

LUCKMORE MUTAPIGO

Versus

**HAWKFLIGHT ENTERPRISES (PRIVATE) LIMITED
t/a HAWKFLIGHT CONSTRUCTION**

HIGH COURT OF ZIMBABWE
M DUBE J
BULAWAYO 1 NOVEMBER 2024 AND 25 JUNE 2025

Opposed Chamber Application for Condonation and Extension of Time.

S Mlambo, for the applicant
L. Nyamapfene, for the respondent

DUBE J: The applicant herein filed a chamber application seeking relief as follows:

1. The application for condonation for the late filing for rescission be and is hereby granted.
2. The application for extension of time within which to file an application for rescission of judgment be and is hereby granted.
3. The applicant should file his application for rescission of judgment within ten days of granting this order.
4. Costs to be in the cause”

BRIEF BACKGROUND

Sometime in 2011 the applicant entered into an agreement of sale by which he purchased from the respondent Stand Number 992 Emthunzini Township for the price of US\$20 880. After paying a deposit of \$5 313-00 he was supposed to make monthly payments in the sum of US\$145-00. He fell in arrears. On the 4th of July 2020, he received from the respondent a letter calling upon him to rectify the breach within 30 days as required by the Contractual Penalties Act [Chapter 8:04]. The letter was dated 25th June 2020 by which respondent demanded that applicant pay the sum of \$4 920-00 within 30 days of the letter

failing which the respondent would cancel the agreement. Payment was not received within the stipulated 30 days. On the 17th September 2020 the applicant was served with summons commencing action. He did not defend. Default judgment was granted against him on the 10th of December, 2020 under case number HC1463/20. On the 26th April, 2021, applicant became aware that respondent had obtained judgment against him. On the 8th of September, 2021, applicant filed an application for rescission of judgment under Case Number HC1218/21. The application was filed later than one month after applicant became aware of the judgment in violation of Rule 27 of the High Court Rules 2021. On the 1st June, 2023, the application for rescission of judgment was struck off the roll by this Honourable Court as the applicant had filed the application out of time without first seeking condonation hence the current application. The applicant admits that this application is out of time by 2 years and 1 month. He further admits that after his rescission application was struck out, he only acted after 30 days to bring forth this application.

ISSUES IN DISPUTE

The applicant contends that even though the extent of his delay is seemingly inordinate it was caused, on the one hand by his lack of legal expertise in computing his time of reckoning and lack of financial resources to instruct a legal practitioner on the other.

The respondent contends that the applicant has no regard for court rules and was only jolted into action by his eviction from the disputed premises. Despite such eviction, as a show of his disdain for courts he still forcefully took possession of the property after eviction leading to contempt of court proceedings. He ultimately had to be locked up to enforce the court order.

The Law on Condonation

Condonation is not a right obtainable on demand but is fundamentally an indulgence granted by the court. The court possesses a discretion to grant condonation, which must be exercised judicially. This means the discretion is not arbitrary but must be based on a consideration of all relevant facts and established legal principles. Condonation applications are not to be treated as mere formalities. As stated in *United Plant Hire (Pty) Ltd v Hills & Ors* 1976 (1) SA 717 (A), 'It is well settled that in considering applications for condonation, the court has discretion, to be exercised judicially, upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides'.

In exercising its discretion, the court is enjoined to look at several factors cumulatively, weighing them one against the other. No single factor is decisive on its own. These factors include:

a) Length of the Delay

The extent or duration of the delay is a primary consideration. An inordinate, extreme, or flagrant delay will generally weigh heavily against the applicant and will require a more compelling explanation and stronger prospects of success to overcome. This principle was articulated in *Kombayi v Berkout* 1988 (1) ZLR 53 (SC), which stated that

“If the tardiness of the applicant is extreme, condonation will be granted only on his showing good grounds for the success of his appeal”.

Similarly, *Mashave & Ors v Zupco & Anor* 2000 (1) ZLR 478 (SC) also emphasizes the length of the delay as a key factor.

b) Explanation for the Delay

The applicant must provide a full, reasonable, and acceptable explanation for *each* period of delay and non-compliance. This includes not only the delay in filing the rescission application but also the delay in seeking condonation for that late filing, and any subsequent delays in bringing the condonation application itself. The explanation must be honest and candid, taking the court into confidence.

c) Prospects of Success on the Merits of the Underlying Application

The applicant must demonstrate that the underlying application (in this case, the application for rescission of default judgment) has reasonable prospects of success. The onus is on the applicant to set forth facts upon which the prospects of success of their defence may be assessed. Good prospects of success can, in certain circumstances, compensate for a less satisfactory explanation for the delay.

d) Prejudice to the Respondent

The court must consider the possible prejudice that the respondent might suffer if condonation is granted, and conversely, the prejudice to the applicant if it is refused. Fairness to both sides is a key consideration.

e) Need for Finality in Litigation and Administration of Justice

The court strives for finality in litigation and the efficient administration of justice. Unnecessary delays and a disregard for court rules undermine these principles.

Application of the Law to the Facts

As mentioned above, it is trite that the above principles are not assessed individually. One factor is weighed against the others and the courts at the end consider the cumulative effect of the principles set above in relation to the application. More importantly, the question of fairness to both parties is at the core of the application for condonation and extension of time. I shall now assess these factors as follows:

a. Length of the delay

As agreed by all parties a delay of over two years is inordinate. It was however argued for the applicant that; in *casu*, the extent of the delay is slightly above two years and admittedly, the delay is inordinate. However, this is not the end of the matter as this factor is considered in relation to other factors. It is submitted that even in cases where there is a delay, condonation may still be granted if the court thinks that there are good prospects of success in the matter. This proposition was said by Korsah J in *Kombayi v Barkout* (supra).

Counsel for the applicant submitted that the applicant has very good prospects of success as shall be explained later, it is further submitted that delay on its own is not the end of the matter as such delay can be complemented by prospects of success and where the prospects of success are weak, that defect can be cured by a satisfactory explanation for the default. This position was aptly explained by Molahleli AJ in *Academic and Professional Staff Association vs Pretorius SC NO and Ors* JR 1552/06 when he said;

“A good explanation for lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success compensate the inadequate explanation and long delay”

b. Prospects of Success

Section 8(1) of the Contractual Penalties Act [*Chapter 8:04*] reads as follows:

“No seller under an instalment sale of land may, on account of any breach of contract by the purchaser—

(a) enforce a penalty stipulation or a provision for the accelerated payment of the purchase price; or

(b) terminate the contract; or

(c) institute any proceedings for damages;

unless he has given notice in terms of subsection (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued, as the case may be.”

This section is highly specific in its application, pertaining exclusively to **instalment sales of land**. Subsection 1 outlines significant restrictions on a seller’s ability to act when a purchaser breaches an instalment sale of land contract. A seller is expressly prohibited from taking certain actions unless specific conditions are met. These prohibited actions include:

1. Enforcing a penalty stipulation or a provision for the accelerated payment of the purchase price.
2. Terminating the contract.
3. Instituting any proceedings for damages.

These actions are prohibited unless the seller has first issued a valid notice in accordance with subsection (2) and the period specified in that notice has expired without the breach being remedied, rectified, or discontinued. This establishes the notice as an indispensable legal prerequisite for any subsequent enforcement action. Section 8(2) details the essential requirements for a valid notice. I will not go into detail on this provision as the applicant is not dispute that the notice given was legally effective.

The wording “unless he has given notice in terms of subsection (2) and the period of the notice has expired without the breach being remedied.....” is explicit, the act requires a single notice period for the purchaser to rectify the breach. There is no requirement for an additional, separate 30 day notice specifically for contract termination after the initial remedy period expires as submitted by Mr Mlambo. The seller's right to terminate the contract, enforce penalties, or institute damages proceedings becomes actionable *immediately* upon the expiry of the initial, compliant notice period if the breach remains unremedied. The initial notice serves as both a demand to remedy and a pre-condition for subsequent enforcement actions, including termination.

I am of the opinion that in the present matter the extent of the delay is inordinate. The explanation given is improbable. Applicant himself has shown a deliberate disregard of the Rules of this court until he had to be locked up. There is surely a need to reach finality in litigation. The applicant’s glimmer of hope were the prospects of success. That hung tenaciously on the interpretation of the Contractual Penalties Act as discussed above. I find the interpretation of such law not to favour his argument and it accordingly fails.

In the premises the application lacks merit and is hereby dismissed with costs.

Majoko & Majoko, applicant’s legal practitioners
Masiye Moyo & Associates, respondent’s legal practitioners

