

STEPHEN CHITUKU  
and  
PATIENCE FADZAI CHITUKU  
and  
SOUTHEND CARGO AIRLINES (PVT) LTD  
versus  
INFRASTRUCTURE DEVELOPMENT BANK OF ZIMBABWE  
and  
STANDARD CHARTERED BANK OF ZIMBABWE  
and  
RESERVE BANK OF ZIMBABWE (N.O)  
and  
REGISTRAR OF DEEDS (N.O)

HIGH COURT OF ZIMBABWE  
MUZOFA J  
HARARE, 24 May & 12 August 2021

### **Opposed Matter**

*D. Sanhanga*, for the applicants  
*F.Mahere*, for the 1<sup>st</sup> respondent  
No appearance for the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> respondents

MUZOFA J: This is an application for condonation of late filing of heads of arguments.

#### Factual background

The applicants and the 1<sup>st</sup> respondent have been in and out of court from 1998 and its now about 22 years later the parties are still on the case. There must be finality to litigation. It is indeed an inconvenience for a party to be haunted by a case for such a long time. In the circumstances of this case the matter must have been put to rest as far back as 2004. The applicants seem unrelenting and continue to file applications with condescension.

On 26 November 2002 an order by consent was granted in favour of the 1<sup>st</sup> respondent in the sum of US\$590 470, 68 with interest and \$54 917, 68 with interest thereon ‘the order by consent’. In 2003 the applicants filed an application for the setting aside of the order by consent. The application was dismissed under HH123/04. Several court applications ensued between the parties. I shall not refer to them as they are not directly relevant in the determination of this matter. I shall refer to a few that are relevant. Subsequently the applicants

filed yet another application for the setting aside of the order by consent under HC 5408/18' the main matter' in terms of rule 449 (1) and (2) of the High Court Rules, 1971. Parties filed their pleadings. The applicants failed to file their heads of argument in terms of the rules. In the result they filed this application for condonation for late filing of the heads of argument.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents did not file opposing papers.

#### Preliminary issues

In its opposing affidavit, the 1<sup>st</sup> respondent took the point that the applicants cited a non-existent entity. The application is therefore a nullity, there is no 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent is not a private company but a statutory body. It is known as the Infrastructure Development Bank of Zimbabwe. In their answering affidavit and heads of argument the applicants conceded that the 1<sup>st</sup> respondent was not properly cited but explained it as a mis-description as opposed to citing a non-existing party. On the date of hearing of the matter *Ms Sanhanga* applied for an amendment so that the 1<sup>st</sup> respondent may be properly cited. She submitted that the amendment is not a substitution with another party but a correction of a mis-description. The application was opposed mainly on the point that since there is no 1<sup>st</sup> respondent in the first place, an amendment cannot be effected on nothing. A nullity cannot be amended.

It is the applicant's duty to make sure that it cites the correct party in its pleadings. There must be either a legal or natural person answering to that name<sup>1</sup>. By adding Private Limited to Infrastructure Development Bank of Zimbabwe the applicants altered the identity of the party in whose favour the order by consent was granted. There is no natural or legal person answering to the name cited as the 1<sup>st</sup> respondent in this matter. The description of the 1<sup>st</sup> respondent in the founding affidavit does not cure the defect. The fact is there is no entity answering to the name cited as the 1<sup>st</sup> respondent. If it was a mistake, it was a mistake made by the applicants and they must live with it. The substitution the applicants are seeking is not a matter of form, but a matter of substance. Such a substitution of a party cannot be achieved through an amendment. There is nothing to amend since there is no party in the first place. I agree with the 1<sup>st</sup> respondent. On that basis alone this application is doomed to fail.

The interests of justice and the public policy on finality to litigation demand that this is a matter that I must proceed to address on the merits. I shall proceed to determine all the issues raised by the parties. In the heads of argument, the applicants raise the issue that there is no

---

<sup>1</sup> *Gariya Safaris (Pvt) Ltd v van Wyk* 1996 (2) ZLR 246 (H), *Fadzai John v Delta Beverages Limited*

opposition since the person who deposed to the 1<sup>st</sup> respondent's affidavit has no personal knowledge of the issues raised. His evidence is predominantly hearsay evidence. The point has no merit. The 1<sup>st</sup> respondent's affidavit was deposed to by its principal credit control officer. He is employed by the 1<sup>st</sup> respondent. Obviously, his evidence is based on official documents prepared and kept in the course of employment.

Submissions on the merit

The applicants submitted that they could not file the heads of arguments in terms of the rules due to a breakdown in communication between them and their contact person. At the relevant time they were in Mozambique where they have business interests. The national lockdown due to the Covid 19 pandemic also contributed to the delay. They believe the delay is not inordinate and they have prospects of success in the main matter. From the 1<sup>st</sup> respondent's opposing affidavit, the heads of argument and the oral submissions, the point made is that there is no reasonable explanation for the delay, no prospects of success in the main matter specifically that the matter is *res judicata*, partial execution has been effected and in the interest of finality to litigation the application must be dismissed with costs on a higher scale.

The law

Both parties in their heads of argument referred to the main considerations in such an application. The considerations are now trite. These include the degree of non-compliance and the explanation thereof, the prospects of success in the main matter, the importance of the matter, respondent's interest in the finality of the matter, the convenience of the court and that the administration of justice is not unnecessarily delayed<sup>2</sup>.

No one factor is decisive, the factors are taken cumulatively. By applying for condonation, the applicant is asking the court to exercise its discretion on a consideration of the said factors. The granting of condonation being entirely in the discretion of the court, these factors merely guide the court to exercise its discretion in a manner that balances the interests of the applicant, the respondent, the court and the administration of justice.

The degree of non-compliance and explanation thereof

The applicants' explanation for the delay is that after their legal practitioners of choice renounced agency, their contact person could not get in touch with them promptly as they were working in Mozambique. When they were eventually advised of the service of the 1<sup>st</sup>

---

<sup>2</sup> *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (SC), *KM Auctions (Pvt) Ltd v Samuel & Anor* SC15/12

respondent's heads of argument, they instructed counsel to file heads of argument. The delay was also exacerbated by the national lockdown during which period the High Court's work was limited to urgent matters.

I find the explanation very porous and lacking in detail. It has no dates. For instance, the court is not told when the erstwhile legal practitioners renounced agency, neither is it told when the applicants' contact person was served with the 1<sup>st</sup> respondent's heads of argument and when the contact person eventually advised the applicants of such service. I perused the main matter and noted that the applicants' erstwhile legal practitioners renounced agency on 22 June 2018. Thereafter the applicants were self-actors, and their address of service was care of Citizens Legal Aid and Advisory Services. Toindeipi Mahaso from Citizens Legal Aid and Advisory Services filed a supporting affidavit confirming receipt of the 1<sup>st</sup> respondent's heads of argument and what he did thereafter. His affidavit is bereft of the relevant information. He does not state when he contacted the applicants neither does he advise the court when he forwarded the heads of argument to the applicants' legal practitioners of choice. The applicants refer to the national lockdown which affected the High Court work. They do not refer to the practice direction that specifically limited their access to the court. To simply refer to the national lockdown is not enough. It is common cause that during national lockdown, the office of the Chief Justice issued Practice Directions regulating the conduct of courts during the period. In the absence of reference to the relevant Practice Direction, the point taken for the applicants would not advance their cause. The applicants also indicated that they instructed counsel to file heads of argument yet by then they were already barred. They did not apply for condonation. There is no explanation why the application for condonation was not filed as soon as possible. There is no reasonable explanation for the delay.

Condonation for the non-observance of the rules is not just there for the asking. Where a litigant realises that he or she has fallen foul of the rules of court, an application for condonation must be made without delay. If the litigant does not make the application without delay, he or she should give an acceptable explanation, not only for the delay in filing the heads of argument, but also for the delay in seeking condonation. See *Viking Woodwork (Private) Limited v Blue Bells Enterprises (Private) Limited*<sup>3</sup>.

---

<sup>3</sup> 1998 (2) ZLR 249 (S) @ 251 C-D, Herbstein & Van Winsen's. *The Civil Practice of the Supreme Court of South Africa* 4 ed at pp 897-898:

The prospects of success

There is authority that where the explanation for non-compliance with the rules is not acceptable, the applicant must show very good prospects of success in the main matter. See *Mahachi v Barclays Bank of Zimbabwe*<sup>4</sup>.

I find no prospects of success in the main matter for the following reasons, I comment at the outset that the application is unclear which paragraph(s) the applicants rely on in their application. This is evident from the terminology used in the founding affidavit. At one point there is reference to a patent error, in another paragraph reference is made to a mistake common to the parties and lastly that the judgment was entered in the applicants' absence. In such an application it must clear which paragraph the applicant relies on since the issues for consideration are different. A convoluted approach such as this may point to an applicant who is trying all options just in case one of them rescues him. The application does not indicate that it was made in the alternative.

The order that the applicants seek to set aside was granted by consent in 2002. The application is made in terms of r449. Although the rule does not provide for the period within which the application must be made, it is accepted that it should be made within a reasonable time. What constitutes a reasonable period depends on the circumstances of each case. Where there has been a delay the applicant must explain why he or she could not approach the court as soon as possible. In this case the applicants filed the application in June 2018 some 16 years after the order by consent was entered and 14 years after the application for the setting aside of the consent order was dismissed. Either way the period is unreasonably long. In *Grantully (Pvt) Ltd and Another v UDC Ltd*<sup>5</sup> the court held that an application for rescission can be dismissed by reason of an inordinate lapse of time. Rule 449 is a procedural step meant to correct expeditiously an obviously wrong judgment or order. In this case the delay of sixteen years is inordinate the court may dismiss the application on that basis alone. The applicants must be taken to have accepted the judgment of the court. It is undesirable to reopen a matter after 16 years unless the interests of justice require so. It has not been shown that the interests of justice demand that this matter be revisited.

Some of the issues raised in the main matter are *res judicata*. The applicants filed an application to set aside the order by consent in 2003. The application was dismissed under

---

<sup>4</sup> SC 6/06.

<sup>5</sup> 2000(1) ZLR 361 (SC)

HH123/04. In the main matter on paragraph 15 of the founding affidavit the applicants aver that the judgment was entered in their absence in the sense that the lawyer who entered the consent order had no mandate, that there were patent errors of law committed by the court in granting the consent order for instance the payment in foreign currency. These issues were considered and disposed under HH123/04. In that case the court made a finding that the applicants were taken as not disputing liability. The court also made a finding that the liability was in foreign currency. The judgment was not appealed. The requirements of *res judicata* are satisfied the subject matter, the issues and the parties are the same. The submission made for the applicants that the cause of action in the main matter and HC2000/03(HH123/04) are different is just splitting hairs. As already demonstrated the issues for determination were the same regardless of what the application was termed.

There are indeed some issues raised in the main matter that were not raised before the court under HH123/04. Even for those the applicants must be barred from raising them in the interest of justice and finality to litigation. It is surprising that the applicants have approached the court again after the terse dictum by the court in HC 123/04 that,

‘In light of the above, I do not see any basis upon which the applicants can escape liability for the actions of their agent in settling the matter on their behalf and on their express instructions. In this regard, I am of the firm view that the principle that there must be finality to litigation must take precedence. The applicants have not made out a case why they should be allowed to fight the same battle twice. Simply because they may have come across a new weapon they did not deploy in the lost battle is not sufficient a ground upon to gain the indulgence they seek. In my view, for the applicants to be allowed to re-engage in the lost battle, they must show that their surrender on the battlefield was no surrender at all and not merely that it was an uninformed surrender. The courts would be inundated with reopened cases were litigants allowed to rethink their defences to cases where they would have consented to judgment.’

The applicants have approached the court once again with new and fresh thought-out defences. The court cannot allow such an approach to litigation. It seems the applicants have totally disregarded the warnings given to them in the pursuit of their case. I refer to another stern warning made but disregarded in *Southend Cargo Airlines (Pvt) Ltd v Chituku & Others*<sup>6</sup> where the applicants filed what it termed a chamber application for reinstatement of a lapsed appeal. The appeal court marked its displeasure and noted,

‘The applicants’ shoddy attempt to resurrect a dead case eleven years after the event is despicable and deserves censure. The need to have finality to litigation cannot be over emphasised. It appears that this application has been filed merely to delay the date of reckoning. I am unable, and loath, to render assistance in that regard.

---

<sup>6</sup> SC 42/16

The courts' displeasure with the growing tendency among some legal practitioners to handle applications of condonation of failure to comply with the rules with disdain was amply articulated by Ziyambi JA in *Apostolic Faith Mission in Zimbabwe and 2 Ors v Titus Innocent Murefu* SC 28/03....

It is needless to say that the applicants have dismally failed to discharge the onus of proving that there is any justifiable reason for excusing them from the natural consequences of their deliberate disdain of the rules of court 11 years after the event.

The respondent has been put to unnecessary expense long after the matter had been put to rest by the courts. The application appears to be a delaying tactic in a futile attempt to delay the course of justice. It is only fair that the respondent should recoup its costs at the highest scale. It is accordingly ordered that the application be and is hereby dismissed with costs on the attorney client scale.'

The applicants have literally failed at every turn to upset the order granted in 2002 but they continue to approach the court in a trial an error fashion. I associate myself with the sentiments of the court under HH124/04 a litigant must be barred from approaching the court on the same matter every time they come up with a new argument. The court is not surprised that the 1<sup>st</sup> respondent has made a counter application for an order of perpetual silence in the main matter. This court has inherent powers to regulate its processes and it can grant such an order. See *Fuyana v Moyo*<sup>7</sup> .

As properly submitted for the 1<sup>st</sup> respondent, the applicants have accepted the order for execution and the order has been partially executed. The order sought in the main matter is the setting aside of the order by consent and the reversal of the transfer of title from the 1<sup>st</sup> respondent. When the order by consent was granted, the 1<sup>st</sup> respondent subsequently issued a writ of execution. The applicants approached the court for the setting aside of the writ of execution on the basis that the order by consent had been fully paid under HC 906/09 judgment delivered under HH 225/10. The application was dismissed. The relevance of that case is that, in their founding affidavits the applicants indicated that they had fully discharged their obligations. The statement has two implications that must bar the applicants from reopening this case. Firstly, it shows that the applicants accepted the order by consent as binding on them. Secondly there has been partial execution of the order by consent. Once an order has been executed it is taken that the matter is put to rest. The applicants cannot therefore blow hot and cold. The applicants made their bed when they consented to the granting of the order by consent, they should lie on it no matter how hard it maybe.

---

<sup>7</sup> SC 24/06

### Other considerations

In considering the interests of justice, the administration of justice and the convenience of the court, the court would assess the implication of either granting or not granting the order. If the order is granted the court would be saddled with a matter that was determined some decades ago. The main matter would be unnecessarily clogging the system. The issues have been dealt with there is no need for it to remain as a pending matter. Secondly the need for finality to litigation cannot be overemphasised but it rears its head in this case. Granting the order is certainly would contradict and negate the public policy principle on finality to litigation. Litigants must have confidence in the system that once matters are finalised they are not re opened over and over again. It is about 16 years after the order by consent was granted. The 1<sup>st</sup> respondent has dealt and organised its affairs in tandem with the order. To reopen the matter would certainly result in untold inconveniences to the 1<sup>st</sup> respondent including some innocent third parties. Obviously, the 1<sup>st</sup> respondent has dealt with the property as it pleases as the owner of the property. In the final analysis the considerations point to the one result that the application cannot succeed.

The 1<sup>st</sup> respondent requested for costs on a legal practitioner client scale. I agree. The court must mark its displeasure in the way the applicants have conducted themselves in the main matter. They are *dominus litis* in the main matter. They defaulted in filing heads of argument until the 1<sup>st</sup> respondent filed its heads of argument and set down the matter. It is only then that the application for condonation for late filing of heads of argument was filed. Besides the unconvincing explanation given for the delay the main matter is devoid of any merit. The court can grant punitive costs where the litigant pursues a hopeless case. I intend to do so in this case.

Accordingly, the following order is made.

The application is dismissed with costs on a legal practitioner client scale.

*Chingeya-Mandizira Legal Practitioners*, applicants' legal practitioners  
*Gill Godlonton & Gerrans*, 1<sup>st</sup> respondent's legal practitioners