

THOMAS MOYO

Versus

CARRY ON SIBANDA

AND

ELLEN SIBANDA

AND

MR T MUCHEMWA N.O

(Additional Assistant Master of the High Court)

AND

MS M MUTSHINA N.O

(Additional Assistant Master)

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 22 FEBRUARY 2019 AND 13 FEBRUARY 2020

Opposed Application

Ms A Musvipwa, for the applicant

K Ngwenya, for the respondent

TAKUVA J: This is an application for condonation of late filing of an application for review. The salient background is that the 1st respondent is the eldest son of the late Josiah Makore and Ellen Sibanda (the 2nd respondent herein). The 2nd respondent was customarily married to the late Josiah Makore who passed on on 15 November 2000. On 11 October 2015 the 2nd respondent registered the estate of the late Josiah Makore with the Additional Assistant Master of the High Court under DRBY 648/15. The 1st respondent was subsequently appointed the Executor Dative of the estate of the late Josiah Makore on the 13th of October 2015 and proceeded to execute his duties as an Executor Dative up to the winding up of the estate.

The 1st and Final Liquidation and Distribution Account was confirmed on the 15th of April 2016. After that, stand number 238/2 also known as stand 00238002 Magwegwe was transferred to the 2nd respondent in pursuance of the First and Final Liquidation and Distribution Account as more fully appears in the memorandum of agreement made and entered into by and between the Municipality of Bulawayo and the 2nd respondent. The 2nd respondent subsequently sold the house to Oma Ndarowa. A memorandum of agreement of sale was signed between the 2nd respondent and Oma Ndarowa and the house has since been transferred to Oma Ndarowa and Zandile Tshabalala in pursuance of the agreement between the parties

Applicant has approached this Court seeking leave to file his application for review out of the time frames permitted by the Rules of this Court. The 1st and 2nd respondents are opposed to the relief being sought on the basis that the applicant has failed to place before this Court adequate and sufficient reasons warranting or justifying this Court to exercise its discretion and grant the application for condonation. The issue therefore becomes whether the applicant has good cause which justifies this Court granting his application for condonation of late filing of an application for review.

LEGAL PRINCIPLES GOVERNING AN APPLICATION FOR CONDONATION

The law was stated by the Supreme Court in the following cases;

- (a) *Kodzwa v Secretary For Health And Another* 1999 (1) ZLR 313 (SC)
- (b) *Viking Woodwork (Pvt) Ltd v Blue Belss Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (SC) and
- (c) *Chimunda v Zimuto And Another* SC 361/05.

In Kodzwa's case the Court stated that;

“The factors which the Court should consider in determining an application for condonation are clearly set out in *Herbstein and VanWinsen's Civil Practice of The High Courts and The Supreme Court Of Appeal Of South Africa 4th Edition* by Van Winsen, Cilliers and Loots at page 897-898 as follows;

“Condonation of the non observance of the rules is by no means a mere formality. It is for the applicant to satisfy the Court that there is sufficient cause to excuse him from compliance” The Court’s power to grant relief should not be exercised arbitrarily and upon the mere asking but with proper judicial discretion and upon sufficient and satisfactory grounds being shown by the applicant. In the determination whether sufficient cause has been shown, the basic principle is that the Court has a discretion to be exercised judicially upon a consideration of all the facts and in essence it is a matter of fairness to both sides in which the Court endeavors to reach a conclusion that will be in the best interests of justice.

The factors usually weighed by the Court in considering applications for condonation include the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, the respondent’s interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice.” (my emphasis)

In the Viking Woodwork case, the Court emphasized that if the litigant does not seek condonation as soon as possible he should give an explanation for the delay for seeking condonation. Put differently the applicant will have to surmount two hurdles, namely, to proffer an acceptable explanation for their delay in making application for condonation and to satisfy all the ordinary and general requirements for an application for condonation as stated in Kodzwa’s case *supra*.

In my view it is well established that the Court has a discretion to grant condonation when the principles of justice and fair play demand it, when the reasons for non-compliance with the rules have been explained by the applicant to the satisfaction of the Court. Further, where a litigant does not seek condonation as soon as possible, he should give an acceptable explanation for the delay in seeking condonation.

APPLICATION OF THE LAW TO THE FACTS

1. DEGREE OF NON COMPLIANCE

In terms of Order 33 Rule 239 of the Rules of the High Court of Zimbabwe 1971,

“Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceedings in which the irregularity or illegality complained of is alleged to have occurred.” (my emphasis).

In casu, it is evident that applicant wants to be granted leave to review proceedings that were terminated on the 15th of April 2016. The applicant filed this application on the 18th of May 2017. In essence the applicant has filed this application thirteen (13) months after the termination of the proceedings. The rules of this Court require an application for review to be filed within 8 weeks after the termination of the proceedings. This is a period of 2 months. Accordingly applicant has delayed to file this application by a period of 11 months. In *Chidziva And Others v Zisco Steel Co., Ltd* 1997 (2) 368 (S) a delay of five (5) months was held to be inordinate and the application for condonation was dismissed. In my view, a delay of eleven (11) months is indeed inordinate.

2. **EXPLANATION FOR THE DELAY IN SEEKING CONDONATION**

The applicant's explanation for the delay which he labels a "good explanation" appears on paragraph 14 of his founding affidavit wherein he states;

"I only came to know about the respondent's involvement in the administration of the late Josiah Makore's estate when one Sheillah Ndarowa served me with a letter demanding my eviction from house number 238/2 Old Magwegwe on the 7th of April 2017."

This explanation is unsatisfactory in my view. Applicant knew that the late Josiah Makore had passed away as far back as 2000. Further, he knew that the immovable property was registered in the name of the late Josiah Makore. This is the property he claims to have been bequeathed to him. Applicant knew that he was in possession of a Will and he further knew that the late Josiah Makore had a wife and children who would register and administer the estate. Applicant was the late Josiah Makore's son inlaw. Surely applicant as part of the late's family cannot profess ignorance on the 1st and 2nd respondents' involvement in the administration of the estate of the late Josiah Makore. Also, the First and Final Liquidation and Distribution Account in the estate of the late Josiah Makore were advertised in the Chronicle newspaper and Government Gazette. In the circumstances, applicant ought to have known about the 1st and 2nd respondents' involvement in the administration of the estate of the late Josiah Makore.

What I find *in casu*, is that the applicant has been too cavalier in his approach. The reason and explanation for non-compliance given by the applicant is unsatisfactory. If applicant really knew that he was in possession of a Will related to the administration of the estate of the late Josiah Makore he should have either registered the estate himself or inquired from the respondents on the registration of the estate much sooner. I find it unbelievable that applicant held on to the Will for seventeen (17) years with no action and it took him thirteen (13) months to know that the estate had been wound up. Quite clearly, there has been a flagrant breach of the rules *in casu*.

PROSPECTS OF SUCCESS

Applicant argued that he has good prospects of success on the merits in that the late Josiah Makore left a valid Will wherein he bequeathed stand number 238/2 Old Magwegwe Bulawayo to him. He argued further that the 3rd and 4th respondent had no jurisdiction to administer a testate estate as this would violate the provisions of section 52 (1) of the Administration of Estates Act (Chapter 6:01). This argument has no merit in my view because it is common cause that none of the respondents had prior knowledge of the existence of the Will which was never placed before the 3rd and 4th respondents. That Will was also never lodged with the office of the Master of the High Court. Without such knowledge, it cannot be said that the 3rd and for 4th respondents had no jurisdiction to preside over the estate of the late Josiah Makore. I take the view that the application for review is evidently without foundation.

The applicant clearly is the author of his predicament in that since the year 2000, applicant knew that Josiah Makore had passed on, he also knew that an estate will be registered and administered, he held his peace, he was in possession of the alleged Will, still he held his peace, now that the estate has been registered, administered and wound up, he surfaces claiming that the deceased left a Will wherein he is the sole beneficiary, he should in my view forever hold peace. I agree with *Mr K Ngwenya* (for the 1st and 2nd respondents)'s submission that "Applicant must carry his cross, and should not be heard to impute any blame to any of the respondents as all respondents acted in terms of the provisions of the law."

THE IMPORTANCE OF THE CASE

The applicant alleged that the matter is of “considerable importance as he seeks to rectify an injustice perpetrated on him when he was wrongfully deprived of his inheritance as a result of the 3rd and 4th respondents administering an estate which they had no jurisdiction to administer.” I disagree because if indeed the applicant was interested in this matter and was in possession of the alleged Will as far back as the year 2000, he would have lodged the Will with the Master of the High Court and proceeded to register the estate as required by the law and would also have canvassed all the requirements for an application of this nature. The inescapable conclusion is that the applicant does not consider this matter to be of such importance as requiring condonation to be granted.

THE CONVENIENCE OF THE COURT AND THE NEED TO AVOID UNNECESSARY DELAY IN THE ADMINISTRATION OF JUSTICE

It is apparent from the facts of this matter that the inconvenience that would be occasioned on the 1st and 2nd respondents if condonation was to be granted is enormous. The estate has already been wound up and the property has been sold and transferred to a 3rd party. In the circumstances, granting condonation would open floodgates for more litigation which will burden and inconvenience the administration of justice. There surely must be finality in litigation. See *Deweras Farm v ZimBank* 1997 (2) ZLR 47.

Finally, I take the view that this application is devoid of merit. Not only has applicant inordinately delayed in filing this application, but has also dismally failed to offer a reasonable and satisfactory explanation for his non-compliance. No good cause has been shown to justify the granting of condonation.

Accordingly, the application for condonation of late filing an application for review is hereby dismissed with costs.

Sengweni Legal Practice, applicant’s legal practitioners
Messrs T.J Mabhikwa And Partners, 1st & 2nd respondents’ legal practitioners