

Judgment No. HB 167/04  
Case No. HC 3244/01  
X Ref HC 2130/03 & 2131/03

**TSHOVA MUBAIWA TRANSPORT  
CO-OPERATIVE LIMITED & 4 OTHERS**

**versus**

**JOSPHAT MPOFU AND 4 OTHERS**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 17 FEBRUARY 2005

*S S Mazibisa* for applicants  
*R Moyo-Majwabu* for respondents

Application for condonation for late filing of application for rescission of judgment

**CHEDA J:** This is an application for condonation of late filing of application for rescission of judgment. The history of this matter is that a default judgment against applicants was granted under case HC 3244/01. This was due to applicants' erstwhile legal practitioner's failure to file heads of argument in that matter.

According to applicants, they only became aware of the said judgment after they went to seek legal advice from their present legal practitioner regarding a contempt of order that had been granted against them. They applied for the stay of execution of that order which was granted. It is their averment that they were not in wilful default as they were let down by their erstwhile legal practitioner's ineptitude.

Mr *Moyo-Majwabu* for respondent has argued that this matter dates back to 1996, there has been various applications and negotiations between the parties.

Applicants' most strong argument if I understood them correctly, is that they were let down by their erstwhile legal practitioner whose handling of this matter leaves a lot to be desired.

Mr *Moyo-Majwabu* for respondents has argued that applicants have failed to give a satisfactory explanation of their failure to comply with the rules of court. Further that they have approached the court with dirty hands in that they have been evading the Deputy Sheriff's arrest for contempt of court.

In terms of the rules of this court, applicants should have filed their application for rescission of the default judgment within 30 days from the date they learnt or became aware of the default judgment. It was after one year that applicants came to know about the judgment that they filed their application for condonation. Mr *Moyo-Majwabu* referred this court to the principle enunciated in *Saloofeen & Ano N O v Min of Country Dev* 1965(2) SA 135(A) at 138 where STEYN CJ stated-

“... what calls for some acceptable explanation, it is not only the delay on noting an appeal and lodging the record timeously, but also the delay in seeking condonation.”

This indeed is the approach by our courts. The principles governing an application for condonation was clearly laid down in *Hodzwa v Secretary for Health & Ano* 1999(1) ZLR 313(S) where it was held that.

1. the court has a discretion to grant condonation when the principles of justice and fair play demand it and when the reasons for non-compliance with the rules have been explained by the applicant to the satisfaction of the court.
2. The principles applicable are the same, whether one is dealing with an application for condonation or the failure to file an application for review timeously or to note an appeal timeously; and

3. Whether the presence of reasonable prospect of success on appeal is an important consideration which is relevant to the granting of condonation, it is not necessarily decisive.

First and foremost, the rules of court no doubt have to be complied with by all litigants who seek the court's relief and or protection. Condonation remains a sole discretion of the court which discretion has to be used judicially upon consideration of all facts at all times with a view of doing justice between man and man. The following factors have to be taken into account in determining the question of condonation.

1. the degree of non compliance;
2. the importance of the case to the parties;
3. the prospects of success of applicant's case;
4. the explanation for the failure of non compliance;
5. respondent's interest in the finality of his judgment;
6. the need to bring the litigation to finality.

In *casu*, no doubt the delay has been over a year which indeed is long under the circumstances. The reason for such delay is that of the ineptitude of their legal practitioner. While these courts have on many occasions held that a litigant chooses his legal representative and it is through that choice that he should either succeed or fail in that litigation. However, this approach should not be adopted as a cut and dry principle. Applicant's explanation together with other factors *supra* should also be considered. Their explanation for the delay and the prospects of success are in my view bright which therefore necessitates the need for them to have their day in court. Above all the parties have been suing and counter suing each other. It is therefore

clear that they have always desired to have their disputes resolved in court. Therefore to allow one party to find a way out of the problem through a technical fault will be a failure by these courts to do justice between man and man.

The matter has been going on since 1996 and both parties have been vigorously pursuing it, which shows that it is altogether important to them. Both parties no doubt are desirous to have the matter finalised once and for all. The matter in dispute centres on a commercial interest of both parties which makes it more important for it to be finalised once and for all. In *Ndebele v Ncube* 1992(2) ZLR 288(S) at 290E McNALLY JA stated-

“It is the policy of the law that there should be finality in litigation on the other hand. On the other hand one does not want to do injustice to litigants.”

One of the ways of doing injustice to the parties whose disputes in the litigation are highly contentious will be the failure to exercise the court’s discretion judicially which if so exercised will result in doing justice between man and man and thus bringing the matter to finality. I must add, though, that the courts will not lightly grant such condonation where the delay has been fairly long in the absence of reasonable explanation which favour the interest of justice.

In conclusion the order of this court is as follows that:-

1. The late filing of an application for rescission of judgment under HC 2130/03 be and is hereby condoned.
2. That the costs for the application shall be cost in the cause under case number HC 3244/01.

*Cheda & Partners* applicants’ legal practitioners  
*James, Moyo-Majwabu & Nyoni* respondents’ legal practitioners