

REPORTABLE (32)

LEONARD DZVAIRO
v
KANGO PRODUCTS

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GOWORA JA & GUVAVA JA
HARARE, 11 JUNE, 2015 & MAY 23, 2017

The appellant in person

C. Bhebhe, for the respondent

GUVAVA JA: This is an appeal against the entire judgment of the Labour Court sitting at Gweru dated 12 March 2013 dismissing the appellant’s application for condonation for leave to file his appeal out of time.

BACKGROUND

Although the facts of this matter are mainly common cause, it is necessary to set them out in some detail in order to determine whether the court *a quo* exercised its discretion judicially. The appellant was employed by the respondent as a creditor’s clerk. He was charged under the relevant Code of Conduct with the offence of “any conduct or omission inconsistent with the fulfillment of the express or implied conditions of his contract of employment and willful disobedience to a lawful order”. It was alleged that the appellant failed to comply with written and verbal instructions given to him on 24 May 2001 regarding the checking of daily

banking. Following a disciplinary hearing he was found guilty and dismissed on 15 August 2002. He appealed against the decision to the internal Appeals Committee which upheld the decision of the Disciplinary hearing on 4 September 2002.

About five months later, the appellant alleged that he filed a notice of appeal with the Labour Relations Tribunal Court on 26 February, 2003. The respondent asserted that they were not served with the notice of appeal and there is no proof in the record that they were served. The matter was never prosecuted.

The appellant states in his founding affidavit that he made several inquiries with his legal practitioners about the appeal but did not get a satisfactory response. On 5 July 2006 he retrieved his file from his erstwhile legal practitioners and instructed new counsel. His new legal practitioners wrote a letter to the registrar of the labour Tribunal enquiring about the appeal. As they did not have a reference number they did not receive a response.

Through his new counsel, the appellant then filed a chamber application for Condonation of late noting of appeal and extension of time at the Labour court in November of 2006. This application, for some unknown reason, was only served upon the respondent in October 2012. Perturbed by his new lawyers seeming ineptitude, the appellant wrote a letter of complaint to the Secretary of the Law Society of Zimbabwe in October of 2010 complaining against the legal practitioners. His legal practitioners then renounced agency.

He then enlisted the services of another lawyer. Following the application for condonation made in 2006, the appellant then filed heads of argument in December of 2012. The

Labour Court dismissed the application for condonation of late noting of appeal and extension of time on 12 March 2013.

After a further five months, on 26 August 2013, the appellant filed for condonation for late filing of an application for leave to appeal to the Supreme Court. This application was dismissed by the court *a quo*. He subsequently filed another application for leave to appeal which was eventually granted.

The appellant then filed his appeal with the Supreme Court on 19 November 2014.

The appellant has appealed to this court on four grounds which he set out as follows:

- “1. The Court *a quo* misdirected itself by dismissing an application on the basis of the extent of delays occasioned to the appellant by members of this honorable court and their resultant failure to proffer reasonable explanation for the professional ineptitude.
2. The court *a quo* erred in failing to place importance of the case to the public at large which protection should only be seen to be given by this honorable court exclusively as one of the main purposes of the act.
3. The court *a quo* misdirected itself by upholding the need to put finality to litigation at the expense of justice thereby ignoring the record that clearly showed seriousness of purpose displayed by the now self-acting appellant throughout his case as a court of equality.
4. The Court *a quo* erred by conditioning the glaring misrepresentation by a legal practitioner who forged appellants signature of an affidavit after inheriting the case from another lawyer who had also inadvertently and

unjustifiably delayed to note an appeal as required by the hallowed rules of the Labour Court as provided for in Statutory Instrument (S.I.) 59 of 2006.”

As can be seen from the grounds of appeal the appellant is dissatisfied with the manner in which the court *a quo* dealt with his application for condonation of the late noting of an appeal. It is therefore necessary to ascertain whether the court *a quo* complied with the requirements of the law in respect to such applications.

REQUIREMENTS FOR AN APPLICATION FOR CONDONATION

In the case of *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S). GUBBAY CJ sets out factors to be considered in such an application. These are as follows:

- (a) That the delay involved was not inordinate, having regard to the circumstances of the case;
- (b) That there is a reasonable explanation for the delay;
- (c) That the prospects of success should the application be granted are good; and
- (d) The possible prejudice to the other party should the application be granted.

See also *Marick Trading (Pvt) Ltd v Old Mutual Life Assurance Co (Pvt) Ltd & Anor* HH 667/15.

The appellant explains the delay by giving a series of unfortunate interactions with inefficient lawyers. KORSAH JA in *Kombayi v Berkout* 1988(1) ZLR 53 (SC) stated thus:

“The broad principles the Court will follow in determining whether to condone the late noting of an appeal are: the extent of the delay; the reasonableness of the explanation for the delay; and the prospects of success. If the tardiness of the applicant is extreme, condonation will be granted only on his showing good grounds for the success of his appeal.”

In *casu*, even if the court were to disregard the time the appellant spent changing lawyers, the appellant disregarded the restriction of time placed by the Labour Court Rules. Rule 15(1) provides for 21 days to note an appeal once one has received the decision. The period between the granting of the judgment in 2002 and noting of the appeal after instructing the first lawyer in February of 2003 is well beyond the 21-day limit. No justifiable excuse has been proffered by the appellant as to why it took him so long to file the appeal.

The application for condonation was made on 12 November 2006, but only served on the respondents in 2012. They quickly opposed the application but the Heads of Argument were only filed on 27 December 2012. From the papers before me no explanation was made for this delay. The court *a quo* cannot be faulted for finding that the delay was caused by the appellant's own dilatoriness.

In the case of *H. J. Vorster (Private) Limited v Save Valley Conservancy SC* 20/14 this court concluded that:

“...there was no merit in the application for condonation because the applicant's predicament was due to its own dilatoriness. Having so found, the court proceeded to dismiss both applications with costs on the legal practitioner and client scale”

With regard to the appellant's allegation that it was the incompetence of his erstwhile legal practitioner that led to the excessive delays the court *a quo*, correctly, in my view, held that even where this is the case one cannot seek to insulate himself using such a defence. A litigant will not be completely absolved for the incompetence of his or her legal practitioner. This principle was set out in the case of *Kombayi v Berkout (supra)* at p 56 where KORSAH JA

quoted with approval the case of *Saloojee & Anor NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141C where it was stated that:

“There is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of the Court. Considerations *ad misericordium* should not be allowed to become an invitation to laxity.” (Own emphasis)

It should also be noted that in the case of *Ganda v First Mutual Life Assurance Society* SC/01/05 the court was at pains to explain that it is not enough for one seeking condonation to simply explain the delay of the failure to observe the rules in the main appeal but one needs to do so also with the delay in the *seeking* of the condonation.

“In addition, it is pertinent to note that it has been stated in a number of cases that a person seeking condonation of the late noting of an appeal should give a reasonable explanation, not only for the delay in noting the appeal, but also for the delay in seeking condonation. Thus, in *Saloojee and Anor, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138H STEYN CJ said:

‘What calls for some acceptable explanation is not only the delay in noting an appeal and in lodging the record timeously, but also the delay in seeking condonation. As indicated, inter alia, in *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at p 449, and in *Meintjies* case supra [*Meintjies v H.D. Combrinck (Edms) Bpk* 1961 (1) SA 262 (A)] at p 264, an appellant should, whenever he realizes that he has not complied with a Rule of Court, apply for condonation without delay.’”

In the case of *Musiyarira v Rufaro Marketing* SC 96/05 this court highlighted that it will be slow to interfere with a court *a quo*’s decision on condonation as it involves the exercise of discretion.

“Condonation of the late noting of an appeal and granting an extension of time within which an appeal is to be noted are matters within the discretion of the court of first instance. Unless it has been shown that the learned President of the Labour Court misdirected herself in dismissing the application, this Court will not interfere with the exercise of that discretion.

The delay was indeed inordinate. The explanation given for the delay was correctly found unacceptable. There is nothing to gainsay the finding by the court a quo that there were no prospects of success on appeal.
(My emphasis)

The law is clear that there must be finality to litigation. McNALLY JA spoke on this in *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290 C- E when he said the following:

“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.” (Own emphasis)

The appellant attempts to rely on *Dalny Mine v Musa Banda* 1999 (1) ZLR 220 (S) at 221 where the court stated that deciding labour matters on technicalities is not desirable.

However, if one examines the quote in full from this case, McNALLY JA stated as follows:

“As a general rule it seems to me undesirable that labour relations matters should be decided on the basis of procedural irregularities. By this, I do not mean that such irregularities should be ignored. I mean that the procedural irregularities should be put right... I would think it often superfluous for the Tribunal to hear evidence relating to the irregularities. I say “often” because there may be cases in which this is not so. It may be that the existence of irregularities will affect the date from which the termination of employment takes effect. It may sometimes take effect from the date on which the irregularity is cured.” (My Emphasis)

As can be observed, his remarks are not a blanket cover for all technical defects. It was highlighted that there are circumstances where a decision on technicalities could be

warranted and in my view, this case is one such example. The appellant's lack of diligence was of such gross magnitude that it ceased to be a mere technicality that can be cured.

With regards to the prospects of success, the appellant has not shown that he has any prospects of success on appeal. His complaint was merely that the case had never been heard on the merits. This is not sufficient. He must allege facts which if proved would show that he had prospects of success. To grant condonation in respect of an appeal with little to no prospects of success only serves to clog the judicial system.

In *casu*, the merits of the appeal cannot even be ascertained as they were never explored in a trial court. From its inception this matter has been a series of applications for condonation and cries for mercy. The appellant alleges that this amounts to denying him a right to be heard for procedural technicalities. However, it is clear that in the twelve years the matter has lingered in the justice system, if the appellant had been diligent he would have had his day in court.

In my view the appellant has failed to establish any justification for the delay which necessitated repeated requests for condonation. Further, the appellant has failed to demonstrate any prospects of success if condonation were granted and the appeal were to be heard. Finally, the potential prejudice to the other party is totally unacceptable. Not only has the respondent been put out of pocket in defending the multitude of applications but the matter has not to date been finalized.

Finally, the appellant does not allege that the court *a quo* failed to exercise its discretion properly. As was stated in the *Vorseter case* (supra) by PATEL JA

“As for the judgment appealed against, we are unable to find any fault or impropriety in the exercise of the court’s discretion. Indeed, counsel for the appellant was unable to identify any misdirection by the court *a quo* in the exercise of its discretion to dismiss the applications for condonation and rescission of default judgment.”

DISPOSITION

There must be finality to litigation. Twelve years is a remarkably long time before a matter is finalized by any standard. As such the court *a quo* cannot be faulted in dismissing the application.

Accordingly, I make the following order:

1. The appeal is hereby dismissed.
2. The appellant shall pay the respondent’s costs of suit.

ZIYAMBI JA:

I agree

GOWORA JA:

I agree

Coghlan and Welsh, respondent's legal practitioners