MINISTER OF LANDS AND RURAL RESETTLEMENT
versus
NAVAL PHASE FARMING PRIVATE LIMITED
and
BEACH FARMS PRIVATE LIMITED
and
TAWANDA NYAMBIRAI
and
BERNARD MAKOKOVE
and
CHIURAYAYI
and
DZVAIRO

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 16 July 2015, 30 September 2015

Opposed Application

P Kapasura, for the applicant
H Nkomo, for the 1st and 2nd respondents
T Nyambirai, for the 3rd respondent
D Ochieng, for the 4th, 5th and 6th respondents

CHIGUMBA J: In what circumstances should a court forgive or turn a blind eye to lack of compliance with its rules by a litigant who wishes to be heard in a civil matter? Naturally each case depends on its own circumstances. Some general principles have evolved over time, which may be used as a guide by a court seized with such an application. The discretion of the court to absolve the litigant who has failed to comply with its rules will be exercised in favor of an applicant where the principles of justice and fair play demand it, and where a satisfactory explanation is given as to how the non-compliance with the rules of court came about. The applicant for condonation must show that no prejudice will be occasioned on the respondent, and

prove that the flouting of the rules of court was not deliberate, or a flagrant disregard, or calculated to impair the dignity of the court. The applicant must show that it acted quickly in seeking to purge its disregard of the rules, from the time of becoming aware of the lack of compliance. There must be good prospects of success in the main matter, although good prospects alone will not be persuasive in the absence of a corollary of other cumulative factors which must be sufficiently and satisfactorily established. The applicant must establish sufficient cause to be excused from the lack of compliance with the rules of the court. The overriding consideration is the best interests of justice.

This is a court application for condonation of late filing of the notice of opposition in the main matter, case number HC 915/15. Applicant contends that the effect of acceding to this application is to extend the time within which the opposing affidavit ought to have been filed, and to deem the opposing affidavit to have been duly filed in terms Order 32 r 233 of the ***High Court Rules 1971.*** It was submitted on behalf of the first to third respondents that the effect of failing to file a notice of opposition on time is to be automatically barred from further participation in the proceedings, and that consequently, the applicant ought to have applied for an upliftment of the automatic bar. The court must decide whether, by condoning the late filing of the notice of opposition, and by permitting the affidavit to form part of the pleadings, it will in effect, have ordered that the automatic bar operating in terms of rr 233 (3), be uplifted. The other issue for determination is whether the applicant has placed sufficient evidence before the court, to persuade it to absolve the applicant of its failure to file the notice of opposition within the prescribed period.

The first and second respondents are companies which are duly registered in accordance with the laws of Zimbabwe. The third respondent is their managing director and principal shareholder. The fourth, fifth and sixth respondents are farmers who were resettled on various farms which form the subject matter of the main application. Applicant failed to file its notice of opposition to the main application, in which it is cited as the first respondent, case number HC 915/15 within the ten day period prescribed by Order 32, and contrary to the provisions of r 233 of the rules of this court. Applicant is now barred, in terms of r 233, sub-rule 3. The background to this matter is that, applicants acquired Rusfontein farm under General Notice 483g of 2000 on

20 October 2000. Beach Farm and Duncanston Farm were acquired on 20 April 2001 under general Notice 208 of 2001. Kopje Alleen Farm was acquired on 16 November 2001. Following the acquisition of these farms by the applicant, fourth, fifth and sixth respondents were subsequently resettled there. The first, second and third respondents, the alleged former owners of these farms, approached the court in the main matter seeking an order of spoliation on the basis that they were unlawfully dispossessed of their farms by acts of intimidation and violence or alternatively by a wrong application of the law that governed acquisition of agricultural land in Zimbabwe at the time. They seek the ejectment of the fourth to sixth respondents from the farms, contending that the farms were never properly acquired by the applicant. The first to third respondents also seek a declaratur in the main matter that their farms were not properly acquired in accordance with the law.

The applicant ought to have filed a notice of opposition to the main application by 16 February 2015, but failed to do so and only filed the opposing papers 5 March 2015, a delay of thirteen days. This application was filed on 6 March 2015. The legal requirements that must be met in an application for condonation of non compliance or observance of the rules of court are settled. Condonation is a discretionary remedy which the court will grant "…when the principles of justice and fair play demand it, and when reasons for the non-compliance with the rules have been explained by the applicant…to the satisfaction of the court". See ***Kodzwa* v *Secretary for Health & Anor***[1]. At p 315 the court stated that:

> "The factors which the court should consider in determining an application for condonation are clearly set out in Herbstein & Van Winsen's *The Civil Practice of the Supreme Court of South Africa* 4 ed by Van Winsen, Cilliers and Loots at pp 897-898 as follows:
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> > 'Condonation of the non-observance of the rules is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient cause to excuse him from compliance ... The court's power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judicial discretion and upon sufficient and satisfactory grounds being shown by the applicant. In the determination whether sufficient cause has been shown, the basic principle is that

[1] 1999 (1) ZLR 313 (s) @ 315 B-E

> the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides in which the court will endeavour to reach a conclusion that will be in the best interests of justice. The factors usually weighed by the court in considering applications for condonation ... include the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice." See also United ***Plant Hire Private Limited*** **v** ***Hills & Ors***[2] **.**

(a) <u>The degree of non-compliance and the explanation for it</u>

It is common cause that the applicant was out of time by a period of thirteen days. It admitted that it failed to comply with the provisions of Order 32 of the rules of this court, and that it was barred in terms of r 233 sub-rule 3. It was submitted on behalf of the applicant that a delay of thirteen days cannot be said to be inordinate in the circumstances of this case. In the case of ***Kodzwa*** **(*supra*)**, a delay of eight months was held to be inordinate, in light of the fact that applications for review were supposed to be filed within a period of eight weeks from the date of the judgment. In the case of ***Manemo & Anor*** **v** ***Achinulu & Anor***[3] a delay of one month and one week was held not to be inordinate, given the circumstances of the case. In ***Viking Woodwork Private Lmited*** **v** ***Blue Bells Enterpries Private Limited***[4]**,** the delay was less than a week but the court held that any delay must be accompanied by a reasonable explanation.

It is common cause that the application in the main matter was served on the applicant on 2 February 2015, and that a calculation of the *dies induciae* will show that the opposing papers ought to have been filed by 13 February 2015, at the expiry of ten working days. It is common cause that the opposing affidavit was executed before a commissioner of oaths on 12 February 2015, which was within the prescribed period. The papers were only filed however 5 March 2015. I am unable to agree with the submission made on behalf of the first to third respondents that the Minister himself ought to have deposed to the affidavit in this matter for the simple

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[2] 1976 (1) SA 717 (a) @ 720 F-G

[3] HB 12-02

[4] 1998 (2) ZLR 249 (S) @ 253F-H

reason that the Minister may not have the requisite knowledge himself, as to why the papers were not filed on time. The Minister does not personally mann the registry where it is alleged the mix up which resulted in the papers being filed out of time happened. I find myself unable to agree with the submission that the explanation proffered is hearsay evidence which is inadmissible, for the reason that the deponent to the affidavit averred to having personal knowledge of the facts, and swore positively thereto.

I accept that the delay in filing the opposing papers was not willful, in the sense of being deliberate or intentional or grossly negligent. The respondents admitted that the opposing affidavit was commissioned within the prescribed time period. It seems to me to be more probable than not that the applicant intended to file the notice of opposition on time, which is why the affidavit was signed on time. It is my view that the explanation for the delay is believable and ought to be accepted. It is common cause that the Civil Division of the Attorney General's office is a rather large department and that its registry is manned by junior personell who indeed might fail to comprehend the need for urgency. In the absence of evidence that the failure to file the opposing papers was deliberate of intentional or occasioned by gross negligence, evidence of willful disobedience, the applicant's explanation for the delay is accepted by the court. It is sufficient, and adequate. Respondents have not shown that a delay of 13 days would prejudice their case. Instead they have focused on protecting the dignity of the court. The court's interest and ability to protect itself from abuse by the flagrant breach of its own rules is always at the forefront. That interest must be balanced with the overriding principle to promote the interests of justice. The interests of justice are always served when litigation is brought to finality, on the merits.

(b) <u>The importance of the case</u>

The application in the main matter is very important in my view because it poses the question of whether judicial review of the process of acquisition of agricultural land in Zimbabwe can be done by way of an application ten years after the purported acquisition took place, or whether by implication a review of any proceedings should be brought within the time limits prescribed by s 27 of the ***High Court Act*** **[*Chapter 7: 06*].** In other words is the judicial review a review in the narrow sense of being confined to the stipulated grounds for review, or

should it be a review in the wider sense of 'judicial oversight' or supervision of the process of acquisition, in order to ensure that all the stipulated procedures are adhered to? If it is accepted that the review of the acquisition of the respondents' farms would be in the narrow sense of being confined to the stipulated grounds for review, then by implication this court would only have the power to review the process of acquisition which was before the Administrative court, being an inferior court. If the review is accepted to be in the wider sense, then it would not be confined to the grounds of review set out in its governing act, which are inadequate to 'review' land acquisition which was done in terms of the Constitution. It is also an important aspect of the main application that, although the farms were acquired in terms of the former Constitution, the court is being asked to apply principles which are entrenched in the new Constitution, to determine the dispute.

(c) The prospects of success

The applicant contends that there are good prospects of success in the main matter for the reason that the state did not withdraw the General Notices which were published in the government gazette and in terms of which the farms were 'identified' for acquisition. Applicant contends further, that the first to third respondents went ahead and purchased the farms without applying for a certificate of 'No Present Interest'. The third reason put forward by the applicant is that s 16 B (2) (a) as read with section 16 B (3) (a) of ***Constitutional Amendment number 17 of 2005***, provided that all land which had previously been identified for resettlement purposes vested in the State, will full and unchallengeable title, with effect from the effective date. The court was referred to the case of ***Chisvo & Anor* v *Peter & Ors***[5] as authority for this proposition. The court in that case took time to expound on the procedures which governed land acquisition before s 16 B came into force.

In the case of Kodzwa **(*supra*),** at p315, the court said that:

> "Whilst the presence of reasonable prospects of success on appeal is an important consideration which is relevant to the granting of condonation, it is not necessarily decisive. Thus in the case of a flagrant breach of the rules, particularly where there is no acceptable explanation for it, the indulgence of condonation may be refused, whatever the merits of the appeal may be. This

[5] HH 23-2006

was made clear by Muller JA in ***P E Bosman Transport Works Committee & Ors* v *Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A) at 799D-E,*** where the learned Judge of Appeal said:

> 'In a case such as the present, where there has been a flagrant breach of the Rules of this court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects of success may be'"

The same point was made by Hoexter JA in ***Rennie* v *Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131G-J** A where the learned Judge of Appeal said:

> "In applications of this sort, the prospects of success are in general an important, although not decisive, consideration. It has been pointed out ***(Finbro Furnishers (Pty) Ltd* v *Registrar of Deeds, Bloemfontein & Ors 1985 (4) SA 773 (A) at 789C)*** that the court is bound to make an assessment of the petitioner's prospects of success as one of the factors relevant to the exercise of the court's discretion unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. It seems to me that in the instant case the cumulative effect of the factors which I have summarised ... above is by itself sufficient to render the application unworthy of consideration; and that this is a case in which the court should refuse the application irrespective of the prospects of success. "

More recently, in our own jurisdiction, the court said the following in ***Ndebele* v *Ncube* 1992 (1) ZLR C 288 (S) at 290C-E:***

> "It is the policy of the law that there should be finality in litigation. On the other hand, one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute. The time has come to remind the legal profession of the old adage, vigilantibus non dormientibus jura subveniunt - roughly translated, the law will help the vigilant but not the sluggard."

I am persuaded that the applicant has good prospects of success in the main application, especially when regard is had to the provisions of s 290 of the ***Constitution of Zimbabwe Ammendment Act Number 20 of 2013***(the current Constitution) which entrenches the rights of the state to all agricultural land which was acquired and itemized in Schedule 7 of the former Constitution. There is no evidence of a flagrant disregard of r 233, and the prospects of success of the applicant in the main application make this application for condonation worth considering,

in the interest of justice, and fairness. While a certain level of incompetence was admitted to by the applicant when it averred that staff manning its registry failed to apprehend the urgency of the matter and the need to file the papers timeously, the failure to act was not deliberate in the sense of being willful, as in choosing not to act despite knowledge of the need to act timeously.

(d) The respondents' interest in the finality of the judgment

The farms were acquired between the years 2000-2001. First to third respondents have given an explanation as to why it took them this long to approach the court for relief. It is common cause that an interim interdict which had been granted by this court on an urgent basis was withdrawn by the first to third respondents, who allege that they were intimidated and subjected to violence to bring that about. It would be in the interests of justice that the respondents' allegations be scrutinized and a determination made, which would lay this matter to rest once and for all, not only for the benefit of the applicant and the first to third respondents, but for the benefit of the fourth to sixth respondents the current settlers on the farms, and the Zimbabwean populace at large, whose right to agricultural land is enshrined in the Constitution. The due and proper administration of the land acquisition process is a Constitutional right which must be upheld.

(e) The convenience of the court

In the case of ***Manemo* v *Achinulo* (*supra*)** the court considered whether it ought to shut its doors on the applicant for condonation because of the inconvenience caused to it, and to the respondent. In this case a delay of thirteen days cannot be held to have caused any serious inconvenience to any of the respondents, or to the court for that matter. The court is satisfied that the applicant acted timeously when it discovered that the opposing affidavit had not been filed on time. There was no dilatoriness in filing the application for condonation.

(f) The avoidance of unnecessary delay in the administration of justice

It is common cause that the first to third respondents have waited for more than ten years to get their day in court. Non suiting the applicant at this stage, by denying it condonation for the late filing of its notice of opposition in the main matter, would not assist the administration of justice because the court must hear from the applicant in relation to the procedure adopted, and to the allocation of the farms which formerly belonged to the first to third respondents to the

fourth to sixth respondents. Only applicant can place evidence before the court as to what transpired when the first to third respondents' farms were acquired. Only applicant can confirm whether third to sixth respondents hold legitimate title now to the farms previously owned by first to third respondents. Only the applicant can positively swear as to whether it discharged its duty as the Ministry charged with the acquisition of Agricultural land. Finally, applicant must answer the charges of spoliation leveled against it, and answer the charges of unlawful deprivation of the farms, contrary to the relevant law at the time. Applicant must tell the court whether the policy of land acquisition at the time involved an assessment of whether the land proposed for acquisition was owned by a black or a white Zimbabwean, or whether the phrase 'indigenous' Zimbabwean is synonymous with a black Zimbabwean.

Disposition

The court does not find any merit in the submissions made on behalf of the first to third respondents that the applicant in this matter was not only merely sluggish, it disrespected the court by filing an application for condonation thirteen days after the date when it ought to have filed its notice of opposition in the main matter. The evidence on record does not support this contention. On the contrary the evidence shows that the opposing affidavit was commissioned within the prescribed time period. This is my view gives rise to a presumption that the applicant intended to comply with Order 32 r 233 of the rules of this court. In the absence of evidence to the contrary, this court finds that it is more probable than not that there was indeed a mix up in the registry of the Civil Division of the Attorney General's office which resulted in the late filing of the opposing papers. No evidence was placed before the court, that there was a deliberate or intentional or grossly negligent failure to comply with the rules of this court. The explanation given by the applicant was sufficient, and adequate, for the purpose of being absolved, or forgiven by the court for failing to comply with its rules.

The applicant has good prospects of success in the main matter, mainly because of the lengthy delay by the first – third respondents in bringing the application in the main matter, and because of the withdrawal by the first to third respondents of the relief (an interdict under case number HC 1180A-2002) which this court had granted on an urgent basis at the relevant time.

There can be no 'dirty hands' to speak of, or lack of compliance with a court order in the face of the withdrawal of the application for an interdict, before the confirmation of the interdict, or its metamorphosis, into a final order of this court. The withdrawal of that application gave this court pause in accepting the submissions made that due to the passage of time, and the demise of some of the protagonists in the dispute, special challenges await the first to third respondents in proving their case on a balance of probabilities, in the main matter. Another challenge is the advent of the current Constitution, and the implications arising there from to a case where the land was acquired in terms of the provisions of the old or former Constitution.

Where there has been lack of compliance with the rules of the court, it is customary to seek the court's indulgence or forgiveness, by way of an application for 'condonation'. Once the court grants the indulgence, the effect of that would be to 'absolve' the applicant of the failure to comply with the rules, and by implication to undo the wrong occasioned by the failure to comply with the rules. It follows that if the applicant was operating under an automatic bar as a result of failing to comply with the rules, the automatic bar would be uplifted by the granting of condonation.

The application before the court, for condonation of the late filing of the notice of opposition be and is hereby allowed, with costs to remain in the cause in the main matter. It is hereby ordered that;

1. The application for condonation of late filing of notice of opposition in HC 915/15 be and is hereby granted.
2. The applicant's late filing of opposing papers is hereby condoned and the time within which to file opposing papers be and is hereby extended.
3. Notice of opposition and opposing affidavits filed by the applicant in case number HC 925-15 be and are hereby deemed to have been filed in terms of the rules.
4. Costs shall remain in the cause.

Civil Division of the Attorney General's Office, applicant's legal practitioners
Messrs Mtetwa & Nyambirai, 1st-3rd respondents' legal practitioners
Messrs Coghlan, Welsh & Guest, 4th-6th respondents' legal practitioners