

LAKE HARVEST AQUACULTURE (PVT) LTD
versus
TICHAONA REVESAI

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 12 April 2017

Chamber Application

T J Mafongoya, for the applicant
Respondent in person

CHITAPI J: The applicant's legal practitioners filed this chamber application headed "Chamber Application for Dismissal of Application in terms of Rule 236 (4) (b) of the High Court Rules, 1971."

The background to this application is that the respondent who is a self-actor filed "a chamber application for condonation for late filing of opposing affidavits" on 22 January, 2016 under case No. HC 606/16. The applicant herein as respondent filed a notice of opposition and an opposing affidavit to the said application on 08 February, 2016. There has been no further action taken on the application which remains filed in the Civil Registry.

In the draft order in this application, the applicant prays for the following order:

IT IS ORDERED THAT:

1. The application is hereby granted
2. The "Court Application" (sic) filed by the respondent under case Number HC 606/2016 be and is hereby dismissed for want of prosecution.
3. The respondent shall pay costs of suit on a higher scale.

I queried the propriety of the application and directed the applicant's legal practitioners to address me on whether r 236 (4) (b) on which the application is based is applicable to an ordinary chamber application which is not filed as a court application. I specifically referred

applicant's legal practitioner to r 245 of the High Court Rules and asked that I be addressed on its purport.

The applicant's counsel prepared heads of arguments in an attempt to convince me to grant the application. I have gone through the heads of argument and no doubt counsel took time to prepare them. Counsel's efforts are acknowledged.

Counsel submitted that the respondent had failed to prosecute his matter in terms of the rules of court. Counsel argued that a litigant who leaves his affairs to chance and is not diligent had only himself to blame because the law will assist the diligent and not the sluggard. Reference was made to the Supreme Court judgment in *Ndebele v Ncube* 1992 (1) ZLR 288 (S) where it is stated:

“it is a policy of the law that there should be finality to litigation ... the time has come to remind the legal profession of the old adage *vintilantibus non dormlentibus jura subveniurit*, roughly translated; the law will help the vigilant and not the sluggard.”

Counsel argued that because the applicant had filed an opposing affidavit to the chamber application, this meant that the application now awaited the normal set down on the opposed roll as obtained with ordinary court applications.

Counsel referred me to the judgment of my brother MATHONSI J in the case of *Permanent Secretary; Ministry of Higher and Tertiary Education v College lecturers Association & Ors* HH 688/15. The judgment is reported in 2015 (2) ZLR 290.

The learned judge in his insightful judgment reasoned that Part D of Order 32 dealing with chamber applications in application procedure should be construed as intended to apply to chamber applications which are either unopposed or urgent and do not have to be set down for argument

On p 292 G – 293 G the learned judge stated thus:

“Part D of Order 32 dealing with chamber applications appears to confine itself to the disposal of those chamber applications which are either unopposed or urgent and do not have to be set down for argument. Rule 241 (1) provides:

“A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29 B duly completed and except as is provided for 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.”

It is significant that a chamber application that has to be served on an interested party has to be in Form No. 29 which is the Form in which a court application is made as provided for in r 230. Rule 230 also provides that if a court application does not have to be served on any person “it shall be in Form No 29B with appropriate modifications.” (compare with r 241 (1)).

I have said that Part D is concerned with chamber applications which do not have to be set down for argument and which, if not urgent, the registrar should “in the normal course of events” (r245) refer to a judge for consideration in chambers. In my view a chamber application that is opposed is treated like a court application and must be allocated to a judge for set down on the opposed roll. I agree with Mr *Mucheche* for the applicant that a rule of practice has evolved in terms of which such matters are dealt with that way.

There is no way in which an opposed chamber application can be disposed of without the parties filing heads of argument and seeking a set down of the matter on the opposed roll. That would infringe the *audi alteram partem* rule. I do not agree with Ms *Mahlangu* for the respondent that the filing of heads of argument and requesting a set down is discretionary. If it was discretionary there would have been another method of prosecuting opposed chamber applications without resort to that. There is none. The use of the word “may” in r 243 does not help the respondents at all because that rule clearly has no application whatsoever to the present matter. It merely allows a party who has filed a chamber application to attach to it heads of argument justifying why the application has been made without notice and in support of the order sought to be granted without notice to the other party.

There is no doubt in my mind that the respondents were required to prosecute their application in terms of the rules relating to court applications because it is, for all intents and purposes, a court application hence the provision that it has to be in Form No 29. In arriving at that conclusion I am mindful of the fact that rules are merely the court tools fashioned for its own use and they are flexible and adaptable to meet the particular needs of the court at any one time: *Nxasana v Minister of Justice & Anor* 1976 (3) SA 74; *Scottish Rhodesian Ltd v Honiball* 1973 (2) SA 247 (R).

It is unthinkable that the drafters of the rules may have intended that an opposed application brought as a chamber application would be allowed to remain pending *ad infinitum* without any recourse to the remedy provided for in r 236 (4) (b) or that an applicant in that matter has a discretion not to file heads of argument when represented by a legal practitioner or not to bother setting down the matter. Those rules must be construed in such a way that they remain useful tools to the court in the resolution or disposition of matters before the court and I am empowered by r 4C (b) to construe them that way.

I therefore come to the inescapable conclusion that the remedy provided for in r 236 (4) (b) is available to the applicant even though the application was commenced as a chamber application. It is a court application which is opposed and which the respondents have failed to prosecute as required by the rules thereby entitling the applicant to the remedy of dismissal for want of prosecution.”

I have exercised my mind on the judgment of my learned brother. The question that has kept ringing in my mind is whether it can be laid down as a correct interpretation of the rules that the filing of opposing papers by a respondent who has been served with a matter which has been

filed as a chamber application in terms of the rules, converts such an application “to all intents and purposes” to a court application. I have also asked myself whether there is a lacuna in the rules. Further if as stated by my learned brother that a rule of practice has echoed in terms of which such matters are treated as opposed court applications, what form has such rule of practice taken because for it to be authoritative it must be issued as a practice direction which is in fact a supplementary protocol to existing court rules normally issued by authority of the Chief Justice to plug procedural lacunas or gaps.

I do not for once take issue with the logic expressed by my learned brother in coming to the conclusion that it was equitable to dismiss the opposed chamber application for want of prosecution in so far as he sought to find a legal basis for what he did by reference to r 4 C (b). I am however mindful that r 4 C (b) allows the court or judge in any case before him to “give such directions as to procedure in respect of any matter not expressly provided for in these rules as appears to it or him, as the case may be, to be just and expedient.” To the extent that the learned judge may have and did indicate that he acted in terms of the said rule, I must hold that he did so only in respect of the particular case before him. I respectfully hold a different view if it is argued that the learned judge proposed to lay a rule that a chamber application mutates into court application once a respondent has opposed it.

Order 1 of the court rules clearly makes a distinction between a chamber application and a court application. A chamber application is defined as -: “chamber application” means an application to a judge in terms of para (b) of sub rule (1) of r 226. A court application is defined as -: “court application means an application to the court in terms of para (a) of subrule 1 of r 226.”

Rule 226 (1) and (2) provides as follows:

“(1) Subject to this rule, all applications made for whatever purpose in terms of these rules or any other law, other than applications made orally during the course of a hearing shall be made-

(a) as a court application, that is to say, in writing to the court on notice to all interested parties;
or

(b) as a chamber application, that is to say, in writing to a judge.

(2) An application shall not be made as a chamber application unless-

(a) the matter is urgent and cannot wait to be resolved through a court application; or

(b) these rules or any other enactment so provide; or

(c) the relief sought is procedural or for a provisional order where no interim relief is sought only; or

(d) the relief sought is for a default judgment or a final order where-

- (i) the defendant or respondent, as the case may be, has previously had due notice that the order will be sought, and is in default; or
- (ii) there is no other interested party to the application; or
- (iii) every interested party is a party to the application; or
- (e) there are special circumstances which are set out in the application justifying the application.”

Rule 226 (2) (b) specifically allows that it is competent for a party to bring a matter by way of chamber application where “these rules or any other enactment so provide;.....”. I observe in passing that the chamber application whose dismissal for want of prosecution is sought herein is for condonation for late filing of opposing affidavits. In essence the application was one for upliftment of bar in terms of r 84 as read with r 233 (3) the latter rule which provides that “a respondent who has failed to file a notice of opposition and opposing affidavit in terms of sub rule (1) shall be barred.

Rule 84 provides as follows:

“84. Removal of bar

(1) A party who has been barred may –

(a) make a chamber application to remove the bar; or

(b) make an oral application at the hearing, if any, of the action or suit concerned;

and the judge or court may allow the application on such terms as to costs and otherwise as he or it, as the case may be thinks fit.

2.....”

I therefore observe that the respondent herein as the applicant in the application whose dismissal is sought filed a chamber application as provided for in terms of the rules. Rule 226 (b) permitted the making of the chamber application. In fact, r 84 gives the applicant who is barred two options, to either file a chamber application to a judge to remove the bar or to apply orally at the hearing of the matter. It should also be borne in mind that r 84 was amended by SI 33/96 to provide that an application for upliftment of bar be made to a judge by way of chamber application. Before the amendment, the application was supposed to be made as a court application. I keep in mind the question; once opposed, does such chamber application convert into a court application which procedure was discarded and substituted with the provision that such application be dealt with as a chamber application.

The process of filing, management and disposal of a chamber application is provided for in terms of rules 241 – 247. For the purposes of my judgment however, I will confine myself to rules 241, 242, 243, 245 and 246. The said rules provide as follows:

“241. Form of chamber applications

- (1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29 B 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.

- (2) where a chamber application is for default judgment in terms of rule 57 or for other relief where the facts are evident from the record, it shall not be necessary to annex a supporting affidavit.

242. Service of chamber applications

- (1) A chamber application shall be served on all interested parties unless the defendant or respondent, as the case may be, has previously had due notice of the order sought and is in default or unless the applicant reasonably believes one or more of the following-
- (a) that the matter is uncontentious in that no person other than the applicant can reasonably be expected to be affected by the order sought or object to it;
- (b) that the order sought is-
- (i) a request for directions; or
- (ii) to enforce any other provision of these rules in circumstances where no other person is likely to object; or
- (c) that there is a risk of perverse conduct in that any person who would otherwise be entitled to notice of the application is likely to act so as to defeat, wholly or partly, the purpose of the application prior to an order being granted or served;
- (d) that the matter is so urgent and the risk of irreparable damage to the applicant is so great that there is insufficient time to give due notice to those otherwise entitled to it;
- (e) that there is any other reason, acceptable to the judge, why such notice should not be given.
- (2) Where an applicant has not served a chamber application on another party because he reasonably believes one or more of the matters referred to in paragraphs (a) to (e) of subrule (1) –
- (a) he shall set out the grounds for his belief fully in his affidavit; and
- (b) unless the applicant is not legally represented, the application shall be accompanied by a certificate from a legal practitioner setting out, with reasons, his belief that the matter is uncontentious, likely to attract perverse conduct or urgent for one or more of the reasons set out in paragraphs (a), (b), (c), (d) or (e) of subrule (1).

243. Heads of Argument

A chamber application may be accompanied by heads of argument clearly outlining the submissions relied upon and setting out the authorities which justify the application being made without notice and in support of the order sought.

244. Urgent applications

Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (b) of subrule (2) of rule 242 to the effect that the matter is urgent, giving reasons for

its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith.

Provided that, before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent.

245. Non-urgent applications

Where a chamber application is not accompanied by a certificate referred to in Rule 244, the registrar shall in the normal course of events, but without undue delay, submit it to a judge who shall consider the papers without undue delay.

246. Consideration of applications

- (1) A judge to whom papers are submitted in terms of rule 244 or 245 may –
- (a) Require the applicant or the deponent of any affidavit or any other person who may, in his opinion, be able to assist in the resolution of the matter to appear before him in chambers or in court as may to him seem convenient and provide, on oath or otherwise as the judge may consider necessary, such further information as the judge may require;
 - (b) Require either party's legal practitioner to appear before him to present such further argument as the judge may require."

From my reading of the rules which I have cited above, I capture the important points as follows:

- (i) That in terms of r 242 every chamber application save where excepted in terms of r 242 (1) (a-e) should be served on all interested parties. Where the applicant in a chamber application has not served the application on all interested parties, such applicant shall in terms of subrule (2a) of r 242 justify his decision not to serve in the affidavit which in terms of r 241 (1) should support every chamber application. Additionally in terms of subrule (2b) of the said r 242, where the applicant in a chamber application which has not been served on any of the grounds set out in paragraphs (a), (b), (c), (d) or (e) of r 242 (1) *supra* is legally represented such applicants' legal practitioner is required to file a certificate with reasons supporting such legal practitioner's belief of the existence of the matters aforesaid.
- (ii) That the proviso to r 241 (1) that where a chamber application is to be served on interested parties it should be in "form 29 with appropriate modifications" is not to be construed as then seeking to turn to a chamber application into a court

application but to advise the interested parties of the need to file opposing affidavits if they wish to oppose the relief sought in the chamber application.

- (iii) That in terms of rule 245, the process of the disposal of the chamber application is initiated by the Registrar, who should "in the normal course of events, but without undue delay", submit the chamber application to the judge who should consider the papers without undue delay".
- (iv) Rule 246 in my view is the one which determines how the chamber application should be dealt with by the judge to whom it had been referred in terms of r 245. Critically the rule allows for the judge to conduct a hearing in chambers or where it is not convenient for the judge to hear the chamber application in chambers, he can at his option assign a court where he will hear argument or such other information he may enquire on the chamber application. The judge has wide powers to exercise in determining a chamber application whether its an ordinary one referred to the judge under rule 244.
The judge can require any of the deponents to the affidavits before him or any person who in the judge's opinion may be able to assist in resolving the matter to appear in chambers or in court as the case may be at a time convenient to the judge to provide any information on oath or otherwise as the judge may require. Additionally the judge may require "either party's" legal practitioner to appear before the judge and present argument on any point which the judge may require to be addressed upon.

In my reasoning therefore, a chamber application filed under r 241 cannot mutate or convert into a court application. Court applications are dealt with under rr 230-240. The conduct of the hearing of court applications is provided for under rr 239 and 240 whilst the disposal of chamber applications is provided for in r 246.

The way I look at the two processes, that is, court applications contrasted with chamber applications is that the former are party driven whilst the latter are judge driven. Court applications are set down for hearing by the parties in terms of r 236 whilst chamber applications are referred to the judge for disposal in terms of rr 244 and 245 depending on whether the application is urgent or not.

The fact that a chamber application should be served upon every interested party unless excepted is intended to give the interested party an opportunity to oppose the chamber

application or make such representations as such party may be advised to make. The opposition or representation by the interested party does not remove the chamber character of the application. The judge should deal with the chamber application taking into account any opposition filed by the interested party and if the judge decides that he requires to hear the parties, the parties are called to chambers for that purpose or the judge can hear them in court.

Chamber applications are meant to be more expeditiously dealt with as compared to court applications because they are referred to a judge immediately or without undue delay to be dealt with. The problem which I find with the proviso to r 241 (1) is that it does not spell out the nature and extent of the “appropriate modifications” which should be made to form 29 where a chamber application is to be served on interested parties. Rule 230 on court applications also provide that if a court application is not to be served on any person it should be in form 29B. Form 29B does not require that any other party be addressed or served with the proposed chamber application. It therefore does not call upon any interested party who may wish to oppose the application to file opposing papers and serve them on the applicant. An application for default judgment in terms of rr 58 and 60 where the claim is not for a debt or liquidated demand and the defendant has not entered appearance is an example of a court application where a party should use form 29B instead of form 29. There will be instances therefore where the rules or an enactment will provide that a specific application be made as a court application even though it is not served on any interested party as with *Ex Parte* court applications.

In the Permanent Secretary, *Ministry of Higher & Tertiary Education v College Lecturers Association and Ors*, case *supra*, the learned judge indicated that there was some significance in the similarity of the wordings of the provisos to rr 230 and 241 to the extent that they provide for an interchange of forms 29 and 29B depending on whether a court application or chamber application is or is not to be served on interested parties as the case may be. The significance in my view simply lies in that where an interested party is to be served, be it with a chamber application or a court application, such party should be given an opportunity to oppose the relief sought and if the party so decides, to file opposing papers. The existence of the similarly worded provisos does not then mean that when a court application is in form 29B it mutates into a chamber application nor that when a chamber application is in form 29 it mutates into a court application.

I do not propose to design a modified form 29 to suit what is envisaged in the proviso to r 241 (1). I would however imagine that any reference in form 29 to the court should be substituted with a reference to a judge of the High Court. Where I find form 29 wanting is with respect to the time which must be given to an interested party in a chamber application to file any opposing papers. The form is blank on the number of days to be given to an interested party to file, a response. Rule 242 is silent on the issue. The proviso to r 241 (1) which obliges the use of form 29 is also silent on the issue. Neither r 242 nor the proviso to r 241 (1) refers to r 232 which prescribes the times for filing opposing papers. There is clearly a *lacuna* in the rules respecting the time lines for interested parties to file any oppositions or representations. The rules need to be revisited in this respect and the omission rectified. I would however hold that in the absence of a specified period, a reasonable period should be allowed interested parties to respond to the chamber application. A reasonable period should in my view be no less than that the given for responding to a court application. Therefore, applying the provisions of r 232 appears to me to be reasonable. Thus, for purposes of case management, it appears to me that where an ordinary chamber application is to be served on all interested parties, it should allow a reasonable period to the parties served to respond. In the light of the gap in the rules as to the length or extent of such period, I would hold that a period which is not less than that provided for responding to court application should be given in the notice.

The procedure for dismissal for want of prosecution set out in r 236 (4) does not in my view and with due respect to the conclusion by my learned brother MATHONSI J in his judgment in the *Permanent Secretary* case (*supra*) apply to chamber application filed in terms of terms of r 241. I accordingly must hold a contrary view. I have reached the conclusion that the chamber application *in casu* should be dealt with by the judge in terms of the provisions of r 246. The filing of any opposing papers by an interested party served with the chamber application in terms of r 242 does not convert the chamber application to a court application. The rationale of serving chamber applications is to safeguard the *audi alteram partem* doctrine. Simply put, it affords the interested party an opportunity at his election to make representation which the judge should then consider in deciding whether to grant or refuse the chamber application in terms of r 246. To refer a chamber application in which an interested party has filed an opposition to the opposed roll for set down on the court applications opposed roll is a procedure not provided for in the

rules. In fact what this would mean is that the applicant whose chamber application has been opposed must now apply and pay for set down. The disposal of the chamber application is then delayed further because it must now join the queue of set down of opposed applications. The rule makers could not have intended that an opposition to a chamber application converts it not a court application. It becomes an opposed chamber application without a change in character. There is nothing in rules 245 and 246 to authorize the judge to abdicate determination of the chamber application where opposition has been filed by referring the matter to the opposed roll.

A judge must consider and dispose of a chamber application without undue delay as clearly spelt out in r 245 which does not distinguish between a chamber application where opposition has been file and one where no opposition has been filed. Chamber applications are intended to be deal with matter as such within the parameters of r 226 (2). That they are served on interested parties in terms of r 242 and opposed does not change their character or the nature of the matters they are intended to cover. A party who is party to a chamber application which has not been determined or been disposed of by the judge within a reasonable period is advised to compose and forward a gentle written reminder or follow up to the Registrar who as in practice will bring the follow up to the attention of the judger to whom the chamber application may have been allocated and is pending determination. Systems are not perfect and judges are human. A matter may for one reason or another have escaped the judge's attention. Reminders and follow ups are therefore nothing which should offend the judge and they are usually and should be responded to.

Before I conclude my determination I should mention that I caused the Registrar to place before me case No HC 606/16 whose dismissal is sought. It was necessary for me to peruse the record so that I appreciate the background to the present application. Instead of referring case No. HC 606/16 back to the Registrar, I have separately disposed of it in terms of rules 245 and 246.

Disposition

For the avoidance of doubt therefore I make the following order:

1. The application for dismissal for want of prosecution in term of r 236 (4) (b) is non suited in terms of the High Court Rules, 1971 and is accordingly dismissed with no order of costs.

Matsikidze & Mucheche, applicant's legal practitioners