

HH 40-02
HC 11744/2001
EBEN CASPARUS ERAMUS
versus
ERICA ZIMET
and
DEPUTY SHERIFF N.O.

HIGH COURT OF ZIMBABWE
PARADZA J,
HARARE, 27 March, 2002

Mr Chinyanga for the applicant
Mr F Girach for the respondents

PARADZA J: This matter came before me as an Urgent Application. It had been filed through the Chamber Book.

The following order was being sought by the applicant -

"TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a Final Order should not be made in the following terms:-

- (1) That the first and second respondents be and are hereby interdicted from enforcing the Order of the Honourable Mr Justice HUNGWE of the 1st November, 2001 under Case Number HC 8958/00, pending the outcome of the appeal under Case Number SC 316/2001.
- (2) **That should the first respondent have enforced the Order referred to in paragraph (1) above, the first respondent be and is hereby ordered to restore the *status quo ante*, pending the outcome of the appeal under Case Number SC 316/2001.**
- (3) **That the first respondent's legal practitioners bear costs of this application *de bonis propriis*.**

INTERIM RELIEF GRANTED

1. That the first and second respondents should abide by paragraph (1), (2) and (3) above.

SERVICE OF ORDER

That leave is hereby granted that applicant serves the Provisional Order upon all the respondents."

It is common cause that respondent obtained an Order of ejectment against

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the applicant on the 1st November, 2001 under Case Number HC 8958/00 before my brother Mr Justice HUNGWE. Applicant appealed against that order on the 5th November, 2001. A copy of the Notice of Appeal was annexed to the application. It shows a Supreme Court stamp and a Case Number SC 316/2001.

Applicant's complaint was that despite the noting of an appeal, first respondent instructed the Deputy Sheriff, cited in these proceedings as second respondent, to proceed and execute the order of ejection. A Notice of Removal served upon the applicant by the second respondent was annexed in support of that application by the applicant. It shows that ejection was to be effected on the 19 December, 2001.

Faced with the pending ejection, the applicant filed this application on an urgent basis to have the first and second respondent restrained from executing the order of ejection under Case Number HC 8958/00. The applicant stated in his affidavit in support of the application that leave to execute pending appeal had to be obtained before the first respondent could proceed to enforce the order. Letters were written by applicant to first respondent which did not have the desired effect of persuading the first respondent to stay the order of ejection. He stated that if the respondents were not ordered to stop the ejection, he would suffer irreparable loss. For that reason the matter was urgent and had to be dealt with by this court on that basis.

The respondent opposed this application on the ground that although, *prima facie*, a Notice of Appeal had been filed with the Supreme Court, it did not comply with the provisions of the Supreme Court Rules which require that a Notice of Appeal once filed, should be served upon the Registrar of the High Court within 15 days.

Mr Girach who appeared for the first respondent submitted that because of this oversight on the part of the applicant, the Notice of Appeal filed with the Supreme Court was defective. He stated that a Notice of Appeal which does not comply with the mandatory provisions of the Supreme Court Rules rendered such an appeal in essence a non-event. His argument was that under those circumstances there was no Notice of Appeal which had been filed and served in terms of the Supreme Court Rules.

He referred me to Rule 29 of the Supreme Court Rules which reads as follows -

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"29. Entry of Appeal

- (1) Every civil appeal shall be instituted in the form of a Notice of Appeal signed by the Applicant or his legal representatives, which shall state -
- (a) The date on which, and the Court by which, the judgment appealed against was given;
 - (b) If leave to appeal was granted, the date of such grant;
 - (c) Whether the whole or part only of the judgment is appealed against;
 - (d) The grounds of appeal in accordance with the provisions of Rule 32;
 - (e) The exact nature of the relief which is sought;
 - (f) The address of service of the applicant or his legal practitioner.
- (2) The Notice of Appeal shall be served on the Registrar, the Registrar of the High Court and the Respondent."

What is of relevance to us is Rule 29(2).

The first respondent in his Opposing Affidavit submitted that the Notice of Appeal was filed with the Supreme Court on 5th November, 2001. It was immediately served upon the first respondent. Unfortunately no service was effected upon the Registrar of the High Court in compliance with Rule 29(2), at least, not until 29 November, 2001. In a letter dated 6 December, 2001, respondent advised applicant that in view of this delay in serving the Registrar of the High Court with a Notice of Appeal as provided for in the Rules, he was going to ignore the Notice of Appeal and proceed with ejectment. The letter from Messrs Kantor and Immerman, for the first respondent addressed to Messrs Mudambanuki & Associates, legal practitioners for the applicant read in part as follows -

"We note that your client's appeal filed with the Supreme Court on 5th November, 2001 is defective for want of compliance with the Supreme Court Rule which stipulates that the Notice of Appeal should be filed with the Registrar of the High Court and of the Supreme Court. Your Notice of Appeal was not filed with the Registrar of the High Court. Effectively no Appeal has been noted and the time within which to do so having expired, we are proceeding with execution of the Order of HUNGWE J granted on 1st November, 2001".

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The applicant's legal practitioners responded thereto by a letter dated 10 December, 2001. That letter, enclosed a Notice of Appeal which revealed that service upon the Registrar of the High Court was only effected on 29 November, 2001. It would appear that no further correspondence was entered into and the first respondent then instructed the second respondent to proceed with the enforcement of the ejection order.

It is quite clear what Rule 29(2) provides for. It clearly sets out the period within which a Notice of Appeal under these circumstances has to be filed and served.

Mr Chinyanga for the applicant submitted that as far as the applicant is concerned, he (the applicant) was satisfied that the requirements of the rules were complied with by ensuring that the Notice of Appeal was duly served upon the Registrar of the High Court on 29 November, 2001 a date long after the 15 day period provided by the Rules.

The first respondent submitted in his affidavit that under these circumstances applicant was required to seek condonation or other indulgence from the Supreme Court to file his Notice of Appeal out of time. I agree with him. Where rules of court have not been fully complied with and compliance is impossible because the time laid down by the rules has expired, litigants have to take every possible route available at law to ensure compliance. In the case at hand the applicant's attention was brought to the fact of non-compliance. He sought to "comply" with the rules by serving the Registrar of the High Court out of time. It was improper for him to do so. He should have sought leave of the Supreme Court or condonation for so doing. He jeopardised his client's interests by allowing the respondents to rely on a technicality in proceeding in the manner they did.

I will now deal with the aspect of non-compliance with the mandatory provisions of the Rules of the Court.

In the case of *Jansen v Acavaloc* 1993(1) ZLR 216 (SC) KORSAH JA dealt with the mandatory provisions of Rule 29 and the effect of non-compliance with those mandatory provisions. That judgment dealt with non-compliance with sub rules (c), (d) and (e). The case before me deals with non-compliance with sub rule (2) of Rule 29.

Rule 29(2) makes it mandatory that the Notice of Appeal shall be served upon the

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Registrar of the Supreme Court, the Registrar of the High Court and the respondent.

Rule 30 provides the time limits within which the Notice of Appeal shall be filed and "served". My view is that is if the Notice of Appeal is to be served within a prescribed period of time, then service must be effected within the time provided. Service of a Notice of Appeal would only be complete if served upon all the parties that should be served in terms of the Rules. Failure to do so would amount to non-compliance with the mandatory provisions of Rule 29(2) as read with Rule 30 of the Supreme Court Rules. This is what the learned judge of appeal had in mind in arriving at his decision in the *Jansen* case (*supra*). In that case, it was held that a Notice of Appeal must comply with the mandatory provisions of the necessary Rules. If it does not do so, it is a nullity and cannot be condoned or amended or even rectified outside the time laid down by the Rules without the need to be granted some form of indulgence by the court.

My attention was drawn to the matter of *Kombayi v Berkhout* 1998(1) ZLR 53 (SC). That case dealt with the method of calculating the time within which appeals can be lodged or should be lodged. It also dealt with errors by legal practitioners and whether such errors should be reason for condonation of delays in filing papers. The case also lays down certain principles that should be followed by a Court in determining whether to condone the late noting of an appeal.

It does not deal with the circumstances before me.

As to the urgency of this application I am satisfied that the matter is not urgent. Applicant's attention was drawn to the defective nature of the Notice of Appeal around the 6 December, 2001. Applicant did not take any action whatsoever to rectify the defect despite being advised of the pending action that was to be taken by the respondent. No explanation has been given to me for the delay in taking appropriate action up to now. Applicant did not himself treat this matter

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with the urgency he now asks the Court to do. Under the circumstances I make the following order -

This application is dismissed with costs.

***Mudambanuki & Associates* , applicant's legal practitioners
Kantor & Immerman , first respondent's legal practitioners**