

REPORTABLE (30)

JOHN BASERA
v
**(1) THE REGISTRAR OF THE SUPREME COURT OF
ZIMBABWE (2) SAMUEL TENDAI MUVUTI (3) JOYLIN MUVUTI
(4) MINISTER OF LANDS, AGRICULTURE, WATER, FISHERIES
AND RURAL SETTLEMENT**

**SUPREME COURT OF ZIMBABWE
HARARE, 9 FEBRUARY 2022**

T. S. T. Dzvetero, for the applicant

No appearance for the 2nd & 3rd respondents

Ms. C. Garise-nheta, for the fourth respondent

IN CHAMBERS

MATHONSI JA: This is a chamber application made in terms of r 13(1) of the Supreme Court Rules, 2018 (“the Rules”). The applicant seeks the review of a decision of the first respondent, the Registrar of this Court, that deemed an application for condonation for the late filing of an appeal abandoned and dismissed it. After hearing the parties, I issued the following order:

“IT IS ORDERED THAT:

1. The decision of the first respondent of the 21st of October 2021 to regard as abandoned and to dismiss a chamber application for condonation for late noting of an appeal and for extension of time within which to appeal filed in SC 362/21 be and is hereby declared to have been in error and is hereby set aside.

2. The applicant's application for condonation of non-compliance with Rule 37(1) and Rule 38(1) of the Supreme Court Rules lodged in case number SC 362/21 be and is hereby reinstated.
3. Each party shall bear its own costs."

I indicated that the full reasons for my decision would follow. What follows hereunder are those reasons.

THE FACTS

On 5 October 2021, the applicant filed an application for condonation of the late noting of an appeal under case number SC 362/21. The application was served on the second and third respondents on that date and on the fourth respondent on 7 October 2021. It is common cause that the certificates of service were only filed on 12 October 2021.

Despite the filing of the proof of service on 12 October 2021, by a letter date-stamped 21 October 2021, the Registrar notified the applicant that in terms of r 39 (2) of the Rules, the application under SC 362/21 had been regarded as abandoned and dismissed. Due to its importance in the resolution of the present application, I reproduce the letter hereunder:

"RE: JOHN BASERA VS SAMUEL TENDAI MUVUTI AND 2 OTHERS SC 362/21

Reference is made to a Chamber Application you filed on the 5th of October 2021. It is noted that you did not serve your application to the respondents in terms of Rule 39 (2) of the Supreme Court Rules (2018).

In terms of the aforementioned rule, the application is regarded as abandoned and is hereby dismissed."

In response, the applicant's legal practitioners wrote a letter to the Registrar contending that her decision had been made erroneously and requesting her to rectify it because the application had been served on the respondents. Indeed, the Registrar appeared to

acknowledge the error in her letter dated 5 November 2021. The Registrar, however, advised the applicant that she could not review her own decision and, thus, invited the applicant to proceed in terms of r 13 of the Rules, which he has done.

In his founding affidavit, the applicant asserted that the chamber application under case number SC 362/21 was filed and served within three days. He stated that r 43 of the Rules does not make the filing of certificates of service preemptory. He further averred that the Registrar erred by dismissing his application in terms of r 39 rather than in terms of r 43 of the Rules.

Significantly, in her report prepared in terms of r 13(3) in respect of the present application, the Registrar rendered two conflicting reasons for dismissing the application. First, she stated that she dismissed the application on the basis that the applicant had not served the application on the respondents within three days of filing or furnished proof of such service. Second, she stated that “the applicant filed proof of service of the application on the 12th of October, 2021. The delay is the basis of the Registrar’s decision.”

SUBMISSIONS BY THE PARTIES

Mr *Dzvetero* for the applicant motivated the application on three grounds. Firstly, he submitted that the application was, as a matter of fact, filed and served on the respondents within three days. He referred to the certificates of service that were filed of record as proof of this fact. Secondly, he submitted that there is no requirement in r 39(2) for proof of service to be filed within the three days of the filing of the application. This would not only be impossible, so it was argued but also impractical.

Thirdly, he argued that the decision of the Registrar was erroneous because r 39(2) was inapplicable in the circumstances of this case, the application having been filed in terms of r 43 (4). It could only be regarded as abandoned and deemed to have been dismissed under that subrule.

Ms *Garise-nheta* indicated that the fourth respondent was not opposed to the application. As such, she did not make any submissions.

THE LAW

A review application under r 13 of the Rules is equivalent to what INNES CJ termed “review by motion” in the case of *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 114. Under this form of review, and as INNES CJ stated, a Court or a Judge reviews the proceedings or decisions complained of and sets them aside or corrects them, if:

- a. a public official disregards important provisions of a statute that imposes obligations on him or her;
- b. a public official is guilty of gross irregularity. It is settled law that a decision will be irregular and irrational, where the decision-making body has arrived at a decision;

“so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

See *Secretary for Transport & Anor v Makwavarara* 1991 (1) ZLR 18 (S) at 20. A decision would also be irrational if it is irreconcilable with the facts that were before the decision-maker.

- c. there is clear illegality in the performance of a duty. Illegality arises where the decision-making authority has been guilty of an error in law, see *Secretary for Transport* case *supra*.

See also *Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S).

Although the above list is not exhaustive, where any of the above grounds are established, a Judge is bestowed with discretion regarding the appropriate order to make. He or she may amend, confirm or set aside the decision of the public official, in this case the Registrar, or give any other order as he or she thinks fit. See r 13(4) of the Rules and s 169(4) of the Constitution of Zimbabwe, 2013.

ANALYSIS

This application turns on the simple question whether or not the applicant failed to comply with r 43(4) of the Rules as to attract the consequence of the application being regarded as abandoned and therefore dismissed. Rule 43(4) provides that:

“(4) An application in terms of this rule and accompanying documents shall be filed with a registrar and thereafter served on the respondent within three days, failing which the application shall be regarded as abandoned and deemed to have been dismissed.”

The resolution of the matter involves a purely interpretative exercise. On a literal interpretation, “if the words of a statute are clear then one must follow them even if they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity.” See *R v Judge of the City of London Court* [1892] 1 QB 273 at 290, and *Chegut Municipality v Manyora* 1996 (1) ZLR 262 (S) at 264D-E.

By applying a literal interpretation to the provision in question, the following requirements emerge:

- (a) an application under r 43 must be filed with the Registrar of the Supreme Court;
- (b) the application must be served on the respondent within three days of filing; and
- (c) if the application is not served on the respondent within three days of filing, it is regarded as abandoned and deemed to be dismissed.

Evidently, the literal interpretation of the rule does not make it peremptory for an applicant to file proof of service within three days of filing the application. It however makes it abundantly clear that if an application is not served on the respondent within three days of filing, it is regarded as abandoned and deemed to be dismissed. That ought to be the end of the matter.

There is nothing in the rule, in terms of which the Registrar acted, which empowers the Registrar to dismiss an application because of the delay in filing proof of service. Indeed, the reason given by the Registrar in her notice to the parties dated 20 October 2021 was that the application was being regarded as abandoned and therefore dismissed because the application had not been served within three days.

The dismissal, as communicated to the parties, was not for failure to file proof of service. It was factually incorrect because, to the full knowledge of the Registrar, the application had been served within time. To that extent, the aspect of a delayed filing of a certificate of service pales to insignificance.

It was not open to the Registrar to revise her reasons for deeming the application as abandoned in her report filed in response to this application. Not that it would have made a difference because nowhere in the rules is it provided that an application can be deemed abandoned and dismissed for failure to file a certificate of service within three days of its filing.

It is only a failure to serve the application that forms the basis for a dismissal. While r 11 (2) requires proof of service to be filed, it does not fix a time frame for such filing. Even if one were to interpret the rules as requiring proof of service to be filed, surely such a generous interpretation cannot extend to requiring proof of service to be filed within three days as well.

In that regard, I agree with Mr *Dzvetero* that it would not be practical to comply with such a requirement. A certificate of service is usually prepared and signed by both the legal practitioner and his or her messenger or clerk, after service has been effected. The legal practitioner signs it after satisfying himself or herself from inquiry with the messenger or clerk that service has been effected at the given address on a given date and time.

It may, however, be alluring to believe that the literal and grammatical interpretation of the subrule does not adequately amplify the meaning of the rule. But even by applying the mischief rule or by taking a purposive approach, there still would not be an imperative in terms of r 43(4) to file proof of service within three days. In the case of *Zimbabwe Electoral Commission & Anor v Commissioner-General, Zimbabwe Republic Police & Others* 2014 (1) ZLR 405 (S) at 413B – C, this Court remarked:

“Another rule of construction, the mischief rule, can be called in aid at this juncture. In order to assist the court in deciding on the true intention of the legislature, the court may have regard to ‘the mischief’ that the Act was designed to remedy. Thus the court

may look not only at the language of the statute, but also at the surrounding circumstances, and may consider its objects, its mischiefs, and its consequences.”

In the case of *S v Meredith* 1981 ZLR 123 (AD) at pp. 127 – 128, BARON JA accepted that the existing state of the law and other statutes in *pari materia* may be relied on to discern what a provision was intended to remedy. In *Chihava & Anor v The Provincial Magistrate & Anor* 2015 (2) ZLR 31 (CC) at 37C the state of the law in place before the enactment which is the subject of interpretation was regarded as a useful aid in ascertaining the legislative purpose and intention.

A comparison of r 31(4) of the Supreme Court Rules, 1964 and r 43(4) reveals that the first part of r 43(4) of the Supreme Court Rules, 2018 and the entire rule 31(4) of the Supreme Court Rules, 1964 are, in essence, the same. Rule 31(4) was couched as follows:

“(4) A notice of motion in terms of this rule and accompanying documents shall be served on a registrar and copies thereof shall be served on the respondent.”

The only significant difference arises in that r 43(4) of the Supreme Court Rules, 2018 has the following additional prescription:

“... within three days, failing which the application shall be regarded as abandoned and deemed to have been dismissed.”

Under the repealed rules, the failure to serve on a respondent an application for condonation and extension of time within which to appeal would not cause the application to be regarded as abandoned and deemed to have been dismissed. There was no time limit for serving the application. Rule 43(4) does, however, cause an application that has not been served on the respondent within three days to be regarded as abandoned and deemed to have been dismissed.

In my view the addition of a deeming provision, is indicative of the draughtsman's intention to render non-compliance with the rule fatal. Resultantly, it is only the failure to serve an application made in terms of r 43 on the respondent that is fatal to the application and not the filing of proof of service.

In *Harare Wetlands Trust v Minister of Environment Tourism & Ors* S-141-20, this Court made the point that the use of the word "within" in a provision relative to time signifies that the provision is peremptory. Therefore, the mischief behind the inclusion of a time limit in r 43(4) is to curtail unnecessary delays in serving applications for condonation which affects speedy finalisation of litigation.

Applications for condonation should be prosecuted expeditiously. I reiterate that the provision of proof of service which, for all intents and purposes, is clerical does not affect the speedy movement of cases. I come to conclusion that the decision taken by the Registrar was erroneously made and should be vacated.

Having said that, I must sound a word of caution to legal practitioners and litigants in general, that this should not be regarded as *carte blanche* allowing them to sit on certificates of service. The rules require service of applications within three days. They also require the filing of a certificate of service. Clearly time is of the essence in this procedure. As such the prompt filing of a certificate of service is required.

Considering that r 11 is silent on the time frame for the filing of a certificate of service, it must be interpreted to mean that compliance should be made within a reasonable

time. In appropriate cases, where there has been an unreasonable delay in complying, the Registrar may be entitled to regard the application abandoned and dismiss it.

I mention for completeness that Mr *Dzvetero* abandoned the argument that r 39(2) was not applicable in the circumstances of this case. It is a concession that was properly made because the Registrar correctly relied on the subrule. This is because r 39 employs the words “subject to”. The words “subject to” are used to denote the dominant provision where there is a conflict between two related provisions. The meaning of that phrase was considered in the South African case of *Zantsi v The Council of State & Ors* 1995 ZACC 9 at par. 27 where the court said:

“I respectfully agree with, and adopt, what Miller JA said in the following passage in *S v Marwane* 1982 (3) SA 717 (A), 747H to 748A, namely—

“The purpose of the phrase “subject to” in such a context is to establish what is dominant and what[is] subordinate or subservient; that to which a provision is “subject” is dominant - in case of conflict it prevails over that which is subject to it.”

To the extent that r 39 is not in conflict with r 43, it follows that its provisions are generally applicable to applications under r 43. However, where there is a conflict, the provisions of r 43 will be dominant. See *National Social Security Authority v Housing Cooperation Zimbabwe (Pvt) Ltd & Anor* S–20–22 at p. 2 where MAVANGIRA JA held that “Rule 39 does not override r 41. It applies to applications in general.” Accordingly, Mr *Dzvetero* was right to abandon his arguments on the applicability of r 39 of the Rules.

DISPOSITION

In conclusion, let me underscore the fact that effective access to justice is the underlying consideration in the application of our procedural jurisprudence. The subrule under interpretation is itself a result of the shared objective by those charged with the administration

of justice and those seeking it, to ensure efficient justice delivery. The rules of court must always be interpreted in a way that gives effect to the scales of justice that they are designed to balance. It is therefore unnecessary, if not undesirable, to read into both r 39 (2) and r 43 (4) conditions tending to stifle access to justice which they do not impose.

Mr *Dzvetero* having abandoned the prayer for costs, I granted the order set out above for the foregoing reasons.

Antonio & Dzvetero, applicant's legal practitioners.

Civil Division of the Attorney General's Office, fourth respondent's legal practitioners.