M & W MOTORS (PVT) LTD
and
SYDNEY TENGANISO
and
SIMINYENI SIBINDI
versus
OWEN MUDHA NCUBE
and
TAPIWA MUGANHU

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 25 July 2019 & 12 May 2021

Opposed Chamber Application for condonation of late filing of an application for leave to appeal to the Supreme Court and application for leave to appeal to the Supreme Court

L Rufu, for the applicants
K Mahereni, for the 1st respondent

CHITAPI J: The background of this application is that in case No. HC 4321/15, the same parties as herein were applicants and respondents'. In that case, the dispute between the parties was over possessory and occupational rights of the parties in respect of a property called stand No. 1244/1209; No 1 Harare Road, Kwekwe. The second respondent in application HC 43421/15 did not oppose the relief sought by the applicants and has equally not opposed the present application. Case No. HC 4321/15 was instituted as an urgent chamber application. The application was placed before MUSAKWA J who issued a provisional order in which he ordered the first and second respondents to restore possession and occupation of stand No1244/1209 No 1 Harare Road, Kwekwe to the applicants. Further, the learned judge issued an order directing the Sheriff to enforce the order in the event of the respondents' non-compliance.

The application HC 4321/15 was then argued before me on the return date. The terms of the final order sought on the return date were to order that the first and second respondents and all persons claiming occupational rights through the first and second respondents should be interdicted from interfering with the applicants' possession of the property aforesaid nor to

evict the applicants. Costs were sought on the punitive scale of legal practitioner and client scale against the applicants.

The facts forming the applicants' claim were fairly straight forward as I indicated in my judgment HH 503/17, a copy of which the applicants attached to this application as Annexure "A". The first applicant is the registered owner of the property, subject of the dispute between the parties. He holds the property under deed of transfer No 253/92. It was the first applicant's claim that it leased the property to the first respondent in 2012. The second respondent however occupied the property without the consent of the first applicant. The applicants therefore prayed for the eviction of the second respondent.

It was alleged that on or before 21 February 2015, the applicant's managing director was served with a letter authored by the first respondent's legal practitioners in which it was claimed that the first respondent was now the owner of a mine claim called Isar which was situate on the property involved in the application. A demand was made in the letter that the addressee, one, Mandi Masasa should vacate the property on which the mine was situate on or before 31 March 2015. The letter was brought to the attention of the first applicant's managing director who then engaged the first respondent's legal practitioners. In the course of the engagements, the applicant's managing director produced a copy of the title deeds to the property. The first applicant considered the matter closed.

On 5 May 2015, the second and third applicants telephonically reported to the first applicant's managing director that four persons who were reportedly the first respondent's aides had visited the property and threatened the second and third applicants with eviction. The aides were said to have been four in number. They had forcibly removed the movable property of the second and third applicants from the property. It was averred that the police upon receiving a report of the events which allegedly occurred at the property did not act on the report. It was alleged further that following the forced displacement of the second and third applicants from the property, the second respondent took over occupation of the main house. The forced eviction of the second and third applicants resulted in the filing of application HC 4321/15 by the applicants herein for restoration of possession of the occupancy of the property. MUSAKWA J granted the application in the form of a provisional order.

The provisional order was returned to court for its confirmation or discharge. I then dealt with the application on the return date on the opposed roll. In the opposing affidavit to the confirmation of the provisional order, the first respondent averred that he amicably resolved the property ownership with the applicant. He denied that he was responsible for or complicit

in the acts of despoiling the second and third applicants of the property in question. The first respondent specifically denied that the second respondent was his aide nor that the second respondent acted under the first applicant's direction. The first respondent averred that the applicants were out to tarnish his image as he was a well-known politician. In my judgment HH 503/17 on p 11, I stated as follows-

> "The first respondent further averred that there was no need to require him to restores possession of the property or be interdicted from interfering with the applicants because he had not committed any wrong. In the same view, the first respondent deposed that he had no problems with the court issuing the final order except with respect to any costs order being made against him. He stated that he had not and would not interfere with the applicants. In para 15.2 of the opposing affidavit, the first respondent stated;
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> > '15.2 In respect of the same costs; there is no basis for them to be claimed against me at whatever scale. I never despoiled anyone there is nothing in the affidavit which detail my role in the alleged spoliation. There is therefore no reason for this court to grant any costs against me in the circumstances'".

In my judgment I made several findings of fact and law. I determine that the applicants had simply made unsupported averments that the first respondent was party to or legally responsible for the spoliation of the second and third applicants. I also determined on the authority of the decision in *Austerland (Pvt) Ltd* v *Trade Investments Bank & 2 Ors* SC 92/05 and *Magwiza* v *Ziumbe & Anor* 2002 (20 ZLR 489 (S) that the applicant's case had to rise or fall on the founding affidavit. The applicant could not build a case against the first respondent by alleging facts which it could have pleaded in the founding affidavit to support its case as the facts were in existence. There were no special circumstances pleaded by the applicants to justify the adduction of evidence of the involvements of the first respondent in the spoliation. On p 6 of the cyclostyled judgment HH 503/17, I stated as follows-

> "A cause of action cannot be made in an answering affidavits after a respondent against whom a case has been brought has opposed the applicant (sic). The founding affidavits of the applicants in this applicant (sic) lack detail as to the basis of apportioning liability to the first respondent. I have carefully perused the founding affidavit of the first applicant's managing director and the supporting affidavits of the second and third applicants. The culpable conduct of the first respondent is not detailed as regards to the commission of the acts of spoliation. The first respondent did not take part in the spoliation. His connection with the second respondent was not pleaded. It was incumbent upon the applicants and their founding affidavits to set out the basis for extending liability to the first respondent who was not at the scene of the commission of the spoliation. The applicant cannot fill a yawning gap or *lacuna* in its case by founding a basis or cause of action in subsequent affidavits which answer the first respondent denial".

In the judgment, I gave reasons why the court could not exercise a discretion in favour of disallowing the evidence. It is evidence which was always in the hands of the applicants. Its

exclusion was undoubtedly due to the ineptitude of applicants' counsel who was not properly directed on choosing what evidence to include in the founding affidavit as would prove the liability of the first respondent for the spoliation complained of. In my conclusive findings, I stated as follows on p 7 of the cyclostyled judgment

> "The failure by the applicants to properly plead a case against the first respondent when such information was available to them typifies an example where the general rule must apply that their case stands or falls on the founding affidavit".

I made a positive finding that the applicants had on a balance of probabilities failed to prove the first applicants' involvement in the commission of the act of spoliation either directly or indirectly. The first respondent then indicated that without admitting liability, the first respondent was not opposed to the court granting the order sought for as long as there was no costs of order sought against him. He did not mind the order being made against him because he did not commit any act of the alleged spoliation and further he had no intentions to do so. The first applicant could have insisted on a dismissal of the application and discharge of the provisional order with costs but did not do so. Further, I did not consider that the applicants were entitled to any costs against the first respondent inasmuch as they did not prove a case for spoliation against the first respondent. I however, ordered that the second respondent should pay the applicants costs on the higher scale of attorney and client. The judgment was delivered on 2 August 2017.

On 23 August 2017, the applicants noted an appeal against my judgment in part. They were dissatisfied by my dismissing their claim for costs against the first respondent. The grounds of appeal were set out as follows:

> "(a) The High Court misdirected itself by making a finding that the first respondent did not despoil the applicants of their possession and occupation of No. 1 Harare Road, Kwekwe when the facts and evidence that was placed before the High Court clearly shows that the second respondent was acting at the specific instructions of the first respondent.
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> (b) The learned judge erred in making a finding that the applicants had failed to place facts which apportion liability on the first respondent, when the applicant's founding papers as well as their answering affidavits clearly sets out facts and evidence which apportions liability on the first respondent.
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> (c) The High Court therefore wronged to conclude that the first respondent was not liable to meet the applicants' costs".

As regards the alleged misdirection that there was clear evidence that the first respondent gave instructions to the second respondent to commit the spoliation of the applicants, I am not persuaded that there is any substance to this ground of appeal. Although it

is alleged that there were "facts and evidence" placed before the court which "clearly shows that the second respondent was acting at the specific instructions of the first respondent", there was no such evidence of facts to prove the applicant's assertions. The specific instructions alleged were not set out at all or in any detail. A specific instruction must be one whose content is clear and must be pleaded in specific terms. The specific instructions alleged were not set out at all or in any detail. A specific instruction must necessary be one whose continent is clear and must be pleaded. The specific instruction must therefore differ from one inferred from objective facts. Further, it was not alleged as to when and where the specific instructions were given to the second respondent.

It is significant to note in this respect that the applicant did not appeal against my order to refuse to accept the facts alleged in the answering affidavit as supplementing the founding affidavit in proof of the alleged liability of the first respondent. The founding affidavit standing alone did not prove the first respondent's liability. I therefore do not consider that the first and second ground of appeal have any prospects of success on appeal. The second grounds of appeal presupposed that in the judgment, reliance was placed on the answering affidavit to supplement the opposing affidavit. This premise is wrong. The founding affidavit made bold allegations on the involvement of the first respondent in the spoliation. The applicants to the extent that they sought to rely on the second respondent having acted under the ostensible authority of the first respondent were required to acquaint themselves with the law on vicarious liability on a balance of probabilities. The applicants failed to do so hence my determination that the appeal has no prospects of success on these two grounds.

Lastly and in regard to the two grounds aforesaid, it is not very clear as to what the applicants intend to gain by pleading them. The applicants had judgment entered in their favour by consent of the first respondent, subject to his not being saddled with costs. I assume that the grounds of appeal are intended to show that I made a costs order based on the misdirection alleged and that had I been properly directed I would have made an order of costs against the first respondent.

The last ground of appeal is that the court erred in making a finding that the applicant was not liable to pay the applicant's costs. I must confess that I do not really appreciate the applicant's problem in relation to costs because the applicants were awarded their costs albeit as against the second respondent only. The costs were awarded on the punitive scale of legal practitioner and client. The applicants were fully covered in relation to costs. The pursuit of

costs against the first respondent appears to be motivated by other considerations other than the genuine need by the applicants to be recover their costs.

In further regard to the issue of costs the second ground of appeal is not clear nor concise. It is not capable of ascertainment on the nature of the wrong which was committed as alleged. In the absence of the alleged wrong or misdirection being pleaded, the ground of appeal may well be adjudged to be invalid by the Supreme Court. In my view, there are no prospects of appeal of this ground succeeding in as much as it is so vague and embarrassing as to be incapable of answer or response. It is trite that costs are in the discretion of the court. The applicants did not in the grounds of appeal allege any fact or misdirection on the part of the court in exercising its discretion on the award of costs. For the avoidance of doubt, it was considered that although the first applicant consented to an order being made, in regard to future conduct, no liability was established against him in the application. There was in such circumstances no rationale ground or basis to order costs against the first respondent. I do not perceive that the applicants appeal on this ground has prospects of success.

I have in the background expose of how this matter progressed commented on the grounds of appeal. The applicants however pray for condonation of late application for leave to appeal and for leave to appeal if condonation is granted. Condonation of a failure to comply with rules of court is an indulgence which is not there for the taking. The court will in its discretion grant condonation where condonaton is deserved. In the case of *Adrian Paul Hoyland Read* v *John Stewart Matthews Gardiner & Anor* SC 70/20; PATEL JA stated at pages 5-6

> "**Criteria for Condonation of Non-Compliance**
> The factors to be considerd in an application for condonation of any failure to comply with the rules of court are well established. They are amply expounded in several decisions of this court in which the salient criteria are identified. They include the following
> - The extent of the delay involved or non-compliance in question.
> - The reasonableness of the explanation for the delay or non-compliance.
> - The prospects of success should the application be granted.
> - The possible prejudice to the other party
> - The need for finality in litigation
> - The importance of the case
> - The convenience of the court
> - The avoidance of unnecessary delays in the administration of justice.
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> See *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S); *Maheya* v *Independent African Church* SC 58/07; *Paul Gay Friendship* v *Cargo Carriers Limited and Anor* SC 1/13. As was observed in the latter case, the factors listed are not exhaustive."

In casu, there are two angles from which delay can be computed. Firstly, upon the date by which the applicants should have sought leave to appeal the judgment intended to be

appealed against. The applicants filed a purported notice of appeal which was struck off the roll by Supreme Court. The intended appeal was a nullity. It was as if it was never there. That being the case, nothing comes out of nothing or a nullity begets a nullity. Lord DENNNING in the case *MacFoy* v *United Africa Company Limited* [1961] 3 All ER 1169 stated–

> "…if an act is void, them it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it be so. An every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

The other angle is to compute the delay from the date that the Supreme Court struck the abortive appeal off the roll. My view is that the first approach or angle is the one to be preferred and followed because it is consistent with the interpretation of the law, logic and common sense. If the applicants were pursuing a nullity as they did by pursuing an invalid appeal, their wasted efforts cannot be rewarded with imputing reasonable conduct without their explanation on why they pursued a nullity. The applicants must be regarded as not having done anything which the court can recognise for purposes of computing delay. The length of the delay should therefore be imputed from the date by which the applicants should have applied for leave to appeal.

Assuming that I am wrong in my preferred approach on the effective date from which to compute the period of delay and should hold that the days be computed from the date of striking off the appeal from the roll, then, again, the applicants fall short of giving a reasonable explanation for non-compliance. The founding affidavit by Mr Wadi the managing director of the first applicant does not provide any explanation for the delay. In paras 5.1 and 6 of the founding affidavit, the deponent simply stated that the appeal was struck off the roll and that it was intended to "pursue and prosecute their appeal in the Supreme Court." It is clear that the person who bungled the pursuit by the applicants of their right to appeal was their legal practitioner who showed his or her shortcomings in not appreciating procedural law by purporting to note an abortive and still born appeal which as pointed out was a nullity *ab initio*. It is the legal practitioner who was expected to confess his or her ignorance of procedure on noting the appeal without first seeking leave as the explanation for the delay. It was the legal practitioner who should have then sought to persuade the court that his or her ignorance be not visited on the applicants. This application was a classical example of a circumstance in which r 227 (4) should have been utilized. The rule provides that other than by the applicant or respondent as the case may be, an affidavit filed with a written application shall be made by a

"person who can swear to the facts or averment set out therein…". The applicants' legal practitioners would have done well to depose to the founding affidavit and explained the paper trail and his or her failings. These are issues to which the applicant's legal practitioner could positively swear.

The grant of condonation is an indulgence as I have indicated hereinabove. There is no basis on which the court could properly consider whether or not to grant condonation if the explanation for the default or non-compliance is not set out. It is the explanation for the delay for non-compliance which the court first considers. In *casu*, no explanation was attempted. The application cannot succeed. Even if I am wrong in this regard, I hold the view that the appeal is deemed too predictable dismissal for reasons I discussed. There is no prejudice to the applicants that resulted from the judgment intended to be appealed against because the applicants will recover their costs from the second respondent. This case cannot be said to be of such importance as to merit the grant of condonation moreso bearing in mind that the applicants were granted their costs albeit against the second respondent. There has to be a limit beyond which completed matters are allowed to continue doing the rounds in the same courts in circumstances of non-compliance with the rules and the mattes are as in this case motivated by self-ego and other considerations other than a *bona fide* pursuit of justice. I take note that the first respondent's counsel had queried the propriety of combining an application for condonation of late filing of an application for leave to appeal and the leave to appeal itself. I do not find it necessary to delve into the point because of the finding I have made that the failure to explain the delay is fatal to the application which is in any event without merit.

The first respondent argued for costs *de bonis propriis* in the event that the application is dismissed. Such award of costs may be granted in exceptional circumstances where for example, the conduct of the legal practitioner is found to be improper and negligent. See *Matamisa* v *Mutare City Council* 1998 (2) ZLR 439 (SC). In *casu*, the applicants' legal practitioners exhibited ignorance on procedure for appeal by failing to appreciate the need to obtain leave to appeal first before noting the appeal. It cannot be said that a failure to grasp the law amounts to negligence or impropriety. Many legal practitioners including the court will now and then be misdirected on procedural and substantive law. This is not a ground to penalize the legal practitioner to bear costs out of the legal practitioners own pocket. It may well be justiciable to make an order that the legal practitioner concerned does not recover fees from his or her client or is ordered to refund any fees charged for processing an invalid application. Such order would have been appropriate in this case. The applicants' legal practitioners will however

not be saddled with such an order because I did not ask counsel to address me on what they thought of such an order. That notwithstanding, the impression I got from a consideration of this application is that the legal practitioner was intent on pursuing the appeal to the end. However, the legal practitioner fell short on his or her limited knowledge of procedural law. In the exercise of my discretion, I consider that an appropriate costs order is one in which costs must follow the event.

DISPOSITION

Resultantly, it be and is hereby ordered that the application is dismissed with costs.

Rufu Makoni, applicant's legal practitioners
Mutatu and Partners, 1st respondent's legal practitioners