REPORTABLE (10)

RITA MARQUE MBATHA
v
THE MESSENGER OF COURT

SUPREME COURT OF ZIMBABWE
HARARE, 13 NOVEMBER 2024 & 13 FEBRUARY 2025

The applicant in person

P. Murove, for the respondent

CHAMBER APPLICATION

CHITAKUNYE JA. This is an opposed chamber application for condonation for non-compliance with rr 55(5) and 70(2) and for reinstatement of an appeal deemed dismissed in terms of r 70 (1) of the Supreme Court Rules, 2018.

THE FACTS.

On 1 October 2016, the applicant and Vincent Ncube (Mr Ncube") entered into a lease agreement for the property at 126 Edgemore Road, Park Meadowlands, Hatfield, Harare. The property was owned by Mr Ncube. A dispute concerning rental payments arose between the two, prompting Mr Ncube to approach the Magistrates' Court for the applicant's eviction. An eviction order was granted in default. The applicant then approached the Magistrates' Court for a rescission of the default judgment. Before the proceedings in the Magistrates' Court were concluded, she filed an application for review under case number HC 7542/17 in the High Court.

The applicant also approached the High Court with an urgent chamber application for stay of execution in HC 9296/17, pending the determination of her application for review. The High Court dismissed the application for stay of execution, which prompted the applicant to approach the Supreme Court on appeal under case number SC 847/17. The applicant stated that the Supreme Court granted her appeal and set aside the High Court's decision on 17 May, 2018. She further averred that despite the setting aside of the High Court's decision by the Supreme Court, the respondent proceeded to evict her and attach her property.

The applicant filed an urgent application with the High Court (the "court *a quo*") in HC 7310/18, seeking to be reinstated into the property and to have her property returned to her. An interim order was granted in her favour. She alleges that she served the order on the respondent on 10 August 2018, and the respondent refused to comply with the order. A final order was subsequently confirmed on 12 September 2018.

The applicant further alleged that the seizure of her property, which she termed arbitrary, was unlawful, infringed s 71(3) (d) of the Constitution of Zimbabwe, 2013 (the "Constitution"), and was a violation of her right to privacy guaranteed under s 57 of the Constitution. The applicant averred that when her efforts to have the respondent comply with the order in HC 7310/18 failed, she thereafter applied for a declarator*y* order under case number HC 2590/22 to assert her rights protected under s 71 of the Constitution. She further averred that the conduct of the respondent violated the rule of law and principles of good governance.

Per contra, the respondent, in resisting the application for a *declaratur*, averred that the order the applicant sought in HC 2590/22 required the court *a quo* to revisit its order in HC 7310/18 as the application brought up the same issues that had already been dealt with. The respondent further averred that the court was already *functus officio* regarding those issues, and the matter had to be dismissed on that basis alone.

In the alternative, the respondent contended that the applicant's cause of action had prescribed as it was based on events that occurred more than three years ago.

The respondent also stated that, in any case, it had complied with the order granted in HC 7310/18 in that it had made efforts to return the attached and removed property to the applicant but she had resisted. The respondent further contended that the applicant could collect her property, which had already been released under a release note. The respondent further averred that there was no active dispute for the court to address under s 14 of the High Court Act [*Chapter 7:06]*, and there was no constitutional matter to be determined.

The respondent further contended that the applicant had not presented a strong case for the granting of a *declarator* and that this was not the first time that the applicant had brought the same issue to Court. The respondent prayed that the application be dismissed with costs at a higher scale.

The respondent filed a counter-application in terms of r 58 (8) and (9) of the High Court Rules, 2021 seeking an order of perpetual silence against the applicant. In the counter application the respondent alleged that the applicant had repeatedly filed many unmerited cases intending to harass and annoy the him.

The court *a quo* upheld the respondent's contention that what the applicant was seeking was in fact a variation of that court's order in HC7310/18 in which the court had clearly ordered that the attached items, as per the notice of attachment, be restored to the applicant, by the inclusion of other items not stated in HC7310/18. The court *a quo* in effect found the respondent not at fault as it had made efforts to return the items but such efforts were rebuffed by the applicant who sought to impose conditions not included in the court order for her to

accept the items. The court *a quo*, therefore, found that there was no merit in the applicant's application for a *declaratur* and dismissed it.

In respect of the counter-application, the court *a quo* recounted the numerous cases the applicant had brought against the respondent and their fate after which it considered whether the applicant's actions were justifiable or amounted to an abuse of the court and its processes. The court *a quo* found merit in the counter-application and held that the applicant should be restrained from repeatedly bringing the same issues before the court when it had pronounced itself on such issues.

Aggrieved by the decision of the court *a quo*, the applicant appealed to this Court under case number SC 184/24 on 5 April 20 24.

In terms of r 55(5) of the Supreme Court Rules, 2018, the applicant was required to pay security for the respondent's costs within a month from the date of noting the appeal. She did not do so.

At the hearing of the appeal on 26 September 2024, this Court noted that the appeal had been regarded as abandoned and deemed dismissed by operation of law because the applicant had not paid security for costs as required in terms of r 55. The matter was thus removed from the roll. It was upon such turn of events that the applicant filed the present chamber application for condonation for failure to furnish security for costs in terms of r 55, extension of time in which to pay security for costs, and reinstatement of the appeal under case number SC 184/24.

SUBMISSIONS BEFORE THIS COURT

The applicant motivated her application premised on the papers filed of record. She alluded to the requirements of such an application as referred to in her pleadings filed of record. She thus prayed for the grant of the application in terms of the draft order.

Mr *Murove*, for the respondent, submitted that the applicant had not met the requirements for the grant of the applications for condonation, extension of time within which to pay security for costs and for reinstatement of the appeal. In this regard, he submitted that the applicant had not provided a satisfactory explanation for her failure to pay security for costs within the required period in terms of the rules. He also submitted that the applicant had not established that the appeal enjoyed any prospects of success if the indulgence was granted. He thus concluded that in the circumstances the application cannot succeed.

THE LAW

It is trite that a litigant who has infringed the rules of court must seek condonation for non-compliance with the rules and extension of time within which to comply. Where the matter is regarded as abandoned and deemed dismissed, as *in casu*, the litigant would need to also seek the reinstatement of the appeal. In this endeavour an applicant is obligated to, *inter alia*, provide a reasonable explanation for non-compliance with the rules and any delay involved in seeking condonation. The applicant must also establish that there are good prospects of success on appeal should the indulgence be granted. These and other relevant factors were amply stated in *Maheya v Independent Africa Church* 2007(2) ZLR319(S) at 323B-C wherein MALABA JA (as he then was) said:

> "In considering applications for condonation of non-compliance with its rules, the court has a discretion which it has to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefor; the prospects of success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the Court and the avoidance of unnecessary delays in the administration of justice"

These factors are considered cumulatively and, depending on the weight of each factor and obtaining circumstances, a decision is made. 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."

In *casu*, the applicant's non-compliance with r 55 resulted in the appeal being regarded as abandoned and deemed dismissed. The rules of this Court provide for reinstatement of such an appeal that is regarded as abandoned and deemed dismissed. Rule 70 of the rules of this Court is apposite. It provides that:

> "(1) Where an appeal is—
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> (a) deemed to have lapsed; or
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> (b) regarded as abandoned; or
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> (c) deemed to have been dismissed in terms of any provision of these rules; the registrar shall notify the parties accordingly.
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> (2) 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."

The legal considerations governing applications for reinstatement of appeals regarded as abandoned and deemed dismissed were stated in *Champion Constructors* v *Mkandla & Anor* SC 18/07 at p 3 as follows:

> "The position is now settled that in an application for the re-instatement of an appeal which was regarded as abandoned and deemed to have dismissed(*sic*) the applicant must show <u>good cause</u> for the default - *Susan Chipo Vera* v *Mitsui & Company Limited* SC 32/04. The requirements that have to be satisfied in an application of this nature <u>are the same as in an application for condonation for late noting of an appeal and for extension of time within which to file an appeal</u>." (My emphasis)

In *Chandra Mohan Goyel* v *Myrammar Farming (Pvt) Ltd* t/a *Cottonzim & Ors* SC 59/24, at p 13 the Court stated that:

> "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."

It is thus imperative that in a combined application, such as this one, the applicant provides a reasonable explanation for the default and for the length of the delay in seeking condonation. The applicant must then establish that there are prospects of success if the appeal is reinstated. The applicant must show good cause warranting reinstatement.

ISSUE FOR DETERMINATION

The overarching issue in this application is, whether or not the applicant has established good cause for condonation and for the reinstatement of the appeal.

APPLICATION OF THE LAW TO THE FACTS

1. The extent of the delay and reasonableness of the explanation for the delay.

It is incumbent upon the applicant to give a reasonable explanation for the failure to act in terms of the rules. *In casu*, the appeal that the applicant seeks to have reinstated was noted on 5 April 2024 and was, by operation of law, regarded as abandoned and deemed dismissed upon failure to pay security for costs at the end of a month from that date; that is about 5 May 2024. This application for condonation for the failure to pay security for costs in terms of the rules was only made on 1 October 2024. The applicant was thus approximately five months out of time. The applicant is obligated to provide a reasonable explanation for that default and for the period of the delay.

Though in her founding affidavit the applicant alleged that she paid the security for costs on 8 May 2024, she conceded that this was a unilateral figure and was not in

accordance with the rules. This payment was a knee-jerk reaction to the registrar's letter of 8 May 2024 calling upon her to furnish proof that she had paid security for costs. This reaction was, in any case, made after the lapse of the period for payment. It was thus a belated attempt to meet the requirement albeit without complying with the dictates of the rules. The sum paid was her own figure yet the rules provide for the parties to agree on the amount failing which the registrar is required to make a determination of the sum to be paid upon application by the appellant. (See r 55(2). It is thus conceded that the payment was not in accordance with the rules. In the circumstances, the applicant must proffer a reasonable explanation for the entire period of the delay. Such a delay is inordinate unless one can provide good reasons for it.

In the founding affidavit, the applicant unfortunately failed to provide a reasonable explanation for her failure to comply with the rules and for the delay in seeking condonation for the default.

The applicant, in her explanation, did not address the cause for her failure to pay security for costs within one month from the date she filed the notice of appeal. She instead related the events that occurred prior to her noting the appeal yet the delay to be explained was not before the noting of the appeal but after the noting of the appeal. So whatever challenges she may have faced in accessing the judgment were not relevant to the events after obtaining the judgment and noting her appeal.

The next leg of the applicant's explanation relates to events after the court had informed her on 26 September 2024 that due to her failure to pay security for costs in terms of the rules, her appeal was regarded as abandoned and deemed dismissed. She attempted to use that date as the date the appeal was dismissed and, due to that misunderstanding on her part, she considered her filing of this application a day after that pronouncement as having acted in

time. Thus, in addressing the requirement for a reasonable explanation for the delay in para 11 of her founding affidavit she simply stated that:

> "The appeal under SC184/24 was heard yesterday (26 September 2024). I will be filing this application before end of day today (27 September2024)".

Further on, under paras 12,13 and 16, she makes it clear that she was taking 26 September 2024 as the date the appeal was regarded as abandoned and deemed dismissed hence by filing this application on 27 September, she was within the time limit for seeking reinstatement.

In her submissions in court, the applicant submitted that she only realized that her appeal had been regarded as abandoned and deemed dismissed when she was in Court and that she had not received any notification from the registrar as stipulated by the rules and so she was taking the court order as the notification. This was clearly incorrect.

In *Gazi v Mbababala Properties (Pvt) Ltd* SC 24/23, the Court emphasized that the registrar's failure to inform an appellant that their appeal had been regarded as abandoned and thus deemed dismissed for non-compliance with the rules did not justify missing the deadline to reinstate the dismissed appeal. At pp 7-9, paras 19-22 MAVANGIRA JA aptly stated as follows:

> "I pause at this juncture merely to note that r 70 provides that the application for reinstatement is to be made "within 15 days of receiving any notification by the Registrar in terms of subrule (1)." However, in *casu*, the Registrar had not sent any notification to the applicant, hence the ruling by the court that it was by operation of law that the matter had been regarded as abandoned and deemed to have been dismissed and that therefore the matter ought to be struck off the roll, as the court accordingly proceeded to do. The court correctly so ordered even though there was no notification to the applicant by the Registrar.
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> A failure by the registrar to notify a party in terms of r 70 does not, in my view, deprive a litigant of the remedy provided for in r 70 (2). Neither does it create a different legal

> status or consequence to the affected appeal. In terms of subrule (2) of the rule, it is capable of reinstatement on good cause shown. The striking of the matter off the roll was subsequent to, and resultant of the deemed dismissal by operation of law. Non-notification by the registrar does not alter the nature or character of the matter. Admittedly, the lack of notification by the registrar, even though it might in itself be, and at the same time also create a highly unsatisfactory, if not prejudicial state of affairs, may result in the litigant unwittingly and unintentionally failing to take the necessary action within the stipulated time frame. While ignorance of the law is said to be no excuse, it seems to me that where there has been no notification as required, the effect of such non-notification is not, and cannot have been meant to render the appeal as having been finally and effectively dismissed and thereby leaving the litigant with no opportunity to seek reinstatement. If that were so, this application would be inappropriate. It must remain as an appeal that stands as having been regarded as abandoned and deemed to have been dismissed. It is my considered view that in such a situation, even without the registrar's notification, a litigant, on becoming aware by itself, of the fate of its appeal by reason of the operation of law per r 55 as read with r 70, may properly apply for condonation of non-compliance with the rules and for extension of time within which to file the application for reinstatement. It is my view that that is what the applicant ought to have done in *casu*. …..
>
> It is also important to note that the notification that is done by the Registrar must be recognized for the administrative action that it is. On the other hand, the regarding as abandoned and being deemed to have been dismissed, is automatically triggered by operation of law. In terms of the Rules, the applicant's remedy lies in r 70."
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> (Underlining for emphasis)

It is crystal clear that the applicant cannot hide behind the failure by the registrar to notify her that her appeal had been regarded as abandoned and thus deemed dismissed for her own failure to apply for the reinstatement of the appeal within 15 days after it was deemed dismissed. This is because the provisions of r 70 were automatically activated upon the expiry of a month from the date of filing the notice of appeal by virtue of her non-payment of security for costs in terms of the rules. The pronouncement by the court was simply confirming the existing legal status as from the expiry of the one-month period from when she noted her appeal. In any case, I did not hear the applicant to dispute that in the registrar's letter to her of 8 May 2024, besides asking her to furnish the registrar with proof of payment of security for costs, the registrar had also stated that:

> "Failure to comply with the directive, in terms of Rule 55(6), the appeal shall be regarded as abandoned and shall be deemed to have been dismissed."

Further, on 25 June 2024 the respondent's legal practitioners filed a notice of objection in terms of r 51 in which they stated, *inter alia*, that by virtue of her failing to pay security for costs within one month from the date of noting the appeal, the appeal was deemed to have been dismissed by operation of law. The applicant did not deny receiving this notice of objection. The fact that the applicant did not pay security for costs within one month is common cause and the above communications served to remind her of the consequences of such failure.

Despite the above communications, the applicant waited till 26 September 2024, when this Court simply confirmed the consequences of her failure to pay security for costs, before filing this application. Clearly the fact that the registrar had not notified her that her appeal had been regarded as abandoned and deemed dismissed is neither here nor there. She already knew the position but took a risk by pursuing the matter which had been deemed dismissed by operation of law.

The applicant lamentably failed to provide a reasonable explanation for her failure to comply with r 55 and for the failure to seek condonation and reinstatement of the appeal in time. She could not explain why, in the face of communications referred to above, she waited till this Court's confirmation on 26 September 24 before attempting to redress the situation.

In *Zimslate Quartzite (Pvt) Ltd & Ors* v *Central African Building Society* SC 34/17 at p 7 this Court aptly stated that:

> "An applicant, who has infringed the rules of the court before which he appears, must apply for condonation and in that application explain the reasons for the infraction. He must take the court into his confidence and give an honest account of his default in order to enable the court to arrive at a decision as to whether to grant the indulgence sought**.** An applicant who takes the attitude that indulgences, including that of condonation, are there for the asking does himself a disservice as he takes the risk of having his application dismissed." (underlining for emphasis)

Further, in *Lunat* v *Patel* SC 47-22 at p 6, CHATUKUTA JA held that:

> "A party seeking condonation and extension of time must satisfy the court that a valid and justifiable reason exists as to why compliance did not occur and why non-compliance should be condoned**.** Further, regardless of the prospects of success, a court may decline to grant condonation where it considers the explanation for failure to comply with the rules unacceptable*."* (My emphasis)

In *casu,* the applicant did not provide the envisaged explanation, let alone a plausible one, for the period of the delay.

Though the applicant has not provided a plausible explanation for her default it is imperative to consider other relevant factors as submitted by the applicant, such as prospects of success of the intended appeal. There are instances where the lack of a reasonable explanation may be offset by the existence of good prospects of success in which case the court may, in the exercise of its discretion and in the interests of justice, still grant the indulgence sought.

2. Prospects of success in the envisaged appeal.

In the founding affidavit, the applicant averred that her appeal enjoys good prospects of success. In this regard she referred to the grounds of appeal as showing that there are prospects of success. She stated thus:

> "18. I submit that the appeal commands bright prospects of success in that:
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> 19. From a reading of the notice of appeal which was filed under SC184/24, it is apparent that it commands prospects of success."

The applicant did not elaborate on how she believed the grounds as couched 'command prospects of success'.

The applicant's grounds of appeal mostly alluded to a dissatisfaction with the court *a quo's* decision without challenging the bedrock of that decision; the *ratio decidendi*. In a number of the grounds there is reference to breaches of sections of the Constitution such

as ss 56(1), 69, 165(2) and 86(3). There is no indication of how the grounds are self-speaking on the prospects of success considering the factual conspectus that was before the court *a quo*, parts of which were common cause as will later be shown below.

There is also a ground alleging that the respondent did not comply with r 15(8) and (9) of the High Court Rules, 2021 by not paying for the set down of their counter application. However, the record of proceedings does not show that such an issue was ever raised in the court below. Yet another ground alleges that the court *a quo* no longer had jurisdiction to issue the judgment in the case as the judgment was delivered after 180 days when statutory instrument 107 of 2012 requires that judgment be delivered within 180 days.

The respondent on the other hand contended that the applicant has failed to show that there are any prospects of success other than to simply refer to the grounds of appeal as commanding prospects of success.

It is axiomatic that in assessing whether or not there are prospects of success on appeal the court is enjoined to consider the grounds of appeal to be relied upon and their prospects of success *vis-a-vis* the *ratio decidendi* in the court *a quo's* impugned judgment. Grounds of appeal that do not challenge or impugn the *ratio decidendi* or the bedrock upon which the decision was premised cannot, with any seriousness, be said to carry any prospects of success.

It is trite to note that prospects of success refer to the question of whether the applicant has an arguable case upon which an appellate court could possibly arrive at a different decision. What constitutes reasonable prospects of success was articulated in *Smith v S*, 2012 (1) SACR 567 (SCA) para 7 as:

> "What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal, or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

In *casu*, the appeal is against the dismissal of the applicant's application for a *declaratu*r and the granting of the respondent's application for perpetual silence against the applicant.

The court *a quo* in dismissing the applicant's application reasoned that:

> "The restoration of the applicant's property was dealt with by this court in HC7310/18. Paragraph 2 of the interim relief granted by KUDYA J clearly directed the respondent herein to restore possession of the applicant's property…. The property identified in para 2 is the same property recorded in the notice of attachment in execution on 7 August 2018. That property also appears in sub paras1.1 to 1.4 of para 4 of the draft order. No evidence was placed before the court to confirm that the additional property in sub-paras 1.5 to 1.9 was indeed attached by the respondent.
> It follows that the claim for additional property cannot be grounded on the order granted by this court in HC7310/18. The notice of attachment and the order granted in HC7310/18 were specific on the property that had been attached. It is not clear from the papers when exactly the additional property was allegedly attached by the respondent. What is before the court is an application for a declarator. The applicant cannot seek to recover property through an application for a declarator when the respondent denies ever attaching that property. The applicant ought to institute a separate action to pursue the additional property if she so desires."

The court *a quo* also noted that in seeking an order directing that the electronic equipment be inspected and tested jointly by the parties before it is returned to her, the applicant was in effect seeking a variation of the order granted in HC7310/18 and that the court could not be asked to revisit its order under the guise of a *declaratur*. Having reasoned thus, the court *a quo*, being alive to its discretion in the matter, noted that the circumstances did not warrant the exercise of its discretion in favour of granting the *declaratur* sought. It aptly noted that the

court had already pronounced itself on the issues in which the *declaratur* was being sought. The bedrock of the court *a quo's* decision was premised on the fact that in seeking the *declaratur* the applicant predicated her case on allegations that the respondent had refused to comply with the court order in HC7310/18, when the reality was that the respondent had made efforts to return the attached property but the applicant had resisted and had instead imposed conditions not in the order including the demand for other properties she had not stated in her claim in HC7310/18. The court *a quo* noted that the respondent had in fact issued a release note such that the property was available for collection and no longer under attachment. The court *a quo* noted that there was nothing stopping the applicant from collecting her property listed in the court order as the respondent long issued a notice of release.

Juxtaposing the *declaratur* sought and the order granted in HC7310/18 confirms that the applicant was in effect seeking to vary the order in HC7310/18 by adding properties that she had not claimed when she made her application in that case and when such properties were neither in the notice of attachment nor in her papers in HC 7310/18. In the same manner she wished to now incorporate the requirement for inspection and testing of electronic equipment before it was returned to her when such was neither in the court order nor in the papers she filed in HC7310/18.

Regarding the counter application, the court *a quo* upon noting the numerous cases the applicant had unsuccessfully litigated held that the cases post HC 7310/18 essentially dealt with the same issues that had been resolved in HC 7310/18. Other judges of the High Court had also made similar observations in dismissing the applicant's other applications but this had not dissuaded the applicant from continuing with the same course.

In light of this the court *a quo* held that the applicant cannot be permitted to recycle the same issues before the same court repeatedly. This amounted to an abuse of the

court and annoyance to the respondent who has made every effort to return the property to the applicant but for her rebuff. It is in these circumstances that the court *a quo* granted the decree of perpetual silence. That order is specific in its terms as it provides that:

> "The respondent be and is hereby restrained from instituting any proceedings in this court against the applicant or relating to the applicant without first obtaining the leave of this Honourable Court, where such proceedings relate directly or indirectly to the question of the attachment of her property which matter this court fully and finally determined under HC 7310/18, and the further question of the execution of the Magistrates Court order under case reference HC 39520/16 which again this Court has fully and finally determined under HC 5701/21."

In light of the above discourse it is clear that the applicant's submission that the appeal has prospects of success has no merit as the respondent had made effort to return the property. Instead of accepting delivery of the items stated in HC 7310/18 she opted to be obstructive by placing conditions that were not in the order. She in effect declined to accept the items unless the electrical items were inspected and tested yet she had not sought such a condition in HC 7310/18. She equally did not deny that the respondent had issued a release note entitling her to collect the property at any time she wished.

On the decree of perpetual silence, the applicant did not deny the numerous cases she filed against the respondent post the order in HC 7310/18 and that these had not been successful. Given the nature of the decree, the applicant's intended ground of appeal in this regard is difficult to comprehend. The ground reads:

> "The order of the court *a quo* restraining Appellant from instituting any proceedings in the High Court against the Respondent is unconstitutional per the provisions of s 69(3) as read with s 86(3)(e) of the Constitution of Zimbabwe."

When this ground is juxtaposed with the court *a quo's* order it is clear that the applicant either misunderstood the order or is simply feigning ignorance on her understanding of the order. The order did not bar her from instituting any proceedings against the respondent,

but was restricted to proceedings to do with the issues that had already been resolved by the order for the release of the property itemised in HC 7310/18. The order is issue specific.

A decree of perpetual silence is not commonly granted. It is a drastic action as it may impinge on a litigant's right of access to the courts for relief. In *City of Harare* v *Tendai Susan Masamba* HH 330-16 at p 8 MAFUSIRE J aptly put it thus:

> "It is an exceptional and drastic cause of action to withdraw a litigant's constitutional access to the courts. But it is one the courts will not shirk from where there has been persistent abuse."

The circumstances where a decree of perpetual silence may be granted include instances of abuse of court processes and cases of harassment of other parties. In *Masamba* v *Secretary, Judicial Service Commission* HH 283-17 at p 8, it was held that:

> "Courts have a duty to guard against the abuse of the court processes and where there is unmitigated abuse as in this case, it is only reasonable, expected and indeed proper for the court to shut its doors to the abuser and or place such abuser on terms with regards how he may be allowed to exercise his rights of access to the courts."

In *Carderoy* v *Union Government (Minister of Finance*) 1918 AD 512, the South African Appellate Division held that:

> "When there has been repeated and persistent litigation between the same parties in the same cause of action and in respect of the same subject matter, the court can make a general order prohibiting the institution of such litigation without the leave of the court but that power extended only to prevent abuse of its own process without being concerned with the process of other courts."

A reading of the order for perpetual silence shows that it is narrow in nature. It prevents the applicant from repeatedly raising the same issues against the respondent in the court *a quo*, as that court has already addressed those issues in HC 7310/18 and HC 5701/21. The order is issue specific. If a need arises to litigate on the same issue or issues related to

those cases, the applicant is simply required to firstly seek leave from the court *a quo*. The order does not bar the applicant from approaching the courts on any other cause of action even against the respondent.

A decree of perpetual silence is recognized as a legal remedy in deserving cases. The court has inherent power to prevent abuse of its own process where there is a demonstration that the underlying intent is to abuse not only the court's process but the respondent as well.

In *casu,* the applicant has instituted many unmerited applications on the same issues virtually calculated at harassing the respondent and abusing court processes. At some point from 9 August 2018 to 27 September 2018 she had filed 5 applications all relating to the same issue which were dismissed.

It is imperative that, in granting an order for perpetual silence, the court must assess whether the actions of the applicant clog the court system with groundless and unending litigation on the same issues and against the same respondent. In *casu,* it is apparent that both the court *a quo* and the respondent were harassed by litigation on the same issues with no end in sight despite the court having decided on the issue and the respondent having released the property in terms of the law. It may also be noted that the proposed grounds of appeal that the applicant seeks to rely on in respect of the decree for perpetual silence relate to a wider prohibition against litigating which is not what the court *a quo* granted.

In the circumstances, it is clear that the applicant has no prospects of success on appeal against the court *a quo's* decision on this aspect as well. The right of access to courts is maintained even if a party is subjected to restrictions such as perpetual silence. It is axiomatic that despite the order, the applicant still has other avenues to file complaints, appeals, or

requests for judicial review or to even make claims against the respondent on issues other than those resolved in HC 7310/18 and HC 5701/21. Therefore, the applicant can still approach the court *a quo* on different issues that the court has not dealt with.

Other factors advanced by the applicant in an endeavour to show good cause include: importance of the case; finality to litigation; interests of justice and possible prejudice; and balance of convenience. Other than making general references to these factors, the applicant failed to show how these factors atone for the lack of a reasonable explanation and lack of prospects of success. It will be remiss of me, and hence not in the interests of justice, to allow the reinstatement of a hopeless appeal just because a litigant alleges that the case is important to her or that she simply wants to hear the last word from the appeal bench.

It may also be noted that in her submissions the applicant was obsessed with references to constitutional issues which she said would benefit the general public without addressing her mind to the specific issue placed before me. What was before me was not an application for referral to the Constitutional Court but a simple application for condonation of failure to comply with r 55 and extension of time within which to pay security for costs and also an application for the reinstatement of an appeal.

In conclusion I am of the firm view that the application has no merit. Not only did the applicant fail to proffer a reasonable explanation for the default and for the delay in seeking condonation, but she also failed to show that her intended appeal enjoys prospects of success. No good cause was shown for the reinstatement of the appeal. The application ought to be dismissed.

On costs there is no reason why these should not follow the cause.

DISPOSITION

The applicant failed to provide a reasonable explanation for the default and for the delay in seeking condonation for her failure to comply with the rules. She also failed to establish that there are any prospects of success on appeal. The other factors referred to by the applicant were inadequate to atone for the lack of prospects of success. Resultantly no good cause was shown for the reinstatement of the appeal under SC 184/24.

Accordingly, it is hereby ordered that:

"The application be and is hereby dismissed with costs."

Scanlen & Holderness, respondent's legal practitioners.