GABRIEL KABANDA
versus
PATIENCE NYASHA KABANDA
and
CLOETE MUNJOMA
and
SARAH MUNJOMA
and
SEEFF PROPERTIES
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE N.O.
and
THE REGISTRAR

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15 June 2023

Opposed Chamber Application

R G Zhuwarara, for the applicant
P Chimombe, for the 1st respondent
Z W Makwanya, for the 2nd respondent

CHITAPI J: In this application the applicant seeks the following relief as stated in the draft order to the application:

"**IT IS ORDERED THAT**:

1. The applicant be and is hereby granted condonation for non-compliance with rule 94 subrules (3) and (5) of the High Court Rules, 2021.

2. The applicant be and is hereby granted an extension of time within which to file and serve an application for leave to appeal against judgment No. 491/21.
3. The application for leave to appeal which is Annexure "E" to this application shall be deemed to have been filed on the date of this order.
4. There shall be no order as to costs."

The applicant and first respondent were husband and wife. They divorced by order of this court granted in case number HC 7833/13 on 2 February 2016. The two executed a consent paper which *inter-alia* governed the devolvement of an immovable property called Stand Number 159 Philadelphia Township of Philitia of Guomemadewood of Philadelphia which the two parties jointly owned. The two parties' agreement was that they would share the house on a 40% to the applicant and 60%0 to the first respondent. The consent paper was made an order of court together with the divorce decree itself.

The applicant subsequently sold the property to the second and third respondents herein through the agency of the fourth respondent. The fifth and sixth respondent are cited to comply with the law on the need to cite and serve all interested parties in an application. Consequent upon the sale of the property as aforesaid, the first respondent refused to act her part to have the property transferred to the second and third respondents. In the words of MANGOTA J in judgment number HH 421/21, the learned judge stated as follows at p 3 of the cyclostyled judgment in relation to the first respondent's:

> "Aa is often the case with contracts and sale, the issue of transfer of title on the property from Patience and Gabriel to the second and third respondents became topical. Her apparent intransigence made it difficult if not impossible for title to change heads."

It was on account of the perceived intransigence of the first respondent to derail transfer of the property that the applicant instituted a court application in case number HC 8650/18 claiming relief to have the first respondent play ball so that transfer of the property sold to the second and third respondents could be held to the lawful and extant. The applicant obtained a default judgment against the first respondent in case number HC 8650/18 aforesaid. Pursuant to the default judgment in case number HC 8650/18, the property in issue was transferred to the second and third respondents under deed of transfer number 7364/19.

The first respondent meantime filed case number HC 6/20 in which she sought the cancellation of a purported transfer of the property from deed of transfer number 7364/19 in the name of the second and third respondents and the restoration of the cancelled deed of transfer number 34/1998 in the name of the applicant and first respondent.

It suffices for me to record that the learned judge in judgment number HH 491/21 rescinded the default judgment in case number HC 8650/21 and with regards to case number

HC 6/20, the learned judge cancelled the deed of transfer of the property to the second and third respondents. The effect of the judgment was that it restored the *status quo* of the property ante its sale and reopened case number HC 8650/18 to contestation.

The applicant was not satisfied with the judgment of MANGOTA J. The judgment it must be observed is interlocutory in relation to the application for rescission of default judgment, case number HC 9129/19 and final in relation to the application for relation to case number HC 6/20 wherein the learned judge ordered the cancellation of the sale agreement between the first respondent, second and third respondents and resolved deed of transfer number 34/1998. In terms of procedure on appeal, the applicant would require leave of the court to appeal against the judgment of the court wherein rescission of default judgment and leave to defend is granted. because of the order is interlocutory and does not finalize the dispute before the court.

The judgment of MANGOTA J was delivered on 15 September 20212. In relation to time lines for appealing against the judgment, the appeal in case number HC 9129/19 would require that leave to appeal be first granted. The appeal in relation to case number HC 6/20 could be appealed as of right within fifteen (15) days from the date of judgment which would be 6 October 2021. The period of appeal is provided for in r 30(a) of Supreme Law rule. In relation to case number HC 9129/19, the applicant was required to make an application for leave to appeal.

Leave to appeal is applied for immediately after pronouncement of judgment and that is the ideal situation which however for practical purposes presents obvious challenges to the would be appellant particularly where the judgment was reserved and is handed down in motion court invariably by another judge who is seldom the presiding judge in the trial or application as the case may be. The mode of handing down judgment in motion court and indeed of any written judgment is by the presiding judge himself or herself by reading out the order and handing down the reasons or whole judgment which parties will upon payment of requisite charges uplift from the Registrar. Upon upliftment, it will become necessary for the parties to peruse and appreciate the reasons for the order. For all practical purposes, it is only upon acquainting with and appreciating the reasons for judgment that an informed decision whether to appeal the judgment or not is then made. The position is otherwise in criminal trials for example where the Judge reads through the whole judgment. Parties may in such instances be

reasonably expected to address the court in an application for leave upon the passing of sentence.

In my respectful view, the rule maker may not have immediately taken note of the practical difficulties which the conflation of procedures for applying for leave to appeal in relation to criminal and civil proceedings present. The net result of the conflation is that courts will invariably be inundated with subsequent post judgment applications being made. The making of an immediate application after pronouncement of judgement where judgment has been reserved and handed down subsequently is unlikely to be effectively applied. It can be of practical application where a ruling on the interlocutory application or such other application which requires leave to appeal to the first granted, is given with reasons in the course of a hearing.

However, where judgment on the interlocutory application is reserved and subsequently handed down by reading out the order and not the full reasons for judgment, then recourse must of necessity be had to the provisions of r 94(2) in terms of which the application may be in waiting within twelve (12) days of judgment. The applicant is then required to explain why an oral application was not made at the time judgment was handed down. The explanation is fairly obvious. It is respectfully suggested without directing the rule maker on what it considers appropriate in its wisdom and discretion that it would simplify the rule were it to provide squarely for matters where leave is required and reasons are not provided on handing down judgement that the application be made in writing within the twelve days without requiring that there be an explanation for not making oral application upon handing down judgement save where judgement is read out in full.

In casu apart from the fact that the judgement of MANGOTA J was from the record handed down in motion court on 15 September 2021, the applicant's legal practitioners confessed that they were ignorant of or did not appreciate the existence of r 94 and its application *mutatis mutandis* to both criminal and civil proceedings. The applicants filed an application for leave to appeal under case number HC 5346/21 on 7 October 2021. In the notice of opposition, the first respondent raised the issue of the out of time filing of the application which was filed outside the twelve-day window given in r 94(2) of the High Court

Rules. The twelve-day window had lapsed on 1 October 2021. The applicant's application was filed on 6 October 2021 without condonation having been sought and granted.

It is common cause that the applicant agreed with the first respondent that the applicant was time barred. The applicant filed a notice of withdrawal of the abortive application on 4 November 2023. The result of the withdrawal was that the parties were back to 15 September 2023 when the judgement of MANGOTA J was delivered. Upon withdrawing the abortive application on 4 November 2021, the applicant filed the application *in casu* on the following day on 5 November 2021 seeking condonation and extension of time to file the application seeking leave to appeal. The application was opposed by the first respondent only.

The law which is applied in determining an application for condonation and extension of time to comply with a rule(s) of court is agreed. The judgement of CHIGUMBA J in the case of *Shaoliang & Anor* v *Haixi & Anor* dealt with the law on condonation. By way of acknowledgement for assisting, the court acknowledges that the applicant's practitioners referred to this case in their heads of argument. The learned judge stated as follows:

> "Condonation as a legal concept put simply, is a consideration of whether the applicant ought to be excused for failure to comply with the rules. It is an exercise of discretion, a value judgement which must by necessity depend on the circumstances of each case. It has been said that:
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> > 'In considering applications for condonation the court has a discretion, to be exercisedjudicially upon a consideration of all the facts. In this enquiry, relevant considerations may include the degree of non-compliance with the rules. The explanation therefore, the prospects of success 1976 (1) SA 717 A at 720 F – G (case is *United Plant Hire (Pty) Ltd* v *Hills* – own insertion) avoidance of unnecessary delay in the administration of justice *(sic*). The list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other, thus a slight delay and good explanation may help compensate for the prospects of success which are not strong. See *United Plant Hire (Pty)* v *Ganda & Ors* 2009 (1) ZLR (5) 245 GE; *Maheya* v *Independent African Church* 2007 (2) ZLR 319 (S) at 323 B – C; *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S) at 260 D – E; *Bishi* v *Secretary of Education* 1989 (2) ZLR 240 (H) at 242E – 243C; *Chimponda & Anor* v *Muvami* 2007 (2) ZLR 326 H at 327F – 328E; *Georgias & Anor* v *Standard Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (SC); *Cordier* v *Cordier* 1984 (4) SA 524 (C) at 528I – 529B'."

Again, in the case of *Mashave & Ors* v *Zupco & Anor* 2000 (1) ZLR 478 (SC) at 486C-D quoted by the applicant's counsel in heads of argument, the Supreme Court noted that three factors had to be considered, being the length of delay, the explanation for the delay and prospects of success.

The length of delay in this matter must be computed from the date of judgment which was 15 September 2021. Leave to appeal should have been applied for on the day. The impracticality of complying with this requirement in circumstances where judgement was handed down in motion court have been interrogated. The applicant adverted to the need for the applicant's legal practitioners to acquaint with the reasons for judgement. The applicant also alluded to the fact that he could not raise legal fees and had outstanding invoice balances to pay. He further attached

E-mail correspondences between him and his legal practitioners in which the issue of outstanding fees and no further representation until the outstanding fees had been paid was subject of the

E-mails attached to the founding affidavit. The first respondent did not deny the e-mails.

The first respondent had a point *in limine* to the effect that the application was not properly before the court because it was time barred in the absence of condonation. In other words, the first respondents' argument was that there had to be an application for condonation to condone this late application for condonation of late filing of the application for leave to appeal. The first respondent relied on r 94(6) for her argument. To contextualize the applicant's argument, I quote r 94(5) and (6). They read as follows;

> "94(5) where an application has not been made within the period of twelve days, an application for condonation may be filed with the registrar and served forthwith on the Prosecutor General, together with an application for leave to appeal and whereupon the Prosecutor General may, within three days of the date of the said service file with the registrar submissions on both applications and the provisions of subrule (4) shall apply to both such applications and submissions of any
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> (b) No application in terms of subrule (5) may be made after the expiry of twenty-four days from the date on which sentence was passed unless the judge otherwise orders."

The simple interpretation of the rule in question as I have elsewhere dealt with some of the relevant provision is that, where an application is not made orally at the time judgment is delivered, then the application may be made within twelve days of the date. Failure to file the application within twelve (12) days, the applicant may apply for condonation and the

application for condonation should be accompanied by the application for leave to appeal. The judge then determines both applications.

Subrule (6) provides the cut off period for making application in terms of sub rule (5). The sub rule does not debar the applicant from approaching the court for relief. All that it does is to require that the application envisaged in sub rule (5) be subject to the applicant obtaining the nod of the judge to invoke the procedure in sub rule (5). The judge can only make an order otherwise or give the nod for a sub rule (5) application to be made after twenty-four days have lapsed from the date of judgment, if a chamber application is made to the judge for such go ahead. The application to be made can only be for condonation of failure to comply with sub rule (5) and for an extension of time within which to comply with the provisions of sub rule (5). It seems to me that a holistic approach is to require that the condonation application for failure to comply with sub rule (5) made in terms of subrule (6) should be accompanied by the proposed application set out in sub rule (5).

In casu, the applicant has sought condonation of failure to comply with r 94 sub rules (2) and (5). There was no separate application made for an order that the applicant be permitted to make the application envisaged in sub-rule (5) outside the twenty-four days. At the commencement of hearing, Advocate *Zhuwarara* for the applicant made an oral application for condonation of failure to comply with the provisions of sub rule (6) aforesaid. I allowed oral submissions to be made, Advocate *Zhuwarara* submitted that the same reasons of applicant's counsel being misdirected on the appropriate procedure to follow and the bad standing of the applicant with respect to his legal practitioner and client relationship in regard to outstanding fees and reluctance of applicant's legal practitioners to continue to incur fees without payment explained the delay.

The first respondent's counsel submitted that he stood by the submissions made in the heads of argument. He did not oppose the making of an oral application as was done by Advocate *Zhuwarara*. As a result, there was no submission made on the merits of the oral application in opposition. I considered that the applicant having failed to make oral application when judgment was delivered on 15 September, 2021 should have filed the application for leave to appeal by 1 October, 2021 which was the twelfth day past 15 September, 2021. The applicant did not file the application until 6 October when he filed the abortive case number

HC 5346/21 without prefacing it with an application for condonation as envisaged in r 94(5). The abortive application was filed three days past the first of October, 2021 therefore. The current application was then filed on 5 November, 2021 after withdrawal of case number HC 5346/21 on 4 November 2021. The delay has to be calculated from and after the 1st of October, 2021 because the withdrawal of case number 5346/21 returned the parties to 1 October, 2021. The delay would therefore be thirty-nine days. The applicant calculated it as thirty-eight days. The first respondent did not take issue with the calculations and the difference between my calculation and that of the applicant's counsel is not markedly different as to be of great moment.

In considering the delay, what is important is to consider the nature of the delay. The applicant did not sit on his laurels but took steps albeit ill-advised one by his legal practitioners to file an application for leave to appeal without seeking condonation first. Upon the applicant's legal practitioners appreciating the folly of the application for condonation, they withdrew the application and immediately filed the current application. The applicant followed his rights. Delay is always explained and if the explanation is reasonable then the delay may be condoned. The delay is not considered in isolation but together with other factors which are proper to take into account. The delay was not in ordinate in the circumstances of this case.

I was not persuaded to accept the first respondent's bold assertion that the applicant deliberately filed a defective application when he knew the rules applicable. The fact that the applicants' legal practitioner upon conceding the first respondents point on the need to seek condonation, made in the opposing affidavit, obliged and withdrew the defective and immediately filed the current one is inconsistent with deliberateness. It is clear that the applicants' legal practitioners used old precedents in directing that the first respondent should respond to the abortive application within. Ignorance of the law must be distinguished from mistake of the law. *In casu*, the applicant was aware that he was required to apply for leave to appeal. He went about it the wrong way procedurally. The situation must be distinguished from one wherein an applicant does nothing to assert a position or a right and when prompted replies that he is not aware of the law which requires that leave to appeal be applied for. The applicant clearly acted under a mistaken belief that he could seek leave to appeal using the procedure which turned out to be defective. Whilst the point made by the first respondent that

the applicant did not file a supporting affidavit from his legal practitioners confessing to their ignorance of the law is naked, I have already indicated that the issue arising is not of ignorance of the law but going about seeking to assert rights provided by that law wrongly. The applicant did not sit on his laurels. The want of an affidavit by the applicants' legal practitioners confessing ignorance of the law at least as suggested by the first respondent does not put paid to the explanation of the applicant because the withdrawal of the defective application and filing of another one is ample evidence of an implied admission that the legal practitioners bungled. It being a mistake genuinely made, the sins of the applicants' legal practitioner will not be visited upon him.

The last issue are the prospects of success on appeal. The applicant seeks to advance several grounds of appeal. The first ground suggested in the draft notice of appeal and advanced in argument was that the learned judge misdirected himself by granting rescission of judgment on the basis of grounds not advanced by the applicant in the founding affidavit to the application for rescission of judgment. The applicant will seek to argue that the court *a quo* ought to have founded its judgments on grounds arising in the founding affidavit since the applicants' case is made or it fails on the founding affidavit. Upon perusal of the records in case numbers HC 9129/19 and HC 6/20 shows that in the founding affidavit the rescission was sought on the basis that default judgment ought not to have been granted since there was on record an irregularly filed notice of opposition. It was filed out of time. The learned judge did not accept this ground and dismissed it. He then made findings that the judgment be rescinded because the applicant and first respondent had not complied with the consent order is selling the property and thirdly that the applicant committed a material non-disclosure that the order be sought violated the order of the court in case number HC 7833/13. These latter two grounds were not relied upon in the founding affidavit but in the answering affidavit. It does not appear to me that the ground of appeal is frivolous. It certainly enjoys of success.

The applicant also seeks an appeal to impugn this court judgment on appeal on the ground of a failure by the court to find that all material facts of the case were disclosed by the applicant in his opposing affidavit to the application for rescission of judgment.

In relation to case number HC 6/20 the applicant seeks to argue that the court *a quo* erred in law and fact when it cancelled the sale agreement and transfer of the property to the

second and third respondents yet the first respondent received her share of the purchase price and thus ratified the sale.

There are reasonable prospects of the two grounds above succeeding on appeal. It is not clear as to what facts were withheld by the applicant since the consent paper was referred to and the sale had been done in the knowledge of both the applicant and first respondent. Equally there are prospects of success that the receipt of the sale proceeds of the sale property by the first respondent estopped her from impugning the scale.

In my judgment, therefore, the applicant has made a case for condonation to file an application for condonation and leave to appeal in terms of rule 94(5) out of time. I therefore condone the failure to comply therewith. The applicant submitted that the proposed application which he attached as annexure E to this application be deemed to have been filed on the granting of condonation. The first respondent did not address the draft order. As is often the case with most litigants, they do not realize that they may lose in their defences. In the process, they do not plead in the alternative that without conceding or compromising their positions, if the court finds against them they address the draft order. *In casu* I take it that the first respondent does not have a problem with the draft order if she loses in her defence which in fact stands dismissed.

From a procedural point of view the granting of the application means that application annexure E is deemed filed under sub rule (5) of rule 94. The rule provides that the papers filed in terms thereof be dealt with in terms of sub- rule 4. The sub rule provides that the judge should determine whether or not to grant leave to appeal in chambers upon a consideration of the papers filed. Applying Sub rule 4 *mutatis mutandis* it is competent to determine the application to finality. However, because the first respondent has not filed a response to the application annexure "E" which the applicant prays that it be deemed filed, she must be granted an opportunity to file submissions if so advised whereafter the application annexure "E" as deemed filed in terms of r 94(S) can be dealt with in terms of subrule (4).

Accordingly, I issue an order as follows:

1. The applicant is granted condonation to apply for condonation of want of compliance with the provisions of subrules (2) and (5 of the High Court Rules, 2021 in failing to timeously apply for leave to appeal against the judgment of this Court,

per MANGOTA J in case No. HC 9129/19 and HC 6/20 is case No. HH 491/21 on 15 September 2021.

2. The applicant is granted an extension of time to file an application for condonation and extension of time to apply for leave to appeal as provided in form r 94(5) of the High Court Rules, 2021.
3. The draft application for leave to appeal in terms of r 94(5) attached to the founding affidavit as Annexure "E" is deemed filed as the applicant's application in terms of r 94(5) of the High Court Rules, 2021.
4. The applicant shall within forty-eight (48) hours of this judgment being granted serve it upon the first respondent who if advised may file and serve a response thereto within three (3) days allowed in r 94(5) a response.
5. The Registrar shall upon the expiry of the period given to the first respondent to file a response place record before the Judge to be dealt with in accordance with r 94(5) of the High Court Rules.
6. Costs are reserved for determination upon the final determination of the application.

Chihambakwe, Mutizwa & Partners, applicant's legal practitioners
Jarvis Palframan, first respondent's legal practitioners