

TRYNESS KABITI
versus
DIRECTOR GENERAL CENTRAL
INTELLIGENCE ORGANISATION N.O.

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 26 & 31 May 2023

Opposed Application

Mr *Kanoti*, for the applicant
Mr *Chitekuteku*, for the respondent

MHURI J: Applicant approached this court for a declaratory order and consequential relief. The application was filed on 31 August 2022.

Applicant filed all her pleadings with the heads of argument being filed on 13 January 2023 and served on the respondent's legal practitioners on 16 January 2023. No heads of argument were filed by the respondent.

This application was set down for hearing on 26 May 2023. At the commencement of the hearing, respondent's counsel made the submission that he had not filed respondent's heads of argument, as such respondent was barred. He then advised the Court that in terms of Rule 39 (4)(b) of this Court's Rule, Statutory Instrument 202/2021 he is making an oral application for condonation of his failure to file the heads of argument and the upliftment of the bar operating against respondent.

The application was opposed by applicant.

Mr *Chitekuteku* for respondent submitted that the degree of non-compliance was four (4) months and that this was not inordinate. He explained that as a lawyer dealing with the matter he did not receive applicant's heads of argument. He checked with their Registry and did not find any indication that they had received applicant's heads of argument. He checked on Tuesday 3 May 2023 after having received the notice of set down. He received the notice of set down on 17 May 2023. He asked respondent's counsel about the heads of argument here in court today 26 May 2023 and was then shown proof of service. He submitted it was an error on their part.

As for prospects of success, he submitted that respondent has huge prospects of success in that in the main matter, respondent raised the point that applicant had not exhausted the internal remedies. The dispute can be resolved administratively. In his opposing affidavit, respondent is requesting applicant to come so that any outstanding queries on salaries and allowances can be resolved amicably without coming to court as provided for in terms of the code of conduct. He further submitted that applicant was supposed to appeal to the Minister first before approaching the court. She jumped the gun.

He prayed that the respondent be condoned for non-filing of his heads of argument and the bar operating against him be uplifted.

On the point raised by applicant about the opposing affidavit, he submitted that the affidavit was properly commissioned. Officers of the Attorney-General's Office are *ex-officio* commissioners of oath who have no interest in the matters where Government or Ministers are cited, so nothing precludes them from commissioning affidavits.

In response to the application, applicant's submission was that there is no opposition to its application upon which the respondent's heads of argument will be based on as the opposing affidavit was not properly commissioned. The person who commissioned the affidavit is an officer of the Civil Division of the Attorney General's Office who are the respondent's attorneys.

Applicant also submitted that on the merits, the application be dismissed. Respondent's counsel was sluggish, the period of non-compliance is inordinate, the explanation given is a bare averment that there was an error at the Registry, there is no supporting affidavit in that respect. He did not check with applicant's counsel on the 17th May nor on 23 May for the heads of argument.

On the prospects, respondent's defence is that of approbating and reprobating, he did not point out which internal remedy was not exhausted as applicant wrote to the Minister and was not responded to.

As correctly submitted by the respondent's counsel, the factors which the Court is required to consider in applications for condonation of non-compliance with the rules of court are:

- the degree of non-compliance.
- the explanation for the non-compliance
- prospects of success in the main matter
- prejudice to the other party

- finality to litigation
- convenience to the court and other party.

Forestry Commission v Moyo 1997(10 ZLR 284.

In casu, having been served with applicant's heads of arguments on the 16th of January 2023, respondent was obliged to file his heads of argument within ten (10) days thereof. Rule 59(21) the respondent's heads of argument were therefor supposed to have been filed by the 30th January 2023. Up until today, 26 May 2023 none were filed. This is almost four (4) months period of non-compliance.

Four months in my view is an inordinate delay. From the explanation given by respondent's counsel, I find that respondent was sluggard. Applicant's heads of argument were served on respondent's counsel's office way back in January. His counsel only started checking for applicant's heads of argument on Tuesday 23 May that is two (2) days before date of hearing whereas he had received the notice of set down on the 17th of May 2023 i.e a week before the date of hearing. He also waited until the day of hearing to make an oral application for the condonation and upliftment of the bar. This sluggish behaviour has harmstrung him as he failed to submit a supporting affidavit to bolster his explanation. If he had proceeded in terms of subparagraph (a) of subrule (4) of Rule 39 and filed a chamber application he could have placed all the necessary information in the affidavits for consideration by the court. As the matter stands, he did not even address the other factors which the court ought to consider. He just made submissions on the degree of non-compliance, the explanation and prospects. He did the respondent a dis-service. I did not hear him plead with the Court that his sins should not be visited on his client

As regards prospects, it is my finding that contrary to his submissions, the prospects of success are dim. It was his submission as alluded earlier, that applicant rushed to this court when this matter could be resolved amicably between the parties, that, in its opposing affidavit, applicant is being called upon to come so that any queries and outstanding salaries and allowances can be resolved amicably without going to court, that respondent is saying that I have not failed to resolve this dispute as the Code provides for resolution of disputes before applicant approached this court.

The above gives the inference that respondent is not on firm ground as far as the dispute between the parties is concerned, this is despite the submission that applicant ought to have appealed to the Minister first. The submission that the parties' contract did not state payment in US\$, in my view, does not brighten respondent's prospects, as it is common cause that

applicant's salary and allowance was being paid in US\$ and even the other amount that was paid after the issue had been raised, it was paid in US\$.

The adage there must be finality to litigation is apt in this matter. The law helps the vigilant and not the sluggard *Ndebele v Ncube* 1992(1) ZLR 288.

I have had a look at the cases cited by applicant's counsel in bolstering his point on the commissioning of respondent's affidavit. I found that they are distinguishable from this case. The only case in which such a point was raised but was not upheld, is the case of *Toverengwa Marega v The Commissioner General of Prisons and The Trial Officer* HH 140-17 wherein TAGU J (the late) stated:

"I agree with counsel for the respondents that the affidavit deposed to by the respondents is valid as it was commissioned by a member of the Public Service whose primary interest in the affidavits is that of the State. The second point is dismissed."

The case of *Bruce Ndoro and Fungayi Ndoro* HH 814/22, the point was in relation to there being no date on the affidavit. The case of *Miriam Mkandla & Ors v Fletcher Parks Dube & Ors* HB 41/07 the point was in relation to a founding affidavit was not attested to and signed before a commissioner of oaths or some other such officer authorized to do so. The case of *Prosper Tawanda v Ndebele* HB 27/06 the point was in relation to a power of attorney that was not properly notarized.

I therefore find that the point as raised by applicant is not sustainable in this matter and cannot be upheld.

Having found that the degree of non-compliance was inordinate, the explanation not satisfactory and the prospects of success not being bright, respondent cannot be granted the indulgence that he seeks. He remains barred.

It is ordered that the application for condonation and upliftment of the bar be and is hereby dismissed.

Applicant's application is to proceed as unopposed on the 12th of June 2023 at 12:00 hours.