CHARLES NDEBELE

Versus

S.B NUNU N.O AND ANOR

HIGH COURT OF ZIMBABWE
M DUBE J
BULAWAYO 30 SEPTEMBER AND 4 OCTOBER 2024 AND 25 JUNE 2025

Opposed Chamber Application for Condonation and Extension of Time.

M.E.P Moyo, for the applicant
M.Dube, for the 2nd respondent

DUBE J The applicant herein filed a chamber application seeking relief as follows:

> "1. The application for condonation for non-compliance with Rule 95 (8) of the High Court Rules, 2021 be and is hereby granted.
>
> 2. The application for extension of time within which to file an application for review in terms of the Rules be and is hereby granted.
>
> 3. Applicant to file his application for review within 10 days of this order.
>
> 4. Costs of suit be and are hereby awarded against 2nd Respondent if she opposes this matter on a legal practitioner-client scale."

BRIEF BACKGROUND

On the 14th November 2022 the 1st respondent in her official capacity as the Additional Master sitting at Filabusi Magistrates Courts, made a ruling to the effect that a certain property described as Stand No. 19 Pansikwe Business Centre, Insiza District belongs to the Estate late Gladys Dungeni registered under F/L DR 07/22. The 2nd respondent is the appointed executrix to such estate. In the process of determining the assets of the Estate she got embroiled in a dispute with the applicant herein who claimed to have purchased the said property as an empty stand from the deceased during her lifetime sometime in year 2001. The Applicant claims that

he developed such property into a shop which he named after himself. The determination made by the 1st Respondent sought to resolve that impasse; however, the Applicant was not satisfied with it. He alleges that on the advice of his legal practitioners he issued out summons seeking a declaratory relief to declare the agreement of sale he entered into with the deceased to be binding. At the hearing of the summons matter, the 2nd respondent raised a special plea of *res judicata* which my brother Dube-Banda J upheld under case number HC 2323/22. Still not satisfied the Applicant approached the apex court under SCB 25/23. The ruling of this court per Dube-Banda J was upheld. Needless to say, the applicant was still not satisfied. He brought forth this application.

What is clear from this background is that the time within which to either appeal or seek review of the 1st respondent's ruling has been ticking ever since the applicant went on wild goose chase. The applicant contends therefore that he was not sitting on his laurels but rather, he has been frantically pursuing what he thought was the best course. He places the blame, even though in not so many words, on his legal counsel.

On the opposing end counsel for the 2nd respondent argues in the main that there is a point at which the sins of the legal practitioner ought to be reckoned against the client. That is the subject for determination by this court.

PRELIMINARY POINTS

At the opening of this hearing Counsel for the 2nd respondent raised two preliminary points viz:

1. That the application made is ill conceived.
2. That the application is bad at law.

Under the first head Counsel argued that this application is unnecessary because the applicant is adopting the wrong procedure altogether. He argued that applicant could achieve his desired result by simply putting a claim against the Estate late Gladys Dungeni via the Executrix who is the 2nd respondent. It is argued further that even if this application is granted, a review application is successfully filed and prosecuted, the end result would still be the need to file a claim with the 2nd respondent. I must state that I agree with this point in so far as the

need to file and pursue a claim with the 2nd respondent. It was argued by counsel for the applicant that this preliminary point in fact borders on the merits. While that is also correct I am of the view that as long as the decision of the 1st respondent remains extant, the applicant will not succeed in any claim he may make. The *res judicata* plea will always stand in his way. It will always be a correct argument that the 1st respondent sitting as the Additional Master already made a determination to the effect that the property belongs to the Estate late Gladys Dungeni. That prevents any further litigation on ownership of the property. Whether correctly or incorrectly that is not the subject of this determination. It is for that reason that I dismiss this preliminary point.

The second point raised *in limine* was that this application is bad in law. The thrust of this application is the law cited as the basis for bringing in this application. Per its draft order the applicant seeks relief in terms of Rule 95 (8) they later conceded to the error and argued that a draft order is simply that. It is not binding on the court as the court may vary it and make an appropriate order in the circumstances of the case. The applicant argued that the substance of the founding affidavit clearly captured the relief it seeks. It thus prayed for an amendment to the draft order to the effect that the relief sought is in terms of Rule 62(4) of the High Court Rules, 2021.

While I found the preliminary point to be meritorious, I dismissed it for not being dispositive of the matter. I thus allowed the amendment sought by the applicant as it did not alter the substance of the application and thus caused no prejudice to the 2nd respondent.

I proceeded to hear the matter on the merits.

The Law on Condonation Applications

For an application for condonation to succeed, there is need for laid down requirements to be satisfied. These requirements were outlined in *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (8) as follows:

a. Length of the delay;
b. Reason for the delay
c. Prospects of success
d. Prejudice to the respondent

e. Need for finality in litigation

It is trite that the above principles are not assessed individually. One factor is weighed against the others and the courts at the end consider the cumulative effect of the principles set above in relation to the application. Most importantly, the question of fairness to both parties is at the core of the application for condonation and extension of time. I shall now asses these factors as hereunder.

In terms of Rule 62 sub rule 4 of the High Court Rules, 2021 the applicant had eight weeks within which to institute these proceedings from the 14th November 2022 being the date of the 1st respondent's determination. He only filed this application on the 8th September 2023 almost a year after.

In *casu,* the counsel for the 2nd respondent concedes that when the applicant issued out summons under HC2323/22 he was still within the requisite time line to file an application such as this. Instead he sought the wrong relief. When he met no luck, he still followed the wrong path by seeking to appeal against the upholding of the special plea. It is argued by the 2nd respondent's counsel that had he taken heed, then his delay would not have been inordinate.

At this juncture one is reminded of the words of STEYN CJ in the matter of *Saloojee & Anor, NNO v Minister of Community Development* 1965 (2) SA 135 (A) to the following effect:

> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to act was due neglect on the part of the attorney. The attorney after all is the representative whom the litigant has chosen for himself and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."

An attorney after all, is the representative whom the litigant has chosen himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship- no matter what the circumstances of the failure are. Gwaunza JA (as she then was) in also

dealing with the same issue of a legal practitioner's tardiness had this to say in the case of *FBC Bank Limited* v *Robert Chimwanza* SC 31-17 at p 4 of the cyclostyled judgment:

> "I found it quite tempting to follow the principle in McNab's case, and would have done so but for the fact that I do not believe it would be fair on the applicant to visit this particular 'sin' of its legal practitioner, on it."

In the present case clearly applicant's legal practitioners set him on a costly tangent. Unfortunately, the applicant at all material times thought his legal practitioners are taking the best route his matter should take. He being a lay person as far as legal processes are had no reason to doubt them. I have no doubt that he paid legal fees up to the apex court. When things had gone south as it were his legal practitioner did not depose to any affidavit explaining why they chose to be strong headed against all legal currents. The record shows that they have since renounced agency.

In the matter of *Kombayi v Barkout* 1998 (1) ZLR 53 (8) it was held that;

> "... if the tardiness of the applicant is extreme, condonation will be granted only on his showing good grounds for the success of the appeal"

In *Academic and Professional Staff Association vs Pretorius* SC NO and Ors (JR1552/06) it was held that;

> "A good explanation for lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success compensate the inadequate explanation and long delay"

In the present matter I am of the view that bad as the delay might be, the applicant enjoys very good prospects of success. That is so bearing in mind that applicant has been in undisturbed occupation of this property for over 20 years. The determination made by the 1st respondent was not done after ventilating the merits of a sale contract but rather on the prima facie finding that if the property is still registered in the name of the late Gladys Dungeni then it is estate property. It is another matter to establish if the title holder did sell or not during her life time. Such an inquiry would seek to re-visit the circumstances surrounding the alleged sale and the available evidence if any.

I have no doubt in my mind that this matter is of utmost importance to both the applicant and the 2nd respondent. Applicant states that he has expended value on the property to its current developmental status. No wonder he litigated right up to the apex court. Equally the 2nd respondent has at all material times raised a spirited fight to protect the interests of the estate. There is therefore need to afford the parties an opportunity to litigate on the merits and hopefully reach finality.

Disposition

I am of the view that based on the prospects of success this is one matter where the sins of the legal practitioners should not be visited on their client.

Accordingly, it is ordered that:

1. The application for condonation for non-compliance with Rule 62(4) of the High Court Rules, 2021 be and is hereby granted.
2. The application for extension of time within which to file an application for review in terms of the Rules be and is hereby granted.
3. Applicant to file his application for review within 10 days of this order.
4. Costs to be in the cause.

Mathonsi Ncube Law Chambers, applicant's legal practitioners
Dube, Mguni & Dube, 2nd respondent's legal practitioners