

REPORTABLE (32)

Judgment No. SC. 37/05

Civil Application No. 311/04

BURDOCK INVESTMENTS (PRIVATE) LIMITED
v

(1) WINSLEY MILITALA (2) C.A. BANDA N.O.

SUPREME COURT OF ZIMBABWE
HARARE, JULY 20 & SEPTEMBER 13, 2005

F M Katsande, for the applicant

A Mugandiwa, for the first respondent

No appearance for the second respondent

Before: CHEDA JA, In Chambers, in terms of Rule 31 of the Supreme Court Rules

This is an application for leave to note an appeal outside the time limit provided for by the Rules of this Court.

On 29 September 2004 the applicant's application against the respondents was dismissed by an order that read as follows:

"IT IS ORDERED:

That the application be and is hereby dismissed with costs."

On 11 October 2004 the applicant filed a notice of appeal against the High Court's order. A letter addressed to the registrar of the High Court is part of the record. This letter requested the registrar to proceed to prepare the record for appeal purposes with an undertaking to pay the costs of preparation of the record.

On 5 November 2004, in response to an enquiry from the first respondent's legal practitioners, the registrar of the High Court advised that he had perused the record and checked with the accounts office and had established that the applicant had neither deposited the estimated costs of preparing the record within five days of noting the appeal nor provided any undertaking for the payment of such costs as required by Rule 34(1) of the Supreme Court Rules ("the Rules"). The registrar advised that the appeal was therefore deemed to have lapsed.

A quick look at the dates reveals that the notice of appeal was filed within the stipulated period in terms of Rule 31 of the Rules, but the request for preparation of the record and the undertaking to pay the costs was made well after the five days provided in Rule 34(1) of the same Rules.

Rule 34(1) of the Rules provides as follows:

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

It is on the basis of this provision that the registrar of the High Court advised that the appeal was deemed to have lapsed.

The facts stated above are not disputed by the applicant.

The applicant's explanation for the delay is not a clear and satisfactory one.

The reasons for judgment were made available on 16 February 2005. The applicant did not make any follow-up on its case or communicate with its legal practitioners to establish developments concerning its case. This Court was informed that the applicant next engaged Mr F.M. Katsande, who advised it of the problem after assuming agency about June 2005.

There was a further delay before corrective measures were taken. The respondent alleges that a letter was written by the applicant's current legal practitioners on 12 May 2005, which is annexure 'D'.

No explanation was obtained from the applicant's former legal practitioners concerning their failure to act timeously. The excuse made for them by the applicant of an "administrative oversight due to pressure of work" is unacceptable. Litigants cannot be allowed to make such excuses for the failure by their legal practitioners to comply with the Rules of Court.

It is clear that the applicant has not given a satisfactory explanation for the delay.

I now turn to deal with a point that has influenced me in making my decision on this application.

The applicant's contention is that the parties met and held discussions in order to resolve the matter. Some form of agreement was reached verbally. The parties were to put it in writing in draft form and then agree on the draft before it could be presented to the arbitrator as reflecting their agreement. The draft was prepared by the first respondent's legal practitioners. However, the first respondent placed the draft before the arbitrator without seeking the approval of the applicant.

Mr Mutunami, the managing director of the applicant, is said to have stated as follows in his founding affidavit:

"It is not true that the parties came to an agreement as stated by the (first) respondent's attorney in his letter of 28 August 2003, appended as D but rather the parties should have jointly formulated the suggested terms and conditions of settlement. This was not done and no settlement was reached within the contemplation of article 30 ...".

Indeed, where parties enter into an agreement verbally and agree that it be put in writing to reflect their agreement, both parties should approve the written agreement as reflecting what they agreed on. It would not assist the party that drafted the agreement to argue that it reflected what was agreed when the other party has not had sight of that agreement.

If the first respondent was certain that the draft reflected what was agreed there was no reason for him to present it as an agreement without the applicant having had sight of it. The first respondent clearly took the risk of the applicant disputing the contents of the draft document and this is what has since happened. It would not be proper, in the circumstances, to hold the applicant to an agreement that was never shown to it.

It is for this reason that I am prepared to grant the application to allow the applicant to contest the matter.

Rule 31(5) of the Rules gives a judge a discretion to grant relief on cause shown. It is my view that this is a proper case for me to exercise my discretion in favour of the applicant.

I therefore order as follows -

- “(a) The delay in requesting the registrar of the High Court to transcribe the record and pay for the costs of the transcript or make an undertaking to do so be and is hereby condoned.

(b) The written request for the transcript of the record filed with the registrar of the High Court on 28 October 2004 be and is hereby deemed to be filed in terms of the Rules of the Supreme Court.

(c) The applicant will pay the costs this application.”

F.M. Katsande, applicant’s legal practitioners

Wintertons, first respondent's legal practitioners