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Judgment No S.C. 7\03
Civil Application No 339\2002

At The Ready Wholesalers (Private) Limited T/A Power Sales V (1) Innocent Katsande (2) Alfred Goredema (3) Wirimayi Jakopo (4) Stephen Samhembere (5) Sailas Baloyi (6) Itai Muradzikwa

SUPREME COURT OF ZIMBABWE
HARARE MARCH 4, 2003

E.W.W. Morris, for the appellant

M.G. Ndiweni, for the respondents

Before: CHIDYAUSIKU CJ, in Chambers, in terms of the Supreme Court Rules.

The applicant in this case summarily dismissed the respondents from employment in terms of Statutory Instrument 368A of 1998. The respondents successfully challenged their dismissal as unlawful in the High Court. MUNGWIRA J concluded that the respondents' dismissal from employment was null and void. The applicant appealed to this Court against that judgment. The notice of appeal was fatally defective in that it did not comply with Rule 29(1)(c)(e) of the Supreme Court Rules. Attempts were made to remedy the defect by a Notice of Motion or Petition that was to be moved at the hearing of the matter. It was indicated in the notice of motion that an application would be made at the hearing for an extension of the time within which to note an appeal and proposed new grounds of appeal that complied with the rules.

At the hearing of the appeal no application for condonation was made. Accordingly, no extension of the time within which to note an appeal could be considered. The appeal was, therefore, struck off the roll on the basis

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that the notice of appeal before the court was a nullity. Detailed reasons for judgment are contained in judgment S-36-02.

The applicant now applies for an extension of time within which to note an appeal.

This case reveals a lackadaisical approach that borders on an abuse of court process. To start with the applicant filed a notice of appeal that did not comply with the rules to the extent that it was a nullity. When the defect was pointed out to it the applicant filed with this Court a notice of intention to apply for condonation at the hearing of this matter. The notice of motion, for reasons never disclosed to this Court, was never served on the respondents. At the hearing of the appeal the application for condonation, for some inexplicable reason was never moved, and, consequently the appeal was struck off because it was not properly before the court, there being no proper notice of appeal.

Now the applicant has filed a Chamber application for an extension of time within which to note an appeal. In the Chamber application no attempt is made to explain the inordinate delay between the day the respondents' heads of argument were served on 22 November 2001, pointing out that the notice was invalid, and, 4 February 2002 when the applicant filed the application for condonation. Seventy three days or so had elapsed since the defect in the notice of appeal was brought to the attention of the applicant before the applicant did anything about the matter. The applicant has not explained why the application for condonation which it seeks to reinstate was never served on the respondents until some eighty-one days from the date it was filed. Instead the applicant contends it was never opposed. If the application had been served that argument would make sense. The last judgment in the matter was handed down

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on 6 June 2002 and nothing happened until this application was launched some 119 days later on 4 October 2002.

As Mr *Ndiweni* correctly submitted, the failure to explain, particularly when it is shown to be sustained and customary with a particular litigant, is inexcusable.

Having failed to apply for reinstatement timeously the applicant neglects to apply for condonation for the late application, or is perhaps oblivious of the need to do so. It is trite that what calls for some explanation, is not only the delay in noting an appeal and in lodging the reward timeously, but also the delay in seeking condonation. *Solojee and Anor NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 135H. Commenting on this case, this Court, in *Viking Woodwork (Pvt) Ltd v Blue Balls Enterprises (Pvt) Ltd* 1998 (2) ZLR 251 had this to say:-

"There are, therefore, two hurdles to overcome."

The applicant's attention was drawn to the fatal irregularity in its notice and it should have applied for condonation without delay. That is trite.

Whenever an appellant realises that he has not complied with a rule of court he should, without delay, apply for condonation. This is a case where there has been breaches of the rules without any explanation being tendered to explain away the breaches. And in such a case, especially where there is no acceptable explanation therefore, the indulgence of condonation may be refused whatever the merits of the appeal are; this applies of even where the blame lies solely with the attorney, see e.g. *P.E. Bosman Transport Works Committee and Ors v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at

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799D-H. Hence even if the case had any merits it should fail on the first hurdle of failing to act timeously to seek condonation etc, see *Viking, supra*, at 254C-E.

Accordingly, on this basis alone, and without considering the merits the application should fail.

The application is, therefore, dismissed with costs.

Joel Pincus Konson & Wolhuter, applicant's legal practitioners

McGown Gideon Ndiweni, respondents' legal practitioners

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