ZIMBABWE OPEN UNIVERSITY APPLICANT
and
DR. O MAZOMBWE RESPONDENT

HIGH COURT OF ZIMBABWE
HLATSHWAYO J
HARARE 4 FEBRUARY 2009

OPPOSED MATTER

A K Maguchu, for the applicant
A Mugandiwa, for the respondent.

HLATSHWAYO J: The applicant seeks an order setting aside the registration of an arbitral award granted in favour of the respondent. The award was submitted for registration at the High Court in terms of the provisions of the Labour Act (Chapter 28:01) and was duly registered on 25 February 2008.

The applicant submits that the registration of the award was defective in that it was done by way of a chamber application, without notice to the applicant, instead of a court application, which would have required notice to be served on the applicant. In response, the respondent maintains not only that it proceeded lawfully, but that the applicant, in its own application for the rescission of the registration of the award failed to comply with the Rules of Court in a manner fatal to its application for rescission.

I shall examine first the issue of the regularity or otherwise of the application before this court, i.e., the application for rescission of judgment. If the application is properly before this court, then the other issues will follow. If not, then *cadit quaestio*.

Rule 230 of the High Court of Zimbabwe Rules, RGN 1047/1971 as amended prescribes in mandatory terms that a court application shall be made in Form No. 29 or where it is *ex parte*, in Form No. 29B, which latter form is generally used for chamber applications. It is common cause that the form used by the applicant for the rescission of judgment is neither of the above stated forms, that is, it is in neither the court application form nor the chamber application form nor the hybrid *ex parte* court application form.

Now, Rule 4C gives the court or judge discretion to condone departures from the rules, while Rule 229C deals with a specific form of departure, viz., proceeding by way of court instead of chamber application and *vice versa*.

In terms of Rule 229C, the use of one form instead of another, of Form 29 instead of Form 29B, does not in itself constitute sufficient ground for dismissing the application, it being necessary for a court or judge to conclude that some interested party has thereby suffered prejudice which cannot be remedied by directions for service on the injured party, with or without an order of costs. In his submissions on behalf of the applicant, *Mr. Maguchu* sought to rely on Rule 229C arguing that the respondent had neither alleged nor demonstrated any prejudice. However, the applicant's error in this instance was not one of using one form instead of another but of using a completely different format from the authorized ones and, therefore, falls directly under Rule 4C and not Rule 229C. (Ironically, it is respondent's alleged breach of the rules – proceeding by way of chamber instead of court application in the registration of the arbitral award – which falls squarely under Rule 229C.)

Lest an impression be formed that this is a sterile dispute about forms, I have deemed it necessary to outline in a summary way what each of the two forms contains, on the one hand, and the unique features of the format used by the applicant, on the other. In Form 29 the applicant gives notice to the respondents that he or she intends to apply to the High Court for an Order in terms of an annexed draft and that the accompanying affidavit/s and documents shall be used in support of the application. It goes on to inform the respondent, if he or she so wishes, to file papers in opposition in a specified manner and within a specified time limit, failing which the respondent is warned that the application would be dealt with as an unopposed application. In Form 29B an application is made for an order in terms of an annexed draft on grounds that are set out in summary as the basis of the application and affidavits and documents are tendered in support of the application. By contrast, the unique format used by the applicant consists of a heading: "Application for Rescission of Judgment" and the following terse statement: "Take notice that the Applicant, Zimbabwe Open University, hereby applies for Rescission of Judgment. The annexed affidavit is used in support thereof."

Now, the format adopted by the applicant does not contain the plethora of procedural rights that the respondent is alerted to in Form 29 nor the summary of the grounds of the

application required in Form 29B. Can this substantial departure from the rules be condoned under Rule 4C? Rule 4C states as follows:

> "The court or judge may, in relation to any particular case before it or him, as the case may be –
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> (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."

In the cases of *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* 1978 (1) SA 779, the applicants, in three applications for compulsory sequestration, had used the notice of motion prescribed in Form 2 of the South African Uniform Rules of Court, which was a form appropriate to *ex parte* applications. The applicant in the first application had not served the notice on the respondent, but the applicants in the other two applications had so served the notices on the respondents. It was held that in the first application the use of the Form 2 was perfectly in order as the application was brought *ex parte*. However, as to the other two applications, it was held that as they were not brought *ex parte*, the notices of motion used in these applications (i.e., the Form 2 notice) were nullities and their use could not be condoned and the applications had to be struck off the roll:

> "…This applicant also relies on a *nulla bona* return, but it chose not only to address the Form 2 notice of motion to the respondent, but also to serve it on him. Hence it is not brought *ex parte* and Rule 6(5) applies. It was suggested in some of the other applications which were eventually struck off the roll that this non-compliance might be condoned under Rule 27(3). I have considered that possibility in this case, but apart from the fact that no cause at all is shown why there should be condonation, the 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 addition it must be emphasized that Form 2(a) contains a description of the procedural rights of the respondent after service of the notice of motion. These rights are considerable and substantial. How could a Court, even if it were not a nullity, put a blue pencil through all these rights in the absence of the person in whom they reside and without notice to him that such an order which abrogates his rights might be made? This application is struck off the roll."

Our own Supreme Court has agreed with the above approach to non-compliance with mandatory rules of court. In the case of *Jensen v Acavalos* 1993 (1) ZLR 216 the superior court dealt with the non-compliance with provisions of Rule 29 of the Rules of the Supreme Court, RGN 380/1964 and said the following at p.220 A-D:

> "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 of appeal to be filed, the appeal must be struck off the roll with costs: *De Jager v Diner & Anor* 1957 (3) SA 567 (A) at 576 C-D
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> In *Hattingh v Pienaar* 1977 (2) SA 182 (O) at p.183 KLOPPER JP held that a fatally defective compliance with the rules regarding the filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule. With this view I most respectfully agree; for if the notice of appeal is incurably bad, then, to borrow the words of LORD DENNING in *McFoy v United Africa Co Ltd* [1961] 3All ER 1169 at 1172, "every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it stay there. It will collapse.""

As if the non-compliance with the mandatory rules noted above was not bad enough, the applicant has not bothered to apply for condonation of its failure to comply with the rules in spite of such non-compliance having been drawn to its attention as early as when the notice of opposition was served on it. In my considered view, where the errant party has not applied for condonation in spite of its awareness of its non-compliance, it suffices for the objecting party merely to point out the non-compliance for the application to be struck off. Furthermore, the applicant's failure to even recognize the need to apply for condonation shows a cavalier approach to compliance with rules of court, which must be discouraged by an exemplary order of costs.

Accordingly, this application is struck off the roll with costs on the legal practitioner and client scale.

Dube, Manikai & Hwacha, applicant's legal practitioners
Wintertons, respondent's legal practitioners.