REPORTABLE (65)

ADRIAN PAUL HOYLAND READ
v
(1) JOHN STEWART MATHEWS GARDINER (2) SAFARI HUNTERS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
HLATSHWAYO JA, PATEL JA & MAVANGIRA JA
HARARE, MAY 21 & SEPTEMBER 19, 2019

T. Zhuwarara, for the appellant

F. Mahere, for the respondent

PATEL JA: This is an appeal against the judgment of the High Court dismissing, with costs on a legal practitioner and client scale, an application for condonation of the failure to apply for the rescission of a default judgment granted in Case No. HC 2424/17 within the time stipulated by the High Court Rules 1971. The appellant had simultaneously filed an application for the rescission of the default judgment. However, this part of the application was abandoned following strenuous opposition by the respondents and with the concurrence of the court *a quo*.

Background

The respondents issued summons against the appellant on 21 March 2017, in Case No. HC 2424/17, for the payment of $98,979.00, together with interest, in respect of sums allegedly misappropriated by the appellant from the second respondent. The appellant disputed the claim and denied owing any monies as alleged.

A pre-trial conference was set down for 9 October 2017 and was postponed to 26 October 2017. The appellant failed to appear at the pre-trial conference because he was unaware that he was required to be present. His legal practitioner also did not appear himself but was represented by his colleague who was unable to explain the appellant's absence. A default judgement in favour of the respondents was entered against the appellant who consequently filed the dual application for condonation and rescission referred to above, through a different firm of legal practitioners.

As was noted by the court *a quo*, none of the appellant's erstwhile lawyers had filed any supporting affidavits explaining their conduct and the appellant's absence from the pre-trial conference. Furthermore, there was no supporting affidavit from the employee in that firm of lawyers who was said by the appellant to have called him belatedly on the day of the pre-trial conference. In his founding papers, the appellant lamented the "gross negligence" on the part of his erstwhile lawyers and the "great disservice" occasioned to him by their conduct.

Judgment Appealed Against

The court *a quo* found that, in view of the above evidentiary deficiencies, the appellant's averments remained unsubstantiated. In the court's view, this was a typical case where the dereliction of professional duty imputed by the appellant to his legal practitioners of choice should be held against him personally. The court observed that the pre-trial conference was postponed and that the appellant must have been aware of the postponement. There was therefore no reason why he did not attend the pre-trial conference since any diligent litigant would attend unless excused from so doing. Additionally, the fact that the appellant had accepted the wrong legal advice from his lawyers in noting an appeal against the default judgement did not justify his subsequent attempt to follow the correct procedure because, if he were allowed to do so, there would be no finality to litigation.

As regards the appellant's prospects of success, the learned judge *a quo* found that the appellant had not shown that the intended application for rescission had any merit. This was due to the fact that his defence to the claim instituted by the respondents was not articulated in his application. As for costs, the learned judge took the view that the appellant had persisted with the application even though he knew that it had no merit. Consequently, the respondents had been unnecessarily put out of pocket for the costs of attendance by an advocate on two different days when the matter could have been argued in less than an hour. In the event, the application for condonation of the failure to timeously apply for rescission of the default judgment was dismissed with costs on a punitive scale.

Grounds of Appeal

The grounds of appeal in this matter, as grammatically corrected, are as follows:

1. The court *a quo* erred at law in finding that the appellant did not articulate his defence to the claim despite such defence being addressed in the application for condonation and the heads of argument. The failure to properly deal with prospects of success amounts to a failure to determine the matter according to law.
2. The court *a quo* erred in not making a cumulative assessment on whether all the requirements had been satisfied as required by law. A court is bound at law to consider and evaluate all the requirements in conjunction with each other and not to place too much emphasis on the requirements individually.
3. The court *a quo* grossly misdirected itself in extending the sins of the appellant's erstwhile legal practitioners to the appellant. The peculiar circumstances of the matter were that the appellant could not make an independent assessment or give a considered instruction on the remedies adopted and, therefore, non-compliance should not have been extended to him.
4. The court grossly erred at law in failing to find that the appellant had high prospects of success and in failing to exercise its discretion to grant condonation in the interests of justice.

Criteria for Condonation of Non-compliance

The factors to be considered in an application for the condonation of any failure to comply with the rules of court are well-established. They are amply expounded in several

decisions of this Court in which the salient criteria are identified. They include the following:

- The extent of the delay involved or non-compliance in question.
- The reasonableness of the explanation for the delay or non-compliance.
- The prospects of success should the application be granted.
- The possible prejudice to the other party.
- The need for finality in litigation.
- The importance of the case.
- The convenience of the court.
- The avoidance of unnecessary delays in the administration of justice.

See *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S); *Maheya* v *Independent African Church* SC 58/07; *Paul Gary Friendship* v *Cargo Carriers Limited & Anor* SC 1/13. As was observed in the latter case, the factors listed above are not exhaustive.

Whether Defence to Claim was Articulated

In its judgment, the court *a quo* found that "the applicant has not shown that the intended application for rescission has merits [because] the applicant's defence to the claim is not articulated in this application". Having regard to the contents of the applicant's founding affidavit *a quo*, the above finding is patently erroneous. In that affidavit, the appellant not only attacks the order sought to be rescinded but also categorically articulates his defence to the main claim, to wit, that the alleged payments of salary were not made by

the second respondent but by a different company run by the first respondent and that, therefore, the respondents had no cause of action against him. In their opposing papers, the respondents did not challenge the appellant's averments as to his defence. What this shows is that there was a dispute between the parties which required a determination on the merits. The court *a quo* did not find that the appellant's defence was spurious or unsustainable. It simply declared that there was no defence whatsoever.

It is relatively clear, therefore, that the court *a quo* failed to take into account the appellant's averments and consequently made findings that were entirely inconsistent with the affidavits filed by the parties. In this regard, it obviously erred and misdirected itself in the exercise of its discretion on the facts that were placed before it, by not dealing properly with the appellant's defence and his prospects of success.

Which Prospects of Success

An interesting point of law that arose in the course of submissions by counsel relates to the following question: which prospects of success must a court assess in considering an application for condonation of the failure to apply timeously for the rescission of a default judgment? Is it the prospects of success in the application for rescission or the prospects of success in the main matter in which the default judgment was granted? Ms *Mahere*, for the respondents, insists that it is the former only, while Mr *Zhuwarara*, for the appellant, contends that it is either the latter or both the former and the latter.

In this context, the cases relied upon by both counsel do not afford any definitive answer to the question raised. In *Maheya's* case (*supra*), the Court was seized with an application for the reinstatement of an appeal. Malaba JA (as he then was) held, at pp. 8-9, that the appellant could not escape the consequences of the lack of diligence on the part of her legal practitioners and that this, coupled with the absence of prospects of success on appeal, justified the dismissal of the application for reinstatement of the appeal. In *Chomurema & Anor* v *Telone* SC 86/14, the applicants sought leave to file a belated appeal against their dismissal from employment. Gwaunza JA (as she then was) noted, at p. 7, that there was nothing to prevent the Labour Court, in the interests of finality to litigation, from hearing a composite application for condonation of the late filing of an application for leave to appeal together with an application for leave to appeal to the Supreme Court. Finally, the case of *Hove* v *Zimphos Ltd & Ors* SC 08/18 concerned an application for condonation of the late noting of an application for the rescission of a default judgment. Ziyambi AJA, at pp. 4-5, found that the applicant had to establish that the intended application for rescission enjoyed prospects of success. The learned judge then proceeded to find that it had not been shown that there were prospects of success on appeal on the grounds of appeal raised or that there was any impropriety in the manner in which the Labour Court exercised its discretion to dismiss the application for condonation. For these combined reasons, the instant application for condonation was dismissed with costs.

As I have already intimated, these decisions, rendered in chamber applications, do not decisively answer the question posed. My tentative and *obiter* view is that it is the merits of the main matter and the prospects of success therein that the court is enjoined to

consider in an application for the condonation of the late noting of an application for the rescission of a default judgment. I take this view on the basis that it is necessary for the court seized with either application to grapple with the merits of the main matter in order to properly address the gravamen of the real dispute between the parties involved. Any other approach would tend to militate against the need for finality in litigation as well as the interests of justice. In any event, my view on this question is rendered somewhat superfluous by the fact that the court *a quo* did not address any prospects of success whatsoever in disposing of the application before it.

Whether Criteria for Condonation Properly Assessed

The appellant does not dispute that his erstwhile legal practitioners displayed a flagrant disregard for the rules in the manner in which they conducted themselves in the main matter. Nevertheless, he avers that he has a viable and *bona fide* defence to the respondents' claim in that matter. In this respect, Ms *Mahere* submits that condonation for non-compliance may be refused even if the applicant concerned has demonstrated good prospects of success. This submission is clearly correct as is illustrated by the case of *Kodzwa* v *Secretary for Health and Child Welfare & Anor* SC 50/99, at P. 4, where Sandura JA remarked:

> "Thus in the case of a flagrant breach of the rules, particularly where there is no acceptable explanation for it, the indulgence of condonation may be refused, whatever the merits of the appeal may be."

While this approach is unassailable, it does not, whether expressly or impliedly, discount the need to consider cumulatively all of the factors to be taken into account, and

to weigh them in a measured balancing exercise, before deciding whether or not condonation should be granted in any given case. See *Maheya's* case (*supra*), at p.5. This position is also aptly captured in *Chiweza & Anor* v *Mangwana & Ors* HH 186-17, *per* Dube J at p.4, as follows:

> "The court is required to consider the requirements for an application for condonation cumulatively and weigh them against each other. The application for condonation is not decided on one exclusive factor. The existence of strong prospects of success may compensate for any inadequate explanation given for the delay. Where the applicant proffers a good explanation for the delay this may serve to compensate for weak prospects of success in the main matter. Good prospects of success and a short delay, albeit with an unsatisfactory explanation, may lead to granting of the application. The court dealing with the application has a wide discretion which it must exercise judicially after considering all the circumstances of the case. The factors are not to be individually considered, but cumulatively considered with the strong making up for the weak. The court should endeavor [*sic*] to be fair to all the parties involved."

In the instant case, it is evident that the court *a quo* focused solely on the reasons for non-compliance, *i.e.* the gross lack of diligence on the part of the appellant's erstwhile legal practitioners and the vicarious attribution of their incompetence to the appellant himself. The court failed to assess all the other relevant aspects of the test for condonation. In particular, it totally failed to evaluate the appellant's prospects of success, whether in respect of the intended application for rescission or in respect of the main matter. The court only considered the reasonableness of the explanation proffered by the appellant for the delay in applying for rescission of the default judgment. Having found that the appellant's explanation was not reasonable, the court proceeded without further ado to dismiss his application for condonation. However, it was imperative for the court to have assessed all the other salient factors to be considered, in a cumulative fashion, and then to have weighed them against each other, before declining to grant the application before it.

In failing to do so, it proceeded upon the wrong principle and consequently gravely misdirected itself.

Disposition

Given my findings in respect of the first and second grounds of appeal in favour of the appellant, I do not deem it necessary to consider the merits of the third and fourth grounds which are essentially tangential to and dependent upon the first two grounds. A determination of those grounds is also rendered otiose in light of the amended relief sought by the appellant at the hearing of this appeal, *viz.* that the matter be remitted to the High Court, before a different judge, to deal with the matter *de novo*.

The decision of the court *a quo* was based on the exercise of its discretion on whether or not to grant the application for condonation. It is trite that an appellate court will not readily interfere with the exercise of discretion by a subordinate court. It should only do so, having regard to the oft-quoted test enunciated in *Barros & Anor* v *Chimponda* 1999 (1) ZLR 58 (S) at 62 – 63, *per* Gubbay CJ:

> "if the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration."

In casu, I have earlier adverted to the errors made by the learned judge *a quo* in the exercise of his discretion. Firstly, he mistakenly found that the appellant had not articulated his defence to the main claim and thereby failed to take into account the relevant considerations underlying the appellant's prospects of success. Secondly, he confined his

attention to the reasonableness or otherwise of the explanation advanced by the appellant for the delay in applying for rescission of the default judgment. By not having regard to all the salient factors to be considered in an application for condonation, in particular, the appellant's prospects of success in either the intended application for rescission or in the main matter, and by not balancing those factors against each other, the learned judge proceeded on the wrong principle and thereby incurably misdirected himself. Consequently, the foregoing errors and misdirections in the injudicious exercise of his discretion operated to vitiate his decision to dismiss the application for condonation before him. It follows that the decision cannot be allowed to stand and must be set aside.

As regards the relief to be granted *in casu*, the most appropriate remedy would be to remit the matter to the High Court to enable a different judge to address and determine the application for condonation on a proper basis. Furthermore, it also seems expedient, in order to expedite the finalisation of the matter, that the application for rescission be adjudicated at the same time as the application for condonation. In my view, there is nothing in principle to preclude the composite adjudication of the two applications together, especially as the considerations to be applied in the determination of both applications are virtually identical. As regards the costs of this appeal, there is no compelling reason why they should not follow the cause.

It is accordingly ordered that:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside.

3. The matter is remitted to the High Court, before a different judge:

   (a) to determine the application in Case No. HC 1067/18 for condonation of the late filing of the application for rescission of the default judgment granted in Case No. HC 2424/17 on 26 October 2017;

   (b) and thereafter, in the event that the aforesaid application for condonation is granted, to determine the aforesaid application for rescission of the default judgment.

HLATSHWAYO JA: I agree.

MAVANGIRA JA: I agree.

Gill Godlonton & Gerrans, appellant's legal practitioners

Atherstone & Cooke, respondent's legal practitioners