

ISMAIL MOOSA LUNAT

And

CONVERGING INVESTMENTS (PVT) LTD

And

MOHAMED IQBAL LUNAT

Versus

TOPPERS UNIFORMS (PVT) LTD

And

MOHAMED ZAKARIYA PATEL

And

THE REGISTRAR OF DEEDS N.O. BYO

IN THE HIGH COURT OF ZIMBABWE

MOYO J

BULAWAYO 29 OCTOBER 2020 & 18 MARCH 2021

Application for upliftment of bar

Advocate P. Dube for 1st applicant

E. R. Samukange for 1st & 2nd respondents

MOYO J: This is a chamber application for the upliftment of a bar. The applicant avers that this is an application for the upliftment of a bar effected against him in case number HC 783/20 on the 9th of June 2020 following his failure to file a notice of opposition and opposing affidavits by the end of day on 9th June 2020. The opposing papers related to a chamber application for the dismissal for want of prosecution of HC 371/20 on the basis that the answering affidavit and the heads of argument therein had not been filed timeously. The 9th of June 2020 was the last day on which applicant had to file his opposing papers to the chamber application filed for the dismissal of his other chamber application for want of prosecution. He further avers that some engagements were made by the parties over the same issue.

He avers that when he tried to attend at the offices of his legal practitioners to sign the affidavits, he was held up at a police check point that had been set up to screen travelers due to the Covid 19 pandemic restrictions. He had to contact his lawyers but it was in vain. He only got hold of his lawyers a lot later and that is when his lawyer came to pick him up at the police check point at 16:00 hours. They rushed to collect the papers. The clerk however, later took

the papers to the High Court with applicant's unsigned affidavit. The papers were only stamped by the registry clerk but he/she refused to accept them due to applicant's unsigned affidavit.

The application is opposed by the respondents who primarily oppose the application on the basis of the arguments on the application they made for the dismissal for want of prosecution of the chamber application that was filed by applicant for failure to file their plea on time in the main matter. Respondents also alleges fraud in respect to the filing of the papers whose late filing is the subject matter of the application for dismissal for want of prosecution of applicant's application for the upliftment of a bar which is operational in the main dispute.

Respondents also oppose the application on the basis that applicant has not been candid with the court on matters relating to the application for dismissal for want of prosecution of his application for the upliftment of the bar. Further, that applicant is manufacturing the facts because he says Mr Bekithemba Nyathi took unsigned affidavits to the High Court on 9 June 2020 where else in his founding affidavit he stated that they had been signed on 8 June 2020 at paragraph 2.9 to 3. I have however, not seen such a fact from paragraphs 2.9 and 3 of the founding affidavit as therein, per the papers filed of record, applicant avers that his lawyers had said if by 8 June 2020 the respondents had not withdrawn their application for dismissal he would have to sign opposing affidavits on the 9th June 2020. He thus says he then tried to do that on 9 June 2020 resulting in the delay occasioned by the police.

The respondents bring in a lot of issues surrounding the other applications, but I hold the view that only matters relevant to this determination should be canvassed.

I then turn to look at the requirements for such an application. Such requirements were pronounced in the case of *Smith N.O. vs Burmmer N. O. & Anor* 1954 (3) SA 352 at page 358:-

- (a) A reasonable explanation for the applicant's delay must be given.
- (b) The application must be *bona fide* and not made with the intention to delay the other party's claim.
- (c) The applicant must not be guilty of a reckless or intentional disregard of the rules.
- (d) The applicant's case should not be obviously without foundation.
- (e) The other party should not be prejudiced to an extent that cannot be rectified by a suitable order for costs.

Whilst the applicant may clearly have issues with the delays in filing his plea in the main matter and whilst there is a dispute with regard to the filing of the answering affidavit and the heads of argument in his pending application for upliftment of bar, (leading to an application for dismissal of that application for the upliftment of the bar, for want of prosecution), I do not hold the view that the test to be used on this application, that is, whether or not it should be granted, should be the test about his conduct or delays in all the other matters, as such matters are not before me and applicant may still have a reasonable explanation for the delay in each other. I thus do not subscribe to the view presented by respondents' counsel that that should be the barometer in this case. I also do not hold the view that applicant should have gone into detail about the other matters pending before this court as respondent's counsel suggests, but I believe it would be sufficient to give a reasonable explanation for the delay in this particular case.

To prejudge applicant's conduct in the other cases that have not yet been heard and use such judgment on this case will be a miscarriage of justice in my view.

I believe the principles to be considered in such an application should be the ones applicable to the determination of the matter. Although it was not prudent for applicant to wait for the 9th of June being the last date for file his opposing papers, clearly on the 9th of June an effort was made to file the opposing papers, within the *dies induce*, albeit, on its last day.

A reasonable explanation has been proffered for the failure to file signed papers such being the delays caused by the police who were enforcing Covid 19 regulations. I hold the view that such an explanation is indeed reasonable.

On the defence to the application for dismissal for want of prosecution of applicant's application for the upliftment of the bar in default of the plea, applicant avers that it was during the Covid 19 pandemic and that the delay was caused by the police road block. Respondent has not disproved that fact and I cannot dismiss it. I have not been given any reason to believe that applicant is being *mala fide* in filing this application, in fact applicant has presented a case to show that he ran around on 9th of June in a bid to file his opposing papers. I also have no reason to find that applicant's conduct in this particular matter amounted to a reckless or intended disregard for the rules since clearly there is a possibility that the enforcement of Covid 19 restrictions put him in the predicament he now finds himself in. I hold the view that if applicant has lacked diligence or committed fraud in the other 2 matters with no pronouncement in a judgment by a court determining those, I cannot make a finding as those matters are yet to be decided and are therefore not before me.

I do not hold the view that applicant's case is without foundation either because he has given an explanation for his failure to file the papers and he submits that the question of the time within which he should have filed his answering affidavit and heads of argument in the chamber application is arguable and therefore I cannot hold that there is no foundation to this case.

I also believe that respondent will not be prejudiced by a cause of action that allows the other party to file papers in a matter that they have an interest to oppose and undo the failure to comply with the rules. There also has been no inordinate delay.

I am persuaded by the decision of MAKARAU JP (as she then was) in the case of *Chimpondah & Anor v Muvami* 2007 (2) ZLR 326 at 328 wherein she stated thus:

"It is my further view that, when considering an application for condonation for the late observance of a rule of procedure before default judgment is given in the matter, the court should lean towards granting rather than refusing the application.

I am however not suggesting that, prior to judgment, condonation should be granted for the mere asking. The applicant still has to satisfy the court that there is good cause to excuse the negligence and grant the indulgence."

Whilst the application before me is one for upliftment of the bar, and not condonation, I believe the criteria and views taken by the court on matters relating to condonation is the same

on matters relating to upliftment of a bar because they both have to do with delays in complying with the rules of procedure.

Above all, I hold the view that where possible parties should be granted an indulgence that will open the door to them being able to file the necessary papers that will enable the real dispute between the parties to be ventilated and determined. I do not believe that, except where there has been a grave disdain for the rules of court, the door should be slammed shut on a litigant who is out of time but has an interest in defending the real dispute between the parties. I refer in this regard to the case of *Songore vs Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 201 (S) wherein McNALLY JA (as he then was) in that case stated as follows:

“One is naturally reluctant to reach a decision which would result in the giving of judgment against a person without his being heard, when he protests that he has a valid defence.”

I thus find that where there has been no blatant disdain for the rules of this court justice between man and man demands that where possible and where an opportunity can be given to those seeking it, every litigant should be heard on the merits of a case so that the real dispute between the parties can be resolved.

It is for the reasons enunciated herein that I am inclined to exercise my discretion in applicant’s favour.

I accordingly grant the application with costs being in the cause.

Ncube Attorneys, applicant’s legal practitioners
Samukange Hungwe Attorneys, 1st and 2nd respondent’s legal practitioners