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Judgment No. SC 1/06
Civil Application No. 337/05

TEL ONE (PRIVATE) LIMITED v COMMUNICATION AND ALLIED SERVICES WORKERS' UNION OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 7 & 9, 2006

A K Maguchu, for the applicant

T Biti, for the respondent

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

This is an application for the reinstatement of an appeal following the applicant's failure to file, with the Registrar of the High Court, a letter of undertaking for the payment of the cost of the preparation of the appeal record. The application is opposed by the respondent.

The applicant concedes it did not submit the written undertaking to the Registrar of the High Court. It is, however, submitted on behalf of the applicant that this default was not an indication that the applicant did not wish to pursue the appeal. To the contrary, it is contended, the applicant's counsel had timeously filed the Notice and Grounds of appeal and had, immediately and with the applicant's cooperation, seen to it that the record of the appeal was prepared at the applicant's cost.

The applicant submits and has not been challenged by the respondent, that preparation of the record had duly been completed, and that copies thereof had already been made and submitted to the Registrar. The Registrar's letter notifying of the lapsing of the appeal had, it is submitted, been received while this process was under way. It is argued for the applicant that in view of this development, the requirement of the letter of undertaking had in effect become a formality. This however, the applicant asserts, was not to say the requirement was to be ignored. The point was stressed that, to the extent that Rule 34 was intended to expedite the process of an appeal, what the applicant had done was in fact to ensure that this was so. The applicant's action, it is submitted, had been prompted by delays due to lack of the relevant stationery and equipment, currently being experienced at the office of the Registrar in the preparation of appeal records.

In opposing the application, the respondent argues that Rule 34 was mandatory in its terms and should have been complied with regardless of the fact that the applicant had taken upon itself the task of preparing the record. It is argued further for the respondent that in addition to not sending the written undertaking to the Registrar, the applicant had taken too long, i.e. three months, to prepare the record in question. It was noted that the preparation in question simply involved the photocopying of the various documents that had constituted the application in the court *a quo*.

The respondent argued further that the failure of the applicant's legal practitioner to submit the written undertaking in question should appropriately be visited on the client, i.e. the applicant. For this the respondent relied on the decision

of this Court in the case of *Apostolic Faith Mission & Two Ors v Titus Innocent Murefu* SC 28/03.

Essentially, in an application of this nature, the applicant must satisfy the court firstly, that he has a reasonable explanation for the delay in question and secondly that his prospects of success on appeal are good.

I am satisfied, and I find, that the explanation tendered by the applicant for not submitting the letter of undertaking on the payment of the cost of preparing the record, is reasonable. It can be said that by taking upon itself the task of preparing the record, and not leaving it to the Registrar's Office, with all its constraints in this respect, the applicant had literally rendered Rule 34 irrelevant in the processing of its appeal.

This however, should not be taken to mean that applicants should, at will, enjoy the licence of usurping the Registrar's responsibilities and then proceed to disregard the rules with impunity. The rule is still in existence and can only cease to operate if repealed according to laid down procedures.

Once it had been decided that the applicant would take it upon itself to prepare the record, the applicant's legal practitioner, being aware, as he must have been, of the provisions of Rule 34, should have informed the Registrar that, rather than pay the cost of preparing the record, the applicant was itself and at its expense, going to prepare the record in question.

There is in my view no reason why the applicant's legal practitioner, preoccupied though he might have been with preparing the record, could not have paused long enough to submit a note to that effect to the Registrar. That said, it cannot be denied that the applicant's action in preparing the appeal record did have the effect of facilitating the speedy processing of the appeal in question. Even though the applicant defied a mandatory provision of the rules of this Court, I find that the effect of this default is greatly mitigated by the fact that its action fulfilled and promoted the basic purpose of the rule in question.

I am persuaded by the applicant's contention that the circumstances of this case are distinguishable from those in *Apostolic Faith Mission in Zimbabwe & 2 Ors v Titus Innocent Murefu*, cited above. In the latter case the legal practitioner concerned did nothing to expedite the appeal, beyond filing the notice and grounds of appeal. ZIYAMBI JA, who heard the matter, commended correctly of the legal practitioner's conduct in not submitting the undertaking in terms of Rule 34:

> "Procrastination is different from inadvertence.
> It involves putting off what one knows one has to do. The legal practitioner was at all times aware of his responsibility in terms of the rules but kept on postponing it."

In *casu*, the applicant's legal practitioner was not idle. He took what he saw as the necessary steps to ensure that the record of the appeal was prepared without delay and submitted to the court. He did not postpone complying with the rule, in the sense meant by the learned judge in the case cited.

In any case my determination that the default in question has been greatly mitigated by the effect of what the applicant's legal practitioner set out to do, and did, leaves little or no "sin" to be visited on the applicant.

Nor am I persuaded that there was an unreasonable delay in preparing the record, as alleged by the respondent. While the task could have been completed sooner than it was, it certainly did not take as long as the three months alleged by the respondent. This application, is however, concerned about the applicant's default in submitting the written undertaking, not in preparing the record of the appeal.

All in all, I am satisfied that the explanation given by the applicant for the delay in question, is reasonable.

I will turn now to the applicant's prospects of success on appeal.

The applicant has given eight grounds of appeal against the decision of the court *a quo*. It takes issue with the finding of the court *a quo* that the respondent had *locus standi* and sufficient interest in the dispute between Tel One and its individual employees, to interpose itself as a party to the proceedings. The applicant also charges that the court *a quo* erred in the exercise of its discretion in deciding to entertain a labour dispute when more effective domestic remedies were available under the Labour Act. Lastly the applicant challenges the finding of the court *a quo*, without evidence on the issue, that all employees had taken part in the collective job action. It is the applicant's assertion that there is undisputed evidence that not all employees went on collective job action.

The respondent, in opposing this application, filed no papers in support of such opposition. In his argument before me, counsel for the respondent expressed no serious challenge to the applicant's detailed grounds of appeal. No argument was tendered in respect of the charge concerning the exhaustion of domestic remedies, a charge that, if proved, may lead to the applicant succeeding in its appeal. Nor was there any argument directed at the applicant's assertion that not all employees had gone on the collective job action concerned. A finding that the applicant is correct in this assertion may result in a different ruling on appeal. In the light of this lack of any challenge to the applicant's grounds of appeal, I am unable to make a definitive finding that the applicant has no prospects of success on appeal. The contrary is, in effect, indicated.

The applicant is therefore entitled to the order sought.

It is in the premises ordered as follows:

1. The appeal in SC 337/05 be and is hereby reinstated.
2. There shall be no order as to costs.

Dube, Manikai & Hwacha, applicants legal practitioners

Honey & Blanckenberg, respondent's legal practitioners