SANCTUARY INSURANCE COMPANY (PRIVATE) LIMITED
versus
MICROMART ZIMBABWE (PRIVATE) LIMITED
and
TENDAYI GURUWO
and
T. MUPITA N.O

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 25 October, 2021 & 12 January 2022

OPPOSED APPLICATION-CONDONATION

T.Sena, for Applicant
T.Guruwo for 1st and 2nd Respondents
No appearance for 3rd Respondent

MAXWELL J: This is an application for condonation of the late filing of an application for review of a taxed bill and non-compliance with Order 38 Rule 314 (1) of the High Court Rules, 1971.

At the hearing of the matter Mr Guruwo raised a point *in limine* which I dismissed. His submission was that on 16 June 2021 the matter was struck off the roll for non-citation of the taxing officer therefore the matter could only be re-set down pursuant to a court order to that effect. In his view such order was not obtained. In response *Mr Sena* referred to page 87 of the record where a court order authorized Applicant to apply for set down or enrolment of case number 6390/20 for hearing. The order shows that only *Mr Sena* was in attendance on the date of issue. In light of the order, the point *in limine* had no basis.

The Applicant instituted legal proceedings against the Respondents under case number HC 9923/14. The Respondents filed a special plea which was granted with costs on a party-to-party scale on 16 January, 2019. On 2 September 2020, the bill of costs was taxed. The third respondent

approved a grand total of eight thousand seven hundred and eight dollars ($8 708). On 3 September 2020, a writ of execution was issued which was acted upon on 15 September 2020 when a Ford Ranger registration number ACX 8177, a Toyota March registration number AEH 3363 and a Honda Fit registration number ADX 5791 were placed under judicial attachment.

On 16 of September 2020, Applicant's Legal Practitioners wrote to the Sheriff of the High Court of Zimbabwe advising him that the granting of costs sounding in hard currency was a mistake as the costs constituted liabilities incurred before 22 February 2019, and, that in view of Statutory Instrument 33 of 2019, costs could not have been allowed in United States dollars. They requested the stay of the removal of the attached motor vehicles against payment of ZW$8708, which was deposited into the sheriff's account. On 23 September 2020, the Sheriff's office advised Respondents' Legal Practitioners that the three vehicles were released from attachment. On 7 October 2021, Respondents' Legal Practitioners wrote to the Sheriff challenging the stay of execution and instructed that removal of the vehicles be done. On 30 October 2020, a number of household goods were placed under judicial attachment in the same matter. Applicant then filed the present application on 3 November 2020, seeking to be condoned for non-compliance with the rules of this Court.

Rule 314 (1) of this Court's rules of 1971 states; -

> "A party aggrieved by the decision of a taxing officer may apply to court within four weeks after the taxation to review such taxation. The application shall be by court application to the taxing officer and to the opposite party, if such opposite party was present at the taxation or if the court decides that such opposite party should be represented."

Applicant ought to have applied for review of the taxed bill on or before 12 October 2020 failing which condonation should be sought first. The principles governing an application for condonation are stated in a plethora of cases including *Director of Civil Aviation* v *Hall* 1990 (2) ZLR 354 (S). They are; -

a) that the delay involved was not inordinate, having regard to the circumstances of the case;
b) that there is a reasonable explanation for the delay;
c) that the prospects of the appeal succeeding should the application be granted are good; and
d) the possible prejudice to the other party should the application be granted.

In *Kodzwa* v *Secretary for Health & Anor* 1999 (1) ZLR 313 (S), it is stated that the principles applicable are the same, whether one is dealing with an application for condonation of the failure

to file an application for review timeously or to note an appeal timeously. These factors are not individually determinative, but must be weighed, one against the other. There may be times when a slight delay and a good explanation may help to compensate for weak prospects of success; and strong prospects of success may tend to compensate for a long delay. See: *Melane* v *Santam Insurance* Co Ltd 1962 (4) SA 531 (A). There would also be cases where the prospects of success, a reasonable and acceptable explanation for the delay and the importance of the issues raised may compensate for a long delay. See: *South African Poultry Association and Others* v *Minister of Trade and Industry and Others* 2018 (1) NR 1 (SC).

The principles are considered below in the light of Applicant's submissions.

The extent of the delay and the explanation thereof

Applicant submitted that the delay in filing the application for review is fifteen (15) working days or twenty-two (22) calendar days which is neither inordinate nor deliberate as there is a reasonable explanation for it. Applicant alleges that it was not aware of the taxation process as the taxed bill shows the name of Applicant's former lawyers, *Mungeni and Muzvondiwa* Legal Practitioners. It contended that no evidence was produced to show that its erstwhile Legal Practitioners were served with the notice of taxation. It argued that in the event that the former lawyers were served, they did not notify it and therefore Applicant cannot be faulted for not attending a taxation process it was not aware of. Applicant further argued that it got to know of the taxed bill on 15 September 2020 after being served with the notice of attachment and seizure by the sheriff. Also that after paying the value of the writ in Zimbabwean dollars, and after the sheriff released the property Applicant thought that the matter had been settled but had to file this application after a second notice of attachment and seizure had been served on it, bringing the realization that the matter had not ended as it initially thought.

Mr Guruwo submitted that the delay is extremely inordinate. He disputed that the applicant's legal practitioners were not served with the notice of taxation and insisted that proof of service was available. He submitted that he did not know why his erstwhile legal practitioners had not filed the return of service. I allowed him to bring the return of service which he did. He submitted a notice of bill taxation stamped 31 August 2020. The notice was received at *Mungeni & Muzvondiwa* legal practitioners on same day at 12:26 hours. Applicant's

counsel sought to have the proof excluded as it was not submitted through an affidavit. That attitude ignored the fact that the court had asked Mr Guruwo to submit the proof. Clearly applicant's counsel was desperate to exclude the proof that established that applicant was not being candid with the Court.

In the affidavit of Amos Kusikwenyu, paragraph 8 reads; -

> "Whilst the bill of taxation cited Mungei and Muzvondiwa Legal Practitioners, the applicant's erstwhile legal practitioners, I am not sure if they were served with the notice of taxation and consequently if they attended the taxation process. Efforts to reach them did not achieve any results. However, I aver that Mungeni and Muzvondiwa Legal Practitioners had ceased to be applicant's legal representatives following the conclusion of Case No. HC 9923/14"

The efforts made to ascertain the position from *Mungeni and Muzvondiwa* Legal Practitioners were not stated. There is nothing to demonstrate that the applicant sought an explanation for the default from his former legal practitioners. In *Paul Gary Friendship* v *Cargo Carriers Limited & Anor* SC 1/13 it is stated that where the legal practitioners are blamed for the default, it is necessary for the litigant to avail proof, preferably in writing, that it has demanded an explanation from the legal practitioners concerned.

However the default before the taxing officer is not the issue before the Court, but whether or not there is a reasonable explanation for the delay in seeking review. Applicant has outlined what happened from the time the notice of attachment and seizure was served on it. The correspondence between applicant and the Sheriff's Office is on record. Applicant stated that at one point it was of the view that the issue had been settled. What has not been explained satisfactorily is the period between the date of taxation and the service of the notice of attachment and seizure. It is common cause that the bill was taxed in Applicant's absence. It has alleged that it was not aware of the taxed bill. No evidence to the contrary has been availed. I find that a reasonable explanation for the delay in seeking review has been proffered.

The prospects of success

In an application for condonation such as this, the applicant must demonstrate that there are prospects of success. Applicant avers that the taxed bill is on a legal practitioner and client scale when the court order granted costs on a party-to-party scale. Further that the bill is sounding in United States dollars contrary to the law. Applicant submitted that the taxing officer erred in passing the bill and that in the light of the case of *Zizhou* v *The Taxing Officer & Anor* SC 7/20

the bill should be set aside. Mr Guruwo disputed that the bill was contrary to the law. He submitted that the Taxing Officer exercised his discretion and crossed out what he considered was not part of costs on party-to-party scale. On the denomination in United States dollars, Mr Guruwo submitted that the obligation only arose after the application for rescission of judgment was dismissed in 2020 therefore Statutory Instrument 33 of 2019 is not applicable. Clearly there is a dispute as to which law was applicable at the time of taxation and on that basis applicant has an arguable case.

Other Factors

Applicant submitted that Respondents will suffer no prejudice at all if the application for review is heard. Applicant gives two reasons for this submission. The first is that respondent waited for one year nine months before having the bill taxed. Secondly the bill is sounding in hard currency therefore their value is preserved. Mr Guruwo submitted that the first and second respondents will suffer great prejudice if the taxed costs are not recovered. They will not be able to recover their property if the taxed costs are not paid. I am persuaded that the interests of justice in this case favour the granting of condonation. If the bill had been taxed in January 2019 soon after the order of costs was granted, the applicable law would not have been an issue. I therefore find that even though first and second respondents will suffer prejudice, they contributed to their predicament. It is necessary that the merits of the matter be dealt with so that there is finality.

Costs

Even though the draft order sought costs on a legal practitioner and client scale, no justification was advanced in either oral submissions or heads of argument. The merits of the case demand that each party bears its own costs.

Disposition

The application succeeds. The following order is appropriate.

1. Condonation of non-compliance with Order 38 R 314 of the High Court Rules 1971 be and is hereby granted to the applicant.

2. The applicant be and is hereby granted leave to file an application for review of the decision of the taxing officer dated 2 September 2020 under case number HC 9923/14 within seven days from the date of this order.
3. Each party bears its own costs.

Chimuka-Mafunga Commercial Attorneys, Applicant's Legal Practitioners.