HB 106/16
HC 2084/15

RAPHAEL MASUKU

And

SICINGILE MASUKU

Versus

SHERIFF OF ZIMBABWE

And

THERESA BELL

And

STANLEY NAZOMBE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 22 FEBRUARY & 14 MARCH 2016

Opposed Application

G. Sengweni for the applicants
N. Mazibuko for the 2nd respondent
K. Ngwenya for the 3rd respondent
No appearance for the 1st respondent

TAKUVA J: This is an application for condonation of late filing of an application to set aside the decision of the 1st respondent confirming the sale of stand number 4022 Khumalo Township, Bulawayo

The background facts are that sometime in December 2011, 1st applicant and 2nd respondent entered into what 1st applicant described as "an agreement of exchange" wherein he received two motor vehicles, namely a BMW and a Suzuki pick-up truck from the 2nd respondent in exchange for his Toyota Hiace. Subsequently, the Toyota Hiace was impounded by the police on allegations that it was a stolen vehicle, leading to 1st applicant's arrest. Meanwhile, the 2nd respondent issued summons against 1st applicant claiming the value of her two motor vehicles. She obtained a default judgment under case number HC 1938/12 against the 1st applicant.

The 2nd respondent obtained a writ of execution leading to the sale of the property on 28 August 2013. The 1st respondent then informed all interested parties including 1st applicant and his erstwhile legal practitioners to file written objections to him within 15 days from the date the highest bidder was declared to be the purchaser in terms of r 356 or the date of sale in terms of r 358 of this court's rules. The parties were warned that if no objections were received the 1st respondent would proceed to confirm the sale. No such objections were received by the 1st respondent. The 3rd respondent was then declared and confirmed as the purchaser of the property at the sum of US40 000,00 on 17 October 2013.

First applicant through his lawyers Messrs Marondedze, Mukuku, Ndove and Partners filed a chamber application on 16 July 2013 seeking the postponement or suspension of sale under case number HC 1800/13. The application was dismissed by KAMOCHA J on the grounds that it had been served on the respondents when the property had already been sold. The 1st applicant then filed this application on 4 August 2015 seeking the following relief;

> "1. Applicants be and are hereby granted condonation for leave to file the application to have the decision of the Sheriff of Zimbabwe confirming sale of a certain piece of land being stand 4022 Khumalo Township of stand 4125 Bulawayo commonly known as number 36 Ellington Avenue, Khumalo, Bulawayo set aside in terms of r 359 of the High Court Rules, 1971 out of time.
> 2. Each party to bear its own costs."

The basis upon which the application has been made can be gleaned from 1st applicant's founding affidavit. I summarise them thus;

1. 1st applicant believed that his erstwhile lawyers had made an application to set aside the sale.
2. He only discovered that the lawyers had done absolutely nothing when 3rd respondent was granted an order under case number HC 214/14 to transfer the property to his name.
3. His failure to ensure that his instructions were executed by his erstwhile lawyers was mostly caused by the fact that at the material time he was incarcerated on allegations which gave rise to the judgment debt.

4. Applicant contended that he has bright prospects of success in that the property was "given away at an outrageously unreasonable price."
5. He also submitted finally that, his family will become destitute as the purchase price is insufficient to secure them alternative accommodation.

Applicants filed heads of argument and their lawyer made oral submission during the hearing. It was contended on applicants' behalf that it was never their wish to display a wilful disdain of the rules of this court.

The 2nd and 3rd respondents opposed the application on generally similar grounds. They argued that the applicants have not established the requirements of such an application in that the delay is inordinate, the explanation for the delay is unreasonable and the prospects of success are not bright. As regards the delay respondents argued that applicants were supposed to act no later than the 30th of November 2013. They did not do so until the 4th of August 2015 when they filed this application, i.e. more than twenty (20) months later. Therefore, the application is "glaringly inordinate."

In respect of the reasonableness of the explanation, respondents submitted that it is incorrect to attribute the delay to 1st applicant's incapacity due to incarceration, in that at the time the need to act arose, 1st applicant had been released from prison. He was released on 13th September 2013 and was required to act in November 2013. Through his current legal practitioners he filed a chamber application under case number HC 2815/13 on 7 November 2013.

The 1st applicant's contention in paragraph 14 of his founding affidavit that he "only discovered that his erstwhile lawyers had done nothing when the 3rd respondent was granted an order by Hon. MAKONESE J under case number HC 214/14 to transfer the property to his name" is clearly untrue as that judgment was delivered on the 2nd of July 2015 and it took applicants a full month to file this application. In any case, applicants should have realised in April 2015 that their erstwhile lawyers had done nothing to set aside the sale. This is so because 3rd respondent applied for and was granted a provisional order on 24th April 2015.

It was further argued that applicant had no prospects of success in that they cannot complain about the low price when they refused auctioneers access to the building. Since they created this situation, they cannot expect the court to protect their interests. Also, applicants have not placed any evidence to suggest that the price for which the house was sold is unreasonably low. In any case, according to the distribution plan, 1st applicant is to be paid an amount of US$18 143,50 which amount has not been shown to be inadequate to secure alternative and descent accommodation for the applicants and their family.

In *Kodzwa* v *Secretary for Health & Anor* 1999 (1) ZLR 313 (SC) it was stated that:

> "The factors which the court should consider in determining an application for condonation are clearly set out in Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa* 5th edition, Cilliers and Loots at page 897 -898 as follows:
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> > "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 the 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. <u>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 he 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."</u> (my emphasis)

See also *Bishi* v *Secretary for Education* 1989 (2) ZLR 240 (HC); *United Plant Hire (Pvt) Ltd* v *Hills & Ors* 1976 (1) SA 717 (A); *Chimunda* v *Zimuto & Anor* SC 361/05; *Viking Woodwork (Pvt) Ltd* vs *Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (SC)

These requirements have been summarised as;

(a) the degree of non-compliance;
(b) the explanation therefore;
(c) the prospects of success on the merits;
(d) the importance of the case;
(e) the convenience of the court;
(f) the avoidance of the unnecessary delay in the administration of justice.

Applying these principles to the case *in casu*, I find that the degree of non-compliance with the rules is excessive in that it took applicants 1 year and 8 months to file this application. It should be noted that Rule 359 (8) of the High Court Rules 1971 requires that an application in terms of that rule be filed within 30 days of the date of confirmation. The decision applicants seek to set aside in casu was made on 17th October 2013. Applicants were supposed to act no later than 30th November 2013 but they waited until the 4th of August 2015.

In *Chidziva and Ors* vs *ZISCOSTEEL Co. Ltd* 1997 (2) ZLR 368 (S) a delay of five (5) months was held to be inordinate and the application for condonation was dismissed. *In casu*, 1st applicant admits in paragraph 17 of his founding affidavit that the delay is inordinate. He admitted that he became aware of the Sheriff's decision to confirm the sale on the 16th October 2013.

The applicants sought to explain the delay in bringing their application for condonation on the flimsy and naked allegation that they "… believed that their former legal practitioner had made a court application in terms of Rule 359 (8) of the Rules after the Sheriff had dismissed their request to set aside the sale of the property." In my view, this explanation is highly improbable and unreasonable in that there is no evidence placed before me to prove that such instructions were issued to the erstwhile legal practitioners but were not acted upon. An affidavit from the legal practitioner handling the matter was not attached in support of this allegation. More significantly, it does not appear that the legal practitioner who previously acted for the applicants was informed of the allegation against him. See *Chibanguza Motor Car Repairs and Spares (Pvt) Ltd* v *Mutyasira NO and Others* 2003 (1) ZLR 6 (H).

As pointed out above, 1st applicant's explanation for not acting timeously is untruthful as he was a free man when the time to act arose in November 2013. The second applicant has not tendered an explanation whatsoever on why she did not pursue the court application. Her affidavit is hollow and inadequate in his regard. In my view, applicants deliberately abstained from acting due to lack of diligence. The expression, *vigilantibus non dormientibus jura subveniunt*, loosely translated to mean, the law will help the vigilant but not the sluggard applies to them with equal force. See *Ndebele* v *Ncube* 1992 (1) ZLR 288.

I take the view that the applicants have been too cavalier in their approach in that they have not explained their default in a manner that can convince me to exercise my discretion in their favour. Even assuming that the failure to act was due to the ineptitude or negligence of the former legal practitioner, the applicants still bore a duty to show that they should be excused as a result. See *S* v *Sibanda* 2001 (2) ZLR 574 (H); *Metro International (Pvt) Ltd* v *Old Mutual Property Investments Corp P/L* 2008 (2) ZLR 257 (S) at page 260; *Mutizhe* v *Ganda & Others* 2009 (1) ZLR 241 (S); *Kombayi* v *Berkout* 1988 (1) ZLR 53 (S)

As regards prospects of success, I am of the view that the applicants have no prospects of success on the merits because the applicants or one of them were intent on frustrating the sale of the immovable property such that they refused the auctioneers access to the property. Further, there is no evaluation report to determine the value of the property. Therefore, there are no reasonable grounds in my view to conclude that the US$18 143,50 due to 1st applicant is inadequate to secure alternative descent accommodation for applicants' family.

Both applicants did not address the issue of the importance of the case in their papers. From the totality of the submissions, I am convinced that the importance of this case to the applicants is open to doubt. Surely, if indeed the applicants were interested in this case, they would have prosecuted their matter diligently, timeously and their application would have canvassed all the requirements for an application of this nature. This application is an after-thought designed to frustrate the various judgments of this court.

Finally, as regards the convenience of the court and the avoidance of unnecessary delays in the administration of justice, it is the policy of the law that there should be finality to litigation – see *Deweras Farm* v *ZIMBANK* 1997 (2) ZLR 47. *In casu*, not only have the applicants delayed in noting their application, they have offered no plausible reasons for their non-compliance. Further they demonstrated that they enjoy no good prospects of success at all. The inconvenience that would be occasioned upon the respondents if condonation were granted would be immense. So far there has been a multiplicity of litigation involving these parties. For the respondents, defending further proceedings means more costs. Also, the court is over burdened with cases that require its audience. It would not be in the interests of justice and fairness to all other litigants and the court's resources to allow applicants to be heard in an application in terms of Rule 359 (8) whose provisions they have not complied with.

I find that this application is devoid of merit in that applicants have not only inordinately delayed in filing their application but have also dismally failed to offer a reasonable and acceptable explanation for their non-compliance. They did not show any good prospects of success. Applicants have failed to establish and satisfy the requirements for an application of this nature. Consequently, the court cannot exercise its discretion as it would unnecessarily delay the administration of justice and inconvenience the court.

In the result, the application is dismissed with costs.

Messrs T. Harar & Partners, applicant's legal practitioners
Calderwood, Bryce Hendrie & Partners, 2nd respondent's legal practitioners
T. J Mabhikwa & Partners, 3rd respondent's legal practitioners