

DISTRIBUTABLE (23)

Judgment No S.C. 33\03
Civil Application No 265\03

(1) CHIEF SUPERINTENDENT MADZINGO (2) THE COMMISSIONER
OF POLICE
v ASSOCIATED NEWSPAPERS OF ZIMBABWE (PRIVATE)
LIMITED

SUPREME COURT OF ZIMBABWE
HARARE OCTOBER 14, 2003

F.C. Maxwell, for the applicants

A.P. de Bourbon SC., for the respondent

Before: CHIDYAUSIKU CJ, in Chambers in terms of the Supreme Court
Rules

This is a Chamber application for condonation for the late filing of the court record. The application is made, presumably, in terms of Rule 31 of the Supreme Court Rules. The following are the facts. On 22 September 2003 the applicants were granted leave to appeal against the interpretation given to s 8(2)(a) of the Access to Information and Protection of Privacy (Registration Accreditation and Levy) Regulations S.I. 169C by OMERJEE J on 18 September 2003. The court ordered by consent that the notice of appeal and the record were to be filed by close of business on 22 September 2003. The notice of appeal was filed and service was

effected on the respondent by close of business on 22 September 2003. Thus the notice of appeal was served within the time prescribed in the court order.

The applicants, however, failed to file the record within the time set out in the court order for reasons set out in paragraph 5 of Mrs Maxwell's affidavit. Paragraph 5 of the affidavit reads as follows:-

“However we failed to file the record because:

1. The messenger who went to file the notice of appeal delayed in coming back. After 1500 hours the deponent realised that the Notice of Appeal had only been filed at the Supreme Court and served on the Respondent's legal practitioners, a copy had not been filed at the High Court.
2. The messenger had to go to the High Court to file the Notice of Appeal. Meanwhile the record was being prepared. Because of a temporary interruption when bond paper ran out, photocopying of the record was finished after 1600 hours.

WHEREFORE I pray that the delay be condoned and that appellants be allowed to file the record.”

The relief sought is set out in the draft order which reads as follows:-

- “1. The appellants' failure to file the record by close of business on 22nd September 2003 be and is hereby condoned.
2. The appellants be allowed to file the record forthwith.
3. That costs be reserved.”

The application was served on the respondent. No opposing papers were filed by the respondent in terms of Rule 31(5) but there was appearance by the respondent at the hearing of this matter. The respondent offered no explanation for the failure to comply with the above rule nor was there application for condonation

for the non-compliance. The respondent opposed the application on the basis that the notice of appeal was defective. Mr *de Bourbon* submitted that he opposed the application for condonation on the basis that the notice of appeal was fatally defective in that it was not an appeal against the relief granted by the learned judge but the reasoning behind the granting of the relief. It is now settled that condonation is invariably granted upon good cause being shown by the applicant.

In determining whether or not good cause exists the following factors are considered:

- (a) duration of the delay;
- (b) explanation for the delay; and
- (c) prospects of success on the merits

In this matter the delay was very short. The *dies induciae* was missed by hours and not days.

The explanation for the delay is plausible. The bond paper ran out causing the preparation of the record to be completed a few hours after the deadline. In any event the appeal itself was lodged on time. It is the record of the proceedings that could not be filed on time. There is hardly any prejudice that could have been caused to the respondent.

The point taken by Mr *de Bourbon* is relevant to the question of the prospects of success on the merits. In my view, in a case where the delay is minimal

and a good explanation exists for the delay the requirement for prospects for success on the merits recedes into the background. In cases, as in *casu*, where the delay is minimal and the explanation for the delay is plausible condonation should be granted unless the prospects of success on the merits are virtually non-existent and the applicant is only seeking to delay the day of reckoning. This is not the case here. The legal point raised by Mr *de Bourbon* is debatable and, in my view, it is better determined by the court as opposed to by a judge in Chambers.

In the result I will allow the application and an order is made in terms of the draft.