CHHAGANBHAI VITHAL RAMA
versus
MINISTER OF LOCAL GOVERNMENT,
PUBLIC WORKS & NATIONAL HOUSING N.O.
and
GLORYBOOST INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 20 July 2022 & 27 July 2023

Opposed application

E Mubaiwa, for the applicant
L T Muradzikwa, for the 1st respondent
TC Masawi, for the 2nd respondent

MANYANGADZE J: This is an application for condonation of the late filing of an application for review. The application is peculiar in that it was filed nearly five (5) years after the decision sought to be reviewed was made. It arises out of a decision made by the first respondent to cancel a lease agreement he had entered into with the applicant in respect of a certain piece of agricultural land, way back in October 2016.

The facts forming the background to the matter are largely common cause. The applicant and the first respondent were at the material time parties to a long lease agreement. The applicant leased a plot known as Stand 554 Chirundu Township, measuring 198.5 hectares ("the property") from the first respondent, for the purpose of carrying out the business of fish farming. The lease was set to lapse in 2054.

The first respondent cancelled the lease in October 2016, alleging gross underutilisation of the property.

The applicant was advised by some legal practitioners he had engaged in connection with the cancellation that it was of no force and effect, as it had not been confirmed by a court of law. He was further advised that it was not necessary to challenge the cancellation but must simply wait for the first respondent to obtain a court order confirming the cancellation.

Two years later, in October 2018, the applicant engaged different legal practitioners for purposes of planning his estate. He included the property on his inventory of assets. His new

legal practitioners expressed concern over the legal status of the property, in view of the cancellation letter from the first respondent. The legal practitioners pointed out that the advice from the applicant's erstwhile legal practitioners was incorrect. The correct position was that the first respondent's cancellation took immediate effect. The property was therefore not part of the applicant's estate for as long as that cancelation was extant. It was incumbent upon the applicant to challenge that cancellation. The lawyers further advised the applicant to file an application for a declaratory order to the effect that the first respondent's cancellation was invalid.

The applicant proceeded to file an application for a declaratory order, under Case No. HC 9163/18. That application was dismissed by MUSHORE J in an order handed down on 16 January 2020. The papers filed in connection thereto show that the judge upheld a preliminary point raised by the first respondent, to the effect that the application was improperly before the court. The applicant ought to have filed an application for a review of the first respondent's decision to cancel the lease agreement, instead of filing an application for a *declaratur*.

Aggrieved by the High Court order, the applicant noted an appeal with the Supreme Court. In an order handed down on 30 September 2021, the Supreme Court upheld the appeal. The Supreme Court substituted the High Court order of dismissal with one striking the application off the roll i.e. application for a declaratory order. It is thus significant to note that in essence, the Supreme Court agreed with the court *a quo*'s decision that the application for a declaratory order was improperly brought before that court. However, the court *a quo*'s order of dismissal was incorrect. Having found that the application was improperly before it, the High Court should have ordered that the application be struck off the roll.

Meanwhile, following the cancellation of the lease agreement with the applicant, the first respondent entered into a lease agreement with the second respondent. The papers filed of record indicate that that lease agreement has since been upgraded into an agreement of sale between the first respondent and the second respondent, and the full purchase price has been paid. Effectively, the property has since been disposed of by sale to the second respondent, who is now the owner thereof.

Notwithstanding these developments, the applicant persisted with his bid to have the cancellation of his lease set aside. Again, he suffered the consequences of wrong advice from his new legal practitioners. Whilst this time around they had properly advised him to challenge the cancellation of the lease, they adopted the wrong procedure. The consequence was a

dismissal of his application for a declaratory order by the High Court, which was subsequently corrected to an order striking off the improper application.

Realising he was way out of time to file the correct application, being an application for review, the applicant then filed the instant application, wherein he seeks condonation for the delay. By the time he filed the application for condonation, he had exceeded the *dies induciae* by a staggering 58 months. That is 2 months shy of 5 years. That is almost half a decade.

The factors taken into account in an application of this nature are well set out in the cases. They include:

(i) The degree of non-compliance or length of the delay.
(ii) The explanation for the delay.
(iii) The prospects of success on the merits
(iv) The importance of the case to the parties
(v) convenience of the court
(vi) avoidance of unnecessary delays in the administration of justice

See *Kodzwa* v *Secretary for Health* 1999 (1) ZLR 313 (S) , *Bishi* v *Secretary for Education* 1989 (2) ZLR 240 (H), *Tshova Mubaiwa Transport Co-operative Ltd &Ors* v *Mpofu & Ors* HB 167/04, *United Plant Hire (Pty) Ltd* v *Hills & Ors* 1976 (1)SA 717,*Ndebele* v *Ncube* 1992 (1) ZLR 288 (S).

In casu, as already indicated, the delay amounts to almost 5 years. That is no doubt an inordinate delay. It is not clear why Mr *Mubaiwa*, on behalf of the applicant, kept on averring that the delay was not an issue. Neither was the explanation therefor. Yet these are the issues at the very heart of this application.

In countering these submissions, Mr *Muradzikwa*, on behalf of the first respondent, remarked during oral argument:

> "It is not correct that the issue of delay is by consent. We totally disagree. We submitted that the delay was unreasonable as applicant was not a self-actor. He had the opinion of two legal practitioners.....Applicant is the author of his own predicament. The court ought to withhold the grant of condonation."

It seems to me the applicant was intent on downplaying the issue of the delay in this matter, which was gross by any stretch of the imagination. He appeared to impute to the first respondent concessions he did not make. The applicant pushed his arguments more on the prospects of success, leaving him exposed and vulnerable on the question of the inordinate delay and the explanation for it.

In my view, this case turns largely on the question of whether the sins of a legal practitioner ought to be visited upon the client. Generally, the courts are reluctant to punish litigants for the omissions of their legal practitioners. However, there is a limit beyond which they will not excuse such omissions, or commissions for that matter. The *locus classicus* on this issue is the South Arican case of *Salojee & Anor* v *Minister of Community* Development 1965 (2)SA 135 (A). The often quoted remarks of STEYN CJ are instructive. The learned Chief Justice remarked, at p141 C-E:

> "There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have the disastrous effect upon the observance of the Rules of this Court. Consideration *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney is after all the representative whom the litigant has chosen for himself and there is little reason why in regard to condonation of a failure to comply with a Rule of court, the litigant should be absolved from the normal consequence of such a relationship no matter what the circumstances of the failure are."

This approach has been followed in our courts. In the matter of *Bishi* v *Secretary for Education*, supra, CHIDYAUSIKU J (as he then was) referred to the case of S v Mc Nab 1986 (2) ZLR 280 (S) in which the above remarks by STEYN CJ were cited with approval.. In that case (*Bshi* v *Secretary for Education*), a delay of 18 months, largely caused by the lawyers' negligence, was considered inordinate. The learned judge stated, at p243 C-D and G-H:

> "The degree of non-compliance with the requirements of the rule in his case is considerable. A review has to be commenced within 8 weeks. In the present case about 18 months elapsed after the review should have been launched. A delay of 18 months is clearly inordinate.....
> The delay was almost entirely caused by the applicant's legal practitioner. Courts are very reluctant to visit the client with the sins of his legal practitioner but there has to be a limit beyond which the court will not go. This was the view expressed by no less authority than our Supreme Court in the not so recent case of *S* v *McNab* 1986(2) ZLR 280."

In casu, the applicant received the letter cancelling his lease in October 2016. Needless to say, it was clearly bad news. He had up to December 2016 to file an application for review challenging that cancellation. In para 1.5 of his founding affidavit, the applicant recognises the predicament he placed himself. He states:

> "First respondent cancelled the lease sometime in October 2016. As I shall soon show, this is a position he accepts on record. The eight weeks within which I was entitled to seek a review of the decision expired in December 2016. I am accordingly out of time by some 58 months."

In para 1.6, the applicant describes the delay as "*considerable*". This is an understatement. The delay is beyond considerable. This description would perhaps suit a delay

of about 12 months. There have been some exceptional cases where 12 to 18 months delays have been condoned. Going beyond that would be really overstretching the court's indulgence. It would be in the most compelling and exceptional circumstances that such indulgence will be granted. In my view, the circumstances of this matter do not fall under this category.

The lawyers for the applicant took the wrong course of action, on both occasions as already indicated. The applicant, on his part, adopted a disturbingly naive and lackadaisical approach. I say so especially with regard to the first instance, after he received the letter of cancellation of the lease agreement. That was the genesis of all his woes. Notwithstanding the advice he got from the lawyers, it was the height of naivety to sit on such a letter and treat it as something of no consequence. The letter was clearly and effectively ending his relationship with his landlord. His behaviour is akin to that of a person who continues to stay at home in unbearable pain, simply because a medical practitioner has told him there is nothing wrong with his condition. It will not take long for a reasonable person, placed in a similar situation, to recognise that there is something seriously wrong with the advice he has been given. The applicant is not a simple and unsophisticated farm worker. He is a businessman supposedly used to making massive investments, going by what he claims he wanted to do on the property in question.

In *Kodzwa* v *Secretary for Health,supra*, SANDURA JA stated that if the delay is inordinate and the explanation for it poor, condonation may be refused irrespective of the merits of the main matter. The learned judge of appeal stated, at p315:

> "It is, therefore, well established that the court has a discrerin to grant condonation when the principles of justice and fair play demand it, and when the reasons for non-compliance with the rules have been explained by the applicant/appellant to the satisfaction of the court. The principles applicable are the same, whether one is dealing with an application for condonation of failure to file an application for review timeously or to note an appeal timeously.
> Whilst the presence of reasonable prospects of success on appeal is an important consideration which is relevant to the granting of condonation, it is not necessarily decisive. Thus in the case of a flagrant breach of the rules, particularly where there is no acceptable explanation for it, the indulgence of condonation may be refused, whatever the merits of the appeal may be. This was made clear by Muller JA in *P E Bosman Transport Works Committee & Ors* v *Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799 D-E, where the learned Judge of Appeal said:
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> > "In a case such as the present, where there has been a flagrant breach of the rules of this court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects of success may be."

The present case is similarly afflicted. It fails on the first two hurdles, being the length of the delay and the explanation proffered. It must take the most compelling reasons to turn back the hand of time to a degree desired by the applicant. The merits must be overwhelmingly in his favour. That is not so in the circumstances. The papers filed of record show that as far back as 2009, there was a site visit by officials from the Chirundu Local Board and first respondent's Department of Physical Planning, being the responsible authorities. The authorities noted that the land was neglected and their findings were communicated to the applicant. So the cancellation that eventually followed was not a sudden and surprise move.

There has to be a point where litigation ends and parties thereto be allowed to move on with their respective lives. The applicant cannot seek to reverse the clock to half a decade ago. He was the architect of his own demise. Apart from the ineptitude of his attorneys, his conduct was far from diligent. He cannot expect the law to come to his aid well after sunset. In this regard, Mc NALLY JA stated in *Ndebele* v *Ncube*, *supra*, at p290 C-D:

> " It is the policy of law that there should be finality in litigation. On the other hand, one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time and for other relief arising out of delays either by the individual or his lawyers have rocked in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re- argued until the costs far exceed the capital amount in dispute. The time has come to remind the legal profession of the old adage, *vigilantibus non dormientbus jura subveniunt* – roughly translated; the law will help the vigilant but not the sluggard."

Turning to the instant case, it is my considered view that the application for condonation is hopelessly out of time. There is nothing that may be regarded as so exceptional and compelling to warrant institution of an application for review that should have been filed five (5) years ago. The indulgence of condonation cannot be granted in the circumstances. Both respondents have asked for costs on the higher scale of legal practitioner and client. I do not think that is warranted. Whilst the application indeed stood on very shaky ground, it cannot be said that the applicant recklessly conducted litigation to call for the punitive scale of costs. It was a vehemently contested application. The applicant argued his case and lost. Costs should therefore be on the ordinary scale.

In the result, it is ordered that:

1. The application for condonation be and is hereby dismissed.

2. The applicant bears the respondent's costs.

Zimudzi & Associates, applicant's legal practitioners
Civil Division of the Attorney General's Office, first respondent's legal practitioners
Masawi & Partners, second respondent's legal; practitioners