

**DISTRIBUTABLE** (36)

(1) SOUTHEND CARGO AIRLINES (PRIVATE) LIMITED (2)  
STEPHEN JACKSON CHITUKU (3) PATIENCE FADZAI CHITUKU  
v  
INFRASTRUCTURE DEVELOPMENT BANK OF ZIMBABWE

**SUPREME COURT OF ZIMBABWE**  
**HARARE, NOVEMBER 12, 2015 & SEPTEMBER 29, 2016**

*T. A. Toto*, for the applicant  
*M. Mahlangu*, for the respondents

**IN CHAMBERS**

**BHUNU JA:** This is a rather convoluted chamber application with no clear cut basis or rule of law upon which it is founded. The application was filed as a chamber application for reinstatement of the lapsed appeal under case number SC 209/04 but ended up as an application for condonation of late noting of appeal.

There being no clear cut basis for the procedure adopted by applicants, counsel for the applicants resorted to inviting the court to depart from the rules and adopt uncharted procedures in terms of r 4 of the Supreme Court Rules to advance their own purpose. The rule authorises a judge in appropriate cases to depart from the rules in order to do justice between the parties. It provides that:

“Subject to the provisions of subsection (3) of section 19 of the Act, a judge or the court may direct a departure from these rules in any way where this is required in the interests of justice and, additionally or alternately, may give such directions in matter of practice or procedure as may appear to him or it to be just and expedient”

In his main written submissions Mr *Toto* counsel for the applicants sought to explain and justify their admitted tardiness and flagrant disdain of the rules in the following vein:

**“A CONDONATION**

The court is asked for indulgence in terms of rule 4 of the SC rules whereon the court can use its inherent powers to depart from the Rules in the interest of justice and to control its own proceedings to achieve justice. The court is asked to condone the tardiness inherent in the following papers filed of record:-

- i. This matter has taken too long to conclude and justice demands that it be put to rest in (one) way or the other which does not include a dismissal of this application on account of non-compliance with the rules.
- ii. Considering that this application is made for the reinstatement of the appeal supposedly pending in this court it is submitted that:

**1. THIS APPLICATION WAS MADE WITH THE INITIAL  
IMPRESION THAT:**

- a) There was an appeal pending before this court that has been struck off the roll.
- b) After which efforts were made to find the Supreme Court record which was only retrieved from the Archives.
- c) In an effort to comply with the High Court Civil Appeal Rules but erroneously so, a letter dated September 30, 2015 was written to the High Court Registrar (Tendered hereto), causing the preparation of the High Court record.
- d) Applicants’ files were also still sitting at various law firms and the proper and adequate briefing was difficult from applicants who are lay people.
- e) Be that as it may, it came to the attention of counsel that the appeal had in fact lapsed and it required revival.
- f) However, in terms of the Appeal Rules and the law, prior to making this application, there must have been the need to apply to this court or a judge for condonation before such an appeal can be reinstated because technically there is no appeal pending. See case of:-

**Bobby Maparanyanga versus Dean Pernell Van Schakwyk SC  
64/02**

- g) As a result of this history and lapse of time over the years and the failure by applicant to access legal counsel, it is necessary that an application is made to regularise applicant’s papers.
- h) The court is asked to condone the applicants for their conduct that led the Appeal to lapse. Accordingly the court is asked to condone the applicants by exercising its inherent powers to achieve the interests of justice and finality of this matter by allowing applicants to lodge the appeal out of time and to effectively grant an order to the effect that:

- i. Failure to file the appeal in terms of the rules is condoned.
- ii. Applicants are ordered to file the appeal with the Registrar of the SC within 7 days from the date of this order.
- iii. Applicants must comply with the Appeal Rules of this court to the extent of causing the preparation of the court record as a matter of priority within 21 days from the date of this order.”

From the applicants’ own summation of their irregular and improper prosecution of the intended appeal I discern a deliberate disdain of the rules.

I observe in passing that the tardiness with which this matter is being handled betrays a woeful lack of diligence and serious resolve to bring the matter to finality. Despite the inordinate delay spanning more than 11 years both counsel appeared without filing written heads of argument. They however promised to file written heads of argument later that day particularly to address the novel objection raised by Mr *Mahlangu* that an application for reinstatement of a lapsed appeal ought to be brought by way of a court application and not by chamber application.

Mr *Mahlangu* promptly filed his heads of argument on the same day 12 November 2015. To date more than 8 months later Mr *Toto* has not filed his heads of argument. Mr *Mahlangu* has since written to the Registrar requesting judgment. I therefore proceed to determine this matter without the benefit of Mr *Toto*’s written heads of argument.

The application is against the judgment of Makarau J, as she then was. In that judgment the learned judge dismissed the applicants’ application to set aside a consent judgment. The judgment was delivered on 16 June 2004 more than 11 years ago.

The brief facts are that on 26 November 2002 the court *a quo* entered a consent judgment against the applicants in the sums of US\$590 470.68 and US\$54 917.68 together with interest. Having consented to judgment the applicants who were legally represented later on had a change of heart and approached the court *a quo* seeking an order setting aside the consent order in terms of r 56 of the High Court Rules 1971. The application found no favour with the learned presiding judge who dismissed the application with costs on 16 June 2004.

Aggrieved by the determination the applicants noted an appeal to this court on 1 July 2004 under case number SC 209/04. The applicants however did not prosecute their appeal as expected. They sat back and did nothing until the appeal lapsed or was deemed to have been abandoned in terms of r 25(1)(c).

About 11 years later and on 12 October 2015 the applicants filed this chamber application seeking condonation and reinstatement of the long forgotten appeal. The record of proceedings had to be retrieved from the archives where it was now gathering dust.

The appeal having lapsed or deemed to have been abandoned it follows that there is no appeal pending in this court. This prompted the applicant to apply for condonation of late filing of the notice of appeal together with the application to reinstate the lapsed or abandoned appeal.

The application for reinstatement of the appeal was however initially brought without the necessary application for condonation of late filing of appeal. The application

was only belatedly made at the hearing as an afterthought. It was not accompanied by the necessary request to amend the draft order to incorporate the envisaged amendment.

The respondent has raised 2 points *in limine*.

1. That the matter is not properly before me as the applicant ought to have proceeded by court application and not by chamber application.
2. That the applicants' failure to comply with rule 34 of the Supreme Court Rules renders the application a nullity.

The objection in paragraph 1 above brings into question the propriety of bringing an application for reinstatement of a lapsed appeal by way of a chamber application rather than a court application. I now proceed to ventilate that issue.

### **Whether an Application for Reinstatement of Appeal Can be Brought By Way of a Chamber Application.**

In its objection *in limine* the respondent sought to rely on r 26 (1) of the Supreme Court Rules 1964 which provides that:

- “26. *Applications*  
(1) All applications, other than an application for leave to appeal, for extension of time in which to perform any act or for legal aid, shall be made by court application.”

The rule clearly stipulates that all applications except those specifically mentioned in r 26 shall be brought by way of court application. There are only 3 exceptions specifically mentioned in the rule. That is to say:

1. Application for leave to appeal.

2. Application for an extension of time in which to perform any act.
3. Application for Legal Aid.

The application for reinstatement of an appeal not being one of the above 3 exceptions mentioned in r 26 (1), it would appear on the face of it that the law requires that such an application be brought by way of a court application and not as a chamber application.

A closer analysis of the rules however shows that r 26 falls under Part IV which exclusively deals with criminal appeals from the High Court as will more fully appear from the heading which reads:

“PART IV  
CRIMINAL APPEALS FROM THE HIGH COURT”

Rule 26 therefore, has no application in civil appeals in this court. This being a civil appeal from the High Court it follows that the rule has no application in this case.

There is no corresponding rule under Part V which deals with civil appeals from the High Court. Consequently the objection is misplaced and unsustainable as it is premised on an inapplicable rule of court. The objection is accordingly overruled.

Turning to the objection of failure to comply with r 34, the rule requires an appellant to pay for the preparation of the record or make an acceptable written undertaking to pay to the Registrar unless he is suing *in forma pauperis*. It reads:

“(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.”

Counsel for the applicant stated from the bar that the rule had been complied with. The applicant’s founding affidavit does not however deal with the issue and no proof of payment or written undertaking to pay was furnished. The applicant was therefore unable to discharge the onus of proving compliance with r 34.

The rule is couched in peremptory terms. Once the issue of non-compliance had been raised it was incumbent upon the applicant to furnish proof of compliance with the rule. This the applicant did not do.

Rule 34 provides a penalty for non-compliance under sub rule (5) which provides that:

- (5) 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.

The applicant apart from his mere say so has not furnished any proof of compliance with the mandatory provisions of r 34.

The applicants’ failure to provide proof of compliance leads to the inexorable conclusion that they did not comply with the mandatory provisions of r 34. No explanation has been furnished for their failure to furnish proof of compliance. In the absence of any plausible explanation I cannot grant them relief for the flagrant disdain of the mandatory rule

of court. The conclusion that there is no valid appeal pending before this court is inescapable in light of the applicant's own admission to that effect. That finding has fatal consequences to the applicants' application.

The applicants' shoddy attempt to resurrect a dead case eleven years after the event is despicable and deserves censure. The need to have finality to litigation cannot be over emphasised. It appears that this application has been filed merely to delay the date of reckoning. I am unable, and loath, to render assistance in that regard.

The courts' displeasure with the growing tendency among some legal practitioners to handle applications of condonation of failure to comply with the rules with disdain was amply articulated by Ziyambi JA in *Apostolic Faith Mission in Zimbabwe and 2 Ors v Titus Innocent Murefu* SC 28/03. In that case the learned judge had occasion to restate the words of Steyn CJ in *Saloojee and Anor v Minister of Community Development* 1965 (2) SA 135E, where the learned Chief Justice had this to say:

"It is necessary once again to emphasise as was done in *Meintjies v H.D. Combrinck (Edms) Bpk*, 1961 (1) SA 262 (AD) at p 264. That condonation of the non-observance of the rules of this court is by no means a mere formality. It is for the applicant to satisfy this court that there is sufficient cause for excusing him from compliance, and the fact that the respondent has no objection is, although not irrelevant, is by no means an overriding consideration."

It is needless to say that the applicants have dismally failed to discharge the onus of proving that there is any justifiable reason for excusing them from the natural consequences of their deliberate disdain of the rules of court 11 years after the event.

The respondent has been put to unnecessary expense long after the matter had been put to rest by the courts. The application appears to be a delaying tactic in a futile



attempt to delay the course of justice. It is only fair that the respondent should recoup its costs at the highest scale.

It is accordingly ordered that the application be and is hereby dismissed with costs on the attorney client scale.

*T. A. Toto Attorneys*, applicants' legal practitioners

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