PHELEKEZELA MPHOKO
versus
FUNGAI KWARAMBA
and
STANLEY GAMA
and
ASSOCIATED NEWSPAPERS OF ZIMBABWE
(PRIVATE) LIMITED
and
PRINTCO (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 22 October and 7 December 2016

Opposed Matter

T Mpofu, for the applicant
A Muchadehama, for the respondents

MAKONI J:The applicant, approached this court seeking a rescission of the order handed down on 24 March 2016 in case no HC 6788/15, in terms of r 449 1 (a) and (b) of the High Court Rules 1971. This is on the basis that the order was erroneously granted in the absence of the applicant. The application was brought as chamber application in terms of r 226 (1) (b) as read with r 449 (1) (a).

The background to the matter is that the applicant instituted defamatory proceedings against the respondents in HC 6788/15 following publication, in the Daily News newspaper of 5 June 2015, of an article construed, by the applicant, to be grossly defamatory of him. At the closure of the pleadings, the parties, on 8 March 2016, met for a pre-trial conference before MUSAKWA J. Mr Mlotshwa with a Mr Ndlovu (Ndhlovu) who is a Principal Director in the applicant's office, appeared representing the applicant. The respondents were in default. The applicant made an application to have the defendants' defence struck out and have the matter referred to the unopposed role for quantification of damages. The application was granted. On 9 March 2016 the parties appeared again, before MUSAKWA J and the respondents made representations to the effect that the notice for the PTC had been served at their previous address.

They sought the reinstatement of their defence. Mr Madzingira, appearing for the applicant on that day, initially opposed the application but thereafter consented to rescission of the order and reinstatement of the defendants' defence. The matter was postponed to 24 March 2016.

On 23 March 2016 the parties held a round table conference at Messrs Mbidzo Muchadehama legal practitioners' offices. Mr Madzingira and Ndlovu attended. The plaintiff was not in attendance. After deliberations the plaintiff's legal practitioners prepared a joint PTC minute for the signature of the respondents.

On 24 March the parties appeared before MUSAKWA J. The applicant was not in attendance and was represented by his legal practitioner and Ndlovu. The applicant's legal practitioner advised the judge of the outcome of their deliberations at the round table conference and that the parties had agreed that the matter be referred to trial. When Mr *Muchadehama* was asked to confirm the position, he then sought for the dismissal of the plaintiffs claim on the basis that the applicant was in default. The application was made in terms of r 182 (11). The application was granted and the plaintiffs claim was dismissed. It is on the basis on these facts that the applicant approached the court.

The application is opposed and the respondent raised two points *in limine* which are that:

1. That the application was brought as a chamber application as opposed to a court application
2. The application is not properly before the court as it made in terms of r 449

Form Of Application

Mr *Muchadehama* submitted that the applicant failed to comply with the mandatory provisions of r 241 in that a chamber application meant to be served on a respondent shall be on form 29. Mr *Mpofu* submitted that the chamber application can be saved by r 229 C. He further submitted that the court was at large to condone the non-compliance with the rules. There was no prejudice suffered by the respondent as they were able to respond to the application.

Rule 241 regulates the form that chamber applications should take whenever a litigant chooses to proceed by way of Chamber Book. Subrule 1 is couched in peremptory terms, so is the proviso. In terms of that proviso, where a party intends to serve the chamber application, it shall be on form 29 with appropriate modifications.

This is not an issue that is coming before our courts for the first time. One can trace it back to *Zimbabwe Open University* v *Madzombwe* 2000 (1) ZLR 101, and beyond, where the court found that the application filed in that matter was fatally defective as it used either of the forms

prescribed in the rules. This was followed by a judgement by GUVAVA J in *Jumbo* v *Church of the Province of Central Africa and Others* HH 329/ 13 where she stated the following:

> "This court has stated in a number of judgements that parties are obliged to comply with the rules, where there is non-compliance the applicant must seek condonation and give reasons for such failure to comply with the rules (see also *Jensen* v *Ava Carlos* 1993 vol 1 ZLR216 SC).
>
> In this case the applicants' legal practitioner made no effort to comply with this rule despite the fact that the point was raised in the respondents 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".

The same point was made in *Minister of Higher and Tertiary Education* v *BMA Fasteners (PVT) LTD and Others* HB42/14 where it was stated:

> "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) 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 ten days to file opposing affidavits. In urgent matters the court may specify a shorter period than ten day". See also *Base Minerals Zimbabwe (Pvt) Ltd and another* v *Chirosva (Pvt)Ltd and other* HH559/14.

In *casu* the applicant's legal practitioner, whilst not disputing that the wrong form was used, sought to hide behind r 229 C and r 4 C. No proper application for condonation was made despite the fact that the issue was raised in the respondents' opposing papers and what the case law states. To my mind this suggests that legal practitioners, in filing pleadings, adopt a cavalier approach, by not first reading the rules and ascertain which rule applies before drafting and filing the pleadings. It appears the opposite is correct that they file papers first and then read the rules. That is why we have so many pleas for mercy made under r 4 C. A message should be sent to legal practitioners that non-compliance with mandatory rules will be taken seriously by these courts and that r 4 C will only be used in circumstances where a party brings itself before the court in the form of an application for condonation and good cause shown for the grant of such relief.

In any event r 229 C will not save the application. The rule would have been available to the applicant if it had complied with r 241. The issue would then have been that the applicant proceeded by way of chamber instead of court application. The applicant has brought an application alien to the rules and is not a chamber application as contemplated by the rules. The application cannot escape the fate suffered by the application in Zimbabwe Open University (*supra*).

I will therefore hold that the application is not properly before me.

Assuming I am wrong, I will proceed to consider the other point *in limine.*

The other point *in limine* is that the applicant used the wrong procedure in seeking to rescind the judgment. It is the respondents' contention that in the circumstances of this matter, the applicant should have applied for default judgement in terms of r 63.

My view is that, in making submissions on this point, the parties ventilated on issues touching on the merits of the matter as well. I propose to deal with the matter on the merits rather than deal with the point *in limine* first and then proceed to the merits. The issue would be whether the applicant has made out a case for the setting aside of the judgement in terms of r 449 (1) (a) and (c).

Mr *Mpofu* submitted that the judge fell into error in dismissing the applicant's claim in terms of r 182 (11). In terms Practice Direction 1/ 95 and in para10, a party must attend a pre-trial conference or its representative, who has full instructions. He further submitted that a legal practitioner can attend without a party and may apply for the party to be excused. He submitted that the applicant was represented by a representative, Ndlovu, who was well versed with case.

The same representative had represented the applicant on 23 March 2016 at a round table conference that was convened at the respondent's legal practitioner's office. At that meeting, parties agreed on something which led to the preparation of a pre-trial minute. The respondents did not raise issue with the absence of the applicant and the attendance of the representative. Mr *Mpofu* concluded by saying that if r 449 fails then the court can extend it to r 63. The explanation for the default is reasonable and there are prospects for success in the main matter.

Mr *Muchadehama* submitted that for r 449 to apply the judge ought to have been made aware that the applicant was attending to national duty and that he was represented by Ndlovu and proceeded to grant default judgement. This fact was not brought to the attention of the judge. The judge could not therefore have granted the judgement in error. In any event even if it had been brought to the attention of the Judge, it was irrelevant. The applicant should have proceeded in terms of r 63 and not through r 449. The applicant had a choice to make between one of the three applications to institute to seek rescission. He chose the wrong procedure.

Rule 449 (1) provides as follows:

> " the court or a judge may in addition to any other power it or he may have *meru motu* or upon the application of any party affected correct, rescind or vary any judgement or order:
>
> (a) That was erroneously sought or erroneously granted in the absence of any party affected thereby; or
> (b) …….
> (c) That was granted as a result of a mistake common to the parties."

Paragraph 10 of Practice Direction 1 of 95 reads as follows;

"Every party to a trial action shall attend the pre-trial conference in person or by a representative familiar with the facts and duly authorised to make decisions on behalf of the party or parties, together with his legal practitioner, if any. A legal practitioner may for good cause apply to a judge for his client to be excused attendance but the judge will only grant such an application in exceptional circumstances."

Rule 182 (11) provides:

"A judge may dismiss a parties claim or strike out his defence or make such other order as may be appropriate if:

(a) The party fails to comply with directions given by a judge in terms of sub rule (4), (6), (8) or (10) or with a notice given in terms of sub rule (4); and
(b) Any other party applies orally for such an order at the pre-trial conference or makes a chamber application for such an order."

Rule 182 (4) provides:

"The registrar, acting on the instructions of a judge, may at any time on reasonable notice notify the parties to an action to appear before a judge in chambers, on a date and at a time specified in the notice, for a pre-trial conference or a further pre-trial conference, as the case may be, with the object of reaching agreement on or settling the matters referred to in subrule (2), and the judge may at the same time give directions as to the persons who shall attend and the documents to be furnished or exchanged at such conference."

The scope of r 449 (1) has been clearly explained in case law. One such case is *Rudo Tiriboyi* v *Albert Nyoni Jani and another* HH 117/04 where the following was stated from pp 2 - 3 of that judgement. I will quote in extensor that judgement because it brings out clearly the scope of r 449 (1).

"In this matter the error that the applicant complains of is that she was not cited in the proceedings between Sithole and the respondents, clearly this was not an error of the court. It is not the duty of the court to go looking for all potential respondents in suites brought before it. A review of the authorities would appear to suggest that the rule is designed to correct errors made by the court itself and is not an omnibus through which new issues and new parties are brought before the court for trial.

In *Grantully (Pvt) Ltd &* v *UDC Ltd* 2000 (1) ZLR 361 SC the default judgement was granted at a time when the judge was unaware of the relevant facts. The amount claimed was not yet due and payable to that extent the judgement was entered erroneously and the Supreme Court may have had the judgement set aside had the applicant not delayed in bringing his application.

In *Banda* v *Pitluk* 1993 2 ZLR 60 default judgement was granted against an applicant who had filed a notice of appearance to defend that was not brought to the attention of the Judge entering the default judgement. This was a procedural irregularity on the part of the court.

> In the South African case of *Mthebwa* v *Mthebwa* 2000 (2) SA 193 (TKH) the ambit of the equivalent rule in South Africa was discussed and it was held that the three requisites that have to be satisfied for relief under the rule were:
> (1) That the judgement was erroneously sought or granted.
> (2) That the judgement was granted in the absence of the applicant.
> (3) The applicants' rights or interests are affected by the judgement.
>
> Once these 3 factors are satisfied the applicant is entitled to succeed and the courts should not inquire into the merits of the matter to find good cause upon which to set aside the order or the judgement in issue. The issue that falls for determination in this application is whether the order against Sithole was erroneously granted. In my view it appears it was not. It appears to me that misjoinder where the court is unaware of the interested party who has not been cited is not an error on the part of the court granting the order and cannot be corrected in terms of r 449. It could only be an error on the part of the court, if it had been made aware of the interest of the non cited party, proceeds notwithstanding the absence of that party to pass judgement that will affect the rights of that party. There is no indication that the rights of the applicant were brought before the court that granted the order against Sithole."

I will examine whether the applicant has satisfied the three requisites set out in the *Mathebwe* v *Mathebwe* (*supra*), matter as quoted above. There is no dispute that the judgement was granted in the absence of the applicant and that the applicant's rights or interest are affected by the judgement. The only issue in contention is the first requirement.

That The Judgement Was Erroneously Sought Or Granted

The applicant appears to advance two positions on this issue. On one hand he says that the court fell into error by granting the judgement after it had been informed that he had gone to attend to national duties. On the other hand, he advances the position that he was represented by a representative who was familiar with facts of the matter as is provided for in terms of Practice Direction 1 of 95. One might at this stage pause and consider the applicability of Practice Direction 1 of 95. This might entail examining what a Practices Directions are and their relationship with the rules of court. Practice Directions are procedural guidelines issued, in our jurisdiction, by the Chief Justice. They are designed to supplement and complete existing rules of court by regulating practice and procedure. They are issued in instances where there would be a lacuna in the rules. Practice Directions do not seek to override the rules of court which have the force of law.

In *casu*, the judgement was entered in terms of r 182 (11) for failure, by the applicant, to comply with a notice issued in terms of r 181 (4). CHIGUMBA J had this to say, regarding failure to comply with r 184 (4), in *Jonas* v *Mabwe* HH 72/16.

> "A Pre-Trial Conference is provided for by Order 26 of the rules of this court. Rule 182(11) reads as follows;-

(11) A judge may dismiss a party's claim or strike out his defence or make such other order as may be appropriate if—
(*a*) the party fails to comply with directions given by a judge in terms of subrule (4), (6), (8) or (10) or with a notice given in terms of subrule (4); and
(*b*) any other party applies orally for such an order at the pre-trial conference or makes a chamber application for such an order.

My reading of Order 26 r 182 (11) is that the Pre-Trial Conference Judge has a discretion to dismiss a party's claim or strike out his defence, or make some other appropriate order where the party fails to comply with any direction given by the Judge as prescribed in r 182, or where the party fails to comply with a notice issued in terms of r 182. In the circumstances of this case, there was no direction issued in terms of r 182. The failure by the applicant to attend the Pre- Trial Conference at the set down date and time constituted a failure to comply with a notice given in terms of Order 26 r 182 (4). 'Default' in the legal context has been described as a failure to do something required by law, usually failure to comply with mandatory rules of procedure. See *Oxford Dictionary of Law*[1]. If we apply that definition to the circumstances of this case, the failure by the applicant to comply with a notice given in terms of Order 26 r 182 (4), being a failure to comply with that mandatory rule, constitutes a default."

The applicant submits that judgement was entered in error, as in terms of the Practice Direction 1 of 95, he was properly represented at the pre-trail conference. The question would be which of the two instruments applies in the circumstances of the matter. From the definition of the practice direction that I gave above, r 182 applies. A Practice Direction cannot override a rule which has the force of law.

The significance of attendance by parties at pre-trial conference cannot be over emphasised. The position was made clear in *Zimbabwe Electricity transmission And Distribution Company* v *Ignatius Ruvinga* SC 20/13 where the following was stated:

"It may be noted here that the purpose of the pre-trial conference is to attempt to reach settlement between the parties ad, where this is not possible, to identify issues for trial with a view to curtailing the proceedings. This is the reason why the presence of both the parties and their legal practitioners are required thereat. Where a legal practitioner attends a pre-trial conference set by a judge without his client he must have his client's instructions to take decisions on its behalf. The pre-trial conference is not a formality. It is an essential part of the proceedings and the judge will have put aside other work and studied the pleadings, in order to prepare for the conference. It is therefore disrespectful in the extreme to wait until the time scheduled for the conference to advise the court that the parties are unable to attend".

Even assuming the Practice Direction was operational, this is a personal action brought by the applicant in his personal capacity. He could not effectively be represented by a director in his office as the Vice President.

[1] 8th ed Jonathan Law p 179

Looking at the second aspect, the judge did not grant the judgement in error as he was not made aware that the applicant was attending to national duty. It was incumbent, on the applicants' legal practitioner, to make an application to have him excused and indicate that he had a representative who was familiar with the facts of the matter, at the outset of the pre-trial conference. In *casu* the applicant's legal practitioner proceeded as if everything was in order and proceeded with the matter without seeking the indulgence of the court to excuse the applicant. The respondent's legal practitioner had to raise the issue. Despite it being raised, the applicant's legal practitioner did not advise the Judge of the reasons for his absence. Neither did he advise the judge that he was proceeding in terms of para 10 of Practice Direction 1/95. As was submitted by the Mr *Muchadehama,* it was neither here nor there that the applicant was the Acting President the time. He should have made the necessary arrangements with regard to his personal matters.

In the result it is my finding that the applicant has not met the first requirement. I will therefore find that the applicant has not satisfied the requirements of r 449 (1) (a). Neither has the applicant established that the judgement was granted as a result of a mistake common to the parties.

The applicant made a choice, out of the three procedures available, to proceed in terms of r 449. He could have chosen to proceed in terms of r 63 or in terms of common law. He has not laid a basis for the court to proceed in terms of r 63.

In the result, I will proceed to make the following order.

1. The application is dismissed.
2. The applicant is to pay the respondents costs.

G N Mlotshwa & Co, applicants' legal practitioners
Mbidzo, Muchadehama & Makoni, respondent's legal practitioners