FBC BUILDING SOCIETY

Versus

BLESSING ZIBOWA

And

BELIA ZIBOWA

And

WILLING SHOKO

And

REGISTRAR OF DEEDS NO

And

SHERIFF OF THE HIGH COURT OF ZIMBABWE NO

And

ISAIAH SHONHIWA

And

TERRENCE KENNY

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 20 AND 30 JUNE 2022

Application for Leave to Appeal

Advocate P. Dube, for the applicant
Professor W. Ncube, for the 1st and 2nd respondents

KABASA J: This application was filed as a chamber application for leave to appeal MABHIKWA J's judgment, which judgment granted the 1st and 2nd respondents' application for

condonation for late filing of an application for review. The chamber application was duly placed before the Judge who ordered that it be referred to the opposed roll. This order was given on 10th March 2020. In compliance with that order the chamber application was referred to the opposed roll and finally set down for hearing in 2022.

This brief background was meant to explain why a chamber application for leave to appeal filed in February 2020, was only heard in 2022. At the hearing of the application counsel for the 3rd respondent appeared but did not participate in the proceedings as they were barred. Counsel's appearance was only to follow the proceedings and consequently abide by the decision of the court.

Turning to the application itself, the brief background is that the 1st and 2nd respondents made an application for review under case number HC 2748/18. The details thereof are not relevant for purposes of this matter and I will therefore not go into them. That application was dismissed by MOYO J, for failure to comply with rule 257 of the High Court Rules, 1971. The 1st and 2nd respondents subsequently filed an application for condonation for late filing of an application for review and this application was granted by MABHIKWA J under case number HC 1096/2019. Aggrieved with that decision the applicant then filed this application for leave to appeal.

Section 43 (2) (d) of the High Court Act, Chapter 7:06 provides that:-

"(2) No appeal shall lie –

(d) "from an interlocutory order or interlocutory judgment made or given by a Judge of the High Court, without the leave of that Judge …"

MABHIKWA J's judgment was an interlocutory judgment and so leave had to be sought in order to appeal to the Supreme Court.

The application was served on the 1st and 2nd respondents on 26th February 2020 and they filed their notice of opposition on 2nd March 2020.

In opposing the application the respondents took points *in limine* and this judgment is concerned with these preliminary points. These are:-

1. The chamber application is defective as the mandatory provisions of rule 241 of the High Court Rules, 1971 were not complied with.

2. The application equally failed to comply with the mandatory provisions of rule 263, rendering it defective.

Professor Ncube's argument is that the chamber application was one which required to be served on the respondents, it ought therefore to have complied with the proviso to rule 241.

Rule 241 (1) provides that:

> "A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29 B duly completed and, except as is provided in subrule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies.
>
> Provided that where a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications."

A failure to comply with this mandatory provision renders the application fatally defective, so counsel argued. In support of this argument the court was referred to the following cases, *David Masungo* v *Cleopas Taruwanza* HH 3668-12, *Lake Harvest Aquaculture (Pvt) Ltd* v *Tichaona Revesai* HH 242-17, *Marick Trading (Pvt) Ltd* v *Old Mutual Life Assurance Company of Zimbabwe (Pvt) Ltd* HH 667-15.

Advocate Dube held a different view and contended that the same Judge who held that non compliance with the mandatory provisions in rule 241 rendered an application fatally defective, distinguished that case in a later decision, that later decision being *RioZim Limited* versus *Maranatha Fero Chrome (Private) Limited* HH 482-20. In that case, the learned Judge held that rule 241 is the general rule governing chamber applications in general. Rule 263 is specific for a specific instance and what is to happen in a chamber application for leave to appeal is as per the provisions of rule 263 and several other rules on that same issue. These rules are therefore a self-contained code to which parties must look when dealing with chamber applications for leave to appeal. Parties must therefore not be guided by the provisions of rule 241. The application *in casu* ought therefore to be judged as per rule 263 provisions not rule 241.

Whilst this argument sounds attractive, I respectfully hold a different view. I am of the considered view that the starting point is that this is a chamber application and one brought in terms of section 43(2) (d) of the Act as aforesaid. Chamber applications are provided for under rule 241 and the proviso thereto would apply where such chamber application is to be served

on an interested party. Section 43 (2) (d) speaks of a Judge of the High Court and where there is reference to a Judge it means a Judge sitting otherwise than in open court. This follows therefore that it is a chamber application.

The specificity of rule 263 would, in my view, come in on the "appropriate modifications" mentioned in the proviso to rule 241. In saying so I am alive to the decision in *Zimbabwe Open University* v *Mazombwe* 2009 (1) ZLR 101 (H) where the issue of use of an appropriate form exercised the court's mind. The form used therein was alien to the rules, not Form 29 B nor Form 29 was used and the court observed that had the application at least been in one of the recognized formats, the application could have been saved by the court giving directions as to service on the other party. As the form in that case did none of what Form 29 B and Form 29 provides, the application was fatally defective.

That said however, does this mean where a chamber application is in one of the accepted forms, that is *in casu* Form 29 B but however fails to comply with the proviso thereto because the application is to be served on interested parties, the fact that an acceptable Form was used makes such application compliant and therefore not defective? I think not.

In the *Mazombwe* case, HLATSHWAYO J (as he then was) had this to say:-

> "Lest an impression be formed that this is a sterile dispute about forms, I have deemed it necessary to outline in a summary way what each of the two forms contains, on the one hand, and the unique features of the format used by the applicant, on the other. In Form 29, the applicant gives notice to the respondents that he or she intends to apply to the High Court for an order in terms of an annexed draft and that the accompanying affidavit/s and documents shall be used in support of the application. It goes on to inform the respondent, if he or she wishes, to file papers in opposition in a specified manner and within a specified time limit, failing which the respondent is warned that the application would be dealt with as an unopposed application. In Form 29 B, an application is made for an order in terms of an annexed draft on grounds that are set out in summary as the basis of the application and affidavits and documents are tendered in support of the application."

In casu the grounds are not so set out in summary as required by Form 29B and secondly the procedural rights that the respondent ought to be alerted to are not there. I must point out at this stage that the applicant sought to non-suit the respondents by arguing that their notice

of opposition was filed out of time and so there is no opposition, yet the application itself does not advise the respondents of what to do and when to do it.

This is the same point that was made by KUDYA JA in *Reverend C Nyathi* v *The Trustees for the Time Being of the AFM of Africa and 5 Others* SC 63-22 where the court observed that the use of Form 29 and the denotion of the correct *dies induciae* thereon is mandatory.

> "It is a settled position of our law that a failure to adhere to the peremptory provisions of the rules of court renders such an application a nullity."

The learned JA went on to cite GOWORA JA's decision in *Veritas* v *Zimbabwe Electoral Commission and Others* SC 103-20 where the court said:-

> "The rule requires that a court application be in Form 29. It is only when the application is not to be served on any other party that the rule permits reliance on Form 29 B. The application in contention was served on 3 respondents. It therefore did not fall within the genre of applications provided for in the proviso to the rule. A notice in an application serves many purposes. The notice informs the respondent of the steps he is required to take if he intends to oppose the application. It also places upon a respondent the onus to file and serve his or her papers within a given period and most importantly gives the address for service of the applicant. The court and the Registrar are also informed by the notice of the requirements placed upon the respondent to such suit. This is why the rule is peremptory."

The applicant filed a chamber application but the proviso to the rule on chamber applications required that Form 29 with appropriate modification be used as such application was served on interested parties.

What GOWORA JA (as she then was) stated in the *Veritas* case therefore applies with equal force *in casu.*

> "Contrary to the requirements of Form 29 which are peremptory, there was no attempt to give notice to the respondents of what was required of them to oppose the application. The form excludes the fundamental elements upon which an application is founded, which are material for purposes of giving notice to a respondent of his rights as regards the application. It did not state the *dies induciae* operating against the respondent for purposes of mounting any opposition. I hold that the application is as a result fatally defective."

These remarks are apposite and apply with equal force *in casu.*

It is my considered view that a chamber application for leave to appeal is no less a chamber application because of the relief sought. It is still a chamber application and therefore must comply with rule 241 (1) and the proviso thereto.

Mr. Absalom Muchandiona, the instructing attorney and the one who was representing the applicant before Mabhikwa J sought to argue, in his answering affidavit, that the application stated on the face of it that it was being made in terms of Order 34 rule 263 and the respondents were sufficiently informed of what they were supposed to do. What this means is counsel is suggesting that the respondents ought to have looked to that rule so as to be informed on what to do and when to do it were they inclined to oppose the application. To suggest so is tantamount to arguing that in all applications be they chamber or court applications, once the respondents are informed of the rule applicable, they ought to look to that rule in order to know what to do and when to do it. This is contrary to the settled position and introduces a novel approach. To allow such would be tantamount to saying in all chamber applications once the applicant refers to the rule under which such application is made, the interested parties to be served with such application must go to that rule and be informed of what they are required to do should they intend to oppose the application. I am not persuaded by such an argument nor am I persuaded to accept that a chamber application for leave to appeal is to be treated differently.

Turning to the non compliance with the provisions of rule 263, *Professor Ncube's* argument is that the peremptory provisions of this rule were not complied with and this renders the application defective. The non compliance relates to the fact that it does not say why an oral application was not made on the date judgment was delivered, it does not set out any special circumstances justifying the application, the notice of application does not ex facie state the grounds upon which it is contended that leave to appeal should be granted and it does not state the grounds of appeal.

A reading of rule 262 would give the impression that this only relates to applications for leave to appeal in criminal matters. The parties were agreed and I equally agree that the provisions of rule 269 brings applications for leave to appeal in civil matters within the ambit of rule 262 and all the other rules which follow thereafter which make the self-contained Code M*AFUSIRE J* referred to in the *Rio Zim* case.

With that said Rule 263 provides that:

> "Where application has not been made in terms of rule 262, an application in writing may in special circumstances be filed with the Registrar within twelve days of the date of the sentence. The application shall state the reason why application was not made in terms of rule 262, the proposed grounds of appeal and the grounds upon which it is contended that leave should be granted."

There is no dispute that the requirements stated in rule 263 were not complied with. The application does not state why application was not made in terms of rule 262, it also does not state the proposed grounds of appeal and the grounds upon which it is contended that leave to appeal should be granted.

Advocate Dube however contended that the judgment by MABHIKWA J was an *ex tempore* judgment and so the applicant had to await the written reasons as at that time clear reasons were not known. The court was invited to refer to the record under case number HC 1096/19 so as to verify that it was an *ex tempore* judgment whose reasons were furnished later.

The point however is that such explanation ought to have been given in the chamber application for leave to appeal as expressly provided for in rule 263. In any event such reasons were given at the time the *ex tempore* judgment was handed down and the 3rd – 6th respondents were able to appeal relying on that judgment. This submission by *Professor Ncube* was not controverted. Professor Ncube unlike Advocate Dube was representing the 1st and 2nd respondents in the application for condonation and the *ex tempore* judgment was delivered in his presence. It follows therefore that the reason proffered by the applicant as to why rule 262 was not complied with is not a true reflection of the facts. Rule 263 also clearly states that such explanation shall be contained in the written application and not proffered from the bar as *Advocate Dube* sought to do.

Advocate Dube's instructing attorney also sought to justify the non compliance with rule 263 in his answering affidavit by stating that since this application was not raising anything new which the judge from whom leave was being sought was unaware of, everything that needed to be stated ex facie the application was known to the judge and so the lack of compliance is neither here nor there. The fallacy of this argument lies in the fact that the rules provide that in the absence of the judge whose decision is sought to be appealed against, any

other judge may deal with the application. The application was not heard by Mabhikwa J due to his unavailability and I had to hear it.

Advocate Dube further contended that rule 262 and rule 263 are not couched in peremptory terms. The word "SHALL" is not used. Rule 262 allows the court to exercise a discretion and where that is so it follows that a breach of the rules should not be visited with nullity. (*Tobacco Processors (Pvt) Ltd* v *Tongoona Mutasa & Others* SC 12-21).

It is important to look at the wording in rule 262. It states:-

> "Subject to the provisions of rule 263, in a criminal trial in which leave to appeal is necessary, application for leave to appeal shall be made orally immediately after sentence has been passed. ….."

The use of the words "subject to…." allows for a departure so it is not peremptory as a matter of law, so argued *Advocate Dube*. My understanding of rule 262 is that application for leave to appeal should be made soon after judgment is passed. The rules however allow a party who has not made the application immediately after judgment is passed, to still make such application in special circumstances, within 12 days. Should the applicant still be desirous of seeking leave to appeal, such applicant is supposed to then state why such application was not made as per rule 262, the departure brought in by the phrase "subject to rule 263" does not make the provisions of rule 263 any less mandatory. In other words where rule 262 is complied with, the mandatory provisions therein apply. However where the application is not made in terms of rule 262 but in terms of rule 263, the mandatory provisions of rule 263 come into play.

The "may" in rule 262 is permissive to an applicant who has not complied with rule 262 but who is still desirous to seek leave to appeal. In other words the rule allows such applicant if they are still so inclined to make the application within 12 days but should they choose to do so they must comply with the mandatory provisions of rule 263.

> "The application shall state the reason why application was not made in terms of rule 262, the proposed grounds of appeal and the grounds upon which it is contended that leave to appeal should be granted."

I agree with counsel for the 1st and 2nd respondents' argument that rule 263 is peremptory and cannot be read as directory no matter how one tries to import a different meaning to how rule 262 and rule 263 are couched. The "SHALL" in rule 263 is peremptory and allows for no other interpretation.

The argument that the time limitations provided for in rule 262 are not peremptory as it allows for condonation for non compliance (*S* v *Chikotora* HH 47-20) is not what the 1st and 2nd respondents' argument is about. The issue is not on the failure to make the application soon after judgment but on the failure to comply with rule 263 which is the rule that seeks to condone a failure to comply with rule 262.

The application itself and the founding affidavit merely repeat the background to the application but not the issues stated in rule 263. An attempt to address this in an answering affidavit, as submitted by Advocate Dube does not suffice. Surely the application itself and the founding affidavit should address what the applicant's cause of complaint is and what they seek to appeal against. Such ought not to be left to be addressed in an answering affidavit.

I am therefore persuaded by *Professor Ncube's* argument that the chamber application for leave to appeal is a chamber application like any other and so should comply with rule 241.I am equally persuaded by the argument that rule 263 is peremptory and a failure to comply with a peremptory provision renders the application defective. I am not persuaded to hold that this settled position applies to all other applications except applications for leave to appeal.

The points *in limine* were properly taken and must succeed.

The applicant also raised a point in limine to the effect that the 1st and 2nd respondents filed their notice of opposition out of time and are therefore barred. The application was served on the respondents on 26 February 2020. It was not controverted that 26th February 2020 was a Friday. The *dies induciae* is reckoned a day after such service. The following day was a Saturday and the next a Sunday, which was the 27th and 28th February 2020. The next working day was a Monday and that was 1st March 2020, Tuesday was the 2nd of March, which was the second day. The applicant has not disputed that 26th February was a Friday and if that is correct, it follows the notice of opposition was filed within the 2 day period. It was argued by counsel for the 1st and 2nd respondents that the *dies induciae* of 2 days is directory because the provision uses the word 'may' in relation to what a respondent is expected to do should they want to oppose the application. I disagree.

The "may" in rule 264, in my view, is permissive as it relates to the Attorney-General or respondent for purposes of this case, to file whatever written submissions they wish to file

if they are opposing the application. Where they do not intend to oppose they do not file. So the "may" is not permissive in that the respondents have an option to file within 2 days or any other day. I therefore disagree with the respondents' argument that the 2 day period is not mandatory because of the use of the word "MAY". The respondents filed the opposition on time so that point has no bearing to the issue.

Having found that the opposition was filed on time, the point *in limine* taken by the applicant has no merit and is accordingly dismissed.

I have already held that the points in limine taken by the 1st and 2nd respondents have merit.

In the result I make the following order:-

1. The points *in limine* have merit and are accordingly upheld.
2. The application for leave to appeal is accordingly fatally defective and is consequently struck off the roll, with costs.

Messrs Danziger & Partners, applicant's legal practitioners

Mathonsi Ncube Law Chambers, 1st and 2nd respondents' legal practitioners