NICOLA JANE GOUMA

Versus

MARC PHILLIP MITCHELL

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 29 JUNE 2022 & 15 JUNE 2023

Opposed application

P. Moyo for the applicant
C. Nyathi for respondent

TAKUVA J: This is an application for condonation of late filing of an appeal.

Salient background facts

The applicant and respondent's late father were boyfriend and girlfriend who had been together as life partners for a period spanning over 14 years. They jointly purchased the immovable property in which applicant currently resides. Applicant was awarded a lifelong usufruct over the property. Upon his father's death, respondent was appointed executor of his Estate. The estate also has a half share of the property known as number 2 Vair Close, Burniside Bulawayo. Respondent frequently visits the property to ensure that the property is well looked after.

The applicant approached the Magistrates' Court in terms of the Domestic Violence Act (Chapter 5:10) [the Act] seeking an order that respondent be barred from setting foot at house number 2 Vair Close, Burnside Bulawayo. Applicant alleged that respondent had displayed stalking behavior which she felt uncomfortable with. At one stage respondent switched off the main electricity lines at the house leaving applicant in darkness and harassed applicant's guest.

At the hearing the respondent raised the following preliminary points:

(i) that the applicant was not a complainant as envisaged in the Domestic Violence Act; and

(ii) that the applicant's application was *res judicata.*

On 10 September 2021, the Magistrates' Court upheld both preliminary points and dismissed the application. On 13 September 2021, applicant filed a defective notice of appeal which did not contain the exact nature of the relief sought. This notice of appeal was withdrawn on 28 October 2021 and applicant tendered wasted costs. Applicant then filed the present application.

Legal requirements for such application

The factors that a court will consider germaine in an application for condonation for non-compliance with any rule were set out in *Bessie Maheya* v *Independent Africa Church* SC-58-07 at page 5 as follows;

> "the degree of non-compliance, the explanation therefore, the prospects of success on appeal, the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the court and the avoidance of unnecessary delays in the administration of justice."

> See also *Rinos Terera* v *George Lentanee Ingram Lock & 3 Ors* SC-93-21 at page 7 where the court stated that, "it is pertinent that the application must be *bona fide* and be premised on relevant factors."

In casu, the applicant relies on three factors namely (a) the degree of non-compliance; (b) the explanation thereof and (c) prospects of success if the indulgence is granted. I now examine these factors one after the other.

The degree of non-compliance and explanation thereof

The relief that the applicant seeks is not for the mere asking but is dependent on this court's exercise of judicial discretion. For the applicant to deserve the court's empathy, the applicant must be candid with the court in giving an acceptable explanation for failure to comply with the rules. See *Kodzwa* v *Secretary for Health & Anor* 1999 (1) ZLR 313 (S) at 315B-E.

In essence an application for condonation must be lodged without delay and must provide a full, detailed and accurate explanation for the delay. In the main an application for condonation is required to meet two requisites of good cause, first establishing a reasonable and acceptable explanation for the delay and secondly, satisfying the court that there are reasonable prospects of success in the main application.

It is trite that what is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help compensate prospects which are not strong. Or the importance of the issue and strong prospects may have to compensate for a long delay. Also the respondent's interests in finality must not be overlooked – see *Melane* v *Santam Insurance Co. Ltd* 1962 (4) SA 531 (A)).

In this case, the applicant's argument is that she fell foul of the rule because she had to withdraw her initial notice of appeal which had been filed within the period prescribed by the rules. The applicant's explanation for the delay is captured in paragraph 9 of her founding affidavit wherein she states;

> "9. I must add that I had initially filed an appeal but I honestly had to have it withdrawn upon being informed that there was a clerical error made on the notice of appeal and accordingly due to this clerical error, the notice of appeal was defective. The decision to dismiss my application had been made on the 10th of September 2021 and I filed a withdrawal of the matter on 28 October 2021 …"

What is clear *in casu* is that the delay from the 10th of September to the 28th October 2021 is a little less than two months. The respondent argues that the applicant's explanation is unsatisfactory because the nature of the error is unclear. A *fortiori* so the argument went, it is not apparent at whose instance the error occurred.

I take the view that the respondent is clearly splitting hairs. What is uncontroverted is that the notice of appeal was withdrawn and the reason for withdrawal was the existence of an error. The applicant tendered wasted costs. The period it took applicant to file this application is not inordinate. The explanation provided by the applicant is reasonable.

Prospects of success on appeal

The test for reasonable prospects of success was set out in *Essop* v *S.* [2014] ZASCA 114 at p 6 cited with approval in *Rinos Terera supra* at p 9 as follows:

> "What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a different conclusion to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding."

In casu, the applicant has made it abundantly clear that she was aggrieved by the court *a quo's* decision to uphold the two points *in limine*. In para 10 of her founding affidavit applicant states that, "I believe the decision to dismiss my case was a travesty of justice and this can only be corrected by allowing one to appeal the decision." Further in para 12 of the same affidavit, she states;

> "12. I also believe that my case has merits and moreso because I continue to live in fear of the respondent's action that have bordered on being obsessive and intent to make sure I suffer for having been in a relationship with his late father."

At the heart of this matter is the interpretation of the Act, in particular the meaning of the word "complainant" by the court *a quo*. This explains why the grounds of appeal are couched as;

> "1. The court *a quo* erred and misdirected itself at law in finding that appellant and respondents were not in an intimate relationship as defined in section 2 of the Act [Chapter 5:16]
>
> 2. The court *a quo* erred or misdirected itself in finding that the matter was *res judicata* when it should have rather determined whether an act of Domestic Violence had been committed under the circumstances."

In order to arrive at a dispassionate decision on the prospects of success, this court must examine the relevant provision of the Domestic Violence Act specifically section 2(1)(d)(ii).

The word complainant is defined in section 2 of the Act. The section provides:

> "2.1 In this Act –
> "complainant" in relation to a respondent means –
> (a) a current, former or estranged spouse of the respondent; or
> (b) a child of the respondent whether born in or out of wedlock, and includes an adopted child and a step child; or
> (c) any person who is or has been living with the respondent whether related to the respondent or not; or
> (d) any person who:-
> (i) cohabits with the respondent; or
> (ii) is or has been in an intimate relationship with the respondent; who applies for a protection order in respect of whom a protection order may be issued …"

In determining whether or not the applicant falls within the definition of complainant *supra*, the court *a quo* restricted itself to paragraph (d)(ii) of section 2. It concluded that the parties were not in an intimate relationship. However, the word "intimate" is defined widely and one of its meanings is that an intimate relationship could be one "marked by very close association, contact or familiarity."

I take the view that the court was supposed to examine the Act as a whole including its purpose in order to ascertain the meaning of "complainant". To the extent that the court *a quo* adopted a narrow approach while interpreting the Act, I find that the court *a quo* erred. It should be noted that by using "intimate relationship" instead of "intimate partner" the Legislature intended that a wider interpretation is required. This in my view makes the prospects good. The appeal is arguable.

As regards *res judicata*, a close look at the provisions of section 12 of the Act, reveals that this defence may not be available to respondents facing allegations arising from the Act. Section 12 states;

> "12. Application for revocation, variation or extension of protection orders;
> (i) where there is a change of circumstance, a complainant, complainant's representative or a respondent may apply to the court for the revocation or variation of an interim protection order, or protection order for the extension of anytime limit attached to any direction or award contained therein
> 2. …"

Accordingly, the court *a quo* was supposed to conduct some inquiry to establish when the acts of domestic violence were perpetrated in relation to the matter that had been brought as an interdict before concluding that the matter is *res judiccata.* In view of the fact that again this is a question of interpreting the provisions of a statute, applicant's prospects of success are not bad.

In the result, the application for condonation has merit in that the applicant has established its legal requirements.

Accordingly, it is ordered that:

1. The applicant's application for condonation for late filing of appeal be and is hereby granted.

2. Applicant to file her notice of appeal and serve it on the respondent within ten (10) days of this order.

3. Each party to bear its own costs.

Mathonsi Ncube Law Chambers, applicant's legal practitioners
Matatu, Masamvu & Da Silva-Gustavo, respondent's legal practitioners