

OLIVER MUTYAMBIZI
and
MIDROC HOLDINGS (PVT) LTD
versus
STANELY KASUKUWERE
and
BATSIRAYI MARTHA BAKARE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 25 & 28 October 2022

Opposed Application

A Chimhofu, for the applicants'
T Sengwayo, for the respondents'

TAGU J: This is an application for dismissal of matters HC 1230/19 and HC 3457/19 for want of prosecution being made in terms of r 236(3) (b) of the High Court Rules, 1971.

The brief background being that on 15 February 2019 the first and second respondents filed an application with this court under case number HC 1230/19 for rescission of the judgment of this court granted in matter number HC 10839/18. They also filed a chamber application under HC 3457/19 for leave to admit into evidence supporting affidavits earlier filed without the leave of the court. The applicants filed their Notices of Opposition in respect of both files. Since the 12th of June when first and second respondents filed their answering affidavit in HC 3457/19 they have failed to file their heads of argument and to set the matter down for hearing. Matter HC 3457/19 could not be set down due to the circumstances obtaining in matter 1230/19 hence the need to have it dismissed as well.

At the commencement of the hearing Mr T *Sengwayo* applied for the postponement *sine die* of the hearing of case HC 4469/20 to enable the filing of an application for leave to appeal and condonation for late noting of appeal against case HC 3984/21. What happened was that the

respondents had withdrawn cases HC 1230/19 and HC 3457/19 to which the present application pertains. Honourable MANZUNZU J found that the withdrawals were invalid for the reason that the present matter HC 4469/20 had already been set down. The court further held that HC 1230/19 and HC 3457/19 could not be withdrawn as the cases are interlinked. Dissatisfied by the court's decisions the respondents appealed against that ruling. On 15 September 2022 this matter HC 4469/20 was postponed *sine die* by MANZUNZU J. However, before the matter was heard, applicant set matter HC 4469/20 down before CHITAPI J. The respondents opposed the matter and CHITAPI J again removed the matter from the roll on account of MANZUNZU J's order.

Mr T *Sengwayo* said matter HC 3984/21 was heard and order made on 6 September 2022. On 8 September 2022 a letter was written to the Registrar requesting for reasons of judgment in order to file an appeal. The Honourable Judge only managed to write the judgment on 12 October 2022 and the respondents were telephoned on 17 October to come and uplift the judgment. The respondents uplifted the judgment on 19 October 2022. According to r 38 of the Supreme Court Rules, application for leave to appeal was supposed to be done in 30 days, but 30 days had elapsed hence the need for condonation. He said the Chamber Application was ready yesterday the 24th October 2022. He attended to the Supreme Court today for the filing of the same. He produced a copy of the Chamber Application.

It was Mr *Sengwayo*'s contention that where there is an ancillary matter pending, the main matter can wait for the disposal of the ancillary matter. For this contention he referred the court to the case of *GNG v Martin Mutero* SC 69/07. He further referred the court to the case of *Abramacos v Roman Gardens (Private) Limited & Ors* 1960 R&N 1 at p 2 where HATHORN J said:

“It cannot be doubted that if the Defendant had made an application for condonation in proper form that application would have been heard and disposed of before the hearing of the application for default judgment. Indeed, the result of the former application would have been decisive of the latter.

This being so, it seems to me that a defendant ought not to be deprived of the opportunity of having an application for condonation disposed of before default judgment is given against him where, as here there appears to be an adequate explanation why that application is not properly before the Court.”

Further down on page 3 the judge remarked –

“On more than one occasion I have had before me a case on which counsel has appeared for a barred defendant on the plaintiff's application for default judgment. In those cases in which the defendant's

counsel has asked for a postponement in order to enable a proper application for removal of the bar to be made and has given a satisfactory explanation why such an application was not then before the Court. I have treated the appearance as the first step in an application for removal of the bar, and granted the postponement.”

See also *Heywood Investments (Private) Limited t/a GDC Hauliers v Pharaoh Zakeyo* SC 32/13 for the need to resolve ancillary application first. Mr T *Sengwayo* prayed that the matter be postponed sine die pending final determination of HC 3984/21.

The application for postponement was opposed by the applicants. Counsel for the applicants submitted that there is no impediment to the hearing of this matter. He said the postponement by MANZUNZU J and CHITAPI J was the determination of HC 3984/21 and the matter was heard. He submitted that the application has no legal basis. He referred the court to the case of *Sheckem Barrister Ngazimbi v Murowa Diamonds (Pvt) Ltd* SC 13/13 where the following remarks were made:

“A wish to exercise the right to appeal remains in the mind of the person intending to appeal. As long as it is not communicated to the President of the Labour Court who made the decision or a judge of the Supreme Court upon refusal of leave by the later it cannot be granted or refused.”

In this case it was submitted that no application for leave has been filed. It is also out of time and requires condonation. He said respondents cannot be given postponement in anticipation of an application to be filed before the court. The court was further referred to HC 4469/20 an Order by CHAREWA J dated 19 March 2021 where the respondents were ordered to set down matters HC 1230/19 and HC 3457/19 within 14 days but have failed to do so.

What is now clear from the papers and submissions by the parties is that on 19 March 2021 case HC 4469/20 (the present application) was removed from the roll with an Order that respondents were to set down cases HC 1230/19 and HC 3457/19 within 14 days from the date of the Order, failure of which the applicant was ordered to reset down HC 4469/20. The respondents did not set down the matters for hearing but instead withdrew cases HC 1230/19 and HC 3457/19. The Honourable MANZUNZU J did not accept the withdrawal. His reasons for refusal being that case HC 4469/20 had been set down. In HC 3984/21 the respondents filed an application to withdraw cases HC 1230/ 19 and HC 3457/19. The respondents intend to appeal against the decision of MANZUNZU J. The matter HC 4469/20 having been reset down and placed before

CHITAPIJ suffered the same fate as it was postponed as per MANZUNZU J's order. This is the appeal to be filed by the respondents to the Supreme Court. All the paper work has been done and the court was served with a copy. It is therefore not true that there is no impediment to hearing of case HC 4469/20. I say so because HC 3984/21 is being appealed against, a case that has a bearing to case HC 4469/20 in that if the withdrawals were accepted or are to be accepted as being valid, then case 4469/20 falls away.

Applying the reasoning in *Abramacos* Case (*supra*), a defendant ought not to be deprived an opportunity of having an application for condonation and leave to appeal disposed of before the judgment is given against him. Where, as here, there appears to be an adequate explanation, while that application is not properly before the court they have proffered a reasonable explanation. Further, Case HC 3984/21 being an ancillary matter must be finalized first before the new matter is heard. True case HC 3984/21 was disposed of by BACHI-MUZAWAZI J on 12 October 2022, it remains a subject of appeal. In the result I grant an application for postponement.

IT IS ORDERED THAT:

1. The application for postponement is granted.
2. Case number HC 4469/21 be and is hereby postponed sine die pending final determination of HC 3984/21.
3. There is no order as to costs.

Trust Law Chambers, applicants' legal practitioners
Matsikidze and Mucheche, respondents' legal practitioners