REPORTABLE (137)

MADEFIT INVESTMENTS (PRIVATE) LIMITED
v
PROSECUTOR GENERAL

SUPREME COURT OF ZIMBABWE
HARARE, 31 MAY 2021 & 12 NOVEMBER 2021

T. Zhuwarara, for the applicant

T. Mutangadura, for the respondent

IN CHAMBERS

UCHENA JA: This is a chamber application for condonation for failing to note an appeal within the prescribed time limits and extension of time within which to note an appeal in terms of r 43 (1) of the Supreme Court Rules, S.I. 84 of 2018.

BACKGROUND

The respondent applied to the court *a quo* for a civil forfeiture order of the applicant's motor vehicles. The five motor vehicles are commercial heavy trucks namely four freightliner horses registered in the name of the applicant as AEZ 0790, ADS 4104, AEG 6695 and ADS 0982 respectively and an international horse registered as ADZ 4880. The application was made in terms of s 79 as read with s 80 of the Money Laundering Proceeds of Crime Act [*Chapter 9:24*] (hereinafter referred to as the "Money Laundering Act").

In seeking forfeiture of the motor vehicles, the respondent led evidence to the effect that the applicant's motor vehicles were tainted property. It was the respondent's case that the applicant was smuggling trucks into the country and thereafter altering the identities of the vehicles using identities of motor vehicles, which would already have been registered in terms of the Vehicle Registration and Licencing Act [*Chapter 13:14*]. The result being that the smuggled vehicles would be carrying false identities in contravention of the Vehicle Registration and Licencing Act. It is on this evidence that the police impounded the motor vehicles.

The forensic examination of the motor vehicles established that the identities of the motor vehicles had been altered, in that the original chassis numbers were removed and new numbers punched in and the colours of the vehicles had also been changed. It was on this basis that the respondent sought forfeiture of the vehicles

The applicant denied tampering with the identities of the vehicles but argued that what was done was restoration of the corroded particulars of the vehicles. It argued that it purchased the motor vehicles locally and effected change of ownership through Southerton Police Station. In respect of ADZ 4880 and AEZ 0790, the applicant submitted that it did not tamper with the identities of the vehicles but, applied to the Zimbabwe Republic Police Crimi nal Investigation Department Vehicle Theft Squad for restoration of the engine and chassis numbers which applications were granted, therefore absolving it from any wrong doing.

DETERMINATION OF THE COURT *A QUO*

In granting the application for forfeiture, the court *a quo* held that the applicant had not placed any forensic evidence before it to prove its claim that the vehicles had not been tampered with and to justify its submission that the forensic examination should not be relied

on. The court *a quo* accepted expert evidence adduced by the respondent. It found that the forensic report established that there was evidence proving the commission of money laundering offences by the applicant. It further found that the falsification of the identities of the vehicles proved that the vehicles' acquisition and registration were part of criminal activities necessitating the material alteration of their identities.

The court *a quo* also found that the tampering with the motor vehicles' chassis numbers and the changing of the colours of some of them pointed to some form of criminal activity. It held that on a balance of probabilities the five motor vehicles were tainted property. On that basis the court *a quo* granted the application and ordered forfeiture of the tainted vehicles to the state.

Aggrieved by that decision, the applicant sought to appeal against the decision of the court *a quo,* but the time within which to file the appeal had lapsed. The applicant filed a chamber application for condonation of the late noting of an appeal on 29 March 2021 which it subsequently withdrew because it was fatally defective. It thereafter filed the present application for condonation for failing to note an appeal within the prescribed time limits and extension of time within which to note the appeal.

APPLICANTS' SUBMISSIONS

Mr *Zhuwarara* for the applicant submitted that the judgment of the court *a quo* was handed down on 18 January 2021 during the lockdown period when the courts were only dealing with urgent matters. This was after the Chief Justice had issued a practice direction to the effect that the filing of ordinary court process would resume from the date of the lifting of lock-down regulations which occurred on 1 March 2021. Counsel submitted that after the

lockdown an oversight by applicant's legal practitioner resulted in its failure to file the notice of appeal within the prescribed time limits.

The first application for condonation was made seven (7) days after the prescribed time limit. Mr *Zhuwarara* submitted that, that delay was not inordinate.

Counsel further contended that the delay was due to the fact that during the lockdown period the applicant's legal practitioner was working from home and as a result he failed to monitor the correct progression of the case. It was the applicant's case that by the time the legal practitioner was able to attend to the backlog caused by the lockdown, the time within which the appeal should have been noted had already lapsed.

On prospects of success, applicant's counsel argued that the appeal has bright prospects of success because the respondent had not managed to prove that the vehicles were proceeds of, or instrumentalities of the commission of serious offences. Mr *Zhuwarara* therefore argued that the court *a quo* fell into error in finding that the applicant's vehicles were tainted property for the purposes of the Money Laundering Act.

Counsel further submitted that the court *a quo* fell into error by failing to properly interpret s 8 of the Money Laundering Act particularly in relation to which provisions the applicant had contravened. He further contended that the court *a quo* misdirected itself by failing to find that the applicant had lawfully restored its vehicle's chassis numbers and thus had not committed any criminal offence.

RESPONDENT'S SUBMISSIONS

Mr *Mutangadura,* for the respondent contended that when the applicant's legal practitioners became aware of the judgment on 18 January 2021 they had ample time to prepare the notice of appeal which they ought to have filed as soon as the lockdown was lifted. Counsel further argued that the applicant filed a chamber application for condonation which was fatally defective for failure to comply with the Rules. He submitted that the negligence of the applicant's legal practitioner ought to be visited on the applicant since the reason proffered did not constitute a justifiable basis for condonation.

He submitted that the applicant's intended appeal has no prospects of success, because, expert evidence led before the court *a quo* clearly and sufficiently proved that the vehicles were grossly tampered with. This according to counsel is exactly what s 8 of the Money Laundering Act seeks to combat and thus the court correctly found that the vehicles in question are proceeds of crime and instrumentalities of some serious offence by the applicant. The respondent's counsel therefore argued that the applicant had failed to establish why it should be granted condonation and extension of time within which to note its appeal.

THE LAW

It is a trite principle of law that a party who fails to comply with the rules of the Court must apply for condonation and give adequate reasons for his or her failure to comply with the rules. Rule 38 (1) (a) of the Supreme Court Rules 2018 provides as follows:

> "(1) An appellant shall institute an appeal within the following times-
>
> (a) by filing and serving a notice of appeal in compliance with sub rule (2) of rule 37 within 15 days of the date of the judgment appealed against."

Condonation is not granted just because the applicant applied for it. In the case of *Zimslate Quartize (Pvt) Ltd & Ors v Central African Building Society* SC 34/17 at p 7 of the cyclostyled judgment this court said:

> "An applicant, who has infringed the rules of the court before which he appears, must apply for condonation and in that application explain the reasons for the infraction. He must take the court into his confidence and give an honest account of his default in order to enable the court to arrive at a decision as to whether to grant the indulgence sought. An applicant, who takes the attitude that, indulgences including that of condonation are there for the asking does himself, a disservice as he takes the risk of having his application dismissed."

The factors to be considered by the court were outlined by BHUNU JA in *Mzite v Damafalls Investment (Pvt) Ltd & Anor* SC 21/18 at p 2 of the cyclostyled judgment where he said:

> "The requirements for an application of this nature to succeed are well known as outlined in the case of *Kombayi v Berkout* 1988 (1) ZLR 53 (S). These are:
>
> 1. The extent of the delay;
> 2. The reasonableness of the explanation for the delay; and
> 3. The prospects of success on appeal."

It must be noted that other factors to be considered are:

1. The importance of the case.
2. The respondent's interest in the finality of his judgment.
3. The convenience of the court and
4. The avoidance of unnecessary delay in the administration of justice.

These are referred to in the cases of *Federal Employer's Insurance Co v Mckenzie* 1969 (3) SA 361 at p 362 F-G, *Dzvairo v Kango Products* SC 35/17 and *Paul Gary Friendship v Cargo Carriers Ltd & Anor* SC 1/13 in which this Court said:

> "Condonation is an indulgence which may be granted at the discretion of the court. It is not a right obtainable on demand. The applicant must satisfy the court/judge that

there are compelling circumstances which would justify a finding in his favour. To that end, it is imperative that an applicant for condonation be candid and honest with the court.

Certain criteria have been laid down for consideration by a court/judge in order to assist it in the exercise of its discretion. Among these are, the extent of the delay and the reasonableness of the explanation therefor, the prospects of success on appeal, the interest of the court in the finality of judgments and the prejudice to the party who is unable to execute his judgment. The list is not exhaustive."

Condonation is therefore an indulgence granted when the Court is satisfied that there is good and sufficient cause for condoning the non- compliance with the Rules. Good and sufficient cause is established by considering cumulatively, the extent of the delay, the explanation for that delay and the prospects of success of the applicant's case on appeal. See *Bonnyview Estates (Pvt) Ltd v Zimbabwe Platinum Mines (Pvt) Ltd & Anor* SC 58/18. An application can in most cases be determined on the basis of the extent of the delay, its explanation and prospects of success. However, in other cases, the other factors discussed above should be considered cumulatively together with the extent of the delay, its explanation and prospects of success.

APPLICATION OF THE LAW TO THE FACTS

In this case the application will be determined on the extent of the delay and the reasonableness of the explanation and the applicant's prospects of success on appeal, because that is the criteria the parties argued the application. The application can also be determined on the consideration of that criteria.

(a) The extent of the delay and reasonableness of the explanation.

The applicant should have noted its appeal fifteen (15) days after 1 March 2021 being the date when the lockdown was lifted and the filling of ordinary court process resumed. It was therefore required to note its appeal by 22 March 2021. The applicant failed to do so

but filed a chamber application for condonation on 29 March 2021. It however withdrew that application because it fell short of the requirements of the rules of this Court. From the time the appeal should have been filed to the time this application was filed, a period of two months had lapsed. I am satisfied that the delay is not inordinate.

The applicant contends that its failure to note the appeal on time was caused by the Covid 19 lockdown. The judgment was handed down during the lockdown period on 18 January 2021. The legal practitioner deposed to an affidavit explaining that the judgment was handed down during the lockdown period. He further submitted that when he was notified of the handing down of the judgment he went to court unprepared and could not immediately diarise it, he therefore intended to diarise the judgment when he got home but forgot to do so.

Under normal circumstances, Counsel for the applicant could have been guilty of failure to exercise due diligence in carrying out his client's work. I am however of the view that since he was working from home under the unusual circumstance induced by the Covid 19 lockdown the explanation is reasonable.

(b) The prospects of success on appeal.

Even though the applicant has given a reasonable explanation and the delay is not inordinate, it is required to prove that it has prospects of success on appeal. In the case of *Essop v S* [2014] ZASCA 114, at page 6 the court said:

> "What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

The applicant intends to raise four grounds of appeal which are premised on the contention that the court *a quo* erred in concluding that the respondent had satisfied the threshold envisaged by the Money Laundering Act in proving that the applicant's trucks were tainted property. The applicant challenges the decision of the court *a quo* in granting the application by contending that there was no justification for its finding that a serious offence had been committed which justified the forfeiture of the applicant's motor vehicles when in fact the restoration of the chassis numbers on two of the vehicles had been done after lawful application to and authorisation by the police.

In granting the application for forfeiture the court *a quo* relied on s 8 of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*]. The section provides that:

"1. Any person who converts or transfers property-

(a) that he or she has acquired through unlawful activity or knowing, believing or suspecting that it is the proceeds of crime; and

(b) for the purpose of concealing or disguising the illicit origin of such property, or of assisting any person who is involved in the commission of a serious offence to evade the legal consequences of his or her acts or omission; commits an offence.

1) Any person who conceals or disguises the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing or suspecting that such property is the proceeds of crime, commits an offence.

2) Any person who acquires, uses or possesses property knowing or suspecting at the time of receipt that such property is the proceeds of crime, commits an offence.

3) Participation in, association with or conspiracy to commit, an attempt to commit, and aiding, abetting, facilitating and counselling the commission of any of the offences referred to in subsections (1), (2) and (3) is also an offence.

4) Knowledge, suspicion, intent or purpose required as elements of an offence referred to in subsections (1), (2), (3) and (4) may be inferred from objective factual circumstances.

5) In order to prove that property is the proceeds of crime, it is not necessary for there to be a conviction for the offence that has generated the proceeds, or for

> there to be a showing of a specific offence rather than some kind of criminal activity, or that a particular person committed the offence."

The court *a quo* found that the applicant was, on a balance of probabilities, caught within the ambit of the above provisions and it went on to note that this was because the applicant had taken positive steps to tamper with the identities of the vehicles by changing their chassis numbers and colours. The court *a quo* held that there would have been no need for the applicant to falsify the chassis numbers and change the colours of some of the vehicles if some form of criminal activities were not involved.

At the hearing of the application counsel for the applicant placed emphasis on the fact that the applicant had in respect of two of the vehicles sought police clearance and had been granted authority to effect the alterations. Based on the evidence placed before it, the court *a quo* drew an inference to the effect that the motor vehicles were used in committing crimes. In *Mtetwa v The State* HH 63-15 the court held that:

> "The courts are clear that in the drawing of inferences they must take into account the totality of the evidence, and must not consider evidence on a piecemeal basis. (*S* v *De Villiers* 1944 AD 493, *S* v *Reddy* 1996 (2) SACR 1 (A); *R* v *Mtembu* 1950 SA 670 (A)."

The applicant, placed before the court *a quo* evidence that alterations in respect of two of the vehicles were authorised by the police. It was argued on its behalf that, that evidence should have been taken into consideration in drawing inferences.

On p 7 of its judgment the court *a quo* commented on the authorization of alterations on vehicle ADZ 4880 as follows:

> "Despite bearing a new, and different chassis number, the vehicle now appearing as ADZ 4880 was resilient to the extent that remnants of the original chassis number, --- JH537341, were restored under the forensic examination. Yet, in applying for and obtaining approval for restoration not only of the engine but chassis number, the respondent had supplied the chassis number as IHTRL00085H652 998. This means the

application for restoration of the chassis number was deceptive. Respondent cannot rely on the deception to resist forfeiture of this vehicle."

Later on the same page commenting on vehicle AEZ 0790 for which authority to restore had also been granted the court *a quo* said:

"Respondent applied for restoration of the chassis and engine numbers of yet another vehicle. The application which was granted bears the last integer of the chassis number not as "3" but as "5". On examination the last integer was" 5". The "B" and "H" letters had font that was bigger and uneven compared to the rest of the integers. The vehicle now appears as AEZ 0790".

On p 8 the court *a quo* commented on vehicle AEZ 0790 as follows:

"Further Nzirawa and Mukura also say the following in their affidavits. The vehicle appearing as AEZ 0790 bore particulars of a different freight liner horse that was involved in an accident which resulted in it being burnt to ashes and was accordingly written off. The burnt horse was registered under AEU 2791 bearing engine number 11760181 and chassis number **IFUYDMD6544395-----**. The accident occurred on 10 March at the 46 km peg along the Harare –Nyamapanda Highway and was investigated under Murewa Traffic CR43/03/19 and Traffic Accident Book 112/19. **The mystery is that in or about November 2019 the respondent applied for and obtained permission to restore the chassis number IFUYDMDB65H544395** (and the engine number) to an existing vehicle" --- (Emphasis added)

It is apparent that the court *a quo* held that the applicant relied on deception to obtain authority to restore the motor vehicles' chassis and engine numbers. It observed that the applicant's application for alteration used chassis numbers which resembled but were different from the ones on the motor vehicles. It demonstrated the veracity of its findings by giving clear examples of the deception. It is clear that in view of the court *a quo's* decision being based on a thorough analysis of the evidence placed before it, it cannot be said that the applicant has prospects of success on appeal.

It is also pertinent to note that the burden of proof in all civil matters is on a balance of probabilities. The concept of proof on a balance of probabilities was enunciated in

British American Tobacco Zimbabwe v Chibaya SC 30/19 wherein the court quoted with approval the case of *Miller v Minister of Pensions* [1947] 2 All ER 372, at p 374 and explained as follows:

> "The concept must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not."

This point is further emphasized by P.J Schwikkard and S.E Van Der Merwe in their book, *Principles of Evidence*, 4th ed, where they at p 579 say:

> "In civil proceedings the inference sought to be drawn must also be consistent with all the proved facts, **but it need not be the only reasonable inference, it is sufficient if it is the most probable inference."** (emphasis added)

In this case the inference which could have been drawn from the authorization by the Police cannot be drawn as the authority was obtained through deception. The most probable inference remains that the applicant dealt with the motor vehicles deceptively because they are tainted property.

The court *a quo* clearly noted that counsel for the applicant chose not to focus on the application and simply contended that the forensic examination was not to be relied on yet it did not submit expert evidence of its own which the court could use to decide the matter. Therefore, its bare allegation that the motor vehicles were not tampered with cannot be relied on. In the case of *Barros & Anor v Chimphonda* 1999 (1) ZLR 58(S) at 62G-63A the court held that,

> "If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account relevant some consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for so doing. In short, this court is not imbued with the same broad discretion as was enjoyed by the trial court."

In the circumstances, it seems to me that the court *a quo*, applied the law fairly and equitably in order to make an objective assessment of the motor vehicles' liability for forfeiture and the applicant failed to prove that the decision of the court *a quo* is likely to be set aside if its late noting of the appeal is condoned. I am therefore of the view that the applicant has no prospects of success on appeal.

DISPOSITION

Accordingly, it is ordered that the application be and is hereby dismissed with costs.

Ngwerume Attorneys, applicants' legal practitioners

The National Prosecuting Authority, respondent's legal practitioners