

DISTRIBUTABLE: (108)

OLIVER BWITITI

v

(1) STANLEY FARMS (PRIVATE) (LIMITED)
(2) MAVINGTON CHIDONGO (3) AMON KUNJE
(4) GARIKAI MAFA (5) COSMAS SHUMBAIMWE (6) AMON
TARUONA (7) TAKESURE CHIDONDO (8) NETSAI MAKONYE
(9) MATHEW MANDALELA (10) MOSES MUGARI (11) RAVIOUS
MUSHAYANGONI (12) TAVENGWA NYIKA (13) NCELE PAUL
(14) PHILIMON PAUL (15) CLEOPAS PHIRI (16) WALLAS
PHIRI (17) COLLEN TAVENGWA (18) WASTINGTIME
MUSHAYANGONI (19) ANDREW TSOKA (20) TARUVINGA ZIVANAI
(21) LIVINGSTONE NYAMADZAWO (22) THE OFFICER
COMMANDING ZIMBABWE REPUBLIC POLICE

**SUPREME COURT OF ZIMBABWE
HARARE: 30 JUNE 2021 & 12 OCTOBER 2021**

Judgment No. SC 112/21
Chamber Application No. SC 115/21

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G. R. J. Sithole, for the applicant

T. K. Tundu, for the 1st respondent

CHAMBER APPLICATION

MWAYERA JA: This is an opposed chamber application for condonation and extension of time within which to note an appeal in terms of r 43 of the Supreme Court Rules 2018. The applicant intends to appeal against the whole judgment of the High Court handed down on 7 July 2017.

FACTUAL BACKGROUND

The brief background of the matter has to be put into perspective. In December 2015 the first respondent sought an order of ejectment and an interdict against the applicant and the second to the twenty-first respondents from Dorithmore and Stanley Farms. The applicant and second to twenty-first respondents unsuccessfully opposed the application which was granted by the High Court.

The first respondent is by virtue of an offer letter from the relevant ministry, the lessee of Dorithmore Farm measuring 3149.506 hectares in extent and Stanley Farm measuring 5631.007 hectares in extent. The applicant and second to twenty first respondents were held to be illegally occupying the first respondent's farms since they did not have any offer letters, permits or lease agreements authorising them to occupy the land in question. The twenty first respondent Mr Livingston Nyamadzawo was the only respondent with an offer letter. The offer letter however related to a different piece of land and not the first respondent's farms. The said offer letter issued to the twenty first respondent was in respect of subdivision 1 of Clinton Farm measuring 46.88 hectares and was subsequently withdrawn. Thus nothing entitled the applicant, the twenty first respondent and the second to twentieth respondents to occupy the first respondent's Farms.

The court *a quo* made a finding that the reliance on the withdrawn offer letter which related to a different piece of land other than that of the first respondent was not tenable. The applicant and second to twenty first respondents had no offer letters, or permits or lease agreements entitling them to remain in occupation of Stanley Farm. The court *a quo* thus held the applicant and second to twenty first respondents to be unlawfully encroaching and occupying the first respondent's property. The court *a quo* on that premise granted the

application for ejectment and interdicted the applicant and second to twenty first respondents and all those claiming occupation through them from entering the first respondent's farms.

The applicant was irked by the decision of the court *a quo* and thus instructed his erstwhile legal practitioners to note an appeal on his behalf. The appeal was not noted and upon realising the anomaly that no appeal had been lodged timeously, the applicant filed the present application for condonation of noncompliance with the rules and extension of time within which to note an appeal.

On the date of hearing the first respondent's counsel, Mr *Tundu* raised the issue about the delay in filing the answering affidavit by the applicant. Mr *Sithole* for the applicant conceded that the answering affidavit had been filed out of time (4–5 days late). By consent the parties agreed that condonation for the late filling of the answering affidavit be granted. In view of the satisfactory explanation for the delay coupled with the fact that the delay was just by a few days the court acceded and condoned the late filing of the answering affidavit.

APPLICANT'S SUBMISSIONS

Mr *Sithole* for the applicant submitted that although the applicant was about 4 years late in noting his appeal he should be condoned as he met all the requirements for condonation. Counsel argued that the delay was not deliberate but occasioned by the fact that Mr *Mutebere* the applicant's erstwhile legal practitioner who had been instructed to note an appeal, did not do so. The applicant subsequently lodged a complaint to the Law Society of Zimbabwe registering his concerns on Mr *Mutebere*'s conduct. According to the applicant Mr *Mutebere* had ditched him at the last minute resulting in proceedings *a quo* being conducted with the applicant as a self-actor. The applicant upon losing the case instructed Mr *Mutebere*

to note an appeal and was unaware that his instructions for an appeal to be noted had not been pursued and only became aware at the time of eviction. Further, in argument the applicant's counsel submitted that the explanation for the delay was reasonable considering that it was not of the applicant's own making but rather the negligence of his then legal practitioner. He also submitted that the application should be granted as the applicant has prospects of success on appeal.

Mr *Tundu* for the first respondent contended that the delay of 4 years was inordinate. He pointed out that the applicant's explanation was not genuine. The applicant was aware of the decision of the court *a quo* but did not note an appeal. Even if he had instructed his erstwhile counsel to note the appeal and same did not pursue the client's instruction he had thereafter become aware that no appeal had been noted as far back as June 2017 when eviction was effected by the Sheriff. When the applicant and others reinvaded the farms, contempt of court proceedings were instituted and the applicant instructed new legal practitioners Messrs *Chambati, Mataka and Makonese*. All these events, he submitted were a clear indication that no appeal had been lodged against the judgment *a quo* and that judgment was not suspended. The first respondent's counsel in short submitted that it follows that the applicant was aware that no appeal had been lodged. In the circumstance hiding behind the fact that Mr *Mutebere* was later deregistered by the Law Society cannot be a reasonable explanation for non-compliance with the rules. Mr *Tundu* further argued on behalf of the first respondent that the applicant enjoyed no prospects of success at all on appeal. He further submitted that from the factual background, it is clear that the applicant and second to twenty first respondents have no legal basis to be on respondent's farms or to interfere with the farms. The first respondent has an offer letter confirming entitlement to the farms in question

whereas the applicant has no offer letter, permit or lease agreement justifying occupation of the first respondent's farm.

The first respondent's argument that the applicant enjoys no prospects of success on appeal was thus anchored on the factual background as chronicled by the court *a quo* in its judgment ejecting the applicant, the second to twenty first respondents and others claiming occupation through them from the farms.

The Issue

The issue that falls for determination in this application is whether or not the applicant has met the requirements for the granting of condonation and extension of time within which to appeal. Put differently the question really is whether or not the applicant has established sufficient cause warranting this Court to grant the order sought.

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APPLICATION OF THE LAW TO THE FACTS

In considering whether or not to grant the indulgence sought, the court has to consider the following established factors cumulatively.

1. The extent of the delay
2. The reasonableness of the explanation for the delay.
3. The prospects of success.
4. The interests of administration of justice.

These factors are clearly set out in a number of cases in this jurisdiction. In *Mzite v Damafalls Investments (Pvt) Ltd and Anor* SC 21/18 BHUNU JA echoed the same requirements as outlined in *Kombayi v Berkhout* 1988(1) ZLR 53 (S).

Herbstein and Van Winsen in *The Civil Practice of The Supreme Court of South Africa* 4th ed by Van Winsen, Cilliers and Loots pp 897-898 set out the requirements as follows:

“Condonation of non-observance of rules is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient cause to excuse him from compliance.....

The Court’s power to grant relief should not be exercised arbitrarily and upon mere asking but proper judicial discretion and upon sufficient and satisfactory grounds being shown by the applicant. (underlining my emphasis)

In the determination whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judiciously upon consideration of all the facts, and in essence it is a matter of fairness to both sides in which the court will endeavour to reach a conclusion that will be in the best interest of justice. The factors usually weighed by the court in considering applications for condonation include the degree of non-compliance, the explanation for it, the importance of the case, the respondent’s interests in the finality of its judgment, the convenience of the court and avoidance of unnecessary delay in the administration of justice.”

Having spelt out the relevant considerations in an application for condonation what remains is for me to relate the requirements to the facts of the matter at hand.

1. THE EXTENT OF THE DELAY AND EXPLANATION THEREOF

The applicant’s application for condonation and extension of time was filed on 10 May 2021 a period of almost 4 years from the date of judgment. The explanation proffered by the applicant that he was not aware that his lawyer had not filed the appeal is discarded as not being genuine. It is common cause that the noting of an appeal against the High Court order would have the automatic effect of suspending the order. The fact

that the applicant and the other respondents were ejected in compliance with the order and that the applicant further reinvaded the first respondent's farms is a clear indication that there was no appeal noted much to the full knowledge of the applicant. The reinvansion after ejectment was followed by contempt of court proceedings which the applicant contested. The contempt of court proceedings were actuated by none compliance with the extant court order. All these factors display that the applicant was not being sincere with the court when he stated that he was not aware that his then legal practitioner had not noted an appeal against the ejectment and interdict order. In the circumstances the delay of almost 4 years is certainly inordinate. The applicant has not been candid with the court regarding the 4 years delay.

2. PROSPECTS OF SUCCESS ON APPEAL

It is settled in applications for condonation that the delay, explanation thereof and prospects of success on appeal should be holistically considered by the court exercising discretion whether or not to grant the indulgence. Prospects of success entail that there is a reasonably arguable case depicted from the grounds of appeal. The prospects of success on appeal have to be realistic and not remote. Once there is a sound, and rational basis that the case is arguable on appeal then there are prospects of success warranting the indulgence to be granted.

In casu the main issue for determination is whether or not the court *a quo* erred in issuing an order of ejectment and an interdict against the applicant and those claiming occupation through him. It is apparent from the factual background of the matter that the applicant has no basis for being on the first respondent's farms. The applicant has no offer letter, lease agreement or permit entitling him to the applicant's

farms. It is clear that the applicant sought to ride on an affidavit by the twenty first respondent Livingstone Nyamadzawo whose offer letter related to a different piece of land and had been withdrawn as at the time of hearing in the court *a quo*. The applicant simply has no legal basis to cling on to and interfere with first respondent's farms. The court *a quo* rightly and correctly found no reason not to grant ejectment. Considering the circumstances of the matter the applicant does not enjoy any prospects of success on appeal.

Upon considering the period of delay of noting the appeal of almost 4 years together with the totality of the circumstances one cannot fail to note that the delay was inordinate and the explanation for the delay unreasonable. That, coupled with the fact that the applicant has no legal basis for being on first respondent's farms is a clear indication that the intended appeal enjoys no prospects of success. The application must fail. Costs will follow the cause.

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DISPOSITION

Accordingly it is ordered that:

The application for condonation of noncompliance with r 43 of the Supreme Court Rules 2018 and extension of time within which to appeal be and is hereby dismissed with costs.

Makiya & Partners, appellant's legal practitioners.

Chihambakwe Mutizwa & Partners, 1st respondent's legal practitioners.

Civil Division of the Attorney General's Office, 22nd respondent's legal practitioners.

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