STAR AFRICA CORPORATION (PRIVATE) LIMITED
versus
BROADHAVEN MANUFACTURING (PRIVATE) LIMITED
and
THE SHERIFF (HARARE)

HIGH COURT OF ZIMBABWE
TSANGA J
Harare, 27 February 2018 & 20 March 2018

Opposed Application

T Mutema, for the applicant
R Nyapadi, for the 1st Respondent
No appearance, for the 2nd respondent

TSANGA J: Following an urgent chamber application for stay of execution, the applicant and first respondent had entered into a deed of settlement on 24 May 2016 in which the Applicant (as then first respondent), agreed to stay execution on account that the 1st Respondent (as then Applicant), paid an amount of $40 345.45 owing to it as rentals in monthly instalments of $6000.00 starting 30 May 2016 and thereafter on the 24th day of every new month for a further period of 7 months until the debt was extinguished. What was indisputable in this application was that the first respondent herein made the first payment on 2 June with difficulty as only US$4000.00 was paid instead of the agreed US$6000.00. It was also not in dispute that it was the only and ever payment made under the Deed. As such, applicant sought to enforce its rights for the payment of what remained owing, namely, US$36 345.45. It also sought that the first respondent be forthwith evicted from Stand 371-275 Mubaira Growth Point, Mhondoro.

The first respondent sought to challenge the applicant on several grounds. Firstly, it was argued that in terms of the Deed of Settlement the applicant should have written to it

confirming the stay and that as it had not done and it was therefore approaching the court with dirty hands.

Clause 3a of the Deed of Settlement in question read as follows:

> 3. It shall be a further condition that upon the signing of this deed that:
>
> a) The applicant shall withdraw its application for rescission of judgment under case no. 4014/16 and that the applicant undertakes not to file any subsequent application in this matter seeking either a stay of execution or a rescission of judgment in this matter and that;
>
> b) first respondent … shall not execute and /or enforce the judgment under HC 10793/14 and shall forthwith instruct the second respondent (sheriff) in writing to unconditionally stay the execution of the judgment under HC 10793/14 and immediately furnish proof of same to applicant through its legal practitioners of record.

It was however not in dispute that the Applicant effectively instructed the Sheriff to stay execution in HC 10793/14 and that following the signing of the agreement in that no attempt was ever or has ever been made to execute. The applicant's heads made it clear that pursuant to the deed of settlement the applicant had instructed the Sherriff at Chivhu to stay execution of HC 10793/14 which execution was accordingly stayed on 26 May 2016. Respondent's gripe was therefore simply that despite these realities on the ground, proof had not been furnished to it.

What the first respondent sought to rely on was therefore no more than a technical argument in saying that the stay should have been communicated to it in writing in order for it to pay what it owed. As Applicant rightly argued, no prejudice had befallen the 1st Respondent since the Applicant had in practical terms stayed the execution. This court therefore dismissed this argument in the absence of a compelling reason why the 1st Respondent had not paid the instalments due.

Secondly, the first respondent argued that the relief sought was not in the Deed of Settlement and that in terms of the deed, what applicant should have done was to seek to have the Deed registered as an order of the court.

Clause 4 of the Deed read as follows:

> 4. In the event that applicant fails to comply with any of the above clauses, this order shall be registered as an order of court and the full amount owing at that time and eviction shall immediately become due and payable to the first respondent and such balance shall be executable.

Applicant explained that the terms of draft order were as per the initial court order in HC 10793/14. In any event, what was sought in the event of non-payment was as *per* Deed of Settlement, namely, the balance of what was owing and eviction, which order would become executable upon being granted. Again, there was also no merit in this additional argument.

The first respondent's final objection was to the form of application used. It argued that the applicant had not followed r 241 in terms of using the appropriate Form given that the application was to be served on an interested party.

> R 241 clearly states that:
> "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 sub rule (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."

A stringent approach has often been taken by our court to the failure to use the appropriate form, often justifying the removal of a case from the roll under various circumstances of non-compliance. See *Nyamhuka and Anor v Mapingure and Ors* HH 29-17*; Justice Zvandasara ZRP High School & Anor* HH 63-17; *The Trustees Of The Apostolic Faith Mission Of Africa v Zulu Rosewell & Ors* HH 158-17*; David Jack and Others* v *Lloyd Mushipe and Others* HH 318/15. Applicant's chamber application was essentially in Form 29B which sets out the grounds for the application in summary form. On the other hand Form 29A, as has been observed in *Marick Trading P/L* v *Old Mutual Life Assurance Company P/L and the Sheriff for Zimbabwe* 2015 (2) ZLR 341at p 345 E, which is used where there is an interested party, notifies the respondent of the right to oppose the application among other rights. As observed in *Zimbabwe Open University v Mazombwe* 2009 (1) ZLR 101 the use of Form 29 instead of 29B or vice versa is not in itself detrimental in terms of constituting a sufficient ground to dismiss an application. There must be some prejudiced suffered. This case before was certainly not one where a completely different format was used from the authorised ones.

The court was in agreement that the first respondent had not in any way been adversely affected by the Form used particularly in terms of responding to that application. The chamber application was made on 24 August 2016. Regardless of which form has been used, the general practice is to serve notice of a chamber application on the other side save in exceptional *ex parte* applications. Granted where from 29B has been used, problems do sometimes arise where the chamber application is placed for the judge's attention without giving the other side the requisite time to respond. In this instance, this was not the case. The certificate of service that was attached showed that the chamber application was served on 25 August 2016 on the first respondent as the interested party albeit Form 29 applicable where there is an interested party was not the one used.

The Registrar's date stamp on the certificate of service was reflected as 1 September 2016. The first respondent, as an interested party, then filed its notice of opposition on 21 September 2016. Furthermore, the first respondent thereafter filed all necessary papers and heads of argument in accordance with requisite timelines. There was therefore no prejudice that was occasioned by failure to use the relevant form, being Form 29.

Whilst indeed adherence to rules allows for uniformity and coherence, clearly the reasoning behind the use of the form should not be lost sight of in any particular case. Granted lawyers ought to be chided for failure to observe rules, but it is equally vital that technical rules that have caused zero prejudice should not be allowed to form the basis of needless points *in limine*. There is a need to remain alive to the court's ultimate role of resolving disputes on their merits. I can put this no better than was stated in the case of *Yost v. Alderson, 58 Miss. 40*

> "But when the neglect is in the mere conduct of a suit, and its consequences do not operate injuriously, its condonation by the judge can do no harm except to deprive the adverse party of an advantage which he has secured in virtue of such neglect, and in that case the party guilty of the neglect should not on that account alone be deprived of the means and opportunity of maintaining or defending his rights. The object of the institution of courts is to administer justice according to law, and lawsuits are allowed for that purpose alone. Rules of procedure regulating the conducting of business in courts are instituted solely to facilitate these ends. They are necessary, and their due observance should be enforced by the courts. But it should not be forgotten that they are aids to secure the administering of justice, not shackles to bind courts to the perpetration of wrong. When their non-observance is in a trivial matter, working no

> injury to the adverse party and not materially impeding the due progress of the cause, the fault should be corrected...."

In this instance there was clearly no prejudice in terms of the filing of a response as the first respondent in any event filed well in excess of the normally stipulated days for a court application. There was therefore zero prejudice in the filing of its opposition arising from the non-use of the stipulated form. There was nothing to be corrected and nothing to be condoned as the first respondent had in fact had more than ample time to file its response. What the justice of the case required was that the first respondent be held accountable for what it owed instead of clinging to unstainable technicalities. It was never the first respondent's argument at any point that it was holding the Applicant's monies and ready to pay. It simply raised technicalities which were unstainable in light of the facts to avoid payment.

It was for the above reasons that I granted the order sought by the Applicant and indicated that I would reduce my oral reasons in writing.

Sawyer and Mkushi, applicant's legal practitioners
Muza and Nyapadi, 1st respondent's legal practitioners