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Judgment No S.C. 32/04

Civil Application No 198/01

SUSAN CHIPO VERA v MITSUI AND COMPANY
LIMITED

SUPREME COURT OF ZIMBABWE
HARARE MAY 5, 2004

C. Selemani, for the applicant

J.J. Callow, for the respondent

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

This is a Chamber application for the re-instatement of an appeal which was regarded as abandoned and deemed to have been dismissed by reason of the failure of the applicant to file heads of argument within 15 days of being called upon to file the heads of argument, see Rule 43(2) as read with Rule 44 of the Supreme Court Rules.

Although the application does not state in terms of which rule it is being made I assumed it was made in terms of Rule 36 of the Supreme Court Rules. It is well settled that for an application for reinstatement to succeed good cause for the default must be established. The issue for determination before me is whether good cause for the default has been shown.

The facts of this case are briefly as follows. The respondent issued summons for the eviction of the applicant from certain premises known as No 7 Ridgeway North, Highlands, Harare, and payment of a certain amount of money from a co-defendant who is not party to the present proceedings. The applicant entered an appearance to defend. The respondent applied for and obtained summary judgment against the applicant. The applicant was dissatisfied with this outcome and noted an appeal against the judgment.

When the record was complete the Registrar wrote to the applicant's erstwhile legal practitioners Chibune & Associates to file the applicant's heads of argument within 15 days of the notification. The notification was in terms of Rule 44. The applicant avers, and this was not disputed, that Mr Chibune contacted her on the last day the heads of argument were due for filing. The applicant instructed her erstwhile legal practitioner to seek an extension of the time within which to file the heads of argument as she wished to pursue her appeal. Mr Chibune refused to do that on the basis that in his view her case had no prospects of success and proceeded to renounce agency leaving the applicant in the lurch, as it were. The applicant secured the services of another legal practitioner who then launched this application. While Mr Chibune had some basis for being of the view that the applicant had no prospects of success on appeal his conduct in advising his client of this on the last day of filing heads of argument and renouncing agency, falls far below what is expected of a legal practitioner. He should have advised the applicant in sufficient time for her to make alternative arrangements in the event of her erstwhile legal practitioner wishing to terminate his services.

Mr *Callow*, who appeared for the respondent, and opposed the application argued strenuously that the applicant had very little prospects of success on the merits. He did not have much to say on the eminently plausible explanation for the failure to file heads of argument by the applicant. I agree with Mr *Callow's* submission that the applicant has very little prospects of success on the merits. The net result is that the applicant has a good explanation for the default but very poor prospects of success on the merits.

Given this situation I have decided to grant the application for the following reasons:

- (a) the applicant was badly treated by her erstwhile legal practitioners and she should not be made to pay for the sins of her legal practitioners;
- (b) while I agree with Mr *Callow* that the applicant's prospects of success

on the merits are poor it really is for the appeal court to have a final say on this issue. My view on the prospects of success is, of necessity, *prima facie*. If the explanation for the default were not plausible I probably would have come to a different conclusion. The applicant deserves her day in court regardless of the merits of the case. This is particularly so taking into account that she is appealing against summary judgment which, in effect, deprives her the chance to defend herself in the court *a quo*;

- (c) while I accept that there has been some delay in the finalisation of this matter blame for such delay is attributable to the learned judge in the court *a quo* and not the applicant. The record in this case is complete and all that remains is for the parties to file their heads of argument and the matter to be set down for argument, something that can be done within a relatively short time.

In the result the application is granted and I make the following order:

1. The appeal is re-instated.
2. The applicant is ordered to file her heads of argument within 7 days of this order and thereafter the matter should proceed to set down in accordance with the rules.

Muzenda & Maganga, applicant's legal practitioners

Stumles & Rowe, respondent's legal practitioners