REPORTABLE (75)

MAXWELL MATSVIMBO SIBANDA
v
(1) PARKS AND WILDLIFE MANAGEMENT AUTHORITY
(2) THE MINISTER OF ENVIRONMENT AND TOURISM
(3) TSANGA TIMBERS (4) ALLAN JOHN SANDERS (5) RICHARD SAZIYA

SUPREME COURT OF ZIMBABWE
HARARE, JULY 26 AND OCTOBER 14, 2019

Applicant in Person

V. Bhebhe, for the first respondent

No appearance for the second and third respondents

P. Charamba, for the fourth, fifth and sixth respondents

IN CHAMBERS

MAVANGIRA JA: This is a chamber application in terms of r 43 of the Supreme Court Rules, 2018 for condonation of the failure to comply with r 38 (1) of the same Rules and an extension of time in which to appeal. The applicant seeks an order in the following terms:

1. The application for condonation for non-compliance with Rule 38(1)(a) of the Supreme Court Rules, 2018 (Statutory Instrument No: 84 of 2018) be and is hereby granted.
2. The application for extension of time within which to file and serve a notice of appeal in terms of the rules be and is hereby granted.
3. The notice of appeal shall be deemed to have been filed on the date of this order.
4. Each party to bear its own costs.

BACKGROUND

In August 2013, the applicant in this matter made an application before the High Court in HC 6975/13 for a declaratur of his rights in relation to a certain piece of immovable property known as the remainder of Inyanga Block [Folio number 6151], registered under Deed of Transfer No. 1813/61. This piece of land was originally owned by a certain William Anthony Igoe (Mr. Igoe) who in 1986 entered into an agreement of sale with the Ministry of Lands, Agriculture and Rural Resettlement. In terms of the said sale, Mr Igoe retained limited rights in a portion of the land that was registered as Gleneagles Estate. He retained the rights only to extract and harvest, for a period of 25 years from the date of transfer of the land, the timber that he had planted on the said portion of the property.

As a consequence, the Registrar of Deeds duly cancelled Title Deed No. 1813/61 in favour of the Ministry of Lands by Deed Entry No. 2181/86 on 23 May 1986, in terms of s 5 of the Rural Land Act [*Chapter 155*]. By this process the whole piece of land became vested in the President. This is by virtue of subs (5) of s 5 of the Rural Land Act which provides:

> "(5) Where the title deeds of any land have been cancelled in terms of subsection (2) the land shall vest in the President."

On May 7 2003, the applicant's company, Industrial & Farming Development (Pvt) Ltd, entered into an agreement of cession with the Liquidator of Gleneagles Timber Products (Pvt) Ltd. The cedent thereby transferred all its rights, title and interest in the Remainder of Inyanga Block (Folio No 6151, Title No. 1813/61) to the cessionary. Such rights were then subsequently ceded to the applicant in his personal capacity on 8 May 2003. In terms of the cession agreement the applicant acquired the entitlement to harvest timber for the remaining period of the 25 years that had been agreed to in 1986.

Faced with the expiry of the 25 year period in 2011, the applicant wrote to the first respondent seeking an extension of 30 years, which was denied. He was however granted an extension of one year on the property to enable him to conclude his operations. Aggrieved by this, he filed the aforementioned application for a declaratur. This application was premised on the argument that the government of Zimbabwe was yet to effect transfer of the said land and thus the 25 year period had not lapsed as it had not even started to run.

DETERMINATION OF THE COURT *A QUO*

The court *a quo*'s findings are succinctly captured on pages 7 and 8 of its judgment and I shall reiterate them *verbatim* as they cannot be faulted. The court *a quo* found that:

> "The sale agreement between the seller and the purchaser granted the seller cutting rights, for 25 years from the date of transfer, over the Remaining Extent of Nyanga Block [Folio No. 6151], Transfer Deed No. 1813/61. Transfer having occurred on 23 May 1986, the rights which applicant received by way of cession were due to expire on 22 May 2011, but for the one year extension granted to him. Therefore, as properly found by BHUNU J on 9 October 2013 *in Maxwell Matsvimbo Sibanda v Tsanga Timbers and 4 Others*, HC7525/13 (HH334/13), his rights expired in 2012. (*sic*)
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> Further, it must be noted that applicant was alive to the fact that his cutting rights expired in 2011; hence he sought an extension which was granted up to 2012. Any further extension was declined by the first respondent in October and December 2011. In fact applicant's cession agreement over the cutting rights clearly states in clause 2, that they expire in 2011. Moreover, the title deed upon which he bases his claim was cancelled 27 years prior to his issuance of summons, and his claim, if any has long prescribed.
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> Note must be had that these cutting rights only related to Remaining Extent of Nyanga Block held under Deed of Transfer No. 2182/86. This is because the sale agreement between William Anthony Kevin Igoe and the government, which created these rights, was only in respect of the Remaining Extent. Sub-Division B of Inyanga Block was not subject to this agreement and was only acquired by the government through the land acquisition programme. Therefore, contrary, to applicant's assertions, he did not acquire any cutting rights to the whole land that was clearly beyond the rights due to William Anthony Kevin Igoe.
>
> The cession documents produced by the applicant are quite clear: it is only the cutting rights in respect of the Remaining Extent of Inyanga Block which the applicant acquired. This is so because the seller could not have ceded rights to Gleneagles Estate as he was the owner. Nor could his heirs have ceded cutting rights thereto as they would have been beneficial owners of Gleneagles Estate. All they could have done was to

> bequeath, grant or sell the cutting rights, but not cede them. By the same token, the seller and his heirs could not have ceded cutting rights to Sub-Division B of Inyanga Block because they did not own it: it belonged to Peter William Bailey. In any case, the applicant has not produced any evidence to show that Peter William Bailey ceded cutting rights to Sub Division B to the seller or anyone else. The respondents are therefore quite correct: the applicant could not have acquired cutting rights greater than what the seller received in terms of the agreement of sale he entered into with the government in 1986.
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> In addition, applicant's claim to "ownership" of trees is misguided: all he had were cutting rights over trees owned by the title holder of the land. In any event, since the cedent only had cutting rights, he could not have ceded ownership rights to the trees."

The court *a quo* as a consequence dismissed the application with an order of costs on the legal practitioner and client scale.

According to the applicant, he intended to note an appeal against this decision but failed to do so within the stipulated time frame of fifteen (15) days as required by r 38. The applicant thus instituted the instant application with the anticipation that his success would enable him to note an appeal against the judgment of the court *a quo*.

SUBMISSIONS MADE IN CHAMBERS

The applicant submitted that the reason for delay was partly due to the fact that he could not secure the reasons for judgment timeously as the judge's clerk at the High Court was unavailable. He further submitted that he was unable to note the appeal on time as he failed to timeously raise the United States dollars that legal practitioners demanded as payment before they could take up his matter.

On the prospects of success, the applicant argued that the court *a quo* erred in making the finding that his cutting rights had expired in 2011 because the land had not yet been transferred to the third respondent. He argued that in terms of the agreement of sale, the 25 year

period would only start running after the transfer of the land. Thus, since the land had not yet been transferred, as evidenced at the Deeds Registry, then the 25 year period had yet to commence running.

The applicant submitted that the agreement between the seller and the third respondent was an agreement of sale which superseded the acquisition of May 1986. Therefore, the parties could not enter into another sale agreement on 21 August 1986.

Mr *Bhebhe*, for the first respondent submitted on the other hand, that the applicant had always been aware that his rights were expiring in 2011, hence the 30 year extension that he sought *albeit* unsuccessfully. He further submitted that although the agreement between William Anthony Kevin Igoe and the government was titled an 'agreement of sale' it lacked some of the essential elements of an agreement of sale. The said agreement, although citing the parties and the *merx*, did not include the *pretium*, that is to say the price of the property in question.

Mr *Bhebhe* went on to argue that perhaps the applicant was under the misapprehension that when the government acquires land it must go through the usual formalities that other persons go through. However, in terms of s 5 of the Rural Lands Act [*Chapter 155*], now [*Chapter 20:18*]), transfer of rural land to the state is done through cancellation of the existing deed of transfer which was duly cancelled. As such, the applicant had no claim.

Mr *Charamba*, for the fourth, fifth and sixth respondents, associated himself and largely concurred with the submissions made by Mr *Bhebhe*. Mr *Charamba* insisted that the

applicant could not possibly have acquired more rights than those retained by the cedent in the first place.

THE LAW

It is a trite principle of law that a party who fails to comply with the rules of this Honourable Court must apply for condonation and give adequate reasons for his or her failure to comply with the rules. The applicant failed to comply with r 38 (1) (a) of the Supreme Court Rules, 2018. The rules state that;

> "(1) An appellant shall institute an appeal within the following times-
> (a) by filing and serving a notice of appeal in compliance with subrule (2) of rule 37 within 15 days of the date of the judgment appealed against."

Condonation is not granted merely because a party has sought it. In *Zimslate Quartize (Pvt) Ltd & Ors v Central African Building Society* SC 34/17, ZIYAMBI JA stated:

> "An applicant, who has infringed the rules of the court before which he appears, must apply for condonation and in that application explain the reasons for the infraction. He must take the court into his confidence and give an honest account of his default in order to enable the court to arrive at a decision as to whether to grant the indulgence sought. An applicant who takes the attitude that indulgences, including that of condonation, are there for the asking does himself a disservice as he takes the risk of having his application dismissed."

The factors to be considered by the court were outlined by BHUNU JA in *Mzite v Damafalls Investment (Pvt) Ltd & Anor* SC 21/18 where he said:

> "The requirements for an application of this nature to succeed are well known as outlined in the case of *Kombayi v Berkhout* 1988 (1) ZLR 53 (S). These are:
> 1. The extent of the delay;
> 2. The reasonableness of the explanation for the delay; and
> 3. The prospects of success on appeal."

Condonation is thus an indulgence granted when the Court is satisfied that there is good and sufficient cause for condoning the non-compliance with the Rules. Good and sufficient cause is established by considering cumulatively, the extent of the delay, the

explanation for that delay and the strength of the applicant's case on appeal, or the prospects of its success. See *Bonnyview Estates (Pvt) Ltd v Zimbabwe Platinum Mines (Pvt) Ltd & Anor* SC 58/18.

APPLICATION OF THE LAW TO THE FACTS

a) The extent of the delay and reasonableness of the explanation.

The applicant ought to have noted his appeal 15 days after 10 April, that being the date when the judgment it is intended to appeal against was handed down. He was thus required to note his appeal by 8 May 2019. This application for condonation was however filed on 20 June 2019, 31 days after the *dies induciae* had lapsed.

The applicant contends that he failed to note the appeal on time due to delays encountered in retrieving the reasons for judgment from the judge's clerk. To further add to the delay, he submits that he was unable to secure funds to pay for legal representation until after the *dies induciae* had lapsed. Upon securing such funds he now applies for condonation and extension of time to note an appeal, 31 days after the *dies induciae* have lapsed.

Thirty-one days does not appear to be an inordinate delay. However, in terms of the explanation for delay, the applicant would appear to be less than candid with the court. Despite waiting for so long to secure the services of a legal practitioner, the applicant made the application without any legal representation. The delay therefore seems to be unjustified.

b) The prospects of success on appeal.

It is apparent from the agreement between William Anthony Igoe and the government that the cutting rights retained in terms of the agreement were rights to extract

timber from the remainder of Inyanga Block Folio No. 6151 for 25 years after the date of transfer. Section 5 (2) and (5) of the Rural Lands Act [*Chapter 20:18*], formerly [*Chapter 155*], provides as follows:

> "(2) Subject to this section, the appropriate Minister may direct the Registrar of Deeds to cancel the title deeds of any land acquired in terms of subsection (1) and the Registrar of Deeds shall comply with such direction.
> …
> (4) Where the title deeds of any land have been cancelled in terms of subsection (2) the land shall vest in the President."

From the Act, it is clear that transfer of rural land to the state is done through cancellation of the existing deed of transfer, whereby the land reverts to the State. Transfer of the land in question was thus effected in 1986. Thus the cutting rights originally owned by Mr. Igoe expired in 2011 after a period of 25 years. These rights were not perpetual and thus the applicant could not obtain rights greater than those of the cedent.

As stated earlier herein, the finding of the court *a quo* cannot be faulted. The applicant was alive to the fact that his cutting rights were to expire in 2011. He accordingly sought an extension. Such extension was granted up to 2012. The cession documents produced by the applicant are quite clear. It is only the cutting rights in respect of timber on the Remaining Extent of Inyanga Block which the applicant acquired. He did not acquire any other or greater rights in respect thereof. Neither did he acquire any rights in respect of the rest of or any other part of the land. Such would have been beyond or in excess of the rights due to Mr. Igoe from whom the clearly stated rights that he acquired emanated. Mr. Igoe could not pass to the applicant greater rights than he had.

An additional factor with regard to the lack of merit of this application is that the intended appeal is defective. The grounds of appeal are not clear and concise as is required by

r 44 (1) of the Supreme Court Rules, 2018. It is trite that grounds of appeal must be clearly set out to enable the court and the respondent to be fully and properly informed of the case which the appellant seeks to make out and which the respondent is to meet. Anything that falls short of that is improperly before the court.

The applicant's intended appeal raises twelve grounds of appeal and most of these grounds are argumentative and inconcise. In The *Master of the High Court v Lilian Grace Turner* SC 77/93, the following was stated "**it goes without saying that by concise is meant brief, but comprehensive in expression...**" Most of the applicants' grounds of appeal cannot be said to be comprehensive in expression. The grounds of appeal are unnecessarily long and seek to explain or argue the applicant's case, thereby falling foul of r 44 (1).

On a cumulative consideration of the relevant factors, viz. the extent of the delay, the explanation for that delay and the fact that the strength of the applicant's case on appeal is negated or decimated by the clear and cogent findings of the court *a quo*, which cannot be faulted at all, this application lacks merit and therefore cannot succeed.

It is accordingly ordered as follows:-

"This application is dismissed with costs."

Chinogwenya & Zhangazha, first respondent's legal practitioners

Charamba & Partners, Fourth, Fifth and Sixth respondents' legal practitioners