RIOZIM LIMITED
versus
AFRICAN EXPORT-IMPORT BANK

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 13 January 2014, 29 January 2014

Opposed Application

F, *Girach* for applicant
T. Mpofu, for respondent

CHIGUMBA J: Applicant filed a chamber application for leave to appeal, on 7 November 2013. On 23 October 2013, I had granted an order for provisional sentence in favor of African Export-Import Bank, under case number HC8117/13, in the sum of USD8 000 000, 00 (eight million United states Dollars), together with interest at the prescribed rate of 5% per annum calculated from 29 December 2012 being due date of the Promissory Note to the date of payment in full, and costs of suit.

Respondent filed written submissions, on 13 November 2013, in terms of Order 34 rule 264 of the rules of this court, and took the position that the chamber application was fatally defective for lack of compliance with the rules of this court. Respondent also took issue with the supporting affidavit filed by the applicant, again on the basis that the affidavit was filed in flagrant disregard of the rules of this court. I then directed that the parties file heads of argument and set down the matter on the opposed roll, in order to do justice to the submissions of the parties. At the hearing of the matter, I directed that the applicant move its application first, and then the respondent could raise its objections to the form and substance of the founding affidavit, and the propriety or lack of it, of filing a supporting affidavit.

The application for leave to appeal is premised on the averment that the applicant raised sufficient grounds to establish that the respondent's claim for provisional sentence under HC8117/13 is not valid. It is premised on the further averment that applicant has a bona fide and valid defense to the claim. In its founding affidavit, applicant averred that, in granting provisional sentence in favor of the respondent, the court erred when it found that the facts set out in applicant's opposing affidavit failed to establish a prima facie and valid defense to the applicant's claim. Applicant submitted that it has good prospects of success on appeal, in that, The Promissory Note in question was not payable on demand, it was not presented for payment on its due date which was the 29th of December 2010, being presented for payment on 8 August 2013, thereby, in accordance with the England Bills of exchange Act 1882, discharging applicant from its obligation to pay. Applicant submitted further, that the amount currently outstanding was now substantially less than the sum claimed by the respondent, and that the court did not have jurisdiction to entertain the claim because the parties agreed that any dispute would be governed by the laws of England, which would have exclusive jurisdiction.

Bhekinkosi Nkomo, applicant's acting Finance Director, deposed to the founding affidavit, and reiterated that a Promissory Note, issued without being payable on demand, but with a stipulated date for presentment, 29 January 2010, could not found a claim at law if presented at a later date, 8 August 2013. On 14 November 2013, seven days after the application for leave to appeal was filed and served on the respondents on 11 November 2013, applicant filed a "supporting" affidavit by Succeed Takundwa, a Legal Practitioner who had represented the applicant in the provisional sentence claim. Mr. Takundwa deposed to the fact that, on 23 October 2013, when provisional sentence was granted in favor of the respondent, he failed to immediately apply for leave to appeal against the granting of provisional sentence after judgment had been handed down ex tempore in motion court, because he was unsure as to what the proper procedure was. He stated that he believed that an order granting provisional sentence was final in nature, and appealable without leave. Lastly, Mr. Takundwa deposed to the fact that he had not taken his client's instructions or obtained counsel's opinion on how to proceed at that stage. He

begged the leave of the court that this "supporting" affidavit be included as part of the original application for leave to appeal.

Respondent, in its opposition to the application for leave to appeal, filed of record on 13 November 2013, filed written submissions in terms of Order 34 r264 of the rules of this court. The following points were taken *in limine,* that the chamber application was fatally defective for lack of compliance with the provisions of O34 rule 262 of the rules of this court which require two essentials to be set out in such an application:

(a) The special circumstances that necessitated the filing of the chamber application for leave to appeal

(b) The reason why the application for leave to appeal was not made orally immediately after provisional sentence was granted on 23 October 2013.

The second preliminary point taken by the respondent is that appealing against provisional sentence is procedurally incorrect, because the rules of this court provide that the remedy against an order for provisional sentence is to enter appearance to defend and have the matter proceed to be determined at trial in terms of rule 33 of the rules of this court. Respondent averred that provisional sentence is generally not appealable because it is not a final judgment definitive of the rights of the parties, and it does not have the effect of disposing of a substantial portion of the relief claimed in the main proceedings. However respondent conceded that there is a school of thought that suggests that provisional sentence is appealable in exceptional circumstances.

Regarding the merits of the matter, respondent averred that the court did not err in granting provisional sentence against applicant. This is so because the Promissory Note is clearly an authentic liquid document, and according to rule 21 of the High court Rules, a defendant who has been served with a claim for provisional sentence is only permitted in its defense, at this stage, to deny the signature to the liquid document or the validity of the claim, which applicant did not do in this instance, opting instead to raise other defences:

(a) That the High Court of Zimbabwe lacked the requisite jurisdiction to deal with this matter

(b) That there had been improper service of summons.

(c) That the defendant's liability had been reduced.

(d) That the Promissory Note had been replaced by a subsequent facility.

Respondent reiterated that none of these defences raised by the applicant in the main matter qualified for purposes of rule 21, because they did not constitute a denial of the applicant's signature to the Promissory Note, nor a bona fide defense against the validity of the respondent's claim. Respondent submitted that, instead, applicant further acknowledged its indebtedness to respondent on 21 October 20013, in a letter in which it proposed that the parties reschedule the debt, and submitted a payment proposal to respondent, after provisional sentence had been granted. Respondent averred that the defences raised by the applicant against provisional sentence went beyond the scope of the valid defences that may be raised by a defendant faced with a claim for provisional sentence.

Respondent averred that a proper reading of the Promissory Note will show that its terms are clear and that the applicant agreed that it would submit to any jurisdiction selected by the respondent in the event of a dispute. Respondent averred further that, having chosen the jurisdiction of the Zimbabwean courts, after presenting the Promissory Note to Banc ABC, that line of defense was unsustainable. Respondent disputed the validity of the argument that the parties agreed that any legal proceedings were to be served on the applicant at the chosen address in England, submitting instead that the English address was for purposes of service of process, only in the event that respondent had elected to institute proceedings in England. Respondent averred that a reduction in applicant's liability in terms of the Promissory Note could not constitute a valid defense against provisional sentence or form the substance of appeal against the granting of provisional sentence. Respondent submitted that it is trite that a provisional sentence judgment is founded entirely upon the presumption of indebtedness created by the liquid document, and that the question of the actual quantum was one for trial.

Respondent averred further, that the existence of a subsequent facility between the parties did not change the basis of the claim, being the Promissory Note. Respondent averred that applicant

has absolutely no prospects of success on the intended appeal, because the defences raised are more suited to the resolution of the matter at trial, not to defeat the granting of provisional sentence. Respondent reiterated that applicant merely seeks to buy time and postpone the inevitable, and has no genuine or bona fide expectation of overturning the judgment.

At the hearing of the matter, counsel for the applicant, Mr. Girach commenced the proceedings by making an oral application for leave to allow the supplementary affidavit of Mr. Succeed Takundwa to be admitted into evidence and to be incorporated as part of the original application for leave to appeal filed of record on 7 November 2013. The supplementary affidavit was filed of record on 14 November 2013, after respondent had filed its opposing papers on 13 November 2013. The court was asked to utilize its discretion in terms of rule 4C and admit the affidavit in order to supplement the requirements of rule 262 of the rules of this court which sets out the requirements in an application for leave to appeal. The court was enjoined to avert the 'tragedy' of resolving this matter on a technicality.

Counsel for the respondent, Mr. Mpofu's submissions in response to the oral application for leave to incorporate the supplementary affidavit of Mr. Succeed Takundwa to form part of the original application for leave to appeal, were that :

(i) applicant, in applying for the admission of its supplementary affidavit, ought to have had regard to the provisions of rule 235 of the High Court Rules, which stipulates that such an application be made in writing, and that leave to file the supplementary affidavit must first be applied for and obtained, as opposed to filing the supplementary affidavit, then asking the court to endorse such an unprocedural course of action, retrospectively.

(ii) a whole host of requirements stipulated for the filing of a supplementary affidavit where the door has been closed were not complied with by the applicant. The first such requirement that the application be made in writing not orally from the bar, even if the court is enjoined to use Rule 4C, such application must be made in writing, on

affidavit, by the party to the proceedings seeking the court's indulgence, not by counsel, orally from the bar.

(iii) an affidavit seeking the court's indulgence ought to have been filed on behalf of the applicant. The court was asked to verify the sufficiency of the applicant's founding affidavit, and if it is deficient, by reason of failing to meet the requirements of the rules of this court, to dismiss the application for leave to appeal on that basis, without allowing the supplementary affidavit to cure the deficiencies in the founding affidavit.

Order 32, Rule 235 of the High Court Rules 1971 provides as follows:

> "***235. Further affidavits***
> After an answering affidavit has been filed, no further affidavits may be filed without the leave of the court or a judge."

In reply, Applicant submitted that this rule was not applicable in this case because no answering affidavit had been filed. In my view, rule 235 may not be applicable to this case, but not for the reason advanced by the applicant. The application under consideration is not governed by the provisions of Order 32 of the rules of this court, buy by the provisions of Order 34, which makes no mention of opposing affidavits, answering affidavits, or supplementary affidavits.

The question that the court must answer is whether, there has been non-compliance with the provisions of Order 34, and if so whether such non compliance can be cured by the use of the court's discretion and utilization of the provisions of rule 4C. In other words, did the application for leave to appeal comply with Oder 34 rule 263, and if not, whether it is in the interests of justice that applicant be allowed, on oral application at the hearing of the matter, to apply to admit the affidavit of Mr. Succeed Takundwa, in a bid to cure the defects.

Rule 262 of the High Court Rules 1971 provides as follows;

> "**ORDER 34**
> **APPLICATIONS FOR LEAVE TO APPEAL TO THE SUPREME COURT**
> ***262. Criminal trial: oral application after sentence passed***

> Subject to the provisions of rule 263, in a criminal trial in which leave to appeal is necessary, application for leave to appeal shall be made orally immediately after sentence has been passed. The applicant's grounds for the application shall be stated and recorded as part of the record. The judge who presided at the trial shall grant or refuse the application as he thinks fit.
> ***263. Criminal trial: application in writing filed with registrar***
> Where application has not been made in terms of rule 262, an application in writing may in special circumstances be filed with the registrar within twelve days of the date of the sentence. The application shall state the reason why application was not made in terms of rule 262, the proposed grounds of appeal and the grounds upon which it is contended that leave to appeal should be granted.
> ***264…***
> ***265….***
> ***266. Application for condonation of failure to apply timeously***
> Where an application has not been made within the said period of twelve days, an application for condonation may be filed with the registrar and served forthwith on the Attorney-General, together with an application for leave to appeal. The Attorney-General may, within three days of the date of the said service, file with the registrar submissions on both applications. The provisions of rule 265 shall apply to both such applications and submissions, if any.
> ***267….”***

Applicant did not dispute that the application for leave to appeal was defective. Order 34 r 262 provides that an application for leave to appeal be made orally at the hearing immediately after sentence has been passed. It is common cause that this did not happen on 23 October 2013 when provisional sentence was passed. By implication, applicants written application for leave to appeal was brought in terms of Order 34 r263, whose requirements include: that it be made within twelve days of the date when sentence was passed, that it be filed with the registrar in special circumstances, that it state the reasons why no oral application was made in terms of rule 262, and that it state the proposed grounds of appeal, and the reasons why leave to appeal ought to be granted. The application for leave to appeal, in its founding affidavit, did not state the reasons why no oral application was made on 23 October 2013. That is the defect that is sought to be cured by the application to admit the supplementary affidavit of Mr. Succeed Takundwa in which he pleads unfortunate lack of knowledge of the requirements of Order 34 on the day provisional sentence was pronounced. Applicant however, is hampered by a further defect which I will allude to later.

In *Silver's Trucks (Pvt) Ltd & Anor* v *Director of Customs & Excise 1999(1) ZLR HH98-99,* in answer to the question of whether an additional affidavit could be introduced by the respondent after applicant had already filed an answering affidavit, it was held that:

> "…it only in exceptional circumstances that the court will allow the filing of an additional affidavit. There must be an application for leave to file such affidavit. The party applying for leave must provide a satisfactory explanation for the failure to put the information or facts before a court at an earlier stage and for the late filing of the affidavit. The explanation must be one that negatives bad faith or culpable failure to act timeously. The court must also be satisfied that no prejudice will be caused to the opposing party which cannot be remedied by an appropriate order as to costs".

Order 34 r265 provides that after an application for leave to appeal is made in writing, and written submissions are filed in response, the matter may be set down before a judge for determination. Written submissions are not placed before the court by way of affidavit. There is no requirement for answering affidavits to be filed. Clearly, there is a distinction between the Order 32 and the order 34 procedure. However, in light of the fact that Order 34 stipulates that the matter be set down for determination after written submissions, the filing of an additional affidavit by the applicant, not being expressly provided for, may only be done after leave to do so has been applied for and obtained. See *Silver's Trucks supra*. Further, a court seized with such an application must be guided by the considerations set out such as the reason why such information was omitted from the original affidavit. The court must consider any indications of possible prejudice to the other party.

It is my view that the interests of justice would not be served by allowing the affidavit of Mr. Succeed Takundwa to form part of the application for leave to appeal. No written application for leave to file such an affidavit was filed prior to the filing of the affidavit. Applicant pre-empted the exercise of the court's discretion by filing the affidavit first, and applying for leave to file it after the fact, and orally from the bar. Clearly there is no provision for proceeding in such a cavalier manner in the rules of this court.

In any event, even if the affidavit of Mr. Takundwa is admitted, the application for leave to appeal would still remain defective for not addressing the requirement that it be made only in special circumstances. The aspect of special circumstances is not canvassed in the founding affidavit, nor is it alluded to in the supplementary affidavit that is proposed to be admitted. It is my view that Applicant has exhibited an unfortunate lack of apprehension of, not only the provisional sentence procedure and its attendant remedies, but also the leave to appeal procedure. Rule 4Cof the rules of this court provides as follows:

> Rule 4C of the High Court Rules 1971 provides as follows:
>
> ***4C. Departures from rules and directions as to procedure***
> The court or a judge may, in relation to any particular case before it or him, as the case may be—
> (*a*) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;"

It is a remedy provided by the rules of this court for those situations where a strict adherence to the rules would result in a miscarriage of justice. A tree that does not bend, breaks. This rule is designed to give the court flexibility, in appropriate circumstances, in doing justice between man and man. It is my considered view that, invoking rule 4C is a drastic measure which should be used sparingly and reserved for the most deserving of cases where a rigid adherence to the rules of this court would result in a miscarriage of justice. The court is literally being prevailed upon to act as a fairy godmother and wave its magic wand to make the bad stuff go away so that justice can be done between the parties when it is asked to utilize its discretion in terms of Rule 4C.

In the case under consideration the papers filed of record are a testimony to a slippery slope of disregard of not one but many of the rules of this court and it would be inappropriate for the court to exercise its discretion in favor of an applicant who has proved to be dilatory in many aspects of its conduct of this matter. Further, in my view, Rule 4C should only properly be resorted to in the absence of other suitable remedies in the rules of this court, where a party is in danger of being non-suited.

Clearly, in this case Order 34 itself provides the applicant with other suitable alternative remedies. Applicant could have withdrawn the application when respondent schooled it on the requirements of rule 263 in its written submissions. If the time within which to file the application ran out, applicant could have filed for condonation of late filing of the application for leave to appeal in terms of Order 34 r266, and 267. There is no justification for deliberately proceeding with a defective application on the basis of an unfounded hope that a judge can be persuaded to utilise rule 4C to cure any defects, especially defects that were glaringly obvious, and which were brought to the applicants attention before the matter was allocated dates for hearing. An application stands or falls on the basis of its founding affidavit. See *Mangwiza v Ziumbe & Anor 2002(2) ZLR489(S)* where the court stated that:

> "…in application proceedings the cause of action must be set out fully in the founding affidavit and new matters should not be raised in an answering affidavit".

I find that, neither the founding affidavit nor the proposed supplementary affidavit combined and in tandem, suffice to cure the application for leave to appeal of its defects. In any event, Applicant has other remedies at its disposal other than the proposed appeal against provisional sentence. These include asking for security *de restituendo*, and applying for stay of execution pending trial. See The Civil Practice of the Superior Courts of South Africa, *Herbstein & Van Winsen, 3rd ed, p 589.* Applicant will not be non-suited by the refusal to grant leave to appeal. It is at liberty to utilize other remedies provided by the rules of this court. There is thus no justification for invoking the provisions of rule 4C in its favor. Having found that there is no proper application for leave to appeal before the court in terms of Order 34, the matter must end there. It follows that the application for leave to appeal is dismissed with costs.

Wintertons, applicant's legal practitioners
Dube, Manikai & Hwacha, respondent's legal practitioners