DEMETRIA MANYONGA (PVT) LTD
versus
ASSETFIN (PVT) LTD
and
UNITIME INVESTMENTS (PRIVATE) LIMITED
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 4 November 2021 and 23 January 2023

Court application for condonation

Mr *B Diza*, for the applicant
Adv *G Madzoka*, for the respondent

CHINAMORA J:

Background facts

This is an application for condonation of late filing of an application for rescission of a default judgment entered against the applicant. The detailed facts are as set out in the applicant's founding affidavit and, because of the attitude that I have taken in this case, I do not wish to regurgitate them. Suffice it to say the key facts are briefly as follows:

On 22 March 2019, under case number HC 2387/19, the first respondent filed an application for setting aside of a title deed registered in the applicant's favour. Then on 30 September 2019, the first respondent served that application on Tawanda Jagada who accepted service on behalf of the applicant. Subsequently, on 6 November 2019, the first respondent obtained a default judgment against the applicant. The present application was filed on 3 August 2020, several days after the applicant had had knowledge of the default judgment in HC 2387/19 hence the need to seek condonation. In both the notice of opposition to the application filed and its compact heads of argument the first respondent raised a point in *limine*. *inter alia*, concerning the format of the

application which it alleged was not in terms of the rules. The applicant conceded this point but sought to argue that the court must condone or ignore it since the first respondent had not been prejudiced since it had filed its papers in opposition despite the complained defect in the papers. I believe this point is critical and dispositive of the matter and I want to zero on it. To quite appreciate the arguments in this matter, I reproduce here under the format of the application filed by the applicant and served on the respondents:

> "TAKE NOTICE THAT the applicant hereby applies for an Order in terms of the Draft annexed hereto. The accompanying affidavits and documents will be used in support of the application.
>
> DATED AT HARARE THIS 30th day of July 2020"

This is the form of the application complained of by the first respondent which argued that it rendered the application a nullity.

The detailed arguments

The first respondent put up a flawless argument that in terms of r 230 of the High Court Rules (then in force), a court application must be made in the prescribed form, form number 29. It was also argued that the application was not even in the alternative format, the use of form 29 B which is used in chamber applications. To this argument the applicant had no answer except to concede by saying the following in its heads of argument:

> "11.1...The respondent was not prejudiced by the error in the form of the application and to that end the preliminary point must fail.....
> 12.1.The applicant concedes that there was an error in the form on the application. Having said that, the first respondent was able to file its opposing papers within the *dies induciae* (*sic*) provided for in the rules meaning that it was not prejudiced. The application should not be dismissed on the basis that the Applicant failed to use the proper form." (See pages 108 and 109 of record)

I am shocked by the casual approach adopted by the legal practitioner for the applicant. For a moment, I thought these remarks were being made by a self-actor. It is most unusual that a qualified legal practitioner should ever project a posture of taking pride in assaulting the very rules which were created to regulate the operations of our courts. I am not quite sure of the experience of this particular legal practitioner. Nevertheless, his attitude brings to my mind the remarks made

by BERE J (as he then was) in the case of *David Addenbrooke* v *Norman James Pattason and David Coltart and Joseph Tshuma* HB118-18 where he stated:

> "...Perhaps this case is a clarion call to all law firms that it is a monumental risk for them to allow inexperienced young legal practitioners to represent clients on behalf of the law firm with little or no supervision at all as what seems to have been the situation in this case. Young and inexperienced lawyers must be kept on leash until such time they are able to go about in their own to represent clients on behalf of the law firm"

Cases of flouting court rules are not new in this jurisdiction. As a result, courts have pronounced on these issues on times without number. In *Forestry Commision* v *Moyo* 1997 (1) ZLR 254 (S), GUBBAY CJ emphasized the need to comply with our rules of procedure. The learned Chief Justice commented that even where one wants to take refuge in r 4 C (a) of the previous High Court Rules, in general, strong grounds would have to be advanced to persuade the court or judge to act outside the stipulated procedure. My brother MAFUSIRE J in the case of *Marick Trading(Pvt) Ltd* v *Old Mutual Life Assurance and Anor* HH 667-15 echoed the same views in the following words:

> "The Courts, both in this jurisdiction and elsewhere have repeatedly drawn attention to the need to follow the rules....It is not "sterile" argument about forms....The applicant used a format that is foreign to our Rules. The respondent objected. The objection was taken as far back as the notice of opposition. It was persisted with in the heads of argument. Finally, it was pressed on with at the hearing. But throughout these stages, the applicant steadfastly refused to acknowledge any wrong doing". In the circumstances the applicant has made its bed of roses. It must lie on it. There being no application properly before the court, the application should simply be struck off the roll with the applicant paying the wasted costs"

I draw an analogy from these two richly decided cases with this case before me. What makes the instant case particularly bad is that despite the applicant appreciating that it had flouted the rules by subsequently filing the application using the correct form, the applicant deliberately abstained from serving same on the first respondent. In future such carefree, if not cavalier, attitude must be punished by ordering such errant legal practitioner to pay the costs from their pocket.

Disposition

I have no reason to depart from the weight of the authorities that I have referred to. The applicant, having flouted the rules with its eyes wide open, there is no proper application before me. Consequently, I make the following order:

1. That the matter be and is hereby struck off the roll

2. The applicant shall pay costs of suit.

Mhishi Nkomo Legal Practice, applicants' legal practitioners
Muronda Malinga Legal Practice, respondent's legal practitioners