

DR CHURRCHILL MPIYESIZWE GUDUZA

And

NOKUKHANYA NOBLE GUDUZA MOYO N.O.
(In her capacity as Executrix Dative of the Estate Late
Makhathini Bhekisizwe Guduza)

Versus

PATIENCE POSIWE N.O.
(In her capacity as Executrix Dative of the
Estate Late Zephaniah Nkatazo Sihwa)

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 8 JUNE 2022 & 31 JULY & 10 AUGUST 2023

Opposed Application

Advocate Siziba for the applicant
J. Tshuma for the respondent

TAKUVA J: This is an application wherein the applicant seeks an order reinstating the appeal under cover of case number HCA 49/20 which was deemed to have been abandoned because of the applicant's failure to serve the Clerk of Court with a copy of the notice of appeal issued by the Registrar of the High Court.

The application is opposed by the respondent on the following grounds;

1. The relief sought is incompetent.
2. The applicants have approached this court with dirty hands.
3. There has been an inordinate delay in prosecuting this matter.
4. The applicants have failed to provide a reasonable explanation for their delay.
5. There are no prospects of success on appeal. The appeal is merely meant to buy time and frustrate the respondent from executing the judgment granted by the Magistrates' Court on the 10th day of February 2020.

Background facts

The facts go back a very long way. However the relevant facts are as follows:

Sometime in 2005 the now late Zephania Nkatozi Sihwa instituted action proceedings in the Magistrate's Court under cover of case number MC 9887/05 wherein he sought the eviction of all those in occupation of the above mentioned property.

An appearance to defend was noted by the 1st applicant and the 2nd applicant was subsequently joined to the proceedings. On or about the 10th day of February 2020, judgment was handed down under cover of case number MC 9887/05 in favour of the estate late Zephania Nkatozi Sihwa DRB 662/09, ejecting the applicants and all those claiming occupation under or through them. On 30th day of September 2020, eight (8) months after the above mentioned judgment was handed down, the applicants instituted motion proceedings under cover of case number HC 1604/20, seeking to be condoned for the late noting of an appeal. Despite a letter dated the 14th day of October 2020 consenting to the relief sought by applicants in their condonation application, the matter was only set down on the unopposed roll on the 8th day of November 2020.

Subsequently an order condoning the late noting of an appeal was granted on 5th day of November 2020. In terms of this order, the applicants were directed to note the appeal within ten (10) days. On the 16th of November 2020 the applicants filed a notice of appeal under cover of case number HCA 49/20. Seven (7) months later, applicants were advised by the Registrar of the High Court, in a letter issued on the 24th day of May 2021 that the notice of appeal had been deemed to have lapsed for failure to serve the Clerk of Court with a copy of the notice of appeal issued by the Registrar of the High Court. A warrant of ejectment and notice of eviction was subsequently served on a responsible person at the property in question. Applicants and all those claiming occupation under or through them were evicted from the immovable property in question.

Applicants, after being indulged by this court for the late noting of an appeal have instituted the present proceedings for the reinstatement of the lapsed appeal under cover of case number HCA 49/20, seeking to be indulged by this court. At the hearing *Mr Tshuma* indicated that while in his heads and notice of opposition, he had raised two points *in limine*, he was abandoning the second one namely that the applicants have approached the court with dirty hands. He then relied on the 1st point which is whether or not the relief sought is competent.

The Registrar of this court deemed the appeal under cover of case number HCA 49/20 to have been abandoned and lapsed due to the applicants' failure to serve a copy of the notice

of appeal issued by the Registrar on the Clerk of Court in compliance with Order 31 Rule (1) (2) (a) of the Magistrates' Court (Civil) Rules, 2019.

The order provides:

- “(2) An appeal shall be noted by –
- (a) the delivery of notice; and
 - (b) unless the court of appeal otherwise directs, giving security for:-
 - (i) the respondents' costs of appeal to the amount of one hundred dollars;
 - (ii) the costs of the preparation of the record to the amount estimated by the Clerk of Court. Provided that a Clerk of Court may in his or her discretion accept a written undertaking from the applicant to pay for the costs of the preparation of the record.”

It appears to me that in order to fully comply with this rule, the procedure is as follows;

- (a) The applicant must deliver a copy of the notice of appeal to the Clerk of Court who will then cause the applicant to pay the prescribed fee of RTGSS\$500,00 for the Notice of appeal.
- (b) Appellant pays a further RTGSS\$500,00 as security for costs.
- (c) The cost of preparing the record is then calculated by the Clerk of Court.
- (d) Once payment of the costs is done or an undertaking by the appellant, the Clerk of Court will stamp the copies of the notice of appeal.
- (e) After that a copy of the stamped notices along with receipts must then be taken to the Registrar of the High Court to be issued and allocated a case number.
- (f) Once the notice has been issued by the Registrar of the High Court, it must be served on the Clerk of Magistrates' Court in order to enable him to start preparing the record.
- (g) The issued notice is then served on the respondent or his legal practitioners.

In casu, the payments of the notice were done on the 13th day of November 2020 and the notice was delivered to the Magistrates' Court on the 16th day of November 2020. Subsequently, the notice was stamped by the Clerk of Court on the 16th day of November 2020 and taken to the Registrar of the High Court to be issued and given a case number. The issued appeal was then served on the respondent's legal practitioners on the same day.

Applicants failed to serve the Clerk of Court with a copy of the notice of appeal issued by the Registrar of the High Court. Consequently, the Clerk of Court could not attend to preparing the record. The appeal was then deemed to have been abandoned and lapsed by the Registrar of the High Court due to the applicants' failure to serve a copy of the notice of appeal issued by the Registrar or the Clerk of Court on the 24th day of May 2021. It should be noted that applicants have not denied that they failed to serve the Clerk of Court with a copy of the notice issued by the Registrar of the High Court. Applicants claim that there was no breach of the rules.

In *Southend Cargo Airlines (Pvt) Ltd v Chituku & Ors* (SC 42/2016), the court found that;

“The appeal having lapsed or deemed to have been abandoned it follows that there is no appeal pending in this court. This prompted the applicant to apply for condonation of late filing of the notice of appeal together with the application to reinstate the lapse or abandoned appeal.

The application for reinstatement of appeal was however initially brought without the necessary application for condonation of late filing of appeal.”

In my view the terms “abandoned” and “lapsed” mean that the appeal was terminated, voided upon the applicants' failure to serve a copy of the notice of appeal issued by the Registrar on the Clerk of Court. As a result, the effect of the lapsed appeal under cover of case number HCA 49/20 is that there is no appeal pending before this court. See also *Zimslave Quartzite (Pvt) Ltd & Ors vs CABS* (SC-34-12 where the court stated that,

“an appeal which has been voided or terminated or which has expired cannot be reinstated since there is no appeal pending and one can only reinstate something which exists.”

To resuscitate a matter that has been deemed abandoned, an applicant must apply for condonation coupled with an application for reinstatement see *Sgt Mande & Cst Mhaka v The*

Chairman of the Police Service Commission (2) Commissioner General of Police (3) Minister of Home Affairs HC 63/18 Civ Appeal 64/18.

In the present matter there is no application for condonation as applicants contend that it is not necessary as there was no need to serve the Clerk of Court. I disagree.

For these reasons, I find that the point *in limine* has merit. The relief sought by the applicant is wholly incompetent. In the result, the matter is struck off the roll with costs.

T. J. Mabhikwa & Partners, applicants' legal practitioners

Webb, Low & Barry (inc. Ben Baron & Partners), respondent's legal practitioners