CHEN SHAOLIANG
and
CHEN MANDONG
versus
ZHOU HAIXI
and
WENZHOU ENTERPRISES PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 15, 18, 29, November 2016, 2 December 2016,
12 January 2017, 8 February 2017

Opposed Application-Leave to Appeal

S. Hashiti, for the applicants
L. Uriri, for the respondents

CHIGUMBA J: The phrase good prospects of success on appeal' is used so often that its meaning should be clear and obvious to everyone by now. The phrase has been interpreted to mean that the chances of the appeal being allowed are high, and or that it is more likely than not, that the appeal will be allowed. The difficulty that arises is that the determination of 'good prospects of success' on appeal involves what amounts to a second bite of the cherry for all the parties concerned. It is an opportunity for each party to convince the court a quo that its position whether of fact or of law is correct, or put differently, that a different court might come to a different conclusion. See *Tetrad Investment Bank Limited* v *Finwood Investments Private Limited and Kilima Investments Private Limited*[1]

This is an application for leave to appeal against the judgment of this court granted in case number HC 726-15; HH613-16, on 14 October 2016 in a civil trial where *Zhou Haixi and Wenzhou Enterprises Private Limited sued Chen Shaoliang and Chen Xiadon*, for a declaratur

[1] HC19097-14; Ref Case HC10031-14

and ancillary relief with regards to the directorship and shareholding of a company which is the registered owner of a gold mine known as 'Eldorado' which is situate in Chinhoyi. The defendants applied for absolution at the close of the plaintiff's case. The court found that there was some evidence on which a reasonable court could find for the plaintiffs. It exercised its discretion and leaned in favor of allowing the case to proceed. Aggrieved by the court's exercise of discretion, the defendants applied for leave to appeal against the court's decision.

It is common cause that the judgment which was appealed against is interlocutory, and that leave to appeal is required in terms of s 43 (2) (d) of the High Court Act [*Chapter 7: 06*].

Section 43 (2) (d) provides that;

> **"43 Right of appeal from High Court in civil cases**
> (1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction.
> (2) No appeal shall lie—
> (*a*)…
> (*b*)
> (*c*) from—
> (i) …
> (ii) …
> *d*) from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, except in the following cases- "

An interlocutory order has been defined as 'something that is issued provisionally during a lawsuit'. Herbstein & van Winsen *Civil Practice of the Supreme Court of South Africa 4 Ed p 877* define an interlocutory order as:

> "An order granted by a court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties. Such an order may be either purely interlocutory or an interlocutory order having final or definitive effect."

In the case of *Mwatsaka* v *ICL Zimbabwe*[2], this court found that;

> "…a distinction is drawn between interlocutory orders having final effect (which orders are appealable) and those which do not have final effect, in the sense that they do not irreparably preclude some of the relief which might be granted in the main action. The latter are referred to as simple or purely interlocutory orders. Simple interlocutory orders are further sub-divided into those that are appealable before the completion of the trial with leave of the court and orders that are mere procedural rulings which are not appealable before the completion of the trial, even with leave of the court. The main reasons for disallowing appeals in respect of

[2] 1998 (1) ZLR 1 (H)

> procedural rulings are that, if they were to be appealable, this would lead to a multitude of expensive and inconvenient subsidiary appeals and no hardship is caused to the aggrieved party by disallowing an appeal, because he can raise the issue of the erroneous ruling on appeal after completion of trial."

This matter came before me in chambers, and I directed that it be set down in open court for the hearing of oral argument. It was titled court application for leave to appeal. The judgment of the court in the application for absolution from the instance was handed down on 14 October 2016. The application for leave to appeal was filed of record on 11 November 2016. At the hearing of the matter, in a case management conference in chambers, counsel for the respondents raised a preliminary point that the applicant be directed to address the court on whether the application for leave to appeal complied with the provisions of Order 34 r 263 of the rules of this court which provides that;

> **"ORDER 34**
> **APPLICATIONS FOR LEAVE TO APPEAL TO THE SUPREME COURT**
> ***262. Criminal trial: oral application after sentence passed***
> Subject to the provisions of rule 263, in a criminal trial in which leave to appeal is necessary, application for leave to appeal shall be made orally immediately after sentence has been passed. The applicant's grounds for the application shall be stated and recorded as part of the record. The judge who presided at the trial shall grant or refuse the application as he thinks fit."

So the first thing to note is that an application for leave to appeal must be made orally immediately after judgment has been handed down. I say judgment because of the provisions of r 269 which provide that;

> "In a case in which leave to appeal is necessary in respect of a judgment of the court given in such proceedings as are described in subparagraph (ii) of paragraph (*c*) and in paragraph (*d*) of subsection (2) of section 43 of the High Court Act [*Chapter 7:06*], the provisions of rules 262 to 268 shall apply to an application for leave to appeal and to an application for condonation as if for the words "Attorney-General" there were substituted the word "respondent",

It is common cause that no oral application for leave to appeal was made on 14 October 2016 when judgment was handed down. It is further common cause that the application for leave to appeal is not in the form prescribed by rule 263 as follows;

> ***"263. Criminal trial: application in writing filed with registrar***
> Where application has not been made in terms of rule 262, an application in writing may in special
> circumstances are filed with the registrar within twelve days of the date of the sentence. The application shall state the reason why application was not made in terms of rule 262, the proposed

> grounds of appeal and the ground upon which it is contended that leave to appeal should be granted. (my underlining for emphasis)"

These parties have been engaged in a bitter and protracted battle for ownership and control of Eldorado mine. No fewer than ten sets of litigation first in the magistrates court and now in this court, have clogged court calendars over a considerable period of time. The parties take polarized positions, then engage counsel to bolster these positions, and prepare to put each other under siege at all costs. This particular trial commenced before a brother Judge, and became so convoluted and protracted that a recusal of the Judge was inevitable in the interest of justice. When I took over the matter a transcript of the record of proceedings before my brother Judge became part of the record before me, having been introduced into evidence by the plaintiff during evidence in chief. The trial commenced afresh. Evidence was placed before me, including all the documents and testimony of the court that tried the matter initially. I must decide whether a different court might come to a different view on the question of whether the defendants are entitled to be absolved from the instance. Before I do that, I must decide whether the applicants are properly before me, outside the stipulated time period, without a separate application for condonation of the late filing of the application of leave to appeal. Is it in the interests of justice to allow the application for leave to appeal to be considered on its merits, in these circumstances?

It would serve no useful purpose to chronicle the legal shenanigans that bedeviled the court at the instance of the parties before the matter was finally heard. Suffice is to say, there were no less than four or five case management conferences, applications for recusal of counsel, applications for postponement to enable counsel who subsequently became seized with the matter to bring himself up to speed with the record of proceedings, an application for postponement to enable the record of proceedings to be transcribed as a matter of urgency, allegations that the chain of custody of the tape of the proceedings in court had been broken, that the tapes were missing, then they were found, and so on and so forth. It is the applicants' case that the Supreme Court may differ with this court on the question of whether the defendants

ought to have been absolved from the instance. The applicants relied on the case of *Delta Corporation Limited* v *Onismo Rutsito* [3]as authority for this proposition.

In that case the issue that arose for determination was whether the court *a quo* had misdirected itself in refusing to absolve the defendant from the instance on the two issues which had to be established by the plaintiff, that of whether there was a viable cause of action, and that of whether the plaintiff had established that the defendant was negligent. The Supreme Court held that the pleadings did not establish a cause of action, its view being that it is not every form of harm which entitles one to damages, the court was satisfied that the respondent did not prove any damage such as would have founded a cause of action under our law of delict. On the question of negligence, it was held that as no particulars of the negligence alleged were set out or proved, there was no basis upon which the appellant could have been placed on its defence. It is my considered view that this case is of no assistance to the court in the circumstances of a dispute regarding ownership, control, shareholding, directorship of a private limited company where the litigants are current and former directors of this company. It is accepted that as a matter of law, the Supreme Court may or may not find that a court a quo misdirected itself, on any issue placed before it.

The respondents contend that the applicant in its founding affidavit did not proffer any special circumstances to justify a delay of eight days in filing the application for leave to appeal. It is contended that the applicants ought to have filed an application for condonation of failure to apply for leave to appeal immediately after judgment was handed down. They had twelve working days, from 14 October 2016, the date of judgment, to bring an application for condonation of late application for leave. The application for condonation is premised on the concept of special circumstances, an applicant must state the reason why it failed to apply for leave on the date of the judgment. Applicant contends that the application for condonation is encompassed and combined with the application for leave. Respondents contend that there is no provision in the rules of this court for such legal gymnastics, that the provisions of Order 34 rr262, 263, and 266 rr are clear.

[3] SC42-13

The respondents referred the court to the case of *Business Equipment Corp Private Limited & Ors* v *ZIMRE Property Inv & Anor*[4] , in support of their contention that the applicants' papers do not establish any special circumstances to justify their failure to comply with the rules, resulting in there being no proper application for leave. It was held in that case that if the explanation of special circumstances is inadequate, then the application for leave is defective and ought not to be heard. The failure to make an oral application for leave to appeal at the handing down of judgment must be explained, to the satisfaction of the court. The special circumstances explanation must be held to a standard much higher than the 'good and sufficient cause' test. A perusal of the applicants' founding affidavit will show that an explanation for the failure to make an oral application for leave was proffered at par 1.9-2.2. There is a prayer for the delay to be excused. The explanation proffered is that there was need to study the judgment and to retain counsel for an expert opinion, which took time.

Condonation, as a legal concept, put simply, is a consideration of whether the applicant ought to be excused for failure to comply with the rules. It is an exercise of discretion, a value judgment, which must by necessity depend on the circumstances of each case. It has been said that;-

> "…in considering applications for condonation the court has a discretion, to be excercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to the both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the rules, the explanation therefore, the prospects of 1976 (1) SA 717 (A) @ 720 F-G avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.
> These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a god explanation may help compensate for the prospect of success which are not strong".

See *United Plant Hire (Pty) Ltd* v *Hills & Ors* [5]*; Mutizha* v *Ganda & Ors* [6]*; Maheya* v *Independent African Church*[7]*; Forestry Commission* v *Moyo*[8]*; Bishi* v *Secretary of Education* [9]*;*

[4] 2015 ZWHHC 684-05
[5] ;;;;;;;;
[6] 2009 (1) ZLR 241 (S) 2 245C-E
[7] 2007 (2) ZLR 319 (S) @ 323 B-C
[8] 1997 (1) ZLR 254 (S) @ 260 D-E
[9] 1989 (2) ZLR 240 (H) @ 242E-243C

Chimpondah & Anor v *Muvami*[10]*; Gergias & Anor* v *Standard Chartered Finance Zimbabwe Ltd*[11]*;Cordier* v *Cordier*[12]

I am not persuaded that the explanation given in seeking to be excused must be held up to a standard higher that 'good and sufficient cause' in each and every case. It is my considered view that the explanation must be;-

(a) Reasonable; and, the court should consider the same principles which guide it in an application for leave, which are now settled;

(b) (i) The extent of the delay in failing to note the appeal;

(ii) The reasonableness of the explanation for the delay;

(iii) Whether the litigant himself is responsible for the delay;

(iv) The prospects of success of an appeal, should the application be granted; and

(v) The possible prejudice to the respondent, should the application be granted."

It has been held that;-

> 'The rules of Court are not laws of the Medes and Persians and in suitable cases the Court will not suffer sensible arrangements between the parties to be sacrificed on the alter of slavish obedience to the letter of the rules" *See Scottish Rhodesian Finance Limited* v *Honiball*[13].

In the case of *Telecel Zimbabwe Private Limited* v *Portraz*[14], the court said that;-

> "…the Courts appreciate that litigants do not eat, move, and have their being in filing process. There are other issues they attend to and where they have managed to bring their matters within a reasonable time they should be accorded audience. It is no good to expect a litigant to drop everything and rush to court even when the subject matter is clearly not a holocaust."

This is what we must ask ourselves;-Is a delay of eight days reasonable for the purpose of engaging counsel and seeking an opinion on how to proceed in a complicated matter where the pleadings are voluminous and the documentary evidence convoluted? Should the court blame the applicants for this delay? Will the respondents be irreparably prejudiced if this failure to adhere to the stipulated time limit is excused?

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[10] 2007 (2) ZLR 326 (H) @ 327 F- 328E
[11] 1998 (2) ZLR 488 (SC)
[12] 1984 (4) SA 524 © @ 528I-529B
[13] 1973 (2) SA 747 ®
[14] HH446-15

In asking these questions, the answer becomes crystal clear. It is not unreasonable, firstly because of the sheer volume of documents which form part of the record, and secondly because the court can see no irreparable prejudice to the respondents which cannot be cured by an appropriate order as to costs. Condonation is, ultimately, a value judgment, an indulgence which is at the disposal of a litigant, at the mere asking, provided that it is backed by sufficient facts, on balance of probabilities. It is more probable than not, that the applicants did not deliberately and intentionally fail to make an oral application for leave to appeal when the judgment was handed down. It is more probable than not, that the failure to apply for leave to appeal within the 12 day stipulated period, on the basis of special circumstances, was not calculated to impair the dignity of the court. Finally, the court finds that special circumstances do exist, the interest of justice in the finalisation of this matter, the incessant bickering and delays that have caused justice to elude the parties, and the prospect of doing justice between man and man. We exercise our discretion in favour of condoning the late filing of the application for leave to appeal, in the interests of justice, which would not be served by further delays to the finalisation of this matter.

Turning to the merits of the matter, the law that regulates the circumstances in which leave to appeal ought to be granted is clear. It is common cause that the order being appealed against in this matter is a simple or purely interlocutory order which is appealable with the leave of the court. It has been held that;

"…with regard to that portion of the order which is interlocutory, leave to appeal will be granted when there is a reasonable prospect of success, the amount in dispute is not trifling and the matter is of substantial importance to one or both parties concerned. *Herbstein & Van Winsen The Civil prcatise of the Superior Courts of South Africa 3rd edition page 714-716.* See *Pitchanic NO v Patterson.* [15]*and Rood v Broderick Properties Ltd*[16], *Haine v Podlashuc & Nicolson,* [17]*Clerk v Shepherd*[18].

The main consideration is the prospects of success on appeal. See *Van Heerden* v *CronWright*[19], *Botes* v *Nedbank*[20], *and Castel & Metal Alliied Workers Union*[21]. The court accepts that;-

[15] 1993(2) ZLR 163(H)
[16] 1962 (2) SA 434 (T) @ 435C-D
[17] 1933AD104
[18] 1956 R & N 542 @ 543 E-544D
[19] 1985 (2) SA 342
[20] 1983(3) SA 27(A)
[21] 1987(4) SA 795

> "It is every litigant's rights to appeal to the highest court in the land. The purpose of an appeal to a higher court is so that an error committed by the lower court is corrected…in terms of a 169(1) of the Constitution of Zimbabwe, the Supreme Court is the final court of appeal in Zimbabwe, except for Constitutional matters". See *Golden Reef Mining Private Limited & Anor v Mnjiya Consultinh Engineers Pty Ltd & Anor*[22].

The court also accepted the submission made on behalf of the applicant that, in the circumstances of this case, there is no doubt that the case is important to both parties and that the amount in dispute is not trifling. The suggestion that the prospects of success on appeal should guide the court in considering whether or not to grant leave to appeal was also accepted by the court. Naturally, the applicant submitted that it has good prospects of success on appeal. The respondents contended that the applicant has no 'good' or 'strong' prospects of success on appeal a legal concept whose meaning is set out in the case of *Radebe* v *Hough*[23]. In my considered view good prospects of success on appeal is a phrase which refers to the likelihood that the appeal that will be allowed, being high. It refers to the probability of the appeal being allowed, and involves a demonstration that the grounds of appeal have merit, and that the appeal is more probable than not, likely to be allowed.

The grounds of appeal appear at page 26 of the application for leave to appeal. No useful purpose would be served be regurgitating them. My understanding of the grounds of appeal is that the defendants in the main matter who are now the applicants for leave to appeal against a decision refusing to absolve them from the instance, hold the view that the evidence which the plaintiff placed before the court was fell below the *prima facie* standard. Their view is that the evidence fell short of the standard of proof required for them to be put to their defence. Their view is that the pleadings do not establish a cause of action and that the oral evidence did not establish a cause of action. Finally, the applicants in their grounds of appeal take issue with certain inferences of fact and law which the court relied upon in its decision to put them to their defence.

In considering the principles which ought to guide a court in an application of this nature, the prospects of success on appeal gave me pause. In my view the applicant's prospects of success, on the voluminous grounds of appeal, are not high. If this were the only principle which

[22] HH631-15
[23] 1949 (1) SA 380

should guide the court, the matter would end here. However, the applicable law is a juggling of various principles, which list is not exhaustive, and which always depend on the circumstances of each case and is informed by the interests of justice, and the concept of fairness to both parties. The rules of this court were put in place in order to facilitate the expeditious dispatch of cases. See *Kombayi* v *Berkhout*[24]. The purpose of the rules, is to buttress the rules of natural justice, and to ensure that every litigant is afforded an equal opportunity to be heard. See *Metsole* v *Chairman, Public Service Commission & Anor*[25]. The rules of procedure are meant to be followed both by the court and by litigants. See *Makaruse* v *Hide & Skins Collectors Private Limited*[26].

In order to guard against potential injustices that could arise from slavish adherence to the rules, the legislature saw fit to allow the court a measure of discretion to depart from its own rules in the interests of justice. Rule 4C provides that;

> ***"4C. Departures from rules and directions as to procedure***
> The court or a judge may, in relation to any particular case before it or him, as the case may be—
> (*a*) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice".

It is common cause that the respondents were out of time by twenty days. They ought to have applied for leave to appeal within 12 days of the date of the handing down of judgment, and set out special circumstances why their application should be allowed. The court found that it was in the interests of justice to condone this failure to comply with the rules, because of the importance of the matter to both parties, the substantial amount of cash involved, the involvement of foreign investors who parted with their hard earned money, this country's economic prospects as a future investment destination, and the interest in finality to litigation. It would not have served the interests of justice to refuse condonation, and to non suit- the respondents, who would have approached the Supreme Court for leave and caused further protracted litigation in a matter that has taken up a lot of court hours already.

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[24] 1988 (1) ZLR 53 (SC)
[25] 1989 (3) ZLR 147(S)
[26] 1996 (2) ZLR 60 (SC)

The court found that the respondents had good cause for their non compliance with r 266. This was a proper exercise of discretion on the part of the court. See *Forestry Commission v Moyo*[27], where it was held that non compliance with the rules can be condoned for good cause shown. The applicant's prospects of success on appeal are poor. The probabilities support a finding that the refusal to absolve the defendants at the close of the plaintiff's case is at law, more likely than not, to be correct.

For these reasons, the application for leave to appeal is allowed. Costs shall follow the cause.

Messrs Venturas & Samkange, applicant's legal practitioners
Messrs Hussein Ranchod & Co, respondents' legal practitioners

[27] 1997 (1) ZLR 254 (SC)