

DISTRIBUTABLE (36)

MANALA LOVENESS MOTSI
v
(1) VIRGINIA CHIDHAKWA (nee Machokoto) (2) DEPUTY
MASTER OF THE HIGH COURT

**SUPREME COURT OF ZIMBABWE
BULAWAYO: MARCH 3, 2021**

Ms *F. Chinwawadzimba*, for the appellant.

G. Nyoni, for the first respondent.

IN CHAMBERS

MATHONSI JA: On 2 July 2020 the High Court granted an application made by the present first respondent for the removal of the applicant from the position of executrix of the estate of the late Remnsi Machokoto. The applicant, having failed to note an appeal against that judgment within the time allowed by the rules of this Court, has made this application in terms of r 43 (1) of the Supreme Court Rules, 2018 for condonation of the late noting of an appeal and extension of time within which to appeal. The application is strongly opposed by the first respondent.

FACTS

Generally the facts are common cause. The late Remnsi Machokoto was married to the late Miriam Machokoto. He died on 7 January 2000 and was survived by his wife who

was then appointed executrix dative of the estate of the late Remnsi Machokoto. Before accomplishing the winding up of the estate of her husband, Miriam Machokoto also died on 4 July 2001.

A daughter of the deceased couple, Martha Mataruka was appointed the executrix dative of the estate of her late father on 5 May 2005 but that of her late mother remained unregistered. Unfortunately Martha also died before completing the winding up of the late Remnsi Machokoto's estate and before registering the estate of the late Miriam Machokoto. The latter was only registered several years later in November 2015 by the applicant. An executor is yet to be appointed to that estate.

The applicant was appointed executrix and issued with letters of administration for the estate of the late Remnsi Machokoto on 1 August 2014. Nothing tangible was done towards the finalisation of the estate from that time right up to the time that the first respondent, who is the daughter of the late Remnsi Machokoto, filed an application for the applicant's removal more than 5 years later on 16 October 2019.

The application was made in terms of s 85 (1) of the Administration of Estates Act [*Chapter 6:01*]. The basis was that not only had there been an inordinate delay in the finalisation of the estate but also that the applicant had acted in a manner prejudicial to the estate and the beneficiaries. The applicant was accused of failing to comply with statutory obligations, mismanagement of the assets and disposal of a house without the knowledge and consent of the beneficiaries.

Despite the applicant's spirited opposition to the application, the High Court granted it. It found that the applicant was not fit to hold the office of executrix of the estate. As I have said, the judgment was handed down on 2 July 2020. The applicant had 15 days within which to file her appeal in terms of r 38 (1) (a) of the Supreme Court Rules, 2018. The applicant failed to do so until the 15 days expired on 23 July 2020.

On 3 September 2020 the applicant filed an application for condonation and extension of time within which to appeal as case number SC 106/20. She only served that application on the first respondent more than a month later on 21 October 2020. She withdrew that application on 23 October 2020 and filed a similar application, the present one, on 29 October 2020.

The application is opposed by the first respondent on the basis that no reasonable explanation for the failure to comply with the rules has been given. In addition, the first respondent maintains that the proposed appeal enjoys zero prospects of success.

ISSUES FOR DETERMINATION

This being an application for the indulgence of condonation and extension of time within which to appeal, the issues for determination are:

1. The extent of the delay and the reasonableness of the explanation for it; and
2. Whether there are prospects of success on appeal.

THE EXTENT OF THE DELAY AND THE EXPLANATION FOR IT.

I have said that the applicant had until 23 July 2020 to note an appeal but did not. This application was only filed about 3 months later on 29 October 2020. On the face of it the

period of the delay is not inordinate. The applicant stated that she only became aware of the judgment on 13 July 2020 when she found it tucked under the door at her office. She had been working from home at the time because of the lockdown restriction prevailing at the time.

The applicant went on to say that even after receiving the judgment there was a further delay in securing an appointment to confer with her legal practitioner. As if that was not enough, when she finally did, the legal practitioner refused to note an appeal on her behalf. She was then forced to look for a different set of legal practitioners. As a result the *dies inducaie* expired on 23 July 2020 without an appeal being noted.

Regarding the seemingly lengthy delay in making this application, the applicant's explanation is that she had to secure the services of legal practitioners based in Harare which presumably consumed more time. This may not be true because her legal practitioners are Maseko Law Chamber located at 6th Floor LAPF House, Jason Moyo Street in Bulawayo. The applicant stated further that although her initial application (SCB 85/20) was prepared by her current legal practitioners, it was somehow in her possession when she contracted Covid 19. As a result, the papers were infected.

According to the applicant she had to withdraw the initial application because it was infected. This is meant to account for the further delay of 6 days between the date of withdrawal and 29 October 2020 on which this application was filed. I agree with Mr *Nyoni* for the first respondent that this explanation is not reasonable at all. In fact it is tenuous indeed and may pass as "a dog's breakfast."

There is no reasonable explanation, in spite of all the alleged challenges the applicant faced, why it took her 3 months to approach the court. Her explanation that she was afflicted with Covid 19 does not make any sense. This is more so considering that ordinarily a represented litigant would have her application handled, filed and served by her legal practitioners and not herself.

More importantly, if indeed the application was contaminated as she alleges, surely she would not have had it served on the first respondent on 21 October 2020. Doing so would have put the first respondent and her legal practitioner at risk.

It should be appreciated that condonation of the non-observance of the rules is not just there for the asking. Whenever a litigant realises that he or she has fallen foul of the rules of court, that litigant should apply for condonation without delay. If the litigant does not make the application without delay, he or she should give an acceptable explanation, not only for the delay in filing the appeal, but also for the delay in seeking condonation. See *Viking Woodwork (Private) Limited v Blue Bells Enterprises (Private) Limited* 1998 (2) ZLR 249 (S) at 251 C-D.

The point is also made in *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S) at 315 B where this Court cited with approval the following passage in Herbstein & Van Winsen's. *The Civil Practice of the Supreme Court of South Africa* 4 ed at pp 897-898:

“Condonation of the non-observance of the rules is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient cause to excuse him from compliance

The court's power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judicial discretion and upon sufficient and satisfactory grounds being shown by the applicant.”

The poor explanation for the delay rendered by the applicant would have been excused or the court would look aside had the applicant shown good prospects of success on appeal. I proceed to consider those.

WHETHER THERE ARE ANY PROSPECTS OF SUCCESS ON APPEAL

It is settled that where no acceptable explanation for non-compliance with the rules has been given, the more reason the applicant for condonation must show very good prospects of success. See *Mahachi v Barclays Bank of Zimbabwe SC 6/06*.

The question whether there are prospects of success in the intended appeal is answered by consideration of the grounds of appeal and the judgment sought to be impugned. The applicant intends to raise 4 grounds of appeal which deal with only one issue namely, whether or not the High Court properly found that the applicant's conduct warranted her removal from the position of executrix dative of the estate.

In ordering the removal of the applicant, the High Court was exercising judicial discretion. In fact all the 4 proposed grounds of appeal seek to attack the exercise of the court's discretion. It scarcely needs repeating that an appellate court will not lightly interfere with the exercise of discretion by the lower court. For it to do so, it has to be shown that the discretion was exercised unreasonably or irrationally. See *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62 G-H; 63 A; *Makintosh v The Chairman Environmental Management Committee of City of Harare & Anor SC 12/14*.

The High Court found that the applicant had unreasonably delayed in finalising the estate and was also guilty of impropriety in the management of the estate. It bears testimony

that the applicant was issued with letters of administration on 1 August 2014 and yet when the application for her removal was lodged on 16 October 2019, which was more than 5 years later, she had not done anything tangible towards finalising the estate. In fact the only distribution account in the possession of the Master is one filed on 10 March 2020 months after her removal was sought.

The applicant had not paid estate duty. More importantly, it was common cause that she had unilaterally sold an immovable property belonging to the estate of the late Miriam Machokoto without the knowledge and consent of the beneficiaries. She sold it, not to settle any liabilities of the estate she was managing but on flimsy grounds. The applicant had no right, not being the executrix of the estate of the late Miriam Machokoto to sell the property in question. Indeed up to now the applicant has not accounted to anyone the proceeds of that sale.

There is also evidence showing that the applicant installed occupants at the immovable property of the estate which is located in Luveve Bulawayo. Those occupants are living there for free and were installed there as part of the applicant's scheme to resolve a dispute with them over their father's estate which the applicant did not manage properly. To say that the applicant's conduct is prejudicial to the estate she was assigned to manage is an understatement. It borders on criminality.

In removing the applicant, the High Court also took into account that even though she was the appointed executrix the appellant had delegated her duties to her husband. It is her husband who was communicating with the beneficiaries and had even opened a whatsapp chat

group with them for that purpose. When called by the Master to attend meetings, the applicant defaulted and did not even respond to correspondence.

There were sufficient grounds for the removal of the applicant as executrix even without regard to the damning Master's report submitted to the High Court in terms of r 248 of the High Court Rules, 1971. All this leads to the inescapable conclusion that the applicant does not have an arguable case on appeal.

As the function of a judge in an application of this nature is that of a gatekeeper assigned to vet and keep away those proposed appeals without merit, it would be remiss of me to grant the indulgence of condonation. The application is without merit.

Mr *Nyoni* for the respondent asked for costs on the adverse scale. I am not persuaded that such costs are warranted in this case. There is however no reason for departing from the norm that costs follow the result.

In the result it is ordered that the application be and is hereby dismissed with costs.

Messrs Maseko Law Chambers, applicant's legal practitioners

Messrs Moyo and Nyoni, 1st respondent's legal practitioners

The Deputy Master of the High Court, 2nd respondent