VILLER PHARMACY (PRIVATE) LIMITED
and
TAKAWIRA CHAGWEKA
versus
MEDICINES CONTROL AUTHORITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 23 & 24 & 29 August 2018

URGENT APPLICATION

C.T Manyani, for the applicants
S Njerere, for the respondent

CHIRAWU-MUGOMBA J: The applicants filed an urgent application seeking a provisional order whose final and interim relief were couched as follows:

TERMS OF FINAL ORDER

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That the respondent's decision to cancel 1st applicant's premises licence and to disqualify the 2nd applicant from dealing with medicines of *(sic)* being a Director of any pharmaceutical business for a period of twenty four months of 12 July 2018 be and i.e. hereby set aside pending the hearing and determination of the 1st and 2nd Applicants' appeal in the Administrative Court under case No. ACC 74/18.
2. 1st respondent (*sic)* shall pay costs of suit on an attorney-client scale.

INTERIM RELIEF GRANTED

Pending the determination of this matter, Applicant is granted the following relief:-

1. That the Respondent's decision to cancel 1st Applicant's premises license and to disqualify the 2nd Applicant from dealing with medicines of *(sic)* being a Director

of any pharmaceutical business for a period of twenty four months of 12 July 2018 be and i.e. hereby suspended pending the return date.

2. Respondent shall pay costs of suit on an attorney client scale.

SERVICE OF THE PROVISIONAL ORDER

Applicant's Legal Practitioners be and are hereby authorised to serve the provisional order upon the respondent, with or without the assistance of member(s) of the Zimbabwe Republic Police.

At the hearing on 23 August 2018, *S Njerere* for the respondent raised four points *in limine* as follows:

a. That the form of the application did not comply with Order 32, Rule 241(1) of the Rules of the High Court of Zimbabwe. More specifically, the form used is not as per Form 29 as modified. As a result, the purported application is a nullity and must be struck off the roll.

b. That the matter is not urgent especially when regard is had to the fact that there is an appeal before the Administrative Court.

c. That in terms of Section 61(4) of the Medicines and Allied Substances Control Act (the act) *(Chapter 15:03), "A direction given in terms of subsection 3, shall have immediate effect notwithstanding the noting of an appeal against the decision of the Authority."* First applicant continues to trade and has failed to return its licence thus committing an offence in terms of the Drugs and Allied Substances Control (General) Regulations of 1991, (S.I 150/91). She averred that the 1st applicant is in defiance of the law and the court should not come to its aid until it purges its defiance.

d. Applicants' relief lies in the Administrative Court to which it has noted an appeal and even if the respondent were to exercise the discretion it has in terms to the provision in section 61(4), " Provided that where a licence has been cancelled or suspended the Authority may, subject to such conditions as it may specify, authorize the person concerned to continue to operate under the original licence until the appeal is determined or has been abandoned as the case maybe", this would only apply to the first applicant and not to the second applicant.

In response, *C.T Manyani* for the applicants stated as follows:

a. There is no prejudice suffered by the respondent and that the court has discretion in terms of Rule 4C to condone non-compliance.

b. The Administrative Court is not empowered to deal with urgent applications and that this court is clothed with inherent jurisdiction.

c. The respondent effectively shut the door on applicants in terms of exhausting domestic remedies by averring that it was *functus officio* in relation to the proviso in section 61(4) already outlined above when requested to exercise its discretion.

d. The relief sought is not to have the decision reviewed but to seek an order that whilst the appeal in the Administrative Court is being finalised, the applicants should be allowed to operate.

e. The applicants had ceased operating on the 21st of August 2018 and had surrendered the licence to their legal practitioner. This was based on the calculation of the seven days to run from the 16th of August 2018.

In reply, *S Njerere* averred that the applicants' calculation of the seven day period within which to surrender the licence had no basis in law and in any event the law required that the licence be surrendered to the respondent and not to applicants' legal practitioners. Further that by approaching the court to seek suspension of the operation of respondent's direction, they were seeking that the court assists them in breaking clear provisions of the law. In terms of section 62 of the act, the remedy available is to appeal to the Administrative Court. Whilst rule 4C gives the court discretion, condonation for non-compliance is not as of right but must be based on an application made by the party which fails to comply with the rules.

The issue of non-compliance with the form of an urgent chamber application is not new to the courts.

In, *Zimbabwe Open University* v *Mazombwe*, [1] HLATSHWAYO J (as he then was)stated as follows:

> "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

[1] HH-43-09

> 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."

In support of her contention that using an incorrect form is fatal to an urgent application, *S Njerere* made reference to *Marick Trading (private) Limited* v *Old Mutual Life Assurance (Private) Limited and anor.* [2] In that case, MAFUSIRE J also dealt with the hybrid form in cases in which a chamber application must be served on an interested party and he restated the position as in the *Zimbabwe Open University* case.

An analysis of the form used by applicant shows that it is more or less as provided for in Form Number 29B but it is not a hybrid form as envisaged in r241(1). It missed the essential part of informing the other party of the plethora of rights available as envisaged in Form Number 29. The immediate question that arises is whether or not the court relying on Rule 4C can condone a departure from the rules in the absence of an application for condonation. Rule 4C reads as follows:-

> "The court or judge may, in relation to any particular case before it or him, as the case may be –
>
> (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 *Nyamhuka and anor* v *Mapingure and others,*[3] FOROMA J held as follows

> "As observed above in the absence of condonation of the failure to comply with r 241 (1) as aforesaid the application is fatally defective. Had the applicant not been adamant that they had complied with the rules the applicant would have been advised to seek condonation. Regrettably the applicant's counsel was dismissive of the objection taken by the respondent's counsel. What triggers the exercise of the court or judge's discretion to grant condonation is the application for condonation. The court or a judge does not consider condonation *mero motu*. A party has to move it for such relief.

[2] HH-667-15

[3] HH-29-17

In the *ZOU* case, HLATSHWAYO J stated as follows;-

> "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".

The dominant view is therefore that there should be an application for condonation for non-compliance. The applicants became aware of the fact that the respondent was challenging the form of the application when they received the notice of opposition. At the hearing despite a hint from the respondent's legal practitioners on the need to apply for condonation, the applicants did not apply for condonation.

In passing perhaps it is time for this ***"Form No. 29 with appropriate modifications."*** to be developed so that urgent matters are dealt with on the merits. Nonetheless, this should not be an excuse for litigants to fail to comply with the rules.

In the result, it is ordered as follows:-

The matter be and is hereby struck off the roll with costs.

T. H Chitapi and Associates, Applicants' Legal Practitioners
Honey and Blanckenberg, Respondent's Legal Practitioners