

REPORTABLE (53)

(1) SERGEANT MHANDE 04737T (2) CONSTABLE MHAKA O
081215B

v

(1) THE CHAIRMAN OF THE POLICE SERVICE
COMMISSION (2) THE COMMISSIONER GENERAL OF POLICE
(3) THE MINISTER OF HOME AFFAIRS

SUPREME COURT OF ZIMBABWE
BERE JA,
HARARE: OCTOBER 4 & 5, 2018

T. Muvhami, for the appellant

T. Shumba, for the respondent

Judgment No. SC 63/18
Civil Appeal No. SC 674/18

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IN CHAMBERS

BERE JA: This is a chamber application for reinstatement of appeal where the application seeks an order couched in the following terms: -

“It is ordered that

1. The application for reinstatement of appeal be and is hereby granted.
2. The applicants’ appeal in SC753/17 be and is hereby reinstated.
3. The applicants’ heads of argument in SC752/17 attached to this application shall be deemed to have been filed as at the date of this order.
4. The costs shall be in the cause.”

The facts giving rise to this application which can be gleaned from the filed papers are as follows: -

Under case number SC753/17 the applicants made a similar application for reinstatement of their appeal before my brother Bhunu JA who after considering the documents filed and hearing counsel granted the order by consent with a caveat that the applicants were supposed to file their heads of argument within ten (10) days from the date of the order.

For some reason, the order by Bhunu JA was not complied with. I suppose this is what has now necessitated the filing of this current application.

In their application for reinstatement of the appeal, the applicants through their counsel allege that the letter calling on them to file heads of argument was not received due to misfiling in the lawyer's offices. This was attributed to the negligence of their secretary.

In support of the confusion in their offices the deponent attached an affidavit from the secretary concerned which details the alleged mix up. The secretary alleged that she received the letter calling on the applicants to file their heads of argument on 20 June 2018 and inadvertently filed the letter in a wrong file. She further alleged that she only discovered the mix up or the misfiling of the letter on 24 August 2018, necessitating the filing of this chamber application on 10 September 2018, exactly 17 calendar days after the alleged anomaly.

The respondents have opposed this application. The respondents expressed reservations on the bona fides of the explanation given by the applicants for their failure to comply with Bhunu JA's order which had been granted by consent.

More importantly, the respondents argued that the applicants had not sought condonation for their non-compliance with the court order and that therefore, the application for reinstatement was improperly before the court.

Finally, the respondents argued that the applicants desired appeal had no prospects of success.

CONDONATION AND EXTENSION OF TIME

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It is the accepted position of the law that an applicant who has failed to comply with a given court order, or infringed the rules of the court must seek to be condoned or pardoned for non-compliance first before applying for reinstatement of their case.

In the case of *Zimslate Quartzize (Pvt) Ltd & Others v Central African Building Society SC34/17* Ziyambi JA, when dealing deal with an almost similar matter remarked as follows: -

“An applicant who has infringed the rules of the court before which he appears, must apply for condonation and in that application explain the reasons for the infraction. He must take the court into his confidence and give an honest account of his default in order to enable the court to arrive at a decision as to whether to grant the indulgence sought. An applicant who takes the attitude that indulgence, including that of condonation, are there for the asking does himself a disservice as he takes the risk of having his application dismissed.”

It is clear that in this application, the applicants have not made any attempt to seek condonation. This does not appear in the founding affidavit or in the draft order filed. There is no indication at all why the application is being brought back to court almost four months after they failed to comply with an earlier order for reinstatement of the appeal. The situation is further compounded by the failure by the applicants to explain the cause of the delay seeking an appropriate remedy 17 days after they discovered the anomaly.

As noted by Makarau JA in *Bonnyview Estates (Pvt) Ltd vs Zimbabwe Platinum Mines (Pvt) Ltd & The Minister of Lands & Rural Resettlement Judgment No SC58/18*;

“Condonation is an indulgence granted when the court is satisfied that there is good and sufficient cause for condoning the non-compliance with the rules.”

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I might add that it is not for the court to infer or speculate about the existence of condonation when no request has been made for it. It must be applied for before reinstatement can be sought. It is in my view jumping the gun to seek reinstatement of an appeal before first seeking condonation and extension of time in situations where one has clearly infringed the court rules or an order of court as in this case.

MATERIAL NON-DISCLOSURE

There is one other aspect of this case which has caught my attention. There is no attempt by the applicants to advert to Bhunu JA’s earlier order in this application. There is no appetite by the applicants through their founding affidavit to openly disclose that this application is a second similar application which is being brought to court. That deliberate attempt to

withhold information does not project the applicants in good light. Our courts are not keen to grant favorable orders to litigants who withhold vital information to it. Ndou J made this important observation in the case of *Anabus Services (Pvt) Ltd vs Minister of Health and Others HB88-03* when he remarked as follows: -

“The courts should in my view always frown on an order whether *ex parte* or not sought on incomplete information. It should discourage non-disclosure, *mala fides*, or dishonesty.”

The order by Bhunu JA and its relevance to these proceedings only came to the attention of the court through the notice of opposition filed by the respondents. That non-disclosure did not enhance the applicants’ application.

DISPOSITION

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Under normal circumstances, if this application had been properly before the court I would have been inclined to consider prospects of success.

However, given my position that the absence of an application condonation and extension of time to seek reinstatement must be precedent to an application for reinstatement of this appeal, I consider the application as fatally defective.

I accordingly order that the matter be struck off. It is thus ordered: -

“That the matter be and is hereby struck off the roll with costs.”

Mugiya & Macharaga Law Chambers, appellant's legal practitioners.

Civil Division of the Attorney General's Office, respondent's legal practitioner's

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