

REPORTABLE (95)

CAROL AND TATENDA MINING SYNDICATE
v
MILCAH MASHIRI

SUPREME COURT OF ZIMBABWE
HARARE: 30 APRIL & 30 OCTOBER 2024

G. Maseko, for the applicant

I. Mandongwe, for the respondent

CHAMBER APPLICATION

MAVANGIRA JA

1. This is an application brought in terms of r 43 of the Rules of the Supreme Court, 2018 for condonation of non-compliance with r 38 (1) of the same rules and for extension of time within which to appeal. The applicant intends to appeal against a judgment of the High Court of Zimbabwe (“the court *a quo*”) handed down on 6 November, 2023. The application is opposed.

FACTUAL BACKGROUND

2. The applicant is a mining syndicate duly registered in accordance with the laws of Zimbabwe. It is a holder of a mining claim known as “Victory 100 A Mine Registration Number 42931.” The respondent is a female adult who is a holder of an offer letter in respect of a piece of land called subdivision 2 Veblyden of Dunphaile Farm, situate in Zvimba District of Mashonaland West Province.
3. The respondent approached the court *a quo* under case number HC 4346/23, seeking an interdict against the applicant. She claimed that the applicant’s mine fell within the

borders of her farm and complained that the applicant had started erecting a fence on land under cultivation, in contravention of s 31 (1) of the Mines and Minerals Act, [Chapter 21:05]. The said provision prohibits a holder of mining rights from exercising such mining rights upon any land under cultivation.

4. The applicant, on the other hand, denied having encroached into the respondent's farm and contended that it was the respondent who was extending her farm towards its mine.
5. On 2 November 2023, the court *a quo* held that there was evidence showing that the mine was extending to the respondent's farm and that there was a report from the provincial Mining Director to that effect. It thus granted the application sought by the respondent, thereby interdicting the applicant from exercising any mining rights on land under cultivation or on any area within fifteen meters of the land under cultivation. It also ordered the applicant to stop erecting a fence on the land under cultivation and to remove the fence that it had erected on such land on the respondent's farm.
6. Aggrieved, the applicant filed an appeal under SC 651/23 on 24 November 2023. On 4 December 2023, the respondent's legal practitioner advised the applicant's legal practitioner of the amount of security for costs payable. There was no response and the security for costs was not furnished. The registrar wrote to the applicant's legal practitioner calling upon him to file heads of argument within fifteen days. There was no compliance. On 1 February 2024, the registrar wrote to the parties advising that the appeal under SC 651/23 had been deemed abandoned and dismissed for failure to file heads of argument.

7. Consequently, the applicant's legal practitioner filed an application under SC 86/24, for reinstatement of the appeal and extension of time to file heads of argument. The application was set down for hearing before CHITAKUNYE JA. At the hearing, on 6 March 2024, the respondent raised a preliminary point to the effect that the notice of appeal had been filed one day out of time. The applicant conceded the point and the matter was consequently struck off the roll. This has resulted in the filing of the present application, a month later, on 5 April 2024.

THIS APPLICATION

8. In its founding affidavit, the applicant, in its bid to persuade the court to view its application favourably, averred that during the month of January 2024, its legal practitioner of record, Mr Gift Maseko, fell ill and was bed ridden. A doctor's note to that effect, dated 7 February 2024 was attached. It reads:

“This letter serves to inform you that the above mentioned was under our care from 3 January to 1 February 2024. He had severe recurrent migraine headache attacks. He was continually monitored throughout the period and he was prescribed bed rest for that same period because of the debilitating nature of the condition. He has now fully recovered and can now attend to his full duties.”

9. It is stated in the affidavit that during the month of January, the applicant tried on several occasions to contact its legal practitioner, in vain. It only managed to establish contact with the legal practitioner and learn of his “perilous condition” on 5 February 2024. On the same date, the legal practitioner checked his email and found that there was a notification from the registrar of this Court dated 30 January 2024 calling upon the applicant to file its heads of argument. In addition, there was another email from the registrar advising that the matter had been deemed dismissed for failure to file heads of argument. This led to the filing of an application which was struck off the roll by

CHITAKUNYE JA after the raising of a preliminary point by the respondent, that the appeal had been noted one day out of time. The point was conceded by the applicant.

10. Curiously, the applicant's legal practitioner wrote a letter requesting reasons for the judgment (the striking of the matter off the roll). The letter (Ann J) was written on 19 March 2024, almost two weeks after the striking of the matter off the roll and reads:

“We received a Court Order on the 6th of March 2024 and the Court Order stated that the matter was struck off the roll with costs.

We kindly request full judgment for the above matter and that this letter be placed before Justice CHITAKUNYE.”

This letter was written by the applicant's legal practitioner, notwithstanding that before CHITAKUNYE JA, it is him who appeared for the applicant. The letter was also written notwithstanding that the applicant's founding affidavit states that it conceded the point that led to the striking of the matter off the roll. Even more surprising is the applicant's regret that at the time of the filing of this application, the requested reasons had not been availed. The applicant does not stop there. The founding affidavit reads in para 18:

“**18.** It is on the basis of **the issues noted in the judgment** of CHITAKUNYE J (sic) that the applicant now files an application for condonation for late noting of the appeal.” (The emphasis is added)

11. The deponent to the founding affidavit further confounds issues by stating in para 22 as follows:

“THE DELAY INVOLVED, REASONABLE EXPLANATION AND CIRCUMSTANCES OF THE CASE”

- (i) The decision for which condonation, **reinstatement** and extension of time is being sought was handed down on the 6th of March 2024 as per the judgment of **CHITAKUNYE J** (sic) wherein it was discovered that the applicant had filed its appeal 1 (one) day out of time. The applicant has promptly filed this application in order to reinstate the appeal and seeks to comply with the rules.”

12. It is further stated in para (iii) of the founding affidavit that before the matter was set down before CHITAKUNYE JA, all parties believed that the appeal under SC 651/23 had been timeously filed. Further, that:

- “(iv) The grounds of appeal mentioned in the notice of appeal also resonated with the issues raised in the matter under **HC 4346/23** given under **SC 651/23**.
- (v) Given the circumstances of this case applicant has taken a reasonable time to consult and launch this application
- (vi) Applicant submits they believe they have tendered an understandable explanation as to the cause of the delay.
...
- (viii) I submit that even though leave is yet to be granted, the delay in appealing against the judgment in this matter having regard to the rule that applicant had 15 days from the date of judgment to appeal, is not inordinate.
- (ix) I submit that there is a reasonable explanation for the delay.
- (x) The applicant’s legal practitioners out of a genuine mistake on procedure applied for reinstatement of appeal and extension of time to file heads of argument on the basis that the Registrar of the High Court deemed the appeal under **SC 651/23** abandoned for failure to file heads of argument in time. It was only when the matter came before **CHITAKUNYE J (SIC)** under **SC 86/24** wherein it was discovered that the appeal was filed 1 (one) day out of time. The Applicant has acted promptly by filing the current application in order to deal with the issue of filing 1 (one) day out of time.”

13. Para 23 of the founding affidavit is headed “**THE PROSPECTS OF SUCCESS.**” The deponent avers that there are very high prospects of success and that the intended appeal has merit for the following reasons. Firstly, on paper, the respondent’s farm is indicated as being 87.5 hectares but in reality, it sits on 104 hectares; an indication that the respondent is illegally extending her farm and encroaching on the applicant’s mining territory. The court *a quo* thus erred in concluding that the applicant was in contravention of s 31 (1) (a)(iv) of the Mines and Minerals Act, [Chapter 21:05] when it was the respondent who trespassed onto the applicant’s mining territory. The court *a quo* thus erred on a point of law and fundamentally misdirected itself when it concluded that the

respondent had made a case for a final interdict when respondent had not exhausted internal remedies by not seeking the outcome of its letter to the Ministry of Mines dated 26 June 2023.

14. It is also stated that the court *a quo* “erred in denouncing a letter dated 16 August 2023” and not accepting it to be part of the record despite the fact that the said letter was the response from the Ministry of Mines directed to answer respondent’s letter dated 26 June 2023. The deponent further states that should this application be granted, a further application shall be made “to adduce the letter into evidence in the main appeal.” It is finally stated that the letter is fundamentally important in that it puts an end to the dispute between the parties.
15. Under the heading “**PREJUDICE**” the deponent to the founding affidavit avers that the respondent cannot, by the granting of this application, suffer any prejudice that cannot be compensated by an order of costs.
16. In opposing this application, the respondent’s stance is that the delay is inordinate and the explanation is unreasonable and not satisfactory. She contends that the applicant was always represented and must be presumed to have always known of the need to comply with r 38 of the Supreme Court Rules, 2018, which stipulates the time frame within which an appeal must be instituted. By only being jolted at the hearing before CHITAKUNYE JA, the applicant exposed itself as being sluggard and not vigilant and the law is not inflamed with any desire to come to the assistance of such a litigant. The respondent also contends that the applicant’s intended appeal enjoys no prospects of success on appeal. In addition, the applicant’s conduct is causing her serious prejudice and it is acting out of sheer bad faith to reverse the court *a quo*’s judgment in her favour, at all costs. The applicant is

harassing her by dragging her to court at every turn and making her a punching bag which it strikes with one flawed or defective lawsuit after another. She is constantly being put out of pocket. There should be finality in litigation.

ANALYSIS

17. It is settled that in order to succeed in an application of this nature, the applicant must satisfy the court, *inter alia*, that the delay is not inordinate, having regard to the circumstances of the case; that it has a reasonable explanation for the delay and non-compliance with the rules; that its intended appeal has good prospects of success. It is well established that these factors are not individually decisive as to whether the application should be granted. They are considered conjunctively.
18. The extent of the delay between the time the judgment intended to be appealed against was handed down and this application is calculated at nearly six months, a period held to be inordinate in *Nelisiwe Mlambo v Arosume Property Development (Pvt) Ltd & Ors* SC 35/23.
19. The explanation proffered for the delay is that until the hearing of 6 March 2024, the applicant was unaware that the appeal that it had noted on 23 November 2023 had been noted out of time. However, the delay of a full month covering the period from 6 March 2024 when SC 86/24 was struck off the roll and 5 April 2024 when this application was filed has not been satisfactorily explained in the applicant's founding affidavit. Purporting to await reasons for judgment for an order striking a matter off the roll does not, in my view, qualify as a reasonable explanation for delay, especially where the reason for the striking off was conceded by the applicant before the judge. Pertinently,

in *Zimslate Quartzite (Pvt) Ltd & Ors v Central African Building Society* SC 34/17, the court stated at para 17:

“An applicant, who has infringed the rules of 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.”

In addition, in *Lunat v Patel* SC 47/22 this Court stated as follows at p 6:

“A party seeking condonation and extension of time must satisfy the court that a valid and justifiable reason exists as to why compliance did not occur and why non-compliance should be condoned. Further, regardless of the prospects of success, a court may decline to grant condonation where it considers the explanation for failure to comply with the rules unacceptable.”

20. The order striking the matter off the roll was issued on 6 March 2024. The letter requesting reasons was written on 19 March 2024 and this application was filed on 5 April 2024. It appears to me that for a whole month the applicant was inactive not due to the legal practitioner’s indisposition but because it required and was purportedly awaiting a “full judgment” on the striking off. In addition, the statement in para 18 could very well be described as a statement of much ado about nothing for without the judgment, how can the applicant seriously claim that this application is filed on the basis of the issues noted in the non-existent judgment of CHITAKUNYE JA? What reason would CHITAKUNYE JA have to write a judgment to justify the striking off of a matter from the roll, more so where the preliminary point leading to that result was conceded by the applicant? Further, an order striking a matter off the roll is the only and correct order to be granted where a purported appeal is filed outside the time frame prescribed by law. For a litigant to explain a period of delay before he or she does the proper thing by making such a lame excuse is, in my view, to trifle with the court.

21. The adoption of a wrong procedure by the applicant's legal practitioner cannot be said to be a reasonable explanation for the delay. Legal practitioners, as officers of the court, ought to be diligent in their work and know the correct procedure to adopt in a particular situation. The applicant ought to have known that it was already out of time to file the appeal. In *Sibindi v Municipality of Victoria Falls* HB 85/17 at p 1, MATHONSI J (as he then was) stated:

“There is a limit beyond which a litigant cannot escape the repercussions of his or her legal practitioner's dilatoriness or lack of diligence. To hold otherwise would render nugatory the need for a court of law to function through rules of procedure which are provided for in advance in order to guide litigants on how to approach the court and what to do upon court process being served upon them. The situation that the appellant finds himself in, that of trying to reverse the grant of default judgment entered against him was self-inflicted ably assisted by his legal practitioners of his own choice. After all it is his constitutional right to be represented by a legal practitioner of his choice and having made such a choice he cannot escape the consequences of it.”

22. The extent of the delay *in casu* is in my view inordinate. In addition, the explanation for it is totally unreasonable.
23. With regard to the applicant's prospects of success on appeal, the respondent contends that the applicant has, in its founding affidavit, merely reproduced the grounds of appeal that are in its draft notice of appeal. However, a perusal of the applicant's founding affidavit does not support this contention. On the contrary, it is clear that the applicant's contention is that, on paper the respondent's farm is 87.5 hectares whereas on the ground it is sitting on 104 hectares. The applicant contends that this is an indicator that it is the respondent who is illegally extending her farm and encroaching onto the applicant's mining territory and that therefore, the court *a quo* erred in concluding that the applicant was in contravention of s 31 (1) (a)(iv) of the Mines and Minerals Act. It is also the applicant's contention that the court *a quo* further erred in not accepting to be made part

of the record, a letter dated 16 August 2023 emanating from the Ministry of Mines in response to the respondent's letter dated 26 June 2023.

24. The applicant's founding affidavit also states that should this application be granted; it is intended to make a further application to adduce the said letter in evidence in the main appeal. This, it is alleged, is against the background that on 26 June 2023, the applicant wrote to the Ministry of Mines. The Ministry responded by way of a letter dated 16 August 2023. In the proceedings *a quo*, the court did not accept the letter embodying the Ministry's response to be made part of the record.
25. The question is, does the applicant have an arguable case on appeal? The concept of prospects of success on appeal was defined in *Essop v S* [2016] ZASCA 114 in the following terms:

“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 different conclusion 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.”

26. Pertinent to this issue, the court *a quo*'s determination of the dispute comes into focus. The learned judge *a quo* stated at pp 3 – 5:

“*In casu*, it is not in doubt that the applicant is a holder of an offer letter to Subdivision 2 of Veblyden of Dunphaile situate in Zvimba District. She has the right to farm on that land. It is also established that the mining claim belonging to the respondent is within her farm. This is confirmed by a report by the Provincial Mining Director Mashonaland West done on 24 September 2021 which appears as Annex “D” to the founding affidavit. Further evidence is contained in Annex “M” to the answering affidavit which presents different mining claims located within the applicant's farm including the respondent's mining claim. The map thereon has not been challenged. Equally the respondent itself has presented a

topographical map Annex “A” which shows the respondent’s mine as located within the applicant’s farm.

The respondent then seeks to say that the applicant extended her farm to incorporate the mine. This cannot be true as the report from the Provincial Mining Director shows the mine within the farm and indeed the maps including one presented by the respondent itself. Further the history of the case shows that the applicant had raised issue that the respondent’s claim had been granted without her consent as it was within her farm. The court does not accept the respondent’s argument that this involves a boundaries issue. No official has found that the applicant has extended her farm to overlap on respondent’s mine, the report simply says the applicant’s farm is 87 hectares on paper but on the ground as indicated by the applicant it constitutes 104 hectares. Thus the respondent’s claim that its mine is outside the applicant’s farm has no merit as evidence at hand shows otherwise.

What this case is all about is that the applicant (sic) has sought to extend its mining activities on cultivated land which is prohibited by the Act absent the owner’s consent. Apparently the respondent has not denied erecting a fence over cultivated land. Its defence has been that it advised the applicant to remove its crops, and in fact there is a letter by the sympathising organisation Veterans of The Liberation Struggle stating that the applicant shall remove her crops from the mining site. The colour pictures presented as Annex L1 to L3 clearly show a fence running across a cultivated field. The other photograph clearly shows dry stalks of maize, thus supporting the applicant allegations that she had harvested maize from the section which she had now tilled to plant her bean crop. The claim by the respondent that they are divided by a road and it is the applicant who planted crops up to the fence cannot be true. This is because the fence runs across a field, if the applicant had ploughed up to the fence how would the other side of the fence be tilled? The court finds that the applicant’s clear right is certainly affected by the respondent’s conduct. There is an injury committed. The applicant’s interest is being harmed. The carrying of mining activities or an intention to do so on cultivated land is harmful to the applicant’s farming activities. The law is clear as enunciated in s 31 (1) (a) (iv) that mining activities cannot be carried on upon any land under cultivation or within fifteen meters thereof without the consent of the land owner. It is not in doubt that applicant has not consented to the respondent’s actions. Cultivated land is clearly defined in s 30 of the Act ...”

27. The court *a quo* also found that the respondent’s farming plans were in jeopardy, that she would suffer harm and that she had no other remedy to protect her interests apart from an interdict. The learned judge also noted that the applicant’s approach and attitude in garnering the support of an organisation which brazenly wrote a letter dated 16 June 2023 addressed to the respondent’s legal practitioners in which the following statement was made:

“Your conduct to us appear as if you and your client are trying to bring fresh arguments to delay mining production which is an economic sabotage of our country. Be warned you are dealing with war Veterans.”

The court *a quo* noted that the respondent had sought to engage the police to sort out the problems between the parties but the applicant did not turn up. It also found that the respondent was within her rights to seek an interdict where the applicant unlawfully sought to conduct mining activities on cultivated land. It also found that the respondent had satisfied the requirements for a final interdict and granted an order as related to in para 5 above.

28. The applicant’s intended grounds of appeal seek to argue that the respondent ought to have exhausted domestic remedies first by seeking the outcome of her letter dated 26 June 2023 to the Ministry of Mines. Further, that the court *a quo* erred by granting a final interdict and not considering that there was a boundary dispute between the appellant and the respondent. In addition, that it erred in concluding that the applicant was in contravention of s 31 (1) (a)(iv) of the Mines and Minerals Act when it was the respondent who had trespassed onto the applicant’s mining territory. It is also sought to argue that the court *a quo* erred in “denouncing” the letter dated 16 August 2023 and not accepting it to be part of the record despite the fact that it was the response from the Ministry of Mines to the letter of 26 June 2023. Another ground contends that the court *a quo* “erred by being unreasonably restricted by procedural technicalities.” The sixth and final ground alleges that the court erred in failing to take into consideration that the respondent had illegally increased its farm from 87.5 hectares to 104 hectares thereby encroaching into the appellant’s territory.

29. It was established in the court *a quo* that the respondent had cultivated land on her farm, over which she has an offer letter. It was also established that the applicant's mining claim is within her farm. Based on documents, maps and photographs, produced by both parties, the court *a quo* found that the applicant's claim that its mining claim is outside the respondent's farm had no merit as the evidence at hand showed otherwise. The court *a quo* cannot be faulted for holding that the respondent had a clear right. There was before the court evidence that the applicant erected a fence on land on which the respondent had sown and harvested crops and over which land preparations had been made for the next crop. Section 31 (1) (a)(vi) of the Mines and Minerals Act reads:

“31 Ground not open to prospecting

(1) Save as provided in parts V and VII, no person shall be entitled to exercise any of his rights under any prospecting licence or any special grant to carry out prospection operations or any exclusive prospecting order-

(a) upon any holding of private land except with the consent in writing of the owner or of some person duly authorised thereto by the owner or, in the case of a portion of Communal Land, by the occupier of such portion, or upon any State land except with the consent in writing of the President or of some person duly authorised thereto by the President-

.....

(vi) upon any land under cultivation or within fifteen metres thereof.”

30. The meaning of “land under cultivation” is given in s 30 of the same Act as:

“For the purposes of s *thirty-one*- “land under cultivation” means-

(a) land which has been *bona fide* cleared or ploughed or prepared for the growing of farm crops;

(b) ploughed land on which farm crops are growing;

(c) ploughed land from which farm crops have been reaped, for a period of three years from the date of completion of such reaping;

(d) land which has been *bona fide* prepared for the planting of such permanent crops as orchards or tree plantations, and land on which such crops have been planted and are being maintained;

(e) ploughed land on which grass has been planted and maintained for harvesting, rotation of crops or stock feeding, for a period of six years from the date of planting:

Provided that if any such land as is described in paras (a) and (d) is not utilised for the growing of farm crops or of such permanent crops as orchards or tree plantations within two years of it having been *bona fide* cleared or ploughed or prepared for such crops, such land shall forthwith become open to prospecting.”

31. The court *a quo*, in its determination of the matter before it, cannot be faulted for taking into account that the respondent had recently harvested her maize crop and that the land was tilled and ready for planting. Furthermore, proof of seed and fertilizer having been purchased was placed before it. The court *a quo* correctly exercised its discretion in granting the interdict. The respondent managed to establish all the requirements for the granting of such relief. She would have suffered irreparable harm if the interdict had not been granted.

32. For these reasons, it is my view that the applicant enjoys no prospects of success on appeal. On a cumulative consideration of all the pertinent factors as discussed herein, I am of the view that the application has no merit. The respondent has prayed for the dismissal of the application with costs on the legal practitioner and client scale. While the applicant’s case may be without merit, I do not consider that there is sufficient justification for such a level of costs. Costs will thus be awarded on the ordinary scale.

As a result, it is ordered as follows:

“The application be and is hereby dismissed with costs.”

Maseko Law Chambers, applicant’s legal practitioners

Chitewe Law Practice, respondent’s legal practitioners