

**RICHARD MOYO-MAJWABU (in his capacity
As Executor of the Estate Late SIPHIWE DUBE
DRB 966/20)**

Versus

**THE PROVINCIAL MINING DIRECTOR FOR
MATABELELAND SOUTH**

And

**OBRAM TRUST COMPANY (PVT) LTD (in its
Capacity as the Executor of the Estate of the Late
CLEMENT DUBE DRB 450/07)**

And

THE MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 7 AUGUST & 9 NOVEMBER 2023

Urgent Chamber Application

Advocate P. Dube for the applicant
L.T. Muradzikwa for the 1st respondent
B. Maruva for the 2nd respondent

MOYO J: This is an urgent application wherein applicant at the hearing of the matter, raised a point *in limine* to the effect that the 2nd respondent's papers should be expunged from the court record and the matter be dealt with as unopposed because the notice of opposition failed to comply with Rule 58 (2) (c) where it is provided that, "Every written application and notice of opposition shall:- Give an address for service which shall be within a radius of ten kilometres from the registry in which the document is filed."

The applicant's counsel argued that the notice of opposition had been filed with an address beyond the 10km radius from the registry. The 2nd respondent's papers give a Harare address for service ye the matter is in Bulawayo. It is that conduct that is being attached by the applicant. The applicant's counsel in support of her point *in limine* cited 2 cases, the first one being *Charlton Hwende & Others vs The Speaker of the National Assembly & Others* HH-633-20.

I have read through the case, which is an application for recusal and the subject matter therein was not a challenge by one party of the defendant's failure to comply. The court analysed the documents before it and at page 5 of the cyclostyled judgment stated as follows:-

“I have underlined some of the mandatory provisions of the court application procedure. The applicants neglected to comply in all material respects. (emphasis mine) The applications are not supported by affidavits. There are no draft orders. The application by Tendai Biti Legal Practitioners was not signed by the legal practitioner who prepared it.”

What I have before me and what is described by the court in the quoted case are distinct scenarios whilst there is non-compliance with the peremptory rule of an address of service that should be within 10km of the registry in this case. I am not persuaded that the magnitude of non-compliance described by the judge in the other case and the cause that the court then took in those circumstances should be adopted as a one jacket fits all kind of approach as clearly, the court in every scenario where non-compliance with the rules is raised or exists must assess the degree and impact of the non-compliance as per the case before it. I have a notice of opposition before me whose substance has not been challenged, the form, the rest of the issues stated in Rule 58 save for that the 2nd respondent gave an address for serve beyond 10km. That on its own distinguishes this case materially from the *Charlton Hwende* matter (*supra*).

The 2nd case referred to by applicant's counsel in support of the point *in limine* is that of *Equity Properties (Pvt) Ltd vs Al Shams Global BVL Ltd & Another* HH-801-22. Again, this case deals with litigants that failed to file heads of argument in accordance with a previously issued court order. The application under cover of HH-80-22 was then an application for leave to appeal. Again I do not accept the argument that a person that has flouted a court order by failing to file heads of argument mention the *dies inducie*, is in the same bracket and degree of non-compliance with a person that files a notice of opposition in proper format within the time frame provided for in the rules but just fails to provide an address within the 10km radius. The respondent's counsel contended that this is an urgent application and it could under the rules of urgency be heard even within a formal notice of opposition. That, in the event that the court is of the view that the issue of urgency is no good on its own for condonation of this omission, they make a formal plea for condonation on the basis that this is an urgent matter and goal posts are different.

I hold the view that firstly, the cited cases are not authority at all for the issue before me. Secondly, that the 2nd respondent substantially complied with the rules in form and the rest of the requirements save for an address which they did provide but failed to meet the 10km radius provided for in the rules. Thirdly, I do not see 2nd respondent's conduct as a flagrant breach of the rules propelled by a carefree attitude on the requirements therein. 2nd respondent's lawyers being based in Harare where the provided address is, it is a reasonable and inadvertent omission that can be condoned especially considering that this is an urgent application wherein the respondents had to act with speed.

I would accordingly allow 2nd respondent's plea for mercy and an indulgence then to be heard. After all, the court is inclined to resolve the real dispute between the parties and not to just slam the door shut on the face of a litigant displaying a motivation to file their response and argue the matter on the merits. The rules as we know are not cast in stone, neither was the court made for the rules but it is the rules that were made for the court. I should be at liberty to assess each case on its own shortcoming taking into account the degree of non-compliance and any prejudice to the other party and the court itself. I find that the degree of non-compliance is minimal and does not have a real effect on the issues that need to be determined between the parties hence my flexibility towards condonation.

It is for these reasons that the point *in limine* raised by the applicant is dismissed.

Messrs James, Moyo-Majwabu & Nyoni, applicant's legal practitioners
Civil Division Attorney General's Office, 1st respondent's legal practitioners
Zuze Law Chambers, 2nd applicant's legal practitioners