TANAKA SITHOLE
and
CYNTHIA SITHOLE
versus
PENNIWILL (PRIVATE) LIMITED
and
EDITHA INVESTMENTS (PVT) LTD
and
THE TRUSTEES FOR THE TIME BEING OF GABRIEL AND ANGELS TRUST
and
NOBERT MAVUNGA
and
JOICE POUND
and
CECIL KACHAMBWA
and
LEWIS DOWA
and
NYARADZO CHEZA
and
PAMELA KUBARA
and
LINDA MUNJOMA
and
BRADLEY TRUST
and
THE SHERIFF OF HIGH COURT OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 16 & 26 May 2023

**Application for Condonation**

*J Mambara,* for the applicants
*Advocate W Ncube,* for the 1st respondent
*T Makanza,* for 2nd respondent
Ms *A Chatsama,* for the 3rd – 11th respondents
No appearance for the 12th respondent

MHURI J: On 16 May 2022 this Court (HON. MANGOTA J) issued an order (the Order) in an application HC 5689/21 pitting first respondent (applicant therein) against applicants *in casu* and the rest of the respondents. The order read as follows:

1. Applicant's papers to serve as its summons.
2. Applicant to prepare, file and serve upon the respondent its declaration on or before 31 May 2022.
3. Respondent's notice of opposition to serve on (*sic*) its notice of appearance to defend.
4. Respondents to prepare, file and serve upon the applicant its plea on or before 14 June 2022.
5. Thereafter the case shall proceed in terms of the rules of court.

It is this Order, in particular para. 4 thereto, that gave rise to this application for condonation for late filing of first and second applicant's plea. Applicants fell foul of this order by not complying with the time limits stated in para (4). In this application, applicants are seeking the following relief that:

1. The application for condonation for late filing of the first and second applicants' pleas in case number HC 5689/21 be granted.
2. The first and second applicants file their pleas within seven (7) days of the granting of this order

First respondent is averse to the granting of the application and prays that it be dismissed with costs.

Second to eleventh respondents are not averse to the granting of the application and have filed their consent to judgment.

It is an established position of the law that in applications such as this one, the court has to consider the following main factors *inter alia*:

- the length of the delay
- the explanation for the delay
- the prospects of success in the main matter
- finality to litigation

The list is not exhaustive. The courts have pronounced on this principle in several cases. See *K M Auctions (Pvt) Ltd* v *Adenash Samuel and Registrar of Deeds* SC 262/08, *Kombayi* v *Berk* hout 1988(1) ZLR 53(S

) and *National Social Security Authority* v *Denford Chipunza* SC 116/04.

It is also a trite position that when determining such applications, the court will be exercising a discretion which discretion must be exercised in a judicious manner. This position was elaborately pronounced by SANDURA JA in the case of *Kodzwa* v *Secretarty for Health & Anor* 1999(1) ZLR 313(S) at p 315 B-C quoting Herbstein & Van Winsen's *The Civil Practice of the Supreme Court of South Africa* 4ed, by Van Winsen, Cilliers and Loots, the learned

Judge of Appeal had this to say:

> "Condonation of the non-observance of the rules is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient cause to excuse him from compliance….. The court's power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judicial discretion and satisfactory grounds being shown by the applicant.".

In the present matter, para (4) of the Order was to be compiled with by 14 June 2022. This was not done. This application for condonation was filed on 5 October 2022. The delay therefore is almost four (4) months. This is a long delay in my view.

In explaining the delay, applicants averred in their founding affidavit that these are fully explained in their legal practitioner's supporting affidavit, who accepts the blame for taking the route the matter proceeded on.

In his supporting affidavit, Mr *Mambara* (applicants' legal practitioner) gave the explanation that, the delay was not of the applicants' making but his and he fully took the blame. He filed an appearance to defend on the mistaken view that the matter was to proceed in terms of the Rules and yet the Order indicated otherwise. He completely missed the directive. He explained further that he was out of time to file the plea as the special plea he had filed was pending. It was only heard on 4 October 2022. He further averred that the fact that the special plea was still pending did not take away the blame from him. He fully accepted the blame for misreading the Order. His submission in this regard was that he had relied on Rule 42(7) of the High Court Rules 2021 which in his view, the plea would only be filed after the special plea had been heard. Had he not waited for the outcome of the special plea, the plea would have been noted in time. He submitted further that the misreading of the

Order was not deliberate but an honest mistake on his part as such his sins should not be visited on the applicants.

The following facts are common cause that:

- as per paragraphs 3 and 4 of the Order, applicants notice of opposition was to serve as its notice of appearance to defend;
- Applicants were to file and serve their plea by the 14th of June 2022
- On 6 June 2022 applicants' legal practitioners filed a notice of appearance to defend
- On 29 June 2022 applicants' legal practitioners wrote a letter of complainant to first respondent in terms of Rule 42(3).
- On 15 July 2022 he filed a special plea
- On 4 August 2022 first respondent filed its opposition to the special plea in which it raised a point *in limine* that the special plea was filed out of time.
- On 4 October 2022 the special plea was set down for hearing and was struck off.
- The next day i.e. 5 October 2022 this application was lodged.

I have stated that the delay is long. I now turn to consider whether the explanation given is reasonable.

Clear from the founding affidavit is the absence of any explanation for the delay. Applicants left it to their legal practitioner to profer the explanation as according to their averment they had instructed him to take the matter further after it had been referred to trial. Their stance is understandable in my view as it was the legal practitioner who took the route that he did despite a clear wording of the Order and fully acknowledged his tardiness.

The Order, particularly paragraphs 3 and 4 are very clear and unambiguous. They need no interpretation at all. It is not Mr *Mambara's* position however that the order was not clear but that he misread it and took the route that he took i.e. filed a notice of appearance to defend, wrote a letter of complaint and filed a special plea in terms of Rule 42. Mr *Mambara* took this route up to the end i.e. until the special plea was struck off for being improperly before the court.

Rule 42(7) relied upon by Mr *Mambara* reads as follows:

> "Whenever any exception is taken to any pleading or an application to strike out is made, until it has been determined, no plea replication or other pleading shall be necessary except as provided for in subrule (8)."

In view of the above, his decision though wrong for not filing the plea before determination of the special plea cannot be faulted and to that end his explanation for the delay is found to be reasonable.

Mr *Mambara* acknowledged his tardiness. Should his sins be visited on the applicants, his clients? The relationship between legal practitioner and client is akin to the principal and agent relationship. The principal is bound by the actions of his agent. The same applies in legal practitioner-client relationships.

*In casu,* it goes without saying that applicants' legal practitioner was very tardy in the manner he handled this matter moreso, after it had been brought to his attention by the first respondent in its response to the special plea that the special plea was improperly before the court as it was filed out of time in contravention of paragraph 4 of the Order.

The question about the legal practitioner's sins being visited on his clients, should be answered in the negative in these circumstances. I find support for this answer in the remarks by MANGOTA J in the case of *Michelle Nyamangunda* v *Mashonaland Turf Club* HH 125/13 in which he found the answer to the same question to be in the negative though as he aptly put it, generally this answer is in the affirmative. Also, when dealing with the same issue of a legal practitioner's tardiness, GWAUNZA JA (as she then was) had this to say in the case of *FBC Bank Limited* v *Robert Chimwanza* SC 31/17 at p 4 of the cyclostyled judgment:

> "I found it quite tempting to follow the principle in McNab's case, and would have done so but for the fact that I do not believe it would be fair on the applicant to visit this particular 'sin' of its legal practitioner, on it."

Turning now to consider the requirement on the prospects of success. From the pleadings filed of record, it is not in dispute that applicants bought the stand in question from the second respondent who had bought it from the first respondent. This shows they have an interest in the outcome of the trial. The issue for trial is about the subdivision permit, the determination of which will have a bearing on the applicants. In their draft plea filed of record it is their position that at the time of the agreement of sale between them and the second respondent, there was no repudiation and there was a deed of settlement between first and second respondents. In view of the above, I find that applicants' prospects of success are not dim. Their case is arguable in the main matter. They will suffer great prejudice if not allowed to ventilate their issues at trial. This will also ensure finality to litigation between the

parties. I am, however, of the view that the prejudice suffered by first respondent can be cured by an order for costs.

In the result, I grant the applicants the indulgence they are seeking and grant the application. It is therefore ordered that:

1. The application for condonation of late filing of plea by first and second applicants in case no. HC 5689/21 be and is hereby granted.
2. Applicants file their plea within seven (7) days of the date of this Order.
3. Applicants to pay costs of this application.

*Mambara & Partners*, first and second applicants' legal practitioners
*Tamuka Moyo & Partners*, first respondents' legal practitioners
*Makanza Law Chambers*, second respondents' legal practitioners
*Chatsama & Partners*, third to eleventh respondents' legal practitioners