

**REPORTABLE (24)**

**JIMMY GAZI**  
**v**  
**MBABABALA PROPERTIES (PRIVATE) LIMITED**

**SUPREME COURT OF ZIMBABWE**  
**31 JANUARY 2023 & 24 MARCH 2023**

*J. Tshuma*, for the applicant

*N. Mazibuko*, for the respondent

**IN CHAMBERS**

**MAVANGIRA JA:**

1. This is a chamber application for condonation and extension of time within which to file a notice of appeal against part of the judgment of the High Court of Zimbabwe sitting at Bulawayo, being Judgment No. HB 16/22, handed down on 20 January 2022.
2. The order sought by the applicant in this application, as amended, would, if granted, read as follows:
  - “1. The application for condonation for failure to comply with rule 55 (2) of the Supreme Court Rules, 2018, be and is hereby granted.
  2. The application for extension of time within which to file and serve a notice of appeal in terms of the Rules be and is hereby granted.
  3. The applicant is granted leave to note the appeal within 15 days from the date of the granting of this order.
  4. The appeal record prepared in the matter under SCB 10/22 be and is hereby deemed to be the appeal record in the appeal to be filed by the applicant in terms of para (3) above.”

### **FACTUAL BACKGROUND**

3. The applicant filed an appeal against the judgment of the High Court (the court *a quo*) sitting at Bulawayo referred to in para (1) above. In the said judgment the court *a quo* dismissed the applicant's claim for:

- “1. An order compelling the defendant to pass transfer to the plaintiff or his nominee, of a certain immovable property, being Lot 3 of Lot 1 of Swaite, measuring ....
2. An order directing the defendant to, within 21 days of the date of this order, execute all documents, and take all necessary steps to procure the transfer of the above-described property to the plaintiff, .....
3. Costs of suit.”

4. The appeal was set down for hearing but on the date of hearing it was struck off the roll. The respondent's unchallenged submission was that it was struck off the roll due to the applicant's failure to comply with r 55 (2) of the Supreme Court Rules, 2018, (the Rules). The court ruled it to have been “regarded as abandoned” and “deemed to have been dismissed” by operation of law, viz., r 55 (6).

### **THIS APPLICATION**

5. The applicant thereafter filed this application seeking the relief, as amended, reflected in para 2 above.

### **APPLICANT'S SUBMISSIONS BEFORE THE COURT**

6. In his submissions to the court in motivation of the application, Mr *Tshuma*, for the applicant, also addressed the points raised by the respondent in its opposing papers. He contended that r 70 is not applicable to this application and that it is Practice Direction

3/2013 that provides the applicant with a remedy as it explains what happens where a matter is struck off the roll as happened *in casu*. In para 5, it gives a litigant 30 days within which to rectify the defect. He submitted that para 5 must be read together with paras 3 and 4 which provide firstly, that the term “struck off the roll” shall be used to effectively dispose of matters which are fatally defective and should not have been enrolled in that form in the first place. Secondly, that if a court strikes a matter off the roll, the effect is that such a matter is no longer before the court. He submitted that he disagreed with the respondent’s counsel’s interpretation that a Practice Direction is subordinate to the Rules. He argued that a Practice Direction is an explanation of the Rules, especially where there is a lacuna in the Rules.

7. It was also counsel’s submission that the respondent’s contention that the application was filed out of time was predicated on the erroneous assumption that the applicant ought to have filed his application in terms of r 70, which rule he submitted was not applicable. The application before the court was properly filed within 30 days as provided for by Practice Direction 3/2013.
8. Counsel submitted that the respondent’s contention that there was no notice of appeal attached to this application because what was attached was a **draft** notice of appeal was erroneous and ill-conceived because the draft notice of appeal is the notice of appeal that will be filed if this application succeeds. Furthermore, that in any event, the respondent’s argument was predicated on r 70 being the applicable rule whereas *in casu*, the applicant is in fact starting afresh and not seeking a reinstatement.

9. Counsel argued that with regard to the respondent's contention that the applicant had not complied with r 37, the particular aspect of r 37 that was being referred to was not known as it was not stated. He also argued that the attached notice of appeal is in accordance with the Rules. Counsel addressed the respondent's contention that the applicant does not, in his papers, show why he says that he has prospects of success in the intended appeal. His submission was that the applicant had attached to the application and incorporated into his affidavit, the heads of argument that were filed in anticipation of the hearing which unfortunately resulted in the order striking the matter off the roll. The said heads of argument, he submitted, summarise the applicant's case and show that the applicant has an arguable case. He prayed for the granting of the order sought, as amended during the proceedings.

#### **RESPONDENT'S SUBMISSIONS BEFORE THE COURT**

10. Mr *Mazibuko*, for the respondent, thereafter addressed the court. He submitted that the respondent opposed the application on the basis that the applicant had adopted the wrong procedure. He contended that the applicant ought to have filed an application for the reinstatement of his appeal in accordance with r 70, as that is the appropriate remedy available to him in the circumstances of the matter. The notice of appeal filed by the applicant had not been defective; the applicant's downfall having been occasioned only by his failure to enter into good and sufficient security for the respondent's costs of appeal.
11. It was further contended that the instant application was filed out of time as r 70 requires that it be filed within 15 days.

12. Counsel further argued that the applicant's reliance on Practice Direction 3/2013 was ill conceived as Practice Directions are meant to cater for situations where there is a *lacuna* in rules and the particular rules have no provision catering for a specific situation. Furthermore, that whereas r 37 (1) requires a notice of appeal to be attached, the applicant had attached a **draft** notice of appeal, thereby rendering the document defective. In addition, the applicant's address for service was not stated in the draft notice of appeal, in defiance of the Rules.
  
13. Regarding the merits of the application, respondent's counsel submitted that the applicant had, in his papers, not given a satisfactory explanation for his failure to comply with the Rules and that this was despite the applicant having been advised about the non-compliance with r 55. The said advices were by way of letter authored by counsel in April 2022 and also by the point being repeated in the respondent's heads of argument filed in August 2022. Thus, for 7 months the applicant took no action about the complaint regarding his non-compliance with the rule in respect of security for costs. The applicant having in his notice of appeal, tendered security for costs of the appeal, could not now be heard to argue that he did not believe that security for costs was needed.
  
14. It was also respondent's counsel's argument that the applicant's claim had prescribed, anyway, and that on the basis of any or all of the points thus raised, the application's fate was an unavoidable dismissal with costs. Furthermore, even if the court is minded to grant the application, the applicant must still be ordered to pay costs.

## ANALYSIS

15. Rule 55 provides as follows:

**“55. Security**

- (1) If the judgment appealed from is carried into execution by direction of the court appealed from, security for the costs of appeal shall be as determined by that court and shall not be required under this rule.
- (2) Where the execution of a judgment is suspended pending an appeal and the respondent has not waived his or her right to security, the appellant shall, before lodging copies of the record with a registrar, enter into good and sufficient security for the respondent’s costs of appeal:  
Provided that where the parties are unable to agree on the amount or nature of the security to be furnished—
  - (i) the matter shall be determined by the registrar upon application by the appellant; and
  - (ii) the registrar shall specify the period within which the security shall be furnished
- (3) A judge may, on application at the cost of the appellant and for good cause shown, exempt the appellant wholly or in part from the giving of security under subrule (2).
- (4) No security for costs in terms of subrule (2) need be furnished by the Government of Zimbabwe or by a municipal or city council or by a town management board.
- (5) Subject to the proviso to subrule (2), where an appellant is required by this rule to furnish security for the respondent’s costs of appeal, such security shall be furnished **within one month of the date of filing of the notice of his or her appeal** in terms of rule 37 or, where applicable, within the period specified by the registrar in terms of the proviso to subrule (2).
- (6) If an appellant who is required to furnish security for the respondent’s costs of appeal fails to furnish such security with (in) the period specified in subrule (5), the appeal shall be **regarded as abandoned and shall be deemed to have been dismissed.**” (the emphasis is added)

16. The emphasis placed on the words or phrase in r 55 (6) above, is meant to show the irresistible immediate calling to mind of r 70 which provides the following:

**“MISCELLANEOUS**

***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. (the added emphasis and the differentiation thereof is intended).

17. It is tempting to conclude this judgment at this very juncture because the answer to the dispute seems to stand out and to be so clearly visible as to require no further elaboration. But that luxury is not available, lest I fall foul of the trite requirement of the law to give reasons for the court's judgment.
18. The applicant's appeal in SCB 10/22 having been regarded as abandoned and deemed to have been dismissed, it fell squarely into the purview of paras (b) and (c) of subrule (1) of r 70. At the risk of repetition, para (c) regulates all appeals "**deemed to have been dismissed**", "**in terms of any provision of these rules.**"
19. Regarding the appellant's contention as reflected in para 11 above, I pause at this juncture merely to note that r 70 provides that the application for reinstatement is to be made "within 15 days of receiving any notification by the Registrar in terms of subrule (1)." However, *in casu*, the Registrar had not sent any notification to the applicant, hence the ruling by the court that it was by operation of law that the matter had been regarded as abandoned and deemed to have been dismissed and that therefore the matter ought to be struck off the roll, as the court accordingly proceeded to do. The court correctly so ordered even though there was no notification to the applicant by the Registrar.

20. A failure by the registrar to notify a party in terms of r 70 does not, in my view, deprive a litigant of the remedy provided for in r 70 (2). Neither does it create a different legal status or consequence to the affected appeal. In terms of subrule (2) of the rule, it is capable of reinstatement on good cause shown. The striking of the matter off the roll was subsequent to, and resultant of the deemed dismissal by operation of law. Non-notification by the registrar does not alter the nature or character of the matter. Admittedly, the lack of notification by the registrar, even though it might in itself be, and at the same time also create a highly unsatisfactory, if not prejudicial state of affairs, may result in the litigant unwittingly and unintentionally failing to take the necessary action within the stipulated time frame. While ignorance of the law is said to be no excuse, it seems to me that where there has been no notification as required, the effect of such non-notification is not, and cannot have been meant to render the appeal as having been finally and effectively dismissed and thereby leaving the litigant with no opportunity to seek reinstatement. If that were so, this application would be inappropriate. It must remain as an appeal that stands as having been regarded as abandoned and deemed to have been dismissed. It is my considered view that in such a situation, even without the registrar's notification, a litigant, on becoming aware by itself, of the fate of its appeal by reason of the operation of law per r 55 as read with r 70, may properly apply for condonation of non-compliance with the rules and for extension of time within which to file the application for reinstatement. It is my view that that is what the applicant ought to have done *in casu*.
21. Practice Direction 3/2013 does not make r 70 redundant. It does not override or supersede the rules. The Rules having been enacted in 2018, subsequent to the Practice Direction,

could not be taken as having been made redundant by the Practice Direction made five years earlier. In any event, the Rules are given life to or enacted by a Statutory Instrument and certainly enjoy a superior status to the Practice Direction. Any confusion that might have been encountered, if at all, in ascertaining the appropriate and legally provided remedy, ought to be cleared by these factors.

22. It is also important to note that the notification that is done by the Registrar must be recognized for the administrative action that it is. On the other hand, the regarding as abandoned and being deemed to have been dismissed, is automatically triggered by operation of law. In terms of the Rules, the applicant's remedy lies in r 70.
  
23. The rest of the issues raised and ventilated by the parties need not detain the court. The application must be struck off the roll. I find no reason for departing from the norm, that costs follow the cause.
  
24. It is accordingly ordered as follows:

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

*Webb, Low & Barry*, applicant's legal practitioners

*Calderwood, Bryce Hendrie & Partners*, respondent's legal practitioners