

**REPORTABLE** (102)

(1) **BOBBY DUBE** (2) **KHULEKANI MOYO**  
(3) **VINCENT SITHOLE** (4) **SIPHAKAMILE MPOFU** (5)  
**LUKE DUBE** (6) **THAPELO SEBETA** (7) **CUTHBERT**  
**MARADZA** (8) **EDITH DUBE** (9) **FAITH MAGARIRA**  
v  
**TM SUPERMARKETS (PRIVATE) LIMITED**

**SUPREME COURT OF ZIMBABWE**  
**HARARE: 5 OCTOBER 2022**

*J. Mambara*, for the applicants

No appearance for the respondent

**IN CHAMBERS**

**MATHONSI JA:** After hearing this application for reinstatement of an appeal purportedly made in terms of r 70(2) of the Supreme Court Rules, 2018, I issued the following order which the applicants consented to:

“By consent, it is ordered that:

1. The application, being incompetent, is hereby struck off the roll with no order as to costs.
2. Reasons are to follow.”

I undertook to give reasons for the order to assist the parties appreciate why they misapplied the Rules of this Court. What follows hereunder are those reasons.

## **FACTS**

On 2 March 2022, the applicants noted an appeal to this Court under case number SCB 30/22 against the judgment of the Labour Court handed down on 23 July 2021. They were legally represented. Having been employed by the respondent on fixed-term contracts of lengths varying from four to seven years, the applicants sought to challenge the Labour Court's decision which concluded that they had no basis for legitimate expectations of reemployment by the respondent.

The said appeal was set down for hearing at Bulawayo on 20 July 2022. On that date, Mr *Mambara*, their counsel of choice was not in attendance. He instructed his correspondent, Mr *Sengweni*, to appear before the court and apply for a postponement of the hearing of the appeal by reason that Mr *Mambara* was indisposed. The court allowed the application and rolled over the hearing of the appeal to 21 July 2022 to enable the applicants' counsel of choice to appear and prosecute the appeal. He did not. Infact there was no appearance at all for the applicants.

Resultantly, after hearing counsel for the respondent, the court issued an order in the following terms:

“IT IS ORDERED THAT:

The appeal be and is hereby dismissed for want of prosecution with costs on the ordinary scale.”

Upon becoming aware of the fate of their appeal the applicants sprung into action. They brought this application for reinstatement of their appeal in terms of r 70(2) of the Supreme Court Rules, 2018. The basis of the application is that they were not in wilful default when the appeal was heard in that, having diligently prosecuted the appeal up to then, they fell

short on the date of hearing because their legal practitioner fell ill. He could therefore not travel to Bulawayo for the appeal hearing.

### **SUBMISSIONS BY THE APPLICANT**

At the hearing of the application, even though the respondent was in default and filed no opposing papers, I requested counsel to address me on two pertinent points. Firstly, whether the application could competently be made under r 70(2) in the absence of notification issued by the Registrar to the applicants in terms of r 70(1). Mr *Mambara*, who appeared for the applicants, initially took the view that the dismissed appeal could be subsumed under r 70(1)(c), which requires the Registrar to notify the parties of any appeal that is deemed to have been dismissed in terms of any provisions of the Rules.

In counsel's view, the court order issued by the court which I have reproduced above should be taken as standing for the standard letter of the Registrar which is issued to the parties in terms of subrule (1) of r 70 notifying the parties of the fate of an appeal deemed to have lapsed, regarded as abandoned and deemed to have been dismissed in terms of any provision of the rules within the contemplation of that subrule.

After our exchange on the applicability of that Rule to an appeal that is dismissed by the court in terms of r 53(3) for want of prosecution as opposed to one deemed dismissed in terms of r 70, Mr *Mambara* saw the light, albeit belatedly. He conceded that r 70(2) was inapplicable. To be precise, he accepted that the appeal under case number SCB 30/22 was not deemed to be dismissed in terms of any provision of the Rules. Instead, it was actually dismissed by the court. He also conceded that no notification had been issued by the Registrar in terms of subrule (1) as to trigger the remedy provided for under subrule (2) of r 70.

Secondly, I also invited Mr *Mambara* to address his mind to the competency of a single Judge of this Court, sitting in Chambers, to set aside a decision of the full Court. That being the nature of relief that the applicants sought in this application, Mr *Mambara* conceded that a single Judge of this Court, sitting in chambers, could not competently do so. Counsel entreated me, as a result, to strike the matter off the roll with no order as to costs. As shall more fully appear hereunder the concessions made by counsel were properly made.

### **THE LAW**

As already mentioned, two key issues arose for determination in this application. The first relates to the propriety of bringing an application in terms of r 70(2) for the reinstatement of an appeal dismissed for want of prosecution by the court as opposed to one dismissed by the Registrar. The second relates to the competency of a single Judge, sitting in chambers, to set aside a judgment passed by the full court.

The requisites of an application for the reinstatement of an appeal in terms of r 70(2) are all set out in that rule. Rule 70 provides that:

***“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 underlining is for emphasis)

Clearly, the basic juristic act that triggers the application of r 70(2) is a notification by the Registrar in terms of r 70(1). Without it, a litigant cannot competently invoke r 70(2)

and purport to institute an application for the reinstatement of an appeal. In *Bonde v National Foods Limited & Anor* S–96–21 at p 8, MAVANGIRA JA aptly stated:

“21. The rule specifically refers to the reinstatement of appeals. It does not apply to orders made by the court but to decisions of the Registrar in the stated circumstances. The reinstatement that the applicant craves is of an application for reinstatement of an application.”

More importantly, there is presently no procedural mechanism by which a single Judge in chambers can reinstate an appeal that has been dismissed by the full court as was the case under the Old Supreme Court Rules. Just by way of comparison, see *Machiels v Coghlan, Welsh & Guest* S–46–98, wherein this Court had occasion to deal with an application for the reinstatement of an appeal in terms of the proviso to r 25(6) of the Supreme Court Rules, 1964.

Although the parties in that case consented to the reinstatement of the appeal which had been dismissed for want of prosecution, counsel for the respondent objected to the overturning of the decision on costs which had been made by three Judges. On this issue, MCNALLY JA observed at pp 7 – 8 of the cyclostyled judgment:

“There remains two issues concerning costs: As far as this application is concerned, the parties are agreed that costs be in the cause. But what of the award of costs made when the appeal was dismissed?”

Mr *de Bourbon*'s submission was that I, sitting as a single judge, have no power to overturn a decision on costs made by three judges of this Court. The applicant asks that I should reserve those costs or order them to be in the cause.

I start with the proposition that my authority stems from Rule 25(6) (proviso). The Rule Reads:-

‘When at the hearing of an appeal there is no appearance by, and no written argument on behalf of an appellant who is not in custody, the court may dismiss the appeal:

Provided that a judge may on application and for good cause shown reinstate, on such terms as he thinks fit, any appeal dismissed in terms of this subrule.’”  
(The underlining is for emphasis.)

If anything, the foregoing *dictum* from the *Machiels* case eminently demonstrates that a single Judge of this Court, sitting in chambers, does not have jurisdiction to reinstate an appeal that was dismissed by the full Court for want of prosecution unless expressly authorised by statute. The position that a single Judge sitting in chambers cannot do what he or she is not authorised to do by the Supreme Court Act [*Chapter 7:13*] or the Rules of this Court has been stressed time and time again. In *Church of the Province of Central Africa v Kunonga & Anor* 2008 (1) ZLR 413 (S) at 416 E, Chidyausiku CJ made the point:

“The issue that arises is whether a Judge in Chambers can strike out an appeal for failure to comply with the Rules of this Court. Where the Rules provide that a Judge can do that, I see no problem. Where, however, such jurisdiction is not conferred by statute or the Supreme Court Rules, I entertain serious doubt.” (The underlining is for emphasis.)

See also *Blue Rangers Estates (Pvt) Ltd v Muduviri & Anor* 2009 (1) ZLR 368 (S) at 374F – 375B; *Mutasa & Anor v The Registrar of the Supreme Court & Ors* S–27–18 at p 6 – 7 and *Mbatha & Anor v Ncube & Anor* S–19–18 at p 7.

## **SYNTHESIS**

It is apparent that the applicants’ cause of action did not meet the jurisdictional threshold embedded in r 70(2). The applicants’ appeal was dismissed by this Court for want of prosecution. The applicants only uplifted the court order but did not have notification from the Registrar in terms of subrule (1) of r 70, which would have entitled them to proceed in terms of r 70(2). Having elected to proceed in terms of r 70(2) in the absence of the Registrar’s notification, the applicants filed an incompetent application. It did not meet the remit of r 70 (2) and accordingly suffered still-birth.

Substantively, there was no jurisdictional basis upon which I, as a single Judge sitting in chambers, could reinstate a civil appeal that was dismissed by the full court. In any event, the applicants had not suggested any basis for doing so. In the circumstances, the application suffered the fate of all such applications. It stood to be struck off the roll by reason that it was improperly made.

### **DISPOSITION**

The applicants failed to demonstrate that they could approach this Court for the reinstatement of an appeal that was dismissed by the full Court in terms of r 70(2). In addition, there was no basis upon which I could order the reinstatement of an appeal that was dismissed by the court for want of prosecution.

It is for the above reasons that I made the order set out at the outset of this judgment.

*J. Mambara & Partners*, applicants' legal practitioners

*Coghlan & Welsh*, respondent's legal practitioners