REPORTABLE ZLR(14)

K.M. AUCTIONS (PVT) LTD v (1) ADENASH SAMUEL (2) REGISTRAR OF DEEDS, HARARE

SUPREME COURT OF ZIMBABWE
HARARE, MARCH 5, 2012

N Bvekwa, for the appellant

S M Bhebhe, for the respondent

Before, GOWORA AJA, in Chambers, in terms of r 31(7) of the Rules of the Supreme Court.

This is an application for condonation for the late filing of an appeal and for an extension of time within which to file the appeal. The application follows the decision of this court on 30 January 2012 to strike the appeal off the roll due to certain defects on the notice of appeal initially filed in this case.

On 22 October 2009 the High Court dismissed with costs a claim brought by the applicant herein against the respondent wherein it, the applicant, sought an order requiring the respondent to sign all documents necessary to effect the transfer of certain premises, namely Lot 10 of Lot 24A Block C, Avondale into the applicant's name.

The dispute was in respect of a written agreement of sale entered into by the parties on 13 March 2006. It is common cause that the respondent cancelled the agreement, citing breach of its obligations under the agreement by the applicant. The applicant had

thereafter filed an application for specific performance which was referred to trial. The trial court dismissed the claim with costs. On 28 October 2008 the applicant filed an appeal against that judgment.

On 10 February 2011 this Court granted the applicant leave to file its appeal out of time and ordered that the notice of appeal be filed within seven days of the date of the order. The appeal was then set down for hearing on 30 January 2012 on which occasion the appeal was struck off the roll for want of compliance with the Rules of this Court.

The applicant has now filed this application to comply with the Rules. The founding affidavit has been deposed to by Mr *Bvekwa* who is the legal practitioner of record for the applicant. He has deposed to an affidavit in which he states the following:

> "The appeal, a copy of which I attach hereto as "A", does not explicitly state what the Appellant wants this Honourable Court to grant as contained in the relief being sought. It does not explain what should be done with the order of the Court *a quo.* The notice of appeal was drafted by me. It was an oversight on my part. I had filed an Application in this case for the same reason. It was granted. When the fresh notice of appeal was filed it did not indicate what was to be done with the court *a quo's* judgment although I had specified in the relief. It does not state the fate of that judgment. I was actually taken by surprise when the court raised this issue. I checked with my own draft where I was proof reading the draft notice of appeal. The relevant clause which was in long hand is there. I had added it as I had realised as well that the draft notice which was presented to the court was also wrong. I added this clause to the draft notice that had been filed with the earlier application. My secretary had not included the clause. She told me that it was inadvertence. When the document came back for signature I thought all the amendments I had made had been attended to and I proceeded to sign the notice of appeal for filing."

It is suggested by counsel that it was only on the date of hearing that he realised after it was brought to his attention by the court that the amendments had not been effected. He had checked the position with his secretary and she had admitted that she had,

due to inadvertence, omitted the clause. The secretary has deposed to an affidavit confirming that she had omitted the clause containing the amendments.

It is also contended in the founding affidavit that the applicant has prospects of success on appeal and accordingly, the applicant has prayed for an extension of time within which to file the notice of appeal.

The application is opposed.

It is trite that in considering an application such as this the Court will amongst others consider the following factors:

(i) The degree of non-compliance

(ii) The explanation for it

(iii) The importance of the case

(iv) The prospects of success

(v) The respondent's interest in the finality of the case

(vi) The convenience of the court; and

(vii) The avoidance of unnecessary delay in the administration of justice

See *Herbstein & van Winsen- The Civil Practice of the Supreme Court of South Africa* 4 ed at p 897. See also *National Social Security Authority v Denford Chipunza* SC-116-04.

Further in *Maheya v Independent African Church* SC-58-07 the Court reiterated the same principle in the following terms:

> "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 interest in the finality of the judgment; the convenience to the Court and avoidance of unnecessary delays in the administration of justice. *Bishi v Secretary for Education* 1989 (2) ZLR (H) at 242D-243C."

It is argued on behalf of the respondent that the application in *case* falls short of the requirements referred to above. The respondent contends as follows. The explanation for the lack of compliance is unsatisfactory to say the least. In October 2010 the applicant filed an application for condonation and leave to file an appeal out of time. The founding affidavit was, as in the present application, deposed to by Mr *Bvekwa*. He averred therein that the notice of appeal which had been drafted by him did not specify if the appeal was against the whole or part of the judgment from the High Court. He also averred that the prayer in the notice was not "specific". He said that the defect on the notice of appeal was due to an oversight on his part. There has been a lack of diligence on the part of applicant and its legal practitioners. This Court cannot continue to be encumbered by applications for condonation caused by a legal practitioner's tardy performance of his work.

In *casu*, the applicant is represented by a senior legal practitioner with considerable experience. He is expected to be familiar with the rules of this Court. The negligence on the part of the legal practitioner or lack of attention to detail on the part of that legal practitioner cannot be an explanation that this Court should find satisfactory. In *Maswaure v Nyamunda* 2001(1) ZLR 405 at 409E-G this Court stated:

> "Even if the delay in applying for condonation were due to the fault or negligence of the appellant's legal practitioners, the appellant would not escape the consequences of their lack of diligence. As STEYN CJ said in the *Saloojee* case *supra* at 141B-E:
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> > "I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the

> attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of application for condonation in which the failure to comply with the Rules of this court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."

In *Selk Enterprises (Pvt) Ltd v Oliver Hunungwe Chimenya & Ors* SC-10-03 the court held as being manifestly inadequate an explanation to the effect that the default in complying with the Rules was due to an oversight on the part of the legal practitioners. The fact that the legal practitioner's conduct caused the delay is not a reasonable explanation in applications such as this. This remark is particularly pertinent and of significance where previously an applicant has been granted an indulgence by this Court in a similar application again premised on the inadvertent conduct on the part of his legal practitioners. See also *S v McNab* 1986 (2) ZLR 280 (S).

This is the second application by this applicant for condonation and leave to appeal and an extension of time within which to file such appeal.

Taking into account the abortive hearing of 30 January 2012, this makes this application the third occasion on which this Court is being asked to deal with the matter. If the application succeeds this Court would be dealing with the same matter on four occasions. Clearly it is not in the interest of the general administration of justice for a court to deal with one matter on so many occasions and allowing the roll to be clogged. The administration of

justice would be prejudiced and compromised if laxity on the part of legal practitioners were to be encouraged.

I will then deal with the issue of applicant's prospects of success on appeal.

The court *a quo,* correctly in my view found, that in interpreting the contract it was duty bound to give effect to the intention of the parties at the time of concluding the contract.

The learned Judge in the court *a quo* found that from the facts the parties were agreed from the onset that time was of essence. Initially the respondent, the defendant in the court *a quo,* had wanted payment upon transfer but the parties negotiated and compromised on payment being effected after 14 days from signing the agreement of sale.

The learned Judge found that having regard to the prevailing economic circumstances it would have amounted to an absurdity for the defendant to have given the plaintiff the freedom to pay at any time when the circumstances clearly established that time was of the essence. He found that in terms of the agreement the applicant was required to pay the balance of the purchase price within 14 days from the date of signature. His reasoning cannot be faulted.

In its prayer, the applicant seeks for an order for specific performance in terms of the contract against the respondent. The order, if granted, would result in the applicant having transfer of the immovable property into its name.

At the time that the respondent cancelled the contract, she reimbursed the applicant with the portion of the purchase price paid by the applicant up to that date. By November 2006 the applicant had become aware of the deposit of the purchase price in its account and it retained it. The sum total of these events is that the applicant has not paid the purchase price and it seeks therefore, in the appeal, an order that it pays to the respondent an amount of Z$16 000.00.

If this Court was to accede to the appeal and issue an order for specific performance, the applicant would acquire an immovable property for no value. Although the Zimbabwe dollar still is legal tender it has fallen into disuse. The respondent would have no use for it and it is most unlikely that the applicant would be in a position to effect payment of the sum tendered.

A party who claims a decree of specific performance must be willing and able to tender performance of his own obligations unless he has already performed. As matters stand the applicant will not be in a position to pay value for the property in terms of the contract the parties executed. I am therefore not persuaded that the applicant has prospects of success on appeal.

The respondent complains that the grounds of appeal are long and winding and that consequently the notice is defective. In my view given the conclusion I have come to above, it will not be necessary to determine this issue.

In the premises the application is without merit and it is hereby dismissed with costs.

Bvekwa Legal Practice, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners