REPORTABLE (34)

ANJIN INVESTMENTS (PRIVATE) LIMITED
v
(1) THE MINISTER OF MINES AND MINING DEVELOPMENT (2) THE MINISTER OF HOME AFFAIRS (3) THE COMMISSIONER – GENERAL OF THE ZIMBABWE REPUBLIC POLICE

SUPREME COURT OF ZIMBABWE
BERE JA
HARARE, SEPTEMBER 20, 2018, MARCH 10, 2020

T. Magwaliba, for the applicant

L. Uriri, for the first respondent

No Appearance for the second and third respondents

IN CHAMBERS

BERE JA: This is an opposed chamber application for condonation of late noting of an appeal and extension of time within which to appeal in terms of r 43 of the Supreme Court Rues, 2018. The applicant seeks an order couched in the following terms:

> "It is hereby ordered that
> (a) The application for condonation for non-compliance with Rule 38 (1)(b) of the Supreme Court Rules, 2018 be and is hereby granted.
> (b) The application for an extension of time to note the applicant's appeal be and is hereby granted.
> (c) The appeal is deemed noted in terms of the Notice of Appeal attached hereto from the date of this order.
> (d) Costs of this application shall be costs in the cause."

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

The applicant had been conducting mining operations in Chiadzwa District from 2009 under a Special Grant and stated that it was in undisturbed possession and occupation until February 2016. On 22 February 2016, the first respondent wrote a letter to the applicant notifying it that the special grant issued to it had expired therefore the applicant had to cease all mining activities with immediate effect and had to vacate the mining area. The applicant together with its employees was forced to vacate the mining location on the same date by armed police, leaving its assets on the site.

In March 2016 the applicant filed an urgent chamber application in the High Court against the respondents seeking restoration of the parties' *status quo ante*. This application was further necessitated by the first respondent's decision to terminate the applicant's right to conduct mining operations under a Special Grant. In the application, the applicant stated that it was substantially prejudiced by the respondents' conduct and resultantly, there was significant financial harm. In addition to this the applicant sought to justify its continued operations on the strength of the special grant which it alleged had been ceded to it by the first respondent.

That application was opposed by the first respondent who argued that the matter was not urgent and that the relief sought by the applicant sought to perpetuate an act of illegality. It stated that the applicant had no rights in the special grant as it had expired some years before. Further, it stated that the mining grant had been issued to the 'Zimbabwe Mining Corporation' and not to the applicant.

The application was argued before the court *a quo* and judgment in the matter was handed down on 30 March 2016. In that judgment, the court *a quo* stated that although several

points in *limine* had been raised by the respondents, it was of the view that the application had to be disposed of on substance and not on technicalities. On substance, the court *a quo* found that the special grant relied on by the applicant had expired five years before it was declared expired in February 2016. It also held that the clause which allowed the applicant to work on sites ceded to it for an indefinite period was contrary to the peremptory provisions of s 291 of the Mines and Minerals Act [*Chapter 21:05*]. Resultantly the applicant's application was dismissed.

Mr *Magwaliba* for the applicant argued that the explanation of the delay in filing the appeal was reasonable as the applicant sought to deal with his Constitutional Court application before seeking remedy in the Supreme Court.

In addressing prospects of success in the intended appeal Mr *Magwaliba*, for the applicant submitted that the court *a quo* erred in finding that the special grant had expired and thus the applicant had not acquired any rights through the grant. He further contended that the question of legality or unlawfulness on the part of the applicant was irrelevant. He also contended that the court *a quo* had erred in not finding that the applicant was entitled to an order restoring the status *quo ante* when it had established that it was in peaceful and undisturbed possession of the mining location and further that the court *a quo* had also erred in finding that the first respondent was entitled to summarily cancel the special grant, even without following due process.

Per contra, Mr *Uriri* for the first respondent argued that the applicant, in deciding not to appeal and instead choosing to approach the Constitutional Court had deliberately lost its right to appeal. He further stated that by approaching the Constitutional Court, the applicant

showed acquiescence of the judgment of the High Court. Counsel further argued that the applicant, by raising issues of entitlement to the special grant had invited the court *a quo* to make a determination on the substantive issue between the parties and that the court had proceeded to properly do so, as a result of which he opined that the applicant had no prospects of success on appeal.

APPLICATION OF THE LAW TO THE FACTS

In the case of *Tel-One (Pvt) Ltd v Communication and Allied Services Workers Union of Zimbabwe* SC 01/06, GWAUNZA JA (as she then was) said the following:

> "Essentially, in an application of this nature, the applicant must satisfy the court firstly, that he has a reasonable explanation for the delay in question and secondly that his prospects of success on appeal are good."

Further, in the case of *Florence Chimunda v Arnold Zimuto*[1] the court per ZIYAMBI JA held that the approach of the courts when dealing with applications of this nature is to consider the cumulative effect of the following:

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

EXTENT OF THE DELAY AND REASONABLENESS OF THE EXPLANATION

In the case of *Ganda v First Mutual Life Assurance Society*[2] SC 01/05, it was stated that:

> "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

[1] SC 76/14
[2] SC 01/05

> explanation, not only for the delay in noting the appeal, but also for the delay in seeking condonation …"

From the record, the judgment which the applicant seeks to appeal against was handed down on 30 March 2016 and the present application was filed on 13 July 2018 following the handing down of the Constitutional Court judgment on 29 June 2018. The extent of the delay is therefore 2 years 3 months. It is apparent that the delay was quite inordinate.

The applicant stated that it did not file a Notice of Appeal at the time it was supposed to because it had filed an application in the Constitutional Court under case number CCZ 38/2016. In that application, the applicant sought relief in terms of s 85 (1)(a) of the Constitution of Zimbabwe against the respondents together with 'ZMDC and ZCDC.' In my view the explanation for the delay is unreasonable in the sense that the time lines for an appeal have no relevance to any form of remedy desired in the Constitutional Court. It was not necessary for the applicant to either wait for or link its appeal to the outcome of the Constitutional Court application.

It was therefore unreasonable for the applicant to awake from his slumber after the dismissal of his application in the Constitutional Court on 29 June 2018 to file the instant application.

PROSPECTS OF SUCCESS

In the case of *Kombayi v Berkout*[3], KORSAH JA 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,

[3] 1988(1) ZLR

> condonation will be granted only on his showing good grounds for the success of his appeal." (my emphasis)

As alluded to in the above case, it is imperative for an applicant making an application for condonation for the late noting of an appeal, to demonstrate to the court that the appeal enjoys prospects of success on the merits. The issue to be determined in the intended appeal is whether the first respondent could summarily cancel the special grant without following due process.

The requirements and defences for a spoliation order were re-stated in the case of *Augustine Banga & 2 Ors v Solom Zawe* SC 54/14 by GWAUNZA JA (as she then was) to be as follows:

> "(i) the applicant was in peaceful and undisturbed possession of the thing; and
> (ii) he was unlawfully deprived of such possession."

In the case of *Botha and Anor v Barrett* 1996 (2) ZLR 73 (S) at 79E, also cited by the learned judge *a quo*, the court qualified "unlawful deprivation" to mean that the respondent deprived the applicant of possession '*forcibly and wrongfully against his consent'.* The court *a quo* went on to list the valid defences against a spoliation claim, among them that:

> "(i) the applicant was not in peaceful and undisturbed possession of the thing in question at the time of dispossession, and;
> (ii) the dispossession was not unlawful and therefore did not constitute spoliation."

In the case of *Chesveto v Minister of Local Government and Town Planning* 1984 (1) ZLR 240(H) REYNOLDS J at 250 A-D stated that:

> "It is a well-recognised principle that in spoliation proceedings it need only be proved that the applicant was in possession of something and that there was a forcible or wrongful interference with his possession of that thing – that *spoliatus ante omnia restituendus est (Beukes v Crous & Another* 1975 (4) SA 215 (NC)). Lawfulness of possession does not enter into it. The purpose of the mandament van spolie is to

> preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the *status quo ante* to be restored until such time that a competent court of law assesses the relative merits of the claims of each party. Thus it is my view that the lawfulness or otherwise of the applicant's possession of the property in question does not fall for consideration at all." (my emphasis)

From the cited cases, the position of the law is quite clear in that an application for a spoliation order is not concerned with the legality or otherwise of the applicant's conduct. The court would be called upon to determine whether one was in a peaceful and undisturbed possession and whether he was dispossessed unlawfully.

The situation that confronted the court *a quo* was adequately dealt with in a recent decision of this Court, viz, *Minister of Mines and Mining Development and 2 others vs Grandwell Holdings (Private) Limited and 2 others*[4] which reaffirmed the requirements for spoliation.

The case which was placed before the court *a quo* was by way of an urgent chamber application which sought to have the status *quo ante* of the parties restored after the applicant had been evicted from its mining activities without due process on 22 February 2016.

The judgment of the court *a quo* completely ignored dealing with the issue to do with spoliation and decided to deal with the application on the substantive issues between the parties, that is, on the existence or otherwise of the special grant which applicant claimed to have. In my view, it is doubtful if such issues could have been adequately determined in an urgent chamber application.

[4] SC 34/18/1

It does seem to me, as argued by Mr *Magwaliba* that the dominant issue that the court ought to have dealt with was the issue of spoliation. It was a misdirection for the court not to deal with this issue and focus exclusively on the substantive rights of the parties which could have been dealt with on the return day.

It is precisely because of this that I believe that there are prospects of success in the intended appeal.

I accept there was tardiness on the part of the applicant as argued by Mr *Uriri* but the prospects of success on appeal has titled the balance in favour of the applicant. As observed by CHIDYAUSIKU J (as he then was) in the case of *Lovemore Sango vs Chairman of Public Service Commission and Anor*[5]*:*

> "In deciding whether to condone the delay or not two factors are of paramount importance. Firstly, the period of the delay and the reasons for such a delay. Secondly, the prospects of success on the merits."

In the result I make the following order:

1. The application for condonation of non-compliance with Rule 38(1) of the Supreme Court Rules, 2018 be and is hereby granted.
2. The application for an extension of time to note the applicant's appeal be and is hereby granted.
3. The appeal is deemed noted in terms of the notice of appeal attached hereto from the date of this order.
4. Costs of this application shall be costs in the cause.

Hussein Ranchhod & Co., applicant's legal practitioners

Civil Division of The Attorney-General's Office, 1st respondent's legal practitioners.

[5] HH28/96 at p. 2 of the cyclostyled judgment