

RITA MARQUE MBATHA
versus
CONFEDERATION OF ZIMBABWE INDUSTRIES

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 22 June 2017 & 8 November 2017

Opposed Matter

Applicant, in person.
H Mutasa, for the respondent

MAKONI J: The applicant approached this court seeking an order in the following terms:

“IT IS BE AND HEREBY ORDERED THAT:

1. That condonation of the late application for leave to appeal for case number HC1788/15 be and is hereby granted.
2. That Applicant shall lodge her leave to appeal to the Supreme Court within 7 days of the granting of this order.
3. There be no order as to costs.”

The background of the matter was clearly set out by CHATUKUTA J in *Rita Marque Mbatha v Confederation of Zimbabwe Industries* HH 225/15 as follows:

“The parties have been engaged in protracted litigation dating back from 2002 over allegations by the applicant of sexual harassment by the respondent’s then President and Chief Executive Officer. The applicant’s employment with the respondent was terminated after the allegations. The applicant challenged the termination. The dispute was referred to arbitration culminating in an award in favour of the applicant on 24 March 2014. The respondent appealed against the award. Quantification of damages was pronounced on 27 July 2014. The respondent thereafter appealed against the quantification. The respondent at the same time, applied to this court in case number HC 8795/14 to have the award set aside. The award was set aside on 11 February 2015 in case number HH 125/15.

Dissatisfied with the judgment in case number HH 125/15, the applicant filed the present application for leave to appeal to the Supreme Court.”

The urgent chamber application filed by the applicant on 5 March 2015, in HH 225/15 was dismissed with costs on an attorney client scale and the application was ordered to proceed as an ordinary court application. On 15 March 2015, the applicant lodged an application in the Supreme Court for review of the decision in HH 225/15. The application was dismissed on 30 March 2015 on the basis that the Supreme Court does not have powers to review decisions of the High Court. The applicant then filed the present application for condonation of late application for leave to appeal to the Supreme Court.

The applicant avers that she is of ill health hence the delay in lodging the application for condonation. She further avers that she did not make an oral application for leave to appeal as she was of the view that the remedy available to her was to take the matter on review to the Supreme Court.

The application is opposed. In the notice of opposition, the respondent took two points *in limine* firstly that the founding affidavit was inherently defective and secondly, that the applicant failed to comply with the provisions of rule 267.

However, the respondent did not persist with the issue of the defective affidavit in its heads of argument. I will therefore deal with the remaining point only.

On the merits, the respondent avers that the applicant has failed to satisfy the requirements of an application for condonation.

I will deal with the point *in limine* first.

FAILURE TO ABIDE BY RULE 267

Mr *Mutasa*, submitted that the present application was filed after the expiry of the twenty-four (24) day period prescribed by r 267 for filing an application for leave to appeal. The application was filed notwithstanding that there was no order by the Judge in question authorising the institution of the present application. Non-compliance with rule is fatal.

The applicant contended that, she is of ill health and at times she is not able to respond to court document or issue court documents in time.

Rule 267 provides:

“267. Limitation of time for application for condonation

No application in terms of rule 266 may be made after the expiry of 24 days from the date on which the sentence was passed, unless the judge otherwise orders.”

Rule 266 provides for the filing of an application for condonation where a party would have failed to make an application for leave to appeal in terms of r 262 within the prescribed period of 12 days.

The rule is couched in very simple terms. A party cannot file an application for condonation of late filing of an application for leave to appeal without the leave of the judge who presided over the matter or any other judge if that judge is not available.

The procedure for seeking leave is set out in Order 34. In terms of r 269 in case where leave to appeal is required in respect of the judgment rendered in such proceedings such as described in s 43 (2) (c) (d) of the High Court Act [*Chapter 7:06*], the provisions of the r 262 to 268 shall apply.

In terms of r 262 an application for leave to appeal shall be made orally immediately after the judgement is granted. Where the party fails to make the oral application immediately after the rendering of judgment, such party must seek condonation in terms of r 266. Where a party does not make the application for condonation within a period of 24 days from the date of judgement, such party must first obtain leave of the judge.

The last scenario is where the applicant finds herself in. The judgment by CHATUKUTA J was rendered on 5 March 2015. The applicant then filed the present application for condonation on 12 May 2015, some days later. The applicant did not seek leave of CHATUKUTA J to file the present application.

The applicant has not proffered any reasonable explanation as to why in the first place she did not make the oral application as provided for in r 262. She submitted that her failure to comply with r 262 was because she was of the view that the only remedy available to her was a review in the Supreme Court. It is trite that “*ignorantia legis neminem excusat*” thus ignorance of law excuses no one. Further, she did not explain why she did not approach the judge in question in terms of r 267 to obtain leave to file the present application.

It has been held, that if a party fails to seek condonation “as soon as possible, he should give an acceptable explanation, not only for the delay in making the application for the rescission of the default judgment, but also for the delay in seeking condonation”. *Viking Woodwork (Pvt)*

Ltd v Blue Bells Enterprises (Pvt) Ltd 1998 (2) ZLR 249(S) at 251D-E; *Sloojee & Anor NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138 H.

The applicant in an attempt to proffer an explanation, throws in the issue of illness but as was submitted by Mr Mutasa this is “flagrantly misleading”.

The medical papers indicate that during the time that she alleges that she was receiving medical treatment she appeared in this court and argued her urgent chamber application. Moreover, the Doctor’s notes relate to the applicant’s visits to the doctor during the month of May 2015 well after the expiry of the 12-day period. The applicant, within the 12-day period, lodged a chamber application in the Supreme Court. This clearly shows that if the applicant was of ill-health as she alleges, she would not have managed to make an application in the Supreme Court.

In *National Social Security Authority v D Chipunza* SC 116/04 ZIYAMBI JA had this to say on rules of court:

“There is a constant flow of applications for condonation of non-compliance with the Rules of this Court, often based on the flimsy and inane excuses. The pronouncements issued by this Court requiring a diligent compliance with the Rules of this Court appear to fall on deaf ears. It must be emphasised that the Rules of court are enacted for purpose of regulating the conduct of matters brought before the Court and that condonation of failure to observe them is not automatic or there for the asking. An applicant must make out a good case for condonation of his non-compliance with the rules. Failure to do so is fatal to his application.”

In *Richard Itayi Jambo v Church of The Province Of Central Africa and Ors* HH 329/13 GUVAVA J (as he then was) had this to say:

“Clearly, where a party fails to comply with the rules there must be a plausible reason why there has been a failure to comply. In this case the attitude of the applicant was that such non-compliance must be granted by the court even though no explanation has been proffered for such failure.”

For these reasons, I find that the application is not properly before me by reason of failure to comply with the rules.

I will therefore uphold the point *in limine*.

In view of the above findings in respect of the point *in limine*, it will not be necessary for me to determine the merits of the matter.

The respondent prayed for costs on a punitive scale on the basis that the applicant has a penchant for litigation without proper legal advice. Mr *Mutasa* submitted that the applicant had

not learnt from the sentiments of CHATUKUTA J expressed on page 6 of the cyclostyled judgment. She is vexing the respondent.

Costs on a punitive scale are granted when by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court considers it just by means of such an order to ensure that a successful party is not put out of pocket in respect of the expenses caused to him by the litigation. The considerations include: dishonest conduct, malicious conduct, vexatious proceedings, reckless proceedings and frivolous proceedings. See *Mahembe v Matambo* 2002 (1) ZLR 149 (H).

I want to agree with Mr *Mutasa*, that the applicant should seek legal advice before dragging the respondent to court. All that the present application succeeded in doing is to vex the respondent and put it out of pocket by defending reckless proceedings brought to court without any regard to the rules of the court. The applicant, other than pleading for mercy, has not advanced any reason why she should not be mulcted with costs on a punitive scale. I will therefore accede to the respondent's prayer.

In the result, I will make the following order:

1. The application is dismissed.
2. The applicant to pay the respondent's costs on a legal practitioner client scale.

Gill, Godlonton & Gerrans, respondent's legal practitioners