

**DISTRIBUTABLE (21)**

**MARVELLOUS TARUWONA**  
v  
**(1) COBRA SECURITY (PRIVATE) LIMITED (2) MISHECK BRIAN**  
**ZVARIVADZA (3) TAPSON MADZIVIRE**

**SUPREME COURT OF ZIMBABWE**  
**HARARE, AUGUST 21, 2012 & MARCH 20, 2017**

In Person, for the applicant

*S. Mushonga*, with client, for the respondent

**IN CHAMBERS**

Judgment No. SC 24/17  
Civil Appeal No. SC 288/01

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**GOWORA JA:**

On 27 September 2001, the High Court in Harare issued an order in terms of which it dismissed an application filed by the applicant herein against the three respondents. No reasons were provided by the learned judge in the court *a quo*. Despite this the applicant noted an appeal against the judgment on 11 October 2001.

Written reasons for the judgment were availed on 7 May 2007. A record of proceedings having been prepared, on 19 March 2009 the Registrar of this court requested the applicant to file his heads of argument in support of the appeal in accordance with the rules. On 17 August 2009, the Registrar dispatched a second letter to the applicant's legal practitioners of

record informing them that the appeal was deemed to have abandoned in view of the failure to file heads of argument. The records in the matter were returned to the court *a quo* to allow execution in terms of the judgment. No further action was taken by the applicant.

On 12 June 2012 the applicant's legal practitioners filed a notice of renunciation of agency. On 22 June 2012 the applicant filed this application. The applicant was unrepresented.

In the founding affidavit in support of the order for reinstatement of the appeal, the applicant stated that after the reasons were availed he made all the requisite ground work to expedite the hearing of the appeal. He claimed that he had been abandoned by his legal practitioners and as a result he had not been in a position to prosecute his appeal. His erstwhile legal practitioners filed a supporting affidavit in which they indicated that they had renounced agency on 1 April 2009. In the affidavit they further averred that on receipt of the letter dated 17 August 2009 the legal practitioners responded by letter dated 19 August 2009 and informed the Registrar that they had renounced agency on 1 April 2009. It appeared that the notice of renunciation was not on record and consequently on 12 June 2012, upon instruction from the applicant, another notice was issued and filed with the Registrar.

On these facts the applicant contends that he was not in willful default of filing heads of argument as required by the rules of this court. He contends further that in view of the fact that he was no longer represented he was not obliged in terms of the rules to file heads of argument. He referred to the draft of notice of appeal and contended that the appeal had merit, warranting the grant of the relief sought.

In opposing the application, the second respondent stated that during the period extending from October 2001 and 17 August 2009, the applicant had filed no less than ten applications with the High Court. He had also filed not less than four appeals with the Supreme Court. Copies of the documents filed in relation to those matters were attached. The documents show that the applicant was legally represented in all the matters. In some of the cases he was represented by senior counsel. It was contended by the respondents that a judgment delivered by KUDYA J on 20 February 2012 appeared to be the reason that spurred the applicant to act and pursue the appeal which is the subject of this application.

As far as prospects of success were concerned, it was contended by the respondents that the applicant had not set out the basis upon which he considered that there were prospects of success in relation to his appeal. The respondents contended that the applicant has not explained the inordinate delay from the time that the Registrar deemed the appeal to have been abandoned and the time that it took the applicant to file his application for reinstatement of the appeal.

In the matter heard by KUDYA J the applicant was the plaintiff and he was legally represented. In his judgment, the learned judge sets out in detail the prolixity of the litigation that the applicant and his opponents had been engaged in. The applicant was criticized for the dilatory manner in which he dealt with the matter which was the subject of that judgment. What is clear is that it is the statement by the learned judge in the judgment to the effect that the only claim that was still alive was the one for shares which was still pending in the Supreme Court. The judgment is dated 21 February 2012. This application was filed on 22 June 2012. The

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statement by the respondents appears to have merit. The applicant must have been encouraged by the learned judge's remarks.

According to the affidavit from the applicant's erstwhile legal practitioners they renounced agency on 1 April 2009. The letter calling upon the applicant to file heads of argument was dated 19 March 2009. There is no dispute that it was received. It has not been attached to the application as a result there is no indication as to when it was received. That notwithstanding, the applicant cannot run away from the fact that when the letter of 19 March 2009 was written, he was legally represented. As such in terms of the rules, he was obliged to file heads of argument. The Registrar was, as a consequence, well within his rights in terms of the rules to write the letter of 17 August 2009 in terms of which the appeal was deemed to have been abandoned due to the failure on the part of the applicant to file heads of argument when called upon to do so.

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Turning to the merits of the application, the applicant was under an obligation to explain the delay in filing the application. It is obvious that by 19 August 2009, his erstwhile legal practitioners had become alive to the fact that the appeal had been dismissed due to the failure on their part to attend to the heads of argument as requested by the Registrar. They had filed a notice of renunciation of agency on 1 April 2009. He was aware of this as he makes a statement to the effect in his founding affidavit.

There is no explanation from the legal practitioner concerned as to what action he took when he received notification that the heads of argument were required. The legal

practitioner does not explain whether or not the applicant was advised of the notice of renunciation. It is fair to say that the supporting affidavit from the erstwhile legal practitioners is short on detail and does not assist the applicant's case whatsoever.

A litigant who has not complied with the rules is entitled to seek condonation from the court from such non-compliance. A court, may on good cause grant condonation for failure to comply with rules of court but such condonation is not to be had merely for the asking. An applicant seeking condonation has an *onus* to establish good cause. That is to say that such applicant must provide a full detailed and accurate account of the reasons for the delay and the failure to do that which the rules require to be done.

In this instance, the applicant has given conflicting and patently false versions as to why there was non-compliance with the request by the Registrar to file heads of argument. In his founding affidavit he pleads poverty as a reason for the failure to comply with the demand for heads of argument. The record confirms that the applicant has been litigating in the High Court as late as February 2012. He also fails to explain the failure by his legal practitioners to file the heads of argument. The notice of renunciation was filed more than ten days after the Registrar had written to the applicant's legal practitioners on the subject matter of the heads of argument. The supporting affidavit should have explained that failure, as that was the reason for the dismissal of the appeal. There is no explanation from the legal practitioners as to why the heads of argument were not filed. In fact, the letter by the Registrar did not appear to have received attention apart from the renunciation of agency.

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In *Machaya v Muyambi* SC 4/05 ZIYAMBI JA had occasion to deal with passiveness on the part of a legal practitioner called upon by the Registrar to file heads of argument in an appeal. The learned judge stated:

“The time has come for sterner measures to be taken of applications of this nature where negligence, tardiness and disdain for the rules of court is exhibited by legal practitioners. The often quoted passage from the judgment of STEYN CJ in *Saloojee & Anor, NNO v Minister of Community Development* 1965(2) SA 135(A) at 141C-E bears repeating here, namely that:

“There is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to act was due neglect on the part of the attorney. The attorney after all is the representative whom the litigant has chosen for himself and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.”

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And at F-H:

“A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney (cf. *Regal v African Superstate (Pty) Ltd.*, (*supra*) at 23 i.f) and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case. In these circumstances I would find it difficult to justify condonation unless there are strong prospects of success.”

The applicant in my view, is suffering from a misapprehension of the law. He cannot claim that he was not required to file heads of argument because he was unrepresented. What is of paramount import is what his status was at the time that he was called upon to file the written submissions. He was legally represented at the time and the Registrar was within his rights to deem the appeal abandoned when the applicant failed to comply with the demand.

The letter from the Registrar dismissing the appeal was received by the applicant's legal practitioners. They responded to the same. However, they do not proffer an explanation as to what action they took upon its receipt apart from informing the Registrar that they had renounced agency on behalf of the applicant.

The applicant himself does not deal with this aspect of the matter. He fails to see the significance of the letter from the Registrar. The letter determined the fate of his appeal and the delay in applying for its reinstatement needs a full and detailed account to explain why no action was taken from 17 August 2009 to 22 June 2012. The delay is clearly inordinate and in the absence of an explanation for the same the only inference is that the applicant chose not to take action until the judgment by the Honourable KUDYA J.

As for prospects of success, clearly the applicant has not pointed this court to any. In the judgment sought to be impugned, the learned judge stated:

“The application was ill-conceived in two mutually inclusive aspects. Firstly, there is a dispute of fact which cannot be resolved on the papers. The applicant avers that he is entitled to access the first respondent's statements of account during the period 1995-2001 by virtue of his being a shareholder of the same.

The second and third respondents oppose the application on the grounds that the applicant is not a shareholder of the first respondent and on that basis is not entitled to the

order that he seeks. The applicant is unable to furnish acceptable evidence documentary or otherwise proving his shareholding in the first respondent during the period in question.

The applicant states that such evidence is in the files of the first respondent access to which has been denied him by the second and third respondents. That brings me to the second hurdle in the applicant's case. The applicant has put the cart before the horse by bringing this application at this stage. He should first have sought an order compelling the respondents to give him access to such records as he may need to prove his shareholding. Only then, in the event he had succeeded would it have been prudent to contemplate the present application."

The notice of appeal filed on 11 October 2001 attacks the judgment on two bases. The first is that the court erred in dismissing the application on the basis that the applicant had not produced a share certificate. The applicant did not, before the court *a quo*, produce a share certificate. His second ground confirms this. The second ground attacks the judgment on the basis that the court erred by not having regard to correspondence between the respective legal practitioners of the parties which confirmed that the applicant was a shareholder. Again this ground is clearly misplaced when regard is had to the applicant's acceptance before the court *a quo* that the evidence by which he could prove his claim to the shareholding was contained in files kept by the respondents and that he had not been given access to the files. The correspondence between the legal practitioners in light of his concession as to the lack of proof of ownership could not be a substitute. Such correspondence could not on its own be held to be the evidence that he was required to adduce.

In my view, I can find no better way of describing the prospects of success or lack thereof of the contemplated appeal than was stated by the court *a quo*. Clearly there was no proof presented before the court *a quo* which would have warranted an order declaring the applicant a shareholder of the first respondent.



In the premises the application lacks merit and is hereby dismissed with costs.

Applicant in person

*Mushonga, Mutsvairo & Associates*, for the respondents

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