

REPORTABLE (114)

THE COMBINED SERVICE ORGANIZATIONS TRUST (registered as Athol
Evans Hospital Home Reg. No. 31/60)

v

(1) **MITZI CARRUTHERS** (In her capacity as the executrix dative and
sole beneficiary of the estate of the late Martha Elizabeth Van Der Linde) (2) **THE
MASTER OF THE HIGH COURT**

**SUPREME COURT OF ZIMBABWE
HARARE: 16 JUNE 2023 & 7 NOVEMBER 2023**

R Mabwe, for the applicant

K.H Mlambo, for the first respondent

No appearance for the second respondent

CHAMBER APPLICATION.

**Judgment No. SC 114/23
Chamber Application No. SC 260/23**

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BHUNU JA:

INTRODUCTION

1. This is a chamber application for reinstatement of the applicant's appeal in terms of r 70 (2) of the Supreme Court Rules 2018 (the Rules). The application is pursuant to the Registrar's order deeming the appeal abandoned and dismissed in terms of r 53 (1) of the Rules. The appeal was deemed abandoned and dismissed for want of filing heads of argument on time. The application is opposed.

THE PARTIES

2. The applicant is a non-profit making philanthropic organization. It provides shelter and nursing care for the old and infirm members of society among other related operations. It runs the Athol Evans Complex for the purpose.

3. The first respondent is the executrix dative (the executrix) of the estate of the late Mrs. Van Der Linde who was an inmate at the applicant's Athol Evans complex for a considerable number of years.
4. The second respondent is the Master of the High Court cited in his official capacity. He has not filed any papers. He takes no part in the legal conflict.

FACTUAL BACKGROUND.

5. On 5 August 2014 Mr. and Mrs. Van Der Linde (the Van Der Lindes) concluded a loan agreement with Athol Evans Complex. The terms of the contract may be summarized as follows:
 - i. The Van Der Lindes advanced to Athol Evans an amount of USD75,000.00 (clause 2);
 - ii. In return, the Van Der Lindes were entitled to occupy Cottage No. 28 in the Athol Evans Complex during their lifetimes. (clause 2);
 - iii. The loan agreement was subject to termination on two months written notice (clause 11 (b));
 - iv. Upon termination, Athol Evans would endeavour to find another occupant to pay a reasonable advance market value for the cottage. Athol Evans was obliged to pay the Van Der Lindes a percentage of the amount advanced calculated in terms of a schedule attached to the agreement (clause 12).
6. By dint of fate, Mr. Van Der Linde predeceased his wife. Whereupon Mrs. Van Der Linde terminated the agreement on two months written notice in December 2019. Upon

termination of the agreement, Mrs Van Der Linde became entitled to a refund calculated in terms of clause 2 of the agreement. She subsequently passed on and her deceased estate represented by Mtizi Curruthers the executrix dative became entitled to the amount.

7. When the money was not forthcoming, the executrix approached the High Court (the court *a quo*) seeking declaratory relief. The court *a quo* granted an order in the following terms:

“IT IS ORDERED THAT:

1. The application for a (declaratur) is hereby granted.
2. It is hereby declared that the residual value of cottage number 28 at Athol Evans Complex located on Chiremba Road, Craneborne, Harare is USD48 750 (*Forty-eight thousand Seven Hundred and Fifty United States Dollars*) Which should be paid to the applicant in ZWL RTGS at the Reserve bank of Zimbabwe exchange rate ruling on the date of payment.
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3. The first respondent shall keep cottage number 28 at Athol Evans Complex in a good state of repair and shall not use the same for any purpose whatsoever pending occupation by a new tenant/occupant.
4. The first respondent shall pay out to the applicant the sum stated in paragraph 2 above within 90 days of the order.”

8. Disenchanted with the court *a quo*'s order, the applicant approached this Court on appeal on the following grounds:

“1. The court *a quo* erred in finding that applicant is indebted to the first respondent in the sum of USD48, 750.

2. The Court (sic) erred in issuing an order without regard to the effect of s 22 (1) of the Finance (No. 2) Act 7 of 2019 on the agreement between the parties.

3. The court erred in implying into the contract terms that were not part of the contract agreed to by the parties.
- 4 The court *a quo* misdirected itself in any event in failing to find that even if there was any liability to the first respondent such liability was not yet due.”

REASONS FOR DELAY

9. The reasons for delay in filing the heads of argument are wholly attributable to the applicant’s legal practitioners. The applicant’s legal practitioner seized with the matter has filed an affidavit stating that he had some urgent business to attend to away from the office. While he was away, his secretary received the notice of hearing from the Registrar and filed it away without drawing it to her attention when she came back.

10. The legal practitioner’s secretary has filed a supporting affidavit confirming her principal’s averments. She confirmed that while her principal was away she received the notification from the Registrar and filed it away. She forgot to bring the notification to the attention of her principal as she was required to do.

11. I find that to err or to forget is human but the legal practitioner concerned is not entirely blameless. She could have averted the problem by a simple enquiry of the secretary if any mail needing her attention had been received during her absence. The legal practitioner was also negligent in not checking her inbox where she could have seen the notification for herself without any prompting. It would therefore, be unfair to solely load the secretary with the entire blame. It is always easy to blame others except oneself.

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12. I cannot over emphasize the need for legal practitioners to exercise due diligence in handling their clients' affairs. While courts may punish litigants for the sins of their lawyers, this weighs heavily on the court's conscience to punish the innocent litigant. Legal practitioners should therefore be warned that in circumstances of this nature the courts may resort to awarding costs *de bonis propriis* against the erring legal practitioners who cause unnecessary delays instead of punishing the innocent litigants.

13. Fortunately the delay was not inordinate and there was prompt action to rectify the anomaly once it came to the notice of the applicant's legal practitioners. Considering that the appeal involves substantial amounts of money to be paid by a charitable organization and the rights of the deceased estate of a person who died in need of care, there is need to condone the delay and ventilate the prospects of success on appeal.

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PROSPECTS OF SUCCESS

14. At p 34 of the record of proceedings and para 8 and 9 of its heads of argument in the prospective appeal, the applicant states that:

“8. As the court *a quo* correctly observed, it was common cause between the parties that a debt existed (although it was not payable) and that the quantum of this debt was \$48, 750.

9. The focus of the parties' dispute was whether this dispute was in USD or whether it had converted by operation of law into a debt in RTGS/ZWL at a rate of 1:1.”

15. The heads of argument then go on to address that sole issue. In dealing with that issue at p 7 of his cyclostyled judgment the learned judge *a quo* made the following factual findings:

“The *quantum* of the refund remained unknown to the parties from the time that they concluded the contract to 7 January, 2021. This was well after the effective

date of 22 February 2019. The respondent mentions the *quantum* in the letter. Annexure G, which it wrote to the applicant on 7 June 2021. The letter appears at page 32 of the record. It is in the annexure that it acknowledges what it owes to the applicant. It claims that it owes her an amount of ZWL 48,750. It bases its calculation on s 4 (1) of SI 33 of 29.”

16. On the basis of such factual findings the court *a quo* ruled against the applicant on account that the obligation to pay arose on 7 June 2021 when applicant admitted liability but sought to rely on a law that was not applicable to obligations arising after the due date of 22 February 2019.
17. Section 4 (1) (d) of S. I. 33 of 2019 and 22 (1) (4) of the Finance (No. 2) Act have been interpreted by the courts such that it is now trite that obligations arising after the due date of 22 February 2019 do not fall within the scope of the above quoted statutes.
18. The applicant’s argument that the obligation to pay solely arose when the contract was concluded to the exclusion of the date when liability was admitted in a specified amount is an exercise in futility. The learned judge *a quo*’s finding that at the time of the agreement the amount payable to the Van Der Lindes was unquantified and unknown is unassailable. The amount was only quantified and known well after the due date when the applicant admitted liability. The admission and quantification of the amount due unquestionably created a new obligation after the due date. In light of the undisputed findings of fact, the learned judge *a quo*’s findings of law cannot be faulted at all. That being the case the application cannot succeed.

COSTS

19. It is somewhat disconcerting that in an attempt to hoodwink the judge in chambers the applicant attempted to shy away from the debt with the full knowledge that it had admitted the existence of the debt in writing on 7 June 2021.

20. It is further disturbing that at p 11 para 21.5 the applicant feigned contrition and offered to pay all the respondents costs only to make an about turn and present a draft order praying for no order as to costs. The deceitful paragraph reads:

“No prejudice will be suffered by the Respondents in this matter if this application was to be granted. Sufficient security for costs has been tendered and it will be in the interest of justice for the Appeal to proceed to finality. **We further tender all wasted costs attendant on the respondents as a result of this error.**”

21. Fast forward to page 51:

DRAFT ORDER

- “1. The application for reinstatement be and is hereby granted.
2. The applicant’s case under case number SC 556/22 be and is hereby reinstated.
3. The Applicant is directed to file its heads of argument in case number SC 556/22 within 3 days of the granting of this order. **Judgment No. SC 114/23**
4. The Registrar of this Honourable Court be and is hereby directed to set the appeal under case number 556/22 for hearing on the next available date. **Chamber Application No. SC 260/23**
5. **There shall be no order as to costs.**”

DISPOSITION

22. There being no prospects of success in this application, it can only fail. Given the applicant’s shenanigans, costs at the higher punitive scale are clearly warranted. I note in passing that had the respondent asked for costs *de bonis propriis* I would have obliged.

23. It is accordingly ordered that:

1. The application be and is hereby dismissed.

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

Gill Godlonton & Gerrans, applicant's legal practitioners.

Hogwe Nyengedza, 1st respondent's legal practitioners.