

**REPORTABLE**

(5)

**GOVATI MHORA  
v  
EMMACULATA MHORA**

**CONSTITUTIONAL COURT OF ZIMBABWE  
PATEL JCC  
HARARE: 08 JUNE & 05 JULY 2022**

*J. Majome*, for the applicant.

*C. Damiso & D. Atukwa*, for the respondent.

**IN CHAMBERS**

Judgment No. CCZ 5/22  
Chamber Application No. CCZ 24/22

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**PATEL JCC:** This is a chamber application for condonation and extension of time within which to file an application for leave to note an appeal against the decision of the Supreme Court under judgment number SC 89/20. The instant application was made pursuant to r 35 of the Constitutional Court Rules 2016. The applicant craves the grant of his application, with no order as to costs.

**Background**

The two parties involved in this matter are a formerly married couple in terms of the Marriages Act [*Chapter 5:11*]. Following an irretrievable breakdown in their relationship, the respondent sought a decree of divorce in the High Court. The order sought in the court

*a quo* also regulated the distribution of their perceived matrimonial property. During the course of those proceedings, the applicant contested the distribution of an immovable property known as house number 114 Lomagundi Road, Harare. His chief argument was that there was no direct contribution towards the purchase of the property by the respondent and hence she was disentitled from any claim to the property as part of their divorce proceeds.

This proposition was countered by the respondent who insisted that she had been the primary caregiver to their family and had remitted the various monies she had earned to the applicant during the subsistence of their marriage. The applicant's purported former second wife also testified to the same effect on behalf of the respondent. She submitted that the respondent had raised various amounts of income that she submitted to the applicant during their marriage. In the event, the court *a quo* found in favour of the respondent and granted her a fifty percent share in the property.

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Irrked by the High Court's determination, the applicant launched a subsequent appeal to the Supreme Court. From the submitted grounds of appeal, the sole issue that arose for determination was whether the court *a quo* had erred in awarding the respondent a fifty percent share in the contested immovable property.

It was submitted on behalf of the applicant that the court *a quo* had adopted a narrow construction of the principle of equality as the respondent had not contributed towards the purchase of the immovable property. It was contended that the judgment by the court *a quo* upset the established jurisprudence regarding the primary considerations for equitable distribution of matrimonial property.

*Per contra*, the respondent submitted that the court *a quo* had exercised its wide discretion under s 7 of the Matrimonial Causes Act [*Chapter 5:13*] (“the Matrimonial Causes Act”). It was contended that the High Court in arriving at its determination was guided by the Constitution as well as established precedent. The respondent submitted that taking into consideration the circumstances of the case, the court *a quo*’s determination could not be faulted.

Once seized with the matter, the Supreme Court proceeded to first correct the order of the court *a quo* that had omitted to grant a decree of divorce before distributing the parties’ matrimonial property. On the merits, it reaffirmed the respondent’s position that s 26(c) and (d) the Constitution, as well as international law, mandated a fair and equitable distribution of matrimonial property. The Supreme Court upheld the court *a quo*’s determination on the basis that the court *a quo* had properly exercised its discretion under the Matrimonial Causes Act.

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The Supreme Court also noted that the applicant’s moral turpitude was a critical factor in the decision of the High Court. The applicant’s conduct in trying to frustrate the equitable distribution of matrimonial property was held to justify the order granted by the High Court. Thus, the appeal was held to be meritless and dismissed. Thereafter, the applicant failed to note an application for leave to appeal against the Supreme Court’s decision within the allotted timeframe stipulated by the Constitutional Court Rules, 2016.

Based on the foregoing, the applicant filed the instant application before this Court on 22 March 2022. The judgment of the Supreme Court was handed down on 29 June 2020 and the Rules of this Court provide fifteen days from the date of judgment to apply for

leave to leave to note an appeal against the judgment. The applicant was evidently barred from noting his application for leave to appeal against the Supreme Court's decision and hence he has filed the present application for condonation.

In his founding papers filed of record, the applicant averred that his application for condonation ought to be granted as the intended application for leave to note an appeal enjoyed prospects of success. It was contended that the applicant enjoyed a right to petition the Court under s 69(3) of the Constitution and, in the present instance, such access hinged on the existence of a constitutional matter in the subordinate court. He averred that the Supreme Court overextended the import of the notion of "equality" when interpreting the provisions of the Matrimonial Causes Act.

It is on the basis of the foregoing that the applicant submitted that he had a justiciable right to equality under s 56 of the Constitution that ought to be protected by this Court. He averred that s 56(3) of the Constitution, in particular, prohibited every person, including judicial officers, from discriminating against litigants based on their culture. He asserted that the High Court's determination was primarily influenced by his cultural practice of taking another spouse during the subsistence of his marriage to the respondent. The applicant advanced the position that the Supreme Court consequently failed to protect his right to equality. This constituted a flagrant violation of his fundamental right which ought to be redressed by this judicial forum.

Regarding the extensive delay in applying for leave to note an appeal, the applicant pleaded that he had limited financial liquidity to afford legal consultation and was oblivious of the prescribed period to access this Court. He also averred that the Covid-19

pandemic militated against the filing of the present application due to onerous lockdown restrictions. The applicant conceded that the extent of the delay in filing the application was inordinate but countered this concession by reasoning that, at any rate, the respondent was not prejudiced by the delay due to the peculiar circumstances of the matter.

The application was strenuously opposed by the respondent. She averred that the Supreme Court was not seized with a constitutional matter and did not determine any constitutional issues in rendering its verdict. The respondent submitted that the draft grounds of appeal filed by the applicant related to general points of law. It was contended that the judgement of the Supreme Court did not stray from the established legal precepts governing the distribution of matrimonial property in determining the rights of the parties. The application was deemed to be an abuse of court process due to the obvious absence of any constitutional issue in the Supreme Court's judgment.

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#### Submissions by counsel

Ms *Majome*, appearing on behalf of the applicant, conceded that there was an extensive delay in filing the present application and that such delay was inordinate. She countered her concession by arguing that the applicant had been pondering his available remedies due to the complexity of the matter. It was submitted that the applicant sought legal advice from counsel, a process that extended the delay in filing the present application. When it was pointed out that the founding affidavit on record contradicted her submissions, counsel admitted that the applicant had not been candid with the Court. She then submitted that the applicant's precarious financial position had prevented him from engaging legal counsel timeously. Upon further inquisition by the Court, it was conceded that the applicant's explanation for the delay was unreasonable.

Addressing the Court on the balance of convenience between the parties, Ms *Majome* submitted that the respondent would not suffer any financial prejudice if leave to appeal were to be granted. She insisted that the filing of the matter was not predicated on the election of the respondent to exercise her right to liquidate her fifty percent holding in the disputed immovable property. It was advanced that other measures could be employed to alleviate any possible prejudice suffered by the respondent as a result of the petition to this Court. To buttress her submissions, Ms *Majome* submitted that the applicant would provide for the respondent's financial needs whilst this Court dealt with the substance of the parties' dispute.

As regards the existence of a constitutional matter, Ms *Majome* submitted that the Supreme Court amended the law by awarding the respondent a fifty percent share in the property. When pressed on the exact constitutional issue determined *a quo*, counsel conceded that the Supreme Court did not explicitly deal with any constitutional matter. Rather, it was the import of its determination that raised a constitutional issue. She submitted that the court *a quo* legislated over and above what was provided for in the Matrimonial Causes Act.

In essence, it was argued that the Supreme Court failed to properly apply the principles set out in the aforementioned Act. Ms *Majome* submitted that the applicant was punished for conducting his marital affairs in a polygamous manner. She indicated that the judgment reprimanded the applicant for indulging in a potentially polygamous marriage during his union with the respondent.

In any event, Ms *Majome* was unable to pinpoint specific portions of the Supreme Court's judgment that admonished the applicant's polygamous conduct. In a bid to lend credence to her submission on this aspect, she argued that the issue was addressed in the proceedings before the High Court. However, the High Court judgment was not made part of the record before this Court. Nonetheless, Ms *Majome* persisted with her argument that the Supreme Court discriminated against the applicant on the grounds of custom and culture and that this raised a constitutional matter.

*Per contra*, Ms *Damiso* submitted that the applicant had conceded that the delay in filing the instant application was inordinate and urged the Court to disregard the reasons proffered in explaining the delay. She referred to correspondence on record between the parties that highlighted their concurrence in implementing the order of the High Court that had been upheld on appeal. It was submitted that the applicant initially did not highlight any dissatisfaction or intent to appeal against the Supreme Court's determination. Thus, Ms *Damiso* argued that the present proceedings were only prompted by the respondent's election to sell and liquidate her fifty percent share in the disputed property.

As regards the balance of convenience, Ms *Damiso* highlighted that the respondent was advanced in age, well beyond 65, and that the protracted legal dispute threatened her already precarious financial position. She submitted that her client needed the judgment of the High Court to be executed so that she could access the financial proceeds from the sale of the immovable property. Ms *Damiso* also noted that the applicant had not contested the respondent's submissions through an answering affidavit and that therefore her averments were to be deemed uncontested.

Ms *Damiso* vehemently rebutted the notion that the Supreme Court dealt with a constitutional question in its judgment. She submitted that reference was made to s 26 of the Constitution in its judgment to highlight that the Supreme Court was alive to the application of the principle of equality in determining the rights of the parties in terms of the Matrimonial Causes Act. It was contended at any rate that the Supreme Court's application of the aforementioned s 26 was not an intended ground of appeal as formulated in the draft notice of appeal. She argued that the applicant's objection was against the application of the Matrimonial Causes Act. Thus, the prospective appeal was doomed to fail on the grounds advanced by the applicant. It was submitted that this Court could not exercise its discretion in a non-constitutional matter. Ms *Damiso* concluded that the application amounted to an abuse of process due to the absence of any prospects of success.

#### The governing principles

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The relevant considerations in an application for condonation are well established in this jurisdiction. The Court will primarily assess these factors, although they are not limited or exhaustive, depending on the facts of the matter at hand. They are as follows:

- The extent of non-compliance with the Rules of the Court. See *Zhuwaki v The State* SC 99/21 at p 4.
- The explanation for non-compliance with the Rules of the Court. See *Chikanga v The State* SC 93/04 at p 2; *Zhuwaki v The State* SC 99/21 at p 4.
- The balance of convenience. See *Synohydro Zimbabwe (Pvt) Ltd v Townsend Enterprises Pvt Ltd & Anor* SC 27/19 at pp 9-10.
- The prospects of success. See *Prosecutor General v Intratek Zimbabwe (Pvt) Ltd & Anor* SC 59/19 at p 13; *S v Tengende and Ors* 1981 ZLR 445 (S) at 446H-447A;



*Kereke v Maramwidze & Anor* SC 86/21 at p 10; *Undenge v The State* SC 23/21 at p 5.

Extent and explanation for non-compliance with the Rules

It is a common cause in this matter that the delay in filing not only the application for leave but also the instant application for condonation is inordinate. The applicant concedes that there was a protracted delay from the date judgement was delivered on 29 June 2020 by the Supreme Court to the lodging of the instant application on 22 March 2022. The extent of the delay in vindicating the applicant's constitutional rights falls just short of two full years, which by reasonable standards is evidently unconscionable in the absence of compelling reasons to the contrary.

The explanation tendered by Ms *Majome* seeking the Court's indulgence is starkly at odds with the applicant's averments in his founding affidavit. Upon reflection of the Court's observation regarding this disparity, she conceded that the applicant was not being candid in the papers filed of record. In his founding affidavit, he pleads financial impoverishment amongst a variety of other reasons. This position was contradicted by the submissions made by Ms *Majome* to the effect that the delay was occasioned by the complexity of the legal issues involved and the briefing of external counsel for legal advice.

*Ms Majome* attempted to absolve the applicant by passing the blame onto her junior who was supposedly tasked with drafting the founding affidavit. It is trite that, generally, a litigant cannot be absolved of the alleged ineptitude of his or her chosen legal practitioners. See *Beitbridge RDC v Russel Construction* 1998 (2) ZLR 190 (S). The applicant's difficulty is compounded by having appended his signature to the founding

affidavit. Certainly, candour is the bare minimum in an application that beseeches this Court to grant its indulgence for non-compliance with the Rules.

The Supreme Court in *Moroney v Moroney* SC 24/13 upheld the position that a litigant's lack of candour fatally impairs his argument. It was held as follows, at p 7 of the judgment:

“In *Leader Tread Zimbabwe (Pvt) Ltd v Smith* HH-131-03 NDOU J at p 7 of the cyclostyled judgment stated as follows:

‘It is trite that if a litigant gives false evidence, his story will be discarded and the same adverse inferences may be drawn as if he had not given evidence at all – See *Tumahole Bereng v R* (1949) AC 253 and *South African Law of Evidence* by LH Hoffman and DT Zeffert (3 ed) at p 472. If a litigant lies about a particular incident, the court may infer that there is something about it which he wishes to hide’.”

*In casu*, the applicant's lack of probity regarding the circumstances resulting in the inordinate delay to petition this Court fortifies the respondent's case. Ms Damiso submits that the letters exchanged by the parties highlight the fact that the applicant at all material times was under legal representation and that the delay was therefore not occasioned by any lack of financial capacity. When this is tallied with the concoction of differing justifications proffered by the applicant, it is abundantly evident that he is not being candid with the Court. Consequently, he has not been able to provide a reasonable explanation for his failure to impugn the Supreme Court's determination timeously.

#### Balance of convenience

A determination of the balance of convenience is premised, in essence, upon a consideration of the interests of justice. The Court is compelled to make a value judgment of the balance of convenience that is informed by the circumstances of the parties in the matter. The applicant, through his counsel, pledged to indemnify the respondent for any financial

loss occasioned by the possible adjudication of the dispute by this Court. On the other hand, the respondent submits that her status as an elderly person accentuates her need to have the matter resolved expeditiously. She highlights her dire financial straits as motivating her election to liquidate her fifty percent share in the immovable property.

Generally speaking, a court ought not to allow the interests of justice, which has fairness at its core, to be trumped by issues of expediency. See *Nel & Ors v The State* [2017] ZAGPJHC 296. However, I am inhibited from finding in favour of the applicant in this respect, given that he has also pleaded financial impoverishment in his founding papers. Accordingly, to place the respondent at the mercy of a party whose own financial situation is shrouded in mystery would be contrary to the interests of justice in this case.

Existence of a constitutional matter

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The Constitutional Court is a specialised court whose jurisdiction is limited to strictly constitutional matters, as outlined in s 167(1)(b) of the Constitution. This emphasis on the existence of a constitutional question is reinforced in the rules that govern access to this Court. The relevant rules in this regard are r 35, which governs applications for condonation and extension of time, and r 32 which deals with the substance of the prospective application for leave to note an appeal should the Court accede to the request for condonation.

Rule 32(2) of the Constitutional Court Rules provides the following on the right of appeal to this Court:

“(2) A litigant who is aggrieved by the decision of a subordinate court on a constitutional matter only, and wishes to appeal against it to the Court, shall within fifteen days of the decision, file with the Registrar an application for leave to appeal and shall serve a copy of the application on the other parties to the case in question, citing them as respondents.” (My emphasis)

The requirement of the existence of a constitutional matter as an imperative is further highlighted by the succeeding r 32(3) which mandates that an application for leave to appeal to this Court must contain or have attached to it a statement setting out clearly and concisely the constitutional matter raised in the decision sought to be appealed against. In addition, the founding affidavit supporting the application must verify the fact that the cause of action arises from a decision of the subordinate court premised on a constitutional matter. Therefore, it is axiomatic that where the subordinate court has not determined a constitutional issue, a litigant has no right of appeal to this Court. Access to the jurisdiction of this Court unavoidably hinges upon the existence of this juridical fact. It is unarguably the *sine qua non* of any approach to the specialised forum of the Constitutional Court.

The applicant's counsel pinpointed s 26(c) of the Constitution which was referred to in the impugned judgment as establishing a basis for petitioning this Court. Ms *Majome* submitted that the Supreme Court violated the import of equality in respect of the rights of the parties at the dissolution of their marriage in applying the principles enunciated in the Matrimonial Causes Act.

This position was countered by Ms *Damiso* who insisted that the Supreme Court disposed of the matter on a non-constitutional basis. She cited the case of *Chiite & Ors v The Trustees of the Leonard Cheshire Homes Zimbabwe Central Trust* 2017 (1) ZLR 603 (CC), to support the contention that a prospective appeal to this Court ought to be premised on a constitutional question that was determined by the lower court. She pointed to the prospective grounds of appeal as being devoid of any meaningful constitutional challenge.

It is an established position in our jurisprudence that mere reference to the Constitution by a subordinate court does not establish a constitutional issue. *In casu*, the application for condonation and the attached draft application for leave fail to meet the essential requirement of a constitutional matter as obligated by the Constitution and the Rules. The applicant's founding affidavit does not set out the constitutional matter that was determined by the Supreme Court. The applicant seems keenly aware of this fact as evidenced by the poverty of his flimsy reference to s 56 of the Constitution in his papers in seeking to establish a basis for invoking the jurisdiction of this Court.

Furthermore, the attempt to latch onto s 26(c) of the Constitution in the course of submissions by Ms *Majome* is irreconcilable with the applicant's pleadings. The founding affidavit and the draft application for leave are patently devoid of any mention of the specific manner in which the Supreme Court is alleged to have violated the rights protected under that constitutional provision.

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This Court, in *The Cold Chain (Pvt) Ltd t/a Sea Harvest v Makoni* 2017 (1) ZLR 14 (CC), clarified the parameters of a constitutional matter as follows:

“The mere reference to the Constitution did not make what was said a constitutional matter. Reference by the Supreme Court to s 176 of the Constitution was an *obiter dictum*. The Constitution was referred to after the *ratio decidendi* had been arrived at and declared by the court. The effect of what the Court said in relation to s 176 of the Constitution was that its reasoning was not inconsistent with the provisions of that section. That is different from saying the decision on the issues before the court were based on the interpretation and application of s 176 of the Constitution.

It follows that where a subordinate court did not take a view of the case that required it to interpret and apply a constitutional provision to determine the issue raised, the matter does not pass for a constitutional matter. Application for leave to appeal will be dismissed as the subordinate court will have rested its decision on an independent non-constitutional ground.” (My emphasis)

The above position was reiterated in *Madyavanhu v Saruchera & Ors* 2019 (1) ZLR 434 (CC) at 438B, wherein the following was observed regarding the right of appeal to this Court:

“A person has a right to appeal against a decision of a subordinate court on a constitutional matter only. A decision of a subordinate court on a non-constitutional issue is unappealable because the Court has no jurisdiction to review such a decision. The purpose of the procedure of an application for leave to appeal provided for in r 32(2) of the Rules is to show that the Court has jurisdiction as provided for in the Constitution to hear and determine the appeal. In other words, the purpose of the procedure is to ensure that the applicant has a right of appeal to the Court against the decision of the subordinate court.”

From the above-cited authorities, it is evident that an application for leave to note an appeal against the determination of a lower court in the Constitutional Court hinges upon the existence of a constitutional matter. The present application for condonation and extension of time cannot be granted as the prospective application for leave to appeal fails to satisfy the threshold for accessing the jurisdiction of this Court. The reference by the court *quo* to the concept of equality enshrined in s 26(c) of the Constitution was purely tangential and not in any way dispositive of the main non-constitutional issues determined by that court. Thus, the absence of a constitutional matter critically undermines the validity of the instant application.

### Disposition

The relevant factors that are assessed in condonation proceedings must be considered cumulatively. The instant application fails to satisfy any of the evaluated requirements for the Court to consider granting its indulgence. The disingenuous explanation proffered by the applicant for the delay in lodging the application in effect aggravates his non-compliance with the Rules due to his lack of probity and candour regarding the inordinate delay. This has the attendant effect of tipping the balance of convenience in the

respondent's favour. In any event, the most pertinent factor in the disposition of this matter is the absence of a constitutional matter. It is evident that the Supreme Court did not determine any constitutional issue in deciding the questions before it. Consequently, the applicant has no discernible prospects of success on appeal should leave to appeal against the judgment of that court be granted.

Regarding costs, Ms *Damiso* conceded that there was no grossly reprehensible conduct on the part of the applicant and withdrew her initial prayer for costs on behalf of the respondent. Ms *Majome* submitted that the general position in constitutional matters ought to prevail. I fully agree and find no reason to depart from the usual position of not awarding costs in constitutional litigation.

In the result, it is ordered that the application be dismissed with no order as to costs.

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*Jessie Majome & Co*, applicant's legal practitioners

*Atukwa Attorneys*, respondent's legal practitioners