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Judgment No. SC 118/02

Civil Application No. 212/02

(1) CHRISTOPHER MAPONDERA (2) JUDY BILLINGS MAPONDERA

v (1) HAPPY NCUBE (2) SHERIFF OF ZIMBABWE
(3) REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
HARARE, OCTOBER 23, 2002 & JANUARY 16, 2003

A M Gijima, for the applicants

A Mugandiwa, for the respondents

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

This is an application for an order for the reinstatement of an appeal deemed to have lapsed in terms of Rule 34(5) of the Supreme Court Rules. The appeal was noted by the applicants on 1 July 2002 against a judgment of the High Court dated 18 June 2002 dismissing with costs an application in case HC 417-02 for condonation of a late institution of a court application in terms of Rule 359(8) of the High Court Rules. The relief sought in that application was an order setting aside the decision of the second respondent ("the Sheriff") to confirm a sale by private treaty of immovable property to the first respondent.

Rule 34(1) of the Supreme Court Rules provides that:

> "The appellant, unless he has been granted leave to appeal *in forma pauperis*, shall, at the time of 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 representatives for the payment of such cost immediately after it has been determined."

Subrule (5) of Rule 34 provides that:

> "If the appellant fails to comply with the provisions of subrule (1) or any written undertaking made in terms of the proviso to that rule, the appeal shall be deemed to have lapsed unless a Judge grants relief on cause shown."

The acts to be performed by the applicants as appellants to discharge the duty imposed on them by the provisions of subrule (1) of Rule 34 are clear. They had to deposit the estimated cost of the preparation of the record with the Registrar of the High Court ("the Registrar") at the time of noting the appeal on 1 July 2002. If they were unable to deposit the estimated cost at the time of noting the appeal they had to ask the Registrar for an extension of time, not exceeding five days from 1 July 2002, within which to deposit the estimated cost. If they were unable to deposit the estimated cost at the times prescribed they or their legal representatives had to give to the Registrar a written undertaking for the payment of such cost immediately after it was determined. They would have discharged their duty under subrule (1) of Rule 34 only if the Registrar accepted the written undertaking in lieu of the deposit.

The applicants did not do any of the above-mentioned acts. There was therefore total failure on their part to comply with the provisions of subrule (1) of Rule 34.

In considering an application for an order for reinstatement of an

appeal deemed to have lapsed a Judge takes into account, amongst other factors, the explanation given for the non-compliance with the provisions of subrule (1) of Rule 34 and the prospects of success on appeal.

In this case, no explanation has been given by the applicants for their failure to do the acts required to be done in order to comply with the provisions of subrule (1) of Rule 34. The founding affidavit deposed to by their legal representative, Mr Chinawa, contains statements of what he claimed was done by a clerk, which does not constitute compliance with the provisions of subrule (1) of Rule 34.

Mr Chinawa stated:

> "2. On 1 July 2002, the applicants noted an appeal to this Honourable Court against the judgment of the High Court in case HC 417/02, delivered on 18 June 2002 by the Honourable Mr Justice Chinhengo.
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> 3. On the same date, I instructed one of our legal clerks, Mr Bongayi Mulambo, to go to the High Court and urgently ascertain from the Registrar's Office the amount of money required to be deposited with the Registrar as deposit cover for costs of the preparation of the record.
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> 4. As fully appears from Mr Bongayi Mulambo's affidavit annexed hereto marked 'C', the Registrar's Office indicated to us that they would advise us in due course and gave the impression that they were proceeding to prepare the record.
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> 5. We were therefore shocked to discover through a letter from Messrs Wintertons dated 8 August 2002, but received by us on 14 August 2002, in which it was alleged that the applicants had failed to comply with Rule 34(1) of the Rules of this Honourable Court by failing to deposit with the High Court Registrar the estimated cost of preparing the record nor in lieu of such deposit made any written undertaking to pay such costs."

It is important to note that the discharge of the duty imposed on an appellant in terms of subrule (1) of Rule 34 is not dependent upon the Registrar providing him or her with a figure of the estimated cost of the preparation of the record in his case or her case. It must be assumed that the applicants' legal representative knew that for them to comply with the provisions of subrule (1) of Rule 34 he had to have the estimated cost of the preparation of the record before the appeal was noted in order to be able to deposit it with the Registrar at the time of noting the appeal. If he was unable to arrive at a figure of the estimated cost he had

to provide the Registrar with a written undertaking at the time of noting the appeal for the payment of such costs immediately after it was determined. As the applicants' legal practitioner does not say non-compliance with the provisions of subrule (1) of Rule 34 was a result of his misinterpretation of the law, what he said in his founding affidavit reveals nothing other than a disdain for the Rules.

There was no reference in the founding affidavit to the prospects of success on appeal and an examination of the facts of the case presented to the court *a quo* does not reveal the existence of any.

The applicants, who are husband and wife, owed Trade and Investment Bank Limited ("the Bank") an amount of about $4 million, which they failed to pay on the due date. On 1 May 2000 the Bank issued summons against the applicants for the payment of the debt. The applicants, however, consented to judgment but nonetheless failed to pay the judgment debt.

Their immovable property, Lot 130 Pomona Estate Extension 2 of Pomona, commonly known as No. 10 Kirkaldy Road, Pomona, was attached in execution of judgment. The applicants agreed with the judgment creditor that the property should be sold by the Sheriff in terms of Rule 358(1) of the Rules of the High Court, which provides for the sale by the Sheriff of property in execution other than by public auction. The property was, therefore, to be sold by private treaty.

An offer of $10 million was made but later withdrawn. The property was advertised on three occasions in the newspapers before the first respondent made the offer to purchase it for $7 million. The offer was accepted by the Sheriff and the property sold to the first respondent on 8 October 2001.

If the applicants were unhappy with the manner in which the sale was conducted or felt that it was sold at an unreasonably low price, they had a right, under Rule 359(2), to lodge an objection to the sale with the Sheriff within fifteen days of the sale. They did not object to the sale. It was confirmed by the Sheriff on 5 November 2001 in terms of Rule 359(10).

The applicants, who resided in England at the time but acted through their agent, John Mapondera, said they became aware of the confirmation of the sale on 30 November 2001. They, however, did nothing until 21 December 2001 when they claim to have instructed their employee in Zimbabwe to contact their legal practitioner. The court application for an order setting aside the decision of the Sheriff to confirm the sale was only made on 17 January 2002. No affidavit from the employee on what he did on receipt of the instruction on 21 December 2001 was

filed.

The application was made in terms of Rule 359(8) of the Rules of the High Court. The provisions of Rule 359(8) make it clear that the only relief available on an application made under the subrule is an order setting aside a decision made by the Sheriff in terms of Rule 359(7). That is a decision confirming a sale after an objection thereto has been lodged with the Sheriff and a hearing of the parties who had noted interest in the sale has been conducted by him.

As no objection was lodged with the Sheriff by the applicants within fifteen days of the sale, the decision confirming the sale was not liable to be set aside on a court application made in terms of Rule 359(8). It must follow that the applicants made an application to the High Court to set aside a decision which was never made. They, however, seem to have been keen to lie on the bed they had made because they persisted with the submission before the High Court that the court application made under Rule 359(8) was the appropriate remedy for the relief they sought. Their submission did not find favour with the learned judge, who said:

> "Mr *Girach*, for the first respondent, has correctly stated that the relief which the applicants seek cannot therefore be granted or even considered under Rule 359. I agree that this is the position. The question, of course, which then arises is whether the applicants are out of court by reason of the procedure that they adopted in this matter. I would agree that the application should be dismissed on the basis of the failure by the applicants to follow the procedure outlined in the Rules of this court."

Mr *Gijima*, who appeared for the applicants, conceded that nowhere in the papers filed in this application was it suggested that the learned trial judge was wrong in reaching the conclusion he arrived at. As there is no criticism of the findings made by the learned judge, there is no basis upon which a finding of the existence of prospects of success can be made.

The application is accordingly dismissed with costs.

Kantor & Immerman, applicants' legal practitioners

Wintertons, respondents' legal practitioners