

MARICK TRADING (PRIVATE)LIMITED
versus
OLD MUTUAL LIFE ASSURANCE COMPANY OF ZIMBABWE (PRIVATE)LIMITED
and
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 13 & 31 July 2015

Opposed application

S. Njerere, for the applicant
Adv T. Mpofu, for the first respondent
No appearance for the second respondent

MAFUSIRE J: Legal practitioners should keep abreast with, and heed pronouncements from the courts. It is a duty. The determination of cases on the merits should not be impeded or stalled unnecessarily for failure to follow the rules. This was the case in this matter.

From the papers filed by both parties, the merits appeared well set out. But the case could not proceed. A technical objection taken by the respondent *in limine* blocked it. I reserved judgment to think through it properly. Now here is my judgment on the point.

In December 2014 this court granted a provisional order by consent. This followed an urgent chamber application by the applicant. The interim relief was a stay of execution of the applicant's goods, pending the confirmation or discharge of the provisional order. The final relief sought was for the first respondent ("*the respondent*") to show cause why its writ in the main action under HC 3268/12 should not be set aside, and why its legal practitioner of record should not pay the costs of the application personally or, in the alternative, why the respondent should not pay those costs on the higher scale.

The facts were simple. The parties had once been landlord and tenant, the applicant being the tenant, and the respondent the landlord. There was a dispute over the proper level of

rentals to be paid with the advent of the multi-currency system introduced in this country in 2009. The dispute was taken to arbitration. An award was made in favour of the respondent. The award was registered as an order of this court under HC 3268/12. A writ of execution was issued. But the applicant claimed it had since paid all the arrear rentals. It accused the respondent and its legal practitioner of improper conduct by improperly trying to use the rent writ to recover operating costs and interest over which the respondent had no judgment. Certainly the respondent had no judgment for the operating costs and the interest on the rentals. It had issued summons under HC 8399/14 to claim these. However, the applicant took a special plea in bar. It pleaded prescription. That case was yet to be determined.

So basically, applicant's case was that for respondent to try and use the rent writ to recover disputed operating costs and interest was an extreme form of abuse of the court process. It prayed that its lawyer, allegedly the architect of the abuse, be mulcted in costs.

Of course, the respondent denied any wrong doing. So the case before me was the return day of the provisional order.

The point *in limine* by the respondent was that there was nothing before me to determine because the applicant's application was neither in Form No. 29 nor Form 29B as required by r 241 (1) of the Rules of this Court. Rule 241 reads:

- “(1) A chamber application shall be made by means of an entry in the chamber book and **shall** be accompanied by Form 29B 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.” (my emphasis)

In casu, the applicant's urgent chamber application was one to be served. Indeed it was served. So it had to be in Form No. 29. But it was not. It was also not in Form No. 29 either. It read like this:

“TAKE NOTICE that the Applicant hereby makes an Urgent Chamber Application for an order in terms of the draft order annexed to this application and the accompanying affidavits and documents will be used in support of the application.”

I observe in passing that the format of the application used by the applicant seems so popular among legal practitioners in this jurisdiction. I do not know where it comes from. But all that is required of litigants is simply to copy and paste either Form 29B or Form 29, the latter with appropriate modifications if the application is a chamber application that needs to be served on interested parties.

Form 29 is for use in ordinary court applications, or those chamber applications that require to be served. One of its most important features is that it sets out a plethora of procedural rights. It alerts the respondent to those rights. For example, in notifying the respondent of the court application, the form also notifies the respondent of his right to oppose the application and warns him of the consequences of failure to file opposing papers timeously.

On the other hand, Form 29B, for simple chamber applications, requires that the substantive grounds for the application be stated, in summary fashion, on the face of that form. Nothing can be more elementary.

The courts, both in this jurisdiction and elsewhere, have repeatedly drawn attention to the need to follow the rules on this. It is not a “*sterile*” argument about forms¹. I sample some of the pronouncements by the courts:

- (1) In *Simross Vintners (Pty) Ltd v Vermeulen. VRG Africa (Pty) Ltd v Walters t/a Trend Litho. Consolidated Credit Corporation (Pty) Ltd v Van Der Westhuizen*² COETZEE J said³:

“..... [T]he more fundamental difficulty arises that the document which purports to be a notice of motion is, as I have indicated above, a nullity, and I have grave doubt whether the court has power under this Rule to repair a nullity, a concept in law which carries within itself all the elements of irreparability. In addition it must be emphasized that Form 2(a) contains a description of the procedural rights of the respondent after service of the notice of motion. These rights are considerable and substantial. How could a Court, even if it were not a nullity, put a blue pencil through all these rights in the absence of the person in whom they reside and without notice to him that such an order which abrogates his rights might be made? This application is struck off the roll.”

- (2) In *Jensen v Acavalos*⁴ KORSAH JA, stating the same principle, albeit in respect of a notice appeal, said⁵:

“The reason is that a notice of appeal which does not comply with the rules is fatally defective and invalid. That is to say, it is a nullity. It is not only bad but incurably bad, and, unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice to be filed, the appeal must be struck off the roll with costs ...”

- (3) In *Zimbabwe Open University v Mazombwe*¹ HLATSHWAYOJ, as he then was, said²:

“In terms of r 229C, the use of one form instead of another, of Form 29 instead of Form 29B, does not in itself constitute sufficient ground for dismissing the application, it being necessary for a court or a judge to conclude that some interested party has thereby suffered prejudice which cannot be remedied by directions for service on the injured party, with or without an order of costs. **However, the applicant’s error in this instance was not one of using one form instead of another, but of using a completely different format from the authorized ones**....” (My emphasis)

- (4) In the *Mazombwe* case above, there is this seminal statement, at p 103C – E:

“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 so 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 29B, 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.”

- (5) In *Richard Itayi Jambo v Church of the Province of Central Africa & Ors*³ GUVAVAJ, as she then was, said⁴:

“This court has stated in a number of judgments ... that parties are obliged to comply with the rules. Where there is a non-compliance the applicant must apply for condonation and give reasons for such failure to comply with the rules. (See also *Jensen v Avacalos* 1993 (1) ZLR 216 (SC).

In this case the applicant’s legal practitioner made no effort to comply with this rule despite the fact that the point was raised in the respondent’s opposing affidavit. The request to the court to condone the non-compliance was made cursorily at the hearing as if the grant of such condonation is always there for the asking.

It seems to me that legal practitioners must be reminded that there is an obligation to comply with the rules of this court.....

Clearly, where a party fails to comply with the rules there must be a plausible reason why there has been a failure to comply. In this case the attitude of the applicant was that such non-compliance must be granted by the court even though no explanation has been proffered for such failure. The applicant's counsel merely submitted that the defect was not material enough to vitiate the application. In my view this is not sufficient and on this basis alone I would dismiss the application."

- (6) In *Minister of Higher & Tertiary Education v BMA Fasteners (Private) Limited & Ors*¹ MAKONESE J said:

"It is trite law that a Chamber Application must comply with the rules governing Chamber Applications. Chamber Applications are provided for by Order 32, Rule 241. Rule 241(2)(sic) states that where a Chamber Application is to be served on an interested party it should be in Form No 29 with appropriate modifications. In terms of Rule 232 a Respondent shall be entitled to not less than 10 days to file opposing affidavits. In urgent matters the court may specify a shorter period than 10 days."

- (7) I have also had occasion to comment on this matter. In *Base Minerals Zimbabwe (Private) Limited & Anor v Chiroswa Minerals (Private) Limited & Ors*² I said, in relation to non-urgent chamber applications³:

"The proviso to r 241(1) permits the modification of Form 29 where the chamber application has to be served. What would constitute "**appropriate modifications**" is not stated. Why then does it become important that every time a chamber application has to be served, the applicant should abandon Form 29B and switch over to Form 29? In my view, once the chamber application becomes one that must be served then the respondent is entitled to a period within which to file opposing papers. The "**appropriate modifications**" would include, in my view, a fusion of the contents of Form 29 and those of Form 29B. In other words, it becomes a hybrid, containing both "**.... the plethora of procedural rights.....**" of Form No. 29, including the *dies induciae*, and a summary of the grounds of application of Form No. 29B."

In casu, there is really no aspect of the matter that has not been dealt with, or commented upon before. In particular, the applicant used a format that is foreign to our Rules. The respondent objected. The objection was taken as far back as the notice of opposition. It was persisted with in the heads of argument. Finally, it was pressed on with at the hearing. But throughout all these stages, the applicant steadfastly refused to acknowledge any wrong doing. It has argued that its format substantially complies with the Rules. It has consciously and deliberately, so it seems to me, refrained from applying for condonation. But with the weight of authorities against such a stance, what has been the applicant's argument?

Applicant's argument before me was that this was the return day of the provisional

order. It argued that the respondent had consented to the grant of the provisional order and that the provisional order had been predicated on the very same application now sought to be impeached. Furthermore, the argument went on, this court had also seen it fit to grant the provisional order on the basis of the same application. Therefore, the argument concluded, the respondent was now disbarred from raising the challenge.

In my view, the applicant's argument is illusory. That the respondent consented to the provisional order being granted on the basis of a defective application, or that this court had gone on to grant the provisional order, did not, in my view, disbar the respondent from raising the objection on the return day. There are a number of reasons for my saying this. The defective application gave notice of an application for an order in terms of the draft. One goes to the draft order. It was on the return day, the day when the final order was being sought, that the actual application would be moved and the substantive relief sought. It was on the return day that the respondent would be called upon to show cause why its writ of execution should not be set aside. It was on the return day that the respondent would show cause why its legal practitioner of record should not be ordered to pay the costs of suit personally, or in the alternative, why it should not itself pay them at the higher scale. In other words, the actual application would happen on the return day.

Given the somewhat summary fashion with which issues are inevitably dealt with in urgent applications, a respondent might consider it futile to contest the fact that the applicant might have established some *prima facie* right worthy of interim protection by the court. A respondent might decide that an applicant's fear of an irreparable might be found to be reasonable by the court. It might also decide that the balance of convenience might be found to favour the applicant, and so on. So the respondent might decide to reserve its rights to fight the real battle on the return day. Therefore, I do not read anything into the respondent's consent to the granting of the provisional order, or the fact that this court went on to actually grant it. The respondent was entitled to raise the objection on the return day. Nothing was decided by the provisional order.

An application, like a summons commencing action, is the founding process by which a matter is brought to court for determination. If the application is incurably defective, as it was in this case, then there cannot be anything before the court to sit over in judgment. The purported application is simply a nullity and must be struck off the roll.

Presumably, owing to the attitude that it had taken, namely that its format was in substantial compliance with the Rules, the applicant probably felt constrained to apply for condonation. I need not deal with this aspect in any depth. The respondent railed against the applicant for its failure or reluctance to apply for condonation. What triggers the exercise of discretion by a court or a judge to grant or refuse condonation is the application: see *Forestry Commission v Moyo*¹. The court does not just do it of its own accord.

In the circumstances, the applicant has made its bed of roses. It must lie on it. There being no application properly before the court, the application should simply be struck off the roll, with the applicant paying the wasted costs.

However, having struck off the application from the roll, it is not the end of the matter. The merits were not argued because I took the view that the point *in limine* went to the root of the matter such that if upheld, as I have done, that would be the end of the road for applicant. But the law has been called all sorts of names, most of them not very complementary. I had looked at the merits in advance of the hearing. They were well set out. In my view, to just strike off the application from the roll and stop there would make justice turn on its head. In its papers, the applicant made the point that the respondent is abusing the writ for rent, which has been paid, to recover operating costs and interest, which are prescribed. *Prima facie* that is fraudulent.

On its part, the respondent has not taken the accusations lying down. It has made the point that the applicant has been dishonest and that it is the one bent on abusing, not only the relationship of landlord and tenant that once existed between the parties, but also the legal system. Among other things, the respondent says the applicant knew it had to pay the operating costs; that the applicant knows it did not pay them; that it has never disputed liability for them and that it knows arrears on rent would accrue interest at the rates agreed upon by the parties in terms of the lease.

Therefore, in my view, this is a matter crying out for determination on the merits. Furthermore, although I have penalised the applicant for its defective application and for not taking heed of the respondent's objection, the fact remains that the matter is at such an advanced stage within the adjudication system that it would not be, in my considered view, in the interests of justice to just turn it away completely. In my view, this is a proper case, in the interests of justice, to invoke the spirit of r 4C. That rule reads as follows:

“4C. Departures from rules and directions as to procedure

The court or a judge may, in relation to any particular case before it or him, as the case may be-

- (a) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;
- (b) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appears to it or him, as the case may be, to be just and expedient.”

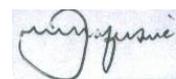
I have considered it just and expedient to give the applicant, if it so wishes, the opportunity to rectify its mistake, on notice to the respondent, within a specified period, failing which the application shall permanently remain struck off the roll. I have also considered it just and expedient that the life of the provisional order be extended for the same period granted the applicant in terms hereof.

DISPOSITION

In the final analysis, my order is as follows:

- 1 The application is hereby struck off the roll with costs.
- 2 Notwithstanding paragraph 1 above, the applicant shall be at liberty to file a proper application, on notice to the first respondent, within seven (7) court days of the date of this order, failing which the application shall be deemed permanently struck off.
- 3 The provisional order granted by this court on 19 December 2014 shall be extended for the same period as referred to in paragraph 2 above.

31 July 2015



Honey & Blanckenberg, applicant's legal practitioners

Gill, Godlonton & Gerrans, first respondent's legal practitioners