

REPORTABLE (64)

DOVES FUNERAL ASSURANCE (PRIVATE) LIMITED
v
(1) HARARE MOTORWAY (PRIVATE) LIMITED (2) AFRICAN
BANKING CORPORATION LIMITED (3) BLUE STAR
LOGISTICS (PRIVATE) LIMITED (4) THE SHERIFF OF
ZIMBABWE (5) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
HARARE: 31 MAY 2023

R. H. Goba, for the applicant

T. Mpfu, for the first respondent

R. G. Zhuwarara, for the second respondent

J. Makanda, for the third respondent

Judgment No. SC 64/23
Chamber Application No. SC 283/23

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CHAMBER APPLICATION

MAKONI JA:

[1] This is an opposed chamber application for condonation for non-compliance with rules

and reinstatement of an appeal in terms of r 70 of the Supreme Court Rules, 2018 (the Rules).

[2] After hearing submissions from counsel I dismissed the application, with costs on a legal practitioner- client scale, and indicated that reasons will be furnished in due course. These are they.

BACKGROUND FACTS

[3] The facts relevant for the determination of this matter are that the applicant, after being aggrieved by the decision of the High Court (the court *a quo*), duly filed a notice of appeal to this Court on 19 October 2022 under case number SC 529/22. In its notice of appeal, the applicant tendered security for the respondents' costs of appeal 'in an amount agreed between the parties failing such agreement in an amount determined by the registrar'. The tender was made as a requirement under r 55 (2) of the Rules. Pursuant to the tender and on 26 October 2022, the applicant's legal practitioner wrote to the respective legal practitioners of the respondents seeking an indication as to the amount of security they required respectively. The respondents were given seven days within which to respond.

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[4] The respondents' legal practitioners responded to the tender. Messrs Cull, Gordon and Gerrans demanded security in the sum of USD 10 000; Messrs Danziger and Partners and Kantor and Immerman demanded security in the sum of ZWL 5 500 000. On 16 November 2022 the applicant's legal practitioner wrote to the respondents' legal practitioners, in identical terms, proposing security for costs in the sum of ZWL3 000 000 in respect of each of the respondents. The respondents' legal practitioners rejected the applicant's proposed amount in respect of each of them. However, after further discussions all parties agreed that the applicant was to pay ZWL 5 500 000 in respect of security of costs for each respondent. The security for costs were eventually paid on 9 November and 1 December 2022 and by then the payment was out of time as it was due on 19 October 2022.

[5] The appeal, in SC 529/22, was heard in court on 15 May 2022. The respondents

objected that the appeal was deemed to have been abandoned and dismissed in terms of r 55 (6) on account of the applicant's failure to pay security for costs within the prescribed time frame of one calendar month. The objection was upheld and consequently, the appeal was struck off the roll resulting in the filing of the present application.

[6] The applicant seeks the following relief;

“The application be and is hereby granted.

1. Applicant's appeal in SC 529/22 is reinstated and the registrar of this Court is ordered to re-enrol the matter for hearing.
2. First, second and third respondents shall pay the costs jointly and severally.”

[7] At the hearing of the application, the respondents took several preliminary points *in limine*. Mr *Mpofu*, for the first respondent, submitted that the application was incompetent as the applicant had not only failed but refused to address the court on the prospects of success of the appeal. He contended that this being an application for condonation and reinstatement of an appeal, the applicant ought to have satisfied the court that it has good prospects of success on appeal in order to establish that it had shown good cause for the application to be granted.

[8] The second point taken is that there is no proper explanation tendered for failure to comply with the rules. Mr *Mpofu* submitted that instead of the applicant tendering an explanation as required, it instead blames the court. It states that the application was “struck off in error”. It asks a judge sitting in chambers to review a decision made by a three-member panel.

[9] Mr *Mpofu* prayed that the points *in limine* be upheld and the application be dismissed with costs on a higher scale.

[10] Mr *Zhuwarara*, for the second respondent, associated himself with the submissions made by Mr *Mpofu*. He however added that the applicant further deliberately continues to flout the rules by failing to attach the judgment under challenge and the Notice of Appeal to enable the judge, seized with matter, to assess prospects of success. He also prayed for dismissal of the application with costs on a punitive scale.

[11] Mr *Makanda*, for the third respondent, also, associated himself with the submissions made by Mr *Mpofu* save to add that the relief sought was incompetent in that the applicant is seeking condonation but there is no such prayer in the draft order. He also sought the same prayer as the other respondents.

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[12] Mr *Goba*, for the applicant, countered that the points taken *in limine* relate to the merits of the matter and cannot be dealt with *in limine*. Regarding the issue of prospects of success, he maintained the stance adopted by the applicant, in the founding affidavit, that it is not necessary to address the question of prospects of success. Relying on the authority of *Mhungu v Mtindi* 1986 (2) ZLR 171 (SC) he submitted that I could have regard to the record in SC 529/22, which is the main appeal, to assess whether there are prospects of success on appeal. He opined that examining prospects of success in the present application is tantamount to being asked to determine the outcome of the appeal. He concluded, on this point that the applicant would not appeal if it did not have prospects of success.

[13] Regarding the question of the draft order he conceded that it could have been better phrased. He sought that it be amended to make it clearer.

THE LAW

[14] The appeal in SC 529/22 was struck off the roll for the reason that it had been deemed abandoned and dismissed. The applicant has approached this Court with an application for reinstatement in terms of r 70 of the Rules. Rule 70 of the Rules provides as follows:

- “(1) Where an appeal is-
- (a) deemed to have lapsed; or
 - (b) regarded as abandoned; or
 - (c) deemed to have been dismissed in terms of any provision of these rules;
- the registrar shall notify the parties accordingly.
- (2) The appellant may, within 15 days of receiving any notification by the registrar in terms of subrule (1), **apply for the reinstatement of the appeal on good cause.**” (my emphasis)

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[15] Good and sufficient cause, in the context of an application for reinstatement, has been defined by this court in a number of authorities.

[16] Dealing with an application for reinstatement of an appeal in *Tel-One (Pvt) Ltd v Communication and Allied Services Workers Union of Zimbabwe* SC 01/06, this Court stated 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”

[17] In the case of *Bessie Maheya v Independent Africa Church* SC-58-07 at p 5, Malaba JA (as he then was) stated the following as the requirements for an application for reinstatement:

“The question for determination is whether the applicant has shown a cause for the re-instatement of the appeal. In considering applications for condonation of non-compliance with its Rules, the Court has a discretion which it has to

exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefore; the prospects of success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the Court and the avoidance of unnecessary delays in the administration of justice"- see also *FBC Bank Ltd v Chiwanza* SC 31/17.

- [18] In *Conju Incorporated (Pvt) Ltd v Registrar of the Supreme Court* SC 28/20 at p 6, the court in explaining the import of r70 reiterated that:

“Rule 70(2) allows an appellant whose appeal is deemed to have lapsed or is regarded as abandoned in terms of sub r (1) of r 70 to apply for its reinstatement within fifteen days of receiving notification from the registrar. The legal principle governing applications for reinstatement of appeals is now settled in this jurisdiction. It is that in an application for the reinstatement of an appeal that was regarded as abandoned and deemed to have lapsed the applicant must show good cause for the default. In doing so, the applicant is required to satisfy the court firstly, that he or she has a reasonable explanation for the delay in question and secondly, that his or her prospects of success on appeal are good.”(my emphasis)

- [19] In my view and basing on the aforementioned authorities, it is now ^{Judgment No. SC 64/23} ~~clear~~ ^{Chamber Application No. SC 285/23} ~~trite~~ that an applicant, in an application for reinstatement, ought to establish, *inter alia*, that it has good prospects of success on appeal as it is one of the elements that this Court considers in deciding whether or not the applicant has shown good cause.

- [20] As noted above the applicant also seeks condonation for failure to comply with the rules. The law regarding condonation for noncompliance with the rules is a well-trodden path in our jurisdiction. If authority is required for this settled position, for the benefit of the applicant, see *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S), *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S), *Machaya v Munyambi* SC 4/05; *Ester Mzite v Damafalls Investments (Pvt) Ltd* SC 21/18.

- [21] The factors to be considered in such an application 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.

[22] Reasonable prospects of success on appeal features as one of the requirements for the grant of an application for condonation. It is an important consideration which is relevant to the granting of condonation, although not necessarily decisive.

ANALYSIS

[23] The applicant, in para 15 of its founding affidavit, avers that;

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“Furthermore, it is respectively submitted that applicant **has shown good cause** for reinstatement **which is the only requirement** in the circumstances. **For good reason the question of a shewing of reasonable prospects of success is not contemplated under rule 70 (2) where rule 55 (6) is applicable(sic).** A *fortiori* the position is the same where a matter is struck off the roll by the court. **To the extent that condonation is required it is submitted that a *bona fide* and reasonable explanation has been given. It is all the rules required.** It is submitted that the requirement has been met in this instance.” (my emphasis)

[24] It is this paragraph that triggered the respondents to take, as a point *in limine*, the question of the failure to address prospects of success rather than deal with it on the merits. I entirely agree with the position taken by the respondents that the present application is incompetent. The applicant flatly refuses to address the issue of prospects of success in its founding affidavit. It boldly asserts that the question of reasonable prospects of success ‘is not contemplated under r 70 (2) where r 55 (6) is applicable.’ This is a novel submission to this Court. The assertion is made in the

face of a plethora of authorities stating otherwise. In oral submissions before me, Mr *Goba* made the astounding contention that if this court was to make a determination on the issue of prospects of success in this application, it will be pre-empting the decision of the three-member panel that will finally deal with the main appeal. To me this submission demonstrates a clear misapprehension of the concept of prospects of success. Prospects of success refer to the question of whether a court of appeal could reasonably arrive at a conclusion different from that of the court or tribunal of first instance. In *Essop v S*, [2016] ZASCA 114, the court in defining prospects of success held that;

“What the test for reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal”

[25] After initially persisting with the submission that it was not necessary to address prospects of success, Mr *Goba* later on capitulated and based on the authority of *Mhungu v Mtindi supra*, contended that for the prospects of success on appeal I should have regard to the main appeal record. The judgment appealed against and the Notice of Appeal are contained therein. He expects me to sift through the main appeal file and extract what I may consider to be the prospects of success in the appeal. Firstly, there is no such invitation by the applicant in the founding affidavit for me to have reference to that file. Secondly, there is no such obligation on a judge dealing with such an application. In *John Chikura & Anor v Al Shams Global BVI Limited* SC17/17 the following was stated in respect of prolix grounds of appeal;

“It is not for the court to sift through numerous grounds of appeal in search of a possible valid ground; or to page through several pages of ‘grounds of appeal’ in order to determine the real issues for determination by the court. The real issues for determination should be immediately ascertainable on perusal of the grounds of appeal.”

In my view the same sentiments apply with equal force to the applicant’s submission that I should go through the record of appeal to determine whether there are prospects of success on appeal. These should, however, be immediately ascertainable from the applicant’s founding affidavit. Thirdly this flies in the face of the authorities referred to above.

[26] The same reasoning applies to the applicant’s failure to address prospects of success in respect of the issue of condonation. It again makes the baseless averment that shown a *bona fide* and reasonable explanation, “It is all the rules required”. It is actually worrying that the applicant is represented by legal practitioners, who despite all the countless authorities developed over the years on this issue, still believe that there is only one requirement to be satisfied in an application of this nature.

[27] In addressing the requirement of a reasonable explanation for the delay, the applicant in para 13 of its founding affidavit states the following;

“I aver therefore that the rule had not been infringed at all. Respondents being fully aware of the above ought not to have joined hands and disingenuously raise the unnecessary objection that exercised the Honourable Court’s mind ultimately leading to an order striking off the appeal and necessitating the present application on the basis that the rules of the court were infringed.”

[28] Further down in para 16 the applicant averred that:

“In the circumstances it is prayed that the Honourable Judge be pleased to grant the application so that the Registrar may re-enrol the matter on the bases that;
!6.1 The matter was in fact struck off in error..... “

[29] One can understand the position taken by the respondents that the applicant does not tender a reasonable explanation for its failure to comply with the rules. Instead, it blames the respondents for taking the objection and the three-member bench for upholding the objection and striking the matter off the roll. This is despite the fact that the consequences of failure to pay security for costs timeously was decisively dealt with in *Watermount Estates (Private) Limited v Registrar of the Supreme Court & Ors* SC 135/21. In any event the decision of the Supreme Court is correct because it is final. See *Lytton Investments (Private) Limited v Standard Chartered Bank Zimbabwe Limited & Anor* CCZ 11/18.

[30] The applicant ought to have set out that it has good prospects of success, in relation to both condonation and the reinstatement of appeal in its founding affidavit. It is a common principle that an application stands or falls on the averments made in the founding affidavit. This Court in *Unki Mines (Pvt) Ltd v Dohne Construction (Pvt) Ltd* SC 18/23 re-stated the position thus:

“It is trite law that an application stands or falls on the averments made in the founding affidavit. According to *Herbstein & van Winsen* the Civil Practice of the Superior Courts in South Africa 3rd ed p. 80 the learned authors state as follows:

‘The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavits will be struck out.’”

[31] Whether or not an applicant has shown good cause for the granting of an application of this nature, is in the discretion of the court. However, for the court to be able to exercise its discretion judiciously, it places reliance on whether or not the applicant has tendered a reasonable explanation for the non-compliance and has also established the prospects of success thereof. The applicant, having refused to do so, it is my view that the respondents' preliminary objections have merit and ought to be upheld.

[32] The application, falling short of the requirements of an application, such as the present one, ought to be dismissed. Allowing the matter to proceed to the merits would be a waste of valuable judicial resources which should be directed to worthy causes.

[33] Regarding costs, all the respondents applied for costs on a punitive scale. They are warranted in this matter. The defects in the application were pointed out to the applicant in the notices of opposition. Applicant took a deliberate decision not to seriously consider the points in *limine* raised by the respondents and take remedial action. It persisted, in oral submissions, to defend the indefensible thereby unnecessarily putting the respondents out of pocket.

[34] It is for the above reasons that I upheld the points *in limine* and dismissed the application with costs on a higher scale.

Gill Godlonton & Gerrans, 1st respondent's legal practitioners

Danziger & Partners, 2nd respondent's legal practitioners

Kantor & Immerman, 3rd respondent's legal practitioners