DISTRIBUTABLE (10)

Judgment No. SC 14/06
Civil Application No. 343/05

MINISTER OF TRANSPORT & COMMUNICATION

v

C V CHITATE

SUPREME COURT OF ZIMBABWE
HARARE, MAY 16, 2006

V B Chigwida, for the appellant

N Chiwa, for the respondent

Before: ZIYAMBI JA, in Chambers, in terms of r 5 of the Rules of the Supreme Court.

Application for an extension of time within which to appeal

The respondent was awarded, by the High Court, damages in the sum of $400 000 000.00 in respect of a collision which took place between a vehicle belonging to the respondent and a truck belonging to the applicant on 6 September 2001. The applicant's driver perished in the collision.

The founding affidavit is sworn by the legal practitioner for the applicant.

She states that the judgment sought to be appealed against was delivered on 22 June 2005. As the legal practitioner representing the applicant, she was unaware that the judgment had been delivered as she was on maternity leave from May – August 2005. She first had sight of the judgment in September (date not given) when she went to the office to extend her leave to October 2005. On perusal of the judgment she noted the comment by the learned Judge that the judgment had been written without the benefit of her closing submissions. She then left the file in the hands of another law officer who proceeded to communicate with the Judge's clerk in the hope of "clearing up the issue of the submitting of our closing arguments". She attached to her affidavit a letter from her colleague addressed to the Judge's clerk dated 1 August 2005. The letter states in part:

> "We refer to the above matter in particular to the judgment that was handed down on 22 June 2005 by the Honourable Bhunu J in particular to pages 4 and 5 of the judgment and advise that the closing submissions by Ms Chigwida were filed on 22 March 2005. In this regard please see attached copy.
>
> Please may you bring this to the Honourable Judge's attention and advise our office accordingly….".

The deponent averred that it was the hope of her colleague that the Judge would "vary his order in the line (sic) of enlightenment on that issue".

A response from the Judge's chambers was received on 23 September 2005. The letter dated 4 August 2005 and date stamped 12 August 2005 and addressed to the Civil Division of the Attorney General's Office stated:

"In response to your letter dated 1 August, I want to high light(*sic*) to

> you that the respective lawyers were supposed to submit their closing submissions by 16 March 2005 and it was even endorsed on the file cover by the Honourable Judge on 8 March 2005.

According to your papers, the submissions were date-stamped on 22 March, well after the due date, worse still they did not reach the judge's chambers.

I even communicated with Ms Gatsi before the judgment was written and I was told Ms Chigwida was on maternity leave. Again, I talked to you Ms Mudenda in person and you told me the same story that Ms Chigwida was on maternity leave. Consequently the judge prepared the judgment."

The deponent resumed office and continued the correspondence with the judge's clerk. She was "under the *bona fide*belief that the variation of the order could be done." She waited for a response but none was forthcoming thus prompting her to file this application.

She averred that the appeal had prospects of success in that the respondent (Plaintiff in the High Court) had no *locus standi*as the vehicle in respect of which the claim was made belonged to the respondent's wife and not to the respondent. Further, there were two accident reports by the police which had different implications and the respondent had failed to call the police detail who attended the scene of the accident to verify the existence of two different reports. There are further grounds of appeal attacking the assessment of the evidence by the learned Judge and the quantum of damages.

The application is opposed on grounds that the delay is inordinate and willful and the prospects of success slim since the learned judge dealt extensively with the issue of *locus standi*and his judgment thereon is unassailable. Further, the issue of an inspection in *loco*was never raised by the applicant at the trial it being common cause that the road accident in which the respondents vehicle was damaged had occurred in 2001 and that, due to the effect of rain wind and use by many vehicles of the road, an inspection in *loco*would yield no helpful results. As regards the quantum of damages, the amount claimed is far less than the actual worth of the vehicle. Because of the effects of inflation the amount awarded would be insufficient to replace the vehicle whose value has soared since the date of the judgment.

It would be *naïve*to accept the explanation given by the applicant's legal practitioner as being reasonable. Nowhere in the affidavit is it averred that she or her office checked with the judges' clerk in order to ascertain whether the judgment had been delivered. As early as 1 August 2005, the applicant's legal practitioners were aware that the judgment had been delivered on 22 June 2005. Yet no steps were taken to seek

condonation and an extension of time within which to appeal. The deponent's averment that she thought the order would be varied is nonsensical having no foundation in law. Are there not set procedures in the Rules of the High Court for applying for variation of orders and rescission of judgments? The deponent has not explained in the application and to this Court why she hoped that a court would vary its order upon receipt of a letter by her and without notice to the other party.

As to the prospects of success, I agree with the respondent that there are little or no prospects of success on appeal, the learned Judge having been satisfied that the vehicle was jointly owned by the respondent and his wife. Regarding the police reports, it was open to the applicant, if it thought the evidence of the police detail necessary, to call him to give evidence. This, the applicant did not do. As to the quantum of damages, the effects of present day inflation on the prices of goods is a well known fact. In the end the respondent will be out of pocket and the longer the delay in finalizing the matter the more difficult it will be to replace the respondent's vehicle with the amount awarded. Thus it can be seen that the prejudice to the respondent in granting this application is great.

Accordingly when regard is had to all the above factors, I have to hold that the applicant has failed to satisfy me that there are good reasons for granting the application and it is therefore dismissed with costs.

Attorney-General's Office, appellant's legal practitioners

Chihambakwe, Mutizwa & Partners, 's legal practitioners