CHIDO FELICITY MATEWA
(In her capacity as the executrix dative in the estates of the late Stephen Tapiwa Matewa & Judith Matewa)
versus
EXQUISITE MARKETING (PRIVATE) LIMITED (1)
and
ACE OF TRUMPS INVESTMENTS (PRIVATE) LIMITED (2)
and
MONREITH INVESTMENTS COMPANY (PRIVATE) LIMITED (3)
and
LOVEMORE PFUPAJENA (4)
and
CITY OF HARARE (5)
and
THE SURVEYOR GENERAL OF ZIMBABWE (6)
and
THE REGISTRAR OF DEEDS HARARE (7)

HIGH COURT OF ZIMBABWE
**DEMBURE J**
HARARE: 19 November & 2 January 2025

**Opposed Application**

*E. Nyakunika*, for the applicant
*T. E. Mudzuri*, for the 1st respondent
*P. Nyakutombwa*, for the 2nd respondent
No appearance for the 3rd to 7th respondents

[1] DEMBURE J: This matter was placed before me as a chamber application for reinstatement of a matter deemed abandoned and dismissed. After hearing submissions from the parties' legal practitioners, the court dismissed the application with costs on a legal practitioner and client scale. The following are the full reasons for my decision.

**BACKGROUND FACTS**

[2] The applicant is the *executrix dative* in the estates of the late Stephen Tapiwa Matewa and Judith Matewa. The first respondent is Exquisite Marketing (Private) Limited a company registered in accordance with the laws of Zimbabwe. The third respondent is Ace of

Trumps Investments (Private) Limited a company registered in accordance with the laws of Zimbabwe. The third respondent is Monreith Investments (Private) Limited a company also registered in accordance with the laws of Zimbabwe. The fourth respondent is Lovemore Pfupajena, a male adult. The fifth respondent is the City of Harare, a local authority. The sixth respondent is the Surveyor General of Zimbabwe cited in his official capacity. The seventh respondent is the Registrar of Deeds – Harare cited in his official capacity.

[3] On 5 July 2023, the applicant issued summons against the respondents in Case No. HC 4408/23 alleging that the transfer of stand 432 Mandara Township of Subdivision A of Lot 2 Mandara Township of the Grange *("the property")* currently registered in the name of the fourth respondent was unlawful. She sought a declaratory order that the purported sale and transfer of the property beginning with the deed of transfer number 4106/2010 in favour of the first respondent was void on the basis that the property only exists as part of stand 431 Mandara Township owned by the late Stephen Tapiwa Matewa and Judith Matewa and there was non-compliance with the provision of Government Notice 159/57. Further, the applicant claimed an order that the purported transfer of the property from the second respondent to the third respondent and from the third respondent to the fourth respondent be declared illegal, unprocedural and void. She also claimed the costs of suit.

[4] The said action was opposed by the respondents in *casu*. On 17 June 2024, the court issued a case management order *per* ZHOU J in terms of which the applicant was directed to take steps necessary to ensure that the matter is finalised within thirty (30) days from the date of receipt of the order and that if the applicant fails to comply the matter shall be deemed abandoned and dismissed and the Registrar shall notify the parties accordingly. The order was served by the Registrar through the IECMS platform in the matter HC 4408/23 on 3 July 2024 in terms of the court rules as amended. On 12 September 2024, the Registrar issued a letter that due to the non-compliance with the case management order, the matter was accordingly dismissed.

[5] The applicant subsequently filed this application on 24 September 2024 seeking the reinstatement of the summons matter she filed in Case No. 4408/23 which had been regarded as abandoned and deemed dismissed. The applicant alleged that the case

management order did not come to its attention on 3 July 2024 but only became aware of it on 12 September 2024 when the matter was dismissed. She could not, therefore, comply with the order.

[6] The first and second respondents opposed the application. The first respondent raised a point in *limine* in its heads of argument that the application was fatally defective on the basis that the applicant did not seek condonation first as the application was filed outside the three months provided by Practice Direction 3 of 2013. This point was also raised and argued by the second respondent's counsel. The other point in *limine* raised by the second respondent was that the deponent to the applicant's founding affidavit had no *locus standi* or authority to depose to the founding affidavit. I had to deal with these preliminary points first before considering the merits of the application

**POINTS IN *LIMINE***

**WHETHER OR NOT THE APPLICATION IS FATALLY DEFECTIVE**

[7] Mr *Mudzuri*, counsel for the first respondent, submitted that the application only makes a prayer for reinstatement but does not seek condonation. He argued that the notification of the court order was sent as far back as 3 July 2024. The application was filed on 24 September 2024 outside the thirty (30) days provided for by Practice Direction 3 of 2013. The applicant has no audience without seeking condonation. He referred me to the submissions in para(s) 1 - 4 of the first respondent's heads of argument. The applicant must apply for condonation before seeking reinstatement.

[8] Counsel, however, conceded that there is a lacuna in the current High Court Rules as there exists no direct rule stating the period within which an application for reinstatement must be filed where a matter has been deemed abandoned and dismissed as in this case unlike rule 70 of the Supreme Court Rules which specifically set out the procedure for reinstatement of appeals. Mr *Mudzuri* insisted that the application must still be made within thirty (30) days. Practice Direction 3 of 2013 should be the answer as the effect of a matter being deemed abandoned should be the same. He further submitted that the applicant cannot get sympathy as she is not being honest.

[9] Mr *Nyakutombwa*, counsel for the second respondent, supported the first respondent and argued that the point in *limine* must be upheld. He referred the court to rule 66(3) of the

High Court Rules, 2021. His argument was that the understanding should be that once a matter is dealt with by the court it is clear from that subrule (3) that within three months something must be done. The idea is that there must be a speedy resolution of matters.

[10] It was further submitted that there is no explanation for the failure to apply within thirty days. The rule speaks of thirty (30) days and there is a delay. Without condonation coupled with reinstatement, the application is fatally defective. Counsel referred the court to para(s) 6 – 9 of the second respondent's heads of argument. There is a presumption of a party being aware of the order from the date it is issued. Everyone is notified in the electronic system. Mr *Nyakutombwa* also argued that where we have a lacuna it is important for the court to develop the law. The court should move for thirty days as the Supreme Court Rules provide for fifteen days.

[11] On the other hand, Mr *Nyakunika*, for the applicant, submitted that in nature an application for condonation is an indulgence. Counsel referred the court to para 20 of the applicant's founding affidavit where there is an indication that the applicant failed to comply with an order of the court. The applicant only became aware of the order dismissing the case on 12 September 2024. This application was then made twelve days later on 24 September 2024. It was further argued that he does not understand the argument about the thirty days. The rules of this court do not specifically provide for condonation and reinstatement unlike the Supreme Court Rules particularly rule 70. The rules are not specific.

[12] It is trite that reinstatement is an indulgence which the court has the discretion to grant. Thus, in *Nyeve & Anor v Sibanda & Ors* HB 31/24 KABASA J had this to say:

> "Is this matter before me for the applicant to seek such indulgence? Where a matter is deemed abandoned and dismissed it is no longer before the court or judge. For a party to bring it before the court or judge, they must seek its reinstatement first. It is in seeking such reinstatement that a party seeks the court's indulgence to authorize a departure from the rules and extend the period stated in such rule, including pardoning the non-compliance…In such circumstances a party does not just come to court and seek the court's indulgence to hear the matter because the matter will no longer be before the court. It has to be reinstated first with an explanation as to why the party failed to act. So it is *in casu* the matter is no longer before the court until such time that it is reinstated."

[13] As correctly conceded by Mr *Mudzuri* and Mr *Nyakutombwa* there is no direct provision in the High Court Rules, 2021 which deals with the procedure for reinstatement of a matter

deemed abandoned and dismissed or in particular the period within which such an application must be lodged. Practice Direction 3 of 2013 deals with the reinstatement of those matters which would have been struck off the roll, removed from the roll or postponed *sine die*. Rule 66(3) of the High Court Rules, 2021 provides that a matter which have been postponed *sine die* or removed from the roll and is not set down within three months from the date it was postponed *sine die* or removed from the roll shall be regarded as abandoned. That rule does not provide the procedure for reinstatement at all. It does not apply to the present circumstances.

[14] There is a lacuna in our rules on the specific procedure for reinstatement of a matter arising from the present situation. This is different from the Supreme Court Rules where rule 70 provides for the reinstatement of appeals deemed abandoned and dismissed and such application must be filed within fifteen (15) days of being informed by the Registrar of the dismissal of the appeal. The procedure and the law for condonation and reinstatement of an appeal in the Supreme Court is, therefore, clearly outlined and settled. *In Khanyisa Minerals (Pvt) Ltd v Crowburg Resources (Pvt) Ltd & Ors* HH 334/23 the court recognised the lacuna in our rules and eventually had to resort to the inherent power of this court to control its process by granting a reinstatement when the applicant had sought rescission of the order dismissing the matter for want of prosecution. In that case, CHITAPI J had this to say:

> "If the applicant whose application has been dismissed for want of prosecution desires to have the matter again placed before the court, the applicant must apply to reinstate the matter. Neither r 236 in the 1971 High Court Rules nor r 59 (15) of the current rules 2021 dealt with the remedy open to the applicant whose case has been dismissed for want of prosecution in terms of the rule.
> By comparison r 26(1) of the Supreme Court Rules 2018 provides for a deemed abandonment and dismissal for want of prosecution of an appeal for failure by the appellant to arrange for preparation of the record, failure to file heads of argument or failure to apply for a trial date as provided for in the rules. Rule 26(2) then explicitly provides an elaborate procedure for the appellant to exercise the right to apply to a judge of that court for reinstatement of the appeal. There is therefore no debate on the procedure to be adopted by an appellant in the circumstances of the deemed abandonment and dismissal as aforesaid. It is suggested with all deference to the rule maker that it may in its wisdom consider inserting an express provision in the rules for the applicant whose case has been dismissed for want of prosecution to apply for reinstatement on such conditions and within such period as the rule maker may specify. I note in passing that Practice Direction 3 of 2013

> for example provides for what an affected party may do in the event that its matter is struck off the roll or postponed *sine die*/removed from the roll. The issue of reimbursement of a claim dismissed for want of prosecution could also be revisited, again with due respect. It is also suggested if the Supreme Court practice of a deemed abandonment and dismissal is adopted, then only those applications for dismissal which have been opposed may be referred to the judge with unopposed applications being deemed dismissed and abandoned and the Registrar advising the applicant accordingly in a standard form of notification. In this way judges would only have to determine opposed chamber applications for dismissal and applications for reinstatement where there would have been a deemed abandonment and dismissal."

[15] The above sentiments equally apply to the present situation where there is a case management order for a party to prosecute its matter within a specified period and as a result of failure the matter is regarded as abandoned and dismissed by the Registrar. The applicant must apply for reinstatement of the matter. However, as noted above, there is no rule stating that such an application must be made within thirty (30) days. Practice Direction 3 of 2013 does not say so. The resort must be had to the common law under the principle of the inherent power of this court to control its process and the procedure for a chamber application is then followed. In the absence of an expressly stated period within which such an application must be made it cannot be said that this application was filed out of time. The court cannot impose thirty days from nowhere nor can it simply create such a period in the interests of justice.

[16] Mr *Nyakutombwa* argued that the court must develop the law to cover the gap and upheld thirty days as the period within which the application for reinstatement must be filed. While s 176 of the Constitution of Zimbabwe provides for the inherent powers of this court to protect and regulate its own process and to develop the common law or customary law, it is pertinent to note that in doing so the court must take "into account the interests of justice and the provisions of this Constitution". Adopting the approach advocated by Mr *Nyakutombwa* would simply be to abruptly shut the door on the applicant who approached the court when there was no such period prescribed for the application. That would not be in the interests of justice in this case before me. It would be ideal and the proper approach for the issue to be considered by the drafters of the court rules as a way to improve the rules for the benefit of all litigants in future cases. There is, therefore, no legal basis to impose thirty days as the period within which an application of this nature must be filed. Since

there is no such legal provision for thirty days it cannot be said that this application was filed out of time. The point in *limine* accordingly had no merit. It was, therefore, dismissed.

**WHETHER OR NOT THE FOUNDING AFFIDAVIT IS VALID**

[17] The second respondent raised the point that the deponent to the founding affidavit, Jonas Dondo who is the applicant's legal practitioner, had no authority to depose to the founding affidavit. It was argued that he did not attach a special power of attorney. It was also averred that the deponent lacks *locus standi* and that renders the application fatally defective. Mr *Nyakutombwa* submitted that it is undesirable for a legal practitioner to depose to an affidavit on behalf of a client. It was further argued that when someone's authority has been challenged it must be proved. The averments in the affidavit ought to have been made by the client. There is no answering affidavit filed to then answer the point raised. An answering affidavit must have been filed. Accordingly, all averments in the opposing affidavit were, therefore, unchallenged.

[18] Counsel further argued that Mr *Dondo* is deposing to the health of the applicant. He cannot verify those facts. The affidavit should have strictly been for procedural matters. There is proof of authority for the second respondent in the form of a company resolution. In this case, the lawyer went on a frolic of his own. Without the founding affidavit, the application cannot stand.

[19] In response, Mr *Nyakunika* submitted that the second respondent was misplaced. The requirement in terms of r 58(4)(a) is that an affidavit filed in a written application shall be made by the applicant or by a person who can swear positively to the facts or averments set out therein. It was further submitted that there was no objection that the legal practitioner was not well versed with the facts to depose to the affidavit. There must be a distinction between instituting an action and the authority to depose to an affidavit. He referred the court to the case of *Dhliwayo v Warman Zimbabwe (Pvt) Ltd & Ors HB* 12/22.

[20] Counsel also argued that the quotation cited from *Ibbo Mandaza t/a Induna Development Projects v Mzilikazi Investments (Pvt) Ltd* HB 23/07 was not fully captured. There is an exception to the general rule if the case is within the legal practitioner's knowledge. The application is about a procedural matter. When an application is procedural in nature the

law allows the legal practitioner to depose to the affidavit. It was finally argued that there was nothing wrong for the deponent to depose to the affidavit.

[21] It is trite that there is a distinction between the authority to bring proceedings and being a witness in the proceedings. Rule 58(4)(a) of the High Court Rules, 2021 provides that an affidavit filed in written applications "shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein". A person who has knowledge of the facts and can swear to those facts is, therefore, qualified to depose to an affidavit in application proceedings. This legal position was remarkably restated in *Dhliwayo v Warman Zimbabwe (Pvt) Ltd & Ors supra* where this court had this to say:

> "Mr *Mpofu* argues that the issue of authority has been improperly taken. It is contended that applicant is confusing the distinction between the authority to bring proceedings and being a witness in the proceedings. I agree. Cut to the borne, what applicant is challenging is the deponent's (Nyoni's) competence to depose to the opposing affidavit on behalf of the respondents. I say so because 2nd and 3rd respondents are not being represented by the deponent in these proceedings, but by their legal practitioners of record. The deponent is merely a witness, if this was a trial he would simply take the witness stand and testify under oath. This position was stated with clarity in *Willoughby's Investments (Pvt) Ltd v Peruke Investments (Pvt) Ltd & Anor* HH 178/14, where the court held thus:
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> > "The applicant persisted with the contention that the deponent was not authorised to represent the respondent. That argument seems to be raised with amazing regularity these days. The applicant's contention is not that the respondent has not sanctioned the opposition to the application but, rather, that the deponent is not authorised to represent the respondent in these proceedings. But the respondent is represented not by the deponent but by its legal practitioners. The rules are clear as to the qualification for a person to depose to an affidavit. Order 32 r 227(4) provides that an affidavit filed in written applications "shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein".
>
> In other words, a person who has knowledge of the facts and can swear to those facts is the one qualified to depose to an affidavit in application proceedings. The applicant is not contesting the assertion that the deponent to the affidavit has knowledge of the facts stated in the affidavit. The cases cited by the applicant in its heads of argument relate to authority to institute proceedings on behalf of a company or to take certain decisions on its behalf, and not to the competence of a witness to depose to an affidavit on behalf of a company. Compare *Madzivire & Others* v *Zvarivadza & Others* 2005 (2) ZLR 148(H); see also *Madzivire & Others* v *Zvarivadza & Ors* 2006 (1) ZLR 514(S). For that reason, the objection cannot be sustained."

[22] In *casu,* it was common cause that the deponent, Mr *Dondo,* was the legal practitioner acting for the applicant. Further, the facts were within his personal knowledge. While it is undesirable for a legal practitioner to depose to an affidavit on behalf of his client the law permits an exception where the matter is procedural and the facts are within the legal practitioner's personal knowledge. In *Mandaza t/a Induna Development Projects v Mzilikazi Investments (Pvt) Ltd supra* the court also put the position clearly as follows:

> "Before I conclude I would like to deal with the point *in limine* raised by Mr *Ndove* on the applicant's legal practitioner deposing to the founding affidavit under a power of attorney. Generally, I agree with *Mr Ndove,* that a legal practitioner should not depose to a founding affidavit on behalf of a client. This court has previously stated why it is undesirable for legal practitioners to do so. But there is an exception to this general rule if the facts are within the knowledge of a legal practitioner (he may swear an affidavit on behalf of the client) – *Samkange & Anor* v *The Master & Anor* HH-63-93. Even in such exceptional cases, the route should be, in my view, be sparingly resorted to. The facts of this application are within the knowledge of the applicant's legal practitioner. He is in fact, in better position to highlight the applicant's case as the application is about procedural matters. In the circumstances the legal practitioner was justified in deposing to the affidavit."

[23] I agree with Mr *Nyakunika* that the second respondent did not capture the law fully as reflected in the above case. The issue can also be settled by the decision in *Riozim Ltd v Nigel Dixon – Warren N.O* SC 21/23 where the court held:

> "It is without doubt that the deponent had access to all the files that had to do with the present case before he took over the matter. In the case of, *Antonio v Ashanti Goldfields Zimbabwe Ltd* 2009 (2) 372 (H) HH 135 2009 at 11, MAKARAU J, as she then was, made a finding that:
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> > "it is not every employee who can give evidence on behalf of a corporate body such as defendant which has a board of directors and an executive management. The employee who gives evidence on behalf of a corporate litigant must be suitably placed within the corporate governance structures to have knowledge of the facts to which they testify." [My emphasis]
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> In *Zimbabwe Corporation Ltd v Trust Finance Ltd & Anor* 2006 (2) ZLR 404 (H) a legal practitioner deposed to a founding affidavit on behalf of his client. He averred that he had acted for the applicant in litigation, which had given rise to the application at hand. However, he omitted to state that he had been authorized to depose to the affidavit. In the opposing affidavit, the first respondent challenged his capacity and authority to depose to the founding affidavit. In the answering affidavit, the legal practitioner confirmed that he had been authorized by the applicant to depose to the founding affidavit as well as to the answering affidavit in his capacity as the applicant's legal practitioner. MAVANGIRA J, as she then was, held that:

> "This same legal practitioner acted for the applicant in the proceedings which subsequently led to the taxation now sought to be reviewed and in which the issue of his authority was not an issue. I am satisfied that the deponent's averment in the founding affidavit is sufficient in the circumstances of this matter, to show his authority to depose thereto and therefore find that the deponent was duly authorised by the applicant as he states." (own emphasis)

On the authority of the above referred cases the deponent to the opposing affidavit was competent to depose to the opposing affidavit. The legal practitioner joined the firm on 1 January 2021 and the matter was heard on 11 March 2021 and 17 May 2021 therefore he had the conduct of this matter when the application was determined and has the capacity to depose to the opposing affidavit. It is also important to note that the deponent clearly stated in his opposing affidavit that:

> "I am duly authorized to depose to this affidavit. The averments contained herein are within my personal knowledge both true and correct. Where I do not have personal knowledge I have satisfied myself through diligent inquiry as to the veracity of such facts." (own emphasis)

Therefore, the preliminary objection is dismissed."

[24] Similarly in this case, there is no dispute that Mr *Dondo* was acting for the applicant as her legal practitioner in the main matter. The facts were also within his personal knowledge. He also stated that he had the authority of the applicant to depose to the affidavit on her behalf. Thus, in para 1 of the founding affidavit, he clearly stated that;

> "I am the legal practitioner who has been handling this matter on behalf of the applicant and I am the only person vested with facts leading to the application and I am authorised to depose to this affidavit on behalf of the applicant."

Applying the above principles, the point in *limine* is legally untenable. The deponent clearly had the authority and the competence to depose to the founding affidavit. The point in *limine* lacked merit and it was, therefore, dismissed.

**THE MERITS**

**APPLICANT'S SUBMISSIONS**

[25] Mr *Nyakunika* submitted that he would abide by the submissions filed for the applicant. He submitted that it is trite that there are several requirements for an application for reinstatement but the two main ones are the reasonableness of the explanation and the prospects of success. The applicant, it was argued, has managed to give a reasonable explanation as to why he failed to comply with the directive. For some reason he did not see the directive. Applicant filed a summary of evidence and invited the parties for a Pre-

Trial Conference but due to the non-availability of the applicant the conference could not be held. At least the applicant was doing something. She filed a consolidated index but it was rejected. She did not neglect the proceedings before the court.

[26] On the prospects of success, Mr *Nyakunika* submitted that her prospects of success are high. On the point of *res judicata*, he argued that the relief sought are different. He, therefore, prayed for the reinstatement of the main matter with no order as to costs. It was also submitted that there is nothing which warrants punitive costs. Such costs are awarded in exceptional circumstances and this is not one of the cases.

**FIRST RESPONDENT'S SUBMISSIONS**

[27] Mr *Mudzuri* submitted that he would abide by the heads of argument filed of record. Regarding the issue of delay, he argued that the delay was inordinate. It was for about eight months when the last thing was done from December 2023 to June 2024. The applicant was joined to the IECMS. On the prospects of success, it was argued that they do not exist. The judgment by DEME J is still extant. The relief being sought has already been dealt with. Counsel prayed for costs on a punitive scale. It was submitted that the applicant is trying to have a second bite of the cherry. Counsel referred me to the case of *Brooklands (Pvt) Ltd v Save Valley Conservancy* HH 283/13 and argued that the costs must be punitive. The court has interrogated the same matter and the application should have been withdrawn.

**SECOND RESPONDENT'S SUBMISSIONS**

[28] Mr *Nyakutombwa* submitted that he will also abide by the submissions filed for the second respondent. It was further argued that the particular aspects of this application have not been met. The explanation has not been satisfactory. The conduct of the senior counsel is deplorable. The second respondent in para(s) 6 and 7 of its opposing affidavit has torn through the explanation in the founding affidavit. In the founding affidavit the applicant did not have any explanation. He said he does not know. He ought to have made averments to explain the prospects of success.

[29] Counsel also argued that the prospects of success do not exist. This matter has been dealt with. There is an extant judgment. There is an attempt to bring the matter again. The relief they seek is to overturn the judgment by DEME J. The second respondent has noted that there would be an impediment on prescription. On prescription, there is no answering

affidavit. Counsel prayed for the application to be dismissed with costs on an attorney-client scale. It was argued that such costs are warranted. There is insistence on a matter which has been finalised. This persistence is in the face of an extant order. There has been abuse of court process.

**THE LAW**

[30] The requirements for an application for reinstatement are settled. In *Dube v Matseka* SC 48/23 BHUNU JA stated as follows:

> "The legal requirements for the application to succeed are well known. In *Apostolic Faith Mission & Two Ors v Murefu* SC 28 – 03 the court held that the applicant must satisfy the court that:
> a. He has a reasonable explanation for the delay.
> b. He has reasonable prospects of success on appeal."

See also *Tel-One (Pvt) Ltd v Communication and Allied Services Workers Union of Zimbabwe* SC 01/06. It important to note that while the court was dealing with the reinstatement of an appeal in the above cases, the legal position is the same for an application for reinstatement of any other matter as in *casu*. The only difference is that the court in *casu* considers the prospects of success of the summons matter which the applicant seeks to be reinstated.

**WHETHER OR NOT THE APPLICANT HAS A REASONABLE EXPLANATION FOR THE DELAY**

[31] In this case, the case management order issued by the court *per* ZHOU J was served on the parties in Case No. HC 4408/23 on 3 July 2024. It was dated 19 June 2024. The applicant's legal practitioner admitted that he had no explanation to give as to why the court order did not come to his attention when it was uploaded on the IECMS platform where he was linked. This is stated in para 10 of the founding affidavit where he said: "For a reason I cannot explain the order dated 3 July 2024 did not come to my attention otherwise I would have written to the court to explain the predicament that I found myself in." He did not comply with the court order within thirty days which lapsed on 2 August 2024.

[32] This application was only filed on 24 September 2024 after the matter was dismissed on 12 September 2024. The delay to seek condonation or reinstatement was for one month and about three weeks from 3 August to 24 September 2024. In the circumstances of this

matter, the applicant was called upon to prosecute her case to finality and in that context, the demand was for a speedy resolution of the dispute. This also arises from inaction by the applicant from 20 December 2023 when the last Pre-Trial Conference papers were last filed. There was also no explanation for that long period to July 2024 when the order was issued.

[33] The application did not give a reasonable explanation for the delay in complying with the court order and seeking reinstatement. As noted above, the applicant or her legal practitioners did not also give an explanation as to why the legal practitioners could not receive the case management order uploaded or served by the Registrar on 3 July 2024. All the other parties confirmed receiving the same order. The applicant or her legal practitioner did not allege that they were not linked to the matter through the IECMS nor allege any difficulty in receiving communications through that platform at the relevant time. Her lawyer proffered no reason why he could not get the order through the system or became aware of it. Surprisingly, the applicant could only claim receipt of the letter dismissing the matter from the Registrar on 12 September 2024 when it was convenient to do so. I found the explanation by the applicant to be dishonest and accordingly unacceptable.

[34] It could not reasonably be accepted that the applicant could not receive the case management order on 3 July 2024 served through the same platform he confirmed he used to access the letter dismissing the matter. It was the same account linked to the IECMS that was used. The applicant's legal practitioner was dishonest in that regard. In applications of this nature as with condonation, the applicant must be candid and honest with the court and must give a full explanation. In *Zimslate Quartize (Pvt) Ltd & Ors v Central African Building Society*, SC 34/17 at p. 7 while dealing with an application for condonation, ZIYAMBI JA remarked that;

> "An applicant, who has infringed the rules of the court before which he appears, must apply for condonation and in that application explain the reasons for the infraction. He must take the court into his confidence and give an honest account of his default in order to enable the court to arrive at a decision as to whether to grant the indulgence sought. An applicant who takes the attitude that indulgences, including that of condonation, are there for the asking does himself a disservice as he takes the risk of having his application dismissed."

[35] The above remarks apply with equal force in this matter where an indulgence of reinstatement was being sought. It must be premised on an honest and acceptable explanation. One who puts forward a reason which is an insult to the intelligence of the court may have difficulty in satisfying the court of his good faith (See *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 at 211E-F) and in *casu*, of his entitlement to the indulgence sought. See also the case of *Kodzwa* v *Secretary for Health and Another* 1999 (1) ZLR 313 (SC) where it was held that the court has a discretion to grant condonation when the principle of justice and fair play demand it and when reasons for non-compliance with the rules have been proffered by the applicant to the satisfaction of the court.

[36] Even after 12 September 2024 when the applicant alleged, she received the letter dismissing the matter, up to 24 September 2024 when this application was lodged, there is no explanation tendered for the delay in seeking reinstatement. It would appear the applicant took reinstatement as if it was there for the mere asking. It is trite that the applicant suffers for the negligence of her legal practitioner (*S v McNab* 1986 (2) ZLR280 (SC)). Mr *Dondo* was expected to get things right. The applicant as the litigant did not even explain what herself did during the relevant period up to the time this application was filed. I found there was no reasonable or acceptable explanation for the delay. I had to consider the other important requirement: whether there are prospects of success in the main matter, which is the second part of the enquiry.

**WHETHER THE APPLICANT HAS REASONABLE PROSPECTS OF SUCCESS ON APPEAL**

[37] What constitutes prospects of success was fully explained in *Mlambo v Arosume Development (Pvt) Ltd & Ors* SC 35/23 at p. 10 as follows:

> "Prospects of success refer to the question of whether the applicants have an arguable case on appeal or whether the case cannot be categorised as hopeless.
> In the case of *Essop v S*, [2016] ZASCA 114, the Court in defining prospects of success held that;
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> > "What the test for reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a

> realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[38] Having failed to give an acceptable or reasonable explanation the applicant must at least have shown that she had very good prospects of success. This position was outlined in *Mahachi v Barclays Bank of Zimbabwe* SC6/06 where MALABA JA (as he then was) stated:

> "In a case of this kind, where no acceptable explanation for non-compliance with the Rules has been given, the applicant must show very good prospects of success on appeal"

In this case, I found that the applicant's main action in Case No. HC 4408/23 has no prospects of success. In that matter she sought an order to declare void the current deed of transfer of the property in question up to the fourth respondent for non-compliance with the Government Notice 159/57. Her claim or the cause of action is fully captured from para(s) 9 to 16 of the plaintiff's (applicant herein) declaration where it is fully stated as follows:

> "9. On or about 10th September 2010, first defendant wrongfully, unlawfully and unprocedurally obtained transfer of an immovable property namely certain piece of land situate in the District of Salisbury called stand 432 Mandara Township of Subdivision A of Lot 2 MANDARA OF THE Grange measuring 8 763 square metres [hereinafter referred to as the property].
>
> 10 The defendant wrongfully, unlawfully and procedurally approved the registration of the illegal transfer of the immovable property to first defendant and such transfer was registered in the seventh defendant's land register as Deed of Transfer 4106/2010.
>
> 11 The transfer of the immovable property above to first defendant and the approval of the transfer by seventh defendant is wrongful, illegal and unprocedural in the following respects:-
>
> 11.1 A property known as stand 432 Mandara Township does not exist individually but exist as part of stand 431 being the property purchased in 1986 by the late STEPHEN TAPINDWA MATEWA and the late JUDITH MATEWA from Deed of Transfer 2183/73 which is a composite Title Deed whose diagrams are contained in Deed of Transfer 2193A /73 and 2183B respectively;
>
> 11.2 The Government Notice 159/57 which approved the established of MANDARA Township states in clause 5 that stand no 431 shall not be sold or leased until the Chief Health Officer has certified that an approved system of sewerage disposal can be made available to such stand;
>
> 11.3 Permit 241A shows that stand 431 was not in compliance with this requirement in 1986 hence the stand could not be sold individually and outside its compositeness with stand 432;

11.4 As of October 2022, no Certificate of Compliance had been issued by the Chief Health Officer and for that reason stands 431 and 432 cannot be sold and or transferred individually;

11.5 In terms of clause 7 of schedule 1 of the Government Notice 159/57 the seventh defendant shall not pass transfer of stands within the Township in question until such time that he has received a Certificate from the Chief Town Planning Officer that clause 4 of Schedule 1 of the Government Notice 159/57 has been complied with and the servitudes required by clause 6 have been registered.

11.6 The proposed storm water drain in stand 431 has not been constructed; and

11.7 Stand number 432 Mandara Township could not be legally sold Compliance of a Certificate of Separation, construction of a storm water drain done to the specification of fifth defendant Separation issued by fifth defendant which renders the registration of the transfer of the property to first defendant by seventh defendant irregular and illegal.

12. The second defendant could not have legally sold and transferred stand 432 to third defendant in 1985 as stands 431 and 432 Mandara Township can only be sold and transferred as one in the absence of a Certificate of Compliance and a Certificate of Separation issued by fifth defendant a fact which is also borne by an endorsement on the Title Deed for stand 431 that the price for stand 431 includes the price for stand 432.

13. The sale and transfer of stand 432 by second defendant to third defendant was in the circumstances wrongful and illegal and seventh defendant acted illegally in registering the said transfer from second defendant to third defendant.

14. The third defendant could not legally sell and transfer stand 432 to fourth Defendant in the absence of a valid Certificate of Compliance and a Certificate of Separation issued by fifth defendant, consequently the seventh defendant wrongfully and unlawful registered the transfer of the stand to fourth defendant.

15. The first defendant could not have legally purchased stand 432 Mandara Township from fourth defendant in the absence of a valid Certificate of Compliance and a Certificate of Separation issued by fifth Defendant a fact which renders the registered of the transfer of stand 432 Mandara Township to first defendant wrongful and illegal.

16. In 2019 the sixth defendant wrongfully and unlawfully approved a relocation of Survey in respect of stand 432 Mandara Township in the absence of a valid Certificate of Compliance and a Certificate of Separation in respect of stand 431 and stand 432 issued by fifth defendant."

[39] What is clear from the above para(s) of the applicant's declaration in Case No. HC 4408/23 is that the applicant as the plaintiff therein challenges the validity of the Deed of Transfer number 4106/2010 on the basis that the first respondent unlawfully and unprocedurally obtained the transfer of the property. It was also alleged from that illegal transfer the subsequent transfers to the second and up to the fourth respondents were consequently invalid or void. This court has already found the said Deed of Transfer number 4106/2010 to be valid. In the matter brought by the first respondent and concerning a Matewa,

represented by Mr *Dondo* and the other respondents who included the Registrar of Deeds and the Surveyor General the same argument was raised that the Deed of Transfer No. 4106/2010 was unlawful and void. The court considered the same argument raised in this suit by the applicant and on 12 January 2023, the court handed down its judgment before DEME J where it held that: "The title deed issued under Deed of Transfer No. 4106/2010 be and is hereby declared valid". See para 1 of the said court order.

[40] The court has, therefore, pronounced a final judgment on the matter settling the issue of the validity of the said deed of transfer which is the foundation of the applicant's suit in the main matter. Having fully and finally determined the issue the court exercised its jurisdiction fully and became *functus officio*. The court cannot be asked to re-open the same issue. The said judgment by DEME J is still extant. At p 74 of the record is the letter from the Registrar of the Supreme Court dismissing the appeal which had been lodged against the court's decision under SC 37/23 dated 16 June 2023. That settled the matter. The Deed of Transfer 4106/2010 as declared by the court remains valid. The matter becomes *res judicata.* It involved principally the same parties and the same legal issue that was disposed of is again the same issue brought up from para 9 of the applicant's declaration. The principle of *res judicata* was fully explained in *Tongogara Rural District Council v Ndiripo* SC 19/23 in the following words:

> "The concept of *res judicata* basically means that "the matter has already been decided" and cannot be redecided. In the case of *Sibanda v Sheriff of the High Court* HB22-22 at p 6, the concept was lucidly defined as follows:
>
> > "The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in the proceedings between the parties and that it therefore cannot be raised again."
>
> In *Wolfenden v Jackson* 1985(2) ZLR 313 at 313B-C GUBBAY JA (as he then was) articulated the special plea of *rei judicata* as follows: -
>
> > "the exception *rei judicatae* is based principally upon the public interest that there must be an end to litigation and that authority vested in judicial decisions be given effect to even if erroneous. See *Le Roux en' Ander v Roux* 1967 (1) SA 446(a) at 461H. It is a form of estoppel and means that where a final and definitive judgement is delivered by a competent court the parties to that judgment or their privies (or in the case of a judgment in rem, any other person) are not permitted to dispute its correctness."

See *Munemo v Muswera* 1987(1) ZLR 20(SC)"

[41] This court having declared the said Deed of Transfer No. 4106/2010 to be valid it would also follow that the subsequent deeds of transfer in respect of the same property to the current one registered in favour of the fourth respondent are valid. The validity of the said deeds cannot be impugned. An extant court order has the force of law and remains binding unless reversed or set aside. The applicant did not challenge that the court order is still extant and that it applies to render the main proceedings improper. The applicant did not file any answering affidavit to dispute that the appeal against the order was dismissed by the Registrar in terms of the Supreme Court Rules and was never pursued. Mr *Nyakunika* in his oral submissions simply claimed that the relief sought is different from the one in the court order. A closer look at the main matter shows that the applicant wants the court to consider the same issue of the validity of the Deed of Transfer No. 4106/2010 which it resolved. Since it was ruled that the said deed of transfer was valid it consequently means that the other subsequent deeds of transfer flowing from it for the property are valid too.

[42] Given the above reasons, the applicant has no arguable case in the main matter. The action is hopeless. The applicant did not challenge that the claim, in any event, had prescribed, but given my decision above I did not consider it necessary to look at the issue of prescription *vis-a-vis* the applicant's action. The enquiry was accordingly terminated with the conclusion that there was no reasonable explanation for the delay and that the applicant's main matter in HC 4408/23 has no prospects of success on the basis that the court has already settled the issue concerning the validity of the Deed of Transfer No. 4106/2010 which is being challenged again by the applicant. The indulgence sought could not be granted.

**COSTS**

[43] Both the first and second respondents prayed for punitive costs to be awarded against the applicant. I accepted that the conduct of the applicant deserves an award of costs on a punitive scale. It is trite that costs on a legal practitioner and client scale are only granted in exceptional cases. In *casu*, there are such exceptional circumstances warranting an order for costs on a higher scale. The applicant, despite being aware of the court order by this court settling the issue of the validity of the Deed of Transfer in question being No.

4106/2010, persisted with this application. The meaning and effect of the decision by DEME J ought to be known by the applicant who was represented by a senior counsel, Mr *Dondo*. The judgment of the court is still extant. To seek to re-argue the case in the circumstances, was, in my view, a blatant abuse of court process. The issue of the validity of the said title deed was resolved fully and finally by this court. There must be finality to litigation. The authority of this court must be reasserted. Litigants cannot abuse the court process and get away with it. This application was completely without merit. All it succeeded in doing was wasting the court's time and making the respondents suffer unwarranted litigation expenses. Costs on a legal practitioner and client scale were, therefore, proper, just and fair in the circumstances.

**DISPOSITION**

[44] In light of these reasons, judgment was entered as afore-stated.

**DEMBURE J:** ……..

*Dondo & Partners*, applicant's legal practitioners
*Lawman Law Chambers*, 1st respondent's legal practitioners
*Nyakutombwa Legal Counsel*, 2nd respondent's legal practitioners