ABEL MUBANGO
versus
ANGELINE UNDENGE

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE 11 & 13 October 2006

Opposed application

Mr Mafusire, for applicants
Mr Uriri, for respondent

CHATUKUTA J: This is an application for summary judgment. Applicant seeks an order for the eviction of the respondent and all those claiming rights of occupation through her and holding over damages with effect from 1 April 2005 up to the time of eviction of the respondent. In the alternative, the applicant seeks an order for the eviction of the respondent and all those claiming rights of occupation through her. However, the applicant raised an issue *in limine* that the respondents are automatically bared for filing the notice of opposition out of time. It is therefore necessary to dispose of this issue first.

The facts of the case are that the parties entered into a lease agreement on 31 July 2002 whereby the applicant leased out his property, 3 Chelsea Close, Marlborough, Harare (the property), to the respondent. The relationship between the parties under that lease agreement was not a rosy one. It ended in April 2005 with an order from the Magistrates Court dated 28 April 2005 (case No 10369/2005) for the ejectment of the respondent. Following the order in case no 10369/2005, there was a tirade of applications and counter applications between the parties. During this period, the respondent has remained in occupation of the property.

On 15 May 2006, the applicant issued summons in this court against the respondent claiming the ejectment of the respondent from the property and also holding over damages with effect from 1 April

2005 up to the time of eviction of the respondent on the basis that the respondent had not been paying any rentals since April 2005. The summons was served on the respondent on 23 May 2005. The respondent entered an appearance to defend. The applicant then filed this application for summary judgment on 15 June 2006. The application was served on the respondent on 15 June 2006. The respondent filed her notice of opposition on 5 July 2006. The respondent was required to file the notice of opposition within 10 days of the service of the application. The notice of opposition was filed four days out of time.

The respondent applied for condonation for the late filing of the notice of opposition. The court was referred to the reasons for the late filing of the notice of opposition contained in paragraph 2 of the Opposing Affidavit where the applicant avers:

> "The application for summary judgment was served on my legal practitioners on the 15th of June 2006. It has been brought to my attention and I understand that I am a few days out of time and I respectively pray for condonation of the late filing of the Notice of Opposition. The reason for the late filing of the notice of opposition seem (*sic*) to being that my legal practitioner was unable to attend to this matter because of pressing commitments and he was operating without a secretary. I am just 3 days out of time and I submit that the delay is not inordinate and I pray that the late filing of this notice of opposition maybe condoned."

The impression given in the cited paragraph is that the court should proceed to grant condonation as a matter of course because the delay in filing the notice of opposition was by a mere three days and therefore not inordinate. It is important to note that the respondent's opposing affidavit was filed by the respondent's legal practitioners who surely should be aware that condonation is not granted as a matter of course. The words of ZIYAMBI JA in ***Apostolic Faith Mission in Zimbabwe & others v Titus I Murefu*** SC 28/03

cited by the applicant are relevant that there is a growing tendency among legal practitioners to regard the application for condonation of failure to comply with the Rules of this Court as a mere formality. (See also ***Kodzwa v Secretary for Health & Another*** 1999 (1) ZLR 313 (S) at 315B-E).

The respondent must satisfy the Court that there is sufficient cause to excuse her from failing to file the notice of opposition on time. The requirements for condonation have been exhaustively discussed in a number of cases in our jurisdiction and are in the main:

(i) the degree of non-compliance and the reasonableness of the applicant's explanation for the default;
(ii) the prospects of success;
(iii) respondent's interest in the finality of the case; and the convenience of the Court and the avoidance of unnecessary delay in the administration of justice.

Although the delay in filing the notice of opposition is indeed not inordinate, the reasons proffered for the delay are difficult to comprehend. The reasons tendered are, it appears, that the legal practitioner had other pressing commitments that precluded him from complying with the rules of this court and that he did not have a secretary. There is no indication of what the commitments were. In fact, the respondent is not so clear as to whether that was one of the reasons as she says that the "reason for the late filing of the notice of opposition ***seem (sic)***"(own emphasis) to be what is stated. It seems to be but may not be. This court cannot be expected to accept such excuse as a reasonable excuse for failure to comply with the rules. What is most disturbing is that the legal practitioner who filed the opposing affidavit did not file a supporting affidavit to explain the failure. The respondent did not see it fit to explain in her founding affidavit why she could not secure a supporting affidavit from the legal practitioner. This is reflective of the lack of diligence on the part of the

respondent and her legal practitioner. (See *Eddie Chirwa v Westend Outfitters (Private) Limited* 91/1992 at pp3-4).

As rightly submitted by the applicant in his heads of argument, the reasons advanced by the respondent are hearsay. Whilst section 27 of the Civil and Evidence Act [*Chapter 8:01*] provides for the admission of first hand hearsay evidence, this should not be taken as a wholesale licence for the indiscriminate production documents containing hearsay evidence and more particularly evidence of a legal practitioner representing one of the parties and appearing before this court as an officer of the court. The legal practitioner still failed to explain to the court during oral submissions what the pressing commitments were that precluded him from complying with the rules of the court. As stated by *Mr Mafusire* for the applicant, the court is expected to speculate as to what the commitments might have been and what difficulties the legal practitioner operated under as a result of not having a secretary. *Mr Uriri* submitted that he was of the view that the delay was so minimal he did not consider it necessary to file a supporting affidavit. This gives credence to the statement by ZIYAMBI JA in ***Apostolic Faith Mission in Zimbabwe & others v Titus I Murefu*** that some of the legal practitioners do regard the application for condonation of failure to comply with the Rules of this Court as a mere formality.

In the absence of a plausible explanation why the legal practitioner could not file a supporting affidavit to explain why a notice of opposition was filed four days late, I find it difficult to hold that the explanation for the default was reasonable.

The respondent submitted that she has reasonable prospects of success in her defence that the matter is *lis pendens*. The respondent submitted that the applicant obtained a writ of ejectment in the magistrates court and is frustrated with the numerous applications in

relation to that case and the ensuing lack of progress. The applicant, on the other hand, submitted that the cause of action in the present case is separate from the cause of action in the magistrates court. It was applicant's submissions that, the basis of the action in the magistrates court was contractual, whilst in the present case it is delictual. The writ of ejectment issued in the magistrates court was as a result of the respondent having breached the agreement between the parties and covered the period between September 2004 and March 2005. I have not considered it necessary to dwell on the propriety orotherwise of the process in the magistrates court as the matters are not properly before me. It is clear from the summons issued in this court that the cause of action is the respondent's continued illegal occupation of the applicant's property for no consideration. The claim related to the period commencing April 2005 to the present date. It was not disputed that the respondent has not paid any consideration to the applicant for the occupation of the property during the period in issue. All counsel for the respondent would say regarding the issue was that he did not have instructions on that issue. As rightly submitted by *Mr Mafusire*, each day of the month the respondent continues to occupy the applicant's property for no consideration raises a new cause of action. I do not see how this submission can be faulted more particularly in view of non payment of any rentals to the applicant. It is my view that the respondent does not have any prospects of success in its defence to the applicant's claim in this case.

Even assuming I am wrong in my assessment of the respondent's prospects of success, I would still have refused the respondent's application for condonation on the basis that the respondent's explanation for failure to file notice of opposition within the time prescribed by the rules was unreasonable. The question

regarding the weight that should be accorded to the prospects of success in an application for condonation was discussed in ***Kodzwa v Secretary for Health & Another*** (*supra*) at page 315 F-H. SANDURA J had this to say:

> "Whilst the presence of reasonable prospects of success on appeal is an important consideration which is relevant to the granting of condonation, it is not necessarily decisive. Thus in the case of flagrant breach of the rules, particularly where there is no acceptable explanation for it, the indulgence of condonation may be refused, whatever the merits of the appeal may be."

Assuming, further, that I am wrong in refusing to grant the respondent condonation in respect of late filing of notice of opposition, the respondent would still be barred for the late filing of heads of argument. The applicant filed her heads of argument on 26 July 2006. The heads of argument were served on the respondent's legal practitioners on the same day. The respondent only filed her heads of argument on 5 October 2006. The following is the explanation given by the respondent for the late filing of the heads, and I quote paragraph 1 of the heads of argument:

> "The present Heads of Argument are being filed out of time because counsel had not been placed in cover in respect of his fees. Because of the limited time between the time of the payment of the fees and the set down date, it is not possible to file a formal application for condonation and have the same determined before the main cause. An application for condonation will be made on the set down date."

This explanation was again tendered by *Mr Uriri* as a reasonable explanation for filing respondent's heads of argument out of time. The explanation is totally unacceptable. The explanation for the failure to comply with the rules should not be for the convenience of the legal practitioner but for the convenience of all the parties and the court. As rightly submitted by *Mr Mafusire* the court is now expected to inquire

again into the operations of law firms. This is not the function of the court. The respondent was out of time by 26 days, taking into account that the High Court was on vacation between 7 August 2006 and 4 September 2006. It is clear that the respondent believes that this court is supposed to grant condonation on the mere say so of the respondent. The reasons given above for denying the respondent condonation with respect to the late filing of notice of opposition equally apply and I need not belabour the point.

Generally, there is reluctance by the courts to visit the sins of the legal practitioner on the applicants. However, the courts have held that there is a limit of the extent to which a litigant should escape the results if his/her legal practitioner's sins. In *Kodzwa v Secretary for Health and* Anor (*supra*) at 317E, SANDURA J cited with approval, STEYN CJ in *Saloojee & Anor v Minister of Community Development* 1965 (2) SA 135 (A) at 141 C-E that:

> 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 misericordiam* 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 ***Apostolic Faith Mission in Zimbabwe & others v Titus I Murefu,*** supra).

I share the same sentiments. This is a case where applicants cannot escape the results of their legal practitioner's lack of diligence and the insufficiency of the explanation tendered. The respondent was

automatically barred after failing to file both the notice of opposition and the heads of argument on time. The explanations for the non observance of the rules were unreasonable in either case. The respondent is therefore not before me.

The application for summary judgment is accordingly granted in default with costs.

Scanlen and Holderness, applicants' legal practitioners
Honey & Blanckenberg, respondent's legal practitioners