

REPORTABLE (16)

Judgment No. SC 19/06

Civil Application No. 34/06

MAKO PROPERTIES AND CONSTRUCTION (PRIVATE) LIMITED v

(1) JACOBUS ADRIAN BOTHA (2) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
HARARE, MAY 11 & JUNE 20, 2006

A Rubaya, for the applicant

Ms J Wood, for the first respondent

No appearance for the second respondent

Before: CHEDA JA, In Chambers, in terms of r 31 of the Supreme Court Rules

This is an application for condonation for the late noting of an appeal.

The first respondent was the registered owner of two stands, nos. 281 and 236, both of Prospect, Waterfalls, Harare. The two stands were transferred into the applicant's name on 2 and 3 December 2003 respectively.

Subsequent to that, the first respondent obtained an order from the High Court in which it was ordered that the transfers be reversed and the applicant was ordered to pay the costs on a legal practitioner and client scale. The applicant now wishes to appeal against this order, but is out of time.

In *De Kuszaba-Dabrowski et Uxor v Steel*, N.O. 1966 RLR 60, BEADLE CJ set out the broad principles to be taken into account in considering an application for condonation of the late noting of an appeal. Some of these are –

- a) the extent of the delay;

- b) the reasonableness of the explanation for the delay;
- c) whether the litigant himself is responsible for the delay;
- d) the prospects of success on appeal should the application be granted; and
- e) the possible prejudice to the respondent should the application be granted.

In this case, the judgment of the High Court was passed on 1 July 2005.

No action was taken by the applicant.

On 30 January 2006 the applicant received a letter from the first respondent's legal practitioners, indicating that they intended to apply for the cancellation of the transfers. This was seven months from the date of judgment.

In attempting to explain the reason for the delay, the applicant says it was agreed after judgment that the judgment was unfair, as it had the effect of enriching the first respondent.

No appeal was noted against the judgment. The applicant says the parties agreed that the *status quo ante* would be maintained. The applicant claims to have been surprised when the first respondent wanted to apply for cancellation of the transfers.

It is surprising that the applicant would have expected to retain the property against the judgment of the High Court. In any case, the first respondent's legal practitioners deny that there was ever such an agreement.

The applicant based its argument on a letter in which it was proposed that a meeting be held to discuss the matter. The meeting never took place.

It is clear that the applicant's explanation is not reasonable and is in fact false.

On the prospects of success, the Judge who dealt with the matter analysed the facts in detail before he decided on the matter.

The facts of this case are that the first respondent had lived with a woman for fifteen years, but they never got married. It was this woman who visited the first respondent with a Mr Marimba, and they fraudulently got him to sign a power of attorney. He was at an old people's home and sickly. The first respondent says he was told that it was documents for horticultural purposes that he was signing. Mr Marimba had no instructions at all from the first respondent, and even after disposing of the property he never accounted to the first respondent for the proceeds. Instead, part of the proceeds was used to purchase one property, which was then registered in the joint names

of the first respondent and the woman he was living with. The woman then became a joint owner of property with the first respondent, but without his knowledge or consent.

It was further established that the properties were transferred, despite the fact that the first respondent had since withdrawn his so-called mandate on the special power of attorney.

In the circumstances, the decision of the High Court cannot be faulted and there are therefore no prospects of success on appeal.

It is the first respondent who will be greatly prejudiced if this application were to succeed.

I am satisfied that the application for leave to appeal out of time is yet another attempt by the applicant to hold onto property which was fraudulently obtained from the first respondent.

The application is therefore dismissed with costs.

Mudambanuki & Associates, applicant's legal practitioners

Byron Venturas & Partners, first respondent's legal practitioners