

REPORTABLE: (80)

(1) DOMBO CHIBANDA (2) PINGO WILBROAD
KANDORORO (3) JOHN KANDWE
v
CITY OF HARARE

**SUPREME COURT OF ZIMBABAWE
HLATSHWAYO JA
HARARE: 29 NOVEMBER 2019 & 29 JUNE 2021**

J. Mambara, for the applicants

T.L. Mapuranga with T.G. Chigudugudze, for the respondent

HLATSHWAYO JA: This is a chamber application for condonation for failing to note an appeal within the prescribed time limits and extension of time within which to note an appeal in terms of r 43 of the Supreme Court Rules, 2018 (the Rules). The applicants seek an order in the following terms:

1. The application for condonation for non-compliance with r 38 of the Supreme Court Rules, 2018 be and is hereby granted.
2. The application for extension of time within which to file and serve a notice of appeal in terms of the rules be and is hereby granted.
3. The notice of appeal shall be deemed to have been filed on the date of this order.
4. The costs shall be in the cause.

BACKGROUND

The applicants in this matter were employed by the respondent. In 2014, they received letters notifying them that they were being retired as they had reached the age of sixty years. At the time the first applicant was sixty-two years, the second applicant sixty-four years and the third applicant sixty-two years. The first applicant had been in the employ of the respondent for forty years, the second applicant for thirty-five years and the third applicant for twenty-one years. The letters advised them that they would receive their terminal benefits including three months' notice and a continued use of their designated company vehicles. The applicants challenged this retirement by making an application for a *declaratur* in the High Court (the court *a quo*).

They argued that s 11 (1) of the Local Authorities Employees Principal Pension Scheme, in terms of which they had been retired, did not apply to them as they had passed sixty years. They argued that since they had been in employment past the age of sixty they could only be retired at the age of sixty-five and that they now had a valid legitimate expectation to be retired at sixty-five since they had gone past the age of sixty without being retired. They further argued that the pension regulations provided for retirement at the ages of fifty-five, sixty and sixty-five and not in between those ages.

Furthermore, according to the applicants, their retirement was discriminatory since other employees who were in similar positions had been retrenched and not retired. In the circumstances the applicants prayed for a declaration to the effect that the purported retirement was a legal nullity and that the respondent was to be ordered to reinstate or retrench them.

DETERMINATION OF THE COURT A QUO

The court *a quo* noted that the major question for determination was whether or not the respondent's pension scheme applied to the applicants. The court found that the applicants' argument that the pension scheme did not apply to them was without merit. This was because the respondent's pension scheme was regular and the applicants, by joining the respondent, had accepted to be bound by its pension scheme and according to this scheme the normal retirement age was sixty years.

The court further found that the applicants' argument that the respondent was precluded from retiring them in between the segments of fifty-five years to sixty years and sixty to sixty-five years, lacked merit because nothing in s 11 of the respondent's pension scheme suggested that. According to the court *a quo* the applicants' legitimate expectation that they would not be retired before attaining the age of sixty-five years had no foundation because the pension scheme did not suggest that in any way.

The court held that in terms of the respondent's pension scheme, it was purely at the discretion of the employer for an employee to continue serving after his attainment of sixty years of age and as such there was nothing precluding the respondent from retiring the applicants. The applicants having gone past the normal age of retirement, the court *a quo* found that they were serving at the pleasure of the respondent and as such the respondent was entitled to dispense with their services at any time. The court *a quo* thus dismissed the application with an order of costs.

Aggrieved by that decision, the applicants noted an appeal with this Court on 6 October 2015 under case number SC 549/15. The applicants failed to pay costs for the preparation of the record and the appeal was deemed abandoned on 6 January 2016. On

19 March 2019 the applicants filed a chamber application for condonation of late filing of an application for reinstatement of the appeal and extension of time within which to pay costs for the preparation of the record. However, the application was later withdrawn on the basis that the nature of the relief sought was unascertainable and, subsequently, the application was removed from the roll on 28 May 2019. Again, a similar application was filed and subsequently withdrawn on 5 July 2019 on the basis that the notice of appeal appended to the application did not comply with r 43(3) as read together with r 37(1) of the Rules. The applicants then filed the present application for condonation for failing to note an appeal within the prescribed time limit and extension of time within which to note an appeal against the judgment of the court *a quo*.

APPLICANTS' SUBMISSIONS

The applicants' counsel, Mr *Mambara*, conceded that the delay was inordinate but, however, submitted that the explanation for that delay was reasonable. The applicants submitted that the reason for delay was due to the fact that they could not pay the requested costs for preparation of the record the first time they filed the appeal and as a result the appeal was deemed lapsed. The reason for the failure to pay the costs according to the applicants was because they could not afford to provide the same since the respondent had not paid their salaries which would have enabled them to pay the costs. It was the applicants' case that by the time they received money from the respondent, the appeal had already lapsed.

The applicants also attributed their failure to note the appeal on time to wrong advice from their erstwhile legal practitioner who notified them that since their appeal had been deemed abandoned this marked the end of their appeal. It was the applicants' case that being laymen they thought this meant there was no other way their matter could be heard by this

Court. They also averred that the case of *Nyamande & Anor v Zuva Petroleum (Pvt) Ltd & Anor* 2015 (2) ZLR 186 (S) discouraged them from prosecuting their appeal. The applicants thus submitted that, faced with the wrong legal advice and the *Zuva* judgment, they thought that they had no recourse whatsoever.

According to the applicants it was the success of their colleague's case, *Mubvumbi v City of Harare* SC 64/18 which prompted them to file an application for condonation for failing to note an appeal within the prescribed time limit and extension of time within which to note an appeal.

On the prospects of success, the applicants' counsel argued that their appeal had bright prospects of success because the *Mubvumbi* judgment, which was allegedly on all fours with the circumstances of their case, had been successful before this Court and as such they expected the same for their case. The applicants further submitted that the matter was important in that it related to administrative justice. They argued that, since they had served the respondent for a long time, their discharge with immediate effect amounted to arbitrary dismissal.

RESPONDENT'S SUBMISSIONS

The respondent's counsel submitted that even though the applicants had admitted that the delay was inordinate, they had omitted to disclose that the degree of non-compliance was extremely long - three years and nine months. The respondent further argued that the applicants' reasons for delay had no merit and their numerous applications were an abuse of court process. Mr *Mapuranga*, for the respondent, further noted that the applicants' averments that they did not have money to pay costs were false because they managed at the same time

to raise substantially higher fees to brief and pay counsel for legal opinions and, in any case, they had an option to proceed *in forma pauperis* but they did not, thus making their explanation unreasonable.

The respondent further argued that the applicants' case was distinguishable from the *Mubvumbi* case and the fact that the applicants took time to approach this Court, even after the *Mubvumbi* case, shows that they have no prospects of success. He further submitted that the applicants should have attached an affidavit from their legal practitioner showing that he had given them wrong advice and failure to do so weakened their reason for the delay in noting the appeal. Mr *Mapuranga* also argued that the applicants appeal was supposed to stand or fall on their grounds of appeal yet they had failed to motivate the grounds and demonstrate the prospects of success on appeal. As such it was the respondent's submission that the applicants had failed to show cause why they should be granted condonation and extension of time within which to note their appeal.

THE LAW

It is a trite principle of law that a party who fails to comply with the rules of this Court must apply for condonation and give adequate reasons for his or her failure to comply with the rules. Rule 38 (1) (a) states that:

- “(1) An appellant shall institute an appeal within the following times-
- (a) By filing and serving a notice of appeal in compliance with subrule (2) of r 37 within 15 days of the date of the judgment appeal against.”

Condonation is not simply granted by virtue of the mere fact that a party has sought it. This was emphasized by ZIYAMBI JA in *Zimslate Quartize (Pvt) Ltd & Ors v Central African Building Society* SC 34/17 as follows at p 7 of the cyclostyled judgment:

“An applicant, who has infringed the rules of the court before which he appears, must apply for condonation and in that application explain the reasons for the infraction. He must take the court into his confidence and give an honest account of his default in order to enable the court to arrive at a decision as to whether to grant the indulgence sought. An applicant who takes the attitude that indulgences, including that of condonation, are there for the asking does himself a disservice as he takes the risk of having his application dismissed.”

The factors to be considered by the court were outlined by BHUNU JA in *Mzite v Damafalls Investment (Pvt) Ltd & Anor* SC 21/18, where he expressed the following at p 2 of the cyclostyled judgment:

“The requirements for an application of this nature to succeed are well known as outlined in the case of *Kombayi v Berkout* 1988 (1) ZLR 53 (S). These are:

1. The extent of the delay;
2. The reasonableness of the explanation for the delay; and
3. The prospects of success on appeal.”

Condonation is thus an indulgence granted when the court is satisfied that there is “good and sufficient cause” for condoning the non-compliance with the rules. Good and sufficient cause is assessed by considering, cumulatively, the extent of the delay, the explanation for that delay and the strength of the applicants’ case on appeal, or the prospects of its success. See *Bonnyview Estates (Pvt) Ltd v Zimbabwe Platinum Mines (Pvt) Ltd & Anor* SC 58/18.

APPLICATION OF THE LAW TO THE FACTS

a) The extent of the delay and reasonableness of the explanation.

The applicants ought to have noted their appeal fifteen days after 24 September 2015, being the date the judgment appealed against was handed down. They were thus required to note their appeal by 16 October 2015. The applicants initially noted their appeal timeously on 6 October 2015 but the appeal was deemed abandoned after they failed to pay costs for the preparation of the record. From the time the appeal was deemed abandoned

to the time this application for condonation of failing to note an appeal within the prescribed time limits and extension of time within which to note an appeal was filed, a period of three and a half years had lapsed. Such a long delay is indeed inordinate, as correctly conceded. Three and a half years is too substantial a period for a litigant to do nothing.

As an explanation for the delay, the applicants contend that they failed to pay the requested costs for the preparation of the record of appeal because they were unable to secure the necessary funds. The reason proffered by the applicants for failure to make an application for reinstatement of their appeal after it had been deemed abandoned is because of the wrong advice which they purportedly received from their legal practitioner. The wrong advice of the applicants' erstwhile legal practitioners, which is pleaded by the applicants, cannot be accepted as a reasonable explanation. The applicants cannot blame their legal practitioners of choice for their misfortune.

In *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S) at 317E, SANDURA JA cited with approval STEYN CJ in *Saloojee and Another v Minister of Community Development* 1965 (2) SA 135(A) at 141 C-E wherein the court stated:

“I should point out however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation for laxity. In fact, this Court has been lately burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this Court was due to negligence on the part of the attorney. The attorney after all is the agent whom the litigant has chosen for himself, and there is little reason why, in regard to condonation for failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship.”

As such the applicants cannot seek to escape the consequences of their actions to timeously note their application for condonation by blaming their legal practitioner. It would have been prudent if the responsible legal practitioner had filed an affidavit admitting fault and explaining in some detail what happened, then this Court would be in a position to decide whether the applicants should not be visited with the sins of their legal practitioners. See *Diocesan Trustees for the Diocese of Harare v The Church of the Province of Central Africa* 2010 (1) ZLR 267 (S). The delay of three and a half years which the applicants took to make a proper application for condonation of late filing of an appeal is clearly inordinate and the reason offered by the applicants for such delay cannot be accepted as a reasonable explanation.

The applicants submitted that they were prompted to make the present application because of the success of the *Mubvumbi* case which they felt was on all fours with the circumstances of their case. Clearly this reasoning does not justify the granting of condonation because litigants cannot wait to be prompted by a favourable decision before they make their own applications.

When a party brings an unsavoury situation upon himself by taking a lackadaisical approach to litigation in which he is involved and showing utter disinterest for a long time, the arrival of the day of reckoning does not create a calamity in respect of which the court should drop everything in order to give him audience. Those are the consequences of being a sluggard and in the present case the court is unmoved as it does not ordinarily come to the rescue of the indolent. See *Ndebele v Ncube* 1992 (1) ZLR 288 (S). The reasons offered by the applicants for such delay are not sufficient to enable this Court to grant the applicants condonation and extension of time within which to note an appeal. The delay is clearly unjustified and cannot be the kind of delay occasioned by a party who has a serious intention to prosecute his appeal.

b) The prospects of success on appeal.

It is settled that where no acceptable explanation for non-compliance with the rules has been given, an applicant for condonation must at least show very good prospects of success. See *Mahachi v Barclays Bank of Zimbabwe* SC 6/06. The applicants are required to show that they have an arguable case on appeal as was noted by the court in *Essop v S* (2014) ZASCA 114, where the court stated the following at para 6:

“What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

It is settled law that the applicant’s case stands or falls on the founding affidavit. See *Austerlands (Pvt) Ltd v Trade and Investments Bank Ltd & Ors* 2006 (1) ZLR 372 (H). In their founding affidavits the applicants only alluded to but did not demonstrate any prospects of success on appeal. They just stated that their appeal has bright prospects of success because it is similar to the *Mubvumbi* case which was successful. That cannot possibly be a clear and sufficient articulation of prospects of success and clearly does not satisfy the requirements of the law. The applicants could not sit on their rights for years until a favourable appellate decision was handed down and then claim to be diligent in pursuing their rights so that they can take advantage of that favourable decision.

In any event, the grounds of appeal themselves are afflicted by such defects that they do not even meet the strict threshold fixed by the Rules for valid grounds of appeal. The grounds of appeal are not clear and concise as is required by r 4(1) of the Rules. It is trite at law that grounds of appeal must be clearly set out to enable the court and the respondent to be fully and

properly informed of the case which the appellant seeks to make out and which the respondent is to meet. Anything that falls short of that is improperly before the court. See *Econet Wireless (Pvt) Ltd v TrustCo Mobile (Proprietary) Ltd & Anor* SC 43/13.

It appears from the grounds of appeal that the applicants are aggrieved by the factual findings of the court *a quo*. It was stated in *Nzira v The State* SC 23/06 that an appeal court is very unlikely to go against factual findings of the trial court which had the opportunity to listen to and actually see the witnesses and observe their demeanour when giving evidence. The appeal court will only interfere where it is shown that there was a clear misdirection on the part of the trial court which has not been demonstrated in this case.

Considered cumulatively, the extent of the delay, the explanation for that delay and the strength of the applicant's case on appeal, it is clear that the Court cannot extend the indulgence of condonation in these circumstances and, therefore, this application cannot succeed. Costs in this case should follow the outcome, nothing having been sufficiently advanced to the contrary.

DISPOSITION

Accordingly, it is ordered that the application be and is hereby dismissed with costs.

J Mambara and Partners, applicant's legal practitioners

Chihambakwe, Mutizwa & Partners, respondent's legal practitioners