CUTHBERT CHIROMO
versus
STEADY MUNYANYI
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 10 & 20 December 2018

Urgent Chamber Application

C. Warara, for the applicant
D. Kanokanga, for the 1st respondent

MANZUNZU J: This is an application filed on urgency in which the applicant seeks a provisional order in the following terms:

"TERMS OF ORDER SOUGHT

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

1. The respondents be and are hereby directed to stay all attempts at executing against the applicant's property pending the hearing of the appeal case no. SC 458/17.
2. The 1st respondent shall pay the costs of this application.

INTERIM RELIEF GRANTED

Pending the determination of this matter, applicant is hereby granted the following relief:-

1. The respondents shall not proceed to execute the writ issued in case no. HC 5114/11 until this court has determined this matter on the return date."

The first respondent opposed the application and in the process raised three points *in limine*. These are:

1. That the application is fatally defective for its failure to comply with Rule 241 in that it is not in form no. 29.
2. That the relief being sought was incompetent in that no appeal was pending before the Supreme Court.
3. That the application was not urgent.

This judgment is a determination of the three preliminary points raised by the first respondent.

BACKGROUND:

The application is premised on fairly straight forward facts. The first respondent obtained judgment in his favour as against the applicant in case no. HC 5114/11. The founding affidavit does not disclose as to when judgment was handed down but the notice of appeal which was filed as an annexure is the one which says that judgment was handed down on 12 March 2014. However, the applicant, dissatisfied with that judgment, filed an appeal with the Supreme Court on 13 July 2017 under case no. SC 458/17.

On 24 September 2018, the Registrar of the Supreme Court wrote a letter to the applicant advising him that his appeal had lapsed and was deemed to have been abandoned due to non-compliance with the rules of that court.

On 22 October 2018 the first respondent issued a writ of execution with the Registrar of the High Court to enforce the judgment in his favour.

The applicant, according to the founding affidavit, was served with the writ of execution on 3 December 2018 and his attached property was to be removed on 6 December 2018. This was said with no supporting documents from the Sheriff. It is on the basis of this writ being served on him on 3 December 2018 that the applicant brought this application on 6 December 2018.

I now turn to the three preliminary points raised by the first respondent.

1. The use of form no. 29

Mr *Kanokanga* who appeared on behalf of the first respondent argued that there was no application before the court because Rule 241 was not complied with particularly the proviso to that Rule.

Rule 241 reads,

> "241 (1) 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, when a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications."

It was further argued that the form used by the applicant was neither form 29B nor 29. This position could not be disputed because the form used speaks for itself (it's a *res ipsa loquitur* situation). Counsel for the first respondent urged the court to remove the matter from the roll with costs. He relied among other cases on the case of *George Katsimberis & Others* v *Kenneth Raydon Sharpe & Others* HH 649-18.

Mr *Warara* who appeared for the applicant conceded that the form used neither took the template of form 29B nor 29. He tried to distinguish the judgment in the case of *Katsimberis* (supra) which first respondent relied on, in that it dealt with the application for rescission of judgment. The only explanation which Mr *Warara* gave for non-compliance was that it was a typographical error. He referred to Rule 4C through which he smuggled an application for condonation. Rule 4C deals with the discretion given to a judge to direct, authorise or condone any departure from the provisions of the rules but only when the court is satisfied that the departure is in the interests of justice.

Mr *Warara* has not shown that the departure is required in the interests of justice. Furthermore, an application for condonation must have pioneered at the hearing. To wait for the other party to address the court and only move for condonation during a response does not show alertness by the applicant to comply with the rules. None compliance with r 241 is fatal to the application. I associate myself with the remarks of MAFUSIRE J in the case of *Marick Trading Pvt Ltd* v *Old Mutual Life Assurance Co. of Zimbabwe Pvt Ltd & Ano* HH 667-15. The case is on all fours on this point with the present case. In dealing with the situation the learned Judge had this to say;

> "The point *in limine* by the respondent was that there was nothing before me to determine because the applicant's application was neither in Form No. 29 nor Form 29B as required by r 241 (1) of the Rules of this Court….
> *In Casu*, the applicant's urgent application was one to be served. Indeed it was served. So it had to be in Form No. 29. But it was not …..
> But all that is required of litigants is simply to copy and paste either Form 29B or Form 29, the latter with appropriate modification if the application is a chamber application that needs to be served on interested parties.
> Form 29 is for use in ordinary court applications, or those chamber applications that require to be served. One of its most important features is that it sets out a plethora of procedural rights. It alerts the respondent to those rights. For example, in notifying the respondent of the court application,

> the form also notifies the respondent of his right to oppose the application and warns him of the consequences of failure to file opposing papers timeously…..
> The courts, both in this jurisdiction and elsewhere, have repeatedly drawn attention to the need to follow the rules on this. It is not a "**sterile**" argument about forms"

The Honourable Judge relied on a number of authorities one of which was the case of *Simross Vintners (Pty) Ltd* v *Vermeulen*. *VRG Africa (Pty) Ltd* v *Walters t/a Trend Litho*. *Consolidated Credit Corporation (Pty) Ltd* v *Van Der Westhuizen* 1978 (1) SA 779 (T) at pp 783 H – 784A where COETZEE J said:

> "……..[T]he more fundamental difficulty arises that the document which purports to be a notice of motion is, as I have indicated , a nullity and I have grave doubt whether the court has power under this Rule to repair a nullity, a concept in law which carries within itself all the elements of irreparability. …in addition it must be emphasized that Form 2 (a) contains a description of procedural rights of the respondent after service of the notice of motion. These rights are considerable and substantial. How could a court, even if it were not a nullity, put a blue pencil through all these rights in the absence of the person in whom they reside and without notice to him that such an order which abrogates his rights might be made. This application is struck off the roll"

I can do no better than uphold this point *in limine.*

2. Relief being Sought

The relief being sought in brief is to suspend the execution pending the determination of the appeal. But can that factually be correct. The truth of the matter is that there is no appeal laying with the Supreme Court. Mr *Warara* for the applicant admitted that position. He also further admitted that this court was not the forum to argue whether the decision taken by the Registrar of the Supreme Court was the correct one or not. Applicant knew the appeal was dismissed as he stated in his letter to the Registrar of the Supreme Court. The fact that there is no appeal before the Supreme Court makes the relief sought incompetent. The point *in limine* is upheld.

Urgency

The popular case of *Kuvarega* v *Registrar General & Ano* 1998 (1) ZLR 188 CHATIKOBO J as he then was, had occasion to define urgency as contemplated by the Rules. He stated at p 193,

> "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 absention from action until the deadline draws near is not the type of urgency contemplated by the Rules"

The applicant admits a letter by the Registrar of the Supreme Court dated 24 September 2018 was sent to his chosen address of service. He further confirms someone received the letter on his behalf. What he keeps silent on is when the letter was received and by whom and when he saw the letter himself. He however says he received the letter when he was served with the writ. He chose not to give full details surrounding the receipt of this letter. No affidavit was recorded from the person he claims received the letter.

The question then is, when did the need to act arise. The applicant says on 3 December 2018 when he received the writ. The first respondent says in September 2018 when a letter was received at his address. There is no doubt that the need to act was prompted by the letter of 24 September 2018. The writ of execution was certainly a day of reckoning. The applicant should have acted as soon as the letter dismissing his appeal was received. He did not. There is no explanation why he did not and chose to act after service of the writ. The certificate of urgency failed to disclose any urgency, neither did the founding affidavit. There is no urgency in this matter.

Consequently,

IT IS ORDERED THAT:

1. The application is struck off the roll of urgent chamber applications.
2. Applicant to pay the costs

Warara & Associates, Applicant's Legal Practitioners
Kanokanga and Partners, 1st Respondent's Legal Practitioners