

REPORTABLE (96)

**ZIMIND PUBLISHERS (PRIVATE) LIMITED t/a ALPHA MEDIA
HOUSE (PRIVATE) LIMITED**

**v
(1) R. G. CHIRENDA N.O. (2) KANGAI MAUKAZUVA**

**SUPREME COURT OF ZIMBABWE
HARARE: 23 JULY 2024 & 29 OCTOBER 2024**

L. Uriri, for the applicant

No appearance for the first and second respondents

IN CHAMBERS

CHATUKUTA JA:

1. This is chamber application for condonation for non-compliance with the rules and extension of time within which to note an appeal in terms of the Supreme Court Rules, 2018 ('the Rules'). The application is unopposed.

FACTUAL BACKGROUND

2. The applicant is a company duly incorporated in terms of the laws of Zimbabwe. The first respondent is a Labour Officer. The second respondent was employed by the applicant as a Chief Operating Officer.
3. In 2013, the second respondent was employed by the applicant as a Chief Technology Officer. He was promoted to the position of a Chief Operating Officer in August 2015. In 2022 he was retrenched and was paid his full terminal benefits.

4. On 13 June 2022, the second respondent approached the first respondent claiming as against the applicant arrear salary and other benefits in the sum of US\$576 885.44 and 3319 litres of fuel. He claimed that the arrears arose at the end of February 2019 up to his retrenchment in 2022. He further submitted that although his salary was denominated in United States dollars as per his contract of employment, the arrear salary and other benefits were payable in local currency at the prevailing interbank rate as at the date of payment.
5. The applicant opposed the application on two grounds. The first ground was that the claim had prescribed. The second ground was that the second respondent's salary and benefits constituted a financial obligation incurred before the effective date as it arose from a contract denominated in United States dollars. The contract had been concluded before the effective date thus placing the obligation within the ambit of Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations, 2019 (SI 33 of 2019). The obligation was therefore payable in local currency at the rate of one-to-one.
6. The first respondent ruled in favour of the second respondent. He held that the claim had not prescribed. Relying on the decisions in *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R Barber (Pvt) Ltd & Anor* 2020 (1) ZLR 138 (S) and *CABS v P. Douglas & Ors* SC 15/21, he held that the second respondent was entitled to payment of US\$ 281 572.12 in local currency at the prevailing bank rate at the time when the amount was due and 1 120 litres of fuel.

Aggrieved by the decision, the applicant appealed to the court *a quo*.

PROCEEDINGS BEFORE THE COURT A QUO

7. The applicant's argument before the court *a quo* remained that the second respondent was entitled to arrear salary and benefits at the parity rate of one-to-one. *Per contra*, the second

respondent persisted that the arrear salary and benefits were payable in local currency at the interbank rate prevailing on the date of payment.

8. The court *a quo* held that the first respondent was correct in finding that the amount payable to the second respondent was valued in United State dollars after the effective date. It held that the second respondent's claim arose post the effective date being 22 February 2019 because the arrears in question accumulated from the end of February 2019 up to the date of retrenchment in 2022. It further held that the amount was to be paid at the prevailing interbank rate. Accordingly, the court *a quo* dismissed the appeal.
9. Disgruntled with the decision of the court *a quo*, the applicant applied for leave to appeal to this Court. Leave to appeal was granted by the court *a quo* on 4 June 2024. The court *a quo* ordered the applicant to note his appeal within 5 days from the date of the order.
10. After failing to timeously note its appeal with this Court, the applicant filed the present application on 20 June 2024.

PROCEEDINGS BEFORE THIS COURT

11. At the hearing of the matter, Mr *Uriri*, for the applicant, persisted with the arguments made before the first respondent and in the court *a quo* that payment was supposed to be at the parity rate. He argued that the valuation of the obligation is not the time at which the obligation accrues but at the time the contract between the parties is concluded.
12. I referred Mr *Uriri* to the case of *Mashinya v Pioneer Corporation Africa* SC 11/24 (*Mashinya* case) in which this Court held that what brought liability within the ambit of SI 33 of 2019 was the date at which the liability was valued in United States dollars. This had to be before the effective date, being 22 February 2019.

13. Mr *Uriri* submitted that the *Mashinya* case was inapplicable as it had been appealed to the Constitutional Court. The determination of the appeal was still pending and there was a possibility that it would be reversed.

APPLICATION OF THE LAW TO THE FACTS

14. An application for condonation is a formal request made by a party for its non-compliance with the procedural rules of court to be condoned. It is trite that the applicant must satisfy the court that the failure to comply with the rules was not wilful and that the length of breach was not inordinate. The applicant must also establish that there are prospects of success on appeal that warrant the court to excuse the non-compliance.

(See *Rita Mbatha v Justice Catherine Bachi-Muzawazi* SC 76/24)

15. The applicant ought to have filed its notice of appeal on or before 11 June 2024, the judgment of the court *a quo* granting leave to appeal having been issued on 4 June 2024. The applicant attempted to file a notice of appeal on 14 June 2024 and again on 18 June 2024. The notices were rejected by the IECMS for being out of time. The applicant was out of time by 3 days when the first attempt was made. The extent of delay is not inordinate.

16. In explaining the delay, the applicant averred that its legal practitioner was under the misconception that it had 15 days, from the date of the order granting leave to appeal, within which to note the appeal. It filed a supporting affidavit by the legal practitioner. The legal practitioner averred that, upon being instructed on 5 June 2024 to note an appeal, he perused the Supreme Court Rules, 2018 and established from r 60 (2) of the Rules that the applicant had 15 days from the date of the judgment granting leave to appeal to note an appeal. Without stating when and how, he/she averred that he/she became aware that

the order of the court *a quo* expressly stated that the applicant was to file its notice of appeal within 5 days from the granting of leave to appeal and that it was the applicant who had specifically asked for the 5 days.

17. It is difficult to comprehend how the legal practitioner would have perused the Supreme Court Rules without even looking at the court order. The noting of an appeal in labour matters is triggered by an order granting leave to appeal. One would have therefore expected the legal practitioner to look at the order giving the applicant leave to note the appeal first. Legal practitioners are required to meticulously handle their clients' affairs. Their services are specially sought out to avoid such misconceptions as in *casu*. The explanation given by the applicant is, in my view, unreasonable. The applicant has therefore failed to overcome the second hurdle.
18. The last consideration by the court in such an application is whether the intended appeal enjoys prospects of success. Prospects of success relate to whether a party has an arguable case if their matter is to proceed on appeal. A judge in chambers must seriously interrogate the question of prospects of success given that in an application of this nature, the judge is the gatekeeper ensuring that only meritorious matters are brought before a full bench. This was aptly emphasised in the case of *Makwabarara v City of Harare & Ors* SC 139/20, at p 8, wherein the Court held that:

“I must make the point that I am not sitting to determine the appeal itself. The duty of the judge in an application of this nature is to evaluate the grounds of appeal to be relied on to see whether the appeal is arguable. It is the function of a gatekeeper, to keep out those applicants who do not have arguable cases. See *Prosecutor General v Intratek & Ors* SC 59/19.”
19. The foregoing sentiments were adopted in *Chitambira v Mega Pak Zimbabwe Limited* SC 108/23, at p 9, wherein MATHONSI JA held the following:

“In addition, it is also settled that the role of the court or judge in an application for leave to appeal is that of a gate keeper to keep out meritless appeals while allowing in only those with merit. The court or judge does that in order to protect the appeal court from those chancers only bent on wasting the court’s time with baseless appeals. Therefore, in order to succeed in an application for leave, the applicant must show reasonable prospects of success on appeal.”

The above applies with equal force to applications for condonation.

20. It would therefore be a gross miscarriage of justice and dereliction of judicial responsibility to place an unmeritorious matter before a full bench.
21. The applicant’s draft notice of appeal raises six grounds of appeal. Mr *Uriri*’s submissions were on one issue only, that the court *a quo* misdirected itself when it held that the applicant was liable to pay the second respondent in local currency at the prevailing interbank rate as at the date of payment. It can be concluded that the applicant was abandoning all the other grounds of appeal.
22. Mr *Uriri* submitted that the applicant has high prospects of success on appeal given that the contract of employment entered into by the second respondent was concluded before the effective date of 22 February 2019. Therefore, the second respondent’s salaries and allowances expressed in United States dollars were payable in local currency at the parity rate of one-to-one.
23. The applicant did not dispute that the arrear salary and benefits, the subject of the second respondent’s claim, started accruing after the effective date. It puts in issue the date when the obligations were valued in United States dollars and therefore the correct conversion rate.

24. The issue has been well trodden by this Court and it is of great concern that it is still the subject of litigation. It is for that reason that the applicant's counsel was referred to the *Mashinya* case.

25. Section 4 (1)(d) of SI 33 of 2019 stipulates that only assets and liabilities incurred immediately before the effective date of 22 February 2019 shall be converted into local currency at par with the United States dollars. The section was re-enacted in s 22 (4)(a) of the Finance (No.2) Act, 2019, with some modifications. This Court had the occasion to interpret the section in dispute in the *locus classicus* case of *Zambezi Gas* (supra). Therein, MALABA CJ held that:

“The phrase “immediately before” means that the liability should have existed at a date before the effective date and that such liability should have been valued and expressed in United States dollars. The issue of the time-frame within which the liability arose in relation to the effective date of 22 February 2019 does not matter. What is of importance is the fact that the liability should have been valued before the effective date in United States dollars and was still so valued and expressed.”

26. It follows from the above, that a value must have been assigned to the liability before the first effective date for payment of a liability to be made at the parity rate of one-to-one.

27. This Court has consistently maintained the position that debts expressed and valued after the effective date of SI 33 of 2019 are payable at the prevailing interbank rate on the date of payment and that the origin of the liability in issue is irrelevant. (See *Ingalulu (Pvt) Ltd & Anor v National Railways of Zimbabwe* SC 42-22 and *Magauzi v Jekera & Anor* SC 54-22).

28. MATHONSI JA, in the *Mashinya* case, remarked at p 2 that:

“In that case this Court determined that the origin of the liability is not the criterion for its exclusion but that what brings the asset or liability within the provision of s 4 (1) (d) of S.I. 33/19 is the fact that its value was expressed in United States Dollars immediately before the effective date, namely 22

February 2019. That resolves the appeal. The value of the damages claimed by the appellant was only expressed on 21 October 2022 after the effective date. **There is no merit in Mr Ndlovu’s argument that the origin of the liability, being the employment contract, and the date of unlawful dismissal determine the conversion rate.** The court *a quo* misdirected itself by holding that the applicable rate was the parity rate of one as to one. The correct rate is the interbank rate prevailing at the time of payment.”(Emphasis added)

29. In *casu*, it is common cause that the arrear salary and benefits accrued after 22 February 2019, being the effective date. The applicant’s liability was therefore expressed and valued in United States dollars after the effective date. It is therefore irrelevant that the contract of employment was concluded in 2015.
30. The applicant argued that the *Mashinya* case had been appealed to the Constitutional Court and there was a probability that it would be set aside. I was urged to await the outcome of the appeal. Section 6 of the Constitutional Court Act [*Chapter 7:22*], however, provides that an appeal to the Constitutional Court does not suspend the decision being appealed against. It reads:

“An appeal from the Supreme Court to the court shall not suspend the decision being appealed against unless the court orders otherwise”
31. The wording of the section is peremptory, clear and unambiguous. Mr *Uriri* did not refer to any order issued by the Constitutional Court directing the suspension of the judgment in *Mashinya* case pending the appeal before it. He however, conceded that, in view of s 6 of the Constitutional Court Act, there was nothing precluding me from determining the matter as the judgment in *Mashiya (supra)* is extant and binding until such a time it is overturned by the Constitutional Court. The concession was proper.
32. The applicant’s prospects of success on appeal are slim and as the gatekeeper, it would be remiss of me to grant the indulgence sought.

DISPOSITION

33. The explanation given by the applicant is unreasonable. In addition, the applicant does not have prospects of success on appeal.

34. In the result, it is accordingly ordered as follows:

“The application be and is hereby dismissed with no order as to costs.”

Matsikidze Attorneys-At-Law, applicant’s legal practitioners