JOHN JERE
versus
TURNALL HOLDINGS LIMITED
and
HERBERT NKALA
and
JAMES PRINCE MUTIZWA
and
KIRIT NAIK
and
CHIRANDU E DHLEMBEU
and
CELESTINE M GADZIKWA
and
PETER C MOYO
and
JOHN MUSHAYAVANHU
and
LINDA MANYENGA
and
RITA LIKUKUMA
and
EDWIN KONDO
and
FRANCIS CHIGWEDERE
and
ELIZABETH MAMUKWA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 30 October 2023

Opposed Chamber Application for dismissal for want of prosecution

R M Dhaka, for the applicant
T Chagudumba, for the respondent

CHITAPI J: The applicant seeks the dismissal of the first respondents application for joinder to case No. HC 674/16. The joinder application is case No HC 8576/18. It was filed by the first respondent on 20 September 2018. There are thirteen respondents in the joinder application and the applicant seeks that they are joined as first to thirteenth respondents. The applicant herein is the tenth respondent in the joinder application. In fact, she is the only one who opposed the application as far as record HC 8576/18 reveals. The rest of the respondents did not oppose the application. The applicant filed his notice of opposition on 20 September 2018. Record HC 8576/18 shows that no further documents and in particular the answering affidavit was filed by the first respondent after the filing of the notice of opposition by the tenth respondent who is applicant herein.

In this application, the applicant prayed for the dismissal of the first respondents application for joinder on the basis that the same was not prosecuted more than a month later after the filing by the applicant as tenth respondent of his notice of opposition. The application was made in terms of r 236(3)(b) of the High Court Rules, 1971 then in force. The rule provided that where an applicant in application proceedings which are opposed fails to file an answering affidavit after the lapse of one month from the date than a notice of opposition and opposing affidavit has been filed by the respondent or the applicant fails to set down the application for hearing within the same one month period the respondent may do one of two procedures:

> "(a) apply for the set down of the matter for hearing; or
> (b) make a chamber application to dismiss the matter for want of prosecution and the judge may order the matter to be dismissed with costs or such terms as he or she considers fit."

It is common cause when this application for dismissal was made and filed on 5 March 2019 almost six months, the first respondent had not set the matter down for hearing. The applicant was entitled to apply for dismissal for want of prosecution as he did *in casu*.

The first respondent opposed the application. The first respondent raised points of *limine* in the opposing affidavit. The first one was that the application was invalid because as a chamber application it ought to have been in term No 29A with modifications. It was averred that the application should have specified the number of days by which the respondent should have filed the notice of opposition. It is correct that the notice of application for joinder did not

specify the number of days by which the applicant therein should have opposed the application. The notice of application was in all other respects rule compliant. The applicant in the heads of argument conceded the mission to specify the number of days for opposition. It was submitted that the applicant did not suffer any prejudice because he opposed the application and no issue was raised by the applicant in relation to the *dies induciae* that passed by before the first respondent opposed the application which he did on 19 March 2019. This was fourteen days away from 5 March 2019 which was the date of filing and service of the application.

The first respondent submitted that once the applicant had conceded the omission to insert the number of days for opposing the application, he should have applied for condonation. Reliance was placed on the judgment of GUVAVA JA in the case *Richard Itayi Jambo* v *Church of the Province of Central Africa and 2 Ors* HH 329/13 to the effect that where a party has not complied with a rule that it is obliged to comply with, that party must apply for condonation with reasons for non-compliance. I agree that condonation is necessary to be sought where there has been non-compliance with the rules. In the *Richard Jambo* judgment as cited, the applicant used a completely wrong form. *In casu*, the applicant used the correct form but committed an act of omission in not specifying the days for opposition. I have considered rule 241(1) of the 1971 rules which provided that for chamber applications form 29B is used but where the chamber application is to be served on interested parties then form 29 is used with modifications which are appropriate. The nature and extent of modifications is not given and is left to the applicant to figure out and indicate. Whatever the modifications to be inserted are they should in my view enable the other party to sufficiently appreciate the application and what that party is called upon to do. The applicant stated in the notice of application that the first respondent should file opposing papers if he intended to oppose the application. The consequences of a failure to oppose were outlined having that the application would be deemed unopposed and dealt with as such.

The first respondent opposed the application. It did not allege prejudice and objectively speaking, it did not suffer prejudice. In the case of *Telecel Zimbabwe (Rt) Ltd* v *Potraz* 2015(1) ZLR 657 the learned judge MATHONS J (as then he was) took a dim view of legal practitioners who raise points *in limine* for the sake of it. The learned judge stated at p 659D as follows:

> "A preliminary point should only be taken where first it is meritable and secondly, where it is likely to dispose of the matter."

I would add that where there is no prejudice alleged or apparent from the papers which the respondent has suffered as in the instant case, then depending on the extent and nature of the non-compliance, the court or judge should consider invoking rule 4C which gives the court of judge a discretion to condone a non-compliance. I do so in this case because I do not see just how the marginal omission to specify days for opposing the application should be held to invalidate the process when the first respondent opposed the application and did not aver that he suffered any handicap or disadvantage in filing the notice of opposition and opposing affidavit.

The first respondent also averred that the applicant opposed the application for joinder, which had not been served on him. As I have indicated, the joinder application has thirteen respondents with the applicant being the tenth respondent. There is no certificate of service filed in case No HC 8576/18, the joinder application. The only certificate of service is that of the applicant herein of his notice of opposition. The first respondent directed the joinder application for all thirteen respondents at the address of the second respondent herein as first respondent therein at 5 Turnal Holdings Workington 5 Glasgow Road, Harare. The second respondents legal practitioners wrote a letter to the applicants' legal practitioners pointing out that the second respondent did not accept service of process on behalf of all the respondents including the applicant except for the second respondent herein. The first respondent averred that he still has to effect service on the rest of the respondents except the second respondent. The second respondent did not oppose the application for joinder.

The applicant did not file an answering affidavit or deal with the issue of non-service of documents or how he came to know about the process when the applicants' legal practitioners had been addressed on the invalid service of process. The applicant did not relate to how valid service of the application was effected on him. In the heads of argument the applicants counsel submitted that the first respondent could not rely as an excuse on his own omission of not serving the joinder application. The applicant did not explain the service or its appropriateness in the light of the letter from the second respondents' legal practitioners that their client, the second respondent had not been served with the joinder application on behalf of the applicant.

The applicant did not tell the court how it came into possession of the application which it then opposed. The issue is whether the end justifies the beginning. Can a respondent hunt for litigation against him and oppose it or if it is a summons enter appearance before the summons, is served?

The rules on service of process are clear and listed in the rules. Where a challenge to propriety of service is raised, the party who claims valid service must establish that the application or process was served in terms of the rules. The applicant did not put the court into his confidence and set out the method of service. I cannot hold that there was valid service of the application for joinder. A party who has not served an application can withdraw it at any time by notice to the Registrar. The applicant was not justified to engage in litigation and join issue with the first respondent's application for joinder before it was properly served on him.

I therefore find merit in this second point *in limine*. The notice of opposition did not have validity as it was based upon an application not yet validity served on the applicant. The applicant is not entitled to hold the first respondent to the filing of an answering affidavit or to set down the matter. The filing of this application was ill advised.

There being no proper application before the court.

IT IS HEREBY ORDERED THAT

The application is struck off the roll with costs.

Matizanadzo & Warhurst, applicants' legal practitioners
Atherstone & Cook, first respondents' legal practitioners