

**DISTRIBUTABLE (23)**

**FBC BANK LIMITED**  
**v**  
**ROBERT CHIWANZA**

**SUPREME COURT OF ZIMBABWE**  
**HARARE, FEBRUARY 21 & MARCH 27, 2017**

*A.K. Maguchu*, for the applicant

*S. Machingauta*, for the respondent

In Chambers in terms of Rule 5 of the rules of the Supreme Court, 1964.

**GWAUNZA JA**

This is an application for the reinstatement of an appeal. Judgment No. SC 31/17  
Civil Appeal No. SC 719/16

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**Factual Background**

The respondent was employed by the applicant as a bank teller. On 15 June 2014, the respondent was presented with a US\$20 bill for the payment of US\$12. The respondent is alleged to have signed the payment slip to show that he had given the client his change. The client allegedly came back a month later, claiming his change.<sup>1</sup> A Closed Circuit Television footage confirmed the allegation that the client had not been given his change. The respondent was charged with theft or fraud and was found guilty and dismissed. He appealed to the Grievance and Disciplinary Committee which reached a deadlock and referred the matter to NEC Appeals Board. The NEC Appeals Board ordered the respondent's

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<sup>1</sup> Page 9 of the Chamber application

reinstatement without loss of salaries and benefits. On appeal to the Labour Court, the decision of the NEC Appeals Board was upheld.<sup>2</sup>

The applicant then appealed against the decision of the Labour Court, to this court, but the appeal was deemed to have lapsed because of the applicant's failure to pay costs for the preparation of the record.<sup>3</sup> Hence this application.

### **The degree of non-compliance and the explanation proffered for the non-compliance**

In considering an application for reinstatement, MALABA JA (as he then was), held that: -

“The question for determination is whether the applicant has shown a cause for the reinstatement of the appeal. In considering applications for condonation of non-compliance with its Rules, the Court has a discretion which it has to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefore; the prospects of success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the Court and the avoidance of unnecessary delays in the administration of justice.”

*In casu* the Registrar of the Labour Court wrote a letter to the applicant requesting payment of costs for the preparation of the record on 13 April 2016. The payment was to be made within 5 days that is, on or before 20 April 2016. This was in terms of Rule 34(1) of the rules of this court. The applicant's legal practitioner Mr *Maguchu* alleges that he attempted to make payment on 27 April 2016, which was seven days after the expiry of the time limit, but was informed that the matter had been referred to the Registrar of the Supreme Court and that he must await communication from that office. The length of the delay is in my view therefore, not inordinate.

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<sup>2</sup> Page 13 of the Chamber application

<sup>3</sup> Page 35 of the Chamber Application

The main reason given by the applicant for not paying the costs within the requested time was that its legal practitioner, Mr *Maguchu*, was of the view that Rule 34 (1) of the Supreme Court rules was not applicable to appeals from the Labour Court. He accordingly engaged the Registrar of this court, expressing this view.<sup>4</sup> The Registrar interpreted the same rule differently and insisted on the payment of the costs in question. The process eventually ended with Mr *Maguchu* resolving to comply with the Registrar's request, but the appeal had already been deemed to have lapsed.

I take the view that Mr *Maguchu* was misguided in his decision not to comply with the directions of the Registrar, on the mere ground that he did not agree with the latter's interpretation of the relevant court rules, and their applicability to the matter. Such action was akin to taking the law into his own hands, conduct that is improper and deplored under the law. It would have been prudent for him to comply with the Registrar's request and thereafter, should he have felt the need to have the matter definitively determined, apply to the court for a review of the registrar's decision. The failure to comply with the rules in this case was therefore wilful, *albeit* on the part of the applicant's legal practitioner. It hardly needs mention that rules of court must be followed in order to ensure proper and good administration of justice.

In *Sibanda v The State*, the court quoted the case of *S v McNab* 1986 (2) ZLR 280 (S) at 284E where DUMBUTSHENA CJ noted the following: -

“I have dealt at length on this point because it is my opinion that laxity on the part of the court in dealing with non-observance of the rules will encourage some legal practitioners to disregard the rules of court to the detriment of the good administration of justice.”

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<sup>4</sup> Page 5 of the Chamber application

I found it quite tempting to follow the principle in McNab’s case, and would have done so but for the fact that I do not believe it would be fair on the applicant to visit this particular ‘sin’ of its legal practitioner, on it. The matter concerned the interpretation of rules of the court, an issue naturally falling outside the applicant’s sphere of knowledge or influence. Secondly, while Mr *Maguchu*’s conduct is deserving of censure, I do not find that it scales such levels of seriousness, blatancy or unreasonableness as would merit a dismissal of the application. In addition, and as indicated below, I find that the applicant has some prospects of success on appeal.

In the judicious exercise of my discretion in this matter I therefore find it to be in the interests of justice to condone this particular non-compliance with the rules of this court.

### **Prospects of success**

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The applicant alleges that the court *a quo* erred in preferring the definition of fraud in the Criminal Law (Codification and Reform) Act instead of a definition from the Dictionary. The applicant further alleges that the court *a quo* erred in law in finding that the respondent’s guilt had to be proved beyond a reasonable doubt.

While I perceive there to be nothing amiss in adopting the definition of fraud as defined in the Criminal Law (Codification and Reform) Act, I am not persuaded that an offence in a labour dispute must be proved beyond a reasonable doubt. It is trite that proof in civil, disciplinary proceedings must be on a balance of probabilities. I therefore hold the view that the judge *a quo* erred in applying a burden of proof that is applicable in a criminal trial. On that ground, I find that the applicant may have reasonable prospects of success on appeal.

Having already found that both the period of and explanation for the delay in complying with the rule in question were not unreasonable, I am satisfied that the application ought to succeed.

However, given the circumstances of this case, I find it would not be in the interests of justice to saddle the respondent with an order of costs. Instead, the costs ought to be borne by the applicant.

It is in the premises ordered as follows: -

1. The application is granted.
2. The appeal filed under case No. SC 447\15 be and is hereby re-instated on the roll
3. The applicant is to pay the costs of this application.

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*Dube, Manikai & Hwacha*, applicant's legal practitioners

*Tavenhave & Machingauta*, respondent's legal practitioners