CHRISTINE WANGAYI
versus
JESTINAH MUDUKUTI

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 1 JUNE 2017 AND 15 JUNE 2017

Opposed Application

L Mudisi for the applicant
H Ndlovu for the respondent

MATHONSI J: The facts of this matter clearly demonstrate why it has always been salutary in this jurisdiction that there should be finality in litigation for the good of both the parties and the justice delivery system. Why it is a celebrated principle of our law that a person cannot approbate and reprobate a course in the proceedings. One cannot, on the one hand liquidate a judgment debt allowing her property to be sold in execution, be imprisoned for a civil debt and then pay a number of instalments towards the debt and then somewhere along the line, turn round and challenge the judgment. See *S* v *Marutsi* 1990 (2) ZLR 370; *Archipelago (Pvt) Ltd* v *Local Authorities Pension Fund and Another* S-30-13; *Fulner* v *Freeman* 1985 (3) SA 555(C).

In historical perspective, the respondent sued the applicant in the magistrates court Zvishavane for payment of certain sums of money arising out of a lease agreement in terms of which the applicant had leased from her house number 1339 Mandava Township in Zvishavane and had subsequently vacated leaving arrear rentals and having caused certain damage to the property. The applicant entered appearance to defend through the medium of her erstwhile legal practitioners Messrs Makonese Chambati and Mataka who gave their address for service as care of Advocate Legal Aid Society 54R Mugabe Way Zvishavane.

The papers before me show that although the said legal practitioners prepared a request for further particulars, they did not file or serve it. On 23 September 2014 the respondent issued a notice to plead giving the applicant 48 hours to file a plea as provided for in the rules of the

magistrates court. The notice to plead was received by a person who signed as P Ncube at 11:50am on 25 September 2014.

When the applicant did not comply with the notice, the respondent moved for default judgment which was granted on 6 October 2014. The respondent issued a writ of execution against the applicant's property. It is important to note that according to the affidavit of Nomore Hlabano, the then legal practitioner for the applicant, which he deposed to on 15 October 2014 (paragraph 3), the applicant became aware of the default judgment on 6 October 2014. She then made an application for rescission of that default judgment which was set down for hearing on 27 October 2014.

In her founding affidavit in support of this application for condonation, the applicant states that she became aware of the default judgment on 15 October 2014 which is contradictory. She says that the messenger of court had attached her husband's motor vehicle in execution of that judgment. She questioned how default judgment could be granted when both herself and her legal practitioner had not been served with the notice to plead. I have already said that there is proof that the notice to plead was served at the applicant's address for service and therefore will not be detained by that issue.

The applicant stated that at the end of the hearing of the rescission of judgment application, the magistrate reserved judgment. Thereafter she spent four months checking for the judgment without any joy. She later discovered that her application had been unsuccessful when the messenger of court attached and removed her property for sale in execution. It is then that she learnt that a court order dismissing her application had been made on 7 November 2014. It is that court order (there are no reasons) which she would like to appeal against. Being out of time to note that appeal she prays for condonation and extension of time during which to appeal.

The applicant goes on to say that her application for rescission was dismissed on "a technicality that is non-existent," the court having ruled that in terms of Order 30 Rule 1 (2) (a) of the Magistrates Court (Civil) Rules, 1980 an affidavit in support of an application for rescission of judgment can only be deposed to by the applicant and not by her legal practitioner. It is not clear where the applicant derives that reasoning from because she has only attached a court order with no reasons.

Whatever the case, the applicant says the delay in filing an appeal was occasioned by court officials at Zvishavane who did not avail the record of proceedings in time. While she awaited judgment on her application, her property was removed on 15 April 2015. This application was filed on 15 April 2016 meaning that there was a delay of exactly one year from the time that she became aware of the judgment sought to be appealed against and the filing of the application for condonation. The founding affidavit is completely silent as to why there was that inordinate delay in making an approach to this court either on appeal or, once the appeal was out of time, seeking condonation. The applicant has occupied herself with arguing why default judgment should not have been granted and why she did not appeal when the judgment was handed down. We are left completely uninformed as to why after she became aware of it, it took him 12 months to make this application.

What is apparent though is that during that period she had the time to lodge a complaint against her former legal practitioner to the Law Society of Zimbabwe. Her undated letter of complaint attached to her founding affidavit is quite revealing. She bemoaned the fact that after the dismissal of her rescission of judgment application her property was placed under judicial attachment and was removed during her presence. "The property was eventually sold at an auction," she complains. The applicant also reveals in that letter that after the sale of her property the respondent instituted civil imprisonment proceedings against her still pursuing the judgment debt.

A civil imprisonment order was issued against her. She goes on to say:

> "I was only surprised to be arrested by the messenger of court on the 11th of September 2015 and spent 22 days in prison."

Mr *Mudisi* who appeared for the applicant conceded that the judgment sought to be appealed against has indeed been carried into execution. He submitted that the reason the applicant would like to appeal is because she would like to reverse an in justice that was done to her.

Mr *Ndlovu* for the respondent took issue with the fact that the inordinate delay of one year in bringing this application has not been explained. All that the applicant has done is to blame everyone else except herself. She has blamed court officials for not availing the court order to her timeously and blamed her erstwhile legal practitioners for her other woes.

In respect of the blame visited on the door step of the legal practitioner, I can only repeat what was stated by STEYN CJ in *Saloojee and Another* v *Ministry of Community Development* 1965 (2) SA 135 (A) at 141 C-E (quoted with approval by SANDURA JA in *Kodzwa* v *Secretary For Health and Another* 1999 (1) ZLR 313 (S) 317E;

> "I should point out however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Consideration *ad misericordian* should not be allowed to become an invitation for laxity. In fact, this court has been lately 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 negligence on the part of the attorney. The attorney after all is the agent whom the litigant has chosen for himself, and there is little reason why, in regard to condonation for failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship."

See also *Musemburi and Another* v *Tshuma* 2013 (1) ZLR 526 (S) 529 E-G; *Mubango* v *Undenge* HH-110-06 (unreported).

The applicant noticed quite early, in fact on the day of the removal of her property for sale in execution, that her legal practitioner was not acting in her best interest. She however did not do anything about it until a year later.

It is settled in our jurisdiction that whenever a litigant realizes that he or she has not complied with a rule of court, he or she should apply for condonation without delay. If that litigant does not make the application without delay, he or she should give an acceptable explanation, not only for the delay in filing the appeal on time, but also for the delay in seeking condonation. See *Viking Woodwork (Pvt) Ltd* v *Blue Bells Entreprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) 251 C-D. Therefore what calls for some acceptable explanation is not only the delay in noting an appeal but also the delay in seeking condonation. See *Saloojee and Another NNO* v *Minister of Community Development, supra* at 138H.

The explanation for the delay in seeking condonation is what the applicant has dismally failed to give. A party cannot decide to come to court a year after the judgment that it seeks to appeal against was brought to her attention and merely state that there was some challenge in the judgment being availed to her and then seek condonation to file an appeal out of time. She must

explain why she did not take action immediately after becoming aware of that judgment. Failure to do so is fatal to the application.

I also find it strange that the applicant would want to re-open a case that has been put to bed just because she has belatedly felt aggrieved. This court is always willing and able to protect the rights of individuals and to dispense justice. It is however not an arena for academics who spend their time engrossed in hypothetical issues and theory.

What happened in this matter is that the applicant stood akimbo as her property was attached and sold in execution of a judgment she was aware of. When the sale of her property did not realize the value of the judgment she was served with a civil imprisonment summons and had an order for civil imprisonment granted against her. She allowed herself to be carted away to prison where she spent 22 days incarcerated before she made a payment plan. She then paid according to that plan thereby liquidating the debt. Then she sought to appeal against the judgment she had liquidated over a period albeit out of time.

There must be finality to litigation and courts of law should not be abused in that manner by litigants with wounded pride and a lot of money to waste fighting personal battles in the courts. Nothing is being served here other than an itching ego seeking a massage in the wrong place.

In that regard, the application cannot succeed. Having elected to comply with the judgment and liquidated it, the applicant could not turn round and challenge it. She cannot approbate and reprobate a course in the same proceedings. Having dared to play football with the court and in the process putting the respondent unnecessarily out of pocket, the applicant has made her bed of thorns. She must now lie in it because surely there must be consequences for such misadventure. She must bear the costs on a punitive scale which is the least that the respondent deserves.

In the result, the application is hereby dismissed with costs on a legal practitioner and client scale.

Mutendi, Mudisi and Shumba, respondent's legal practitioners
Chidawanyika, Chitere and Partners, applicant's legal practitioners