CITY OF HARARE
versus
ALBERT MAROZVA
and
COMMISSIONER GENERAL OF POLICE
and
MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 18 January, 2022 and 09 February, 2022

Opposed Application

Mr. A. Moyo, for the applicant.
Mr. T. Bhatasara, for the 1st respondent.
No appearance for the 2nd and 3rd respondents.

DEME J: This is an application for condonation for late noting of appeal and extension of time within which to appeal. In particular, the order sought by the applicant is as follows:

> "1. Application for condonation and extension of time within which to appeal is hereby granted.
> 2. The applicant to note an appeal within ten days of this order being granted.
> 3. Costs of application be in the cause."

A brief summary of the facts is as follows. The present application follows the earlier appeal noted by the applicant which, on 3 June 2021, was struck from the roll for want of compliance with the rules.

On 20 June 2019, the first respondent issued Summons against the applicant, second and third respondents claiming damages for assault, unlawful arrest and illegal impounding of the motor vehicle in the sum of US$ 9 556. The first respondent's averred in the summons that Police Officers from the applicant and second respondent impounded his vehicle on 13 November 2018. The Police Officers also assaulted him according to the first respondent's averment in the summons. On the same day, the Police Officers arrested the first respondent but they later released him without a charge, according to the first respondent. The first respondent further averred that he only managed to have his vehicle released four days later, on 17 November, 2018 upon payment of storage fees.

Before the date of trial, the first respondent sought to amend his claim so that it could provide for the option of paying in local currency at the prevailing inter-bank rate. The application was opposed by the second respondent on the grounds that the rate was to be on 1 as to 1 basis in accordance with Statutory Instrument 33 of 2019. . The applicant was not present on the day of the application for amendment of summons. The Magistrates Court dismissed the first respondent's application and ruled that the first respondent's claim was to be converted according to the rate of 1 as to 1. Thus, after amendment, the first respondent's claim was now ZW$ 9 556.

Sometime in August 2020, The Magistrates Court ruled that the applicant was to pay the first respondent damages in the sum of US$ 8 656 payable in local currency. The breakdown for the damages in terms of the judgment is as follows:

(a) US$ 276 being damages for payment of vehicle storage fees.
(b) US$ 700 for damages to the first respondent's motor vehicle.
(c) US$180 for loss of income.
(d) US$ 5 500 for pain, suffering and nervous shock.
(e) US$ 2000 for contumelia.
(f) Interest per prescribed rate.
(g) Costs of suit on an ordinary scale.

On 18 September 2020, the applicant noted an appeal against the decision of the Magistrates Court. The appeal was noted under Civil Appeal Number 203-20. More particularly, the grounds for the appeal were as follows:

> "1. The court a *quo* grossly erred and misdirected itself in law when it granted without jurisdiction, the 1st Respondent's claim denominated in United States *Dollars payable* at the interbank rate yet:
> (a) the claims ought to have been converted to Zimbabwean Dollars at *a* rate *of one is* to one in terms of the law
> (b) the same court had ruled that the claims should be treated on a one is to one basis in line with the law when 2nd and 3rd Respondents successfully objected to amendment of the claim. Her Worship Dhliwayo therefore ended up reviewing
> (c) the decision of her Worship Zvenyika who had dismissed the motion for amendment of the claim before commencement of the trial, and by so doing, gave a judgment beyond what was prayed for.
> The court *a quo* erred grossly erred in fact and misdirected itself in law by granting excessive damages that were not proven and in circumstances where the
> 1st Respondent had admitted liability by paying an admission of guilt fine. The court therefore erred by awarding the following;
> (a) damages for vehicle storage in circumstances where the 1st Respondent's vehicle was lawfully impounded

(b) damages for repairs to the motor vehicle when there was no proof to support the claim by basing on the evidence of a quotation without any proof of payment in the form of a receipt
(c) damages for loss of income of USD180.00 in the absence of any proof and quantification/calculation of how the amount was arrived at
(d) damages for contumelia which were not proven by the 1st Respondent
(e) excessive damages for pain and suffering amounting to USD5500.00 which damages which were not proven and in the absence of a medical affidavit to match/justify the excessive award of same."

The applicant, upon being requested by the Registrar, filed heads of argument for appeal. On the date of hearing, 3 June 2021, the appeal was struck off the roll with costs as the grounds for appeal were deemed to be defective. According to the applicant, its legal practitioner verily believed that the grounds of appeal were valid. The present application was filed on 7 June 2021. The applicant verily believes that the delay was not wilful.

The draft notice of appeal filed by the first respondent is as follows:

"1. The court *a quo* grossly erred and misdirected itself in law when it granted judgment denominated in United States Dollars for obligations that arose on 13 November 2018.
2. The court *a quo* grossly erred and misdirected itself when it granted judgment amount outside its monetary jurisdiction.
3. The court *a quo* grossly erred in fact resulting in misdirection in law when it found the appellant liable for 1st Respondent's damages when 1st Respondent had paid a fine as admission of guilt.
4. The court *a quo* erred grossly erred in fact and misdirected itself in law by awarding excessive and irrational damages that were not proven at trial."

The application is opposed by the first respondent who raised two points *in* limine. Firstly, he averred that the deponent of the founding affidavit, Mr. Zinhema,

Had no authority to depose on behalf of the applicant. The purported authorisation from Mr. Phakamile Mabhena Moyo was invalid as he had no power to authorise the deponent, according to the first respondent. Secondly, the first respondent averred that the draft notice of appeal was defective as it was not signed by the applicant.

The first respondent further alleged that the present application lacks merits. He also averred that the present application was an attempt to correct the negligence of the applicant's legal practitioners. It is the first respondent's view that the applicant's explanation for the late noting of appeal is not reasonable. The first respondent further alleged that the applicant's legal practitioners did not diligently do their work. The first respondent further averred that the

Applicant should accept the errors of its legal practitioners. The first respondent also averred that the proposed grounds of appeal lack merits.

At the hearing of the present application, the first respondent abandoned its points *in limine*. Mr. Moyo, on behalf of the applicant, submitted that for purposes of the present application, the court must consider the extent of delay, reasonableness of the explanation and prospects of success. He further submitted that the factors have been addressed in the papers before the court. He further submitted that the first appeal was filed within time. The present application was filed two working days after the initial appeal had been struck from the roll. Mr. Moyo also submitted that he has offered reasonable explanation for the delay, the delay having been occasioned by the defective appeal which was struck off the roll. Thus, the applicant's legal practitioners were forced to file the present application.

In response, Mr. Bhatasara, on behalf of the first respondent, submitted that the applicant had delayed to file the present application by nine months. Thus, he further submitted that the delay of nine months is inordinate. With respect to the explanation for the delay, Mr. Bhatasara submitted that the explanation for the applicant is not reasonable. He highlighted that the applicant has pleaded ignorance of its legal practitioners which is unacceptable as a reasonable explanation. Mr. Bhatasara urged the court to frown upon the conduct of legal practitioners who display ignorance. He also implored the court to punish the applicant for the sins committed by its legal practitioners by dismissing the present application. He, however, also submitted that where there is tardiness, the applicant must demonstrate prospects of success in the main matter. Mr. Bhatasara further submitted that the proposed grounds of appeal as reflected on the draft notice of appeal lack merits. He moved the court to dismiss the application with costs on a legal practitioner and client scale.

It has been established in our jurisdiction that where there are time frames enshrined in the Rules, litigants must strictly observe such time frames. Failure to observe such time frames may make the process filed fatally defective if there is no application for condonation. Bere JA, in the case of *Sergeant Mhande v The Chairperson* of Police Service Commission and Others[1] emphasised the following:

> "It is the accepted position of the law that an applicant who has failed to comply with a given court order, or infringed the rules of the court must seek to be condoned or pardoned for non-compliance first before applying for reinstatement of their case."

[1] SC 63-18.

In the case *of Zimslate Quartize (Pvt) Ltd & Others v Central African Building Society*[2], the court commented as follows:

> "An applicant who has infringed the rules of the court before which he appears, must apply for condonation and in that application explain the reasons for the infraction. He must take the court into his confidence and give an honest account of his default in order to enable the court to arrive at a decision as to whether to grant the indulgence sought. An applicant who takes the attitude that indulgence, including that of condonation, are there for the asking does himself a disservice as he takes the risk of having his application dismissed."

Thus, the applicant, being alert to the fact that its appeal has been filed out of the time frame, it is seeking condonation through the present application. After this, the applicant must satisfy the requirements of the present application. It must demonstrate good and sufficient cause for the court to condone its failure to comply with the Rules. Reference is made to the case of *Bonnyview Estates (Pvt) Ltd vs Zimbabwe Platinum*

Mines (Pvt) Ltd & the Minister of Lands & Rural Resettlement[3], where the court held that:

> "Condonation is an indulgence granted when the court is satisfied that there is good and sufficient cause for condoning the non-compliance with the rules."

In discussing the requirements for the present application, the court, in the case of *Mzite v Damafalls Investment (Pvt) Ltd & Anor*[4], expressed the following remarks:

> "The requirements for an application of this nature to succeed are well known as outlined in the case of Kombayi v Berkout 1988 (1) ZLR 53 (S). These are:
> list of 3 items
> 1. The extent of the delay;
> 2. The reasonableness of the explanation for the delay; and
> 3. The prospects of success on appeal."

With respect to the delay, I am of the opinion that the applicant swiftly reacted after being alerted by the court that its grounds of appeal were defective. The applicant only took four days to file the present application. The first respondent submitted that the extent of delay should be considered from the day when the Magistrates Court handed down its judgment sought to be appealed against as the purported appeal filed was a nullity. I give the applicant benefit of doubt. I am of the view that the extent of delay was reasonable in the circumstances.

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[2] SC34-17.
[3] SC58-18.
[4] SC21-18.

The explanation by the applicant is that its legal practitioners made an error by filing defective grounds of appeal. There are certain instances where the court may condone errors of legal practitioners. The question is whether the conduct of the applicant's legal practitioners falls within the exempted category. In the case of *Saloojee and Another v Minister of Community Development*[5], the court made the following observations:

> "I should point out however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation for laxity. In fact, this Court has been lately burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this Court was due to negligence on the part of the attorney. The attorney after all is the agent whom the litigant has chosen for himself, and there is little reason why, in regard to condonation for failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship."

The applicant's legal practitioners verily believed, at all material time, that the grounds of appeal were reasonably arguable. The defective grounds of appeal were filed within time. They did not have any reason to doubt the validity of the grounds of the appeal. For that reason, I do condone their explanation.

The applicant submitted that its appeal enjoys prospects of success. After perusing its grounds of appeal, I am of the view that the second ground of appeal where the applicant is challenging monetary jurisdiction of the Magistrates Court lacks merits. At the time when Summons was issued, on 20 June 2019, Statutory Instrument 126 was in force. This instrument fixed the monetary jurisdiction of the Magistrates Court to be ZW$300 000. By this time, the sum claimed, after being converted to local currency was way below ZW$300 000. Thus, this ground of appeal is hopeless.

However, other grounds of appeal appear to be reasonably arguable, according to my view. Deserving special mentioning is that the 1st Respondent sought to amend his claim at Magistrates Court. This application was rejected. According to the ruling, the claim was supposed to be denominated in local currency following the ratio of 1 as to 1 introduced by Statutory Instrument 33 of 2019. However, the trial Magistrates Court went on to make a ruling

[5] 1965 (2) SA 135(A) at 141 C-E.

sounding in United States Dollars. That irregularity makes the applicant's appeal rationally arguable. In that light, the appeal is not hopeless.

The issue of damages sought to be challenged by the fourth ground of appeal also appears to be reasonably arguable. According to the applicant, no evidence was led to substantiate the damages for pain and suffering, for example. In the face of this ground, one cannot say that the appeal is hopeless.

It is also the applicant's case that the Magistrates Court erred by failing to consider that the first respondent admitted his guilt by paying a fine. Thus, according to the applicant, it was not liable to pay damages under such circumstances. This is captured in the third ground of appeal. On the other hand, the first respondent insisted that he paid the fine under duress. The two different positions held by parties make the Applicant's case arguable. In the case of *Essop v S*[6], the court noted the following:

> "What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

The purpose of the appeal is for a dissatisfied party to test the correctness of the judgment of the inferior court. See the case of *Old Mutual Life Assurance Company (Pvt) Ltd v Makgatho*[7]. Thus, the granting of the present application will enhance the Applicant's enjoyment of the right to a fair hearing established in terms of Section 69 of the Constitution. Resultantly, I consider that the grounds of appeal do have prospects of success. Thus, I am of the considered view that the Applicant is entitled to the relief sought.

With respect to costs, the first respondent has moved this court to award costs against the applicant on an attorney and client scale. I am of the view that, in the interest of justice, costs must be in the cause.

Consequently, it is ordered as follows:

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[6] (2014) ZASCA

114.

[7] HH 39-07.

(a) Application for condonation and extension of time within which to appeal be and is hereby granted.

(b) The Applicant be and is hereby ordered to note an appeal within ten days of this order being granted.

(c) Costs of the application shall be in the cause.

Gambe Law Group, Applicant's Legal Practitioners.
Mapanga Bhatasara A ttorneys, 1st respondent's Legal Practitioners