THE PERMANENT SECRETARY,
MINISTRY OF HIGHER AND TERTIARY EDUCATION
versus
COLLEGE LECTURERS ASSOCIATION OF ZIMBABWE AND 18 OTHERS

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 14 July 2015 and 22 July 2015

Opposed application

C Mucheche, for the applicant
Ms C Mahlangu, for the respondents

MATHONSI J: Voluminous papers running into 223 pages have been filed in this matter and quite a number of extraneous issues have been raised. However, when all has been said and done, the application is a simple one for the dismissal of an application for want of prosecution, an application made in terms of r 236 (4) (b) of the High Court of Zimbabwe Rules, 1971. The only meaningful issue for determination is whether that rule also applies to chamber applications.

In HC 10528/13, the nineteen respondents filed a chamber application for registration of an order of the Labour Court issued in their favour. They purported to make the application in terms of s 98 (14) of the Labour Act [*Chapter 28:01*] which provides for registration of arbitral awards for enforcement purposes. This was however a blatant error which the applicant quickly latched on to in its opposition, because a Labour Court order can only be registered with this court in terms of s 92B (3) of the Act. That however is not the subject of the present inquiry.

The application was filed on 6 December 2013. The applicant, filed a notice of opposition on 20 December 2013. It was not until 21 February 2014, 2 months later, that the respondents filed an answering affidavit. After that they did not do anything to prosecute the application. On 20 March 2014 the applicant sent a letter of reminder to the respondents in the following:

> "RE: COLLEGE LECTURERS ASSOCIATION OF ZIMBABWE & 18 ORS VS THE PERMANENT SECRETARY (MINISTRY OF HIGHER AND TERTIARY EDUCATION): CASE NO HC 10528/13

> We refer to the above matter. We kindly remind you to file heads of argument in terms of the High Court Rules if the applicant is still pursuing the High Court matter. We kindly await to hear from you.
>
> Yours faithfully
> Caleb Mucheche
> Matsikidze and Mucheche"

That reminder did not attract any action from the respondents. When this application was filed on 13 May 2014, more than three months had lapsed since the answering affidavit had been filed and still nothing had been done to prosecute the application for registration of the award. It is for those reasons that the applicant seeks the dismissal of the application for want of prosecution.

Only the second respondent filed an opposing affidavit purporting to do so on behalf of all the other respondents in that:

> "I am the second respondent and has (*sic*) already been conferred with the authority by all the other applicants to represent them in the legal suit to ensure registration of Labour Court Judgement number LC/H/279/13. Seed (*sic*) Annexures A1 and A4"

It is not clear what authority the second respondent refers to because there are no annexures A1 and A4 to his affidavit. In fact the only document annexed to that affidavit is a judgement of the Labour Court dated 11 March 2013 which has nothing to do with conferring authority upon him to represent the other respondents. No authority to represent the other respondents is attached.

Ms *Mahlangu* for the respondents submitted that authority should be inferred from the previous dealings of the parties and the fact that as the President of the Union the second respondent automatically represents the other respondents. I do not agree. However there is merit in the application even without relying on that technicality.

In opposing the application, the second respondent maintains that they have not been found lacking in prosecuting their application and that the application is ill-conceived because r 236 (4) (b) under which it has been made does not apply to chamber applications, it being applicable only to court applications. Even if r 236 (2) applied, the setting down of the matter for hearing is discretionary and not mandatory. In addition, the filing of heads of argument provided for in r 243 is again discretionary and not mandatory. As it is, the respondents "have made numerous inquiries" about the outcome of the chamber application without success. He makes reference to annexure "B" to the affidavit as proof of such but again there is no such annexure.

It is true that r 236 is located in part C of Order 32 which deals with court applications and that chamber applications are contained in part D of that Order dealing with chamber applications. Rule 236 (4) provides;

> "Where the applicant has filed an answering affidavit in response to the respondent's opposing affidavit but has not, within one month thereafter, set the matter down for hearing, the respondent on notice to the applicant, may either-
> (a) set the matter down for hearing in terms of rule 223; or
> (b) make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make such other order on such terms as he thinks fit."

Clearly therefore where an applicant has not acted one way or the other to have the matter set down within one month of filing an answering affidavit, the respondent has an election either to set the matter down himself or to approach a judge in chambers for the dismissal of the application for want of prosecution. It is a choice available to the respondent where the applicant has not done anything for a period of one month after filing an answering affidavit and is designed to move the matter forward or to finality instead of leaving it stagnant.

Part D of Order 32 dealing with chamber applications appears to confine itself to the disposal of those chamber applications which are either unopposed or urgent and do not have to be set down for argument. Rule 241 (1) provides:

> "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 for 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."

It is significant that a chamber application that has to be served on an interested party has to be in Form No. 29 which is the Form in which a court application is made as provided for in r 230. Rule 230 also provides that if a court application does not have to be served on any person "it shall be in Form No 29B with appropriate modifications." (compare with r 241 (1)).

I have said that Part D is concerned with chamber applications which do not have to be set down for argument and which, if not urgent, the registrar should "in the normal course of events" (r245) refer to a judge for consideration in chambers. In my view a chamber application that is opposed is treated like a court application and must be allocated to a judge for set down on the opposed roll. I agree with Mr *Mucheche* for the applicant that a rule of

practice has evolved in terms of which such matters are dealt with that way.

There is no way in which an opposed chamber application can be disposed of without the parties filing heads of argument and seeking a set down of the matter on the opposed roll. That would infringe the *audi alteram parterm* rule. I do not agree with Ms *Mahlangu* for the respondent that the filing of heads of argument and requesting a set down is discretionary. If it was discretionary there would have been another method of prosecuting opposed chamber applications without resort to that. There is none. The use of the word "may" in r 243 does not help the respondents at all because that rule clearly has no application whatsoever to the present matter. It merely allows a party who has filed a chamber application to attach to it heads of argument justifying why the application has been made without notice and in support of the order sought to be granted without notice to the other party.

There is no doubt in my mind that the respondents were required to prosecute their application in terms of the rules relating to court applications because it is, for all intents and purposes, a court application hence the provision that it has to be in Form No 29. In arriving at that conclusion I am mindful of the fact that rules are merely the court tools fashioned for its own use and they are flexible and adaptable to meet the particular needs of the court at any one time: *Nxasana* v *Minister of Justice & Anor* 1976 (3) SA 74; *Scottish Rhodesian Ltd* v *Honiball* 1973 (2) SA 247 (R).

It is unthinkable that the drafters of the rules may have intended that an opposed application brought as a chamber application would be allowed to remain pending *ad infinitum* without any recourse to the remedy provided for in r 236 (4) (b) or that an applicant in that matter has a discretion not to file heads of argument when represented by a legal practitioner or not to bother setting down the matter. Those rules must be construed in such a way that they remain useful tools to the court in the resolution or disposition of matters before the court and I am empowered by r 4C (b) to construe then that way.

I therefore come to the inescapable conclusion that the remedy provided for in r 236 (4) (b) is available to the applicant even though the application was commenced as a chamber application. It is a court application which is opposed and which the respondents have failed to prosecute as required by the rules thereby entitling the applicant to the remedy of dismissal for want of prosecution.

In the result, it is ordered that;

1. The chamber application for registration of the Labour court judgement filed

under case number HC10528/13 be and is hereby dismissed for want of prosecution.

2. The respondents shall bear the costs of this application jointly and severally, the one paying the others to be absolved.

Matsikidze & Mucheche, applicant's legal practitioners
Munyaradzi Gwisai & Partners, respondent's legal practitioners