

**ELIZABETH MOYO**  
**(In her capacity as the Executor Dative**  
**of the Estate of the Late Fredi Banda)**

**Versus**

**BUSISANI NCUBE**  
**(In his capacity as the Executor Dative**  
**in the Estate of the Late Austin Banda)**

IN THE HIGH COURT OF ZIMBABWE  
TAKUVA J  
BULAWAYO 25 JUNE 2020 & 21 JANUARY 2021

**Opposed Court Application**

Applicant in person  
*M. Moyo* for the respondent

**TAKUVA J:** This is an application for condonation of late filing of an application for rescission of the default judgment against the applicant. The default judgment was granted on 24 February 2016 under cover of case number 2906/15.

**Background facts**

This matter is all about the affairs of the Banda family. The late Austin Banda (Austin) whose deceased estate's executor is the respondent was the son of the late Fredi Banda (Fredi) whose deceased's estate's executor is the applicant. Between 1983 and 1987 Austin, his wife Rebecca and their children lived in the family home being house number 4734 Nkulumane, Bulawayo. In 1987 Austin and his family moved out and rented their own accommodation. Later, in 1995, the late Fredi who was the late Austin's father experienced financial problems as he was out of employment and had no pension. Fredi failed to pay for municipal rates, water and could not afford the instalment for the purchase price of house number 4734 Nkulumane to the Municipality of Bulawayo. The City of Bulawayo threatened to repossess the property and Fredi then asked Austin to rescue the property. He promised to donate the house to Austin. Subsequently Fredi donated the house to Austin in writing. From that time in 1995 till now Austin's family has resided and paid all the outstanding moneys due to Bulawayo City Council and all the outstandings in the property.

When it came to the winding up of the late Fredi's estate by applicant she continually resisted transferring the house to the late Austin's estate until Austin's wife's legal practitioners issued summons under HC 2966/15 to compel her to do so. Respondent obtained a default judgment against applicant on 24 February 2016. The order authorized the transfer of the property into the estate late Austin. The property was subsequently transferred by Bulawayo City Council into the late Austin's estate and is now registered in the late Austin's estate.

### **Applicant's case**

Applicant is Fredi's daughter and Austin's sister. Fredi owned the house in dispute, which house was regarded as a family house to his 5 children. At the time of Fredi's death in July 1999, Austin was resident at the house until his death in 2004. His family remained there. The respondent is claiming the immovable property on the grounds that the same was donated to Austin by Fredi. Austin never communicated that fact to his siblings during his life time. Further, he did not attempt to change ownership of his property for a period of four years.

On 17 December 2015 respondent issued summons against the applicant which summons were served on her by "affixing to the outer principal gate after unsuccessful diligent search" on 29 December 2015 by the Sheriff. According to applicant no diligent search was carried out in that respondent should have supplied the Sheriff with her phone numbers. Applicant claimed that she was not at her residence on the day the summons were served. She alleged that she was at her rural home in Glendariff Village 4 Umguza, ploughing.

Applicant returned on 25 January 2016 and found the summons and entered appearance to defend on the same day and served the respondent's lawyers on the same day. It was contended that applicant was unaware that respondent had applied for default judgment against her and judgment in default was entered on 24 February 2016. Applicant claimed to have seen the judgment on 24 June 2016 "affixed to her gate" again.

It was further submitted that applicant has "great prospects of success" in that there is nothing to show that the immovable property being stand 4734 Nkulumane was donated to Austin. Applicant also submitted that Austin's failure to transfer ownership during his lifetime shows he knew he had no right to do so.

Finally, applicant contended that Austin handed over the "house papers to her and he never mentioned the donation to her or to any of his siblings. Applicant on these reasons prayed for an order in terms of the draft.

### **Respondent's case**

Respondent argued that applicant willfully neglected to abide by the rules of this court. Her explanation for the delay is improbable and false. The letter from the headman is not an affidavit. Therefore its weight is very low. According to the respondent the applicant's degree of non-compliance and the explanation thereof is not credible and tainted with dishonesty.

On the merits, respondent submitted that there are no prospects of success in the main matter as there is proof beyond any doubt that the property was donated and the donation was reduced to writing. It was further contended that applicant has failed to attach supporting affidavits from the rest of her siblings who she alleges have no knowledge of the donation. Finally, respondent argued that applicant's failure to cite the Municipality of Bulawayo and the Deputy Master of the High Court is fatal to her case. Respondent prayed for the dismissal of the application with applicant personally paying the costs on an attorney and client scale as her persistence with the matter in the circumstances is reckless.

To demonstrate this recklessness, respondent gave a brief narration of the history of the application as follows. Upon receipt of the application, the parties' legal practitioners agreed to put the matter on abeyance pending negotiations aimed at settling the matter out of court.

This was confirmed by the applicant's legal practitioners on 14 July 2016- see annexures "A" and "B". Following that agreement, the parties together with their lawyers had a meeting in which the document respondent relied upon for the donation was displayed. Applicant and her legal practitioner requested for more time to consult other relatives before they could decide whether or not the court proceedings would be withdrawn. See annexure C.

On the 9<sup>th</sup> September 2016, applicant personally approached respondent's legal practitioners indicating that she was no longer interested in negotiations. She wanted the matter to proceed to court. Respondent's legal practitioners wrote to applicant's legal practitioners who renounced agency. This version has not been denied by the applicant.

It is trite in our law that in an application for condonation the applicant has to address the following requirements:

- i. the degree of non-compliance with the rules;
- ii. the explanation thereof
- iii. prejudice to be suffered by the other party as a result of the delay
- iv. need to achieve closure of litigation expeditiously
- v. the importance of the case
- vi. the balance of convenience

See *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (SC) and *Chimunda v Zimuto & Anor* SC 361/05

### **Application of the law to the facts**

#### **1. Degree of non-compliance with the rules and the explanation thereof**

The applicant is not being candid in relation to her non-compliance and the explanation thereof. Applicant has attached a letter from someone claiming to be a village head and stating that the applicant was at all times at her homestead between early December 2015 and late January 2016. However, this letter is not a sworn affidavit attested to by the writer, neither does the writer state how he knows that the applicant was for the entire period of two months at the rural home, day in day out. Accordingly the letter does not hold any probative value as there is no way of proving its contents.

Further, applicant defeats her own explanation for the default in that she states in her application that she came back to her house in Bulawayo on 25 January 2016 but does not explain how the summons which were served by affixing on the letter box and not outside, survived the vagaries of the weather, namely the rainy season from early December 2015 till late January 2016. A period of almost four weeks. Also, it is in her own appearance to defend to the summons matter that applicant states that she was served with summons on 29 December 2015. Surprisingly, applicant does not state how she came to know that summons had been served on the 29<sup>th</sup> December 2015 while she claims she was during the same period away in the rural areas.

Quite clearly, applicant is not being honest with the court. Depending on the circumstances, a court may make adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants. The reason is simply that the court may not have the capacity to pick and choose the truth from lies. See *Contra (Pvt) Ltd v Pralene Moya and*

*Deputy Sheriff Harare* HH-157-12. *In casu* the applicant's explanation is tainted with dishonest. Also, applicant read and understood the summons before entering appearance to defend out of time.

Instead of regularising her affairs and seeking an upliftment of the bar that was operational against her, applicant chose to sit on her laurels. She acted recklessly in this regard.

MOYO J sounded a warning for such litigants in *Jabulani Ncube v Innocent Nyathi* (2015) ZWB HC 60 in the following terms:

“A litigant .... Is not entitled to handover a matter to his attorneys and then wash his hands of it. If as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, she cannot sit passively, without so much as directing any reminder or enquiry to his attorney ...”

In the present matter, applicant knowingly entered appearance to defend out of time in January 2016 and never followed up on the file until June 2016 when she was served with a court order in the summons matter. It is beyond doubt that applicant was not diligent in the conduct of her affairs. In *Paul Gary Friendship v Cargo Carriers Ltd and Across Enterprises (Pvt) Ltd* ZIYAMBI J (as she then was) whilst referring to the case of *Viking Woodwork supra* stated;

“Flagrant breaches of the Rules especially where there is no acceptable explanation thereof the indulgence of condonation may be refused whatever the merits of the appeal are. This applies even where the blame lies solely with the attorney.”

In my view, the degree of non compliance with the rules is high and the explanation for it is unsatisfactory.

### **Prejudice to be suffered by the other party as a result of the delay and the need to achieve closure of litigation expeditiously**

That there is finality to litigation is a principle of our law. *In casu*, the applicant has made bald averments that there was no donation made to the late Austin without attaching any supporting documentation. Applicant has failed to attach even a single supporting affidavit from one of her siblings attesting to and supporting the facts in her founding affidavit. It has not been denied by the applicant that both parties attended a hearing together with their lawyers where applicant sought time to “consult” her family members as to the existence and veracity of the donation. Therefore, applicant's failure to incorporate her siblings' views is surprising. It leaves me with only one reasonable inference, namely that they do not support her claim.

Also applicant makes no mention of whether she and her siblings have ever contributed to the outgoings to the disputed property. Applicant has also failed to file an answering affidavit controverting the respondent's opposition to applicant's application. In our law all the averments made in the opposing affidavit that have not been subsequently controverted in the answering affidavit must be taken to be true.

*In casu*, the applicant has not filed an answering affidavit to controvert the respondent's case as it stands in the opposing papers. I accordingly accept it as it stands. Additionally, the property has already been transferred by the City of Bulawayo into the Estate Late Austin and

it would thus be an onerous task to endeavour to reversal the processes that have been completed thus far, when it is clear that applicant's claim arises from greed and that save for bald averments, applicant does not have a *bona fide* defence to the summons in the main matter.

Accordingly, the importance of the case and balance of convenience favours that condonation be denied in this matter as ZIYAMBI J stated in the *Friendship* case (*supra*)

“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 or judge that there are compelling circumstances which would justify a finding in its favour. To that end it is imperative that an applicant for condonation be candid and honest with the courts.”

In my view, there is another reason why the application must be dismissed, it is the failure to serve the Deputy Master with this application.

Rule 248 of this court's rules requires that the Master must be served with all applications involving deceased estates. The rule is peremptory in nature in that it uses the word “shall”. Failure to cite and serve the Master of the High Court by the applicant in this matter renders the application fatally defective as the Master is an interested party in all the deceased estates.

In light of the above, condonation in the current case must be refused. The explanation by the applicant is not only inadequate but is fraught with dishonesty and there is thus no explanation for the delay by the applicant in both entering appearance to defend in the main matter and also in bringing the condonation application. The applicant has failed to satisfy any of the requirements for condonation.

In the circumstances, it is ordered that:

1. The application for condonation be and is hereby dismissed.
2. The applicant pays costs of suit.

*Masiye-Moyo & Associates*, respondent's legal practitioners