REPORTABLE (138)

ISMAIL MOOSA LUNAT
v
(1) MOHAMMED ZAKARIYA PATEL (2) THE DEPUTY SHERIFF

SUPREME COURT OF ZIMBABWE
BULAWAYO: 20 OCTOBER 2021 & 8 NOVEMBER 2021

Ms *P. Dube*, for the applicant

E.R. Samukange, for the first respondent

IN CHAMBERS

MATHONSI JA: This is an application for condonation of the late filing of an appeal and extension of time within which to appeal against the judgment of the High Court delivered on 19 November 2020.

The judgment sought to be impugned dismissed an urgent application by the applicant who sought to interdict the Sheriff of the High Court from disposing of the applicant's assets which had been taken in execution of an earlier judgment of the same court issued on 12 December 2019. The latter judgment granted summary judgment in favour of the respondent against the applicant in the sum of US$384 177.00 "or its equivalent at the prevailing interbank rate."

Subsequent to the grant of summary judgment aforesaid, on 6 February 2020 and at the instance of the respondent, the High Court granted leave to execute the summary judgment pending the appeal noted by the applicant. Leave was granted unopposed.

I observe that the applicant is guilty of several infractions of the rules of court and that the application itself is beset by irregularities. In that regard I find that no case has been made for the relief sought and that condonation and extension of time within which to appeal cannot be extended to the applicant.

THE FACTS

On 11 January 2019 the applicant signed an acknowledgment of debt in favour of the respondent in terms of which he acknowledged being indebted to the respondent in the sum of US$384 177.00. The applicant undertook to pay that amount with interest at the rate of 12 per cent per annum and collection charges and attorney and client costs by 30 March 2019.

The applicant did not honour his undertaking resulting in summons actions being instituted against him. He entered appearance to defend the action prompting the respondent to make an application for summary judgment. In opposing the application the applicant sought to be excused from liability in terms of the acknowledgment of debt on what the High Court found to be "illusory defences." The application was granted and the judgment directed the applicant to pay the debt in United States Dollars or in RTGS dollars at the prevailing interbank rate.

The applicant was dissatisfied with the turn of events. He lodged an appeal to this Court against the judgment. The noting of an appeal prompted the respondent to approach the court for leave to execute the judgment pending appeal. As already stated, leave was granted on 6 February 2020.

Notwithstanding the clear wording of the judgment granted on 12 December 2019 that the rate to be applied was the prevailing interbank rate, and indeed notwithstanding the noting of an appeal, the applicant later sought to settle the judgment debt in RTGS dollar at the parity rate of one to one.

The respondent resisted the applicant's attempt to side-step the imperatives of the judgment. Instead, he proceeded to enforce the judgment through the Sheriff. The applicant would have none of it. He filed an urgent application seeking effectively a stay of execution in the interim. On the return date the applicant indicated that he would seek a declaratory order, *inter alia,* that the debt denominated in United States Dollars was valued in RTGS dollars at the rate of one to one. Further, the applicant would seek a declaratory order that the High Court judgment granting relief to the respondent had been overturned by this Court in the case of *Zambezi Gas Company (Pvt) Ltd v N.R. Barber (Pvt) Ltd & Another* SC 3/20.

The application was opposed by the respondent. The High Court found no merit in the application and dismissed it with costs. It is that judgment which is the subject of the present proceedings, the applicant having initially noted an appeal against it on 8 December 2020.

The appeal was set down for 19 July 2021 but prior to that date, the respondent gave notice in terms of r 51 of his intention to object to the appeal on the basis that the notice of appeal was defective. As I have said, the court struck the matter off the roll for the reason that the appeal was fatally defective. It ordered the applicant to pay costs on the adverse scale.

The applicant has made this application in terms of r 43(1) of the court's rules seeking condonation for non-compliance with the rules and extension of time within which to appeal. The explanation proffered for failure to comply with the time frame for noting an appeal provided for in the rules is that the legal practitioner who was tasked with the responsibility of drafting the notice of appeal was not familiar with the procedure for doing so because he was freshly registered as such.

I mention in passing that no affidavit has been elicited from the legal practitioner accused of incompetence, "error and oversight" to confirm that the blame lies with him. In fact even the name of that legal practitioner has not been given.

The founding affidavit also does not advert to what appears to be quite a long delay of over a month from the date the appeal was struck off on 19 July 2021 to the date this application was filed on 26 August 2021.

Regarding prospects of success on appeal again there is a demonstrable deficiency in the founding affidavit. Other than merely stating that the appeal has prospects of success, the prospects are not stated. The closest the applicant comes to mentioning prospects of success is at paras 20 to 23 of the founding affidavit which read:

"20. I attach hereto the Draft Notice of Appeal that I intend to file upon leave being granted as Annexure C. I humbly submit that my appeal has prospects of success.

21. The grounds of appeal raise arguable issues of law. I also believe that those points can be argued in favour of the appeal, as will be clear from heads of argument already filed by the parties.

22. The grounds of appeal will further be motivated in argument at the hearing of this application.

23. It is my humble belief that the judgment of the court *a quo* went contrary to statutory law and was therefore, a nullity to the extent that it went contrary to law."

ANALYSIS

What the court has regards to in an application of this nature is now well settled in our jurisdiction. The position was stated very succinctly in *Zimslate Quartize (Pvt) Ltd & Others v Central African Building Society* SC 34/17 at para 17 where the court remarked:

> "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 considering an application for condonation the court is engaged in the exercise of judicial discretion, that is, whether to grant the indulgence of condonation or not. In doing so it has regard to the reasons or explanation advanced by the applicant for the infraction.

In order to succeed the applicant must satisfy the established requirements which motivate the court to extend an indulgence. The extent of the delay and the reasonableness of the explanation for such delay as well as the prospects of success on appeal are the relevant considerations.

It has been stated that what calls for a reasonable explanation is not just the delay in noting an appeal but also the delay in seeking condonation especially in a case such as the present where the applicant took more than a month after his appeal was struck off before filing this application. See *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998(2) ZLR 249(S) at 251 C-E.

For filing a defective notice of appeal resulting in a delay from the time the impugned judgment was delivered on 19 November 2020, the applicant blames a junior lawyer representing him who is said not to have appreciated the procedure. In my view the explanation is far from reasonable or being acceptable. A qualified lawyer is an officer of the court and is expected to know the procedure for filing valid appeals.

The applicant cannot expect that explanation to be accepted especially when not even the name of the lawyer has been disclosed. More importantly, the nameless lawyer has not even deposed to an affidavit accepting responsibility. It is trite that where a lawyer is blamed for failure to abide by the rules, an affidavit by the lawyer taking responsibility has to be filed in support of the application.

But then I digress. The point I am making is that it does not follow that a "newly registered" lawyer does not or should not know the procedure. I find the remarks made in *Guard Force Investments (Pvt) Ltd v Ndlovu* SC 24/16 apposite. It was stated:

> "The junior legal practitioner is also a qualified legal practitioner capable of following instructions given to him. There is no evidence on record to show that the junior legal practitioner was less competent than would be expected."

In any event, the courts have repeatedly stated that there is a limit beyond which a litigant cannot escape the results of his or her legal practitioner's lack of diligence or the

deficiency of the explanation tendered. See *Machaya v Muyambi* SC 32/03; *Saloojee & Anor NNO vs Minister of Community Development* 1965 (2) SA 135(A) at 141 C-E.

Apart from that, there has been no explanation whatsoever as to why the applicant did not approach the court for condonation between 19 July 2021 and 26 August 2021 when the application was eventually filed. That delay also calls for an explanation and it is not for me to make a case for the application. Condonation is not there for the asking.

Authorities also make it clear that where the explanation for the delay is weak the applicant must really have a strong case on appeal before condonation can be extended. Regrettably, the applicant has not bothered to even set out what his prospects on appeal are. To begin with, an application stands or fails on its founding affidavit. I have demonstrated above that the founding affidavit does not outline prospects of success on appeal.

The passages in the founding affidavit I have reproduced above do not even begin to show prospects of success. It is not enough for the applicant to refer to the grounds of appeal and expect the court to extrapolate what the prospects of success are. The founding affidavit presents the applicant with an opportunity to set out his case. I cannot piece it together for him. As stated in *Sibanda v T.S. Timbers Building Supplies (Pvt) Ltd* SC 50/15 a bare and unsubstantiated averment that prospects of success exist is not sufficient.

In any event, what is lost to the applicant is that what he intends to appeal against is the judgment of the High Court denying him a stay of execution pending the determination of his application for a declaratory order on the return day if the provisional order had been granted. It is an exercise in futility to cover acres of space, both in the grounds of appeal and

in submissions made before me, addressing the applicability of s 44C of the Reserve Bank of Zimbabwe Act.

What the High Court was seized with were the requirements for the grant of an interdict or stay of execution. It had to relate to the applicable law on that aspect having regard to the background of two extant court orders of its own. The first granted summary judgment while the second granted leave to execute the former. The question was whether it could competently stay the execution in those circumstances.

The applicant shies away from addressing that pertinent issue in the founding affidavit, in the heads of argument and indeed in oral submissions made before me. What then remains is that the applicant has failed to show prospects of success on appeal.

That is not all. The applicant did not comply with r 43(1) of this Court's rules which requires that an application for condonation for non-compliance and extension of time "shall be accompanied by a copy of the judgment" sought to be appealed. The judgment was not attached and Ms *Dube*'s attempt to smuggle the judgment as an attachment to heads of argument filed a day before the set down date could not rescue the situation.

In arriving at that conclusion, I am fortified by the obvious fact that having realised the non-compliance with r 43(1) just like in any infraction of the rules, the applicant should have sought condonation. He did not. The belated attempt to ask for condonation in response to my query in which counsel's attention was drawn to the infraction, could not possibly meet the requirements for seeking condonation.

Mr *Samukange* for the respondent also attacked the validity of the draft notice of appeal. He submitted that the prayer is fatally defective by reason that it seeks substitutionary relief which is incompetent. I agree. What the High Court dealt with was the interim relief of an interdict or a stay of execution. It did not relate to the declaratory relief which could only be dealt with on the return date of the provisional order had it been granted.

The prayer in the proposed notice of appeal seeks the substitution of a declaratory order which the High Court could not have granted. It is incompetent. It is trite that to an application for condonation and extension of time to appeal should be attached a valid notice of appeal not a fatally defective one. This only piles up on all the infractions I have referred to.

DISPOSITION

The applicant has not made out a case for the relief sought. The relief provided for in r 43(1) of the court's rules is granted on good cause shown. The cumulative effect of the failure to give a reasonable explanation for non-compliance with the rules, the failure to show good prospects of success on appeal, the infringement of r 43 by not attaching the impugned judgment and attaching a defective notice of appeal means that the indulgence of condonation cannot be extended to the applicant.

Mr *Samukange* urged of me the award of costs on a punitive scale. He did not move for the award of those costs *de bonis propriis*. In other words, he would want such costs to be borne by the applicant. In my view the applicant's misfortunes are entirely attributable to his legal practitioner's inattention. It has not been shown that the applicant himself is guilty of

conduct calling for admonition with an award of such costs. An award of costs on the ordinary scale will suffice.

In the result, the application is hereby dismissed with costs.

Ncube Attorneys, applicant's legal practitioners

Samukange Hungwe Attorneys, 1st respondent's legal practitioners