

MEDICAL AND DENTAL PRACTITIONERS
COUNCIL OF ZIMBABWE
versus
Dr. FARAYI SHAKESPEAR MOYANA

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 18 February and 8 June 2016

OPPOSED MATTER

Ms I Tiyago, for the applicant
E Matinenga, for the respondent

MATANDA-MOYO J: This is an application for dismissal of the respondent's matter under case number HC 6274/14 for want of prosecution.

The brief facts are that the respondent on 25 July 2014 filed a chamber application for condonation for late noting of appeal. A notice of opposition was filed on 6 August 2014. On 21 April 2015 the applicant made this application on the basis that the respondent had failed to file an answering affidavit within a month of the filing of the notice of opposition or alternatively had failed to set the matter down for hearing in terms of r 236 (3) and (4) of this court's rules.

The respondent filed its opposing affidavits to this application out of time. On the date of hearing the respondent applied for upliftment of bar. The reason proffered by counsel was that the instructions to him were done during vacation when he was not in the office. On return counsel was not briefed of the matter and only had knowledge of the matter when the instructing attorney enquired on the matter. Counsel pleaded that the sins of counsel should not be visited upon the client.

The applicant opposed the application on the basis that the reason proffered by the applicant was neither reasonable nor adequate. The respondent flagrantly breached the rules of court. Counsel for the applicant urged this court to consider the tardiness in the handling of this matter by the respondent. At every stage the respondent is making an application for

condonation. The appeal itself was filed late and there is an application for condonation for late filing of appeal. The respondent is not serious in prosecuting his matter. Counsel urged this court to dismiss the application.

In his application the applicant did not address the court on his prospects of success on the matter. Counsel touched on prospects in his reply.

The Supreme Court in the case of *Friendship v Cargo Carriers Ltd and Another* 2013 (1) ZLR (1) (S) at p 4 said;

“Condonation is an indulgence which may be granted at the discretion of the court. It is not a right obtainable on demand. The applicant must satisfy the court/judge that there are compelling circumstances which could justify a finding in his favour.

To that end, it is imperative that an applicant for condonation be candid and honest with the court. Certain criterias have been laid down for consideration by a court/judge in order to assist it in the exercise of its discretion. Among these are, the extend of the delay and the reasonableness of the explanation therefor, the prospects of success on appeal, the interest of the court in the finality of judgments and the prejudice to the party who is unable to execute his judgment. The list is not exhaustive.”

See also *Viking Woodworks (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249.

Where there is flagrant disregard of the rules, a court is entitled to dismiss that application on that basis alone. See *De Vos v Cooper and Ferreira* 1994 (4) SA 1290 (SCA) at 1298 and *Tiashi SA (Pvt) Ltd v Molemeka* [2008] ZAFSHC 142.

The explanation proffered by the applicant is not reasonable at all. Counsel did not bother to explain the delay in filing opposing papers. These days the courts are congested with applications of this nature, where litigants are flagrantly breaching court rules and proceeding to seek the court’s indulgence. Time has come for courts to be strict and not come to the assistance of those litigants who negligently pursue their matters. It appears to me that this default was willful and due to gross negligence on the part of the respondent.

There is a tendency of courts to grant the removal of the bar where the following requirements have been met;

- 1) the applicant has given a reasonable explanation for his delay;
- 2) the application is *bona fide* and not made with the object of delaying the opposite party’s claim;
- 3) there has not been a reckless or intentional disregard of the rules of the court,

- 4) the applicant's action is clearly not ill-founded; and
- 5) any prejudice caused to the opposite party could be compensated for by an appropriate order as to costs.

See *Smith N.O v Brummer N.O* 1954 (3) SA352 (O) at 358 A and *Els Sand and Grondverskuiwing CC v Lonhro Mining SA (Pty) Ltd* (2010) ZANCHC 64.

The respondent made an oral application which failed to disclose the above requirement.

The respondent failed to set out the facts on which his defence is based so that the court could form some opinion on the merits of his defence. It has been held in several cases that it is not sufficient to simply make a bold assertion that the respondent believes he has a good case. Facts must constitute a defence in law.

It is trite that condonation is not merely for the asking.

I am of the view that no reasonable explanation has been put forward by the respondent. No affidavits have been put forward. I am not satisfied that the defendant has shown good cause see also *Madinda v Minister of Safety and Security* (2008) ZASCA 34; 2008 (4) SA 312 (SCA) at 316 E-G.

In the result I am unable to grant the application for upliftment of bar. The applicant seeks the dismissal of the respondent's application for condonation for late noting of an appeal under case number 6274/14. Applicant opposed that application on 6 August 2014. The respondent has not filed an answering affidavit nor set the matter down for hearing within 30 days of receiving the notice of opposition sometime in August 2014. In terms of r 236 (3) and (4) of these court's rules this court is entitled to dismiss the respondent's application.

In the result I order as follows:

- 1) The respondent's application for upliftment of bar is dismissed.
- 2) The chamber application filed by the respondent under High Court case number 6274/14 be and is hereby dismissed for want of prosecution.
- 3) The respondent shall bear costs of suit.

Scanlen & Holderness, applicant's legal practitioners
Chivave & Partners, respondent's legal practitioners