CAREY FARM (PRIVATE) LIMITED
versus
SIKONA FARM (PRIVATE) LIMITED
and
GIRDLESTONE ENGINEERING (PRIVATE) LIMITED
and
NEWTON MADZIKA

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 24 January 2014, 24 March 2014

Chamber Application

Messrs Manase & Manase for applicant
In Default, Respondents

CHIGUMBA J: The applicant filed a chamber application in terms of order 32, rule 226(2) (e), as read with rule 233(3) of the High Court Rules 1971, on 20 December 2013. The application was placed before me in chambers. At record page fifty eight, a certificate of service was attached, indicating that the application had been served on the legal practitioners of record for the first and second respondents, Messrs *M. E. Motsi*, on 13 January 2013 at 14:54 hours, and on the legal practitioners of record for the third respondent, Messrs Mambosasa,, on the same date, at 15:25 hours. There being no opposing papers in the record placed before me in chambers, and after considering the papers filed on behalf of the applicant, I granted the following order, in chambers, on 24 January 2014:

IN CHAMBERS

WHEREUPON after reading documents filed of record;

IT IS HEREBY ORDERED THAT

1. The notice of opposition filed by the 1st and 2nd respondents on the 12th of December 2013 under case number HC10178/13 be and is hereby struck out from the record for non-compliance with the rules of this court.
2. The judgment granted by the Honorable Mr. Justice Hungwe on the 5th of June 2013 be and is hereby rescinded.
3. The applicant is granted leave to file its appearance to defend within 10(ten) days from the date of this order.
4. Costs to be in the cause.

On 4 February 2014, I received a letter from Messrs M. E. Motsi & Associates, requesting the reasons for the order granted in chambers. I instructed the registrar to respond to the letter, and to inquire from the erstwhile legal practitioners, as to the purpose of the request for written reasons for judgment given in chambers, unopposed. The registrar wrote to Messrs M.E Motsi & Associates, on 17 February 2014. The Legal Practitioners did not deem it necessary to respond to the letter. Instead, they filed a chamber application for leave to appeal on 19 February 2014, under case number HC 965/14. When the two records were brought back to me for consideration, I found that a notice of opposition, purportedly filed of record on 17 January 2014, and an answering affidavit, purportedly filed of record on 20 January 2014, had mysteriously found their way into the original file, HC 10949/13. I will proceed to lay down the reasons why I granted the chamber application on 24 January 2014, below.

In the founding affidavit, deposed to by Edward Edmore Sithole, the managing director of the applicant, the following background facts are set out:, that applicant filed and served a court application for rescission of judgment under case number HC 10178/13, on 27 November 2013, in which rescission was sought on the basis that judgment in default had been granted in error against the applicant in case number HC 9801/12. That, the third respondent herein, Mr. Newton Madzika, had not opposed the application for rescission of judgment and is barred in terms of Order 32 rr 233(3) of the rules of this court. That, the first and second respondents herein had filed an opposing affidavit to the application for rescission of judgment, which was being impugned, by way of the chamber application, as being null and void at law, for failure to comply with the rules of this court.

The first basis of the chamber application to strike out the notice of opposition filed of record on 12 December 2013 under case number 10178/13 was that it failed to comply with the provisions of Order 32 rr 226(2)(e), which reads as follows:

"***226. Nature of applications***
(1) …
(*a*) …
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; o
(*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."**

The applicant based its application for the relief sought, on special circumstances. The special circumstances consisted of an allegation that the notice of opposition did not comply with order 32 rr 233(1) and 233(3) of the rules of this court which provide as follows:

"***233. Notice of opposition and opposing affidavits***
(1) The respondent shall be entitled, within the time given in the court application in accordance with rule 232, to file a notice of opposition in Form No. 29A, together with one or more opposing affidavits.
(2) …
(3) A respondent who has failed to file a notice of opposition and opposing affidavit in terms of subrule (1) shall be barred."

The applicant contended that the first and second respondent's notice of opposition was not filed in Form number 29A as stipulated by rr 233(1), and that rule 233 was couched in peremptory language, leaving no room for the exercise of discretion in condoning the lack of

compliance with it, by the court. Applicant relied on *Cockram's Interpretation of Statutes, and Scheirhaut* v *Minister of Justice* 1926 AD 99, as authority for the proposition that, all acts done in breach of a statutory direction that is peremptory, are null and void. A perusal of the sample of Form number 29A at record page 59 will show that it is entitled "Notice Of Opposition". Respondents filed "affidavit of A.J.L. Manning" and "Supporting Affidavit of *M.E. Motsi*", instead of a notice of opposition. Applicant contended that the failure to file a notice of opposition in form number 29A brought on the sanction imposed by rr233 (3), respondents were barred.

Applicant averred that, the first and second respondents also failed to comply with Order 32 rr227 (2) (d) which provides that:

"(2) Every written application and notice of opposition shall—
(*a*) …
(*b*) …
(*c*)…
(*d*) where it comprises more than five pages, contain an index clearly describing each document included and showing the page number or numbers at which each such document is to be found.
(3)….
(4)…
(5) …"

Basically applicant alleged that the first and 2nd respondent's opposing papers contained more than five pages but were not indexed and paginated as required in terms of Order 32 rr227 (2)(d), which was again couched in peremptory language "..every written application and notice of opposition Shall". (my underlining for emphasis) Applicant averred that the opposing papers were null and void for failure to comply with peremptory provisions of the rules of this court, which were enacted pursuant to the provisions of the High Court Act [*Cap 7:06*]. The applicant relied on the following authorities: *Minister of Labour Manpower Planning & Social Welfare & Ors* v *Pen (Private) Limited* 1989 (1) Zlr 293. *Practise Note 3 of 1972 General Division 1972(1) ZLR 2 (G)...*

Lastly, applicant challenged the authority of the deponent to the affidavit filed on behalf of the first and second respondent to depose to the affidavit without a board resolution authorizing him to represent the respondents.

In my view, there was no impediment to granting the relief sought, on points of law, or questions of fact. Applicant established, on the papers filed of record that the first and second respondent's opposing papers were fatally defective for not being in form number 29 as stipulated by rr 233(1), resulting in the respondents being barred in terms of rr 233(3). The applicant correctly submitted that Order 32 rr 233 was couched in peremptory terms, and that, the effect of rr 233(3) was that the failure to comply with it could not be condoned, or overlooked. The respondents being barred, there was no opposition before the court, and the domino effect of that was that the judgment which resulted from those papers was void, because it was based on nothing.

I also considered the fact that respondents had been served with a copy of the chamber application in terms of the rules, and had failed, refused or neglected to file opposing papers, as there were none in the record that was placed before me. I took into consideration that the circumstances were indeed exceptional as provided for in terms of Order 32 rr 226(2)(e). In fact, the applicant could have relied on the provisions of rr 226 (2) (d) (i)-(iii) which provide that:

"(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"

I say so because, on the papers filed of record, applicant had served all the respondents with a copy of the application, which constitutes notice, and, as at 24 January 2014, when the court granted the order sought, there were no opposing papers in the record that was placed before me. Whether opposing papers had been filed of record but for some reason unbeknown to me had not been placed in the record, is knowledge which I acquired after I had Granted the judgment and which did not come into consideration in granting the order sought. Suffice is to

say that I was satisfied that the applicant's reliance on Order 32 rr 222(2)(e) was justified and sustainable in the circumstances of the papers that were before me, and I would have allowed the relief sought had applicant sought to rely on rr 226 (2)(d)(i)-(iii) as well. Those provisions applied to the circumstances of the case. Even if there was no interested party to the case, or if every interested party was a party to the case, I would have granted the relief sought. I was persuaded that, failure to file a notice of opposition in form number 29A renders the respondent barred. Once respondent is barred and there is no viable opposition before the court, any order premised on the discredited opposing papers is a nullity, and is accordingly void. It was vitiated by a fundamental irregularity. It was tainted *ab initio* and must therefore be declared a nullity. See *McFoy* v *United Africa Co. Ltd* [1961] 3 All ER 1169 (PC) at 1172; *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 (S) at 157. Accordingly, and for these reasons, I granted the following order:

IT IS HEREBY ORDERED THAT

1. The notice of opposition filed by the 1st and 2nd respondents on the 12th of December 2013 under case number HC10178/13 be and is hereby struck out from the record for non-compliance with the rules of this court.
2. The judgment granted by the Honorable Mr. Justice Hungwe on the 5th of June 2013 be and is hereby rescinded.
3. The applicant is granted leave to file its appearance to defend within 10(ten) days from the date of this order.
4. Costs to be in the cause.

Manase & Manase, applicant's legal practitioners