**REPORTABLE (59)**

**CHANDRA MOHAN GOYEL**

**v**

1. **MYRAMMAR FARMING (PRIVATE) LIMITED t/a COTTONZIM (2) VIRENDRA RANCHOD (3) MANOJKUMAR JIVAN (4) JAYPRAKASH PATEL (5) VINODKUMAR RAMA (6) SERISH PURSHOTAM RANCHOD (7) GLOWORM INVESTMENTS (PRIVATE) LIMITED**

**SUPREME COURT OF ZIMBABWE**

**HARARE: 05 DECEMBER 2023**

*F. Mahere* with *M. Kumalo,* for the applicant

*L. Uriri* with *I.T. Chingande,* for the third, fourthand fifth respondents

No appearance for the first, second, sixth and seventh respondents

**IN CHAMBERS**

**MWAYERA JA:**

1. This is a chamber application for condonation for the late noting of an appeal and extension of time within which to note an appeal made in terms of r 43(1) as read with r 43(2) of the Supreme Court Rules, 2018 (“the Rules”). The application is opposed. The order sought by the applicant in this application is as follows:

“**RELIEF SOUGHT**

**WHEREUPON** after reading documents filed of record and hearing counsel;

**IT IS ORDERED THAT:-**

1. The applicant’s non-compliance with r 38(1) (a), r 37(1) (e), r 37(2) r 55 (5) of the Supreme Court Rules be and is hereby condoned.
2. The application for extension of time within which to note an appeal be and is hereby granted.
3. Within 5 days of this order, the applicant shall file and serve its notice of appeal.
4. There shall be no order as to costs.”
5. On 5 December 2023 in an extempore judgment I struck the matter off the roll with costs. The applicant has requested for the written reasons for judgment. These are they;

**FACTUAL BACKGROUND**

1. The background to this application can be summarised as follows.

In December 2011, the applicant lent and advanced an amount of One Million United States Dollars (USD$1 000 000.00), (hereinafter referred to as the loan) to the first respondent to fund its cotton seed purchase for the 2012 buying season. The second to the sixth respondents executed personal guarantees in respect of the transaction that bound them as guarantors of the loan. They jointly and severally bound themselves in varying amounts in respect of the loan. In addition, the respondents also bound themselves as sureties and co-principal debtors for a punctual re-payment of the loan. The seventh respondent tendered stand number 7489 of Salisbury Township held under Title Deed number 8677/97 as security for the loan. The first respondent, duly represented by the second and sixth respondents, undertook to pay this amount in full on or before December 2012.

1. Despite various letters demanding payment by the applicant, the respondents failed to pay the applicant back the full amount as had been agreed. In November 2013, the first respondent signed an acknowledgment of debt in respect of the loan in the sum of one million united state dollars plus interest. On 30 July 2014, the first respondent was placed under provisional judicial management.
2. On 8 June 2016, the applicant instituted proceedings against all the respondents in the High Court under case number HC 5762/16 wherein he sought, *inter alia,* the payment of the USD$1 million, which amount had been advanced to the first respondent.

**PROCEEDINGS BEFORE THE COURT *A QUO***

1. On 10 May 2022, at the commencement of the trial, the third to the fifth respondents raised three points *in limine.* Firstly that the matter had prescribed; secondly that there was a violation of the provisions of the Exchange Control Regulations and lastly that leave of the court was required before suing the first respondent which was under provisional judicial management.
2. In arguing the third preliminary point, counsel for the applicant submitted that leave was only required in respect of already existing proceedings at the time the provisional order is granted and that no leave was required for new suits. In support of this argument, counsel cited the case of *Zambezi Gas Zimbabwe (Pvt) Ltd & Anor* v *N.R Barber (Pvt) Ltd & Anor,* SC-3-20. *Per contra*, counsel for the first respondent argued that leave to sue a company under judicial management was necessary and failure to do so was fatal. He further submitted that the rationale for judicial management is an endeavour to resuscitate a company and avoid liquidation hence the need for leave.
3. The court *a quo* dealt with the issue regarding leave to sue, it upheld that first respondent, being a company under provisional judicial management, could not be sued without leave of the court.
4. Aggrieved by this decision, the applicant noted an appeal in the Supreme Court under case number SC 146/23 wherein he sought the setting aside of the decision of the court *a quo* upholding the preliminary point. The appeal was noted on the grounds that the court *a quo* erred in finding that the applicant was required to seek leave to sue the first respondent notwithstanding that the applicant instituted proceedings against the respondents after the provisional order placing the first respondent in judicial management was handed down. Further, the applicant averred that the court *a quo* erred in overriding the position that leave to sue companies placed under provisional judicial management only applies to proceedings already in existence at the time the provisional judicial management order is granted. Lastly, the applicant averred that the court erred in failing to find that the respondents were estopped from raising the point relating to leave to sue in light of the fact that the issue had already been dealt with by the High Court.

10. It is important to note that the appeal was timeously lodged on 15 March 2023. The applicant offered to pay security for the respondents’ costs but however, while such tender was made, the security for costs was not paid within one month from the date of filing the notice of appeal. The appeal was then deemed to have been abandoned and dismissed by operation of the law.

11. On 18 October 2023, the applicant filed an application for reinstatement of the appeal that had been deemed abandoned and dismissed under case number SC 579/23. However, the appeal that the applicant sought to reinstate was mistakenly set down for hearing on 31 October 2023. In light of these events, the applicant wrote a letter to the Registrar of the Supreme Court seeking for the application for reinstatement to be heard prior to the set down date.

12. The applicant was advised by the respondent’s legal practitioners, that the correct application to be filed was an application for condonation and extension of time within which to note an appeal and not reinstatement since the appeal was regarded a nullity.

13. The Registrar sent the applicant a notice that the application for reinstatement was set down for hearing on 1 November 2023. Consequently, on 31 October 2023, at the hearing of the appeal, the applicant sought for the removal from the roll of the appeal under SC 146/23 for the reason that it had been deemed abandoned and dismissed by operation of the law. By consent, the appeal was removed from the roll. On 1 November 2023, the applicant withdrew the application for reinstatement with a view to filing an application for condonation and extension of time within which to note an appeal and ensuring that the appeal would be heard on the merits. It is against this background that the applicant approached this Court with the present application seeking condonation for the failure to comply with r 38(1) (a), r 37(1)(e), r 37 (2) and r 55(5) of the Rules.

**PROCEEDINGS BEFORE THIS COURT**

14. At the hearing of the application, Ms *Mahere,* counsel for the applicant submitted that the application for condonation and extension of time within which to note an appeal had been necessitated by the apparent fact that there had been non-compliance with the rules of this Court. She submitted that the failure to pay security for costs was not deliberate but actuated by a misinterpretation and oversight on the import of r 55(1) and r 55(2) of the Supreme Court Rules. She further submitted that the applicant, upon realising concerns raised by the respondents relating to the validity or otherwise of the appeal for non-compliance with the rules, took steps to rectify the non-compliance. She contended that the breach of the rules was not deliberate and not caused by the applicant but borne out of a genuine oversight by his legal practitioners.

15. Further, she submitted that the respondents would not suffer any prejudice if condonation and extension of time is granted. As regards prospects of success on appeal counsel submitted that the applicant enjoyed prospects of success because leave to sue a company under judicial management only applies to actions or proceedings already in existence at the time that the provisional order is granted.

16. She argued that no leave is required to institute proceedings against a company under provisional judicial management after the provisional order has been granted. She prayed that in view of the explanation for non-compliance and the delay which she described as “not inordinate”, coupled with the fact that the applicant enjoyed prospects of success on appeal, the court ought to grant the indulgence. Counsel thus sought that condonation and extension of time within which to note an appeal be granted.

17. *Per contra,* Mr *Uriri*, for the third, fourth and fifth respondents opposed the application. He submitted that the application was fatally defective for the reason that the earlier, albeit irregular appeal, remained hanging in the court’s records as it was not struck off the roll at the instance of the applicant. He further submitted that the applicant despite being conscientised of the irregularities, persisted on a trajectory of filing defective processes. He argued that even the present application was improperly before the court as a Judge sitting alone in chambers could not strike off an appeal that has been filed and *in* *casu*, the appeal under SC 146//23 remained on record.

18. He further submitted that the applicant did not proffer an explanation for the failure to pay security for costs and the reason for the filing of irregular process. He also submitted that the applicant instead of explaining the non-compliance with the rules, merely alludes to the respondents having highlighted irregularities which they were quick to attend to. He contended that the applicant did not tender an explanation for the delay and that there was no satisfactory explanation offered for the non-compliance and filing of a defective process. He reiterated the point that the present application was improperly before the court as the appeal under SC146/23 was still before the court.

19. Regarding the merits of the appeal, Mr *Uriri* submitted that the application did not enjoy any prospects of success. He referred to the case of *Allied Bank Limited* v *Dengu & Others* SC 52/2016 which is authority for the requirement to seek leave to sue a company placed under judicial management. Counsel submitted that the application, being improperly before the court, ought to be struck off the roll.

**ISSUES FOR DETERMINATION**

20. The issues that fall for determination in this case are as follows:

1. Whether or not the application is properly before the court.
2. Whether or not the requirements for granting condonation for late noting of an appeal and extension of time have been satisfied.

**THE LAW**

21. It is trite that when an application is improperly before the Court, there will be no application for the court to relate to. The matter which is improperly enrolled faces the fate of being struck off the roll. In the case of *Ahmed* v *Docking Station Safaris Private t/a CC Sales,* SC 70-18, at p 4, this Court made the following pertinent remarks:

“In view of the above, it is clear that the applicant has approached this court with a wrong application. The circumstances to make an application for condonation for non-compliance with the rules and extension of time within which to file and serve a notice of appeal. This, the applicant failed to do. **The net effect of bringing a wrong application before the court is that there will be virtually nothing placed before it and, to that end, the application cannot stand.** (my emphasis.)

22. The law applicable to applications for condonation and extension of time within which to comply with the rules and file the relevant application or appeal is settled. The requirements for this application were aptly captured by Gubbay CJ (as he then was) in the case of *Forestry* *Commission* v *Moyo* 1997(1) ZLR (S),and they are as follows:

1. That the delay involved was not inordinate, having regard to the circumstances of

the case;

1. That there is reasonable explanation for the delay;
2. That the prospects for success should the application be granted are good;
3. The possible prejudice to the other party should the application be granted.
4. In addition to the above, in the case of*Hove* v *Berea Mining Syndicate* SC-50-23,at p8, it was aptly stated that:

“It is trite that for an application for condonation for non-compliance with the rules and for extension of time within which to note an appeal to succeed, the applicant should satisfy the court that he or she has a reasonable explanation for the delay and non-compliance with the rules and also establish that there are prospects of success of the appeal.”

24. It is important to note that these factors are not individually decisive on whether the application for condonation for late noting of appeal and extension of time within which to appeal is granted. They are considered conjunctively. In *Kodzwa* v *Secretary for Health & Anor* 1999 (1) ZLR 313 (S), Sandura JA remarked as follows:

“Whilst the presence of reasonable prospects of success on appeal is an important consideration which is relevant to the granting of condonation, it is not necessarily decisive. Thus, in the case of a flagrant breach of the rules, particularly where there is no acceptable explanation for it, the indulgence of condonation may be refused, whatever the merits of the appeal may be.”

**APPLICATION OF THE LAW TO THE FACTS**

1. After considering both the written and oral submissions by counsel, it is apparent that the appeal in case number SC 146/23 which was deemed abandoned and dismissed by operation of law has a life line for reinstatement as provided for in rule 70 of the rules. It is an established principle that when a matter is deemed abandoned and dismissed because of operation of the law, it is removed from the roll.
2. *In casu*, it is worthwhile to refer to the orders of this Court in respect of the matter. The order in the record issued on 31 October 2023, is pertinent. The order reads as follows:

“**IT IS ORDERED THAT:**

1. By consent, the matter be and is hereby removed from the roll for the reason that it has been deemed abandoned and dismissed in terms of r 55(6) of the Supreme Court Rules, 2018.
2. The appellant shall bear the respondent’s costs for today’s appearance.”
3. In respect of the chamber application for condonation and reinstatement of the appeal, the application was removed from the roll for the reason that it had been withdrawn. On 1 November 2023, the court ordered as follows:

“**IT IS ORDERED BY CONSENT THAT**

The matter is removed from the roll, with no order as to costs for the reason that it has been withdrawn.”

1. The import of these orders is that the appeal in case SC 146/23 therefore remains deemed abandoned and dismissed. Mr *Uriri’s* submission that the application in the present case is fatally defective, is confirmed by the sequence of earlier highlighted proceedings before this Court. In my view, the appeal under SC 146/23 stands in the way of seeking condonation and extension of time within which to note an appeal by operation of the law. The proper way to revive an appeal deemed abandoned and dismissed is by seeking reinstatement.
2. In the present case, the applicant’s non-compliance with r 55 resulted in the appeal being deemed abandoned and dismissed. Rule 55 is instructive. It provides as follows:

“**55. Security**

1. If the judgment appealed from is carried into execution by direction of the court appealed from, security for the costs of appeal shall be as determined by that court and shall not be required under this rule.
2. Where the execution of a judgment is suspended pending an appeal and the respondent has not waived his or her right to security, the appellant shall, before lodging copies of the record with a registrar, enter into good and sufficient security for the respondent’s costs of appeal:

Provided that where the parties are unable to agree on the amount or nature of the security to be furnished—

1. the matter shall be determined by the registrar upon application by the appellant; and
2. the registrar shall specify the period within which the security shall be furnished
3. A judge may, on application at the cost of the appellant and for good cause shown, exempt the appellant wholly or in part from the giving of security under subrule (2).

1. No security for costs in terms of subrule (2) need be furnished by the Government of Zimbabwe or by a municipal or city council or by a town management board.
2. Subject to the proviso to subrule (2), where an appellant is required by this rule to furnish security for the respondent’s costs of appeal, such security shall be furnished **within one month of the date of filing of the notice of his or her appeal** in terms of r 37 or, where applicable, within the period specified by the registrar in terms of the proviso to subrule (2).
3. If an appellant who is required to furnish security for the respondent’s costs of appeal fails to furnish such security with (in) the period specified in subrule (5), the appeal shall be **regarded as abandoned and shall be deemed to have been dismissed**.” (My emphasis)
4. The rules provide for reinstatement of such an appeal that has been deemed abandoned and dismissed. Rule 70 of the rules of this Court is apposite. It provides that:

“(1) Where an appeal is—

1. deemed to have lapsed; or
2. regarded as abandoned; or
3. deemed to have been dismissed in terms of any provision of these rules;

the registrar shall notify the parties accordingly.

1. **The appellant may, within 15 days of receiving any notification by the registrar in terms of subrule (1), apply for the reinstatement of the appeal on good cause shown.” (**My emphasis**)**
2. *In casu*, the appeal was removed from the roll because it was deemed abandoned and dismissed since the applicant had not paid security for costs within the prescribed time. The redress to this infraction is as provided for in the rules. The applicant in this case while apportioning blame to the respondents for consenting to the orders granted, cannot be exculpated from lack of probity and diligence. It is clear that the applicant has approached this Court with a wrong application for condonation and extension of time within which to note an appeal, when in actual fact, the deemed abandoned and dismissed appeal can be resuscitated by seeking condonation for non-compliance with r 55(5) and extension of time within which to pay security of costs. Further, the applicant ought to file for condonation for late filing of the application for reinstatement and extension of time within which to file an application for reinstatement and reinstatement of the appeal.
3. In the case of *Gazi* v *Mbababala Properties (Pvt) Ltd*, SC 24/23, Mavangira JA, sitting in chambers stated that:

“It is my considered view that in such a situation, a litigant, on becoming aware by itself, of the fate of its appeal by reason of operation of the law per r 55 as read with r 70, may properly apply for condonation of non-compliance with the rules and for the extension of time within which to file an application for reinstatement.”

These remarks resonate well with the circumstances of the present case. See also *Ahmed*v *Docking Station (supra)*, which emphasized the fact that bringing a wrong application before the court virtually places nothing for the court to relate to.

1. The circumstances presented require the applicant to make a composite application for condonation for non-compliance with the rules and extension of time within which to pay security of costs of court, condonation for the late filing of the application for reinstatement and the extension of time within which to file the application for reinstatement and reinstatement of the appeal which is already in the system.
2. In view of the fact that the matter is improperly before the court, it ought to be struck off the roll. The court will not relate to whether or not the requirements for granting of condonation and extension time have been met, because there is no proper application to relate to.

See the case of *Gospel of God Church International 1932 v Mungweru & Ors*, at page 6 where this Court aptly made the following remarks:

“Similarly with findings such as *in casu*, that the application is ill founded, the court has no basis for proceeding any further. A finding on a dispositive issue should mark the end of the court’s enquiry and of its curiosity too.”

There is therefore, no basis for the court, to relate to the submissions on the issues regarding extent of delay, reasonableness of the explanation proffered and prospects of success since there is no proper application before the court.

**DISPOSITION**

1. The fact that the applicant’s legal practitioner acted upon the suggestions of the respondents’ counsel on the defects in the notice of appeal and the promise not to oppose the application do not validate the propriety of the present application. When an appeal has been removed from the roll, for the reason that it has been deemed abandoned and dismissed by operation of the law, recourse is provided for in the rules through an application for condonation of non-compliance with the rules and reinstatement. Seeking condonation and extension of time to note an appeal in this case is incompetent and the applicant was thus misguided in this regard. The application is improperly before the court, hence the matter ought to be struck off the roll.
2. Regarding the issue of costs, there is no reason why the costs should not follow the result.

In the result, it is accordingly ordered as follows:

“The matter be and is hereby struck off the roll with costs.”

*Atherstone & Cook,* applicant’s legal practitioners

*Chasi Maguwudze Legal Practice,* 3rd to 5th respondents’ legal practitioners