

DISTRIBUTABLE (12)

IN RE THE MALILANGWE TRUST

**SUPREME COURT OF ZIMBABWE
HARARE: 12 MAY 2021 & 1 FEBRUARY 2022**

L.T. Kafesu, for the applicant

IN CHAMBERS

KUDYA AJA: This is an application for condonation of failure to file a notice of appeal within the time prescribed by r 38 of the Supreme Court Rules, 2018 and extension of time within which to appeal.

THE FACTS

The applicant is a charitable trust of a public character. It was registered with the Registrar of Deeds in terms of s 5 (b) and (m) of the Deeds Registry Act [*Chapter 20:05*] under a notarial deed of trust number MA NO 2079/2019 on 25 September 2019.

Thereafter the applicant lodged a chamber application for the registration and certification of the same trust with the High Court. On 2 January 2020, a judge in chambers granted the following order:

“On payment of the appropriate fees provided for in SI 187/2019 (item 12 of Schedule r 2) the Notarial Deed of Trust MA. NO. 20179/2019 be and is hereby registered with the court and a copy thereof shall be retained by the Registrar who shall issue a Registration Certificate of the Trust.”

The Registrar of the High Court failed to effect the order. She sought directions from the presiding judge. Only then did it dawn upon the judge that the order lacked a legal basis to stand on. The presiding judge invoked the provisions of Order 49 r 449 of the High Court Rules, 1971 and sought to rescind the order.

The appropriate notice of her intention to revoke the order was duly served on the applicant. On the date of hearing, counsel for the applicant argued in support of the order. Judgment was reserved.

The judgment, HMT 59/20, was released on 15 September 2020. The order of 2 January 2020 was revoked in its entirety on the basis that it was “erroneously sought and erroneously granted”. The applicant’s counsel collected it on 17 September 2020.

The applicant sought to appeal against the judgment on 7 October 2020, which turned out to be a day after the *dies induciae* for doing so had lapsed. It filed the initial application for condonation and extension of time within which to note an appeal under r 61 instead of r 43 of the rules of this Court. That application was removed from the roll for that reason on 28 October 2020.

The present application was filed on 19 November 2020. It was set down on 12 March 2021 for hearing before me in chambers on 30 March 2021. On the date of hearing, I postponed the application to 12 May 2021 to enable the applicant to file heads of argument to address the propriety of lodging the application for a prospective appeal to this Court, without a respondent. The applicant’s counsel duly did so on 30 April 2021.

On the date of hearing, I directed counsel to address me on both the preliminary point and the merits of the application and thereafter reserved judgment. I am grateful to counsel's industry on the preliminary point.

I now turn to deal with the preliminary point.

Whether an appeal can properly be filed to this court without a respondent

THE LAW

The Supreme Court Rules, 2018, do not expressly deal with a situation, such as the present one, where an appeal is sought to be lodged against an order or judgment of a subordinate court or tribunal, without a corresponding respondent. However, r 73, incorporates by reference the position that relates to the High Court. It is for this reason that the High Court Rules are the default rules that cover the procedural gaps in the Supreme Court Rules.

Regarding chamber applications, r 39 (4) of the Supreme Court Rules 2018 reads as follows:

“(4) Applications referred to in rules 43, 48, 49, 53 and 55 shall be by way of chamber application as regulated, *mutatis mutandis*, by the High Court Rules.”

An application in which only one party approaches a court for relief without a corresponding respondent falls into the category of *ex parte* applications. TJM Paterson in *Eckard's Principles of Civil Procedure in Magistrates Court* 5th ed Juta 2010 states that:

“The *ex parte* applications may be used in the following cases; (*inter alia*) when the applicant is the only person with an interest in the case.”

In the same vein is *Herbstein and Van Winsen the Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* by Cilliers, Loots and Nel, 5th ed at p 421:

“An *ex parte* application is an application brought without notice to anyone, *either* because no relief of a final nature is sought against any person, *or* because notice might defeat the object of the application or the matter is one of extreme urgency. It has also been described as an application of which notice has *as a fact* not been given to the person against whom some relief is claimed in his absence. Where relief is claimed against another party in an *ex parte* application, the application must be ‘addressed’ to that party but need not be served on that party.”

On the same page, in note 7, the learned authors rely on *Development Bank of Southern Africa Ltd v Van Rensburg* [2002] 5 SA 425 (SCA) at 443 and *Ghomeshi-Bozorg v Yousefi* 1998 (1) SA 692 (W) at 696 to underscore that:

“An order granted *ex parte* is by nature provisional, irrespective of the form which it takes.”

In our law, in terms of Order 32 r 226 (1) of the High Court Rules, 1971 applications fall into two separate and distinct groups. The first relates to court applications, which are made in writing to a court on notice to interested parties.

Rule 226 (2) (d) prescribes that:

- “(2) An application shall not be made as a chamber application unless—
(d) the relief sought is for a default judgment or a final order where—
(ii) there is no other interested party to the application; or”

Again r 241 (1) contemplates the absence of a respondent by prescribing that a chamber application that is not going to be served on an interested party be filed under Form 29B. Rule 242 (1) (a), however, contemplates the existence of a respondent to whom the applicant is precluded from serving a chamber application because he “reasonably believes that the matter is uncontentious in that no person other than the applicant can reasonably be expected to be affected by the order sought or object to it”.

In our procedural law, unlike in South Africa, therefore, an *ex parte* application filed in terms of r 226 (2) (d) (ii) may be made for a final order in circumstances where there is no other interested party to the application.

A general perusal of our law reports shows that *ex parte* cases have been determined by this Court. The obvious case that comes to mind, where the High Court *mero motu* refused to register a legal practitioner “on the basis of a long-standing rule of practice adopted and enforced in this country that members of the legal profession who appear to present cases must be formally dressed, tidy and well groomed” is *In re Chikweche* 1995 (1) ZLR 235 (S). My researches have shown that between 1992 and 2009 all the *in re* cases such as *In re Hoggart* 1992 (1) ZLR 195 (S) (immigration), *In re Wood & Anor* 1994 (2) ZLR 155 (S) (immigration) *In re Kwenda* 1997 (1) ZLR 116 (S), (Criminal offences) *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S) (Law and Order Maintenance Act), *In re Ndimande: A-G v Ndimande* (criminal) 1992 (2) ZLR 259 (S), *In re Patrick Chinamasa* SC 113 /2000 (contempt of court) and *In re Hativagone & Ors* 2004 (2) ZLR 133 (S) (fraud permanent stay under s 24 (2) of the old Constitution) that came before this Court were constitutional challenges. I was unable to find a case on all fours with the present matter.

That an appeal can be lodged in the Supreme Court without a respondent is implicitly stated in s 43 of the High Court Act [*Chapter 7:06*]. It reads:

“43 Right of appeal from High Court in civil cases

- (1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction.”

Any judgment of the High Court that is not specifically excluded by subs (2) of s 43 of the High Court Act is therefore appealable. The present judgment is not excluded so it would be appealable.

To the same effect is s 21 of the Supreme Court Act [*Chapter 7:13*], which provides that:

“21 Jurisdiction in appeals in civil cases

- (1) The Supreme Court shall have jurisdiction to hear and determine an appeal in any civil case from the judgment of any court or tribunal from which, in terms of any other enactment, an appeal lies to the Supreme Court.
- (2) Unless provision to the contrary is made in any other enactment, the Supreme Court shall hear and determine and shall exercise powers in respect of an appeal referred to in subsection (1) in accordance with this Act.”

The provisions of rules 37 (2), 37 (3) and 43 (4) of the Supreme Court Rules, 2018, which require that a copy of the appeal and chamber application shall be served on a respondent, would therefore be inapplicable in a case such as the present one. I am satisfied that the present application in which the applicant seeks to appeal without citing a respondent is contemplated by the Supreme Court Rules 2018 as read with the above cited provisions of the High Court Rules, 1971.

I find the application to be properly before me.

I now proceed to determine whether the applicant is entitled to the relief it seeks.

It is trite that the general requirements for an application for condonation and extension of time to note an appeal are the length of the delay, the reasonableness of the explanation for the delay and the prospects of success on appeal. These factors must be

considered cumulatively and not individually. See *Ester Mzite v Damafalls Investments (Pvt) Ltd* SC 21/18.

THE EXTENT DELAY AND THE REASONS THEREOF

In the present matter, the applicant was required to file its notice of appeal by 6 October 2020. It filed the present application on 19 November 2020. This was a delay of 6 weeks. It was not an inordinate delay regard being had to the explanation provided by its erstwhile legal practitioner. She filed the founding affidavit for the applicant and took personal responsibility for failing to compute the *dies induciae* from the *ex facie* date of judgment and for basing the initial application on r 61 instead of r 43. This Court has in numerous cases emphasized that the duty of a legal practitioner is to be knowledgeable about the rules of this Court. It is not to make excuses, based on their ignorance of the rules of court, on behalf of the clients. These were, however, minor bleeps and blunders that could have been avoided with a small measure of diligence. I, however, accept the explanation proffered as reasonable.

PROSPECTS OF SUCCESS

The application revolves upon the prospects of success on appeal.

THE JUDGMENT A QUO

The learned judge *a quo* relied on r 449 (1) (a) of the High Court Rules, 1971, to revoke the judgment. The presiding judge held that the High Court did not have the jurisdiction to either register or issue a certificate of registration to the applicant. And, further, held that the absence of an enabling statutory framework precluded the Registrar of the High Court from enforcing or implementing the order of 2 January 2020. The presiding judge further held that as the applicant had already been registered by the appropriate authority, it could not properly

seek a second registration and certification from the High Court. All that the High Court could do was to issue a mandatory interdict, for good cause, against the Registrar of Deeds to register and certificate the applicant had he declined to do so.

The judge *a quo* also relied on the case of *Veritas v Zimbabwe Electoral Commission & Ors* SC 103/20 to hold that the applicant was not a legal person and as such it could not invoke its inherent powers codified in s 13 of the High Court Act to give it access to address a wrong or enforce civil remedies.

THE PROSPECTIVE GROUNDS OF APPEAL

The applicant intends to raise three grounds of appeal, which are worded as follows:

1. The court *a quo* erred in law by applying subs (sic) (1) (a) of Order 49 Rule 449 of the High Court Rules to the facts at hand, in that the order was not erroneously sought nor was it erroneously granted.
2. The court *a quo* erred in law and in fact in holding that the order granted was incapable of enforcement when the actual issue before the court had not been enforcement but registration.
3. The court *a quo* erred in law and fact in concluding that the court had no jurisdiction to register the trust by virtue of it having been registered with the Deeds Registry Office when there is no law or practice barring such registration with the High Court.

The applicant will seek that the appeal be allowed, the judgment *a quo* be set aside and substituted with the initial order granted on 2 January 2020.

It is clear from the grounds of appeal as worded that the applicant seeks to impugn all the other legal and factual findings of the court *a quo* other than the legal finding that it does not have legal standing to sue in its own name.

APPLICATION OF THE LAW TO THE GROUNDS OF APPEAL

The first ground of appeal, which mirrors the averment made by the applicant in para 14.1 of its founding affidavit, specifically limits the attack to the construction of r 449 (1) (a) to the finding that the initial order “was erroneously sought or erroneously granted”. It does not further impugn the inapplicability of this subrule to circumstances where there is an absent party adversely affected by the order. However, in oral argument, Mr *Kafesu*, for the applicant, argued that as there was no respondent *a quo*, the order could not conceivably have been “granted in the absence of any party affected thereby”. He contended that the only party affected by the order was the applicant, which through the chamber application, was present and not absent before the High Court. He therefore submitted that the revocation could not properly be done under r 449 (1) (a).

He further contended that the High Court had jurisdiction to register the applicant notwithstanding that this had already been done by the Registrar of Deeds. Lastly, he argued that the learned judge erred in holding that the order was incapable of enforcement when the actual issue before the Court was registration.

Rule 449 reads as follows:

“449. Correction, variation and rescission of judgments and orders

- (1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order—
 - (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or
 - (b) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
 - (c) that was granted as the result of a mistake common to the parties.
- (2) The court or a judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed”

The meaning of r 449 (1) (a) was rendered in *Grantully (Pvt) Ltd & Anor v UDC Ltd* SC 17/2000 (2000 (1) ZLR 361 (S)). This Court said at pp 3 and 5 that:

“Rule 449 is one of the exceptions to the general principle that once a court has pronounced a final judgment or order it is *functus officio* and has itself no authority to correct, alter or supplement it”. “Moreover, the specific reference in Rule 449(1) (a) to a judgment or order granted “in the absence of any party affected thereby” envisages such a party being able to place facts before the correcting, rescinding or varying court, which had not been before the court granting the judgment or order. I think the Rule goes beyond the ambit of mere formal or technical defects in the judgment or order.”

The purpose of r 449 is to prevent the continued existence and perpetuation of an obvious judicial injustice by correcting or setting it aside. See *Tiriboyi v Jani & Anor* 2004(1) ZLR 470(H) at 472D-F.

The three conjunctive prerequisites for invoking r 449 (1) (a) were rendered by GOWORA JA in *Maxwell Matsvimbo Sibanda v Zambe Nyika Gwasira & Ors* SC 14/21 at para [26]. They are that:

- “(a) The judgment must have been erroneously sought or granted.
- (b) The judgment must have been granted in the absence of the applicant and
- (c) The applicant’s rights or interests must be affected by the judgment. See *Mashingaidze v Chipunza & Others* HH 688/15.”

Mr *Kafesu* strongly argued that there was not another party interested or affected by the order other than the applicant. The relief sought by the applicant demonstrates his patent error. In terms of the relief sought, the registrar was required firstly, to accept the appropriate fee provided for in para 12 to the Second Schedule of the High Court (Fees) (Civil Cases) (Amendment) Rules, SI 187/2019, secondly, to register the notarial deed with the court, thirdly, to retain a copy thereof and lastly, to issue a registration certificate of the trust to the applicant. The registrar was therefore a party with a direct and substantial interest in the order sought. Indeed, the fact that when confronted with the order, the registrar was unable to implement it

clearly shows that he was an interested party. There is no doubt in my mind that the applicant failed to cite the registrar as a party who had a direct and substantial interest in the application.

The further and alternative argument by Mr *Kafesu* was that, as the application was addressed to the Registrar of the High Court, he cannot be said to have been absent. It is correct that every application lodged in the High Court is by operation of law addressed to the Registrar of that court. *Herbstein and van Winsen, supra*, at p 421, makes the same point in the following words:

“In an *ex parte* application the notice of motion is addressed to the registrar. It must be supported by an affidavit as to the facts upon which the applicant relies for relief.”

The same procedural requirement to address every application to the Registrar of the court *a quo* and then to other interested parties is prescribed by both Form 29 and 29B. It is, however, noteworthy that such an address does not signify the service of the application upon the registrar. Rather, it is an administrative device that allows the registrar to file the issued pleading in a court record opened at the institution of the relevant proceedings. It does not, therefore, denote service of the relevant pleading on the Registrar. In any event, it would be well-nigh impossible for the registrar to ferret through every pleading to determine whether or not he is being addressed as a litigant or as an administrator. Where, therefore, an applicant wishes to sue the registrar, he or she or it must treat him as befitting of every other respondent by specifically citing him on the face of the application, utilizing the appropriate form and serving him with the application.

It seems to me that it was important and necessary for the applicant to specifically follow the relevant requirements prescribed in the rules. This was because the applicant was not only seeking relief from the registrar but was also seeking novel relief at that.

In these circumstances, a relevant and necessary respondent was not cited. The vacated order was given in favour of the applicant in the absence of a party who was duly affected by it. See *Kufakwazvino v Mutandwa & Ors* SC 29/07.

The further question raised by the prospective first ground of appeal is whether the vacated order was erroneously sought or erroneously granted.

Mr *Kafesu* contended that the vacated order was neither erroneously sought nor erroneously granted. He premised his argument on two grounds. The first was that the High Courts in South Africa are imbued by s 4 of the Republic of South Africa's Trust Property Control Act (No. 57/1988) with the authority to register Trusts similar to the applicant. He equated this power with the one conferred on the High Court to charge the specified fee for "Registration Certificate" by para 12 of Statutory Instrument SI 187/2019. He, therefore, premised his second contention on that Statutory Instrument. He argued that the High Court had the power to issue, register and certify the applicant as a Trust under the same provision. He further argued that the provision drew its force from the inherent power of the High Court codified in s 13 of the High Court Act. Counsel submitted that these were arguable propositions which stood a reasonable possibility of success on appeal to the Supreme Court.

The contentions by Mr *Kafesu* are patently fallacious. He was unable to pinpoint local legislation similar to the South African one which confers such power on the High Court. The registration and concomitant certification of Trusts is not a mere matter of form but is one of substance. In Zimbabwe, the process is governed by the Deeds Registries Act [*Chapter 20:05*]. In terms of s 5 (b) as read with s 70A of that Act, it is preceded by an examination of the deed or other documents submitted to the Registrar of Deeds for execution

or registration, who may for prescribed reasons reject the documents and therefore the registration and certification of the Trust. The registration and certification is then undertaken by the Registrar of Deeds in terms of s 5 (m) as read with (r1) and recorded in the appropriate register opened for that purpose in terms of s 5 (w) of the same Act. The specific details regarding the examination and registration are provided in the Deeds Registry Regulations RGN 349/1977, promulgated by the Minister of Justice, Legal and Parliamentary Affairs in terms s 87 (1) (c1) and (2) (a) of the Act. These statutory powers are not conferred on the High Court or its Registrar, who in any event, as this application demonstrates would not know how to deal with such an application. The High Court is clothed with the power to enforce the rectification of such deeds in terms of s 6 (b) (ii) and (v) of the Deeds Registries Act against a recalcitrant interested person. This is in addition to the power to cancel real rights in land provided for in s 8 (1) of the same Act.

The registration and certification by the Registrar of Deeds has the imprimatur of law. Indeed s 24 (1) and (2) of the Interpretation Act [*Chapter 1:01*] confers and imposes on a regulatory authority such as the Registrar of Deeds the necessary powers, jurisdiction or right to effectuate the powers bestowed upon it by its enabling enactment. The applicant was in the same vein, thus, given the power to activate the provisions of the trust deed by the registration thereof by the Registrar of Deeds. It did not require any added legitimacy to operate from the High Court or its Registrar. It, therefore, lacked a cause of action to approach the High Court to seek the relief that was initially granted on 2 January 2020 and duly revoked on 15 September 2020. See *Wector Enterprises (Pvt) Ltd v Luxor (Pvt) Ltd* SC 31/15.

SI 187/19 was promulgated in terms of s 57 of High Court Act. The section provides that:

“57 Regulatory power to fix fees

The Minister may make regulations providing for the fees which shall be payable in respect of instruments, services or other matters received, issued, provided or otherwise dealt with by the registrar or Sheriff or any other officer to the High Court in the course of his duties or in the office of such officer.”

Paragraph 12 of the Schedule to the Fees enactment covers the instruments, services or other matters received issued, provided or otherwise dealt with by the registrar or Sheriff or any other officer to the High Court in the course of his or her duties. The only registration certificate that is issued by the registrar I am aware of is the certificate of registration as a legal practitioner, conveyancer and notary public. This is issued in terms of s 5 (1) of the Legal Practitioners Act [Chapter 27:07] to persons who qualify to be so registered. In terms of s 3 (1) of the same Act, the registrar is mandated to keep a register of registered legal practitioners. Coincidentally, the Registrar of Deeds is also mandated to keep such a register by s 59 of the Deeds Registries Regulations RGN 349/1977.

It is not part of the legal duties and responsibilities of the Registrar of the High Court to register certificates of registration of trusts. The regulations thus made in terms of s 57 of the High Court Act would, therefore, not apply to such registrations.

Lastly, Mr *Kafesu* sought to link para 12 to the Schedule of SI 187/19 to the inherent power of the High Court to determine controversies between litigants, which is codified in s 13 of the High Court Act. It seems to me that the inherent power of the High Court, if any, to register trusts has been attenuated by the Deeds Registry Act. This is patently clear from the opening words of s 13, “subject to this Act and any other law”, which subordinates the inherent powers of the High Court, *inter alia*, to any other law. The exercise of the High Court’s inherent jurisdiction over the registration and certification of trusts is, therefore,

made subject to the provisions of the Deeds Registries Act by the opening words in s 13 of the High Court Act.

In the circumstances, I am satisfied that the vacated order was erroneously sought and erroneously granted in the absence of a party affected by it. I, therefore, find the prospective first ground of appeal will unlikely succeed on appeal.

The second ground of appeal need not detain me. It seeks to distinguish registration from enforcement. I find this to be a puerile play of semantics. The practical reality is that the cumulative effect of the relief sought is the enforcement by the Registrar of the High Court of the vacated order that the applicant seeks reinstated on appeal. That ground of appeal is therefore unlikely to succeed.

In dealing with the prospects of success of the first ground of appeal I have already answered the issues raised in the third ground. The High Court does not have the power to grant the order sought. Such power is reposed in the Registrar of Deeds. The third ground is therefore not arguable. It is thus unlikely to succeed on appeal.

In my view, the arguments advanced *a quo* and rehashed in this application are unlikely to succeed on appeal. They are simply not arguable. There are, therefore, no prospects of success on appeal.

In our law, as espoused in *Crundall Bros (Pvt) Ltd v Lazarus NO & Anor* 1991(2) ZLR 125(S) at 128F, a “trust is not a person”. It must be represented by a trustee or trustees, *nomine officii*. This position is affirmed in the *Veritas* case, *supra* para [20] and *Chiite &*

7 Others v Trustees, Leonard Cheshire Homes Zimbabwe Central Trust CCZ 10/17. These authorities and in particular the *Veritas* case, *supra*, also lay down the principle that the founding affidavit of a trust suing in its name must be deposed to by an authorized trustee and not by an employee of the trustee/s and not in the trade name of the trust to satisfy the requirement that it is the “trust” that is before the court. I am aware that this Court in the recent judgment of *Sharadkumah Patel & Anor v The Cosmo Trust & Ors* SC 165/21 at para [44] held that a trust has the legal capacity to sue in its own name or in the name of a trustee. That finding does not appear to affect the principle raised in the above cited cases that the founding affidavit of an application of such a trust must be deposed to by a trustee to render the application valid.

The prospective grounds of appeal do not impugn this finding. There is no likelihood that the appeal, which does not additionally attack this very fundamental finding that goes to the very root of the application, would succeed.

DISPOSITION

The original application *a quo* was misconceived. Thus even if r 449 (1) (a) were inapplicable, I would have invoked the powers vested in me by s 25 (2) of the Supreme Court Act [*Chapter 7:13*] to review the initial proceedings and the judgment sought to be appealed.

The section provides that:

“Review Powers

- (1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction, and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, tribunals and administrative authorities.
- (2) The power, jurisdiction, and authority conferred by subs (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court.”

In view of the reasons alluded to above, this would have been a proper case for me to exercise my review powers in terms of s 25 (2) of the Supreme Court Act, to set aside both the judgment No. HMT 59/20 dated 15 September 2020 and the original order in HC 342/19 dated 2 January 2020.

The present application is, however, devoid of merit and ought to be dismissed.

In the circumstances, it is ordered that:

1. The application be and is hereby dismissed.
2. There shall be no order as to costs.

Henning Lock, applicant's legal practitioners