INYANGA DOWNS ORCHARDS
versus
EDWARD BUWU

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 4 and 11 June 2010

Urgent Chamber Application

T. Mpofu, for the applicant
G.C. Chikumbirike, the for the respondent

MUSAKWA J: The parties to this case are embroiled in a contractual dispute. Basically the allegations against the respondent are that he has taken control of farming operations at Inyanga Downs Orchards without the consent of other directors. In its amended draft order the applicant is seeking the restoration of the status *quo ante*. At the hearing of this application counsel for the respondent raised some points in *limine.*

The first point raised by Mr *Chikumbirike* is that there is no application before the court. The submission was that for a party to litigate, it must have some legal status, either as a natural person or as a legal *persona*. As such, the status of the applicant is not known. If the applicant is a legal *persona*, that should have been apparent in its description.

The second point raised by Mr *Chikumbirike* was that the application does not conform to rule 241 of the High Court Rules. His submission was that rule 241 is clear on what form a chamber application should assume. Whereas the rule requires that in a chamber application there must be a summary of the facts, what is before the court is merely the founding affidavit. Mr *Chikumbirike* cited the cases of *Ndebele v Ncube* 1992 (1) ZLR 288(S) and *Beitbridge Rural District Council v Russell Construction (Pvt) Ltd.* 1998 (2) ZLR190 (SC) as authorities on non-compliance with rules of court.

The third point raised by Mr *Chikumbirike* was that the certificate of urgency accompanying the application is defective and therefore invalid. Mr *Chikumbirike* cited several errors in the certificate as a basis for attacking the validity of the certificate. In essence his contention was that the legal practitioner who signed the certificate did not apply his mind to the facts giving rise to his opinion that the matter is urgent. Mr *Chikumbirike* went on to suggest that he doubted that the legal practitioner who signed the certificate of urgency is the one who prepared it.

Lastly Mr *Chikumbirike* took issue with the delay by the applicant to institute the present proceedings. He submitted that from a reading of the founding affidavit the cause of action arose on 10 May 2010. If that is the case, there is no explanation why the application was not made a few days thereafter and only to be filed on 1 June 2010.

Mr *Mpofu* submitted that as regards the applicant's status, this is adequately disclosed in the founding affidavit. In this respect he referred to paragraph 3 thereof. Alternatively, he submitted that in terms of Order 2 rule 8 of the High Court Rules the applicant can institute proceedings or be sued in its trade name.

On the defective form of the application Mr *Mpofu* submitted that there is no strict requirement that there be a summary of the facts. In essence he submitted that forms used are not a rigid requirement and therefore non-compliance is not fatal to the application. The thrust of Mr *Mpofu*'s submission on this issue is that if there is such an omission then it should be condoned by the court.

On the issue of urgency Mr *Mpofu* submitted that typographical errors cannot invalidate the certificate of urgency. As regards certification of the urgency by a legal practitioner from a different legal firm, he submitted that there was nothing wrong with such a practice. He further submitted that a matter is urgent not on account of the certificate of urgency but by virtue of what is stated in the founding affidavit.

Mr *Mpofu* also submitted that it is now settled that commercial harm may ground urgency. In respect of when the cause of action arose he submitted that contrary to the contention advanced on behalf of the respondent that this was on 10 May, he submitted that the conduct complained of is as set out in paragraphs 13 and 15 of the founding affidavit. Accordingly, the issue is whether at the material time when the wrongful action complained of arose, the applicant acted to redress the wrong.

I must say that the certificate of urgency is replete with glaring anomalies. The author starts by averring that he is a senior legal practitioner at Gill, Godlonton and Gerrans, "legal practitioners of record". It is common cause that the legal practitioners of record are Mtetwa and Nyambirai.

The certificate further alleges that the respondent has "of date" forcibly violated the rights of the applicants and its employees by "forcibly removing them from employment without following any procedures and against the will of other Directors and Shareholders". It is also alleged that the respondent is disrupting operations at the farm. The respondent is alleged to have directed "that company money of 800 tonnes of apples sitting in the cold rooms be banked into his personal account…….". On 31st May 2010 the respondent allegedly fired all employees in key positions, including the general manager and replaced them with unqualified personnel.

On the contrary, the founding affidavit alleges that there are 600 tonnes of harvested apples in the cold rooms. Then on 10 May 2010 the respondent is alleged to have instituted eviction proceedings against Mr Anthony Swire Thompson who is described as one of the shareholders. In addition, it is alleged that the respondent brought in a new administration manager to the farm without the consent of other directors. This is alleged to have occurred on 20 May 2010. Then paragraph 15 deals with why the deponent considers the matter urgent. The reasons advanced under this paragraph are additional to what is alleged as the wrongful conduct of the respondent in the preceding paragraphs. No dates of occurrence of these incidences are stated.

A certificate of urgency can only complement the founding affidavit. It constitutes the opinion of a legal practitioner why he thinks a matter should be heard on an urgent basis. It follows that he can only formulate such an opinion from the facts alleged in the founding affidavit. A reading of the certificate of urgency shows that it does not complement the founding affidavit. Its shortcomings are so glaring as to render it invalid.

Going by the founding affidavit, I agree with Mr *Chikumbirike*'s submission that the cause of action arose on 10 May 2010. This is when the respondent is alleged to have instituted eviction proceedings against one of the shareholders. That allegation cannot be construed as anything else other than a cause of action. If it is not, one may ask what was the purpose of including it in the founding affidavit? I also agree that the institution of eviction proceedings cannot constitute a cause of action warranting the present application.

If I am correct that the cause of action arose on 10 May 2010, then the delay in instituting the current proceedings has not been explained either in the certificate of urgency or the founding affidavit. I am fortified on this aspect by the remarks of CHATIKOBO J in the much cited case of *Kuvarega v Registrar General and Another* 1998 (1) ZLR 188 in which the learned judge had this to say at p 193-

> "There is an allied problem of practitioners who are in the habit of certifying that a case is urgent when it is not one of urgency. In the present case, the applicant was advised by the first the respondent on 13 February 1998 that people would not be barred from putting on the T-shirts complained of. It was not until 20 February 1998 that this application was launched. The certificate of urgency does not explain why no action was taken until the very last working day before the election began. No explanation was given about the delay. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay. In casu, if I had formed the view that it was desirable to postpone the election I may nevertheless, have been dissuaded from granting such an order because, by the time the parties appeared before me to argue the matter, the election was already under way. Those who are diligent will take heed. Forewarned is forearmed."

Regarding the identity of the applicant, Mr *Mpofu* submitted that a party may sue or be sued by its trade name. Mr *Mpofu* cited Order 2A rule 8. However this provision relates to associates being able to sue or be sued in the name of the association. He must have had in mind Order 2A rule 8C of the High Court Rules which provides that-

> "Subject to this Order, a person carrying on business in a name or style other than his own name may sue or be sued in that name or style as if it were the name of an association, and rules 8A and 8B shall apply, *mutates mutandis*, to any such proceedings."

As submitted by Mr *Chikumbirike*, in the papers before this court the applicant is not described as an association.

Reverting to rule 8C Mr *Mpofu* sought to argue that the applicant is sufficiently described in paragraph 3 of the founding affidavit where it is stated that-

"The applicant, as a person at law was first incorporated in terms of the law as far back as 1968."

Now, the effect of incorporation is that a company assumes the name by which it is registered. In this respect see s 22 (2) of the Companies Act [*Chapter 24:03*]. Although Mr *Mpofu* drew the court's attention to paragraph 3 of the founding affidavit, it is clear that the applicant is not sufficiently described by its trade name. Therefore, Mr *Chikumbirike* was quite correct that the respondent does not know who Inyanga Downs Orchards is. The applicant should have instituted proceedings in the name by which it was incorporated.

Concerning the form of the present application, it is quite clear that the applicant fell foul of Order 32 Rule 241 (1) which provides that-

> "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.'

Form 29 B requires the applicant to set out in summary the basis of the application. It is a mandatory requirement by virtue of the wording of Rule 241 (1). I am further fortified in my view by Order 1 rule 4 which provides that-

> "The forms in the First Schedule shall be used where applicable and any reference in these rules to a form by number is a reference to the form in that Schedule bearing that number.
> (2) The forms prescribed in the First Schedule may be used with such alterations as circumstances require."

Mr *Mpofu* cited the case of Moyo v Forestry Commission 1996 (1) ZLR 173 (H) in support of his contention that non-compliance with rules of court can only be fatal if the grounds for the application are not sufficiently canvassed in the founding affidavit. In that case an ordinary court application was instituted in terms of Order 32 whereas the applicant should have proceeded in terms of Order 32 and the attendant rules. Commenting on the provisions of the rules MALABA J (as he then was) had this to say at pages 181-182-

> "The requirements are peremptory. A court application that omitted to incorporate these particular requirements for review is liable to being set aside for being a nullity: *Secretary for the Interior v Scholtz* 1971 (1) SA 633 (C) at 636A-637D; SAFCOR Forwarding (Jhb) (Pvt) Ltd v NTC 1982 (3) SA 654 (A) at 673B; *Deputy Minister of Tribal Authorities v Kekana* 1983 (3) SA 492 (B) at 496-7. Courts are however not captive to the Rules. Rules were made for the benefit of litigants. The engrafting of the ordinary court application onto the review procedure through rr 256 and 258 made it an integral part of the form of the review procedure. It was therefore prima facie a competent form for instituting proceedings to set aside the administrative decision.
> It was upon the examination of its content revealed by the supporting affidavits that a decision could be made whether or not the use of the court application instituting proceedings to set aside the administrative decision, without incorporating the particular requirements of rr 256, 257 and 259, was so inappropriate in the circumstances of the case, that it would be legally incompetent to grant the relief sought."

After analyzing a number of authorities the learned judge further went on to say at p 184-

"Decided cases show that the following are some of the situations in which relief would be granted in proceedings instituted by way of an ordinary application not incorporating the particular requirements of Order 33 (the list is not meant to be exhaustive but illustrative):

1. Where good cause has been shown in an application for condonation of non-compliance with the particular requirements of Order 33.
2. Where there has been no formal application for condonation but the proceedings (or decision) sought to be set aside are ex facie the papers null and void so that condonation would have been granted as a matter of course had an application been made.

   Refusal to grant the relief prayed for, for the simple reason that an incorrect form for instituting the proceedings was used, would in such circumstances amount to condonation of the perpetuation of the nullity and gross injustice."

The decision by MALABA J was upturned on appeal by the Supreme Court and is reported in 1997 (2) ZLR 254. In upholding the appeal GUBBAY CJ had this to say at pp 259 - 260-

"Insofar as the High Court Rules are concerned, r 4C(a) permits a departure from any provision of the Rules where the court or judge is satisfied that the departure is required in the interests of justice. The provisions of the Rules are not strictly peremptory; but as they are there to regulate the practice and procedure of the High Court, in general strong grounds would have to be advanced to persuade the court or judge to act outside them. See *Sumbereru v Chirunda* 1992 (1) ZLR 240 (H) at 243B; *Makaruse v Hide* \& *Skin Collectors \(Pvt\) Ltd* S-140-96 B 1996 (2) ZLR 60 (S); *Wilmot v Zimbabwe Owner Driver Organisation \(Pvt\) Ltd* S-211-96 1996 (2) ZLR 415 (S).

Under r 53 of the Uniform Rules no period is prescribed within which proceedings for review must be brought. Yet it is clear that they must be brought within a reasonable time. See *Wolgroeiers Afslaers (Edms) Bpk v C Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39B; *Radebe v Government of the Republic of South Africa & Ors* 1995 (3) SA 787 (N) at 798A-B.

Rule 259 of the High Court Rules, on the other hand, requires an application for review to be instituted within eight weeks of the termination of the proceedings in which the irregularity or illegality complained of is alleged to have occurred. Its proviso allows the court to extend the time for good cause shown. In other words, if the application for review has been brought out of time, condonation for the failure to comply with r 259 must be sought. If authority is required for this self-evident concept, it is to be found in

Bishi v Secretary for Education E 1989 (2) ZLR 240 (H) at 242D; and *Mushaishi v Lifeline Syndicate \& Anor* 1990 (1) ZLR 284 (H) at 288E-F. The court is entitled to refuse the review or may condone the omission. It exercises a judicial discretion, while taking into consideration all relevant circumstances.

In adopting an incorrect procedure, the respondent did not advert to the time period prescribed in r 259. It was necessary for him therefore to apply for condonation in terms of the proviso to that rule. This he did not do, not even at the eleventh hour when the objection was taken by the appellant. Thus there was before the court a quo no endeavour to show good cause to justify it in extending the time in bringing the application. No explanation was offered in respect of the manifestly inordinate delay of just over two years in launching the proceedings. Was this due to the neglect of the legal practitioner? Or perhaps the respondent himself was responsible in prevaricating as to whether to bring proceedings? The court was left completely in the dark.

Notwithstanding that there was before him no application, the learned judge condoned the unexplained delay. He did so solely on the ground that as, in his opinion, the decision to dismiss the respondent was null and void on account of gross procedural irregularities by the investigation panel, to dismiss the application would constitute a failure to redress an injustice. Put tersely, he held that if an application for condonation had been made, it would have been granted "as a matter of course". The cases relied on, for what is an innovative approach to r 259, were *Rampa en Andere v Rektor, Tshiya Onderwyskollege en Andere* 1986 (1) SA 424 (O); *Secretary for the Interior v Scholtz* 1971 (1) SA 633 (C); and *Jockey Club of South Africa v Forbes supra*. None of these decisions, however, concerned the necessity to establish a reasonable explanation for the delay in instituting the application. The reasonableness of time within which the application was brought was not a factor in any of them. See also *Mabuza v Tjolojo District Council* HB-52-92 (not reported).

I entertain no doubt that, absent an application, it was erroneous of the learned judge to condone what was, on the face of it, a grave non-compliance with r 259. For it is the making of the application that triggers the discretion to extend the time. In Matsambire v Gweru City Council S-183-95 (not reported) this court held that where proceedings by way of review were not instituted within the specified eight week period and condonation of the breach of r 259 was not sought, the matter was not properly before the court. I can conceive of no reason to depart from that ruling. One only has to have regard to the broad factors which a court should take into account in deciding whether to condone such a non-compliance, to appreciate the necessity for a substantive application to be made."

In the present matter counsel for the applicant did not apply for condonation of non-compliance with the rules.

From a consideration of the points in *limine* I come to the conclusion that the application cannot be entertained. Therefore the application is dismissed with costs.

Mtetwa & Nyambirai, the applicant's legal practitioners
Chikumbirike & Associates, the respondent's legal practitioners.