

REPORTABLE (36)

(1) GLOBAL HORIZON (PRIVATE) LIMITED (2) GODFREY
CHINDOMU (3) NOMUSA CHINDOMU

v

(1) FMC FINANCE (PRIVATE) LIMITED (2) SHERIFF OF
THE HIGH COURT, N.O. (3) REGISTRAR OF DEEDS

**SUPREME COURT OF ZIMBABWE
HARARE, 3 APRIL 2023**

M. Ndlovu, for the applicants

T.W. Nyamakura with R.M. Dhaka, for the first respondents

IN CHAMBERS

**Judgment No. SC 36/23
Chamber Application No. SC 145/23**

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MAVANGIRA JA:

1. This is a chamber application in which the applicant seeks condonation for failure to comply with Rule 38 (1) (a) of the Supreme Court Rules, 2018 and for extension of time within which to file and serve a notice of appeal. The application is opposed.

FACTUAL BACKGROUND

2. The background to the matter is that on 11 November 2021, the first respondent, a financial institution, issued provisional sentence summons against the first applicant, a legal entity, and the second and third respondents who are the legal entity's directors, claiming payment of USD142 392, 54. The provisional sentence summons having been served and the applicants not having acted upon it, a default judgment was entered against them.

3. The default judgment ordered the applicants, jointly and severally, the one paying, the others being absolved, to pay the first respondent USD142, 392.54, payable in Zimbabwe Dollars at the Reserve Bank of Zimbabwe auction rate as at the date of payment together with interest on that amount at the rate of 18 per centum per month plus penalty at the rate of 25 per centum per month from 1 October, 2021 to the date of payment in full.
4. The applicants filed before the court *a quo* an application for rescission of the said default judgment under HC 7268/21. They sought an order in the following terms:
 - “1. The application for rescission of the Provisional Judgment in case number HC 6333/21 be and is hereby granted.
 2. The Provisional Judgment granted by this court in the matter HC 6333/21 be and is hereby discharged.
 3. The Applicant be and is hereby granted leave to defend the main action instituted by the 1st respondent under case number HC 6333/21.
 4. The 2nd Respondent be and is hereby barred from executing the default order pending the finalization of the matter in case number HC 6333/21.
 5. 1st Respondent be and is hereby ordered to pay costs of suit on a legal practitioner-client scale.”
5. The application was dismissed on 13 December, 2022.

THIS APPLICATION

6. Irked by the dismissal, the applicants have now filed this application.
7. The applicants’ papers aver that a notice of appeal was after the dismissal of the application for rescission, a notice of appeal was timeously filed but there was no communication from the Registrar. The date of the alleged filing is not disclosed in the papers. The legal practitioner seized with the matter alleges that when she checked on the Intergrated Electronic Case Management System (the IECMS), on 10 March, 2023,

she then realized that no case number had been allocated to the appeal and that no payment request had been made by the Registrar.

8. By implication, the stance of the applicants is that it was only thereafter that they realized that their notice of appeal, despite their timeous attempt to file it, was now out of time and they therefore had to make this instant application.

PRELIMINARY POINTS

Submissions on behalf of the first respondent

9. At the onset of these proceedings, Mr *Nyamakura*, for the first respondent, raised preliminary issues on the basis of which he prayed for the application to be struck off the roll.
10. Counsel submitted that the applicants are guilty of abuse of the processes of the court by filing myriad applications, including the current application, without disclosing to the court that they are making payments in terms of the judgment that they seek to challenge. He referred the court to a receipt dated 8 February 2023 reflecting payment of ZW\$45 million by the first applicant to the first respondent. The payment, counsel submitted, means that the applicants were acquiescing in the judgment and the filing of this and other applications is made merely to delay execution by the second respondent while they make payments at their leisure. Furthermore, he argued, they have not disclosed to the court the basis for making the payment while at the same time proceeding to allege that the judgment obtained against them ought not to stand. By their actions, and this payment having been made prior to the filing of this application the applicants were approbating and reprobating at the same time, a position impermissible at law.

11. Counsel further submitted that the application is founded on a lie in respect of a material term. The falsehood, he submitted, was in respect of the averment made in the applicants' and their legal practitioner's affidavits, that an appeal had been timeously uploaded on the IECMS system within the stipulated time limits but the Registrar did not respond to them until on their own initiative they followed up on the matter and discovered alleged technical issues. Counsel submitted that the falsehood is exposed by the Registrar's record as reflected in Annexure GH3 which clearly shows that the said notice of appeal was submitted on 17 January 2023. He contended that when regard is had to the date of the judgment sought to be appealed against, being 13 December, 2022, it is clear that the last date on which the notice of appeal could be filed was 6 January 2023. Thus, by 17 January, the applicants were already 12 days out of time for purposes of filing a notice of appeal. It was therefore entirely false to claim that the appeal was properly filed but was not, or could not, be accepted, due to technical reasons. Counsel submitted that this was an attempt to mislead the court because the IECMS system does not accept documents out of time. He argued that the applicants ought to have disclosed that the *dies induciae* had expired on them and ought to have explained why there was no action on their part and also explained the period from 6 January 2023 to the date of the filing of this application.

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12. Mr *Nyamakura* contended that there was therefore no explanation before the court because a false explanation is no explanation at all. Without an explanation, the application is fatally defective.

13. Counsel referred to the case of *Matsika & Anor v Chingwena & 38 Ors* SC 144/2001 and submitted that an application based on lies relating to fundamental issues can be dismissed on that basis alone. He also submitted that a litigant who gives an

explanation that is an insult or an affront to the intelligence of the court cannot convince the court on the validity of his alleged explanation for non-compliance. In this regard he cited *Songore v Olivine Industries* 1988 (2) ZLR 210 (S) at 211E-F. He also referred the court to *Diocesan Trustees for Diocese of Harare v CPCA* 2010 (1) ZLR 267 at 277 where MALABA DCJ (as he then was) stated at 277 C - D:

“... How could a judicial discretion be exercised in favour of a party when that party had not placed before the judicial officer an explanation for non-compliance with a mandatory rule of court and asked for indulgence? Indulgence cannot be extended to a party that has not asked for it”

14. Counsel prayed that the court strikes the application off the roll on the basis of these preliminary points.

Submissions on behalf of the applicants

15. *Per contra*, Mr *Ndlovu*, for the applicants, submitted that the payments that the applicants are making are not in respect of the judgment that they seek to appeal against but against the judgment that dismissed their common law application for the rescission of the default judgment in terms of which they were ordered to pay the first respondent! He submitted that the two judgments must be differentiated as one is a judgment *ad pecuniam solvendam* and the other is not.
16. Mr *Ndlovu* further argued that the applicants do not deny owing the principal amount; it is the interest that has become contentious. The payment being made is thus in respect of the capital amount.
17. Counsel further submitted that by his argument that the applicants were acquiescing in the judgment by making payments, Mr *Nyamakura* was thereby raising the issue of peremption. He submitted that the principle of peremption can only be invoked in

circumstances where the applicants seek to impugn the judgment *ad pecuniam solvendam* and not in the present circumstances. The principle of peremption has thus been prematurely raised in this application.

18. On the contention that the effect of the application being premised on a falsity was that there was in fact no explanation placed before the court, counsel argued that the issue cannot properly be treated as a preliminary point because it should be related to and ventilated in the context of being one of the requirements in an application for condonation. It is only then that the court can determine the adequacy or falsity of the explanation.
19. Counsel also submitted that in the *Matsika* case (*supra*), the court was dealing with the merits of the matter that was before it and not with a preliminary point and that the case therefore did not advance the first respondent's contention. It was his contention that this specific issue does not qualify to be treated as a preliminary point as it is not one.
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20. Counsel prayed for the dismissal of the points that have been raised as preliminary points on the basis of them being meritless.
21. After hearing the parties, I reserved my ruling on the understanding that the merits of the application would be related to depending on the determination made on the preliminary issues.
22. It is my view that if this application is, as alleged, premised on a falsity, then it certainly must be struck off the roll, as prayed for by the first respondent. In order to ascertain the validity of this accusation, I will proceed to examine the veracity of the allegations laid at the applicants' door.

23. The second applicant deposed to the founding affidavit for this application. He stated at paras 7.1 and 7.2:

“7.1 This is an application for condonation and extension of time within which to note an appeal with the Supreme Court made in terms of Rule 43 of the Supreme Court Rules 2018. The Applicant **noted attempted to note** (sic) an appeal with this court **sometime in January 2023** on the intergrated electronic management platform **timeously** but the same process was not successful and a case number was not generated.

7.2 I attach hereto as Annexure GH2 the notice of appeal that was uploaded by the Applicants. I further attach proof from the page of electronic management system that attests that indeed an appeal was filed and the same was not issued **because of operating and network issues on the system** as I am advised by my practitioners. The same is attached as Annexure GH3.” (the emphasis is added)

24. The applicants’ legal practitioner deposed to a supporting affidavit stating at paras 3 to 9:

“3. I aver that on the 13th of December 2022, an adverse judgment was rendered against the Applicant. I received instructions from the Applicant to appeal against the same.

4. I **timeously uploaded the appeal** on the IECMS platform. I however, did not receive any communication from the Registrar, I thought all was well until the 10th of March 2023 when I just investigated in order to see progress.

5. I noted that no case number was allocated to the appeal and no payment request was made to me.

6. **I thus acted erroneously**. I carry the responsibility and pray that this court indulges the Applicant for **my error**. It is one which is not out of this world.

7. I have always made efforts to prosecute the appeal.

8. I have been candid with this court as its officer.

9. I pray that I be forgiven and the Applicant be granted the relief it craves for.” (the emphasis is added)

25. A perusal of Annexure GH3 at p 20 of the application reveals and confirms that an appeal against the dismissal of an appeal (sic) (application) for default judgment was submitted by the first applicant on the IECMS platform on 17 January, 2023.

26. The date 17 January, 2023 must now be juxtaposed with the date of the judgment sought to be appealed against. It is common cause that that judgment was rendered on

13 December 2022. Rule 38 (1) (a) of the court rules requires a notice of appeal to be filed within 15 days of the date of the judgment appealed against. It appears to me, if my calculation is correct, that the deadline for the filing of an appeal would have been 3 January 2023. However, first respondent's counsel submitted that the last day for filing any appeal against the judgment was 6 January 2023. For the purposes of this judgment, I will relate to counsel's calculation giving the 6 January date. The undeniable fact though, is that both dates are outside the 15 days prescribed period.

27. The appeal that the applicants describe as having been timeously noted having been submitted on the IECMS platform on 17 January, 2023, it follows that that was certainly outside the prescribed time limit. If the applicant's legal practitioner believed that she had submitted or uploaded the notice of appeal timeously as she claims, one would have expected her to have timeously raised a complaint or a query with the Registrar and not to wait until almost 2 months later, on 10 March, 2023, to investigate "in order to see progress." Notably, Mr *Ndlovu* did not dispute Mr *Nyamakura*'s submission that the IECMS platform does not accept documents that are filed outside the prescribed time limits. Neither did he dispute the allegation that the applicants and their legal practitioner had not hold the truth. More importantly though, he made no submission in response to the allegation that the applicants' legal practitioner, who is an officer of the court, and who deposed to the supporting affidavit had told a "positive falsehood."
28. No submission was made regarding the fact that the date of submission reflected on the Registrar's IECMS excerpt was 17 January 2023 and that the said date is way outside the prescribed 15 day period.

29. The challenges that legal practitioners and/or litigants might have been faced with in filing documents and pleadings on the IECMS platform during the period from soon after its inception, must not be viewed as a convenient scapegoat to fall back on and ascribe unrelated personal incompetencies and inefficiencies to. The “operating and network issues on the system” that the deponent to the founding affidavit claims to have been advised of by the legal practitioner, are not referred to or substantiated by the said legal practitioner in the supporting affidavit that she deposed to.
30. The notice of appeal was patently filed out of time and was consequently not accepted by the system. One ought not to be faulted in assuming that that would explain why the legal practitioner in her affidavit refrained from making any reference to any operating and network issues. That might also explain why counsel, during the hearing of this application avoided making any submissions on this aspect. Such operating and network issues would, if genuinely raised, have been raised with and confirmed by the Registrar. This has not happened in this case. If anything, the Registrar’s data from the system exposes the fact that the attempt to file a notice of appeal was made out of time. It is also significant to note at this juncture that in any event, in terms of r 37 as read with r 38, an appeal is properly instituted by **filing and serving** “on a registrar, a registrar of the High Court and the respondent.” The applicants do not state that they complied with the said requirements.
31. Numerous decisions of this Court have reiterated the need for candour on the part of litigants, and more so legal practitioners whenever an indulgence is being sought from the court. Such candour is clearly lacking in this application. In fact, a reading of the supporting affidavit by the legal practitioner, besides telling an untruth that there was

timeous filing of the appeal, also evinces a “highly visible” if not deliberate effort to be very scanty on explaining what actions she took as would be expected of a legal practitioner. This is further exacerbated by her refraining from taking any action for a period of 2 months. Para 24 above literally captures almost the whole of her affidavit; in fact, the material portions of it. It is only the 2 introductory paras that have not been quoted. In para 8 she confirms that she is an officer of the court and claims that she has been candid with the court. The papers do not support her averment. In addition, she gave the second applicant an explanation that she would not confirm in her own affidavit. She makes reference to her error without stating what that error was, especially as the fault is being laid at the IECMS system or platform.

32. It seems to me that the respondent’s counsel’s contention that this application is premised on a positive falsehood is well made and amply substantiated. There must be **Judgment No. SC 36/23** and in fact, there are consequences to such conduct. Mr *Nyamakura* prayed for the striking off of the application. The merits of the application were not ventilated. His prayer will be granted. Costs will follow the cause.

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33. In view of the findings that have been made herein, I do not consider it necessary to determine the other issues raised.

34. It is accordingly ordered as follows:

The application be and is hereby struck off the roll with costs.

T. K. Hove & Partners, Applicants’ legal practitioners

Dhaka Lightfood & Stone, 1st Respondent's legal practitioners

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