EX-CONSTABLE GANI 987343Y
versus
THE COMMISSIONER GENERAL OF POLICE
and
THE POLICE SERVICE COMMISSION

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 16 May & 24 August 2022

Opposed Matter

N Magiya, for the applicant
Mr *C Chitekuteku*, for the respondent

MANGOTA J: I heard this application on 16 May 2022. I delivered an *ex tempore* judgment in which I granted the applicant's prayer as contained in her draft order.

On 23 May 2022 the respondent wrote requesting written reasons for my decision. My reasons are these:

The applicant who is an ex-constable in the Zimbabwe Republic Police was charged under para 35 of the Schedule to the Police Act and was convicted. She appealed to the first respondent who is the Police Commissioner-General. He dismissed her appeal but did not furnish her with reasons for the dismissal of her appeal. He convened a Suitability Board which recommended her discharge from the Police Service. She was so discharged as per the Board's recommendation.

Aggrieved by the decision of the first respondent, the applicant successfully moved the court to compel the respondent to furnish her with reasons for her discharge. She filed her application in November, 2018 and under HC 42/18.

In terms of the order which the court entered in her favour, the respondent was to furnish the applicant with reasons for his decision within fourteen (14) days which were reckoned from the date of the order. The respondent did nothing about the order which had been issued against him. The attitude of the respondent prompted the applicant to write urging the respondent to comply with the order of court. She wrote to him on 24 December 2018. He furnished his reasons to her on 14 February 2019.

On 20 May 2020 the applicant applied for a declaratur. She did so under HC 2450/2. Her application was heard on 6 July 2021. It was struck off the roll. It was so struck off because, in the view of the court, she should have reviewed the decision of the respondent as opposed to applying for a declaratur.

The applicant who received the respondent's reasons in February 2019 should have filed her application for review within eight (8) weeks of her receipt of the requested reasons. She did not file it within the requisite *dies*. The current is, therefore, an application for condonation of late filing of an application for review.

The position of the law is that, whenever a litigant realizes that he has flouted the rules of court, he must apply for condonation with little, if any, delay. If he does not do so, he is required to give an explanation not only for the delay in the filing of the application, but also for the delay in seeking condonation: *Jongwe* v *National Foods Ltd*, HB 147/18.

In laying down the above-mentioned guideline in respect of an application of the present nature, the court was merely re-emphasizing what Herbstein and van Winsen stated in *The Practice of the High Court of South Africa*, Volume 1, 5th edition, page 723 wherein the learned authors remarked as follows:

> "The court may, on good cause shown, condone any non-compliance with the rules. The circumstances or cause must be such that a valid and justifiable reason exists why compliance did not occur and why non-compliance can be condoned."

The Supreme Court enunciated the requirements which an applicant for condonation must establish in order for him to succeed. It stated in *National Social Security Authority* v *Chipunza* SC 116/14 that:

> "In considering an application for condonation of failure to comply with the rules of court….the court weighs, among others, the following factors:
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> i) The degree of non-compliance;
> ii) The explanation given for it;
> iii) The importance of the case;
> iv) The prospects of success;
> v) The respondent's interest in the finality of his judgment;
> vi) The convenience of the court- and
> vii) The avoidance of unnecessary delay in the administration of justice."

The above-stated requirements are not exhaustive. They, however, offer a good guide to a court which is seized with an application of the present nature. None of the seven requirements is, on its own, decisive. They are considered together and are, in fact, weighed one against the other

in an effort to do fairness and justice to the two parties whose case is before the court at any given time.

Condonation, the authorities state, is not there for the mere asking. It is extended only to deserving cases. Deserving cases because it is premised on the applicant's admission that he violated the rules of court. An applicant for condonation must, therefore, show his candidness, his honesty and his contrition for not complying with the court's rules. His explanation for the delay and his prospects of success in the main matter, therefore, become issues of paramount importance in the court's discretion to grant or refuse his application. Ranking third in the order of the requirements which have been stated in the foregoing paragraphs is the issue which relates to the importance of the case to the applicant *vis-à-vis* the respondent's interest in the finality of his judgment.

That this application is important to the applicant whom the respondent discharged from work requires little, if any, debate. The matter relates to her bread and butter set of circumstances, her livelihood and, therefore, her beinghood. The same is, no doubt, also important to the respondent who does not want dead wood to remain within his rank and file and continue to serve the people of this country when, in his view, they should not. The bottom line, therefore, is that fairness and justice must be allowed to prevail on both sides of the legal divide. That is only achieved when both parties are accorded the opportunity to be heard without any short-cuts being allowed to prevail in one case over the other.

In so far as the first requirement is concerned, the applicant, it is observed, received the respondent's reasons on or about 14 February 2019. She filed this application on 14 July 2021. She filed it, apparently, some two years and five months outside the *dies*. Her period of delay is, from a *prima facie* perspective, inordinate. It is for the observed reason that the respondent insists that the application should be dismissed. In insisting as he is doing, he places reliance on what the court was pleased to enunciate in *Kodzwa* v *Secretary for Health & Anor*, 1991 (2) ZLR 313 SC in which it remarked that:

> " Condonation of 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 for non-compliance. The court's power to grant relief should not be exercised arbitrarily and upon a mere asking but with proper judicial discretion and upon sufficient and satisfactory grounds being shown by the applicant."

The importance of the above-cited case authority to which the respondent drew my attention can hardly be over-emphasized. It beckons upon me and all those who are in my line of work to exercise our discretion in applications for condonation fairly all the time that an application of the present nature lands on our desks. It exhorts us not to just rubber-stamp the case of the applicant for condonation. It encourages us to always be circumspective and to keep at the back of our minds the simple and obvious fact that we are dealing with an applicant who not only violated the rules of court but who also admits his wrong-doing. It, in short, places upon us the duty to do fairness and justice to the applicant and the respondent who are before us.

It is in the context of *Kodzwa* v *Secretary for Health* (*supra*) that this application shall be considered. The applicant's statement is that, before she received the respondent's reasons for her discharge from the Police Service, she filed HC 42/18 to compel the respondent to furnish her with the reasons. She states further that, when the respondent appeared to have ignored the order of court, she, on 24 December 2018, wrote drawing the respondent's attention to the order which the court entered in her favour on 18 November, 2018.

The conduct of the applicant as she narrates her story in the foregoing paragraph does not show any material delay on her part. The conduct evinces the attitude of the person who has always been very eager to move her case forward. Her failure to do so lies at the doorstep of the respondent who did not furnish her with the reasons for his decision compelling her to approach the court which entered judgment in her favour which the respondent ignored without giving any reason for his failure to comply with the clear order of the court. The fact that he availed the reasons to her only after she had written to him speaks volumes of the respondent's attitude to court orders and their effect upon him. This is a *fortiori* the case given that the respondent took the oath of office in which he swore to obey the country's constitution and all the laws which flow from it, court orders included.

The applicant received the respondent's reasons on 14 February 2019. She applied for a declaratur on 20 May 2020. She did so under HC 2450/20. The court decided her application on 6 July 2021. It struck it off the roll. Its correct view was that she should have reviewed the decision of the respondent instead of applying for a declaratur. Her period of waiting for the court's determination of HC 2450/20 was, therefore, a stretch of some fourteen months running. That

delay is most certainly not of her own making. She had no choice but to await the decision of the court which she did.

The applicant's explanation regarding the eleven months which relate to 14 February 2019 to 20 May 2020 is very revealing. Judicial notice is taken of covid 19 which counsel for her made reference to during submissions. The disease was/is a reality which people lived the world over. It could not be wished away. Its effects adversely affected the operations of governments including the court throughout planet earth. It brought the entire world to a virtual stand-still position. It adversely affected commerce and industry in a very sustained manner. The applicant, it stands to reason, was no exception to the menacing character of the disease. She could not apply for condonation when the court had its doors closed to the public during part of the period which she should have filed her application.

The court struck HC 2450/20 off the roll on 6 July 2021. The applicant filed this condonation application on 14 July 2021. She filed it eight (8) days after the event. She cannot, under the stated set of circumstances, be said to have inordinately delayed to apply for condonation. She filed HC 2450/20 as soon as was reasonably possible. The fact that the application did not turn out to be what she should have filed cannot be held against her. The error was not her own but that of her legal practitioner, according to her sworn statement.

I stated, during the time that I delivered the *ex tempore* judgment, that no man is infallible. I stated that legal practitioners are, like any other person, not exempt from making mistakes. They do. I emphasize then and I emphasize now that, even judges are not infallible. If they were, there would have been no provision for such processes as appeals and/or reviews. The law of practice and procedure, it is evident, put those processes into place to take care of litigants who are not satisfied with decisions of the lower courts. They are, through those processes, enabled to test the correctness or otherwise of decisions of the court *a quo*.

It is from a consideration of the above matters that I remain satisfied that the degree of non-compliance with the rules of court by the applicant is not inordinate and that the explanation which she proffered for her non-observance of the court's rules is not without merit.

It is a fact that when the first respondent deals with appeals which are referred to him in terms of the Police Act, he assumes the role of a judicial officer. He, as is known, has the function of an administrative officer as well as that of the judicial officer both fused in one person. It is to

his former function that he has the capacity to delegate duties to junior members of the organization which he heads. He cannot delegate his judicial function to anyone. Where, as *in casu*, he heard the appeal of the applicant, the law enjoins him to give reasons for the decision which he makes. He cannot delegate that judicial duty to anyone who falls under his command. The role of hearing and determining appeals which are filed through the Police Act is specific to the first respondent and him alone.

It is, in fact, the duty of the judicial officer who hears a matter to give reasons for the decision which he makes. He cannot delegate that function to some other person. He, and no one else, knows why he took the decision which he made: *Makombe* v *Makombe & Anor* HH 120/86.

The first respondent, it is observed, did not furnish the applicant with reasons which relate to the latter's dismissal from work. One R.M Basera did. The reasons which R.M. Basera, who is an assistant commissioner in the first respondent's structure, gave to the applicant on 14 February 2019 are not those of the first respondent. They are for Mr Basera and are, to all intents and purposes, invalid. The long and short of the matter is that the first respondent is yet to furnish the applicant with reasons for his decision to discharge her from the Police Service.

The above-observed matter places the applicant's prospects of success in the main matter on a very high scale. In the absence of reasons, as is the case *in casu*, the review court will have difficulty in deciding whether or not the proceedings of the first respondent were in accordance with real and substantial justice. It is, in fact, an irregularity of a very serious magnitude for a judicial officer not to give reasons for the decision which he makes. The applicant is entitled to be informed of the respondent's decision. The information remains contained in his reasons. A failure to give reasons as occurred with the applicant's case has the effect of vitiating the first respondent's proceedings: *Botes & Anor* v *Nedbank Ltd,* 1983 3) SA 27 A-H.

The applicant should not be prejudiced by the respondent's care-free attitude to her case. Principles of fairness and justice demand that she be heard in respect of her application for review. She proffered satisfactory reasons for her non-compliance with the rules of court. Her prospects of success in the main matter are very high. The review of the first respondent's decision is of paramount importance to her.

The applicant proved her case on a preponderance of probabilities. The application is, in the result, granted **as prayed.**

Mugiya and Munhami, applicant's legal practitioners
Civil Division of the AGS Office, respondents' legal practitioners