GREENWOOD ENTERPRISES T/A COST TIMBERS
versus
GARAI MANZUNZU
and
PETER MUTUME
and
LUKE TSAMBA
and
REBECCA CHITATE
and
ELTON MADERA
and
DIWANI WDZERAI
and
THE SHERRIFF N.O
and
GLADNESS TARIRO MAJUTA
and
COST BENEFIT ENTERPISES

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 14 February & 20 March 2018

Urgent chamber application

CC Kanengoni for the applicant
P Seda, for the 1st to 6th respondents
No appearance for the 7th respondent
No appearance for the 8th and 9th respondents

TSANGA J: The applicants filed an urgent chamber application to try and stop a sale in execution following attachment of their property. The attachment was rooted in an arbitral award granted to the first to sixth respondents in 2015 against Cost Benefit Holdings (Private) Limited, as the judgment debtor. The applicant had laid claim to the property and when its claim was dismissed by MANGOTA J in HH 20/17 (HC 1572/16), it had appealed to the Supreme Court under SC 21/17. This appeal had been deemed abandoned following failure

by the applicant's legal practitioners to file heads of argument within 15 business days as requested by the Registrar of the Supreme Court. Stay of execution was therefore sought pending the hearing in the Supreme Court of a condonation matter pertaining to the reinstatement of the appeal and condonation of failure to file heads of argument under case SC 21 /17. In reality therefore this application was brought against a backdrop where there is no appeal in the main matter but merely an application to reinstate an appeal. The eighth and ninth respondents in this matter had also laid claim to the property and upon their claim being dismissed, the Sheriff being the seventh respondent had attached property at applicant's premises.

Counsel for the first to sixth respondents argued that they were no prospects of success in the reinstatement of the appeal as the applicant had failed in the High court to show that it was the owner of the property it was claiming. The court premised its decision on the grounds that the debtor and the applicant were in a subsidiary relationship and were operating from the same address and premises and were virtually one and the same. The applicant had failed to produce separate books of accounts and to tender inventories for each entity which would have illustrated who owned what. The applicant was therefore said to have lost the matter on the basis of failure to prove why its operations should be regarded as separate from the judgement debtor. The fact that the applicants had deliberately omitted to place this judgment before the court in their application was pointed to at the hearing as an attempt at material non-disclosure of crucial facts which would work against their application.

The founding affidavit in the application before me was also said by Mr *Seda* to have deliberately skirted the issue of prospects of success of the pending application for reinstatement of the appeal. He also pointed out that the application for reinstatement of the appeal had only been made on 5 December 2017 when applicant was aware as early as 13th September 2017 that its matter had been dismissed for failure to comply with the directions to file heads of argument. He further pointed out that the reason why applicant had not acted earlier was because two other sets of interpleaders, which have both since been dismissed, had been filed equally laying claim to the same property. Also highlighted was that in total four different applications inclusive of this one have been lodged with respect to the same property. Furthermore, the same lawyers representing the applicant herein were also said to

have represented the ninth respondent in its claim that it had filed for the same property. Mr *Seda* pointed to this as highly unethical conduct on the part of applicant's counsel. Against the totality of these background factors, he sought dismissal of the application with costs on a higher scale on the basis that quest to reinstate the appeal would most likely be unsuccessful as there was no merit in the main matter.

It is trite that where a party has not complied with a rule of court they should apply for condonation and explain the breach of the rules. This is what the applicant has done in the Supreme Court. However, until such condonation is granted, there is no appeal pending before the courts against MANGOTA J's judgment dismissing applicant's interpleader. Prospects of success are always central to any application seeking condonation for failure to observe rules. See *At the Ready Wholesalers (Pvt) Ltd* v *Katsande & Ors* S-7-03. The applicant will have to satisfy the various criteria laid down for consideration by the court or judge to assess in the exercise of its discretion. As stated in *Friendship* v *Cargo Carriers Ltd & Anor* S-1-13 these include 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. *Nyakambangwe* v *Jaggers Trador (Put) Ltd* HH-146-03.

The fact that the failure to act timeously lay with the practitioner is not the point. It would only make sense to grant a provisional order staying the execution where the court is convinced that the case before the Supreme Court for condonation and reinstatement of the appeal holds some prospects of success. What the counsel for first to sixth respondents did before me was to adequately illustrate why the Supreme Court is unlikely to find favour with the application for condonation in that the appeal itself which the applicants are seeking to reinstate, holds no merits and there would therefore be little point reinstating it.

Whilst that would ultimately be a decision for the Supreme Court itself to take were the case to get to that hurdle, more importantly, what is clear from case law is that the Supreme Court takes a very strict approach in such matters involving failure to observe court rules. It is these decisions which the High Court is bound by which led this court to the conclusion that the application for reinstatement holds no prospects of success by a long mile and that it would be prejudicial to delay the first to sixth respondents their relief. In the case of *Jaison Kokerai Machaya* v *Lameck Nkiwane Muyambi* SC-04-05 the circumstances in

seeking condonation were similar with applicant's pending matter in the Supreme Court. Whilst conceding that the legal practitioner was remiss the applicant therein had asked the court that the "sins of his legal practitioner" not be visited on his client.

The court had this to say:

> "How many times has this plea been heard in the many applications before this Court whether for condonation and extension of time within which to appeal, or for reinstatement of appeals! Times innumerable. Yet the flood of applications continue unabated and the same excuses are tendered over and over.
>
> The time has come for sterner measures to be taken of applications of this nature where negligence, tardiness, and disdain for the rules of court is exhibited by legal practitioner".

And further:

> "The notion that condonation of a breach of the Rules is there for the asking ought to be dispelled. And, there must be finality to litigation. It is an injustice to a party who has been waiting to execute his judgment to be forced to suffer the effects of the disregard by the other party's legal practitioners of the Rules of Court, namely, the delaying of the execution of his judgment".

In the Supreme Court case of *Prize Mahachi* v *Barclays Bank of Zimbabwe* SC 06-06 again the applicant's legal practitioners had failed to file heads timeously after having been reminded to do so by the Registrar. When their appeal had been deemed abandoned they sought to apply for condonation of the late filing of heads. Their application was similarly dismissed with these observations:

> "In this case, the reasonable inference is that the applicant's legal practitioners were disdainful of the Rules of this Court. Not only did they fail to comply with the rule requiring them to file heads of argument within the period specified in the registrar's letter of reminder, which they received, they went on to commit two more sins. They applied for condonation of the late filing of heads of argument when there was no appeal pending before the Court. They also failed to apply for reinstatement of the abandoned and dismissed appeal."

Therefore based on the facts the view taken in this matter was that the Supreme Court is similarly unlikely to find favour with the application for reinstatement. There are virtually no prospects of the appeal being reinstated in the face of the facts where there have been so many competing claims for the same property. The conclusion was that the applicant was simply buying time to avoid the finding upholding the up-lifting of the corporate veil in an endeavour not to pay the first to sixth respondents what is due to them. The interim relief and

the final relief were also the same which also meant that a final order was effectively being sought.

It was for the above reasons that I dismissed the application with costs on a higher scale as the first and sixth respondents have been put through unnecessary expense with this application.

Matsika Legal Practitioners: applicants legal practitioners
Sawyer and Mkushi Legal Practitioners: 1st to 6th respondents legal practitioners