DISTRIBUTABLE (21)

RIOZIM LIMITED
v
NIGEL DIXON – WARREN N.O

SUPREME COURT OF ZIMBABWE
HARARE, 16 MARCH 2022 & 20 MARCH 2023

L. Uriri & D. Matau, for the applicant

F. Girach & S. Chikengezha, for the respondents

CHAMBER APPLICATION

CHATUKUTA JA: This is an application in terms of r 43 (1) of the Supreme Court Rules, 2018 (the Rules) for the condonation of non-compliance with r 38 (1) of the Rules and for extensionof time within which to appeal. The applicant seeks to appeal the judgment of the High Court handed down as judgment number HH 452/21.

FACTUAL BACKGROUND

The applicant is a company incorporated in accordance with the laws of Zimbabwe. The respondent is cited in his official capacity as the recognized liquidator of record in Zimbabwe of BCL Limited (In liquidation) a company incorporated in Botswana.

The applicant concluded withBCL Limited an agreement in terms of which BCL Limited was to supply the applicant with matte for use at the applicant's Empress Nickel Refinery. On 8 April2017, the applicant received from the respondent a letter of demand for US $ 30 495 342

for matteallegedly delivered to it and not paid for. Thereafter and on 3 December 2018 the respondent issued summons under Case No. HC 11505/18 claiming US $30 495 342. On 27 February 2019 the applicant demanded security *de restituendo* from the respondent. The parties failed to agree on the quantum of security for costs and approached the Registrar of the High Court for a determination thereof. The Registrar directed that the security for costs be in the form of security from a reputable insurance company in the sum of US$50 000.00.

The respondent furnished the applicant with a bond as security which he purported to bea bond issued by ZIMNAT. The bond was addressed to the Master and not the applicant. It had the same serial number, EAB 0005/18, as the bond issued to the Master of the High Court pursuant to the recognition of respondent as the provisional liquidator of BCL Limited. Further, the bond was not signed by the respondent or the Master.

On 18 September 2019, ZIMNAT wrote to the Master ofthe High Court withdrawing with immediate effect the bond EAB 0005/18. The Master wrote to the respondent compelling him to file a new bond as the withdrawal with immediate effect of Bond number EAB 0005/18 meant that therewas no bond of security. The respondent did not respond to the letters from the Master.

On 4 December 2019, the applicant applied for the dismissal of HC 11505/18 for want of prosecution. The application was dismissed on 4 March 2020 under judgment number HH192-20. The applicant failed to apply for leave to appeal within the time set out in the High Court Rules. It proceeded on 29 June 2020 to apply forcondonation for the late filing of its application for leave to appeal and for leave to appeal. The application was dismissedunder judgment number HH-452/21. The applicant then applied to the Supreme Court for leave. This Court held that the disposition in the court *a quo* in HH-452/21 related to condonation only and not to leave to appeal.

It consequently held that theapplication was improperly before the Court as leave to appeal was not determined by the High Court and hence the applicant ought to have appealed against the dismissal of the application for condonation. The decision of this Court prompted the filing of the present application.

APPLICANT'S SUBMISSIONS

The applicant took a point *in limine* that there is no valid opposition to the application as the opposing affidavit before the Court has been sworn to by a legal practitioner in the employ of Messrs Manokore Attorneys who:

i) does not have personal knowledge of the facts, cannot swear positively to those facts and verify the correctness of the facts; and

ii) is not authorized to depose to the opposing affidavit.

Mr *Uriri*, for the applicant, submitted that itis not the respondent that is litigating but a third party who does not have the respondent's authority. He further submitted that the respondent did not depose to any affidavit confirming that it is indeed him who is litigating. It was his argument that the respondent is therefore improperly before the court.

It was counsel's further argument that the opposing affidavit ought to be struck out and the application dealt with as unopposed.

On the merits of the case, counsel argues that a delay of just over three months reckoned from the 27 September 2021, being the date of the judgment sought to be appealed against, is not inordinate. As regards the reason for the delay, he submitted that the applicant's legal practitioners made a genuine procedural error when they applied for leave to appealto the Supreme

Court against the decision under judgment number HH 192-20 instead of appealingagainst the judgment in HH 452/21 leading to the striking off of its application. He submitted that as soon as the reasons for the striking off of the application were availed on 17 February 2022, the applicant filed the present application on 25 February 2022. It is his argument that a client ought not to suffer the consequences because of the recklessness of a legal practitioner. He further argues that the delay had therefore been adequately explained.

Mr *Uriri* contends that the applicant has prospects of success on appeal. He submitted that the court *a quo* failed to take into account that the delays in filing the application for leave had been occasioned by the complete lockdown of the country towards the end of March 2020 following the outbreak of the COVID 19 pandemic. He further submitted that the applicant took precautionary measures well beforethe lockdown by working from home. He further submitted that the applicant took precautionary measures well beforethe lockdown by working from home. Furthermore, that the matter before the Court is very important to the applicant as the matter involves a substantial claim of US$35 000 000.

RESPONDENT'S SUBMISSIONS

Mr *Girach*, for the respondent, submitted as follows with regards the preliminary points raised by the applicant. The contention that Manokore Attorneys did not have the authority to act on behalf of the respondent is wholly without substance. He submitted that all correspondence pertaining to the case which appears from the recordshows that the applicant has always dealt with the law firm. The applicant recognized the firm's involvement in the matter by serving the application on the firm and has done so from the inception of the matter.

He argues that the deponent to the opposing affidavit is qualified to swear positively

to the facts. He further argued that the deponent would be a competent *viva voce* witness as he has the conduct of this matter and has access to the company'srecords.

Counsel argues that there was a valid order of the High Court in terms of which respondent has been recognized as the provisional liquidator of BCL Limited and his recognition will continue notwithstanding his resignation.

On the merits, counsel submitted that the failure to pursue an appeal in good time was attributed to the applicant's legal practitioner and yet no supporting affidavit by that the allegedly errant legal practitioner was attached. It was submitted that the applicant cannot seek to blame unnamed lawyers for giving it erroneous advice.

He argues that the applicant has no prospects of success on appeal as it failed to act timeously once the legal practitioner realized that the rules had been breached and that no sufficient explanation had been given for the inordinate delay.

ISSUES FOR DETERMINATION

The following issues arise for determination:

1. Whether or not Manokore Attorneys had the authority to act for the respondent and whether the deponent to the opposing affidavit had the capacity todepose to the affidavit.
2. Whether the respondent is properly before the Court.
3. Whether or not the application before this Court should be granted.

APPLICATION OF THE LAW TO THE FACTS

The applicant raises a preliminary point to the effect that a legal practitioner may not depose to substantive matters in an affidavit on behalf of a client. It argues that the deponent was not employed in the firm of attorneys when the substantive matters that he relates to took place. It further argues that the key and critical aspects of the disputes took place before he joined the firm. Its contention is that this evidence will amount to hearsay evidence.

The respondent argues as follows: The deponent joined the law firm on 1 January 2021 and that the matter was heard before MANGOTA J on 11 March 2021 and 17 May 2021. He had enough time to understand the substantive facts that made up the case. He was therefore qualified to depose to the opposing affidavit.

It is without doubt that the deponent had access to all the files that had to do with the present case before he took over the matter. In the case of, *Antonio v Ashanti Goldfields Zimbabwe Ltd* 2009 (2) 372 (H) HH 135 2009 at 11, MAKARAU J, as she then was, made a finding that:

> "it is not every employee who can give evidence on behalf of a corporate body such as defendant which has a board of directors and an executive management. The employee who gives evidence on behalf of a corporate litigant must be suitably placed within the corporate governance structures to have knowledge of the facts to which they testify." [My emphasis]

In *Zimbabwe Corporation Ltd v Trust Finance Ltd & Anor* 2006 (2) ZLR 404 (H) a legal practitioner deposed to a founding affidavit on behalf of his client. He averred that hehad acted for the applicant in litigation, which had given rise to the application at hand. However, he omitted to state that he had been authorized to depose to the affidavit. In the opposing affidavit,the first respondent challenged his capacity and authority to depose to the founding affidavit. In the answering affidavit,the legal practitioner confirmed that he had been authorized by the applicant to depose to

the founding affidavit as well as to the answering affidavit in his capacity as the applicant's legal practitioner. MAVANGIRA J, as she then was, held that:

> "This same legal practitioner acted for the applicant in the proceedings which subsequently led to the taxation now sought to be reviewed and in which the issue of his authority was not an issue. I am satisfied that the deponent's averment in the founding affidavit is sufficient in the circumstances of this matter, to show his authority to depose thereto and therefore find that the deponent was duly authorised by the applicant as he states."(own emphasis)

On the authority of the above referred cases the deponent to the opposing affidavit was competent to depose to the opposing affidavit. The legal practitioner joined the firm on 1 January 2021 and the matter was heard on 11 March 2021 and 17 May 2021 therefore he had the conduct of this matter when the application was determined and has the capacity to depose to the opposing affidavit. It is also important to note that the deponent clearly stated in his opposing affidavit that:

> "I am duly authorized to depose to this affidavit. The averments contained herein are within my personal knowledge both true and correct. Where I do not have personal knowledge I have satisfied myself through diligent inquiry as to the veracity of such facts."(own emphasis)

Therefore, the preliminary objection is dismissed.

The applicant also argues that the respondent has no authority to depose to the opposingaffidavit as by so doing he is not acting on behalf of the respondent but rather on behalf of his successor who does not have *locus standi* in these proceedings. Its contention is that it is not the respondent that is litigating but a third party without the respondent's authority.

The point raised lacks merit. On 27 August 2019, the applicant received communication that the respondenthad resigned as liquidator. By letter dated 4 September 2019 the applicant and the respondent's legal practitioners of record, Manokore Attorneys, had agreed that in pursuance of the respondent having resigned as the Liquidator of BCL Limited the matter

would be held in abeyance until suchtime when a new liquidator for BCL Limited had been duly appointed. It is the applicant who cited the respondent as a party in spite of being aware that he had ceased to be the liquidator of BCL. It is absurd that after citing the respondent as a party, applicant raised a preliminary point that the party is not properly before the court. It would be even more absurd for the court to non-suit such a party. (See *Mudzengi & Others vHungwe &v Anor* 2001 (2) ZLR 179 (H) at 182 D-E).

Further, all communication by the applicant regarding this matter has been to Manokore Attorneys. It would be equally absurd for the applicant to dispute Manokore Attorneys' authority to represent the respondent.

On that basis, this preliminary point is dismissed.

WHETHER OR NOT THE APPLICATION BEFORE THIS COURT SHOULD BE GRANTED

It is trite that a party who fails to comply with the rules of this Court must applyfor condonation for the non-compliance and give adequate reasons for his or her failure to so comply. The law has been well traversed by this court. The requirements for an application of this nature to succeed are set out in *Kombayi* v *Berkhout* 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.

I will therefore proceed to deal with these factors hereunder:

Extent of delay and explanation for the delay,

The applicant intends to appeal against judgment number HH 452/21 which was passed on8 September 2021. In terms of the rules of court, the applicant ought to have applied for leave to appeal within 12 days of the date of the judgment which days lapsed on 29 September 2021. The applicant was almost four months out of time. The delay is inordinate contrary to the applicant's otherwise assertion.

The applicant argues that the delay was as a result of a genuine mistake by its legal practitioners. It further argues that the legal practitioner applied to this court for leave to appeal the decision under judgment number HH 452/21 instead of appealing against the dismissal of its application for condonation for the late noting of the application for leave. It contendsthat a client ought not to suffer the consequences of the recklessness of its legal practitioner.

The mistake of a legal practitioner cannot be a reasonable explanation and cannot be used as an excuse. (See *Saloojee & Anor NO* v *Minister of Community Development* 1965 (2) SA 135 (A). It was also held in *Dombo Chibanda & Ors* v *City of Harare* SC 83/21 that:

> "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."

Further, having blamed the legal practitioner for its failure to comply with the rules, the applicant failed to furnish this Court with a supporting affidavit of the legalpractitioners concerned. In this regard see *Diocese of Harare* v *The Church of the Province for Central Africa* SC-9-10. The applicant'sexplanation cannot therefore be adequate in the absence of a supporting affidavit from the legal practitioner who is blamed for the non-compliance with the rules.

This Court cannot therefore condone the omission of a legal practitioner on the basis

that the sins of the legal practitioner cannot be visited on the client. Therefore, the explanation for the delay is one that cannot be accepted by this Court.

PROSPECTS OF SUCCESS

The applicant argues that it has prospects of success on appeal. It further argues that the court*a quo* erred in its finding that the explanation it gave was unreasonable. In the court *a quo*, the applicant argued that the corona virus pandemic was the reason for late filing of its application for leave to appeal.

The judgment by DUBE- BANDA J which the applicant sought to appeal against was handed down on 4 March 2020. The first lockdown was imposed on 27 March 2020 as provided in the Public Health (COVID 19 Prevention, Containment and Treatment) (National Lockdown) Order, 2020 (SI 83 of 2020). The applicant ought to have filed the application for leave to appeal on or before 20 March 2020. This means that by the time lockdown was imposed, the applicant was already outof time in filing its application as 12 days had already lapsed from the date of the judgment.

In further explaining the delay, the applicant submitted *a quo* that whilst the country went into complete lockdown at theend of March 2020, the applicant as a matter of precaution, had taken self-preservation steps well before the lockdown by working from home. The import of that explanation is that the applicant had already chosen to disregard the rules of the Court even before the Chief Justice had issued a Practice Directive limiting access to the courts because of the COVID 19 pandemic.

The explanation given by the applicant in the court *a quo* cannot be said to be reasonable.

It appears that a court on appeal is not likely to find the court *a quo* to have erred in dismissing the application before it.

The applicant also argues that the present application ought to be granted as it is an important case as it involves US$35 000 000.If it was such an important case to it, the applicant ought to have proceeded diligently and in compliance with the rules.

In the result, this application has no merit and ought to fail.

DISPOSITION

It is accordingly ordered as follows:

"The application be and is hereby dismissed with costs."

Coghlan, Welsh & Guest, applicant's legal practitioners

Manokore Attorneys, respondent's legal practitioners