

DISRIBUTABLE (11)

SIMON CHINGANGA

v

**(1) MUNASHE SHAVA (2) TAPSON MADZIVIRE (3) ADAM BEDE
MANUFACTURING (PRIVATE) LIMITED**

**SUPREME COURT OF ZIMBABWE
HARARE, 18 MAY 2021 & 1 FEBRUARY 2022**

T Mpofo, for the applicant

G Madzoka, for the respondents

Judgment No. SC 12/22
Chamber Application No. SC 575/20

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IN CHAMBERS

KUDYA AJA: This is an application for reinstatement of an appeal, which was not deemed to have been dismissed, but was by consent, struck off at the hearing on 24 November 2020 in SC 99/20, for the reason (per para 18 of the applicant’s founding affidavit) that the applicant “had failed to file heads of argument as required by the rules of this Honourable Court”.

The applicant deliberately did not identify the rule under which he lodged the application. However, in oral argument, Mr *Mpofo*, for the applicant contended that it was filed in terms of para 5 of Practice Direction No. 3 of 2013 and not r 70 (2) of the Supreme Court Rules, 2018.

THE BACKGROUND FACTS

The main protagonists in this dispute are the applicant and the first respondent. The dispute turns on the scope and extent of the first respondent's shareholding in Adam Bede Manufacturing (Pvt) Ltd (the third respondent). The second respondent is the majority shareholder in the third respondent.

The first and second respondents, with the assistance of a promoter of companies (Hove), concluded a shareholders agreement in which they became equal shareholders in Extreme Security Group (Pvt) Ltd (the Special Purpose Vehicle or SPV). They further agreed to purchase the entire equity of Hunting Furniture (Pvt) Ltd t/a Adam Bede (Hunting) through the SPV. The two prospective shareholders soon realized that the participation of the first respondent would, at that time, be in conflict with his employment contract. They sought to make Hove the first respondent's nominee shareholder, but, for professional reasons, he declined to undertake that role. On the recommendation of the second respondent, and, again, with the help of Hove, the applicant became the first respondent's nominal shareholder in the SPV.

The SPV purchased Hunting and re-registered it as the third respondent on 4 May 2017. The applicant and the second respondent were registered as the sole shareholders and directors in the third respondent. They each held one share apiece. The two directors became the sole joint signatories of the third respondent's bank account.

The conflict of interest situation that had previously bedeviled the first respondent ceased. He sought to assume his role as the true shareholder and director in the third

respondent. His efforts were vigorously resisted by the applicant, who claimed to be a 50% shareholder in the third respondent in his own right.

The first and second respondents negotiated a settlement of the dispute with the applicant. They concluded an oral agreement in which they restructured the shareholding of the third respondent by allotting 40 shares to the second respondent, 30 shares to the first respondent, 20 shares to the applicant and reserved 10 shares to a future technical partner. The parties then reduced the oral agreement to writing but the applicant refused to sign it.

The applicant requisitioned an Extraordinary General Meeting on 3 November 2018 for the dismissal of the first respondent as a director of the third respondent. He defaulted the meeting. At the meeting, the first and second respondents removed the applicant as a director and company secretary of the third respondent. He, however, was restored to both positions, unopposed, by the High Court in HC 10 298/18.

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Thereafter, the applicant insisted that he was a 50% shareholder in the third respondent and sought to resile from the restructured shareholding agreement. His assertions caused the first respondent to lodge a court application in the High Court for a declaration of his rights as a shareholder and director in the third respondent.

The application was opposed by the applicant. At the hearing, *a quo*, the applicant raised three preliminary points. The first was that there were material disputes of fact that could

not be resolved on the papers. The second was that several paragraphs in the founding affidavit ought to be struck out in terms of r 141 of the High Court Rules, 1971 for being argumentative, irrelevant, inconsistent and contradictory. The last was that the supporting affidavit of Hove ought to be expunged from the record for the reason that he was conflicted as he had rendered professional registration services to the third respondent.

On the basis of the common cause documents filed of record such as the draft shareholders agreement, the judgment in HC 10 298/18 and Form CR2 and CR14, the court *a quo* held that the material disputes of fact were more illusory than real and could, therefore, be resolved on the papers. Regarding the second preliminary point, it held that the court's power to strike out the impugned pleadings under r 141 of the Rules of Court could only be exercised in action proceedings and not in application proceedings. Lastly, that as judgment No. SC 12/21 Chamber Application No. SC 575/20 the supporting affidavit was not a legal practitioner, he could not, therefore, be a conflicted witness and his affidavit could not properly be expunged from the record. All the preliminary points were, accordingly, dismissed.

On the merits, the court *a quo* found that the first respondent had established all the essential requirements for the grant of a declaratory order. He had a direct and substantial interest in the application. He held existing rights that were under threat from the applicant's conduct. The applicant sought to impugn without evidence and appropriate to himself the primary and pivotal role played by the first respondent and the second respondent in purchasing the entire equity in Hunting through the SPV. The court *a quo* further found that the first and second respondents had contributed US\$160 000 and US\$180 000, respectively into the SPV for

the purchase price of, and as working capital in Hunting while the applicant had not made any monetary or material contributions thereto.

The court *a quo*, therefore, declared the first respondent to be the holder of 30 ordinary shares, against the 20 shares of the applicant and 40 shares of the second respondent, in the third respondent. It also declared him to be a duly appointed director of the third respondent. And, as consequential relief, ordered the restoration of his name as a director on the company's letterheads. The applicant was also interdicted from misrepresenting to "clients and associates of third respondent", the extent of his equity holding, and the status of the first respondent, in the third respondent. Lastly, he was ordered to pay the costs of suit.

Aggrieved by the decision *a quo*, the applicant, ^{Judgment No. SC 12/22} ~~appealed against the whole~~ ^{Chamber Application No. SC 575/20} judgment of the court *a quo* to this Court in SC 99/20, within the prescribed period. On 30 September 2020, a day before they were due, the applicant's legal practitioners filed heads of argument, which, *ex facie*, bore the correct SC case number and designations of the parties. It was common cause that these heads were a truncated version of the heads that had been filed *a quo* and even embodied the parties' respective designations *a quo*. They, also, did not relate to the grounds of appeal. The applicant raised the following four grounds of appeal.

- “1. The court *a quo* erred in finding for the first respondent in para 2, 3 and 4 of the order notwithstanding that such determinations were not supported by any reasons for the decision.
2. *A fortiori*, the court *a quo* erred in making an order without considering the adverse factual position presented by the now appellant which contradicted the first respondent's version and not providing reasons for accepting the first respondent's story and rejecting the appellant's rendering its decision arbitrary and capricious.

3. The court erred and grossly misdirected itself in finding that the evidence of a professional who has previously acted for a company can be accepted to support a litigant against a shareholder of the same company without being conflicted.
4. The court *a quo* erred in making an order declaring first respondent owner and holder of 30 ordinary shares outside legally acceptable principles and norms of property acquisition. In particular, the order of the court does not relate with the cause of action proffered.”

The relief sought by the applicant was for the appeal to be allowed and the judgment *a quo* set aside and substituted with the dismissal of the application with costs.

The impropriety of the heads was brought to the attention of the applicant in the first respondent’s heads filed on 16 October 2020 and served on 20 October 2018. The applicant, however, sought to remedy the defect by filing “appellant’s supplementary heads of argument (enrolled for hearing on 24 November 2020)” on 19 November 2020.

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At the appeal hearing, on 24 November 2020, an order was issued, by consent, striking the matter off the roll with costs.

THE PROPRIETY OF THE PRESENT APPLICATION

In his opposing affidavit, the first respondent raised five preliminary points against the application. The first was that the applicant had merely headlined the application as a “Chamber Application for the Reinstatement of an Appeal” and deliberately avoided identifying the rule under which the application was being made. Secondly, the application did not address the prospects of success in any meaningful detail. Thirdly, the application did not embody the

order granted in SC 99/20. Fourthly, the application was filed outside the 15-day time line prescribed in r 70 (2) of the Rules of the Supreme Court, 2018. And lastly, the founding affidavit was deposed to by the applicant's legal practitioner of record, who did not indicate that he was authorised to depose to the affidavit.

The applicant did not file an answering affidavit. Nor did the parties file any heads of argument prior to the hearing of this application. Mr *Madzoka*, for the first respondent, abided by the contentions made in the first respondent's opposing affidavit. He sought the striking off of the matter with costs on the higher scale.

Mr *Mpofu*, however, argued for the dismissal of all the preliminary points at the hearing. He argued that the application was based on para 5 of Practice Direction No. 5 of 2012, and not r 70 (2) of the Supreme Court Rules, 2018. The Practice Direction provides a *dies induciae* of 30 days for filing a reinstatement in which a matter has been struck off for failure to abide by the Rules of the Court. On the other, hand, r 70 (2) prescribes a *dies induciae* of 15 days within which to file a reinstatement of an appeal that has either been deemed to have lapsed, or regarded as abandoned or deemed to have been dismissed in terms of any provision of the Supreme Court Rules, 2018. He accordingly prayed for the dismissal of the first and fourth preliminary points.

Regarding, the third preliminary point he contended that the application raised prospects of success, notwithstanding that the first respondent may be dissatisfied with the manner in which they were addressed. These were raised in paraS 23 to 26 of the founding

affidavit. The thrust of these paras being that the decision of the court *a quo* is most likely to be overturned on appeal for being contrary to the stipulations enshrined in the articles and memorandum of association of the third respondent regarding the acquisition and allotment of shares in the company, after registration. Further, that the judgment was based on a draft shareholding agreement that had not been executed. And lastly, that the endemic material disputes of facts presented by the parties were incapable of resolution on the papers without the hearing of oral evidence.

On the failure to attach the order of this Court in SC 99/20 he argued that the order and the circumstances under which it was issued had been adequately adverted to in paras 17 and 18 of the founding affidavit. In any event, being a document emanating from this Court, the judge in chambers could always call for and refer to the order. Lastly, on the authorization of the applicant's legal practitioner of record to depose the founding affidavit on his behalf, he argued that it was trite that a legal practitioner who had personal knowledge of the procedural facts is not precluded from filing a founding affidavit for and on behalf of his client.

He also took the point that the grounds of appeal were not prolix. This point had been raised by first respondent in the heads of argument filed in the appeal that was struck off the roll. Mr *Mpofu*, sought to rely on *Afritrade International Ltd v Zimbabwe Revenue Authority SC 3/21* for the further submission that the question of prolixity could best be raised and dealt with at the reinstated appeal and not in these proceedings.

I turn to deal with the first preliminary point, which in my view is dispositive of this application.

The first respondent contended that the failure to identify the rule under which the application was lodged embarrassed him and prevented him from adequately responding to the application. He did not know whether the application was properly brought as a chamber application for reinstatement of an appeal or is a disguised application for condonation and extension of time within which to file an appeal. It was only at the hearing that Mr *Mpofu*, pontificated that the application was premised upon para 5 of the Practice Direction 3/13. That submission immediately raises the question of the propriety of bringing the present application under this Practice Direction.

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The reinstatement of an appeal is dealt with under r 70 of the Supreme Court Rules, 2018. The rule states that:

“70. Reinstatement of appeals generally

- (1) Where an appeal is—
 - (a) deemed to have lapsed; or
 - (b) regarded as abandoned; or
 - (c) deemed to have been dismissed in terms of any provision of these rules; the registrar shall notify the parties accordingly.
- (2) The appellant may, within 15 days of receiving any notification by the registrar in terms of subrule (1), apply for the reinstatement of the appeal on good cause shown.

Reinstatement, for a matter that has been struck off for failing to comply with a provision of the Rules of Court, is also dealt with in terms of para 3 to 5 of Practice Direction 3/13. It reads:

“Struck off the roll

3. The term shall be used to effectively dispose of matters which are fatally defective and should not have been enrolled in that form in the first place.
4. In accordance with the decision in *Matanhire v BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLA 147 (S) and *S v Ncube* 1990 (2) ZLR 303 (SC), if a Court issues an order that a matter is struck off the roll, the effect is that such a matter is no longer before the Court.
5. Where a matter has been struck off the roll for failure by a party to abide by the Rules of the Court, the party will have thirty (30) days within which to rectify the defect, failing which the matter will be deemed to have been abandoned.

Provided that a judge may on application and for good cause shown, reinstate the matter, on such terms as he deems fit.”

The meaning of para 5 was rendered by GUVAVA JA in *Bindura Municipality v Mugogo* 2015 (2) ZLR 237 (S) at 238G-240A. That application for reinstatement of an appeal concerned a fatally defective notice of appeal that reflected the wrong date of judgment and which had been served on the registrar of the Labour Court outside the period granted in an order for leave to appeal. At 238G, GUVAVA JA held that:

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“Where a matter has been struck off the roll because it has failed to comply with the rules of court, one cannot simply apply for reinstatement of the appeal as such an appeal is a nullity. This position has been stated in a number of decisions of this Court.”

And at pp 239E-240A, relied on *Hattingh v Pienaar* 1977 (2) SA 182 (0) to construe para 5 of the Practice Direction:

“It seems to me that a proper interpretation of para 5 of the Practice Direction 3/13 is that the applicant must, within thirty days, **rectify the defect by applying for condonation for the late noting of appeal and an extension of time within which he should comply with the rules.** He may not do so after the window period which he has been given to rectify the defect as the matter will be deemed to have been abandoned. In this case the applicant correctly filed an application within the prescribed period of thirty days. However, an application for reinstatement is not the appropriate remedy...The appeal, having been found to be fatally defective, cannot be reinstated after being struck off the roll. The applicant’s remedy to rectify the defect is to apply for condonation and extension of time within which to file a fresh notice of appeal in terms of rule 6 of the

Supreme Court (Miscellaneous Appeals and References) Rules. He should do so within the period of thirty days provided for in the Superior Court Practice Direction.”

Mr *Mpofu* argued that the failure to file heads in SC 99/20 did not render the appeal fatally defective because it was, but for this anomaly, a complete appeal that was ripe and ready for hearing. His argument in this respect is totally misconceived. Were he correct, then this Court would not have struck the matter off the roll but would have, in the exercise of its inherent power to regulate its own proceedings, have regarded it as abandoned and deemed it dismissed as prescribed by r 70 (1) (c). The power of this Court to act in this manner does not only arise from its inherent power to control its own rules but is clearly codified in r 53 (3), which reads:

“53. Dismissal of appeal in the absence of heads of argument or appearance

(3) Where, at the time of the hearing of an appeal, there is no appearance for the appellant or no heads of argument have been filed by him, the court may, at its discretion, determine or dismiss the appeal and make such order as to costs as it may think fit.”
(Underlining for emphasis)

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Rule 53 (3) confers a discretion on this Court by the use of the word “may”, as well as the repeated use of its synonym “discretion” to determine or dismiss the appeal. In my interpretation of the underlined words, the power conferred on this Court is not limited to determining or dismissing. It is trite that “may” is directory. In its proper interpretation the subrule merely means that this Court may or may not in its discretion determine or dismiss the appeal. In striking off the appeal this Court elected to not determine or dismiss the appeal. This Court did, by consent, strike off the matter from the appeals roll for the obvious reason that the appeal was fatally defective and could neither be determined nor dismissed. Otherwise, were there room to salvage the matter, it would simply have by consent removed the matter from the roll thereby making it eligible for enrolment upon request. See *Maparanyanga v Van Schalkwyk* SC 64/02.

That the application was fatally defective is apparent from a closer scrutiny of the grounds of appeal sought to be reinstated. All the grounds of appeal are fatally defective in two main respects. They are all vague and embarrassing. In the words of LEACH J in *Sonyongo v Minister of Law and Order* 1996 (4) SA 384 at 385F:

“it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law made by the court *a quo*, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet.”

The above cited words afflict the first ground of appeal. It is so vague as to be of no value to either this Court or the first respondent. In addition, it is also simply inconceivable and in fact incorrect to raise such a ground against a well-reasoned seven paged judgment.

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The second ground of appeal is so widely cast that it leaves the applicant free to attack every finding of fact and ruling of law made *a quo*. The manner in which the second ground of appeal is crafted has consistently been deplored in this jurisdiction since 1957 when the case of *R v Emerson* 1957 R&N 743 (SR) at 748D-E was decided. See also *S v Ncube* 1990 (2) ZLR 303 (S) at 304, *Chikura NO & Anor v Al Shams Global BVI Ltd* 2017 (1) ZLR 181 (S), *Econet Wireless (Pvt) v Trustco Mobile (Pty) Ltd* SC43/19.

This Court has consistently reminded legal practitioners to desist from drafting such vague and unacceptable grounds of appeal. The ground falls into the same general genre with those that litter our law reports, some of which read as follows: “the learned magistrate

erred in accepting the complainant’s evidence” or “the conviction is against the weight of evidence” or “the evidence does not support the conviction” or “the conviction is wrong in law”. The latest case that lamented this failure to draft cogent grounds of appeal was *Afritrade International Ltd v Zimbabwe Revenue Authority* SC 3/21 at pp 5-6. In that case, the unacceptable ground of appeal impugned the judgment *a quo* for “rejecting the evidence given on behalf of the appellant as being unreliable”. It was struck out on appeal for being too widely cast to such an extent that it failed to identify the specific evidence that was unreliable and to which the respondent and the court could relate.

The third and fourth grounds are also afflicted by the same malady as the first. They, too, are generalized, vague and embarrassing. They fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet. The law to which ground number 3 is premised on is not specified nor are the “legally acceptable principles of property acquisition” identified. These are meaningless phrases that do not impugn the specific findings of fact or law that were made by the court *a quo*.

To suggest, as Mr *Mpofu* did, that these fatally defective grounds should be foisted upon an appeal court for it to deal with them is simply preposterous. To do so, would not only constitute an abdication of my responsibility as a gate keeper beholden to permit only deserving appeals to pass through but would also result in a complete waste of valuable judicial time for the panel that would be seized with the defective appeal.

In any event, the first ground of appeal appears to be contradicted by the second, third and fourth grounds which in a misogynistic way provide the reasons for the impugned

orders. They are that the court *a quo* accepted the version of the first respondent because it was supported by Hove's affidavit. In his affidavit Hove confirmed the existence of the share subscription agreement between the first and second respondents prior to the involvement of the applicant in the affairs of the third respondent. In addition, the court *a quo* based its determination on the common cause fact that the applicant and the first and second respondents negotiated a new shareholding structure and concluded an agreement in respect of the third respondent, which was critically captured in the draft written agreement and official CR2 and CR14 documents that the applicant failed to successfully impeach.

The Court *a quo* also found that the probabilities supported the existence of the first shareholders document and the second unsigned restructuring and share allotment agreement. These were that: firstly, Hove would not have been approached to be the second respondent's nominee shareholder had the Hunting deal been consummated by the applicant and the second respondent. Secondly, the applicant only came into the picture after Hove had declined the nomination. Thirdly, the applicant had failed to impeach the existence of the second agreement. His refusal to sign the agreement was inadequate to dislodge the corroborated version of the first respondent. The recasting of the onus to the applicant to impeach the agreement was restated by PATEL JA (as he then was) in the *Afritrade* case, *supra*, at p 11. He stated that:

“In principle, an unsigned agreement cannot ordinarily be relied upon as creating a valid and binding contract. However, the surrounding circumstances, including prior dealings between the parties concerned, may give rise to the *prima facie* presumption that the terms and conditions embodied in an unsigned agreement represent the true intention of the parties. The burden then shifts to the party disputing the authenticity of the agreement to show that it was not intended to be binding. This position was affirmed by this Court in *Associated Printing and Packaging (Pvt) Ltd & Ors v Lavin & Anor* 1996 (1) ZLR 82 (S), at 87.”

The point I make by these references is simply that all the four grounds of appeal were on 24 November 2020, fatally defective. That is why the purported appeal was, “by consent”, struck off the roll. Such a defective appeal cannot be reinstated. See *Bindura Municipality v Mugogo, supra*.

The applicant misconceived the application of Practice Direction 3/13. It does not apply to a fatally defective appeal that is struck off the roll. The first preliminary point is resolute of the whole application. It is, therefore, not necessary for me to deal with the other preliminary points or to delve into the merits of the application.

COSTS

I agree with the first respondent’s counsel that the import of striking off, especially in the light of the interpretation rendered to Para 5 of the Practice Direction 3/13 should have been apparent to the applicant. He has, through his erstwhile legal practitioners, been making elementary bleeps and blunders that have unnecessarily put the first respondent out of pocket. This is an appropriate case to mulct him with an adverse costs order at the scale of legal practitioner and client.

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DISPOSITION

In the circumstances, it is ordered that:

1. The application be and is hereby struck off the roll.

2. The applicant shall pay the first respondent's costs at the scale of legal practitioner and client.

Munangati & Associates, applicant's legal practitioners

Mawere Sibanda Commercial Lawyers, 1st respondent's legal practitioners