JOYLEEN TATSIDZA MAKIWA (NEE TEKERE)

Versus

MOSES JUNIOR JOHN ROSS MAKIWA

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 5 July 2023 & 27 July 2023

Chamber application for condonation

K. Ngwenya, for the applicant
Ms. V. Chikomo, for the respondent

DUBE-BANDA J:

[1] This is an application for condonation. The applicant seeks an order that she be condoned for the late filing of a court application for rescission of judgment in terms of r 29(b) of the High Court Rules, 2021.

[2] The application is opposed by the respondent.

The background facts

[3] The background to this matter may be summarized as follows, that the parties were married to each other, and their marriage was dissolved on 19 May 2022. The division of the assets of the parties was predicated on a consent paper. In respect of the immovable property, the court granted an order (HC 1131/21) couched as follows: -

> "House No. 1449 Mahatshula North, Bulawayo be and is hereby awarded to the plaintiff and defendant on a ratio of 6:4 with the plaintiff being awarded 60% and the defendant 40% of the property. The plaintiff is awarded the option to buy defendant out of his 40% share in the property within 60 days of the granting of this order. The plaintiff shall pay the defendant for his 40% share on the agreed value of US$70 000.00 (seventy thousand dollars)."

[4] The applicant tendered payment to the respondent of his 40% share in local currency, the respondent declined to accept such payment and insisted that payment must be in United States

currency. The applicant seeks condonation as a gate way for her to file an application to rescind the part of the order that requires her to pay the respondent 40% of the US$70 000.00 in United States dollars, and pay in local currency.

[5] The order sought to be rescinded was granted on 19 May 2022. And in terms of r 29(2) of the High Court Rules, 2021 a party desiring a rescission may make a court application within one month after becoming aware of the existence of the order sought to be rescinded. It is clear from the founding affidavit that the applicant became aware of the order sought to be rescinded on the date it was granted, i.e., 19 May 2022. This application was filed on 19 October 2022. A simple calculation shows that this application was filed five months outside the time-line permitted by r 29(2) of the High Court Rules. It is against this background that applicant launched this application seeking the relief mentioned above.

[6] In his opposing affidavit the respondent had taken a point *in limine* attacking the form used in this application and asking that the application be found to be fatally defective. At the commencement of the hearing, Ms *Chikomo,* counsel for the respondent abandoned this point *in limine*. Now that it was abandoned no further reference shall be made to this point *in limine*.

The law

[7] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the noncompliance with the rules of court. Factors which usually weigh with the court in considering an application for condonation include the extent of the delay; the reasonableness of the explanation for the delay; the prospects of success; respondent's interest in the finality of the matter; the convenience of the court; and the avoidance of unnecessary delay in the administration of justice. See *Kombayi v Berkhout* 1988 (1) ZLR 53 (S) 57G-58A; *Lunat v Patel* SC 47/22.

[8] The requirements were restated in *Zimslate Quartzite (Pvt) Ltd & Ors v Central African Building Society* SC 34/17 at p 7. ZIYAMBI JA made the important point which is apposite:

> "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 indulgences, including that of condonation, are there for the asking does himself a disservice as he takes the risk of having his application dismissed."

[9] These factors are not individually determinative, but must be weighed, one against the other. There may be times when a slight delay and a good explanation may help to compensate for weak prospects of success; and strong prospects of success may tend to compensate for a long delay. See *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A). There would also be cases where the prospects of success, a reasonable and acceptable explanation for the delay and the importance of the issues raised may compensate for a long delay. See *South African Poultry Association and Others v Minister of Trade and Industry and Others* 2018 (1) NR 1 (SC).

[10] It is against the backdrop of these legal principles that I consider this application for condonation.

Extent of the delay

[11] The order in HC 1131/21 that the applicant seeks to rescind was handed down on 19 May 2022. The applicant was required to have filed her application for rescission of judgment on or before 19 June 2022. Instead, this application was filed on 19 October 2022, i.e., four months outside the timeline prescribed by the rules of court. A delay of four months, cannot be anything but inordinate delay.

Reasons for the delay

[12] Explaining the delay, the applicant avers that at the time the order was granted she believed that all debts or obligations that arise in this country are settled in local currency. And that the option to use foreign currency or free funds lies with the person settling the debt. She avers further that she thought this was common cause amongst all persons in Zimbabwe. She did not seek counsel from her legal practitioners because she believed that the position of the law was

obvious. And she also believed that the respondent was aware that the exchange regulations forbid settling obligations in foreign currency.

[13] The applicant avers further that in August she made a tender of payment, and this was after she had received a letter demanding payment from respondent's legal practitioners. In her letter dated 18 August 2022 she offered to pay in local currency. It is contended that she did not sit on her laurels as it were, but was engaging respondent through his legal practitioners until a dead -lock was reached. It is after the dead-lock that she decided to approach this court to seek leave to pay in local currency.

[14] Per *contra* the respondent avers that in the discussions leading to the signing of the consent paper, the parties agreed to obtain their share values in their preferred currencies. The applicant had to be paid US$1 500.00 as her share in the BMW 1 Series motor vehicle, and ZAR 6000.00 for the Chevrolet JR 78 VS GP, and the respondent had to be paid his 40% of the value of the house in United States dollars. Respondent avers further the contention by the applicant that she believed that she had an option to pay the 40% share in local currency is not correct. It was further argued that this application was filed to evade her obligation to make the payment in terms of the consent paper and the court order, and this is the reason it was filed after the timeline to make payment had expired. Further respondent contended that the explanation for the failure to file an application for rescission of judgment within the timeline allowed by the rules of court is not satisfactory.

[15] The granting of condonation by a court is an indulgence and not a right obtainable on request. A party seeking condonation must provide an adequate explanation for the delay. The applicant must provide a full, detailed, accurate and frank explanation, which must be a reasonable one. The explanation must also show that the applicant took reasonable and available steps in an attempt to avoid or curtail the delay. What constitutes a reasonable explanation is a matter of fact and depends on the circumstances of each case. In deciding whether there was an unreasonable delay, each case must be judged on its own facts and circumstances. What may be unreasonable in one case may not be so in another instance and *vice versa*.

[16] The explanation for the delay is unsatisfactory for a number of reasons. In terms of the court order, the respondent's 40% share of the value of the property was due and payable within sixty days of the court order. The order was granted on 19 May 2022, and payment was due and payable on or before 19 July 2022. This application was filed three months outside the payment timeline prescribed in the court order. At the time this application was filed, the applicant was already in breach of the court order. Cut to the bone, the applicant seeks this court to sanitise her breach of the court order.

[17] However, she remained quiet about payment until she received a letter dated 16 August 2022 from respondent's erstwhile legal practitioners demanding payment. This was already way outside the timeline for making payment decreed by the court in HC 1131/21. In her letter dated 18 August she raised for the first time the issue of paying in local currency. She offered to pay in local currency in clear disregard of an extant court order. The decision to file this application was only prompted by the respondent's decision to demand his payment. It is only then that she decided to file this application, anchoring it on what is apparently misleading facts. In all the circumstances, I consider the explanation given for the delay to be unreasonable. It is merely a strategy to evade payment in foreign currency.

Finality to litigation

[18] The delay is prejudicial to the respondent; I say this because my view is that a party after a divorce is entitled to get to a stage where he of she should be able to arrange his or her affairs without the fear of litigation with the former spouse resuming or starting all over again. See *Moyo v Moyo* 1999 (2) ZLR 265 (HC). Further the respondent is entitled to receive his share as *per* the court order and move on with his life. The filing of this application is a belated attempt to evade payment as *per* the court order. The applicant is not permitted to do that. There must be finality in litigation. See *S v Franco & Ors* 1974 (2) RLR 39 (AD).

Prospects of success

[19] Cut to the bone, the applicant's argument is that in terms of the law it is unlawful to settle any domestic obligation in foreign currency unless by use of free funds. The applicant relies on Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations, 2019 (S.I. 212/19). The contention is that the use of free funds is optional at the instance of the purchaser or the person making the payment. And in this instance the applicant did not opt to settle her obligation in foreign currency. It was argued further that the court made an error in granting the order sought to be rescinded by omitting to order the applicant to pay in local currency or in foreign currency.

[20] Indeed, it is correct that a domestic obligation may be settled in foreign currency by the use of free funds. The amendment of S. I. 212/19 through the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) (Amendment) Regulations, 2020 (No. 2) (S.I. 85/20) adds a new exception to what is allowable in terms of transacting in foreign currency. The exception being the use of free funds in settling domestic obligations. Free funds are defined in the Exchange Control Regulations 1996, S.I 109/96 as follows:

> "Money which is lawfully held outside Zimbabwe by a Zimbabwean resident and which was acquired by him otherwise than as the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe".

[21] Statutory Instrument 85/2020 extends the definition of free funds by adding that free funds include funds lawfully held or earned in foreign currency. Therefore, a party may lawfully opt or enter into an agreement to settle a domestic obligation in foreign currency.

[22] In the consent paper the applicant agreed that she will pay the respondent 40% share on the agreed value of US$70 000.00. The applicant had the benefit of legal representation at all times i.e., at the negotiations leading to the signing of a consent paper. She made an option to settle the obligation in foreign currency. The argument that the payment of the respondent's 40% share of the house in foreign currency would be unlawful is incorrect. There is nothing unlawful about a party opting or agreeing to settle a domestic obligation in foreign currency. The applicant voluntarily assumed this obligation and she cannot renege from it at her convenience. The court cannot extricate her from a liability voluntarily assumed. See *Tindwa v ZB Bank Ltd* 2019 (3) ZLR 280 (S). In the circumstances, the applicant has no prospects of success in the application for rescission of judgment.

Disposition

[23] The explanation for the dilatoriness lacks *bona fides*. The applicant has no case on the merits. There must be finality to litigation. To extend indulgence under the present circumstances would, in my view, bring the administration of justice into disrepute. It is for these reasons that this application must fail.

[24] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule. Accordingly, the applicant must bear the respondent's costs.

In the result, it is ordered as follows:

The application for condonation be and is hereby dismissed with costs.

Mutuso, Taruvinga & Mhiribidi, applicant's legal practitioners
V. Chikomo Law Chambers, respondent's legal practitioners