

DAVID MUSUNGO
versus
CLEOPHAS TARUWANZA

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 15 July 2015 & 25 September 2015

Opposed Application

T. G. Mboko, for the applicant
M. Mtlongwa, for the first respondent

MAFUSIRE J: This was supposed to be an application for rescission of judgment. It was opposed. After argument on a point *in limine* I struck off the matter from the roll. The point *in limine* was that the application was fatally defective for want of compliance with the rules of this court, more particularly Form No. 29. This was true.

Headed “**COURT APPLICATION FOR RESCISSION OF JUDGMENT**” the purported court application read as follows:

“TAKE NOTICE THAT an Application for Rescission of Judgement will be made on the _____ day of _____ 2012 at _____ am/pm.

FURTHER TAKE NOTICE THAT document/s attached hereto will be used to support this Application.”

It is surprising that such a matter found its way to the court roll. The applicant was not a self-actor. He was represented right from the onset. Such crass inattention is inexcusable. What is more, the respondent, then himself the self-actor, had raised the point in his notice of opposition. But it was ignored right up to the time of the hearing. At the hearing, Mr *Mtlongwa*, who had just assumed agency for the respondent, persisted with the objection. Mr *Mboko*, for the applicant, conceded the gross defect. However, he sought condonation under r 4C. That rule reads:

“4C. Departure 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;
- (b) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient.”

Mr *Mboko* argued that in the interests of justice, a litigant should not be non-suited simply by reason of a technicality. Courts should endeavour to dispense real justice by determining matters on the merits.

It was all very well for Mr *Mboko* to argue like that, perhaps because he was only looking at the interests of his client. Undoubtedly, he was not concerned with balancing the competing interests as the courts are wont to do. But even as counsel, he was in breach of his sworn duty as an officer of the court. Where did that format of the court application come from? It is alien to the rules of this court. Rule 4C should not be a sanctuary for the reckless. In an ordinary court application the rules command that Form No. 29 shall be used. All one does is to copy it from the rules and paste it onto the application. One then fills in the relevant details such as the case number, the names of the parties and the *dies induciae*. Nothing can be more elementary.

The application *in casu* was against a background of judgments in cases such as *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*¹; *Jensen v Acavalos*²; *Zimbabwe Open University v Mazombwe*³ and *Richard Itayi Jambo v Church of the Province of Central Africa & Ors*⁴, and many others.

The *ratio decidendi* in all these cases is that parties are obliged to comply with the rules. Where there is non-compliance, the applicant must apply for condonation and give reasons why.

¹1978 (1) SA 779 (T)

² 1993 (1) ZLR 216 (S)

³ 2009 (1) ZLR 101 (H)

⁴ HH 329-13

In *Simross Vintners (Pty) Ltd* above, in relation to an equivalent rule, COETZEE J said⁵:

“..... [T]he more fundamental difficulty arises that the document which purports to be a notice of motion is, as I have indicated above, 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 *Jensen*, KORSAH JA, stating the same principle, albeit in respect of a notice appeal, said⁶:

“The reason is that a notice of appeal which does not comply with the rules is fatally defective and invalid. That is to say, it is a nullity. It is not only bad but incurably bad, and, unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice to be filed, the appeal must be struck off the roll with costs ...”

In *Richard Itayi Jambo* GUVAVA J, as she then was, said⁷:

“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).

In this case the applicant’s legal practitioner made no effort to comply with this rule despite the fact that the point was raised in the respondent’s opposing affidavit. The request to the court to condone the non-compliance 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 conduct or attitude of the applicant in *Richard Itayi Jambo* was almost on all fours with that of the applicant herein. I associate myself fully with the remarks of Her Ladyship in that case.

⁵ At pp 783H – 784A

⁶ At p 220A - D

⁷ At p 3 Of the cyclostyled judgment

Condonation is not just for the asking. Good and sufficient reasons must be proffered for the non-compliance. None were given herein. A court application being the founding process to bring a matter to court, the only course open in this matter was to strike it off the roll with costs.

25 September 2015

A handwritten signature in blue ink, appearing to read 'Donsa Nkomo', written over a horizontal line.

Donsa-Nkomo & Mutangi, applicant's legal practitioners
Chambati Mataka & Makonese, respondent's legal practitioners