REPORTABLE (46)

Judgment No. SC 54/06
Civil Application No. 236/00

VIGOUR BUSILIZWE FUYANA v NTOMBAZA MOYO

SUPREME COURT OF ZIMBABWE
HARARE, OCTOBER 11 & NOVEMBER 30, 2006

The applicant in person

No appearance for the respondent

Before: CHIDYAUSIKU CJ, In Chambers, in terms of r 31
of the Rules of the Supreme Court

This is a Chamber application for the condonation of the late noting of an appeal. Although the applicant does not specifically aver this, I shall assume that the application is made in terms of rule 31 of the Supreme Court Rules ("the Rules").

On 25 July 2005 SANDURA JA, sitting with MALABA JA and NDOU AJA, issued the following order:

> "WHEREUPON, after reading documents filed of record and hearing counsel,
>
> IT IS ORDERED THAT:
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> The matter be struck off the roll with costs."

The record reveals that both parties were present, and the record of SANDURA JA, who presided over the matter, indicates that the matter was struck off the roll because the

notice of appeal was filed out of time and no application for condonation had been made. Because of the multiplicity of cases involving the same parties, it is important to understand that the Court was seized with appeal case no. SC 236/2000, which was an appeal against judgment no. HB-44/2000.

Where an appeal is noted out of time, before the matter can be heard by this Court an application for condonation has to be made and such condonation granted before the appeal can be entertained. A matter that is set down for hearing without condonation being first granted will be struck off the roll, as happened in this case.

On 14 and 18 July 2000 the applicant filed a Chamber application for directions before KAMOCHA J. He handed down judgment dismissing the application on 20 July 2000. The judgment is judgment number HB-44/2000.

Over a year after the handing down of the judgment, on 21 August 2001, the applicant filed a notice of appeal against the judgment of KAMOCHA J. The headnote of that notice of appeal reads as follows:

> "Take notice that the applicant hereby appeals against the judgment of the High Court No. HB-44/2000, in terms of which the Honourable Judge dismissed the applicant's application for discharge of the provisional order in case number HC 5207/99 with costs on the grounds and reasons detailed below."

Apart from the fact that the above notice of appeal does not comply with the Rules, in particular r 29(a) and (c) in that it does not give the date when the judgment was delivered nor state whether the appeal is against the whole or part of the judgment, and is

therefore invalid, it was filed way out of time. The applicant was appealing against the judgment of KAMOCHA J (no. HB-44/2000) which had been handed down on 20 July 2000 and not any of the other judgments involving the same parties of which there are several. Thus the Court was seized with an appeal against judgment no. HB-44/2000 and no other matter.

The applicant in his submissions to the Court alleges that he filed a notice of appeal against this judgment, no. HB-44/2000, on 15 August 2000 and that the above notice of appeal of 21 August 2001 was an amendment to the notice of appeal filed on 15 August 2000. The alleged notice of appeal of 15 August 2000 is not on the record. The notice of appeal of 21 August 2001, cited above, is not an amendment but a notice of appeal on its own. However, even if I were to accept that the applicant did file a notice of appeal on 15 August 2000, that notice of appeal would have been out of time. Judgment HB-44/2000 was handed down on 20 July 2000 and, according to my calculations, the *dies induciae* for noting an appeal expired on 10 August 2000. Thus, the notice of appeal filed on 15 August 2000 was outside the fifteen days prescribed by the Rules of the Supreme Court. Thus, whichever of the two dates one accepts as the date for the filing of the notice of appeal makes no difference. Both dates were outside the *dies induciae*. Consequently, the striking off of the matter from the roll admits no doubt. The applicant contends that the matter should not have been struck off the roll and impugns the integrity of the Court for striking the matter off the roll. I shall revert to this aspect of the matter later.

Ten months after the appeal was struck off the roll, on 17 May 2006, the applicant filed the present application for condonation of the late noting of an appeal. The Rules of this Court provide that condonation for the late noting of an appeal can be granted upon the establishment of a good cause.

It is well settled that the essential elements of a good cause are –

(a) a reasonable explanation for the failure to file the notice of appeal within the prescribed period;

(b) some prospect of success on the merits; and

(c) the *bona fides* of the application.

REASONABLE EXPLANATION FOR THE FAILURE TO NOTE THE APPEAL IN TIME

The applicant's application for condonation in this case consists of unwieldy voluminous affidavits, submissions and attached documents. The voluminous application for condonation does not provide the one thing that is critical to the applicant's case, namely the explanation for the applicant's failure to file the notice of appeal in the time prescribed by the Rules. Without such an explanation it is difficult to see how a Judge can grant the applicant the indulgence or condonation sought.

The applicant in para 7.4 of the founding affidavit makes the following averment:

> "The Appellate Judge did not appreciate the fact that judgment Number HB-44/2000 was uplifted on 3 August 2000; that the original Notice Of Appeal in SC 236/00 was filed on 15 August 2000; that the notice of amendment of the grounds of appeal was filed on 3 August 2001 and the fact that the Appeal Number is SC 236/00 and not SCA 236/01.
>
> The Appellate Judge did not appreciate the fact that the main action matter number HC 4295/98 and its allied application HC 5207/99 were consolidated into one matter and that condensed arguments in both applications were presented on 14 July 2000. Therefore there was no need to apply for leave to appeal or for condonation to appeal out of time, as there was nothing interlocutory about HC 5207/99 and since the CHEDA J (as he then was) Orders and Judgments must not have been at all, as the respondent had recovered her $20 384."

The applicant suggests the matters between the parties had been consolidated. The record shows no order consolidating the cases. Cases do not consolidate on the mere say so of the litigant. This near meaningless averment is the nearest that can be described as an explanation proffered by the applicant for the failure to file the notice of appeal on time. The above averment falls far short of discharging the *onus* on the applicant to provide a reasonable explanation for his failure to comply with the Rules. In my view, the above averment is no explanation at all. If anything, the suggestion in para 7.4 is that *dies induciae* should run from 3 August 2000 because that is when the applicant became aware of the judgment. That contention is untenable and unacceptable.

The applicant has not provided an acceptable reason for his failure to comply with the Rules and on this basis alone the application for condonation must fail.

However, even if I were to accept that the applicant filed his alleged notice of appeal, which is not on the record, within five days of the *dies induciae*, and therefore

should be given some latitude, I would still dismiss this application on the basis that it has no prospects of success on the merits.

PROSPECTS OF SUCCESS ON THE MERITS

As I have already stated, the appeal that was before the Court and that was struck off the roll was the appeal against judgment no. HB-44/2000. In that judgment KAMOCHA J dismissed a Chamber application for directions by the applicant. Judgment no. HB-44/2000 is very brief and to the point. The judgment very ably sets out the facts of this case and the reasoning behind the learned Judge's conclusion. I can do no better than refer to it extensively. It reads in part as follows:

> "For convenience, the parties in this matter will be referred to as Fuyana and Ntombaza.
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> On 14 October 1998 Ntombaza obtained a provisional order whose terms *inter alia* barred Fuyana from taking transfer of stand number 11747 Nkulumane from one William Ndlovu who had allegedly sold the same property to Ntombaza using Fuyana as his agent. Ntombaza was also granted rights to re-occupy the house as she had been in occupation before the said house had been damaged by one Jericho Maphosa.
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> Fuyana filed his notice of opposition but did not anticipate the return date. Exactly a year later, on 14 October 1999, Ntombaza made an *ex parte* application seeking for (*sic*) an order converting the papers in the first application to pleadings and the matter (to be) referred to trial. The parties were allowed to file further pleadings within fourteen days of the order if they so desired.
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> This application to refer the matter to trial was served on the legal practitioners of Fuyana on 8 October 1999. There seemed to be no opposition from Fuyana's legal practitioners and the application was granted six days after it had been served. To illustrate the confusion that reigned in Fuyana's camp a belated attempt to oppose the application was made by Fuyana himself, not through his lawyers.
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> Ntombaza asserted that Fuyana's legal practitioners had agreed that the matter be referred to trial. I am inclined to agree with her because if what she

asserted was not true Fuyana's legal practitioners would have filed an affidavit denying that they had agreed to the matter being referred to trial with the terms of the provisional order standing.

When the court granted the application it must have been satisfied that the matter was not capable of being resolved on the papers filed of record. It then issued an order which has not been rescinded. The matter has been settled and yet Fuyana still calls upon the court to interfere.

The court had concluded that a robust approach could not be adopted in this particular case to resolve the matter on the papers in the light of the numerous disputes of fact therein. But Fuyana still lodged this application requesting the court to discharge the provisional order in question. He also wanted Ntombaza and all persons claiming through her to be ordered to vacate stand 11747 Nkulumane within forty-eight hours of service on them of the order, failing which the Deputy Sheriff be ordered to evict them and their possessions.

Fuyana is clearly abusing court process and this court should express its displeasure by ordering him to pay punitive costs.

In the result, the application is dismissed with costs on an attorney/client scale."

It is difficult to see on what possible basis a Court of Appeal can interfere with the above judgment more so having regard to the grounds of appeal contained in the notice of appeal. The reasoning and the conclusion of the learned Judge, in my view, are flawless and there is no prospect of an appeal court differing from the learned Judge. The notice of appeal filed by the applicant is no more than a series of senseless assertions that the learned Judge misdirected himself on this fact or on that point of law. The notice of appeal raises nothing worth serious comment or consideration.

I would also add that KAMOCHA J was dealing with an application for directions by the applicant. The heading of the application specifically indicates that the application before the learned Judge was one for directions. An application for

directions, as the word implies, is an application seeking directions on how to proceed in the main proceedings, usually the trial. Order 23 and r 152 clearly set out the purpose and content of an application for directions.

The application before KAMOCHA J, although headed application for directions, sought to canvass issues between the same persons referred to trial by another judge. The draft order attached to the application for directions sought substantive and not procedural relief.

In my view, an application for directions that seeks in its draft order the eviction of the respondent from the premises is totally misconceived and should have been dismissed on that basis alone without much ado. The merits of the case involving the agreement of sale which the applicant is harping on *ad nauseum* could only be resolved properly at a trial. The judge in the previous proceedings was quite correct in referring the issues for trial. This was done with the consent of the applicant's legal practitioner and therefore with the consent of the appellant. The learned Judge, in my view, was correct in ordering the matter to go to trial.

It would appear from the record that the trial did not take place because the applicant was in default. Where a default judgment has been granted, the recourse open to an aggrieved party is to apply for rescission of the judgment. It may well be that the applicant applied for rescission of the judgment – that is not very clear on the record. But whatever the applicant's grievance may have been in respect of those proceedings,

they are totally irrelevant to the filing of an appeal against the judgment of KAMOCHA J.

I am satisfied that the applicant has no prospects of successfully appealing against the judgment of KAMOCHA J, No. HB-44/2000. On that basis alone, even if I were to forego the failure to note an appeal on time, this application must fail.

Before concluding, I would like to make the following observations –

Voluminous submissions, affidavits and documents relating to the validity or otherwise of an agreement of sale and the issue and status of the agreement of sale, were filed in this application for condonation. These were totally irrelevant to the issues I need to determine in this case, namely, whether or not KAMOCHA J was correct in dismissing an application for directions seeking the discharge of a provisional order which had already been referred to trial by another Judge.

It is trite that supporting affidavits in an application should contain essential averments in support of the relief claimed. The papers filed in this case bear no resemblance to the above requirement. For instance, the founding affidavit and its attachments run into some forty pages, yet there is no explanation as to why the notice of appeal was not filed in time. Further, as part of the application a bundle of documents of about seventy pages headed “Evidence” was filed. Another bundle of documents entitled “Supporting Heads of Argument”, consisting of not less than fifty-five pages was

also filed. A good part of the so-called "Supplementary Heads of Argument" is devoted to principles of what the applicant called "Advocacy", "Advocacy A Code of Conduct", "Objections *in limine*". A long list of the cases that were cited and summarised in the supplementary heads of argument had no bearing on the application for condonation of the late noting of an appeal. There was also another bundle of documents filed in this application headed "Civil Appeal". This bundle of documents amounted to some forty pages and consisted of what the applicant called "Opening Speech", "Consolidated Heads" and "Closing Speech". In brief, this application was overloaded with rubbish.

Worse still, after hearing this matter I reserved judgment. The applicant, without the leave of the Judge, filed yet another lengthy document, in which he sought to explain why the notice of appeal was not filed on time and to lecture me on how a CHIEF JUSTICE should discharge his duties and his intention to write a book about this case. I have completely disregarded this document, as it was improperly placed before me. The application stands or falls on the founding affidavit. It is not open to litigants to file affidavits in complete disregard of the Rules.

Apart from this, the applicant has impugned the integrity of virtually all the Judges who handled this case. There is absolutely no basis for impugning the integrity of the Judges who have handled this case. This case constitutes the most blatant abuse of court process I have ever come across. This kind of abuse of court process is unacceptable.

It is also apparent from the record that the applicant was imprisoned for contempt of court for refusing to obey a court order in respect of proceedings involving the same parties to this application. The inescapable inference is that the applicant has very little regard for court process.

It is quite apparent from the nature of the documents filed in these proceedings that the applicant is conducting himself in this manner at the instance of or with the assistance of some "bush lawyer" with very limited knowledge of the law and the procedures of the courts. Be that as it may, I hold the applicant accountable for this abuse of court process and warn him of the risk of an order of perpetual silence. In the meantime there is need for the Court to protect its process from this kind of abuse.

The Court has inherent jurisdiction to regulate its own processes, which it can use to protect its process from abuse. See *De Villiers and Anor v McIntyre N O* 1921 AD 435. In the exercise of that jurisdiction, I will therefore issue the following directive –

> "THAT the applicant is barred from commencing any litigation concerning the disputed sale of Stand No. 11747 Nkulumane, Bulawayo, without first obtaining the leave of a Judge of the High Court or this Court".

For the foregoing reasons, the application is dismissed. There will be no order as to costs as none was asked for.