

JAMES CHIGWEDERE
versus
MUGOVE GERALD MADZIVIRE
and
NYASHA MONICA MADZIYIRE

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 20 July 2017

Opposed Matter

Miss *L. Gaba*, for the applicant
C. Mavhondo, for the respondent

DUBE J: This is an application for condonation of late filing of an application for rescission of judgment.

The applicant avers that sometime in 2012 he launched a project to subdivide his stands in Glen Lorne into a number of stands for resale. He gave the mandate to sell the stands to Alison Chikava of Ivory Gate (Pvt) Ltd, an estate agent. Subsequent to this, he cancelled the mandate when he discovered that the estate agent was operating without a registered licence. He later discovered that the estate agent had sold stand 3043 for \$80 820.00 to the respondents without his authority. He reported the matter to the police. He denies signing the agreement of sale.

His explanation for failure to file an application for rescission of judgment timeously is as follows. The respondent issued summons against him and on 3 February 2016 and obtained judgment in default against the applicant after he failed to attend a pre-trial conference. His legal practitioners never advised him of the date tabled for the pre-trial conference and thus he failed to attend the conference. He asserts that his failure to attend the pre-trial conference was not wilful as he was unaware of the date of the conference. There was no reckless or intentional disregard of the rules of court. After he became aware of the default judgment, he instructed his erstwhile legal practitioners to file an application for rescission of judgment. He was advised by Mr Machiridza that he had filed an application for rescission of the judgment. He believed that same had been filed with the court. He later

discovered that nothing was happening and that no application had in fact been filed. He took his files from his previous legal practitioners and instructed his current legal practitioners file this application. By the time he gave his current legal practitioners instructions to file an application for rescission of judgment; he was already out of time. The applicant did not do anything about the matter until the 20th of September 2016 when he filed this application. He wishes to be condoned for failing to file an application for rescission of judgment on time. The applicant avers that he has a *bona fide* defence on the merits

The respondents defend the application. They challenged the applicant's application on the basis that it was not filed in form 29A of the rules. On the merits, they submitted that the applicant's delay in filing the application for rescission of judgment is inordinate and that he failed to give a reasonable explanation for his non-compliance with the rules. Further that he has no prospects of success on the merits of the main matter. They argued that the applicant has not shown that the matter and that the convenience of the court and the respondent's interest in the finality of the matter favours the dismissal of the application.

As regards the failure to file the application in the proper form, the applicant requested the court to employ rule 4C and condone non-compliance with the rules. There is no prejudice that the respondents will suffer if the application proceeds in the form in which it is and therefore I condone the applicant's non-compliance with the rules.

Where a party has failed to file an application for rescission of judgment timeously, it is incumbent upon him to make an application requesting the court to condone his failure to file an application for rescission of judgment. *The Civil Practice of the Supreme Court of South Africa* 4th, Ed by Van Winsen, Cilliers and Loots at pp. 897-898 state as follows with regards the requirement,

"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 complianceThe 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. 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."

The case of *In Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) , dealt with the requirements in this sort of application and held that what calls

for an explanation is not only the delay in making the application but the delay in seeking condonation. See *Saloojee and Anor NNO v Min of Community Development* 1965 (2) SA 135 @ 138 H.

The factors that the court will consider when dealing with an application for condonation are trite. They are:

- (a) The explanation for the delay
- (b) Prospects of success in the main matter
- (c) Importance of the matter
- (d) Degree of non-compliance with the rules
- (e) The respondent's interest in the finality of the matter
- (f) The avoidance unnecessary in the administration of justice.

See *United Plant Hire (Pty) Ltd v Hill and Ors* 1976 (1) SA 717 (A) *Maheya v Independent African Church* 2007 (2) ZLR 319 (S).

The list is not exhaustive and these factors are not individually decisive but are to be considered cumulatively. The court has discretion in considering these factors which it must exercise judiciously. In *United Plant Hire Pvt Ltd v Hill (supra)*, the court said the following of the discretion reposed on the court and the requirements of an application of this nature.

“It is well established that, in considering applications for condonation, the court has discretion to be exercised judicially upon a consideration of all the facts and that in essence it is a question of fairness to both sides. In such an enquiry, relevant considerations may include degree of non-compliance with the rules, the explanation therefore, the prospects of success, the importance of the case, the respondents interest in the finalities of his judgment and the avoidance of unnecessary delay in the administration of justice. The list is exhaustive. These factors are not individually decisive but are against the other, thus a slight delay and a good explanation may help compensate for prospects of success which are not strong.”

See also *Mutizwa v Ganda* 2009 (1) ZLR 241 (S).

A litigant who has failed to file an application for rescission of judgment within the prescribed times must, without delay, apply for condonation. He must give a reasonable explanation for the delay. It is critical for an applicant to explain his non-compliance with the rules in detail. He must explain every step he took to address the non-compliance with the rules, see *CIR v Powger* 1956 (4) SA 446 (A) @b 449. An application for condonation of late filing of an application for rescission of judgment cannot constitute a proper application without indications of dates when an applicant took steps to address the failure to comply with the rules.

The delay in making this application is more than 6 months long. This is an inordinate delay. In any case where the failure to comply with the rules is attributable to a legal practitioner, the legal practitioner concerned is required to swear to an affidavit explaining his conduct, the delay and the reasons thereof. In this case, the applicant has not filed an affidavit from the legal practitioners concerned explaining their conduct. The applicant does not say when he became aware of the judgment and when he instructed his legal practitioners to lodge the application for rescission of judgment. He fails to explain when he took his files from his former legal practitioners and handed them over to his new lawyers or when he gave the new legal practitioners instructions to lodge the application. There is effectively no adequate explanation for the delay in bringing this application. The applicant has in explaining the delay paid lip service to the rule. The omission of the dates in the application seems to have been done deliberately in an attempt to starve the court of useful information and hoodwink it into granting this application. Legal practitioners have a habit of refraining from including dates when events happened in this type of application in the feign hope that the court will not detect the omission. It is high time legal practitioners learnt that deception does not pay. The legal practitioners who drafted this application have by failing to follow set guidelines for this type of application cost the applicant. The question regarding the reasonableness of the explanation does not come up because there is no explanation at all. There was a flagrant breach of the rules of this court. This is one such case when the sins of a legal practitioner ought to be visited on a client.

The general rule is that a principal is held liable for any contracts entered into by the agent with his authority even where he exceeds his authority. An agent is expected to act within the authority of his principal. Where an agent enters into an unauthorized contract with a third party on behalf of a disclosed principal, the principal is required to fulfil that contract. No personal liability responsibility attaches to the agent. Similar sentiments were made in *Musungu and Ors v Kennere and Anor* SC 307/13 where the court dealt with a principal agent relationship and remarked as follows;

“Bowstead on Agency is equally clear an agent is bound to act in the matter of agency subject to the direction and control of the principal A principal is liable for the delict of his agent where such an agent is a servant.....”

He who does an act through an agent does it himself. See also *Amy Zimbabwe Pvt Ltd v Cassalee Holdings* 1997 (2) ZLR 77, *Henney v Annesley* 1960 (4) SA 462 (SR), where the court held that whether or not the act of an agent is lawful or fraudulent, as long as the particular person is an agent of the principal, the principal is held liable.

The applicant denies signing the agreement of sale with the respondent and avers that it is forged. The agreement of sale is not attached. The outcome of the police investigations is not known. The agent held out that he represented the applicant to an innocent party. The applicant does not deny that he engaged the agent concerned and was reportedly paid \$8 000.00 for the stand through the agent. This shows that he was aware of the sale. It is surprising that he would receive such monies if he had not sold the stand. The probabilities of the matter favour the respondent's case that he was aware of the agreement of sale and assented to it. The applicant is bound by the acts of his agent. The applicant's merits in this matter are hopeless.

I have considered the circumstances of this case and the requirements cumulatively. The law is clear that prospects of success though important, are not solely decisive of success in an application such as this nature where there was a flagrant disregard of the rules in *PE Bosman Transport works & Committee & Ors v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799 D-E, the court held that,

‘where there has been a flagrant breach of the rules this court in more than one respect, and where in addition there is no reasonable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should...not be granted whatever the prospects of success maybe’

The applicant did not address the court on the importance of the case and other requirements of this sort of application. In a case where an applicant has failed to explain the delay in making an application for condonation, no matter the merits of the matter, that application is doomed to fail. The applicant had no explanation for the delay in filing this application. That on its own is a good enough reason to decline this application. The applicant not showed good and sufficient cause to justify the granting of this application.

In the result it is ordered as follows,

The application is dismissed with costs.

Takawira Law Chambers, applicant's legal practitioners
Mhishi Legal Practice, respondent's legal practitioners