

**DISTRIBUTABLE (90)**

**RINOS TERERA**  
**v**  
**(1) GEORGE LENTAIGNE INGRAM LOCK**  
**(2) CK HOLLAND t/a HOLLAND ESTATE AGENT**  
**(3) ZIMBABWE HOUSING COMPANY (PRIVATE)**  
**LIMITED (4) THE REGISTRAR OF DEEDS**

**SUPREME COURT OF ZIMBABWE**  
**HARARE: 19 MAY 2021 & 08 SEPTEMBER 2021.**

*R. Terera*, in person

*T. Maanda*, for the first and second respondents

*B. Majamanda*, for the third respondent

No appearance for the fourth respondent

**IN CHAMBERS**

**CHITAKUNYE AJA:** This is an opposed chamber application for condonation of non-compliance with the Supreme Court Rules, 2018 and for extension of time within which to appeal. Though at the outset the applicant did not state the rule that was not complied with and the rule under which this application is brought, it is apparent from the founding papers that the rule not complied with is r 38(1)(a) and the application is in terms of r 43(1) of the aforesaid rules. The intended appeal is against a judgment of the High Court

handed down on 29 October 2020 upholding special pleas and dismissing the applicant's claim.

The applicant seeks an order in the following terms:

1. The application for condonation for non-compliance with the Supreme Court Rules, 2018 be and is hereby granted.
2. That the application for extension of time within which to file and serve the appeal in terms of the rules be and is hereby granted.
3. The appeal shall be deemed to have been filed on the date of this order.
4. There will be no order as to costs.

## **BACKGROUND**

The applicant issued summons against the respondents on 9 June 2020 seeking an order:-

- (a) that the agreement of sale between the applicant and the first respondent be declared valid and still operational;
- (b) declaring the agreement of sale that was entered into between the first, second and third respondents null and void;
- (c) nullifying the transfer of title of land by the fourth respondent into the third respondent's name; and
- (d) that respondents pay costs of suit.

The facts giving rise to the above claim may be encapsulated as follows- The applicant entered into an agreement of sale with the sellers of an immovable property described as Lot number 17 Weirmouth Small Holdings of Weirmouth on 23 June 2014, namely Laureen Tatenda Mvududu and Maureen Mazviita Middleton. The first and second respondents acted as agents for the sellers in the transaction. The agreement was in the names of the sellers. The agreement of sale was subsequently cancelled and the applicant was advised of the same on 14 September 2015. On 22 January 2016 that same property was sold to the

third respondent through the agency of the first and second respondents. Transfer was subsequently effected to the third respondent in that same year.

In his suit the applicant did not cite the sellers upon whose mandate the first and second respondents acted. The three cited respondents filed special pleas seeking the dismissal of the applicant's claim. The first and second respondents sought the dismissal of the claim on the grounds that the claim had prescribed, that they had been wrongly cited, that the matter was *res judicata* and *lis pendens*. The third respondent also sought the dismissal of the claim on the grounds that the claim had prescribed, the matter was *res judicata* and that the applicant was estopped from claiming the setting aside of the third respondent's title deeds.

The applicant argued that the claim has not prescribed and that the matter was neither *res judicata* nor *lis pendens*. He also argued that the sale to the third respondent was not above board. He alleged that the sale to the third respondent was fraudulent since there was no proper cancellation or termination of the sale agreement between him and the sellers.

The issues for determination on the special pleas were as follows:

- i. Whether or not the claim had prescribed;
- ii. Whether or not the matter was *res judicata*;
- iii. Whether or not the matter is *lis pendens*;
- iv. Whether or not the non-joinder of the former registered owners who sold the immovable property to the third respondent was fatal to the claim; and
- v. Whether or not the applicant was estopped from claiming the setting aside of third respondent's title deeds.

After hearing submissions on the special pleas, the court *a quo* noted that the issue of *lis pendens* was not persisted with as the case that had given rise to it namely HC 67/2020 had since been withdrawn by the applicant.

The court *a quo* proceeded to make a determination on the other grounds. It held that the first and second respondents, being the agents who facilitated the sale and subsequent transfer of property to the third respondent for and on behalf of their principals, were unnecessarily joined to the action procedure. The sellers and transferors having been known their non-joinder in the case was thus fatal. The non-joinder was coupled with misjoinder of the first and the second respondents who were discharging legal functions for and on behalf of their principals; there was therefore no valid claim against them. The court further held that, in terms of the Prescription Act [*Chapter 8:11*] s 15 (d), the claim should have been made within 3 years of the cause of action. The judge *a quo* reasoned that the cause of action arose in 2015 when the applicant was notified of the cancellation of his agreement of sale with the sellers. It was also noted that despite knowledge that the property had subsequently been sold and transferred to the third respondent in 2016, the applicant had not acted to protect his perceived interests till June 2020 when he issued the summons in question.

In upholding the special pleas the court *a quo* stated thus:

“Considering the totality of submissions it is clear that the cancellation of the sale agreement between the Plaintiff and the first and second defendants’ principals was communicated as early as 2015. Further communication in 2016 and subsequent sale of the property to third defendant, culminating in transfer in 2016 was to the knowledge of the Plaintiff. The Plaintiff despite the knowledge did not take action until June 2020 when he issued summons. The Defendants’ special plea that the Plaintiff’s claim must be dismissed on the basis of prescription, estoppel, non-joinder and misjoinder is well supported by the facts of this matter. The special pleas must succeed.”

Accordingly, the applicant’s claim was dismissed.

The applicant was aggrieved by the decision of the court *a quo*. In terms of r 38(1)(a) he ought to have noted his appeal within 15 days from the date of judgment. He was unable to do so hence this application for condonation of non-compliance with the rule and extension of time within which to appeal.

### **APPLICANT'S SUBMISSIONS**

The applicant submitted that he only became aware of the judgment on 2 November 2020. He further submitted that the reason for the late noting of the appeal was that he had assumed that he could file the appeal within 30 days of that date. As a result of that assumption he attested to the founding affidavit on 21 December 2020. When he later approached court to inquire on the matter he was informed that he was out of time as the *dies induciae* was 15 days. The applicant did not, however, disclose the date he approached court. It could certainly not have been before 21 December 2020. He conceded that he had failed to give a reasonable explanation for the delay between 21 December 2020, when he attested to the affidavit, and 31 March 2021 when he filed the present application. He, in fact, acknowledged that he had not rendered any explanation for that latter period of the delay. The applicant averred that he, however, had bright prospects of success on appeal because the court *a quo* had failed to deal with the issues on the merits.

### **RESPONDENTS' SUBMISSIONS**

All the respondents opposed the application and contended that the delay was inordinate and the applicant had not proffered a reasonable explanation for the delay. They also contended that there were no prospects of success on appeal as not only were the grounds of appeal defective but they, in fact, did not impugn the decision of the court *a quo* in upholding the special pleas. As far as the respondents were concerned the applicant has not met the

requirements for condonation of failure to file the appeal in time and for an extension of time within which to file the notice of appeal. Both Counsel for the respondents were in unison on these submissions.

Counsel also submitted that the applicant had approached the court on the wrong rule, as he had made reference to rr 30 and 38 in the application. They further submitted that the applicant had been very provocative in his language and relentless in the manner in which he approached the courts, which amounts to an abuse of court process. The applicant had virtually attacked court officials including the Judge *a quo* on matters that had not been placed before that court. They thus prayed that the application be dismissed with costs on a higher scale as a measure of censure and to caution the applicant to take court business seriously and desist from bitter and paranoid conduct.

### **ISSUE FOR DETERMINATION**

The issue for determination is whether or not the applicant has established sufficient cause for the grant of the order sought.

### **APPLICATION OF THE LAW TO THE FACTS**

It is trite that where a litigant realises that they have fallen foul of court rules, they ought to apply for condonation without delay. The litigant must give an acceptable explanation for the failure to comply with the particular rule and for the delay in approaching court seeking condonation. See *Viking Woodwork (Private) Limited v Blue Bells Enterprises (Private) Limited* 1998(2) ZLR 249 (S) at 251. One must be candid with the court in their explanation in order to satisfy the court that the explanation is reasonable and deserves the court's empathy and that there are prospects of success on appeal if granted the indulgence.

In *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S) at 315 B-E, the court aptly indicated that:

“The factors which the court should consider in determining an application for condonation are clearly set out in *Herbstein & van Winsen's The Civil Practice of the Supreme Court of South Africa 4 ed by van Winsen, Cilliers and Loots* at pp 897-898 as follows:

‘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. In the determination whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both sides in which the court will endeavour to reach a conclusion that will be in the best interests of justice. The factors usually weighed by the court in considering applications for condonation ... include the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.’”

In *Bessie Maheya v Independent Africa Church* SC-58-07, MALABA JA (as he then was) at p 5 reiterated the position as follows:

“In considering applications for condonation of non-compliance with its Rules, the Court has a discretion which it has to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefor; the prospects of success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the Court and the avoidance of unnecessary delays in the administration of justice.”

It is pertinent that the application must be *bona fide* and be premised on relevant factors. The applicant must be candid with the court on the factors he/she seeks to rely on in the application. In *casu*, the applicant sought to rely on: -

- i. the extent of the delay, which he deemed not inordinate;
- ii. the explanation for the delay; and

- iii. prospects of success. These factors must be considered in their proper perspective.

### **EXTENT OF THE DELAY AND THE EXPLANATION THEREOF**

The applicant intends to appeal against an order handed down on 29 October 2020. He was supposed to file his notice of appeal within fifteen days of that date. The *dies induciae* fell on 19 November 2020. He failed to note the appeal by that date. The applicant avers that he only became aware of the judgment on 2 November 2020. The present application for condonation was filed on 31 March 2021, 4 months 8 days out of time. It was incumbent upon the applicant to explain the delay in noting the appeal and in filing this application for condonation. The applicant's explanation as noted above was that he assumed he had thirty days within which to file his appeal. He did not, however, state the basis for that assumption. Other than that, he also did not explain why he did not note the appeal or even attempt to file the notice of appeal within his assumed 30 days which lapsed on 14 December 2020. Instead he confirms by virtue of his founding affidavit that he only took action after the 30 day period when he attested to the founding affidavit on 21 December 2020. He did not proffer any explanation for the period after his 30 days lapsed to 21 December 2020 and the further delay from 21 December 2020 to 31 March 2021 when he filed the present application. When asked about the lack of explanation for this period, the applicant could not provide any.

In my view, the applicant was not being candid with court in his explanation for the delay hence he could not account for the periods in question. In the circumstances the extent of the delay in bringing this application is inordinate and the explanation tendered for the delay is also unreasonable.

## PROSPECTS OF SUCCESS ON APPEAL

It is settled that where no acceptable explanation for non-compliance with the rules has been given by an applicant seeking condonation for the late noting of an appeal, one must at the very least show very good prospects of success if the indulgence is to be granted. See *Mahachi v Barclays Bank of Zimbabwe* SC 6/06 and *Kombayi v Berkout* 1988(1) ZLR 53(SC). The applicant is required to show that he has an arguable case on appeal. In *Essop v S* [2014] ZASCA 114, the court aptly stated the following at para 6:

“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.”(my emphasis)

*See Dzvairo v Kango Products* SC 35/17.

*In casu*, the main issue for determination is whether or not the court *a quo* erred in upholding the special plea and dismissing the claim as a result. For an appeal to enjoy any prospects of success it must attack the findings of the court *a quo* on the issues before it for determination. Grounds of appeal that do not address or attack the findings upon which the determination was made would have no prospects of success at all. In *casu*, the court *a quo*'s determination was on the special plea. The court *a quo* upheld the special plea and dismissed the applicant's claim on the grounds that the claim had prescribed; that there was non-joinder and misjoinder; and that the applicant was estopped from seeking the setting aside of third respondent's title. The applicant's grounds of appeal do not attack any of the above findings

by the court *a quo*. Instead the purported grounds of appeal, defective as they are, pertain to issues that were not argued before the court *a quo*. The grounds of appeal are crafted as follows:

- “1. Non-Refund of the applicant’s deposit of US\$35 000 binds parties to this agreement.
2. The court *a quo* deliberately violated s 74 of the Constitution. No competent court ever heard this case which then ordered the cancellation of the agreement of sale.
3. Third respondent is a criminal accomplice as he bought a disputed property well aware a dispute existed.
4. The court *a quo* erred at law for deliberately non recuse(*sic*) of herself in a case(the Judge) has interest in, second respondent is an agent of the High Court Sheriff at Mutare High Court, fair judgment is impossible.
5. Conflict of interest as second respondent’s duties as an Estate Agent and an Agent of the Sheriff of the High Court are in conflict.
6. Gross misconduct and criminal abuse of office by the Judge to preside in a case she has interest in.
7. Deliberate violations of the agreement of sale by the Judge, second respondent has no power of attorney, the purported cancellation by second respondent is unlawful and of no effect or force.
  - The court *a quo* deliberately ignores double sale by first and second respondents to third respondent
  - The court *a quo* cannot prove a breach, neither do respondents.
  - The court *a quo* erred by assuming this case was brought to court in June 2020, when in fact it was at the courts in August 2017. See annexure E.
  - Fraudulent court orders, Annexures ‘J’ 0224983 and ‘K’ HC 2042/19 are a result of a fraudulent, Notice of set down urgent chamber application Annexure ‘I’ HC 1377/19 as it is not served on the applicant. It has a wrong surname, wrong address and faxed at odd hours of business, 2:11 am.”

The grounds of appeal do not challenge findings that he was advised of the cancellation of the agreement of sale in 2015 hence when he filed the summons in issue on 9 June 2020 a period of more than 3 years had lapsed; that the first and second respondents were merely acting as agents for the owners of the property who were known to the applicant and so could not be sued in place of known principals; and that he knew about the sale and transfer to the third respondent in 2016 and so by the time he issued the summons in question a period of three years had lapsed.

It may also be noted that the relief that he seeks on appeal is on the merits and is the same as in the summons. The relief is thus incompetent as it is premised on the merits of

the matter when the intended appeal ought to have been on the determination on the special pleas. Clearly the applicant has lamentably failed to establish an arguable case on appeal for which I can grant the order sought. There are no prospects of success at all.

The respondents' Counsel, in seeking costs on the higher scale, alluded to the litigious nature of the applicant in spite of extant court orders against him which he has not challenged and the fact that the property in question was transferred to the third respondent in 2016 to his knowledge. Transfer to the third respondent was effected more than three years ago yet the applicant still drags respondents to court on unsustainable claims. In this regard they submitted that the applicant has been constantly in and out of the courts in a plethora of matters some of which were referred to as case numbers HC 1236/17, HC 8602/17, HC 1377/19, HC 2042/19, MUTP 3015-16/18, Mutare Magistrates Court 2102/17, not to mention open files before the anti-corruption court, the Law Society of Zimbabwe and the Judicial Service Commission Secretariat. The applicant clearly is very litigious and unrelenting despite advice that his complaints were not sustainable. It is in the interests of justice that court proceedings be brought to finality. Competent orders affording real rights to the third respondent remain extant as the applicant has not appealed against them. They thus submitted that applicant be mulcted with costs on a higher scale.

I am inclined to agree with the respondents on this point. The applicant's Achilles' heel is his failure to seek appropriate legal advice in pursuit of litigation. In the result, he has pursued wrong causes just as in this case, whereby instead of appealing against the findings by the court *a quo* on the special plea, he opted to attack issues that were not determined by the court *a quo*. In this regard during the hearing effort was made to direct him to the real issues at hand as he had submitted heads of arguments unrelated to the findings on the special plea. The

applicant seems to be confused as to the extent of the issues he can raise on appeal. He appears headstrong that this Court, if it is to condone his non-compliance, should proceed to hear his cause on the issues the court *a quo* did not hear at all. The inevitable consequence is that he has caused the respondents to defend the spurious processes thus incurring unnecessary costs. The respondents were thus justified in seeking costs on a punitive scale.

## **DISPOSITION**

Accordingly, it is ordered that -

The application for condonation of non-compliance with the rules and extension of time within which to appeal be and is hereby dismissed with costs on the legal practitioner and client scale.

*Henning and Lock*, 1<sup>st</sup> and 2<sup>nd</sup> respondent's legal practitioners

*Khupe & Chijara Law Chambers*, 3<sup>rd</sup> respondent's legal practitioners.