

GIDEON BALOYI
versus
THE COMMISSIONER GENERAL OF POLICE
and
MINISTER OF HOME AFFAIRS AND CULTURE

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 29 November 2021 & 26 May 2022

Opposed Application: Reinstatement of Dismissed Application

N Chikono, for the Applicant
R B Madiro, for the Respondent

KATIYO J: The applicant approached this court seeking the following order.

IT IS ORDERED THAT:

1. The applicant's application case number HC 1587/20 which was dismissed on the 22nd June 2021 be and is hereby reinstated.
2. Costs to be in the cause.

Brief background

The Applicant's case was that on the date his application for reinstatement of his application was dismissed, he together with his legal practitioner of choice did not attend court. The reason for non-attendance was that his legal practitioner a Mr *Chikono* had misdiarised the court date and advised his client, now the Applicant that the case was to be heard on 28 June 2021 instead of 22 June 2021.

Applicant visited the court on 26 June 2021 to check if the matter was on the court roll for 28 June 2021. He could not locate his name which led him to approach court officials who advised that a default judgement had been granted on 22 June 2021 against him. He then approached his lawyer who was equally surprised. He checked the notice

of set down and was clearly written that the court date is 22 June 2021. It was then that his lawyer realized had misdiarised and advised Applicant of a wrong date.

Applicant also addressed on his prospects of success in the main application. He even attached the founding affidavit of application for condonation for the matter that was dismissed. His lawyer then deposed to supporting affidavit apologizing for misdiarising and misinforming applicant, even in court put the blame on him. He apologized.

On the other hand the respondent opposed the application. His basis was that there was no way applicant's lawyer would misread 22 and 28. He at length argued and tried to convince the court of his lack of prospects of success in the main matter.

Analysis of Arguments

At the hearing both parties stood by their papers filed of record. They added nothing to their papers. The respondent stated that the non-appearance on its own shows that the applicant was acting *mala fide* and that even on merits the applicant had no prospects of success on the application for condonation itself.

In the case of *Susan Chipo Vera v Mitsubishi and Company Limited*, SC 32/04 at p 3 CHIEF JUSTICE CHIDYUSIKU (as he then was), despite acknowledging that the applicant who was applying for reinstatement of his appeal had poor prospects of success on the merits, leaned backwards and allowed reinstatement of the appeal. The learned Chief Justice put it this way:-

“While I agree with Mr Callow that the prospects of success on the merits are poor it really is for the appeal court to have a final say on the issue. My view on the prospects of success is, of necessity, prima facie. If the explanation for default were not plausible I probably would have come to a different conclusion. The applicant deserves her a day in court regardless of the merits of the case. This is particularly so taking into account that she is appealing against summary judgement, which, in effect deprives her chance to defend herself in the court *a quo*.”

Having made the above findings I want to emphasize that getting judgements on technicalities should not be the best way to have a dispute resolved. At times one's whole or life career is ruined by virtue of such technicalities which if one had been

afforded his or her day in court could have been avoided. Many time's parties want to snatch judgements on technicalities to avoid the pain and agony of going through a fully-fledged application or trial for obvious reasons. We all have to accept that this is what the profession calls for. This is not to say if a party shows his unwillingness to proceed or tries to unnecessarily delay the finalization of litigation should not reap the fruits of his action.

In this case it is not even the fault of the applicant but that of his legal practitioner who misdiarised the case. Surely in those circumstances the sins of the legal practitioner cannot be visited on the applicant. The two offered some explanation which is plausible. Whilst the conduct of the legal practitioner cannot be condemned it should be understood that human beings are prone to errors even such as this.

Conclusion

After perusing the papers and hearing both counsels I am of the view that the applicant deserves his day in court. I have already concluded in this case that the applicant has shown good cause warranting reinstatement of his main matter. It is therefore ordered as follows:-

1. The applicant's application case number HC 1587/20 which was dismissed on 22 June 2021 be and is hereby reinstated.
2. Costs shall be in the cause.

Moyo Chikono & Gumiro, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioner