

BORROWDALE RESIDENTS AND  
RATES PAYERS ASSOCIATION

1<sup>ST</sup> APPELLANT

and

THE TRUSTEES FOR THE TIME BEING  
HARARE WETLANDS TRUST  
and

2<sup>ND</sup> APPELLANT

DANDARO HOME OWNERS ASSOCIATION

3<sup>RD</sup> APPELLANT

versus

CITY OF HARARE

1<sup>ST</sup> RESPONDENT

and

MINISTER OF LOCAL GOVERNMENT, PUBLIC  
WORKS AND NATIONAL HOUSING

2<sup>ND</sup> RESPONDENT

and

SEATRITE PROPERTIES (PVT) LTD

3<sup>RD</sup> RESPONDENT

and

MINISTER OF ENVIRONMENT, CLIMATE CHANGE  
TOURISM AND HOSPITALITY INDUSTRY

4<sup>TH</sup> RESPONDENT

and

ENVIRONMENTAL MANAGEMENT AGENCY

5<sup>TH</sup> RESPONDENT

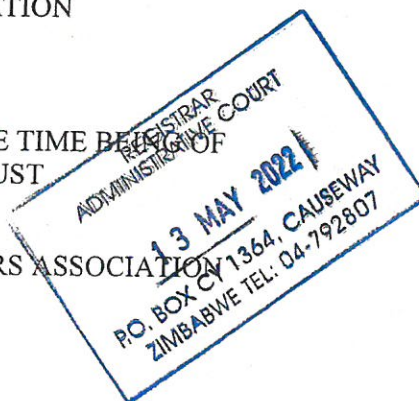
and

IAN MAKONI (Chairman of the Harare City Council  
Environmental Committee)

6<sup>TH</sup> RESPONDENT

ADMINISTRATIVE COURT  
MANDEYA J

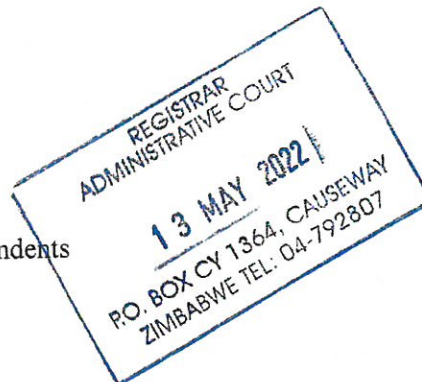
HARARE, 23 March and 13 May 2022



**Assessors**

P. Chiwanga  
A. Kwangwama

*D.P. Drury*, for the Appellants  
*A. Moyo*, for the 1<sup>st</sup> & 6<sup>th</sup> Respondents  
*S. Moyo*, for the 3<sup>rd</sup> Respondent  
*No appearance*, for the 2<sup>nd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Respondents



**JUDGMENT**

MANDEYA J: The 1<sup>st</sup> and 6<sup>th</sup> respondents as well as the 3<sup>rd</sup> respondent raised the preliminary point that the notice of appeal was filed out of time.

Section 38(1)(a) of the Regional, Town and Country Planning Act, [Chapter 29:12] (the Act) provides:

- “Any person –**  
**(a) who is aggrieved by any decision made ... by a local planning authority in connection with an application for**  
**(i) a permit ...**  
**(ii) ...**  
**(iii) ...**  
**may, within one month from the notification of such decision**  
**...**  
**(b) ...**  
**(c) ... appeal to the Administrative Court ...”**

What is significant is that a party who applies for a permit is required by this section to appeal to this court if aggrieved by the non-issuance of the permit. The party must appeal within 30 days of getting to know that the application for the permit was turned down. Alternatively, a party who is aggrieved by the issuance of a permit to a particular party should also appeal within 30 days against the issuance of that permit.

Rule 4 of the Administrative Court (Miscellaneous Appeals) Rules, 1980 (the Rules) provides:

**“An appeal shall be instituted by means of a notice”**

The interpretation section, that is, rule 3 of those Rules, states that **“notice” means “a notice instituting an appeal.”**

What is significant is that both the Act and the Rules set time limits within which specified conduct should be performed. If it is not performed within the set limits r 6 of the said rules should be resorted to, to obtain the court's permission to extend the time limit. The following words in r 6 show the seriousness and precision in handling such applications: the application **"shall be accompanied by an affidavit verifying the facts on which the application is based."** It is not just any statement, but a sworn statement.

In the case of *Zimslate Quartize (Pvt) Ltd & Ors v Central African Building Society* SC 34/17 at page 7 the court said:

**"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."**

In this case the appellants did not seek condonation at all. In the case of *Fuyana v Moyo* SC 54/06 the court held:

**"Where an appeal is noted out of time, before the matter can be heard by this court an application for condonation has to be made and such condonation granted before the appeal can be entertained. A matter that is set down for hearing without condonation being first granted will be struck off the roll."**

In the circumstances of this case we find that the notice of appeal reads in relevant parts:

**"Take notice that the appellants hereby appeal against the whole ... decision handed down by the City of Harare ... notification of which decision was served on the 3<sup>rd</sup> appellant on 21 July 2021..."**

The notice of appeal in this case was date-stamped 17 September 2021 by the registrar of this court. It was filed well after the 30 days permitted by the rules of this court and the aforestated Act.

Appellants' counsel in paragraph 18 of his heads of argument submitted:

**"... it is true that 30 days would lapse well before 17 September 2021. This period however was during the time of the 3<sup>rd</sup> wave of the Covid-19 pandemic... it is during this period when the Chief Justice passed Practice Direction 6 of 2021 which interrupted this period from 22 July to 27 July; Practice Direction 7 of 2021 which interrupted this period from 29 July to 19 August and Practice Direction 8 of 2021 which interrupted this period from 20 August to 24 August. As such the 30 days lapsed on 22 September 2021 meaning that the Appellants were well within time to file their notice of appeal."**



Rule 10(1) of the aforesaid Rules requires that:

**"An appellant ... who will be legally represented at the hearing of an appeal ... shall prepare a document setting out the main heads of his argument ..."**

This is what appellants' counsel did.

Rule 10(2) of those Rules demands that:

**"The appellant shall, not later than four days before the date of hearing, deliver four copies of his heads of argument to the registrar and one copy to the respondent ..."**

Counsel for the respondents did not dispute that appellants' counsel complied with this subrule. The court in *Fawcett Security Operations (Pvt) Ltd v Director of Customs and Excise & Ors* 1993(2) ZLR 121 (S) at 127 said:

**"The simple rule of law is that what is not denied in affidavit must be taken to be admitted."**

Therefore respondents must be taken to have admitted that the 30 days lapsed on 22 September 2021 as asserted by counsel for the appellant in paragraph 18 of his heads of argument.

The present appeal was filed on 17 September 2021. It was filed five days before the 30 days for filing it lapsed because of the Covid-19 induced lockdowns. Therefore the complaint that the applicants should have applied for condonation falls away. Similarly the complaint that the appeal was noted out of time is dismissed.

### **CONFUSION OF OLD ACT and NEW ACT**

The notice of appeal in this case boldly states:

**"Notice of Appeal under section 38 of the Regional Town and Country Planning Act [Chapter 29:12]"**

It is common cause that on 18 November 2021 parties appeared before me for a case management meeting. At that meeting the court directed that parties would file their heads of argument in accordance with the rules of this court.

For the appellant to later turn around and rely on the Town Planning Rules, 1971, is as submitted by counsel for the third and first and sixth respondents irregular and not proper. No party should be taken by surprise in our civil law. If the notice of appeal was filed in accordance with the current Regional, Town and Country Planning Act, [Chapter 29:12], why did the appellants turn around and rely on an old statute?

At the case management meeting the appellants did not disclose that it would seek to rely on the old statute.

The confusion caused by the appellants' conduct is undesirable and not acceptable.

The appellants have been successful on the first issue. There will be no order as to costs in this case.

**DISPOSITION**

Although the appellant was successful on the first issue the appellant has been found responsible for the confusion in mixing up the old Act and the new Act. That ultimately rendered the appeal a nullity. The appeal is dismissed.

Both assessors concur with this judgment.



*Honey & Blanckenberg*, appellants' legal practitioners  
*Gambe Law Group*, 1<sup>st</sup> & 6<sup>th</sup> respondents' legal practitioners  
*Scanlen & Holderness*, 3rd respondent's legal practitioners

