

**REPORTABLE:** (37)

**ISMAIL MOOSA LUNAT**  
**v**  
**MOHAMMED PATEL**

**HIGH COURT OF ZIMBABWE**  
**CHATUKUTA JA**  
**HARARE: 16 NOVEMBER 2021 & 7 APRIL 2022**

*P Dube*, for the applicant

*E Samukange*, for the respondent

### **CHAMBER APPLICATION**

**CHATUKUTA JA:** This is an opposed chamber application for condonation of non-compliance with the rules and extension of time in which to appeal in terms of rule 43(1) of the Supreme Court Rules, 2018 (the rules). The application was filed on 6 October 2021. The applicant intends to appeal against the whole judgment of the High Court handed down on 12 December 2019 under HB 196/19.

### **BACKGROUND FACTS**

The following facts are largely common cause. On 11 January 2019, the applicant signed an acknowledgment of debt in favour of the respondent in the sum of USD\$384 177. The

applicant undertook to pay the amount by 20 March 2019. He failed to pay the debt. The respondent issued summons against the applicant on the basis of the acknowledgement of debt. On 12 December 2019, summary judgment was entered in the respondent's favour for payment of the sum of US\$ 384 177.00, or its equivalent with interest at the prevailing interbank rate.

The applicant timeously noted an appeal against that judgment to this Court on 17 December 2019 under SCB 48/19. On 6 February 2020, the respondent was granted by the High Court leave to execute the summary judgment pending the appeal.

On 2 March 2020, the applicant was called upon by the Registrar of the High Court to pay costs for the preparation of the appeal record. The applicant, acting on advice from his legal practitioners, decided not to pay the costs. He instead took a decision to abandon the appeal and settle the judgment debt. He deposited an amount of ZW\$384 177.00 into the respondent's attorneys' trust account on 17 March 2020. The payment was at the parity rate of 1:1 notwithstanding the order by the court *a quo* that the rate to be applied was the prevailing interbank rate. On 7 July 2020, the Registrar of the Supreme Court, acting in terms of r 46 (5) of the Supreme Court Rules, 2018, wrote to the applicant's legal practitioners advising them that the appeal had been deemed to have lapsed.

On 24 March 2020 the applicant unsuccessfully sought an interim order for stay of execution of the judgment under HB 196/19 and, as final relief, a declaratur that he had acquitted his indebtedness by paying the amount of ZW\$384 177.00. The applicant noted an appeal under SC 117/20 against the dismissal of his application. The matter was struck off the roll on

19 July 2021 for the reason that the appeal was fatally defective. Undeterred, the applicant sought condonation of non-compliance with the rules and extension of time in which to appeal on 28 August 2021 under SCB35/21. The application was dismissed on 8 November 2021 in SC 142/21.

The respondent thereafter commenced civil imprisonment proceedings against the applicant. This prompted the applicant to file the present application on 6 October 2021.

### **ISSUE FOR DETERMINATION**

The issue for determination in my view is whether the applicant has satisfied the requirements for an application for condonation for the late noting of an appeal and extension of time in which to appeal.

### **SUBMISSIONS BY THE PARTIES**

#### **Applicant's Submissions**

Miss *Dube*, for the applicant, conceded that there has been an inordinate delay in seeking the condonation. She conceded that the applicant's legal practitioners took a deliberate decision to abandon the appeal. She further conceded that the explanation tendered by the applicant was evidently unreasonable in view of the deliberate abandonment of the appeal. She also conceded that the applicant ought to have proceeded in terms of r 48 of the Supreme Court Rules, 2018 which rule sets out the procedure which an appellant should follow if he/she/it chooses to abandon an appeal. She conceded that the applicant's conduct was indefensible.

Miss *Dube* submitted that in spite of the concessions regarding the applicant's infractions, this Court ought to grant the application for condonation nonetheless on the basis that the applicant has prospects of success on appeal. She submitted that the applicant intends to raise an unassailable point of law in his prospective appeal. The point had not been raised before the lower court and would be raised in the intended appeal as a new point of law. She further argued that the other prospective grounds of appeal in the draft notice of appeal raise arguable issues warranting the granting of the condonation.

She however conceded that punitive costs as prayed for by the respondent were warranted even if the applicant succeeds in this appeal.

### **Respondent's Submissions**

Riding on the concessions by Miss *Dube*, Mr *Samukange*, for the respondent, submitted that the applicant was not entitled to the relief sought. He submitted that the requirements for such an application must be considered cumulatively. He also submitted that the applicant would not be entitled to the indulgence of the court in light of the concessions made. Furthermore, that the applicant does not have prospects of success on appeal and that the application should be dismissed with costs on a punitive scale.

Mr *Samukange* however raised other issues which in my view are irrelevant to the determination of the application in view of the concessions by the applicant.

## THE LAW

The requirements for an application of this nature are well established. They are:

1. The extent of the delay;
2. The reasonableness of the explanation for the delay;
3. The prospects of success on appeal;
4. Respondent's interest in the finality of the judgment in his/her/its favour;
5. Convenience of the court; and
6. Avoidance of unnecessary delay in the administration of justice.

See *Kombayi v Berkhout* 1988 (1) ZLR 53 (S) 57G-58A; *Herbstein & Van Winsen*  
*The Civil Practice of the Supreme Court of South Africa* 4<sup>th</sup> ed at p 898.

The requirements were rehashed by ZIYAMBI JA in *Zimslate Quartzite (Pvt) Ltd & Ors v Central African Building Society* SC 34/17 where she held at p 7 that:

“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 indulgences, including that of condonation, are there for the asking does himself a disservice as he takes the risk of having his application dismissed.**”(own emphasis)

Therefore, in considering whether or not the Court should grant the applicant *in casu*, the indulgence sought, I have to consider the reasons advanced by the applicant in his explanation for the failure to comply with the rules. The court retains a discretion on whether to

condone the non-compliance with the rules taking into account the principles of justice, fair play and the established factors that have to be considered in the exercise of this discretion.

A party seeking condonation and extension of time must satisfy the court that a valid and justifiable reason exists as to why compliance did not occur and why non-compliance should be condoned. Further, regardless of the prospects of success, a court may decline to grant condonation where it considers the explanation for failure to comply with the rules unacceptable.

It was stated in *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 at 315 F-H (S) that:

“Whilst the presence of reasonable prospects of success on appeal is an important consideration which is relevant to the granting of condonation, **it is not necessarily decisive.** Thus in the case of a flagrant breach of the rules, particularly where there is no acceptable explanation for it, the indulgence of condonation may be refused, whatever the merits of the appeal may be. This was made clear by Muller JA in *P E Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799D-E, where the learned Judge of Appeal said:

‘In a case such as the present, **where there has been a flagrant breach of the Rules of this court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects of success may be.**’

The same point was made by Hoexter JA in *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131G-J where the learned Judge of Appeal said:

‘In applications of this sort, the prospects of success are in general an important, although not decisive, consideration. It has been pointed out (*Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein & Ors* 1985 (4) SA 773 (A) at 789C) **that the court is bound to make an assessment of the petitioner’s prospects of success as one of the factors relevant to the exercise of the court’s discretion unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration.** It seems to me that in the instant case the cumulative effect of the factors which I have summarised ... above is by itself sufficient to render the application unworthy of consideration; and that **this is a case in which**

**the court should refuse the application irrespective of the prospects of success.**” (own emphasis)

See also *Jaison Kokerai Machaya v Lameck Nkiwane Muyambi* SC 4/05.

## **APPLICATION OF THE LAW**

### **Extent of the delay**

The judgment under HB 196/19 that the applicant seeks to appeal against was handed down on 12 December 2019. The applicant was required to have noted the appeal on or before 9 January 2020. This application was filed 21 months out of time. The notice of appeal that was timeously filed under SCB 48/19 was deemed to have lapsed on 7 July 2020. The present application was filed 15 months after the lapse of the appeal. The inordinate delay has been properly conceded by the applicant.

## **REASONABLENESS OF THE EXPLANATION FOR THE DELAY**

It is the applicant’s submission that the reason for his delay was that he had received advice, which advice he accepted, from one of the senior partners at the firm of his legal practitioners, to settle the debt in accordance with the dictates of the case of *Zambezi Gas v N.R Barber and Anor* SC 3/20. He paid the debt in Zimbabwean dollars which the respondent did not accept on the grounds that the applicant was required to pay the debt at the prevailing interbank rate or in US dollars as ordered in HB 196/19.

The applicant contended that he instructed his legal practitioner to brief counsel to review his case. It is then that it became clear to him that any argument on the invalidity of a judgment under SC 48/19 would best be made in an appeal against the judgment itself. He discovered that his original notice of appeal was not in accordance with the rules as it did not clearly and concisely state the grounds of appeal and the exact prayer sought. He then decided not to seek the reinstatement of the appeal and opted to pursue the present route.

Miss *Dube* conceded that the explanation was not satisfactory. In spite of the concession, it is necessary to interrogate the explanation as it must be considered cumulatively with the other requirements.

The reason for the delay proffered by the applicant is very simple. It is that he took a deliberate decision not to pay costs for the preparation of the record of appeal upon being requested to do so by the Registrar. Instead of pursuing the appeal under SC 48/19, he sought to pursue other options to satisfy the judgment debt.

To say the explanation was not satisfactory is an understatement. The explanation was hopelessly unsatisfactory for a number of reasons. Firstly, the applicant made a calculated decision not to pursue the appeal. He decided to settle the judgment debt at the parity rate in spite of the dictates of the judgement which required him to pay the debt at the interbank rate. The import of the decision he took is that the applicant chose to disregard a court judgment which was extant.

The judgment remained binding because the applicant deliberately chose not to test the correctness of the judgment that he now seeks to appeal against. He instead decided to apply his own rate to pay off the judgment debt which was contrary to the rate prescribed in the judgment. This was a clear disdain and open defiance of an order of court as it was incumbent upon the applicant to pay at the prevailing interbank rate.

Secondly, after the applicant opted on a rate to apply other than the interbank rate, he hit a brick wall when the respondent indicated that he had not fully discharged the judgment debt. He decided to seek a stay of execution in circumstances where the respondent had successfully obtained an order for execution of the judgment pending appeal under HB 196/19. Leave to execute had in fact been granted unopposed. The application for stay of execution was filed on 24 March 2021, a year after the Registrar had requested the applicant to pay costs for preparation of the appeal record.

The appeal under SC 48/19 had been deemed by virtue of r 46 (5) of the Rules, to have lapsed by operation of law. The application for stay of execution was therefore launched notwithstanding the fact that there was no pending appeal against the judgment HB 196/19 which appeal the applicant had unilaterally and intentionally abandoned. There was no legal basis for the application for stay as there was no pending appeal. The applicant further sought a declaratur as the final relief on the basis that he had discharged his indebtedness by paying the judgment debt at the parity rate.

This again was notwithstanding the extant judgment under HB 196/19 which stipulated that payment be at the interbank rate. In essence, the applicant was seeking in the final order to set aside the judgment under HB196/19 through an urgent chamber application. The final relief sought was therefore not competent.

Thirdly, the applicant was not a self-actor. He was represented by counsel at all times. He disregarded the rules of court on the advice of his legal practitioners. He stated in para 16 of the founding affidavit that:

“16. The understanding of my legal practitioners, which I share, was that, in the wake of the judgment of this Honourable Court in the Zambezi Gas case, and given the date of the debt in this matter, I was entitled to pay ZW384 177.00 as the parity rate applied to the debt.”

The applicant agreed with the advice given by his legal practitioners. He is therefore not blameless. The applicant, being represented, ought to have known of the probable ramifications that could arise due to his abandonment of the appeal.

Fourthly, instead of pursuing an appeal against the judgment under HB 196/19, the applicant, acting on the advice of counsel, unsuccessfully sought to challenge the judgment by the High Court dismissing his application for stay of execution not only once but twice.

Fifthly, the decision to pursue his appeal again was only prompted by the respondent's decision to institute civil imprisonment proceedings. It is only then that he decided to have counsel briefed. Prior to the civil imprisonment proceedings, the applicant was happy to

delay the execution of the judgment under HB 196/19 by pursuing incompetent proceedings *a quo* and before this Court.

In spite of the concession by the applicant that the delay is inordinate and that the explanation for the delay is unsatisfactory, a litigant who wantonly disregards the rules of this court (and brazenly states so in his founding affidavit) does not deserve the indulgence of the court. The indulgence of the court should be reserved for parties who inadvertently do not comply with the rules. In *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290 C-D it was held that:

“It is the policy of the law that there should be finality in litigation. On the other hand one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute.

.....

It was further held at 290E-F that:

**“There will always be cases where the delay is due to some reasonable incapacity to act in time, or to some understandable oversight such as the misfiling, or misplacing of a document. This is not such a case. ....The time had come to call a halt to the throwing of good money after bad.”**(own emphasis)

The import of the averments by the applicant is that despite having deliberately disregarded the rules on the advice of counsel, he can come back two years later to seek the indulgence of this Court. The impression created by the applicant’s averments and concessions is that condonation is for the asking solely on the basis that the applicant’s appeal is arguable. To

extend indulgence under the present circumstances would, in my view, bring the administration of justice into disrepute.

### **INTEREST OF THE RESPONDENT IN THE FINALITY TO LITIGATION**

One of the considerations in deciding whether or not to grant condonation is the respondent's interest in the finality of the judgment of the court. The respondent obtained judgment on 12 December 2019. After the applicant noted an appeal against the judgment, the respondent obtained an order for leave to execute on 6 February 2020.

The respondent caused the execution of the judgment. He successfully opposed the application by the applicant for stay of execution. He resisted the appeal under SC 117/20. He opposed the application for condonation for late noting of appeal under SCB35/21. He instituted civil imprisonment proceedings against the applicant. The respondent has clearly exhibited an interest in the finality of the litigation between him and the applicant.

The respondent has obviously proceeded for the past two years under the impression that the applicant no longer intends to pursue the appeal only to be landed with an application to resuscitate the appeal wilfully abandoned two years ago.

In order to forestall the civil proceedings instituted by the respondent, the applicant now wishes to appeal against the judgment granted in 2019.

As stated in *Jaison Kokerai Machaya v Lameck Nkiwane Muyambi (supra)* at p 5:

“The notion that condonation of a breach of the Rules is there for the asking ought to be dispelled. And, there must be finality to litigation. **It is an injustice to a party who has been waiting to execute his judgment to be forced to suffer the effects of the disregard by the other party’s legal practitioners of the Rules of Court, namely, the delaying of the execution of his judgment.**”

It appears the applicant’s attitude is that the longer it takes for the respondent to enjoy the benefits of the judgment under HH 196/19 the better for him. This cannot be countenanced by the law as there must be finality to litigation.

## **PROSPECTS OF SUCCESS**

The applicant argued that he intends to introduce new points of law in his intended appeal. I have therefore considered that the question whether the applicant has prospects of success is not decisive. (See *Kodzwa v Secretary for Health & Anor, supra*). The applicant could have prosecuted his appeal under SC 48/19 and raised in that appeal the very point of law in that appeal which it now seeks to raise in the proposed appeal.

In *The Amptill Peerage [1977] AC 547 at 569 LORD WILBERFORCE* remarked as follows:

“Any determination of dispute of fact may, the law recognises, be imperfect; the law aims at providing the best and safest conclusion compatible with human fallibility, and having reached that solution it closes the book. The law knows. And we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry.”

The prospects of success or lack thereof of the applicant's prospective appeal are outweighed by the other requirements for condonation. This is borne out by Miss *Dube*'s concession that the applicant's infractions warrant an order of punitive costs.

## **COSTS**

Costs follow the cause. Miss *Dube* conceded that punitive costs were warranted in the present case.

## **DISPOSITION**

The application is beset by infractions of the rules of this Court. The delay by the applicant in seeking the condonation is considerable and clearly inordinate. The explanation tendered in support of the application is also unsatisfactory especially when considering the concession by the applicant's counsel that the infraction was deliberate. The applicant does not deserve the indulgence of the court.

In the result, the application is dismissed with costs on a legal practitioner and client scale.

*Ncube Attorneys*, applicant's legal practitioners  
*Samukange Hungwe Legal Practitioners*, respondent's legal practitioners