HB 68/20
HCA (COND) 13/18

BRIGHTON NDEBELE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 18 JUNE 2019 & 21 MAY 2020

Opposed Application

B. Dube for the applicant
K. Jaravaza for the respondent

TAKUVA J: The applicant, who was a man of the cloth at the time, was convicted of contravening section 67 (1) (a) of the Criminal Law Codification and Reform Act Chapter 9:23.

Brief allegations are that applicant with an indecent intent hugged and caressed Ntokozo Tachiona's back and buttocks against her consent. Complainant is a female married congregant. Applicant denied the allegations but was convicted on 5 October 2016 after a full trial and sentenced to perform 315 hours of community service. He duly performed community service and completed it. On 31st March 2017 applicant left for South Africa and only returned on 26 December 2017. On 18 March 2018, applicant filed this application for condonation of late filing of the appeal. The application is opposed by the respondent.

Applicant contended that he has shown that there are compelling circumstances which could justify a finding in his favour in that he has been candid and honest with the court. As regards the delay, his explanation is that he had "no legal fees" to pay his new lawyer to launch the appeal.

On the merits, applicant in his founding affidavit avers that he has bright prospects of success on appeal in that;

"4(a) …

(b) I was until the criminal case an accredited Pastor and Minister of Religion under the Seventh Day Adventist Church (SDA)

(c) Complainant Ntokozo Dube-Tachiona was a friend and one of the office bearers and parishioners at our church where I was head Pastor. She served as one of the Head Superintendents of the City Main Church Bulawayo.

(d) On 20 April 2016 at the complainant's office as the court record will show. I visited the complainant and when leaving we hugged, consensually I emphasised this.

(e) The complainant later took exception to the hug for reasons she knows and alleged that she felt "raped" and that was only two months down the line and later reported the matter to my employers and the police for my prosecution after a solid two months.

(f) I have since been fired or resigned from my work or discharged and not employed by the SDA, anymore to my financial and spiritual prejudice.

(g) Further, the complainant has proceeded to file a civil action or suit against me under case HC 977/17 and HC 2003/17 seeking damages in the sum of $250 000,00 cumulatively. …" (my emphasis)

According to the applicant, he has had time to reflect and has come to the conclusion that he was wrongly convicted.

The law

The approach to be adopted in considering applications of this nature was laid down by the Supreme Court in *Kodzwa* v *Secr for Health and Anor* 1999 (1) ZLR 313 (SC) the court stated that;

> "The factors which the court should consider in determining an application for condonation are clearly set out in Herbstein and Van Winsen's *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 4th Edition by Van Winsen, Gilliers and Loots at page 897 – 898 as follows;
>
> > "Condonation of the non-observance of the rules is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient cause to excuse him from compliance. …" The court's power to grant relief should not be exercised arbitrarily and upon the mere asking but with proper judicial discretion and upon sufficient and satisfactory grounds being shown by the applicant. In the determination whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and in essence it is a matter of fairness to both sides in which the court endeavours to reach a conclusion that will be in the best interests of justice.

> The factors normally weighed by the court in considering applications for condonation include the degree of non compliance, the explanation for it, the importance of the case, the prospects of success, the respondent's interest in the finality of this judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice." (my emphasis)

See also, *Kombayi* v *Berkout* 1998 (1) ZLR 53 (S) *Viking Woodwork (Pvt) Ltd* v *Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (SC); *Chimwanda* v *Zimuto & Anor* SC-361-05.

It is trite that a court has a discretion to grant condonation when the principles of justice and fair play so demand. However, the reasons for non compliance with the rules must first be explained by the applicant to the satisfaction of the court. Also, where a litigant does not seek condonation as soon as possible he should give an acceptable explanation for the delay in seeking condonation.

Application of the law to the facts

1. Degree of non-compliance

In terms of Rule 22 (1) of the Supreme Court (Magistrates Courts) Criminal Appeal (s) Rules, Statutory Instrument 504/1999, the applicant was supposed to note his appeal within ten (10 days of being sentenced. *In casu* applicant was sentenced on 5 October 2016 and left for South Africa on 31 March 2017 after performing 315 hours of community service. He returned to Zimbabwe on 26 December 2017 but only filed this application around February/March 2018. From the above, it is common cause that the extent of the delay is a period of at least sixteen (16) months.

In *Chidziva and Anor* v *ZISCO Steel Co.* Ltd 1997 (2) 368 (S) the court held that a delay of five (5) months was inordinate resulting in the dismissal of the application for condonation. In the present matter, applicant failed to comply with the rules over a period of sixteen (16) months. I find that the degree of non-compliance is very high and the delay to be inordinate and excessive in the circumstances.

2. Explanation for the delay in seeking condonation

The explanation for the delay is captured in paragraph 4.4 of the applicant's founding affidavit in which he states;

"4.4 After serving (sic) the sentence l left for South Africa on the 31st of March 2016 [2017] and came back on the 26th day of December 2017. I went out of the country to have time to unwind and reflect on the matter and what I wanted done to redeem my name and character and ensure that justice is done."

In paragraph 5 of the same affidavit he explains that this sudden interest was informed by the "now pending civil cases" filed by the complainant against him and his former employer (the SDA Church). In paragraph 6 he makes this point abundantly clear when he averred that;

"6. As indicated above I served community service and thought that my conscience as a man of God will be at peace and life will go on. But the matter refused to leave my conscience. The complainant also is keen to proceed not only against me but my former employer. I have consulted my new lawyers who advised me to appeal but I need an application or order granted to appeal out of time which is what I am doing. I wish I had gotten proper legal advise to appeal while doing community service which did not happen. Further I had no legal fees to instruct lawyers to launch the appeal until now …" (my emphasis)

This explanation is pregnant with contradictions. Applicant claims the reason for the delay was that he wanted to "reflect on the matter." Secondly he claims to have lacked "proper legal advice" from his erstwhile legal practitioners. Thirdly, he claims the delay was due to lack of resources i.e. "legal fees". Finally he attributed the delay to absence of a civil action against him and his erstwhile employer. He gives the impression that the filing of the civil suit cajoled or influenced him to appeal. Whichever way one looks at these reasons, the inescapable conclusion is that they are in their singular and collective effects unsatisfactory. What they simply show is that the applicant is not candid with the court.

As regards the 1st explanation, I fail to understand what was there to reflect on? The matter he faced was a simple one. He was legally represented throughout the lengthy trial by a senior counsel. He throughout the trial maintained his innocence until found guilty and sentenced. Applicant is not an unsophisticated villager. Surely, the most logical question to ask his lawyer would be whether or not to lodge an appeal more so in circumstances where he believed he had been wrongly convicted. It was not the legal practitioner's call but his. It would be unreasonable to believe that every day he woke up and proceeded to Hillside Police Station,

performed menial duties, returned home at the end of the day, it never dawned on him that he could appeal. In my view, the good ex pastor is being untruthful.

The second explanation is simply unreasonable in that it is trite that the sins of a legal practitioner may in appropriate circumstances visit the client. Therefore even assuming the legal practitioner was negligent, the applicant will be adversely affected by this negligence because he freely and voluntarily chose that lawyer amongst many. As I pointed out *supra* whether or not to appeal was not a decision that solely rested on the legal practitioner's opinion. Surely, one need not be a lawyer to appreciate the need for an appeal. In any event in Roman Dutch Law the client's liability for a legal practitioner's conduct is the same as if the client had performed the service himself – see *Machaya* v *Muyambi* SC-4-05.

As regards the third explanation, applicant has not provided relevant details. He has not for example indicated how much money was required. How he was going to raise it or how he eventually raised it. Even without this information, I take the view that it would be unreasonable to believe that it would take applicant more than 12 months to raise "legal fees" to enable a lawyer at least to file a notice and grounds of appeal.

The fourth explanation actually exposes applicant's deception in that it shows that applicant had accepted his fate but for the civil suit. Applicant has been too cavalier in his approach. The bottom line is that the reasons given by the applicant are totally unsatisfactory. As a result, I find that there has been a flagrant breach of the rules *in casu.*

3. Prospects of success

Applicant argues that he has good prospects of success on appeal against conviction and sentence. He so submits, based on his grounds of appeal filed of record. Unfortunately the grounds are simply a repetition of his defence in the court *a quo* except his wish or desire to lead fresh evidence on appeal. In paragraph 5.6 (c) of his founding affidavit he stated;

"(c) The complainant only produced excerpts of whats app messages we exchanged. Some messages which we shared show that we had a cordial

personal relationship and these were routinely deleted by the complainant leading to my conviction. (my emphasis)

The applicant is not confident with the evidence he led during the trial, hence this proposed supplement. It is surprising why applicant wants this area revisited when he had ample opportunity to deal with the evidence during the trial. The principles upon which an Appellate Court allows the adduction of further evidence were set out by the Supreme Court in *Bendezi Sugar Farm (Pvt) Ltd* v *Mhene Estates (Pvt) Ltd* 1995 (1) ZLR 135 (S) at p 142 as follows;

1. The evidence must not with reasonable diligence have been obtainable for use at the trial;
2. The evidence must be such as is presumably to be believed or is apparently credible;
3. The evidence must be such as would probably have an important influence on the result of the case, although it need not be decisive;
4. Conditions since the trial must not have so changed that the fresh evidence will prejudice the opposite party."

   See also *Warren-Codrington* v *Forsyth Trust (Pvt) Ltd* 20000 (2) 377 (S) at 380G – 381B.

In the present matter it is clear from the first requirement that the evidence sought to be adduced on appeal by the applicant was available at the time the issue in respect to which it would have been led was determined. For applicant to stand any chance, the evidence should not have been available with reasonable diligence.

In one of applicant's grounds of appeal he stated;

"6. The court *a quo* erred in dismissing applicant's appeal and request for a full disclosure of the text or whats app messages between the parties which will have exposed the nature of the relationship.

However, my reading of the record and the judgment does not reveal that this ever happened. The closest I came to something like this is the following exchange between the Prosecutor and the applicant on page 71;

> "Q - If I can refer to the chat with complainant you said I miss that hug, which has a double g.
> If indeed you had not indecently assaulted her why did you miss that hug?
> A As for this chat that is before the court, it is not the first time for us to talk. We have a background of that. We talk about church business, on social basis. It is not surprising when I say I miss that hug. We normally chat.
> Q If indeed there were other chats why did you not produce them for the court to see?
> A - They were not asked to be produced and after we chatted of this nature, we would tell each other to delete the chats. I was not going to produce anything not asked and she should have produced them."

From this exchange, applicant did not appeal or request for a full disclosure of the text messages. I could not find any order dismissing such a request. The puzzling question is what does the applicant say was the true nature of their relationship that would be exposed? Is he saying the two had a love relationship? If so why did he not just say so from the beginning? Would the chats show that complainant used to consent to being indecently assaulted by the applicant before this incident? The applicant from his own mouth says they used to chat about "church business on social basis …". If this is all that the chats would reveal, how do they become relevant to the question of consent? Applicant seems to insinuate that the relationship was more than that of Pastor/congregant. If that was the case why did he deny caressing her buttocks? Surely one would have expected him to say, I touched her buttocks with her consent arising from our special relationship.

The rest of the grounds relate to the alleged errors by the court *a quo* in finding the complainant to be a credible witness. The applicant complains about (i) the failure by the indecent complainant to make a timeous report to her husband, church authorities and the police, (ii) complainant's failure to scream on account of being asthmatic, (iii) the hug was not indecent, (iv) the dismissal of his defence.

In its analysis of the evidence the court *a quo* reasoned as follows;

> "Given the totality of evidence given or presented in court, it then remains for determination whether the State has managed to prove its case beyond any reasonable doubt. It is settled law that the trier of facts in a case of a sexual nature is enjoined to exercise proper care and diligence when presiding over sexual offence cases. There is a necessity to guard against the risk of false incrimination or concocted allegations on the part of the complainant.
> So, could the complainant have concocted allegations against the accused person and could there have been any reason to concoct such allegations. The court notes that this was not the first time accused person visited the complainant at her office on church, financial or business issues … From the evidence presented from complainant Mrs Tachiona and even accused himself, it is undisputed that there was no bad blood between accused and complainant. It was apparent that at times money would be borrowed from complainant to (*sic*) accused, they were in good books in as far as their relationship of parishioner, and congregant was concerned."

There is no motive which was shown that indeed complainant would have had the reason to lie against the accused person. As has been presented to the court, complainant is a mature woman of 35 years, who has 12 years experience in the legal field. She has a reputation to protect and business interests to protect. She stands to lose a lot by fabricating charges against the accused person. She is a woman who is post-fantasy stage and the court notes that it is highly improbable that she fabricated a story against accused whom she was in good terms with. See p4 – 5 of the court *a quo's* judgment.

In so far as the alleged delay to report, the court said;

> "… the court views that the time that she reported cannot be said to be unreasonable. This was the very day of the alleged attack and she volunteered to tell her close confidants after a crusade fully and voluntarily without any confusion."

As regards the failure to inform her husband immediately, the court said, "It is common cause that complainant's husband works and resides in Harare." It was established that the two are in a normal communication mode. The reason for not telling her husband was that this was an invasion of their matrimony and the husband would require more explanations and decided to do it face to face … I do not think such reasoning can be faulted. The offence of such a nature

has a huge bearing on her matrimony and complainant's decision cannot be faulted to the extent of suggesting that her version has been concocted …"

While dealing with the alleged late report to the police the court *a quo* said;

> "… the issue is not about reporting to the police but reporting to the people whom one is reasonably expected to report to within a reasonable time."

The court also dismissed the defence that the hug was consensual in the following terms;

> "… the independent evidence she was hoping for manifested itself when accused person chatted or talked with her via the social media. As can be noted from the conversation complainant did not say much, but accused person is the one who instigated the whats app conversation and goes at length to explain how he misses the hug. The conversation was not lengthy and what is striking is that the hug is referred to by complainant as "rape" … when asked to explain why she used that word she said she was hugged and caressed against her will as to the extent of thinking that she would be raped, and the accused tells her to have him arrested. Thus the court takes as evidence which corroborates that indeed the hug and what subsequently followed was against her will. Why else would complainant refer to it as "rape" if she had consented to it. Accused seeks to establish that it might have been a trap, but as a mature man he instigated the conversation and was not influence to write what he wrote at his own instance."

The court *a quo* believed the complainant and in my view on good ground. It is hard to believe how a Christian and probably a conservative married and professional woman can just come up with an allegation that her buttocks had been caressed by her pastor of two years? In my view, on the totality of the evidence, there is no conceivable reason why she would want to embarrass both herself and the pastor. It is even harder to believe applicant's contention that complainant lied against him in order to "save her marriage". This argument does not make sense in my view. Firstly, there was no other person in or around the office when the incident occurred. How would the complainant's husband have known about it? Secondly, it is the complainant herself who told her friends and husband about it. If she had consented at a time when she knew her marriage was on the rocks, why would she report to the husband?

All I can say is that applicant's defence is false and the court *a quo* was justified at law to reject it. In the circumstances, I find that the applicant's prospects of success on appeal are bleak

if not non-existent. The court *a quo's* finding on the narrow issue of whether or not complainant consented to the indecent assault cannot be assailed in my view. It is a principle of our law that there must be finality in litigation – see *Dewaras Farm* v *ZIMBANK* 1997 (2) ZLR 47. In my view, where a crime is one against the person, affecting the dignity or emotional stress of that person, it is desirable that there be finality to enable the victim to move on the recovery path.

In the final analysis, I take the view that this application is totally devoid of merit. Not only has the applicant inordinately delayed in filing this application but has also dismally failed to offer a reasonable and satisfactory explanation for his non-compliance. There are no prospects of success on appeal. Therefore no good cause has been shown to justify the granting of condonation.

Accordingly the application for condonation of late noting of an appeal is hereby dismissed.

Mabundu & Ndlovu Law Chambers, applicant's legal practitioners
Prosecutor General's Office, respondent's legal practitioners