

CHRISTOPHER ANDREW SAMKANGE
and
ASSUMPTA SAMKANGE
versus
VISION/R4 CORPORATION
and
PROFESSIONAL COMPUTER SERVICES (PVT) LTD
and
CHRISTOPHER JOHN NDABEZINHLE MAKASI-SHAVA

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 27 June 2016 and 3 March 2017

Opposed Matter

R T Zhuwarara, for the applicants
R Chingwena, for the respondents

PHIRI J: This is an application for condonation of the late filing of Heads of Argument and Rescission of Judgment granted in the main matter in case Number HC 10930/14.

First Applicant's Affidavit

In the first applicant's founding affidavit, it was submitted that the first respondent served its Heads of Argument on the respondents on 3 February, 2015.

The applicant contends that the address for service where the Heads were served was in accordance with the last known address supplied by the applicants' former legal practitioners namely Messrs Nyawo Ruzive Legal Practitioners and Baera and Company.

The applicant contends that they got to know of the fact that the respondent had filed its heads, and of the Renunciation of Agency of their erstwhile legal practitioners around May, 2015.

The applicants aver that they filed an application for condonation for the late filing of Heads of Argument in the main matter under case number HC 6847/15. The application is filed as Annexure “C” (pp 16 to 23 of the record.)

The application was dismissed by the judgment of MATANDA-MOYO J annexed to the papers as Annexure “D”.

That judgment is self-explanatory. In that judgment the court explained that by any standards the delay to file heads of argument was inordinate (see p 65 of the record.) The court also held that the validity of service (of the heads) cannot be questioned. (See p 66).

The applicants aver that they then instructed their legal practitioners to file a fresh application for condonation and rescission of judgment.

Condonation and Rescission of Judgment

The applicant admits, in its para 24.1 that the extent of the delay, in this application, is inordinate. “Considering that the first respondent’s heads of argument in the main matter were filed on 3 February 2015 and the heads for the (The Applicants) and second applicant were only filed on 21 July, 2015. Further, the application for condonation is only being filed in January, 2016.”

The applicant however avers that a reasonable explanation for the delays has been tendered (see para 24.2 p 7 of the record.)

This court notes the fact that this was the very basis of the dismissal of the application before MATANDA-MOYO J (*supra*) and finds it very bizarre that the applicant purports to reintroduce this factor.

This court reiterates that no reasonable explanation has been given for the inordinate delay in the applicant’s failure to file Heads of Argument and accordingly holds that it does not condone such conduct on the part of the applicant.

Similarly the applicants’ explanation, given in paras 14 to 16 of the founding affidavit, is not convincing. It appears, to the court that the first applicant chose to give priority to the Mining Project which kept the first applicant in Bulawayo and Kadoma rather than attend to this matter.

The explanation given, that the applicant could not depose to the founding affidavit, in this application, is similarly not convincing as clearly the non-availability of the other applicants was not an issue. The other applicants who were not available clearly did not affect the deposition of the founding affidavit in this case.

Respondents' Opposing Affidavit

It was submitted on behalf of the respondents, that the first applicant cannot possibly represent the second respondent in this matter.

The respondent also contended that there can be no misconception created in the Notice of renunciation of agency filed by the applicant's erstwhile legal practitioners.

Furthermore the respondents challenged the applicant's (at p 37) that their applicant's former lawyers had to explain themselves why they so filed the Notice of renunciation of agency and supplied the address for service referred thereto.

The applicants admitted in their Heads of Argument that the degree of Non Compliance is quite a significant factor. (See para 2 p 47 of the Applicants Heads of Argument).

THE LAW

The applicants in their Heads of Argument also cite the following quotations from the case of *Kodzwa v Secretary for Health and Another* 1999 (1) ZLR 313 (5) at 314:

"... The factors usually weighed by the court in considering applications for condonation include the degree of non-compliance, the explanation for it the importance of the case, the prospects of success the respondent's interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the file administration of justice."

They also correctly cite at p 315 of the same judgment as per SANDURA J, as he then was, that;

".... Thus in the case of flagrant breach of the rules particularly where there is no acceptable explanation for it, the indulgence or condonation may be refused, whatever the merits of appeal may be."

It is this court's view that these remarks apply with full force in respect of the matters and issues raised in this application.

The respondents clearly outlined, (in the first respondents Heads of Argument) the facts of this matter and fully demonstrated that the applicants slept on their rights "and their sloppy" conduct persisted despite lessons to the contrary resulting in default judgment against them in the main matter on 11 January 2016.

The respondents further contended, in paras 1.16 and 1.17 of their Heads, that the applicants took no effort to protect their rights in the main matter itself, "While applying for condonation in case number 6847/15 right up to 11 January 2016 when default judgment was

endorsed against them. This amounts to a total period of 8 months to the day, of sleeping on their rights to take pre-emptive action against the prospect of default judgment.

This court accepts the submission made for and on behalf of the respondents that apart from all the other arguments raised by the respondents, that this matter rests on one issue, which is the legality and validity of the service of the Heads of Argument in case Number 10930/14.

This court agrees that the applicants have not satisfactorily addressed the question that despite having been lawfully and properly served with the aforesaid Heads of Argument, they failed to timeously respond and take action to prosecute their case.

This court accepts the respondents submission filed in respect of observations made in the case of *Ndebele v Ncube* 1992 (1) ZLR 288 (SC) that:

“It is the policy of the law that there should be finality in litigation. On the other hand one does not want to do injustice to litigants. In recent years applications for rescission, for condonation, for leave to appeal out of time, and other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. The Supreme Court is bombarded with excuses for failure to act. The Supreme Court is beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute.

The time had come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt* – roughly translated, the law will help the vigilant but not the sluggard. In the present case the appeal against the decision refusing rescission was unsuccessful. Although there was an arguable case for the defence, there had been an unreasonable delay in applying for rescission and there was no reasonable excuse for the delay, such as some reasonable incapacity to act in time or some understandable oversight.”

Also for the record this court upholds the points in *limine* raised for and on behalf of the respondents.

In the final analysis this court finds that the conduct by the applicants in this case warrants this court expressing its displeasure by awarding costs against the applicants on a higher scale.

In the circumstances this application is dismissed with costs being awarded against the applicants on a legal practitioner and client scale.

Mhishi legal practitioners, applicant’s legal practitioners
Kanokanga & Partners, 1st respondent’s legal practitioners