

KIMBERWORTH INVESTMENTS (PVT) LTD t/a SABI GOLD MINE

versus

FRANCIS NHUZVI

and

LILIAN GANJIRI

and

ELIZABETH SIBANDA

and

MUDYANAGO ZHOU

and

TICHAONA MUDZINGWA

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO 1st OCTOBER, 2020

Opposed Application for Condonation

Ms Mudisi, for the applicant
All respondents in person

ZISENGWE J: On the 1st of October, 2020 I delivered an *ex-tempore* judgment wherein I granted an application for condonation for the late filing of a review application. The respondents have since requested for the full reasons thereof, and these are they.

The nature of the application

Although the applicant instituted separate applications against each of the five respondents, (*which were accordingly heard as five separate matters*) they will be dealt with simultaneously because they all relate to the same set of facts and to the same dispute.

The applicant sought condonation for the late filing of an application for the review of the decisions of the Magistrates Court sitting at Zvishavane.

In those proceedings the applicant had sought an order for leave to execute a judgment of the eviction of the respondents from certain residential premises pending the determination of the latter's appeal against that judgment. That application (*for leave to execute*) was dismissed. It is against that decision that the applicants intend to file an application for review.

The background to the application

This matter has its roots in what is essentially a labour dispute between the parties. The respondents each occupies certain residential premises on account of their employment with the applicant company. There is no consensus, however, as to whether or not that employment relationship still subsists. Whereas the applicants averred that this relationship has since been terminated, the respondents argued contrariwise; they insisted that they are still in the employ of the applicant.

Be that as it may, the applicant instituted in the Magistrates Court a suit for the eviction of the respondents from the said premises. That application was granted on 16 April, 2019. Aggrieved by that decision, the respondents appealed against the same to the High Court. It was then that the applicant filed an application for leave to execute pending the determination of that appeal. As indicated earlier that application was dismissed for the reasons that I will shortly advert to.

In the current application, it was stressed on behalf of the applicant that it (i.e. applicant) has always been keen to pursue a review of the Magistrate's decision denying it leave. It however failed to do so within the prescribed period owing to sentiments expressed by the Magistrate in his judgment dismissing the application for leave to execute pending appeal. More specifically, it was averred on behalf of the applicant that reliance was placed on that part of the judgment to the effect that it is not uncommon for appeals to be processed and determined within a period of thirty days and that on the basis of the Magistrate's personal knowledge of a similar

appeal having been disposed of within a month, he was confident that the appeals in question would similarly be expeditiously disposed of.

Implicit in this particular averment by the applicant was the contention that it deemed it unnecessary to pursue an application for the review in question when the impending appeal would in any event have disposed of the dispute in no time.

It was contended therefore, in the context of this current application that all the pre-requisites for the granting of an application for condonation were satisfied. All five respondents were self-actors in this application. What is interesting, however, is that their notices of opposition were identical in every respect (*save of course, for their names, addresses and other personal details*) including the wording, structure and content. Yet each claimed to have independently and personally authored their respective papers.

Further, it did not escape my attention that although they each claimed to have authored those court documents, none of them could properly articulate the contents thereof during oral submissions in court. Mr Imbayago Zhou, for instance was essentially dumbstruck when requested by the court to explain and expand on the contents of his affidavit. Other than muttering a few incomprehensible words, he remained literally mum when asked to respond to the application and to explain the contents of his opposing affidavit. Similarly, Lilian Ganjiri and Elizabeth Sibanda apart from brazenly claiming authorship of the said court papers, could hardly mouth anything intelligible. Although Francis Nhunzvi and Tichaona Mudzingwa fared slightly better, they too struggled to sustain any meaningful argument in support of their respective positions. They would frequently wander off on matters tangential to the issues at hand.

It was apparent therefore that someone else assisted them to draft the opposing papers although they refused, for reasons best known to themselves, to acknowledge as much.

In the determination of the issues at hand, reliance therefore had to be placed to a large extent on the contents of their opposing affidavits.

In these affidavits the respondents opposed the application on the basis that no cogent or reasonable explanation had been proffered by the applicant for the late filing of the application for review.

They each raised two preliminary objections to the granting of the application. In the first objection they impugned the authority of the deponent to the applicant's founding affidavit to so

institute the application on behalf of the applicant. This stems, so the argument went, from the fact that as far as they were aware the authority granted to the deponent (*Albert Chitambo*) was defective. The alleged defect in turn arose from the fact that it was granted by one Oliver Mtasa, whose Appointment Certificate as Provisional Judicial Manager of the applicant had not been availed.

Ultimately, however, Francis Nhunzvi, whose matter was argued first, consented to the production by counsel for the applicant, of the Certificate of Appointment of Oliver Mtasa as Provisional Judicial Manager of the applicant. That effectively put paid to the first preliminary point. The Certificate of Appointment is marked as Exhibit 1 of record.

The second preliminary objection was to the effect that the application for condonation was defective for want of citing of the Judicial Officer who presided over the application for leave to execute. Reliance was ostensibly placed on Rule 256 of the High Court Rules, 1971. Whereas it is a requirement to cite the Judicial Officer who presided over the proceedings which form the subject matter of review in the review proceedings themselves, there is no similar requirement to do so in application for condonation that may precede the application for review.

The issues

The sole issue that fell for determination was whether or not the applicant had managed from the facts to satisfy all the prerequisites for the granting of an application for condonation for the late filing of an application for review.

The applicable law

The requirements of the granting of an application for condonation have been formulated in various ways. One case which I find instructive in this regard is that of *Forestry Commission v Moyo* 1997 (1) ZLR 254 (SC) where the then Chief Justice, GUBBAY CJ listed the following as the prerequisites;

- (1) That the delay involved was not inordinate, having regard to the circumstances of the case
 - (2) That there was a reasonable explanation for the delay
 - (3) That the prospects of success should the application be granted are good, and
 - (4) And the possible prejudice to the other party should the application be granted
- Often a fifth requirement is considered namely

(5) The need to bring finality in litigation

Each of these will be considered in turn as they apply to the facts

Length of delay

The period within which an application for the review of judicial or quasi-judicial proceedings is provided for in Rule 259 of the High Court Rules, 1971 which reads;

“259. Time within which proceedings to be instituted

Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred:

Provided that the court may for good cause shown extend the time”.

In the present matter, the judgment which appears ex facie the record indicates that the judgment was passed on 5 July, 2019.

Under this heading it was averred on behalf of the applicant as follows;

(a) extent of the delay

“the judgment in question was granted on the 5th of July, 2019 and the 30 day period expired on 16th August, 2019 and as such the matter had delayed with 20 days and such delay cannot be said to be inordinate. Hence the extent of the delay is reasonable under the circumstances.”

It is apparent that there was misapprehension on the part of the applicant regarding the period within which one is required to file an application for review. As stated earlier a party desirous of instituting an application for review has eight weeks within which to do so and not thirty days.

Had the applicant made a proper construction of the Rules it may very well have instituted its application without the need to bring the current application. It would appear the applicant mistook such period with the one prescribed for the lodging of appeal.

Even if one were to consider the twenty days as erroneously referred to by the applicant, one would still be inclined to accept the applicant’s position that the delay cannot be considered as inordinate.

The reasonableness or otherwise of the explanation for the delay

The explanation proffered by the applicant is fairly straight forward. It was averred in this regard that the Magistrate had given the distinct impression in its reasons dismissing the application for execution pending appeal that appeals are usually disposed of expeditiously - within a month to be precise.

It is perhaps necessary to revisit the exact wording of the Magistrate's ruling. In the penultimate paragraph of its judgment the court made the following remarks:-

“What this basically means is that it will not take a long time before the appeal is dealt with by the High Court. The court makes that determination in view of the fact that a similar case involving the applicant which was heard on the same date with this case was dealt with by the High Court within a period of about a month. It is therefore prudent that this court allows the High Court to decisively deal with the appeal.

For that sole reason that the appeal is going to be decided within a short period of time the court would therefore dismiss the application for execution pending appeal.”

The sentiments of the court are expressed in rather emphatic and definitive terms. One can hardly question the applicant's position that it was influenced by the above pronouncement and waited to see if indeed the court *a quo's* “prognosis” would eventuate. Litigants seldom lightly dismiss court pronouncements as they tend to accept same at face value.

I interpose here to address one of the averments by the respondents challenging the authenticity of the reasons for judgment appearing on pages 39 – 40 of this current application. Apart from merely highlighting the difficulty they purportedly encountered in securing a copy of that judgment, the respondents failed to advance any meaningful reasons why I should dismiss that judgement as a fraud.

Prospects of success on review

A perusal of the reasons given by the Magistrate for dismissing the application for leave to execute pending appeal appears to reveal an inappropriate importation of factors extraneous to consideration of such an application.

As indicated earlier the dismissal was solely predicated on the Magistrate's projection that the appeal filed by the respondents would be disposed of by the High Court within a month.

In *ZDECO (Pvt) Ltd v Commercial Careers College (1980) (Pvt) Ltd* 1991 ZLR 61 (HC) SMITH J, referred among other authorities to the case of *South Cape Corporation (Pty) Ltd* 1977 (3) SA 534(A) where CORBETT JA set out the factors relevant to the exercise of the court's discretion in an application for leave to execute pending appeal.

It was stressed that the court enjoys a wide general discretion to grant or refuse leave and, if leave were granted, to determine the condition upon which the right to execute should be granted, the following was stated;

“In exercising this discretion the court should in my view determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, inter alia, to the following factors:

1. *The potentiality of irreparable harm or prejudice sustained by the appellant on appeal (respondent in the application) if leave to execute were granted;*
2. *The potentiality of irreparable harm sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;*
3. *The prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous and vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose e.g. to gain time or harass the other party; and*
4. *Where there is potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardships or convenience as the case may be.”*

See also *Dabengwa & Anor v Minister of Home Affairs & Ors* 1982 (1) ZLR 223, *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (HC).

What is surprising though is that the court *a quo* after having correctly referred to the applicable factors, went off at a tangent and based its order on a consideration alien to the application. As fate would have it, the projection that the appeal against the eviction order would be determined within a month has in fact proved to be unjustifiably optimistic as to date that appeal is yet to be heard let alone disposed of.

The failure by the Magistrate to apply the relevant factors is in my view fertile ground for the setting aside of that ruling on review or the basis of gross unreasonableness or some other related ground for review.

Possible prejudice

I do not see any prejudice to the respondents should the applicant be granted leave to file its application for review. The granting of this application for condonation does not in the least translate to an order for their eviction (*which is what they are fearful of*). The order for their eviction remains suspended until set aside on appeal or until the order for the dismissal of the application for execution pending appeal is set aside on review.

In view of the foregoing therefore I am of the view that there is merit in the application for condonation for late filing of review.

Costs¹

The general rule is that the substantially successful party is entitled to his costs. The court can withhold costs if there is justification for doing so.

It emerged during these proceedings that the applicant disregarded counsel's advice to timeously file its application for review. The officials of the applicant insisted on waiting to see if what the Magistrate had stated regarding the time frame within which the appeal against

eviction would take place. To some extent therefore, despite its *bona fides*, the applicants should shoulder part of the responsibility for the delay in the filing of its application for review. For this reason the court will not award costs to the applicant.

Ultimately, therefore, the following order is hereby given;

IT IS ORDERED THAT:-

1. Application for condonation for late noting of application for review be and is hereby granted.
2. Leave be and is hereby granted for the applicant to file an application for review out of time.
3. The applicant shall file the application for review within fourteen (14) days of the granting of this order
4. There shall be no order as to costs.

Mutendi, Mudisi & Shumba, applicant's legal practitioners