

MAXWELL SIBANDA
v
T.S. TIMBER BUILDING SUPPLIES (PRIVATE) LIMITED

CHAMBER APPLICATION

L Madhuku, for the applicant

D. Halimani, for the respondent

HARARE, JULY 20 & JULY 23, 2015

ZIYAMBI JA:

[1] This is an application for condonation of the late noting of an appeal and an extension of time within which to appeal.

[2] The judgment was delivered by the High Court on 22 April 2015.

[3] This application was filed on 16 June 2015 more than one and a half months from the date of the judgment. The explanation given by the applicant for the failure to lodge its appeal on due date is as follows.

[4] On 22 April the judgment was delivered in motion court and the operative part read out. The applicant's legal practitioners Musimwa and Associates noted the judgment and advised the applicant of it. On 14 May 2015 the applicant's present legal practitioners Matsikidze And Mucheche received a copy of the judgment. They attempted to file a notice of appeal with the Registrar of the Supreme Court notwithstanding that the date *ex facie* the judgment was 22 April 2015. That notice of appeal was rejected by the Registrar. This led to the filing of the present application for condonation.

[5] The main thrust of the applicant's affidavit is that there was no judgment on 22 April 2015; that the correct date is the date when the written reasons were received (and I take that to mean 'uplifted') by the legal practitioners; that the Registrar wrongly rejected the notice of appeal; and that while he remained adamant in his stance that the order read in motion court was not the judgment, he was nevertheless filing this application on the assumption that condonation was necessary.

[6] As to the prospects of success he said:

“16. I believe that I have very good prospects of success on appeal. The grounds of appeal in my notice of appeal attached herein as Annexure 4 show the basis of my appeal.”

[7] The application was opposed by the respondent who submitted that the applicant was well aware of the date of the judgment since it appeared *ex facie* the judgment and that the applicant's attitude was not that of one seeking an indulgence since in his founding

affidavit as well as at the hearing he persisted in his allegation that the correct date was the date on which he received a copy of the judgment.

Further, the applicant had not shown that there were prospects of success on appeal. A bare and unsubstantiated averment that such prospects exist is insufficient.

[8] The applicant did not, in his affidavit, explain the delay after the upliftment of the judgment on 14 May 2015. It is common cause that 14 May 2015 was the last date for filing the notice of appeal in conformity with the Rules. No explanation is given as to why the application for condonation was not filed earlier. Even if the applicant's explanation that he genuinely thought the *dies induciae* was to expire on 4 June, 2015 was to be accepted, there still remains an unexplained gap between 4 June 2015 and 16 June 2015, when the application for condonation was filed.

[9] In my judgment, the delay has not been satisfactorily explained. A legal practitioner is expected to be acquainted with the Rules of the court in which he files pleadings or appears and displays negligence when he fails to acquaint himself with the Rules and the pronouncements of the superior courts on the issues of law which he intends to argue before the courts on behalf of his client. An erroneous assumption, that the date *ex facie* the judgment is not the judgment date, is not a satisfactory explanation.

[10] As already noted the applicant made no effort to establish that there are reasonable prospects of his appeal succeeding. Mr Madhuku who appeared for the applicant was only able to say that this is an issue upon which the Supreme Court must pronounce

itself. But this is not the test to be applied in an application of this nature. A court must take into account the cumulative effect of a number of factors including, but not restricted to,:

The length of the delay and the explanation given therefor;

The *bona fides* of the application;

The prospects of success;

The prejudice to the other litigating parties if the application is granted;

The need for finality in the proceedings.

The grant of condonation is not for the asking. The tone of the applicant's affidavit suggests that his legal practitioners hold the opposite view despite the many judgments on this subject which have emanated from this Court.

[11] The judgment sought to be appealed against is one delivered by the High Court. In that judgment the learned Judge declined to register an arbitral award on two bases, the first being that the award had been fully satisfied by the respondent in that the applicant, who sought to have the award registered, had been paid, in full, as far back as August 2012, the total amount agreed by the parties to be owing in consequence of the award. The second was that the award sought to be registered did not sound in money and was therefore not registrable.

[12] It was common cause that following the grant of the arbitral award, the parties through their legal practitioners agreed on an amount to be paid in settlement of the award. The respondent paid that amount, which was USD 39 295.75, in August 2012. Thereafter, the

applicant withdrew its application for registration of the award which application was premised on the agreed figure of USD 39 295.75.

[13] About 16 months later, the applicant, through its legal practitioners again sought registration of the award. Since the award was not sounding in money but was stated only as follows:

“5. Claimant’s proved losses are the interest due on the sums of money specified in the contract, from the time in (sic) which they become due until the date of payment, and I order that the respondent pay damages in those amounts”,

the applicant caused the interest to be calculated by Interest Research Bureau on 21 November 2013. The figure now claimed and presented to the court *a quo* for registration was USD 265 740.16.

[14] The respondent opposed the registration on the two grounds on which the application was dismissed by the court.

[15] In my view the applicant has not made out a case for the indulgence sought. Not only has there been no satisfactory explanation of the delay in noting the appeal or filing this application, but the conduct of the legal practitioners displays a casual disregard for the Rules of Court. When this is considered together with the applicant’s failure to establish any reasonable prospects of success on appeal and the cumulative effect of the factors set out above, it is evident that the application lacks merit.

[16] The application is dismissed with costs.

Matsikidze & Mucheche, applicant's legal practitioners

Wintertons, respondent's legal practitioners