

DISTRIBUTABLE (1)

**AFRITRADE INTERNATIONAL LIMITED
V
ZIMBABWE REVENUE AUTHORITY**

**SUPREME COURT OF ZIMBABWE
GUVAVA JA
HARARE: MAY 29, 2018**

H. Mutasa for the applicant
T. Magwaliba, for the respondent

IN CHAMBERS

GUVAVA JA: This is a chamber application for condonation and extension of time within which to note an appeal made in terms of r 31 of the Supreme Court Rules, 1964. At the close of arguments I granted the application by consent.

In the normal course of events where judgment is by consent it is not necessary to provide written reasons. However in this particular case an issue pertaining to the interpretation of a court order and the widespread confusion that has arisen with regards to the procedure which should obtain after the issuance of such an order have made it imperative to provide some guidance to legal practitioners and litigants.

BACKGROUND FACTS

The brief background of this application may be summarised as follows:

The applicant is an international business company incorporated in the British Virgin Islands in Guernsey in the Channel Islands but is not permitted to trade in that jurisdiction.

The respondent is a body corporate, responsible for the collection amongst other taxes, of Value Added Tax (VAT) in Zimbabwe.

The respondent sued the applicant in the High Court alleging non-payment of VAT by the applicant. The facts leading to the dispute are that on 1 October 2007, the Governor of the Reserve Bank of Zimbabwe (RBZ) unveiled the Basic Commodities Supply Side Intervention (BACOSSI), a facility designed to end chronic shortages of basic commodities in Zimbabwe. The applicant and RBZ concluded an agreement in which the applicant supplied basic commodities to the RBZ. The respondent conducted a tax investigation of the purchases in foreign currency made by the RBZ between May 2006 and September 2008. It is alleged that during the course of this period the applicant was not remitting the requisite VAT to the respondent.

The applicant unsuccessfully defended the respondent's suit resulting in a judgment being granted in favour of the respondent. Aggrieved by this outcome the applicant noted an appeal to this court.

In compliance with r 30 of the Supreme Court Rules, 1964 the applicant filed its notice of appeal in this Court on 11 November 2015 within the stipulated 15 day

period. The appeal went through the usual processes set out in the Rules. Heads of Arguments were filed by both parties upon which they awaited the set down date from the Registrar of this Court.

On 8 August 2017 the parties were invited by the Honourable Chief Justice to attend in his chambers concerning the notice of appeal. Following a discussion it was conceded by the applicant that the notice of appeal was defective in two respects. Firstly, the preamble to the notice of appeal did not state whether the appeal was directed against the whole or part of the judgment and secondly, the relief sought did not comply with the Rules. As a result of the defects, the applicant withdrew the appeal.

On 31 August 2017 the applicant filed an application for condonation and extension of time within which to note an appeal. The application was granted by Ziyambi A/JA on 19 September 2017. In granting condonation the court ordered as follows:

“The Notice of Appeal filed of record be and is hereby deemed to have been filed as of the date of this order in terms of rule 31(8) of the Supreme Court Rules (1964).”

Following the grant of the above order the applicant awaited the call for the next step by the Registrar. On 21 March 2018 after having waited in vain for close to six months the applicant’s legal practitioner decided to follow up the matter with the Registrar. It was only then that he was advised that he should have filed his notice of appeal and this therefore meant there was no appeal before the court. The applicant thereafter filed the present application.

APPLICANTS SUBMISSIONS

Mr *Mutasa*, for the applicant, submitted that he understood the above order to mean that the notice of appeal had been deemed to have been filed therefore there was no need for him to file or serve another copy of the notice of appeal. He was of the view that after the conclusion of the matter before Ziyambi A/JA the Registrar was going to write to him requesting the filing of heads of argument since the notice of appeal filed in the application had been deemed to have been filed.

He was thus surprised when he was advised that the appeal was again out of time considering that the order was given on 19 September 2017.

RESPONDENTS SUBMISSIONS

The respondent initially opposed the application on the basis that the delay in seeking condonation and extension of time within which to file the appeal was inordinate. However during the hearing the respondent conceded that the phrasing of the order has caused considerable problems to litigants and there was need for the order to be interpreted.

In interpreting the order I am of the view that it is also necessary to set out the procedure which ought to obtain once such an order has been granted.

INTERPRETATION OF THE ORDER

The order is couched with a few variations in accordance with r 31 (8) of the Supreme Court Rules, 1964 as read together with Practice Direction No 1 of 2017 which was issued by the Chief Justice. Rule 31 (8) reads as follows:

“If leave to appeal or leave to appeal out of time is granted, the appeal shall be deemed to have been instituted in accordance with the notice of appeal filed in the application on the date on which it was granted.”

Form 3 to the Practice Direction which deals with Chamber Applications For Condonation And Extension Of Time states in the relevant part as follows:

“1.....
2.....
3. The notice of appeal shall be deemed to have been filed on the date of this order. (or on such date as may be fixed by the Judge)”

The order which was granted by the Court stated as follows:

“The Notice of appeal filed of record be and is hereby deemed to have been filed as of the date of this order in terms of rule 31(8) of the Supreme Court Rules (1964).”

As can be noted the order that was granted incorporates the wording in r 31 (8) and form 3 of the Practice Direction No 1/2017.

As alluded to earlier, this order has caused a lot of problems to the majority of legal practitioners and litigants alike who have interpreted the word “deemed” in the above order to mean that once the court has made an order the notice of appeal filed of record has been filed with the court. As the order is made primarily from r 31 (8) it is

necessary to begin by interpreting this Rule. A proper reading of r 31 (8) in my view merely states that the notice of appeal that has been filed by the applicant is the notice that will have been accepted by the court in granting the extension of time. The applicant cannot thereafter file a different notice of appeal to the one that was filed in the application for condonation and extension of time to appeal.

It also seems to me that the assumption made by legal practitioners and litigants is legally wrong as it seeks to read the Rules in isolation. It completely disregards the Rules that state that service has to be effected on the Registrar of this Court, Registrar of the court *a quo* as well as the respondent(s). This is all prescribed in r 29 (2).

In terms of procedure, it also overlooks the fact that in granting an application for condonation and extension of time with which to appeal there is no record of proceedings which is being appealed against and that no specific case number has been accorded to the intended appeal.

In my view therefore, when the court makes an order such as the one in question, it simply means that the “draft” notice of appeal which must be filed together with the chamber application for condonation and extension of time to note an appeal has been accepted by the court.

In my view it follows that the applicant must thereafter file the notice of appeal within the prescribed period in terms of the Rules.

PROCEDURE AFTER THE GRANTING OF THE ORDER

It is also necessary for the sake of completeness to mention that the acceptance of the notice of appeal does not do away with the appeal process, it actually marks its genesis.

The granting of an application for condonation and extension of time means that one has been granted an indulgence by the court to do that which they ought to have done in the first place. Under the circumstances there is no pending appeal before the court. In other words it means that soon after the issuance of the order the applicant's legal practitioner ought to revert back to the initial process of noting an appeal.

The process begins with the noting of an appeal to this Court. It is at this stage that the appellant is issued with a case number. In terms of Rule 30 (a), where leave is not necessary an appellant has fifteen days within which to file and serve the notice of appeal. This same 15 day rule applies with equal force where an applicant has been condoned and granted extension of time within which to note an appeal, unless a shorter period is ordered by the judge.

In casu, the applicant had 15 days from the date the order was made within which to file its notice of appeal under a new and separate case number.

Thereafter, the applicant is mandated to comply with the provisions of r 29 (2) which is to the effect that the notice of appeal shall be served on the Registrar of this Court, the Registrar of the High Court and the respondent. It automatically follows that once the appeal has been noted and served on the relevant parties, r 34 comes into effect. It mandates that the requisite fees be paid to ensure the preparation of the record. Thereafter, in terms of r 43 the parties may be called upon to file their heads of arguments and the appeal is finally set down.

In simple terms the effect of the above order is, since condonation and extension of time has been granted, the applicant has been granted the indulgence to file his appeal and in doing so the prescribed provisions in the Rules apply.

It is imperative to note that the notice of appeal filed in the application is merely a draft that sought approval from the court and it forms part of the chamber application record. It is not a stand-alone document. Therefore, once an order is given pertaining to the chamber application that file is closed and the matter is deemed to have been completed. The contents therein cannot be tempered with. It also does not form part of the record which is being appealed against. In the event that the above procedure is not complied with the Appeal record will not have a notice of appeal as part of its papers.

DISPOSITION

The failure to comprehend the import of this order has been a major cause for concern for a long time. It has completely defeated the concept of bringing finality to litigation as applications for condonation have kept coming back concerning the same case because they will not have complied with the Rules.

It is for this reason that I have sought to interpret the Rule, the meaning of the order and to set out the procedure that must be followed after the order has been granted.

Following the hearing of this application I made the following order by consent:

- “1. The application for condonation of non-compliance with Rule 30 of the Supreme Court Rules, 1964, be and is hereby granted.
2. The application in terms of Rule 31 of the Supreme Court Rule 1964 for extension of time within which to appeal be and is hereby granted.
3. The notice of appeal filed of record be and is hereby deemed to have been filed as of the date of this order in terms of Rule 31 (8) of the Supreme Court Rules, 1964.
4. There shall be no order as to costs.”

Gill, Godlonton & Gerrans applicant’s legal practitioners

