DISTRIBUTABLE (57)

FLORENCE CHIMUNDA
v
(1) ARNOLD ZIMUTO (2) LOVENESS ZIMUTO

SUPREME COURT OF ZIMBABWE
HARARE, NOVEMBER 26, 2013 & SEPTEMBER 30, 2014

F M Katsande, for the applicant
I Maja, for the respondents

Before **ZIYAMBI JA:** In chambers in terms of r 5 of the Rules of the Supreme Court, 1964.

This is an application for condonation of the late noting of an appeal and an extension of time within which to note an appeal.

The judgment sought to be appealed against was delivered by the High Court on 5 October 2005. The application was first filed on 17 November 2010 but, being non-compliant with the Rules of this Court, was the subject of much correspondence between the Registrar of this Court and the applicant's legal practitioners, with the result that it was only finally set down for hearing on the 26 November 2013.

The applicant averred in her founding affidavit which is dated 13 November 2010, as follows:

> "On 18 November 2005 the applicant, then a self-actor filed a notice of appeal in the Supreme Court. Nothing was apparently done to prosecute the appeal and nearly three years later, on 12 June 2008, the Registrar of the Supreme Court wrote to the appellant advising the appeal was deemed to have lapsed in terms of r 34(5) of the Rules of the Supreme Court."

The communication from the Registrar therein referred to was followed by a letter dated 17 June 2008, to Katsande & Partners then the applicant's legal practitioners, from the respondent's legal practitioners, requesting compliance by the applicant with the High Court judgment within fourteen days from 12 June 2008 in view of the lapse of the appeal.

There followed a long silence of two years and three months. Then on 16 September 2010, the matter assumed new life. A letter was written to the Registrar of the High Court by Katsande & Partners. The Registrar was accused of failing to respond to a letter by the applicant requesting a transcript of the record for the purposes of applying to the Supreme Court for an extension of time within which to appeal. The letter read:

> "The Registrar
> High Court of Zimbabwe
> Harare
> 16 September 2010
>
> **Florence Chimunda v Arnold Zimuto 5261/05**
>
> 1. The above matter for which we now act for Mrs Chimunda and in particular your letter of 12 June 2008 refers.
> 2. On 9 February 2007, Mrs Chimunda then a self-actor wrote to the office of the **Registrar requesting a transcript of the record of the proceedings as she**

intended to apply to the Supreme Court for leave to appeal out of time. The copy of the letter is attached.

3. Instead of responding to the request, you wrote to her the letter of 12 June 2008 **informing her of what she knew already that her appeal had lapsed**.
4. To date your office has still not supplied the transcript.
5. We write requesting that as a matter of urgency you supply us with a copy of the transcript to **enable us to apply to the Supreme Court for leave to appeal out of** time.
6. We undertake to meet the costs of the preparation of the transcript." (The underlining is mine.)

Attached to the letter was a copy of the letter allegedly written by the applicant. It was dated 9 Feb 2007. It read:

"281 Carrigh Greagh Road
Helnvale, Borowdale (sic)
Harare

To: High Court of Zimbabwe

RE: REQUEST FOR THE TRANSCRIPT OF COURT PROCEEDINGS CASE NO 8530/02

I am requesting for a transcript of Court proceedings for case No 8530/02 to be copied to Mr F. M Katsande and Partners.

Yours faithfully

_____

F.Chimunda
Copies to be collected."

One immediately notes the differences in case numbers cited in the two letters and wonders how the Registrar of the High Court could be faulted for not locating the record and providing the transcript quite apart from the fact that the letter of 9 February 2007 makes no

undertaking to pay the costs of the transcript and does not, on the face of it, bear any stamp or other indication of its having been received by the Registrar.

In addition, the letter of 16 September2010 makes no reference to the case under discussion which, *ex facie* the judgment, appears to bear the number HC 8530/02.

The applicant denied having received the communication from the Registrar advising of the lapse of the appeal. She averred that she had constantly visited the appeals office of the High Court but was told that the appeal was being processed and that she would be advised in due course of the hearing date. In 2007 she had written to the Registrar of the High Court requesting that a transcript of the record of proceedings be prepared in order for her to prepare for the hearing of the appeal. However, the process of obtaining the transcript and setting the matter down for hearing appeared to be lengthy and drawn out so she instructed her legal practitioners to attempt dialogue with the respondents' legal practitioners on a 'without prejudice basis'. It was during this dialogue that she learnt, through the letter of the 17 June 2008 which the respondents' legal practitioners wrote to hers, that her appeal had lapsed. (This is contradicted by the underlined portion of the legal practitioners' letter of 16 September 2010).

Thereafter her daughter was diagnosed with cancer and she spent the rest of 2008 and the whole of 2009 commuting between South Africa and Zimbabwe attending to her daughter who was receiving medical treatment. When her daughter's condition improved, (the date is not given) she consulted her legal practitioners on the way forward. This resulted in her legal practitioners writing the letter of 16 September 2010. The Registrar's response was that nothing could be done before the lapse of the appeal was addressed.

She claimed that it was at that stage that a close perusal of the documents made available to her lawyers revealed that the agreement of sale was null and void by virtue of its having been concluded in violation of s 39 of the Regional Town and Country Planning Act [*Cap 29:12*]. Accordingly she had good prospects of success on appeal as she intended at the appeal to raise this new point of law on appeal.

The approach of the Courts when dealing with applications of this nature is to consider the cumulative effect of the following:

> "The extent of the delay
>
> The reasonableness of the explanation tendered therefor;
>
> The prospects of success on appeal
>
> The prejudice if any, that is likely to be caused to the
>
> respondent should the application be granted; and
>
> The need to bring finality to the proceedings."

There is no doubt that the delay in this matter is inordinate. The Rules require a notice of appeal to be filed within fifteen days of the delivery of the judgment appealed against. The applicant, on her own admission filed a defective notice of appeal and did nothing further to prosecute it. It is now almost nine years since the matter was determined in the High Court.

The applicant was advised on 12 June 2008 that the appeal had lapsed. The letter was addressed to the same address given by the applicant as her residential address in the letter of 9 February 2007. Yet the applicant claims not to have received it. At any rate the applicant knew, by 17 June 2008, that the appeal had lapsed but did nothing about it. According to her

affidavit, it would appear that she was represented by her present legal practitioners as far back as 2007 when she instructed them to 'attempt dialogue with the respondents' legal practitioners on a without prejudice basis'.

The explanation advanced by the applicant for her inaction from 17 June 2008, is far from satisfactory and lacks the ring of truth. It would have been an easy matter to attach copies of her passport showing that she did travel between Zimbabwe and South Africa during the relevant period and indeed it became imperative to do so in the light of the challenge, raised by the respondents in their opposing affidavit, that no evidence was produced by the applicant in support of her averments in that regard. In any event, since she was travelling to and from Zimbabwe, no reason has been advanced as to why her legal practitioners could not have made the application earlier. I find the applicant's explanation to be false and totally unsatisfactory.

Having regard to the considerable passage of time since the delivery of the judgment the prejudice to the respondents would, as they have submitted, be great. Not only that, but it is in the interests of justice that court proceedings be brought to finality.

Lest the applicant be inclined to rely on the prospects of success, I would adopt the approach of this Court in *Kodzwa v Secretary for Health & Anor*[1]. At p 316 of the judgment, SANDURA JA said:

> "Whilst the presence of reasonable prospects of success on appeal is an important consideration which is relevant to the granting of condonation, it is not necessarily decisive. Thus in the case of a flagrant breach of the rules, particularly where there is no acceptable explanation for it, the indulgence of condonation may be refused, whatever the

[1] 1999 (1) ZLR 313 at 316

merits of the appeal may be. This was made clear by MULLER JA in *P E Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799D-E, where the learned Judge of Appeal said:

> 'In a case such as the present, where there has been a flagrant breach of the Rules of this court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects of success may be.'

The same point was made by HOEXTER JA in *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131G-J where the learned Judge of Appeal said:

> 'In applications of this sort, the prospects of success are in general an important, although not decisive, consideration. It has been pointed out *Finbro Furnishers (Pty) Ltd v Registrar ofDeeds, Bloemfontein & Ors* 1985 (4) SA 773 (A) at 789C, that the court is bound to make an assessment of the petitioner's prospects of success as one of the factors relevant to the exercise of the court's discretion unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. It seems to me that in the instant case the cumulative effect of the factors which I have summarised ... above is by itself sufficient to render the application unworthy of consideration; and that this is a case in which the court should refuse the application irrespective of the prospects of success.'

More recently, in our own jurisdiction, my brother McNally said the following in *Ndebele V Ncube*1992 (1) ZLR C 288 (S) at 290C-E:

> 'It is the policy of the law that there should be finality in litigation. On the other hand, one does not want to do injustice to litigants. But it must be observed that in recent years, applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute. The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt* - roughly translated, the law will help the vigilant but not the sluggard.'"

Having regard to the inordinate delay in making this application, the total disregard for the Rules of both Courts, the unsatisfactory nature of the explanation tendered by the applicant as well as the prejudice likely to be caused to the respondents by the grant of this application, I consider this to be one of those cases where the cumulative effect of the factors set out above is such that the application ought not to be granted. The applicant is in my judgment, totally undeserving of the indulgence of condonation whatever the prospects of success.

The application is dismissed with costs.

F M Katsande & Partners, applicant's legal practitioners

Maja & Associates, respondent's legal practitioners