

MOSI-OA-TUNYA (PRIVATE) LIMITED v
(1) JOINA DEVELOPMENT COMPANY (PRIVATE) LIMITED
(2) CB RICHARD ELLIS

SUPREME COURT OF ZIMBABWE
HARARE, OCTOBER 17, 2008 & FEBRUARY 18, 2009

K Gama, for the applicant

I Chagonda, for the first respondent

No appearance for the second respondent

Before: SANDURA JA, In Chambers, in terms of r 31(1) of the Rules of the Supreme Court, 1964

This is an application for an extension of time within which to appeal against a judgment of the High Court.

The essential facts are as follows –

1. On 14 March 2007 the applicant (“Mosi”) made an *ex parte* application in the magistrate's court, for a provisional order interdicting the first respondent (“Joina”) and the second respondent (“Ellis”) from letting a certain shop (“the property”) to any person other than Mosi. The provisional order was granted.
2. On 10 May 2007 the magistrate's court confirmed the provisional order and granted an order in the following terms:

“(a) (That) the lease agreement entered into by the applicant and

(the) first respondent on 28 October 2003 (be and is hereby) declared valid and binding on both parties.

(b) (That) in the event that (the) respondents, both or one of them, had entered into any other lease agreements with any other parties, such agreements (be and are hereby) declared null and void.

(c) (That the) second respondent (should bear) the costs of suit.”

3. On 22 May 2007 Joina and Ellis filed a notice of appeal in the High Court, challenging the order granted by the magistrate's court on 10 May 2007.
4. On 10 July 2008 the High Court heard the appeal and reserved its judgment.
5. On 6 August 2008 judgment was handed down, but Mosi was not aware of that fact until 8 September 2008 when it was informed by its legal practitioners that the High Court had set aside the order granted by the magistrate's court.
6. On 10 September 2008 Mosi filed a notice of appeal in this Court, challenging the High Court's decision. The notice of appeal was filed long after the fifteen day period within which it should have been filed had expired. No extension of time within which to note the appeal had been granted.
7. On 11 September 2008 Mosi filed the present Chamber application for an extension of time within which to appeal against the High Court judgment. A copy of the application was served on Joina's legal practitioners on the

same day.

8. On 1 October 2008 Joina filed its opposing affidavit and served it on Mosi. The opposing affidavit was filed long after the three day period within which it should have been filed in terms of r 31(5) of the Rules of the Supreme Court, 1964 (“the Rules”) had expired. No extension of the period within which to file the affidavit had been sought or granted. Although this was brought to the attention of Joina’s legal practitioners on 2 October 2008, no extension of time in which to file the affidavit was sought.

When the matter came before me for hearing on 17 October 2008, Mr *Gama*, who appeared for Mosi, raised a point *in limine* and submitted that Joina was not properly before me because its opposing affidavit had not been filed timeously.

After hearing both counsel on the point *in limine* and on the main application, I reserved my decision.

It is clear from the provisions of r 31(5) of the Rules and from the facts set out above that Joina’s opposing affidavit was not filed timeously, and that notwithstanding the fact that this was brought to the attention of Joina’s legal practitioners on 2 October 2008, nothing was done about the failure to comply with the rule until 17 October 2008 when Joina’s legal practitioner made an oral application after the point *in limine* had been raised.

In my view, Mr *Gama*’s submission on the point *in limine* is unassailable. Before the hearing of the Chamber application Joina did not seek, nor was it granted, an extension of time in which to file the affidavit. Mosi’s Chamber application was, therefore, unopposed and Joina was not properly before me at the hearing of the Chamber application.

However, even if the opposing affidavit had been filed timeously I would have granted Mosi’s application for an extension of the time within which to appeal. I say so because Mosi gave a reasonable explanation for its failure to note the appeal

timeously. The explanation was that its lawyers had not been notified of the date when the judgment was to be handed down. Consequently, neither Mosi nor its lawyers knew that the judgment had been handed down until long after the fifteen day period had expired.

As far as the merits of the appeal are concerned, the issue between the parties is whether a lease agreement was concluded between them. Mosi alleges that it was, but Joina alleges that it was not.

However, having listened to counsel's submissions, I cannot say that the appeal is unarguable.

In the circumstances, it is ordered –

1. That the delay by the applicant in filing its notice of appeal be and is hereby condoned.
2. That there be no order as to costs.

Madzivanzira, Gama & Associates, applicant's legal practitioners
Atherstone & Cook, first respondent's legal practitioners