REPORTABLE (76)

RITA MARQUE MBATHA
v
JUSTICE CATHERINE BACHI-MZAWAZI

SUPREME COURT OF ZIMBABWE
HARARE, 7 MARCH 2024 & 25 JULY 2024

No appearance for the applicant

A. B. C. Chinake, for the respondent

IN CHAMBERS

GUVAVA JA:

[1] This is an application for condonation and extension of time within which to note an appeal made in terms of r 39 (4) as read with r 43 (3) of the Supreme Court, 2018.

[2] This matter was set down for a virtual hearing on 7 March 2024. Although the applicant had filed heads of argument, on the date and time of the hearing, she did not connect onto the IECMS system. Soon after the session started the IECMS system had a partial connectivity breakdown. While it was possible to see the party before me the sound was mute and there was no communication. Attempts by the Information and Technology Department to resolve the problem proved futile. The hearing of the matter was thus finalised in chambers. The applicant, in spite of being properly served in terms of the rules of this Court, made no appearance on the date of hearing.

[3] That the applicant was aware of the date of hearing is not in dispute as she had, in the morning, served the respondent's counsel and the registrar with a letter which indicated that she had made an application to the Constitutional Court. While it is not clear what its relevance is to the application before me, one can only assume that the flurry of activity in the morning by the applicant, was a misguided endeavour to stop the proceedings which were about to commence. The respondents counsel chose to make submissions on the merits and as the applicant had filed heads of argument I reserved judgment in order to give due consideration to the application in view of the fact that the issue concerned leave to sue a sitting judge.

FACTUAL BACKGROUND

[4] The applicant approached the High Court (the 'court *a quo*') under HC 6446/22 with an application for leave to sue the respondent, who is a sitting judge, in terms of r 12 (21) of the High Court Rules, 2021. The basis of the application is that the applicant is disgruntled with the manner in which the respondent has been dealing with the matter under case number HC 9/22 wherein one Farai Bwatikona Zizhou ('Zizhou') and the applicant are parties.

[5] The case under HC 9/22 was allocated to the respondent, who diligently set it down for hearing on 27 July 2022. Prior to the hearing of the matter, the applicant, wrote to the Judge President and complained that the respondent had fast tracked the hearing of the case and given her only 24 hours within which to prepare for the hearing. She also complained that the short notice was despite the fact that she is of ill health. The applicant further alleged that she was not going to get a fair hearing of her matter as the respondent was known to Zizhou.

[6] On 28 July 2022, the Judge President invited the respondent to comment on the letter from the applicant. The respondent, in her response, stated that she had initially set down the matter on 28 June 2022 and that prior to the mentioned date, the applicant had written to the registrar advising that her heads of argument had been misfiled. The respondent explained that the applicant did not turn up for the hearing on 28 June 2022 and in the presence of Zizhou who had come for the hearing, she instructed her clerk to reset the matter down for 10.00 am on 15 August 2022. In another memorandum written on 25 August 2022 addressed to the Judge President, the respondent denied knowing Zizhou or his legal practitioner on a personal level.

[7] After investigating the complaint, the Judge President wrote to the applicant on 29 August 2022, advising her that the respondent denied knowing Zizhou outside her dealings with him in the court. The Judge President advised that the applicant could seek audience with the respondent to bring her concerns regarding the setting down of the matter.

[8] On 15 September 2022, the applicant and the legal practitioner representing Zizhou appeared before the respondent. The applicant alleges, through a letter addressed to the Secretary of the Judicial Service Commission Mr W. Chikwana that at the hearing the respondent traumatized, threatened and shouted at her in her chambers for no apparent reason. The applicant further alleged that the respondent also shouted at her in open court. Following the letter of complaint, the applicant then filed an application seeking leave to sue the respondent for damages. In this regard, the applicant contended that her constitutional rights were breached by the respondent's actions and that she intended to claim damages in the sum of USD500 000.

[9] On the other hand, the respondent denied harassing or shouting at the applicant and maintained that the matter under HC 9/22 was set down for case management in her chambers which she conducted on 15 September 2022 before proceeding to hear it in open court. The respondent averred that it is the applicant's intention to terrorize her and to bring her name into disrepute. She also asserted that the applicant had failed to establish a valid cause of action against her in the claim for damages.

[10] The court *a quo,* in determining the matter, found that the appellant's founding affidavit was skeletal in that she only stated that the respondent traumatized, threatened and intimidated her but did not mention the words which the respondent had allegedly uttered nor did she attach a transcript of the proceedings before the respondent in her application. The court concluded that no cause of action had been established and that the intended suit against the respondent was frivolous and vexatious. The court thus denied the applicant leave to sue the respondent and dismissed the application with costs.

[11] Aggrieved by the decision of the court *a quo,* the appellant appealed to the Supreme Court under SC 267/23. On 21 September 2023, the appeal was struck off the roll on the basis that the notice of appeal was fatally defective. The applicant then made the present application for condonation and extension of time within which to note an appeal.

SUBMISSIONS BY THE RESPONDENT

[12] At the hearing, counsel for the respondent Mr *Chinake,* submitted that the application was devoid of merit and ought to be dismissed. He submitted that the extent of the delay was inordinate. Counsel argued further that the reasons proffered by the applicant for the delay in filing the application for condonation were not reasonable nor *bona fide*. He submitted that the applicant had once again used her usual ploy of ill health to explain

the delay. He submitted that this is an excuse which she brings up whenever it suits her or whenever she has failed to comply with rules of court. Counsel maintained that even in the court *a quo* the applicant would use the same excuse of ill health to avoid acting diligently in accordance with the rules of the court. He averred that the excuse had long outlived its usefulness.

[13] With regards to the merits, counsel argued that the applicant had failed to show that she had prospects of success in the appeal. He argued that the applicant had not established a cause of action against the respondent. He submitted further that the applicant had not, in any event, specified the branch of the law under which the claim was being made other than stating that her constitutional rights had been violated. He further submitted that the applicant failed to state the words allegedly used by the respondent to shout at her and traumatise her. It was his argument that the court could not, without this information, be able to gauge whether or not *prima facie* the words uttered were defamatory of the applicant and warranted raising a claim for damages. Counsel further submitted that the applicant had failed to attach any supporting evidence in circumstances where she averred, in her founding affidavit, that the words were uttered in the presence of other people. Counsel argued that it was necessary for the applicant to show, in her application for leave to sue, that she had a valid claim against the respondent. He thus submitted that in the absence of such evidence, the decision of the court *a quo* could not be interfered with and therefore her application for condonation and extension of time to note the appeal should be dismissed.

THE LAW

[14] The requirements for an application for condonation and extension of time to note an appeal have been set out in various judgments in this jurisdiction. They were aptly captured by ZIYAMBI JA (as she then was) in the case of *Friendship v Cargo Carriers Ltd & Anor* 2013 (1) ZLR 1 (S) wherein she stated at p. 4 B-C that:

> "Condonation is an indulgence which may be granted at the discretion of the court. It is not a right obtainable on demand. The applicant must satisfy the court/judge that there are compelling circumstances which would justify a finding in his favour. To that end, it is imperative that an applicant for condonation be candid and honest with the court.
>
> Certain criteria have been laid down for consideration by a court/judge in order to assist it in the exercise of its discretion. Among these are, the extent of the delay and the reasonableness of the explanation therefor, the prospects of success on appeal, the interest of the court in the finality of judgments and the prejudice to the party who is unable to execute his judgment. The list is not exhaustive."

(See also *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S), *Kombayi* v *Berkhout* 1988(1) ZLR 53(S), *National Social Security Authority* v *Denford Chipunza* SC 116/04 and *Mzite* v *Damafalls Investment (Pvt) Ltd & Anor* SC 21/18).

[15] It is trite that the factors for an application for condonation are not decided individually but are considered cumulatively and as a whole. In other words, if one does not have a good explanation for the delay but has very high prospects of success on appeal or vice versa a judge may, in his or her discretion, grant the application. In *Kodzwa* v *Secretary for Health & Anor* 1999 (1) ZLR 313 (S) at 315 F -G, 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."

Condonation is therefore not for the mere asking. The court only exercises its discretion to condone noncompliance with the rules of the court in deserving matters.

[16] A party seeking such condonation must therefore take the court into his or her confidence by stating his or her case clearly and showing that the delay is not long, that he or she has a reasonable explanation for the delay and that there are reasonable prospects of success of the appeal. At p 315 B-C in *Kodzwa* (*supra*) SANDURA JA, quoting Herbstein & Van Winsen's 'The Civil Practice of the Supreme Court of South Africa' 4ed, further stated that:

> "Condonation of the non-observance of the rules is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient cause to excuse him from compliance….. The court's power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judicial discretion and satisfactory grounds being shown by the applicant."

This Court has also stated in *Zimslate Quartzite (Pvt) Ltd & Ors* v *Central African Building Society* SC 34/17 that litigants should not take the court for granted as the grant of condonation is not guaranteed. It was stated as follows on p 7 of the cyclostyled judgment:

> "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."

APPLICATION OF THE LAW TO THE FACTS

[17] In order to satisfy the above requirements a determination of the application will require that I interrogate the following factors:

i. The extent of the delay.
ii. The reasonableness of the explanation for the delay.
iii. Prospects of success of the appeal.
iv. The interest of the court and finality in litigation.

I will proceed to deal with these points *in seriatim*.

Extent and reasonableness of the delay

[18] The first two requirements are interlinked and it is only reasonable that I deal with them together. The judgment of the court *a quo* was handed down on 26 April 2023. The applicant timeously noted an appeal against the judgment of the court *a quo* under SC 267/23. The appeal was however struck off the roll by the Supreme Court on 21 September 2023 as the notice of appeal was fatally defective. In terms of r 38 (1) (a) of the Supreme Court Rules, the applicant had fifteen (15) days within which to note a valid appeal before this Court from the date that the judgment was handed down in the court *a quo*. The present application for condonation was made on the 30 October 2023, about one and a half months after the matter was struck off the roll. Computed together with the period from the date of hand down of the judgment, this is a period in excess of seven months.

[19] The applicant took six weeks to file this application. She attributes her delay in filing the application for condonation, to the fact that she was unwell and had an eye problem. She alleged that she went to a doctor for treatment and attached, to her founding affidavit, the prescription issued to her by the doctor as well as a picture of the medication which she purchased. It is beyond dispute that the documents that have been produced by the appellant to show that she was not well do not satisfy the accepted requirements of proving that a litigant is unwell. There is no affidavit from her doctor asserting that her condition is such that she was unable to draft any documents. Without that explanation, the court and indeed the counsel for the respondent, both not being medically qualified, find it impossible to ascertain the exact impact of her ailment on her inability to prepare the application for condonation. The applicant, although appearing in person, is a seasoned litigator who knows exactly what is expected of her. The failure to provide a

doctor's note for her illness can only mean that she was not incapacitated to the extent that she has sought to allege.

[20] I have taken into account that the applicant had initially filed her appeal timeously before this Court, which appeal was however struck off the roll. I am however not satisfied that her explanation for the delay is *bona fide*. I agree with counsel for the respondent that the delay is inordinate and that the explanation proffered by the applicant is totally unsatisfactory. Thus, in circumstances where a litigant's delay in filing an application for condonation is inordinate and the explanation given for such delay is unsatisfactory, the application fails to meet the very first threshold. However, that is not the end of the enquiry. It is necessary to examine the other factors relating to such applications.

Prospects of success on appeal

[21] In examining the prospects of success in this matter, I am mindful of two pertinent issues. The first is that, in considering prospects of success I am enjoined to consider whether, based on the facts and the law an appellate court could arrive at a decision different from that of the trial court. The case of *Essop* v *S* [2016] ZASCA 114 puts it succinctly when it states thus:

> "**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 success.** 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 categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal." (My emphasis)

The second consideration is that it must always be borne in mind that in an application such as this, I am not determining the appeal itself but merely interrogating whether, on the facts and the law, the applicant has reasonable prospects of success on appeal.

Turning to the application before me, it is noted that the applicant raises five grounds of appeal in the intended appeal. These grounds of appeal in turn raise three issues for determination which may be summarised as follows:

i. Whether or not the court *a quo* erred in finding that the applicant did not have a cause of action against the respondent.

ii. Whether the judgment of the court *a quo* breached the appellant's right to equal protection and benefit of the law as well as the right to a fair hearing.

iii. Whether or not the court *a quo* erred in awarding costs against the applicant.

Whether or not the court *a quo* erred in finding that the applicant did not have a cause of action against the respondent.

[22] In her first ground of appeal the applicant contends that the court *a quo* erred in dismissing the application for leave to sue on the basis that she failed to establish a cause of action against the respondent. It should be noted at the onset that, although the applicant refers to 'damages arising from the violation of her constitutional rights' she could not seek such damages directly from the Constitution in circumstances where there is a remedy readily available to her under the common law. In stating the violation, whilst she refers to words uttered, she does not specify those words. The court *a quo,* in its judgment, found that the applicant's founding affidavit did not specify the utterances made to her. The court noted that:

> "It (the affidavit) states that the respondent traumatized, harassed, threatened and/or intimidated the applicant. It, for reasons which are not known, does not mention the words which the respondent uttered when she allegedly harassed, intimidated, threatened or traumatized the applicant. Those words are a *sine qua non*-aspect of an application of the present nature."

The court went on to find that the applicant had failed to establish a cause of action against the respondent. It is apt that I, at this juncture, set out briefly what is meant by a cause of action.

[23] The meaning of cause of action was discussed by the court in the case of *Abrahams & Sons* v *SA Railways & Harbours* 1933 CPD 626 at 637 wherein WATERMEYER J stated the following:

> "The proper meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action."
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> See also *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23, and *Peebles v Dairiboard Zimbabwe (Pvt) Ltd 1999* (1) ZLR 41 (H).

Thus, it need not be emphasised that in order to establish a cause of action in the pleadings a litigant must set out facts that disclose the complaint. A litigant cannot merely conclude on their own that they have been injured without setting out the facts that disclose such injury. In this way a clear cause of action is revealed to any court dealing with the case.

[24] The application for leave to sue the respondent is in terms of r 12 (21) of the High Court Rules, 2021. The rule provides as follows:

> "No summons or other civil process of the court may be sued out against the President or any of the judges of the High Court without the leave of the court granted on court application being made for that purpose."

It is implicit in the wording of the above rule that in seeking leave, an applicant's founding affidavit must set out clearly the basis upon which he or she intends to sue the President or a judge. In other words, the founding affidavit must set out the entire set of facts which give rise to an enforceable claim. This information cannot be left to conjecture or speculation as the court is being invited to make its decision, based on those facts.

[25] The rationale behind this rule is to protect the office of a President and that of a Judge against frivolous litigation. The person of a President or Judge are offices which should not be impugned at the mere whim of a disgruntled person. A person must only institute process against such persons in instances when there is a solid case against them. The court in such applications thus acts as a filter which will only allow merited cases to go through. It is therefore imperative that, in such an application for leave, a litigant places facts before a court which will assist in making a well-informed decision. It is trite that an application stands or falls on its founding affidavit. The applicant should have set out facts that indicated which branch of the law she was pursuing in order to claim damages in the sum of USD 500 000 against the judge. If she was relying on the law of defamation, she should have set out the words uttered so that the court *a quo* could take a *prima facie* view of whether or not the words uttered were defamatory. The applicant could not rely on her own interpretation of the words which she found traumatizing, harassing and threatening without taking the court into her confidence with regards to the words actually spoken. The applicant in this matter has failed dismally to set out the relevant facts that would establish a cause of action in this case. The court *a quo* thus could not be faulted for coming to the conclusion that the applicant had failed to establish a valid cause of action against the respondent.

[26] Closely related to the need to establish a cause of action in an application seeking leave to sue a judge, I would venture to suggest that there is need for an applicant to attach to the application, a draft summons and declaration or application which is intended to be used in suing a Judge or the President. An application under r 12 (21) of the High Court Rules, in my view, is very much akin to an application for leave to appeal (in terms of Rule 43 of the Supreme Court Rules where the rules of the court require that an applicant

attaches the intended notice of appeal for purposes of assessment of the prospects of success). Likewise, with an application for leave to sue, the applicant must ensure that the draft summons and declaration establishing the claim is attached to the application so as to give the court a means to assess whether or not the claim is not meant to merely vex the President or Judge. Whilst the wording of r 12(21) does not require a litigant to attach the summons or court application to the main matter, I take the view that this should be a requirement as it would assist the court in deciding whether or not leave to sue should be granted.

Whether the judgment of the court *a quo* breached the appellant's right to equal protection and benefit of the law as well as the right to a fair hearing.

[27] The applicant in her second to fourth grounds of appeal, alleges that the court *a quo* overlooked evidence filed of record resulting in the miscarriage of justice. She also alleges that the court erred in incorrectly stating that the proceedings recorded in court did not show proof of gross injustice. She thus alleged that the findings of the court breached her fundamental rights as set out in s 56 (1) and 69 of the Constitution of Zimbabwe, 2013 (the 'Constitution'). I note in passing that the issue of a constitutional infringement based on the judgment, is being raised for the first time on appeal. This Court does not have original jurisdiction to determine Constitutional issues. However, I find that, other than making the above comment, it is unnecessary to deal with this issue as it is quite apparent that the applicant has failed to establish that she has a cause of action against the respondent.

Having considered the points raised in the *Essop* case (*supra*), I can conclusively state that the applicant has failed dismally to establish a cause of action. It is trite that a litigant

cannot sue without *causa*. It is impossible therefore to find any prospects of success on appeal where there is no valid cause of action.

Whether or not the court *a quo* erred in awarding costs against the applicant.

[28] In the fifth ground of appeal the applicant argues that the court *a quo* erred in granting costs in favour of the respondent. It is trite that costs are granted at the discretion of the court (see *Svova & Ors* v *National Social Security Authority* SC 10/14). A successful party has a right to be awarded costs. The rationale for this principle is clear. A successful party must be entitled to recover his or her expenses incurred during litigation against the losing party which party would have led the wining party to initiate or defend the litigation. This point was clearly enunciated in *Crief Investments (Pvt) Ltd & Anor* v *Grand Home Centre (Pvt) Ltd & Ors* HH 12-18, where the court held that:

> "The general rule is that costs follow the event, in other words, the successful party is usually awarded costs. The rationale for this principle is that the successful litigant should be indemnified from expenses which he/she incurred by reason of being unjustifiably compelled to either initiate or defend litigation."
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> See also *Mahembe* v *Matambo* HB 13/03

[29] In the present case, the respondent was successful in opposing the applicant's application and there was nothing amiss in the court *a quo* awarding the respondent costs.

DISPOSITION

[30] The applicant failed to satisfy the requirements for condonation and extension of time within which to appeal. The delay in bringing the application was excessive and the explanation for the delay unreasonable. The applicant failed to show that she has prospects of success on appeal as she clearly has no cause of action against the

respondent. In the final analysis it is not in the interest of justice to grant the application as there must be finality to litigation.

[31] With regards to costs, Mr *Chinake* prayed that the application be dismissed with costs. I see no reason why the respondent should not be awarded costs. The respondent was unnecessarily dragged to court in circumstances where the application has absolutely no merit and the applicant herself does not turn up.

[32] In the result it is accordingly ordered that:

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

Kantor & Immerman, respondent's legal practitioners