EXECUTIVE AIR (PVT) LTD
and
RODNEY SPRINGER
and
WILLIAM HURREL
and
CAROLINE PUZEY
versus
CIVIL AVIATION AUTHORITY OF ZIMBABWE
and
PROFESSOR HASU PATEL
and
D CHIWOTA

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 3 July 2008.

OPPOSED APPLICATION

Adv Y Phillips for applicants
Mr F Chirimuuta for respondents.

MAKARAU JP: On the turn, I granted an order finding the respondents in contempt of an order of this court and committed the second and third respondents to prison and there to be held until the order of this court, granted on 13 February 2008 is complied with or set aside, whichever occurs sooner. The committal of the second and third respondents was suspended for four days from the date of service of the order upon each of them to give them an opportunity to purge their contempt. I indicated then that my reason would follow. I now set these out.

BACKGROUND.

The first applicant is in the business of flying charters for fee paying clients. The second and fourth respondents are licenced pilots, employed as such by the first applicant. They hold licences issued to them by the first respondents. The third applicant is the Chief Inspector for the first applicant, which holds an Approved Maintenance Organisation Licence issued to it by the first respondent.

On a date that is not material to these proceedings, the first respondent suspended the applicants' licences. On 13 February 2008, this court issued an order setting aside the

decision of the first respondent to suspend the licences that it had issued to the applicants and ordered the first respondent to return to second applicant his licence.

The order was granted in default of appearance by the first respondent.

The order was served upon the respondents and despite several requests to have it complied with, the respondents did not do what the order required them to do. Instead, they, through their legal practitioners, advised the applicants that since they had filed a court application seeking to rescind the default judgment of 13 February 2008, that application had the effect of suspending the operation of the order against the first respondent. Finding the argument by the respondents legally untenable, the applicants filed this court application on 12 March 2008, seeking an order committing the respondents for contempt.

On 19 March, the respondents filed an exception. In the "exception", the point was repeated that the respondents had filed an application rescinding the default judgment and the issues raised in the application for committal were the same issues arising from the application for rescission, thus the matter was pending before this court. Further, it was argued that the second and third respondents were not parties to the original matter in which the default judgment was granted and the applicants were thus non-suited. On the basis of these grounds, it was argued that there was no need for the court to go into the merits of the matter.

In addition to the exception, the respondents also filed a "notice of opposition to the certificate of urgency". This was filed on 26 March 2008. No affidavit was attached to the notice of opposition. I however note that the notice of opposition was filed within the time limited for the filing of opposition to the application for committal.

The applicants' heads of argument were duly filed on 14 April 2008. These were served on the respondents' legal practitioners on 22 April 2008. The application was set down for hearing on 3 July 2008. No heads of argument were filed on behalf of the respondents. The position remained the same when the application was called up for hearing before me.

THE ISSUES.

Two issues of adjectival law presented themselves to me in this application. Firstly, it was whether there was any valid opposition to the application. In this regard, I had to consider the "notice of opposition to the certificate of urgency" that was filed without an opposing affidavit and establish whether this constituted opposition to the application. Secondly, while the respondents were represented by *Mr Chirumuuta* during the hearing, the issue arose as to whether the respondents were properly before me for the purposes of arguing the merits of the matter. In this regard, I made reference and drew to the attention of *Mr Chirimuuta* that he had not settled and filed any heads of argument on behalf of the respondents.

With the greatest of respect to Mr *Chirimuuta*, I find that the filing of the papers on behalf of the respondents in this matter leaves a lot to be desired and may, in my view, reveal a grave skills gap on the part of the legal practioner in appreciating application procedures. No attempt appears to have been made to follow the procedures laid out in the rules of this court when opposing an application. Of great concern to me was the filing of an exception to the application. To my mind, the filing of an exception is a procedure peculiar to and limited to proceedings commenced by way of summons. It has no place in application procedures where affidavits instead of pleadings are exchanged. (See Order 22 of the High Court Rules 1971).

In any event, the bases upon which the exception was taken are not in my view proper grounds for raising an exception.

In my view, the application before me was not opposed. As indicated above, no opposing affidavit was filed together with the notice of opposition that was filed on 26 March 2008. A detailed statement by the legal practioner was filed under the heading: "Notice of Opposition to Certificate of Urgency". Again this is a novel procedure adopted by the respondent's legal practitioners. It is not set out in the rules. It is not clear from the record why the respondents needed to file that document when they were served with a court application. It is however immaterial for me to determine what prompted the respondents to seek to oppose the certificate of urgency only and to avoid opposing the matter on the merits as well as is the usual practice in urgent applications. The net result

of the respondents' actions in this regard however is that they did not oppose the application and in my view, were disarmed from contesting a prayer that the application be treated as unopposed.

Assuming that I have erred in holding that the application was not opposed by virtue of the absence of an opposing affidavit, I still would have granted default judgment in favour of the applicants, as I did, on the basis that the respondents were barred due to their failure to file heads of argument in the matter.

As indicated above, no heads of argument were filed on behalf of the respondents although *Mr Chirimuuta* appeared. He argued strenuously that there was no need for him to file heads as the respondents' case appears clearly from the papers filed of record. Again, the rules of this court are quite clear in this regard. Rule 238 (2) of the High Court Rules 1971 makes it mandatory for respondents represented by legal practitioners to file heads of argument at least five days before the date of the hearing. In the same rule it is provided that where heads of argument have not been filed, the respondent shall be barred and the court may proceed to treat the matter as unopposed.

It is not the approach of this court to decide matters on technicalities where this can be avoided. In an effort to give the respondents a chance to place themselves properly before the court, I granted *Mr Chirimuuta* audience to seek for a postponement to put his house in order. The opportunity went begging for he was desirous of arguing the matter on the merits and appeared oblivious to the fact that a barred litigant can only have the right of audience before the court to move for an adjournment of the matter to enable him to apply to have the bar removed. He cannot be heard on the merits until the bar is removed.

DISPOSITION.

It is on the basis of the foregoing that I treated the application as unopposed and granted the order that I did.

Costa & Madzonga, applicants' legal practitioners.
Chirimuuta & Associates, respondents' legal practitioners.