

SITHABILE MLANGENI (NEE MWANGE)

Versus

MOFFAT MAKOSINI MLANGENI

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 18 MARCH 2024 & 25 APRIL 2024

Application for condonation

Mrs. N. Khumalo for the applicant
T. Nkala for the respondent

DUBE-BANDA J:

[1] This is an opposed court application for condonation for the late filing of an application for rescission of judgment.

Factual background

[2] The parties were married to each other in terms of the Marriages Act [Chapter 5:11] on 19 September 1997. In case number HC 1934/16 the respondent as plaintiff sued out a summons seeking a decree of divorce and ancillary relief. In case number HC 2547/17 he sought and obtained an order for substituted service, and consequent thereof the applicant was served *via* publication of summons in a newspaper circulating in the Republic of Zambia. The applicant did not enter a notice of appearance to defend and the matter was set down on the unopposed roll. On 18 May 2017 the respondent obtained an order granting a decree of divorce and the division of matrimonial property. The order awarded the respondent the following property as his sole and exclusive property: house number 5838 Mkhosana Township, Victoria Falls; a motor vehicle Mazda B2200; bedroom suite; 21 Inch LG television; and pair of sofas. The applicant was awarded as her sole and exclusive property the following: 1 single bed; three quarter bed and kitchen utensils.

[3] The applicant contends that she was not in willful default in that she did not see the publication of the summons in the newspaper circulating in Zambia. Further she contended that she has prospects of success in the intended application for rescission of judgment in that the division of the matrimonial property was not just and equitable in the circumstances. She intends to file an application for rescission of the order in respect of ancillary relief, however she is out of time allowed by the rules of court to file such an application, thus this application for condonation. It is against this background that the applicant filed this application seeking condonation for the late filing of an application for rescission of judgment.

Applicant's case

[4] The applicant avers that she did not see the newspaper advert in Zambia containing the summons. Further, she contended that at all times the respondent knew where she was residing, and he had her phone number. If he wanted her to have notice of the summons, he could have sought an order that she be served by the Sheriff in Zambia, rather than seeking an order for publication in a newspaper. She says she became aware of the order in November 2018, when the respondent phoned and informed her about the existence of the order.

[5] At the time she was making arrangements to travel to Zimbabwe to deal with the court order, she was diagnosed with diabetics and fell seriously ill. She returned to Zimbabwe in Harare in 2019 to seek medical treatment with the help of relatives. She no longer could work on her business and funds got exhausted as she was paying huge medical bills. She was in and out of hospital and the medical condition got worse until her leg was amputated. She attached to this application a number of documents to show the state of her medical condition at the time. The applicant avers further that because of her medical condition she suffered financial, emotional, physical and mental stress and as a result she failed to travel to Bulawayo to deal with the court order.

[6] When she recovered in November 2021, she made inquiries and confirmed that indeed the respondent obtained a default court order against her. She instructed a legal practitioner to file an application for condonation for the late filing of rescission of judgment, however the legal practitioner did not file the application until she transferred her file to the current legal practitioners.

[7] The applicant contends that her intended application for rescission of judgment has prospects of success. She concedes that the marriage relationship had irretrievably broken, however the division of the property was not just and equitable in that the respondent was awarded all the valuable property acquired during the marriage and she was awarded property that was old and worthless. She contended that she should have been awarded fifty percent of the property, especially the house. The parties bought the stand and it was registered in her name. Both parties contributed to the building of a house on the stand. She was a cross border trader, and she would also purchase goods locally for re sale. In 2007 the respondent retired from employment and his pension was used to construct the foundation of the house and thereafter it was eroded by inflation. She used the proceeds from her cross-border trading to complete the building of the house, did tubing and all electrical installation at the house. She bought roofing asbestos, ridges and nails and paid the carpenter. The respondent purchased roofing timber from the proceeds he got from selling his old mutual shares. Further the respondent had been receiving rent for the house since 2013. The applicant contends that she has made a good case for the relief she is seeking.

Respondent's case

[8] The respondent avers that he was not aware of where the applicant resided in Zambia, nor did he have her phoned details. He did not phone her to inform her of the court order. He contends that in 2019 the applicant returned to Zimbabwe and he showed her the court order, and that is when in his view she became aware of the order. He says at the time the applicant was in good health. He made contacts to the applicant's relatives in Harare who did not know of her whereabouts in Zambia. The summons was issued on 3 August 2016 and the publication was carried out 17 February 2017. He avers that the delay between the issuing of the summons and the publication was due to attempts made to reach out to the applicant.

[9] The respondent avers further that the stand was sold to him, and the applicant did not contribute to its purchase and development. The property was not registered in the name of the applicant. After the divorce he has made improvements on the property, i.e., installed burglar bars, plastered the walls, tiled the house and erected a boundary wall around the property. He says he is entitled to the property to the exclusion of the applicant. It is contended that this application does not meet the requirements for condonation. It is further contended that the degree of non-compliance is extreme, and she has not provided a reasonable explanation for the default. The respondent sought that the application be dismissed with costs.

The law

[10] Case law is replete regarding principles that govern the court's exercise of its discretion in matters of condonation. The legal principles a court is to take into account in considering whether or not to exercise its discretion to condone a party's non-compliance with the rules of court are well-established. The first principle is that an application for condonation must be brought as soon as the non-compliance has been detected. Second, there is some interplay between the obligation to provide a reasonable and acceptable explanation for the non-compliance of a rule of court and the reasonable prospects of success on the envisaged application.

[11] The applicant must provide a reasonable and acceptable explanation for his or her non-compliance and must show that the intended application has prospects of success. An application for condonation may, however, be refused where the applicant has provided a good and acceptable reason for his or her non-compliance but has failed to convince the court that there are reasonable prospects of success on the intended application. Third, an application for condonation may be refused because the non-compliance with the rules has been glaring, flagrant or inexplicable. In such an instance, the court may decide on the condonation application without having regard to the prospects of success. Fourth, the *bona fides* of the application has also been held as a factor to be taken into account by the court in exercising its discretion whether to grant condonation or to refuse condonation. In the case of *Bessie Maheya v Independent Africa Church* SC 58/07, MALABA JA (as he then was) said:

“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 therefore; the prospects of success on appeal; the importance of the case; the 1st 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”.

[12] It is on the basis of these legal principles that this application shall be considered and determined.

Application of the law to the facts

Extent for the delay and the explanation thereof

[13] The order sought to be vacated in the intended application for rescission was granted on 18 May 2017. This application was filed on 11 August 2023, which is approximately six years out of the time allowed by the rules of court to file an application for rescission of judgement. The evidence shows that she did not see the advert of the summons in the newspaper in Zambia and became aware of the order in November 2018. And thereafter she became afflicted by illness which resulted in her leg being amputated. However, there is no doubt that there was a delay in this matter, and the delay is flagrant in some respects. It is quite clear that there was a lot of inaction by the applicant when action should have been taken. For instance, when she recovered in November 2021, she did not pursue this matter with the urgency and determination it deserved. She says she instructed a legal practitioner to file an application for condonation, the name of the practitioner is not disclosed to the court. I come to the conclusion that although there was a delay in this matter, and the explanation for the delay starting in November 2018 was unreasonable. I do not classify the unreasonableness of the explanation as glaring, flagrant or inexplicable. However, the delay and a weak explanation thereof alone cannot form a basis for the dismissal of this application, other factors should also be considered.

Prospects of success

[14] I now turn to the issue of prospects of success. The parties got married to each other in 1997, and at that time the applicant was 33 years old and the respondent was 55 years old. The divorce order was granted on 18 May 2017, which shows that the marriage lasted a period of twenty years. I agree with the applicant that the order sought to be vacated in the intended rescission application awarded all valuable assets to the respondent. He was awarded the house as his sole and exclusive property, a house which was acquired during the subsistence of the marriage. He was awarded a motor vehicle and other items of property. On the other hand, the applicant was awarded a single bed; three quarter bed and kitchen utensils. There is a dispute whether the applicant contributed to the acquisition and development of the stand, and it cannot be resolved in this application. However, what is not disputed that the house is the asset of the spouses.

[15] Section 7 of the Matrimonial Causes Act [Chapter 5:13] deals with the division, apportionment or distribution of the assets of the spouses at divorce. It speaks to a just and equitable division of the assets at divorce. The marriage lasted for 20 years. The house was acquired during the subsistence of the marriage relationship. It is an asset of the spouses. See *Sayi (Nee Magara) v Sayi* SC 22/24; *Mhora v Mhora* SC 89/20; *Lock v Lock* SC 51/20. The parties are now old people. I do not think it can be said to be just and equitable that the respondent gets awarded the house to the total exclusion of the applicant. Moreso the respondent got a motor vehicle again to the total exclusion of the applicant. It is on this basis that I take the view that the intended application for rescission of judgment has prospects of success.

[16] As pointed out earlier in this judgment, there is some interplay between the obligation to provide a reasonable and acceptable explanation for the non-compliance with a rule of court and the reasonable prospects of success on the process sought to be filed. See *De Klerk v Penderis and Others* (SA 76 of 2020) [2023] NASC 1 (01 March 2023). This is a case where the prospects of success, and the importance of the issues raised may compensate for a long delay and a weak explanation thereof.

[17] Finally, in an application for condonation, the court has a flexible discretion, which it must exercise judiciously when considering all the facts and in essence, as a matter of fairness to both parties. I am persuaded, notwithstanding whatever imperfections may afflict the applicant's case, and the neglect to the extent that it was, that it would still be a proper exercise of this court's discretion in the circumstances to grant this application. I am of the view, having regard to the entire conspectus of the present matter, that the interests of justice require that the applicant should be allowed to have her grievance in the application for rescission of judgment. Again, regardless of the extent of the delay and the extent of the unreasonableness of the explanation thereof, the applicant has managed to pass the threshold regarding meeting the requirements for the indulgence she seeks. It is for these reasons that this application must succeed.

Costs

[18] The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. In this case there are good reasons not to award the applicant's costs. It is her actions or inactions, which did, to a large extent, contribute to the present scenario. The justice of the case requires that there be no order as to costs.

Disposition

In the result, I order as follows:

- i. The Applicant's non-compliance with the rules of court be and is hereby condoned.
- ii. The applicant be and is hereby granted leave to file her application for rescission of judgment in case number HC 1934/16 within ten (10) days of the granting of this order.
- iii. There is no order as to costs.

Khumalo & Partners, applicant's legal practitioners
Dube Nkala & Company, respondent's legal practitioners