FABIOLA N GONYE
versus
FADZAI MTOMBENI N.O
and
WALTER MULTER
and
CLERK OF COURT, REGIONAL COURT
and
PROSECUTOR GENERAL, ZIMBABWE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 20 October 2016 & 7 June 2017

Opposed Matter

T T G Musarurwa, for the applicant
T Chagonda, for the 2nd respondent

MAKONI J: The applicant approached the court on a Certificate of Urgency setting a Provisional Order in the following terms

"Final Order Sought

1. The decision of the first respondent in Case Number R254-7/15 R300/15 wherein she ordered that the exhibit amounting to US5 545.00 be given to the second respondent is set aside and replaced with the following decision.
2. Party (ies) opposing application to pay costs of suit.

Interim Order Granted
Pending confirmation of the Provisional Order, the applicant is granted the following interim relief:

1. The decision of the first respondent awarding the US$5 545. Kept as an exhibit in Case Number R254-17/15 R300/15 to the second respondent is hereby stayed pending confirmation/discharge.

2. The third respondent is hereby directed to keep in its custody the exhibit in Case Number R254-7/15 R300/15 and not to alienate, dispose or encumbent such exhibit pending confirmation/discharged of this provisional order.

The background to the matter is on 29 December 2014, the 2nd respondent was robbed of 45 000 Euros. The culprits were arrested, duly prosecuted and convicted.

The applicant was state witness in the matter. She had entered into a transaction to exchange 6000 Euros into 6600.00 United States dollars. The euros were part of the money stolen from the 2nd respondent. She was found in possession of the 6000 Euros. She led the Police to the person she transacted with and they recovered the US6 600.00. Both amounts were used as exhibits in court.

At the conclusion of the trial, presided by the 1st respondent, the applicant made an application, in terms of s 61 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] for the return of her United States Dollars. The application was dismissed and the 1st respondent ordered that the money be awarded to the 2nd respondent.

The applicant then approached the court seeking the Provisional Order which she now seeks confirmation.

The application is opposed and the 2nd respondent raised two points *in limine viz* that the application is fatally defective and that the applicant approached the court with dirty hands. 1 will first of all deal with the points *in limine* in *seriatim.*

Fatally Defective Application

Mr *Chagonda* submitted that the applicant used the wrong form. She seeks a review of the decision of the 1st respondent. In approaching the court, in terms of the High Court Rules 1979, the applicant was supposed to proceed by way of court application and not by way of an Urgent Chamber Application for Review. The applicant should have filed an Urgent Application for stay pending the determination of Court Application for Review. As a result, the applicant failed to meet the requirements of a review application. She failed to comply with r 257 which provides that the grounds for review must be clearly set out. The respondent, in her notice of opposition, refers to para 22-24 of her founding affidavit, but those paragraphs do not state the grounds relied upon.

Mr Musarurwa submitted that the applicant complied with the rules. In urgent chamber applications rules are relaxed not to allow on injustice to occur.

He further submitted that in terms of s 27 of the High Court Act [*Chapter 7:06*] an application for review can be brought in terms of any law including common law applicable in Zimbabwe.

He further contended that in terms of r 226, an application for review can be launched in any form, subject to what any other law may provide. The import of the rule is to move any restrictions that may be operative in launching an application for review strictly provided for in r 256.

The issue in my view is whether the application is fatally defective. An application for review is provided for in Order 33.

R 256 provides

> "Save where any law otherwise provides, any proceedings to bring under review the decision or proceedings of any inferior court or of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of court application directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected."

The import of the above rule is that an applicant seeking a review must approach this court by way of court application unless it is proceeding in terms of any other law other than r 256. It is incumbent upon such applicant to state clearly in terms of which law it is proceeding under in filing the application for review right at the outset. Where no such clear statement is made in the Court Application, it will be taken that the applicant is proceeding in terms of r 256.

R 257 provides

> "The court application shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for".

This rule has generated and continue generate a lot of debates and judgments. In *Chataira* v *Zimbabwe Electricity Supply Authority* 2001 (1) ZLR 30 (H) at 34 G-H and 35 A, SMITH J had this to say about non-compliance with r 257:

> "As regards the failure on the part of *Chataira* to comply with r 257 of the High Court Rules, it seems to me that such non-compliance would constitute good grounds for dismissing this application. Rule 257 requires that an application to bring proceedings

> under review shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for. In the *Pen Transport, Mushaishi and Marumahoko* cases referred to earlier, the courts clearly stated that failure to comply with r 257 constituted a fatal flaw. Despite those warnings, legal practitioners still fail to comply with the rule. The time has surely come to say enough is enough and to dismiss the defective applications without considering the merits."

This matter was confirmed by the Supreme Court in *Chataira v Zimbabwe Electricity Supply Authority* SC 83/01 where the court after quoting the above quotation concluded by saying:

> "In my view these observations are beyond criticism"

In *Dandazi* v *Wankie Colliery Co Ltd* 2001 (2) ZLR 298 (H) out 299 E-H and 300 A-B.

> "At this state, l wish to make an observation which is relevant to many review applications that are brought to the High Court. In terms of order 33 r 257, it is a requirement that:
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> > 'The court application shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for'
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> This is not an idle requirement. It was inserted in the rules of the court so that an applicant for review may apply his mind to the grounds upon which he seeks a review and be able to state them clearly and in brief form. Often, in review applications, all sorts of grounds are lumped together in the body of the founding affidavit, making it very difficult for the presiding judicial officer to determine the grounds upon which the matter is to be reviewed. If, as in the present case, the grounds upon which the matter is to be reviewed. If, as in the present case, the grounds are based on bias and gross irregularity in the proceedings, then those grounds must be stated in the application. A failure to do so, as was the case in this application, is a failure to comply with order 33 r 257. The consequence of that failure is that the matter is not properly before the court and the applicant must not be heard. It is important, therefore, that legal practitioners should comply with r 257 in every case if they are to avoid the embarrassment of the matter being struck off for failure to comply with the rules of this court. See the warning given in *Minister of Labour & Ors* v *Pen Transport (Pvt) Ltd* 1989 (1) ZLR 293 (S) at 295 G – 296 D. The applicant *in casu* did not comply with r 257. I condoned the failure to comply with the rule because the significance of the rule has not been brought to the attention of legal practitioners with sufficient force. Also the respondent was not prejudiced by the failure to comply with the rule. It did not demur."

The same point was emphasised in *Mambo* v *National Railways of Zimbabwe & Anor* 2003 (1) ZLR 347 (H) at 350 C-H and 351 A-C.

> "In the case of this application, not only has there been an inordinate delay in the filing thereof, but also there is failure to comply with r 257 of the High Court Rules. That rule requires that an application for review must state, shortly and clearly, the grounds on which the applicant seeks to

have the proceedings set aside or corrected and the exact relief prayed for. In many judgments handed down over the last few years, legal practitioners have had their attention drawn to the requirements of r 257 and the necessity to comply therewith. There have been warnings that failure to comply with the requirements of that rule will result in the application being dismissed. In *Minister of Labour & Ors* v *Pen Transport (Pvt) Ltd* 1989 (1) ZLR 293 (S) GUBBAY JA, as he then was, dealt with the requirements of r 257 at 295 -296 as follows:

> 'The notice of motion itself was not in accordance with proper practice. It simply asked for the relief particularised in an annexed draft order, which was that the determination be set aside and the dismissal of the employee confirmed. I am bound to reiterate the stricture of Greenfield J in *Utterton* v *Utterton* 1969 (2) RLR 404 (GD) at 409 F-G; 1969 (4) SA 391 (R) that the requirement of r 227 (1) of the High Court Rules 1971, that an applicant should append to his notice of motion a draft of the order he seeks, does not relieve him of the necessity to ensure that the nature of the relief appears *ex facie* the notice.
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> But there was a far more serious defect in the preparation of the application. Although the existence of two grounds of review were urged upon the court a quo only the second, that the labour relations officer had declined to hear the employer's accountant, Mr MacKenzie, and had also failed to investigate from other employees the circumstances surrounding the dismissal, was alleged in the founding affidavit. The first ground was not disposed of at all. It was that the labour relations officer had no jurisdiction to make the determination he did because it had been orally agreed that the employee would serve a probationary period of three months, thereby permitting termination pursuant to s 2 (1) (c) of the regulations. That omission amounts to non-compliance with r 257 of the High Court Rules, which provides that the notice of motion (in the wide sense of embracing the supporting affidavit) –
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> > '…shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected.'
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> In *Rimayi* v *Minister of National Supplies & Anor* S 86-90, GUBBAY JA repeated what he had said in the Pen Transport case, supra, about the necessity comply with r257 and said:
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> > 'Non-compliance will bar the grant of relief.'
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> In this case there has been no attempt to set out the grounds on which Mambo seeks to have his discharge by the NRZ or the determination of the second respondent set aside. Although in the Pen Transport case, supra, GUBBAY JA said that the grounds for seeking the relief sought could be set out in the supporting affidavit, l would strongly recommend that the grounds be set out in the notice advising the respondent that the application for review is being made. If that is done, then both the respondent and the court will be made aware, before even starting to delve into the founding affidavit, of the exact relief sought and the grounds upon which the application is based."

What is established by the above authorities are two essential elements i.e. that the application must be by way of court application and in it must be stated shortly and clearly the grounds upon which the applicant seeks to have proceedings set aside or corrected and the exact relief prayed for.

The question that comes to mind is whether the application filed by the applicant, *in casu*, meets the above requirements.

Mr Musarurwa sought to argue that applications for review in terms of the Act can be sought in terms of any other law, including common law applicable in Zimbabwe. He relied on the authority of *Arafas Gwaradzimba* v *Gurta A G* SC 10/15.

S 27 of the Act provides

"27 Grounds for review

(1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be-
   (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
   (b) Interest in the cause, basis, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
   (c) gross irregularity in the proceedings or the decision.
(2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities."

GWAUNZA JA in *Arafas Gwaradzimba supra* had this to say on this point:

> "This argument seems to suggest that review proceedings that are brought in terms of Order 33 of the High Court Rules enjoy a monopoly over the grounds on which interference with an order or proceedings of an inferior court or tribunal, may be justified. I am not persuaded that is the case. As indicated above ss 26 and 27 of the High Court Act [*Chapter 7:06*] and r 256 of the High Court Rules do not rule out review proceedings being brought in terms of "any other law". I take the view that such other review proceedings may properly rely on the same or similar grounds as a basis for some interference or other, by a superior tribunal, with a lower tribunal's order or proceedings. What is important at the end of the day is that justice and fairness prevail, following upon a court ruling that is premised on cogent reasoning and sound principles of law."

I agree entirely with the position stated by GWAUNZA JA and would add that an applicant must state whether the review application is made in terms of 033 or in terms of common law in the court application not in the affidavit. This will assist both the court and the respondents in responding to the application and in preparing for court respectively. It will also

save the court's time by reducing the raising of points *in limine* and money to the litigating parties.

The applicant's application is headed "Urgent Chamber Application for Review in terms of s 26 of the High Court Act [*Chapter 7:06*], as read with Order 32 r 244 of the High Court Rules 1971.

From the above, it is clear that the application is not made in terms of common law but in terms of the Rules. Having been made in terms of the Rules it must comply with the Rules. It must be by way of Court Application and must comply with r 257.

This poses the question whether such an application whether in terms of 033 or common law can be filed by way of certificate of urgency.

The applicant sought to rely on r 226 (1) (a) and (2) (a) which provides for the making of a Chamber Application, if the matter is urgent that it cannot wait to be resolved through a court application. It was submitted on her behalf that the import of the above provisions is to remove any restrictions that may be operative in launching an application for review strictly provided for in r 256. He further submitted that since the application for review was not launched in the form of a court application, the requirements of r 257 operate as a guideline instead of a peremptory requirements. A reading of the Urgent Chamber Application reveal, that the grounds upon which the review is sought are sufficiently clear.

The above argument is not convincing. It is high time this court implements the warnings given in previous judgments that where the grounds upon which an applicant seeks to have proceedings set aside or corrected should be stated in the Court Application and not in the founding affidavit and if that is not done then the application be dismissed.

There are instances where interim relief is required, pending the determination of the application for review. A litigant can approach the court seeking a Provisional Order as *in casu*. The applicant would seek stay of execution of the order granted by the magistrate court. There are two ways that such an applicant can proceed to achieve this. Firstly, as was done by the current applicant, to seek stay of execution as an interim relief and then review on the return day. The danger in opting for this procedure is as the applicant finds herself in. One might end up with a convoluted application as *in casu*. The main averments in the founding affidavit are

centered on the interim relief. The grounds for review are related to in passing towards the end of the founding affidavit. The requirements of r 257 were completely overlooked.

The second option and the neater one is to seek interim relief of stay of execution pending the return day of the Provisional Order. In the final order one then seeks stay of the execution pending the determination of the application for review. The applicant files the application for review simultaneously with the Urgent Chamber Application. That way the application will comply with the rules in that it will be in the form of a court application and grounds for review will be stated clearly and concisely in the Court Application.

My view is that it was deliberate that the drafters of the rules dedicated a whole Order to the procedure for filing of applications for review in the Rules. The rationale for 033 is my view as was stated in *Jockey Club of SA* v *Forbes* 1993 (1) SA 649 (A) of 662 G –H where they were dealing with the equivalent of r 256 which was quoted in Herbstein and Van Winsen. *The Civil Practice of The High Courts And The Supreme Court of Appeal of South Africa*, 5th ed p 129 where it was stated:

> "In *Jockey Club of SA* v *Forbes*[180] the Appellate Division held that the purpose of rule 53 is not to protect the decision-maker, but to facilitate applications for review and to ensure their speedy and orderly presentation. Were it not for rule 53, the private citizen would be obliged to launch review proceedings in the dark and, depending on the answering affidavit(s) of the respondent(s), he could then apply to amend the notice of motion and to supplement the founding affidavit. Manifestly, the procedure created by rule 53 is to the citizen's advantage in that it obviates the delay and expense of an application to amend and provides access to the record.[181]"

I can also add that the applicant will be expecting this court to interfere with a decision of some other tribunal. The necessary averments setting out the basis must be clearly set out and not to be gleaned from the founding affidavit as in casu. This can only be achieved by complying with the rules. The respondent must be very clear right at the beginning what is that he is facing and how to respond.

In the result, I will uphold the point *in limine* and find that the application is fatally defective for failure to comply with the rules. It will not be necessary for me to deal with the other point *in limine* in view of my findings above.

In the result I will make the following order.

1. The application is dismissed.

2. The applicant to pay the second respondents costs.

Mambosasa, applicant's legal practitioners
Atherstone & Cook, 2nd respondent's legal practitioners
The National Prosecuting Authority, 1st, 3rd and 4th respondents' legal practitioners