MAXWELL MATSVIMBO SIBANDA
and
GLADYS SIBANDA
and
GRACIOUS SIBANDA
versus
MARTIN NDORO
and
MERCY NDORO
and
THE MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 20 January & 25 August, 2022

Opposed Matter

1st applicant in person
C T Tinarwo, for 1st and 2nd respondent

MANGOTA J: I heard this opposed application on 20 January, 2022. I delivered an *ex tempore* judgment in which I dismissed it with costs.

On 27 January, 2022 the applicants wrote to the registrar of this court. They requested full written reasons for my decision. My reasons are these:

Maxwell Matsvimbo Sibanda and Gladys Sibanda who are respectively the first and second applicants *in casu* are husband and wife. They are both the judgment debtor in interpleader proceedings which the court of the magistrate determined on December, 2020 under case number 10791/19. Gladys Sibanda, the third applicant *in casu*, is their daughter. She is the claimant in the court *a quo's* interpleader proceedings.

Martin Ndoro and Mercy Ndoro who are the respondents *in casu* are the judgment creditor in case number 10791/19 in which the magistrate dismissed the claim of the claimant.

Following the dismissal of the claim, the first, second and third applicants appealed the decision of the magistrate. They filed their notice and grounds of appeal on 23 December, 2020

and, therefore, within the *dies induciae*. The appeal was, unfortunately for them, struck off the roll on the basis that the same was fatally defective. It lacked clear and concise grounds of appeal.

The striking off of the appeal opened the avenue for the judgment creditor to execute the order of the magistrate who had ruled in its favour. Meanwhile, the applicants who were, and are, without legal representation filed what they referred to as amended grounds of appeal. They filed these on 30 September, 2021. These, unfortunately for them again, did not find favour with the court. The applicants were advised, through the office of the registrar, that the procedure which they adopted/used was wrong. They became aware of the stated matter on 29 October, 2021.

Because Order 31. Rule 1 (1) of the Magistrates Court Civil Rules 2019 stipulates that an appeal should be filed within twenty-one days after the date of the judgment appealed against, the applicants were already very much aware that they could not file a valid notice of appeal without being condoned by the court for their late filing of the notice of appeal. The current is, therefore, their application for condonation and extension of the time within which to appeal.

I state, from the outset, that an applicant for condonation remains very much aware that he has violated the rules of court. He, accordingly, moves the court to exercise its discretion in his favour. However, for him to succeed in his application, he has to satisfy the court on a number of requirements.

It is well settled that in considering an application for condonation, the court has a discretion which it must exercise judicially upon a consideration of all the facts and that, in essence, it is a question of fairness to both sides of the legal divide. The court embarks upon an inquiry and, in this inquiry, relevant consideration may include:

i) the degree of non-compliance with the rules of court;
ii) the explanation therefor;
iii) prospects of success on appeal;
iv) the importance of the case;
v) the respondent's interest in the finality of his judgment;
vi) the convenience of the court – and
vii) the avoidance of unnecessary delay in the administration of justice.

The list is not exhaustive. The factors are not individually decisive but are inter-related. They must be weighed one against the other: *United Plant Hire Ltd* v *Hills & Ors, 1976 (1) SA 717* at *720 F-G.*

The court offered further guidelines on management of the abovementioned requirements. It stated in *Grootboom* v *National Prosecuting Authority & Anor, (2013) ILJ 282 (LAC)* that:

> "…..where the delay is unacceptably excessive and there is an explanation for the delay, there may be need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted".
> *In Nedcor Investment Bank Ltd* v *Visser N O, 2002 (4) SA 588 (T)* at 591 it was held that:
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> "Rule 27(3) requires 'good cause' to be shown by the plaintiff. This gives the court wide discretion….The requirements are, first, that the plaintiff should at least tender an explanation for its default to enable the court to understand how it occurred….secondly, it is for the plaintiff to satisfy the court that its explanation is *bona fide* and not patently unfounded"

It is patently clear, from a reading of the above-cited case authorities, that condonation remains within the discretion of the court which must weigh the case of the applicant as presented to it against that of the respondent. Its aim and object will be to do justice between the parties. What comes out clearly from the authorities is that condonation is not there for the mere asking. The applicant in an application for condonation must satisfy the court of the *bona fides* of his application, the reason why he violated the rules of court as well as the time which he took to make amends given his admission of having infringed the court's rules.

It follows from the above-analysed set of matters that an applicant who admits having violated the rules of court but invites the court to walk with him along a garden path which leads to nowhere has no one but himself to blame. He more likely than not is prone to shoot himself in the foot, so to speak. An applicant for condonation should, therefore, be candid and convincing. He should not embark upon the exercise of playing games with the court which, as is known, has no time for such. He should remain clear of the fact that court business is very serious matter which cannot allow him to arrogate to himself or herself the time or the luxury to play or dance in the halls of justice without him being severely censured for that misdemeanor.

The matter which relates to the appeal of the applicants, it is a fact, was determined by the court *a quo* on 9 December, 2020. The applicants filed this application on 1 November, 2021. This is some ten consecutive months after the event. If this delay is not very inordinate, then one wonders what that is.

The notice of appeal which the applicants filed within the *dies* was struck off the roll of appeal matters. It was struck off the roll on account of its defects which were not only fatal but were also drawn to the attention of the applicants. The mere striking of the notice of appeal off the roll should have compelled the applicants, if they were serious litigants, to have returned to the drawing board with a view to correcting the defects which they had become aware of. The applicants, it is observed, did not pay any heed to their mistakes. They do not state that they made any effort to correct the defects so that they have their notice of appeal filed within some reasonably appreciable time albeit out of time. Their effort to file what they described as amended grounds of appeal does nothing other than to display their unwholesome attitude to what they intended to achieve. The amended grounds of appeal which they filed, also out of time and without being condoned, hit a brick wall against them once again.

The applicants, it is my considered view, made an effort to play games with the court and its rules much to their embarrassment. They, as the respondents correctly state, did not have the intention of seeking proper legal guidance. They continued to clog the court with improperly prepared processes. The respondents state, and I agree, that the applicants are not serious litigants. They are not being candid with the court. The explanation which they tendered for the delay is totally unconvincing let alone acceptable.

An application for condonation for non-compliance should be approached with seriousness. To start with, rules of court are to be obeyed. So, it follows that if one wants the non-compliance to be condoned, they need to show that they are serious. Once non-compliance is pointed out formally before the hearing, corrective measures should be taken: *Chivanga* v *Mahoso*, HH 41/18

The applicants who are not schooled in substantive law and/or the law of practice and procedure cannot pretend to know the law let alone the rules of court. If they were serious litigants who intended to prosecute their appeal, as they allege they did, they would have taken heed from the two errors which they made and should have sought legal guidance. That effort would have rewarded them to some degree. They would have known, for instance, that rules of court have time-lines which they had to adhere to without fail. They would have known that rules of court are there to regulate the practice and procedure of court and that they must, therefore, be complied with in the strict sense of the word.

Rules of court are the court's tools which were/are fashioned for its own use. Non-compliance with the rules of court will be condoned upon good cause shown by an applicant and there must, at all times, be a reasonable and acceptable explanation given by the applicant for failure to adhere to the rules: *Kwaramba* v *Winshop Enterprises (Pvt) Ltd & Ors, HH 788/15*.

The delay which occasioned the filing of the condonation application was/is very inordinate. The applicants' explanation for the same was not only unsatisfactory but was also totally unbelievable. The applicants do not show, or state, that they have any prospects of success on their intended appeal. They were not able to show that they have a defence to the respondents' attachment of the goods which were the subject of the court *a quo's* proceedings. All what they were able to demonstrate to the court *a quo* and me is collusion which exists between the first and second applicants, on the one hand, and the third applicant who is their daughter, on the other. The mere fact that they filed this application together when they are the judgment debtor and the claimant evinces their intention to work in collusion against the respondents.

The applicants were advised, as far back as November 2021, that the goods which were/ are the subject of their appeal had already been sold at a public action by the third respondent who is the messenger of court. The respondents' notice of opposition which they received in November, 2021 conveyed the stated fact to them. It stated clearly and concisely that the application and the intended appeal had been overtaken by events. It advised them that the goods had already been sold under the hammer by the third respondent.

The applicants' insistence, as contained in their answering affidavit, upon condonation and the appeal remains misplaced. Their claim which is to the effect that, even if the goods were sold, the court could still entertain the application shows their lack of seriousness in their approach to the case as a whole. They, for instance, claimed that the determination of the appeal would determine the legal course which they would take. They remain of the view that, if their appeal is upheld, they could sue for damages against persons who caused what they described as wrongful attachment.

Clearly the applicants remain ill-advised. Their case before the court *a quo* was grounded on an interlocutory matter. It was premised on an interpleader wherein the court *a quo* had to determine the relevance or otherwise of the claimant's claim to the goods. Their appeal related to the same matter. It related to the determination of the claim of the claimant to the goods. The sale

of goods did away with the parties' cause of action as they defined it for consideration by the court *a quo* or by this court. It was never a case of the applicants claiming damages *in lieu* of the goods which had been sold.

If the applicants had sought legal guidance, as they should have done, they would have realized that, with the goods having been moved out of the equation as had been stated by the respondents and admitted by them, their pursuit of the application for condonation and their intended appeal would have been akin to them embarking upon a wild goose chase which leads to nowhere. They would have known that their prospects of success on appeal was next to nothing.

With proper legal guidance, the applicants should have withdrawn their application for condonation and pursued any other remedy which, in their considered opinion, remained open to them the moment that they became aware that the third respondent has sold the goods. Their persistence with the application with the knowledge that the goods had been removed from the equation only served to demonstrate their ignorance of the law and what they perceived to be their right. They persisted on a matter which they knew has no merit.

That the applicants made a flagrant breach of the rules of court requires little, if any, debate. They have no explanation let alone a plausible one for their violation of the court's rules. The delay which occasioned the breach is very inordinate. They, on their part, have no prospects of success on appeal. Their case is on all fours with what the court was pleased to enunciate in *Bosman Transport Works Committee & Ors* v *Piet Bosman Transport (Pty) Ltd, 1980 (4) SA 794* A wherein it remarked that:

> "In a case such as the present, where there has been a flagrant breach of the rules of this court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted."
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> On a proper conspectus of this application, therefore, the applicants cannot be said to have satisfied

the requirements for the grant to them of condonation. They left me with no choice but to refuse to exercise my discretion in their favour. They failed to prove their case on a preponderance of probabilities. The application is, in the result, dismissed with costs.

Applicant in person
Zimbudzi & Associates, respondent's legal practitioners