NOBUHLE NANASI NCUBE **APPLICANT**

AND

CBZ BANK LIMITED **1ST RESPONDENT**

AND

THE SHERIFF FOR ZIMBABWE **2ND RESPONDENT**

AND

BULAWAYO REAL ESTATE **3RD RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 4 JULY 2011 AND 7 JULY 2011

Mr L Nkomo for applicant
Mr P. Ncube for 1st respondent

Urgent Chamber Application

MATHONSI J: The applicant is one of the two people who signed an acknowledgement of debt as sureties and co-principal debtors on 6 April 2009 binding themselves for a loan advanced by the first respondent to Balemu Safaris (Pvt) Ltd. The applicant also consented to the registration of a mortgage bond against her title to stand 108 Mahatshula Township of stand 1 Mahatshula Township Bulawayo as security for the debt.

When the debt was not liquidated, the first respondent took judgment against the applicant and two others on 26 February 2010. Subsequent to that, the applicant was served with a writ of execution and notice of judicial attachment of her stand 108 Mahatshula Bulawayo on 13 May 2010. The sale of that property was originally scheduled to take place on 27 August 2010 but was cancelled after the applicant had made an offer to settle the debt together with other charges by 30 November 2010.

The papers show that the applicant paid part of the money owed but did not clear all that was outstanding by 30 November 2010. Up to now the debt has not been cleared. Finding itself with no other option, the first respondent instructed the Sheriff to proceed with the sale of applicant's dwelling house in order to recover what remained outstanding. A new date of sale, being 24 June 2011 was set by the Sheriff.

Stung by that turn of events, the applicant launched the present application on 17 June 2011. The application is purportedly made in terms of Order 40 rule 348A of the High Court of Zimbabwe Rules, 1971. She seeks an order suspending the sale of the house on the pain of her paying US$500-00 per month with effect from 1 July 2011 until the outstanding debt is liquidated. She also seeks an order directing the first respondent to produce a breakdown of what remains owing to facilitate its settlement in monthly instalments of US$500-00 per month aforesaid.

The first respondent has strongly opposed the application as lacking in merit. At the commencement of the hearing *Mr Ncube* for the first respondent took a point in limine that, if this application was meant to be made in terms of subrule (5a) of rule 348A (something not apparent ex facie the application), then it has been brought out of time. As no application for condonation has been made, the application should fall on that score alone.

In response, *Mr Nkomo* for the applicant, while conceding that the application was submitted out of time, urged me to indulge the applicant in the exercise of my discretion given by rule 4C(a) of the High Court Rules because it is in the interest of justice that it be done. He took the view that a grave injustice will occur if there is no departure from the provisions of rule 348(5a) given that the figures submitted by first respondent for the amount owing are contested.

That rule provides;

> "Without derogating from subrule (3) to (5), where the dwelling that has been attached is occupied by the execution debtor or members of his family, the execution debtor may, within ten days after the service upon him of the notice in terms of rule 347, make a chamber application in accordance with subrule (5b) for the postponement or suspension of-
> (a) the sale of the dwelling concerned, or
> (b) the eviction of the occupants."

In casu, the applicant was served with the notice of attachment together with the writ of execution against the dwelling on 13 May 2010. She was therefore entitled to make this application by 28 May 2010. She did not. As already stated the application was only filed on 17 June 2011 almost 13 months out of time. In her wisdom, the applicant did not find it necessary to seek condonation from the court to bring the application out of time.

Mr Ncube has made reference to a catena of cases to the effect that for condonation to be granted, there must be a substantive application for it. In *Forestry Commission v Moyo* 1997 (1) ZLR 254(S) at 260 C-H and 261 A, GUBBAY C.J. stated;

> "I entertain no doubt that, absent an application, it was erroneous of the learned judge to condone what was on the face of it, a grave non-compliance with rule 259. For it is the making of the application that triggers the discretion to extend the time. In *Matsambire v Gweru City Council* S -183-95 (not reported) this court held that where proceedings by way of review were not instituted within the specified eight weeks period and condonation of the breach of rule 259 was not sought, the matter was not properly before the court. I can conceive of no reason to depart from that ruling. One only has to have regard to the broad factors which a court should take into account in deciding whether to condone such a non-compliance, to appreciate the necessity for a substantive application to be made. They are:
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> (a) that the delay involved was not inordinate, having regard to the circumstances of the case;
> (b) that there is a reasonable explanation for the delay;
> (c) that the prospects of success should the application be granted are good; and
> (d) the possible prejudice to the other party should the application be granted.
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> See *Director of Civil Aviation v Hall* 1990(2) ZLR 354(S) at 357 D-G. How can a court exercise a judicial discretion to condone when the party at fault places before it no explanation for the delay?
> Moreover, in every such application the respondent is entitled to be heard in opposition. He must be permitted an opportunity to persuade the court, that the indulgence sought is not warranted. Without hearing him how can a court, for instance, be satisfied that he will suffer no possible prejudice by the condonation."

In the present case, *Mr Nkomo* urged me to rely on rule 4C to indulge the applicant. Quite often legal practitioners who find themselves having fallen foul of the rules of court are quick to rely on that rule to circumvent the process of the rules. There is however no magic coming out of rule 4C (a). It simply provides;

> "The Court or a judge may, in relation to any particular case before it or him, as the case may be-
> (a) direct, authorise or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice."

The applicant has not asked me to condone her 13 months delay in bringing this application because she has not made a substantive application for condonation. The objection to the late filing of this application was made in the opposing papers filed on behalf of the first respondent. The applicant still had time, some 10 days or so before the matter was heard, to submit an application for condonation. She chose not to. Short of descending onto the arena, on what basis can I condone?

That an application for condonation must precede the main application has already been determined by the Supreme Court: *Sibanda v Ntini* 2002(1) ZLR 264(S); *Mlondiwa v Regional Director of Education, Midlands Province N.O and Another* HB 19-94.

In *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) (Ltd)* 1998(2) ZLR 249(S) at 251 C-D SANDURA JA stated that a party who finds himself out of time to make an application must first seek condonation:

> "If he does not make the application within that period but wants to make it after the period has expired, he must first of all make an application for condonation of the late filing of the application. This should be done as soon as he realises that he has not complied with the rule. If he does not seek condonation as soon as possible he should give an acceptable explanation, not only for the delay in making the application for the rescission of the default judgment, but also for the delay in seeking condonation."

As this issue has been settled by the Supreme Court in a number of cases, I find myself in total agreement with the words of NDOU J in *Sai Enterprises (Pvt) Ltd v Girdle Enterprises (Pvt) Ltd t/a Quality Engineering Services (Pvt) Ltd* HB 62/09 (as yet unreported) at page 2 where he said:

> "This court is bound by the precedents set by the Supreme Court. Arguing against such clear decisions of the Supreme Court is province of academics and not this court."

In the absence of a substantive application for condonation, the applicant cannot be indulged. This should have been apparent to the applicant from the very beginning. That

notwithstanding, she set about hopelessly out of time to bring this application. Even after it was brought to her attention in the opposing affidavit that the application was out of time, she still went on, virtually headlong, without seeking condonation.

Even if the acknowledgement of debt she signed did not commit her to pay costs of litigation against her on a higher scale, this is a case which would still attract punitive costs because of the brazen manner in which the applicant rode rough shod on clear provisions of the rules.

I therefore come to the conclusion that the point in limine taken on behalf of the first respondent has merit.

In the result the application is dismissed with costs on an attorney and client scale.

Messrs Cheda and partners, applicant's legal practitioners
Costa and Madzonga c/o Coghlan & Welsh, 1st respondent's legal practitioners