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Judgment No S.C. 31\03
Civil Application No 71\02

(1) REGISTRAR GENERAL OF ELECTIONS (2) MINISTER OF JUSTICE (3) MINISTER OF HOME AFFAIRS
v MORGAN TSVANGIRAI

SUPREME COURT OF ZIMBABWE
HARARE OCTOBER 21, 2003

*C. Muchenga*, for the applicants

*B. Elliot*, for the respondent

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

The appeal in this case was set down for hearing on 2 June 2003. On that date in spite of the applicants' averment that it considered this matter to be very important, there was no appearance for the appellants (now applicants).

Counsel for the respondent moved that the appeal be dismissed for want of prosecution with costs. The application was granted and the appeal was dismissed for want of prosecution with costs. On 6 June 2003 the applicants filed an urgent Chamber application for directions.

An affidavit in support of the application from the Registrar-General reads, in part, as follows:-

> "On 4th March 2002, I filed an appeal against part of the judgment of the High Court handed down by the Honourable Justice Adam in Case No. H.C. 12092/01.
>
> The Hearing was set down for the 2nd June 2003.
>
> I believed that my lawyers were taking care of the matter.
>
> On 2nd June 2003 at about 6 pm I was informed by my lawyers that this appeal had been dismissed for want of prosecution.
>
> On further inquiry I was advised that Mrs *Matanda-Moyo* who was seized with the matter had been taken ill and had been unable to attend this hearing. See her Supporting Affidavit.
>
> I was also advised that due to the lack of phones at the Civil Division a Clerk of the Supreme Court attended personally at Civil Division at 09:45 hours to enquire why there was no appearance on my behalf.
>
> I am further advised that a Law Officer attended court to explain that Mrs M*atanda-Moyo* had been taken ill. However the Law Officer arrived at the Supreme Court at approximately 10:00 hours in the company of the Clerk and was advised by the Registrar Mrs Mazabane that the matter had been dealt with and dismissed for want of prosecution.
>
> As this matter is one of national importance I approach this court for directions on how to proceed given the circumstances surrounding the non-attendance by my lawyers.
>
> In terms of s 26(1) of the Supreme Court Act I cannot appeal against any judgment or order of this Honourable Court. I now approach this court on directions how to proceed.
>
> This Honourable Court in *Registrar-General v Judith Todd* SC-158-02 upheld the validity of section 9(7) of the Citizenship Act of Zimbabwe Amendment Act No. 12/2001.
>
> The effect of the dismissal of the appeal under SC-71-2002 is to uphold the ruling in High Court Case No HC-12092-2001 handed down by the Honourable Justice Adam which is at conflict with the above quoted Supreme Court ruling. In the end we do have two Supreme Court rulings which appear to be in direct conflict.

"It is my understanding that this latest ruling by this Honourable Court was not on the merits. Therefore the law as it stands is as given in *Registrar-General v Judith Todd* SC-158-2002.

The quandary that I am faced with is that I have people attending at my offices claiming rights in terms of the High Court Judgment HC-12092-2002. Yet that is not the law because the law is as stated by this Honourable Court in *Registrar-General v Judith Todd* SC-158-2002.

I am advised that a case of this nature is without precedence and my only remedy is to come to this Honourable Court and ask for directives on rescission of this Honourable Court's decision.

I still intend to prosecute this matter.

I wish to refer to the supporting affidavit of Loyce *Matanda-Moyo*."

Mrs *Matanda-Moyo* explains the default in an affidavit which reads as follows:-

"I am the Director of Civil Division, Applicant's Legal Practitioners.

This matter was set down before this Honourable Court on 2nd June 2003.

On 17 June 2002 I gave birth through caesarian section. I did not take the three months maternity leave but came back after one month rest since there was shortage of staff in the Civil Division.

On 30 May 2003 the operation started giving me problems and I have a serious backache. To date I am still resting as per my doctor's advice. See Annexure 'B'.

As a result of my sudden illness I was unable to allocate the matter to another officer.

By the time I got through to the office it was already after 9.30 hours.

I understand Ms Mudenda arrived at court after the matter had been dealt with."

The certificate of urgency was issued on the basis that the dismissal of the appeal created confusion in the law in that the Supreme Court judgment was in conflict with a High Court judgment and another judgment of the Supreme Court.

There is no indication on the papers in terms of which Supreme Court Rules this Chamber application was being made. The Supreme Court Rules do not expressly provide for Chamber applications for directions. However, Rule 58 of the Supreme Court Rules provides that in any matter not dealt with in the Supreme Court Rules the practice and the procedure of this court shall, subject to any direction to the contrary by the court or a judge, follow as near as may be, the practice and procedures of the High Court. Order 23 of the High Court Rules provides for a Chamber application for direction in respect of any interlocutory matter on which a decision may be required.

I am unable to extend the application of the High Court Rules to the present application for two reasons.

The first applicant is essentially asking for legal advice and not directions from this court That is not the function of this court and Order 23 of the High Court Rules was never intended to enable litigants to obtain legal advice from a judge ahead of a hearing. The first applicant in effect is saying I failed to appear in court please advise me on what to do next.

But more importantly the first applicant is seeking directions that are clearly provided for in the Supreme Court Rules. Rule 36(4) of the Supreme Court Rules provides as follows:-

> "Where, at the time of the hearing of an appeal, there is no appearance for the appellant, and no written arguments have been filed by him, the court may dismiss the appeal and make such order as to costs as it may think fit.
>
> Provided that an appeal dismissed in terms of this subrule may thereafter on application by the appellant, be reinstated."

If the first applicant's counsel had bothered to read the Supreme Court Rules, as he should have done, before launching this application he would have realised that the Rules provide what an appellant wishing to have an appeal dismissed in circumstances of this appeal is required to do to have the dismissed appeal reinstated.

I was prepared to deal with this application as an application in terms of section 36(4) of the Supreme Court rules. Mr *Elliot*, for the respondent, objected to that course of action. While the objection is certainly unreasonable and smacks of an attitude of why should I be difficult when I can be impossible the objection is based on a sound legal basis. A respondent is entitled to know the case he has to meet before coming to court. Mr *Elliot's* objection is sustained. To do otherwise would be to aid and abet the crass ineptitude and inefficiency with which the Civil Division of the Attorney-General's office has handled this matter.

In the result, while it is entirely open to the applicant to bring an application in terms of Rule 36(4) of the Supreme Court Rules, this application is dismissed with costs.