DISTRIBUTABLE (21)

Judgment No. SC 10/03
Civil Application No. 322/02

SELK ENTERPRISES (PRIVATE) LIMITED v

(1) OLIVER HURUNGWE CHIMENYA
(2) PHILLIP VALERIO SIBANDA
(3) MUGOVE MERCY SIBANDA
(4) REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
HARARE, JANUARY 8, 2003

C T Mantsebo, for the applicant

No appearance for the first respondent

I E G Musimbe, for the second and third respondents

No appearance for the fourth respondent

Before GWAUNZA JA, In Chambers in terms of rule 34(5) of the Supreme Court Rules

After hearing argument in Chambers in this matter, I dismissed the application for condonation of the late noting of an appeal with costs. I now give the reasons for the order.

The applicant filed an application in the High Court seeking certain relief against the respondents. The court *a quo* handed down its judgment, in terms of which the applicant's claim was dismissed with costs, on 11 September 2002. The applicant timeously filed its notice of appeal to this Court on 30 September 2002. It

then failed to comply with rule 34(1) of the Supreme Court Rules, which reads as follows:

> "**34 Preparation and Service of Record**
>
> (1) The appellant, unless he has been granted leave to appeal *in forma pauperis*, shall, at the time of the noting of an appeal in terms of rule 29 or within such period therefrom, not exceeding five days, as the Registrar of the High Court may allow, deposit with the said Registrar the estimated cost of the preparation of the record in the case concerned:
>
> Provided that the Registrar of the High Court may, in lieu of such deposit, accept a written undertaking by the appellant or his legal representative for the payment of such cost immediately after it has been determined."

This provision is to be read together with subrule 5 of the same rule, which reads:

> "If the appellant fails to comply with the provisions of subrule (1) or any written undertaking made in terms of the proviso to that subrule, the appeal shall be deemed to have lapsed unless a Judge grants relief on cause shown."

On 4 November 2002 the legal practitioner representing the second and third respondents addressed a letter to the Registrar of the High Court, asking whether the applicant had paid the costs of preparing the record. The Registrar responded to this letter on 28 November 2002, informing the legal practitioners that as of that date the applicant had not complied with rule 34(1) and that, in terms of subrule 5 thereof, the appeal was deemed to have lapsed.

It was that letter, copied to the applicant's legal practitioners, which is said to have prompted this application. The applicant therefore seeks an order for the reinstatement of the appeal.

It is trite that in considering applications for condonation of failure to comply with the Rules of the Court, especially where time limits are imposed, as *in casu*, the Court weighs, among others, the following factors –

(i) the degree of non-compliance;

(ii) the explanation for it;

(iii) the importance of the case;

(iv) the prospects of success;

(v) the respondent's interest in the finality of his judgment;

(vi) the convenience of the Court; and

(vii) the avoidance of unnecessary delay in the administration of justice.

See Herbstein & van Winsen's *The Civil Practice of the Supreme Court of South Africa* 4 ed at p 891.

Insofar as the degree of non-compliance with rule 34 and the explanation for it are concerned, Mr *Mantsebo*, counsel for the applicant and the deponent to its affidavit, asserts simply that he had omitted to furnish the Registrar with the costs of the preparation of the record, or a letter of undertaking to pay the sum concerned, "through an oversight".

In argument Mr *Mantsebo* sought to place the blame for his default on the Registrar, arguing that the latter should have taken the initiative in seeking the relevant costs from him.

There is no merit in this argument, given that the rule in question places the obligation to tender the costs concerned, or make the written undertaking to pay, on the appellant. In addition to this, I found the explanation that the default was occasioned by an "oversight" on the part of the legal practitioners, to be manifestly inadequate. One may excuse this type of oversight in the case of a junior and inexperienced legal practitioner, not one of Mr *Mantsebo's* experience.

However, inadequate though the explanation for the default is, the default itself was not, in my view, so serious as, on its own, to warrant a dismissal of the application.

The default and the inadequate explanation for it have to be considered together with the other factors listed above. In particular, the Court must consider whether or not the applicant has good prospects of success on appeal.

To do this, it is necessary to set out, in brief, the background to the dispute.

The first respondent subdivided his farm and entered into an agreement with the applicant to sell a portion thereof to it. The agreement was entered into prior to the first respondent being granted authority to subdivide his farm in terms of s 39 of the Regional, Town and Country Planning Act [*Chapter 20:16*]. That section, in peremptory terms, forbids the negotiation of such agreements. Thereafter the applicant failed to meet the deadline given to it by the first respondent to sign the purchaser's declaration so that transfer could be effected. The first respondent

consequently cancelled the agreement and sold the property to the second and third respondents, who then took transfer of the property.

In dismissing the application, the learned trial judge relied on the decision in *X-Trend-A-Home (Private) Limited v Hoselaw Investments (Private) Limited* 2000 (2) ZLR 343, in which McNALLY JA considered the effect of s 39 of the Regional, Town and Country Planning Act and stated as follows:

> "The agreement with which we are concerned is clearly 'an agreement for the change of ownership' of the unsubdivided portion of a stand. What else could it be for? Whether the change of ownership is to take place on signing, or later on an agreed date, or when a suspensive condition is fulfilled is unimportant. It is the agreement itself which is prohibited." (my emphasis)

The learned trial judge observed that even if she was wrong in finding that the agreement between the first respondent and the applicant was invalid, she was, in any case, satisfied that the agreement was properly cancelled by the first respondent. She also found to be unsustainable the applicant's contention that the cancellation of the agreement was invalid as it did not comply with s 8 of the Contractual Penalties Act [*Chapter 8:04*], since the first respondent did not give thirty days' notice for cancellation. It was the learned trial judge's finding that as the agreement was clearly a cash sale that Act did not apply.

In respect to the second and third respondents, the learned trial judge found they were clearly innocent purchasers who were unaware of any sale between the applicant and the first respondent and that, as such, the applicant would have no basis for claiming the property from them. It is trite that, in the absence of *mala fides*

on his part, the Court will not interfere with the rights of an innocent second purchaser.

Having considered the above, and the trial judge's reasoning, which I found to be sound, I was satisfied the applicant had no prospect of success on appeal.

This, coupled with the inadequate explanation for the default in question, left no room for any other decision but the dismissal of the application. Hence my dismissal of it.

Mantsebo & Partners, applicant's legal practitioners

I E G Musimbe & Partners, second and third respondent's legal practitioners