REPORTABLE: **(129)**

BESTIAN MUKONO
V
NATIONAL TYRE SERVICE LIMITED

SUPREME COURT OF ZIMBABWE
CHATUKUTA JA
HARARE: 17 JUNE, 2021 & 28 OCTOBER 2021

Mr Zimudzi, for the applicant

Mr Chagonda, for the respondent

IN CHAMBERS

CHATUKUTA JA: This is a dual application for condonation and extension of time within which to file an application for leave to appeal and for leave to appeal made in terms of rule 43 as read with rule 60 of the Supreme Court Rules, 2018 as well as in terms of section 92 F (3) of the Labour Act [*Chapter 28:01*]. The application was erroneously made in terms of rule 43 of the Supreme Court Rules, 2018. Rule 43 falls under Part IV of the Rules. Part VI relates to civil appeals and incidental applications from the High Court. The applicant cross referenced rule 43 with rule 60. Rule 60 relates to appeals and applications for leave to appeal from the Labour Court. I am of the view that the applicant placed himself firmly under an appropriate rule. I am

of the further view that the application can be determined by having regard to rule 60. Reference to rule 43 is therefore not fatal to the application.

BACKGROUND FACTS

The brief facts of the matter may be summarized as follows. The applicant was employed by the respondent as an Internal Audit and Security Manager. Whilst acting as head of the Finance Department, he was charged with breaching Clause 7.3.4 (a) and 7.3.4 (i) of the respondent's Code of Conduct namely committing an act inconsistent with one's contract and for 'fraud or embezzlement or corruption' respectively.

In terms of the first charge, the applicant was alleged not to have followed the respondent's internal policies and procedures on sourcing of foreign funds when he processed a payment to one Harry Ndlovu in the sum of US$ 221 674-15 as purchase price for tyres. The procedure had been in operation for about two years when the applicant processed the payment. The tyres had not been delivered when the payment was made resulting in prejudice to the respondent in lost sales. The respondent's defence was that the procedure had been changed and payment was made to other agents on the basis of the changed procedures. The applicant was given an opportunity by the Disciplinary Committee to submit any proof of such payments and any other relevant documents. He failed to do so.

With regards the second charge, it was alleged that the applicant had sought authority to pay out two separate sums of US$ 70 454-54 to Mr Harry Ndlovu. Authority was granted by a Mr Mandevani. A Ms Gute testified before the Disciplinary Committee that the applicant gave

her verbal instructions to write two payment vouchers each in the sum of US$74 454-54. The two vouchers were submitted to the applicant for authorisation of payment in October 2017. On 7 February 2018 Mr Mandevani discovered that a sum of US$74 454-54 was paid in each case instead of the authorised US$70 454-54. During the hearing, the respondent produced two emails from Mr Mandevani approving payment of two separate amounts of US$70 454-54. Also produced were the corresponding payment vouchers signed by the applicant, however for the payment of US$74 454-54 on each voucher. The applicant did not dispute giving instructions for the payment of the extra US$4 000 in each case. The respondent was prejudiced to the tune of US$ 8, 000.00. The respondent's Disciplinary Committee found the applicant guilty of both charges. The respondent subsequently dismissed the applicant from employment.

The applicant was aggrieved by the dismissal and appealed to the Labour Court seeking an order for his reinstatement. He submitted that there was no evidence adduced by the respondent to substantiate the charges. The applicant had conceded the existence of such procedure with respect to the first charge but argued that it had changed which was denied by the respondent.

The Labour Court held that there was no misdirection or irrationality on the Disciplinary Committee's part when it made the factual findings against the applicant as there was ample evidence informing such findings. The Labour Court found that evidence was adduced on the procedure which the applicant was required to follow when sourcing free funds. In relation to the appropriateness of the penalty of dismissal the respondent found that continuation of the employer-employee contract was not tenable. The Labour Court held that it

could not interfere with the respondent's discretion to dismiss the applicant given the fact that no irrationality in the respondent's exercise of discretion had been found. The appeal was thus dismissed.

Aggrieved by the dismissal of his appeal the applicant applied to the Labour Court for leave to appeal to the Supreme Court which leave was denied. He was undeterred and proceeded to file an application for leave to appeal with this Court on 13 April 2021 under SC 85/21. The respondent opposed the application citing *in limine* that the application was improperly before the court having been made in terms of rule 5 (2) of the repealed Supreme Court (Miscellaneous Appeals and References) Rules, 1964. For that reason, the application was struck off the roll on 19 May 2021 prompting the applicant to make the present dual application.

PROCEEDINGS BEFORE THIS COURT

At the hearing of the application Mr *Zimudzi*, for the applicant, submitted that the requirements for condonation had been satisfied. The failure to file the application for leave timeously was not by design. The application for leave had been initially filed timeously albeit through a defective notice. It was an oversight on the part of the legal practitioners. By the time the matter was struck off the roll by this Court the applicant was out of time. Regarding prospects of success, Mr *Zimudzi*, conceded that the first and second grounds of appeal in the draft notice of appeal were not clear as to what charges they related to and were therefore fatally defective. With regards the third ground, he further conceded that the fact that an employer singled out the applicant and charged him whilst leaving out his subordinates does not constitute

a misdirection. Following the concessions, the applicant abandoned the first three grounds. The grounds were accordingly struck out.

Mr *Zimudzi* argued that there were prospects of success on appeal on the basis of the fourth and fifth grounds which relate to the second charge. He submitted that the court *a quo* grossly misdirected itself by upholding dismissal of the appellant based on non-existent procedures on sourcing of foreign funds. He submitted that the respondent had admitted the absence of such procedures in a letter addressed to the applicant's counsel by the respondent.

Further, it was submitted that the applicant did not accept the authenticity of the record of proceedings of the disciplinary committee. With regards the penalty, Mr *Zimbudzi* conceded that an employer has discretion at common law on what penalty to impose. He further conceded that that the offences the respondent was charged with were dismissible offences in terms of the Code of Conduct. He however persisted with the argument that dismissal of the applicant was excessive considering applicant's disciplinary record and working history.

Regarding the question of costs, it was argued that there was no basis for ordering costs on a punitive scale. It was submitted that the application was merited. It was not frivolous and vexatious as the applicant evidently and genuinely desired to prosecute his appeal.

The respondent opposed the application. Mr *Chagonda*, for the respondent, argued that the fact that there were prior proceedings premised on rules that had been repealed was not a basis for condonation. He submitted that the applicant cannot escape the consequences of his

legal practitioners' tardiness in relying on repealed rules. He argued that where there is an allegation of a legal practitioner having been the cause for any delay, it is incumbent upon the legal practitioner to file an affidavit explaining his/her role in the delay. It was submitted that failure to do so is detrimental to the application.

Mr *Chagonda* further submitted that some of the grounds of appeal in the draft notice were fatally defective hence there were no prospects of success on appeal warranting the indulgence of the Court to grant the application. The charges against the applicant were duly proved. It was argued that the record of proceedings had been tendered by consent and not challenged before the court a quo. The allegation by the applicant that the record is not a true reflection of what transpired is mischievous. The procedures though not in writing were known by the parties.

On costs, Mr *Chagonda* submitted that the respondent had been put out of pocket unnecessarily and this was grossly unfair to the respondent. The applicant's case wholly lacks merit and was an abuse of court process which warranted an order for costs on a legal practitioner –client scale.

THE LAW

This Court has on numerous occasions pronounced itself on the factors that the court has regard to in an application for condonation. MALABA JA (as he then was) in *Maheya* v *Independent African Church* 2007 (2) ZLR 319 (S) at 323 B – C pronounced:

> "In considering applications for condonation of non-compliance with its rules, the court has a discretion which it has to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are the degree of non-compliance; the explanation, therefore; the prospects of success on appeal; the importance of the case; the respondent's interest in the finality of the judgment; the convenience to the court and the avoidance of unnecessary delays in the administration of justice: *Bishi* v *Secretary for Education* 1989 (2) ZLR 240 (H) at 242 D-243 C."

See also *Viking Woodwork (Pvt) Ltd* v *Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) at 251 C-D *Marevesa* v *Telone* SC 32/19, *Minister of Environment, Water and Climate* v *Hippo Valley Estate Limited & Anor* SC 56/19.

ISSUE FOR DETERMINATION

The sole issue for determination is therefore whether the appellant has met the requirements for condonation for late noting of the application for leave to appeal.

EXTENT OF THE DELAY AND REASONABLENESS OF THE EXPLANATION.

The decision denying the applicant leave to appeal was delivered on 26 March 2021. The applicant was required in terms of the *proviso* to rule 60 (2) of the rules of this Court to file his application for leave to appeal within 10 (ten) days of the refusal by the court *a quo* to grant leave. After the application was struck off the roll on 19 May 2021 the applicant was out of time He was therefore required to seek condonation and extension of time within which to file an application for leave to appeal. The present application was then made on 2 June 2021. There

was a delay of about nine days from the day the abortive application for leave to appeal was struck off the roll and 43 days from 26 March 2021. It is my view that the delay in filing the present application is not inordinate.

Despite the delay not being inordinate, the hurdle that the applicant has to contend with is whether his explanation for the non-compliance with the rules is reasonable. The applicant attributes the fate of his aborted application for leave to appeal to an oversight by his legal practitioners in citing the repealed Supreme Court Rules of 1964. Legal practitioners are officers of the court charged with exercising due care in the execution of their roles. In most cases, the courts refrain from visiting the errors of a practitioner on the client however as McNally JA stated in the case of *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290 C-E:

> "It is a policy of the law that there should be finality to litigation. On the other hand, one does not want to do injustice to litigation but it must be observed that in recent years applications 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 lawyer have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for mercy than justice. Incompetence has become a growth industry... The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt,* roughly translated; the law will help the vigilant but not the sluggard."(Own emphasis)

Vigilance applies not only with respect to the time taken to file process but incorporates careful observation, due care, prudence, attention to detail, and conscientiousness that exemplifies diligence on practitioners' part in drafting documents for a litigant and obeying court orders. See J*ohn v Delta SC 40/17*.

In my view, there is a limit beyond which a litigant cannot escape the consequences of his or her legal practitioner's dilatoriness or lack of diligence. To hold otherwise would negate the need for a court of law to function through rules of procedure which are provided in advance in order to guide litigants on how to approach the court. See *Musemburi & Anor v Tshuma* 2013 (1) ZLR 526 (S) at 529 E-H; 530 A – B.

The applicant in this case is represented by Mr *Zimudzi*, who is the same counsel who represented him in the ill-fated application in this Court. Mr *Zimudzi* is the principal partner in Zimudzi & Associates. The conduct of the applicant's legal practitioners in the ill-fated application calls for scrutiny. Firstly the application was filed on 13 April 2021. The respondent's legal practitioners relied on repealed rules. The present Supreme Court rules were promulgated in 2018. The application was therefore filed almost three years after the promulgation of the new rules of this Court. Secondly, the anomaly was raised in the respondent's notice of opposition. The applicant filed an answering affidavit conceding that the provision in terms of which he filed the application had been repealed. He averred in para 7 of the answering affidavit that:

> "Whilst it is conceded that Rule 5(2) of the Supreme Court (Miscellaneous Appeals and Reference) Rules, 1975 was repealed, it is disputed that the present application is founded on that specific Rule. As can be gleaned from the Founding Affidavit the application clearly brought (*sic*) in terms of s 92F (3) of the Labour Act. It is trite that an application stands and falls by its founding affidavit. The applicability of s 92F(3) has not been disputed by the Respondent."

The applicant whilst conceding the defect he was at the same time arguing that the application was properly before the Judge. He persisted with the application and went on to file heads of argument on 23 April 2021 justifying the defective application. Counsel for the applicant made oral submissions in support thereof on the date of hearing of the application. Such tardiness, dilatoriness or lack of diligence cannot be overlooked. The applicant has no one but himself to blame since it is trite that a litigant who engages a legal practitioner who refuses to protect his interests should suffer for the sins of his legal practitioner. See also *Apostolic Faith Mission in Zimbabwe & Ors v Murefu SC 28/03.* The applicant cannot escape the consequences of the laxity of his legal practitioner because after all, he is his legal representative of choice. The oversight which led to the present application is elementary and unacceptable. The applicant's legal practitioners have demonstrated a serious lack of diligence. Any diligent legal practitioner is expected to know that the Supreme Court Rules of 1964 were repealed by the Supreme Court Rules of 2018. This is more so when regard is had to the fact that the legal practitioner responsible for handling this matter is a senior legal practitioner and principal of the firm who has been practising law for years and would be expected to be aware of that fact.

Thirdly, what is more damaging is the fact that the said legal practitioner did not depose to an affidavit acknowledging the error as required at law. It is trite that where the legal practitioner is the one who is at fault, he must file an affidavit admitting his errors. The principle was laid down in the case of *Diocese of Harare* v *The Church of the Province for Central Africa* SC-9-10, where this Court held that:

> "Although in argument Mr *Zhou* suggested that the failure to comply with the relevant Rules of court was wholly attributable to the respondent's legal practitioners, there was

> no admission of negligence by the legal practitioner…… It would have been after the responsible legal practitioner had filed an affidavit admitting fault and explaining in some detail what happened, that the Judge would be in a position to decide whether the respondent should not be visited with the sins of its legal practitioners. Where no factual basis for making such a distinction of culpability has been provided, the Judge would have no right to draw it. It must follow that without an affidavit from the person responsible for the "oversight" admitting fault and explaining the circumstances under which he or she overlooked the Rules, one is at a loss for the reason why it was found necessary to state in the opposing affidavit that an "oversight" on the part of the respondent was the cause of non-compliance. The procedure adopted by the respondent is another example of lack of care to ensure that Rules of court were complied with."

Mr *Zimudzi*, having been the legal practitioner who represented the applicant in the ill-fated application persisted with the present application well aware of the requirement that he ought to have filed an affidavit to explain his tardiness. Such lack of diligence cannot be condoned.

In the final result, I find that the applicant has failed to put forward an acceptable explanation for the late filing of his application for leave to appeal. In *Kodzwa* v *Secretary for Health and Child Welfare & Anor* SC 50/99, at P. 4, Sandura JA remarked that:

> "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."

In the absence of an acceptable explanation, I find it not necessary to consider whether the applicant has an arguable case on appeal. Suffice to observe that the appellant does

not have prospects of success on appeal in light of the numerous concessions made by Mr *Zimudzi* on the lack of merit of the appeal.

COSTS

On costs, the degree of tardiness apparent in the attempt to prosecute this appeal is inexcusable. The applicant has persistently disregarded the rules of this Court. Instead of withdrawing the application when the defect was first raised and save all interested parties time and resources, the applicant persisted with the application which was struck-off. Undeterred, he has proceeded to represent the applicant in the present application and again without complying with the rules. He has indeed unnecessarily placed the respondent out of pocket. The respondent is therefore entitled to costs on a legal practitioner and client scale

DISPOSAL

Accordingly, it is ordered that the application be and is dismissed with costs on a legal practitioner and client scale.

Zimudzi & Associates, applicant's legal practitioners

Atherstone & Cook, respondent's legal practitioners