

WILFRED MANEMO 1st Applicant

and

VIMBAI CHIREMBA MANEMO 2nd Applicant

versus

ALPHONSUS ACHINULO 1st Respondent

and

STELLA ACHINULO 2nd Respondent

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 1 & 21 FEBRUARY 2002

N. Mathonsi for applicants
Hwalima for respondents

Rescission of Judgment

CHEDA J: This matter was brought to me as an opposed application for rescission of judgment granted by this court on 15 February 2001 and condonation of

applicants' failure to make such application timeously as per Rule 63(1) of the High

Court (General Division) Rules (1971).

The brief facts of the matter are that applicants and respondents entered into a

lease agreement in or around July 2000 in relation to a certain immovable property in

Kumalo Suburbs, Bulawayo. Disputes arose between the parties which resulted in the

respondents instituting legal proceedings against applicants. A provisional order was

granted by this court on 10 August 2000.

Before the provisional order was either confirmed or discharged the following

events took place. Or about 4 September 2000 respondents vacated the property and

this was confirmed by their legal practitioner in their letter of 14 September 2000 to

applicants' legal practitioners. In response to his letter, applicants' legal practitioner

advised respondents' legal practitioner that:

- (a) they had issued summons for the eviction of respondents.
- (b) they had therefore not filed a notice of opposition to the provisional order.

This was, because, these legal processes had been overtaken by events namely

that the respondents had vacated the property.

Thereafter, a series of correspondence took place between the two legal practitioners regarding the issue of costs. In their letter of 4 September 2000

respondents' legal practitioners proposed that applicants pay their clients costs to

which applicants' legal practitioners responded on 2 October 2000 stating that their

clients were denying the claim and that any action taken by them would be contested.

(my emphasis)

On 15 February 2001 respondents through their legal practitioners had the provisional order confirmed, a bill of costs was taxed and allowed on 6 July and a writ

issued on 6 August 2001.

Mr Tshuma was acting for applicants at the time when Mr T. Moyo was acting for respondents swore to an affidavit and stated among other things that he only became aware of the confirmation of the provisional order on 22 August 2001 when his clients advised him of the visit by the Deputy Sheriff for attachment of their

property in pursuance of the order obtained on 15 April 2001.

The issues which call for determination are the application for condonation

and the rescission of judgment.

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The question is whether applicant's failure to comply with Rule 63(1) of the High Court (General Division) Rules (1971) should be condoned by this court Rule 63(2) reads,

"If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and giving leave to defendant to defend or to the plaintiff to prosecute this action, on such terms as to costs and otherwise as the court considers just."

The court has a discretion as to whether or not it should condone non-compliance with the rules. The principles which have been a guide for our courts

in the satisfactory determination of the above question was clearly laid down and has

been followed in many cases, one is United Plant Hire P/L v Hills and Others 1976(1)

SA 717(a) where HOLMES JA stated at 720 F-G,

"It is well settled that, considering applications for condonation, the court has a discretion, to be exercised judicially upon a consideration of all the facts, and that in essence it is a question of fairness to both sides. In this inquiry, relevant considerations may include the degree of non-compliance with the rules, the explanation thereof, the prospects of success of appeals, the importance of the case, the respondents' interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice. This is not exhaustive".

It is common cause that applicants did not comply with the rules. The question therefore is that of the degree of non-compliance. There was a delay of one month and one week. Such delay, is satisfactorily explained by Mr Tshuma who in his affidavit states that immediately after he had been notified of the attachment, he went to check with the Registrar's Office and thereafter communicated with respondents' legal practitioners, Mr Hwalima who had taken over the matter.

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I am satisfied that the delay in bringing this application was not inordinate.

There had been negotiations regarding the costs in this matter. The argument

centred on the quantum and applicants had pointed out the error of including fees

relating to a matter at the magistrates' court, which error respondents' legal practitioners admitted, in not so many words as evidenced by their letter to applicants' legal practitioners on 17 September 2001 which reads, "We have re-visited our bill of costs and noted the following errors ..."

The admission therefore in my view enhances applicant's prospects of success

on merits. There was therefore a need for them to defend respondents' claim of costs.

Respondents had full knowledge that their costs were in dispute. The case was of

importance to them because their desire to oppose the provisional order and summons

for eviction which they had instituted, through their erstwhile legal practitioners. This

puts the importance of the case to applicants beyond doubt.

The delay in applying for condonation by one month and one week cannot be said to have placed such inconvenience to the court to the extent that the court can

shut its door on the face of the applicant who looks upon it for dispensation of justice.

This, to me is the type of delay which is clearly overridden by the quest to balance the

scales of justice. It is a settled principle of our law that the courts should expeditiously dispose of cases before them with minimum delay, but, at the same time

not to sacrifice justice for expedience purposes.

I am satisfied that the delay in bringing this application was not inordinate, the

explanation given for the said delay, the prospects of such on the merits are bright, the

respondents have an interest in the finality of their judgment, there is no

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inconvenience caused to the court and the matter has to be concluded without unnecessary delay. This application therefore succeeds.

Rescission of Judgment

On the merits, respondents had always been aware that applicants were opposing their claim, though, their legal practitioners were not keen to address that point. Without regard of possible errors in their calculation they went ahead to have the provisional order confirmed. I agree with Mr Tshuma for the applicants that if the court had been appraised of the full facts of this case it would not have confirmed the provisional order. It is my view, that respondents' legal practitioners took advantage of the fact that applicants had vacated the property and went ahead to confirm the provisional order in relation to costs. They should not have done so without notifying the applicant as they were aware that their costs were being queried, to do so, in my view is indeed to snatch a judgment behind a colleague.

I should add that the legal profession is regarded as an honourable profession and one of its requirements is fairness in the day to day dealings with colleagues. Accordingly, etiquette of the practice requires that colleagues be treated with due consideration without of course sacrificing one's client's interest. There is always the temptation of a desire to benefit or impress one's client by inconveniencing the legal practitioner on the other side. It is the duty of every legal practitioner to overcome this temptation.

In this particular case, I find that, the temptation was too high to overcome by respondents' legal practitioners. This conduct can certainly not be condoned by this court.

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I accordingly make the following order:

- for
1. that the application for condonation of late filing of application rescission succeeds.
 2. that the application for rescission succeeds.
 3. that the question for costs be referred for taxation by the Assistant Registrar's office.
 4. Respondents pay costs for this application at a higher scale.

Web, Low & Barry, applicants' legal practitioners
Messrs Hwalima & Associates, respondents' legal practitioners