FRANCIS URAYAYI CHINGOZHO N.O
(In his capacity as the Judicial Manager of Myrammar Farming (Pvt) Ltd t/a Cottzim
versus
CHANDRA MOHAN GOYEL
and
VIRENDA RANCHODAND
and
MANOJKUMAR JIVAN
and
JAYPRAKASH PATEL
and
VINODKUMAR RAMA
and
SERISH PURSHOTAM RANCHOD
and
GLOWORM INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
DUBE JP
HARARE, 27 May 2021 and 22 September 2021

Opposed Application

C.T Tinarwo, for the applicant
F. Mahere, for the respondent

DUBE JP

1. The applicant seeks an order for upliftment of bar and condonation for late filing of appearance to defend and plea under HC5762/16.
2. The brief background facts to this application are as follows: On 8 June 2016, the first respondent issued summons against Myrammar (Pvt) Ltd t/a Cottzim, [hereinafter referred to as Myrammar Farming], a company under judicial management and six other defendants. Myrammar Farming was cited as the first defendant. The return of service of the summons served on first defendant showed that it was served on Alex, the judicial manager. The 10 days within which the defendants were supposed to enter appearance to defend lapsed and no appearance to defend was entered on behalf of Myrammar Farming. The second to seventh defendants filed appearance to defend. Myrammar Farming was automatically barred. The matter proceeded with second to

seventh defendants and a pre-trial conference was held. On the date set for the trial of the matter, it was postponed *sine die* to enable the applicant to make an application for condonation.

3. In his founding affidavit Mr Chingozho the current judicial manager of Myrammar Farming averred as follows. The summons was served on Alex Dera on 16 June 2016 and the return of service reflects him the judicial manager for Myrammar Farming. The judicial manager was in fact Reggie Saruchera of Grant Thornton. The reason for failure to enter appearance to defend and plea timeously is that the judicial manager did not receive the summons.
4. Sometime in 2017, Reggie Saruchera seized to be the judicial manager and he was appointed the judicial manager for Myrammar Farming. When he took over, he was not given any court documents related to this matter by Mr Saruchera and did not become aware that there was a pending case. Sometime in March 2020, he received a call from one of the directors of the company who advised him that there was a matter set down for 12 March 2020.Although he had no court papers, he instructed his legal practitioners to attend to the matter leading to the matter being postponed *sine die*.
5. He contacted Mr Dera who was looking after the file on behalf of Mr Saruchera in 2016 to find out why appearance to defend was not entered. The applicant filed appearance to defend, plea and pre-trial conference issues on 9 June 2020. Mr Dera only responded on 19 June 2020. He was no longer working with Mr Saruchera. He could not recall receiving the summons on behalf of Myrammar Farming. Mr Saruchera's position is that the summons was not brought to his attention.
6. The applicant submitted that the failure to file appearance to defend within the stipulated times was a result of a genuine mistake by the previous judicial manager. The applicant maintained that it will be gravely prejudiced if condonation is not granted as the opposition to the first respondent's claim is *bona fide* and has high prospects of success. He contended that the first respondent had no right to institute proceedings against the company without leave of court as it is under judicial management and that the claim was prematurely brought. The applicant submitted further that the first respondent being a *peregrinus*, failed to pay security for costs and should be denied audience. He maintained that the respondent's claim has prescribed and has no merit it having failed to institute the proceedings within three years and that the issue regarding

whether or not the respondent's claim has prescribed is an issue that ought to be ventilated through a trial. The applicant submitted that the respondents will not be prejudiced if the present application is granted as he has already filed appearance to defend, his plea and pre-trial conference issues. He abandoned the point on security for costs.

7. The first respondent, [hereinafter referred to as the respondent] opposed the application. The second to seventh respondents are no longer parties to this litigation after the claims against them were withdrawn following settlement of the full amount owed by the respective respondents. The respondent initially opposed the application on the basis that the chamber application is defective and ought to have been filed in Form 29 in terms of order 32 r 241 (1). The noncompliance with the rules was condoned by consent of the parties. A challenge related to failure to enclose a certificate of appointment by the judicial manager was not pursued. In fact, the respondent abandoned all his preliminary points.
8. On the merits of the application, he submitted that the summons was served at Grant Thornton Chartered Accountants who were the judicial managers for Myrammar and on Alex Dera a responsible person and so the judicial manager became aware of the summons. It contended that the failure to comply with the rules is inexcusable, the claim has not prescribed and that the applicant has no *bona fide* defence on the merits of the matter. The respondent submitted that he will be gravely prejudiced if the application is granted. He contended that the matter has been before the court since 2016 and he continues to be prejudiced as a result of the many delays and postponements of the hearing. He urged the court to dismiss the application.

Leave to sue a company under judicial management

9. The provisional order was granted in terms of s 301(1) (c) of the Companies Act [*Chapter 24:03*] which stipulates as follows:

> "(1) A provisional judicial management order shall contain
>
> …….
>
> (c) such other directions as to the management of the company or any matter incidental thereto including directions conferring upon the provisional judicial manager the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders, as the court may consider necessary;

> and may contain directions that while the company is under judicial management, all actions and proceedings and the execution of all writs, summonses and other processes against the company be stayed and not be proceeded with, without the leave of the court."

10. The provisions of s301 (1) (c) of the Companies Act apply only to actions and proceedings already in existence at the time that a provisional order is granted. It makes provision for stay of proceedings and has no effect of barring proceedings instituted against a company under judicial management. See *Zambezi Gas v N R Barber and Amor* SC 3/2020, *MCA Venture Capital (Pvt) Ltd v Secretary for Mines and Mining Development and Ors* SC 43/21 .
11. In line with this provision, the court order placing the company under judicial management suspends all actions and applications, except writs, summons and other processes against the company which may not be proceeded with without leave of court. It has no effect of barring institution of fresh proceedings whilst the company is under judicial management. The stay of proceedings does not extend to new actions and future proceedings.
12. Condonation for noncompliance with the rules is not a mere formality. It is not a right that is there simply for the asking. It is an indulgence that is granted purely at the discretion of the court. These sentiments were echoed in *Friendship v Cargo Carriers Ltd & Anor*, 2013 (1)ZLR 1 (S), where ZIYAMBI JA said the following:

> "Condonation is an indulgence which may be granted at the discretion of the court. It is not a right obtainable on demand. The applicant must satisfy the court or judge that there are compelling circumstances which would justify a finding in its favour. To that end, it is imperative that an applicant for condonation be candid and honest with the court."

13. The factors to be considered in an application for condemnation were set out in Herbstein and van Winsen, The Civil Practice of the Supreme Court of South Africa, Van Winsen Cilliers and Loots, 4th ed p 897-8 as follows:

> "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. 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." See *Maheya v Independent African Church*, SC 58/07; *Bishi v Secretary for Education* 1989 (2) ZLR 240 (H)."

14. The discretion of the court must be exercised in a fair manner, see *Kodzwa v Secretary for Health &Anor* 1999(1) ZLR 313. These factors are to be considered cumulatively and not in isolation. In *Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (SC) stated thus,

> "As has been stated repeatedly, too much emphasis should not be placed on any one of these factors. They must be viewed in conjunction with each other and with the application as a whole. An unsatisfactory explanation may be strengthened by a very strong defence on the merits. See, for instance, *du Preez v Hughes NO* 1957 R&N 706 (SR) at 709A-F*; Stockil v Griffiths* 1992 (1) ZLR 172 (S) at 173F. In general terms, what an applicant must show is something which entitles him to ask for the indulgence of the court. See *Arab v Arab* 1976 (2) RLR 166 (A) at 173E."

15. An application for condonation ought to be brought as soon as a party becomes aware of the noncompliance with the rules. The applicant must proffer a reasonable and acceptable explanation for the failure to comply with the rules, see *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (s) at 251. Not only must he give an acceptable ad reasonable explanation for the delay in taking action, but the delay in seeking condonation. In the case of an inordinate delay, condonation should not be a matter of course. The applicant must show sufficient cause to justify the delay.

16. The court is required to assess the applicant's prospects of success. The applicant's prospects of success are an important consideration in an application for condonation although they are not on their own the only decisive factor. An application for must set out briefly the brief facts of the case so as to equip the court to assess an applicant's prospects of success. The applicant must have a reasonably arguable case on the merits of the matter. The court must also consider the prejudice the condonation will cause to the other party. The applicant must show good cause for condonation .Courts generally adopt a liberal approach to the question of condonation.

The explanation for the default

17. The application for condonation was filed four years after the summons was issued and served and militates against granting this application. The delay in seeking condonation is inordinate and the explanation for the failure to enter appearance to defend on time

unacceptable and unreasonable. What emerges out of the applicant's explanation is that the former judicial manager failed to enter appearance to defend when served with the summons. Both Alex Dera and Reggie Saruchera chose the easy way out by saying that they did not see the summons. Whether they did indeed see the summons remains unclear. The applicant says that there was a genuine mistake and yet fails to say how the mistake occurred.

18. Whilst the then judicial manager may not have seen the summons, it is the conduct of the new judicial manager and the explanation proffered that gravely concerns the court. When the current judicial manager took over, he was alerted of the matter in January 2018 by the respondent's legal practitioners who wrote to him advising that the case had been set down for hearing on the continuous roll for week beginning 29 January 2018. Having acknowledged receipt of the email on 24 January 2018 and indicated that he had not seen the court papers, the applicant failed to take any action to defend the claim despite being aware of the proceedings.
19. He did not make any attempt to obtain the court papers between January 2018 and March 2020 when he got a call from one of the directors alerting him of the matter. He makes no mention in his founding affidavit of the fact that he had been alerted of the matter in January 2018 and has not bothered to explain the cause of the delay after he was alerted of the matter by the respondent. One would have expected that he would make efforts to obtain the papers at this stage. The delay in getting the papers during this period has not been explained. It is unreasonable for the judicial manager to simply say that he had not seen the papers when he was alerted of the matter by the respondent's legal practitioners and sat back and did nothing. The judicial manager ought to have filed for condonation at this stage but did not do so and there is no explanation for the failure. He acted in a manner not consistent with someone desirous of defending the claim.
20. After March 2020, there was another delay of three months and he did not file for condonation until 25 June 2020.The delays related to this period are unexplained. He belatedly instructed his legal practitioners to appear on his behalf and obtain the court papers and explain the applicant's position. The applicant failed to give a reasonable and full explanation covering the entire period under review. The applicant failed to bring an application for condonation immediately he became aware of the default. He

sprang into action the moment he realised that the matter was proceeding to trial prompting him to launch this application for condonation. In a case where the noncompliance with the rules is glaring, flagrant and inexplicable and where there is no explanation or the explanation given for all or some periods of the delay is poor, inadequate or satisfactory , condonation ought to be refused no matter the prospects of success of the matter. See *P.E. Bosman Transport v Piet Bosman Transpor*t 1980 (4) SA 794(A).

21. The failure to give a full explanation seems to be deliberate. The applicant has not been candid and honest with the court. The applicant has failed to take the court into his confidence. The material non-disclosures call for the censure of the court, see *Mukuhlane v Sports and Recreation Commission* HH 469/19.

Has the respondent's claim prescribed?

22. Prospects of success being one of the factors to be considered in an application for condonation must be addressed in pleadings and adequately so. The defence raised must carry some *prima facie* prospects of success. The plaintiff chose to rely only on prescription to show that he has a *bona fide* defence to the respondent's claim. He contended that prescription forms his defence in the main matter. The applicant did not deal with the merits of the claim save for the issue of prescription. The applicant makes no reference to the actual facts surrounding the claim. The applicant's full defence to the respondent's claim is not apparent *ex facie* his pleadings. The applicant did not address when the loan was advanced, was due and essentially when the cause of action arose. No one knows if liability is admitted as with the other respondents. The applicant made no effort to address the prospects of his full defence on the merits at the hearing of this application and declined an invitation by the court to do so.
23. The applicant was required to furnish the court with sufficient detail to enable it to consider the applicant's prospects of success. All the court is told in paragraph 29 of the founding affidavit is that the claim has prescribed for failure to bring the claim within three years. The court was not favoured with facts regarding why it is said that the respondent's claim has prescribed. No one can say from what was pleaded why the defence of prescription has merit. The defence of prescription was not fully and properly articulated by the applicant and hence did not equip the court to have a sneak

peak at the merits of that defence. If the applicant intended to rely on the defence of prescription alone, he needed to equip the court to assess this defence.

24. The risk that an applicant takes in an application for condonation where he dwells on preliminary points and omits to deal with his defence on the actual merits of the matter is that if the court formulates the view that the preliminary points raised are not arguable, that is the end of the matter. Having elected not to address the claim on the merits, his submissions on the merits, are not considered. Whilst the defence of prescription was not fully pleaded, the respondent seemed to be accepting that summons was served on the applicant after the lapse of three years. He however contended that the running of running of prescription was interrupted by an acknowledgment of debt executed by the second respondent.

25. All the court has to consider is whether prescription may have been interrupted. For the reason that this application is simply for condonation, the court need not resolve the question of prescription at this stage. A court seized with a challenge on prescription in an application for condonation has to consider whether the claim has prescribed before it grants or dismisses the application. In the case of a defendant raising prescription as a defence in an application for condonation, the court must satisfy itself that the claim has not prescribed. If it has, that's the end of the matter. It is bound to grant condonation. All the court is required to do is determine whether the defence of prescription he intends to raise is arguable.

26. The summons reveals that in December 2011, the respondent lent and advanced monies to the applicant and the second to sixth defendants executed personal guarantees in which they jointly and severally bound themselves as sureties and co- principal debtors for payment of the debt. The debt was to be paid in December 2012. It was not disputed that the second to sixth respondents are sureties as well as a co-debtors in terms of the guarantees signed in favour of the applicant.

27. The acknowledgement of debt (AOD) relied on by the respondent was made by the second respondent on 19 November 2013 on behalf of Myrammar Farming. A reading of paragraph one of the AOD reveals that it is an acknowledgment of the debt made by the second respondent on Myrammar Farming's behalf. The effect of the AOD is to interrupt the running of prescription. The applicant in his answering affidavit challenged the acknowledgment of debt on the basis that it does not exist. In a surprise

move, without having seen the AOD, he contended at the hearing that in the event that the AOD does exist, it was signed by someone who had no authority to do so. When asked by the court to reveal the name of the person who had signed the AOD he suggested someone completely different. Litigants should take these courts seriously. Clearly the running of prescription was interrupted by the AOD.

28. The court gathered from the respondent's submissions that his claim is for enforcement of personal guarantees executed by the second to seventh respondents and the principal debtor is Myrammar Farming. The applicant does not deny in his plea he subsequently filed that Myrammar Farming entered into a loan agreement with the first defendant, accessed a loan, utilized it and did not pay it back. He does not deny that the money advanced to it was not paid back and has no plausible defence for its failure to do so. Two of its directors who guaranteed the loan have already paid back part of the loan amount. The applicant has made this application simply to frustrate efforts to recover the outstanding loan.
29. The applicant has no defence to the respondent's claim. The applicant's prospects of success are weak. I see no reason why the court should waste everyone's time and money and deny the inevitable and grant condonation in a hopeless case such as this. It does not appear to me that this application was lodged in good faith but to scuttle the respondent's claim and frustrate efforts to recover the outstanding loan. This is so when one considers that the other respondents who guaranteed the loan have not only shown a willingness to settle the indebtedness but have paid part of the debt. The applicant's defence has not been shown to have any merit. Having failed to address the actual merits of his defence, the court is constrained to find that his defence is meritless.
30. Condonation for failure to comply with the requirements of the rules is required to be sought immediately a party becomes aware of his default. Where the delay is inordinate and is likely to cause prejudice to the other party, the request should be turned down. A respondent in an application for condonation must lay a basis for a finding of prejudice in an application for condonation. It is not all or any prejudice that will call for dismissal of an application for condonation. It has to be shown that the prejudice suffered or likely to be suffered due to the delay is unreasonable, see *Madinda v Minister of Safety and Security* 2008 (4) SA 312 SCA. In a case where the delay is

inordinate and is likely to cause prejudice to the other party, the request for condonation is ordinarily turned down.

31. It is not the role of the court to presume that a litigant is likely to suffer prejudice if the application is granted. A respondent who fails to show that he has suffered prejudice or is likely to suffer risks the application for condonation being granted. In *Cordier v Cordier* 1984 (4) SA 524 (C) at 528I-529B the court held that:

> "... [The] defendant does not allege that he will be prejudiced by the condonation of Plaintiffs long delay in pursuing his amendment. Apart from the delay itself, defendant advances no good reason why condonation should not be granted. Long delay per se is not necessarily a good reason for refusing condonation. It is the long delay that necessitates condonation in the Court's discretion, and to say that long delay is reason to refuse condonation is to argue in a circle."

32. It is important to consider the stage at which condonation is being requested. Pleadings have closed and the proceedings in the main matter have already passed the pre-trial conference stage [PTC] in the absence of the applicant. He only sought to defend the proceedings at the stage when the matter had been set down for trial and the other parties were engaged in argument on a preliminary issue regarding prescription.
33. The applicant has no luxury to just fly into the proceedings at the stage when the matter had been set down for trial. The court has considered that if the applicant is joined at this stage, this entails the PTC being held afresh and the trial being further delayed. The fact that the applicant has already filed his plea, pre-trial issues and appearance to defend does not assist his case. If he is joined to the proceedings at this stage, this will entail reopening pleadings and necessitate the respondent filing further pleadings. There will still be need to not only revisit the pre-trial conference minute but actually carry out another pre-trial conference.
34. The respondent who is a *peregrinus* continues to be inconvenienced and prejudiced by the many delays arising out of the postponements of the trial. The proceedings have continued to be postponed at his expense and the delay has been unduly lengthy. Matters should not be allowed to drag on indefinitely. It is convenient for the court to proceed with the matter without the applicant. There is a need for finality to litigation.
35. The court has taken into consideration all the aspects of the matter, and has decided in its discretion to dismiss the application. There is no useful purpose in granting him condonation in a case where the applicant has no defence to the respondent's claim.

The applicant has not shown good cause for condonation. I see no basis for costs on a punitive scale.

Accordingly, it is ordered as follows:

The application is dismissed with costs

Zimudzi and Associates, applicant's legal practitioners
Atherstone & Cooke, respondents' legal practitioners