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Judgment No. SC 13/08

Civil Appeal No. 147/06

GILNAT INVESTMENTS (PVT) LTD v ART CORPORATION LIMITED

SUPREME COURT OF ZIMBABWE
HARARE, SEPTEMBER 11, 2008

R Y Phillip, for the applicant

P C Paul, for the respondent

Before MALABA JA: In Chambers in terms of r 4 of the Rules of the Supreme Court ("the Rules").

This is an application for condonation of non-compliance with r 43(2) of the Rules and re-instatement of an appeal dismissed in terms of r 44(1).

On 17 May 2006 the High Court dismissed with costs on a legal practitioner and client scale an application made under s 196 of the Companies Act [*Cap 24:03*] ("the Act") for an order of relief under s 198 of the Act on the ground that the manner in which the affairs of the respondent company were being or had been conducted was oppressive or unfairly prejudicial to the interests of holders of 5% preference shares including the applicant.

Notice of appeal against the whole judgment of the High Court was filed with the Registrar on 7 June 2006. On 6 March 2007 the Registrar sent a letter to the applicant's legal practitioners calling upon them to file heads of argument in the appeal within fifteen days. The applicant's legal practitioners received the letter on 8 March. In the founding affidavit deposed to in support of the application, Mr *B G Venturas* said he immediately sent a brief to counsel who had argued the applicant's case in the High Court with instructions to prepare heads of argument. He said despite several telephone calls to counsel the heads of argument were not available for filing within the time limit. The appeal was dismissed.

Counsel admitted receiving the brief from the instructing legal practitioner on 9 March 2007. He said it was placed in a heap of six other briefs on his table. Pressure of other court work and a reduced level of concentration due to occasional ingestion of morphine tablets for the mitigation of excruciating pain from the degeneration of the lumbar spine caused him to overlook the need to prepare the heads of argument for filing timeously. The heads of argument were made available ten days out of time.

In *Maheya v Independent African Church* S-58-07 it is stated at p 5 of the cyclostyled judgment that:

> "In considering applications for condonation of non-compliance with its Rules, the Court has a discretion which it has to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefor; the prospects of success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the Court and the avoidance of unnecessary delays in the administration of justice. *Bishi v Secretary for Education* 1989(2) ZLR 240(H) at 242D-243C."

It is clear from the affidavits filed in support of the application that the fault for the applicant's non-compliance with r 43(2) lies in the negligence of counsel. Whilst not underrating the contribution of ill-health to the oversight pleaded by counsel as the immediate cause of his failure to prepare the heads of argument for timeous filing in the appeal, the fact that he was able during the same period of time to attend to other court work makes oversight a difficult explanation to accept as a justification for granting the applicant the indulgence it seeks. That is particularly the case when regard is had to the fact that counsel did not deny the averment by the instructing legal practitioner that several telephone calls were made reminding him of the need to comply with the time for the filing of the heads of argument.

I would have granted the applicant condonation on the basis of what the instructing legal practitioner did in an attempt to comply with r 43(2) of the Rules if the appeal had prospects of succeeding. There are no prospects of the appeal succeeding. The relief

for applied in the High Court related to matters which arose from the implementation of the special resolutions of 23 August 1996 and 31 July 1999. The court *a quo* had to make a finding that the special resolutions were unlawful to the extent in which they introduced matters which were oppressive or unfairly prejudicial to the interests of holders of 5% preference shares including the applicant.

Only after making a finding that the special resolutions were unlawful as being in contravention of s 196 of the Act and setting them aside to the extent of the contravention could the court *a quo* be in a position to grant the relief in the terms of the draft order.

The cause of action arose at the time the special resolutions were passed by the majority of shareholders of the respondent company at the extraordinary general meetings convened for the purposes. The court *a quo* was correct in holding that the relief sought was a debt which would be due to the applicant from the date the special resolutions were passed. Section 15(d) of the Prescription Act [*Cap* 8:11] provides that a debt shall be extinguished by prescription after three years. The period of three years commences to run as soon as the debt becomes due. Section 2 provides that "debt":

> "Without limiting the meaning of the term, includes anything which may be sued for or claimed, by reason of an obligation arising from statute, contract, delict or otherwise."

Proceedings were not instituted until 4 February 2003. As the applicant's cause of action arose at the time the special resolutions it alleges were unlawful were made in 1996 and 1999 it had prescribed at the time the application was made.

It is important to note that whilst the court *a quo* dismissed the application on the ground that the relief sought had prescribed, the incorrectness of the decision was not one of the grounds stated in the notice of appeal filed with the Registrar on 7 June 2006. No application has been made in terms of r 32(3) for an order of amendment of the grounds of appeal. The notice of appeal upon which reinstatement of the appeal is sought does not attack the correctness of the finding of the court *a quo* that the relief claimed had prescribed. I have, however, taken into account the fact that even if an application to amend the grounds of appeal was to be made at the hearing, the appeal would not succeed. The court *a quo* did not misdirect itself in finding that the relief sought had prescribed. Although I agree with the court *a quo's* finding on the merits of the application, it is not necessary to deal with them as I am satisfied that the decision that the relief sought had prescribed disposed of the dispute between the parties.

The application is dismissed with costs.

Byron Venturas & Partners, applicant's legal practitioners

Wintertons, respondent's legal practitioners