

MINISTER OF HOME AFFAIRS
and
COMMISSIONER GENERAL OF POLICE
versus
MUGARIRI ZHOU

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 17 November 2017 and 03 January 2018

Opposed Application

E Mukucha, for applicants
L Mudisi, for respondent

TAGU J: This is an application for condonation for late noting of an appeal against the decision of Rushambwa, Esquire Magistrate sitting at Zvishavane Magistrates' Court on 27 March 2015. The facts were that the applicants were served with summons commencing action by the respondent on the 26th November 2014 claiming USD 10 000. 00 as damages arising out of an assault allegedly perpetrated on the person of the respondent by two Police Constables Kevin Chitenga and Zvavamwe when carrying out official duties of investigations on behalf of the applicants. The applicants through their legal practitioners who have since left the Civil Division of the Attorney General drafted an appearance to defend intending to serve it through the Office of the Area Public Prosecutor for Zvishavane. However, for the reason unknown to the applicants there was no return of service for the appearance to defend and the Law Officer who was handling the matter also left the Civil Division of the Attorney General to join the Prosecutor General's Office in December 2014. The file was then re-allocated to another Law Officer in January 2015 but by that time a default judgment had already been obtained by the respondent. On the 27th February 2015 the applicants filed an application for rescission of default judgment which had been handed down on the 29th January 2015. The respondent filed his Notice of Opposition on the 9th March 2015. The application for the rescission of judgment was set down for hearing on 10 March 2015 and the presiding Magistrate indicated that he would hand down the judgment by 13th March 2015.

On 13 March 2015 the judgment was not yet ready. The applicants went to check for the judgment on 18th March 2015 for the second time and the judgment was still not ready. However, the judgment was later availed to the applicants on the 8th April 2015 but was stamped on the 27th March 2015 by the Resident Magistrate as the date of issue. The applicants noted an appeal against the dismissal of the application of the rescission of judgment and attempted to file it at Zvishavane Magistrates Court through one Khuzani Moyo a Police Sergeant stationed at Zvishavane Police Station on the 17th April 2015. The Clerk of Court one Tatenda Marumbwa refused to accept the Notice of Appeal stating that the applicants (appellants) were out of time. The applicants submitted that they were still within the prescribed time limit within which to file their appeal but the Clerk of Court frustrated their efforts by taking a judicial decision and refused the applicants the opportunity to file their Notice of Appeal.

Further, Tariro Sharon Musangwa a Law Officer in the Civil Division of the Attorney General's Office submitted that the applicants should have filed their application for condonation immediately after such refusal to accept papers by the Clerk of Court but took a month because of slow movement of mail between the applicants and Khuzani Moyo who attempted to file the Notice of Appeal and preparing a Supporting Affidavit narrating the non-acceptance of the Notice of Appeal. She further submitted that they have high prospects of success on the quantum of damages as the award of damages is astronomical as opposed to the injuries suffered by the respondent. Finally she submitted that the applicants were not in wilful default.

The respondent opposed the application for condonation on the basis that incompetence and administrative confusion of the public office has nothing to do with rights of the respondent. He said the applicants should put their house in order. As to the prospects of success on appeal he submitted that Constable Chitenga was convicted after a full trial at Zvishavane Magistrates Court hence has no prospects of success on appeal. He attached a supporting affidavit from the clerk of court which read in relevant part as follows-

- a. The Applicants attempted issuing its Appeal which I, excised my discretion and refused issuing it on the basis that the appeal was being filed out of time.
- b. The judgment had been issued on the 13th of March, 2015 and the Applicants made the Appeal in excess of 21 days.
- c. I advised the Applicants to make an Application for condonation as they were in breach of the Magistrates' Court Rules which entitle an aggrieved party to file its Appeal within 21 days."

The law applicable in an application of this nature was stated in the case of *Maheya v Independent African Church SC -58-07* which re-stated the law in *Herbstein & Van Winsen-The Civil Practice of the Supreme Court of South Africa 4th ed* at p 897 where it was held that-

“In considering the application 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 the established principles bearing in mind that it has to do justice. Some of the relevant factors that has to be considered and weighed one against the other are; the degree of non-compliance; the explanation therefor; the prospects of success on appeal ; the importance of the case; the respondent’s interests in the finality of judgment; the convenience of the court and avoidance of unnecessary delays in the administration of justice. *Bishi v Secretary for Education* 1989 (20 ZLR (H) at 242D-243C”.

In casu assuming that the judgment was handed down on the 13th March 2015 which of course does not appear in the record, the twenty-one days period fell on the 15th April 2015 excluding Holidays and weekends. The applicants attempted to file their Notice of Appeal on the 17th April 2015 and the clerk of court refused to accept them for filing this follows that the applicants were out of time by two (2) days. But further assuming that the date of issue of judgment is as what appears on the judgment itself, that is 27th March the twenty-one days period fell on the 29th April 2015 and it means that the applicants were still within the stipulated time limit as they attempted to file their Notice of Appeal on the 17th April 2015 were it not for the Clerk of Court who took a judicial decision and refused to accept the applicants’ Notice of Appeal for filing.

Two things are worth mentioning here. One, it is important that the day when the judgment is delivered be clearly spelt out to avoid unnecessary arguments when it come to the calculation of time within which an action has to be taken. Going by the date stated by the applicants it means they were within the time limit. If it is accepted that the applicants were out of time by a mere 2 days if we go by the date stated by the respondent, this was a minimal delay. Secondly, in my view, the Clerk of Court ‘s conduct in refusing to accept the Notice of Appeal was not consistent with Order 3 of the Magistrates Court Rules which lays down his functions as Numbering of cases and issue of process. In the present case the Clerk of Court had a hand in delaying the applicants in processing their appeal.

As regards the prospects of success in my view the prospects are very high on appeal as the Presiding Magistrate granted the sum of damages of USD10 000.00 without any justification. No affidavit of evidence was adduced and the medical report showed that the respondent did not sustain permanent injuries. Their case is reasonably arguable on quantum.

Finally I considered the explanation for the delay in filing the application for condonation. A delay of one month in the circumstances is reasonable. The applicants are based in Harare and the processes were to be filed in Zvishavane. The explanation for the delay is plausible and I will exercise my discretion to grant such condonation. In *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S) SANDURA JA had this to say –

“It is therefore, well established that the court has discretion to grant condonation when the principles of justice and fair play demand it and when the reasons for non-compliance with the rules, have been explained to the satisfaction of the court.”

In the circumstances I found the delay to be minimal, the explanation for the delay is plausible and the prospects of success on the merits are virtually existent and I will exercise my discretion to grant such condonation.

IT IS ORDERED THAT

1. The application for condonation of late noting of an appeal in Zvishavane Magistrates' Court Case No. MC/1000/14 be and is hereby granted.
2. Applicants' late filing of appeal is hereby condoned.
3. Applicants' Notice of Appeal be and is hereby accepted for filing in Zvishavane Magistrates' Court in terms of the rules.
4. The bar that is operating against the Applicants be and is hereby uplifted.
5. Costs be costs in the cause.

Civil Division Of The Attorney –General's Office, applicants' legal practitioners.
Mutendi, Mudisi & Shumba, C/O Chadyiwa & Associates, respondent's legal practitioners