

DISTRIBUTABLE (35)

NELISIWE MLAMBO

v

**(1) AROSUME PROPERTY DEVELOPMENT (PRIVATE) LIMITED
(2) MWANA WEVHU HOUSING COOPERATIVE (3) KUDZANAI
CHIKUTU (4) MINISTER OF LOCAL GOVERNMENT AND
PUBLIC WORKS, N.O**

**SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 16, 2022 & 3 MAY 2023**

S. Machingauta, for the applicant

F. Nyangani, for the first respondent

P. Mtukwa, for the second respondent

B. Magogo, for the third respondent

D. Machingauta, for the fourth respondent

IN CHAMBERS

MUSAKWA JA: This is a chamber application for condonation of noncompliance with the Supreme Court Rules, 2018 and for extension of time in which to appeal made in terms of r 43. The intended appeal is against a judgment of the High Court which was handed down on 30 July 2021. In that judgment, the applicant's application for a declaratur was dismissed. The applicant seeks an order in the following terms:

1. The application for condonation for non-compliance with rule 38 (1) of the Supreme Court Rules, 2018, be and is hereby granted.

2. The application for extension of time within which to file and serve a notice of appeal in terms of the rules be and is hereby granted.
3. The applicant shall file and serve the notice of appeal against the judgment of the High Court in HC6650/19 within five days from the date of this order.
4. There shall be no order as to costs.

FACTUAL BACKGROUND

The first respondent is a property development company. The second respondent is a duly registered housing co-operative of which the applicant was a member. The third respondent is the subsequent purchaser of the property in dispute, number 294 Carrick Creagh Borrowdale which property had initially been leased to the applicant on a rent to buy basis. The fourth respondent is the Minister responsible for state land and properties.

It is common cause that on 13 October 2011, the applicant was allocated stand number 294 Carrick Creagh Borrowdale by the fourth respondent on a lease-to-buy basis. The allocation was made pursuant to a partnership agreement entered between the first and second respondents wherein the first respondent was appointed to develop the land on which the property is situated. Members of the second respondent were required to pay a development fee to the first respondent before being issued with a lease agreement by the fourth respondent. The applicant avers that she was exempted from paying development fees through a letter dated 3 November 2008 as she was part of the executive committee of the second respondent.

On 6 August 2019, the applicant visited the fourth respondent's offices to check on the status of the stand. She then found in the relevant file a letter dated 18 December 2018

demanding payment of \$404 999.04 being the outstanding development fees. The fees were to be paid by 31 January 2019 failing which the offer of the stand would be withdrawn. The letter also stated that the applicant had breached the lease agreement by not paying the development fees. The applicant averred that although the letter was dated 18 December 2018, there was no valid cancellation as the same was not served on her at her *domicilium citandi* as reflected in the lease agreement. She only became aware of the letter well after the due date. During the course of the inquiries as to the withdrawal of the offer of the stand, the applicant further discovered that the property had been allocated to the third respondent.

Consequently, the applicant filed an application for a declaratur in the court *a quo* under case number HC 6650/19. She averred that she held a valid lease agreement and never declined to pay the development fees. She contended that there was no basis for the repossession as she was not notified that she owed the development fees. She sought to be declared the true and legal owner of stand number 294 Carrick Creagh, Borrowdale. She also sought that the sale agreement concluded between the first and third respondents be declared null and void and for the same to be set aside.

The first to third respondents opposed the application whilst the fourth respondent did not file any opposition. The first respondent contended that the applicant had no real rights accruing to her. It further contended that the applicant's exemption from paying development fees was not absolute.

The second respondent contended that the applicant could not seek a declaratur on ownership on the strength of a lease. This is because ownership vested in the fourth respondent.

It also contended that the exemption from paying development fees was a privilege that was subsequently withdrawn.

The third respondent argued that she was properly allocated the stand and paid the requisite development costs. She further argued that the requirements for a declaratur had not been met.

The court *a quo* found that the applicant did not satisfy the requirements for the granting of a declaratory order. The court found that it was not in dispute that the letter of cancellation of the lease agreement was not served on the applicant. As such, it ruled that no valid cancellation was effected. The court *a quo* further found that if the letter was a notice of cancellation, then in terms of the parties' agreement, the fourth respondent was supposed to confirm cancellation which he did not do. All the respondents failed to put a date on which the lease was cancelled. However, notwithstanding that it had found that there had been no proper cancellation of the lease agreement, the court *a quo* refused to grant the declaratory order sought by the applicant. It ruled that the applicant had not fulfilled the obligations set out in the lease agreement. Resultantly, the application was dismissed.

Aggrieved by the decision of the court *a quo*, the applicant lodged an appeal to this Court under SC 308/21. The appeal was filed within the 15 days stipulated in r 38 (1) (a) of the Supreme Court Rules, 2018. However, the notice of appeal was defective in that the relief sought was inexact. On the day of the hearing of the appeal that is 11 January 2022, the issue of the defective notice of appeal was brought to the attention of the applicant's counsel. The matter was duly struck off the roll by consent of all the parties.

The applicant intends to file a fresh appeal but she is out of time hence the present application.

APPLICANT'S SUBMISSIONS

Mr *Machingauta* for the applicant submitted that the delay was not inordinate and the reason for the delay is attributed to the legal practitioner who drafted a defective notice of appeal. On the issue of prospects of success, Mr *Machingauta* argued that the intended appeal enjoyed good prospects. Counsel submitted that the court *a quo* correctly made a finding that the termination of the lease agreement was invalid due to the failure by the fourth respondent to serve the required notices at the applicant's *domicilium citandi*. It was further argued that by refusing to declare that the contract between the applicant and the fourth respondent as valid, the court *a quo* made a decision that was contrary to the evidence placed before it. Finally, Mr *Machingauta* submitted that as the application before the court *a quo* related to a declaratory order and not for specific performance the application ought to be granted.

THE FIRST RESPONDENT'S SUBMISSIONS

Mr *Nyangani* for the first respondent submitted that although the delay in noting of the application for condonation is not inordinate, the explanation for the delay is unacceptable since the applicant was legally represented. Concerning prospects of success on appeal, Mr *Nyangani* argued that the applicant has no prospects of success because the reason for the applicant's failure to pay developmental fees could not suffice as the exemption regarding payment was clearly outlined as a privilege subject to revocation. Further, it was *Nyangani's* contention that the applicant failed to establish the reasons why she did not adhere to the obligations which

were set out in the lease agreement. Moreover, he argued that without the applicant first seeking the cancellation of an agreement between the third and fourth respondent, the relief sought by the applicant was incompetent in an application for a declaratur. Finally Mr *Nyangani* prayed that the application be dismissed with costs on a legal practitioner-client scale.

THE SECOND RESPONDENT'S SUBMISSIONS

Mr *Mtukwa* for the second respondent raised a point *in limine* to the effect that the applicant had approached the court with dirty hands as she had neglected to pay costs which the court *a quo* had ordered her to pay. On the merits, Mr *Mtukwa* argued that the appeal has no prospects of success as the applicant was equally in breach of her own obligations in respect of the same lease agreement which she intended to have enforced. Counsel submitted that the applicant sought to be declared the owner of the stand despite the fact that she had no agreement of sale but was merely a beneficiary of a lease agreement. Ownership of the stand continued to vest in the state as represented by the fourth respondent.

THE THIRD RESPONDENT'S SUBMISSIONS

Mr *Magogo* for the third respondent submitted that the applicant did not disclose that she was required to pay development fees and to erect buildings worth USD \$200, 000.00 in her founding affidavit. Counsel submitted that the applicant has no prospects of success due to the fact that she failed to perform all her obligations under the contract she sought to enforce. Mr *Magogo* further submitted that the applicant's lease-to purchase agreement with the fourth respondent has two distinct cancellation for breach clauses; clause 15 requires the lessor forthwith

to declare the agreement terminated and clause 22 has a forfeiture clause in terms of which there is no contemplation of any need to declare and communicate the termination of agreement.

Additionally, it was submitted that the termination of applicant's lease and ejectment was effected by means of the subsequent letting for eventual purchase to the third respondent. The third respondent had made improvements to the immovable property. Counsel further submitted that the double sale argument raised by the applicant is an error of law since there was never any sale and purchase of land in the scheme of the lease-to-buy arrangement. The third respondent argued that the applicant's failure to fulfil the conditions of the lease-to-buy agreement militate against the application.

THE LAW

Applications for condonation of late filing of appeal and extension of time within which to appeal are regulated by r 43 of the Supreme Court Rules, 2018 which states that;

- “(1) An application for leave to appeal or for condonation of non-compliance with the rules and for extension of time in which to appeal shall be signed by the applicant or his or her legal practitioner and shall be accompanied by a copy of the judgment against which it is sought to appeal.
- (2) An application for leave to appeal shall set out the date on which the High Court refused leave to appeal and shall have attached to it—
 - (a) a notice of appeal containing the matters required in terms of paragraphs (a) to (f) of subrule (1) of rule 37;
 - (b) a copy of the proceedings before the High Court when leave to appeal was refused, together with the judgment, if any;
 - (c) an affidavit setting out any facts which are relied upon as affecting the granting of leave to appeal.
- (3) An application for condonation of non-compliance with the rules and for extension of time in which to appeal shall have attached to it a notice of appeal containing the matters required in terms of subrule (1) of rule 37 and an affidavit setting out the reasons why the appeal was not entered in time or leave to appeal was not applied for in time. Counsel may set out any relevant facts in a statement. Where such application

is in relation to a matter in which leave to appeal is necessary the application shall, in addition, comply with the requirements of subrule (2).”

It is a common principle of law that has been practiced over time that a party who fails to comply with the rules of this Court must apply for condonation and give adequate reasons for failure to comply with the rules. This was expressed in *Zimslate Quartzize (Pvt) Ltd & Ors v Central African Building Society*, SC 34/17 where the court held that;

“An applicant, who has infringed the rules of the court before which he appears, must apply for condonation and in that application explain the reasons for the infraction. He must take the court into his confidence and give an honest account of his default in order to enable the court to arrive at a decision as to whether to grant the indulgence sought. An applicant who takes the attitude that indulgences, including that of condonation, are there for the asking does himself a disservice as he takes the risk of having his application dismissed.”
(My emphasis)

The factors to be considered in an application of this nature were outlined in *Mzite v Damafalls Investment (Pvt) Ltd & Anor* SC 21/18 where the court stated that;

“The requirements for the application of this nature to succeed are well known as outlined in the case of *Kombayi v Berkout* 1988 (1) ZLR 53 (S). These are:

1. The extent of the delay;
2. The reasonableness of the explanation for the delay; and
3. The prospects of success on appeal.”

APPLICATION OF THE LAW TO THE FACTS

The extent of the delay and reasonableness of explanation

In *casu*, the judgment in which the applicant intends to appeal against was handed down on 30 July 2021. The applicant filed a defective notice of appeal on time and the matter was struck off the roll on 11 January 2022. She then filed the present application on 18 January 2022, some 7 days after the matter was struck off the roll. The overall delay of six months is inordinate.

The explanation given by the applicant for failing to note a valid appeal is that the applicant's legal practitioners believed that they had filed a valid notice of appeal. It was only on the day for the hearing of the appeal that her legal practitioner realized the defect in the notice. Advent *Tavenhave*, the applicant's legal practitioner, deposed to a supporting affidavit in which he explained the issue of the defective notice of appeal. According to him in crafting the substituting order he omitted to state the substantive relief. He had not seen anything wrong until this was brought to his attention by counsel for the third respondent on the date of hearing.

A client may suffer for the negligence of his legal practitioner (*S v McNab* 1986 (2) ZLR 280 (SC)). This is because a legal practitioner is expected to execute his or her duties diligently and to follow the rules of court. In this respect see *Nguruve v Secretary of The Commission of Inquiry* 1988 (1) ZLR 244 (SC). Mr *Tavenhave* was certainly expected to get things right.

It follows that the application fails both on the length of delay and the reasonableness of the explanation for the delay.

Despite the applicant having failed to meet the first two requirements for such an application, I will proceed to determine whether there are prospects of success in the intended appeal as it is a requirement to consider all the elements cumulatively.

PROSPECTS OF SUCCESS

Prospects of success refer to the question of whether the applicants have an arguable case on appeal or whether the case cannot be categorised as hopeless. In the case of *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.” (My emphasis)

In her draft notice of appeal, the applicant has raised four grounds of appeal and the main issue is whether or not the court *a quo* erred in dismissing the application for a declaratur. In the court *a quo*, the applicant sought for an order declaring her to be the true owner of the stand in question. Clause 2 of the lease agreement entered between the applicant and the fourth respondent shows that it was valid for four years. The lease agreement was entered into on 11 October 2011. It means that the lease expired sometime in 2015. The applicant filed the application for a declaratur on 9 August 2019, some 4 years after the lease had lapsed. The lease agreement which the applicant sought to be declared valid and binding had lapsed by the time she approached the High Court for a declaratur. I am satisfied that the relief or order she sought in the court *a quo* was incompetent as the lease agreement was terminated by effluxion of time and was never renewed. She could not have sought to be declared the owner of a property she had not purchased.

DISPOSITION

The court *a quo* was correct not to grant a declaratur in favour of the applicant as the applicant had not purchased the property and had not fulfilled the conditions relating to developing the property. In addition, the lease on the property had lapsed and had not been renewed. Consequently, there are no prospects on appeal. As the applicant has failed to satisfy the requirements for the grant of this application, the application cannot succeed. As is the norm, costs will follow the event.

Accordingly, it is ordered that the application be and is hereby dismissed with costs.

Tavenhave & Machingauta, applicant's legal practitioners.

Nyangani Law Chambers, 1st respondent legal practitioners.

Mashizha & Associates, 2nd respondent's legal practitioners.

Chikwangwani Tapi Attorneys, 3rd respondent's legal practitioners.