LUKE DANZVARA
and
FARAI MUCHENA
and
PERCY TAKAVARASA
and
STELLAH MUSHIRI
and
NYARADZO MGODI
and
PATIENCE MANENE
and
GETRUDE DAKA
and
WALTER MUDZINGWA
and
ANDREW DAKA
and
SARUDZAI DANZVARA
versus
CITY OF HARARE
and
ZIMBABWE ASSEMBLIES OF GOD

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 10, 16 and 23 November 2022

**Opposed Application**

*N Tonhodzai* with *G Giya*, for the applicants
*N Mangoi*, for the second respondents

**CHITAPI J:** This matter was filed consequent upon my judgment involving the same parties as herein cited which I delivered referenced HH 530-22 in case no. HC 1540/21 on 3 August 2022. The Minister of Local Government, Public Works and National Housing had been a party in case no. HC 1540/21. However, no relief was claimed from him and he is not cited in the current proceedings. Just to recap, in case no. HC 5140/21, the applicants had

pursuant to filing the said application, been granted under case no. HC 9690/21 by MUNANGATI-MANONGWA J, on 1 April 2021 an order of condonation to file a review application against the respondents named in the order who included the first and second respondent herein.

The applicants filed the review application under case No HC 5140/21 as per the order in case no. HC 9690/19. I heard the review application and struck the application off the roll for procedural errors which could not be condoned. The order of the court in case no. HC 9690/19 had directed that the application for review be filed within 10 days of the order. The striking off of the matter from the roll meant that in order to be able to file a fresh review application, the applicants had to seek condonation afresh. They have done so in this application.

The facts of the matter are set out in judgment HH 530/22. I repeat them herein in summary. The applicants and the second respondent own properties in the same neighbourhood of Bannockburn, Mount Pleasant, Harare as follows:

(a) First and tenths applicant – Stand 950
(b) Second applicant – Stand 947
(c) Third applicant – Stand 949
(d) Fourth applicant – Stand 939
(e) Fifth applicant – Stand 931
(f) Sixth applicant – Stand 913
(g) Seventh and Ninth applicant – Stand 945
(h) Eight applicant – Stand number not stated
(i) Second respondent – Stand 946

The stands are contiguous to each other. The applicants and the second respondent are neighbours in terms of the situation of their stands. The second respondent holds a permit to construct a church on stand 946. The applicants do not find the church acceptable as they consider that it will disturb their rights of privacy among their other complaints.

The applicants if granted condonation intend to challenge the issuance to the second respondent of the permit to construct a church on stand 946 on the principal basis that the process to issue the permit was legally flawed. They aver that they were not served with written notification of the proposed application for change of use. They wish to argue that the application was not published in the Government Gazette as required by the law. They intend to argued that they need peace, tranquility and quietness in the area which is zoned for

residential use by individuals and not organizations let alone those which congregate people like churches, shops bars and like businesses.

In dealing with an application for condonation of failure to comply with rules of court, the case of *Read* v *Gardener and Anor* SC 70/2019 quoted by applicant's counsel in heads of argument being a judgment of PATEL JA (as he then was) is useful authority. The learned Judge listed the factors to be considered cumulatively and not individually by the court in dealing with such an application. The learned stated at p 4-5 of the cyclostyled judgment:

> "The factors to be considered in an application for the condonation of any failure to comply with the rules of court are well established. They are simply expounded in several decisions of the court in which the salient criteria are identified. They include the following:
> - the extent of the delay involved or non-compliance in question
> - the reasonableness of the explanation for the delay or non-compliance
> - prospects of success should the application be granted
> - the possible prejudice to the other party
> - the need for finality to litigation
> - the importance of the case
> - the convenience of the court
> - the avoidance of delays in the administration of justice."
>
> See *Forestry Commission* v *Moyo* 1997(1) ZLR 254(S); *Maheya* v *Independent African Church* SC 58/07; *Paul Gary Friendship* v *Cargo Carriers Limited & Anor* SC 1/13.

As was observed in the latter case, the list is not exhaustive. See also *Chimeza and Anor* v *Mangwana and Others* HH 186/17 wherein DUBE J, I noted the need to consider the factors cumulatively to achieve fairness between the parties.

The first respondent did not oppose this application. The applicants explained the delay in filing this application on the basis that after filing he initial application and it being heard on 20 July 2021 judgment was delivered on 3 August 2022. They averred that they then only became aware of the need to file a fresh application whereafter they filed the current condonation application on 24 August 2022. They explained the delay from 3 August to 24 August 2022 on the basis that as the judgment was delivered just before the Heroes Holidays other applicants had travelled out of Harare and the applicants could not come together until after the holidays to discuss their options with legal practitioners and prepare this application. They averred that they instructed legal practitioners to draft the papers on 19 August 2022.

The second respondent averred that the permit had been issued in 2011 and that the applicants had claimed to know about the permit. It submitted that the delay had to be reckoned from that date and that therefore the delay was 11 years to 26 August 2022 when this application was filed. It was contended that the applicant had also filed an application for review to the Administrative Court in case no. HC 2229/19 but had withdrawn the application. It appears to me that the court clearly condoned the delay and events that occurred prior to the condonation granted by MUNANGATI-MANONGWA J. The second respondent's counsel submitted that because the order of condonation by MUNANGATI-MANONGWA J had lapsed by virtue of the striking off from the roll of the review application HC 5140/21 filed consequent on the condonation, the applicants had to be considered as not having complied with the order because the striking off from the roll of application HC 5140/21 rendered it a nullity and that a nullity begets a nullity. The argument is ingenious. Even if technically correct and I make no determination on the correctness thereof, my view is that the applicants did not sit on their laurels following the grant of the condonation. They filed an application for review which, however, did not succeed. The delay even if reckoned from the date of the condonation is accompanied by a reasonable explanation that the applicants acted on the order. It cannot be gainsaid that the applicant remained active in pursuing their cause and continue to do so. I also find that the explanation of the delay between 3 August 2022 when case no. HC 5140/21 was struck off the roll and the filing of this application was reasonable. It was not denied by the second respondent that the judgment was delivered at a time when the Heroes Holiday was a day or two before the weekend which was followed by the Heroes Holiday which was on 8 August 2022. That applicants had travelled for the holiday is probable.

Therefore, in my judgment if the delay is reckoned from the date of the condonation order in case no. HC 9690/19, the parties agreed that the delay would be 15 months and 19 days to the filing of the application. If such calculation be applied whilst, the period might appear to be an ordinate one, the applicant did not ignore the order. If anything, it is in fact the applicant's legal practitioners who were ignorant of the procedural law and filed a defective application. It was not argued that this was a proper case to impute the ignorance of the legal practitioners upon the applicant.

In relation to the importance of the case, the applicants averred that the permit which they seek its setting aside on review was granted without the input of the applicants who did not desire to have a church as a neighbour. They posited that the church would disturb them

and would disturb the neighbourhood's tranquil with all night services, sermons using microphones and speakers causing noise, weekend services and other activities which would disturb the peace in the neighbourhood. The second respondent did not in the opposing affidavit deny that the case was of importance. It only averred in that regard that due process had been followed and that the existence of the church would not infringe on the applicants' rights to dignity. In my judgment the dispute is of importance. It revolves upon a town planning issue which ought to have been dealt with in terms of legislated law. The law must be shown to have been followed.

On prospects of success on review, there was sustained argument on that issue. I must, however, be careful not to fetter or compromise the review application to be filed should condonation be granted by determining the veracity of the defences proferred by the applicants. It should be kept in mind that the court previously granted condonation. Condonation would have been granted upon a consideration of the same factors which the law provides as necessary to take into account. Certainly it would be ludicrous to ask the same court to make a different finding on the issue of prospects of success of the applicant in the proposed rescission application in the absence of new facts that impact on prospects of success having arisen. That issue was settled.

The applicant's case is based upon the alleged irregularity of how the first and second respondents dealt with the process of giving interested parties notice as defined in the Regional Town and Country Planning Act for them to file any objection to the issuance of a permit for change of use of Stand 946 aforesaid from residential to a church. In particular the applicants seek to argue that apart from their not having been given by the second respondent's notification of the intention to apply for a permit for change of use, the notice was not shown to have been delivered by registered post nor was there publication made in the Government Gazette. The applicants averred that the publication of the notice in the Herald Newspaper did not comply with the requirement that notice should be published in a newspaper that circulates in the area. They averred that the Herald Newspaper did not circulate in the area in issue. In relation to the validity of the postal service, the second respondents counsel conceded that service of the notice by registered post could not be said to have been proved after considering the judgment of this court in *Nyakudya* v *Vibranium Resources (Pvt) Ltd* which sets out the mode of providing service of documents and process by registered post.

Counsel also addressed the issue of whether in terms of s 26(3) of the Regional Country and Planning Act it would be compliant with the provisions of the Act not to publish the notice in the Government Gazette and only publish it in the newspaper as was done in this case. Counsel filed supplementary heads of argument dealing with the interpretation of s 26(3)(4) of the Regional Town and Country Act which requires that where the owner of a property seeks a permit for change of use of the property, the owner should inter-alia give public notice of the application. The second respondent averred that it published the notice in the Herald Newspaper. The applicant averred that the section in question required that the notice ought to also have been published in the Government Gazette. The parties joined issue on the interpretation. Section 26(3)(4) reads:

> "The local planning authority shall require the applicant at his own expense, to give public notice of the application and to serve notice of the application on every owner of property adjacent to the land to which the application relates and such owners as the local planning authority may direct and to submit proof that such notice has been given."

The second respondent submitted that the section was permissive of publication in the local newspaper only without publication in the Government Gazette. The applicant contended that the section permitted publication as peremptory in the Government Gazette with option to additionally publish the notice in a local newspaper. The parties filed additional heads of argument on the point of departure in interpretation. I considered the heads of argument and oral submissions and came to the conclusion that the matter of the correct interpretation is reasonably arguable. I have my position on it. I will not say it. The court hearing the review application should I grant condonation shall answer that. It suffices for purposes of considering prospect of success that the view I have formed is that the arguments raised are not frivolous.

In relation to the convenience of the court and the need to have finality to litigation, the convenience of the court and the need for finality to litigation must in my view be considered against the backdrop of what the interests of justice dectate in every case. In the case of *Bessie* v *Maheya* v Independent African Church SC 58/07, a judgment of Malaba JA (as he then was) the point is made that whether or not to grant condonation is a judicial discretion to be exercised judicially after taking into account all pertinent facts bearing in mind that the court "has to do justice" between the parties. The same point is made in the case of *Kodzwa* v *Secretary for Health and Anor* 1999(1) ZLR 313(S) where inter-alia it is stated at p 315B, quoting Herbstein & Van Winsen: *The Civil Practice of the Supreme Court of South Africa 4th Edition* at p 897 concerning condonation of non-observance of court rules:

> "… in determining whether sufficient cause has been shown, the basic principles is that the court has a discretion to be exercised judicially upon a consideration of all facts and in essence, it is a matter of fairness to both sides in which the court will endeavour to reach a conclusion that will be in the best interests of justice …."

It follows that if what is in the best interests of justice is what is sought to be realized in such applications then the convenience of the court should be considered in the light of the fact that such convenience must not result in an injustice being suffered by either of parties. Equally the need for finality to litigation must not overshadow the basic goal of the court which is to do justice between the parties. It is in any event a known principle of procedural law that rules of court are made for the court's convenience and not for the convenience of the litigants. The court in the exercise of its judicial discretion thus condones the non-observance of its rules to achieve the best interests of justice.

Being so guided, I come to the conclusion that it is in the best interests of justice to grant condonation. The delay has been satisfactorily explained. There are reasonable prospects of success of the applicants' proposed review application which has been prepared and is ready of filing upon the grant of condonation succeeding. Whilst accepting that the second respondent has an interest in the finality of litigation, I have considered that the issue for determination is a matter of importance as it involves the exercise of the rights to enjoy property and to ensure that the rights are exercised in terms of legislated law. A court of law does not condone a statutory violation in the absence of the violated statute giving the court the right to condone the violations involved. The matter involves compliance with Town Planning law which if not followed may lead to chaos as land owners may willy-nilly change purposes or wages for which their properties are zoned without a lawful and transparent as required by the parent act being followed. The convenience of the court has been considered and the decision reached that the court's convenience by whatever name it can be described exists within the precincts of what the court is created for which is to ensure that the best interests of justice being paramount are protected and promoted.

In the result, the following order shall issue:

(i) The application for condonation of late noting of review is granted.

(ii) The applicants are granted an extension of time of ten days within which to file their review application calculated from the date of this order.

(iii) The costs of this application be and in the cause in the review application to be filed, provided that in the event that the applicant does not file the application as directed, then the applicant shall in that event pay the second respondent's costs of the application.

*Ndlovu-Pratt*, applicant's legal practitioners
*Matlaw*, second respondent's legal practitioners