HB 190-17
HC 1498-15
XREF HCA 58-14
XREF HC 2186-13

AUTO STAR (PVT) LTD
and
SITHENJISIWE NYAMUDA
and
GEORGE NYAMUDA
versus
OLD MUTUAL PROPERTIES INVESTMENTS
(PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 26 JUNE 2017 AND 29 JUNE 2017

Opposed Application

N Mazibuko for the applicant
Ms S Ngwenya for the respondent

MATHONSI J: The three applicants had a judgment entered against them by the magistrates court sitting at Bulawayo on 31 March 2014. They attempted to appeal against that judgment to this court but messed up the appeal resulting in the appeal being struck off the roll by the appeal court on 18 May 2015. They would not relent. In this application they are seeking an order for an extension of time during which to note an appeal against the same judgment of the magistrates court, their initial effort having come to nought.

The task of deposing to the founding affidavit in support of the application was assigned to the third applicant, the husband of the second applicant. Both are shareholders and directors of the first applicant. He stated that although the trial magistrate had assured the parties that the judgment would be available on 31 March 2014 it was only made available on 10 April 2014. With no hint whatsoever of irony, Nyamuda stated that after the judgment was made available on 10 April 2014, it was not until 9 May 2014, exactly a month later, that their legal practitioners purported to file a notice of appeal in this court. The benefit of another full year did not aid the

applicants at all as they blindly prosecuted what was clearly a nullity right up to the date of set down on 18 May 2015, the appeal having been noted out of time and without condonation.

The applicants were stopped in their tracks by the appeal court which, as I have said, observed that the notice of appeal had been filed outside the time allowed by the rules, and was therefore a none event. As to why the applicant had not addressed the anomaly for all that time, Nyamuda is silent. It is also significant that even after the applicants' appearance before the Appeal Court on 18 May 2015, this application was only filed on 10 June 2015 more than three weeks later. No explanation is tendered as to why they needed all that time to make an approach to the court.

Regarding their failure to appeal timeously Nyamuda stated that this was not due to any negligence or dilatoriness on their part given that he had advised his erstwhile legal practitioners to file an appeal in good time. The failure to do so was entirely the fault of the legal practitioners which should not be visited upon the applicants' doorsteps. He then went on to attribute the failure to "inadvertence rather than willful negligence." In doing so he deferred to the supporting affidavit of Taboka Fatima Nyathi, a legal practitioner at Dube-Banda, Nzarayapenga and Partners, who had the honour then of representing the applicants. Nyathi's own affidavit is itself fairly brief containing only four paragraphs. She stated:

> "1. I recall appearing on behalf of the defendants, Auto Star (Pvt) Ltd for trial at the magistrates court sometime in April 2014. When both the trials were concluded for both matters as they were consolidated MC 2185/13 and 2186/13. We subsequently filed our submissions and waited for the judgment.
> 2. The court had directed that we check with the clerk for its ruling on this matter. We kept going to the clerk of court for ruling as per the instruction of the court, until we got the ruling on the 10th of April 2014.
> 3. The clerk of court's reasons for the unavailability of the ruling upon our inquiry on several occasions was that the ruling was at the typing pool.
> 4. It is for this reason that the appeal was filed out of time unaware that the said judgment was of the 30th of March 2014 instead of the 10th of April 2014."

Nyamuda stated that he instructed the legal practitioner to file the appeal after they obtained the judgment. He went on to say that the appeal in question was deemed a nullity at the date of hearing 18 May 2015 as it did not comply with Order 31 rule 2(1) of the Magistrates

Court (Civil) Rules in that it was neither filed within twenty-one days from the date of judgment nor fourteen days from the date the judgment was made available to the applicants. Having advised his legal practitioners to file an appeal "in good time", he was not negligent or dilatory. It is the legal practitioners who made an error which should not be visited upon the applicants. In fact it was "through inadvertence" on the part of the legal practitioners that the appeal was filed out of time resulting in its demise.

It is significant that the original notice of appeal filed on 9 May 2014 stated in its pre-amble that the judgment was delivered on 31 March 2014. Apart from that, the notice bearing the reference of Mr Muganyi of Dube-Banda, Nzarayapenga and Partners is dated and signed on 16 April 2014. It is however not explained why whoever it is that was dealing with the matter at that law firm, be it Nyathi or Muganyi sat on the notice from 16 April 2014 to 9 May 2014 without filing it when their chambers are just next to the seat of this court.

In fact George Nyamuda did not help the situation either by what he stated in his answering affidavit after the respondent opposed the application. In that affidavit he stated that after the judgment was uplifted on 10 April 2014 he met Mr Muganyi of that law firm on either 11 or 14 or 15 April 2014 to discuss the judgment. He goes on at paragraph 5.2 to say:

> "5.2 I must point out that Mr Muganyi was our original legal practitioner but for purposes of trial had delegated the matter to Taboka Fatima Nyathi. Mr Muganyi then advised us that the judgment had been against us. At that stage we indicated our displeasure that he had delegated the matter to a junior lawyer in the firm for purposes of the trial and that we were considering a different legal firm to file an appeal on our behalf in response to which Mr Muganyi at that time indicated, he could not immediately locate our file but promised that he would personally deal with the matter and would himself file the notice of appeal. When he subsequently sent us a copy of the notice of appeal, we believed that everything was in order as we are not conversant with the rules of court.
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> The point is that we advised out erstwhile legal practitioners to file an appeal as soon as they advised us of the judgment as above stated. We were therefore not tardy. Regrettably my present legal practitioner advises that he has phoned twice my erstwhile legal practitioners looking for Mr Muganyi but was advised that he was out of the office. We understand that in terms of the rules our replying affidavits must be filed within three days of opposing papers being filed and for that reason, we are regrettably unable to file an affidavit by Mr Muganyi explaining why he then delayed in filing the notice of appeal."

The answering affidavit I have quoted from was signed and filed on 18 June 2015. This matter was set down for hearing on 26 June 2017 exactly two years and one week later. During that period the applicants did not see the wisdom and indeed the need to elicit an affidavit from Mr Muganyi and it has never been filed.

Two things arise from that. The first one is that the affidavit of Taboka Fatima Nyathi is of no use whatsoever to the court for an explanation as to why the appeal was not filed timeously after the judgment was handed down. She is not the one who was then seized with the matter, did not receive instructions to appeal and cannot explain why the appeal was not filed until 9 May 2014. The second one is that there is a huge gap in the applicants' application in that there exists absolutely no explanation for the delay, Mr Muganyi not having been called upon to explain himself. Considering that the notice of appeal which was kicked into touch by the appeal court on 18 May 2015 was prepared and signed by Mr Muganyi on 16 April 2014, there is therefore no explanation whatsoever as to why that legal practitioner kept that notice of appeal for exactly twenty-three days after preparing it only to file it on 9 May 2014. It is strange indeed but very important.

While still on that and without speculating on what was playing in the mind of the legal practitioner in question I must take judicial notice of the fact that quite often legal practitioners have this uncanny habit of wanting to use the court as a bargaining tool for collecting legal fees. On many occasions you find a legal practitioner extorting a deposit from a client by holding onto court process and demanding payment first before action is taken. On other occasions a legal practitioner would even allow a *dies inducae* to expire while doggedly awaiting the payment of a deposit before carrying out instructions of a client. It is completely unethical and should be condemned in the strongest of terms. If the client eventually raises the deposit requested by the legal practitioner, but long after the time allowed for action to be taken, that legal practitioner would then embark on the exercise of trying to undo the damage and in doing so still charge the client for the unnecessary work required to reverse the situation.

If the litigant in that situation is lucky to have the damage repaired, they will then be back at square one still required to pay more for any further action to be carried out. It becomes a

vicious cycle where there is a callous disregard of the prejudice that the litigant suffers when the process of the court is abused by a resort to obfuscation by those that have the privilege of being officers of the court in what appears to be an indecent game of cat and mouse in which the only beneficiary is the legal practitioner. I sincerely hope that is not the situation that obtained in the present matter where a notice of appeal was prepared and kept for a number of weeks without being filed. If it is, surely the applicants should have taken the court into confidence and stated that fact. Withholding the truth is not helpful at all, if for no other reason but that the delay remains unexplained.

Be that as it may, in respect of their prospects of success on appeal the applicants made reference to the proposed notice of appeal and heads of argument filed before the initial appeal suffered still-birth. In essence the applicants' case is that they are not bound by the lease agreement because undue influence and fraudulent misrepresentation were used to cause them to sign that agreement. The respondent's claim in respect of arrear rentals and operating costs was not proved at the trial and therefore absolution from the instance should have been entered. The court *a quo* should not have entered judgment in the sums awarded but much lessor amounts, regard being had to what they had paid and the sums of $9909-91 and $8906-52 in arrear rentals and operating costs respectively claimed in the summons.

The applicants further attacked the judgment on the ground that the interest of 14,25% per annum which was factored in and also awarded should not have been as it was not proved. The arrears for a period in excess of three years from the date the summons was served would have been prescribed meaning that the award should have been reduced by those claims which were prescribed. The applicants did not elaborate. It has not escaped my observation that this is not the case the applicants presented before the trial court.

The application was strongly opposed by the respondent which stated in the opposing affidavit of Hloniphani Toma, its property manager, that both this application and the proposed appeal are frivolous or vexatious and devoid of merit. The respondent took the point that it is not good enough for the applicants to condemn their erstwhile legal practitioner when they chose him or her and should therefore sink or swim with the actions of the legal practitioner of their

choice. In any event there has been no sufficient explanation for the delay considering that Nyathi's affidavit only attempts to explain the delay between 31 March and 10 April 2014 and not the delay thereafter. In the absence of an explanation for the delay in filing the appeal and indeed an explanation as to why the application for an extension was not filed timeously, the application cannot succeed.

Regarding the merits of the matter Toma stated that the respondent's claim was premised on a signed lease agreement binding on the parties. Before the agreement was signed the parties freely negotiated the terms and voluntarily entered into the agreement. To then allege undue influence and fraudulent misrepresentation is a red herring. Regarding interest, such was provided for in the lease agreement and was capitalised monthly again in terms of the lease agreement. Therefore the figures of $11 284-12 and $10 141-59 awarded in the judgment included compound interest proved to be due by evidence led at the trial which is why the award of further interest was ordered to run from April 2014, after judgment, when the respondent's prayer in the summons had been for interest from April 2013.

I have already said that the appeal filed by the applicants on 9 May 2014 was ruled a nullity by an appeal court comprising of two judges of this court on the basis that it was purportedly filed out of time whichever way one reckons the time in terms of the magistrates court rules. I will therefore not be drawn into revisiting that decision as *Mr Mazibuko* for the applicants sought to urge of me in seeking to interpret Order 31 rule 2 of the Magistrates Court (Civil) Rules, 1980. This is because I lack jurisdiction to do so. Therefore the scope of the present inquiry is limited to the explanation given for the applicants' failure to act timeously and the prospects of success on appeal. Both counsel referred me to a number of authorities dealing with the subject which I shall shortly examine but perhaps the starting point is to state that the consideration of an application for condonation of the late noting of an appeal involves the exercise of a discretion on the part of the court, a discretion which the court has to exercise judiciously.

The factors which the court has regards to were stated by MALABA JA (as he now is not) in *Maheya* v *Independent African Church* 2007 (2) ZLR 319 (S) at 323 B-C where he pronounced;

> "In considering applications for condonation of non-compliance with its Rules, the court has a discretion which it has to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefor; the prospects of success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the court and the avoidance of unnecessary delays in the administration of justice: *Bishi* v *Secretary for Education* 1989 (2) ZLR 240 (H) at 242 D-243C."

When following that reasoning in *Khumalo* v *Mandeya and Another* 2008 (2) ZLR 203 (S) at 208 B, the same judge of appeal added that;

> "Had it not been for the fact that I consider the prospects of success on appeal to be good I would have dismissed the application."

In that case the Supreme Court was of the view that the explanation for failure to file the appeal on time was unsatisfactory. It however granted the indulgence of an extension of time within which to appeal because the prospects of success on appeal were extremely good. Ms *Ngwenya* for the respondent was therefore not correct to say that once the explanation for the delay is not satisfactory the matter should end there with the dismissal of the application.

Having said that I must still add that it is settled in our jurisdiction that whenever a litigant realizes that he or she has not compiled with a rule of court he or she should apply for condonation without delay. If the litigant does not make the application without delay, he or she should give an acceptable explanation, not only for the delay in filing the appeal on time, but also for the delay in seeking condonation. That is the point made by SANDURA JA in *Viking Woodwork (Pvt*) *Ltd* v *Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) at 251 C-D namely that what calls for some acceptable explanation is not only the delay in noting an appeal but also the delay in seeking condonation. An applicant for condonation has two hurdles to overcome in those circumstances. See also *Saloojee and Another NNO* v *Minister of Community Development* 1965 (2) SA 135 (A) at 138H; *Wangayi* v *Mudukuti* HB 155-17.

In the present matter I have said that there exists no explanation as to why the appeal was not filed from the time that the applicant's erstwhile legal practitioners say they received it on 10 April 2014 to the time that they purported to file it on 9 May 2014. The affidavit of Nyathi only attempts to explain the failure to act between 31 March 2014 when the judgment was handed down and 10 April 2014. She says she could not obtain the judgment. We however know that from that time onwards the matter was, at the insistence of the applicants, in the very capable hands of Muganyi. This is the legal practitioner who prepared and signed the notice of appeal on 16 April 2014 but sat admiring it until 9 May 2014 without filing it. He is the one who is being blamed for failure to act. The applicants say that it is his negligence that got them in this mess and should not be visited upon them.

It is trite that where a legal practitioner is responsible for an alleged fault or for failure to act in accordance with the rules, that legal practitioner must not only be afforded an opportunity to explain himself or herself out but actually owes it to the court to explain what transpired. Therefore an affidavit to that effect must be elicited from that legal practitioner. See *Diocesan Trustees For the Diocese of Harare* v *The Church of the Province of Central Africa* 2010 (1) ZLR 267 (S) at 277G; *BGM Traffic Control Systems* v *Minister of Transport and Others* 2009 (1) ZLR 106 (H) at 108B. The absence of an affidavit by Muganyi when the applicants had more than enough time to obtain it and file it means that the delay in filing the appeal remains unexplained. This is more so as the affidavit of Nyathi which I have referred to above is certainly not helpful at all. It is what MAKARAU JP (as she now is not) eminently referred to in *Hiltunen* v *Hiltunen* 2008 (2) ZLR 296 (H) 299 H-300A as "an affidavit of belief and information." As I have said, having been divested of the file, Nyathi was not privy to what transpired thereafter. Whatever she attempted to explain was hearsay.

It is also important to note that the applicants again do not explain why they did not act until the purported appeal was dismissed. Even then they do not explain why it took them until 10 June 2015 from 18 May 2015 when the appeal was struck off to file this application.

Ms Ngwenya for the respondent submitted that there is no reason why the negligence of the applicants' legal practitioner should not be visited upon them. I agree and certainly do not

agree with *Mr Mazibuko* for the applicants that they ought to be exonerated of any blame. There is a limit beyond which a litigant cannot escape the repercussions of his or her legal practitioner's dilatoriness or lack of diligence. To hold otherwise would negate the need for a court of law to function through rules of procedure which are provided for in advance in order to guide litigants on how to approach the court. See *Sibindi* v *Municipality of Victoria Falls* HB 85-17.

As stated by MALABA DCJ (as he then was) in *Musemburi and Another* v *Tshuma* 2013 (1) ZLR 526 (S) at 529 E-H, 530 A-B;

> "The negligence of the applicants' erstwhile legal practitioners, which is pleaded by the first applicant, cannot be accepted as a reasonable explanation. ---. In *Mubango* v *Undenge* HH-110-06 CHATUKUTA J had this to say about the responsibility of litigants in ensuring that their legal practitioners act diligently:
>
> > 'Generally, there is a reluctance by the courts to visit the sins of the legal practitioner on the applicants. However, the courts have held that there is a limit of the extent to which a litigant should escape the results of his/her legal practitioner's sins. In *Kodzwa* v *Secretary for Health and Another* 1999 (1) ZLR 313 (S) at 317E, SANDURA JA cited with approval STEYN CJ in *Saloojee and Another* v *Minister of Community Development* 1965 (2) SA 135 (A) at 141 C-E that:
> >
> > > 'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Consideration *ad misericordian* should not be allowed to become an invitation for laxity. In fact, this court has been lately burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court was due to negligence on the part of the attorney. The attorney, after all, is the agent whom the litigant has chosen for himself, and there is little reason why, in regard to condonation for failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship.'
>
> The first applicant's explanation for the delay is not reasonable because they knew of the decision of 5 July 2010 by SANDURA JA during the period."

I am not persuaded that the delay has been explained. In fact whatever explanation is given is clearly inadequate.

Having said that, I have to consider whether there are good prospects of success. This is because where there is no reasonable explanation for the delay there should be good prospects of success if condonation is to be given. See the remarks of BEADLE CJ in *Kuszaba-Dabrowski et uxor* v *Steel NO* 1966 RLR 60 (A) at 64 (quoted with deference in *Musemburi and Another*, *supra*) where it is stated;

> "---- the more unsatisfactory the explanation for the delay so much greater must be the prospects of success of the appeal be, before the delay will be condoned and the converse must of course be equally true, the more satisfactory are the explanations for the delay, the more easily will the court be inclined to condone the delay provided it thinks, there is some prospects of the appeal succeeding."

Looking at the record of proceedings in the magistrates court, there can be no doubt that the applicants' case hinged on denial of liability on the basis that they were not bound by the written lease agreement which the parties signed. They alleged undue influence and misrepresentation. The applicants also disputed the amounts claimed. The court *a quo* made findings on those issues and threw out the defence of undue influence. It meticulously dealt with the evidence and upheld the respondent's schedules of arrears, exhibits 8 and 9.

Now the applicants would want to contest the issue of interest at appeal stage when the evidence led for the respondent at the trial that the overdraft rate levied as interest in terms of clause 29.3 of the agreement was 14, 25% at the time was not impeached at all. *Mr Mazibuko,* who I must say was not involved at the trial and therefore incapacitated by having to breathe life into a case that was not diligently presented, has tried to challenge the incorporation of compound interest in the final order granted by the court. He submitted that the court could not grant relief which was not prayed for by the respondent. In my view, *Ms Ngwenya's* submission that the respondent was entitled to capitalize interest monthly in terms of clause 29.4 of the agreement and did make a prayer for such interest in paragraph (c) of the prayer "from April 2013," has merit. Clearly the award of the sums of $11284-12 and $10141-59, for arrear rentals and operating costs respectively is borne by both the pleadings and the evidence. Therefore that argument cannot take the applicant's case very far.

In any event, the authorities I have cited make it very clear that where the explanation for the delay is unsatisfactory, in order for an application for condonation to be saved, the prospects of success must be "so much greater." In my view the applicants' case must not just be arguable, it must be good. I am not satisfied that it is good. Therefore I am unable to exercise my discretion in favour of granting an extension of time during which to appeal. One of the considerations in an application of this nature is the need to bring finality to litigation and the avoidance of unnecessary delays in the administration of justice. In view of the weakness in the applicants' case I am inclined to uphold those principles.

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

Calderwood, Bryce Hendrie and Partners, applicants' legal practitioners
Coghlan and Welsh, respondent's legal practitioners

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