

LILLIAN ESTELLE MUDZONGA
versus
MAZVI INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
HLATSHWAYO J
Harare, 28 June 2013 & 30 October 2020

Chamber Application

C Venturas, for the applicant
G Gapu, for the respondent

HLATSHWAYO J: This matter has taken many twists and turns including abortive attempts to settle out of court. From the record, as late as 28 June 2013, being the last day the court interacted directly with the litigants, the parties were still pursuing dialogue, but thereafter, at a date unknown, they determined that dialogue had failed and that judgment be handed down in the matter. For example, on 27 June 2013, the new legal practitioner for the applicant, *Messrs Chirimuuta & Associates*, wrote through the Registrar of the High Court as follows:

“Please be advised that we have just assumed agency in the above-mentioned matter and are still in the process of perusing the files and obtaining instructions from our clients. As a consequence, thereof and with the agreement of *Messrs Scanlen and Holderness*, we request that this matter that was set-down for tomorrow 28 June 2013 at 1000 hours be deferred to a date to be agreed between the parties and yourselves. This would give the parties ample time to explore new initiatives at an out of court settlement of this dispute.”

No new set down date was subsequently agreed. Instead it appears that at some point settlement efforts collapsed. However, when communication was made, years later, for the request of judgment, confusion as to which matter stood to be finalized between the chamber application and the main application caused further delays as both applications originally bore the same case number, and the main application kept being referred to the court for finalization.

The applicant in this chamber application seeks the dismissal of the respondent’s opposition to the chamber application and the admission of her supplementary affidavit into proceedings in the main matter being HC 5893/02.

The basis of the application is set out in the applicant’s heads of argument, thus:

“2.1 We filed our Chamber application timeously in 2002 following receipt of the Mazvi Investment’s Heads of Argument in Court Application HC 5893/02 in which they as applicant in that matter raised new facts and issues not previously raised by them in their founding affidavit. These new issues...had not been stated in their Court Application or other documents, therefore, in order for justice to prevail we are constrained to answer to those issues raised thus it has resulted in us filing the Chamber Application to submit the Supplementary Affidavit.”

The Chamber application was filed on 20 December 2002 and bore the main application case number HC 5893/02, which was subsequently changed to HC 1785/07 to avoid much confusion which had already occurred and continued to dog this matter. It was served on the respondent’s legal practitioners on 30 December 2002, who formerly opposed the chamber application only on 13 February 2007 after a delay of more than 4 years. The reason for the failure to oppose the chamber application timeously is stated by the respondent as follows:

“By the time the applicant’s chamber application was served on the respondent’s legal practitioners, the main matter had already been set down for hearing and a brief sent to counsel. Counsel reasonably concluded that there was insufficient time to formerly oppose the chamber application and that the question of the proposed supplementary affidavit would be dealt with at the hearing.”

However, even after the main application had failed to take off on several occasions, no attempt was made to formerly oppose the chamber application. Had the opposing papers been filed as soon as the attempts to proceed with the main application had proved futile, this explanation would have been reasonable for the purposes of condonation. But to have waited more than four years, is clearly unreasonable. The notice of opposition was filed outrageously out of time. According to Order 32 r 233 (3) of the High Court Rules, a respondent who has failed to file a notice of opposition and opposing affidavit shall be barred. Such bar can be lifted only upon a successful application for condonation. No condonation application has been made in this case. No reasonable explanation has been given for this conduct but feeble excuses for failure to act. *See, Ndebele v Ncube* 1992 (1) ZLR 288 at p.290, where the court expressed displeasure at the perfunctory and casual manner in which some litigants or their lawyers conduct themselves with wanton disregard of the Rules:

“It is the policy of law that there should be finality in litigation. On the other hand, one does not want to do injustice to the litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry...The time has come to remind the profession of the old adage...the law will help the vigilant but not the sluggard.”

On the merits, it is in the court's discretion to allow the filing of an additional affidavit, and the respondent rightly concedes as much. While it is accepted by the applicant that it is only in exceptional circumstances that the court will allow the filing of an additional affidavit, the principle remains that in a proper case the court will lean towards a full ventilation of issues by allowing the filing of additional affidavits. This position is well settled and was articulated as follows in the case of *Silver's Trucks (Pvt) Limited & Anor v Director of Customs and Excise* 1999 (1) ZLR 490 at pp.493-4 by SMITH J quoting with approval *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599 (W):

“It was contended in argument that I really had no discretion on the question of the admission of these further affidavits because authority had decided that a further set of affidavits can only be submitted, firstly, if they are necessary to answer new matter raised in the applicant's affidavits, or, secondly, if the information of evidence was not available to the respondent when the first set of affidavits was filed...In my view the authorities do not restrict the discretion of the court in that manner suggested. ***I think that if there is an explanation which negatives mala fides or culpable remissness as the cause of the facts or information not being put before the court at an earlier stage, the court should incline towards allowing the affidavits to be filed.***” (emphasis added)

The reasons advanced by the applicant for the admission of a further affidavit have not been challenged at all by the respondent, even in its impugned opposition papers. There is no suggestion of bad faith or culpable failure to act timeously. At any rate, however, the respondent are properly barred and their views in opposition cannot be taken into account.

The court agrees with the applicant that this is a proper case for exercising the discretion in favour of the admission of a further affidavit, as the basic reason the applicant seeks to adduce further information is to put her case fully and clearly before the court as a result of new issues and facts raised by the respondent late in the proceedings.

In its heads of argument, the applicant has sought costs on the higher scale, whereas the prayer in its chamber application is that costs be in the cause, presumably on the ordinary scale. The lower scale of costs in the original chamber application was probably motivated by a belief that the application would not be opposed, but that is not made clear. The higher costs are now sought on the basis of “frivolous excuses” given by the respondent in bringing its opposition more than four years later and causing wasted time and costs to the court and the applicant. However, since the applicant did not reserve their right to seek costs on the higher scale should the application be opposed, this court can award costs only in the manner originally claimed.

Accordingly, it is ordered as follows:

1. The respondent's opposition papers in this chamber application are struck out and the respondent stands barred.
2. The applicant (first respondent in the main matter), or her lawful substitute, is allowed to file the supplementary affidavit attached to this chamber application and dated 12 December 2002 in the main case HC 5893/02, within ten days of this order.
3. The costs of this chamber application shall be costs in the main cause.

Byron Venturus & Partners, applicant's legal practitioners
Scanlen & Holderness, respondent's legal practitioners