KEMBO MOHADI

JOHN JOSIAS MOYO

MRS T. MOHADI

GEORGE MUKAMBA

CAMBEL JUNIOR MOHADI

IRENE NDOU

ALISTER MOYO

THULISANI NDOU

BRIAN MOYO

DUMEZWENI MULEYA

MOSES SIBANDA

RABSON MTHOMBENI

CBZ BANK

Versus

BARBRA LUNGA (in her capacity as the Provisional Liquidator of NERRY INVESTMENTS (PVT) LTD)

and

CBZ BANK

IN THE HIGH COURT OF ZIMBABWE
TAKUVAJ
BULAWAYO27 MARCH & 24 JULY 2014

E.R. Samkange for 1st applicant
R. Moyo-Majwabu for 1st respondent

Civil Application

TAKUVAJ: This is an application for condonation of late filing of a notice of opposition in case number HC 2988/12

The facts are as follows:-

On 4 September, 2012, 1st respondent (as applicant) in case number HC 2988/12 filed with this court a chamber application accompanied by a certificate of urgency. The 1st respondent, relying on Rule 242 (2) (c) of this court's rules sought a provisional order *ex parte*. The matter was placed before a judge in chambers and was granted on 6 September 2012.

Subsequently on 13 September, 2012 the 1st applicant was served personally with the provisional order. Instead of filing a notice of opposition 1st applicant's attorneys Messrs G. N. Mlotshwa and Company appealed the provisional order to the Supreme Court. Meanwhile, respondents set down case number HC 2988/13 on the unopposed roll of the 7th February 2013. Applicants were barred by operation of Rule 233 (3) of the High Court Rules, 1971.

Applicants then filed this application seeking condonation of late filing of a notice of opposition and that costs be costs in the cause. Respondents filed a notice of opposition on 20 February 2013 and 1st applicant filed an answering affidavit on 6 March 2013.

At the hearing of this application, Mr *Moyo-Majwabu* raised a point *in limine* in which he argued that the 1st applicant has no authority to defend this application on behalf of the 12 other applicants because he had produced no mandate from any of them to prove that they so mandated him. He further submitted that the affidavits from 2nd to 12th applicants filed of record, were so filed at a later stage without leave of the court and they should therefore be removed.

Mr *Samkange* sought to rely on Rule 227 (4) of this court's rules. However, Mr *Samkange* conceded that these affidavits were not filed with the application. He submitted that he was not relying on them. Indeed leave should have been sought before filing these affidavits. I then upheld the point *in limine* and ordered that the first applicant cannot represent the other applicants.

First applicant's application is based on the following factors;

1. that he acted timeously by instructing a legal practitioner to defend the matter
2. that the legal practitioners adopted an incorrect procedure
3. that the inability of the legal practitioners to follow the correct procedure in prosecuting applicant's instructions should not be visited on him
4. that 1st applicant's prospects of success on appeal are good in that firstly, respondents adopted an incorrect procedure which was grossly inappropriate and irregular. It was submitted that respondents should have issued summons instead of proceeding by way of an urgent chamber application since the various claims sounded in money. Reliance was placed on *Ex Combatants Security Co* v *Midlands State University* HH-80-2066; *William* v *Turnstall* 1949 (3) SA 835 and *Miller* v *Roussot* 1975 (1) RLR 324.
5. that there is no proof placed before the court in case number HC 2988/12 that the various amounts claimed are due and owing. Therefore 1st applicant has a valid defence against the claims made by the respondents in case number HC 2988/12.

The application was opposed on the following grounds;

1. the 1st applicant was fully aware of what he was required to do if he intended to oppose the provisional order in that the provisional order was served on him personally and it clearly stated that he was required to file opposing papers supported by affidavits within ten days from the date of service.
2. the 1st applicant decided to note an appeal at the Supreme Court. This was a choice he consciously made and that it turned out to be a wrong decision should not be used as a ground for seeking condonation.
3. the decision to commence 1st respondent's case by way of action cannot be a ground for allowing 1st applicant to re-open the case since these issues should have been raised in a proper way as provided for by the provisional order and the Rules of this court.
4. the claims made against the applicants are clearly set out and supported by vouchers signed by the applicants. They are not claims for damages but rather repayment of the company's money unlawfully taken by 1st applicant.
5. the 1st applicant's founding affidavit does not reveal a defence or any disputes of fact.
6. the 1st applicant's prospects of success are non-existent in that he failed to produce proof of authorization by way of a board resolution.

The sole issue that falls for determination is whether 1st applicant has established the requirements for an application for condonation. The broad principles that guide the court in an application for condonation were set out in the case of *United Plant Hire (Pty) Ltd* v *Hills & Ors* 1976 (1) SA 717 (A) in the following words;

> "It is well settled that in considering applications for condonation, the court has discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, 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."

In *Bishi* v *Secretary for Education* 1989 (2) ZLR 240 (HC) it was held per CHIDYAUSIKU J (as he then was) that the following are the factors to be taken into account in considering whether good cause has been shown:

"(a) the degree of non-compliance with the rules;

(b) the explanation therefore;

(c) the prospects of success on the merits;

(d) the importance of the case;

(e) the convenience of the court;

(f) the avoidance of unnecessary delay in the administration of justice."

In *Kombayi* v *Berkout* 1988 (1) ZLR 53 (SC) it was stated that "the broad principles the court will follow in determining whether to condone the late noting of an appeal are: the extent

of the delay; the reasonableness of the explanation for the delay; and the prospects of success. If the tardiness of the applicant is extreme, condonation will be granted only on his showing good grounds for the success of his appeal."

Applying these principles to the facts, I find that the extent of the delay *in casu* is considerable. The 1st applicant became aware of the provisional order in September 2012 and he filed this application on 7 February 2013, a period of six months. The degree of non-compliance with the rules is phenomenal in that in terms of the rules, 1st applicant was supposed to file a notice of opposition within ten (10) days from the date of service but he only acted after a period of approximately 180 days. In my view this delay is clearly inordinate.

The explanation or reason advanced for the delay is that the legal practitioner who was briefed to prepare the notice of opposition decided on his own to mount an appeal against a provisional order. That this procedure is incorrect is beyond question. It was further submitted that since the appeal was filed before the *dies induciae* expired, the inescapable conclusion is that the applicant acted timeously in his desire to defend the matter. It was contended on behalf of the applicant that the issue is whether the inability of the legal practitioners to follow the correct procedure in prosecuting applicant's instructions should be visited on applicant. Mr Samkange submitted that the court should do justice between the parties and *in casu* the errors of the applicant's erstwhile legal practitioners should not be visited upon the applicant.

The law is clear on this point. In *Bishi supra*, it was held that "while the courts are very reluctant to visit the client with the sins of his legal practitioner, there has to be a limit beyond which the courts will not go." See also *Saloojee & Anor NNO* v *Minister of Community Development* 1965 (2) SA 135 (A) where STEYN CJ remarked as follows:

> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the sufficiency 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 applications 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 for 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." See also *Kombayi's* case *supra*.

In the present case, the applicant admitted that he was personally served with the provisional order in September 2012. That order clearly spells out what applicant was required to do. The applicant is not some simpleton but a businessman who should have read the provisional order. There is no affidavit from the erstwhile legal practitioner acknowledging the error. The lawyer being an agent would not have taken the decision to appeal *mero motu* without instructions from applicant. Further, the lawyer would not have crafted grounds of appeal before taking instructions from the applicant. It is at this stage that the applicant should have asked his lawyer why he was not making affidavits and signing them within ten (10) days

from the date they received the provisional order. If this question was asked and the lawyer had given some explanation, this should have been mentioned in the founding affidavit. This was not done. Instead in paragraph 5 (b) of his founding affidavit, applicant states that he gave the lawyers "specific instructions to defend the matter" and he was assured that the matter "was being defended". He stated that he did not enquire as to the "exact manner in which" his defence was prosecuted as that is the exclusive province of attorneys. It is clear that even if the legal practitioner was negligent, there is also evidence of total inaction on the part of the applicant. No explanation has been tendered for that inaction.

For these reasons, I find that the explanation given for the delay is totally unsatisfactory.

I now turn to the prospects of success on the merits. In his founding affidavit applicant simply states that he had "a valid and lawful defence" to case number HC 2988/12 without stating what exactly his defence is – see paragraph (f) (i). In paragraph (h) he contended that case number HC 2988/12 consists of "claims for damages, or put differently, claims that must be pursued through a summons action." He further submitted that this kind of relief cannot be obtained through an application procedure, let alone an urgent chamber application.

In my view, case number HC 2988/12 is not about a claim or claims for damages but is based on specific documents signed by applicant acknowledging receipt of all amounts he took from the company without authorization by the company. Specific allegations were made that applicant paid school fees for his son in South Africa using company funds. There are other numerous examples of such unlawful conversion of funds to personal use. The claims are for refund of such amounts. All that was required of applicant was to file proof of authorization in the form of a company resolution. This he has not done and one wonders what sort of defence applicant is talking about. What is clear though from the papers is that whatever defence he is harping on is *mala fide*.

It follows therefore that applicant's prospects of success on the merits cannot be described as good.

Accordingly, it is ordered that the application be and is hereby dismissed with costs.

Venturas & Samukange c/o Dube-Banda, Nzarayapenga & Partners, 1st applicant's legal practitioners
Messrs James, Moyo-Majwabu & Nyoni, 1st respondent's legal practitioners