REPORTABLE (159)

(1) TAPSON DZVETERO (2) ANTONIO AND DZVETERO LEGAL PRACTITIONERS
v
(1) SAKUNDA TRADING (PRIVATE) LIMITED (2) METALLON GOLD (PRIVATE) LIMITED (3) DTZ-OZ GEO (PRIVATE) LIMITED
(4) THE SHERIFF OF ZIMBABWE
(5) HOLLANDS AUCTIONEERS

SUPREME COURT OF ZIMBABWE
HARARE: 17 NOVEMBER 2021 & 26 NOVEMBER 2021

P. Patisani, for the applicants
B. M. Maunze, for the first and second respondents
T. Tabana, for the fifth respondent

IN CHAMBERS

MAKONI JA: This is an unopposed chamber application for condonation for late noting of appeal and extension of time within which to note an appeal made in terms of r 43 as read with rules 37(1) and 38(1) of the Supreme Court Rules, 2018 (the rules).

BACKGROUND

The first and second respondents are judgment creditors (judgment creditors) of the third respondent (judgment debtor) having obtained judgments against the same in 2015. In the same year, the judgment creditors instructed the fourth respondent (the Sheriff) to attach the property of the judgment debtor who proceeded to do the attachment.

After the attachment, the Sheriff instructed the fifth respondent to auction the property. The fifth respondent duly advertised the auction which was scheduled for 7 April 2017. In the meantime the judgment debtor filed an urgent chamber application on 6 April 2017 for stay of execution of the auction under HC 3101/17 pending the finalisation of its court application under HC 3102/17. The application was granted and the sale was stayed. The second applicant (the Law firm) was the judgment debtor's legal practitioners in both matters.

The Sheriff agreed with the judgment creditors and the judgment debtor that the property be released to the judgment debtor due to the escalating storage costs. They also agreed that the property would remain under judicial attachment.

Unbeknown to the judgment creditors the attached property was sold by private treaty and this prompted them to file an urgent chamber application under HC 10449/19. It became apparent that the attached property had been sold on the instructions of the Law firm. The first applicant, who is a senior partner in the Law firm, confirmed in an affidavit that they had caused the property to be sold as it did not belong to the judgment debtor but to a company called Econandra. This is despite the fact that the property had not been released from attachment and that the said Econandra had not instructed the Sheriff to institute interpleader proceedings. The court *a quo* formed the opinion that the applicants` conduct had been deceitful and fraudulent and ultimately referred its judgment for the attention of the Law Society of Zimbabwe.

The applicants intend to appeal against that decision but they are out of time hence the present application.

THE LAW

This application is provided for in terms of r 43 (3) of the rules. In accordance with the provision, the court may on good cause shown, condone the non-observance of the time frames set out in the rules. The basic requirements to be satisfied for an application of this nature to succeed are well known as outlined in the case of *Friendship v Cargo Carriers Ltd & Anor* SC 1/13 at p 4 of the judgment as:

"1. The extent of the delay;
2. The reasonableness of the explanation for the delay; and
3. The prospects of success on appeal."

As a general proposition these various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice. The point was made in *Gessen v Chigariro* SC 80/21 at p 7 where this Court held that:

> "It is also settled that these factors have to be considered in conjunction with one another as they tend to be complimentary. While it is true that consideration of the factors generally boils down to having regard to the explanation given by the applicant for condonation for delay and the prospects of success on appeal, the lack of a satisfactory explanation for the delay may be complimented by good prospects of success on appeal."

APPLICATION OF THE LAW TO THE FACTS

ISSUES FOR DETERMINATION

1. The extent of the delay.
2. Whether or not the applicant has a reasonable explanation for non-compliance with the rules.
3. Whether or not there are any prospects of success.

I will proceed to consider the above requirements in turn.

The extent of the delay

The judgment that the applicants intend to appeal against was handed down on 21 December 2017. The applicants according, to r 38 of the rules, had 15 days from that date within which to lodge their appeal. They had up to 17 January 2018 to do so. They did not.

The appeal they intend to lodge has a slot under a 2021 case number. The present application was filed on 7 October 2021. There was a delay of approximately four years to seek condonation and leave to note the appeal out of time. As was stated in *Makwabarara v City of Harare* SC 139/20 at p 6:

> "...what calls for an acceptable explanation is not just the delay in submitting the appeal but also the delay in seeking condonation."

The delay in seeking condonation and in filing the appeal is undoubtedly inordinate in my view.

Reasonableness of the explanation

It is settled that an applicant seeking condonation is required to state in his or her affidavit the reasons for the delay. This is so because an application stands or falls on the averments deposed to in the founding affidavit (*Mahommed v Kashiri* SC 41/21 at p 14).

The applicants did not proffer any explanation for the delay in seeking condonation and the noting of the appeal. They do not motivate any explanation as to what took them so long to appeal against the decision of the court *a quo.* Mr *Patisani* could not make any meaningful submissions on this point. He, however, sheepishly referred to para 26 of the founding affidavit deposed to by the first applicant. In the preceding paragraph he had

indicated that the judgment creditors had noted an appeal against the judgment. He then proceeded to state:

> "The material parties in that matter, namely, first, second and third respondents reached an amicable resolution of the matter and the appeal has since been abandoned. See copy deed of settlement attached as Annexure "H". Applicants intended to argue their case in those proceedings but they have since been abandoned. Applicants now seek to appeal solely against the finding of ethical impropriety and referral to the Law Society of Zimbabwe."

On being asked whether it was feasible for the first applicant to argue his case in an appeal which related to a different party and where no ground/s of appeal related to his complaints, Mr *Patisani* conceded the point.

In *Ysmin Tacklah Mahommed v Tawurayi Marvin Kashiri* SC 41/21 at p 14, this Court held that:

> "The applicant should not expect the court to ferret in cross reference files or to surmise from the circumstances of the case what the reasons for the delay are. This is for the simple reason that it is not the duty of the court to make up a case for a litigant but for a litigant to make out her case and persuade the court on the propriety of granting the indulgence sought. This position is affirmed by UCHENA JA in *Nzara & Ors v Kashumba & Ors* SC 18/18 at p. 15 (in) these words:
>
> `A court is not entitled to determine a dispute placed before it wholly based on its own discretion, which is not supported by the issues and facts of the case. <u>It is required to apply the law to the facts and issues placed before it by the parties.</u> ` <u>(My emphasis)"</u>

The failure to give an explanation let alone a reasonable one was fatal. In *Zimslate Quartzite (Pvt) Ltd & Ors v CABS SC 34/17* where at para 17 it was held that:

> "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. "

However, in the case of *Katsande v Katsande* SC 49/19 at p 3-4 this Court still considered the prospects of success, in the absence of an explanation for the delay in filing a similar application and actually granted the application. In the case of Viking *Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) at 251, it was stated that:

> "Where the explanation for the delay is far from satisfactory, the court will still exercise its discretion in favour of granting the indulgence of condonation provided the proposed appeal is arguable. The role of the judge in an application of this nature is to stand sentinel at the gates of the court guarding against those desirous of making a grand entrance into the court with unarguable appeals. In respect of those, the gate must be firmly shut."

In that regard, I will proceed to consider the prospects of success.

Whether or not there are any prospects of success

The applicants brought an application for condonation of late noting of appeal and extension of time within which to note an appeal against 'part of the judgment' of the court *a quo.*

The applicants' intended grounds of appeal are set out hereunder:

"1. The court *a quo* grossly erred and misdirected itself in fact and at law in making a finding that the first appellant's conduct was unethical and improper; and in ordering his referral to the Law Society of Zimbabwe in his absence and without giving him an opportunity to make representations before such adverse decisions were made.

2. The court *a quo* grossly erred in fact and misdirected itself in:

   a) Finding that the first appellant had acted fraudulently and deceitfully in having equipment under judicial attachment removed from attachment and
   b) In consequently ordering his referral to the Law Society of Zimbabwe when judicial attachment had ended *ex lege* upon execution of the agreement contemplated in the interim order granted in HC 3101/17.

3. The court *a quo* erred at law and grossly misdirected itself in failing to find, as it ought to have, that the sheriff had agreed with the second appellant to release the equipment from judicial attachment unconditionally.

The applicants' grounds, for the intended appeal, essentially attack the court *a quo`s* reasoning. This is so because *ex facie* the court *a quo`s* order, the complaints that the applicants raise in their grounds of the intended appeal are not addressed therein. Instead, the issues sought to be appealed against were stated in the substantive judgment or reasoning of the court and under a *nota bene* at the furthermost part of the judgment.

To put the issue in context, the court *a quo,* after analysing certain facts before it, castigated the first applicant`s conduct in the following terms:

> "Such deceitful conduct is certainly unbefitting of a member of the legal profession. Without prejudicing issues, I am of the view that Mr Dzvetero`s conduct deserves to be brought to the attention of the Law Society. If such conduct is left unchecked it may bring the legal profession into disrepute."

The court *a quo* thereafter gave an order that disposed of the dispute that was before it which was an application for an interdict. However, the order did not reflect the sentiments of the court regarding the conduct of the first applicant. Instead at the end of the judgment, after the order, there is a *nota bene* which stated that:

"The Registrar is hereby directed to serve a copy of this judgment on the Law Society."

Aggrieved, the applicant intends to appeal against that reasoning of the judgment *a quo*.

The court engaged Mr *Patisani* on whether or not a party could appeal against the reasons of a judgment rather than the substantive order. He submitted that one has to look at the effect of the finding complained of. He further submitted that *in casu* the finding in issue constituted an order as it could be enforced. The Law Society acted on the directive. He further contended that the court should look at the substance rather than the form. He relied on the

authority of *Thutha v Thutha* 2008 (3) SA 494 for his proposition. In my view that authority does not assist the applicants' case. It examined the wisdom of the practice prevailing in various divisions of the High Court of South Africa of making settlement agreements orders of the court. In his judgment, Alkema J highlights the difficulties which flow from the terms of a contract, in the form of a deed of settlement, being embodied in a court order. Mr *Patisani* did not refer me to any particular passage of the judgment on which he relied. He concluded by saying that that direction, which in effect constitutes an order is appealable.

THE LAW

That an appeal must be directed at the order made and not the reasons thereof is now well established in our jurisdiction. This Court in *Chidyausiku v Nyakabambo* 1987 (2) ZLR 119 (SC) at p 124 C held that:

> "In order to be valid, a notice of appeal must be directed to the whole or part of the order made by the court *a quo* and not to its reasons for making the order in question. It must be lodged against the substantive order."

(See also *Herbstein & Van Winsen's* Civil Practice of the Supreme Court of South Africa by *Gilliers & Loots & Dendy* 4th Ed at p 868-9.

This Court in *Econet Wireless (Pvt) Ltd v Trustco Mobile (Proprietary) Ltd & Anor* SC 43/13 at p 12-13 interpreted the findings in *Chidyausiku supra* in the following terms:

> "It seems to me that the principle that comes out in the case of *Chidyausiku v Nyakabambo* is not always fully appreciated, even amongst lawyers. That case is not authority for the proposition that in an appeal one should not attack the reasons for the order. What the case says is that an appeal should be directed at the order and not simply the reasons. Quite clearly if the intention is not to have the order interfered with in any way, then no purpose would be achieved by attacking the reasons thereof. It goes without saying that in order to attack the order made, one must attack the reasoning process leading to the order. In other words in order to attack the order made, one must attack the findings made that justify the order made." (my emphasis)

In *Kingstons Ltd v L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at p 459 D-F the court said:

> "It is trite that an appeal can only be noted against the substantive order made by a court and not against the reasons for making or the process by which it arrives at, the order in question."

This entails that for one to attack the reasons giving rise to an order on appeal, there must exist an order affecting that party in the first place. If there is no such order, there is nothing to attack and effectively,no appeal lies to this Court.

However, in *Alterm Enterprises (Pvt) Ltd t/a Ruwa Furnishers v John Sisk and Son (Pvt) Ltd* SC 4/13, where a cross appeal was noted, this Court seemed to suggest that there may be instances where it might be necessary to attack the reasoning itself rather than the order. The court made the following sentiments regarding the position laid down in the *Chidyausiku* case *supra* at p *5*:

> "I am prepared to accept that as a general rule, the above remarks correctly reflect the law of this country. To the extent, however, that the judgment suggests that this is a hard and fast rule I am inclined to differ. There may well be cases, such as the present, where the slavish adherence to the above principle would not only cause prejudice but would result in a certain degree of absurdity."

The court made the above remarks, in my view, in circumstances which arose as a result of the manner in which the respondent (the plaintiff) had pleaded its case in its declaration. It sought eviction on various bases which could have been pleaded as different causes of action although the ultimate relief was the eviction of the appellant. The court *a quo* dismissed the other bases and found for the respondent in respect of the one and ordered the eviction of the appellant. The appellant appealed against that order of eviction. The respondent

counter- appealed against the dismissal of its other bases for seeking eviction. The court at p 6 remarked:

> "If the appeal filed by the respondent were to succeed, then the order of eviction and holding over damages would fall away. Since the issue before the Supreme Court would be only whether the court *a quo* was correct in holding that the appellant had failed to pay the rent due, there would be no basis for the respondent to attack the other findings by the court *a quo*, which findings could also justify the order of eviction and payment of holding over of damages, unless the respondent also cross appealed against those findings. This is what the respondent, represented by Mr *Zhou*, did. However faced with the decision of this Court in *Chidyausiku v Nyakabambo* (supra) the respondent was forced to concede that the cross - appeal did not comply with the law as it did not seek any relief on the substantive order made. My understanding of the respondents' position was that in the event the main appeal succeeded, this Court should revisit the finding made by the court *a quo* in dismissing the other causes of action and in the event that any one of them succeeded then the eviction and holding over damages would stand."

The learned Judge went further at p 7 in suggesting that:

> "Hopefully this issue will come up for consideration by a full court so that the principle can be revisited in order to ascertain whether it still makes good law."

While accepting the trite position that an appeal does not lie against the reasons for the order, the court in *Alterm Enterprises Pvt Ltd supra* seems to suggest, in essence, that some cases may present an opportunity for this Court to find that, in exceptional circumstances, an appeal may lie against the reasons for an order.

I am of the considered view that had the respondent in *Alterm Enterprises (Private) Limited supra,* pleaded its case properly it would not have found itself in the invidious position where it had to withdraw its counter-appeal. The court *a quo,* in that matter, would have dismissed the claims and made an order to that effect. The respondent would then have properly counter-appealed against the order.

This is the nearest that this Court has come to dislodge the entrenched position that one appeals against the substantive order and not the reasons for arriving at that order. As things are presently there is no authority in support of this 'novel approach' adopted by the applicants. There is a danger of this Court being inundated with appeals against reasons if such were permitted.

On the strength of the above, the applicants cannot successfully bring the present appeal as there is no order to impugn. He is attacking the reasoning of the court *a quo.* Taking the flexible approach would be to jettison a sound principle which has been confirmed in numerous decisions of this Court over a long period. Such an approach will have the potential of 'opening the floodgates' for this court, with its inherent challenges.

In any event there are no exceptional circumstances present that would justify what would be a radical departure from a sound, tried and tested principle.

To add on to the above, it is my view that, an order referring a judgment to the Law Society is not necessarily part of the order of the court disposing of the dispute before it. It is an exercise of a statutory power given to courts to refer matters of professional misconduct to the Law Society. Although the referral of the judgment to the Law Society may be included in the order given by the court, it is not in itself an order in the dispute that was before the court.

Section 25 of the Legal Practitioners Act [*Chapter 27:07*] (the Act) is, thus, relevant. It provides that:

> "**25 Evidence of unprofessional, dishonourable or unworthy conduct from courts**
> Subject to the Courts and Adjudicating Authorities (Publicity Restriction) Act [*Chapter 7:04*], if after the termination of any proceedings before a court—

(a) it appears to the court that there is *prima facie* evidence of unprofessional, dishonourable or unworthy conduct on the part of a registered legal practitioner, the court shall direct that a copy of the record of the proceedings, or a copy of such part of the record as is material to the issue, be transmitted, free of charge, to the Council of the Society;
(b) the Council of the Society requests that a copy of the record of the proceedings or a copy of any part of the record be supplied to it on the ground that it is of direct interest to the Council of the Society in the exercise of its functions in terms of this Act, the registrar or clerk of the court shall comply with such request and shall transmit, free of charge, such copy of the record or such part thereof to the Council of the Society."

Considering that an order directing the Registrar to place a judgment before the Council of the Law Society has no effect other than alerting the Law Society of the *prima facie* unprofessional conduct of a legal practitioner, it would be ill-advised to appeal against such a judgment. In other words, such an order is unrelated to the *ratio decidendi* of the decision of the lower court which may be subject of an appeal to this Court. Regard must also be given to the provisions of s 26 of the Act which provide that:

"**26 Council of the Society to refer cases to Disciplinary Tribunal**

(1) Whenever there is brought to the notice of the Council of the Society an allegation which might be the subject of an inquiry by the Disciplinary Tribunal, the Council of the Society shall have the power to call for such information and to cause such investigation to be made as it thinks necessary."

The above subsection clearly shows that it is up to the Council to act on the notice of any act which may be the subject of an enquiry. The Council is imbued with a discretion to either act or not to act.

In short, a court referring a matter to the Law Society is not necessarily making an order against which an appeal will lie but rather exercising a statutory power, which power, is not subject to anything but an investigation by the Law Society. In this case the Law Society exercised its discretion and on 29 January 2018 referred the matter to the first applicant and

asked him to respond in 14 days to the substance of the complaint against him. It is a remedy available to him to contest the sentiments expressed by the court *a quo*. After all is considered it is my view that the applicants have no prospects of success.

To conclude, it has been demonstrated above that an appeal is noted not against the reasons for a judgment but against the substantive order itself. What is outside the four corners of an order cannot be appealed against.

In light of the above, I am of the opinion that the present application has no merit. The applicants have not made a convincing case for condonation. The extent of the delay is inordinate, there is no explanation for the excessive delay and there are no reasonable prospects of success. The application ought to be dismissed in this regard. There will be no order of costs as the application was not opposed.

Accordingly it is ordered as follows:

The application be and is hereby dismissed with no order as to costs.

Tavenhave & Machingauta, applicant's legal practitioners

Mawere Sibanda, 1st & 2nd respondent's legal practitioners

Messrs Samundombe & Partners, 3rd respondent's legal practitioners