

DISTRIBUTABLE (18)

UNKI MINES (PRIVATE) LIMITED
v
DOHNE CONSTRUCTION (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
HARARE: 26 JANUARY 2022 & 14 MARCH 2023

D. Tivadar, for the applicant

T. Mpofu, for the respondent

IN CHAMBERS

MUSAKWA JA: This is an opposed chamber application for condonation for non-compliance with the Supreme Court Rules, 2018 and for extension of time in which to appeal made in terms of r 43. The intended appeal is against a judgment of the High Court handed down on 17 February 2021 upholding the respondent's application for a compelling order. The applicant seeks an order in the following terms:

1. The application for condonation for non-compliance with rules and extension of time within which to appeal be and is hereby granted.

2. The Notice of Appeal filed of record be and is hereby deemed to have been filed as of the date of this order.

FACTUAL BACKGROUND

On 6 and 7 March 2013 the applicant and the respondent entered into an agreement whereby the respondent was contracted to construct housing units for the applicant. It was a term of the contract that in the event of a dispute arising between the parties, an adjudicator would be appointed to resolve the dispute and the adjudicator's decision would be final.

Two disputes arose between the parties. The first dispute was referred for adjudication and a determination was made. The applicant did not give notice of dissatisfaction with the adjudicator's decision, thus rendering the decision final and binding. Another dispute between the parties arose and this related to a termination certificate that was issued by the applicant and the matter was also referred for adjudication. The adjudicator ruled that the termination of the contract was improper as it arose out of the applicant's own wrongdoing. The adjudicator further ruled that the termination certificate was not issued promptly and in accordance with the terms of the contract. It is in respect of adjudicator's second decision that the respondent sought a compelling order against the applicant in the court *a quo*.

Before the court *a quo* the respondent contended that the decision by the adjudicator was binding on the parties unless and until it was revised by the tribunal and was enforceable as a matter of contractual obligation between the parties and not as an arbitral award. It thus argued that the respondent was entitled to the relief sought.

The applicant opposed the application arguing that there was no legal basis for the relief sought as the respondent was attempting to enforce the adjudicator's determination as if it was an arbitral award. It further argued that the matter was already before the courts thus the application was an abuse of court process. In addition, the applicant contended that the respondent's claim had prescribed.

It was the court *a quo*'s finding that the parties' relationship, rights, duties and obligations were governed by the contract which the parties had entered into. The court *a quo* ruled that since the adjudicator's decision was final and binding, until it was set aside by the tribunal the argument by the applicant that the matter was improperly before the court fell away. It ruled that a notice of dissatisfaction or referral to arbitration did not within the context of the contractual terms serve to suspend or stay the adjudicator's decision. On the issue of prescription, it was the court's finding that prescription only begins to run when a cause of action is complete and in this case it was not complete since the entire decision of the adjudicator had been referred to arbitration by the applicant. Consequently, the court *a quo* granted the application in favor of the respondent.

Irrked by the decision of the court *a quo*, the applicant appealed to this Court. The appeal was struck off the roll on the basis that the notice of appeal was defective as the grounds of appeal did not comply with the Supreme Court Rules. Accordingly, the applicant brings the present application to seek condonation and extension of time to file a fresh appeal.

At the commencement of the proceedings, counsel for the respondent had sought to argue some points in *limine* first. I directed that submissions be made both on the preliminary points as well as on the merits.

APPLICANT'S SUBMISSIONS

In respect of the preliminary issues raised, Mr *Tivadar* for the applicant argued that the date of the judgment *a quo* was indicated clearly in the notice of appeal. As regards the contents of the founding affidavit he submitted that there were no material falsehoods as contended by the respondent. He further contended that no evidence was advanced to prove the alleged falsehoods.

Regarding the issue of prospects of success, Mr *Tivadar* denied that the applicant did not address the prospects of success. He submitted that the prospects of success are canvassed in the heads of argument filed in the main appeal and referred to in the application.

RESPONDENT'S SUBMISSIONS

Mr *Mpofu* for the respondent submitted that the draft notice of appeal was defective in that the date of judgment is not specific. Counsel further submitted that the founding affidavit does not identify the parties yet the rules state that parties should be identified. He further submitted that there are material falsehoods made regarding the preparation of the founding affidavit.

Mr *Mpofu* also submitted that in an application for condonation, prospects of success ought to be addressed. He further argued that the applicant has failed to address the issue of prospects in the founding affidavit hence the application should fail on that basis. Additionally, he

submitted that an affidavit constitutes both pleadings and evidence. As such, if pleadings do not address the prospects of success, then there is no application before the court. Reference was made to the case of *Matsika v Chingwena* SC 144/21.

THE LAW

Applications for condonation and late filing of appeal and extension of time within which to appeal are regulated by Rule 61 of the Supreme Court Rules, 2018 which states that;

“Save where it is expressly or by necessary implication prohibited by the enactment concerned, a judge may, if special circumstances are shown by way of an application in writing, condone the late noting of the appeal and extend the time laid down, whether by rule 60 or by the enactment concerned, for instituting an appeal.”

It is a common principle of law which has been practiced over time that a party who fails to comply with the rules of this Court must apply for condonation and give adequate reasons for failure to comply with the rules. This was expressed in *Zimslate Quartzize (Pvt) Ltd & Ors v Central African Building Society*, SC 34/17 where the court held that;

“An applicant, who has infringed the rules of the court before which he appears, must apply for condonation and in that application explain the reasons for the infraction. He must take the court into his confidence and give an honest account of his default in order to enable the court to arrive at a decision as to whether to grant the indulgence sought. An applicant who takes the attitude that indulgences, including that of condonation, are there for the asking does himself a disservice as he takes the risk of having his application dismissed.” (my emphasis)

The factors to be considered in an application of this nature were outlined in *Mzite v Damafalls Investment (Pvt) Ltd & Anor* SC 21/18 where the court stated that;

“The requirements for the application of this nature to succeed are well known as outlined in the case of *Kombayi v Berkout* 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.”

ANALYSIS

Preliminary Issues

Concerning the preliminary issues raised, a reading of the draft notice of appeal shows that the applicant stated several dates. However, the relevant date when judgment was handed down is present in the draft notice of appeal. The argument regarding failure to identify the parties does not carry the day. This is because the parties are identified (albeit not in the sequence desired by the respondent). Regarding material falsehoods, the respondent claimed that Gugulethu Ndlovu did not prepare the founding affidavit. On the other hand, Gugulethu Ndlovu maintained that she is the one who prepared the founding affidavit before it was reviewed by Mr *Tivadar*. It is my view that these preliminary issues raised by the respondent are not dispositive of the application. They do not go to the root of an application of this nature. I will accordingly dispose this matter on the merits as opposed to the preliminary issues raised.

THE EXTENT OF THE DELAY

The judgment which the applicant intends to appeal against was handed down on 17 February 2021. The applicant should have filed a valid notice of appeal by 11 March 2021, but it filed a defective notice of appeal which resulted in the matter being struck off the roll on 10 September 2021. The applicant lodged this application for condonation and extension of time on 23 September 2021, some 9 days after the original appeal was struck off the roll. However, the applicant claims to have filed the present application 7 days after the original appeal was struck off the roll. The overall delay from the date judgment was handed down is six months which delay in my view is inordinate.

THE REASONABLENESS OF THE EXPLANATION FOR THE DELAY

The applicant did not explain why it failed to note an appeal timeously. It is only stated that the applicant's legal practitioner was consulted on the first day after the hearing of the appeal to get instructions. Counsel for the applicant avers that they then instructed an advocate to prepare a notice of appeal. In my view, this cannot be regarded as an explanation for the delay at all.

In the case of *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S) the court held 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 was sufficient cause to excuse him from non-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 shown by the applicant.” (my emphasis)

Based on the above authority, the applicant ought to have proffered a reasonable explanation for the delay. The mere asking for condonation does not suffice. There is no explanation given as to why the applicant did not file its appeal on time. As a result, the application for the delay is not satisfactory.

Although the delay is not inordinate, prospects of success have to be assessed.

WHETHER OR NOT THE APPEAL HAS GOOD PROSPECTS OF SUCCESS

It is clear from the record that the applicant did not canvass the prospects of success. Failure to canvass prospects of success in a founding affidavit is fatal to an application of this nature as correctly submitted by Mr *Mpofu*. It is trite law that an application stands or falls on the

averments made in the founding affidavit. According to *Herbstein & van Winsen* the Civil Practice of the Superior Courts in South Africa 3rd ed p. 80 the learned authors state as follows:

“The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavits will be struck out”

Prospects of success refer to the question of whether the applicant has an arguable case on appeal or whether the case cannot be categorised as hopeless. In the case of *Essop v S, [2016] ZASCA 114*, the court in defining prospects of success held that;

“What the test for reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.” (my emphasis)

In *casu*, the contention made by the respondent in relation to failure to address prospects of success in the founding affidavit has merit. The applicant ought to have explained in detail why it believes its intended appeal has prospects of success rather than merely stating so. The applicant has an obligation to satisfy the Court that once an application for condonation is granted, it has prospects of succeeding on the merits of the matter. These prospects need to be explained in depth in order to convince the Court to grant the application. The applicant failed to

advance a case upon which its prospects of success can be assessed. Instead, it only referred to the grounds of appeal.

DISPOSITION

In the final analysis, I hold that the delay in noting an appeal was inordinate and the explanation for the delay is inadequate. In addition, the applicant failed to properly canvass the prospects of success in its founding affidavit. The application cannot succeed. Costs will follow the event.

It is accordingly ordered that the application for condonation of late noting of appeal and extension of time within which to file an appeal be and is hereby dismissed with costs.

Gill, Godlonton & Gerans, applicant's legal practitioners.

Mawere Sibanda Commercial Lawyers, respondent's legal practitioners.