WALTER MURANGA
versus
JOSAM ALIKANJERA LINDE

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 7 March & 5 May, 2022

**Opposed Application**

*C. Ndlovu*, for the applicant
*C.T. Tinarwo,* for the respondent

ZISENGWE J: The applicant seeks the reinstatement of his appeal which was removed from the roll of appeal matters by the Registrar owing to his failure to timeously file heads of argument. Sub rule 15 of Rule 95 of the High Court Rules, 2021 (the rules), requires an appellant to file heads of argument in support of such appeal within 15 days of being called upon to do so by the Registrar. Failure to do so will result in the appeal being regarded as abandoned and deemed dismissed in terms of rule 96(20). This is the fate that befell applicant's appeal.

Upon receipt of the notification of such removal of the appeal from the roll, the applicant swiftly brought this application to pave way for the filing of the heads of argument and have his appeal reinstated on the roll of appeal matters.

**The factual background**

The respondent instituted proceedings in the Magistrate Court for an order for the eviction of one Auxillia Muranga and all those claiming right or title through her from some residential premises situate in Masvingo, namely Stand No. 3415 Muchakata Close, Rujeko 'A', Masvingo ('the property'), as well as holding over damages. The basis of the claim was that the respondent had purchased the said property in the wake of the winding up of the estate of the late Esau Tizirai Muranga and further that the property had since been registered in his name. A copy of the deed of transfer in respondent's favour was attached to the summons.

Auxillia Muranga who is the surviving spouse of the late Esau Muranga resisted the claim and, in her plea, averred that the summons was defective in that the executor of the estate had not been joined to the proceedings and further that the executor had failed to properly account for the proceeds of the sale of the property. She also questioned the authenticity of the title deeds issued in respondent's favour. In due course the applicant in the current matter, Walter Muranga, together with 12 other persons (consisting of 10 Muranga siblings/relatives, the executor of the estate of the late Esau Muranga and the Master of the High Court in her official capacity as such) were joined to the proceedings. Members of the Muranga family were joined on the basis that being beneficiaries of the estate of the late Esau Muranga had an interest in the outcome of the litigation.

Save for the applicant and Auxillia Muranga, the rest of the Muranga family members who had been joined as aforesaid did not participate in the proceedings leaving the main protagonists in the ensuing proceedings being the respondent on the one hand and applicant and Auxillia Muranga on the other.

At the conclusion of the trial in which several witnesses testified, the Magistrate found for the respondent and ordered the eviction of the applicant and Auxillia from the property. The basis of that conclusion was that the respondent being the owner of the property was entitled under the *actio rei vindicatio* to claim the property from whomsoever he found in possession of the same. The court further found that neither the applicant nor Auxillia had any plausible defence to the eviction claim. The court however declined to grant the claim for holding over damages finding as it did that these had not been adequately proved.

It is against that judgment that both applicant and his mother Auxillia noted an appeal to this court alleging an array of errors on the part of the trial court. And it is pursuant to that appeal that the latter failed to file their heads of argument resulting in the appeal being deemed abandoned.

The main reasons advanced by the applicant or failing to file his heads of argument on time are that neither he nor his legal practitioner, *Mr Ndlovu,* received the letter by the Registrar dated 15 July, 2021 calling upon applicant's legal practitioners to file heads of argument within 15 days of the receipt of that letter. This was in turn occasioned by twin misfortunes that befell personnel within the office of the applicant's legal practitioners, namely firstly that *Mr Ndlovu* had taken leave of absence having to attend to some family emergency and secondly that the clerk who

received the registrar's letter had to take sick leave after exhibiting symptoms suggestive that she may have contracted COVID-19.

According to the applicant, the fact that in the interim, the Chief Justice through Practice Directions 6, 7 and 8 of 2021 froze the filing of any court papers (save those filed in urgent matters) did not help matters. The said Practice Directions were issued to implement government's COVID-19 pandemic induced national lockdown in the context of court operations. The applicant avers that he only became aware that her appeal had been removed from the roll when she was served with a writ of ejection arising from the very case he had lodged an appeal.

He avers that he immediately sprang into action in a bid to rescue the situation in the course of which he discovered that his legal practitioners had not received the notification dated 15 July, 2021.

To buttress his assertions, the applicant attached a supporting affidavit by one Maria Mutume a secretary in the employ of his legal practitioners. In that affidavit Maria Mutume explained the circumstances leading to her failure to bring the Registrar's letter to the attention of applicant's legal practitioner *Mr Ndlovu*.

The applicant further avers that he enjoys reasonable prospects of success in the appeal against the Magistrate's decision. Reference was made to the grounds of appeal and the heads of argument compiled in support thereof.

In opposing the application for reinstatement, the respondent while conceding that the delay in filing the heads was not inordinate nonetheless contends that the reasons advanced by the applicant for the failure to file heads on time are riddled with inconsistencies such as to cast serious doubt on their genuineness. In particular, the respondent takes issue with the fact that whereas the applicant avers that it was a *clerk* in the employ of the respondent who, owing to some mishaps, failed to alert *Mr Ndlovu* of the Registrar's letter, yet the person who deposed to an affidavit claiming to have inadvertently failed to so give *Mr Ndlovu* the said letter, identifies herself as a *secretary*.

Secondly, the respondent questions the sincerity of the explanation for the delay given that no medical affidavits were attached to confirm that the clerk/secretary was indisposed as alleged.

The respondent however raised three preliminary points objecting to the application. These are;

(a) that the application is fatally defective for want of compliance with Rule 60(1) of the rules which requires every chamber application which needs to be served to be on Form 23

(b) that applicant failed to apply for condonation for his failure to comply with the peremptory requirements of Rule 60(1) of the rules

(c) that the applicant had approached the court with dirty hands owing to his alleged failure to pay the costs which awarded by the magistrates Court.

Copious case law authorities and dicta were cited in support of each of these contentions. Be that as it may, on the date of hearing the respondent abandoned the third point in limine but insisted on the first two and it is to these that I now turn.

**1. The use of the wrong form**

In this case, the respondent avers that the failure to use the appropriate form renders the application fatally defective. Reliance was placed on the following cases; *Marick Trading (Pvt) Ltd* v *Old Mutual Life Assurance Co. (Pvt) Ltd and Anor* HH 667-15, *Trustees of the Apostolic Faith Mission of Africa* v *Zulu Rosewell and 7 Others* HH 158-17, *NSSA* v *Chipunza* SC 116/04.

Rule 60(1) provides that every chamber application which is required to be served on interested parties must be on Form 23 with appropriate modifications it reads;

"*60. Chamber Application*

*(1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form No. 25 duly completed and, except as is provided in sub rule (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. 23 with appropriate modifications*".

In the present matter the respondent filed application his chamber application on a form that does not resemble Form 23 and therefore non-compliant. It was however submitted on his behalf that such non-compliance does not render the application fatally defective. In this regard counsel sought to distinguish the cases relied upon by the respondent from the present matter. In particular it was submitted during oral arguments in court that most of the decisions relating to the

use of wrong forms leading to the striking of such cases from the roll are those where a form "alien" to the rules would have been used, the example given being that of *Veritas* v *Zimbabwe Electoral Commission* SC 23/2020 and *Mohamed* v *Kashiri* SC 61/2021. However, in the present case, so the argument goes, the applicant made use of a form provided for in the rules albeit for other kinds of applications and for that reason the court should overlook the error in applicant's use of the wrong form. Reliance was placed on the case of *Ysmin Tacklah Mahomed* v *Tawurayi Marvin Kashiri* SC 41/21.

That argument cannot carry the day for the applicant. What is significant about the use of Form No. 23 in chamber applications which need to be served on interested parties is the inclusion of a list of procedural rights including the time frame within such interested party should file its opposing papers should it wish to do so.

In *Zimbabwe Open University* v *Mazombwe* 2009 (1) ZLR (H) the significance of filing a chamber application that needs to be served was stated by HLATSHWAYO J (*as he then was*) as follows;

> "*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.*
>
> *Now, the format adopted by the applicant does not contain the plethora of procedural rights that the respondent is alerted to in Form 29 nor the summary of the grounds of the application required in Form 29B."*

The same approach was used by the court in *Base Mineral Zimbabwe (Pvt) Ltd & Anor.* v *Chiroswa Minerals (Pvt) Ltd & Others* HH 559-14 where at p 7 – 8 of the cyclostyled judgment MAFUSIRE J had this to say;

> "*The proviso to rule 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 29 B 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 29, including the dies induciae, and a summary of the grounds of application of Form No. 29B".*

Commenting on the distinction between Forms 29 B and 29 (now Forms 25 and 23, respectively) and the rationale for such distinction, KUDYA AJA (as he then was) in *Ysmin Tacklah Mahomed* v *Tawurayi Marvin Kashiri* (*supra*) stated the following;

> "*The difference between Form 29 B and Form 29 is that the former specially prescribes the insertion of a summary of the grounds of the application ex facie the application and predicates the application on a draft order. The latter unlike the former, is a "Take Notice" form predicated upon a draft order specially premised on a plethora of procedural rights alerting a respondent of the time frame within which to take action and appropriate documentation".*

The court proceeded to hold that what is critical and of paramount importance is not so much the contents appearing *ex facie* Form 29 B but rather the inclusion of the *dies induciae* for the filing of the notices of opposition. The court proceeded thus:

> *"The distinction between the main provision and the proviso in r 241(a) is that the main provision supplies the documentation that is missing ex facie Form 29 B while the proviso supplies that information ex facie Form 29. It is significant that the proviso designates the use of Form 29 and Form 29B in peremptory language for chamber applications to be served in interested parties. In my view, this specific designation "ousts" the inclusion of "the summary of the grounds of the application" required on the face of Form 29 B. The appropriate modifications contemplated in the proviso have nothing to do with the ex facie contents required by Form 29 B but everything to do with the different time frames or dies induciae within which the notice of opposition are required to be filed. The appropriate modifications are not a requirement for applications predicated in Form 29. Their absence or omission would not render the application for condonation and extension of time within which to file an appeal defective let alone fatally defective.*"

In the present matter, the form used by the applicant does not conform with the peremptory provisions of Rule 60(1). Most significantly, it failed to alert the respondent on what he needed to do should he have wished to oppose it and the time frame within which he was required to do so. It was therefore defective. The fact that the respondent did in any event manage to file its notice of opposition dos not absolve the applicant.

Further, the failure by applicant to seek condonation in the face of non-compliance with the rules made a bad situation worse for him.

In this regard the sentiments expressed in *Zimbabwe Open University* v *Mazombwe* (*supra*) are apposite. The following was said;

> "*As if the non-compliance with the mandatory rules noted above was not bad enough, the applicant has not bothered to apply for condonation of its failure to comply with the rules in spite of such non-compliance having been drawn to its attention as early as when the notice of opposition was served on it. In my considered view, where the errant party has not applied for condonation in spite of its awareness of its non-compliance, it suffices for the objecting party merely to point out the non-compliance for the application to be struck off. Furthermore, the applicant's factors even recognize the need to apply for condonation shows a cavalier approach to compliance with rules of court, which must be discouraged by an exemplary order as to costs.*"

It was therefore incumbent upon counsel to check with the rules of court to the ascertain the form and content of chamber applications of this nature which are required to be served on interested parties. It is my respectful view facile and superficial to simply state that merely because the respondent has as a matter of fact filed its opposing papers applicant should therefore *ipso facto* be condoned for such non-compliance. The application therefore lends itself to be struck off the roll for non-compliance with the peremptory rules of court.

**Costs**

The general rule is that the successful party (in this case the respondent) is entitled to his or her costs. However, I do not believe there is justification, in the context of this case, to award costs on the superior scale as sought by the respondent.

Accordingly the application is hereby struck off the roll with costs.

*Ndlovu & Hwacha Legal Practitioners*, applicant's legal practitioners
*Zimudzi and Associates*; respondent's legal practitioners