MOONLIGHT PROVIDENT ASSOCIATES
versus
MISHECK TINYANI T/A MUTINHIMIRA AGENCIES
and
WILLAS NGOLIMA
and
MANGEGA JAMES GAZA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 23 July, 2019 and 15 September 2021

Application for condonation of late noting of appeal and extension of time to note appeal

R.T Mutero for the applicant
A.Gatse for the Respondents

CHITAPI: The applicant instituted eviction proceedings in the Kadoma Magistrates court against the respondents from a property called Stand 197 Kadoma Township, Kadoma. The claim for eviction was dismissed by the court *a quo*. The date of judgment is in dispute between the parties. The applicant which appear attached a copy of the handwritten judgment to its founding affidavit. There are two dates which appear at the end of the judgment. The dates are 19 December, 2018 which is handwritten with the magistrate's signature on the side. Below the date and signature, there is franked thereon the official court stamp of the Clerk of Court showing the date of 14 January, 2019. The applicant averred that judgement was availed on 14 January, 2019 while the respondents averred that the judgment was delivered on 19 December, 2018. I will revert to this dispute shortly when I deal with the explanation of the applicant for its failure to note appeal timeously.

In the court *a quo*, the applicant claimed that it was the registered owner of the property in issue and that the respondents were in occupation of the property by virtue of lease agreements which had "long expired". No further details of the expired leases or their expiry date were pleaded in the particulars claim. The plaintiff further claimed that the respondents were obliged to pay rentals by the 7th day of each month but had defaulted in their payments. The plaintiff abandoned its right to claim for payment of arrear rentals and prayed for an order

of eviction and costs of suit. In summation of its claim, the plaintiff stated as follows in para 12 of the particulars of claim.

> "12 . The plaintiffs claim is premised on the following-
> a. It is the registered owner of the property
> b. The defendants have no lawful cause of occupying plaintiff's property
> c. Plaintiff is entitled to vacant possession of the property from the defendants"

In their defence to the claim, the respondents, notably requested further particulars. They significantly requested inter alia the following particulars:

> "2. Is there any proof which shows that, plaintiff is the legitimate owner of Stand No. 197 Kadoma Township. Plaintiff to provide proof".

In response, the applicant stated as follows:

> " Ad paragraph 2
> Ownership has never been a legitimate basis for challenging one's landlord. To that end, the requested particulars are irrelevant for purposes of pleading."

The refusal to provide details of ownership contradicted para 12 of the particulars of claim wherein ownership of the property was pleaded as a basis for the plaintiffs' claim.

The respondents in their plea pleaded a special plea of lack of *locus standi* on the part of the applicant. They pleaded that they entered into a lease agreement with the original owner of the property and not with the applicant. They averred that one of the original owners instructed them not to pay rentals "anywhere" as there was an ownership dispute between the plaintiff and the premises owner. The respondents further averred that the applicant had failed to avail details of its averred ownership of the property and that therefore, the applicant had failed to show authority to evict the respondents. On this basis the applicants' *locus standi* was therefore challenged or disputed.

Further and on the merits, the respondents averred that they occupied the property and entered into lease agreements with the original property owner and not with the applicant. They averred that one of the original owners advised them not to pay further rental until the ownership dispute between the original owners of the property and the applicant had been resolved. The respondents averred that upon their advising the applicant on what the original owner of the property had told them to withhold payment of rentals, the plaintiff stopped claiming rentals until the ownership dispute was resolved.

In the judgment of the court *a quo*, the learned magistrate distinguished the principle that a lease cannot challenge the lessors title on the basis that the rule applied where the lessor

establishes that the lessee was placed in occupation or possession by the claimant. The learned magistrate noted that a Mr Broughton is the one who had originally concluded the lease agreements with the respondents. The learned magistrate reasoned that it was Broughton who had the right to evict the respondents and not the applicant. I have noted that in this application, applicant attached a copy of a lease agreement dated 1 July, 2014 between the applicant and the 1st respondent herein which was for the period 1 July, 2014 to 30 June, 2015. There is no allegation made by the applicant that the lease agreement was produced in evidence in the court *a quo*. The learned magistrate made a finding that the applicant had no right to evict the respondents and dismissed the applicants' claim with costs.

The above background sets out what the case in the magistrates' court was all about and how it was determined. The applicant as noted did not appeal against the magistrates' courts judgment within the prescribed period. It seeks the courts indulgence to be permitted to note an appeal out of time. The grant or refusal of an application for condonation of late noting of appeal is a discretionary decision of the court. In the case of *TelOne (Pvt) Ltd* v *Communications and Allied Services Workers Union of Zimbabwe SC 01/06*, GWAUNZA JA (as then she was) stated

> "Essentially in an application of this nature, the applicant must satisfy the court firstly that he has a reasonable explanation for the delay in question and secondly that his prospects of success on appeal are good."

In the matter of *Florence Chimunda* v *Arnold Zimuto SC76/14* ZIYAMBI JA held that the following factors had to be cumulatively considered in reaching a decision whether or not to grant condonation

> "(i) the extent of the delay
> (ii) the reasonableness of the explanation …. Thereof.
> (iii) the prospects of success of an appeal
> (iv) the prejudice if any, that is likely to be caused to the respondent should the application be granted.
> (v) the need to bring finality to the litigant?

See also *Ganda* v *First Mutual Assurance SC 01/05*; *Kombayi* v *Berhout 1988 (1) ZLR 53 (SC)*

Elizabeth Mutizhe v *Loveness Ganda & 2ors* SC17/09;

Muheya v *Independent African Church* SC58/07

Forestry Commission v *Moyo* 1997 (1) ZLR 254 (S)

In relation to the extent of the delay, there is a dispute in regard to when the judgment of the court *a quo* was delivered. I have already pointed out that there are two dates which have not been explained by the persons who made the endorsements on the written judgment and what they signify. The respondents aver that the judgment was availed on 19 December, 2018 whilst the applicant avers that the judgment was availed on 14 January, 2019. The polarised positions of the parties on the point is not capable of ascertainment. The uncertainty arises from the fact that the judgment appears not to have been delivered in open court. The problem of dates of delivery of judgments does not arise in the High Court for example because of the existence of the motion roll where reserved judgments are listed and delivered in open court. Such a system does not obtain in the magistrates court. Were it to be implemented the issue of when judgment was delivered would be resolved. It is an issue which the powers that be may be pleased to consider implementing. Be that as it may, I have resolved to give the applicant the benefit and accept that the judgment was availed to the applicant on the date on the courts' official stamp which was 14 January, 2019. The extent of delay will be determined from that date in this determination.

The applicant was accordingly supposed to note its appeal within the days limited for noting appeal reckoned from 14 January, 2021. The applicant avers that its legal practitioner was confused in the computation of the time period within which to appeal by the promulgation of the new Magistrates Court Civil Rules S.I 11/2019 which came into operation on 1 February, 2019. It is not clear as to how the confusion arose because Order 1 Rule 2 of the rules provide that the rules come into operation on 1 February, 2019 and would apply to all civil proceedings in court including proceedings pending on that date. The case between the parties had been concluded. It followed that the new rules were of no application to completed matters which would be determined under old rules. The applicant should have noted the appeal within 14 days calculated 14 January, 2019 that is by 1 February, 2019 at the latest. The applicant filed this application on 11 February, 2019 which was 10 days after the expiry of the date by which appeal should have been noted. The delay is not inordinate. The explanation given however is not satisfactory. Quite clearly applicants' counsel did not have to wait to act on the last day for noting appeal which was 1 February. 2019 before noting the appeal. Having waited to act at the last minute, applicants counsel then tried to take advantage of the new rules which did not apply to completed matters. What clearly emerges from the applicants' explanation is that counsel did not exercise due diligence in executing his duties. It is often stated that a litigant

must suffer the consequences of his counsel's lack of diligence. I do not follow that route in this case because the length of the delay persuades me to hold that there was no deliberate abstention by the applicant to comply with the rules pertaining to noting an appeal. Counsel for the applicant acted quickly to file this application after disabusing himself of his wrong interpretation of the application of the new rules on the time to note appeal.

The next issue to consider is whether the proposed appeal enjoys any reasonable prospects of success. In case of *Smith* v *S* 2012 (1) SACR 567 at page (7) the Supreme Court of Appeal of South Africa stated-

> "what the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court, of appeal could reasonably arrive at a conclusion different from that of the trial court. 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 of success are not remote but have a reliable chance of succeeding. More is required to be established than 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 be other words be a sound, rational basis for the conclusion that there are prospects of success."

In this jurisdiction, it has been stated that there are no reasonable prospects of success if the intended appeal is shown to be doomed to a predictable failure. See *S* v *Chikumba* HH 724/5 per MAFUSIRE J. *In casu*, the applicants draft grounds of appeal are as follows:

1. The magistrate in the court a quo erred when she found as she did that the appellant in the matter *in casu* is not entitled to an order for the eviction of the respondents when regard is had to the fact that;
    a) The respondents concede that they are tenants on the property
    b) The respondents concede that they were paying rent to the appellant as their landlord and stopped paying at some point.
    c) The respondents are currently not paying rent on the property and are living free of charge.
2. In coming to the conclusion of dismissing the applicant's claim as she did, the Magistrate in the court *a quo* erred at law and in fact when she failed to appreciate the general rule of the common law that a tenant may not dispute the title of the lessor upon termination of a lease.
3. A *fortori*, no piece of evidence was placed before the trial court by the respondents that supports the allegation that there is a third party with better title to the property, thereby disentitling the appellant the relief sought.

I do not intend to deal with each singular ground of appeal in turn. It is important in my view to appreciate what the applicants' case for eviction of the respondents was grounded upon. The applicant upon an analysis of paragraph 12 of the particulars of claim averred that it was the registered owner of the property, that the respondents had no lawful cause to occupy the applicant's property and that the applicant was entitled to an order evicting the respondents. The applicants' claim to being the registered owner of the property was put into issue by the respondents who requested for further particulars which were ill advisedly refused. The applicant in its particulars had pleaded a straight forward cause of action in paragraph 7 to 11 as follows:

> " 7. The plaintiff is the registered owner of the property known as Stand number 197 Kadoma Township, Kadoma
> 8. The 1st to 5th defendants occupied the plaintiffs' property by virtue of lease agreements which have long expired.
> 9. The defendants who became statutory tenants at the expiry of their lease agreements were obliged to pay their rentals by the 7th day of every month.
> 10. The defendants are all in rent arrears. The arrears range from as far as 2015 for some of the defendants.
> 11. The plaintiff is abandoning its claim for arrear rentals and simply wants vacant possession."

The lease agreements were challenged in the plea in paragraph 1 of the plea on the merits wherein the respondents pleaded that-

(i) The defendants took occupancy of the property whilst it was under a different name and entered into a lease agreement with one of the original owners and not the plaintiff.

The applicant did not produce proof of its title to the property nor the expired lease agreements to prove that the relationship between the plaintiff and the respondents was founded upon expired lease agreements which showed the parties to the agreements as the applicant and the respondents. The applicant in the court a quo sought to rely on the principle that a lessee could not challenge the lessor's title. However such title of lessor in as much as the registered title of the applicant being disputed were not established by the applicant.

When the grounds of appeal are considered, there is no merit in the first ground of appeal because the conclusion by the respondents that they were tenants on the property did not prove that they were the applicants' tenants. Issue had been raised on the parties to the tenancy relationship. The same applied to the fact of the rentals having been previously paid to the applicant. This would not prove that the applicant was therefore the lessor.

The second ground of appeal must fail for the reason that the learned magistrate did not misdirect herself in applying the principle that the lessor cannot challenge the lessors' title upon termination of the lease. The respondents not only challenged the title of the lessor but they pleaded that they did not conclude a lease agreement with the applicant. All that the applicant needed to do was to provide a paper trail of its title and the expired lease agreement which connected the applicant to the property and to the respondents. The applicant did not prosecute its claim on the above basis yet it was logical to do so given the manner in which it pleaded its case. The learned magistrate made a finding that the plaintiff had not proved that it is the one that placed the respondent into possession of the property. The learned magistrate determined that the lease agreements which expired and formed the basis for the statutory tenancy were entered into between a Mr Broughton and the respondents and not with the applicant.

The third ground of appeal has substance. The applicant seeks to challenge the finding by the learned magistrate that a third party Mr Broughton had better title to the property. The facts of the case were that neither the applicant nor Mr Brouggton produced documents of title. It was not in the circumstances justified to hold that the third party had better title to the property.

In my view and upon a consideration of the facts of the matter and evidence, the applicant failed to make out a prima facie case to the relief sought. The learned magistrate for her part fell into error in making a finding of a third party having better title because evidence of titles was not produced and thus there was no basis to make that finding. This misdirection is material because the agreed issue for determination was whether or not the applicant was entitled to evict the respondents for non-payment of rentals. The issue was supposed to be answered by first considering legal grounds upon which such entitlement to evict might arise. If as was accepted, the entitlement arose from an expired lease and creation of a statutory tenancy relationship and the statutory tenant does not pay rent, these facts ought to have been proved because with the existence of the lease agreements having been disputed and not produced, they were therefore not proved. The decision on what the correct order ought to have been will be determined by the appeal court.

I therefore determine that the applicants intended appeal has reasonable prospects of success. Condonation and extension of time will be granted. In relation to costs, the applicants' failure to note appeal timeously is the cause of making this application. There is nothing to

suggest that the respondents' opposition was not *bona fide*. The applicant is the one who must shoulder the applicants' costs of this application.

The following order is made:

1. The application for late noting of appeal and extension of time within which to note appeal is granted.
2. The applicant shall note its appeal within 5 days of this order
3. The applicant shall pay the respondents costs of this application.

Mhishi Nkomo Legal Practitioner, applicant's legal practitioners
Mugwagwa & Partners, respondent's legal practitioners