PROSECUTOR GENERAL ZIMBABWE
versus
JUSTICE MPHISA
and
JOSHUA TARUBVA
and
TAWANDA CHIHOMBORI
and
MS MADONDO (N.O.)

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO, 1 July 2021 & 5 April 2022

OPPOSED MATTER

N Chamisa with *BE Mathose*, for the applicant
No appearance for the first respondent
I Moyo, for the second respondent
No appearance for the third respondent

WAMAMBO J: The applicant is the Prosecutor General of Zimbabwe.

The first to third respondents are accused persons appearing before the Magistrate who is cited as the fourth respondent.

The background to the application is as follows:-

The first to third respondents appeared before a Magistrate sitting at Masvingo charged with six counts of fraud as defined in s 136 of the Criminal Law (Codification and Reform Act) [*Chapter 9:23*].

The state outline can be summarized as below:

The complainant is Bikita Minerals (Pvt) Ltd. On 29 May 2018 Gift Gwande an export manager at Bikita Minerals sent a product dispatch schedule (PDS) to Tribal Logistics requesting six trucks to ferry nine consignments ready for export. Tribal Logistics is the sole transporters of Bikita Minerals products. Accused who is employed as a dispatch supervisor at Bikita Minerals

received a copy of the PDS and acting in cahoots with the other two accused created another and separate PDS embedded with false contact numbers and manifest numbers. Trucks and drivers were also fraudulently created to collect petalite from Bikita Minerals.

At the loading bay it was discovered that two trucks bearing South African registration number D967 XP and CX 81RK had not been assigned. Verifications revealed that the said trucks with South African registration numbers had no consignment notes, custom road manifests and currency declaration forms, bill of entry and documents for the Zimbabwean and South African boarder. It was discovered that the PDS in the possession of accused one was forged. To cover up for the transgression accused two used contact reference number and manifest numbers already allocated to trucks which had already loaded at the mine on 29 May 2018.

The three accused acting in concert loaded petalite into the South African trucks using a forged PDS document. The trucks were impounded and the product seized at the mine Bikita Minerals stood to suffer financial prejudice to the tune of US$27 462.40. The total value was recovered.

The State in the trial led a number of witnesses namely Munyaradzi Mapeture, Timothy Madhara, Andrew Van DeMera, Amanda Paidamoyo Makausi (hereafter called Amanda). It was in the course of Amanda's evidence that the State referred to documents Exhibit 4A and 4B, that the defense sprung up and raised issue with the production of the said documents. The defence's position was that the documents had not been served upon them.

The State insisted that the documents Exhibit 4A and 4B had indeed been served upon Mr Shumba and that there was proof of service to evidence that fact. The defence made submissions that:

> *State papers should be served timeously before the trial so that an accused is given adequate time to prepare his defence and that the defence proffered at the start of the trial was in response to documents served upon them by the State. The State on the other hand submitted that there was no ambush upon the defence. The State was of the view that the documents sought to be produced were not only relevant but would assist the court towards the achievement of justice. The State referred to an acknowledgement of receipt and firmly submitted that all the relevant papers were served upon the defence.*

The trial court *a quo* made a ruling to the following effect:

Section 70(1)(c) of the Constitution gives an accused the right to be granted enough time and facilities to prepare his defence. The court found itself in a difficult position to determine whether or not the impugned documents were served on the accused's legal practitioners.

The court noted that the acknowledgement on Exhibits A and B reflected a different font. The court found further that the legal practitioners, all two of them confirmed service of all the other documents besides Exhibit 4 (the dispatch book). The court also noted that the defence outlines of all three accused made no reference to the impugned documents thus giving rise to aspersions that they were not served with the documents.

The trial court found that the dispatch book did not include an "A" thus it meant the defence was served with the dispatch book but not Exhibits 4A and 4B.

It was the trial court's finding that the said documents were not served on the defence team thus the court *a quo* disallowed the production of the said documents.

The state was aggrieved with this interlocutory finding and made an application for review attacking the ruling by the court disallowing the production into evidence of Exhibits 4A and 4B.

Effectively the state seeks the following order:-

IT IS ORDERED THAT

1. "The decision of the fourth respondent to deny applicant the right to use and produce admissible evidence in the form of proof of deliveries which are clearly outlined in the state papers in the matter before the fourth respondent case number MSVP 1423-25/19 be and is hereby set aside as it is irregular and not in accordance with real and substantial justice.

   The proof of deliveries mentioned in state papers served on first, second and third respondents can be used and produced in proceedings before the fourth respondent in case number MSVP 1423-25/19".

At the hearing of this matter Ms I. Moyo advanced a number of points *in limine*. Among the points advanced she averred that the application for review was out of time yet there was no application for condonation. She referred to Order 33 r 259 of the High Court Rules, 1971. I will address this point first. If it is dispositive of this matter at this stage I will need not advert to the other points *in limine*.

Rule 259 reads as follows:

> "Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceedings in which the irregularity or illegality complained of is alleged to have occurred. Provided that the court may for good cause shown extend the same"

It is common cause that the applicant's application in this case is a review application. It is also common cause that applicant instituted his application after a period in excess of eight weeks from the date when the trial magistrate rendered her interlocutory ruling. It is also common cause that applicant did not and has not launched an application for condonation.

No application for condonation was made at any stage. Before the oral hearing in spite of the fact that second respondent had raised the issue in her heads of argument no condonation application was made. In oral submissions before the second respondent pursued the issue relentlessly and again applicant did not request for the matter to be removed from the roll while instituting the condonation application.

The applicant sought to respond to the preliminary point raised through applicant's heads of argument. That is not an application for condonation. In any case before me the applicant was content to request that I make use of Rule 4c of the High Court Rules 1971 to condone the late institution of the application.

What may have escaped the applicant is that our courts have found strongly that where there is no application for condonation then the matter will be improperly before the court, for a ruling on the merits. I shall advert to only a few judgements in this regard.

The oft quoted judgment is that of *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S) where GUBBAY CJ at p259 D – F to 260 A – D said:-

> "Rule 259 of the High Court rules, on the other hand, requires an application for review to be instituted within eight weeks of the termination of the proceedings in which the irregularity or illegality complained of is alleged to have occurred. Its proviso allows the court to extend the time for good cause shown. In other words if the application for review has been brought out of time, condonation for the failure to comply with r 259 must be sought.
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> If authority is required for this self-evident concept it is to be found in *Bishi* v *Secretary for Education* 1989 (2) ZLR 240 (H) at 242D and *Mushaishi* v *Lifeline Syndicate & Anor* 1990 (1) ZLR 284 (H) at 288 E – F. The court is entitled to refuse the review or may condone the omission. It exercises a judicial discretion, while taking into consideration all relevant circumstances.
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> In adopting an incorrect procedure, the respondent did not advert to the time period prescribed in r 259. It was necessary for him therefore to apply for condonation in terms of the proviso to that rule. This he did not do, not even at the eleventh hour when the objection was taken by the applicant. Thus there was before the court *a quo* no endeavour to show good cause to justify it in extending the time in bringing the application. No explanation was offered in respect of the manifestly inordinate delay of just over two years in launching the proceedings. Was this due to the neglect

> of the legal practitioner? Or perhaps the respondent himself was responsible in prevaricating as to whether to bring proceedings? The court was left completely in the dark.
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> Notwithstanding that there was before him no application, the learned judge condoned the unexplained delay. He did so solely on the ground that as in his opinion the decision to dismiss the respondent was null and void on account of gross procedural irregularities by the investigation panel, to dismiss the application would constitute a failure to redress an injustice. Put tersely he held that if an application for condonation had been made, it would have been granted "as a matter of cause". The cases relied on for what is an innovative approach to r 259 were *Ramba en Andere* v *Rektor, Tshiya Onderwys Kollege en Andere* 1986(1) SA 424 (0), *Secretary for the Interior* v *Scholz* 1971 (1) SA 633 (C) and *Jockey Club of South Africa* v *Forbes (supra)*. None of these decisions however concerned the necessity to establish a reasonable explanation for the delay in instituting the application. The reasonableness of time within which the application was brought was not a factor in any of them. See *Mabuza* v *Tjolotjo District Council* HB 52-92 (not reported).
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> I entertain no doubt that absent an application, it was erroneous of the learned judge to condone what was on the face of it a grave noncompliance with r 259. For it is the making of the application that triggers the discretion to extend the time. In *Matsambire* v *Gweru City Council* S 183-95 (not reported) this court held that where proceedings by way of review were not instituted within the specified eight week period and condonation of the breach of r 259 was not sought the matter was not properly before the court. I can conceive of no reason to depart from that ruling.
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> One only has to have regard to the broad factors which a court should take into account in deciding whether to condone such a non-compliance, to appreciate the necessity for a substantive application to be made".

The terse explanation contained in applicant's heads of argument can only be tested if it comes in the form of an application for condonation. The application will have to address the factors as clearly enunciated in a plethora of cases including *Forestry Commission* v *Moyo* (*supra*). The respondent will have to respond and the matter heard for a decision to be made whether or not to grant the application.

As it stands in light of the decision of *Forestry Commission* v *Moyo* (*supra*) by the Supreme Court I cannot deviate from that decision. To that end I find it unnecessary to consider the other points *in limine* raised.

I find that this application is improperly before me for the reason that no application for condonation of the late institution of the application was made.

I therefore order as follows:

The application be and is hereby struck off the roll with each party meeting its own costs.

National Prosecuting Authority, applicant's legal practitioner
Mutendi, Mudisi and Shumba, second respondent's legal practitioners