

TOENDEPI MUKUKA

Versus

JOSHUA MUDZINGWA

And

SIMANGALISO NYANHETE

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 20 AND 26 MAY 2022

Opposed Application

A Sibanda, for the applicant
S. Zingano, for respondents

MAKONESE J: This is an application for condonation and extension of time within which to file an appeal out of time. The application is opposed by the respondents on several grounds. Respondents aver that the application for condonation is defective for non-compliance with the rules of this court. Applicant has not sought to seek the indulgence of this court to amend the application but urged the court to deal with the writs of the application rather than deal with the issue of the defective form. In this regard applicant contends that no prejudice will be occasioned by the defective form since the matter is already before the court and respondent has filed opposing papers. Legal practitioners who deliberately ignore the provisions of the rules of this court only have themselves to blame, and their clients must realize that where no proper explanation for non-compliance is advanced, the sins of their chosen legal representatives will be visited upon them in appropriate circumstances.

Background Facts

On 7th of June 2021 the applicant appeared in this court in an appeal noted against the judgment of the Magistrate sitting at Kwekwe. The judgment was handed down on 10th March 2020. The matter could not proceed on 7th June 2021 and was removed from the roll with the applicant bearing the wasted costs. Applicant was directed to file an application for condonation and extension of time within which to note an appeal. It was pointed out to applicant's legal practitioner that the Notice of Appeal before the court was a nullity as the date of the judgment of the Magistrate's Court was wrongly recorded as the 5th of March 2020. It is common cause that no judgment had been delivered by the Magistrate on 5th March 2020. Before the abortive hearing on 7th June 2021, the respondents had altered the applicant's legal practitioner of the defective Notice of Appeal way back in June 2020, approximately a year before the set down date. In respondent's Heads of Argument filed in this court on 24th June 2020 the respondents stated in paragraph 2 of their Heads of Argument as follows:-

“The Notice of Appeal is fatally defective because it purports to appeal a non-existent judgment dated 5th March 2020. The Notice of Appeal is also dated before the judgment was delivered and is fatally defective for this reason.”

Applicant ignored this warning and failed to rectify the defect by seeking condonation to file a Notice of Appeal out of time. Applicant went on to have the matter set down. The Judges removed the matter from the roll to enable the applicant to remedy the defect. This now is the application filed by applicant seeking condonation for the extension of time within which to note the appeal.

SUBMISSIONS BY APPLICANT

In written submissions filed on behalf of the applicant, he concedes that the wrong form was used in filing this application. Applicant concedes that the application was supposed to be filed in Form 29 B (now Form 25) in the new Rules. Applicant has not sought this court's indulgence to rectify the defect. Applicant views this as a minor breach and argues that since the matter is already opposed the court must concentrate on the merits. Put differently, applicant contends that the matter of substance is more important than form.

Applicant submits that in his view the sole issue for determination in this matter is whether the applicant should be granted an opportunity to reinstate his appeal that was removed from the roll on the basis that the Notice of Appeal stated that the judgment appealed against was handed down on the 5th of March 2020 rather than the 10th of March. It seems to have been lost to the applicant that the reason the matter was removed from the roll was not a simple issue of dates, but rather that the Notice of Appeal was defective and deemed a nullity.

Applicant's explanation is that his legal practitioner believed that the judgment appealed against had been handed down on 5th of March 2020. Applicant's legal practitioner took the blame for the error and apologized. Applicant's legal practitioner apologized for the error but did not explain how the error had occurred. In fact up to this date no cogent explanation has been forthcoming from applicant's legal practitioner.

Applicant averred that he has good prospects of success on appeal and in particular attacks the factual findings of the trial Magistrate. Applicant essentially sought to re-argue his case in this application. Applicant did not address the fact that the purported Notice of Appeal itself raised factual matters in its grounds of appeal.

Applicant persisted with the application notwithstanding the apparent defects in the content of the purported Notice of Appeal. Applicant did not see it proper to seek condonation to amend the defects in the Notice of Appeal.

SUBMISSIONS BY THE RESPONDENTS

Respondents submit that the application for condonation and extension of time within which to file an appeal has no merit and must be dismissed with costs on the punitive scale. Respondents argue that the applicant failed to use the proper form for the chamber application for condonation. In that regard respondents contend that the application is defective for non-compliance with the rules and ought to be dismissed. Respondents aver that applicant has shown a predisposition to persistently breach the rules of this court. In any event, applicant took an inordinate time of 11 months to apply for condonation after the defect in the Notice of Appeal was brought to his attention. Respondents observe that no reasonable explanation for the delay in seeking condonation has been advanced. The purported reasons given by the applicant laying the blame on his legal practitioner are lame,

flimsy and unconvincing. Respondents contend that applicant cannot escape the lack of diligence exhibited by his legal practitioner. As regards the prospects of success, respondents argue that applicant enjoys no prospects of success on appeal in that the grounds of appeal in the purported Notice of Appeal fail to challenge the *ratio* of the judgment appealed against. Respondents aver that it is in the interests of finality of litigation for the application to be dismissed with costs on the higher scale.

ANALYSIS

Applicant has admitted that a wrong form was used in filing the application for condonation. The application is in violation of Order 32 Rule 241 (1) of the old rules which makes it obligatory for Form 29B to be used in such applications. In spite of the apology tendered by the applicant's legal practitioner, no explanation was advanced for use of the wrong form. The suggestion by applicant's counsel was that the matter must just be heard on the merits by virtue of applicant's mere say so. These courts have stated on numerous occasions that rules are made to be observed by litigants. Legal practitioners who wantonly disregard the mandatory provisions of the rules must not cry foul when their applications are dismissed. It must be reiterated that applications for condonation are premised on the discretion of the court to exercise indulgence. For the court to exercise such indulgence a proper case must be made to the court for the exercise of such discretion. These remarks were echoed by CHITAKUNYE J (as he then was) in *Wananga Enterprises (Pvt) Ltd v Mabumbo (Pvt) Ltd & Ors HH 114-09*. See; also *Forestry Commission v Moyo 1997 (2) ZLR 254 (S)*; *Minister of Higher & Tertiary Education v BMA Fasteners (Pvt) (Ltd) HB 42/14*

It is trite that the application for condonation involves the exercise of the court's indulgence. For that reason, the applicant must be candid with the court and advance clear and credible explanations for the failure to comply with this court. In *Friendship v Cargo Carriers Ltd and Anor SC 1-13*, ZIYAMBI JA stated as follows:-

“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 criteria have been laid down for consideration by a court/Judge to assist it in the exercise of its discretion. Among these are the extent of the delay and the reasonableness of the explanation for delay, the prospects of success on appeal, the interest of the court in the finality of judgments and the prejudice to the party who is unable to execute his judgment. This list is not exhaustive.”

The application before the court falls far short of the requirements stated above in every way imaginable. It is clear that applicant’s attitude and that of his legal practitioner is that the defects are trivial in nature. Applicant’s condescending attitude in suggesting that respondents should have ignored the defects in the Notice of Appeal and the attempt to take the high ground on the merits when the law is clear is puzzling. It is clear that applicant’s legal practitioner has not taken heed of the attitude of the courts in respect of such applications as laid down in *Matanhire v BP Shell Marketing Services (Pvt) Ltd* SC 113-04. In that matter the court stated as follows:-

“Mr Muskwe, who was Matanhire’s legal representative, believed that failure to state the date when the decision appealed against was given did not have an invalidation effect on a Notice of Appeal as would failure to state the other matters, such as grounds of appeal or the exact nature of the relief sought. He did not even bother to read the cases referred to in the respondent’s heads of argument on what should be done when a fatally defective Notice of Appeal has been delivered and filed. He asked the court to simply amend the Notice of Appeal by inserting the date when the decision of the Labour Court appealed against was given.”

In this matter *Mr Sibanda*, appearing for the applicant, took the view that the error in dates was a simple matter. In his view the sole issue for determination was ‘whether applicant should be granted an opportunity to re-instate his appeal that was removed from the roll on the basis that the date on the Notice of Appeal stated that judgment was handed down on the 5th of March 2020 instead of the 10th of March 2020.’ There was no attempt at all to explain how the 5th of March 2020 was inserted on the Notice of Appeal. There is no

explanation how the Notice of Appeal was dated 9th of March 2020, a date that is before the handing down of the judgment. The failure to explain the anomaly in the Notice of Appeal is fatal to this application. The matter however does not end there. The purported Notice of Appeal raises 2 grounds of appeal, namely;

- “1. *The court a quo erred at law in concluding that the statement, “I had given this house home ownership being number V 202 Amaveni Kwekwe to Tonderai Mukuka ID number 58 – 198964 – 58 with effect from today 08 – 03 – 99” meant anything other than an unequivocal donation to the applicant.*

2. *Consequently, the court a quo erred at law and in fact when it concluded that 1st respondent could sell a property that it had donated to the appellant some eighteen years before.”*

Mr Zingano, appearing for the respondents, pointed out that the applicant’s appeal does not carry prospects of success. This is borne out by the following considerations:

1. Applicant’s proposed grounds are incompetent to the extent that they do not challenge the *ratio* of the trial Magistrate’s determination.

2. The second ground of appeal does not relate to the judgment of the trial court. As a matter of fact the Magistrate did not make the conclusions set out in that ground of appeal and this fact is borne out by a perusal of the record.

DISPOSITION

In essence therefore, the proposed grounds of appeal leave the gravamen of the court *a quo*’s decision untouched. This court sitting as an appeal could not interfere with the factual findings of the lower court where there are no allegations of irrationality. I have no doubt that the purported Notice of Appeal was hastily crafted without regard to the contents of the judgment appealed against. For this reason, there are no prospects of success on appeal. The applicant has failed to give a satisfactory explanation for the defect in the Notice of Appeal. The application itself is defective. The respondents have been unnecessarily put out of pocket. They are entitled to recovery of their legal costs on the higher scale.

For the foregoing reasons, the following order is made:

1. The application be and is hereby dismissed.
2. The applicant shall bear costs of suit on the legal practitioner and client scale.

Mhaka Attorneys c/o Majoko and Majoko, applicant's legal practitioners
Wilmot and Bennett c/o Dube Mguni & Dube, respondents' legal practitioners