RAVIRO CHISVO
versus
MARKO CHISVO

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 10 February & 12 April 2023

Pre-Trial Matter – Application to amend Pleadings

Mr *M Simango*, for the applicant
Mr *P Tichaona*, for the respondent

MUCHAWA J: The applicant and the respondent are embroiled in divorce proceedings in which the respondent is the plaintiff, and the applicant is the defendant. On the 10 January 2023, the applicant delivered a notice of intention to amend its plea which was objected to by the respondent on the 19th of January 2023. The amendments sought to be effected are set out as follows:

> "A. By the addition of paragraph 6.3.1 to the defendant's plea, which will read as follows:
> 6.3.1. As a result of the aforesaid, it would be just and equitable that she be awarded total ownership of the immovable property known as stand number 810 Marlborough Township of Zizalisari Lot measuring 4 400 square metres held under deed of transfer number 6100/99 as she purchased the house with her sole contributions.
> B. By the addition of paragraph 9.1 and to the defendant's claim in reconvention which will read as follows:
> 9.1 Further, during the course of the marriage, the plaintiff acquired rights of ownership over farm 110/111 Chitowa 2, Murewa District, where the parties jointly built a five bedroomed, with a solar powered borehole installed. It is equitable that the farms be retained by the plaintiff as his sole property and the matrimonial house be given to the plaintiff (sic) as her sole property."

The parties appeared for a pre-trial conference before me on the 23 January 2023 and the applicant indicated that she intended to file a formal application for amendment of pleadings. I proceeded to postpone the holding of the pre-trial conference and gave the following directions, with the consent of the parties:

1. That the applicant would file her application for amendment of pleadings together with heads of argument by the 1st of February 2023.
2. That the respondent would file his opposing papers together with heads of argument by the 7th February 2023.

3. That the interlocutory application would be heard on the 10th of February at 9.30 a.m.

What then transpired is that the applicant only filed her application for leave to amend her plea in terms of r 41(4) of the High Court Rules, 2021 together with heads of argument, only on 2 February 2023. The respondent's opposing papers and accompanying heads of argument were then filed on the prescribed date, the 7th of February 2023. On 9 February 2023, the applicant filed an answering affidavit in which the late filing of the application was sought to be explained.

Instead of going directly into the application for amendment of pleadings, the parties first made submissions on the oral application for condonation of late filing of the application for amendment and then agreed that the application for amendment of pleadings can be decided on the papers filed of record if the condonation application succeeded. This is it my ruling below.

Application for Condonation of late filing of the Application for Amendment of Pleadings

Mr *Simango* submitted that he had instructions to seek condonation for the late filing of the application for amendment of pleadings. He explained that they had filed an answering affidavit to address the reasons for the late filing. It was averred that the papers had been filed out of time due to unforeseen circumstances as their client was not available to sign the papers till end of day when it was too late to access the Registrar's offices. Mr *Simango* advised that he had been in contact with the respondent's counsel in order to explain his predicament and to establish whether the application for condonation would be opposed as the papers had been filed only a few hours out of time.

The case of *Read* v *Gardner* SC 70/19 was referred to set out the factors to be considered in an application for condonation. The extent of the delay was said to be less than 8 hours. The explanation for the delay was said to be reasonable as the applicant's legal practitioner failed to get in touch with her on time as she was going about her day-to-day activities; vegetable vending. It was argued that there is no prejudice to be suffered by the respondent if the application for condonation is granted. The case was said to be important as this is a divorce case and people's lives are at stake and the court is less likely to take a harsh attitude.

Mr *Tichaona* submitted that the applicant is applying for condonation orally just because they have raised a point *in limine* and not because the applicant fully appreciates that she disobeyed an order given by consent. It was pointed out that an application for condonation

should be on notice in the prescribed form as the respondent was taken by surprise, having come to court not knowing that there will be an application for condonation. It was averred that there is no application for condonation before the court and the answering affidavit and heads of argument should be expunged from the record as it is strange to make an application for condonation through an answering affidavit. For this, reliance was placed on the case of *Cheney* v *Cheney* HH 78/18. It was observed that the applicant was not serious in prosecuting the application for amendment of pleadings as there had been an indication of such application being mounted since November 2022.

The court was urged to take note of the fact that there was no proper application for condonation and therefore no application for amendment of pleadings and to therefore strike off the purported applications.

The explanation for the delay was said to be unreasonable as it points to a failure to take the proceedings seriously. This was said to be reflected by the applicants' failure to address on prospects of success. On prejudice, the respondent was said to have been unnecessarily put out of pocket by the actions of the applicant.

Mr *Simango* explained that the answering affidavit is not an application for condonation but was necessitated by the need to respond to the points *in limine* raised by the respondent in its answering papers. It was argued that, if the matter were struck off the roll, it would just elongate the process between the parties. The costs claimed as suffered were said to be unwarranted as there was only a day's delay and the parties availed themselves on the date to which the matter was postponed.

It was only upon the prompting of the court that Mr *Simango* addressed the question of prospects of success. He said that the applicant has documentary and oral evidence of the transfer of the farm to the respondent which information she wishes to use later and attaching the information now would have prejudiced her. To this, Mr *Tichaona* countered that there are lots of lacunas in the applicant's case as she does not say when the farm was acquired, by whom and from whom.

In the case of *Cheney* v *Cheney (supra)* the facts were set out as follows:

> "At the beginning of the hearing respondents counsel asked for the expunging of the applicant's answering affidavit as it was filed late and after respondent's heads of argument had been filed. Upon hearing arguments on the point I granted the request as clearly applicant's answering affidavit had been filed unprocedurally and without seeking condonation for the late filing of the affidavit."

In casu, it was by consent that the parties agreed to file both the application for amendment of pleadings and the opposing papers simultaneously with the heads of argument. There was no agreement on the filing of an answering affidavit. In that regard, the answering affidavit having been filed after the respondent's heads of argument and not having been factored in, was filed unprocedurally without the leave of the court. I therefore proceed to expunge the answering affidavit from the record.

Even though I have expunged the answering affidavit from the record, the applicant was within her rights to make an oral application for condonation. See *GMB* v *Muchero* SC 59/07. Though the court was strictly dealing with an application for upliftment of bar, its comments apply squarely herein. They are as follows:

> "The practice in the High Court, so far as I am aware, is that only in very few instances have oral applications to uplift the bar been entertained by the Court. This is because in such a case the applicant must explain the reason for the delay, and thereafter convince the court that he has a *bona fide* defence on the merits. Most Judges of the High Court believe this cannot properly be done by oral application as the other party would not have been afforded the proper opportunity to prepare and possibly contest the application. In practice where such an application is made, the court will direct that a written application be filed. In that event the court will postpone any decision on the merits pending the determination of the application to uplift the bar. The court may also give a time limit within which any such application is to be made as well as order the payment of the wasted costs by the party seeking the postponement."

In casu, there appears to be no surprise on the part of the respondent. It is the respondent who raised the point *in limine* of the application having been filed out of time. Applicant's counsel made uncontroverted submissions that they communicated with the respondent's counsel after noting that they were out of time and explained their predicament and the cause for it and sought consent to the application for condonation. Mr *Tichaona* indicated that they advised that they would be opposed to any application for condonation. Though I have expunged the answering affidavit from the record, it was filed on the 9th of February, and it alerted the respondent's counsel about the oral application for condonation. This is therefore one of the exceptional cases in which an oral application will be allowed.

In *Kodzwa* v *Secretary for Health & Anor* 1999 (1) ZLR 313 (S) at 315 B-E, the court aptly indicated that:

> "The factors which the court should consider in determining an application for condonation are clearly set out in *Herbstein & van Winsen's The Civil Practice of the Supreme Court of South Africa 4 ed by van Winsen, Cilliers* and Loots at pp 897-898 as follows:
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> > '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 facts, and in essence, it is a matter of fairness to both sides in which the court will endeavour to reach a conclusion that will be in the best interests of justice. The factors usually 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 his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice."'

In this case the degree of non-compliance is a few hours delay. The explanation given for it being the failure to locate the client in time to sign and file sounds reasonable. This is an important case of divorce and concerns the division of the matrimonial assets of the parties. It is the applicant's position that there is some vital information missing in her pleadings which will assist the court arrive at a fair and equitable distribution of the assets between the parties.

Applicant did not make a case on the prospects of success. Counsel did not even address this aspect until the court's prompting. All that was then said was that if the applicant was heard, she has a lot of prospects of success as she has documentary evidence of the transfer of the farm and supplementary oral evidence and that it would have been prejudicial for her if she had produced the documentary evidence in her possession.

I pointed out that neither party had favoured me with the relevant title deeds for this property. This is so despite the respondent indicating in para 3 of his opposing affidavit that the deed of transfer is attached as annexure "A".

The above authorities show that the issue of prospects of success is key. It would be a waste of the court's time to grant condonation for a matter that is hopeless and would simply clog the justice delivery system. What a court should do where a party does not bother to adequately address prospects of success was covered in the case of *Ismail Moosa Lunat* v *Mohammed Zakariya Patel & Anor* SC 142/21 wherein Honourable MATHONSI JA said:

> "Regrettably, the applicant has not bothered to even set out what his prospects on appeal are. To begin with, an application stands or fails on its founding affidavit. I have demonstrated above that the founding affidavit does not outline prospects of success on appeal.
> The passages in the founding affidavit I have reproduced above do not even begin to show prospects of success. It is not enough for the applicant to refer to the grounds of appeal and expect the court to extrapolate what the prospects of success are. The founding affidavit presents the applicant with an opportunity to set out his case. I cannot piece it together for him. As stated in *Sibanda* v *T.S. Timbers Building Supplies (Pvt) Ltd* SC 50/15 a bare and unsubstantiated averment that prospects of success exist is not sufficient."

Mr *Simango* made a bare and unsubstantiated averment that the applicant has prospects of success. Whatever documentary evidence is alleged to be in the applicant's possession was withheld. It was not stated when the property was acquired, from whom and how it was held by the respondent. The respondent's strong averment that the property is deceased property from the applicant's father was not even addressed. The court was left askance regarding why the applicant wants to have the property included. All Mr *Simango* said was as follows:

> "Applicant believes that if she is heard, she will have a lot of chances of success. She has documentary evidence of transfer of the farm to Marko Chisvo. Prospects of success are very high."

It is not for me to extrapolate the prospects of success for the parties. There was no attempt at all to address the court on the law relating to amendments to pleadings such as r 41(1) and (10) of the High Court Rules, 2021 nor any related caselaw authorities. This means that the applicant has failed to show prospects of success in the application for amendment if the court was to condone the delay and proceed to hear the application. The applicant seems to have thought that condonation was hers for the mere asking. That is not so.

Disposition

1. The applicant having failed to show prospects of success in the application for amendment of pleadings, the application for condonation of late filing of the application for amendment of pleadings, be and is hereby dismissed with costs.
2. The Registrar is directed to set down the pre-trial conference for hearing at the earliest available date.

Mushoriwa Pasi Corporate Attorneys, applicant's legal practitioners
P Makora Commercial Law Chambers, respondent's legal practitioners