the use, in the rule itself, of the words “lapsed unless”. While the term ‘lapse’ would suggest the appeal was “terminated, voided, (or) expired” upon failure to comply with r 34 (1) with the result that there is no appeal filed, the two words read together suggest that lapsing is prevented by the relief granted by the judge. If

the correct interpretation is that the appeal shall lapse upon failure to comply with the requirements of r 34(1) but a judge may reinstate it, the application for reinstatement would, on the face of it, be procedurally proper in the circumstances but the question remains as to the effect of the lapsing. If the effect is to void or terminate or bring an end to the appeal, then the relief to be sought should be an application for an extension of time within which to appeal. This is because an appeal which has been voided or terminated or which has expired cannot be reinstated since there is no appeal pending and one can only reinstate something which exists. On the other hand, if the lapsing is interpreted to mean that the appeal merely fell into abeyance then it may be reactivated by an order of reinstatement. It is to be noted that the rule does not speak of reinstatement. It speaks of relief.

[10] Another difficulty presented by the wording of the rule is this. When does the lapsing take place? The words ‘lapsed unless’ appear to convey the meaning that it is the refusal by the Judge to grant relief which gives effect to the lapse and that for as long as there is scope for an application for relief the lapse will not take effect. If that is the correct interpretation, then again an application for reinstatement would be appropriate.

[11] In view of the above, I am not inclined to hold that the application is a contradiction in terms. Accordingly, the point *in limine* fails.

[12] I move on to determine the merits of the application, in particular, whether cause has been shown by the applicants for the grant of relief in terms of r 34(5). The relief sought by the applicants is set out above<sup>3</sup>.

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<sup>3</sup> Para [ 7] *supra*

[13] Mrs *Mabwe*, who appeared for the respondents, addressed me on the question of the reason for the delay and the prospects of success on appeal. She submitted that this was a proper case for condonation to be granted and for the applicants to be allowed to argue their case on appeal. The applicants, she argued, should not be visited with the consequences of the negligence of their legal practitioners. She argued that there were at least arguable prospects of success on appeal in that the court *a quo* had found there was no agreement of loan between the first applicant and the respondent and that therefore the suretyship agreements signed by the second to fourth applicants could not stand. In any event, the amount owing was disputed by the applicants and the court *a quo* had erred in failing to deal with the argument proffered by the applicants on that issue.

[14] The difficulty with Mrs *Mabwe's* submissions regarding the grant of condonation is that condonation was not sought by the applicants. Neither in the founding affidavit nor in the draft order filed is any indication given that condonation is being sought. In an application of this nature and indeed in any application which is necessitated by a breach of the Rules, it is imperative that condonation of failure to comply with the rule in question be applied for because in each case the applicant is seeking an indulgence from the court.

[15] The impression conveyed in the affidavits filed on behalf of the applicants is that the applicants are entitled to the order sought. No regret is expressed for the infringement of the rule. The tone of the founding affidavit is that no fault was to be attributed to the applicants or their legal practitioners and that all blame lay at the door of the Registrar who was accused of serving the letter advising of the costs to be paid at the wrong address having failed to ascertain the correct address of the legal practitioners who had relocated.

[16] The fourth applicant is represented by a different firm of legal practitioners. He supported the averments in the founding affidavit. However, he does not deny receiving the

letter. His explanation for the failure to comply with r 34(1) is that he ‘does not remember’ being served with a letter from the Registrar requesting costs. Like his co-applicants, he has given no explanation for the delay in filing an application for relief in terms of r 34 (5). The record shows the ‘letter of lapse’ (dated 6 July 2016) was received by the first to third applicants. The fourth applicant did not deny receipt of that letter.

In my view the applicants’ conduct in this matter exhibits disdain for the Rules.

[17] An applicant, who has infringed the rules of the court before which he appears, must apply for condonation and in that application explain the reasons for the infraction. He must take the court into his confidence and give an honest account of his default in order to enable the court to arrive at a decision as to whether to grant the indulgence sought. An applicant who takes the attitude that indulgences, including that of condonation, are there for the asking does himself a disservice as he takes the risk of having his application dismissed.

[18] This is not a proper case, in my view, for exemption of the applicants from the total disregard for the rules exhibited by their legal practitioners<sup>4</sup>. The applicants have aligned themselves with their legal practitioners in this regard. They have not shown that they were desirous of prosecuting the appeal or that the appeal has been noted in good faith and carries prospects of success. While they dispute the actual amount ordered by the judgment to be paid to the respondents, they have not made payment of the amounts that they acknowledge to be owing. That fact together with their failure to make payment of the costs or estimated costs of preparation of the record and the prayer in the draft order requiring the registrar again to assess the costs and serve the assessment on their legal practitioners indicates clearly in my view the lack of seriousness with which they view the appeal noted. Why should the registrar reassess the costs which have already been advised to them? It appears to me that any right thinking

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<sup>4</sup> Friendship vs Cargo Carriers Ltd & Anor 2013 (1) ZLR 1 (S)

legal practitioner would hastily approach the High Court and make payment in the interests of progress. It is evident that the applicants are employing delaying tactics.

[19] On the question of reinstatement, the explanation given by the applicants is that the notification by the Registrar of the quantum of costs to be paid by them was served at their previous address and did not reach them. The fourth applicant was content to take solace in some form of loss of memory. They all placed the blame on the Registrar for failing to serve the letter requesting payment of the costs at the correct address of the first to third applicants. The explanation given is totally unsatisfactory. It offers no valid excuse for their non-compliance with the requirements of r 34. The applicants were granted the indulgence of a deferment of compliance with the mandatory requirements of r 34(1). An applicant, desirous of pursuing its appeal would, at the very least, have made enquiries with the Registrar from time to time as to the amount required to be paid. By 26 May 2016 when the Registrar wrote to the applicants' legal practitioners, no enquiries had been made by the applicants. That was well after a total of seven months had elapsed from the date of noting of the appeal. It seems to me that one would be justified in concluding, in these circumstances, that the applicants had abandoned any intention of prosecuting their appeal.

[20] Since the onus lay on the applicants to ensure that the Registrar was notified of their change of address, the blame placed on the Registrar by the applicants is misplaced. They have only themselves to blame. In my view no cause has been shown by the applicants to justify the grant of relief in terms of r 34(5).

The application is, therefore, dismissed with costs.



*Venturas & Samkange*, 4<sup>th</sup> applicant's legal practitioners

*Gill Godlonton & Gerrans*, respondent's legal practitioners