**REPORTABLE (86)**

1. **TENDAI BOTHWELL NDORO N.O. In his capacity as the executor testamentary of the estate of the late Grace Mandaza (2) CATHERINE CONSTANCE MANDAZA In her capacity as the *curator bonis* of the estate of the late Joel Mandaza**

**v**

1. **DOROTHY MANDAZA (2) MASTER OF THE HIGH COURT (3) THE REGISTRAR OF DEEDS**

**SUPREME COURT OF ZIMBABWE**

**GUVAVA JA, UCHENA JA & MATHONSI JA**

**HARARE: 8 JULY 2024, 24 JULY 2024 & 19 SEPTEMBER 2024**

*R.H Goba,* for the first and second appellants

*T. Biti,* for the first respondent

No appearance for the second and third respondents

**MATHONSI JA:** This appeal, against the whole judgmentof theHigh Courtsittingat Harare (the court *a quo*) handed down on 19 October 2023, was initially launched only by the first appellant in his capacity as the executor testamentary of the estate of the late Grace Mandaza. The late Grace Mandaza was sued by the first respondent in the court *a quo* in her capacity as the executrix dative of the estate of her late husband Joel Mandaza as well as in her personal capacity.

Shortly before judgment was handed down Grace Mandaza passed away. The executor of her estate, the first appellant herein, replaced her as the appellant leaving a *lacuna* in the proceedings, namely, that the interest of the late Joel Mandaza, who was represented *a quo* by the late Grace Mandaza, were not protected. On an application for joinder made by the first appellant and Catherine Constance Mandaza, the daughter of the deceased couple, this Court granted the following order on 24 July 2024:

“**IT IS ORDERED BY CONSENT THAT**:

1. The application for joinder in terms of r 54(1) of the Supreme Court Rules, 2018, be and is hereby granted.
2. The first applicant (Catherine Constance Mandaza) be and is hereby joined to the appeal proceedings under Case No. SC 234/24 as the second appellant.
3. The first applicant be and is hereby granted leave to adopt the heads of argument filed of record for and on behalf of the second applicant.
4. Each party shall bear their own costs”

The appeal hearing then proceeded with the two deceased estates of the couple as the first and second appellants duly represented according to law.

**THE FACTS**

This family dispute over a small undeveloped house in New Canaan in Highfield Township, Harare has its parentage in colonial history. The first appellant, as already stated, is the executor testamentary of the estate late Grace Mandaza who died on 10 October 2023 having been appointed by letters of administration. She was married to the late Joel Mandaza who died on 26 January 2011. After the death of Joel Mandaza, his then surviving spouse, Grace Mandaza, was appointed the executrix dative of his deceased estate.

The second appellant is the *curator bonis* of the estate late Joel Mandaza by virtue of letters of confirmation issued by the second respondent on 5 July 2024, following the death of the executrix of the estate. The first respondent is the widow of the late Addison Mandaza, who died on 22 November 2009. The second respondent is the Master of the High Court while the third respondent is the Registrar of Deeds who are both cited in their official capacities. They have both not participated in the proceedings either *a quo* or in the appeal.

The late Joel Mandaza and the late Addison Mandaza were brothers. The house in dispute, being stand 3973 Highfield, Harare (the house) was initially a municipal house belonging to the City of Harare whose policy during colonial times was to only avail such houses to married people. In order to qualify for allocation of a municipal house one was required to produce a marriage certificate and would be eligible for allocation by virtue of marriage.

It is common cause that the house was applied for about March 1960 using the marriage certificate of the late Joel and Grace Mandaza who subsequently moved to Zambia where they set up residence before the house was allocated. It is also common cause that the City of Harare allocated the house to Joel and Grace Mandaza sometime in 1960 at a time when they had migrated to Zambia and that when that happened, the late Addison and Dorothy Mandaza were allowed to immediately move into the house. The late Addison lived in the house until his death while Dorothy is still residing thereon.

The late Joel and Grace Mandaza returned to Zimbabwe in 1978 but, upon their return, they did not take occupation of the house. Instead, they sought and purchased residence, initially in Houghton Park and later in Gunhill suburbs of Harare. There is no convergence between the feuding family members as to what the terms of the arrangement which led to the first respondent and her family moving into the house and spending their entire lives therein were.

The appellants insist that Joel and Grace were the ones who used their marriage certificate to obtain the house for themselves and that when it was allocated to them, out of generosity, they allowed Addison and his wife to occupy it. They maintain that the latter couple did not acquire any ownership rights over the house.

On the other hand, the first respondent asserts that it is herself and her late husband who wanted accommodation because the other family already had a house elsewhere in Highfield, which they had obtained using the marriage certificate of another brother. According to the first respondent, she and her late husband then approached Joel and Grace Mandaza requesting that they use their marriage certificate to apply for a house as they were yet to solemnise their own marriage.

With the consent of Joel and Grace Mandaza, so the first respondent argues, they filled in application forms at the City of Harare offices for rented accommodation resulting in the house being allocated in those names. In the first respondent’s view, for all intents and purposes, the house belongs to herself and her late husband because they applied for it, paid all that was due to the municipality and lived in it for the past sixty-four years.

What is not in dispute though is that rentals and the purchase price were paid for such that in 1994 the City of Harare was ready to transfer ownership of the house. Joel and Grace Mandaza were invited to the municipal offices to complete the process of applying for transfer. In due course, the house was transferred to their joint names and they hold title by Deed of Grant No 5698/94. They flatly refused to transfer the house to the first respondent thereby triggering litigation that has split the family asunder.

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

Having found no joy in the family support structures as the appellants dug in, the first respondent decided to escalate the dispute to court. She issued summons on 9 December 2011 seeking an order compelling the appellants to transfer the house into her name on the pain of costs of suit. The first respondent averred that about March/April 1960, she and her late husband completed forms for the rental of a house in New Canaan Highfield Harare, using the names of the late Joel and Grace Mandaza for the reason that they did not have a marriage certificate of their own at the time.

The first respondent averred further that they agreed with the late Joel and Grace Mandaza that the latter couple would subsequently change the municipal lease agreement into their names and paid the requisite fee for such application for housing. She added that when the house was allocated in the names of Joel and Grace Mandaza it is herself and her late husband who took occupation of it. They have remained in such occupation throughout paying the monthly rentals electricity, rates and other charges.

The first respondent averred that about July 1980, she and her late husband made an offer to the City of Harare to purchase the house and commenced making payments towards the purchase price which they later paid in full. Upon payment of the full purchase price, so the first respondent pleaded, the house was transferred to Joel and Grace Mandaza who refused to honour their undertaking to transfer it into her name and that of her late husband until her late husband died on 22 November 2009. Joel Mandaza later died on 26 January 2011 without so transferring the house.

Finally, the first respondent averred that after the death of Joel Mandaza, the late Grace Mandaza sought the authority of the second respondent to sell the house. Alleging to be the rightful owner of the house, the first respondent craved the grant of an order aforesaid.

The claim was contested by the appellants who filed a plea in abatement on the basis of prescription. The plea in abatement is reproduced below:

“**TAKE NOTICE THAT** the first and second defendants plead in abatement that the debt is prescribed in that:

1. The plaintiff for all purposes became aware of the debt, if any, in 1980 at most when it became possible to purchase a house without a marriage certificate.
2. The prescription period of this type of debt is 3 years.
3. The period of prescription was never interrupted or delayed at the relevant time and the debt effectively prescribed at most in 1984.

**WHEREFORE** the defendant (sic) prays that the plaintiff’s claim be dismissed with costs.”

The appellants also pleaded over on the merits denying completely that the house was applied for by the first respondent and her late husband. They averred that it is them who applied for and purchased the house which house legally belongs to them.

In due course the dispute was referred to trial on two issues namely:

“1. Whether or not the plaintiff’s claim has prescribed.

2. Who is the true owner of the immovable property being Stand 3973 Highfield Township in the District of Salisbury.”

Following a full trial, the court *a quo* dismissed the appellant’s plea in abatement based on prescription after finding that the Mandaza family had breached the law by assisting each other to acquire houses using marriage certificates not belonging to those who applied for housing. It found that prescription did not feature in family arrangements such as the one at hand given that both sides would have been complicit in breaching the law.

On the merits of the matter, the court *a quo* found that there was indeed an agreement between the two Mandaza families in terms of which the first respondent’s family would seek and obtain housing using the other family’s marriage certificate. It concluded that the arrangement was for the appellants to transfer the house to the first respondent and her husband.

The court *a quo* found further that the first respondent had satisfactorily explained how she and her husband acquired the house using the marriage certificate of their relatives. It accepted that they had lived in the house since it was allocated while meeting all the bills without any input from the appellants because the house was acquired on their behalf. It held that the *in pari delictum* rule had to be relaxed in order to do justice between the parties and ordered the transfer of the house to the first respondent.

On its way to arriving at that conclusion, the court *a quo* reasoned at pp 8-9 of the judgment thus:

“In the case before me, the reason given for having the property registered in the names of the first defendant and her husband was said to be because the plaintiff and her husband did not have a marriage certificate which was required at the time. It was a fact that a marriage certificate was a requirement in order to get a house. From the evidence of the plaintiff this Court is most certainly of the view that the arrangements described by the plaintiff for the acquisition of the property took place for the reason that she articulated. She had no reason to lie. Though not present at the time, her witnesses corroborated the dispute as it has been understood over the years that it has created the family rift.

Grace said it was her husband who did everything. The sole reason for her insisting that the property belongs to her and her late husband is because it was registered in their names. More over from her cross examination it was also clear why they later laid a claim to the house as theirs. She and her husband also initially acquired a house under similar circumstances for this reason of need of a marriage certificate but William had reneged on their agreement. This was a key factor for them too reneging on theirs. Prescription does not come into play in the case before me as indeed both were acting outside the law in their transaction as courts have recognised in matters such as this. The special plea of prescription is thus dismissed.

There is no doubt that in this case where the circumstances of the acquisition of the house have been made (more) likely than not, been truthfully explained by the plaintiff. She and her late husband indeed lived in the house all their lives meeting all the bills because the house had been acquired on their behalf because they did not have a marriage certificate at the time. Justice demands that the *in pari delictum* rule be relaxed and that title be transferred to her by the defendants.”

For the foregoing reasons, the court *a quo* granted relief in favour of the first respondent with costs.

**PROCEEDINGS BEFORE THIS COURT**

The appellants were disgruntled by the judgment of the court *a quo*. They filed this appeal on the following grounds:

“1. By finding that the first respondent’s claim had not prescribed, the court *a quo* erred and grossly misdirected itself at law.

2. Related to the above, the court *a quo* erred at law in finding that the first respondent had a valid cause of action against the appellant.

3. The court *a quo* erred and misdirected itself in granting the claim as it did in favour of the first respondent while in fact and law, the (first) respondent had not proved its case on a balance of probabilities.

4. The court *a quo* erred in granting the claim in favour of the first respondent when there was clear evidence of fraud. Put differently, the court *a quo* erred in granting a claim which is *in fraudem legis* to the advantage of the first respondent”

The appellants prayed for the success of the appeal, the setting aside of the judgment *a quo* and the dismissal of the first respondent’s claim with costs.

I mention in passing that Mr *Goba,* who appeared for the appellants, submitted that the fourth ground of appeal was being submitted in the alternative. Having put that qualification, counsel did not bother to motivate the said ground.

There are only two issues for determination in this appeal. They are:

1. Whether or not the court *a quo* erred in dismissing the appellants’ special plea of prescription, and;
2. Whether or not the court *a quo* erred in granting relief in favour of the first respondent.

**WHETHER THE COURT *A QUO* ERRED IN DISMISSING THE APPELLANTS’ SPECIAL PLEA OF PRESCRIPTION**

The Court heard arguments from counsel on prescription and, with the consent of the parties, rolled the issue over for determination together with the merits. The understanding was that, should the Court find in favour of the appellants on prescription that would be dispositive of the appeal rendering it unnecessary to address the merits.

Mr *Goba* for the appellants submitted that the claim such as the one made by the first respondent is governed by the Prescription Act [*Chapter 8:11*]. As such, the running of prescription commenced when the house was transferred into the names of the appellants in 1994. In counsel’s view the position taken by the first respondent and accepted by the court *a quo* is an attempt to abandon all the principles of our law which are cast in stone. He urged the court to find that prescription extinguished the first respondent’s claim.

It is instructive to capture the appellants` submissions verbatim from the heads of argument settled on their behalf:

“3.3. Any claim which first respondent might have had, which is denied, was

extinguished by statutory prescription.

3.3.1. It is irrelevant whether or not the parties had been making promises to each other which were unfulfilled or were in disagreement. First respondent and her husband should have asserted any legal claim they had within the period fixed by law.

3.3.2. Joel Mandaza and SCC signed a Deed of Sale (Existing Tenants:

Incorporated Areas) agreement of sale which was effective January 1981, Clause 1 and 2 thereof are instructive. On 15 September 1994 the Assistant Secretary, Ministry of Local Government signed the Deed of Grant which was then registered on 20 September 1994 to Joel and Grace Mandaza. First respondent and her husband were aware of this development since then but took no legal action to assert any right they claimed to have. The civil action subject of the present proceedings was only instituted on 8 December 2011, some 17 years later. By operation of law any claim would have become prescribed under the statute limiting civil actions.

3.3.3 Prescription of civil claims is part of our law. It is a legislated matter, s 15(d) of the Prescription Act [*Chapter 8:11*]. Respondent`s claim fell in the category of any other debt and would have been prescribed as from the very list (sic) 1980. The issue of prescription was raised at the trial. The court ought not to have ignored or overlooked it. Once it was proven that the suit was brought out of time it was liable to dismissal…”

Motivating the ground of appeal based on prescription further, Mr *Goba* made reference to evidence led by the appellants at the trial in the form of a letter of demand written to the late Joel Mandaza by the first respondent`s erstwhile legal practitioners, Honey and Blankenberg, on 29 June 1995 in which a demand for transfer of the house was made. Counsel also drew the Court’s attention to the late Joel Mandaza`s response dated 6 July 1995 in which the latter flatly refused to transfer the house maintaining that the house was his.

Mr *Goba* made the foregoing submissions notwithstanding the contents of the appellants` plea in abatement which is also reproduced verbatim above. The plea posited the running of prescription in 1980 when it became possible to purchase a house without a marriage certificate. Clearly therefore, the appellants` case on prescription was all over the place.

*Per contra,* Mr *Biti*, for the first respondent, contested the ground of appeal premised on prescription on four fronts, only one of which is dispositive of the issue. Firstly, he submitted that for prescription to arise there must be a valid cause of action. In the present case, so counsel argued, it is accepted that the agreement entered into between the parties was in *fraudem legis* to the extent that it was designed to defeat the dictates of colonial law. It must follow that no cause of action exists and prescription did not arise.

Secondly, Mr *Biti* submitted that the plea of prescription filed on behalf of the appellants averred that prescription started running in 1980 when it became possible to acquire a house without a marriage certificate which is factually incorrect. This is so because even in 1980 women remained perpetual minors under the yoke of their husbands until after this Court`s landmark judgment in *Katekwe* v *Muchabaiwa* which led to law reforms.

Thirdly, it was submitted on behalf of the first respondent that the word “debt” for purposes of prescription should be defined narrowly and confined only to claims sounding in money *ad factum.* Counsel urged the court to adopt the reasoning taken by South African authorities to the effect that the *actio rei vindicatio* does not prescribe. Asked on how the first respondent`s claim qualified as a *rei vindicatio* when, for all intents and purposes, the appellants were the registered owners of the house, Mr *Biti* submitted that this arose from the findings of the court *a quo* that the first respondent was the rightful owner of the house.

Fourthly, it was submitted for the first respondent that prescription must be properly pleaded and that the pleader is bound by his, her or its plea on prescription. In that regard, so the argument went, to the extent that the appellants pleaded that prescription arose in 1980 but led no evidence of how, meant that the plea was not proved at all. This was more so considering that both in evidence and in arguments made on appeal, the appellants relied on facts not pleaded at all. In any event, so it was argued, the first respondent’s claim is a continuing wrong.

In arguing the fourth point, which in my view is dispositive of the special plea, Mr *Biti* relied heavily on two judgments of the Constitutional Court namely, *Nyika & Anor* v *Ministry of Home Affairs & Ors* CCZ 5/20 where at para 26 the Court stated, *obiter dictum,* that where a plea in bar is filed raising two issues, these are the only issues that the court is required to determine and nothing else.

Counsel also drew attention to the case of *Dengezi* v *Nyamururu & Ors CCZ* 13/23 where, after making reference to the case of *Brooker* v *Mudhanda & Anor* 2018 (1) ZLR 33 at 38 F-G in which this Court ruled that the defense of prescription must be specifically pleaded with the plea setting out sufficient facts to show on what it is based followed by the hearing of evidence from the parties, the apex Court stated:

“[35] In light of the above, the defence of prescription has to be specifically pleaded and properly established by evidence. Indeed, the Prescription Act itself provides in s 20, that the defence of prescription must be specifically pleaded.”

It was submitted further that while the plea in bar makes reference to the law or policy that was changed in 1980, no shred of evidence on such change was led and accordingly the appellants` plea was not founded on any proven policy or law that existed or was changed in 1980.

I have said that in both evidence led *a quo* and in submissions made on appeal the appellants appeared to rely on either the registration of transfer of the house in the names of the appellants or the letter of demand written on behalf of the first respondent as triggering the running of prescription. Doing so was clearly at variance with the appellants` pleaded case, a clear case of barking up a wrong tree.

It is trite that a litigant is bound by its pleadings and is not allowed to plead a certain case but to then set about proving a case that was not pleaded. Not only is that procedurally irregular, it is also against public policy. It amounts to an ambush and or sending the opposite party on the garden path that is, having been prepared by the pleadings to meet a certain case the party is then confronted with a different case.

In my view, the court *a quo* arrived at the correct conclusion that the defense of prescription could not be sustained but for the wrong reason. The position is that the appellants did not prove their pleaded case of prescription. The first ground of appeal is demonstrably without merit and ought to fail.

**WHETHER THE COURT *A QUO* ERRED IN GRANTING RELIEF IN FAVOUR OF THE FIRST RESPONDENT.**

It is apparent from the excerpts of the judgment of the court *a quo* quoted above that it made both credibility and factual findings after assessing the evidence led before it. It found the evidence of the first respondent that she and her late husband had an arrangement to acquire that house for themselves using the appellants’ marriage certificate to be credible. It also found that it is the first respondent and her husband who paid all that was due for the acquisition of the house, including the purchase price and transfer fees, and that the appellants did not pay anything. It further found that Grace Mandaza lay a claim to the house merely because it was registered in her name and that of her late husband and nothing else.

The grounds of appeal relied upon by the appellants attack these credibility and factual findings. The position is settled in our jurisdiction that an appellate court can only interfere with credibility and factual findings of the court below on specific laid down grounds.

This Court has been emphatic that it will only interfere with factual findings of a lower court where these findings are grossly unreasonable. This position was reiterated in the case of *Zinwa* v *Mwoyounotsva* 2015 (1) ZLR 935 (S) at 940 E-F as follows:

“It is settled that the appellate court will not interfere with factual findings made by a lower court unless these findings were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusions, or that the court had taken leave of its senses, or, put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided would have arrived at it, or that the decision was clearly wrong.”

See also *Chioza* v *Siziba* 2015 (1) ZLR 252 (S), *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670 C-D, *Shuro* v *Chiuraise* SC 20/19.

By the same token an appellate court is very slow to interfere with a trial court’s findings based on the credibility of witnesses. This is so because, as Mr *Biti* correctly stated, the trial court is better placed to assess the credibility of evidence given that it is the one which feels the temperature of the evidence.

Part of the evidence which the court *a quo* had regard to is that given by Grace Mandaza. It is helpful to make reference to the part of the evidence- in- chief she gave on the issue of whether she and her husband paid anything towards the acquisition of the house. The dialogue between her and her legal practitioner at p 176 to 177 of the record is as follows:

“Q: Why do you say it (the house) belongs to you and your husband?

A: Because we are the ones who applied for it.

Q: Which year was this?

A: I do not recall clearly but it should be in 1960.

Q: Eventually the house was allocated to you?

A: Yes.

Q: Have you ever occupied the house?

A: No. We never occupied the house because when the papers came out that the house had been approved (sic) were no longer residing in this country. We had gone out of the country.

Q: Now from the time that this house was allocated to you up to now have you made any payments in respect of this house?

A: We were never told of any money that was needed that we paid.

Q: Are you aware that there are payments made in respect of this property?

A: What I know is that when you are residing in these urban areas there are some monies that you are expected to pay for example utility bills.

Q: If you did not make these payments who made the payments in respect of this house?

A: From the day it was approved or from the day it was purchased?

Q: From the day it was allocated to you?

A: That one I would leave it to my husband, he was the one who was the owner of the property.”

Grace Mandaza was pressed further on the issue of payment of consideration for the house under cross examination. At pp 186-7 the dialogue went like this:

“Q: And what would be your comment to the evidence advanced by the plaintiff to the

effect that she, together with her husband, are the ones who contributed to the utilities

of the said property?

A: What I know is that when you reside in these urban areas everything that needs money where you reside you are the one who is supposed to pay.

Q: Perhaps then you may reconcile your earlier position that your husband is the one at one point as the head of the house hold who saw to these issues and you never consulted with him?

A: If I may put a question that when you are renting somewhere are you expecting someone to pay rentals for you?

Q: So, to clarify, your position would be that the plaintiff and her husband as the occupants were the ones who were contributing towards the utilities?

A: Yes?”

There is no doubt therefore that the appellants’ case was that, through no consideration whatsoever, they became owners of the house merely by virtue of their marriage certificate and nothing more. We know of course from the documentary evidence on record that a lease agreement commencing on 1 December 1960 was signed in terms of which an initial rental of £ 5-00 was to be paid. We also know that on 28 July 1980 a “Sale of Rented Houses” agreement was again signed in terms of which a purchase price of $ 1185-00 for the house was to be paid in certain instalments.

From the evidence given at the trial, all the money paid for the house was paid by the first respondent and her late husband. The court *a quo* cannot be faulted at all for coming to the conclusion that the circumstances surrounding the acquisition of the house were truthfully explained by the first respondent.

It is also significant to note that in granting relief to the first respondent, the court *a quo* exercised judicial discretion to relax the *in pari delictum* rule given that the parties had acted outside the law in the process of acquiring the house. There has been an attempt by the appellants to impugn that exercise of the judicial discretion. It is clear that the attempt has been half-hearted which is why, after stating that ground 4 was being raised in the alternative, Mr *Goba* did not bother to motivate that ground in his submissions.

Whichever way, the exercise of discretion has not been sufficiently impugned as there is no ground of appeal couched in a manner impeaching it. As eloquently stated by Ziyambi AJA in *African Century Limited* v *Megalink Investments (Private) Limited & Ors* SC 44/18:

“… in exercising this inherent power, the court exercises a judicial discretion. Any attack therefore, on a decision made in the exercise of such discretion must necessarily be aimed at the manner of the exercise of the court`s discretion. Thus, while I agree with Mr *Mpofu* that such ‘incantation’ is unnecessary, it must appear in the grounds of appeal that an improper or incorrect exercise of the court`s discretion is what is being put in issue. None of the grounds of appeal is directed against the propriety or otherwise of the exercise of the court`s discretion.”

The same can be said about the appellants’ grounds of appeal. Not only do they fail to make a case for interference on appeal with the factual and credibility findings of the court *a quo*, they also dismally fail to make a case for interference with what was clearly an exercise of judicial discretion. It is trite that an appellate court will not lightly interference with the exercise of discretion. The remarks made in the famous case of *Barros & Anor* v *Chimphonda* 1999 (1) ZLR 58 (S) at 62F-63A are apposite:

“It is not enough that an appellate court considers that had it been in the position of the primary court it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution…”

As already stated, no case has been made in both the grounds of appeal and the submissions made on appeal for interference.

**DISPOSITION**

The appellants did not properly plead the defense of prescription having pleaded a certain case, that is, that prescription started running in 1980 when it became possible to acquire houses without a marriage certificate, but gone on to lead evidence at variance with the plea.

In finding in favor of the first respondent, the court *a quo* made credibility and factual findings which the appellants have failed to impugn. In relaxing the in *pari delictum* rule, the court *a quo* was engaged in the exercise of judicial discretion. No case has been made for interfering with that exercise of discretion. The appeal ought to fail.

Regarding the question of costs, generally the costs follow the result. The appellants have been unsuccessful. There is no basis for sparing them the consequences of such failure. They should bear the costs.

In the result it be and is hereby ordered that.

“The appeal is dismissed with costs.”

**GUVAVA JA** :I agree

**UCHENA JA** : I agree

*Ziumbe & Partners*, the appellants` legal practitioners.

*Tendai Biti Law*, 1st respondents` legal practitioners