TECHNOFAB ENGINEERING LIMITED
and
TRILOCK CHANDRA
versus
AMA WELDERS AND PIPE FABRICATING ENGINEERS (PVT) LTD
and
SHERIFF FOR ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 4 October, 2016

URGENT CHAMBER APPLICATION

A Debwe, for applicants
B Rupapa, for 1st respondent.

CHITAKUNYE J. The applicants approached this court on a certificate of urgency seeking the stay of execution of an order granted by this court in favour of the first respondent.

In particular the relief sought is captured as:

"TERMS OF FINAL ORDER SOUGHT

That you show cause to this honourable Court why a final order should not be made in the following terms:

1. That the enforcement of the default judgement in Case No. 8792/15 be suspended pending the determination of applicants' Court application for rescission of judgment filed under Case No. HC 9779/16.

2. That 1st applicant's goods listed in Annexure 'B' to applicants' application shall remain under judicial attachment until the outcome of the aforesaid application for rescission of judgment. respondent shall pay costs of this application (*sic*)
3. 1st respondent shall pay the costs of this application.

INTERIM RELIEF SOUGHT
Pending the determination of this matter, applicants are granted the following relief:-

4. That 2nd respondent be and is hereby interdicted from removing 1st applicant's goods from No. 324 Samora Machel Avenue, Eastlea, Harare on the 28th September 2016 and listed on Annexure 'B' to applicants' court application filed under Case No. HC9779/16."

It is common cause that the first respondent obtained judgement against the applicants on 24 February 2016. On 26 September 2016 the second respondent served the writ of execution and notice of attachment at the first applicant's business premises.

It is as a result of the notice of attachment that the applicants have approached this court on a certificate of urgency to stop the execution of the judgment.

The first respondent opposed the application. In is opposition the first respondent raised a number of points *in limine*. These are:

1. The purported urgent chamber application is fatally defective for failure to comply with Rule 241 (1) of the High Court Rules;

2. The deponent to the first applicant's Founding affidavit has not proved that he is authorised to represent 1st applicant;

3. The application lacks urgency.

Counsel for the applicant respondent to the points raised. In his response counsel indicated that the matter was urgent as the applicant's were only made aware of the judgment against them when the notice of attachment was served on 26 September 2016. They acted swiftly by instructing legal practitioners to approach court.

On the aspect of lack of authority counsel alluded to the fact that the deponent to the first applicant's founding affidavit is among the persons the first respondent had been dealing with even in the main matter and so the challenge to his authority is without merit.

On failure to comply with r 241 counsel virtually had nothing to say. I got the impression he just did not appreciate the gravity of such failure. Upon being probed he stated that court has the power to condone failure to comply with the rules as no prejudice was occasioned.

I did not hear counsel to be applying for condonation but to be expecting court to grant condonation that had not been sought. This in my view would not be proper. It is a party in default that must trigger the exercise of the court's discretion to condon the failure to comply with the rules. More so as in this case where the rule is very clear.

Rule 241 (1) states 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."

In *casu*, the chamber application was to be served on the other party and so it had to be in Form 29 with appropriate modifications. This, it was not.

The application before me reads as follows:

> "URGENT CHAMBER APLICATION FOR STAY OF EXECUTION
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> Application is hereby made for an order in terms of the draft provisional order annexed hereto on the grounds that:
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> 1. If the 1st respondent is not interdicted from enforcing its judgment which was granted in default on the 24th February 2016 before determination of applicant's court application for rescission of such judgement, then the aforesaid application would be rendered academic.
> 2. If the 2nd respondent is not interdicted from removing the 1st applicant's movable goods from No. 324 Samora Machel Avenue, Harare, on 28th September 2016, before the determination of applicants' application for rescission, then 1st applicant will suffer irreparable harm and prejudice."

As can be noted the above is a far cry from the requirements of Form 29. 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 affidavits 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. See *Zimbabwe Open University* v *Mazombwe* 2009 (1) ZLR 101(H) at 102H-103E.

In *casu*, the application does not refer to any accompanying affidavits or documents in support of the application thus falling foul of both form 29 and 29B. The form used is novel and not in terms of either Form in terms of the Rules.

Where a party has not complied with the rules it is for that party to seek condonation. As aptly noted by GUVAVA J (as she then was in *Richard Itayi Jambo* v *Church of the Province of Central* Africa *& Ors* HH 329/13 at p 3 of the cyclostyled judgement:-

> "This court has stated in a number of judgments … that parties are obliged to comply with the rules. Where there is a non-compliance the applicant must apply for condonation and give

> reasons for such failure to comply with the rules. (*see also Jensen* v *Avacalos* 1993 (1) ZLR 216 (SC)).
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> In this case the applicant's legal practitioner made no effort to comply with the rule despite the fact that the point was raised in the respondent's opposing affidavit. The request to the court to condone the noncompliance was made cursorily at the hearing as if the grant of such condonation is always there for the asking.
>
> It seems to me that legal practitioners must be reminded that there is an obligation to comply with the rules of this court ……
>
> Clearly, where a party fails to comply with the rules there must be a plausible reason why there has been a failure to comply. In this case the attitude of the applicant was that such non-compliance must be granted by the court even though no explanation has been proffered for such failure. The applicant's counsel merely submitted that the defect was not material enough to vitiate the application. In my view this is not sufficient and on this basis alone I would dismiss the application."

The above sentiments by the learned judge speak well into this application as well. I have already alluded to the fact that despite the non-compliance being pointed out, applicant's counsel virtually glossed over it in his initial address treating it merely as immaterial. No explanation was proffered. It was much later and in response to my question that counsel attempted to proffer an explanation. That explanation was to the effect that the matter was prepared urgently or in haste hence the non-compliance. Such an explanation serves to confirm the cursory with which applicants ' counsel took the issue; yet he ought to have realised that non-compliance with the rules may be fatal to the application.

It would appear that because of that cursory approach applicants' counsel did not deem it necessary to apply for condonation for non-compliance with the rules. This altitude was erroneous. Legal practitioners must be reminded that when issues are raised by the other party they should seriously consider those issues and not take them cursory. Counsel expected court to condone the non-compliance even when no such application was made.

As aptly noted by MAFUSIRE J in *Marick Trading (Private) Limited* v *Old Mutual Life Assurance Company of Zimbabwe (Private) Limited and the Sheriff of Zimbabwe* HH 667-15 at p 7 of the cyclostyled judgement:

> "What triggers the exercise of discretion by a court or a judge to grant or refuse condonation is the application: *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S) at p 260C-D. The court does not do it of its own accord."

I thus conclude that there is no proper application before me. The application will be struck off the roll with costs.

Other points *in limine*

Upon hearing counsel on the issue of Tahir Khan representing the first applicant I was of the view that in light of previous dealings between the parties in which he had represented the first applicant this point had no merit. Clearly, if all along the first respondent had dealt with Tahir Khan as representative of the first respondent, including in the main case before this court, the first respondent had by virtue of that accepted Tahir Khan's authority to represent the first applicant.

The contentious issue pertained to whether the matter was urgent or not. The first respondent contended that the case was not urgent as applicants had been aware of the case. The case in which default judgement was issued had reached pre-trial conference stage. The parties had in fact attended a pre-trial conference (PTC) before a pre-trial conference judge. In that conference applicants were represented by a legal practitioner and two representatives. On the date of first hearing, 10 February 2016, the matter was postponed to the 22nd February 2016. The parties were directed to seek the assistance of a Consultant Engineer. By the 22nd February they had not had a meeting with the engineer and so in the presence of the applicants' representatives and their legal practitioner the matter was further postponed to the 24th February. On the 24th February 2016 the applicants' legal practitioner attended the judge's chambers and alluded to the fact that they had met the engineer and from his report there was no need to pursue the case. However applicant's representatives did not come on the 24th February. The legal practitioner virtually left without the matter being concluded. It was in those circumstances that a default judgement was granted.

The first respondent's counsel further contended that after the grant of the default judgement the first respondent continued to engage the applicants for payment to no avail. It was only in September that execution of the judgment was embarked upon. As far as counsel is concerned applicants must have been aware of the impending consequences as they had not attended court when they knew the date as the PTC was postponed in their presence. Had they been sincere they could have made effort to find out what had happened on the 24th February either from their erstwhile legal practitioner or from court.

Though the applicants insisted that the case be treated as urgent it is pertinent to note that the applicants; were not candid with court as regards the circumstances the default judgement was issued. As a result one notes that in the certificate of urgency the legal practitioner who deposed to it opined that the applicants had not been served with the

summons when this was not so. If this was an error it ought to have been corrected as it is the basis for suggesting that the applicants were shocked to be served with notice of attachment on a default judgement they had not been aware of.

I am of the view that this is one of those cases were a litigant simply wants to use all available processes to delay the inevitable.

The applicants knew about the stage the case had reached but opted to default, probably because they could not agree on the way forward with their erstwhile legal practitioner. To their current legal practitioner they seemed not to have disclosed what exactly had been going on in the main matter. They did not even disclose the stage the matter had reached for the default judgement to be entered. Such is conduct of someone not eager to reach finality in litigation.

I thus find that the application would equally fail as not being urgent.

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

Debwe & Partners, applicants' legal practitioners
Zinyengere Rupapa 1st respondent's legal practitioners