TENKE FUNGURUME MINING SA
versus
BRUNO ENTERPRISES (PRIVATE) LIMITED

Under judicial management

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 4 & 10 July 2019

Opposed Application

O Kondongwe, for applicant
O Takaindisasa, for respondent

TAGU J: This is an application for leave to appeal against the judgment of this Honourable Court dismissing an application for absolution from the instance. The judgment sought to be appealed against was rendered on the 1st of August 2018 but the fact of its existence became known to the applicant and its legal practitioners on the 7th of September 2018. It is alleged that a copy of the written judgment became available to the applicant on the 11th of September 2018. To that extent the time within which the applicant was supposed to have applied for leave to note its appeal to the Supreme Court had expired hence it became necessary for the applicant to seek condonation for the delay in seeking leave to appeal hence this application.

The application for condonation is opposed by the respondent on the basis that this application was brought solely for the purposes of delaying the finalization of the trial in the Honourable Court. It submitted that the applicant does not want to face the witness stand hence would rather have the matter protracted and be dogged with a lot of interlocutory yet unnecessary proceedings. The primary benefit derived by the applicant is that the respondent will continue to suffer losses. It is submitted that the respondent being a company under judicial management has a highly parlous financial position. It attached certain copper which belongs to the applicant in order to confirm the jurisdiction of this Honourable Court. The Sheriff is in the possession of the copper and the applicant has refused to agree to the relocation of the copper to a cheaper storage facility. Accordingly, the charges raised by the Sheriff in respect of the storage of the said copper

presently exceeds the sum of US$300 000. Hence the respondent urged this court to decline to accede to the dilatory tactics and to take part in the unrewarding exercise which the applicant seeks to embark upon since the applicant enjoys no prospects of success on appeal.

At the hearing of this matter the respondent took a number of preliminary points. The first point *in limine* was that that the court application was completely in valid because the founding affidavit deposed to by Claude Polet was fatally defective. The contention by the respondent was that the name of a notary public does not appear anywhere on the founding affidavit. There are unclear stamps which were affixed to the affidavit which do not show the name of the person. Further, it appeared that no oath was taken by Claud Polet or whoever appended his signature to the founding affidavit before a notary public. The affidavit shows that on the 28th September 2018 Claude Polet signed or purported to sign the founding affidavit at Lumbumbashi in the Republic of Congo. The respondent suspects that Claude Polet did not appear before a commissioner of oaths when he appended his signature to the founding affidavit. This is seemed to be confirmed by the fact that the unknown notary public affixed his stamp on the 1st of October 2018. According to the respondent it is evidently impossible for the deponent to have deposed to an affidavit before the commissioner of oath on 28 September 2018 and yet the commissioner of oaths purported to have commissioned the affidavit on 1 October 2018.

To buttress its contention the respondent referred the court to the head note in the case of *Rock Chemical Fillers (Private) limited* v *Bridge Resources (Private) limited & Ors* 2014 (2) ZLR 30 (H) by MATHONSI J (as he then was) where it was said-

> "Quite often legal practitioners indulge in the unfortunate and unbecoming behavior of signing "affidavits" in their capacities as *ex officio* commissioners of oath, not only without satisfying themselves that an oath is taken but also in the absence of the "deponent''. They do this as a favour to colleagues racing against time. Not only is such conduct disdainful, it is clearly dishonourable. It is the height of dishonesty for a commissioner to authenticate a signature he has not seen the signatory sign, but even worse for him to sign a blank document, hoping that the intended deponent's signature would be appended later. It is a serious dereliction of duty on the part of the commissioner of oaths. The deponent must always appears before the commissioner and be duly sworn. His signature must be appended in the presence of the commissioner whose signature is an assurance to the court that all these procedures have been complied with."

The second point *in limine* was that the supporting affidavit of Obert Kondongwe seeks to corroborate the veracity of the averments made in the founding affidavit made in Guy Mbuyu's

affidavit. However, the Honourable Court does not have any affidavit which was filed by Guy Mbuyu. There exist only two possibilities in the circumstances. The first is that the person who purported to depose to an affidavit has Claud Polet is in in fact Guy Mbuyu. No explanation whatsoever had been given for the apparent fraudulent affidavit. The second possible explanation is that in fact Claude Polet does not exist. In that event, there must be an explation as to why an affidavit is purportedly prepared in the name of a non –existent person.

This brings us to the third point in limine. Obert Kondongwe purported to confirm the veracity of the averments by Guy Mbuyu in his affidavit and further proceeded to "confirm that I am their source". It was therefore submitted that Guy Mbyu also known as Claude Polet did not speak to facts within his personal knowledge in his founding affidavit. In fact, the information he was swearing to derived is derived from Mr Obert Kondongwe. This having been raised in the Notice of Opposition by the respondent Mr Obert Kondongwe filed an answering affidavit in which he tried to explain the disparities between the founding affidavit and the supporting affidavit. This compounded the problems in that Obert Kondongwe appeared to have been giving evidence to the effect that indeed the founding affidavit was commissioned on the 1st of October 2018 in Lumbumbashi in the Republic of Congo by Guy Mbuyu and not Claude Polet before the commissioner of oaths. The respondent queried whether in fact Obert Kondongwe was present in the Republic of Congo on the said date. The respondent's disquiet is based on the fact that Obert Kondongwe is a legal practitioner who is actually representing the applicant in these proceedings. The respondent challenged the answering affidavit by saying there is something amiss because a lawyer cannot depose to an affidavit for a party and then continue to act for that party. Reference was made to the case of *Central African Building Construction Co. (Pvt) Ltd* v *Construction Resources Africa (Pvt) Ltd* 2010 (1) ZLR 464 (H) at p 465 where it was held that-

> "in circumstances where the actions of a legal practitioner may be such that he may be called as a witness, as might happen in *casu*, it would be undesirable and indeed not in the interest of justice, if that legal practitioner were allowed to act for a party to the dispute. A legal practitioner should at all times retain his independence in relation to his client and the litigation which is being conducted. If he is to give important evidence in circumstances where his credibility may be called into question, his independence as a professional adviser to his client in the matter may be affected. If he is to testify as a witness, he acquires an interest in the matter which may make it difficult for him to discharge his professional duty to his client, and to this must be added the fact that his impartiality may be suspect due to his being a legal practitioner for one of the parties to the dispute. In assuming the mantle of his clients and accepting the proxies by which he then held meetings and passed resolutions that had a direct bearing on matters in hand, the practitioner clearly

showed a partisanship with the plaintiff 's case in a manner that was incompatible with his duty to the court. If he were called to give evidence this would be irregular indeed, as a legal practitioner is instructed to advise his client, and he cannot be a legal adviser and a witness. He can only assume one role, not both.

Held, accordingly, that the plaintiff 's legal practitioner should not act for the plaintiff in the trial."

The last point *in limine* was that the application for condonation was incompetent because it was joined with the application for leave to appeal leave to the Supreme Court against the High Court judgment. The contention being that r 269 as read with r 263 and r 262 requires that an application for leave to appeal to the Supreme Court must be made immediately after judgment has been passed. If for any reason the application is not made immediately after the passing of the judgment, special circumstances must be established to justify the filing of an application in writing within 12 days of the date of then judgment. The respondent submitted that the joint applications are fatal because in terms of r 266 where the application has not been made within 12 days of the date of judgment, an application for condonation may be filed. However, in terms of r 267, no application for condonation shall be made "after the expiry of 24 days from the date on which the sentence was passed, unless the Judge otherwise orders." It further submitted that the applicant has not received any order permitting it to file the present application after the expiry of 24 days from the 1st of August 2018, hence the application is in valid.

1. IS APPLICATION FATALLY DEFECTIVE IF DATE IN A FOUNDING AFFIDAVIT IS DIFFERENT FROM DATE OF COMMISSIONER OF OATHS?

In *casu*, at the end of the founding affidavit it is recoded as follows-

"THUS DONE AND SWORN TO AT LUBUMBASHI THIS 28TH DAY OF SEPTEMBER 2018 BEFORE ME ……..
NOTARY PUBLIC"

It is clear that Claude Polet singed and put his stamp that does not bear a date. It is clear that the Notary Public did not endorse his names where it is written NOTARY PUBLIC. What is undisputed is that the Notary public endorsed his three stamps below the words NOTRAY PUBLIC. One of the stamps show that this was done at VILLE DE LUBUMBASHI at the stamp is that of a Notary Public (NOTARIAT). The second stamp clearly shows that this was done on the 01st of October 2018. The last stamp bears the names of the Notary public though it is not clear because the signature of the notary public was inserted on top of the stamp and the ink is not clear.

In my view this shows that the founding affidavit though typed 28th September 2018, the oath must have been administered on the 1st of October 2018.

In my view what is not important are the dates but any indication that it was administered by the commissioner of oath. It is not mandatory that the name of the commissioner should have been endorsed on the space provided. As long as it is clear that the affidavit was properly signed by the commissioner of oaths as shown by the three stamps as well as the signature of the notary public in my view the founding affidavit was properly commissioned. Be that as it may I associate my- self with the sentiments of MANTOSHI J (as he then was) in *Rock Chemical Fillers (Pvt) Ltd* v *Bridge Resources (Pvt) Ltd & Ors* supra. Legal practitioners must be careful to endorse dates in typing when they are certain that the deponent will indeed appear before the Notary Public on that date without fail. In the event that the oath is the administered on a different date as shown by the Notary Public this may create problems as in the present case. I am however, convinced that the founding affidavit was commissioned on the date shown by the Notary Public and I have no reason to doubt him/her as he/she is a court official. I am also of the view that it does not make the affidavit fatally defective merely because the name of the Notary Public was not put on the space typed by whoever prepares the affidavit. As long as there is sufficient evidence or detains of the Notary Public on the face where he/she is supposed to sign to me it is sufficient. For these reasons I dismiss the first point *in limine*.

2. IS SUPPORTING AFFIDAVIT OF OBERT KONDONGWE VALID WHEN IT REFERS TO A NON-EXISTENT DEPONENT?

In my view this supporting affidavit is of no value at all. It refers to a non –existent deponent to the founding affidavit. Mr Obert Kondongwe tried to explain the differences in his answering affidavit. This does not help at all. All he needed to do was to file a supplementary supporting affidavit and or remove his initial supporting affidavit and file a proper one rather than trying to give evidence in an answering affidavit. This supporting affidavit is of no force or effect as it does not support the application filed before the court. The best is to have it removed from the record. Be that as it may with or without the supporting affidavit that does not make the whole application fatally defective. While I uphold the point *in limine* I am not persuaded to declare that there is no valid application before me since the founding affidavit was properly commissioned.

2. SHOULD THE SAME LAWYER PROCEED TO REPRESENT APPLICANT WHEN HE IS POTENTIALLY AND LIKELY TO BE CALLED AS A WITNESS?

In *casu,* going by the purported though disregarded supporting affidavit and the answering affidavit I find the conduct of Mr Obert Kondongwe to be undesirable and not in the interest of justice for him to continue to represent the applicant in circumstances where his actions may be such that he may be called as a witness. In my view, he should not have continued to act for the applicant in this application as he appeared compromised regard being had to the evidence he was now or he purported to give in favour of the applicant who is his client in his answering affidavit as well as in this application. A different legal practitioner from his law firm should have appeared. The sentiments raised in the case of *Central African Building Construction Co. (Pvt) Ltd* v *Construction Resources Africa (Pvt) Ltd* supra seem to apply in this case. The application for condonation and leave to appeal, can however, still be entertained with or without him given the papers filled of record. While I accept the concerns of Mr *Takaindisa,* I am of the view that the application is not invalid for that reason alone.

2. WHETHER THE PRESENT APPLICATION FOR CONDONATION IS INVALID MERELY BECAUSE IT IS CO-JOINED WITH AN APPLICATION FOR LEAVE TO APPEAL?

Despite citing the rules no authority has been cited by the respondent prohibiting the co-joining of an application for condonation and an application for leave to appeal. I am persuaded by the counsel for the applicant that the High Court is a court of inherent jurisdiction and in the absence of law which says it cannot be done, the High Court can do it, that is, to hear co-joined applications. *Guwa & Anor* v *Willoughby's Investments (Pvt) Ltd* 2009 (1) ZLR 368 (S) at 383 D-E.

In my view, the use of rules cannot defeat the hearing of co-joined applications. In *Smith & Anor* v *Acting Sheriff of Zimbabwe & Anor* 1995 (1) ZLR 158 (SC) it was pointed out that-

> "Two points must be made. First, as it has often been said, the rules are made for the court, not the court for the rules- see *Republikeinse PPublikasies (Edms) BPK* v *Afrikaanse Pers Publikasies (Edms)* BPK 1972 (1) SA 773 (A) at 783A-B and *Mynhardt* v *Mynhardt 1986* (1) SA 456 (S). And see generally Harms Civil Procedure in the Supreme Court paras A5 and 6……." The court has inherent jurisdiction to grant relief where insistence upon exact compliance with the rules of Court would result in substantial injustice to one of the parties…."

The object of the court is therefore to do justice between the parties. I therefore found nothing wrong if applications are co-joined if in the end it results in justice between the parties. I therefore dismiss the last point on *limine.*

AD MERITS

This is a co-joined application for condonation for late application for leave to appeal as well as for leave to appeal to the Supreme Court. The judgment sought to be appealed against is interlocutory in nature in that it was a dismissal of an application for absolution from the instance hence the need to seek leave to appeal against the said judgment. Secondly leave to appeal should have been made within 12 days from the date the judgment was delivered. The applicant failed to comply with the rules.

The position of the law in applications of this nature is well settled. It is the existence of a delay that activates the court's powers of condonation. In *Cordier* v *Cordier* 1984 (4) SA 524 (C) at 528-529B it was said:

> "…[The] defendant does not allege that he will be prejudiced by the condonation of Plaintiff's long delay in pursuing his amendment. Apart from the delay itself, defendant advances no good reason why condonation should not be granted. Long delay per se is not necessarily a good reason for refusing condonation. It is the long delay that necessitates condonation in the Court's discretion, and to say that long delay is reason to refuse condonation is to argue in a circle."

In the case of *United Plant Hire (Pty) Ltd* v *Hills & Ors* 1976 (1) SA 717(A) at 720F-PG the court stated the following:

> "It is also well established that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefor, the prospects of success…(on the merits), the importance of the case, the respondent's interest in the finality of his judgment, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other, thus a slight delay and a good explanation may help compensate for prospects of success which are not strong."

The above principles have been consistently applied in our jurisdiction. The relevant factors being considered being the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. These factors are interrelated. See *Maheya* v *independent African Church* SC -58-07 and *Mutiza* v *Ganda & Others* 2009 (1) ZLR 241 (S).

In *Kodzwa* v *Secretary for Health & Anor* 1999 (1) ZLR 313 (SC) it was said –

> " it is, therefore, well established that the court has a discretion to grant condonation when the principles of justice and fair play demand it, and when the reasons for non-compliance with the rules have been explained by the applicant/ appellant to the satisfaction of the court. The principles applicable are the same, whether one is dealing with an application for condonation of the failure to file an application for review timeously or to note an appeal timeously."

In the present case I prefer therefore to approach the matter by considering, not how good the prospects must be before leave condonation and leave is granted, but how poor they must be before leave is refused. And for this reason I think the test that has been mooted- that the applicant must show reasonable prospects of success- puts the matter too high, in my view leave to appeal should be granted if the applicant makes out a reasonable arguable case. See *S* v *Tengende & Ors* 1981 ZLR 445.

In *casu*, it has been explained that the judgment which is attached hereto was rendered on the 1st of August 2018 but the fact of its existence became known to the applicant and its legal practitioners on the 7th of September 2018. A copy of the written judgment became available on the 11th of September 2018. As far as the court is concerned it being an interlocutory ruling, the court did not forward the written judgment to the motion court for its deliverance. The court after typing the judgment gave the copies and the file to the assistant and asked the assistant to call the parties as per procedure to come to the assistant's office to collect the copies of the judgment. It is therefore not clear as to when the assistant got in touch with the applicant or its legal practitioners suffice to say that the judgment is dated the 1st of August 2018 and was handed to the applicant's legal practitioners on the 11th of August 2018.

The delay in knowing of the existence of the judgment and collection has therefore been adequately explained. The application ought therefore to be considered on its substance. The court therefor has a discretion to grant condonation when the principles of justice and fair play demand it. The applicant must be given its fair chance to test the correctness of the judgment in the Supreme Court. The application is therefore granted.

IT IS ORDERED THAT

1. The application for condonation for the late bringing of this application is granted.
2. The application for leave to appeal the judgment of the High Court of the 1st August 2018 be and is hereby granted.

3. Applicant shall file with the Supreme Court its notice of appeal within 10 days of service upon its legal practitioners of this order or upon its pronouncement in their hearing.
4. The Respondent shall bear costs of this application on the ordinary scale.

Dube, Manikai & Hwacha, applicant's legal practitioners
Machaya and Associates, respondent's legal practitioners