

REPORTABLE (5)

PAUL GARY FRIENDSHIP
v
(1) CARGO CARRIERS LIMITED (2) ACROSS
ENTERPRISES (PVT) LTD

SUPREME COURT OF ZIMBABWE
HARARE, AUGUST 30, 2012 & JANUARY 10, 2013

L Uriri, for the applicant
R Fitches, for the first respondent

Before, **ZIYAMBI JA**, in chambers in terms of r 5 of the Supreme Court Rules.

This is an application for condonation of the failure to note an appeal timeously as well as an extension of time within which to appeal against a judgment of the High Court dated 12 July 2012. The *dies induciae* for noting the appeal expired on 2 August 2012. This application was filed on 15 August 2012.

The background of the matter is as follows.

On 12 October 2011, the High Court granted a default judgment against the second respondent (of which company the applicant is a director) ordering it to pay, *inter alia*, the sum of US\$101 381.32 to the first respondent. Liability of the applicant to pay the second respondent's debt was founded on s 318 of the Companies Act [Cap 24:03].

In terms of r 63 of the rules of the High Court:

- “(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.
- (2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just.
- (3) Unless an applicant for the setting aside of a judgment in terms of this rule proves to the contrary, he shall be presumed to have had knowledge of the judgment within two days after the date thereof.”

The applicant was therefore presumed to have had knowledge of the judgment on 14 October 2011 unless he proved to the High Court to the contrary.

On 15 December 2011, the applicant filed two applications in the High Court. One was for condonation of failure by the applicant to file an application for rescission of the above mentioned judgment within the period provided for in r 63. The other was an application for rescission of the said judgment. Both matters were argued before the court *a quo* on 10 July 2012. The learned judge dismissed the application for condonation. The application for rescission of the judgment, dependent as it was on the success of the application for condonation, was also dismissed. It is against this judgment refusing condonation that the applicant seeks to appeal.

In its founding affidavit, the applicant alleges that following the issuance of the judgment on 12 July 2012, he received an email from his legal practitioners on 17 July 2012 advising him to seek an opinion from counsel as to whether or not an appeal should be

noted against the judgment. On 24 July 2012, he advised his legal practitioners to obtain an opinion from Advocate *Morris*. Instructions were immediately despatched to Advocate *Morris* to draft *Heads of Argument* but regrettably he was *ill disposed* and the Notice of Appeal could not be drawn within the peremptory time limits. The *opinion* has now been obtained from counsel who has drafted the Notice of Appeal which is attached to the application.

The reference to *Heads of Argument* confuses the issue but I will assume in favour of the applicant that the instructions were to give an opinion and to draft a Notice of Appeal if necessary. The use of the expression “ill disposed” is also confusing as it gives the impression that counsel was averse to the idea of noting an appeal against the judgment. But here again the applicant could have meant that counsel was *indisposed* which would mean that counsel by reason of sickness or otherwise was unable to attend to the matter timeously. The confusion is not resolved on the papers as nothing more is said on the issue.

The application is opposed by the first respondent who avers that the application is an abuse of court process and it ought to be dismissed with costs on a punitive scale as a mark of the court’s disapproval of the contemptuous conduct of the applicant for the following reasons: The applicant has sought indulgences at various stages of the proceedings between the parties. The main application, in case No. HC3795/11, the matter in which default judgment was granted against the applicant and the second respondent, was filed on 19 April 2011. The applicant did not file a notice of opposition in the time provided and was time barred on 10 May 2011. The matter was set down for default judgment on the unopposed roll on 18 May 2011.

On 17 May 2011, a day before the set down date, the applicant sought the consent of the first respondent to a withdrawal of the matter from the unopposed roll in order to enable him to make an application for the upliftment of the bar obtaining against him and to 'remedy his default'. The first respondent grudgingly consented to the withdrawal of the matter from the unopposed motion roll. Thereafter, it took the applicant thirteen days to file and serve the application for upliftment of the bar on the first respondent. Notwithstanding the fact that the respondent did not oppose the application, the applicant failed to prosecute it and in order to make some progress in the matter, the respondent filed a 'consent to the upliftment of the bar' on 12 September 2011 on condition the applicant filed its notice of opposition within ten days of 13 September 2011 on which date the consent to the upliftment of the bar was filed. The ten-day deadline was far more than the forty-eight hours indulgence that the applicant had requested. However, once again, the applicant failed to file its notice of opposition and default judgment was entered. On November 2011, the first respondent served a copy of the default judgment on the applicant.

In any event, so it was argued, the applicant had not shown that there were any prospects of success on appeal because the applicant had made a personal undertaking to repay the debt which undertaking he had not honoured.

Condonation is an indulgence which may be granted at the discretion of the court. It is not a right obtainable on demand. The applicant must satisfy the court/judge that there are compelling circumstances which would justify a finding in his favour. To that end, it is imperative that an applicant for condonation be candid and honest with the court.

Certain criteria have been laid down for consideration by a court/judge in order to assist it in the exercise of its discretion. Among these are, the extent of the delay and the reasonableness of the explanation therefor, the prospects of success on appeal, the interest of the court in the finality of judgments and the prejudice to the party who is unable to execute his judgment. The list is not exhaustive.

The application was filed on 15 August 2012. The judgment was handed down on 12 July 2012. There are no affidavits from the applicant's legal practitioners and Advocate *Morris* supporting the allegations made concerning them by the applicant neither does the applicant disclose the reason why it took him seven days to respond to the email from his Legal Practitioners, or the date on which instructions were despatched to Advocate *Morris*. The *dies induciae* expired on 2 August 2012. The explanation for the delay is itself confusing as I have already mentioned above. I do not, in the circumstances, consider that the applicant has given a reasonable explanation for the delay.

As far as the prospects of success are concerned, the applications before the court *a quo* were two fold. Since his application for rescission of the default judgment was way out of time, the applicant had to pass the hurdle of condonation of his failure to file that application on time. In his application for condonation before the court *a quo* he stated that he was making the application 'out of an abundance of caution' as he only became aware of the judgment against him on 13 December 2011. However, the court *a quo* found this averment to be untrue because a copy of the order in question was delivered to the applicant's legal practitioners by the legal practitioners of the first respondent on 9 November 2011. The court *a quo* appears to have proceeded on the basis that the applicant first had knowledge of the judgment on that date and found that the application for

rescission of the judgment was out of time by six days. In view of the dishonest averment that he had first seen the judgment on 13 December, that was a generous finding on the part of the court *a quo*. The attitude that the application was being made out of an abundance of caution smacked of arrogance bearing in mind the lateness of the application, and ignored the fact that the applicant was seeking an indulgence from the court. The following excerpt from the judgment of the court *a quo* is instructive as to the view which it took of the applicant's explanation for the delay in filing the application for rescission of judgment.

“The applicant did not attach any affidavit from his erstwhile legal practitioners to explain the default. Apart from his mere allegation, there is nothing to demonstrate that the applicant sought an explanation for the default from his former legal practitioners. In a case such as the present where there is a history of consistent default on the part of a litigant and the legal practitioners are blamed for that default, it is necessary for the litigant to avail proof, preferably in writing, that it has demanded an explanation from the legal practitioners concerned.....on his part the applicant has not shown what steps he took to protect his interests.

The fact that the delay was of just below one week does not, on its own, assist the applicant. See *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249(S) at 253F-H”.

The learned Judge then went on to consider the prospects of success.

“The onus is on the applicant to show that he has a defence which has prospects of success. The applicant seems to suggest that because the requirements of S 318 of the Companies Act have to be established for him to be personally liable then he has a defence which has prospects of success. That is not so. The applicant must set forth facts upon which the prospects of success of its defence may be assessed. The documents in the record show that the applicant personally admitted to being liable to pay the second respondent's debt owed to the first respondent.

In any event, it has been held that in cases of “flagrant breaches of the Rules, especially where there is no acceptable explanation therefore, the indulgence of condonation may be refused whatever the merits of the appeal are. This applies even where the blame lies solely with the attorney”. *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd*, supra, at 254D-E, *Tshivhase Royal Council & Anor v Tshivhase & Anor* 1992 (4) SA 852(A) at 859E-F”.

It is now settled that an appellate court will not interfere with the exercise of its discretionary power by a lower court unless it is shown that the lower court committed such an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision.¹

It has not been shown that the learned judge improperly exercised his discretion in refusing condonation and certainly no allegation to that effect is contained in the Notice of Appeal sought to be filed. Having regard to the history of consistent disregard of the rules, the learned Judge cannot be faulted in the exercise of his discretion against the applicant.

In addition, the very fact that the applicant has brought this application for condonation without a satisfactory explanation for the delay is further evidence of his disregard of the rules of this Court. The paucity of evidence explaining the reason for his default and the fact that he had placed the blame for the default on his legal practitioners but filed no affidavits from them in support of his allegations were among the reasons for the dismissal, by the court *a quo*, of his application for condonation. Yet the applicant did not learn from that criticism but instead repeated the same mistake in the present application. The applicant's conduct displays a disdain for the rules of Court and makes the inference irresistible that his desire to defend the matter is not *bona fide* but merely a ploy to delay the evil day to the prejudice of the first respondent who is entitled to execute his judgment bringing finality to the proceedings.

¹ Halwick Investments v Nyamwanza 2009 (2) ZLR 400 (S); Sedco v Chimhere 2002 (1) ZLR 424 (S); ZFC LTD v GEZA 1998 (1) ZLR 137 (S)

In view of the above, the appeal has no prospects of success.

The application is therefore dismissed with costs.

Gill Godlonton & Gerrans, applicant's legal practitioners

Scanlen & Holderness, first respondent's legal practitioners