RUSAPE TOWN COUNCIL
versus
STEPHEN RAZO
and
JAMES CHAGWIZA

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 19 May & 13 July 2022

Opposed Application

D Atukwa, with *O Chitowamombe* for the applicant
T Kapuya, for the respondents

CHILIMBE J

BACKGROUND

[1] Applicant wrongfully dismissed the two respondents ("respondents") from employment sometime in 2015. The respondents successfully contested the unlawful termination before an arbitrator. The arbitrator issued an award in favour of the respondents on 27 August 2017. Under that award, applicant was ordered, to pay respondents a total of USD$53 592.29. The respondents registered the award with this court which issued, unopposed, an order, per MUZOFA J under case number HC 6011/19 on 27 September 2019.Armed with this order, respondents executed in late December 2020.

[2] Execution triggered an application for stay of execution by applicant, in January 2021 under case number HC 770/20.This application was opposed by respondents. They in turn filed, almost a year later, an application HC 2783/21, seeking a dismissal of HC 770/20, (applicant`s prayer for stay of execution), for want of prosecution. This dismissal application HC 2783/21 progressed to hearing stage but applicant was caught out. It failed to file its heads of argument in terms of the rules of court and found itself barred. And so applicant filed the present application seeking condonation for the late filing of argument and upliftment of the bar.

[3] Applicant has now approached this court under the present proceedings seeking condonation for breach of rule 59 (21) of the High Court Rules SI 202/20. Its position is that it has never derelicted, that it in fact satisfied the amount sought on the arbitral award and that a refusal of clemency will cause it immense prejudice. Respondents opposed the prayer. Applicant had been persistent in its breach and dereliction of the rules, they argued. The respondents further averred that this lack of diligence had greatly prejudiced both of them. Since 2017, they have been denied the fruits of the arbitral award.

[4] For completeness, I list the several matters that have been variously filed between these parties and around this dispute:

i. HC 112/18-an attempt to register the arbitral award at Mutare High Court, likely abandoned,

ii. HC 6011/19 -successful registration of the arbitral award before MUZOFA J,

iii. HC 770/20 -application for stay of execution by applicant, still extant,

iv. HC 2783/21 -application for dismissal of application for stay of execution, also extant,

v. HC 55/22 -present application for condonation for non-filing of heads of argument in HC 2783/21.

[4] For further completeness, I set out the order off MUZOFA J which registered the arbitral award in HC 6011/19 on 27 August 2019:

1. Application for registration of arbitral award be and is hereby granted.
2. Respondent to pay the Applicants` a total of (USD$53 592.29) fifty-three thousand five Hundred and Ninety-Two Thousand United States Dollars and twenty-nine cents.
3. Respondent to pay the costs of suit.

BETWEEN THE ARBITRATOR`S AWARD AND ITS REGISTRATION

[5] A period of almost two years elapsed between the issuance of the award (27 September 2019), and its registration under HC 6011/19 (27 August 2019) per MUZOFA J. In between, applicant avers that it elected to settle the obligation. Engagements ensued from 1 March 2019, between applicant`s then lawyers, *Chiwanza and Partners* ("Chiwanza"), and according to applicant, the respondents` legal practitioners at the time, *Pundu and Company*

"Pundu". The engagements resulted in a series of payments to Pundu between 3 April and 26 July 2020, totalling ZWL$43 376.68.

[6] Three important things arise from this development. Firstly, the payments to Pundu were in "RTGS". Secondly the payments were, according to Pundu, rejected by the respondents. Thirdly, the respondents themselves disowned the negotiations and payments made to Pundu on behalf of applicant. They flatly refused that Pundu acted on their behalf and totally distanced themselves from Pundu. Thus the responds proceeded, after obtaining the order in HC 6011/19, to execute as noted above.

THE LAW ON CONDONATION

[7] Firstly, I will deal with the well-established principles governing the exercise of discretion in granting or refusing a prayer for condonation. In *Adrian Paul Hoyland Read* v *John Stewart Mathews Gardiner and Another SC 70-19,* ["*Read* v *Gardiner*"], PATEL JA, as he was then, examined the issue of condonation from several dimensions. (I will, in this judgment, land, refuel and take off regularly from the airfields of this authority. I thus commence with the court`s outline, in that case, of the matters to be taken into account in determining an application such the instant one). It was held as follows at pages 4-5:

> "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 t**he 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." [Bold and underlining for emphasis]

[8] Secondly, the authorities give guidance of how the above principles are to be treated, weighed and balanced. The Supreme Court in *Read* v *Gardiner and Another* (supra), cited with approval, the approach taken by DUBE J as then was, in *David Chiweza and Anor* v *Munyaradzi Paul Mangwana and 4 Others, HH 176-17* where the court held at page 4 that:

> "A party who has failed to comply with the requirements of the rules is required to apply for condonation as soon as he becomes aware of the non-compliance and without further delay. He has the onus to convince the court that he has a good excuse for the delay. Condonation is not there simply for the asking. The interests of justice are paramount in an application for condonation. Condonation will only be granted where it is in the interests of justice to do so, regard being had to all the pertinent factors. The applicant is required to give a full, detailed and reasonable explanation for the delay in bringing the application. The full period of the delay and the date when action was eventually taken should be spelt out in the application to assist the court in determining the degree of non – compliance. 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 to be fair to all the parties involved." [Emphasis added].

[9] Based on the above approach, the Supreme Court in *Read v Gardiner* made the following observation at page in disposing of the matter before it:-

> "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."

[10] Thirdly, *Read* v *Gardiner* resolved the question of how to approach "prospects of success" in multi-layered or duplicitous proceedings. The court itself first posed the question as follows:

> "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?"

[11] The court then considered the different approaches by the Supreme Court in recent decisions such as *Maheya* v *Independent African Church* SC 58/07; *Chomurema & Anor* v *Telone* SC 86/14 and *Hove* v *Zimphos Ltd & Ors SC 08/18,* before setting out the following guidance at page 8:

> "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." [Underlining mine].

APPLYING THE LAW TO THE FACTS

[12] I will deal with the checklist suggested in *Read* v *Gardiner*, but not *in seriatim*. With respect to the delay, I have no hesitation in accepting the respondents` position that the delay in filing heads of argument is inordinate. Ten (10) days grew into five (5) months before applicant made an attempt to file the said heads of argument. I again agree with respondents` contention that no reasonable explanation has been tendered by applicant to explain this delay. In *David Chiweza and Anor* v *Munyaradzi Paul Mangwana, (supra*), it was held that an applicant seeking the court`s leave for violation of the rules needs to fully furnish the timeline details to enable the court to evaluate the delay and cause thereof.

[13] Apart from the papers before me, I took the trouble to peruse HC 770/20 and HC 2783/21 being the related matters to this application. This of course being an option suggested by MCNALLY JA in *Mhungu* v *Mtindi, 1986 (2) ZLR 171 (SC),* (see also *Emily Letisia Runganga* v *Barbara Lunga (In Her Capacity as the Executor dative of the Estate*

Late Phineas Tiwandire) and 3 Ors HB 92-04; and Netone Cellular (Private) Limited and Anor v *Econet Wireless (Pvt) Ltd and Another SC 47-18*).

[14] These records confirm dereliction on the part of applicant`s attorneys. Neither the disruptive impact of the COVID 19 pandemic on court matters, nor the unfortunate passing away of applicant`s then legal practitioner exonerate applicant. I found applicant`s affidavits and counsel`s submissions on the issue of delay, with respect, muffled by imprecision, denial and defensiveness.

[15] The respondents urged me to dismiss the present applicant. They submitted that for the last five (5) years, they have laboured to obtain relief locked away in the arbitral award but to no avail. These are persons who were, after all, wrongfully dismissed by applicant. It was therefore argued on their behalf that the matter needed to be buried to finality. Clearly, the administration of justice is predicated on the speedy disposal of matters as an absolute prerequisite. Where a matter has been finally and definitively disposed of by a court, the parties must accept their fate respectively and move on. It becomes undesirable and quite improper for such parties or matters to continue haunting the corridors, registries, chambers and courtrooms- like buzzards soaring over on a desolate plain.

[16] In our jurisdiction, the policy of finality to litigation discourages such conduct. (See *Ndebele* v *Ncube 1992 (1) ZLR 288 (S); Marimo & Anor* v *Minister of Justice & Ors 2006 (2) ZLR 48 (S), Christopher Andrew Samkange and Anor* v *Vision /R4 Corporation and 2 Ors HH 139-17; Shonhayi Denhere and Anor* v *Attorney General CCZ 9-19; Terera* v *Lock and 3 Ors SC 73/21).*

[17] Lastly, I will focus on prospects of success. As stated in *Read* v *Gardiner*, it is necessary for a court to examine the prospects of applicant`s success in what I might describe as the parent dispute. This being case number HC 770/20 - the application for stay of execution. Applicant`s contention was that it satisfied the judgment debt. Payments were made to Pundu and on that basis, there was no reason why execution should proceed. In addition, the respondents` were claiming a total of UD$53 592.29. This claim, according to applicant, was not competent because (a) the payment was subject to statutory deductions and (b) was now payable in RTGS in terms of Finance Act Number 2 of 2019.

[18] The respondents dissociated themselves from any dealings with Pundu. First respondent stated as follows in his opposition affidavit in the present application:

> "6.1 The only legal Practitioners engaged by the Respondents were Baera and Company who drafted and prepared the order and warrant of execution. The applicants are hearing the name Pindu and Company Legal Practitioners for the first time in these proceedings. It is actually ironic that there is nowhere in any Court pleadings did the respondent cited (sic) Pindu and Company as their lawyers."

[19] I presume that reference to "Pindu" rather than "Pundu" is a misspelling. Applicants never referred to "Pindu" but to "Pundu". It is common cause that the dealings between applicant`s legal practitioners Chiwanza were with the Lawfirm Pundu. Nonetheless, the respondents` emphatic dissociation from anything to do with Pundu is rather puzzling. Pundu did represent, according to the records, applicants in an attempt to register the arbitral award at the High Court seat of Mutare under case number HC 112/18. This fact is borne in HC 770/20. I am not persuaded by this denial that there is absolutely no nexus between respondents and Pundu. It would appear that respondents were gravely piqued by Pundu`s acceptance of the settlement amounts in RTGS. Pundu however, communicated this position to applicant`s then legal practitioners Chiwanza on 12 October 2019.

[20] I would conclude that there is evidence of engagements between the two sides` respective legal practitioners over settlement of the matter. There is also evidence that a payment in RTGS was effected for and on behalf of respondents. These issues are raised by applicant who then argues that (a) that the judgment debt was settled and (b) that the respondents` claim in United States Dollars, becomes unsustainable. In the very least, these averments amount to triable issues. If these arguments find favour with a court, then the application under 770/20 could in fact succeed. On that basis, I would conclude that there are prospects of success in the main matter. I believe that this aspect should qualify applicant for the relief claimed.

[21] I do recognise (a) the prejudice occasioned to respondents who have been battling to close this matter for a lengthy five (5) years. First and second respondent were, as already noted, unfairly dismissed by an employer whom they had served for periods of 35 and 15 years respectively. I do recognise as well the possible misalignment of instruction which may have occurred during the negotiations to settle this matter with the involvement of Pundu. Again as stated earlier, applicant has not driven the litigation between the parties with the expected degree of urgency. I raise and mark these issues as a way of encouraging proper conduct of proceedings going forward.

[22] I also note that this matter is equally important to applicant despite the manner in which they approached its prosecution. Ambulances, earth-moving equipment and utility vehicles were seized in execution of a judgment debt. That cannot be a small matter for a public entity of the nature, purpose and function of applicant. I am satisfied that the justice of the case demands the granting of condonation to applicant, not as an act of mere kindness or accommodation to applicant, but in order to create an opportunity for fa conclusive resolution of the dispute. I am surprised though that applicant had the audacity to ask for costs on a higher scale. If there is anyone deserving of costs and such scale, then it would be the respondents. I will thus depart from the usual approach that costs follow a successful party.

DISPOSITION

It is accordingly ordered that:

1. The application for condonation of late filing of heads of argument and upliftment of bar in case number HC 2783/21 be and is hereby granted.
2. Applicant to file its heads of argument in case number HC 2783/21 within five (5) days from the date of this order.
3. Applicant be and is hereby ordered to pay costs of suit on an attorney-client scale.

Atukwa Attorneys, applicant's legal practitioners
Matsikidze Attorneys at Law, respondents' legal practitioners