

**DISTRIBUTABLE (41)**

**STUTTAFORDS REMOVALS (PRIVATE) LIMITED  
v  
GODFREY NYAMAZUNZU**

**SUPREME COURT OF ZIMBABWE  
MAKARAU JA, GOWORA JA & BERE JA  
HARARE, OCTOBER 12, 2018 & MARCH 10, 2020**

*S. Mubvuma*, for the appellant

*T. Muzana*, for the respondent

**BERE JA:** This is an appeal against the whole judgment of the Labour Court of Zimbabwe dated 14 July 2018, wherein an application for condonation for failure to file an application for leave to appeal in time was dismissed.

Briefly, the background to this matter is as follows:

The respondent was employed as an accountant by the appellant. He was charged with misconduct, that is, wilful disobedience of a lawful order given by the employer. The respondent was found guilty and his contract of employment was terminated. The respondent then appealed to the Labour Court which upheld his appeal on 8 April 2016.

In terms of s 35 of S.I. 59/06 the appellant ought to have sought leave to appeal to this Court within 30 days from the date of the judgment of the Labour Court. Having failed to

observe the prescribed time limits the appellant sought condonation for the late noting of its application for leave to appeal before the Labour Court.

In deciding the application for condonation, the Labour Court concluded that the appellant had not been candid with the court on its explanation for the delay. The court held that it was unnecessary for it to deal with the other principles applicable in applications for condonation. The court proceeded to dismiss the application for condonation before it with costs. It is this finding of the court *a quo* which has led to this appeal.

The appellant having obtained leave to appeal to this Court on 24 November 2017, noted this appeal on the grounds stated hereunder:

- “1. The Labour Court erred in law in its refusal of the application for condonation for failure to comply with the rules on the basis that there were “no compelling circumstances which justified a finding in Applicant’s favour”, when such is not the test applicable in an application such as the one which was before the court.
2. The Labour Court erred in law, in finding that it was unnecessary to consider all the principles applicable in an application such as the one that was before it, with the result that the court did not consider all the other factors which weighed heavily in favour of the application being granted.”

## ISSUE FOR DETERMINATION

**Whether or not the court *a quo* erred in dismissing the application for condonation?**

## THE LAW

The issue that arises from these grounds of appeal is whether the test applicable in matters for condonation was properly applied to the facts of this present matter by the court *a quo*. The requirements for condonation have been set out in a plethora of cases, including the case of *Bessie Maheya v Independent Africa Church* SC 58/07. In that case the court stated the following:

“In considering applications for condonation of non-compliance with its Rules, the Court has a discretion which it has to exercise judicially in the sense that it has to consider all

the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefore; the prospects of success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the Court and the avoidance of unnecessary delays in the administration of justice." (emphasis added).

A reading of the record shows that the court *a quo* took into account one of the requirements to be considered in an application for condonation. Consequently, the enquiry that the court *a quo* made was inconclusive. The court only considered the extent of the delay and ended there. It did not have regard to the other considerations for the granting of condonation. This is apparent from the judgment of the court *a quo* where the learned judge concluded her judgment by stating:

"I am convinced that this is a case in which the sins of the legal practitioner are visited on the client. I therefore do not consider it necessary to deal with whether or not other principles applicable in condonation are favourable to applicant." (emphasis added).

Issues to do with the prospects of success on appeal, the importance of the case, the respondent's interests in the finality of the judgment, the convenience to the court, and the avoidance of unnecessary delays in the administration of justice were completely brushed aside by the court *a quo*. See *Paul Gary Friendship v Cargo Carriers Limited & Anor* SC 1/13. The finding that the explanation for the delay was unreasonable became the basis for the court *a quo*'s justification in not considering the other factors that ought to be taken into account in condoning a party who is in breach of the Rules. With this finding, the court *a quo* resorted to visiting the sins of the legal practitioners on the client and dismissed the application for condonation.

In light of the above, Mr *Mubvuma* for the appellant argued that as the court *a quo* had failed to consider all the requirements for condonation cumulatively, the appeal had to be

allowed. *Per contra*, Mr Muzana contended that, the court *a quo* had power to exercise its discretion in such matters even without considering all the laid down requirements. He further argued that this could be done without taking into account the merits of the matter hence the appeal lacked merit. I do not agree with this proposition of the law. It was incumbent upon the court *a quo* to deal with all the considerations in the determination of the application for condonation. Failure to do so was a misdirection on the part of the court. It ought to have first applied the laid down principles to the facts of the case before proceeding to justify the stance it took in opting to dismiss the application for condonation.

In the case of *United Plant Hire (Pty) Ltd v Hills & Ors* 1976 (1) SA 717(A) at 720F-G, the principles of the law are re-stated as follows:

“It is well established that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefor, the prospects of success ... (on the merits), the importance of the case, the respondent’s interest in the finality of his judgment, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help compensate for prospects of success which are not strong.” (emphasis added).

Condonation remains a sole discretion of the court, which discretion has to be exercised judicially upon a consideration of all facts at all times with a view of doing justice between man and man. A reading of the *United Plant Hire (Pty) Ltd* case, *supra*, shows that such exercise of discretion must be done after a consideration of all the relevant factors. The case of *Ngirazi v Saurosi & Anor* HB 84-16 exhibits how the courts weigh the factors one against the other in granting condonation. It was stated as follows:

“It is settled in this jurisdiction that where the explanation for the delay is unsatisfactory then the prospects of success of the appeal must be really great before the court can exercise its discretion to condone the non-compliance. As stated by BEADLE CJ in

Kuszaba-Dabrowski et uxor v Steel N. O 1966 RLR 60 (AD) at 64; “----the more unsatisfactory the explanation for the delay, so much greater must be the prospects of success of the appeal be, before the delay will be condoned and the converse must of course be equally true, the more satisfactory are the explanations for the delay, the more easily will the court be inclined to condone the delay provided it thinks there is prospects of the appeal succeeding.” See also Maheya v Independent African Church 2007 (2) ZLR 319 (S) at 323 B-C;

It is apparent from the above cases that all the laid down factors ought to be taken into account when dealing with an application for condonation. This was not done in the application *a quo*. Instead of individually dealing with these factors and weighing them one against the other, the court *a quo* opted to deal with only the explanation for the delay. This was a misdirection on the part of the court *a quo*. In the case of Tshova *Mubaiwa Transport Co-Operative Limited and Ors v Mpofu and Ors* HB 167-04, it was further stated that,

“While these courts have on many occasions held that a litigant chooses his legal representative and it is through that choice that he should either succeed or fail in that litigation. However, this approach should not be adopted as a cut and dry principle. Applicant’s explanation together with other factors supra should also be considered... Therefore to allow one party to find a way out of the problem through a technical fault will be a failure by these courts to do justice between man and man”.(emphasis added)

The court *a quo* failed to determine the issues that were before it. It failed to make a determination on whether or not the appellant had satisfied all the requirements for condonation. This was a serious misdirection that warrants interference by this Court. This is a case where a remittal of the matter to the court *a quo* for a consideration of all the requirements for condonation to be done. Those principles ought to be weighed one against the other before the application can be determined. This is so because the merit in one of the principles may help in compensating the weaknesses or lack of merit in the other laid down principles.

Accordingly, it is ordered as follows:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* is set aside.
3. The matter is remitted to the court *a quo* for consideration of the proper requirements for condonation.

**MAKARAU JA:**

I agree

**GOWORA JA:**

I agree

*Mtewa & Nyambirai*, appellant's legal practitioners

*Mushungwe & Company*, respondent's legal practitioners