

HB 96-15  
HC 200/15  
XREF HC 1154-08, 499-14, 591-14,  
HC 900-09, 1894-12, 2187/12,  
HC 1112-09, 3270-12 & HC 766-14

APOSTOLIC FAITH MISSION CHURCH  
OF PORTLAND OREGON  
(SOUTHERN AFRICA HEADQUARTERS)

**versus**

MAXWELL SHUMBA T/A ELITE HIGH SCHOOL  
and  
REGISTRAR OF HIGH COURT, BULAWAYO N.O  
and  
THE DEPUTY SHERIFF, BULAWAYO N.O

HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 27 JANUARY AND 21 MAY 2015

Mr *V. Majoko* for the applicant  
Mr *J. Sibanda* for the respondent

### **Application for condonation**

**MAKONESE J:** The applicant filed an application for condonation for the late filing of heads of argument. The application was brought to court by way of a chamber application. The application is opposed by the respondent.

The respondent has raised the following points *in limine*:

1. The applicant has filed a chamber application for condonation instead of a court application. Respondent argues that in terms of rule 242 of the High Court Rules, 1971, it is impermissible for an application for condonation to be filed as a chamber application.
2. The applicant contends that in terms of rules 241 of the High Court Rules a chamber application should be filed in accordance with Form 29B. The respondent argues that the applicant has not used the correct form and as such there is no application before the court.

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In response to the points *in limine*, the applicant argues that in terms of rule 229C, the fact that an application has been instituted as a chamber application instead of a court application is not sufficient ground to dismiss the claim. Rule 229C provides as follows:

“Adoption of incorrect form of application

Without derogation from rule 4c but subject to any other enactment, the fact that an applicant has instituted-

- (a) a court application when he should have proceeded by way of a chamber application;  
or
- (b) a chamber application when he should have proceeded by way of a court application;

shall not in itself be a ground for dismissing the application unless the court or judge, as the case may be, considers that –

- (i) some interested party has or may have been prejudiced by the applicant’s failure to institute the application in the proper form.
- (ii) Such prejudice cannot be remedied by directions for service of the application on that party, with or without an appropriate order of costs.”

In the instant case the chamber application was served on the respondent who had the opportunity to respond. I have not found any prejudice occasioned on the respondent by proceeding by way of a chamber application. I am of the firm view that the points *in limine* do not have merit and the applicant ought to be heard. The respondent avers that in any event no reasonable explanation has been proffered as to why the applicant filed its heads and argument nine days outside the prescribed time limit. The respondent contends further that in an application for condonation an applicant is required to deal with the issue of prospects of success apart from giving an explanation for the delay. The respondent took the stance that by reason of the deficiency in the application for condonation, the application is fatally defective and must be dismissed without going into the merits.

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The requirements for the granting of an application for condonation are set out by the authors Herbstein and Van Winsen, The Practice of High Courts of South Africa, 5<sup>th</sup> edition Vol 1, at page 723 in the following terms:

“The court may on good cause shown condone any non-compliance with the rules. The circumstances or cause must be such that a valid and justifiable reason exists why compliance did not occur and why non-compliance can be condoned.”

In *Nedcor Investment Bank Limited v Visser NO 2002 (4) SA 588 PATEL (AJ)* as he then was), stated as follows:

“Rule 27 (3) requires “good cause” to be shown by the plaintiff. This gives the court a wide discretion. The requirements are, first, that the plaintiff should at least tender an explanation for its default to enable the court to understand how it occurred. Secondly, it is for the plaintiff to satisfy the court that its explanation is *bona fide*, and not patently unfounded.”

See also the case of *Robert Dombodvuku v CMED (Pvt) Ltd SC 31/12*.

It is my considered view that the issue of prospects of services is a vital component of an application for condonation. I do not agree the failure to canvass the issue of prospects of services in precise and explicit terms renders the application a nullity. I accept that the applicant’s legal practitioner found himself in an awkward position when he inherited voluminous files from *Messrs Cheda and Partners* and had to prepare the present application in limited time. I observe here that this application is one of several applications filed in this court. The dispute between the parties is a protracted one and the applicant avers that some of the matters are pending in the Supreme Court.

In the circumstances I cannot do justice to this matter by declining to hear the parties on the merits and by dismissing it on mere technicalities.

In the result, the application for condonation is allowed and the parties are directed to set the matter down for a full hearing of the application under case number HC 200/15.

*Messrs Majoko and Majoko*, applicant’s legal practitioners  
*Messrs Job Sibanda and Associates*, 1<sup>st</sup> respondent’s legal practitioners