

REPORTABLE (50)

JANE HOVE

v

**1) BERA MINING SYNDICATE 2) MO3 MINING
SYNDICATE 3) THE OFFICER IN CHARGE, MINERALS
FLORA AND FAUNA UNIT, ZVISHAVANE 4) THE
PROVINCIAL MINING DIRECTOR, MIDLANDS 5) M J
MUNODAWAFA**

**SUPREME COURT OF ZIMBABWE
HARARE: 27 & 31 JANUARY 2023 & 30 MAY 2023**

L. Mudisi, for the applicant

W. T. Davira, for first and second respondents

CHAMBER APPLICATION

CHITAKUNYE JA: This is an opposed chamber application for condonation of non-compliance with r 38(1)(a) and extension of time within which to note an appeal made in terms of r 43(3) of the Supreme Court Rules, 2018.

FACTUAL BACKGROUND

In August 2022, the applicant filed an urgent chamber application for an interdict against the respondents in the High Court, Bulawayo. In the application, the applicant sought to interdict the first and second respondents from carrying out any mining activities on the applicant's mining claims; namely- Berea 17, Berea 18 and Site 232 within certain coordinates.

The applicant, on the one hand, and the first and second respondents, on the other, have been involved in a dispute over mining claims' boundaries for some time. The dispute has been before the High Court from as far back as March 2014 when the applicant approached the High Court in an urgent chamber application in HC 386/14 seeking a provisional order against the respondents. On 3 March 2014 the High Court granted an order in these terms: -

1. The court orders and directs the fourth respondent to engage the Regional Mining Surveyor to conduct and prepare a comprehensive report pertaining to the dispute under Case No.HC 386/14.
2. The matter be and is hereby postponed pending production of the report in para 1 above.

The fourth respondent was the Mining Commissioner N. O (Masvingo Mining District).

On 14 August 2014 the Principal Mining Surveyor, in the Regional Mining Engineer's office, submitted his report to the Chief Government Mining Engineer in compliance with the above court order. That report noted a number of irregularities in the disputed claims. These included that whilst the claim numbers remained the same, the sizes of the claims had been adjusted by enlarging some of them leading to claims encroaching into each other. The report therefore recommended that the claims should be adjusted down to the original sizes as at the time of initial registration and that, in the process, the principle of priority rights should be applied.

A final order was granted in that case almost 6 years later on the 24 February 2020 in the following terms:

1. The fourth respondent be and is hereby directed to implement the findings and remove encroachments on the disputed claims in terms of the survey report dated 14 August 2014 within 14 days of this order.

On 4 June 2021, the Chief Government Mining Engineer (CGME), M J Munodawafa, prepared his report on how the findings of 14 August 2014 as mandated by the court order of 24 February 2020 were to be implemented by reverting to the original claim boundaries as at the time of original registration of the parties' respective claims. That report included a map and an explanation of how each claim was to be affected.

The parties were duly advised of the CGME's report on the implementation of the resolution to the dispute by letter dated 31 January 2022.

On 28 August 2022 (or 22 August 2022 as contended by the respondents) the applicant filed another urgent chamber application in the court *a quo* seeking to interdict the first and second respondents from conducting mining activities on the disputed claims.

The application was opposed by the first and second respondents and judgment thereof was rendered on 20 October 2022 in the presence of counsel for the contesting parties. The applicant was also present when judgment was handed down. The judgment having been handed down on 20 October 2022, any aggrieved party had 15 days from that date within which to note an appeal in terms of r 38 (1)(a) of the Supreme Court Rules, 2018. That period lapsed on 10 November 2022 and by that time no party had filed or noted an appeal. When the applicant sought to appeal against that judgment, she was out of time hence this application for

condonation and extension of time within which to appeal which was issued on 5 December 2022.

In making this application the applicant alleged that judgment in the matter was handed down on 21 October 2022. Upon requesting the written judgment, the applicant's legal practitioners were initially advised that the record was with the judge who had handed down the judgment, and later on, that the judgment was available on the Integrated Electronic Case Management System (IECMS) platform. The applicant alleged that her legal practitioner's efforts to log in to the system and retrieve the said judgment were futile. On 2 November 2022, efforts were made to obtain a copy of the judgment from the first respondent's legal practitioner but only a part of the judgment was availed.

The applicant further alleged that her legal practitioners only managed to get the written judgment on 7 November 2022, which judgment she became aware of on 8 November 2022. Thereafter she met her legal practitioners on 12 November 2022 and instructed them to appeal against the court *a quo*'s decision. This was, however, after the expiry of the *dies induciae* on 10 November 2022, thus necessitating the filing of this application. She also alleged that her legal practitioners unsuccessfully tried to upload the current application on the IECMS platform on 21 November 2022. The application was only successfully uploaded on the platform on 5 December 2022 due to technical breakdowns within the IECMS platform.

The application is opposed by the first and second respondents. The first respondent, in its opposing affidavit, contended that the applicant did not file her urgent chamber application for an interdict on 28 August 2022 but on 22 August 2022, with the judgment being handed down on 20 October 2022, and not on 21 October as submitted by the

applicant. The first respondent averred that its legal practitioners got a copy of the judgment from the High Court Civil Registry on 21 October on which date the applicant's legal practitioners could also have obtained the judgment. It contended that there is no evidence to prove the assertion that the applicant was advised by the registrar of the court *a quo* that the record was still before the judge who had delivered the judgment.

The first respondent contended that the applicant was only trying to file the appeal in light of the fact that the first and second respondents started mining operations in November 2022, which the applicant seeks to stop. It further contended that the applicant is misleading the court by stating that her legal practitioners tried to access the judgment on the IECMS platform as she does not have substantive evidence to support her claim. In any case the matter had not been filed through the IECMS platform. There was thus no reasonable explanation why they obtained the judgment on 7 November 2022 despite being aware of its existence prior to that date and that the first respondent's legal practitioner had obtained the judgment a day after the handing down on 20 October 2022.

On the assertion that the first respondent's legal practitioners had given applicant's legal practitioner a part of the judgment, Mr *Davira*, for the first and second respondents, deposed to an affidavit refuting such allegation. He denied being approached by the applicant or her legal practitioners for a copy of the judgment.

On prospects of success of the appeal, the first respondent contended that the applicant's intended appeal had no prospects of success as the dispute between the parties was resolved. It thus prayed for the dismissal of the applicant's application. The second respondent associated itself with the averments of the first respondent.

The two respondents also averred that a large chunk of the applicant's founding affidavit comprised inadmissible hearsay. They contended that once that chunk is expunged there is virtually no explanation for the delay in noting the appeal within the stipulated period. Equally, there is no explanation for the delay in filing this application upon realising that she was out of time. The two respondents contended that the applicant's legal practitioner ought to have deposed to an affidavit confirming the challenges alluded to by the applicant in obtaining the judgment and in noting the appeal.

THE LAW

It is trite that for an application for condonation for non-compliance with the rules and for extension of time within which to note an appeal to succeed, the applicant should satisfy the court that he or she has a reasonable explanation for the delay and non-compliance with the rules and also establish that there are prospects of success of the appeal.

This position was reiterated in *Forestry Commission v Moyo 1997 (1) ZLR 254 (S) at 260E-G* wherein Gubbay CJ set out factors to be considered in such an application as follows: -

- “(a) that the delay involved was not inordinate, having regard to the circumstances of the case;
- (b) that there is a reasonable explanation for the delay;
- (c) that the prospects of success should the application be granted are good; and
- (d) the possible prejudice to the other party should the application be granted.”

See also: *Kombayi v Berkout 1988 (1) ZLR 53 (SC)*; *Ester Mzite v Damafalls Investments (Pvt) Ltd SC 21/18*.

It is important to note that these factors are not individually decisive on whether the application for condonation for late noting of appeal and extension of time within which to appeal is granted. They are considered conjunctively. In *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S), Sandura JA remarked as follows:

“Whilst the presence of reasonable prospects of success on appeal is an important consideration which is relevant to the granting of condonation, it is not necessarily decisive. Thus, in the case of a flagrant breach of the rules, particularly where there is no acceptable explanation for it, the indulgence of condonation may be refused, whatever the merits of the appeal may be.”

See also: *Director of Civil Aviation v Hall* 1990 (2) ZLR 354 (S) at 357D-G.

APPLICATION OF THE LAW TO THE FACTS

1. Extent and reasonableness of explanation for the delay

The judgment which the applicant intends to appeal against was handed down on 20 October 2022. This current application was filed on 5 December 2022. The *dies induciae* to note the appeal expired on 10 November 2022. The applicant is thus 17 days out of time. The delay in making this application is inordinate given the circumstances of the case.

The explanation given by the applicant for the failure to timeously note the appeal is that her legal practitioners encountered difficulties in obtaining the court *a quo*'s judgment. The applicant also stated that her legal practitioners advised her that they had managed to get the judgment on 8 November 2022, although she could not meet with them to discuss the judgment as she had to attend a funeral in Chipinge. She avers that she only gave them instructions to note an appeal on 12 November 2022. There appears to be a bit of confusion as to when the applicant obtained the judgment in question. In her founding affidavit, the applicant stated that her legal practitioners obtained the judgment on 7 November 2022 after having

failed to get it on 20 October, 25 October and 2 November 2022. However, in her answering affidavit, she stated that her legal practitioners got the judgment on 2 November 2022.

It is common cause that, by her version, the applicant obtained the judgment a few days before the *dies induciae* for filing an appeal had expired. She, however, did not state when she attended the funeral in Chipinge such that she could not meet with her legal practitioners in order to map the way forward. Of interest is the fact that she also alleged that she got delayed in making this application as a result of the malfunctioning of the IECMS platform. It was her assertion that her legal practitioners fruitlessly tried to upload the application from 21 November 2022 until 5 December 2022 when it was actually uploaded.

In *Chiutsi v The Sheriff of the High Court and Ors* S-2-19 at p 3 this Court stated that: -

“A litigant’s explanation for his or her non-compliance must be devoid of any undertones of a complacency regarding the observance of the rules of court and it must be adequate and tolerable.”

In *casu*, the applicant’s explanation for the delay is difficult to believe. This is because the applicant is not certain on when her legal practitioners obtained the court *a quo*’s judgment. The fact that the first and second respondents managed to get the same judgment on 21 October 2022 without encountering all these problems which allegedly bedevilled the applicant does not help the applicant’s cause. In addition, if the applicant’s legal practitioners truly experienced challenges in accessing the judgment and in uploading the application on the IECMS platform, they ought to have deposed to an affidavit in support of the applicant’s assertions on the difficulties they encountered. Their failure to do so suggests their lack of confidence in the story being sold by their client. Such a conclusion is not farfetched in that during the hearing of the application, the applicant’s legal practitioner conceded that the delay

in successfully uploading the application from 21 November to 5 December 2022 was because they had not paid the required fees yet the applicant had not alluded to this. She had instead stated that it was due to the malfunctioning of the IECMS platform.

It is apposite to note that paragraphs 12 to 16 and 28 of the applicant's founding affidavit comprise hearsay evidence. The fruitless efforts to obtain a copy of the judgment and in uploading the current application on the IECMS were allegedly encountered by the applicant's legal practitioners in the absence and without the participation of the applicant save for the events of the date of handing down the judgment. It was therefore imperative for the applicant's legal practitioners to depose to a supporting affidavit on the challenges alluded to by the applicant in her founding affidavit if such assertions were to have any probative value. In the absence of such a deposition, only the paragraphs that do not contain hearsay evidence will be considered.

It is trite that hearsay evidence in an affidavit is inadmissible in the absence of an explanation as to why direct evidence is unavailable. *In casu*, there was no explanation as to why the applicant's legal practitioners could not depose to an affidavit on the challenges, if any, they encountered in accessing the judgment and in uploading this application on the IECMS platform. They are the same legal practitioners who have been representing the applicant in this case. Clearly, the explanation for failure to note the appeal within the *dies induciae* and for the delay in applying for condonation after the expiry of the *dies induciae* is without merit.

2. Whether or not the Appeal has good prospects of success

Prospects of success refers to the question of whether the applicant has an arguable

case on appeal. In *Essop v S*, [2016] ZASCA 114, the Court in defining prospects of success held that:

“What the test for reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

In casu, the applicant avers that the intended appeal has good prospects of success.

The applicant alleged that the court *a quo* erred by finding that she had no *prima facie* right entitling her to the relief that she sought. The applicant’s counsel submitted that in terms of the order granted under HC 386/14, which order was based on a survey report dated 14 August 2014, she had been declared the legal owner of the mine in dispute and it had been found that the respondents were encroaching on her legally registered mine. He further submitted that the court *a quo* misinterpreted this order in the sense that another report which was issued on 4 June 2021 replaced the one done on 14 August 2014.

I, however, find that the applicant’s intended appeal does not enjoy good prospects of success. Contrary to what the applicant states, the court *a quo* did not misinterpret the judgment under case number HC 386/14. The report of 4 June 2021 was produced in line with the court’s order in HC 386/14 and in terms of that report, the mining areas which the applicant claims ownership over were found to have been irregularly over-pegged. For instance, the claim Berea 17 was originally 4 hectares in extent and yet it now covered an area of 17 hectares thus encroaching into another miner’s claim that had been registered prior to the expansion. The same was observed of claims Berea 18 and Site 232.

In compliance with the final court order of 24 February 2020, the recommendations of the Chief Government Mining Engineer dated 4 June 2021 were availed to the parties on 31 January 2022 and the necessary adjustments were effected by the fourth respondent under case number HC386/14 on the disputed claims. These recommendations were not challenged. The net effect was that the mining claims were restored to their original positions to eliminate the dispute. This is what was done in the implementation of the court *a quo*'s decision in HC 386/14. The decision and its implementation did not affect ownership of the claims but simply reduced the claims to their original sizes as at the time of original registration.

In the circumstances there are no prospects of success on appeal. If anything, the applicant is simply intent on prolonging a dispute that was resolutely resolved. This will inevitably prejudice respondents who are eager to comply with the adjusted claims and proceed with their mining activities.

This is a case where the applicant ought to be reminded of the need for finality to litigation.

As aptly noted by Mcnally JA in *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290C-E: -

“It is the policy of the law that there should be finality in litigation. On the other hand, one does not want to do injustice to litigants. But it must be observed that in recent years, applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute. The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt* - roughly translated, the law will help the vigilant but not the sluggard.” (my emphasis)

The applicant lamentably failed to justify the need to exercise my discretion in favour of granting her condonation and extension of time within which to note an appeal.

COSTS

Though the first and second respondents asked for costs on a legal practitioner and client scale, it is trite that costs on a higher scale must be justified. In this regard not much effort was made to justify costs on a higher scale. In the circumstances, costs will follow the cause on the ordinary scale.

DISPOSITION

The applicant failed to satisfy the requirements for condonation and extension of time within which to note an appeal.

Accordingly, it is ordered as follows: -

The application be and is hereby dismissed with costs.

Mutendi, Mudisi and Shumba, applicant's legal practitioners.

Gundu Dube and Pamacheche Legal Practitioners, 1st and 2nd respondents' legal practitioners.