RIDGEWAY TICHAWONA CHANAKIRA
versus
GEORGE CHANAKIRA

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 6 March 2015

Opposed Application

R Kunze, for the applicant
Z L Zvobgo, for the respondent

BERE J: This is an application for condonation for the late noting of an appeal against the judgment made by a magistrate sitting at Chitungwiza Magistrates Court on 5 November 2013. In terms of Order 31, r 2 (1) (a) of the Magistrates Court Rules, 1980, the applicant ought to have filed his appeal within 21 days from the date of judgment. He failed to do so hence this application for condonation.

The application is opposed by the respondent for the reasons elaborately dealt with in the notice of opposition. The position of the law is very clear as to what the applicant has to establish and that the court has to exercise its discretion judiciously. The court does not adopt an arm chair approach.

The court basically has to consider the explanation given by the applicant and the prospects of success in the intended appeal. See *Maheya* v *Independent Africa Church,*[1] *Lovemore Sango v Chairman of Public Service Commission*[2]and a host of other similarly decided cases.

The applicant in the instant case was barely 8 days out of time and by any stretch of imagination that cannot qualify to be an inordinate delay.

The applicant explained that he had challenges first in obtaining a copy of the judgment and this position could have been explained best by his erstwhile legal practitioner Mr *F Katsande* but for some reason that has not been done despite the respondent's position that both parties were advised by the presiding magistrate on when to note judgment.

The absence of the record of proceedings even at this stage must be accepted as one of the reasons why the appeal could not be noted in time. This explains why the applicant has alluded to the possibility of filing supplementary grounds of appeal once the record of proceedings is available. See paragraph of the applicant's proposed notice of appeal[1]

The applicant also gives a hint in his papers that he had challenges in putting his current legal practitioners in funds in order for them to launch this appeal, a position which has triggered heavy criticism from the respondent in the light of this court's decision in *Mubayo* v *Chidenge*[2] almost 10 years ago. It must be noted that so much has changed in this country in as far as the economic challenges bedevilling the ordinary citizen is concerned. One therefore need not blindly look at precedent and forget that no legal practitioners worth his salt would accept to represent a client without being put in funds first. Legal practitioners are not for charity work.

It does seem to me that the explanation given by the applicant in failing to timeously file his plea is both reasonable and *bona fide*.

As regards the prospects of success, a perusal of the judgment of the court *a quo* shows to me that if the presiding magistrate had seriously applied her mind to the documentary proof tendered by the applicant (the TT 2455 document in favour of the applicant) against no documentary evidence tendered by the respondent, she would have looked at the matter differently and clearly arrived at a different decision.

The learned magistrate concluded her judgment by expressing her reservations about her jurisdiction to deal with the matter but still went on to determine the matter.

In such circumstances it cannot be said that the applicant has a hopeless appeal. There is so much that can be said in favour of the applicant and adopting a wholistic approach, both parties must be given a second opportunity in the appeal court.

Consequently the application for condonation is granted as prayed for on p 33 of the applicant's papers.

Chihambakwe, *Mutizwa & Partners*, applicant's legal practitioners
Dube, Manikai and Hwacha, respondent's legal practitioners