ROY HARVEY
versus
EYELUTH PROPERTIES

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 5 and 18 March 2015

Chamber Application

IN CHAMBERS

MATANDA-MOYO J: This is an application for leave to submit further closing submissions in terms of r 226 (2) (c) of the High Court Rules. I dealt with this trial on the continuous roll beginning 12 January 2015 in particular on 23 and 26 January instant. After close of the defence case I directed parties to file closing submissions which they did. The applicant now seeks leave to file yet further submissions.

Rule 439 of the High Court Rules provides:

> "After the evidence on both side has been given, the plaintiff's legal practitioner shall have the right to observe severally on the whole case. Thereafter legal practitioners for the defendant shall have a similar right, and finally legal practitioner for the plaintiff shall be entitled to reply to any matters raised by legal practitioner for the defendant. If in such reply plaintiff's legal practitioner cites new cases, the court may allow one legal practitioner for the opposite side to observe on those cases.

Pursuant to the above the applicant sought leave to file further submissions. Under para 6 of his founding affidavit the applicant submitted that the respondent in his submission raised issues of law, which issues were not canvassed in its previous submissions. He does not state which new issues of law were raised by the respondent.

Under para 8 of his founding affidavit the applicant submitted that the further submissions;

"(a) do not prejudice or create unfairness to the respondent.

(b) they relate to an issue of law in the main;

(c) the issues canvassed were addressed in evidence"

The applicant has added new grounds upon which he urged me to accept the further submissions. It is trite that I only accept the further submissions if they are a response to new cases raised in respondent's reply to the applicant's submissions.

The applicant submitted that the respondent in it's reply dealt with the issue whether the cause of action is one based in the Aquilian action or one based on contract. Such issue had not been raised in respondent's closing submissions but was dealt with in its replying submissions. Whilst I do appreciate that point, my worry is that the applicant did not restrict himself to that aspect in the further submissions, but proceeded to deal with other matters he felt he had not tackled properly in his submissions.

That situation should never be allowed as to do so would go against the principle of finality to litigation. It is essential that proceedings be brought to finality to enable the court to make a determination without allowing parties to continue approaching the court once they believe they have found a fresh killer to the other party's case. I agree with the sentiments raised by Makarau J (as she then was) in the matter of *Southend Cargo Airlines (Pvt) Ltd and Ors* v *ZDB* HH 123/04 that:

> "…the principle that there be finality of litigation must take precedence. The applicants have not made out a case why they should be allowed to fight the same battle twice. Simply because they may have come across a new weapon they did not use in the lost battle is not sufficient a ground upon to gain the indulgence they seek. In my view for the applicants to be allowed to re-engage in the lost battle, they must show that their surrender on the battle field was no surrender at all and not merely that it was uniformed surrender. The courts will be inundated with reopened cases were litigants to rethink their defence to cases where they would have consented to judgments".

I shall not allow the filing of further submissions where I feel the applicant intends to have a second bite of the cherry. I shall only allow those legal submissions raised for the first time in respondent's replying submissions. Otherwise there would be no stopping to filing of papers after the close of the case. The courts must protect themselves from abuse by non-diligent lawyers who may believe they could always file submissions well after close of cases.

I have perused the additional submissions that the applicant seeks leave to file and I am satisfied that the applicant is dealing with issues which were all along within his domain. There was no reason proferred by the applicant on why such submissions were omitted from his main submissions. Such matters as he intends to raise had been raised in evidence. He had decided may be that the matters were irrelevant or he simply did not address his mind to

those matters. Those are not the situations envisaged by rule 439 of the High Court Rules in considering whether to allow filing of further submissions.

In the result I shall only allow the response on whether course of action is contractual or delictual.

Granger & Harvey, applicant's legal practitioners
Atherstone & Cook, respondent's legal practitioners