MHLANGANYELWA LEMON MHLANGA

Versus

JACOB CHINYAKATA

And

REGISTRAR OF DEEDS

And

DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 15 JUNE AND 26 JULY 2007

K I Phulu, for the applicant
B Ndove, for the 1st respondent

Opposed Application

NDOU J: This is an application for condonation for the late filing of notice of opposition in case number HC 658/07. The said application was served on one Mr Dube, "a responsible person and a cousin of the" of the applicant who was found present at the place of residence of the applicant. The applicant's case is that he was at his rural home at the time of service and was given the application upon his return on a date he cannot recall. It is common cause that the application was served on 29 March 2007. Applicant, however, instructed his first erstwhile legal practitioners Messrs Ben Baron and Partners who advised him on the matter. He did not accept their opinion and proceeded to seek a second opinion from Hwalima, Moyo and Associates. The latter legal practitioners addressed a letter to the 1st respondent's legal practitioners on 11 April 2007, a day before the expiry of the *dies inducia.* In the circumstances the applicant had seen both legal practitioners well

before the expiry of the *dies indicia*. The applicant gave Hwalima, Moyo and 2

Associates the

mandate to negotiate the issue of costs and notice to vacate the premises as evinced by the following extract from their correspondence to 1st respondent's legal practitioners dated 11 April 2007:

> "We refer to our teleconversation with your Ms Dube held on the 11th instant and confirm that this matter is settled on the basis that you will not set the matter down for hearing and specifically that our client, Mr Mhlanga will be absolved from paying any costs in view of the circumstances surrounding the matter.
>
> Further, we confirm that our client will require and is granted by yourselves two calendar months to vacate the disputed property. We also confirm that Messrs Mashayamombe may now proceed with the transfer."

The correspondence was copied to the applicant and Messrs Mashayamombe (the conveyancers) and the applicant

This offer of settlement was accepted by the 1st respondent in writing in particular that the applicant "shall vacate the premises by the 30th June 2007 and surrender the keys … not later than the 6th July 2007" at the 1st respondent's legal practitioners. The applicant was quiet thereafter until around 28 May 2007 when the applicant's current legal practitioner contacted the 1st respondent's legal practitioners. The applicant is not candid with the court as to when exactly he approached his current legal practitioners. His lack of sophistication cannot come to his aid as his legal practitioners will have some record as to when he gave them the initial mandate. In his affidavit, the applicant has not distanced himself from the above-mentioned written offer of settlement emanating from his erstwhile legal practitioners. He has

not stated that his erstwhile legal practitioner misrepresented the facts. 3

The following background facts have to be highlighted so that this application is understood in its proper context. The 1st respondent had a bank account with Stanbic. In August 2006 when the Central Bank introduced a new monetary dispensation, there was some confusion. The result of such confusion was that the 1st respondent's account was credited with more money than what was due to him. He was a very lucky Stanbic client. By the time Stanbic discovered their mistake, the 1st respondent had already conducted some transactions utilising the said money. Amongst the transactions, is the one subject matter of these proceedings. *In casu*, the applicant and the 1st respondent entered into an agreement of sale of stand number 8060 Pumula East Township of Hyde Park, Bulawayo for a purchase price of $8 500 000,00. The 1st respondent made an initial payment of $3 900 000,00 leaving a balance of $4 600 000,00. On 22 January 2007, the applicant, through his erstwhile legal practitioners, Ben Baron and Partners, wrote a letter of demand in which the 1st respondent was required to pay off the balance of $4 600 000,00 within fourteen (14) days, failure of which the applicant would cancel the agreement of sale. Pursuant to this demand (cum-notice) the 1st respondent paid the balance within the stipulated notice period. He also paid interest and legal costs. The 1st respondent has honoured his part in terms of the agreement of sale but the applicant has refused to collect the money from his chosen agent and has refused to transfer the property into the 1st respondent's name. The basis of his refusal is that the 1st respondent paid him from the proceeds of fraud. He says the *in par delictum* rule applies. It is common cause that the issue between the 1st respondent and Stanbic has been resolved. The 1st respondent paid back Stanbic the amount erroneously deposited into his account. This was done before this application was issued. The 1st respondent was not prosecuted for fraud at the behest of Stanbic. Is this a case where the *in par delictum* rule should be relaxed? The applicant's case is that this is not a case where it should be relaxed. I proceed to consider the merits of the application for condonation.

The approach in such an application for the court's indulgence are set out in *Kudzwa* v *Secretary of Health and Anor* 1999(1) ZLR 313 (S) at 315. The factors to be considered in deciding whether or not to allow condonation are: 4

(a) The degree of non-compliance;

(b) The explanation for it;

(c) Prospects of success

(d) Respondent's interest in the finality of judgment, and,

(e) The convenience of the court in ensuring that there is no unnecessary delay in the administration of justice – see also *Simba* v *Seybrook (Pvt) Ltd* HH-57-03; *Beitbridge Rural District Council* v *Russell Construction Co (Pvt) Ltd* 1998 (1) ZLR 190(S) and *Ndokwani* v *Shoniwa* 1992 (1) ZLR 269 (S).

I propose to consider these factors in turn in relation to the facts of this case.

Degree of non-compliance

The applicant filed this application thirty- five(35) days after the expiry of the *dies inducia.*

Explanation for the delay

To sum up what I have already highlighted above, the explanation proffered by the applicant for the delay is the following:

(a) That he had disagreed with the advice of his first legal practitioners Ben Baron and Partners and sought a second opinion.

(b) That when he approached his second erstwhile legal practitioners Hwalima, Moyo and Associates, the matter was out of time. [This is

not the correct position as shown above]. He was advised to settle, but he disagreed.

(c) Although he does not specifically say so, applicant gives the impression that he delayed because he was ill-advised at law and that his erstwhile legal practitioners, Hwalima, Moyo and Associates, had no authority from him to make the concessions they made on his behalf.

I am satisfied that Hwalima, Moyo and Associates legal practitioners who reached the above-mentioned settlement had the applicant's authority to do so. As alluded to above, even in his founding affidavit the applicant did not aver that he did not sanction the settlement. The applicant is bound by this settlement and has a heavy onus before rescinding this settlement – *Washaya* v *Washaya* 1989(2) ZLR 195(H) and *Masulani* v *Masulani and 2 Ors* HH-68-03. The explanation given by the applicant is not good enough to discharge the heavy onus on him. He did not give the exact date he approached Messrs Ben Baron and Partners and the exact advice he was given. He did not state when he terminated his mandate to them and when he approached the second legal practitioners for second opinion. He does not say the nature of the second advice given . More importantly, he does not shed light at all on the circumstances under which his erstwhile legal practitioners entered into settlement with the 1st respondent's legal practitioners, and whether or not the settlement was negotiated outside his mandate.

Further, the applicant does not give the exact date when he terminated the mandate to Hwalima, Moyo and Associates and when he instructed the present legal practitioners of record. He does not even bother to explain why, after instructing the current legal practitioners he still delayed in filing the present application. In the

circumstances he has failed to present a reasonable and acceptable explanation for 6
the delay – *Bishi* v *Secretary for Education* 1989 (2) ZLR 240 (H), *Songare* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) and *Ndebele* v *Ncube* 1992(1) ZLR 288 (S).

Prospects of success

When the 1st respondent failed to pay the balance of the purchase price on time, the applicant did not concern himself with the reason or the source of funds. He instead, gave 1st respondent notice to make good the breach within 14 days. If the applicant's case is that the agreement was void *ab initio* he could not have to given such a notice. Such a contract which is void cannot be cancelled on notice. The applicant, with full legal advice at his disposal, elected to give the1st respondent notice, i.e. he elected to enforce the contract well aware of the alleged illegality.

What is important here is that the contract itself is not tainted with illegality. The alleged illegality relates to the source of money used by the 1st respondent to pay the applicant. Morally, maybe the applicant is finding it difficult to receive proceeds from Stanbic which were erroneously deposited into the 1st respondent's account. It may well be out of religious considerations but legally, the contract itself is not illegal. The in *pari delicto* rule cannot be extended to cover such a situation. The problem between the 1st respondent and Stanbic was resolved by way of consent judgment in *Stanbic Bank Ltd* v *Jacob Chinyakata and 2 Ors* HC-629-07 and an Agreement of Acknowledgement of Debt concluded by Stanbic Bank and the 1st respondent on 2 February 2007. In my view, the applicant has no legal basis to

decline money paid by the 1st respondent after he sourced it in the circumstances described above.

In light of this finding the applicant's case is very weak on the merits. With the findings on the above-mentioned factors it is not necessary for me to go into detail in respect of the last two factors. Suffice to say there is need for finality in this matter and the balance of convenience does not favour the granting of the application.

Accordingly, the application is dismissed with costs.

Coghlan & Welsh, applicant's legal practitioners
Marondedze, Mukuku, Ndove and Partners, 1st respondent's legal practitioners