

**REPORTABLE (5)**

(1) VANLEDGE INVESTMENTS (PRIVATE) LIMITED (2)  
BAONING GUO (3) MUHAMMAD ISHFAQ (4) TYMOOR  
TASADAQ  
v  
CHEMICAL PROCUREMENT SERVICES AFRICA  
(PRIVATE) LIMITED

**SUPREME COURT OF ZIMBABWE  
HARARE, 30 JUNE 2023 & 19 JANUARY 2024**

*K. Zvinorova*, for the applicants

*E. Jera* with *V.C. Chidzanga*, for the respondent

**Judgment No. SC 5/24  
Chamber Application No. SC 315/22**

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**CHAMBER APPLICATION**

**BHUNU JA**

1. This is a chamber application for condonation of non-compliance with r 37 (2) and extension of time within which to file the appeal. The application is purportedly brought in terms of r 43 (1) of the Supreme Court Rules, 2018 (the Rules). The application is opposed.

**BACK GROUND FACTS**

2. The respondent successfully sued the applicants for breach of contract in the Magistrates Court. It obtained the following order:

“IT IS ORDERED THAT:

1. Defendants be and are hereby, jointly and severally ordered to pay US\$130 being the amount agreed as balance in terms of the written contract.
2. The first defendant be and is hereby ordered to collect and pay for the products valued at US\$27 249.00.
3. The first defendant be and is hereby ordered to pay US\$14 730.21 for products alleged to have failed to meet specifications.
4. The defendant bear costs of suit at the ordinary scale.”

3. Dissatisfied with the Magistrate’s judgment, the applicants appealed to the High Court (the court *a quo*) with the respondent cross appealing in the process.

4. On 16 November 2022 the court *a quo* determined the appeal and issued the following order:

“IT IS ORDERED THAT: **Judgment No. SC 5/24**  
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1. The appellants’ appeal be and is hereby dismissed with costs.
2. The respondent’s cross appeal be and is hereby allowed with costs.
3. The judgment of the Court *a quo* be and is hereby upheld. Further to that, the following is ordered:

“The Court *quo*’s fourth order be and is hereby set aside and replaced by, “The defendants shall pay costs of suit on an attorney and client scale, collection commission and interest as provided for in the agreement between the parties.”

5. Aggrieved, the appellants sought to appeal to the Supreme Court for relief. The appeal was however faulty and fatally defective as it was in breach of r 37 (2) of the Rules. The rule compels a prospective appellant to serve the notice of appeal on the Registrar. It reads:

“(2) The notice of appeal shall be filed and served on registrar, a registrar of the High Court and the respondent in accordance with rule 38”

6. Upon realisation of the serious infraction of the rule, the applicant sought to rectify the irregularity by lodging this application for condonation and extension of time within which to appeal in terms of r 43 (1).

### **THE POINT IN LIMINE**

7. At the commencement of the hearing Mr *Jera*, counsel for the respondent, took a point *in limine*. He contended that the application advanced by the applicant was a nullity for want of compliance with the mandatory provisions of r 70 of the Rules. It was his submission that where an applicant fails to effect service of the notice of appeal in breach of the rules, the remedy resides under r 70 and not r 43 (1).
8. In contrast, counsel for the applicant submitted that case law which is on all four sides of the law, **Judgment No. SC 5/24** **Chamber Application No. SC 315/22** with the circumstances of the present case establishes that one has to proceed in terms of r 43 (1). That rule provides for condonation and extension of time where one fails to observe the prescribed time lines.

### **ANALYSIS OF THE LAW AND THE FACTS**

9. The facts are by and large common cause. Rule 37 (3) prescribes the consequences of failure to serve the notice of appeal as laid down by r 37 (2). The penalty is that the appeal will be deemed to have been abandoned and dismissed. The corollary effect is that the appeal stands dismissed unless remedial action is taken by the defaulting party in terms of the Rules.
10. Rule 37 (3) provides as follows:

“(3) If the applicant does not serve the notice of appeal in compliance with subrule (2) as read with rule 38, the appeal shall be regarded as abandoned and shall be deemed to have been dismissed.”

11. The antidote for curing an appeal regarded as abandoned and dismissed for want of compliance with the rules as prescribed under r 70 which provides as follows:

**“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.** (My emphasis)

12. In bringing this application under r 43 (1), counsel for the applicant placed reliance on a passage in *Bindura Municipality v Paison* **Judgment No. SC 5/24** **Chamber Application No. SC 315/22** **4** *Chikweya Mugogo* SC 52/13. In that case this Court remarked at p 3 that:

“It however seems to me that the applicant has filed a wrong application. 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. The leading case in this regard is the case of *Jensen v Acavalos* 1993 (1) ZLR 216 at 220 B (S) where KORSAH JA stated as follows at :

‘... a notice of appeal which does not comply with the rules is fatally defective and invalid. That is to say it is a nullity. It is not only bad but incurably bad, and, unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice of appeal to be filed, it must be struck off the roll....’”

13. It is clear at first glance that the *Bindura Municipality* case and the case at hand are distinguishable as the relevant legal considerations are diametrically different. The remarks in the *Bindura Municipality* case were made with regard to a matter which

had been struck off the roll for irregularity. **In this case the appeal was not struck off the roll but regarded as abandoned and dismissed.** Where a matter is regarded as abandoned and dismissed, there is a specific remedy provided for that scenario under r 70. That remedy is reinstatement as we have already seen in para 11 above. (My emphasis)

14. The applicant also placed reliance on the case of *Yunus Ahmed v Doicking Safaries (Private) Limited t/a CC Sales SC 70/18*. Mr Zvinorova counsel for the applicant submitted that this case is on all fours with this case. He merely followed the procedure laid down by this Court in that case. That being the case he could not have possibly followed the wrong procedure.

15. In the *Yunus Ahmed* case, *supra* the applicant had breached r 29 (2) of the old Supreme Court rules 1964. The rule provided as follows: **Judgment No. SC 5/24**  
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“(2) The notice of appeal shall be served on the registrar, the registrar of the High Court, and the respondent.”

16. Rule 29 (2) of the 1964 Supreme Court Rules is worded more or less the same as r 37 (2) of the Rules in that they both require the notice of appeal to be served on the same persons. The point of departure is that the advent of the current Supreme Court Rules 2018 repealed and replaced the 1964 Supreme Court Rules. Thus the current rules constitute an improvement over and above the old repealed rules.

17. The 1964 Supreme Court Rules having been repealed, they are now defunct, null and void and of no force or effect. It was therefore folly for Mr Zvinorova, counsel for the applicant, to rely on the repealed Supreme Court Rules and related case law to the

exclusion of the current Supreme Court Rules and case law. One cannot move forward with eyes perpetually fixed on the rear view mirror oblivious of the road ahead. While there might be need to take a glance at the past rules of court from time to time, what rules the day are the current Supreme Court Rules, 2018 which are binding and effectual.

18. Of course, KORSAH JA was correct in *Jensen v Acavalos (supra)* when he remarked that a notice of appeal which does not comply with the rules is fatally defective and invalid and a nullity at law. In this case the applicable Supreme Court Rules, 2018 decree that where an appeal is deemed to have lapsed, the appellant is obliged to apply for reinstatement of the appeal in terms of r 70. The rule is cast in peremptory terms admitting no other procedural avenue as it guides litigants to the appropriate relief.

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19. The main distinction between r 43 (1) and r 70, is that r 43 (1) provides an avenue for the correction and restoration of defective untermiated appeal proceedings. The fatal procedural defects merely suspend the appeal proceedings pending correction of the procedural defects. To that extent, it is not a vehicle for the resuscitation of dead and completed cases that have been deemed abandoned and dismissed and the file closed.
20. When a matter is deemed dismissed that brings the case to an end and the court becomes *functus officio*. Such a case cannot be resuscitated and resurrected through r 43 (1) because the rule is not designed for that purpose. The appeal deemed abandoned and dismissed can only be brought back to life through r 70 which is specifically designed for the purpose.

19. In the circumstances of this case, I accordingly hold that it was a fatal procedural irregularity for the applicant to proceed under r 43 (1) when the law prescribes that the remedy for the resuscitation of appeals deemed abandoned and dismissed resides in r 70. Having come to that conclusion, it is not necessary to consider any other outstanding issues raised by counsel.
20. It is trite that where an application is fatally defective, it is a nullity that must be struck off the roll. Costs follow the result. It is accordingly ordered that the application be and is hereby struck off the roll with costs.

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*Muza Nyapadi*, the applicant's legal practitioners

*Moyo & Jera*, the respondent's legal practitioners