

KATARINA PHIRI
versus
MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS
AND NATIONAL HOUSING

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 27 July & 7 December 2022

Opposed Matter - Condonation

E *Mvududu*, for the applicant
D *Machingauta*, for the respondents

MAXWELL J: This is an application for condonation of late noting of appeal and extension of time to note an appeal. Applicant gave a power of attorney to Erickson Mvududu (Erickson) to handle matters concerning House Number 14084C, New Zengeza 4, Chitungwiza, on her behalf as she is in Australia.

Under case number 436/17, respondent issued out summons for the eviction of the applicant in which he also claimed US\$5 900 as arrear rentals, interest thereon at the prescribed rate from the date of summons to date of payment in full and costs of suit. The facts of the matter were that the parties entered into a lease agreement. Appellant breached the agreement by failing to pay rentals and was given notice to terminate the lease. Appellant did not vacate the premises.

At the commencement of the proceedings in the lower court, appellant raised five points *in limine* which were dismissed by the court a quo on 9 February 2019. On 1 March 2019, applicant noted an appeal against the dismissal of the points *in limine*. The appeal was struck off the roll on 2 July 2020. Erickson said the appeal was struck off for two reasons, that it was fatally defective as it had an error in the narration of the date of hand down of the judgment in the lower court, as well as in the alternative prayer. The present application was filed on 14 August 2020. He submitted that the initial appeal had been filed timeously but was struck off

and there is need to seek condonation. He further submitted that no prejudice will result and there are prospects of success on appeal.

Theodius K. Chinyanga (Chinyanga) deposed to the opposing affidavit. He is the Permanent Secretary to respondent's Ministry. He raised a point *in limine* that the application was improperly before the court as applicant seeks condonation in order to appeal against an interlocutory order. He submitted that the decision of the lower court was not final and definitive because it opened the gate for trial which was still pending. He pointed out that applicant did not proffer any reason for failing to correct the defects in the appeal that was struck off within 30 days. He further pointed out that the majority of the issues in the founding affidavit are for trial and costs should be awarded on a higher scale.

At the hearing of the matter Erickson argued that the application was filed timeously and that respondent's point *in limine* should be dismissed. It is not clear what his argument was based on as the point respondent raised *in limine* was to do with the fact that one cannot appeal against an interlocutory order. He further argued that the judgment on the points *in limine* had a final and definitive effect and was therefore appealable.

It was stated in *Friendship v Cargo Carriers Ltd & Anor* SC 1/13 that condonation is an indulgence which may be granted at the discretion of the court. It is not a right obtainable on demand. The applicant must satisfy the court that there are compelling circumstances which would justify a finding in his favour. In the exercise of discretion the following are considered, the extent of the delay and the reasonableness of the explanation therefore, the prospects of success on appeal. The list is not exhaustive.

Whilst the delay may be excusable due to the fact that the initial appeal had been filed timeously, I am not persuaded that there are prospects of success on appeal. The case of *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) sets out three attributes of an appealable judgment. These are that:

- i) the decision must be final in effect and not susceptible to alteration by that court;
- ii) it must be definitive of the rights of the parties by granting definite and distinct relief; and
- iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the proceedings.

SCHREINER JA in *Pretoria Garrison Institutes v Danish Variety Products* 1948 (1) SA 839 (A) at p 867 made the following remarks:

“A wholly unrestricted right of appeal from every judicial pronouncement might well lead to serious injustices. For, apart from the increased power which it would probably give the wealthier litigant to wear out his opponent, it might put a premium on delaying and obstructionist tactics. This latter consideration has, I imagine been the predominant one in leading legislators to try to restrain the bringing of appeals from orders of a preparatory or procedural character arising in the course of a legal battle.”

It is not in dispute that the order sought to be appealed against was interlocutory. In *Gillespies Monumental Works (Pvt) Ltd v Zimbabwe Granite Quarries (Pvt) Ltd* 1997 (2) ZLR 436 interlocutory orders were said to be pronouncements by the court upon matters incidental to the main dispute. These orders are of two types, those which have a final and definitive effect on the main action and those which do not. The test as to in which category an order falls was stated in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* (supra) as follows:

“...a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to “dispose of any issue or any portion of the issue in the main action or suit” or...unless it ‘irreparably anticipates or predicts some of the relief which would or might be given at the hearing’”.

I am not persuaded that the decision of the lower court sought to be appealed against has a final and definitive effect on the main matter. The matter before the lower court was from the eviction of the appellant from the house in question. The decision on the preliminary issues did not disposed of any aspect pertaining to the eviction. The lower court made a decision that the issues raised by the applicant ought to be ventilated at trial. That cannot be termed “dispositive” of the matter by any means. Instead of seeking to pursue an appeal, applicant should simply submit to trial and have the matter finalized on the merits.

There is no basis for granting condonation in this case. Accordingly the application be and is hereby dismissed with no order as to costs.