

TENDAI LAXTON BITI
versus
AUGUR INVESTMENTS
and
TATIANA ALESHINA
and
KENNETH R SHARPE
and
MOVEMENT FOR DEMOCRATIC CHANGE ALLIANCE

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 28 February & 2 April 2024

Opposed Application

Mr L Madhuku, for the applicant
Advocate Magwaliba, for 1st, 2nd, 3rd respondents
No appearance for 4th respondent

MHURI J: On 1 March 2023, MANZUNZU J issued a default judgment in case number HC4612/21 against the Applicant. It is this default judgment that gave rise to the two applications in *casu*. These are, an application for condonation for the late filing of an application for rescission of the default judgment and an application for rescission of the default judgment.

The brief background giving rise to these applications are as follows, on 10 December 2020, first, second and third Respondents instituted summons for defamation against Applicant under case number HC 7528/20. Applicant then raised an exception and a special plea in bar in those proceedings, which Justice Manzunzu dismissed. Aggrieved by the dismissal, applicant made an application for leave to appeal to the Supreme Court which application was dismissed by MANZUNZU J in default. Applicant then approached the Supreme Court under SC 143/23 which application was later withdrawn. Applicant then made another application under SC 274/23 which was struck off by CHITAKUNYE JA on the basis that applicant should make an application for the rescission of MANZUNZU J's judgment as it was a default judgment.

Considering that these are two applications, I will deal first with the application for condonation and if it is granted, I will proceed to deal with the other application but if it is denied that will be the end of the matter.

Rule 27 of this Court's Rules, S.I.202 of 2021, provides as follows:

“ (1) A party against whom judgment has been given in default whether under these rules or under any other law, may make a court application, not later one month after he has had knowledge of the judgment for the judgment to be set aside, and thereafter the rules of court relating to the filing of opposition, heads of argument and the set down of opposed matters, if opposed, shall apply.

(2).....”

It is settled law that the granting of an application for condonation is at the discretion of the Court.

This was aptly stated by ZIYAMBI JA in the case of *Paul Gary Friendship v Cargo Carriers Ltd and another* 2013 (1) ZLR 1 (S) that,

“Condonation is an indulgence which may be granted at the discretion of the court. It is not a right obtainable on demand. The applicant must satisfy the court/judge that there are compelling circumstances which would justify a finding in his favour. To that end, it is imperative that an applicant for condonation be candid and honest with the court.”

Certain factors have to be considered in exercising that discretion. In *Chimpondah & Anor v Muvami 81-07 MAKARAU JP* (as she then was) held as follows:

“It is trite that there is a certain degree of negligence in failing to observe the rules of court. An application for condonation such as the one before me is, therefore, an application for excusing the negligence of the offending party and the degree of such negligence then becomes a factor, together with the factors that will ensure that at the end of the day justice as between the parties prevails.” (underlining for emphasis)

In exercising its discretion, the court is to consider among others, the following requirements:

- a) the length of the delay
- b) the explanation for the delay
- c) the prospects of success
- d) finality to litigation

In *casu*, the judgment in question was pronounced on 1 March 2023. This application was filed in June 2023. This was a three months delay. This delay in my view and contrary to Applicant's submission, is inordinate.

Applicant's explanation for the delay was that he was pursuing the applications he had filed in the Supreme Court and after the striking off of his second application on 7 June 2023, he was trying to get reasons from the Supreme Court for the decision to strike off. He submitted that his application should be granted as there are reasonable reasons for the delay and that the granting of this application is in the interests of justice. He further submitted that he did not understand the judgment by MANZUNZU J to be a default judgment as he had sent one Tapiwa Chipandu to represent him.

I find Applicant's explanation to be totally unsatisfactory. It is trite that a default judgment is not appealable. See *Zvinavashe v Ndlovu 2006(2) ZLR 372 (S)*. It is also not in dispute that Applicant is a seasoned practising legal practitioner. He therefore knew that a default judgment is not appealable but chose not to seek rescission and approached the Supreme Court. Even before the Supreme Court he was represented by Legal Practitioners of good standing who should have known better. Further, the lawyer Tapiwa Chipandu whom he had sent to represent him before MANZUNZU J, was present when the default judgment was issued, so applicant knew that a default judgment had been issued as of 1 March 2023. He however chose to take the route that he did at his own peril. His explanation is unsatisfactory, I find that he has failed to pass this hurdle.

It is not in dispute that applicant's legal practitioner of record then was Mr Mafume. On the date of hearing of the application before MANZUNZU J, applicant sent a legal practitioner from his law firm to represent him when Mr Mafume had not renounced agency. Further, a reading of MANZUNZU J's main judgment shows that it is well reasoned and the likelihood of it being overturned on appeal are very slim. Applicant's prospects of success are not bright.

The adage, there must be finality to litigation is apt in this case. See the case of *Ndebele v Ncube 1992 (1) ZLR 288 (S)*.

I am of the considered view that the balance of convenience favours that the main matter proceeds to finality.

In the result, applicant cannot be granted the indulgence he is seeking and to that end I will not proceed to deal with the application for rescission.

It is therefore ordered that the application for condonation of late filing of application for rescission be and is hereby dismissed with costs.

Madhuku Law Chambers, applicant's legal practitioners
Scanlen and Holderness, first, second & third respondents' legal practitioners