

SHINGIRAI PHILIP KATSANDE
v
ANGELINA KATSANDE (NEE NYAHEMWA)

SUPREME COURT OF ZIMBABWE
PATEL JA
HARARE, APRIL 3, 2019

Applicant in person

C. Mateza, for the respondent

IN CHAMBERS

PATEL JA: This is a chamber application for the condonation of non-compliance with the Rules of this Court and for an extension of time within which to note an appeal against the judgment of the High Court in Case No. HC 5315/07, handed down on 19 February 2015 as Judgment No. HH 150-15.

On 9 March 2015, the applicant, who is employed in the Zimbabwe National Army as a Lieutenant-Colonel, noted an appeal against the judgment of the High Court. He was a self-actor at that time. In September 2015, he was despatched to China on official duty for a period of about two years, which period was extended for a further one year. He returned to Zimbabwe on 30 October 2017. He then enquired with the Registrar as to the

status of his appeal and was advised that the appeal was deemed to have lapsed because of his failure to make any arrangements for the preparation of the record. The relevant correspondence from the Registrar had been written during his absence from the country.

On 28 September 2018, the applicant filed a chamber application for condonation and extension of time in Case No. SC 709/18. This application was dismissed on 15 February 2019 in default of his appearance at the hearing of the matter. He avers that he did not receive the notice of set down for the hearing. He has now filed the present chamber application for condonation and extension of time on 13 March 2019. The application is strenuously opposed by the respondent.

In an application for condonation and extension of time to appeal the applicant is required to provide a reasonable explanation for his failure to prosecute the matter timeously and to demonstrate that he has reasonable prospects of success on appeal. The applicant has conceded that he has no reasonable explanation for the delay between the dismissal of his earlier chamber application for condonation by reason of his default on 15 February 2019 and the filing of the present application on 13 March 2019. More importantly, he has proffered no explanation whatsoever for the failure to prosecute his intended appeal from the date of his return to this country on 30 October 2017 and the date when he filed his first chamber application on 28 September 2018, a period of inaction of almost eleven months.

However, that is not the end of the matter. In considering his prospects of success on appeal, it is reasonably clear that he had agreed at the pre-trial conference stage in the proceedings *a quo* to pay the school fees for the four children of the marriage. However, there is nothing to show that he agreed to pay any specific amounts for those fees or the monthly rate at which would be required to reimburse the respondent for the fees that she had already paid or would continue to pay thereafter. The court *a quo* ordered that the applicant should pay the current school fees for all four children and that he should also reimburse the respondent at the rate of US\$1,000 per month in respect of an unspecified total amount to be repaid. In making this order, the court did not take into account the current financial standing of the parties.

In my view, the court *a quo* was required, in making an order that is just and equitable, to have due regard to the respective earnings of the parties and, in particular, to the earnings of the applicant himself. At the relevant time, his net monthly salary appears to have been in the region of US\$1,300. If this is correct, and the respondent has not attempted to dispute the figure, the order granted by the court *a quo* was clearly unrealistic and incapable of practical fulfilment. It would then follow that the court erred and misdirected itself in failing to take the applicant's earnings into account in determining the monthly sums that he should be ordered to pay for past and current school fees.

In the event, although the applicant has failed to provide reasonable explanations for the two delays that I have adverted to, he has demonstrated a very arguable case on appeal in respect of the monetary amounts that he was ordered to pay by the court *a quo*.

The application should therefore be granted. However, because of the applicant's failure to prosecute the matter diligently and timeously, he should be mulcted with an order for costs on a punitive scale, such costs to be paid as a precondition to his being allowed to proceed with his appeal. Indeed, the applicant himself was not averse to such order being made so as to enable him to pursue his appeal.

In the result, it is ordered that:

1. The application for condonation for non-compliance with the Rules be and is hereby granted.
2. The applicant be and is hereby granted an extension of time within which to file and serve his notice of appeal.
3. The applicant shall file and serve the notice of appeal within ten days from the date of this order.
4. The applicant shall pay the costs of this application on a legal practitioner and client scale within ten days from the date of this order.
5. In the event that the applicant fails to comply with paragraph 4 above, this order shall lapse *ipso facto* on the last day for compliance with that paragraph and this application shall be deemed to have been dismissed on the same day.

Chimwamurombe Legal Practice, respondent's legal practitioners