Judgment No S.C. 11\2002
Civil Appeal No 117\2001

DIAMOND INSURANCE COMPANY (PRIVATE) LIMITED v (1) ASSOCIATED NEWSPAPERS OF ZIMBABWE (PRIVATE) LIMITED (2) RENAISSANCE ASSET MANAGEMENT (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, EBRAHIM JA & ZIYAMBI JA
HARARE FEBRUARY 25 & MAY 30, 2002

T.H. Chitapi, for the appellant

P. Nherere, for the respondents

ZIYAMBI JA: In this matter the appellant seeks a postponement to enable him to file an application for reinstatement of the appeal.

The history of the matter is as follows:

Consequent upon the appellant having filed a notice of appeal against the judgment of the High Court in this matter, the Registrar of this Court, in terms of Rule 43 of the Rules of the Supreme Court, called upon the appellant to file heads of argument. This was not done and on 26 October 2001 the appeal was, by virtue of the operation of Rule 44 of the said Rules, deemed to have been dismissed.

On the same date the appellant filed an application termed:

"Court Application : WITHDRAWAL OF APPEAL.

The purpose of the application as explained in para. 4 of the founding affidavit was to seek 'an order to remove from appeal the matter between the parties and referring it back to the High Court for the submission of further evidence'.

In paragraph 5 of the affidavit it was averred that:

5. The appellant seeks the Order aforesaid on the basis that the further evidence that the appellant has gathered is so material as to have an important bearing not only on the outcome of the case but also on the ultimate nature and composition of ANZ. Further, the ZRP has instituted criminal investigations against ANZ and the other purported shareholders."

The respondents opposed the application on the grounds, *inter alia*, that the application was misconceived in that the appellant having withdrawn the appeal, this Court was no longer seized with the matter and could not therefore grant the order sought.

The matter was set down for hearing before this Court on 25 February 2002. Meanwhile, the appellant had engaged new legal practitioners and, prior to the date of the hearing, on the 22nd February, the appellant, through his present legal practitioners, filed with the Registrar of this Court a "Notice of Application for Reinstatement of Appeal". The notice was served on the respondents at about 4 pm on Friday 23rd February. In terms of the said notice the respondents had until Wednesday 27th February to file their Notice of Opposition and accompanying affidavits if they so wished.

Before us, Mr *Chitapi* who appeared for the appellant, applied for a postponement of the hearing of the appeal pending the determination of the application for reinstatement filed with the Registrar. It was submitted that in essence, the appeal had not been withdrawn, notwithstanding the terminology used by

the appellant's legal practitioners although the procedure adopted by the appellant's legal practitioners was flawed in that the appellant ought to have proceeded in terms of Rule 39 of the Rules of this Court.

Mr *Nherere*, who appeared for the respondents opposed the application on the ground that there was no appeal before this Court and therefore nothing to postpone. The application for postponement, he submitted, was not properly before this Court. He moved that both applications be struck off the roll with costs.

It seems to me that the correct approach would be to grant the postponement thus deferring all arguments on the merits of the appeal as well as the two court applications to the resumed hearing. At this hearing the court would also determine the issue of the costs of the court application filed by the appellant's previous legal practitioners.

Accordingly the application for postponement is granted. The matter is postponed *sine die*. The costs of the postponement shall be borne by the appellant.

CHIDYAUSIKU CJ: I agree

EBRAHIM JA: On 10 April 2001 HLATSHWAYO J entered judgment in an application brought by the applicant against the respondents. On 7 May 2001, the applicant, dissatisfied with the judgment, noted an appeal against the judgment. On 19 September 2001, the Registrar of this Court, acting in terms of Rule 43(1) of the Rules of the Supreme Court 1964, called upon the applicant's legal practitioner to submit his heads of argument. In terms of Rule 43(2), the legal practitioner is obliged to submit his heads of argument within fifteen days' of being called upon to do so. The Registrar's letter was delivered to the applicant's legal practitioners on Friday 5 October 2001, and thus the applicant had until close of business on Friday 26 October 2001 to submit his heads of argument. I say "close of business", because in terms of s 33(2) of the Interpretation Act [Chapter 1:01], Friday 5 October was not included in the period of fifteen days, nor were any of the weekends. If heads of argument were not submitted, the appeal would be "regarded as abandoned and … deemed to have been dismissed" (Rule 44(1)).

On Friday 26 October, the applicant's then legal practitioner, instead of filing heads of argument, filed a document, entitled "Court application: Withdrawal of Appeal", in which it was intimated that the applicant wished to seek "an order to remove from appeal the matter between the parties and referring it back to the High Court for the submission of further evidence". Why he chose to proceed in this odd way is hard to understand. I can only put it down to an unprofessional ignorance of the rules of procedure. What he should have done, of course, was persist with the appeal, and apply in terms of Rule 39 to lead further evidence on the point of contention. The heads of argument would be accompanied by an application for the adduction of further evidence, with suitable affidavits, to show that the relevant criteria have been met. The criteria to be satisfied before further evidence may be

called are set out in, among other authorities, *Warren-Codrington v Forsyth Trust (Pvt) Ltd* 2000 (2) ZLR 377 (S) at 381 *per* McNALLY JA. It would then have been for this Court, if it considered that grounds had been established for the adduction of further evidence, either to hear the evidence itself or to set aside the judgment appealed from and to remit the case to the High Court for further hearing.

None of this was done, and no heads of argument were submitted, but nonetheless the case was set down for hearing. It is not clear why it was set down. I can only presume that the Registrar treated the document filed by the applicant's legal practitioner as an application to refer the matter to the High Court for the hearing of further evidence. Understandably, though, the respondents argue that there is no appeal properly before this Court and that this Court is not seized with the matter. Technically, there is merit in what they say, but there seems little doubt that what the applicant, through its legal practitioner, wanted to do was to have the matter remitted to the court *a quo*. Because of the incompetence of its then legal practitioner, a wholly wrong procedure was adopted.

Mr *Chitapi*, for the applicant, has applied for a postponement of the hearing of the appeal, pending the determination of an application for reinstatement which he filed with the Registrar of this Court on 22 February. Notwithstanding the merits of what Mr *Nherere,* who appeared for the respondents has said, I feel inclined, though with some reluctance, to grant the application for postponement so that the application for reinstatement can be argued. I say this, not out of a sense of charity, but for practical reasons. If we decline to hear the matter on the grounds that we are not seized of it, inevitably there will be an application by the applicant for the reinstatement of the appeal. That application would no doubt be opposed, and this

Court will have to consider whether, according to the usual criteria, the application should be granted. In trying to convince the court, the applicant will have to show "good cause", and inevitably, as the chances of success form part of the criteria, the merits of the case will have to be argued. There seems, then, little point in refusing to decide the matter now. To accede to the application for postponement would have the advantage of saving the parties' time and costs.

Naturally, though, the costs of this hearing and any costs occasioned by the adoption by the applicant of the wrong procedure must be met by the applicant.

It seems to me that the applicant may well have a legal basis to cause his former legal practitioner to personally pay the costs which appear to have resulted through his incompetence. This Court, however, cannot make such an order without having given him an opportunity to be heard. I therefore, take this issue no further and leave the matter to the applicant to pursue his legal remedies.

In the result I agree with the conclusions of my colleagues.

T.H. Chitapi & Associates, appellant's legal practitioners

Stumbles & Rowe, first respondent's legal practitioners

Kantor & Immerman, second respondent's legal practitioners